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The Circumstances of Democracy: An Investigation of Global Constitutionalist Scholarship

Ruth Alice Houghton

A thesis presented for the degree of Doctor of Philosophy

Durham Law School

University of Durham

October 2017

The Circumstances of Democracy: An Investigation of Global Constitutionalist Scholarship

Ruth Alice Houghton

Abstract

A conceptual understanding of democracy is missing from global constitutionalist discourse. Whilst there are heated debates on the plausibility of transferring democracy to governance systems beyond the state, the discourse lacks grounding in democratic theory. There are discussions on improving participatory or deliberative processes and the mechanisms of accountability, but without further reflection on what makes these processes and mechanisms democratic, the global constitutionalist literature on democratisation falls short of striving towards democracy.

The current debate on democracy spans across two waves of global constitutionalist thought. The first is an organisational wave, which builds on international legal frameworks, and the second is a principled wave that takes theories of constitutionalism as its starting point. The thesis examines the approach to democracy in international legal scholarship and the two waves of global constitutionalist literature, to expose the fragmented nature of the current debates. In response to this fragmentation, this thesis directs the scholarship towards democratic theory as an alternative starting point, whilst also demonstrating the importance of engaging with the relationship between constitutionalism and democracy. This is done by using a new matrix, the Circumstances of Democracy (the Who, What, When, Where and How), which builds on democratic theory to explore the components of democracy. Current global constitutionalist approaches inconsistently prioritise certain components and sidestep others, constructing mere proxies for democracy. Using the Circumstances of Democracy ensures that all the components are considered. Ultimately, this thesis redirects the global constitutionalist literature towards the concept of democracy.

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Committee on the Elimination of Racial Discrimination, 'General Recommendation 21 on the right to self-determination' (15 March 1996) UN Doc A/51/18

Conference on Security and Co-operation in Europe *Charter of Paris For a New Europe and Supplementary Document to Give Effect to Certain Provisions of the Charter* 21 Nov 1990, reprinted in (1991) 30 ILM 190

European Community *Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union* (1992) 31(6) ILM 1485

European Council, 'Conclusions of the Presidency' (Copenhagen Criteria) (1993) SN 180/93

International Covenant on Civil and Political Rights (adopted 16 December 1996, entered into force 23 March 1976) 999 UNTA 171

International Law Commission, 'Draft Articles on the Law of Treaties with Commentaries' (1966) II Yearbook of the International Law Commission 187

MERCOSUR, 'Ushuaia Protocol on Democratic Commitment in MERCOSUR' (24 July 1996)

Organization of American States, 'American Convention on Human Rights' (adopted 22 January 1969, entered into force 18 July 1978), Article 21

Organization of American States, 'Protocol of Amendments to the Charter of the Organization of American States' (Protocol of Washington) (approved 14 December 1992, entered into force 25 September 1997)

Organization of American States, Resolution on Representative Democracy (adopted 5 June 1991) OEA/Ser P/AG/RES.1080 (XXI-o/91)

Summary Report of Thirty-Fifth Meeting of Coordination Committee (20 June 1945) 17 United Nations Information Organisation 276

UN, 'Vienna Convention on the law of treaties' (concluded at Vienna on 23 May 1969, entered into force 27 January 1980) 115 UNTS 331

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UN Economic and Social Council, Resolution 1996/31 'Consultation relationship between the United Nations and non-governmental organizations' (25 July 1996) UN Doc Res 1996/31

UNGA, ‘Report of the Human Rights Committee’ UN GAOR 51st Session Vol I Supp No 40 (1997) UN Doc A/51/40, annex V

UNGA, ‘Report of the Human Rights Committee’ UN GAOR 55th Session Vol II Supp No 40 (2000) UN Doc A/55/40

UNGA, ‘Third Committee at 16th Session, 1096th Meeting’ (1961)

UNGA, ‘Vienna Declaration and Programme of Action’ (1993) UN Doc A/CONF 157/23

UNGA, Res 46/137 ‘Enhancing the effectiveness of the principle of periodic and genuine elections’ (17 December 1991) UN Doc A/RES/46/137

UNGA, Res 1514 (XV) ‘Declaration on the granting of independence to colonial countries and peoples’ (14 December 1960) UN Doc A/RES/1514(XV)

UNGA, Res 2625 ‘Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations’ (24 October 1970) UN Doc A/Res/2625(XXV)

List of Abbreviations

BRICS	Brazil, Russia, India, China and South Africa
ECHR	European Convention on Human Rights
EU	European Union
GAL	Global Administrative Law
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ILO	International Labour Organization
IMF	International Monetary Fund
MERCOSUR	The Common Market of the South
NGO	Non-governmental Organisation
OAS	Organization of American States
OSCE	Organization for Security and Co-operation in Europe
UN	United Nations
UNCHR	United Nations Human Rights Committee
UNGA	United Nations General Assembly
UNPA	United Nations Parliamentary Assembly
WTO	World Trade Organization

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Acknowledgements

None of this would have been conceivable, let alone completed, without the relentless support of my primary supervisor, Professor Aoife O'Donoghue. She has led me on this academic journey, and for that I am forever grateful. My thanks to my second supervisor, Dr Gleider Hernández, for his discussions on international law. Thank you as well to Professor Robert Schütze for his generous support in the final stages of the thesis.

I have been extremely fortunate in the mentors who have taken it upon themselves to guide me through the first phases of an academic career. My thanks to them for their advice and support. Thanks as well to all the academic and administrative staff at Durham Law School who provided day-to-day assistance. Thank you to those who dedicated time to reading sections of the thesis: Dr Kevin Crosby, Mr Peter Etherington, Professor Rosa Freedman, Dr Alan Greene, Dr Sylvia de Mars, Dr Giedre Jokubauskaite, Dr Conall Mallory, Mr Colin Murray, Dr Ben Warwick, and Dr Se-shauna Wheatle.

The PhD is both an academic and emotional adventure. I wish to pay special thanks to those people who have given me the strength to take on this thesis. To Dr Se-shauna Wheatle, thank you for the countless hours of discussion and support. For three years, I shared an office and a Graduate Teaching Assistant experience with Dr Ben Warwick. My thanks to him for providing consolation and support.

Thank you, Marc. It cannot be easy to support a PhD student through the final stages, but you managed it whilst also publishing in world-leading science journals.

Special thanks go to my parents and my sister, Anna. Their endless emotional support through this PhD and across the degree, diploma and masters that led up to it, has been crucial. I thank them for believing in me.

This research has received funding from the European Research Council under the European Union's Seventh Framework Programme (FP/2007-2013) – ERC Grant Agreement n. 312304.

Chapter 1: Introduction

1.1 Democracy in Global Constitutionalist Scholarship

Global constitutionalist literature is an attempt to use constitutionalist frameworks to improve the legitimacy of international law, the international legal system, and more broadly, global governance.[1] Responding to a perceived legitimacy deficit, global constitutionalist scholarship has embarked on a discourse about democracy in global governance and within international organisations. Discussions on the plausibility of a global *demos*, the viability of global parliaments, and alternative methods of accountability abound within this scholarship. Yet, the current discussions on democracy in global constitutionalist literature lack a grounding in democratic theory.

Global constitutionalist scholarship is unwieldy, as it intercepts across international relations, politics, international and comparative law.[2] This scholarship embraces a plethora of research themes and agendas.[3] The nebulous nature of global constitutionalist literature raises unique challenges for coherent discussions on democracy as there is little agreement on where

[1] See, Anne Peters, 'Global Constitutionalism' in Michael T Gibbons (ed), *The Encyclopaedia of Political Thought* (1st edn, John Wiley & Sons Ltd 2015).

[2] Anne Peters and Klaus Armingeon, 'Introduction: Global Constitutionalism from an interdisciplinary perspective' (2009) 16(2) Indiana Journal of Global Legal Studies 385; Antje Wiener, Anthony F Lang, James Tully, Miguel Poiares Maduro and Mattias Kumm, 'Global constitutionalism: Human rights, democracy and the rule of law' (2012) 1(1) Global Constitutionalism 1, 2; Klaus Bosselmann, 'Global Environmental Constitutionalism: Mapping the Terrain' (2015) 21 Widener Law Review 171; David S Law and Mila Versteeg, 'The Evolution and Ideology of Global Constitutionalism' (2011) 99(5) California Law Review 1163.

[3] Rossana Deplano, 'Fragmentation and Constitutionalisation of International Law: A Theoretical Inquiry' (2013) European Journal of Legal Studies 85, 97; Christine EJ Schwöbel, 'The Appeal of the Project of Global Constitutionalism to Public International Lawyers' (2012) 13(1) German Law Journal 1.

democracy and constitutionalisation are located or the actors that should be involved in either process. Moreover, scholars choose different frames of reference, such as constitutionalism and related constitutional theory or international law, which then directs how democracy is conceptualised.

One of the problems with the global constitutionalist discussion on democracy is that it is unclear where constitutionalisation and democracy take place. Projects that consider constitutionalism beyond the state each have a different object of study, which has ramifications, as it is not clear where democracy is located. Within global constitutional scholarship, democracy is discussed at different 'layers of governance', which can include national, regional and international governance.[4] Habermas constructs a three-tiered system of national, regional and global,[5] and Cottier constructs a 'Five Storey House' with levels at the local, sub-national, national, regional and global.[6] Other levels of governance are chosen by different scholars.[7] The different levels discussed can influence the

[4] Peters, 'Global Constitutionalism' (n 1). In de Wet's international constitutionalism, the 'different national, regional and functional (sectoral) regimes form the building blocks of the international community ('international polity')'. Erika de Wet, *The International Constitutional Order (*Amsterdam University Press 2005) 6-7. Compare Kumm and Peters: Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the relationship between constitutionalism in and beyond the state' in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009) 260 and 296; Anne Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19(3) Leiden Journal of International Law 579, 583. See also Petersmann on how the GATT/WTO rules have a 'democratic function' because they protect individual freedom and do not infringe on the democracy within a state. See, Ernst-Ulrich Petersmann, 'Multilevel Trade Governance in the WTO Regimes: Multilevel Constitutionalism' in Christian Joerges and Ernst-Ulrich Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Bloomsbury Publishing 2006) 26.

[5] Jürgen Habermas, 'The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society' (2008) 15 Constellations 444, 448-9. Armingeon et al., argue that there is a regional, national, and international level. Klaus Armingeon, Karolina Milewicz, Simone Peter and Anne Peters, 'The constitutionalisation of international trade law' in Thomas Cottier and Panagiotis (eds), *The Prospects of International Trade Regulation: from fragmentation to coherence* (CUP 2011) 79.

[6] Thomas Cottier, 'Towards a Five Storey House' in Christian Joerges and Ernst-Ulrich Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and International Economic Law* (Hart Publishing 2011) 499.

[7] Brunkhorst argues for 'a great variety of different governmental bodies at all levels [which he outlines as local, national, regional, and global]'. Hauke Brunkhorst, 'Constitutionalism and

breadth of decisions people have power over, and thus the scope of democracy. This raises problems because there are multiple conversations about democracy.

Scholars disagree on how the levels of governance interact. Some, such as Kumm, argue that democracy, as understood in the domestic context, cannot occur at the international level without revisions.[8] In contrast, in the compensatory model adopted by Peters, democracy is envisioned at both the domestic and at international organisations.[9] In the pluralist school, constitutionalisation can be scattered across sites of governance.[10] In this case, democracy might be situated within a particular level of governance or elements of democracy might be situated across governance levels. All these separate projects that fall under the umbrella of global constitutionalism, with their distinct approach to the levels of governance and where democracy falls across these levels creates siloed conversations, where academics can exchange models or approaches to democracy, without necessarily considering that the level of governance or relationship between levels has changed. The different levels of governance and the relationships between them offer alternative remits for decision-making, which influences the scope of democracy.

Identifying the actors within global constitutionalist debates is complex. Within the literature, individuals are placed at the core of international law,[11] participation of

Democracy in the World Society' in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (OUP 2010) 196-197.

[8] See Kumm, 'The Cosmopolitan Turn in Constitutionalism' (n 4) 296-297.

[9] Peters, 'Compensatory Constitutionalism' (n 4) 580 and 591-592.

[10] Neil Walker, 'Beyond the Holistic Constitution?' in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (OUP 2010) 304.

[11] Anne Peters, 'Membership in the Global Constitutional Community' in Jan Klabbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (OUP 2009) 155. See also Deplano (n 3) 83.

NGOs and other civil society actors is considered 'constitutional',[12] and international organisations are considered a site for processes of constitutionalisation to act upon as well as a source of evidence that international constitutionalisation is taking place.[13] Moreover, sociological approaches to global constitutionalism seek to discuss corporations and trade organisations within a constitutionalist frame.[14] Both democracy and constitutionalism are dependent on a relationship between a polity (i.e. a *demos,* constituent power, or community)[15] and authority (i.e. constituted power). Yet, who falls within these categories is not self-explanatory within global constitutionalist discourse.

Scholars in global constitutionalist scholarship disagree on the starting point for discussions on constitutionalisation. Some scholars point to international organisations as a starting point for the contemporary debate on global constitutionalism.[16] International organisations are used as a source and a subject of constitutionalism. One of the ways in which they are a source of constitutionalism is that their treaties are re-read as constitutions. A more recent

[12] Jan Klabbers, 'Autonomy, constitutionalism and virtue in international institutional law' in Richard Collins and Nigel D White (eds) *International Organizations and the Idea of Autonomy* (Routledge 2011) 130; Steve Charnovitz, 'The Emergence of Democratic Participation in Global Governance (Paris, 1919)' (2003) 10(1) Indiana Journal of Global Legal Studies 45, 74-76; Bruno Simma, 'From bilateralism to community interest in international law' (1994) 250 Recueil Des Cours 217, 262; Anne Peters, 'Dual Democracy' in Jan Klabbers, Anne Peters, and Geir Ulfstein (eds), *The Constitutionalization of International Law* (OUP 2009) 313.

[13] Kreuder-Sonnen and Zangl argue that global constitutionalists have seen the 'increasing authority of [international organisations] as an indication of a constitutionalization of the international order' in particular because of increased participation and accountability mechanisms. See Christian Kreuder-Sonnen and Bernhard Zangl, 'Which post-Westphalia? International organizations between constitutionalism and authoritarianism' (2015) 21(3) European Journal of International Relations 568, 569.

[14] See Gunther Teubner and Anna Beckers, 'Expanding Constitutionalism' (2013) 20(2) Indiana Journal of Global Legal Studies 523, 545.

[15] Cf de Wet who argues that European Constitutionalism has challenged the idea that constitutionalism requires a *demos.* Erika de Wet, 'The International Constitutional Order' (2006) 55 International & Comparative Law Quarterly 51, 52.

[16] Peters, 'Global Constitutionalism' (n 1). See also Paulus who argues that 'International lawyers have often construed international constitutionalism as an offspring of the institutionalization of international law'. Andreas L Paulus, 'The International Legal System as a Constitution' in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009) 69.

use of international organisations as a source of constitutionalism, is their role in facilitating participation and accountability.[17] The creation of new institutions is also construed as constitutionalisation as the proliferation of courts, tribunals, decision-making bodies, systems of checks and balances, are used as evidence that there is a constitutionalisation process at the global level.[18]

International law is also a proposed starting point and it features prominently in global constitutionalist literature. It features as a source and a subject of constitutionalisation. The discussion on norms, such as *jus cogens* and *erga omnes* as well as provisions within the UN Charter are examples of the way in which international law is used as a source in global constitutionalist scholarship. In other words, global constitutionalists collect evidence of a constitutionalisation process from the rules of international law.[19] International law is also considered to be a subject of constitutionalisation. To the extent that there is a shift away from sovereign and equal states, towards non-consensual international law and a sense of community that trumps the consent principle, scholars advocate that international law is subjected to constitutionalisation.[20]

[17] See Kreuder-Sonnen and Zangl 'Which post-Westphalia? (n 13) 569. Cf Jan Klabbers, 'Constitutionalism Lite' (2004) 1 International Organisations Law Review 31, 37.
[18] Thomas Kleinlein, 'Between Myths and Norms: Constructivist Constitutionalism and the Potential of Constitutional Principles in International Law' (2012) 81 Nordic Journal of International Law 79, 84; Neil Walker, 'Taking Constitutionalism Beyond the State' (2008) Political Studies 519, 519. Cf de Wet who criticises the lack of judicial review. See, Erika de Wet, 'The Constitutionalization of Public International Law' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 1213 and 1219.
[19] For example, see: Erika de Wet, 'The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order' (2006) 19 Leiden Journal of International Law 611, 614; Jürgen Habermas, 'Does the Constitutionalization of International Law Still Have a Chance?' in Ciaran Cronin (ed), *The Divided West by Jürgen Habermas* (Polity 2006) 160-161.
[20] See Peters, 'Global Constitutionalism' (n 1); Oliver Diggelmann and Tilmann Altwicker, 'Is There Something Like a Constitution of International Law? A Critical Analysis of the Debate on World Constitutionalism' (2008) 68 ZaöRV 623; Kleinlein, 'Between Myths and Norms' (n 18) 79.

A potential starting point for discussions on democracy in global constitutionalist literature is the debate on the 'emerging norm of democratic governance'.[21] The international legal scholarship on the 'emerging norm of democratic governance', which developed in the 1990s, is used as uncontested evidence for democracy at the state level in parts of global constitutionalist scholarship.[22] Peters and Kleinlein refer to Franck's emerging norm of democracy as evidence that states should be democratic,[23] and de Wet uses his thesis as evidence of the importance of the principle of democracy within the international community.[24] However, the discussion on the 'right to political participation', led by Fox, is not often referred to, even when there are discussions on such a right,[25] and even where this debate is invoked it is not questioned.[26] This international legal discussion on democracy within states is distinct from the global constitutionalist literature, which is predominantly concerned with democracy and constitutionalisation beyond the state. Nevertheless, as Franck, a proponent of

[21] See for example, Thomas M Franck, *Fairness in International Law and Institutions* (Clarendon Press 1995); Gregory H Fox, 'The right to political participation in international law' in Gregory H Fox and Brad R Roth (eds) *Democratic Governance and International Law* (CUP 2000) 48.

[22] Peters and Kleinlein refer to the emerging norm of democracy. See Peters, 'Dual Democracy' (n 12) 273; Kleinlein, 'Between Myths and Norms' (n 18) 80. Kumm and Catá Backer refer to Franck, but for his discussion on fairness. See, Mattias Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15(5) EJIL 908, 908, 918; Larry Catá Backer, 'From Constitution to Constitutionalism: A Global Framework for Legitimate Public Power Systems' (2009) 113(3) Penn State Law Review 101, 103.

[23] Peters, 'Dual Democracy' (n 12) 273; Kleinlein, 'Between Myths and Norms' (n 18) 80. See also, Ernst-Ulrich Petersmann, 'State Sovereignty, Popular Sovereignty and Individual Sovereignty: From Constitutional Nationalism to Multilevel Constitutionalism in International Economic Law?' (2006) EUI Law Working Paper 2006/45, 24-25 <http://cadmus.eui.eu/handle/1814/6446> accessed 9 September 2017.

[24] de Wet, 'The International Constitutional Order' (n 15) 63. See also Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (BRILL 2009) 93-94.

[25] See, Thomas Giegerich, 'The *Is* and the *Ought* of International Constitutionalism: How Far Have We Come on Habermas's Road to a "Well-Considered Constitutionalization of International Law"?' (2009) 10(1) German Law Journal 31, 45; Karolina Milewicz, 'Emerging Patterns of Global Constitutionalization: Towards a Conceptual Framework' (2009) 16 Indiana Journal of Global Legal Studies 413, 430.

[26] Besson, who engages with constitutional questions, in her discussion of global democracy refers to the international law debate on the right of democracy. She critiques the debate for not engaging with the legitimacy of international law-making processes, but she does not critique the debate itself. See, Samantha Besson, 'Institutionalising global *demoi*-cracy' in Lukas H Meyer (ed), *Legitimacy, Justice and Public International Law* (CUP 2009) 58, 61-62; Samantha Besson, 'Sovereignty, International Law and Democracy' (2011) 22(2) EJIL 373, 382.

the emerging norm thesis, also offers proposals for democratic reform of international law and organisations, which have been considered part of a debate on constitutionalisation in international law,[27] the debate on democracy within states could provide a foundation for global constitutionalist discussions on democracy.

Given that international law and international organisations are common starting points in global constitutionalist literature, some scholars have questioned the extent to which the literature relies on theories of constitutionalism.[28] Whether domestic, nation-state models of constitutionalism can be used as benchmarks for constitutionalism beyond the state is a fierce debate in global constitutionalist scholarship.[29] Critics have argued that using domestic theories of constitutionalism is inappropriate, inconceivable, improbable and illegitimate because the subject of constitutionalism is the state.[30] Perju, for example, argues that divorcing constitutionalism from the state, means 'leaving the concept empty or overly vague, and therefore unusable, at the international level'.[31] In response, supporters of the idea of constitutionalism beyond the state have discussed the flexibility of constitutionalism, and the extent to which constitutionalism can be freed from the state.[32] Scholars, such as O'Donoghue and Paulus have called on

[27] Bardo Fassbender, 'The United Nations Charter as Constitution of the International Community' (1998) 36 Columbia Journal of Transnational Law 529, 538-539; Christian Volk, 'Why Global Constitutionalism Does Not Live up to Its Promises' (2012) 4 Goettingen Journal of International Law 551, 558.
[28] Kumm, 'The Cosmopolitan Turn in Constitutionalism' (n 4) 259-260; Aoife O'Donoghue, *Constitutionalism in Global Constitutionalisation* (CUP 2014) 9-11 and 14; Paulus, 'The International Legal System' (n 16) 71.
[29] Walker, 'Taking Constitutionalism Beyond the State' (n 18) 520; Vlad Perju, 'International constitutionalism and the state: A reply to Aoife O'Donoghue' 2013) 11(4) I·CON 1046; Aoife O'Donoghue, 'International constitutionalism and the state: A rejoinder to Vlad Perju' (2013) 11(4) I·CON 1052, 1052.
[30] Walker, 'Taking Constitutionalism Beyond the State' (n 18) 522.
[31] Perju, 'A reply to Aoife O'Donoghue' (n 29) 1048.
[32] Aoife O'Donoghue, 'International constitutionalism and the state' (2013) 11(4) I·CON 1021, 1031; Kumm, 'The Cosmopolitan Turn in Constitutionalism' (n 4) 264; Paulus, 'The International Legal System' (n 16) 90-92 (focus on principles); Gunther Teubner, 'Societal Constitutionalism:

global constitutionalist scholarship to engage with domestic theories of constitutionalism.[33] This domestic literature is richly informative and could be used as a starting point for discussions on democracy in global constitutionalist literature.

As the latest forum for a debate on democracy beyond the state, global constitutionalist scholarship provides a platform to revisit democracy within global governance. Constitutionalism literature offers a thick debate on democracy at the domestic level, which arguably could inform the global constitutionalist discussions. Whether scholars embrace a more conceptual understanding of democracy, which is informed by constitutionalism, depends on the biases and assumptions that structure their debates. Global constitutionalist literature is an intra-disciplinary project that reads international law and international organisations through a constitutionalist lens. International law, international organisations and constitutional theory, as sub-disciplines, each have their own contours and biases. Moreover, each sub-discipline has a particular approach to democracy. As scholars within global constitutionalist scholarship pick different starting points, a comprehensive discussion on democracy is obscured and scholars operate in siloed debates.

Alternatives to State-Centred Constitutional Theory?' in Christian Joerges, Inger-Johanne Sand and Gunther Teubner (eds) *Transnational Governance and Constitutionalism* (Hart 2004) 3, 7; Ulrich K Preuss, 'Constitutional Powermaking for the New Polity: Some Deliberations on the Relations between Constituent Power and the Constitution' (1992-1993) 14 Cardozo Law Review 639, 646.

[33] Antje Wiener, 'Contested Meanings of Norms: A Research Framework' (2007) 5 Comparative European Politics 1, 8; Ulrich K Preuss, 'Disconnecting Constitutions from Statehood: Is Global Constitutionalism a Viable Concept?' in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (OUP 2010) 30-32.

Global constitutionalist scholarship is acknowledged to be inter-disciplinary[34] as it situates itself alongside discussions in international relations on global democracy and cosmopolitanism.[35] What is less discussed is the role of the legal sub-disciplines that global constitutionalist scholarship builds upon. What is needed is an exploration of the interplay between these sub-disciplines of legal scholarship, and how this influences the debate on democracy. This thesis examines how global constitutionalist scholarship discusses democracy and how it uses, to differing extents, international law, scholarship on international organisations and constitutional literature in its debates on democracy.

1.2 Research Question

This thesis is concerned with how schoalrs in global constitutionalist discourse debate and conceptualise democracy. It asks how the disciplinary underpinnings and biases of global constitutionalist literature shape approaches to the question of democracy and if this influences how democracy is formulated.

Global constitutionalist discourse is an intra-disciplinary project, which is informed by international law and theories of constitutionalism. Thus, to explore how global constitutionalist scholarship discusses democracy, requires an exploration on how constitutional theory and international law conceptualise democracy. As part of this investigation, the thesis investigates the relationship between democracy and constitutionalism and asks whether this discourse takes place within global constitutionalist scholarship. To date, aspects of global constitutionalist

[34] Peters and Armingeon, 'Introduction' (n 2) 385; Wiener et al., 'Global constitutionalism' (n 2) 2.
[35] Peters for example in 'Dual Democracy' references key international relations scholars writing on 'global democracy'.

scholarship have used international law and international organisations as a starting point, so this thesis analyses the approaches to democracy in international law and global constitutionalist scholarship to demonstrate how the relations between the sub-disciplines shape the discussion on democracy.

1.3 Methodology

To analyse how global constitutionalist scholarship constructs debates on democracy, the adopted method needs to be able to deconstruct those discussions. Rhetoric, as a theory of argumentation, offers tools for the construction of arguments and as such can also be used to unpack how global constitutionalist arguments on democracy are constructed.[36] The Circumstances are an aspect of rhetorical argument, and they are 'resources used in discovering materials for argument'.[37] The Circumstances are a series of questions (the Who, What, When, Where, Why, How and What Resources[38]), which are used in ancient philosophical writings and journalistic writing to demarcate a topic.[39] The Circumstances break down the elements of a topic, and then they interrelate to reconstruct it. This dual function of deconstruction and reconstruction is crucial to investigate the components of democracy. This thesis proposes the

[36] Michael Leff, 'The Uses of Aristotle's Rhetoric in Contemporary American Scholarship' (1993) 7 Argumentation 313, 319.
[37] Michael Leff, 'Commonplaces and Argumentation in Cicero and Quintilian' (1996) 10 Argumentation 445, 448.
[38] Boethius, *De topicis differentiis* (Eleonore Stump trans and ed, Cornell University Press 1978) 1205C; Michael C Leff, 'The Topics of Argumentative Invention in Latin Rhetorical Theory from Cicero to Boethius' (1983) 1(1) Rhetorica: A Journal of the History of Rhetorica 23, 28.
[39] The specific genealogy of 'circumstances' is debated. See, Michael C Sloan, 'Aristotle's *Nicomachean Ethics* as the original *locus* for the *Septum Circumstantiae*' (2010) 105(3) Classical Philology 236. This thesis does not adopt the Aristotelian utilization that refers to agency. Rather, this thesis employs the 'circumstances' as an aid in describing tensions within democratic theory. Leff, 'The Topics of Argumentative Invention' (n 38) 28. For a discussion on the use of the 'Five Ws and H' in legal writing, see Natalie A Markman, 'Bringing Journalism Pedagogy into the Legal Writing Class' (1993) 43(4) Journal of Legal Education 551.

Circumstances of Democracy as an analytical matrix to discuss democracy within global constitutionalist scholarship.

For the purposes of this thesis, five Circumstances will be considered: Who, What, When, Where and How. The Who allows for an exploration of the people, the What instigates a call for a reflection on the scope of people's power, the When in this thesis offers a discussion on whether people should wield power in both everyday decision-making and constitutional moments, the Where points to questions of institutions, and the How is concerned with processes of democracy. This thesis does not explicitly deal with the 'What Resources' Circumstance, as it can be subsumed within the How. 'Why' within this frame would refer to why scholars of global constitutionalism discuss democracy, and this is a meta-question. It is a question that cannot be answered through a discourse analysis alone and would require reflection on the functional and instrumental role of democracy. Instead, the five Circumstances considered in the thesis provide investigatory prompts to deconstruct how global constitutionalist literature debates democracy.

Rhetoric is concerned with real situations, rather than hypothetical issues or abstract concepts, and the Circumstances are used within rhetorical theory as a tool for contextualisation.[40] The Circumstances, for the purposes of this thesis, can then respond to the changing approaches to democracy through history. The Circumstances of Democracy are informed by historical philosophical reflections on democracy. Examples from history are used in the thesis to work through the

[40] Michael Leff, 'Rhetoric and Dialectic in the Twenty-First Century' (2000) 14 *Argumentation* 241, 243 and 245.

tensions within democratic theory and to explore how democracy is manifested in different contexts. For example, this thesis analyses discussions of democracy in Ancient Athens as well as *The Federalist Papers.* Using history as an exploratory tool can be useful as it can help challenge the notion that there are universal understandings of concepts, such as democracy.[41]

This thesis investigates the extent to which global constitutionalist approaches to democracy are influenced by international law and constitutionalist thought. To do this, the thesis focuses on the intra-disciplinary nature of global constitutionalist scholarship. This necessitates both an in-depth exploration of the constitutional thought on democracy and the international law scholarship on democracy.

The use of domestic theories of constitutionalism is controversial, but as O'Donoghue correctly argues, certain norms of constitutionalism, such as the rule of law, human rights, the separation of powers, and democratic legitimacy, 'must be present' in discussions of constitutionalisation at any level or system of governance.[42] To investigate the relationship between constitutionalism and democracy, this thesis explores the difference between Habermas' co-original thesis and Walker's iterative conceptualisation.[43]

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[41] See Jeffrey Edward Green, 'Political Theory as Both Philosophy and History: A Defense Against Methodological Militancy' (2015) 18 Annual Review of Political Science 425, 431-432; Theda Skocpol and Margaret Somers, 'The Uses of Comparative History in Macrosocial Inquiry' (1980) 22(2) Comparative Studies in Society and History 174, 181.

[42] O'Donoghue, *Constitutionalism in Global Constitutionalisation* (n 28) 53. See also Paulus, 'The International Legal System' (n 16) 90-92.

[43] Jürgen Habermas, 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles?' (2001) 29(6) Political Theory 766, 767; Neil Walker, 'Constitutionalism and the Incompleteness of Democracy: An Iterative Relationship' (2010) 39(3) Rechtsfilosofie & Rechtstheorie 206

Part of the discussion on the relationship between constitutionalism and democracy concerns the role of constituent power. An examination of constituent power in this thesis is of importance because of the recent drive within global constitutionalist discourse to engage with constituent power beyond the state.[44] Taking Sieyès as the starting point, this thesis uses Loughlin's categorisations of constituent power to explore the different interpretations of the scope of constituent power. These philosophical discussions on constituent power are used in the thesis to unpack the complex relationship between constituent power and democracy, which is lacking in global constitutionalist scholarship.

This thesis considers the approach to democracy within international legal scholarship as it offers a departure point for discussions in global constitutionalist literature. In relation to the discussions on international law and democracy, the thesis adopts Franck's work as an indicative starting point. The use of self-determination, elections monitoring and human rights provisions, in Franck's and his contemporaries' work, is unpacked in the thesis with the aim of ascertaining how international law scholarship conceptualises democracy. The thesis then considers to extent to which the doctrinal approach adopted by this American tradition of international lawyers in the 1990s,[45] is used by elements of the global constitutionalist debate.[46]

[44] Antje Wiener and Stefan Oeter, 'Introduction: Who recognizes the emperor's clothes anymore?' (2016) 14(3) I·CON 608, 609; Geneviève Nootens, 'Constituent power and the people-as-the-governed: About the "invisible" people of political and legal theory' (2015) 4(2) Global Constitutionalism 137; Neil Walker, 'The return of constituent power: A reply to Mattias Kumm' (2016) 14(4) I·CON 906.

[45] See for example, Franck, *Fairness in International Law and Institutions* (n 21); Fox, 'The right to political participation in international law' (n 21) 48.

[46] See for example, Peters, 'Dual Democracy' (n 12) 273. See also Besson, 'Institutionalising global *demoi*-cracy' (n 26) 61-62; Besson, 'Sovereignty, International Law and Democracy' (n 26) 382.

There are, of course, limitations to the approach adopted in this thesis. The thesis offers an analysis of democracy as understood in global constitutional debates. It is not a definitive study of democracy in international legal scholarship, neither is it a conclusive discussion on democracy. The thesis does not offer a comprehensive overview of democracy within the global legal space, nor a critique of democracy as a governance system. Democracy beyond the state is a topic addressed simultaneously by lawyers and international relation theorists. But, this thesis is concerned with how global constitutionalists discuss democracy and so it does not investigate the international relations models of 'Global Democracy'. Adopting an analytical approach denies space for a critique of democracy as a form of governance. As the Circumstances break democracy into its component parts, it does not accommodate space for critiques of democracy, such as those from feminist or Marxist perspectives.

Despite these limitations, the Circumstances are a starting point for analysing the debates on democracy in global constitutionalist literature. The Circumstances, and an awareness of the intra-disciplinary biases underpinning debates on democracy, can then act as a guide to buttress future debates on democracy in other global legal projects.

1.4 Structure of the Thesis

This investigation exposes the current limitations of global constitutionalist scholarship and offers an alternative approach to debating democracy within and beyond states. Understanding how the sub-disciplines, such as constitutionalism and international law shape the discourse on democracy in global constitutionalist

literature is of paramount importance to critiquing the current debates and offering an alternative approach. This thesis offers a matrix that is rooted within foundational questions, placing democratic theory and theories of democracy in constitutionalism as the starting point. If global constitutionalist discourse is to adopt a constitutionalist position on democracy, then it needs to place democratic theory and the relationship between constitutionalism and democracy at the forefront.

The first part of this thesis is dedicated to the construction of The Circumstances of Democracy, which offers an analytical framework to explore how global constitutionalist scholarship engages with democracy. The second part of the thesis is dedicated to the analysis of the current approach to democracy in international law and global constitutionalist scholarship. The final part of the thesis, informed by this analysis, offers an alternative methodology to discuss democracy.

Chapter 2 provides the analytical tool used to discuss global constitutionalist scholarship. The tool is conceived of two elements. The first element is the Circumstances of Democracy and the second is the complex relationship between democracy and constitutionalism. The Circumstances of Democracy are the foundational questions used to deconstruct and reconstruct the meaning of democracy. The Circumstances are the Who, What, When, Where and How. Each Circumstance isolates a component part of democracy, and then they are pieced back together with cognisance of how they interrelate to facilitate a debate on the meaning of democracy. Using theories of democracy from Ancient Athens,

The Federalist Papers, and modern electoral democracy, Chapter 2 establishes what is meant by the Who, What, When, Where and How of democracy.

The second element of the tool for analysing and discussing democracy is to explore the relationship between constitutionalism and democracy. In Chapter 2 the complexity of the relationship between constitutionalism and democracy is unpacked. Particular focus is placed on the role of constituent power within this relationship. Global constitutionalist discourse shifts to discuss constituent power, and therefore this chapter lays the foundation for considering how this shift might shape the approach to democracy. Constitutionalism and democracy are intertwined and there are tensions between the Who, What, and When of democracy and the question of constituent power. It is these interactions and tensions between constitutionalism and democracy that call for them to be considered together in Chapter 2.

Having established this analytical matrix, it is first applied to international legal scholarship on democracy in Chapter 3. As global constitutionalist scholarship is constructed as an intra-disciplinary literature, which is heavily influenced in parts by international legal scholarship, Chapter 3 applies the matrix to this international legal literature on democracy. Chapter 3 analyses how international law conceptualises democracy and identifies the limitations of the approach. In this chapter, the work of Franck, his contemporaries and his critics, are explored to show how international law frames the question of democracy within the nation-state and reifies elections as fundamental to democracy.

Chapters 4 and 5 then use the Circumstances to analyse global constitutionalist scholarship. In these two chapters, two waves of global constitutionalist literature are discussed. The first is the organisational wave and the second is the principled wave. How these waves are understood is discussed below, but essentially Chapter 4 is concerned with the way democracy is discussed as a process within international organisations and Chapter 5 explores how democracy, as a principle of constitutionalism, is discussed in global constitutionalist scholarship.

In Chapter 4, the Circumstances of Democracy are used to analyse the organisational wave of global constitutionalist discourse. This literature is closely related to the scholarship on international organisational law and it builds on the international legal discourse analysed in Chapter 3. The use of international organisations as a source and subject of constitutionalisation is especially prevalent in the organisational wave of global constitutionalist scholarship. There is a developing literature on the legitimacy of international organisations, which has close ties with the global constitutionalist scholarship and both literatures are concerned with questions of accountability, legitimacy, and democratisation. These disciplinary influences shape the approach to democracy, giving rise to a liberal, procedural notion of democracy.

Chapter 5 considers the principled wave of global constitutionalist scholarship. This chapter is concerned with the way in which the approach to democracy is shaped when it is conceptualised as a norm or principle of constitutionalism. The shift to discuss constituent power beyond the state is discussed in relation to how it frames the question of democracy. In this chapter, societal constitutionalism is

used as an antagonist, to explore potential alternatives to framing a discussion on constitutionalism and democracy beyond the state.[47] The principled wave responds to the perceived limitations of the organisational wave. In so doing, there is the potential that it focuses on elements democracy at the expense of other aspects. A comparison of the findings in Chapters 4 and 5 explores whether a comprehensive discussion of democracy is present in global constitutionalist scholarship.

After exploring the current debates in global constitutionalist scholarship, Chapter 6 draws together the limitations and provides an alternative method for discussing democracy. Building on the Circumstances of Democracy and the complex relationship between constitutionalism and democracy, this chapter offers prompts for future dialogue on democracy. Chapter 6 provides a method for ensuring that democracy, as a concept, informs debates in global constitutionalist discourse.

Dividing the thesis up in this way and applying the Circumstances of Democracy to democratic theory, constitutionalism, international law and then two waves of global constitutionalist scholarship, facilitates a close analysis of the influence of the different disciplinary biases. Separating out the approach in international law and the two waves of global constitutional scholarship ensures that the biases can be isolated and then how these inform democracy can be considered.

[47] Within the global constitutional literature, societal constitutionalism is presented as under-taking a different project. See, Vicki C Jackson, 'Paradigms of public law: transnational constitutional values and democratic challenges' (2010) 8(3) I·CON 517, 521; Volk, 'Why Global Constitutionalism Does not Live up to its Promises' (n 27) 554-555.

1.5 Preliminary Issues

The language choices around democracy (both with respect to the polity and manifestation of democracy), the meaning of constitutionalism, and of global constitutionalism in this thesis are pertinent given the different sub-disciplines that appear within the thesis. This section considers the variety of language used to discuss a polity and power within democratic theory and constitutionalist scholarship. Then the section outlines how constitutionalism and global constitutionalism are conceptualised in the thesis.

1.5.1 Demos, The People, The Nation: ascertaining the people and their power in multi-disciplinary scholarship

The diverse disciplinary backgrounds that inform global constitutional scholarship result in the use of overlapping terms. There are two troubling overlaps; the variety of invocations of polity and the diverse ways the power of people within a polity is expressed. This cross-disciplinary variability around people and their powers can lead to misunderstandings in a discussion on democracy.

The demarcation of people into a polity is expressed differently according to context and discipline. In democratic theory, the common polity is the *demos*, but in international law the polity is a nation-state. Where the organisational wave of global constitutionalist literature uses *demos*, the principled wave refers to polities and constituencies. Moreover, constitutional theory uses The People, with debates around who is included and excluded within this idea. How a polity is constructed within the respective disciplines is the subject of much debate, with

some commentators paying reverence to territory and ethnicity whilst others look to alternative means of constructing commonality. In current discourse, the prevailing opinion is that the *demos*, the nation-state, and The People within constitutionalist thought, are bounded by territorial markers, and as such these different terms point to persons attached to a state.

These invocations of polity have distinct connotations of relative homogeneity that have implications for discussions on democracy. A nation (or a peoples), as understood in international law,[48] means a group of people tied together through a commonality, usually a common ethnicity. The nation thus excludes persons that do not conform with the particular ethnicity. The *demos,* traditionally tied to territorial markers, has also been associated with ethnicity. Scholars, influenced by 19th century nationalism, argue that a *demos* requires commonalty that can only be derived from common heritage, common history, and common language.[49] Recent scholarship that attempts to disconnect *demos* from the state, focuses on a commonality of position; in other words, people are brought together into a *demos* through their common subjection to a decision or act.[50] Such approaches remain controversial, and the prevailing approach ties *demos* to the state. The People is used in constitutional discourse to refer to a unitary collective that stands in contrast to the multitude of persons living in a territory. In other

[48] See Wheatley for a discussion on the diverse meanings of nation in international law. Steven Wheatley, 'Modelling Democratic Secession in International Law' in Stephen Tierney (ed), *Nationalism and Globalisation: New Settings, New Challenges* (Hart 2015) chapter 7.
[49] John Stuart Mill, *Considerations on Representative Government* (Parker, Son and Bourn 1861) 547. For a discussion see, Keith Breen and Shane O' Neill, 'Introduction; A Postnationalist Era?' in Keith Breen and Shane O' Neill (eds) *After the Nation? Critical Reflections on Nationalism and Postnationalism* (Palgrave MacMillan 2010) 1. See also, David Miller, 'Against Global Democracy' in Keith Breen and Shane O'Neill (eds), *After the Nation: Critical Reflections on Post-Nationalism* (Palgrave Macmillan 2010) 145; Laura Valentini, 'No global demos, no global democracy? A systematization and critique' (2014) 12(4) Perspectives on Politics 789, 793.
[50] Robert E Goodin, 'Enfranchising All Affected Interests, and Its Alternatives' (2007) 35(1) Philosophy and Public Affairs 40, 49.

words, it is a construction, which Loughlin exposes as a myth.[51] This imposed homogeneity of the collective, whilst not necessarily predicated on ethnicity,[52] has the potential to exclude dissenting opinion and groups of persons that resist the unitary identity. This thesis does not offer a solution to the *demos* debate, but rather exposes the types of issues that need reflection. An example being the differences in these invocations of a polity, how they differ in the use of exclusionary practices or the imposition of unitary identities.

The use of overlapping, but distinct, terms for a polity means that discussions can be conceived as democratic when the true extent of the inclusion or exclusion is overlooked. The intra-disciplinary nature of global constitutionalist scholarship witnesses the use of these terms interchangeably, without reflection on the implication for a discourse on democracy. Being alert to these distinctions, and their respective connotations, is important when reflecting on what actors are considered to be part of democracy. Mindful of these connotations, this thesis reflects the dual use of *demos* and polity within global constitutionalist scholarship to indicate the collective persons. Furthermore, for the purposes of this thesis, 'the people' refers to the relevant persons within a polity or *demos*, 'The People' refers to the constitutionalist construction, and 'the peoples' invokes the nationalistic connotations it holds in international law.

The power of people is expressed in diverse ways. Within the discourse on constitutionalism, there are references to 'popular sovereignty', 'self-

[51] Martin Loughlin, 'The concept of constituent power' (2014) 13(2) European Journal of Political Theory 218, 222.
[52] For a discussion on the use of *demos* and *ethnos* see, Preuss, 'Constitutional Powermaking for the New Polity' (n 32) 645-646, and 649.

government',[53] 'consent of the governed' and 'popular will'. What these mean and their relationship to democracy is unclear. Taking popular sovereignty first, this nebulous idea can hide the true extent of people's power. Popular sovereignty can refer to 'the right to abolish any form of Government' and to create a new one.[54] Popular sovereignty is also invoked loosely to refer to the idea that power vests in people,[55] which can be symbolic. But, popular sovereignty only has purchase if people are provided with the means to exercise their power. Habermas argues that a liberal conceptualisation of popular sovereignty rests on elections, but the republican approach looks at questions of authority.[56] Democracy has two components; the right to choose a system of government, and 'a method of group decision making characterized by a kind of equality among the participants'.[57] If popular sovereignty is only the right to choose a system of government, then it is only a fragment of democracy.

'Self-government' corresponds with the idea of decision-making being based on the consent of people.[58] This needs to be unpacked. Unlike the discussion on popular sovereignty, which can be tied to the construction of the system of

[53] 'Self-government, as we almost invariably understand it, consists of government by the will or consent of the governed'. See Jed Rubenfeld, 'Legitimacy and Interpretation' in Larry Alexander (ed) *Constitutionalism: Philosophical Foundations* (CUP 1998) 211; A V Dicey, 'Note 2: Self-Government' in J W F Allison (ed) *Lectures on Comparative Constitutionalism A. V. Dicey* (vol II, OUP 2013) 299. It can take the form of representative or direct democracy, see András Sajó, *Limiting Government: an Introduction to Constitutionalism* (Central European University Press 1999) 49.

[54] See Thomas Paine, *Rights of Man* (Dover Publications 1999) 92; Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart 2015) 34.

[55] For a discussion on the difference between popular sovereignty and self-government, see Andreas Kalyvas, 'Popular Sovereignty, Democracy, and the Constituent Power' (2005) 12(2) Constellations 223, 238. Post argues that popular sovereignty means the ultimate control of the government by the people. He argues that this conceptualisation of popular sovereignty is not akin to democracy, because it results in a tyranny of the majority. Robert Post, 'Democracy and Equality' (2005) 1 Law, Culture and the Humanities 142, 143.

[56] Jürgen Habermas, 'Three Normative Models of Democracy' (1994) 1(1) Constellations 1, 9.

[57] T D Christiano, 'Democracy' (*The Stanford Encyclopedia of Philosophy* 2006) <https://plato.stanford.edu/entries/democracy/ > accessed 19 September 2017; Gordon (n 54) 34

[58] Cf Post who argues that self-government is about authorship. Post (n 55) 144.

government, self-government situates itself after the system is chosen and within decision-making process. If democracy requires both popular sovereignty, as the choice of the system of government, and self-government within that system, then self-government might only be a fragment of democracy.

There is a lack of clarity around the scope of people's power in a democracy. Not only does this mean that scholars talk passed each other, but also if references to popular sovereignty and self-government are used interchangeably, there is little reflection on what that means for the extent of power that people wield within a democracy. The ambiguity risks the construction of conceptualisations of democracy that fail to give adequate power to people.

Self-government, along with ideas of consent of the governed or popular will are often equated with democracy.[59] But, the use of self and popular needs unpacking. There is an ambiguity around the meaning of self and popular, and the roles they invoke. The self can imply a specific importance on the role for the individual, but it can also refer to the idea of The People as a single entity. Popular could refer to a majority opinion, but it is usually invoked as a reference to the population and is akin to the common will.[60] There is a debate over the construction of the popular/common will. On the one hand, it refers to an amalgamation of individual wills that are aggregated to make a common will.[61] On the other hand, the common will denies the individual will.[62] This has

[59] Abraham Lincoln, 'Gettysburg Address' (19 November 1863); Richard S Kay, 'Constituent Authority' (2011) 59 American Journal of Comparative Law 715, 738; Gordon (n 54) 34.
[60] See Amy Gutmann, 'The Disharmony of Democracy' in John W Chapman and Ian Shapiro (eds), *Democratic Community: Nomos XXXV* (NYU Press 1995) 132; Jürgen Habermas, 'Popular Sovereignty as Procedure' in James Bohman and William Rehg (MIT Press 1997) 45.
[61] Gerald Gaus, 'Does Democracy Reveal the Voice of the People? Four takes on Rousseau' (1997) 75(2) Australian Journal of Philosophy 141, 144.
[62] Philip Pettit, 'Republican Freedom and Contestatory Democratization' in Ian Shapiro and Casiano Hacker-Cordón, *Democracy's Value* (CUP 1999) 174.

implications for how the rights of individuals are protected. How the self or individual interacts with the common or popular is discussed under the Circumstances of Who, it highlights the lack of clarity around the *demos* for democracy and a simplification of the relationship between individual and collective, which means scholars can invoke one term, without reflecting on the implications for democracy.

Understanding the terms and their usage is important for a discourse on democracy. Whilst authors can infuse terms with their own conceptualisations, it has been shown that such terms can carry connotations. Understanding these connotations is crucial because these terms have a function in democracy scholarship. Reliance on mere labels, such as *demos,* nation, and The People, should be replaced with a broader question of Who, which as the Circumstances of Democracy demonstrate, is a question about the demarcation of a polity and potential exclusions. The use of self-government or popular sovereignty acts as *an* answer to the What of democracy. But again, the Circumstances require a reflection on the extent of people's power in democracy. As this thesis progresses through democratic theory, constitutional, international legal scholarship and global constitutional literature, the confusion around terms and how they shape democracy is explored.

1.5.2 Constitutionalism, Constitutionalisation and Constitutional

Constitutionalism refers to the normative values and principles that underpin the constitutional framework of a governance system;[63] it offers a model for

[63] See O'Donoghue, *Constitutionalism in Global Constitutionalisation* (n 28) 11, 14.

organising political power.[64] These normative principles of constitutionalism include principles that speak to both the allocation and restraint of political power, such as the rule of law and the separation of powers.[65] What norms, values and principles are included within constitutionalism are contested, but for the purposes of this thesis, constitutionalism is taken to mean modern constitutionalism, which includes the idea that the authority of government derives from constituent power,[66] the rule of law, the separation of powers, and fundamental human rights.[67] The role of democracy within constitutionalism is contested,[68] but modern constitutionalism has become intertwined with democracy and liberalism.

Constitutionalism is neither constitutional law nor a process of constitutionalisation.[69] Rather, a state's constitution, its constitutional law and processes of constitutionalisation are girded by constitutionalism.[70] Werner draws a distinction between a state's constitution and constitutionalism.[71] For Loughlin, a constitution can mean 'a formal framework of fundamental law that establishes and regulates the activity of governing a state'.[72] For the purposes of this thesis, a constitution, as a framework of fundamental law that regulates governance, is

[64] Dieter Grimm, 'The Achievement of Constitutionalism and its Prospects in a Changed World' in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (OUP 2010) 3.
[65] Kalyvas (n 55) 223-225; Michael W Dowdle and Michael A Wilkinson, 'On the Limits of Constitutional Liberalism: In Search of Constitutional Reflexivity' in Michael W Dowdle and Michael A Wilkinson (eds), Constitutionalism Beyond Liberalism (CUP 2017) 17 and 21.
[66] Martin Loughlin and Neil Walker, 'Introduction' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (OUP 2012) 1
[67] Wouter G Werner, 'Democracy, Constitutionalism and the Question of Authority' (2010) 39(3) Rechtsfilosofie & Rechtstheorie 267, 269.
[68] See Chapter 2, sections 2.2.1 and 2.2.2.
[69] Martin Loughlin, 'What is Constitutionalisation?' in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (OUP 2010) 55; Dieter Grimm, *Constitutionalism: Past, Present, and Future* (OUP 2016) ch 1.
[70] O'Donoghue, *Constitutionalism in Global Constitutionalisation* (n 28) 5, 14-15; Backer, 'From Constitution to constitutionalism' (n 22) 106.
[71] Werner, 'Democracy, Constitutionalism and the Question of Authority' (n 67) 268-269.
[72] Martin Loughlin, 'Constitutional Theory: A 25th Anniversary Essay' (2005) 25(2) Oxford Journal of Legal Studies 183, 184.

not limited to states. Constitutionalisation is a process where a legal system moves away from decentralisation and towards constitutionalism, for example, constitutionalisation can refer to a system that and becomes 'curtailed by legal form'.[73]

Modern constitutionalism differs from calling something 'constitutional'. Broadly speaking, 'constitutional' refers to 'the character of actually existing constitutional arrangements'.[74] Loughlin argues that 'constitutional' is not prescriptive,[75] and so its content is unclear. It is often used to invoke ideas of shifting towards a legal order and removing decisions from politics spaces,[76] hierarchy, supremacy and the entrenchment of fundamental laws. It is important to distinguish between constitutional and constitutionalism because within global constitutionalist debates, there are many discussions on hierarchy and supremacy but only recently have ideas of modern constitutionalism been debated.

1.5.3 Global Constitutionalist Scholarship

Global constitutionalist scholarship is an evolving literature, which can overlap with comparative constitutionalism and transnational constitutionalism.[77] For the purposes of this thesis, global constitutionalist literature is a strand of international legal scholarship, which encompasses the discussions on the constitutionalisation of international organisations, constitutional pluralism and

[73] O'Donoghue, *Constitutionalism in Global Constitutionalisation* (n 28) 11, 24-25.
[74] Loughlin, 'Constitutional Theory' (n 72) 186.
[75] ibid 186.
[76] Walker, 'Taking Constitutionalism Beyond the State' (n 18) 526 ('a mature rule-based or legal order').
[77] Bosselmann, 'Global Environmental Constitutionalism' (n 2) 171; Law and Versteeg, 'The Evolution and Ideology of Global Constitutionalism' (n 2) 1163.

societal constitutionalism. Broadly concerned with exploring international law and its organisations through a constitutionalist lens, the literature on global constitutionalism studied in this thesis, covers discussions on the UN Charter as a constitution,[78] the legitimacy of, and accountability at, international organisations from a constitutionalist perspective,[79] as well as the most recent shift to consider constitutional principles such as the rule of law, democratic legitimacy and the separation of powers. The focus on global constitutionalist discourse as an international legal debate, obscures other 'global democracy' discussions in international relations scholarship and other global legal projects that have engaged with democracy, such as global legal pluralism and global administrative law (GAL), which could be subjected to The Circumstances of Democracy in future research.

The roots of global constitutionalist literature are contested,[80] but Verdross is often considered the 'Founding Father' of the movement,[81] and the UN Charter in 1945 is often seen as the turning point.[82] Prior to the Charter, the international

[78] Fassbender, 'The United Nations Charter as Constitution of The International Community' (n 27) 529.
[79] For example, Anne Peters, 'International Organizations: Effectiveness and Accountability' (2016) Max Planck Institute Research Papers Series No. 2016-01 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2770606> accessed 9 September 2017.
[80] O'Donoghue notes that Holtzendorff first mentions international constitutionalisation in 1877. See Aoife O'Donoghue, 'Alfred Verdross and the Contemporary Constitutionalisation Debate' (2012) 32(4) OJLS 799, 799. Cf Tokkel Opsahl, 'An "International Constitutional Law"?' (1961) 10 International & Comparative Law Quarterly 760, 761.
[81] Thomas Kleinlein, 'Alfred Verdross and a Founding Father of International Constitutionalism?' (2012) 2 Goettingen Journal of International Law 385.
[82] The idea that the UN Charter is a constitution is debated. See Habermas, 'Does the Constitutionalization of International Law Still Have a Chance?' (n 19) 131 (proto-constitution); Christian Tomuschat, 'Obligations arising for states without or against their will' (1993) 241 Recueil Des Cours 1, 307 (role of *jus cogens*); Ernst-Ulrich Petersmann, 'Constitutionalism, International Law and We the Peoples of the United Nations' in Hans-Joachim Cremer, Thomas Giegerich, Dagmar Richter and Andreas Zimmerman (eds), *Tradition und Weltoffenheit des Rechts: Festschrift für Helmut Steinberger* (Springer 2002) 303 (lack of effective human rights protection and judicial review).

community of states was perceived as disorganised.[83] The Charter,[84] the development of *jus cogens* norms,[85] and the sense of community that came to bear on the organised international community, are crucial to early constitutionalists, such as Mosler and Verdross, who look to norms of international law to demonstrate the creation of a coherent community of states.[86] Focusing on *jus cogens* and the UN Charter gives rise to a constitutionalisation that is concerned with hierarchy and the normative content of international law.[87] More recent iterations of global constitutionalist literature, though still concerned with the constitutional nature of international organisations and their constitutive documents, are more focused on the accountability and legitimacy of international organisations.[88] This could be referred to as an organisational wave of global constitutionalist literature. In addition, there is now a shift to consider questions of modern constitutionalism, such as democratic legitimacy, the

[83] Alfred Verdross 'Jus Dispositivum and Jus Cogens in International Law' (1966) 60 AJIL 55, 62.
[84] See for example: Jost Delbrück, 'Laws in the Public Interest – Some Observations on the Foundations and Identification of erga omnes norms in international law' in Volkmar Götz, Peter Selmer and Rudiger Wolfrum (eds) *Liber amicorum Günther Jaenicke* (Springer 1999) 35; Giegerich, 'The *Is* and the *Ought* of International Constitutionalism' (n 25) 31.
[85] Alfred Verdross, 'Fundamental Human Rights, The Journey of an Idea' (1979-80) 8 Human Rights 20, 23; Hermann Mosler, *The International Society as a Legal Community* (Brill 1980) 15-16; de Wet, 'The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order' (n 19) 614. See also, Kleinlein, 'Alfred Verdross as a Founding Father of International Constitutionalism' (n 81) 399; Michel Byers, 'Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules' (1997) 66 Nordic Journal of International Law 211, 220; Delbrück, 'Laws in the Public Interest (n 84) 35; Giegerich, 'The *Is* and the *Ought* of International Constitutionalism' (n 25) 41.
[86] Verdross, 'Fundamental Human Rights' (n 85) 23; Mosler, *The International Society as a Legal Community* (n 85) 15-16.
[87] In other words, it is not too dissimilar to the normative hierarchy debate in international law. Indeed, Diggelmann and Altwicker reference the normative relativity debate when they discuss trends in constitutionalisation. See, Diggelmann and Altwicker, 'Is There Something Like a Constitution of International Law?' (n 20) 627. See also, Johannes Gerald van Mulligen, 'Global Constitutionalism and the Objective Purport of the International Legal Order' (2011) 24(2) Leiden Journal of International Law 277, 283. Kleinlein and Peters have argued that there needs to be a clearer divide between constitutional hierarchies and relative normativity. See, Thomas Kleinlein and Anne Peters, 'International Constitutional Law' in *Oxford Bibliographies* (2014), 9 <http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0039.xml> accessed 10 September 2017. For the relative normativity debate in international law, see Dinah Shelton, 'International Law and "Relative Normativity"' in Malcolm Evans (ed), *International Law* (OUP 2010) 141; Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 AJIL 413.
[88] See e.g. Christine E J Schwöbel, *Global Constitutionalism in International Legal Perspective* (Martinus Nijhoff Publishers, 2011) 110.

separation of powers and the rule of law, which could be referred to as a principled wave of global constitutionalist debate.[89] Global constitutionalist literature, then, embraces a 'conglomeration' of research interests and themes,[90] but for the purposes of this thesis, two waves of global constitutionalist literature, which have most recently engaged with discussions on democracy, will be discussed: an organisational and a principled wave.

The organisational wave acts as a response to the institutionalisation of international law.[91] As such there is an overlap between the organisational wave and the literature on international organisations. This wave focuses on accountability mechanisms and the legitimation of decision-making at international organisations. Examples of scholars working within this wave are Peters, Dunoff, Trachtman and Petersmann. Fassbender is illustrative of how scholars can traverse a number of waves; his discussions on the UN Charter as a constitution, where the focus is on hierarchy and supremacy fit within an earlier debate on international constitutional law,[92] but his discussion on the democratic legitimacy of the UN falls within this organisational wave. As the organisational wave is closely aligned with the scholarship on international organisations, there are scholars that operate between international organisational law and global constitutionalist debates. For example, Klabbers' discussions on international organisations and global constitutionalism exposes accountability as an

[89] Armingeon et al., have referred to this idea as 'constitutionalist constitution'. See Armingeon et al., 'The constitutionalisation of international trade law' (n 5) 70. Paulus refers to it as 'substantive constitutional principles'. See, Paulus, 'The International Legal System as a Constitution' (n 16) 87.
[90] Deplano (n 3) 97.
[91] See, Anne Peters, 'Constitutional Fragments: On the Interaction of Constitutionalization and Fragmentation in International Law' (2015) Centre for Global Constitutionalism Working Paper No 2 < http://cgc.wp.st-andrews.ac.uk/files/2015/04/CGC-Working-Paper-No-2-Constitutional-Fragments.pdf > accessed 10 September 2017; Deplano (n 3) 67.
[92] See for example: Delbrück, 'Laws in the Public Interest' (n 84) 35; Giegerich, 'The *Is* and the *Ought* of International Constitutionalism' (n 25) 31.

underlying impetus of this wave.[93] Thus, for the purposes of this thesis, Klabbers is considered within the organisational wave.

The principled wave of global constitutionalist scholarship seeks to respond to the limitations of the organisational approach. Engaging in a more abstract discourse, the principled wave takes constitutionalism as its starting point and explores the potential of moving principles and related institutions of constitutionalism beyond the state. Heeding a call from O'Donoghue to adopt constitutionalist literature, rather than international legal doctrine as the foundation,[94] the principled wave witnesses discussions on key elements of constitutionalism, most recently a move to debate constituent power in the global legal space.[95] Key commentators within this wave are Habermas, Walker, and mostly recently, O'Donoghue, and their scholarship forms the basis of the chapter on principled global constitutionalist literature. Though perhaps not a self-defining global constitutionalist, de Búrca's expertise in European Constitutional Law influences her scholarship on democracy beyond the state, where she specifically engages with constitutional democracy,[96] thus for the purposes of this thesis her work is considered as part of a principled wave of global constitutionalism.

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[93] Jan Klabbers, 'The Paradox of International Institutional Law' (2008) 5 International Organizations Law Review 1, 17. See also, Peters, 'International Organizations: Effectiveness and Accountability' (n 79).

[94] O'Donoghue, *Constitutionalism in Global Constitutionalisation* (n 28) 14-15.

[95] See, for example: Nico Krisch, '*Pouvoir constituant* and *pouvoir irritant* in the postnational order' (2012) 14(3) I·CON 657; Nootens, 'Constituent power and the people-as-the-governed' (n 44) 137; Mattias Kumm, 'Constituent power, cosmopolitan constitutionalism, and post-positivist law' (2016) 14(3) I·CON 697, 698; Markus Patberg, 'Against democratic intergovernmentalism: The case for a theory of constituent power in the global realm' (2016) 14(3) I·CON 622; Saki Bailey & Ugo Mattei, 'Social movements as Constituent Power: The Italian Struggle for the Commons' (2013) 20 Indiana Journal of Global Legal Studies 965; Jürgen Habermas, 'Citizen and State Equality in a Supranational Political Community: Degressive Proportionality and the *Pouvoir Constituant Mixte*' (2017) 55(2) Journal of Common Market Studies 171.

[96] Gráinne de Búrca, 'Developing Democracy Beyond the State' (2008) Columbia Journal of Transnational Law 101, 129.

Within the principled wave of global constitutionalist discourse, there are particular approaches espoused; constitutional pluralism and societal constitutionalism. Constitutional pluralism is concerned with de-bunking the myth of the unified constitution of the state, it offers new ways of thinking about the location of democracy and constitutionalism across levels of governance. Concerned with the constitutionalisation of systems, other than the state, societal constitutionalism sits within the principled wave. Teubner's challenge to the role of traditional actors and the structural features in constitutionalism, questions the prevailing liberal approach adopted within global constitutionalist discourse.[97] The different locations of constitutionalisation and the different actors invoked within societal constitutionalism, facilitate alternative discussions on democracy. Whilst Teubner does not resolve the question of democracy, as proxies are still relied upon, he does offer an alternative way of debating constituent power and democracy both within and beyond the state. Thus, Teubner's societal constitutionalist discussions are used here to both consider the different approaches taken to democracy and as an antagonistic approach that exposes the limitations of the global constitutionalist debate. Given the different positions adopted, the principled wave is not defined by a particular normative approach, but rather its distinctive characteristics are the research questions and approaches.

The organisational and principled waves are differentiated in relation to methodology. Usually approaches to global constitutionalism are formulated into categories, and scholars refer to normative, functional, institutional and

[97] See Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (OUP 2012) 17-18.

analogical forms of global constitutionalism,[98] but there is little agreement over these categories. Instead of using these competing categorisations, this thesis considers the research themes brought to bear on constitutional norms or institutions. The organisational and principled waves place emphasis on different research questions, with the organisational wave placing more emphasis on accountability mechanisms, and the principled wave engaging in questions on the rule of the law, the separation of powers and democratic legitimacy. The literature they engage with and what they adopt as their starting points influence their approach both to constitutionalism and democracy. The organisational wave, which is concerned with the reform and creation of international organisations, is influenced by the international legal scholarship on democracy. In contrast, the principled wave, in seeking to reply to the narrow approach to constitutionalism adopted in the organisational strand, engages in a fuller debate on constitutionalism beyond the state.

Focusing on the research themes and research method is one way of demarcating global constitutionalist literature and of considering how the disciplinary contours shape the debate on democracy. The thesis offers a discussion on how the method, the research questions, and the literature used by these two waves shapes the approach to democracy. Applying the Circumstances of Democracy to the two waves will show how the biases

[98] Across the scholarship there are attempts to categorise global constitutionalism. Antje Wiener, Anthony F Lang, James Tully, Miguel Poiares Maduro and Mattias Kumm, 'Global constitutionalism: Human rights, democracy and the rule of law' (2012) 1(1) Global Constitutionalism 1, 6 (normative, functionalist and pluralist); Christine E J Schwöbel, 'Situating the debate on global constitutionalism' (2010) 8(3) I·CON 611, 617-630 (sociological, institutional, normative and analogical); Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the relationship between constitutionalism in and beyond the state' in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009) 259 (formal, substantive, and functional); Karolina Milewicz, 'Emerging Patterns of Global Constitutionalization: Towards a Conceptual Framework' (2009) 16 Indiana Journal of Global Legal Studies 413 (formal, substance, civil-political and socio-economic).

influence the discussion on democracy, and how these lead to an insufficient discourse.

1.6 Conclusion

Global constitutional scholarship is a nebulous discourse that encompasses a raft of competing research questions, aims and agendas. Debates on democracy and the democratisation of international organisations within this unwieldy sub-discipline, are influenced by the different research methods and questions. Within global constitutionalist literature, terms associated with democracy are used without being situated within a conceptual understanding of democracy and discussions on democracy beyond the state stagnate around the plausibility of a global *demos* and the inappropriateness and ineffectiveness of democracy on such a large scale. This thesis tackles how the debates on democracy are structured, it considers what restrictions are placed on a discussion of democracy when competing claims from international law and constitutionalist theory come to bear on global constitutionalism. This thesis offers the Circumstances of Democracy as a tool to ensure that it is democracy which is at the forefront of debates.

Chapter 2: The Circumstances of Democracy

2.1 Introduction

'[D]emocracy has become an altar on which everyone hangs his or her favourite *ex voto'.*[1] As a 'contested concept',[2] democracy invokes competing values and has multiple manifestations.[3] Democracy can be representative, deliberative, or participatory. Such is its malleability that democracy has been promoted for justice,[4] economic redistribution,[5] as well as the more traditional promotion of equality and freedom.[6]

As an idea democracy has a complex history. Democracy has not always been well received.[7] Winston Churchill famously said; 'democracy is the worst form of Government except for all those other forms that have been tried from time to time'.[8] Ancient Greek philosophers were sceptical and concerned that democracy would lead to demagogue,[9] similar scepticism was voiced in the revolutionary

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[1] Adam Przeworski, 'Minimalist conception of democracy: a defense' in Ian Shapiro and Casiano Hacker-Cordón (eds), *Democracy's Values* (CUP 1999) 24.
[2] See W B Gallie, 'Essentially Contested Concepts' (1955) 56 Proceedings of the Aristotelian Society 167, 168.
[3] Michael Coppedge, *Democratization and Research Methods* (CUP 2012) 11; Laurence Whitehead, 'The Vexed Issue of the meaning of "democracy"' (1997) 2(2) Journal of Political Ideologies 121, 130 (accountability, citizenship and deliberation are '"indispensable" components' of democracy).
[4] Joshua Cohen, 'For a Democratic society' in Samuel Freeman (ed), *The Cambridge Companion to Rawls* (CUP 2006) 93 ('the justice of political *process* and to the justice of *outcomes*' (emphasis added)).
[5] For a discussion see, Carl Henrik Knutsen and Simone Wegmann, 'Is democracy about redistribution?' (2016) 23(1) Democratization 164.
[6] For a discussion see, Adam Swift, *Political Philosophy: A Beginners' Guide For Students and Politicians* (3rd edn, Polity Press 2014) 197 and 212-221.
[7] See David Held, 'Democracy: From City-states to a Cosmopolitan Order?' (1992) Political Studies 10, 10.
[8] Winston Churchill, House of Commons, 11th November 1947.
[9] For a discussion on Plato's approach to democracy see, David Held, *Models of democracy* (3rd edn, Polity Press 2006) 23-27. For Aristotle, see Andrew Lintott, 'Aristotle and Democracy' (1992) 42(i) Classical Quarterly 114, 127.

periods in America and France,[10] and again in early 20th century Europe in response to mass society.[11] In contrast, in 1989 it was proclaimed that liberal democracy had won the battle of history and democracy indices appear to demonstrate that the decades at the end of the 20th century witnessed a surge of countries becoming democratic.[12]

Alongside this celebration of democracy, there is a growing sense amongst political scientists that democracy has failed. This failure, arguably, comes from three potential sources; sham democracies, globalization, and discontent with political elites. Democracy indices, though flawed,[13] demonstrate that the moniker of democracy is used when there is little evidence of democratic processes. Take for example, the People's Republic of China. The preamble of the constitution refers to democracy and democratic elections,[14] but there is little evidence of democracy in practice.[15] This highlights that the normative content of democracy can be disconnected from the label. Popular discussions on the state of democracy today show anxieties around decisions being taken at supranational organisations and the introduction of new unaccountable actors.[16] Political developments in 2016-2017 are testament to a growing discontent with

[10] For example, James Madison, 'Letter No X: The Same Subject Continued' in Isaac Kramnick (ed), *James Madison, Alexander Hamilton and John Jay: The Federalist Papers* (Penguin 1987) 126 ('[d]emocracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security, or the rights of property; and have in general been as short in their lives, as they have been violent in their deaths').

[11] For a discussion see, Richard Bellamy, 'The advent of the masses and the making of the modern theory of democracy' in Terence Ball and Richard Bellamy (eds), *The Cambridge History of Twentieth-Century Political Thought* (CUP 2003) 70, 87.

[12] See Francis Fukuyama, *The End of History and the Last Man* (Penguin 1992) xi.

[13] For a discussion see, Diego Giannone, 'Political and ideological aspects in the measurement of democracy: the Freedom House case' (2010) 17(1) Democratization 68.

[14] Constitution of the People's Republic of China (amended 14 March 2004), Preamble, Chapter 1, and Article 3.

[15] Paul Cartledge, *Democracy: A Life* (OUP 2016) 306. See also, David Runciman, *The Confidence Trap: A History of Democracy in Crisis from World War I to the Present* (Princeton University Press 2013) 318.

[16] Runciman outlines war, the environment, international rivals and finance as the biggest contemporary challenges from democracy. Runciman (n 15) xiv.

democracy in liberal democracies as sections of populations lose faith in political elites and there is a rise of voter apathy. This is the paradox of democracy; it is often simultaneously in crisis and endorsed.[17]

Democracy manifests in a variety of ways across history.[18] For instance, Ancient Athens has a direct form of democracy, in post-revolutionary America, a representative form and within East European countries in the late 20th century, a 'one-party model' of democracy dominated.[19] At the beginning of the 20th century, liberalism and democracy became embroiled and liberal democratic models promoted.[20] Then liberal models were challenged by mass societies[21] and cultural idiosyncrasies,[22] and mixed systems were developed.[23] For example, under Putin, Russia combines liberalism, elections and repression.[24] These examples show the fluidity of democracy in politics. There is a distinction between democracy's use in politics and its meaning in philosophical debate. This thesis is not a discussion on the realities of democracy in the 2010s, rather, this is a discussion about the use of democracy as a concept within international legal theory.

[17] ibid 21-22.
[18] See Ellen Meiksins Wood, 'The demos versus "we, the people": from ancient to modern conceptions of citizenship' in Ellen Meiksins Wood (ed), *Democracy against Capitalism: Renewing Historical Materialism* (CUP 1995) ch 7; Daniele Archibugi, 'Demos and Cosmopolis' in *Debating Cosmopolitics* (2002) 13 New Left Review 24, 24-25.
[19] Held, 'Democracy: from City-state to a Cosmopolitan Order?' (n 7) 12.
[20] See Wood, 'The demos versus "we, the people"' (n 18) 225.
[21] See Bellamy, 'The advent of the masses and the making of the modern theory of democracy' (n 11) 70.
[22] See Bhirku Parekh, 'Non-Western Political Thought' in Terence Ball and Richard Bellamy (eds), *The Cambridge History of Twentieth-Century Political Thought* (CUP 2003) 559.
[23] See also '*democradura*', which means 'the mixture of formal democracy and de facto dictatorship in force in many countries of the world'. See Archibugi, 'Demos and Cosmopolis' (n 18) 27.
[24] Runciman (n 15) 321.

Within political philosophy there are ongoing debates about the values supported by democracy. Some argue that democracy is about ensuring the freedom of the individual, but what freedom means is contested.[25] Likewise, there are debates on the extent to which democracy promotes equality, as well as whether it can reconcile political and substantive equality,[26] whether human rights protections are necessary or whether they place undue limits on democracy.[27] These debates are heightened when democracy is incorporated into constitutionalism. Considering the contentious issues within democratic theory, this chapter starts to unpack democracy for global constitutionalist scholarship.

This chapter provides a matrix, called the Circumstances of Democracy, to explore fundamental questions. Asking the Who, What, When, Where and How analyses how democracy can be discussed within global constitutionalist scholarship, highlighting the sorts of questions that the scholarship must engage with. Firstly, this chapter explores the relationship between constitutionalism and democracy and then the contestation between constituent power and democracy. This chapter then outlines the Circumstances, and using historical examples, this chapter garners important, fundamental questions to guide a discussion on democracy.

2.2 Democracy and Constitutionalism

[25] For a discussion see Philip Pettit, 'Republican freedom and contestatory democratization' in Ian Shapiro and Casiano Hacker-Cordón (eds), *Democracy's Value* (CUP 1999) 163.
[26] Robert A Dahl, *On Democracy* (Yale University Press 1998) 37-38 (political equality); Robert Post, 'Democracy and Equality' (2005) 1 Law, Culture and the Humanities 142, 150-151.
[27] Compare Jeremy Waldron, *Law and Disagreement,* (OUP 1999) 212; Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press 1996) 17.

Modern constitutionalism is closely intertwined with democracy. This is, however, a development arising from the American and French revolutions.[28] Constitutionalism now relies on democracy to ensure its legitimacy and acceptability.[29] Yet, arguably constitutional norms, such as the rule of law and the separation of powers, act to limit democracy. A harmonious marriage between the two cannot be assumed. Global constitutionalist discourse, to the extent that it adopts a constitutionalist frame, must be mindful of this complex relationship and how it influences democracy. This section first explores this contentiousness to demonstrate how it shapes discussions on democracy.

One of the implications of the relationship between constitutionalism and democracy is the conflation of constituent power and democracy. Depending on the approach to democracy, both democracy and constituent power have the potential to invoke the radical, destructive and constructive power of people. Scholars argue that for democracy, people must have constituent power to create the constituted power holders in a constitutional system,[30] the power to hold these constituted power holders to account, as well as the power to genuinely participate in decision-making processes. But others have drawn a divide between constituent power and democracy to illustrate the different powers and to highlight how democracy can be limited by constitutionalism. This section

[28] Kay outlines theocratic and monarchical underpinnings of constitutions. See, Richard S Kay, 'Constituent Authority' (2011) 59 American Journal of Comparative Law 715, 736-737.
[29] Kelly L Grotke and Markus J Prutsch, 'Constitutionalism, Legitimacy and Power: Nineteenth Century Experiences' in Kelly L Grotke and Markus J Prutsch (eds), *Constitutionalism, Legitimacy and Power: Nineteenth Century Experiences* (OUP 2014) 11. See also, Francis Sejersted, 'Democracy and the rule of law: some historical experiences of contradictions in the striving for good government' in Jon Elster and Rune Slagstad (eds), *Constitutionalism and Democracy* (CUP 1997) 131, 132; András Sajó, *Limiting Government: an Introduction to Constitutionalism* (Central European University Press 1999) 54.
[30] Illan rua Wall, 'Notes on an "Open" Constituent Power' (2015) 11(3) Law, Culture and the Humanities 378, 378. Cf Neil Walker, 'Constitutionalism and the Incompleteness of Democracy: An Iterative Relationship' (2010) 39(3) Rechtsfilosofie & Rechtstheorie 206, 215.

explores the approach to constituent power taken by Sieyès, followed by Loughlin's categorisation of normativist, decisionist, and relationalist constituent power to expose the complicated relationship between constituent power and democracy.

2.2.1 The Relationship between democracy and constitutionalism: Tension or Co-original?

Scholars disagree on whether constitutionalism and democracy are antithetical concepts, or whether they coexist in a harmonious coupling. The way these theories construct an idea of democracy or constitutionalism, exposes the idea that the relationship is one of complexity. Starting from the idea that the concepts are antithetical, this sub-section discusses theories that operate on the idealistic assumption that democracy and constitutionalism are compatible. Habermas' co-originality thesis and the idea of constitutional democracy is compared with Walker's and Tully's reflections, which highlight how the concepts marshal one another.

Constitutionalism, as understood as human rights, the rule of law, and the separation of powers, places limits on the power of the people. Whilst some scholars argue that constitutionalism can be a tool to prevent democracy becoming a tyranny of the majority,[31] others see the limits that constitutionalism places on democracy as 'anti-democratic'[32] because constitutional laws, such as

[31] Ronald Dworkin, *A Bill of Rights for Britain* (Chatto & Windus 1990) 13-14; Sajó, *Limiting Government* (n 29) xiv.

[32] Jeremy Waldron, 'Constitutionalism: A Skeptical View' (2012) New York University Public Law and Legal Theory Working Papers < http://lsr.nellco.org/nyu_plltwp/248/ > accessed 22 September 2017; Michel Rosenfeld, 'Modern Constitutionalism as Interplay between identity and diversity: an introduction' (1992-1993) 14 Cardozo Law Review 497, 514-522.

fundamental human rights provisions, are protected from contestation. In contrast, MacCormick argues democracy is 'anti-constitutionalist' as the idea of unlimited political power expressed in democracy is at odds with the limits constitutionalism seeks to place on legislative and executive power.[33] These approaches show narrow understandings of democracy as mere majoritarianism and constitutionalism as a form of hierarchy and a way of limiting power.

Yet, there are other conceptualisations of constitutionalism and democracy that shifts the relationship.[34] Some scholars argue that constitutionalism and democracy are 'mutually dependent and mutually reinforcing'.[35] For Habermas, for example, human rights and democracy are co-original[36] and both democracy and constitutionalism are working towards the same objectives. He distinguishes between the protection of public autonomy and the protection of private autonomy.[37] Constitutionalism protects the private autonomy, whilst democracy is concerned with public autonomy. Democracy cannot happen without rights protection and the rights are not protected without democratic processes. Each complements the other.

The complementary nature of the relationship proffered by Habermas is a result of a particular conceptualisation of constitutionalism and democracy. For Habermas, constitutionalism is synonymous with the rule of law and human

[33] Neil MacCormick, 'Constitutionalism and Democracy' in Richard Bellamy (ed), *Theories and Concepts of Politics: An Introduction* (Manchester University Press 1993) 137.
[34] Walker refers to this as defining up and defining down democracy. Walker, 'Constitutionalism and the Incompleteness of Democracy' (n 30) 211.
[35] Rosenfeld, 'Modern Constitutionalism as Interplay between identity and diversity: an introduction' (n 32) 522.
[36] Jürgen Habermas, 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles?' (2001) 29(6) Political Theory 766, 767.
[37] ibid 767.

rights.[38] To ensure compatibility, democracy is modified. He argues that democracy is not majoritarianism because the will of the people should meet the requirements of the rule of law.[39] He argues that this is 'disciplining or enabling (but not constraining)'.[40] Yet, the rule of law (as understood as a principle of legality[41]) does place limits on the scope of power people have in democracy as it restricts the types of decisions that can be made. Arguably, placing such limits operates to ensure the equality of actors and the longevity of democracy. But, if anything, this demonstrates a complex relationship between constitutionalism and democracy, rather than mere coexistence. The construction of constitutionalism and democracy to make them complementary subsumes important tensions around the individual within the collective.

Some liberal constitutional scholars argue that democracy and human rights are compatible. They suggest that both democracy and rights are *instrumental* to protecting personal liberties.[42] Though there is disagreement on the 'core rights', liberal scholars argue that democratic rights, such as the freedom of speech, freedom of association, due process of law, the right to vote and hold office are a prerequisite for democracy.[43] This manifestation of the relationship between democracy and human rights is criticised for two reasons; it places limits on the decisions people can make within a democracy and it acts as 'defining up'

[38] See Bonnie Honig, 'Dead Rights. Live Future: A reply to Habermas's "Constitutional Democracy"' (2001) 29(6) Political Theory 792, 793.
[39] Jürgen Habermas, *The Inclusion of the Other* (MIT Press 1998) 259.
[40] ibid 259.
[41] The rule of law is also a contested concept, but such a debate falls outside the scope of this thesis, which focuses on democracy. For a discussion on the rule of law in relation to constitutionalism and global constitutionalisation, see Aoife O'Donoghue, *Constitutionalism in Global Constitutionalisation* (CUP 2014) 156-170; Jane Marian Rooney, 'The Paradox of Extraterritoriality at the European Court of Human Rights: A Global Constitutionalist Approach' (PhD thesis, Durham University 2016) 97.
[42] See Amy Gutmann, 'Rawls on the Relationship between Liberalism and Democracy' in Samuel Freeman (ed), *The Cambridge Companion to Rawls* (CUP 2002) 169.
[43] Dworkin, *Freedom's Law* (n 27) 17.

democracy.[44] Envisioning certain human rights as intrinsic to democracy places these rights above political debate. In contrast, Waldron argues that the people should decide disagreements about rights[45] and for republican theorists, the constitution 'never escapes democracy, insofar as it is never beyond question or amendment'.[46] Whilst some scholars would label the combined protection of human rights and democracy as substantive or thick democracy,[47] Walker argues that adding human rights (and other aspects of constitutionalism) into democracy 'defines up' democracy.[48] The utility of conceptualising this as 'defining up' lies in acknowledging the tension between human rights and democracy. Human rights, aspects of constitutionalism, and democracy interact; where a majority could violate the rights of the minority, human rights and constitutionalism can intervene, but likewise democracy is needed to add previously hidden voices and interests to constitutional arrangements. Encapsulating all of these interactions and contradictions into 'democracy' is to ignore the tension between constitutionalism and democracy.

The contestation between human rights and democracy, or between constitutionalism and democracy, can be understood as a tension between the individual and the collective.[49] If democracy is a process of collective decision-

[44] Walker, 'Constitutionalism and the Incompleteness of Democracy' (n 30) 211.
[45] Waldron, *Law and Disagreement* (n 27) 212.
[46] Graham Gee and Grégoire C N Webber, 'What is a political Constitution' (2010) 30(2) Oxford Journal of Legal Studies 273, 283.
[47] See, Dahl, *On Democracy* (n 26) 48; Joel I Colón-Ríos, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power* (Routledge 2012) 41. Cf Richard Bellamy and Dario Castiglione, 'Three Models of Democracy, Political Community and Representation' (2013) 20(2) Journal of European Public Policy 206, 208 (thick democracy means the 'intrinsic promotion of a supposed common good' and thin democracy means the 'instrumental protection of individual rights and interests').
[48] Walker, 'Constitutionalism and the Incompleteness of Democracy' (n 30) 211.
[49] For a discussion see Chantal Mouffe, 'Democratic citizenship and the political community' in Chantal Mouffe, *The Return of the Political* (Verso 1993) 61-63; Samantha Besson, 'Sovereignty, International Law and Democracy' (2011) 22(2) EJIL 373, 383.

making, it can negate the interests of the individual so as to promote a collective response.[50] Constitutionalism, and human rights, are used to mitigate the impacts on the autonomy and freedom of an individual within such collective decision-making.[51] This tension between the individual and the collective, and the way that democracy and constitutionalism interact to balance these interests, is an ongoing process that needs constant revision. It is this tension and the need to revisit it that should inform global constitutionalist debates.

The compatibility of democracy and constitutionalism is expressed in the term 'constitutional democracy'. Under 'constitutional democracy', constitutionalism and democracy coexist, such that one cannot trump the other.[52] The liberal constitutional state is built on this constitutional democratic model, and constitutional democracy, with its distinctive features of representative government and the separation of powers, has become an indicator of democracy. Yet, this restricts democracy to a particular model with associated institutions and limits the power of the people to elections and voting. Constitutional democracy can overlook the relationship between democracy and constitutionalism.[53]

Tully argues that constitutional democracy must be accompanied by 'democratic constitutionalism', which is the idea that constitutionalism and its relationship with

[50] See below, section 2.3.2 text at fn 206-217.
[51] For a discussion see, Jean Blondel, 'Democracy and Constitutionalism' in Takashi Inoguchi, Edward Newman and John Keane (eds), *The changing nature of democracy* (United Nations University Press 1998) 81.
[52] Walter F Murphy, 'Constitutions, Constitutionalism, and Democracy' in Douglas Greenberg, Stanley N Katz, Melanie Beth Oliviero and Steven C Wheatley (eds), *Constitutionalism and Democracy: Transitions in the Contemporary World* (OUP 1993) 3, 6; James Tully, 'The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy' (2002) MLR 204, 207.
[53] Neil MacCormick, 'Constitutionalism and Democracy' in Richard Bellamy (ed), *Theories and Concepts of Politics: An Introduction* (Manchester University Press 1993) 145.

democracy is open and contested so that people can rewrite their constitutional system.[54] Democratic constitutionalism is used by Tully to ensure that constitutionalism does not smother democracy. So as aspects of constitutionalism, such as the separation of powers and the rule of law, can be said to protect democracy, democracy facilitates the reformation of constitutional institutions and processes.[55] Tully's pairing of constitutional democracy and democratic constitutionalism is illustrative of the impact of democracy on constitutionalism, which contrasts with Walker, who focuses on how constitutionalism shapes democracy.[56]

Walker argues that democracy and constitutionalism need to be considered as being in a state of iterative tension, but working together to achieve particular aims.[57] He argues that democracy is incomplete and as such constitutionalism both realises and qualifies democracy.[58] He outlines six instances where constitutionalism and democracy are said to collide. These are: the authority of the polity, the membership of a polity, the representative processes in a system, the competences of stakeholders and representatives, public goods and human rights, and the institutional arrangement of a constitutional system.[59] In essence, for Walker, constitutionalism (through a constitution) shapes the polity and the political processes.

[54] Tully, 'The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy' (n 52) 207.
[55] ibid 207.
[56] Cf Walker, 'Constitutionalism and the Incompleteness of Democracy' (n 30) 216 (notes the role of democracy in the reflexivity of the polity).
[57] ibid 213.
[58] ibid 207.
[59] ibid 214-221.

Walker accepts that constitutionalism qualifies democracy. For example, he argues that the protection of human rights and the provision of other public goods require a modification of democracy.[60] In addition, in realising democracy, constitutionalism modifies democracy.[61] For Walker, an undemocratic expression of constituent power constructs a system, and it is within this system that democracy can prosper.[62] The system has 'the necessary framing conditions and any additional norm-generating capacity for the fashioning and operation of democracy within that polity'.[63] It is not clear what these conditions are, but if democracy is then restricted to that system, it operates within those conditions. For some theorists, such restrictions are not legitimate, as scholars contest the undemocratic expression of constituent power.[64] Whilst Walker acknowledges that these conditions have not been consented to by the *demos*,[65] further work is needed to demonstrate the implications of this. As Walker is both a constitutional theorist and a commentator on global constitutionalism, he initiates a conversation within global constitutionalist literature on the relationship between constitutionalism and democracy, but leaving constituent power as an expression of undemocratic power and constitutionalism as an imposition on the people has the unsatisfactory outcome that nascent constitutionalisation in global governance might be imposed upon an unwilling global populace.

The relationship between constitutionalism and democracy is both unresolved and unresolvable. Democracy and aspects of constitutionalism stand in a

[60] ibid 220.
[61] Habermas' co-original thesis is another example of this. Human rights realise democracy, but at the same time, they modify democracy. Habermas, 'Constitutional Democracy' (n 36) 767.
[62] Walker, 'Constitutionalism and the Incompleteness of Democracy' (n 30) 214-215.
[63] ibid 215.
[64] Yaniv Roznai, 'We the Limited People' (NYU Global Fellows Forum, 10 March 2015) 15 < http://www.law.nyu.edu/sites/default/files/upload_documents/Roznai%20-%20March%2010th%20Forum%20draft.pdf > accessed 19 September 2017.
[65] Walker, 'Constitutionalism and the Incompleteness of Democracy' (n 30) 216.

complex, iterative relationship, in which both modifies the other. Idealistic co-existence models subsume the tension between constitutionalism and democracy, and obscure the way that democracy can become conflated with other concepts. To rectify this, the scholarship must query the relationship, acknowledge how their current solutions do not fully resolve the tensions, and be clear as to where limitations are placed on democracy. The complexity between constitutionalism and democracy is compounded when the issue of constituent power is considered, and this is discussed next.

2.2.2 Constituent Power and Democracy

Modern constitutionalism is predicated on popular sovereignty and authority is said to derive from the people. Yet, traditionally this is not explained by democracy.[66] Rather, who has the power to constitute and how is explained through constituent power. For instance, scholars argue that constituent power does not have to be expressed through a democratic procedure nor produce a democratic system. In recent global constitutionalist scholarship, constituent power and democracy are entwined,[67] but the relationship between the two needs further unpacking to demonstrate that there are potential differences in the scope of power between constituent power and democracy, making it problematic to conflate the two. This sub-section begins by exploring Sieyès' conceptualisation of constituent power. Then Loughlin's normativist, decisionist, and relationalist

[66] Cf Andreas Kalyvas, 'Popular Sovereignty, Democracy, and the Constituent Power' (2005) 12(2) Constellations 223, 237.
[67] See, for example: Geneviève Nootens, 'Constituent power and the people-as-the-governed: About the "invisible" people of political and legal theory' (2015) 4(2) Global Constitutionalism 137; Saki Bailey & Ugo Mattei, 'Social movements as Constituent Power: The Italian Struggle for the Commons' (2013) 20 Indiana Journal of Global Legal Studies 965; Jürgen Habermas, 'Citizen and State Equality in a Supranational Political Community: Degressive Proportionality and the *Pouvoir Constituant Mixte*' (2017) 55(2) Journal of Common Market Studies 171.

conceptualisations of constituent power are used to demonstrate alternative approaches. Finally, this sub-section reflects on discussions on the scope of constituent power and how this relates to democracy. As noted above, democracy is invoked alongside popular sovereignty and self-government, and the idea of self-government is tied to elections and voting.[68] Discussing constituent power in relation to the identification of who holds power, how it is used, and the scope of the power demonstrates how it can differ from democracy, if democracy is understood as self-government.

The idea of constituent power is often traced back to Sieyès' discussion. *What is the Third Estate?* provides a tripartite explanation of the positions of power and people within constitutionalism: 'the people as a nation are the constituent power, the government is the constituted power, and the terms on which it functions are the constitution'.[69] In this approach, the exercise of constituent power takes place, in what is called, a constituent or constitutional moment, in which a new political and legal order is established.[70] Constituent power creates the constituted power, which is the legislative and executive power within a constitutional order. In this sense, constituent power is a radical power that destroys a previous order and creates a new one.[71] Sieyès conceptualisation of constituent power is influential and forms a starting point. But, there are other approaches and Loughlin distinguishes between three further conceptualisations of constituent power;

[68] Chapter 1, section 1.5.1.
[69] Denis J Galligan, 'The People, the Constitution, and the Idea of Representation' in Denis J Galligan and Mila Versteeg (eds), *Social and Political Foundations of Constitutions* (CUP 2013) 148.
[70] For a discussion see, Kalyvas (n 66) 226. See also Bruce Ackerman, *We the People, Volume 2: Transformations* (Harvard University Press 2000).
[71] Negri refers to constituent power as a power that 'is aimed at revolutionizing the status quo'. A Negri, *Insurgencies* (Maurizia Boscagli trans, University of Minnesota Press 1999) 337; Wall, 'Notes on an "Open" Constituent Power' (n 30) 384.

normativist, decisionist, and relationalist.[72] These conceptualisations have competing approaches to who holds constituent power. Normativism is predicated on the pre-supposed *Grundnorm*, rather than the will of the people.[73] Dyzenhaus, a proponent of normativism, argues that constituent power is superfluous.[74] If, as the normativist position argues, constituent power is a political myth,[75] there is no space for the will of the people in the authority of the constitutional order. The decisionist strand, in contrast to normativism, acknowledges that constitutions are a product of political moments in history.[76] Decisionists recognise that constituent power can be held by the people or the monarch,[77] where the people is a pre-supposed unified political entity.[78] In the relational approach, constituent power is exposed as a paradox: it 'involves the exercise of power by a people [and] simultaneously constitutes a people'.[79] In the relational perspective, constituent power is not exhausted in the constituent

[72] The German, French, American and English traditions of constitutionalism have conceptualised constituent power differently as well. See Martin Loughlin, 'Constituent Power Subverted: From English Constitutional Argument to British Constitutional Practice' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (OUP 2012) 27; Stephen M Griffin, 'Constituent Power and Constitutional Change in American Constitutionalism' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (OUP 2012) 49; Lucien Jaume, 'Constituent Power in France: The Revolution and its Consequences' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (OUP 2012) 67; Christoph Möllers, '"We are (afraid of) the people"': Constituent Power in German Constitutionalism' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (OUP 2012) 87.

[73] Hans Kelsen, *Introduction to the Problems of Legal Theory* (BL Paulson and SL Paulson trans, Clarendon Press 1992) 1 cited in Martin Loughlin, 'The concept of constituent power' (2014) 13(2) European Journal of Political Theory 218, 222.

[74] David Dyzenhaus, 'Constitutionalism in an Old Key: Legality and Constituent Power' (2012) 1 Global Constitutionalism 233, 253.

[75] Loughlin, 'The concept of constituent power' (n 73) 222.

[76] ibid 227. Loughlin uses Schmitt to explore decisionist approaches to constituent power. Schmitt's use of constituent power undermines democracy. Firstly, as Dyzenhaus notes Schmitt is not concerned with the multitude of persons, but with the myth of a constructed sovereign. See, David Dyzenhaus, 'The Politics of the Question of Constituent Power' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (OUP 2012) 129, 133. Secondly, Schmitt uses constituent power to undermine democratic practices in the realm of constituted power. As Schmitt's theory ultimately leads to dictatorship, it is not used in this thesis.

[77] Loughlin, 'The concept of constituent power' (n 73) 225.

[78] ibid 228.

[79] ibid 229.

moment. Rather, constituent power and constituted power are in a dialectical relationship, in which constituent power irritates the instituted power.[80]

Conceiving of constituent power through these three conceptualisations is useful because it demonstrates the different ways the people are constructed and given particular roles. How the decisionist, normativist and relational approaches conceive of the power of the people impacts the scope of democracy. Scope refers to the breadth of decisions and institutions, the more decisions and institutions that fall within the power of the people the wider the scope of democracy. These conceptualisations of constituent power are re-produced in global constitutionalist scholarship, as scholars translate domestic ideas of constitutionalism for the global level. One example, which is elaborated on in the thesis, is the German tradition that informs Peters and Fassbender.[81] This adoption of a domestic tradition is insufficient as it side-lines the differing extents of people's power, which are uncovered when Loughlin's three conceptualisations are compared. It is critical to reflect on how these conceptualisations impact democracy.

Traditionally, constituent power was not exercised democratically and was not thought to give rise to a democratic constitutional order.[82] Whilst there is a shift towards tying constituent power more closely with democracy, the way the two are disconnected in the literature means it is advisable to initially separate constituent power and democracy. When considering the relationship between constituent power and democracy, there are two issues to consider: how

[80] ibid 232.
[81] See below, Chapter 4, section 4.3.3, text at fn 231-234.
[82] See for example, Walker, 'Constitutionalism and the Incompleteness of Democracy' (n 30) 215.

constituent power is exercised and whether the outcome of constituent power should be democratic.

For Sieyès, constituent power vests in the nation.[83] The nation here means a unity of The People, rather than all the people together, so it is a construct that implies one common identity and one will.[84] The unity imposed through the idea of the nation has been criticised by critical legal theorists, who proffer the idea of the multitude.[85] The multitude expresses the plurality of all the people. According to Sieyès, it is the nation that holds constituent power and the nation is represented in an assembly.[86] In essence, the assembly has constituent power and the people hold it only symbolically. Within this representative model, the people themselves cannot influence the content of the constitution. The representative aspect of Sieyès' constituent power potentially excludes the genuine participation of people because not only is the nation a construct, but it is this construct that is represented in the assembly. Roznai responds to this, and argues, that 'an exercise of *constituent power* should be inclusive, participatory, and deliberative'.[87] Whilst arguably, in an ideal world, constituent power should be exercised through democratic processes to ensure the consent of the people, traditionally constituent power is not exercised democratically; Sieyès' reliance on the nation means for him constituent power is divorced from the genuine participation of the people.

[83] Emmanuel Joseph Sieyès, 'What is the Third Estate' in Michael Sonenscher (ed), *Sieyès: Political Writings; Including the Debate between Sieyès and Tom Paine in 1791* (Hackett Publishing 2003) 133.
[84] ibid 134.
[85] For a discussion, see Illan rua Wall, *Human Rights and Constituent Power: Without Model or Warranty* (Routledge 2012) 80-83.
[86] Sieyès, 'What is the Third Estate' (n 83) 134-135.
[87] Roznai (n 64) 15.

There is a debate about whether constituent power necessitates the creation of a democratic system.[88] Sieyès argues that nothing is above the nation, which is interpreted to mean that constituent power cannot be limited, and therefore it is not obliged to create a democratic system.[89] If constituent power vests in the nation and nothing is above the nation, constituent power can create any form of constitutional order. However, Sieyès argues that the nation is limited by natural law.[90] Roznai interprets this to mean that Sieyès saw constituent power as limited by the natural rights of men.[91] From this limitation, Roznai argues that norms of constitutionalism marshal the exercise of constituent power,[92] and that it must lead to a democratic output. The norms of constitutionalism are contested, and as noted above, do not necessarily include democracy,[93] which weakens Roznai's argument. If constituent power does not have to create a democratic constitutional order, it is not sufficient to focus a discussion on democracy on constituent power. It is imperative that constituent power and the constituted powers it creates are treated separately.

The scope of the power, whether it expires and what it can reappear to do, has implications for the relationship between constituent power and democracy. To understand the relationship between constituent power and democracy, there needs to be further reflection on the scope of that power. To what extent is constituent power absorbed into the constituted power is an important question.

[88] See Kalyvas (n 66) 236.
[89] Sieyès, 'What is the Third Estate' (n 83) 136; Kalyvas (n 66) 227.
[90] Sieyès, 'What is the Third Estate' (n 83) 136-137.
[91] Roznai (n 64) 15.
[92] ibid 15.
[93] See section 2.2.1.

Whilst some argue that constituent power is exhausted in the constituent moment,[94] others argue that it lies latent, and can reappear.[95]

Loughlin refers to Lawson to suggest that the constituent power can 'reappear' as the 'the power to constitute, abolish, alter, [and] reform forms of government'.[96] The meaning of alter and reform here needs unpacking. Constitutions provide rules for amendments, following these rules is a power granted under the constitution. As nothing is above constituent power, constituent power stands outside the constitution, so following amendment procedures is not an expression of constituent power.[97] Constituent power amends the constitutional order without conforming to rules in the constitution.[98] Constituent power plays a role in constitutional amendment, but only those radical changes that are not provided for in the constitution. Following amendments procedures are powers commonly afforded by the constitution to the *demos*, alongside elections and voting. Treating constituent power as outside the constitution, in the first instance, demonstrates its radical nature and how it differs from the powers traditionally associated with processes in a democracy.

Sieyès was clear about the scope of the power and he constructs a differentiation between constituent power and constituted power. For him, constituent power

[94] See, Ulrich K Preuss, 'Constitutional Powermaking for the New Polity: Some Deliberations on the Relations between constituent power and the constitution' (1992-1993) 14 Cardozo Law Review 639.
[95] John Locke, *Two Treatises of Government* (P Laslett ed, CUP 1998) ch II, sec 222. See also Denis J Galligan, 'The Paradox of Constitutionalism or the Potential of Constitutional Theory' (2008) 28(2) Oxford Journal of Legal Studies 343, 358; Colón-Ríos (n 47) 8; Kalyvas (n 66) 227.
[96] George Lawson, *Politica Sacra et Civilis* [1660] (CUP 1992) cited in Martin Loughlin, *Foundations of Public Law* (OUP 2010) 3 fn 7.
[97] Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (CUP 2012) 310. Cf Griffin argues that in the American tradition, amendments to the constitution under Article V are an expression of constituent power. Griffin (n 72) 50.
[98] Pettit, *On the People's Terms* (n 97) 310.

and the legislative processes should be treated differently.[99] In France, the Constituent Assembly made laws before they dealt with writing a constitution, this meant that the distinction between constituent and constituted power collapsed.[100] If all laws are made by a constituent power, then the distinction between constitutional and ordinary law is lost.

Ignoring the difference between constituent power and constituted power has negative consequences for democracy. For example, in England constituent and constituted power was conflated. Once constituent power moved from the King to the people, the representatives assumed this power and acted on behalf of the people, not to create an order but to govern that order.[101] Relying on the idea that they represented the will of the people, there was little need to revert questions to the people. Here the role of democracy in keeping check on the constituted power is overlooked. If, as the relationalist approach argues, constituent power is in a dialectical relationship with constituted power, then the clear-cut divide between the two is lost. Whilst the irritative function of the constituent power in this relationalist approach is attractive as it ensures that constituted powers are accountable to constituent power holders. It can also mean that democratic processes established in a constitution to hold to account constituted powers are replaced with a non-democratic exercise of constituent power. Thus, in the first instance, the constituent and constituted power should not be conflated but treated separately.

[99] In *What is the Third Estate*, Sieyès draws a distinction between the Constituent Assembly and the National Assembly. For Sieyès, the powers of these powers are distinct. Sieyès, 'What is the Third Estate' (n 83) 139 and 143.
[100] Jaume (n 72) 69.
[101] See Loughlin, 'Constituent Power Subverted (n 72) 33.

The section outlined a number of ideas, such as the extent of constituent power, applicable limitations on the power, and its relationship with democracy. It demonstrates that a relationship between constituent power and democracy cannot be assumed. The identity of the constituent power holders, how it is exercised, and the scope of the power was not always addressed through democracy. Who holds constituent power has not traditionally been answered using democracy. Sieyès's reliance on the nation, or 'The People' is a symbolic construct, not linked to the multitude of persons. The role of representation in how constituent power is exercised, means that traditionally people have little influence over the content of a constitutional agreement. There are calls in the scholarship to democratise constituent power, so that it is exercised through democratic processes.[102] The relationship between constituent power and democracy is further complicated by considering the relationship between constituent and constituted power. Within global constitutionalist literature, it is imperative that the relationship between constituent power, constituted power, and democracy is unpacked albeit just as in the domestic debates conclusive answers will inevitably remain elusive, the debate remains necessary.

The complexity of constituent power and democracy is one aspect of the constitutionalism and democracy debate, and assuming a complementary relationship sidesteps the ways in which constitutionalism modifies democracy. Although constitutional democracy suggests a harmonious marriage between constitutionalism and democracy, this cannot be presumed. The complexity around how constitutionalism and democracy intersect and interact must be considered in the global constitutionalist literature to identify the modifications to

[102] Roznai, 'We the Limited People' (n 64) 15.

democracy. The next part offers a partial starting premise by setting out the terms of the Circumstances of Democracy, and each Circumstance evidences the ways constitutionalism and democracy intersect and the critical need to engage with them to understand constitutionalism at the global level.

2.3 The Circumstances of Democracy

Searching for a definition of democracy often generates models and labels. Models such as representative, deliberative and participatory democracy are pitted against one another. Another popular trope is to label democracy as thick (meaning the inclusion of substantive rights) and thin (which invokes a mere procedural account of democracy).[103] Yet, as noted above there are heated debates on the meaning of equality and freedom and the role of human rights, which makes 'thick' and 'thin' or 'procedural' and 'substantial' labels often overly simplistic.[104] These prevailing tropes are unhelpful; rather than relying on labels, these tropes should be deconstructed to unpack what they say about people and power. This thesis adopts the Circumstances of Democracy as a matrix that functions to both deconstruct the meaning of democracy and then to facilitate a discussion of democracy in different contexts including global governance.

The Circumstances are a series of situational questions that construct a narrative.[105] Common questions are: Who, What, When, Where, and How. The

[103] See, Dahl, *On Democracy* (n 26) 48; Colón-Ríos (n 47) 41. Cf For Bellamy and Castiglione, thick democracy means the 'intrinsic promotion of a supposed common good' and thin democracy means the 'instrumental protection of individual rights and interests'. Bellamy and Castiglione, 'Three Models of Democracy' (n 47) 208.
[104] See above, text at fn 25-27.
[105] Natalie A Markman, 'Bringing Journalism Pedagogy into the Legal Writing Class' (1993) 43(4) Journal of Legal Education 551.

Circumstances, as a tool of rhetoric, are often associated with emotions and persuasion,[106] and within law, they are used to construct proof in legal trials,[107] making them potentially unhelpful as a method for analysing legal scholarship. However, the Circumstances are not just a tool of legal argument,[108] and Leff gives the Circumstances a broader role. For him, they are a method of ancient philosophical argument, used to 'mark out the boundaries of rhetorical subject matter' or, in other words, demarcate a topic.[109]

Rhetoric, broadly construed, is a form of argumentation that is concerned with specific situations.[110] Leff contrasts this with dialectical argumentation, which is concerned with abstract concepts.[111] Within rhetoric, the Circumstances play a key role in providing the situational and contextual nature of rhetorical arguments.[112] The Who, What, When, Where and How are used to generate the material for argument, this material is then subjected to the processes of inference, induction and deduction.[113] Leff argues that the Circumstances are used to 'locate argumentative bits' that are relevant to an issue.[114] Whilst Cicero referred to a legal case,[115] 'issue' can also mean something which is in dispute

[106] Michael Carter, 'Stasis and kairos: Principles of social construction in classical rhetoric' (1988) 7(1) Rhetoric Review 97, 99-101; Lorna Hutson, 'Rhetoric and Law' in Michael J MacDonald (ed), *The Oxford Handbook of Rhetorical Studies* (OUP 2017) 399.
[107] M T Cicero, *De inventione* (H M Hubbell trans, Harvard University Press 1949) 1.34-43; Michael Leff, 'Commonplaces and Argumentation in Cicero and Quintilian' (1996) 10 *Argumentation* 445; Lorna Hutson, *Circumstantial Shakespeare* (OUP 2015) 5.
[108] Kathy Eden, 'Forensic Rhetoric and Humanist Education' in Lorna Hutson (ed), *The Oxford Handbook of English Law and Literature 1500-1700* (OUP 2017) 28.
[109] Michael C Leff, 'The Topics of Argumentative Invention in Latin Rhetorical Theory from Cicero to Boethius' (1983) 1(1) *Rhetoric: A Journal of the History of Rhetoric* 23, 29.
[110] ibid 23-25; Michael Leff, 'Rhetoric and Dialectic in the Twenty-First Century' (2000) 14 *Argumentation* 241, 243.
[111] Leff, 'The Topics of Argumentative Invention in Latin Rhetorical Theory from Cicero to Boethius' (n 109) 23-25.
[112] Carter, 'Stasis and kairos' (n 106) 99-10.
[113] Leff, 'The Topics of Argumentative Invention in Latin Rhetorical Theory from Cicero to Boethius' (n 109) 29.
[114] Leff, 'Commonplaces and Argumentation in Cicero and Quintilian' (n 107) 446.
[115] Cicero, *De inventione* (n 107) 1.34-43; Leff, 'Commonplaces and Argumentation in Cicero and Quintilian' (n 107) 445.

or something which does not have a single meaning.[116] Democracy is a disputed term,[117] making it suitable to subject to the Circumstances.

Leff tracks the development of the Circumstances from Cicero, to Hermagoras, through to Quintilian and then their use in the Middle Ages.[118] His commentary on this rhetorical method identifies two trends; the complex relationship between rhetoric and dialectical argument, and how certain Circumstances move in and out of fashion. These trends have ramifications for the use of the Circumstances within this thesis. Leff shows how Cicero sought to unify dialectical argument and rhetoric, by removing the Circumstances from his later works, *Topica* and *De oratore*.[119] Focused on contextualisation, the Circumstances sit uneasily with dialectical argument, which is concerned with abstract ideas and generalisations.[120] This thesis, in relying on the Circumstances, is grounded in rhetoric rather than dialectic reasoning. This means that it cannot then offer general theories of democracy, however democracy is contextualised, and it is through these situational questions that the debates on democracy are deconstructed.

Comparing Cicero's early approach to rhetoric with the work of scholars in the Middle Ages, Leff shows how in the Middle Ages, there is a shift away from focusing on the subject, towards focusing on the performance of the act.[121] This thesis reverses this shift and gives the Who question prominence as it seeks to

[116] Leff, 'The Topics of Argumentative Invention in Latin Rhetorical Theory from Cicero to Boethius' (n 109) 23.
[117] See Gallie (n 2) 168.
[118] Leff, 'The Topics of Argumentative Invention in Latin Rhetorical Theory from Cicero to Boethius' (n 109) 23.
[119] ibid 30.
[120] Leff, 'Commonplaces and Argumentation in Cicero and Quintilian' (n 107) 450.
[121] Leff, 'The Topics of Argumentative Invention in Latin Rhetorical Theory from Cicero to Boethius' (n 109) 36. See also, Hutson, 'Rhetoric and Law' (n 106) 398.

interrogate the global constitutionalist approach to *demos* as well as associated questions to do with the people. Leff also highlights how focusing on the performance of an act places more emphasis on the When as it divides it into multiple questions of time and occasion.[122] The flexible use of the Circumstances makes them useful for exploring where the international legal and global constitutional scholarship places emphasis and how that scholarship discusses democracy.

These Circumstances do not presuppose an answer, but rather act as investigatory prompts. For Carter, the Circumstances are part of a broader tradition within rhetoric that is concerned with arguments and disagreements.[123] This means that they can accommodate the complex debates within democratic theory, such as the relationship between the individual and the community, the role of the state in demarcating the *demos*, and the relationship between constituent power, popular sovereignty, and democratic decision-making.

There are two alternative approaches to discussing democracy that could have been exploited within this thesis; an analytical (or models) method and a conceptual approach. The strengths and weaknesses of each of these and their role within this debate are elaborated upon below, but it is important to remember that to explore how global constitutionalist literature currently discusses democracy, this thesis requires a method that promotes investigation into the approach within global constitutionalist literature to fundamental aspects of democracy.

[122] Leff, 'The Topics of Argumentative Invention in Latin Rhetorical Theory from Cicero to Boethius' (n 109) 27-28 and 32.
[123] Carter, 'Stasis and kairos' (n 106) 99.

Scholars compete to present the best model for democracy.[124] The models are differentiated in relation to the types of institutions they discuss, the types of processes they emphasise, and the weight attached to certain values.[125] In *Models of Democracy,* Held outlines different models of democracy and investigates their unique characteristics. He adopts a historical approach to show how democracy varies across different political contexts. Held's historical approach has value because in discussing the different models he highlights the limitations with respect to enfranchisement, noting in particular the exclusion of women. Held asks foundational questions about the meaning of rule and people, and seeks out areas of disagreement between the models.[126] He also explains how normative ideals (whether freedom or equality) are interpreted into institutional arrangements, which is useful for shifting thinking towards the values rather than conceiving of certain processes as fundamental to democracy.

The value of the models' approach is that it demonstrates the various forms democracy can take and the different institutional arrangements.[127] For instance, in this thesis, a particular model could have been adopted and its characteristics could have been used to structure democracy in global constitutionalism. But, this would not have addressed the research question, which asks how global constitutionalists discuss democracy and thus requires a methodology that is not tied to particular models of democracy.

[124] See for example, Jürgen Habermas, 'Three Normative Models of Democracy' (1994) 1(1) Constellations 1; Bellamy and Castiglione, 'Three Models of Democracy' (n 47) 206.
[125] See David Held, *Models of Democracy* (3rd edn, Polity Press 2006).
[126] ibid 1-2.
[127] Michael Farrelly, *Discourse and Democracy: Critical Analysis of the Language of Government* (Routledge 2014) 13.

One of the limitations of the models' approach is the shifting labels and preferences. Within this analytical approach, models can move in and out of fashion. Which models Held focuses on changes across editions of this pivotal text. In the first edition there are nine different models of democracy: classical democracy, protective democracy, developmental democracy, direct democracy, competitive democracy, pluralism, legal democracy, and his model of 'democratic autonomy'.[128] Other commonplace models are liberal democracy and deliberative democracy, which Held explicitly investigates in the third edition of his book.[129] How these models are labelled is subject to individual preference, as Held notes that these models could fit into broader 'categories' of participatory or representative democracy.[130] The plethora of models is suggestive of a desire to categorise and label systems as democratic. Their interchangeability is evidence of the futility of relying on a models' approach to construct a means of democracy.

Furthermore, whilst a model's approach facilitates a comparison between models, it can neglect the differences of opinion within a model. For example, it would be difficult to encompass the competing theories of liberalism within a liberal model of democracy as liberal democracy is not necessarily homogenous.[131] Furthermore, the different models are process-based, which means this approach can disregard the disagreement on other aspects of

[128] David Held, *Models of Democracy* (Polity Press 1988). NB that liberal democracy does not appear in this 1st edition, a reminder that the so-called victory of liberal democracy, in which the academic and political world marked the end of history is ear-marked as 1989 onwards.
[129] See David Held, *Models of Democracy* (3rd edn, Polity Press 2006) 209 (participatory); Chapter 9 (deliberative); Chapter 3 (liberal).
[130] David Held, *Models of Democracy* (3rd edn, Polity Press 2006) 4.
[131] See Jane Arscott, 'Review: Models of Democracy, David Held (Stanford: Stanford University Press 1987) xii' (1987) *Canadian Journal of Political Science* 902. Dagger criticizes Held's book for not incorporating a discussion on Rawls. See, Richard Dagger, 'Review: *Models of Democracy*. By David Held. (Stanford: Stanford University Press 1987) pp. 321. $35.00 cloth, $12.95 paper.' (1989) 51(2) The Journal of Politics 458, 459.

democracy. What is needed is a focus on the core aspects of democracy, or the foundational questions.

Alternatively, conceptual analysis could be used. Conceptual analysis offers an explanation of a term and it can be used to find a set of common criteria that characterise that term.[132] This form of analysis can be used to 'distinguish between those forms of government that are democratic and those that are not'.[133] List and Valentini break-down conceptual analysis into; 'domain of application', 'defining conditions' and 'extension'.[134] The '*domain of application*' refers to an object which can be said to fall within a concept or not.[135] In relation to democracy, List and Valentini argue that the domain would be 'systems of government or decision-making', for these can be said to be democratic or not.[136] The 'defining conditions' are criteria that determine whether the object falls within the concept and the 'extension' refers to those things that satisfy the criteria. In relation to democracy, List and Valentini state '[t]he extension of the concept *democracy* is the set of all those systems of government or decision-making that, according to the concept, count as democratic'.[137] Conceptual analysis is useful for the way it deconstructs the concept into component parts. The use of domain, conditions and extensions could be used as a starting point in the thesis. Furthermore, List and Valentini show that the domain of application, defining

[132] James L Hyland, *Democratic Theory: The Philosophical Foundations* (Manchester University Press 1995) 38; David Collier, Jody LaPorte and Jason Seawright, 'Typologies: Forming Concepts and Creating Categorical Variables' in Janet M Box-Steffensmeier, Henry E Brady and David Collier (eds), *The Oxford Handbook of Political Methodology* (OUP 2008) 158-159.
[133] Christian List and Laura Valentini, 'The Methodology of Political Theory' in Herman Cappelen, Tamar Szabó Gendler and John Hawthorne (eds), *The Oxford Handbook of Philosophical Methodology* (OUP 2016) 531.
[134] ibid 531.
[135] ibid 531.
[136] ibid 531.
[137] ibid 531.

conditions and extension are contested,[138] which facilitates a discussion on competing approaches to democracy.

The limitation of this approach is that it does not provide a working definition of the concept. The conceptual analysis does not say what would accord with the concept of democracy, rather scholars can construct their own defining conditions. Furthermore, the utility of conceptual analysis lies in categorising things as democratic or not.[139] This thesis investigates how a scholarship discusses democracy, rather than how the scholarship categorises governance structures. As such, the defining conditions would need to be broken down into key aspects.

To explore how global constitutionalist scholarship discusses democracy, this thesis requires a methodology that asks fundamental questions. The inquiry is not restricted to one model of democracy, and so the methodology needs to facilitate an exploration of different approaches to democracy. The next part demonstrates how the Circumstances of Democracy matrix is used within this thesis to build a set of questions with which to analyse global constitutionalist literature.

2.3.1 How the Circumstances of Democracy Work

Within this thesis, the Circumstances (the Who, What, When, Where and How) work as an analytical tool to break down component parts of a topic or narrative,

[138] ibid 531.
[139] Hyland, *Democratic Theory* (n 132) 39; Collier et al., (n 132) 157.

and then they interrelate to reconstruct the topic or narrative. This dual function of deconstruction and reconstruction is useful to investigate the components of democracy. Who discusses the requisite *demos* and the role of the individual within it. What reflects on the extent of the power of the people. When considers whether democracy is required at constitutional moments and everyday governance. Where can refer to the levels of governance at which democracy should be present, which is a question raised by the global constitutionalist debate, but more pertinent questions are the role of institutions and the public/private divide. The How within this matrix has two functions; firstly, it analyses the types of processes the scholarship uses, and secondly, it facilitates a discussion on the interrelationship of the Circumstances of Democracy.

The propositions posed within each Circumstance are complex, as how democracy is manifested changes over time and across different theoretical perspectives. Selection of public officials by lot, the regular rotation of persons in office and the direct democracy of Ancient Athens can be contrasted with the parliamentary buildings and elections of liberal democracy.[140] There was a shift towards representation rather than participatory democracy[141] and a shift away from majoritarianism towards a concern for the protection of rights.[142] These different approaches to democracy will garner mixed responses to the Circumstances.

[140] George Tridimas, 'Constitutional choice in ancient Athens: the rationality of selection to office by lot' (2012) 23 Constitutional Political Economy 1, 1.
[141] Wood, 'The *demos* versus "we, the people"' (n 18) 215-216.
[142] Marc F Plattner, 'Populism, Pluralism and Liberal Democracy' (2010) 21(1) Journal of Democracy 81, 84.

Deriving the meaning of the Circumstances of Democracy is done through an investigation of historical examples and theories of democracy. One response to these shifts in the approach to democracy is to argue that past conceptualisations of democracy were not really democracy at all. Scholars have criticised Athenian democracy because it excluded certain groups in society and did not have an understanding of the civil and political rights seen in modern liberal democracies.[143] It is also arguable, that the form of representative democracy that is most common today, to the Ancient Athenian would have looked more like an 'elective oligarchy'.[144] Whilst some historians have favourably compared Ancient and modern democracy, others question whether comparisons can be made.[145] As such, these historical sources need to be unpacked. In the historical examples, it is often critics of democracy that are discussed. Plato and Aristotle both offered critiques of democracy in Ancient Athens, Madison and Rousseau critiqued direct democracy, and de Tocqueville wrote a critique of America's democracy. Madison considered himself to be anti-democratic, if democracy meant direct participation of the people. He argued that direct democracy risked a tyranny of the majority. He offered instead a republican, representative notion, which can be considered a form of representative democracy.[146] Another example is the work of Schumpeter. Often heralded as a commentator on modern democracy, Schumpeter offers a critique of what he termed 'classical'

[143] Anthony H Birch, *The Concepts and Theories of Modern Democracy* (Routledge 1993) 45. See also Ian Shapiro and Casiano Hacker-Cordón, 'Promises and disappointments: reconsidering democracy's values' in Ian Shapiro and Casiano Hacker-Cordón (eds), *Democracy's Value* (CUP 1999) 1, 2

[144] Tridimas (n 140) 1.

[145] For a discussion on whether ancient and modern democracy can be compared, see Eric W Robinson, *The First Democracies: Early Popular Government Outside Athens* (Franx Steiner Verlag 1997) 32-33; Ellen Meiksins Wood, 'Demos versus "We, the people": Freedom and Democracy Ancient and Modern' in Josiah Ober and Charles H Hedrick (eds), *Dēmokratia: A Conversation on Democracies, Ancient and Modern* (Princeton University Press 1996) 121.

[146] See James Madison, 'Letter No XLIX: The Same Subject Continued with the same view' in Isaac Kramnick (ed), *James Madison, Alexander Hamilton and John Jay: The Federalist Papers* (Penguin 1987).

democracy.[147] Based on empirics, he denies the plausibility of government *by* the people in the current climate of mass populations.[148] Schumpeter rejects participatory models of democracy, and argues that '[d]emocracy means only that the people have the opportunity of accepting or refusing [representatives]'.[149] So the Schumpeterian approach to democracy offers a restricted power for the people. When using these commentaries of democracy, it is imperative to consider the nuances around their use of the term 'democracy', in particular to reflect on what models they are referring to and what aspects of democracy are rejected.

Within the matrix adopted for the purposes of this thesis, democracy is an amalgamation of all the Circumstances. Take, for example, elections. This democratic process is a question of How, but the investigation into why this is democratic must consider Who gets to participate, What power they have, When they have the power to vote and on what sorts of questions, and at which levels of governance can they elect representatives. It is not sufficient to focus on the question of How, and thus to prioritise processes, procedures and institutional reforms. These Circumstances must interrelate to facilitate a reflection on the scope of the power of the people at all levels of governance and decision-making.

Whilst the Circumstances are interrelated, they each have an integral role, and cannot be conflated or substituted with one another. In discussions on democracy, How can easily become synonymous with democracy; discussions

[147] For a discussion see, Shapiro and Hacker-Cordón, 'Promises and disappointment (n 143) 4; David Held, *Models of Democracy* (3rd edn, Polity Press 2006) 141-143 and 146.
[148] Joseph A Schumpeter, *Capitalism, Socialism, and Democracy* (Allen and Unwin 1976) 284-285.
[149] ibid 284-285.

revolve around the types of voting mechanisms or institutional practices.[150] Without further reflection, the question of How can neglect the question on What; the scope of the power of the people over decision-making. The problem with this sort of conflation and substitution is that the focus of discussions becomes skewed in favour of one or two of the Circumstances, in this instance voting becomes an inherent part of democracy, which can obscure the meaning of democracy.

Modalities of democracy, such as accountability, representation and participation are often discussed as a means of moving away from fixed institutions and specific mechanisms.[151] For example, Macdonald and Macdonald offer revised non-electoral accountability mechanisms as a means of making democracy transnational.[152] But, accountability, as discussed below, is only a part of democracy.[153] These modalities require an assessment against the Circumstances, in particular a consideration of the extent of the power being invoked and when that power can be exercised. Democracy requires reflection on who is represented, who participates and how and there are different models of participation and representation that offer varying degrees of power to the people. A discussion on accountability, representation and deliberation is necessary, but not sufficient for a debate on democracy. This chapter discusses

[150] Within the global constitutionalist literature, see Anne Peters, 'Dual Democracy' in Jan Klabbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (OUP 2009); Joel P Trachtman, 'Constitutional Economics of the World Trade Organization' in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009).

[151] See for example, Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the relationship between constitutionalism in and beyond the state' in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009) 260.

[152] Terry Macdonald and Kate Macdonald, 'Non-Electoral Accountability in Global Politics: Strengthening Democratic Control within the Global Garment Industry' (2006) 17(1) EJIL 89.

[153] See below, section 2.4.1

accountability, representation and participation as examples of How, and demonstrates the potential for the conflation of the Circumstances.

The Circumstances of Democracy provide a matrix for exploring what democracy means and offers a way to discuss democracy in global constitutionalist literature. The use of historical examples demonstrates the different approaches that are taken to democracy and the tensions that arise between constitutionalism and democracy, and within democracy itself. The next part of this chapter fleshes out the content of each Circumstance to identify the types of questions and issues global constitutionalist scholarship should engage with when discussing democracy.

2.3.2 Who

Democracy, etymologically, stems from *demos* (the people) and *kratos* (rule or power).[154] This translates to mean power of the people.[155] But a study of the etymology shows that the meaning of 'people' is contested and changes over time.[156] The conceptualisation of the *demos* within Ancient Greek is not the same as the construction of 'The People' in modernity.[157] This section raises three questions; how the people is demarcated, what is meant by 'people', and the role of the people.

[154] Josiah Ober, 'The Original Meaning of "Democracy": Capacity to Do Things, not Majority Rule' (2008) 15(1) Constellations 3.
[155] ibid 3.
[156] Costopoulos and Rosanvallon show how the meaning of the word democracy changed throughout 19th century France. See Philip J Costopoulos and Pierre Rosanvallon, 'The History of the Word "Democracy" in France' (1995) 6(4) Journal of Democracy 140, 140-141.
[157] Edmund Burke's use of 'people' referred to the non-elite and non-aristocrat. See Cartledge, *Democracy. A Life* (n 15) 299.

Demarcation of the people

How the *demos* is demarcated is an important question in a world where the state does not contain all decision-making power. Political scholars (including cosmopolitan theorists) are debating non-territorial means of constructing a *demos*. Traditionally, the *demos* is territorially defined[158] and although the expansion of Roman citizenship bucks this territorial trend, the 19th century witnessed the cementing of the relationship between *demos* and nation-state. This sub-section considers variations on the demarcation of the *demos*.

The *polis* (or *demos*), according to Aristotle, is demarcated in relation to territory and population. In relation to population, Aristotle argues that a *polis* reaches the ideal size when it has the largest population which can still be self-sufficient.[159] Aristotle argues that the ideal territory should be self-sufficient, difficult to invade, and 'easily taken in with one view'.[160] This meant that the city-state was the ideal size for a territory.[161] This form of Ancient Athenian democracy is predicated on a small and homogenous society because those were the conditions that ensured people were like-minded and had common interests.[162]

In contrast, Roman citizenship was not confined to Rome. Unlike Athens, Rome granted foreigners full citizenship rights.[163] This more flexible idea of citizenship

[158] Wood argues that even in Ancient Greek manifestations of democracy, the *deme* were territorially constructed. Wood, 'The *demos* versus "we, the people"' (n 18) 209-210.
[159] Aristotle, *Politics, Book VII* (H Rackham trans, HUP 2014) 1326b (page 557).
[160] ibid 1327a (page 561).
[161] ibid 1327a (page 561).
[162] Shapiro and Hacker-Cordón, 'Promises and disappointments: reconsidering democracy's value' (n 143) 2.
[163] Roger Osborne, *Of the People by the People: a New History of Democracy* (Pimlico 2012) 26

allows for conquered peoples to be incorporated into the Roman state,[164] and for migrants to gain citizenship by moving to Rome.[165] Outside the city of Rome, there were citizens across Italy and in 'citizen colonies'.[166] This offers the potential for non-territorial means of demarcating the *demos.* But, there was a return to the idea of the city-state and the territorial tools for demarcation in the Renaissance period.[167]

In America, the Founding Fathers were versed in the political theory of Ancient Athens and classical models of democracy, which were premised on city-states. Contemporaneous political thought was also premised on the smaller *polis.* For Rousseau, who discussed 'homogenous principalities', the citizenry is small and he envisages that 'the entire population could meet in the town square'.[168] In contrast, the Founding Fathers had to discuss democracy on a larger scale. Whilst Jefferson argues that the state should be small, Hamilton argued that provided there was a powerful centre, there could be a wider union of states.[169] Madison argued that the larger the federal state, the greater protection against the vices of *direct* democracy, by which he meant the tyranny of the majority.[170] The bigger the state, the more interests there are to avoid concentration of power in one faction.[171]

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[164] Michael P Fronda, 'Why Roman Republicanism? Its Emergence and Nature in Context' in Dean Hammer (ed), *A Companion to Greek Democracy and The Roman Republic* (Wiley Blackwell 2015) 58.
[165] Craige B Champion, 'Interstate Relations, Federal States, Colonization, and Empire during the Roman Republic' in Dean Hammer (ed), *A Companion to Greek Democracy and The Roman Republic* (Wiley Blackwell 2015) 332.
[166] ibid 332.
[167] Osborne (n 163) 46.
[168] Shapiro and Hacker-Cordón, 'Promises and disappointments: reconsidering democracy's value' (n 143) 2.
[169] See Osborne (n 163) 110-111.
[170] See John J Schwarzmantel, *Citizenship and Identity: Towards a New Republic* (Routledge 2003) 74.
[171] See ibid 74.

Despite the variations in the construction of a *demos*, in the 19th century, *demos* became synonymous with the nation-state. Habermas and Held argue that the *demos* and the nation developed together.[172] This interconnection gives rise to the argument that the *demos* has to be bounded by the state because only the state constructs the level of trust and commonality within a society of people.[173] But, the interconnection between *demos* and nation-state should be unpacked.

The argument that democracy requires a connection between the people, can be more or less nationalistic in nature. Miller argues that 'for democracy to be possible, there must be sufficient convergence of *interests and belief* among the set of people who will constitute its domain'.[174] For Mill, only nationalism ensures the necessary 'fellow-feeling'.[175] In other words, democracy is built around the need to believe that 'others are genuinely willing to consider your own views', which can be found in a shared nationality.[176] Under this approach the nation is defined by its ethnicity.[177] This means that there are pre-political characteristics, such as 'commonness of origin, language, religion, [and] customs' that bind people together.[178] Yet, in the abstract this could also mean 'trust and

[172] David Held, 'The Changing Contours of Political Community: Rethinking Democracy in the Context of Globalization' (1999) 94 Theoria: A Journal of Social and Political Theory 30, 30-31.
[173] Sarah Song, 'The boundary problem in democratic theory: why the demos should be bounded by the state' (2012) 4(1) International Theory 39.
[174] David Miller, 'Against Global Democracy' in Keith Breen and Shane O'Neill (eds), *After the Nation: Critical Reflections on Post-Nationalism* (Palgrave Macmillan 2010) 145. See also, Laura Valentini, 'No global demos, no global democracy? A systematization and critique' (2014) 12(4) Perspectives on Politics 789, 793.
[175] John Stuart Mill, *Considerations on Representative Government* (Parker, Son and Bourn 1861) 547. For a discussion see, Keith Breen and Shane O' Neill, 'Introduction; A Postnationalist Era?' in Keith Breen and Shane O' Neill (eds) *After the Nation? Critical Reflections on Nationalism and Postnationalism* (Palgrave MacMillan 2010) 1.
[176] Helder de Schutter and Ronald Tinnevelt, 'Is Liberal Nationalism incompatible with Global Democracy?' (2009) 40(1) Metaphilosophy 109, 112.
[177] Preuss, 'Constitutional Powermaking (n 94) 646.
[178] ibid 659.

reciprocity',[179] which is not necessarily reliant on nationality and geographical proximity. Moreover, the reliance on nation does not necessitate a territorial connection. Whilst a nation can be conceived as being within a 'particular territory',[180] a nation does not have to be organised in a single state.[181]

As Habermas argues, democracy is not reliant on the existence of a nation.[182] In 2003 he outlined four components for democracy: 'political apparatus for the execution of collectively binding decisions', a defined 'self', a citizenry 'with an orientation toward the common good', and 'an economic and social milieu'.[183] In 2012, he outlined three components, which do not place emphasis on the decision-making apparatus (which is important to remember when reading aspects of global constitutionalist scholarship which prioritises institutional arrangements). The three common components are: association between free and equal persons, a sense of civic solidarity, and a bureaucratic organisation that will ensure collective action.[184] Whilst the nation-state provides these, it is not the only formation that can support these components.

In relation to the Who, Habermas argues that democracy only requires a 'self' and 'an orientation toward the common good'.[185] For Habermas, national consciousness is created; the nation-state has made an 'artificial form of

[179] de Schutter and Tinnevelt (n 176) 123.
[180] Preuss, 'Constitutional Powermaking' (n 94) 645.
[181] ibid 646.
[182] Jürgen Habermas, 'Toward a Cosmopolitan Europe' (2003) 14(4) Journal of Democracy 86, 88-89, Habermas demonstrates that the state just so happens to provide the requisite criteria for democracy. See also Jürgen Habermas, 'The Crisis of the European Union in the Light of a Constitutionalization of International Law' (2012) 23 EJIL 335, 339.
[183] Habermas, 'Toward a Cosmopolitan Europe' (n 182) 88-89.
[184] Habermas, 'The Crisis of the European Union in the Light of a Constitutionalization of International Law' (n 182) 339.
[185] Habermas, 'Toward a Cosmopolitan Europe' (n 182) 88-89.

"solidarity among strangers"'.[186] As Gerstenberg argues, a requirement that the society has a homogenous identity will undermine democracy, if democracy protects the idea that citizens are free and equal.[187] Furthermore, post-modern discussions on democracy acknowledge the role of heterogeneous groups and models such as conscionable democracy are designed to facilitate divided societies.[188] The critiques of the reliance on the nation-state and the alternatives proffered, suggest that tying democracy to the nation-state seems to be an issue of coincidence rather than necessity.

Though the *demos* is often demarcated using territorial and national claims, this sub-section has highlighted some of the tensions, such as size and identity, which arise when constructing a *demos*. The demarcation of a *demos* has preoccupied international legal and international relations scholars, as scholars argue there is little plausibility of recreating the necessary commonality witnessed within a nation-state.[189] There are attempts to move away from the state-bound conceptualisation of *demos*. For example, scholars proffer the all-affected or all-subjected principle as an alternative to territory and nationality.[190] Rather than offering a means of constructing a *demos* for global constitutionalist scholarship, this thesis highlights that there are other pertinent questions around the construction of the *demos* that can get lost when the focus is on demarcation.

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[186] ibid 98.
[187] Oliver Gerstenberg, 'Law's Polyarchy: A Comment on Cohen and Sabel' (1997) European Law Journal 337, 350.
[188] ibid 350. See also, Iris Marion Young, 'Communication and the Other: Beyond Deliberative Democracy' in Seyla Benhabib (eds) *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton University Press 1996) 120; Chantal Mouffe, 'Democracy, Power, and the "Political"' in Seyla Benhabib (eds) *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton University Press 1996) 245.
[189] Peters, 'Dual Democracy' (n 150) 303; J H H Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy' (2004) 64 ZaöRV 547.
[190] Robert E Goodin, 'Enfranchising All Affected Interests, and Its Alternatives' (2007) 35(1) Philosophy and Public Affairs 40, 49.

These questions include the meaning of 'the people' and their role. This sub-section will now expand upon those issues.

What is meant by The People?

It is not clear what is meant by 'The People' or *demos* in Ancient Greek because the meaning of *demos* is ambiguous; it was used in different ways.[191] For example, it could mean the whole of the citizenry rather than just a fragment.[192] It could also be used to mean 'the common people',[193] and the poor.[194] For example, Aristotle, an anti-democrat, conceptualised democracy as rule of the poor.[195] The issue then is whether 'The People' refers to the whole population or just a segment and what criteria is used to construct the franchise.

Across history, various limitations are placed on the *demos*. In Ancient Athens, the citizenry was limited to men over the age of 20, who were Athenian.[196] Repeatedly, women, people of differing ethnicities, and slaves are excluded from *demoi*.[197] Across the 17th to 19th centuries, in Western states, the *demos* was constructed using property requirements.[198] In essence 'The People', or the

[191] Mogens Herman Hansen, 'The Concepts of *Demos*, *Ekklesia*, and *Dikasterion* in Classical Athens' (2010) 50 Greek, Roman, and Byzantine Studies 499, 502-503. Hansen outlines that *demos* was used to signify the Athenian state, the democratic constitution, the people's assembly, the people at large and the common people.
[192] Ober, 'The Original Meaning of "Democracy"' (n 154) 8.
[193] Hansen argues that *demos* was used to refer to the common people by philosophers who were hostile to democracy. See Hansen (n 191) 500.
[194] Aristotle, *Politics, Book III* (H Rackham trans, HUP 2014) 1279b (page 211).
[195] ibid 1279b (page 211). For a discussion see, Lintott, 'Aristotle and Democracy' (n 9) 116; Eric W Robinson, *Democracy Beyond Athens: Popular Government in the Greek Classical Age* (CUP 2011) 222.
[196] Robinson, *Democracy Beyond Athens* (n 195) 241.
[197] Wood, 'The demos versus "we, the people"' (n 18) 214. For a discussion on Rome, see Osborne (n 163) 26.
[198] Osborne, (n 163) 107 (America) and 131 (France). See also, From the Constituent Assembly, 'On the Constitutions of Eligibility' 11 August 1791 in Marc Allan Goldstein (trans and eds), *Social and Political Thought of the French Revolution 1788-1797* (Peter Lang 2001) 121.

demos, becomes a privileged elite.[199] In the late 19th century and early 20th century, there were renewed questions about the extent of the franchise,[200] with Mill expressing an anxiety about extending the suffrage to less educated members of society.[201] The idea of 'The People' can invoke a broader franchise than these limitations suggest. The criteria used to exclude persons should be considered.

There is a schism between those that see 'a people' and those that see 'a multitude'. 17th century debates can highlight this difference. For Parker, for example, the people were a 'corporation' acting with one will and one voice.[202] Hobbes argued that there was a multitude and every man was at war with the other (or in other words, the state of nature),[203] and the people only became a unified person through a representative. Hobbes states; the multitude 'confer all their power and strength upon one man, or upon one assembly of men, that may reduce all their wills, by plurality of voices, unto one will'.[204] This representative, then, could be a single person or a group of people. Though Hobbes thought power was best concentrated in one person.[205] Hobbes argued that the people were only a people via the sovereign and there was no 'people' for a parliament to represent. Rather than referring to a conglomeration of individuals, 'The

[199] Wood, 'The *demos* versus "we, the people"' (n 18) 205; Birch (n 143) 49.
[200] Bellamy, 'The advent of the masses and the making of the modern theory of democracy' (n 11) 92.
[201] John Stuart Mill, *Considerations on Representative Government* in John Gray (ed), *John Stuart Mill: On Liberty and Other Essays* (OUP 1998) Ch VIII (page 330-331). For a discussion see, David Held, *Models of Democracy* (3rd edn, Polity Press 2006) 86.
[202] Henry Parker, *Observations upon some of his Majesties late Answers and Expresses* (1642) 18. See Quentin Skinner, 'Hobbes on Persons, Authors and Representatives' in Patricia Springborg (ed) *The Cambridge Companion to Hobbes's* Leviathan (CUP 2007) 162.
[203] Thomas Hobbes, *Leviathan* (J C A Gaskin ed, OUP 2008) ch XIII, [8] (page 82).
[204] ibid ch XVII, [13] (page 114).
[205] ibid ch X, [3] (page 58); J C A Gaskin, 'Introduction' in J C A Gaskin (ed), *Thomas Hobbes: Leviathan* (OUP 2008) xxxv.

People' is a construct, with potentially little role for actual persons. This raises the issue of the role of the actual people in a democracy.

Role of the people

Looking at how the individual is conceptualised across different manifestations of democracy highlights the need to ask about the relationship between the individual and the community. In Ancient Athens, a commitment to the common good was combined with an understanding of active citizenship. Citizens were *active* in the sense that they were 'subjects of political authority and the creators of public rules and regulations'.[206] For the Ancient Athenians, society, not the individual, was central.[207] Human rights protections and the dominance of liberalism increases the prominence of the individual. The liberal democratic position conceptualises a passive citizen with negative rights *vis-à-vis* the state.[208] The republican model of democracy imagines an active citizen, but one with positive liberties of political participation and communication.[209] This sub-section unpacks the role of the individual in the community.

Democracy, some suggest, is dependent on the expression of a common will and the commitment to a common good. The common good is the aim of the common/general will, and it is akin to a decision which is for the benefit of the people as a whole. From a republican perspective, for example, decisions by the

[206] Held, 'Democracy: From City-states to a Cosmopolitan Order?' (n 7) 13.
[207] Paul Cartledge, 'Greek political thought: the historical context' in Christopher Rowe and Malcolm Schofield (eds), *The Cambridge History of Greek and Roman Political Thought* (CUP 2008) 13.
[208] Habermas, 'Three Normative Models of Democracy' (n 124) 2.
[209] ibid 2.

people should be for the common good.[210] How this common will is achieved and the relationship between the common will and the individual will is contested.

The common/general will could be an accumulation of individual interests[211] or it could be a constructed common will.[212] For Rousseau, the common/general will was constructed; he argued that individuals have to put their personal interests aside and promote the common good.[213] If in a vote, there are disagreements that is because, Rousseau argues, individuals have misunderstood the common good and common/general will.[214] Whilst some argue that democracy 'binds us together while allowing us to live individually',[215] others argue that the common/general will trumps and therefore suppresses the individual will.[216] Feminist scholars have criticised the homogenous nature of the common/general will and the aim of a common good.[217] This lack of individuality can be criticised for being akin to an imposition by a political elite.

Democracy and constitutionalism potentially have different roles for the people. As discussed above, the powers of the *demos* and the constituent power are

[210] Jean-Jacques Rousseau, *The Social Contract* (Christopher Betts trans, OUP 2008) Book II, ch I and ch III (page 62 and 66); Richard Bellamy, 'Which Republicanism, Whose Freedom?' (2016) 44(5) Political Theory 669, 671.
[211] 'According to popular will theory, the popular will is arrived at by aggregating individual wills into a collective will'. Gerald Gaus, 'Does Democracy Reveal the Voice of the People? Four takes on Rousseau' (1997) 75(2) Australian Journal of Philosophy 141, 144.
[212] See Bellamy, 'Which Republicanism, Whose Freedom?' (n 210) 671 ('individual parties to the contract to incorporate themselves into the body politic').
[213] Birch (n 143) 57.
[214] Jean-Jacques Rousseau, *The Social Contract* (Christopher Betts trans, OUP 2008) Book IV, ch II (page 138).
[215] Osborne (n 163) 1.
[216] Pettit, 'Republican Freedom and Contestatory Democratization' (n 25) 174.
[217] See, Iris Marion Young, 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship' (1989) 99(2) Ethics 250, 251-253; Nancy Fraser, 'Politics, culture, and the public sphere: toward a postmodern conception' in Linda Nicholson and Steven Seidman (eds), *Social Postmodernism: Beyond Identity Politics* (CUP 1995) 294; Chantal Mouffe, 'Feminism, citizenship, and radical democratic politics in Linda Nicholson and Steven Seidman (eds), *Social Postmodernism: Beyond Identity Politics* (CUP 1995) 315.

distinct.[218] A Western liberal picture of the role of the people within a democracy would be of participating in elections and perhaps referenda.[219] In constitutionalism discourse, 'The People' are usually understood to be the authority of power.[220] The extent to which the people themselves hold this power is contested. For example, in the 17th Century the parliamentarian writer, Parker wrote that the people are 'the Authors, or ends of all power'.[221] Hobbes in *The Leviathan* argues that the political covenant undertaken by the multitude means that they become the author of what is done by the representative.[222] The implication of this is that for the parliamentarians, the people remain above the king,[223] but for Hobbes there is no people that could be said to be above the king as the people are only brought into being via the king (or sovereign entity). Whilst from one perspective, the people have only the power to participate in elections, in a constitutionalist debate this is potentially symbolic of a greater authorial power.

Interrogating what is meant by Who in democracy, this section highlights a series of questions that go beyond mere demarcation of a *demos. S*cholars disagree on the type of people that fall within the *demos,* on the size of the *demos* and the role of people within a democracy. In particular, there is disagreement on the role of the individual in democracy and how the individual sits in tension with the community. The discussion on common/general will highlights how the role of

[218] See above, section 2.2.2.
[219] Galligan, 'The Paradox of Constitutionalism or the Potential of Constitutional Theory' (n 95) 358.
[220] Skinner, 'Hobbes on Persons, Authors and Representatives' (n 202) 159-160.
[221] Henry Parker, *Observations upon some of his Majesties late Answers and Expresses* (1642) 1- 3. For a discussion see, Skinner, 'Hobbes on Persons, Authors and Representatives' (n 202) 159.
[222] Thomas Hobbes, *Leviathan* (J C A Gaskin ed, OUP 2008) ch XVIII, [1] (page 115); Skinner, 'Hobbes on Persons, Authors and Representatives' (n 202) 159.
[223] See Henry Parker, *Observations upon some of his Majesties late Answers and Expresses* (1642) 1- 2.

individuals can be subsumed within a role for a community. When examining how international law and global constitutional scholarship discusses democracy, a concern is with who these scholars include in the *demos*, and then whether there is a reflection on the consequences of how they demarcate the *demos* and the role given to the people. Through the Circumstances matrix, the thesis exposes where certain questions need further attention within the global constitutionalist debates.

2.3.3 What

If What is a question about the scope of democracy, then it could consider whether democracy is a way of life[224] or merely a decision-making process. For Athenians, democracy was both a way of life and a decision-making process. Pericles, in the Funeral Speech, conceives of democracy as making decisions but also about being a way of life where 'each individual is interested not only in his own affairs but in the affairs of the state as well'.[225] Similarly, de Tocqueville, talking of American democracy, speaks of both a decision-making process and a way of life.[226] As, Runciman, puts it, democracy is 'a way of doing politics', 'a set of political and moral principles' as well as 'a way of living altogether'.[227] To speak of democracy as a way of life requires the democratisation of more than just decision-making process. As the Levellers in 17th century England noted, it

[224] For a discussion see, Seyla Benhabib, 'Introduction: The Democratic Moment and the Problem of Difference' in Seyla Benhabib (ed) *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton University Press 1996) 3, 8.
[225] Pericles, 'Funeral Oration' in Thucydides, *History of the Peloponnesian War* (Rex Warner trans, Penguin 1972) pp. 145-147.
[226] Jeremy Jennings, *Revolution and the Republic: A History of Political Thought in France since the Eighteenth Century* (OUP 2011) 180.
[227] Runciman (n 15) xxiii. Cohen has drawn a distinction between a political regime and a democratic society, see Cohen, 'For a Democratic Society' (n 4) 87.

requires a call for social as well as political equality.[228] This thesis considers, however, the global constitutionalist approach to democracy as a process of decision-making and system of governance and What becomes a question of the scope of power.

Kratos in democracy is etymologically ambiguous. It can be taken to mean 'power' or 'rule'.[229] Using the term 'rule' as a meaning of democracy is disputed because only 'a small minority of individuals can be rulers in modern, populous societies'.[230] If *kratos* means power, what the people have power over and what they have power to do is contested. Within democratic theory, there is a debate about whether democracy is 'self-government and self-regulation' or 'a means of conferring authority' on others.[231] In other words, democracy can mean that people make the decisions, but it can also mean they choose representatives to make decisions. This section explores the disagreement that arises as to the extent of the people's power. It considers popular sovereignty, the types of decisions people have the power to make, and the extent to which people can influence the agenda.

Popular Sovereignty

How much power the people should have within a democracy is a point of contention within democratic theory and political debate. Too much power and

[228] David Wootton, 'Leveller democracy and the Puritan Revolution' in J H Burns and Mark Goldie (eds), *The Cambridge History of Political Thought 1450-1700* (CUP 1991) 428.
[229] See Ober, 'The original meaning of "democracy"' (n 154) 3. Ober translates it as power and Held translates it as rule. See David Held, *Models of Democracy* (3rd edn, Polity Press 2006) 1. Cartledge asks whether it refers to the organs of state or an elite group of people. See Paul Cartledge, *Democracy. A Life* (n 15) 3.
[230] Birch (n 143) 48.
[231] David Held, *Democracy and the Global Order: from the Modern State to Cosmopolitan Governance* (Polity Press 1995) 5.

there is a risk of a 'tyranny of the majority', too little power and the democracy is a sham. The What of democracy might be conceived as a spectrum. If the ability to construct the political system and make policy decisions is at one end of the spectrum and then somewhere along that spectrum there is participation in decision-making and policy-making, then accountability understood as an *ex post facto* event, is at the end of the spectrum, as the people only have the power to remove representatives. Participation and accountability are discussed in more detail below,[232] this sub-section unpacks popular sovereignty.

Whether popular sovereignty is related to democracy is debated,[233] but there are similarities between the two concepts, namely the idea of giving power to the people, and democracy is discussed in relation to popular sovereignty.[234] As noted, popular sovereignty can be invoked without reflecting on what power this means for the people.[235] Asking the What question, ensures that the notion that the people have power within a democracy is brought to the fore.

Popular sovereignty at its core means that the people (rather than God or a monarch) are sovereign. But, how it is manifested within political systems leads to competing ideas of what popular sovereignty means. Arguably, popular sovereignty can refer to the idea that people govern themselves.[236] Post argues that popular sovereignty refers to the ultimate power over the government.[237] Understood in this way, popular sovereignty invokes a great amount of power for

[232] See below, section 2.4.1 and section 2.4.3.
[233] Post, 'Democracy and Equality' (n 26) 143; Simone Chambers, 'Democracy, Popular Sovereignty, and Constitutional Legitimacy' (2004) 11(2) Constellations 153, 154.
[234] See for example Kalyvas (n 66) 238.
[235] Chapter 1, section 1.5.1, text at fn 54-57.
[236] Chambers (n 233) 154; Kalyvas (n 66) 238.
[237] Post, 'Democracy and Equality' (n 26) 143.

the people. Yet, it can also be a symbolic totem, or in other words, the political system is built on the idea of the people as sovereign but the people are so far removed from decision-making, that they cannot exercise that sovereignty.[238] In these cases, popular sovereignty acts as a mild threat to decision-makers that they are accountable to the people.

As outlined previously, popular sovereignty can become tied to the idea of the creation of the constitution or political system, and thus divorced from everyday governance.[239] Whilst Kalyvas argues that popular sovereignty is the greatest manifestation of democracy, because the people get to write the fundamental laws that govern them, it is also only an aspect of democracy.[240] Popular sovereignty conceived as a constitutional-making power ignores the need for the people to have power over decisions of policy and law-making. The difference between constitutional and everyday decisions is discussed in the When section below.[241] Understanding popular sovereignty as limited to constitutional decisions, limits the amount of power the people have. This thus demonstrates that the What and When questions are interconnected and it is an example of why both questions must be asked.

Whilst it invokes the idea that the people are sovereign, which can mean that they construct the system, they make the decisions, and they ultimately wield power,[242] popular sovereignty is used in the literature to mean something less than this. Ideas of popular sovereignty reappear within the global constitutionalist

[238] For a discussion on how this is achieved see, Lucia Rubinelli, 'How to think beyond sovereignty: On Sieyes and constituent power' (2016) European Journal of Political Theory 1.
[239] See above, Chapter One at section 1.5.1. See also, Chambers, (n 233) 153-154.
[240] Kalyvas (n 66) 238.
[241] See section 2.3.4.
[242] See, Kalyvas (n 66) 238.

discussions, and future chapters explore this usage. The contested nature of popular sovereignty is why asking the What question, and understanding how the manifestation of popular sovereignty within theoretical debates changes, is important.

Types of Decisions

The extent of the power of the people can be determined by the types of decisions people get to make. People within a representative democracy can elect representatives. But, in single-party elections voters are not given a choice. Whilst in multi-party elections there is a choice, these elections can be criticised for the limitation on the choice of the voter, as voters are selecting manifestos or parties rather than expressing their will on a government policy. A distinction should be drawn between elections and voting, as voting allows persons to decide particular policies. In some cases, and in direct democracies, people can choose policies through a plebiscite or referenda. Democracy can be used to label all these different decision-making processes, crucially asking the What question exposes how this influences the people's power.

Historical examples show how the scope of decision-making changes. For Rousseau, the people only get to decide whether a decision meets the expectations of the general will.[243] As noted above, the individual will is subsumed within a general will geared towards a common good.[244] The decision to be made, within Rousseau's concept of democracy, is whether a decision furthers the

[243] Jean-Jacques Rousseau, *The Social Contract* (Christopher Betts trans, OUP 2008) Book IV, ch II (page 138).
[244] See above text at fn 206-217.

common good. This is not an extensive role in decision-making. From the late 19th century, with the rise of mass society, the power of the people to make decisions is increasingly limited. For Schumpeter, contemporary democracy is an act of competition, in which people compete for the vote.[245] In essence, the people within a democracy do not have power over decision-making, rather they get to make only a choice between political parties. But, Schumpeter's reflections on democracy should be read as a comment on modern politics.[246] Whilst it is the case that persons can only make choices between political parties, this is not necessarily sufficient for democracy. For the purposes of this thesis, the What aspect of the Circumstances matrix includes a reflection on the types of decisions people get to make. Increasing the range of decisions people have power over, increases the scope of the power of the people.

Agenda

Whether the people have power over the agenda is contested. Within Ancient Athenian democracy, the Council of 500 operated as the agenda-setter and thus decision-making was limited by that agenda. Within a liberal democratic model, the people might choose a manifesto and can ask their representative to raise issues, but Shapiro and Hacker-Cordón argue that '[v]oters do little, even, to set political agendas'.[247] Dahl argues that '[t]he demos must have the exclusive opportunity to decide how matters are to be placed on the agenda of matters that are to be decided by means of the democratic process.'[248] For Dahl, if democracy

[245] Schumpeter, *Capitalism, Socialism, and Democracy* (n 148) 269.
[246] See above, section 2.3.1, p. 78.
[247] Shapiro and Hacker-Cordón, 'Promises and disappointments: reconsidering democracy's values' (n 143) 3.
[248] Dahl, *On Democracy* (n 26) 113.

is to be about self-government, then it is not sufficient that the people only get to choose a manifesto presented by a party. Giving the people power over the agenda, extends the scope of democracy. The What question asks about the agenda as this is a pertinent question for the global constitutionalist literature, especially given the limited spaces for the participation of people and their representatives in global decision-making.

When considering the meaning of democracy, a question to ask is the extent of the power of the people and the sorts of decisions the people have power over. Some scholars will limit this to the choice of representatives, some assert the choice of policies, and others argue that democracy stretches to constitutional decisions. Arguments on democracy can span the idea that the people are sovereign, to the participation in decision-making (whether this be extensive or not) and to mere accountability of decision-making, so it is imperative that the amount of power being discussed is established.

2.3.4 When

How often the people are given the power to elect representatives is a point of contention within the scholarship[249] and there are disputes on how frequently the people should be consulted. This section illustrates how a frequency question is intimately linked to the question of power. But, for the purposes of this thesis, When is not just a question of frequency, it also invokes a discussion on whether

[249] James Madison, 'Letter No LII: Concerning the House of Representatives, with a view to the qualifications of the electors and elected, and the time of service of the members' in Isaac Kramnick (ed), *James Madison, Alexander Hamilton and John Jay: The Federalist Papers* (Penguin 1987) 322; James Madison, 'Letter No LIII: The Same Subject Continued with a view of the term of the service of the members' in Isaac Kramnick (ed), *James Madison, Alexander Hamilton and John Jay: The Federalist Papers* (Penguin 1987) 326.

democracy is located in legislative practices or also in constitution-making. These different moments can be labelled constitutional decisions and everyday governance. The When of democracy is connected to the What, because when the people have power and how frequently they have that power is a determining factor in the scope of their power. This section first discusses the question of frequency and then it elaborates on the distinction between constitutional decision-making and everyday governance.

Frequency

> As the election approaches, intrigue becomes more active, agitation more lively and more widespread. […] As soon as fortune has pronounced, it is true, this ardour is dissipated, everything becomes calm, and the river, one moment overflowed, returns peacefully to its bed. But should one not be astonished that the storm could have arisen? [250]
>
> (Alexis de Tocqueville)

In this quote, de Tocqueville describes the excitement around the election and then the normality that seems to resume after an election. In this passage, he sums up an ongoing debate in democratic theory, about when the people have power. One of the criticisms of representative democracy is that people only have power at election time (and even then, a limited power to choose a decision-maker or a manifesto). In contrast, in the Athenian model of democracy, the people had a continuous participation in decision-making. There were on average 40 open meetings a year where 6,000 people would congregate to make decisions.[251] This sense of frequent participation, which is a feature of more direct models of democracy, is contrasted with the infrequent participation of people in

[250] Alexis de Tocqueville, *Democracy in America* (Harvey C Mansfield and Delba Winthrop eds and trans, University of Chicago Press 2000) cited in Runciman (n 15) 23.
[251] Held, *Democracy and the Global Order* (n 231) 21.

the representative model of decision-making, where elections take place between 4-6 years on average.[252]

The infrequency of elections causes scholars to reflect on the scope of the power that people have within democracy. Some argue that elections are a fixed event in time and that it is only at that point the people have power. For Schumpeter, once electors have cast their vote, they 'refrain' from political activity.[253] Others have noted the lasting impact of the election and the role of the threat of future elections. Beetham argues that 'elections exert an effect well beyond the time when they are actually taking place' because the decision-makers have to stay responsive to the will of their constituents.[254] Asking the When question offers an opportunity to reflect on how much power people wield if their participation in elections or other decision-making is too infrequent.

Discussions in the *Federalist Papers* on when elections should take place are a good example of the When and the What of democracy coming together. In *Letter No 52* of the *Federalist Papers*, Madison argues that frequent elections are necessary to ensure a connection between people and representatives.[255] The more frequent the elections, the more influence the people have over their representatives. However, for him the concern is that frequent elections might undermine the liberties of the people because elections can bring about too much

[252] Australia votes every three years, in Britain the maximum term of government is five years and in The United States of America the term of the President is four years and the term of a representative in the House of Representatives is two years.
[253] Schumpeter, *Capitalism, Socialism and Democracy* (n 148) 295.
[254] David Beetham, 'Liberal Democracy and the Limits of Democratization' (1992) 40(1) Political Studies 40, 47.
[255] James Madison, 'Letter No LII: Concerning the House of Representatives, with a view to the qualifications of the electors and elected, and the time of service of the members' in Isaac Kramnick (ed), *James Madison, Alexander Hamilton and John Jay: The Federalist Papers* (Penguin 1987) 323-324.

change.[256] In an attempt to strike a balance, Madison argues for biennial elections.[257] This lengthy debate, which runs across two letters, concerns a balance between giving people *influence* and restricting that influence so as to tame the 'danger' of democracy.[258] This debate in *The Federalist Papers* shows how the When and What of democracy interconnect.

Constitutional vs Everyday

A crucial temporal dimension that should be highlighted is the distinction between everyday decision-making and the constitutional moment or the formation of the constitutional system. Cólon-Ríos draws a distinction between everyday decision-making (which he calls democratic governance) and 'democracy at the level of fundamental laws'.[259] Democratic governance in the everyday is about 'the adoption of ordinary laws and the administration of a state's bureaucratic apparatus'.[260] The Fundamental Law idea refers to 'mechanisms of constitution-(re)making'.[261] As the discussions on the relationship between constitutionalism and democracy, and on the meaning of popular sovereignty, illustrate there is disagreement as to whether democracy is to be located within constitutional decision-making or just everyday governance.[262]

[256] James Madison, 'Letter No LIII: The Same Subject Continued with a view of the term of the service of the members' in Isaac Kramnick (ed), *James Madison, Alexander Hamilton and John Jay: The Federalist Papers* (Penguin 1987) 328.
[257] ibid 331.
[258] ibid 328.
[259] Colón-Ríos (n 47) 6.
[260] ibid 35.
[261] ibid 6.
[262] See Chapter 1, section 1.5.1.

The meaning of constitutional decisions requires further unpacking. There is the act of writing the constitution and the act of amending the constitution.[263] The When of democracy in writing the constitution, refers to scholarly debates as to whether democracy has a function in such decision-making. Some argue there should be sufficient participation in the creation or adoption of a constitution.[264] In contrast, liberal constitutionalism is less concerned with how the constitution was written. For Dworkin, this is because the concern is with the content of the constitution and not with the process by which the constitution is written.[265] Dyzenhaus argues that liberal constitutionalism 'grounds justification [of the constitutional system] in rightness itself', rather than in the will of the people,[266] and as such, the process of adopting a constitution does not have to be democratic.[267] These varied positions on the function of democracy within constitution-making shows that there is a disagreement as to the When of democracy.

Constitutional amendments are another moment where people can have power. The extent to which the people should have the power to make amendments preoccupies constitutional theorists, especially those concerned with written

[263] 'Constitutional decision' can also include the act of interpreting the constitution and adjudicating on decisions that invoke the fundamental rights enshrined in the constitution.
[264] See, Kalyvas (n 66) 237; Kay (n 28) 715; Waldron, 'Constitutionalism: A Skeptical View' (n 32). Cf Sajó, *Limiting Government* (n 29) 19.
[265] Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton University Press 2006) 131. See also, Colón-Ríos (n 47) 43
[266] Dyzenhaus argues that liberal political theory used to be 'consent-based', but this was 'hypothetical' consent (it was the argument that the reasonable person would have consented). He argues that modern liberal political theory denies the role of consent. See, David Dyzenhaus, 'Consent, Legitimacy and the Foundation of Political and Legal Authority' in Jeremy H A Webber and Colin Murray Macleod (eds), *Between Consenting Peoples: Political Community and the Meaning of Consent* (UBC Press 2010) 166.
[267] See Frank I Michelman, 'Constitutional Authorship' in Larry Alexander (ed), *Constitutionalism: Philosophical Foundations* (CUP 1998) 86.

constitutions. Taking the American constitution as an example,[268] fault-lines are drawn between the Jefferson position and the Madison position.[269] Jefferson promoted periodical constitutional conventions that would allow for constitutional change.[270] Madison argued that constitutional questions should not be frequently opened to the people as this threatens stability.[271] Whilst this is resolved in constitutions through procedures for constitutional amendments, it opens up a broader question as to whether democracy requires space for amendment to the constitution. The When of democracy asks if the people have the power to amend as well as create new constitutions.

There is disagreement amongst scholars as to When democracy should be present. Republican constitutionalism envisages democracy at both the point of constitutional politics and everyday decision-making.[272] For the republicans, democratic sovereignty cannot withstand a separation between constitutional authority and everyday as 'judgments of the presenting sovereign's title to rule […] and judgments of the rightness of the pretender's constitutional-legislative acts' require democracy.[273] In contrast, liberal constitutionalism constructs a divide between constitutional politics and everyday politics; whilst everyday politics might be subjected to a democratic process, the constitutional questions (i.e. questions of fundamental rights) are not subject to democratic debate. Such

[268] See Gary Jeffrey Jacobsohn, *Constitutional Identity* (Harvard University Press 2010) ch 2; Stephen Holmes, 'Precommitment and the paradox of democracy' in Jon Elster and Rune Slagstad (ed), *Constitutionalism and Democracy* (CUP 1997) 196.
[269] See Colón-Ríos (n 47) 18; Holmes (n 258) 205-217.
[270] Jefferson, 'Letter to Samuel Kercheval' 560 cited in Colón-Ríos (n 47) 18.
[271] James Madison, 'Letter No XLIX: The Same Subject Continued with the same view' in Isaac Kramnick (ed), *James Madison, Alexander Hamilton and John Jay: The Federalist Papers* (Penguin 1987) 313-314.
[272] Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 296. See also Colón-Ríos (n 47) 7 (discussion on 'Democratic openness').
[273] Michelman (n 267) 74. For a discussion on how the UK constitution is a manifestation of democracy at both the extra-constitutional and intra-constitutional level, see Gordon (n 272) 48.

a distinction illustrates the importance of asking the When question, because it changes how much power the people have and when they can use it.

The difference between constitutional decisions and everyday governance was elaborated upon above in the discussion on constituent power and its relationship with democracy.[274] As was demonstrated above, Sieyès draws a distinction between the everyday and the constitutional moment because they are different types of decisions using distinct powers.[275] This distinction is eroded through the relational conceptualisation of constituent power, which envisages an ongoing construction of the relationship between constituent and constituted power.[276] The danger of conflating the two is that it overlooks the distinct powers between constituting a system and participating within that system.

For the purposes of this thesis, When refers to two issues: the frequency with which the people have power, and whether that power is utilised for constitutional decision-making or within everyday governance. The distinction between everyday governance and constitutional decision-making is pertinent given the relationship between constitutionalism and democracy. For example, focusing on constituent power can shift the debate towards constitutional decisions, at the expense of the everyday.

2.3.5 Where

[274] See above, section 2.2.2.
[275] Sieyès, 'What is the Third Estate' (n 83) 139 and 143.
[276] Loughlin, 'The concept of constituent power' (n 73) 229.

The Where of democracy can be a question of scale. For example, there are debates within domestic politics as to whether to locate democracy closer to the people through local government or devolution. Global constitutionalist literature already engages in a scale debate with respect to democracy,[277] though there is a lack of consistency within this literature as to where democracy should be located. Where also covers the types of institutions debated. Focus on particular institutions can restrict democracy to particular types of decision-making. This section discusses the approaches to institutions found in democratic theory to identify the sorts of debates that should be taking place in the global constitutionalist literature. Moreover, Where for the purposes of this thesis refers to the public/private divide. This divide is pertinent given the attempt by societal constitutionalism to dismantle the distinction between the public and the private.[278] The public/private divide is outlined here to show how it can place restrictions on democracy. This section first considers the question of scale, then it discusses the types of institutions used in democratic theory, and then the implications for democracy of the public/private divide are outlined.

Scale

The scale aspect of the Where of democracy refers to the different levels of governance. Scholars demarcate levels of governance, such as the local, domestic, regional, international, and global.[279] Whilst cosmopolitan scholars have envisioned democracy at all levels of governance, some scholars cannot

[277] Chapter 1, section 1.1.
[278] Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (OUP 2012) 26.
[279] See Chapter 1, section 1.1.

conceive of democracy beyond the state.[280] One of the reasons for this reticence is the role of the state in democracy. As discussed, debates on the *demos* have prioritised the state as a traditional site of democracy.[281] These disagreements on whether democracy is plausible beyond the state, mean that across the global constitutionalist literature, democracy is envisioned at a plethora of levels of governance. It is then important to ask the Where question when investigating democracy in global constitutionalist literature to avoid potential generalisations about the meaning and implication of 'global'.

Institutions

The Where of democracy is also a question about the types of institutions associated with democracy. A primary institution associated with democracy is an assembly. Discussions abound about the role of participatory and representative assemblies. Whether it is the direct participatory assemblies of the Ancient Athenians or the legislatures of Western liberal states, the assembly in its many forms is a prominent feature of democracy. Models of democracy within global constitutionalist literature have made use of representative and participatory assemblies, and so this thesis investigates how such a focus on one particular type of institution can shape the approach to democracy.

There are two main types of assembly; the plenary assembly and the representative assembly. The plenary assembly allows all the citizens to come

[280] See Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State' in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009) 296-297.
[281] See above, section 2.3.2, text at fn 158-190.

together regularly. The representative assembly is an elected body. Further, there are two types of representative assembly: the first is statistically representative, which means that representatives mirror the population, and the second is responsively representative, where representatives represent the interests of the populace as a whole.[282] If this is considered using the Circumstances of Democracy, the type of assembly influences the Who of democracy. The discussion on Who previously explored how the people can be a section of the population, the population as a whole, and how it can refer to the individuals or a constructed notion of the collective.[283] The statistically representative assembly is an attempt to represent the individuals, whilst the responsively representative refers to a constructed collective. Thus, the Where impacts Who and it shows how the Circumstances are interconnected.

In the literature on domestic constitutional democracies, there are often two assemblies discussed. The first is a constitutive assembly, which is where constituent power is expressed. The second is a legislature, or parliament. The legislature is the prominent place for everyday decisions, and it should be remembered that this representation is limited to the powers outlined in the constitution.[284] This is an example of the Where and the When interconnecting. It is not sufficient to simply identify an assembly as an indicator of democracy, but rather using the Circumstances of Democracy can expose the types of decisions being made and when, and thus the scope of the people's power.

[282] Pettit, *On the People's Terms* (n 98) 303.
[283] Section 2.3.2.
[284] Roznai, 'We the Limited People' (n 65) 15.

Scholars argue that the assembly is not sufficient for democracy. Deliberative democratic theory and post-modern approaches to democracy relocate democracy to 'the informal public sphere'.[285] Within the public sphere, people take part in informal discussions, which have been described as 'unorganised' and 'decentered'.[286]The public sphere can be a 'sounding board for problems'[287] as it can detect and identify concerns, but it also have to generate solutions and convince institutionalised politics to engage with the problems.[288]The public sphere does not adopt authoritative decisions, but rather the opinions generated within the sphere should inform formal decision-making processes. Moreover, post-modern conceptions of democracy have spoken about the role of public spaces, such as squares.[289] Recent discussions on democracy in Ancient Athens have adopted this shift in favour of informal locations, and have highlighted the role of the Agora.[290] The Agora was akin to the market place; people gathered there to discuss business and commerce. This was an additional space of discussion, for news and the construction of public opinion.[291] Within classical democracy, there was no concept of the public/private divide, rather as the Agora demonstrates, they were intertwined.[292] The role of the public sphere, as envisioned in deliberative democracy, and public spaces in global constitutionalism fall outside the scope of this thesis, but the use of a market place as a potential location of democracy raises the question of the role of the public/private divide, which is discussed next.

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[285] John S Dryzek and Patrick Dunleavy, *Theories of the Democratic State* (Palgrave MacMillan 2009) 220.
[286] Joshua Cohen, 'Reflections on Habermas on Democracy' (1999) 12(4) Ratio Juris 385, 399.
[287] Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity Press 2016) 359.
[288] ibid 359.
[289] For a discussion on the locations of democracy, see John R Parkinson, *Democracy and Public Space: The Physical Sites of Democratic Performance* (OUP 2012) 85-86.
[290] Alex Gottesman, *Politics and the Street in Democratic Athens* (CUP 2014) 26.
[291] ibid 26.
[292] David Held, *Models of democracy* (3rd edn, Polity Press 2006) 14.

Public/Private

The public/private divide is a cornerstone of liberal constitutionalism, where exercises of public power should be democratically legitimate[293] but private power is not subject to the same standards.[294] Liberals use this divide as a means of protecting the private autonomy of individuals. For liberals, democracy takes place in the public realm, but Teubner, within his societal constitutionalism, attempts to discuss democracy within the private realm.[295] What side of the public/private divide democracy is located is an important question given the competing approaches within global constitutionalist literature.

What amounts to the public and the private sphere is contested; the private sphere can be the market, the home, and at its broadest conceptualisation, that which is non-state.[296] One way of distinguishing between public and private, derives from life in the Roman republic: the public concerns matters of collective concern and the private refers to individual concern.[297] These differences show that what is meant by 'public' and thus what should be subjected to democratic legitimacy is contested. Approaches to democracy demarcate the public realm differently; whilst the liberal model of democracy has a narrow understanding of the public realm, social-democracy approaches highlight the role of regulation as

[293] See Gráinne de Búrca, 'Developing Democracy Beyond the State' (2008) 46(2) Columbia Journal of Transnational Law 101, 110.
[294] ibid 110.
[295] Teubner, *Constitutional Fragments* (n 278) 26.
[296] William Lucy, 'Private and Public: Some Banalities about a Platitude' in Cormac Mac Amhlaigh, Claudio Michelon and Neil Walker (eds), *After Public Law* (OUP 2013) 63-80.
[297] ibid 67.

a way to extend the public realm.[298] If democracy is only located within the public realm, it matters how broadly this is defined.

For the purposes of this thesis, the Where of democracy raises three issues: whether democracy is possible at different levels of governance; the types of institutions associated with democracy, and in particular the role of assemblies; and, how the public/private divide is constructed and on which side of the divide democracy is located. These issues are chosen because as demonstrated previously, within global constitutionalist literature there is a lack of consistency as to the Where of constitutionalism and democracy.[299]

2.4 How

Democracy is manifested through different political arrangements, institutions, and processes. For example, whilst some models prioritise voting, others focus on deliberation. These processes institutionalise democracy, but there is a risk that such processes become synonymous with democracy and questions as to the power of the people are side-lined. Within the Circumstances matrix, How does two things; it highlights the tendency to focus on particular processes, and it demonstrates how the other Circumstances interrelate. In this section, three modalities are discussed as potential Hows. These are accountability, representation and participation. As part of the discussion on participation, this section considers the role of voting and referenda. These modalities all play a part within democracy, and they intersect with one another. This section uses

[298] Philippe C Schmitter and Terry Lyn Karl, 'What Democracy is…And is Not' in Larry Diamond and Marc F Plattner (eds) *The Global Resurgence of Democracy* (John Hopkins Press 1996) 49, 51.
[299] See Chapter 1.

these to explore how the Circumstances interact, and to highlight where gaps can arise if the Circumstances are not considered in turn.

2.4.1 Accountability

Accountability is an amorphous term that can encompass a variety of meanings and mechanisms. Accountability can be legal, political or regulatory.[300] The mechanisms of accountability can be *ex ante* and *ex post facto*. For example, Harlow argues that accountability is about giving an account and thus it is retrospective,[301] but others place more emphasis on the *ex ante* mechanisms of accountability.[302] Bovens argues that *ex ante* measures include consultation and participation.[303] Accountability also has many functions within good governance; it can be used to provide objectivity and to verify, as well as to provide an account.[304] This complexity makes the relationship between accountability and democracy difficult to identify.

Arguments that insinuate that democracy is synonymous with accountability need further unpacking. Legal accountability mechanisms have an important role within constitutionalism, and as such sit in tension with political accountability mechanisms.[305] Judicial review, as an accountability mechanism, can place appropriate limits on democratic decision-makers. This is part of the complex

[300] Carol Harlow, *Accountability in the European Union* (OUP 2002) 165.
[301] ibid 10.
[302] Sidney Shapiro, Elizabeth Fisher and Wendy Wagner, 'The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy' (2012) 47(3) Wake Forest Law Review 463, 466.
[303] Mark Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13(4) *European Law Journal* 447, 453.
[304] Elizabeth Fisher, 'Drowning by Numbers: Standard Setting in Risk Regulation and the Pursuit of Accountable Public Administration' (2000) 20 *Oxford Journal of Legal Studies* 109, 126-127.
[305] Dworkin, *Freedom's Law* (n 28) 17; Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115(6) The Yale Law Journal 1346.

relationship between constitutionalism and democracy outlined above.[306] Distinctions need to be draw then between legal and political accountability.

Political accountability mechanisms can be divided into *ex post facto* and *ex ante. Ex ante* mechanisms include giving reasons, taking into account the interests of constituents, and facilitating the participation of individuals. One form of *ex ante* mechanism is the requirement that reasons are given and whilst transparency in decision-making and reasoned decision-making are indicators of good governance, and might happen within a democracy, that does not make them indicators of democracy. If the What question is asked, there are differing extents of power being incorporated into these *ex ante* mechanisms. For example, if *ex ante* means mechanisms that take into account the interests of individuals, then accountability plays a role in the formation of the general will, but it is not then clear that these interests have to be incorporated into the decision.

The What question can also be put to the *ex post facto* mechanisms. An *ex post facto* mechanism can be the removal of decision-makers. For Schumpeter that is the definition of democracy.[307] Within this minimalist conception of democracy, accountability and democracy are conflated. For Przeworski, in defending the Schumpeterian conceptualisation of democracy, the act of *ex post facto* accountability is a measure of representation because as representatives risk losing power, they engage with their constituents.[308] Whilst this might construct responsive representatives, with respect to What it does not necessitate a great amount of power in decision-making and policy-making. Moreover, asking the

[306] See above, section 2.2.1.
[307] Schumpeter, *Capitalism, Socialism, and Democracy* (n 148) 284-285.
[308] Przeworski (n 1) 33.

When question highlights the limits of using accountability as an indicator of democracy. Limiting the role of the people to *ex post facto* accountability ignores the other aspects of decision-making where the people could have control, such as policy-making and constitution-making.

This discussion on accountability shows how using the Circumstances of Democracy exposes the types of questions that should be asked when debating democracy. Rather than relying on a modality or process, such as accountability, scholarship should be interrogating the What and When.

2.4.2 Representation

Within the Western liberal model of democracy, representation is paramount. Loughlin notes that the meaning of representation in modern democracies is assumed and therefore fundamental questions are overlooked.[309] It is assumed that the people are the object of representation.[310] Yet, representation is an indirect method of self-government and one that was originally considered antithetical to democracy.[311] Hobbes, for example argued that the sovereign was the representative of the people, but he was not presenting the idea of a representative democracy.[312] Moreover, theorists have relied on representation as a way of refining the will of the people.[313] This means that the notion of representation and its relationship with democracy needs to be unpacked. This

[309] Martin Loughlin, *The Idea of Public Law* (OUP 2003) 53.
[310] ibid 53.
[311] ibid 53.
[312] David Held, *Models of Democracy* (Polity Press 1988) 50.
[313] John Stuart Mill, *Considerations on Representative Government* (Parker, Son and Bourn 1861) 217-218; James Madison, 'Letter No X: The Same Subject Continued' in Isaac Kramnick (ed), *James Madison, Alexander Hamilton and John Jay: The Federalist Papers* (Penguin 1987) 126.

sub-section considers how different approaches to representation can construct varied ideas of Who and change the What of democracy.

Political debate from England in the 17th century can help to show the different ideas of representation. Parker argues that Parliament is a representation of the 'reall body of the people'.[314] But, the people referred to 'the kingdom, nation or people at large',[315] rather than referring to the needs of individuals. This meant Parliament 'has authority to speak and act in their name'.[316] The people themselves had little power over decision-making within this model of representation. Though Hobbes argued that there was not a unified people that could be represented, he did concede that representatives from different parts of the territory of the state could be brought together as 'a body politic, representing every subject of that dominion', which would act to inform the king of the condition of his subjects.[317] Asking the Who and What question here exposes the problems with these models of representation. In the first model, the Who is a constructed notion of the people or the nation, and as the parliament acts on their behalf the individuals that make up the people are given little power. In the second model, the representative still acts on behalf of the people, but the people are demarcated into regions and their identity is constructed according to their association with that region. This 17th century debate highlights how referring to representation, without interrogating the Who and What, can miss important aspects of how democracy is constructed.

[314] Henry Parker, *Observations upon some of his Majesties late Answers and Expresses* (1642) 15; Skinner, 'Hobbes on Persons, Authors and Representatives' (n 202) 166.
[315] Skinner, 'Hobbes on Persons, Authors and Representatives' (n 202) 166.
[316] ibid 166.
[317] Thomas Hobbes, *Leviathan* (J C A Gaskin ed, OUP 2008) ch XXII, [25] (page 155); Skinner, 'Hobbes on Persons, Authors and Representatives' (n 202) 173.

Within the literature there is a debate on whether representation should be reflective of society. In *Federalist Letter No 35,* Hamilton argues that '[t]he idea of an actual representation of all classes of the people by persons of each class is altogether visionary'.[318] For Hamilton, there is no need for representatives to be appointed with respect to the interests of different classes. This is because the representative is held accountable by the people, and thus, Hamilton argues, will have to 'take care to inform himself of their dispositions and inclinations'.[319] In contrast, in 1789, Dufpurney de Villiers, as part of the debates on the Constituent Assembly in France, argues '[w]hy is this enormous class of day laborers, of wage-earners and of the unemployed, […] rejected from the bosom of the nation? Why does this class not have its own representatives?'[320] The debate on whether representatives should be reflective of society raises questions about the Who of democracy; people are excluded from the *demos*, and in other cases their inclusion in the *demos* is predicated on an assigned identity (such as a class-based or professions-based identity).

Within contemporary debates, there are two approaches to representation; the trustee and the delegate models. The idea that representatives act on behalf of the represented is called the trustee model. In this model, representatives work for what is *best* for the people.[321] The idea that representatives collect the will of the represented and act on that, is known as the delegate model. This second approach is a more challenging model; it requires genuine, multidirectional

[318] Alexander Hamilton, 'Letter No XXXV: The Same Subject Continued' in Isaac Kramnick (ed), *James Madison, Alexander Hamilton and John Jay: The Federalist Papers* (Penguin 1987) 233.
[319] ibid 235.
[320] Dufpurney de Villiers, 'Grievances of the Fourth Order' (1789) in Marc Allan Goldstein (trans and eds) *Social and Political Though of the French Revolution* 1788-1797 (An Anthology of Original Texts) (Peter Lang 2001) 51, 54.
[321] see, Przeworski (n 1) 33.

connections between represented and representative. The representative must gather the will of the people and the represented can hold them to account.[322] This second approach to representation requires responsiveness from the representatives.[323] Again, asking the What question exposes that the models of representation give rise to different understandings of democracy. Whilst the first model has little space for the interests of the people, the second gives much more power to the people.

The different models and approaches to representation show that it is not sufficient to argue that representation is somehow synonymous with democracy. Rather, nuance needs to be shown to the different approaches and the way they construct the Who and What of democracy. Using the Circumstances of Democracy to ask the Who and What questions, this sub-section highlighted how persons can be excluded or their individual interests ignored at the expense of a constructed collective identity and the variations in power.

2.4.3 Participation

One popular model of democracy is participatory democracy. This model invokes a more direct method of democracy, where individuals participate in consultations and deliberations, and individuals have more of a role in policy-making.[324] This specific model of democracy should be differentiated from participation,[325] which

[322] Hamilton argues that the representative should inform himself of the views of the represented. See, Alexander Hamilton, 'Letter No XXXV: The Same Subject Continued' in Isaac Kramnick (ed), *James Madison, Alexander Hamilton and John Jay: The Federalist Papers* (Penguin 1987) 235.
[323] For a discussion on responsiveness, see Lisa Disch, 'Democratic Representation and the Constituency Paradox' (2012) 10(3) Perspectives on Politics 599.
[324] Held, *Democracy and the Global Order* (n 231) 209.
[325] Swift notes the distinction between participation and participatory democracy. Swift (n 6) 193-194.

might include responses to consultations, but also taking part in elections as well as voting in referenda and plebiscites. This sub-section considers one such manifestation of participation, which is voting in referenda and plebiscites.

Voting in a referendum or plebiscite is an example of a more direct form of democracy. As discussed briefly above, voting allows for persons to have a say in or contribute to a decision on a policy, a constitutional amendment, or even the signing of a treaty.[326] Closer inspection of referenda and plebiscites shows the nuances with respect to the Who, What, and When. Referenda can be criticised for being anti-democratic due to the tendency to homogenise the *demos*,[327] or the role of a political elite in shaping the questions put to the population.[328] This sub-section uses Tierney's discussions of referenda to demonstrate the importance of asking the Circumstances.

Tierney draws a distinction between two types of referenda, those referenda that refer to first-order questions, such as legislative decisions, and those that refer to second-order questions or, in other words, constitutional referenda.[329] This reflects the distinction drawn between constitutional and everyday governance in When.[330] Using the example of referenda shows that focusing merely on the process of participating in a referendum, risks overlooking the subtle differences as to When the people are given the power to participate.

[326] See above section 3.3.3.
[327] For a discussion see, Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (OUP 2012).
[328] ibid 23-25.
[329] Stephen Tierney, 'Constitutional Referendums: A Theoretical Enquiry' (2009) 72(3) MLR 360.
[330] See above, section 3.3.4.

Tierney further divides constitutional referenda into four distinct questions: the creation of new states, changes to constitutions, the establishment of sub-state autonomy, and the transfer of sovereign power to supranational or international organisations.[331] For Tierney, these questions form a spectrum of popular sovereignty: 'those which found new states or create constitutions are the most obvious manifestations of popular sovereignty'.[332] This spectrum of popular sovereignty suggests that by asking the What of democracy, these different types of referenda give varying degrees of power to the people. Furthermore, there is a distinction between plebiscites and referenda. Whilst, the outcomes of plebiscites are optional, referenda are binding.[333] Again this is an example of the need to reflect on the What of democracy. Though similar processes, ultimately a binding referendum gives more decision-making power to the people, where the non-binding nature of the plebiscite means that the people do not have power over whether the government accepts the decision.

The facilitation of people participating in decision-making is often invoked as a method of democracy and voting in referenda or plebiscites is just one manifestation of such participation. What this section demonstrates is that it is not sufficient to rely on the process alone. This section on referenda and plebiscites, with the subtle changes as to the What and When, highlights the importance of asking about the Circumstances.

[331] Tierney, 'Constitutional Referendums' (n 329) 360.
[332] ibid 364.
[333] See J Patrick Boyer, *Lawmaking by the People: Referendums and Plebiscites in Canada* (Butterworths 1982) 12-13 cited in Russell A Miller, 'Self-Determination in International Law and the Demise of Democracy? (2003) 41 Columbia Journal of Transnational Law 601, 626.

This section used the modalities of accountability, representation and participation to demonstrate the importance of not merely relying on a process as an indicator of democracy, but that asking the Who, What, When, and Where can expose the scope of the people's power. In the other chapters, a relevant modality will be highlighted to explore how some of the Circumstances can be overlooked or become conflated.

2.5 Conclusion

This chapter interrogates the wealth of democratic theory from the various positions that are taken on the composition of the *demos,* what power people have in democracy, when the people have power, where democracy is located, and how democracy is operationalised. Adapted from classical rhetorical devices, these Circumstances are structured around the Who, What, When, Where and How. They are a series of questions to probe more specifically at concerns within democratic scholarship, such as the role of the individual in the collective, and the relationship between constitutional decision-making and everyday governance.

Who conjures up questions about the polity, the people, or the *demos.* It points to the discussion on the demarcation of a *demos* within democratic theory, but it is broader than this. Who considers whether the people is a section of the population or the populace as a whole. Part of the discussion on Who, is the roles of individuals in democracy and their relationship with the collective. If democracy is to be about collective decision-making, then democracy, working with other norms of constitutionalism (such as human rights), must manage the tension

between individual and collective. Using the Circumstance of Who, rather than merely reverting to labels such as *demos*, facilitates a broader discussion on how a people is demarcated and on the role of those people.

The Who encompasses the question of constituent power in constitutionalist scholarship. This conceptualisation of Who facilitates important discussions on the distinct roles and powers of the *demos* and constituent power holders. There is a differentiation between the power of the *demos* and the power of the constituent power holders. The scope of constituent power is contested, but is often presented as establishing the constitutional system. Constituent power can be said to remain dormant both as a threat to the establishment, but also to cause radical constitutional change. In contrast, the powers of the *demos* are outlined within the constitution; rules on amendments to constitutions, voting and election rights, and participatory rights, are often laid out in the constitutional frame. The difference between the powers needs to be clear.

The **What** Circumstance refers to *kratos*. Not only is *kratos* contested, but the history of democracy demonstrates the extent to which the concept of people's power evolves over time: from the direct democracy of Ancient Athens, to Schumpeter's modern democracy where the only power of the citizens is to choose a party manifesto and remove a party from office. Here, What invokes questions about popular sovereignty, the type of decisions, and whether people have the power of the agenda.

When refers not just to the frequency of elections or other processes, but also to the distinction between fundamental (or constitutional) decisions and everyday

governance. Democracy is often conceptualised as located in everyday governance, with emphasis placed on elections, consultations, and participatory practices. But discussions on popular sovereignty and constituent power have situated democracy within the constitutional decisions. As this chapter highlighted, the complex relationship between constitutional and everyday is exacerbated by the relationship between democracy and constitutionalism. Democracy can be said to encompass the power of the people over constitutional change as well as everyday governance, and this thesis asks the When question to highlight how scholarship can prioritise one aspect of decision-making over the other.

Where within this thesis invokes three questions: scale, institutions, and the public/private divide. The previous chapter highlighted the inconsistent approach to Where within global constitutionalist scholarship and this chapter highlighted the need to ask a slightly different set of questions about institutions and the public/private divide. The Where of democracy is closely associated with the Who, What and When. For example, shifting decision-making beyond the state calls for a reformation of how the *demos* is demarcated and if democracy is predominantly located within a narrowly defined public sphere, then people have no or limited power over the decisions of powerful private actors.

The Circumstances of Democracy are interconnected. The **How** of democracy should ensure that the Who, What, When and Where are aligned. This chapter used the modalities of accountability, representation and participation to explore the interconnected nature of the Circumstances. Asking How can highlight where Circumstances are ignored or conflated. This chapter demonstrated that

processes, such as voting, can be conflated with the What of democracy. Throughout the thesis, the modalities of accountability, representation and participation are used to demonstrate the ways in which the Circumstances interrelate.

This chapter provides fact-finding avenues based on the Who, What, When, Where and How that can be used to analyse democracy in global constitutionalist literature. The matrix offers a coherent structure that will both demonstrate what is overlooked while also setting out a path for global constitutionalist scholarship. The Circumstances constructs and deconstructs and in doing so allows for a penetration of democracy beyond mere platitudes.

Chapter 3: International Legal Scholarship and Democracy

3.1 Introduction

As an intra-disciplinary project, global constitutionalist literature weaves together international law, international legal scholarship, and constitutionalist thought. Global constitutionalist discussions on democracy at international organisations are informed by the scholarship on an international legal norm of democracy.[1] To analyse how global constitutionalist literature discusses democracy, it is first necessary to understand the international law literature on democracy.

From 1989, the fall of the Berlin Wall and the proclaimed 'End of History', there has been an intensification in the literature on democracy in international law.[2] Franck investigates the emerging norm of democratic governance in international law.[3] Referring to the wave of democratisation after 1989, Franck instigates a

[1] Scholars refer to the emerging norm of democracy. See Anne Peters, 'Dual Democracy' in Jan Klabbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (OUP 2009) 273; Thomas Kleinlein, 'Between Myths and Norms: Constructivist Constitutionalism and the Potential of Constitutional Principles in International Law' (2012) 81 Nordic Journal of International Law 79, 80; Ernst-Ulrich Petersmann, 'State Sovereignty, Popular Sovereignty and Individual Sovereignty: From Constitutional Nationalism to Multilevel Constitutionalism in International Economic Law?' (2006) EUI Law Working Paper 2006/45, 24-25 <http://cadmus.eui.eu/handle/1814/6446> accessed 9 September 2017; Erika de Wet, 'The International Constitutional Order' (2006) 55(1) International & Comparative Law Quarterly 51, 63. See also Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (BRILL 2009) 93-94

[2] See Francis Fukuyama, *The End of History and the Last Man* (Penguin 1992) xi. Gregory H Fox and Brad R Roth, 'Introduction: the spread of liberal democracy and its implications for international law' in Gregory H Fox and Brad R Roth (eds) *Democratic Governance and International Law* (CUP 2000) 1. There were discussions on international law and democracy prior to the 1990s, see Elihu Root, 'The Effect of Democracy on International Law' (1917) 11 Proceedings of the American Society of International Law at its Annual Meeting 2; Wallace McClure, 'International Law and Democracy' (1939) 15 Tennessee Law Review 541.

[3] For a discussion on the Manhattan School, see David Kennedy, 'Tom Franck and the Manhattan School' (2003) 35 International Law and Politics 397.

discussion on democracy as a norm in international law.[4] His work spawned discussions that cover democracy as an international human right and the relationship between rights and democracy,[5] democracy as a criterion for statehood,[6] its role in government recognition,[7] as well as in relation to intervention and security.[8] This literature on democracy and international law from the early 1990s, built on international legal practices engaged in promoting democracy; elections monitoring, international human rights instruments and organisations, democracy as a membership criterion for the EU, Organization of American States (OAS) and The Common Market of the Southern Cone (MERCOSUR),[9] and the speeches of UN political actors, such as the Secretary General. It is this 'American literature' and the debates it sparked that are dealt with in this chapter.[10]

[4] Thomas Franck, *Fairness in International Law and Institutions* (Clarendon Press 1995) 85. Crawford places the starting point at 1986. See James Crawford, 'Democracy and International Law' (1993) 64(1) The British Year Book of International Law 113, 121.
[5] Christina M Cerna, 'Universal Democracy: An International Legal Rights or the Pipe Dream of the West?' (1995) 27 New York University Journal of International Law and Politics 289, 329; Steven Wheatley, *Democracy, Minorities and International Law* (CUP 2005).
[6] Anne-Marie Slaughter, 'International Law and International Relations Theory: A Dual Agenda' (1993) 87 AJIL 205, 236; Sean D Murphy, 'Democratic legitimacy and the recognition of States and governments' in Gregory H Fox and Brad R Roth (eds) *Democratic Governance and International Law* (CUP 2000) 123-139. See James Crawford, *The Creation of States in International Law* (OUP 2006) 150. Cf Dame Rosalyn Higgins, 'Democracy and the United Nations' (2015) 4(2) Cambridge Journal of International and Comparative Law 215, 217.
[7] Jean d'Aspremont, 'Legitimacy of Governments in the Age of Democracy' (2006) 28 New York University Journal of International Law and Politics 878; Jean d'Aspremont, 'Post-Conflict Administrations as Democracy-Building Instruments' (2008) 9(1) Chicago Journal of International Law 1.
[8] James Crawford, *Democracy in International Law: Inaugural Lecture* (CUP 1994) 4; Thomas Carothers, 'Empirical Perspectives on the Emerging Norm of Democracy in International Law' (1992) Proceedings of the American Society of International Law 261, 266.
[9] European Council, 'Conclusions of the Presidency' (Copenhagen Criteria) (1993) SN 180/93; Organization of American States, 'Protocol of Amendments to the Charter of the Organization of American States' (Protocol of Washington) (approved 14 December 1992, entered into force 25 September 1997); MERCOSUR, 'Ushuaia Protocol on Democratic Commitment in MERCOSUR' (24 July 1996). See Fox and Roth, 'Introduction' (n 2) 9.
[10] D'Aspremont classifies this scholarship as 'American literature of the early 1990s on the democratic entitlement'. See, Jean d'Aspremont, 'The Rise and Fall of Democracy in International Law: A Reply to Susan Marks' (2011) 22(2) EJIL 549, 550.

The international legal scholarship on democracy is criticised for constructing a procedural, liberal conceptualisation of democracy.[11] This chapter considers the Who and What Circumstances to explore how international law constructs this particularly narrow approach to democracy. The reliance on a state-defined *demos* and the mythologization of elections means the Who and What are the most pertinent Circumstances to consider.

The scholarship adopted self-determination as a starting point, and uses evidence of elections-monitoring and Article 25 of the International Covenant on Civil and Political Rights (ICCPR) to build a norm of democracy in international law. In relation to Who, this chapter investigates the role of self-determination, human rights, and elections in the approach to democracy. This chapter considers the extent to which these topics construct an idea of the *demos* that is bounded to the state. Similarly, with respect to What, this chapter investigates the use of self-determination and elections-monitoring to consider the extent of the people's power. In particular, this chapter considers how the amalgamation of self-determination and elections can contribute to the dissociation of the people from decision-making.

Prior to an investigation into the two Circumstances, it is beneficial to reflect on the nature of the scholarship and the key debates within this literature. Tensions in the approach to these two Circumstances can arise from the different perspectives adopted by scholars within this field of international law. What

[11] For an acknowledgement that it is a procedural conceptualisation of democracy, see Gregory H Fox, 'The right to political participation in international law' in Gregory H Fox and Brad R Roth (eds), *Democratic Governance and International Law* (CUP 2000) 48, 49; Jure Vidmar, 'Democracy and Regime Change in the Post-Cold War International Law' (2013) 11 The New Zealand Journal of Public and International Law 349, 350; d'Aspremont, 'Legitimacy of Governments in the Age of Democracy' (n 7) 891.

follows then is a brief summary of the literature on international law and democracy.

3.2 International Legal Scholarship and Democracy

There are elements of international law that are not democratic and traditionally, international law was not concerned with the nature of domestic governance. For example, international law assumes that the executive of a state has the power in international affairs, and that the government can bind the state for the future.[12] Further, the existence of a contradictory national law is not an excuse for failing to comply with an international obligation; even if the national law is democratically established, international law prevails.[13] Moreover, international law looks at relations between states, and not at the nature of the government within states. The statism of the 18th and 19th centuries meant that international law accepted the sovereign nature of states and did not investigate the states' systems of government.[14]

Franck discusses the idea of an *emerging* norm of democratic government in international law. His theory of democratic entitlement is premised on three stages; self-determination, the protection of human rights, such as freedom of expression, and the creation of a right to vote and elections monitoring.[15] He then uses international legal and political documents, as well as state practice, to collect evidence of an emerging norm of democracy. He places emphasis on the

[12] Crawford, 'Democracy and International Law' (n 4) 117-118; Hilary Charlesworth, 'Democracy and International Law' (2014) 371 Recueil Des Cours 43, 71
[13] Crawford, 'Democracy and International Law' (n 4) 117; Charlesworth (n 12) 71
[14] Fox, 'The right to political participation in international law' in Fox and Roth (n 11) 51
[15] Franck, *Fairness in International Law and Institutions* (n 4) 91.

tide in favour of democracy in states, with states requesting elections monitoring more frequently in the late 1980s and early 1990s,[16] as well as states adopting texts on democracy.[17] For Franck, '[t]he right to democracy is the right of people to be consulted and to participate in the process by which political values are reconciled and choices made.'[18] Participation, for Franck, means 'meaningful participation' and consultation refers to elections and plebiscites, where the people's opinions are collected.[19]

In contrast, Fox discusses a right to political participation. Unlike Franck, who argued that the norm was *emerging,* Fox argues that the right is confirmed.[20] Using international and regional human rights treaties, Fox derives a right to political participation that protects the right to vote in multi-party elections.[21] He uses interpretations of these rights documents to argue that elections must have universal and equal suffrage and secret ballots, they must happen at frequent intervals, and there must be no discrimination.[22] Fox argues that there are two distinct sources for a right to political participation; the human rights documents and standards of elections monitoring. Though these sources are distinct, they produce similar standards for elections.[23] From this state practice, Fox then

[16] ibid 108.
[17] ibid 111-115 (discusses for example: the UNGA, Res 46/137 'Enhancing the effectiveness of the principle of periodic and genuine elections' (17 December 1991) UN Doc A/RES/46/137; Organization of American States, Resolution on Representative Democracy (adopted 5 June 1991) OEA/Ser P/AG/RES.1080 (XXI-o/91); Conference on Security and Co-operation in Europe: Conference on Security and Co-operation in Europe *Charter of Paris For a New Europe and Supplementary Document to Give Effect to Certain Provisions of the Charter* 21 Nov 1990, reprinted in (1991) 30 ILM 190).
[18] Franck, *Fairness in International Law and Institutions* (n 4) 83.
[19] ibid 84, 92.
[20] Fox, 'The right to political participation in international law' in Fox and Roth (n 11) 50.
[21] ibid 50, 55.
[22] ibid 69.
[23] ibid 85.

argues that there is now an agreement that 'an electoral mandate bestows legitimacy upon governments' and that elections require multiple parties.[24]

Marks criticises the procedural understanding of democracy that arises from Franck and Fox. In *Riddle of all Constitutions,* she proposes an alternative solution to the contested emerging norm of democratic governance; the 'principle of democratic inclusion'.[25] Whereas the norm appears to propose a 'low-intensity' electoral democracy, the 'principle of democratic inclusion' includes 'an ongoing call to enlarge the opportunities for popular participation in political processes and end social practices that systematically marginalize some citizens whilst empowering others.'[26] Marks has a radical notion of democracy; for her, democracy addresses inequalities (in particular, inequalities of class), and democracy 'demands change of transformative proportions'.[27] Marks' conceptualisation of democracy is very different to the procedural democracy that Franck and Fox outline. She infuses democracy with values, such as redistribution, that could be said to be 'defining up' democracy.[28] These competing approaches to democracy calls for a systematic unpacking of the foundational questions, hence the use of the Circumstances within this thesis.

There is increasing involvement by international actors in questions of democracy within states. For example, international actors have played a leading role in the constitution-building of post-conflict states.[29] At the UN there is the United

[24] ibid 89.
[25] Susan Marks, *The Riddle of all Constitutions: International Law, Democracy, and the Critique of Ideology* (OUP 2000) 109.
[26] ibid 109.
[27] ibid 95.
[28] See Chapter 2, section 2.2.1.
[29] This role is criticised. See for example, Matthew Saul, 'Local Ownership of Post-Conflict Reconstruction in International Law: The Initiation of International Involvement' (2011) 16(1) Journal of Conflict and Security 165.

Nations Democracy Fund and the Electoral Assistance Division.[30] There is continued elections monitoring by the EU, the Organization for Security and Co-operation in Europe (OSCE) and sometimes the UN.[31] There are contemporary international political commitments as well as regional commitments.[32] These political developments, acknowledge a tripartite relationship between democracy, human rights, and the rule of law.[33] Nevertheless, the procedural conceptualisation of democracy that dominated in the 1990s literature is still prevalent.

The remainder of the chapter is dedicated to exploring the nature of this procedural conceptualisation of democracy. Using the Who and What, this chapter investigates how the international legal scholarship, which builds on the 1990s tradition, approaches democracy. Using these Circumstances of Democracy can uncover some of the limitations in the international legal debates. This thesis is concerned with the extent to which the limitations of Franck and Fox's debate on democracy feed into the global constitutionalist discourse.[34]

[30] For a discussion on the United Nations' agenda on democracy, see Kirsten Haack, *The United Nations Democracy Agenda: A Conceptual History* (OUP 2011).
[31] Franck notes the role of Emissaries of the Council of Freely Elected Heads of Government of the Carter Centre in Atlanta and the US National Democratic Institute for International Affairs. Thomas M Franck, 'Legitimacy and the democratic entitlement' in Gregory H Fox and Brad R Roth (eds) *Democratic Governance and International Law* (CUP 2000) 25, 38. Binder gives the example of the European Network of Election Monitoring Organization. See, Christina Binder, 'International Election Observation by the OSCE and the Human Right to Political Participation' (2007) 13(1) European Public Law 133, 136.
[32] For a discussion democracy in membership criteria and conditionality, see Roland Rich, 'Bringing Democracy into International Law' (2001) 12(3) Journal of Democracy 20.
[33] Higgins argues that democracy has to be understood alongside the rule of law and human rights. Though she does not endorse a legal rule on democracy. See, Higgins, 'Democracy and the United Nations' (n 6). Cf Fox who argues that these more substantive approaches to democracy are too broad. Gregory H Fox, 'Democracy, Right to, International Protection' in *Max Planck Encyclopaedia of Public International Law* (OUP 2008); Susan Marks, 'What has Become of the Emerging Right to Democratic Governance?' (2011) 22(2) EJIL 507, 512.
[34] See below, sections 4.2.1 and 5.2.2

3.3 The Circumstances of Democracy and International Legal Scholarship

3.3.1 Who

International legal scholarship discusses democracy within states,[35] but there are questions about how international law constructs the people within a state. The discussions on democracy in this tradition of international legal scholarship use self-determination and citizens participating in elections as starting points. Yet this leads to ambiguity around the unit of democracy. External self-determination refers to a people, internal self-determination encompasses persons in a territory, and it is only citizens that have a right to participate in elections. There is then uncertainty around the construction of the Who for the purposes of international law. This section considers self-determination and elections, to show how international law constructs the Who of democracy. Due to the controversy about the relationship between self-determination and democracy, this section does not seek to give a comprehensive assessment of self-determination, nor to determine whether self-determination is democracy, but rather it explores the impact that the use of self-determination as a point of reference for the discourse on democracy in international law has on the meaning of Who.[36]

[35] The emphasis placed on states by this tradition of scholarship can be contrasted with the approach of others. For example, the Global Public Authority and Global Public Law traditions; Devika Hovell, 'Due Process in the United Nations' (2016) 110 (1) AJIL 9; See Armin von Bogdandy, Matthias Goldmann, Ingo Venzke, 'From Public International to International Public Law: Translating World Public Opinion into International Public Authority' (2016) *Max Planck Institute for Comparative Public Law & International Law Research Paper No. 2016-2* < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2770639> accessed 19 September 2017.

[36] For a discussion on whether self-determination and democracy are related, see Vladyslav Lanovoy, 'Self-determination in International Law: A Democratic Phenomenon or an Abuse of Right?' (2015) 4(2) Cambridge Journal of International and Comparative Law 388; Jure Vidmar, 'The Right of Self-determination and Multiparty Democracy: Two Sides of the Same Coin?' (2010) Human Rights Law Review 239, 259.

Self-determination: Peoples

Self-determination is protected in international law.[37] Article 1 of the ICCPR and the International Covenant on Economic, Social and Cultural Rights, provides for the right of self-determination: '[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'.[38] There are two issues that arise from this, the first is the meaning of 'all peoples' and the second is the scope of the right of self-determination. The first issue is a question of Who, which will be discussed here, and the second is a question of What, discussed below.

Self-determination is a collective right of 'peoples', but the meaning of a people is disputed. A people could be demarcated by common tradition, race, ethnicity, linguistic unity, religion, or territorial connection.[39] After the UN Charter, self-determination referred to the rights of peoples under colonial rule,[40] but it has evaded its decolonialisation function and has a broader application, so it is now applicable to non-self-governing territories,[41] as well as people subject to foreign

[37] The UN Charter refers to the principle of self-determination of peoples. Charter of the United Nations (adopted 26 June 1945, entered into force October 1945) 1 UNTS XVI, Article 1(2) and Article 55. Though Higgins argues that in the Charter this principle of self-determination refers to equal rights of states and is concerned with non-interference. See Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1995) 112.

[38] See also the UNGA, Res 2625 'Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations' (24 October 1970) UN Doc A/Res/2625(XXV).

[39] Robert McCorquodale, 'Self-Determination: A Human Rights Approach' (1994) 43 International and Comparative Law 857, 866; Sarah Joseph, Jenny Schultz and Melissa Castan (eds), *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (OUP 2004) 142.

[40] UNGA, Res 1514 (XV) 'Declaration on the granting of independence to colonial countries and peoples' (14 December 1960) UN Doc A/RES/1514(XV) [2].

[41] *Legal Consequences for states of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276* (Advisory Opinion) [1971] ICJ Rep 16 [52]. See, Higgins, 'Democracy and the United Nations' (n 6) 218.

and alien domination.[42] This suggests that peoples for the purposes of self-determination is restricted to these specific groups.[43]

A distinction must be drawn between external and internal self-determination. External self-determination refers to determining the status of a territory. Internal self-determination concerns self-government within a state.[44] This requires: 'a people's pursuit of its political, economic, social and cultural development within the framework of an existing state';[45] political participation by minority groups within the mechanisms of the state;[46] and that 'free choice be afforded to peoples on a continuing basis'.[47] Where external self-determination refers to relations between states, internal self-determination captures the relations between a population and its state. These two forms of self-determination influence the construction of the Who of democracy in international law.

External self-determination can be understood in international law in terms of a link to territory.[48] For example, non-self-governing territories are defined by their relationship to a territorially demarcated political unit (a state), rather than shared characteristics.[49] Crawford argues that 'self-determination is not about a self-defined "people" creating its own state', it is instead about 'predetermined "units"

[42] UNGA, Res 2625 'Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations' (24 October 1970) UN Doc A/Res/2625(XXV).
[43] Cf McCorquodale (n 39) 868 (argues that 'State practice is not conclusive as a recognition of a people').
[44] Lanovoy (n 36) 392.
[45] *Reference re Secession of Quebec* [1998] 2 SCR 217 [126].
[46] Arbitration Commission of the International Conference on the Former Yugoslavia *Opinion No 2* (1997) 31 ILM 1497, 1498-99.
[47] Higgins, 'Democracy and the United Nations' (n 6) 219; UNGA, 'Report of the Human Rights Committee' UN GAOR 51st Session Vol I Supp No 40 (1997) UN Doc A/51/40, annex V, [2].
[48] McCorquodale draws a distinction between a people's approach and a territory approach. McCorquodale (n 39) 866-870.
[49] See Benedict Kingsbury, '"Indigenous peoples" in international law: a constructivist approach to the controversy' (1998) 92 AJIL 414, 438; Wheatley, *Democracy, Minorities and International Law* (n 5) 76.

which are “in general those territories established and recognised as [being] separate”’.[50] In other words, international law looks first at the territory, rather than at the people. McCorquodale criticises this focus on territory as it side-lines the people and denies the arbitrary drawing of state-boundaries.[51] This can have the impact of obscuring certain types of groups of people. For instance, Roth shows how the Badinter Commission credited the democratic will of the ‘pre-established territories’ but not the Serb populations.[52] Though these scholars acknowledge the limitations, they demonstrate the conservative approach in international law to construct the people using a link to territory.

Oklopcic argues that international law sees a particular function for the people within external self-determination. The people are used as ‘an intermediary construct that assumed a role akin to a “political elevator”’.[53] In other words, the role of the people is to help determine the ‘political status of a designated territory’.[54] The people are a ‘*terminus technicus*’, which is used in international law ‘to describe a phase in a process of polity formation’.[55] If the people are seen only at the moment of self-determination, it suggests international law has a functional approach to the people and it raises questions about the role international law has in everyday politics, which will be discussed below.

[50] Crawford, *The Creation of States* (n 6) xi.
[51] McCorquodale (n 39) 869-870.
[52] See Brad Roth, ‘Vidmar’s Democratic Statehood Thesis in Light of the Yugoslavia Dissolution’ (*EJIL Talk,* 7 August 2013) < https://www.ejiltalk.org/vidmars-democratic-statehood-thesis-in-light-of-the-yugoslav-dissolution/> accessed 19 September 2017.
[53] Zoran Oklopcic, ‘*Populus Interruptus*: Self-Determination, the Independence of Kosovo, and the Vocabulary of Peoplehood’ (2009) Leiden Journal of International Law 677, 690.
[54] ibid 690.
[55] James Crawford, ‘Right of Self-Determination in International Law: Its Development and Future’ in Philip Alston (ed.), ***Peoples’ Rights*** (OUP 2001) 7.

The meaning of 'peoples' in internal self-determination is challenged. For the Supreme Court of Canada in *Reference re Secession of Quebec,* when discussing internal self-determination, a people could refer to a portion of the population, provided they met certain criteria.[56] The Badinter Commission referred to the right of 'communities' within a state.[57] This reference to 'a people' and 'communities' would seem to suggest internal self-determination is limited to a people, demarcated by common characteristics.[58] Yet, the Human Rights Committee investigates the self-determination of the whole population.[59] Given these inconsistencies, the Who of internal self-determination is unclear.

Internal self-determination has been constructed from a relationship between Article 1 and Article 25 of ICCPR. Article 25 provides for rights of political participation. This includes; the right to 'take part in the conduct of public affairs, directly or through freely chosen representatives' and the right to vote in genuine periodic elections.[60] Higgins argues that it is through Article 25 that Article 1 is protected.[61] In other words, participation in elections is a means of ensuring internal self-determination. Article 1 refers to peoples, which has been interpreted as population,[62] and Article 25 specifically refers to all citizens.[63] This gives rise

[56] *Reference re Secession of Quebec* (n 45) [124] – [125].
[57] 'Opinion No 2' (n 46) 1498-99.
[58] In this respect self-determination in international law is different from Preuss' discussion on constituent power as self-determination in constitutional law. See, Ulrich K Preuss, 'Constitutional Powermaking for the New Polity: Some Deliberations on the Relations Between Constituent Power and the Constitution' (1992-1993) 14 Cardozo Law Review 639, 652.
[59] UNCHR, 'General Comment No 12 – Article 1 (The right to self-determination of peoples)' (12 April 1984) [4]; Higgins, *Problems and Process* (n 37) 116-117 and 120.
[60] International Covenant on Civil and Political Rights (adopted 16 December 1996, entered into force 23 March 1976) 999 UNTA 171, Article 25.
[61] Higgins, *Problems and Processes* (n 37) 120. See also Committee on the Elimination of Racial Discrimination, 'General Recommendation 21 on the right to self-determination' (15 March 1996) UN Doc A/51/18, [4]. Joseph et al., (n 39) 148.
[62] UNCHR, 'General Comment No 12 (n 59) [4]; Higgins, *Problems and Process* (n 37) 116-117
[63] UNCHR, 'General Comment No 25 –The Right to participate in public affairs, voting rights and the right of equal access to public service (Article 25)' (27 August 1996) UN Doc CCPR/C/Rev 1/Add 7, [3].

to a disconnect between population and citizenry. Although the Human Rights Committee states that how citizenship is determined should not be discriminatory,[64] and that restrictions on the right to vote should be 'based on reasonable and objective criteria',[65] the citizenry of a state will be at once a more limited franchise than the population as a whole, but also if there are citizens beyond the territory of the state, they will enjoy the franchise over the non-citizen parts of the population. This disconnect between population and citizenship, makes ambiguous the Who of internal self-determination.

Democracy within international legal scholarship is closely associated with self-determination.[66] Franck uses self-determination as a starting point for his discussion on the 'emerging norm of democratic governance'. He argues that self-determination, though not necessarily democratic *per se*, is evidence of international law requiring the participation of people.[67] The processes of self-determination provide evidence for the consultation of the people on the changing status of a territory. Such consultation takes place through elections and plebiscites.[68] Franck draws a distinction between the individual rights to participate, which he calls democracy and the collective right to constitute a nation state, which he labels self-determination.[69] In essence, the distinction he draws between democracy and self-determination follows the distinction between internal and external self-determination. His argument is that as internal self-determination 'entitles peoples in all states to free, fair and open participation in

[64] ibid [3].
[65] ibid [4], [10]. Joseph et al., (n 39) 659.
[66] Franck, *Fairness in International Law and Institutions* (n 4) 91. See also Crawford, 'Democracy and International Law' (n 4) 116.
[67] Franck, *Fairness in International Law and Institutions* (n 4) 92. Cf Fox who rejects the idea that pre-UN monitoring generated standards for participation and consultation. Fox, 'The right to political participation in international law' in Fox and Roth (n 11) 70.
[68] Franck, *Fairness in International Law and Institutions* (n 4) 92.
[69] ibid 92.

the democratic process of governance freely chosen by each state', there is evidence of democracy in international law.[70]

If internal self-determination is a basis for democracy as a right or principle in international law, then it influences the Who of democracy. Within internal self-determination, the use of peoples can refer to the population, its citizenry, or a section of the population. Even at its broadest conceptualisation, as the population, this still ties democracy to a state territory. If only citizens have the rights to participate, then the franchise can be limited by the state's approach to citizenship. Persons can be excluded, though human rights frameworks protect against using citizenship criteria as discrimination.[71]

External self-determination also shapes the Who of democracy. Though Franck argues that external self-determination is not democracy, he uses it as evidence of a norm of democracy in international law.[72] But, there are concerns about the role of democracy in external self-determination.[73] External self-determination is underpinned by a complex relationship between territory and nationhood, in which international law prioritises a link to territory. This tension between nationhood and territory predetermines, to a certain extent, the way in which the Who of democracy is conceptualised. As Crawford's discussion on the role of territory demonstrates, the state territory forms the 'container' of the *demos*,[74] so democracy is tied to the state territory.

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[70] Franck 'The Emerging Right to Democratic Governance' (1992) 86(1) AJIL 46, 59. Though note in *Fairness in International Law* it is an associational right.
[71] General Comment No 25 (n 63) [3], [4], [10]. Joseph et al., (n 39) 659.
[72] Franck, *Fairness in International Law and Institutions* (n 4) 92.
[73] Vidmar, 'Democracy and Regime Change in the Post-Cold War International Law' (n 11) 370 ('the right of self-determination requires a democratic expression of the will of the people at independence referenda').
[74] Marks uses the image of a container, which is found in Anthony McGrew, 'Globalization and Territorial Democracy: An Introduction' in A McGrew (ed), *Transformation of Democracy?*

The state, its boundaries, and its assumed homogeneity, guide the demarcation of peoples for the purposes of self-determination. Centring a discussion on democracy in the law on self-determination limits the meaning of Who. Whilst internal self-determination seeks to move away from these connotations of peoples, and attempts to shift to encompassing populations, it is still predicated on the state.

Elections and International Human Rights: Citizens

Franck and other scholars use elections monitoring and specific international human rights as evidence of an emerging norm of democracy. This form of evidence shows a bias towards the meaning of Who in democracy. Traditionally, international human rights are held by individuals against a state[75] and the elections being monitored take place within a state.[76] This sub-section discusses how Article 25 of the ICCPR on political participation can shape the meaning of Who in democracy.

In moving from self-determination as evidence of democracy, to international human rights on political participation, Franck notes that this demonstrates a shift away from 'a people' towards all individuals.[77] This would seem to suggest that the unit of democracy, for Franck, is individuals. Yet, using human rights means

Globalization and Territorial Democracy (Polity Press 1997) 5. Marks, *The Riddle of all Constitutions* (n 25) 81.

[75] For a discussion on the accountability of non-state actors for human rights abuses see, Olivier de Schutter, 'Human Rights and the Rise of International Organizations: The Logic of Sliding Scales in the Law of International Responsibility' in Jan Wouters, Eva Brems (eds), *Accountability for Human Rights Violations by International Organizations* (Intersentia 2011) 55.

[76] See, Binder (n 31) 146 (primarily observations of elections at the national level).

[77] Or as he called it 'from "peoples" to persons'. Franck, 'Legitimacy and the democratic entitlement' (n 31) 34.

that the *demos* is still tied to state and not all individuals. The Universal Declaration, for example, states that 'everyone has the right to take part in the government of *his country*',[78] which limits the *demos* to people with a connection to a state. It separates the national governance level from the international governance level,[79] and locates democracy firmly within the national domain.

As discussed above, the ICCPR in Article 25 refers only to the right of 'every citizen'.[80] Citizenship is a bond between persons and the state. As the state defines the criteria for citizenship, it is not open to everyone. Certain persons that have relations with that state (whether this be some form of residence or affected by decisions of that state) will be excluded from citizenship. Moreover, as was discussed above, the right to vote can be restricted through additional criteria.[81] The American Convention on Human Rights allows for restrictions to the right to vote based on 'age, nationality, residence, language, education, civil and mental capacity […].'[82] Similarly, the African Charter on Human and Peoples' Rights places a restriction on the right to vote where it states that it will be 'enjoyed "in accordance with the provisions of the law"'.[83] To suggest, as Franck does, that individuals are now the unit of democracy in international law is too optimistic. This is because some individuals are excluded from participation rights through the idea of citizenship; to place emphasis on individuals ignores that the scholarship constructs the *demos* using citizenship. Furthermore, as discussed

[78] Ludwig Beckman, 'The Right to Democracy and the Human Right to Vote' (2014) The Journal of Human Rights 381, 384 (emphasis added by Beckman).
[79] See Ian Clark, 'Beyond the Great Divide: Globalization and the theory of International Relations' (1998) 24(4) Review of International Studies 479.
[80] ICCPR Article 25. For a discussion on citizenship see Joseph et al., (n 39) 651.
[81] General Comment No 25 (n 63) [4], [10].
[82] Organization of American States, 'American Convention on Human Rights' (adopted 22 January 1969, entered into force 18 July 1978), Article 21.
[83] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58, Article 13.

previously, the emphasis placed on individuals can contradict the idea of common decision-making within democracy.[84]

Even where there is not an explicit focus on the question of self-determination, the state is seen as the bounded space within which democracy takes place. As such, the *demos* is constructed through the state. Whilst there is an acceptance of the needs for human rights to protect the interests of minorities within states,[85] in the mainstream literature on international law and democracy there is little discussion on other types of groups of people: for example, diaspora and stateless persons, who might be excluded from citizenship. This discussion on Who demonstrates the biases in favour of citizens, rather than humanity, at the expense of other groups of persons. Democracy constructed this way excludes certain groups of people.

The rights associated with democracy, such as freedom of expression and freedom of association, are not restricted to citizens.[86] Marks argues that building democracy upon human rights foundations can facilitate a cosmopolitan shift; as human rights are universal in nature, and as they 'are enjoyed by virtue of humanity, rather than citizenship', they can transcend the state-boundary.[87] However, this conflicts with Article 25 ICCPR, which is restricted to citizenship. The state defines citizens and it demarcates the *demos*. Building a norm of democracy from Article 25 of ICCPR can curb a cosmopolitan shift.

[84] Chapter 2, section 2.3.2.
[85] Wheatley, *Democracy, Minorities and International Law* (n 5).
[86] ICCPR Articles 19(1) and 22(1).
[87] Marks, *The Riddle of all Constitutions* (n 25) 106-107.

Furthermore, the Circumstances matrix demonstrates the importance of asking the Who question. Franck argues that self-determination is used as a starting point in the thesis on the emerging democratic norm because of the processes it involves.[88] In other words, he relies on it for the How of democracy. Although Franck notes the shift from peoples to individuals when the focus is on Article 25 ICCPR, neither he, nor Fox, reflect on the role of human rights in the construction of a citizen-based conceptualisation of the Who. The focus on How is at the expense of a reflection on the impacts of self-determination and human rights on Who. This is inadequate because it constructs a citizen-based and state-centric idea of the *demos.* If global constitutionalist scholarship is to be informed by this approach, it must ask the Who question to move away from the narrow definition of *demos*. Conflations between the How and the Who demonstrate why each Circumstance should be taken in turn to ensure proper reflection on the meaning of democracy.

Asking how international scholarship conceptualises the Who, exposes the limitations of that legal framework. It demonstrates that Who is tied to the state. Whether one looks to discourses on self-determination or to Article 25 ICCPR, the *demos* is constructed through a relationship of people, territory, and state. Democracy as formulated in international legal scholarship is not easily disassociated from the state, and therefore less easy to conceive of in non-state systems of governance.

3.3.2 What

[88] Franck, *Fairness in International Law and Institutions* (n 4) 92.

Within the ‘democratic entitlement’ debate, much emphasis is placed on mechanisms of democracy. In particular, scholars discuss at length the importance of elections, referenda, and plebiscites. Within this discussion on mechanisms the question of the scope of the people’s power is left open. Though scholars claim to advocate a shift towards popular sovereignty, at the core of this debate there is a concern about the relationship between popular sovereignty and territorial integrity. This section considers whether such a tension has the potential to place limits on the What of democracy. This section looks at the role of self-determination and elections in how the What of democracy is conceptualised and it considers what the people have power to do.

Self-Determination

The scope of self-determination is contested; there are debates on the legality of unilateral declarations of independence, on the right of secession, and the role of democracy. The referenda in Crimea in March 2014 and Catalonia in October 2017 have sparked fresh discussions on the role of democracy in changes of territory. This sub-section will not offer a comprehensive assessment of the law, but rather an investigation of how scholarship interprets the role of democracy. In developing an understanding of the tie between self-determination and the What of democracy, the role of plebiscites and referenda, the legitimacy of independence declarations, and the role of democracy in secession are all considered.

Plebiscites and referenda are part of the process of self-determination. Vidmar, pointing to the views of the ICJ in *Western Sahara*, argues that the fulfilment of

the right to self-determination necessitates a referendum.[89] The court states that the 'application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned'.[90] Whether this amounts to the power to decide the fate of the territory, is left open. But, as Vidmar goes on to argue, the expression of the will of the people is a necessary but not sufficient 'condition for a successful change of the legal status of a territory'.[91]

Franck uses this requirement of consultation and the ensuing processes as evidence for an emerging norm of democracy. But, what is missing is an investigation as to the scope of the people's power. Plebiscites can be defined as optional, and can be considered to be akin to opinion polls.[92] In contrast, referenda are considered to be binding.[93] In relation to What, the referenda places more decision-making power in the hands of the people, where the plebiscite distances the people from the ultimate decision. Alternatively, plebiscites can be thought of as referenda that are directed towards a question of territory.[94] In international law, plebiscites, which refer to territorial questions, and referenda are used interchangeably, and there is a suggestion that referendum is now the adopted term.[95] Some international scholars have noted that there are binding and non-binding forms of referenda. For example, Vidmar points to the binding

[89] Vidmar, 'Democracy and Regime Change in Post-Cold War International Law' (n 11) 370.
[90] *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12 [55].
[91] Vidmar, 'Democracy and Regime Change in Post-Cold War International Law' (n 11) 370.
[92] See J Patrick Boyer, *Lawmaking by the People: Referendums and Plebiscites in Canada* (Butterworths 1982) 12-13 cited in Russell A Miller, 'Self-Determination in International Law and the Demise of Democracy? (2003) 41 Columbia Journal of Transnational Law 601, 626
[93] Ibid 626.
[94] See Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (OUP 2012) 62 fn 8.
[95] Yves Beigbeder, 'Referendum' *Max Planck Encyclopedia of Public International Law* (OUP 2011) <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1088> accessed 19 September 2017.

nature of referenda in Montenegro, South Sudan, East Timor.[96] Drawing such a distinction would indicate the scope of the people's power in decision-making. But, in the discussion on democracy, there is little consideration as to the binding or non-binding form of referenda. In other words, there is little reflection on the What of democracy.

Referenda and plebiscites are used as evidence of a developing norm of democracy. How many have taken place and how the UN and other international actors monitored these events are collated. This concern for processes focuses on How. Critically, there is a failure to distinguish between referenda and plebiscites, thus overlooking the question of the scope of the people's power. Furthermore, the monitoring of referenda and elections is treated as interchangeable. Where referenda are evidence of direct democracy, elections are an aspect of representative democracy. Using them interchangeably conflates them and thus a shift from representative to a direct form of democracy, a key moment, goes unacknowledged. The focus on process and evidence collection are prioritised, rather than considering the changing scope of the people's power.

The value of democracy with respect to independence declarations is informative for the What of democracy in international law. In the *Kosovo* advisory opinion, the Court suggests that international law is silent on the legality of a unilateral declaration of independence.[97] It is not illegal to make a unilateral declaration of independence, but it might be illegal 'if conjoined with illegal uses of force or [the

[96] Jure Vidmar, 'South Sudan and the International Legal Framework Governing the Emergence and Delimitation of New States' (2011-2012) 47 Texas International Law Journal 541, 546-553.
[97] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403, [81].

violation of] other peremptory norms'.[98] This leaves open whether the territorial integrity of the parent state can trump the will of the people. Vidmar argues that the ICJ claimed state practice demonstrates successful independence claims against unwilling parent states,[99] and it concluded that territorial integrity 'is confined to the sphere of relations between States'.[100] This does suggest that the will of the people can trump the parent state. In the *Reference re Secession of Quebec*, the Supreme Court of Canada states that the will of the people, as expressed in a declaration, cannot be ignored entirely (rather it should be given some weight).[101] Whilst the Supreme Court is clear that this does not necessarily lead to independence,[102] it protects the people's expression. However, scholars have suggested that independence claims are ineffective as they are not binding on the parent state.[103] Vidmar contends that declarations of independence have no 'self-executing legal effects', as the parent state needs to adopt the result of such an independence claim,[104] and where the parent state refuses, the will of the people can be frustrated. The international legal scholarship wrestles with the tension between territorial integrity and popular sovereignty; the power of the people alone is not sufficient.[105] In essence, democracy is facilitated within international law provided it does not challenge the integral structures of the state.

[98] ibid [20].
[99] ibid [79].
[100] ibid [80]. Vidmar argues that the Advisory Opinion on Kosovo is evidence that the principle of territorial integrity does not prohibit declaring independence. Jure Vidmar, 'Unilateral declarations of independence in international law' in Duncan French (ed), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (CUP 2013) 69.
[101] *Reference re Secession of Quebec* (n 45) [87].
[102] ibid [91].
[103] Jure Vidmar, 'The Annexation of Crimea and the Boundaries of the Will of the People' (2015) 16 German Law Journal 365, 379.
[104] ibid 379.
[105] See Crawford, 'Right of Self-Determination in International Law: Its Development and Future' (n 55) 7.

If the integrity of the state is prioritised, thus frustrating the will of the people, this suggests that the What of democracy is compromised in favour of the state. The democratic and constitutionalist literature outlines a broad swathe of powers for the people, including the constituent power to construct their constitutional system.[106] But, the international legal discourse generates a narrow role for the people.

Secession remains controversial, but the debates on the role of democracy provide an important perspective on the What of democracy. Secession brings into sharp focus the tension between territorial integrity and popular sovereignty. Crawford states that 'there is no recognition of a unilateral right to secede based merely on a majority vote of the population of a given sub-division or territory'.[107] In other words, democracy alone is not sufficient to change the territorial integrity of the state. But, there are other readings of key secession texts, which might facilitate a larger role for democracy.

The 'safeguard clause', which is a clause in the Friendly Relations Declaration 1970, provides protection for democratic governments;

> nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed, or colour.[108]

[106] Chapter 2, section 2.3.3.
[107] James Crawford 'State Practice and International Law in Relation to Secession' (1999) 69(1) The British Yearbook of International Law 85, 116.
[108] UNGA, Res 2625 'Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations' (24 October 1970) UN Doc A/Res/2625(XXV), principle 5 [7].

In cases of potential secession in a democracy, the will of the people is in opposition to the democratic nature of the government, and the territorial integrity of the state defeats the will of the people. Crawford places the right of external self-determination against the right of internal self-determination, and argues that in a state where the government is representative of the whole population, the people 'exercise the right of self-determination through their participation in the government system of the State on a basis of equality'.[109] For Crawford, the What of democracy is restricted to processes of political participation within the state. Democracy is confined to internal, state-based processes.

The meaning of 'representative' is pertinent for investigating the What of democracy. The Declaration on Friendly Relations refers to a 'government representing the whole people belonging to the territory without distinction as to race, creed, or colour'. In contrast, the Declaration of the Vienna World Conference on Human Rights 1993, invoking the 'safeguard clause' states; 'Government representing the whole people belonging to the territory without distinction of any kind'.[110] The difference between these two manifestations of the 'safeguard clause' raises questions about the meaning of 'representative' and how it is used in the scholarship. Crawford points to representation of 'the whole people of its territory on a basis of equality'.[111] Connecting Article 1 and Article 25 of ICCPR, some scholars suggest that representative government is manifested through a participation in public affairs and the right to vote.[112]

[109] Crawford 'State Practice and International Law in Relation to Secession' (n 107) 117. See also, *Reference re Secession of Quebec* (n 45) [126].
[110] UNGA, 'Vienna Declaration and Programme of Action' (1993) UN Doc A/CONF 157/23, [2].
[111] Crawford, 'State Practice and International Law in Relation to Secession' (n 107) 117.
[112] Crawford argues that self-determination is connected to individual rights such as freedom of speech, freedom of association and the right to vote. See, Crawford, 'The Right of Self-determination in International Law: Its Development and Future' (n 55) 21.

However, Vidmar argues that this is not necessarily the case. He contends that representation can be tied to issues of identity, for example race, creed or colour.[113] Drawing on the theories of representation extrapolated in the previous chapter, it can be seen that international law for Vidmar, builds on a 'trustee model' of representation, where the state is not responsive but acts on behalf of its citizens.[114] There is, then, a lack of clarity around the meaning of 'representative' in international legal scholarship. Without clarification, the state can be labelled representative, but the What of democracy falls short of people participating in and making decisions.

With respect to secession, a reverse reading of the 'safeguard clause' is possible. Where the government is not representative without distinction on race, creed or colour, external self-determination is legitimised.[115] This has been called remedial secession. If there is a right to remedial secession, it remains controversial,[116] reserved for 'the most extreme of cases',[117] and is linked to the gross or systematic violation of human rights and not merely to a negation of or call for democracy.[118] Given this reading of the safe-guard clause, democracy has little purchase with respect to secession. The discussion on secession demonstrates the limits of democracy as conceptualised in international legal scholarship:

[113] Vidmar points to the Declaration on Principles of International Law. Vidmar, 'The Right of Self-determination and Multiparty Democracy' (n 36) 249.
[114] Chapter 2, section 2.4.2.
[115] See Crawford, *The Creation of States* (n 6) 119; Antonio Cassese, *Self-determination of Peoples: A Legal Reappraisal* (CUP 1995) 120.
[116] In a Separate Opinion in the *Kosovo* Advisory Opinion, Judge Cançado Trindade argued that 'The principle of self-determination applies in new situations of systematic oppression, subjugation and tyranny'. *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) (Separate Opinion of Judge Cançado Trindade) [2010] ICJ Rep 523, [175]. Weller argues that rights violations might constitute a right to self-determination. See, Marc Weller, *Escaping the Self-determination Trap* (Brill 2008) 59-60. For a discussion on remedial secession see, Katherine Del Mar, 'The myth of remedial secession' in Duncan French (ed), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (CUP 2013) 79-80.
[117] *Reference re Secession of Quebec* (n 45) [126].
[118] Del Mar (n 116) 79.

democracy alone does not include the power to change state territory nor to challenge the integrity of the state.

Investigating the relationship between democracy and self-determination, shows that in international legal scholarship, the What of democracy does not extend to changing the territory's legal status.[119] Furthermore, it highlights that there are instances, such as plebiscites and the construction of representation, where the scope of the power of people falls short of decision-making. Applying the Circumstances matrix to this strand of scholarship demonstrates to the need to reflect on the What of democracy. Franck and Fox, in using the monitoring of referenda and plebiscites focus on the How of democracy, at the expense of the other Circumstances. In particular, the failure to draw a clear distinction between plebiscite and referenda – or binding and non-binding referenda – demonstrates a lack of concern for the What of democracy.

Elections

Within the international legal debate on democracy, elections take prominence. The scholarship collects examples of elections taking place and the monitoring of those elections.[120] Whilst there are debates as to the meaning of elections, the impact of elections on the scope of democracy needs to be considered.

Article 25(b) of the ICCPR provides that:

> Every citizen shall have the right and opportunity, without any discriminations mentioned in article 2 and without unreasonable

[119] Vidmar states that democratic will cannot give a right to secession. Vidmar, 'The Annexation of Crimea' (n 103) 375-376.
[120] For example, Franck, *Fairness in International Law and Institutions* (n 4) 108; Fox, 'The right to political participation in international law' in Fox and Roth (n 11) 85.

> restrictions […] To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.[121]

From this it is clear that elections have to have a secret ballot and universal suffrage, but scholars have analysed this provision to consider the meaning of 'genuine'. Their discussions on the requirements for elections give a perspective on the meaning of the What of democracy.

The meaning of a 'genuine election' is not elaborated upon in the Covenant. Under Article 32 of the Vienna Convention on the Law of Treaties, the *travaux preparatoires* can be used as a subsidiary resource of interpretation if the meaning of the text cannot be discerned.[122] In the *travaux preparatoires* of the ICCPR, a Chilean delegate states: 'the adjective "genuine" has been used to guarantee that all elections of every kind faithfully reflected the opinion of the population and to protect the electors against government pressures'.[123] Arguably, the Chilean delegate confirms the plain reading of the text, which is that genuine means effectivity. For Fox, a 'genuine election' is one that guarantees the expression of the people.[124] One question is whether 'genuine' is a comment on the need for multi-party elections.[125] The ICCPR does not provide for multi-party elections.[126] As Fox notes, during the Cold War socialist states would not agree to party pluralism.[127] Vidmar points to UN General Assembly

[121] ICCPR, Article 25.
[122] UN, 'Vienna Convention on the law of treaties' (concluded at Vienna on 23 May 1969, entered into force 27 January 1980) UNTS 115 331, Article 32.
[123] UNGA, 'Third Committee at 16th Session, 1096th Meeting' (1961) 180 cited in Fox, 'The right to political participation in international law' in Fox and Roth (n 11) 56-57.
[124] Fox, 'The right to political participation in international law' in Fox and Roth (n 11) 57.
[125] See Gregory H Fox, 'The Right to Political Participation in International Law' in *National Sovereignty Revisited: Perspectives on the Emerging Norm of Democracy in International Law* (1992) 86 Proceedings of the American Society of International Law 249, 251.
[126] Vidmar, 'The Right of Self-determination and Multiparty Democracy' (n 36) 241.
[127] Fox, 'The right to political participation in international law' in Fox and Roth (n 11) 55-56.

resolutions that do not proclaim that elections have to 'take place in a multiparty setting', and he argues that international law does not provide for multi-party elections, thus restricting the scope of the people's choice.[128] Yet, multi-party elections are the requisite standard proffered in the scholarship. Franck demands multi-party elections[129] and scholars have engaged with human rights documents to demonstrate a commitment to party pluralism.[130] For example, Higgins points to the Human Rights Committee, which said that the principle of self-determination is impossible to meet without multiparty elections.[131] In general the scholarship conceives of democracy as requiring multi-party elections, and thus the dominant approach within this strand of international legal scholarship is that democracy includes the people's power to choose representatives.

Though elections are a key aspect of the discourse, it is not clear what functions they serve. Within the scholarship, elections are offered as aggregative of the common will, as indicative of opinion, as well as evidence of consent. Franck argues that the voting booth is '[t]he most important instrument for developing overlapping consensus'.[132] This idea of consensus is suggestive of an aggregative model, but it falls short of consenting to government. This idea of garnering opinion and consensus aligns with Franck's definition of democracy; it 'concerns the role of people in governance'.[133] For Franck, the people only have a *role*. Fox, however, argues that democracy concerns 'popular sovereignty', which he argues means 'the notion of citizen consent to the exercise of coercive

[128] Vidmar, 'The Right of Self-determination and Multiparty Democracy' (n 36) 267.
[129] Franck, *Fairness in International Law and Institutions* (n 4) 49.
[130] Fox points to the Inter-American Commission on Human Rights, the European Commission on Human Rights and the work of the UN Human Rights Committee. See, Fox, 'The Right to Political Participation in International Law' in *National Sovereignty Revisited* (n 125) 251.
[131] Higgins, 'Democracy and the United Nations' (n 6) 219; UNGA, 'Report of the Human Rights Committee'. 55th Session vol II Supp No 40 (2000) UN Doc A/55/40, [291].
[132] Franck, *Fairness in International Law and Institutions* (n 4) 83.
[133] ibid 83.

power within a state'.[134] For Fox, 'popular consent is made manifest through competitive elections'.[135] The people have a larger role in democratic government within Fox's approach than in Franck's, but it is still a liberal idea of popular sovereignty.[136] The difference in approach is problematic because elections are invoked as evidence of democracy without explicitly stating the role of the people. In essence, international law is ambiguous as to the scope of the people's power.

A further question is the scope of the right to political participation. Vidmar argues that the right to political participation does not necessarily ensure multi-party elections.[137] For the Human Rights Committee direct participation can take the form of consultation, 'influence through public debate', or individuals' 'capacity to organise themselves', which is at a distance from the decision-making.[138] Indirect participation is conceptualised through elections. The Human Rights Committee in *General Comment 25* states that indirect participation is through a process of elections.[139] On the one hand the right to political participation, could be distant from decision-making, and on the other hand, with respect to indirect participation it buttresses the elections-based conceptualisation of democracy.

Within international law, democracy is referred to as a right or 'norm of democratic governance',[140] a 'right to political participation'[141] and the 'right to free and open

[134] Fox, 'The right to political participation in international law' in Fox and Roth (n 11) 49.
[135] Franck, 'Legitimacy and the democratic entitlement' (n 31) 25; Fox, 'The right to political participation in international law' in Fox and Roth (n 11) 49.
[136] Jürgen Habermas, 'Three Normative Models of Democracy' (1994) 1(1) Constellations 1, 9.
[137] Vidmar, 'The Right of Self-Determination and Multiparty Democracy' (n 36) 259. Charlesworth argues that Article 25 falls short of a right to democracy because it is limited to political participation and political accountability. See also Charlesworth (n 12) 83
[138] General Comment No 25 (n 63) [6], [8]. Joseph et al., (n 39) 658
[139] General Comment No 25 (n 63) [7]. Joseph et al., (n 39) 655
[140] See Franck, 'The Emerging Right to Democratic Governance' (n 70) 46.
[141] See Gregory H Fox, 'The Right to Political Participation in International Law' (1992) 17 Yale Journal of International Law 539.

elections'.[142] There is also an alternative 'principle of democracy'.[143] These different labels are used 'with relative interchangeability'.[144] The labels signify different legal statuses and legal obligations, and in particular, there is a difference in the obligations between a right to political participation and a right to free and fair elections. The plethora of labels risks scholars talking past each other without clarifying the scope of the obligations they are equating with democracy. Asking about the What Circumstance helps to unpack these differing obligations.

These various labels illustrate that the question for international legal scholars in the 1990s (and today[145]) is the legal status of democracy.[146] In order to debate the legal status, scholars collect evidence from elections monitoring and human rights instruments. There is a preoccupation with collecting evidence to prove a norm or to negate the norm.[147] The project of collecting examples of elections and of states agreeing to international monitoring of elections, suggests that elections act as a measurable indicator.[148] The legal status debate means that the scholarship prioritises evidence collection, at the expense of revisiting the scope of power or what democracy *could* mean.

[142] See Franck, 'The Emerging Right to Democratic Governance' (n 70) 52.
[143] Marks, *The Riddle of all Constitutions* (n 25) 40.
[144] ibid 40.
[145] Higgins, 'Democracy and the United Nations' (n 6).
[146] Fox, 'The right to political participation in international law' in Fox and Roth (n 11) 48; Fox, 'Democracy, Right to, International Protection' (n 33); Marks, 'Emerging Right to Democratic Governance?' (n 33) 512; d'Aspremont, 'Post-Conflict Administrations as Democracy-Building Instruments' (n 7) 6; cf. Fox, 'The right to political participation in international law' in Fox and Roth (n 11) 69.
[147] For a discussion that uses empirics to negate the norm, see Carothers (n 8) 262-263. For a discussion on proving and negating the norm see, Gregory H Fox and Brad R Roth, 'Democracy and international law' (2001) 27 Review of International Studies 327, 344 and 346. D'Aspremont engages in an exercise of collecting evidence to prove and disprove the norm, see d'Aspremont, 'The Rise and Fall of Democracy' (n 10) 554.
[148] See Carothers (n 8) 264.

Within the international law debate on democracy the scope of democracy is contested. There are grand claims of popular consent and popular sovereignty, which are then mitigated by later discussions on elections and self-determination that place restrictions on the role of the people. This section highlights the need to reflect more convincingly on the scope of democracy. Asking the What question, facilitates a debate on the extent of the power of the people within democracy.

3.4 Conclusion

This chapter used the Who and What from the Circumstances of Democracy, to explore the ways in which democracy is discussed in international legal scholarship. The chapter demonstrates that the research methods and chosen fields of debate have structured the examinations of democracy. Collecting evidence from self-determination, elections and human rights, shapes the Who of democracy as international law constructs a Who bounded to the state. This makes it difficult to disassociate democracy from the state. Later chapters consider the extent to which global constitutionalist scholarship challenges this state-based limitation in international law.

In relation to the question of What, international law prioritises a thin, procedural conceptualisation of democracy. The discussion on self-determination showed how the people's power is curtailed in relation to the territorial integrity of the state. Using the Circumstances, this chapter exposed the emphasis on elections as a signifier of democracy and how this is prioritised at the expense of reflecting on the scope of people's power. The international legal project concerns

determining the legal status of democracy, it therefore collects evidence of the norm of democracy. Evidence of the How of democracy (i.e. elections and elections monitoring) is more ascertainable than investigating the What of democracy.

The Circumstances of Democracy are contested and the sub-disciplines approach them differently. The democratic and constitutional theory that was explored previously, raised several questions about the role of the people and their respective powers, which are not focal points within the international legal scholarship.[149] This international scholarship builds on a select idea of democracy, as it has prioritised a liberal model, predicated on elections and the state. The international law scholarship explored in this chapter offers a potential starting point for further discussions of democracy in international law. Whether the global constitutionalist literature builds on this international legal debate or if it develops an approach from the constitutionalist and democratic theories will be explored in the next two chapters.

[149] Chapter 2, sections 2.3.2 and 2.3.3.

Chapter 4: Democracy in the Organisational Wave of Global Constitutionalism

4.1 Introduction

Global constitutional scholarship has a multiplicity of approaches, and one of the waves within this literature is dedicated to international organisations. Indeed, international organisations have been considered the starting point for global constitutionalist scholarship;[1] they are both a source of constitutionalism and subject to constitutionalisation processes. As a source of constitutionalism, the constitutive treaties of international organisations are re-read as constitutions or seen to facilitate participation and accountability within international decision-making.[2] Some key authors even argue that the creation of new international organisations is also construed as constitutionalisation.[3] As a subject of constitutionalisation, 'limits [are placed] on the activities of international organisations'.[4] This chapter considers how democracy is constructed within this wave of global constitutionalist scholarship.

[1] Anne Peters, 'Global Constitutionalism' in Michael T Gibbons (ed), *The Encyclopaedia of Political Thought* (Wiley-Blackwell 2015). Paulus who argues that '[i]nternational lawyers have often construed international constitutionalism as an offspring of the institutionalization of international law'. Andreas L Paulus, 'The International Legal System as a Constitution' in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009) 69.

[2] See Chapter 1, section 1.1. Cf Jan Klabbers, 'Constitutionalism Lite' (2004) 1 International Organisations Law Review 31-58.

[3] Neil Walker, 'Taking Constitutionalism Beyond the State' (2008) 56 Political Studies 519, 519; Thomas Kleinlein, 'Between Myths and Norms: Constructivist Constitutionalism and the Potential of Constitutional Principles in International Law' (2012) 81 Nordic Journal of International Law 79, 84. Cf Erika de Wet who criticises the lack of judicial review. See, Erika de Wet, 'The Constitutionalization of Public International Law' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 1213 and 1219.

[4] Klabbers, 'Constitutionalism Lite' (n 2) 32.

International relations scholars and scholars researching international organisations have discussed the potential for 'Global Democracy'.[5] These 'Global Democracy' debates centre on the institutionalisation of democracy. Solutions range from creating parliamentary assemblies,[6] introducing membership criteria for states,[7] facilitating the participation of NGOs and other civil society actors,[8] as well as reforms to voting procedures.[9] In particular, there are discussions on the necessity of a global *demos* and on the creation or reform of particular institutions.[10]

In contrast, the literature on the constitutionalisation of international law that developed in the late 1990s and early 2000s was less concerned with democracy.[11] As noted previously, the role of democracy in legitimatising

[5] 'Global Democracy' is considered here as a term of art and a label of a disciplinary discourse. Global Democracy, in all its institutional manifestations, is a 'vision of a system of global governance that is responsive and accountable to the preferences of the world's citizens'. See, Daniele Archibugi, Mathias Koenig-Archibugi and Raffaele Marchetti (eds), *Global Democracy: Normative and Empirical Perspectives* (CUP 2012) 6.

[6] Examples include: Richard Falk and Andrew Strauss, 'On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty' (2000) 36 Stanford Journal of International Law 191; Andreas Bummel, *Developing International Democracy. For a Parliamentary Assembly at the United Nations* (Lulu 2010); John S Dryzek, André Bächtiger and Karolina Milewicz, 'Toward a Deliberative Global Citizens' Assembly' (2011) 2(1) Global Policy 33.

[7] For a discussion on parliamentary assemblies, see Robert Dahl, 'Can International Organizations be Democratic? A Skeptic's View' in Ian Shapiro and Casiano Hacker-Cordón (eds), D*emocracy's Edges* (CUP 1999) 31. See also, Thomas M Franck, *Fairness in International Law and Institutions* (Clarendon Press 1995) 483. For a discussion on membership, see Steven Wheatley, *The Democratic Legitimacy of International Law* (Hart 2010) 223; Alison Duxbury, *The Participation of States in International Organisations: The Role of Human Rights and Democracy* (CUP 2011) 20 and 40.

[8] For example: Steve Charnovitz, 'Accountability of Non-Governmental Organizations in Global Governance' in Lisa Jordan and Peter van Tuijl (eds), *NGO Accountability: Politics, Principles, and Innovations* (Routledge 2006) 21; Jan Aart Scholte, 'Civil Society and Democratically Accountable Global Governance' (2004) Government and Opposition 211, 217.

[9] José E Alvarez, 'International Organisations: Then and Now' (2006) 100 AJIL 324, 341; Joel P Trachtman, *The Future of International Law: Global Government* (CUP 2013) 282.

[10] See J H H Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy' (2004) 64 ZaöRV 547, 560.

[11] See Kumm's distinction between 'Big C' constitutionalism and 'small c' constitutionalism. Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State' in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009) 260. See also Wheatley in his discussion on democracy and international constitutionalism, as he discusses the rule of law and human rights but not democratic mechanisms. See Wheatley, *The Democratic Legitimacy of International Law* (n 7) ch 4.

international law was not a priority, when the focus was on re-reading the constitutive documents of international organisations as constitutions or on the normative values of an international community.[12]

There is a shift in global constitutional scholarship towards a discussion on democracy.[13] But the extent of that discussion varies. On the one hand, scholars such as Peters, Petersmann, and Dunoff and Trachtman have offered detailed proposals for the democratisation of international organisations from a global constitutionalist perspective.[14] On the other hand, there is a tendency to invoke democratic legitimacy or democracy without expanding on the details. For example, Cass refers to the declining role of the state, globalisation, and changing forms of governance as a 'procedural (democratic) transformation', with little explanation.[15] If this argument is considered through the Circumstances, the changing role of the state is a comment on the Who of democracy and the changing forms of governance can be suggestive of How, but more detailed engagement with the Circumstances of Democracy is needed. This highlights the

[12] See Chapter 1, section 1.5.3. Erika de Wet, 'The International Constitutional Order' (2006) 55 International & Comparative Law Quarterly 51, 71-74.
[13] Most prominently, Anne Peters, 'Membership in the Global Constitutional Community' in Jan Klabbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (OUP 2009); Anne Peters, 'Dual Democracy' in Jan Klabbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (OUP 2009). But also, Paulus, 'The International Legal System' (n 1); Andreas Føllesdal, 'When Common Interests Are Not Common: Why the Global Basic Structure Should be Democratic' (2009) 16(2) Indiana Journal of Global Legal Studies 585; Joel P Trachtman, 'Constitutional Economics of the World Trade Organization' in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World?: Constitutionalism, International Law, and Global Governance* (CUP 2009) 216.
[14] Ernst-Ulrich Petersmann, 'State Sovereignty, Popular Sovereignty and Individual Sovereignty: From Constitutional Nationalism to Multilevel Constitutionalism in International Economic Law?' (2006) EUI Law Working Paper 2006/45 <http://cadmus.eui.eu/handle/1814/6446> accessed 9 September 2017; 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* (CUP 2009) 19-21 and 29; Trachtman, 'Constitutional Economics' (n 13) 216-222; Peters, 'Dual Democracy' (n 13).
[15] Deborah Z Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System* (OUP 2005) 242.

speed with which commentators will label something as democratic without close attention to the Who, What, When, Where and How.

International law, global constitutionalism, international relations and international politics overlap. With global constitutionalist scholars building on international relations theorists[16] the disciplinary boundaries are unclear, but this chapter focuses on literatures that explicitly adopt a constitutional approach to international organisations. To reflect the dual focus of world constitutionalism (which considers more than one sector of international law) and sectoral constitutionalism (which focuses on a particular institution, such as the World Trade Organization (WTO)), this chapter considers the work of Peters as an example of world constitutionalism, and Trachtman, Dunoff and Petersmann for their distinct discussions on the WTO. The Where of global constitutionalism has been examined previously, so this chapter will focus on the Who, What, When and How.[17]

Within the organisational wave of global constitutionalist literature, there are a number of themes that reoccur; the role of states and their democratic nature,[18] voting practices,[19] and the participations of non-state actors, which are

[16] Across the literature there are citations to scholars such as Held (e.g. David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (CUP 1995)) and Archibugi (e.g. Daniele Archibugi, 'From the United Nations to Cosmopolitan Democracy' in Daniele Archibugi and David Held (eds), *Cosmopolitan Democracy: An Agenda for a New World Order* (Polity Press 1995)). For example, Peters, 'Dual Democracy' (n 13) 355-365. Besson discusses scholars from international law, global constitutionalism, and international relations. See, Samantha Besson, 'Institutionalising global *demoi*-cracy' in Lukas H Meyer (ed), *Legitimacy, Justice and Public International Law* (CUP 2009).
[17] See Chapter 1, section 1.1.
[18] Trachtman, 'Constitutional Economics' (n 13) 220; Peters 'Dual Democracy' (n 13) 271.
[19] See for example, Peters, 'Dual Democracy' (n 13) 287-288 (on weighted voting); Trachtman, 'Constitutional Economics' (n 13) 221 (majority voting at the WTO).

predominantly NGOs.[20] Using the Who, What, When, and How Circumstances of Democracy, this chapter explores both the uses of these indictors of democracy and their limitations.

This chapter considers in depth the extent to which this wave appreciates the different aspects of the Circumstances of Democracy and it looks at the disciplinary biases that influence the debate on democracy. The next section focuses on two aspects; a reflection on the intra-disciplinary nature of the debate and an exploration of the emphasis placed on the legitimacy deficit, which potentially shapes a particular role for democracy.

4.2 Aspects of Current Discourse in the Organisational Wave

4.2.1 Disciplinary Challenges

The discussion on international organisations traverses international law, international organisations law and theory, global governance and international relations scholarship, as well as discussions on constitutionalism. This section explores how the cross-disciplinary discussion (and the lack thereof) influences *how* democracy is discussed within this wave of global constitutionalist literature. It considers the influence of international organisational law, looking in particular at the question of accountability, how international organisational law centres the Where of democracy on formal organisations, and the commitment to state sovereignty and state consent. International law and international legal

[20] Peters, 'Dual Democracy' (n 13) 315; Cf Samantha Besson, '*Ubi Ius, Ibi Civitas:* A Republican Account of the International Community' in Samantha Besson and José Luis Martí (eds), *Legal Republicanism: National and International Perspectives* (OUP 2009) 227.

scholarship are a prominent influence on the organisational wave. The section considers the influence of state sovereignty on the discussions of democracy within this wave. Then it reflects on the role of constitutionalism discourse. Though there is a shift towards Big 'C' constitutionalism, this section considers whether such a discussion is limited without an engagement with the relationship between constitutionalism and democracy.

International Organisational Law Scholarship

There is an intimate relationship between the scholarship of international organisational law and global constitutionalist literature. It can be difficult to discern a divide between these literatures given that some scholars participate in both. For example, Klabbers and Peters straddle international organisational law and global constitutionalist debate.[21] Furthermore, there are overlapping concerns within these sub-disciplines, in particular with respect to the debates on accountability and legitimacy at international organisations. For example, both Peters and Christiano address a statist and an individualistic idea of democracy[22] and they both debate the plausibility of a Parliamentary Assembly.[23] Wheatley touches upon global constitutionalist approaches in his work on deliberative democracy, and his discussions on democratising the UN Security Council overlap with how an organisational wave seeks to institutionalise democracy

[21] Jan Klabbers, 'Institutional Ambivalence by Design: Soft Organizations in International Law' (2001) 70 Nordic Journal of International Law 403; Klabbers, 'Constitutionalism Lite' (n 2) 31; Anne Peters, 'International Organizations: Effectiveness and Accountability' (2016) Max Planck Institute Research Papers Series No. 2016-01 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2770606> accessed 9 September 2017; Anne Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19(3) Leiden Journal of International Law 579.
[22] See Thomas Christiano, 'Democratic Legitimacy and International Institutions' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 129.
[23] ibid 129.

beyond the state.[24] International organisational law places certain restrictions on the discussion of democracy, and this sub-section considers the extent to which global constitutionalist scholarship adopts these limitations. Three restrictions will be discussed here. The object of study remains an open question, as the meaning of international organisation is not clear and if defined restrictively it can exclude certain aspects of global governance. There is also the question of the relationship between the organisation and its Member States, as understood within international law. Further, within international organisational law there is a shift to investigating accountability, which has reiterations in the global constitutional scholarship discussion on democracy.

Firstly, there is a lack of clarity on the object of study in international organisational law. On the one hand, international organisational law refers to a narrow selection of international organisations. Sands and Klein define an international organisation as being composed of states or international organisations, established by treaty, having a will distinct from the Member State, vested with legal personality, and capable of adopting norms.[25] This definition includes organisations such as the UN, the EU, and the WTO. Sands and Klein state that membership is composed of states and/or international organisations, but they do not indicate whether that is exhaustive. Sands and Klein highlight that such a definition excludes international NGOs and inter-state enterprises.[26] There is a preference for formal organisations within international organisational law.[27]

[24] Steven Wheatley, 'The Security Council, Democratic Legitimacy and Regime Change in Iraq' (2006) 17(3) EJIL 531; Wheatley, *Democratic Legitimacy of International Law* (n 7) 12-13.
[25] Philippe Sands and Pierre Klein, ***Bowett's Law of International Institutions*** (Sweet and Maxwell 2001) 16.
[26] ibid 16.
[27] For a discussion see Klabbers, 'Institutional Ambivalence by Design' (n 21) 407-408. Kratochwil and Ruggie document a shift away from formal organisations to regimes, but they advocate a shift back to organisations. See Friedrich Kratochwil and John Gerard Ruggie, 'International

A tendency that is reiterated in the organisational wave.[28] Such a narrow focus on 'formal' international organisations excludes other forms of governance.[29] For example, it excludes the Commonwealth, which is *a sui generis* inter-national body. Transnational networks, such as the Basel Committee, do not fall within this narrow approach to international organisations based on state-consent.[30] On the other hand, Klabbers would include Conferences of the Parties and Meetings of the Parties as part of international organisational law.[31] Teubner, in his societal constitutionalism, criticises the focus on formal organisations,[32] because it excludes non-state organisations (such as the Internet Corporation for Assigned Names and Numbers), global standards organisations and corporate groupings.[33]

The problem is that it is unclear who is conceptualised as the governors and the governed. The organisational wave places limits on international organisations, as a means of constitutionalisation, but what international organisations are subjected to such limitations is contested. Whilst Klabbers discusses informal institutions or Meetings of the Parties as potential actors, and Teubner expands the scope of constitutionalisation further, studies on sectoral constitutionalism have focused on state-created institutions, such as the WTO. This lack of clarity

Organization: a state of the art on an art of the state' (1986) 40(4) International Organization 753, 759. Cf Duxbury (n 7) 15.

[28] For the most part, the focus is on formal organisations. For example, Peters, 'Dual Democracy' (n 13) (United Nations); Trachtman, 'Constitutional Economics' (n 13) (WTO).

[29] Teubner notes that international institutions literature tends to focus on formal international organizations. See, Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (OUP 2012) 57.

[30] Such institutions and groupings are discussed in the principled wave. For example, Neil Walker, 'Beyond boundary disputes and basic grids: Mapping the global disorder of normative orders' (2008) 6(3&4) I·CON 373, 381-382 (Basel Committee); Petra Dobner, 'On the Constitutionability of Global Public Policy Networks' (2009) 16(2) Indiana Journal of Global Legal Studies 605.

[31] Jan Klabbers, 'The Paradox of International Institutional Law' (2008) 5 International Organizations Law Review 1, 4.

[32] Teubner, *Constitutional Fragments* (n 29) 54-55.

[33] ibid 55-56.

means that there is little understanding of the actors for the purposes of democracy.[34]

Secondly, the relationship between states and international organisations, as understood in international organisational law, has the potential to influence democracy. The creation of an international organisation is predicated on state consent.[35] Member States consent to the creation of an organisation and, as acknowledged by the ICJ, the powers of an organisation are tied to state consent.[36] Within international organisational law there is a debate on the divide between the Member State and the organisation and the extent to which international organisations are autonomous. The extent to which the Member State and international organisation are separate has an impact on potential accountability mechanisms. In an accountability relationship, there is an 'accountor' and an 'accountee',[37] but within international organisational law the identity of these elements of the accountability chain are contested.[38] This has ramifications as who is being held to account by whom can change.

If international organisations are autonomous then they can be held directly accountable. Whether they are accountable to Member States or natural persons

[34] For a discussion on the need for clarity see, Besson, '*Ubi Ius, Ibi Civitas*' (n 20) 208
[35] Charnovitz acknowledges that the state-centricity of international institutional law 'must be respected in finding solutions to the democratic deficit internationally'. See Steve Charnovitz, 'The Emergence of Democratic Participation in Global Governance (Paris, 1919)' (2003) 10(1) Indiana Journal of Global Legal Studies 45, 58.
[36] *Reparation for Injuries Suffered in the Service of the United Nations,* (Advisory opinion) [1949] ICJ Rep 174.
[37] Julia Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2(2) Regulation and Governance 137, 150.
[38] For discussions on the complexity, see Joost Pauwelyn 'Informal International Lawmaking: Framing the Concept and Research Question' in Joost Pauwelyn, Ramses A Wessel and Jan Wouters (eds), *Informal International Lawmaking* (OUP 2012); Catherine Brölmann, *The Institutional Veil in Public International Law: International Organisations & the Law of Treaties* (Hart 2007) 271.

is an open question. Alternatively, if international organisations are not autonomous, and their powers are derived from the states, then arguably it is the states that are held directly held accountable. Some argue that 'since states retain sufficient direct or indirect control' there is not a democratic deficit.[39] The role of Member States here is problematic in a discussion on democracy. Member States are often used as conduits between international organisations and citizens,[40] which means Member States act as intermediaries between international organisations and natural persons. As will discussed in more detail, this constructed chain between citizens, Member States, and international organisations is weak.[41] The natural persons have little power within these chains of accountability. Furthermore, in this chain the 'accountees' are citizens within a state, thus excluding persons from other states that are potentially affected by a decision. To enhance such an accountability chain, would necessitate further accountability mechanisms within the state to ensure that the people can hold the state accountable and mechanisms that facilitate direct accountability links between persons and the international organisation.[42] Where international organisations are held accountable by these conduit Member States, the role of natural persons to hold decision-makers accountable is lost.

That said, there is a shift to prioritise natural persons within accountability. As discussed below, global constitutionalists seek to place individuals at the core of international law, which would make natural persons the appropriate

[39] See Gráinne de Búrca, 'Developing Democracy Beyond the State' (2008) 46(2) Columbia Journal of Transnational Law 101,110.
[40] For a discussion on the shift from state consent to conduit, see Besson who presents it as a shift from state consent to 'democratic state consent'. Besson, '*Ubi Ius, Ibi Civitas*' (n 20) 214; Besson, 'Institutionalising global *demoi*-cracy' (n 16) 61-64.
[41] Peters, 'Membership' (n 13) 212.
[42] ibid 210.

'accountee'.[43] These natural persons could be citizens of a state. Alternatively, Peters argues that global citizens could be the accountee, though she dismisses a global citizenry in favour of nation or local-based *demoi*.[44] Focus on individuals or citizens, rather than polities or *demoi,* fails to appreciate the tension between the individual and collective, and this will be explored further below.

Thirdly, there is a focus on accountability in international organisational law. Since the late 1980s and early 1990s, the study of international organisations is increasingly concerned with the question of accountability,[45] and such a focus shapes the discussion on democracy. Accountability can be *ex post facto* or *ex ante*, so it can refer to taking into account people's interests or giving an account, and it can it be legal or political.[46] If accountability is the framework within which democracy is being discussed, elements of democracy can be side-lined because accountability can encompass the act of holding decision-makers to account and taking into account the preferences and interests of individuals.[47] To focus on one and not the other risks the construct of only a partial idea of democracy. Whilst the relationship between democracy and accountability is complex, with accountability mechanisms forming part of democracy,[48] the concern is that accountability becomes a compensatory approach.[49]

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[43] Jan Wouters, Nicolas Hachez and Pierre Schmitt, 'Managerial accountability: What impact on international organizations' autonomy?' in Richard Collins and Nigel D White (eds), *International Organizations and the Idea of Autonomy: institutional independence in the international legal order* (Routledge 2011) 236.
[44] Peters, 'Membership' (n 13) 211; Peters, 'Dual Democracy' (n 13) 298-300.
[45] See Klabbers, 'The Paradox of International Institutional Law' (n 31) 1-23; Peters, 'International Organizations: Effectiveness and Accountability' (n 21). de Búrca argues that reforms had been targeted at efficiency, effectiveness and output. de Búrca, 'Developing Democracy' (n 39) 103.
[46] For a discussion see Chapter 2, section 2.4.1.
[47] Wouters et al., (n 43) 236.
[48] Terry Macdonald and Kate Macdonald, 'Non-Electoral Accountability in Global Politics: Strengthening Democratic Control within the Global Garment Industry' (2006) 17(1) EJIL 89, 90.
[49] de Búrca, 'Developing Democracy' (n 39) 158.

Within the organisational wave of global constitutionalist scholarship, the meaning of accountability is not always clear. Dunoff and Trachtman refer to accountability mechanisms without further explanation.[50] Yet, there appears to be a shift away from responsibility towards control.[51] Peters makes accountability synonymous with elections[52] and there is a tendency to equate accountability with the removal of decision-makers.[53] Klabbers argues that if there is a lack of *ex ante* accountability, this can be rectified with *ex post facto* accountability mechanisms,[54] But, Peters contests this as she correctly argues that complaints procedures cannot fill the place of people participating in decision-making and judicial accountability mechanisms are not substitutes for political mechanisms.[55] The ambiguity around what accountability means can risk it being associated with democracy when it does not sufficiently contribute to a debate on the What of democracy because it does not lead to the people having power in decision-making.

On the whole, scholars are not arguing that encouraging accountability amounts to democracy,[56] rather that this concept can fill 'the normative gap left by the deficiency of democracy'.[57] Klabbers, for example, draws a distinction between

[50] Dunoff and Trachtman, 'A Functional Approach to International Constitutionalization' (n 14) 21.
[51] See the discussions on accountability in Christine E J Schwöbel, *Global Constitutionalism in International Legal Perspective* (Martinus Nijhoff Publishers 2011) 34 and 58.
[52] Peters, 'Dual Democracy' (n 13) 340; Trachtman, 'Constitutional Economics' (n 13) 221.
[53] See Petersmann, 'State Sovereignty, Popular Sovereignty and Individual Sovereignty' (n 14) 17. See also, Macdonald and Macdonald discuss control mechanisms and the giving of an account. Macdonald and Macdonald (n 48).
[54] Klabbers, 'Institutional Ambivalence by Design (n 21) 420.
[55] Peters, 'Dual Democracy' (n 13) 339-340.
[56] Cf Dobner, who argues that accountability is part of a democratisation of global politics. Dobner, 'On the Constitutionability of Global Public Policy Networks' (n 30) 607.
[57] See, de Búrca, 'Developing Democracy' (n 39) 126. This is a similar conversation to the Global Administrative Law project. See, Sabino Cassese, 'Administrative Law without the State? The Challenge of Global Regulation' (2005) 33 International Law and Politics 663, 688; Daniel Etsy, 'Good governance at the Supranational Scale: Global Administrative Law' (2005-2006) Yale Journal of International Law 1490, 1520.

Franck's 'emerging right to democratic governance' and accountability.[58] He argues that the 'right to democratic governance', whilst plausible within states, is not evident at the international organisational level and instead, accountability is sufficient.[59] Nevertheless, the closeness with which democracy and *ex post facto* accountability are discussed,[60] without consideration as to how they sit in tension with one another, risks accountability being treated as democracy.

Accountability as a dominant theme within international organisational law shapes the discussion on democracy through its emphasis on particular mechanisms, and the role of the state within the international organisations influences the Who of such an accountability process. Constructing an idea of democracy around accountability alone generates a shallow debate, as the extent of the power of the people within democracy is disregarded.

International Law and Global Constitutionalism

Scholars in the organisational wave of global constitutionalist scholarship place reliance on the international law discussion on the 'norm of democratic governance', which was discussed in Chapter 3.[61] Peters, for example, points to Franck as evidence that states should be democratic.[62] As will be unpacked in

[58] Klabbers, 'The Paradox of International Institutions Law' (n 31) 16-17.
[59] ibid 16-17.
[60] Schwöbel, *Global Constitutionalism in International Legal Perspective* (n 51) 22; Petersmann, 'State Sovereignty, Popular Sovereignty and Individual Sovereignty' (n 14) 24.
[61] Peters, 'Dual Democracy' (n 13) 264. See also, Hauke Brunkhorst, 'Constitutionalism and Democracy in the World Society' in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (OUP 2010) 191; Ernst-Ulrich Petersmann, 'European and International Constitutional Law: Time for Promoting "Cosmopolitan Democracy" in the WTO' in Gráinne de Búrca and Joanne Scott (eds), *The EU and the WTO: Legal and Constitutional Issues* (Hart 2002) 86; Besson, 'Institutionalising global *demoi*-cracy' (n 16); Samantha Besson, 'Sovereignty, International Law and Democracy' (2011) 22(2) EJIL 373, 382; Kleinlein, 'Between Myths and Norms' (n 3) 80.
[62] Peters, 'Dual Democracy' (n 13) 273.

more detail below, this assimilation of the international legal discourse on democracy is problematic. That scholarship was shown to be constructed on a narrow, state-centric idea of the *demos* and tied to procedural ideas of democracy that were predicated on elections.[63]

Within this wave of global constitutionalist scholarship, popular sovereignty sits in tension with state sovereignty.[64] In her discussion on the global community, Peters does not go as far as to endorse popular sovereignty,[65] but in her discussion on 'Dual Democracy', she argues that state sovereignty is reconceptualised as being built on popular sovereignty.[66] When discussing the state as a member of an international or global community, the state is sovereign, but when discussing the state as a container of democracy, the people are sovereign. This inconsistent use of popular sovereignty raises questions about the relationship between state and popular sovereignty.

Global constitutionalists sit in a trajectory of international law scholarship that calls for and documents the shift from state to popular sovereignty.[67] Whilst, the starting point is that states are sovereign and equal, scholars including global constitutionalists, attempt to revise this notion of state sovereignty by using international human rights law to show that states have 'responsibility' for their citizens.[68] Reisman goes further, and he argues that human rights, self-

[63] See Chapter 3.
[64] Examples include: Petersmann, 'State Sovereignty, Popular Sovereignty and Individual Sovereignty' (n 14); Besson, '*Ubi Ius, Ibi Civitas*' (n 20) 232.
[65] Peters, 'Membership' (n 13).
[66] Peters, 'Dual Democracy' (n 13) 272.
[67] For discussions on the changing role of sovereignty, see W Michael Reisman, 'Sovereignty and Human Rights in Contemporary International Law' (1990) 84(4) AJIL 866; Jean L Cohen, 'Sovereignty in the Context of Globalization: A Constitutional Pluralist Perspective' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 269-270.
[68] See, Peters, 'Membership' (n 13) 185; See also Cohen, 'Sovereignty in the Context of Globalization' (n 67) 261 and 269-270.

determination and the emerging right to democratic governance, are evidence that international law is no longer concerned with the sovereign state but with popular sovereignty.[69]

However, responsibility is not akin to representation or popular sovereignty. Global constitutionalists, such as Peters and Tomuschat have equated sovereignty as responsibility with the idea that states are representative of their citizens.[70] Building on human rights provisions and the norm of democratic governance, these scholars argue, as Tomuschat states, that it is the function of states 'to serve the interests of their citizens'.[71] But the responsibility idea and the norm of democratic governance is internal to the state, with little investigation by the global constitutionalists on mechanisms within the state to ensure states 'serve' its citizens in foreign affairs. Moreover, reliance on the 'emerging norm of democratic governance' thesis leads to an approach to popular sovereignty that is contained within specific, state-based democratic processes.[72] The people have limited powers within this conceptualisation of democracy, which is restricted to electing and rejecting governments.[73] This limited idea of popular sovereignty, does little to challenge the integrity of the state and leaves intact state sovereignty and the idea that the states are the leading subjects of international law.[74]

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[69] Reisman (n 67) 869.

[70] Peters, 'Membership' (n 13) 185; Christian Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century', General Course on Public International Law (1999) 281 Recueil des Cours 10, 161.

[71] Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century' (n 70) 161.

[72] See Chapter 3. For a discussion on this as a liberal form of popular sovereignty see, Jürgen Habermas, 'Three Normative Models of Democracy' (1994) 1(1) Constellations 1, 9.

[73] ibid 9.

[74] See Armin von Bogdandy, 'Constitutionalism in International Law: Comment on a Proposal from Germany' (2006) 47(1) Harvard International Law Journal 223, 228-230. This is expressed as statism by Reisman and D'Amato. Reisman (n 67) 874; Anthony D'Amato, 'The Invasion of Panama Was A Lawful Response to Tyranny' (1990) 84 AJIL 516, 518. Knop refers to this

The tension between state and popular sovereignty arises from a dual-agenda within global constitutionalist scholarship, which can be either descriptive or normative. A descriptive approach in global constitutionalist literature is situated within the current international legal frameworks, where there is arguably a shift towards state responsibility, but international law is still constructed on the centrality of states. In contrast, a normative approach in global constitutionalist literature, building on constitutionalist theory, advocates popular sovereignty. Peters begins her discussion on democracy in a normative approach, which would mean that democracy is popular sovereignty,[75] but as such a discussion is restricted by the current international legal framework, she adopts a descriptive method that incorporates state sovereignty. Under the normative approach, if individuals are at the core, if they have the potential to hold constituent power, and they made a collective decision to create a Parliamentary Assembly or to change the membership criteria at international organisations, the states would have to comply. However, adopting a descriptive approach, Peters argues that certain organisational reforms, such as the creation of an assembly or the change to membership criteria, cannot take place because international law is predicated on state sovereignty and state consent.[76] As states will not consent to an assembly, for Peters, it is not possible.[77] This sits at odds with the idea that states act on behalf or in the best interests of their citizens.

phenomena as the 'centrality of the state'. See, Karen Knop, 'Re/Statements: Feminism and State Sovereignty in International Law' (1993) 3 Transnational Law and Contemporary Problems 292, 308.

[75] Peters, 'Dual Democracy' (n 13) 267.

[76] ibid 293 (membership criteria) and 320 (Parliamentary Assembly).

[77] ibid 325.

Within Peters' global constitutionalist model, popular and state sovereignty coexist because she attempts to balance a normative and descriptive approach. Whilst in theory there is nothing wrong with advancing a normative claim and then explaining how in the current climate it would not work, such a shift is not made explicitly. Furthermore, using a descriptive or empirical argument to undermine a normative problem, suggests that the commitment to democracy within her account of global constitutionalism is not that strong. If state consent can trump democracy, this strips democracy of weight. The debate over popular and state sovereignty is unresolved, and the dual normative and descriptive agenda makes it difficult to locate sovereignty.

As will be explored in more detail below, the organisational wave of global constitutionalist scholarship attempts to weaken the state-centricity of international law. It seeks to place the individual at the core of international law, for example. However, as this sub-section highlighted, the wave does little to challenge state sovereignty. Building on the international legal discourse on democracy, which keeps intact the integrity of the state, this wave allows state sovereignty to frustrate democratic processes. The Circumstances facilitates a discussion on the What of democracy, which exposes that when state sovereignty and the centrality of the state trumps the will of the people, the people do not have much power.

Constitutionalism and Global Constitutionalist Scholarship

The meaning of constitutionalism changes across the history of international and global constitutionalist literature. Kumm sums up this shift by distinguishing

between ‘small c’ constitutionalism, which focuses on questions of hierarchy, and ‘big c’ constitutionalism, which is open to public law discussions.[78] Such a neat divide overlooks the different approaches to constitutionalism, and other scholars have sought to establish the type of constitutionalism used within global constitutionalist scholarship.[79] This sub-section argues that alongside an awareness of the type of constitutionalism, there is also need for a discussion on the relationship between democracy and the approach taken to constitutionalism.

In this wave of global constitutionalist scholarship, democracy has an instrumental role.[80] Democracy is tied up with questions of accountability and placing limits on the powers of international organisations.[81] Focusing on restricting power can give rise to a limited understanding of the What of democracy. Within this wave the restrictions are derived from the idea of *ex post facto* accountability mechanisms. Moreover, the use of democracy in the limitation of power, but not the allocation of power – or in other words, the use of democracy in everyday decision-making, but not in constitutional moments – demonstrates a narrow approach to the When of democracy.

Within this organisational wave, discussing democracy as a norm or principle of constitutionalism is a common trope.[82] Fassbender engages in a comparative

[78] Kumm, ‘The Cosmopolitan Turn in Constitutionalism’ (n 11) 260.
[79] Schwöbel, *Global Constitutionalism in International Legal Perspective* (n 51); von Bogdandy, ‘Constitutionalism in International Law’ (n 74).
[80] Vicki C Jackson, ‘Paradigms of public law: transnational constitutional values and democratic challenges’ (2010) 8(3) I·CON 517, 540.
[81] See above, section on International Organisational Law. See also, Louis J Kotzé, ‘Arguing Global Environmental Constitutionalism’ (2015) 13(17) Revista Opinião Jurídica (Fortaleza) 398, 410 (previously printed in (2012) 1(1) Transnational Environmental Law 199); Nicholas Tsagourias, ‘Introduction – Constitutionalism: a theoretical roadmap’ in Nicholas Tsagourias (ed), *Transnational Constitutionalism: International and European Perspectives* (CUP 2007) 5.
[82] Peters, ‘Dual Democracy’ (n 13) 263; Antje Wiener, ‘Contested Meanings of Norms: A Research Framework’ (2007) 5 Comparative European Politics 1, 3; Føllesdal (n 13) 586.

exercise in which he argues that democracy is a 'common constitutional value',[83] and reaches the conclusion that democracy is a norm of constitutionalism. Assuming that democracy is a norm of constitutionalism, risks conceptualising them as compatible and potentially conflating the two ideas, thus side-lining the important tensions.

There is some acknowledgement that constitutionalism and democracy are not synonymous. Petersmann, for example, identifies that approaches to constitutionalism will discuss democracy differently. Yet, Petersmann's use of constitutional democracy is an example of how the tension between the two ideas can get lost. He argues that there are three functions of democracy in constitutional democracy: 'to legitimise "government of the people"', 'to constitute and limit "government by the people" through democratic institutions', and 'to promote *participatory deliberative democracy*'.[84] In this approach, democracy is said to 'limit "government by the people"', but the traditional view is that democracy is limited through a tension with the principles of constitutionalism (such as the rule of law, human rights and the separation of powers).[85] Walker would argue that democratic institutions, such as political parties and representative parliaments are aspects of constitutionalism, which act to realise democracy.[86] Werner would prefer to conceptualise them as constructed through the constitution.[87] How democracy and constitutionalism interact is lost in Petersmann's approach; democracy is said to limit itself, rather than appreciating

[83] Bardo Fassbender, 'The United Nations Charter As Constitution of The International Community' (1998) 36 Columbia Journal of Transnational Law 529, 554.
[84] Petersmann, 'European and International Constitutional Law' (n 61) 95.
[85] ibid 95.
[86] Neil Walker, 'Constitutionalism and the Incompleteness of Democracy: An Iterative Relationship' (2010) 39(3) Rechtsfilosofie & Rechtstheorie 206, 218.
[87] Wouter G Werner, 'Democracy, Constitutionalism and the Question of Authority' (2010) 39(3) Rechtsfilosofie & Rechtstheorie 267, 268.

that it is the tension with constitutionalism that shapes democracy. To have a discussion on democracy, it first needs to be understood without being 'defined up'.[88] What is needed is a reflection on the relationship between constitutionalism and democracy.

One of the differences between the waves of global constitutionalist thought is the sources used. The organisational wave prioritises international and international organisational law. These choices with respect to method shape the discourse on democracy. Building on international and international organisations law constructs a dialogue that is restrained by the accountability debate and the need to protect state sovereignty, which leaves a bereft discourse lacking in the rich debates on people's power found in constitutional and democratic theory.

4.2.2 The Legitimacy Deficit

International organisations are increasingly exercising administrative functions that previously belonged to the state.[89] There is an anxiety that decisions made at international organisations override democratic decisions made at the state-level, eroding national sovereignty and democracy within the state.[90] Global constitutionalists have sought to tackle how to legitimise international organisations and protect democracy.[91] Whilst legitimacy is a social construct,

[88] See Chapter 2, section 2.2.1. Walker, 'Constitutionalism and the Incompleteness of Democracy' (n 86) 211.
[89] Weiler, 'The Geology of International Law' (n 10) 561; Errol P Mendes, *Global Governance, Human Rights and International Law: Combating the Tragic Flaw* (Routledge 2014) 151.
[90] Phillip R Trimble, 'Globalization, International Institutions, and the Erosion of National Sovereignty and Democracy: Fairness in International Law and Institutions by Thomas M Franck' (1997) 95(6) Michigan Law Review 1944, 1948.
[91] For a discussion on the loss of democracy, see Eric Stein, 'International Integration and Democracy: No Love at First Sight' (2001) 95 AJIL 489; Wheatley, *The Democratic Legitimacy of International Law* (n 7) 3.

and there are different factors that can be used to construct it, democracy is increasingly important.[92]

At the global level, there is no consensus on how to respond to the legitimacy deficit of international organisations. Global constitutionalists can respond by discussing the legitimacy of the international organisation, and suggesting democracy as the panacea, or they focus on the protection of domestic democracy.[93] This gives rise to an inconsistent discussion on democracy because there is no agreed understanding of Where, with some scholars arguing that it is to remain within states and protected by the constitutionalisation of international organisations, others arguing for a complementary democratic constitutionalisation at the international level.

Legitimacy can be understood as either input or output, and global constitutionalist scholarship responds by discussing democracy as enhancing either. In relation to 'input', there are discussions about transparency, representation and participation.[94] In respect to 'output', most discussions focus on the effectiveness of decision-making,[95] but there are discussions about

[92] Weiler argues that legitimacy is a social construct. Weiler, 'The Geology of international law' (n 10) 552. For a discussion on what legitimacy means, compare: Allen Buchanan, 'The Legitimacy of International Law' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 94; John Tasioulas, 'The Legitimacy of International Law' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 100-101; Daniel C Etsy, 'Good Governance at the Supranational Scale: Global Administrative Law' (2006) 115(7) Yale Law Journal 1490. Bodansky calls democracy the 'touchstone of legitimacy', Daniel Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' (1999) 93 AJIL 596, 599. Føllesdal argues that democracy and legitimacy are entangled, see Føllesdal (n 13) 589.

[93] Petersmann, for example, argues that the constitutionalist functions of the GATT/WTO work to promote domestic democracy, because the rules limit the power of interest groups. See, Ernst-Ulrich Petersmann, 'Human Rights, Constitutionalism and the WTO: Challenges for WTO jurisprudence and civil society' (2006) 19(3) Leiden Journal of International Law 633, 645.

[94] See Jan Klabbers, 'Setting the Scene' in Jan Klabbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (OUP 2009) 40.

[95] Carol Harlow, 'The Limping Legitimacy of EU Lawmaking: A Barrier to Integration' (2016) 1(1) European Papers 29, 31; Klabbers, 'Setting the Scene' (n 94) 40.

decisions being for the benefit of the people,[96] which is arguably an aspect of democracy.[97] In legitimacy scholarship, there are debates on the relationship between input and output legitimacy,[98] but within the global constitutionalist scholarship either input or output is prioritised.[99] Klabbers suggests that output legitimacy can compensate for the lack of input legitimacy.[100] Peters critiques this arguing that decisions cannot be made on behalf of the citizens, rather processes have to take into account citizens' interests.[101] This disconnect between, and potential conflation of, input and output legitimacy has implications for the role of the people. Whilst the people have a role in input legitimacy, output legitimacy operates to instigate decisions on their behalf.

Legitimising international organisations constructs a particular role for democracy. Democracy, it is argued, can have instrumental and/or foundational value.[102] For example, Franck uses the discussion on democracy and international parliaments to incorporate 'fairness into international law and institutions'.[103] Democracy for Franck is tied to the idea of fairness, and as such he asks questions about the inclusion of certain groups, or in other words, he

[96] Peters, 'Dual Democracy' (n 13) 340.
[97] Richard Bellamy, 'Democracy without democracy? Can the EU's democratic "outputs" be separated from the democratic "inputs" provided by competitive parties and majority rule?' (2010) 17(1) Journal of European Public Policy 2, 3. Cf Ferejohn who outlines the difference between government for and government by the people. John Ferejohn, 'Accountability in a Global Context' (2007) Institute for International Law and Justice Working Paper 2007/5 <http://www.iilj.org/publications/accountability-in-a-global-context/ > accessed 9 September 2017
[98] Vivien A Schmidt, 'Democracy and Legitimacy in the European Union Revisited: Input, Output *and* "Throughput"' (2013) 61 Political Studies 2; Harlow, 'The Limping Legitimacy of EU Lawmaking' (n 95) 47.
[99] Ernst-Ulrich Petersmann, 'Multilevel Trade Governance in the WTO Regimes: Multilevel Constitutionalism' in Christian Joerges and Ernst-Ulrich Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Bloomsbury Publishing 2006) 20-21.
[100] See Klabbers, 'Setting the Scene' (n 94) 40-41. Cf Weiler, 'The Geology of international law' (n 10) 562.
[101] Peters, 'Dual Democracy' (n 13) 340. Dobner also criticises such substitutions, see Dobner, 'On the Constitutionability of Global Public Policy Networks' (n 30) 607.
[102] T D Christiano, 'Democracy: Normative Theory' in James D Wright (eds), *International Encyclopedia of the Social and Behavioral Sciences* (Elsevier Science & Technology 2015) 3414-3415.
[103] Trimble (n 90) 1948.

asks about the Who of democracy in his discussion on international forums.[104] In contrast, within the organisational wave, democracy's commitment to participation or accountability is often offered as a panacea. Where the focus is on participation and accountability, questions shift to the How, as will be discussed in detail below. This instrumental role of democracy sidesteps foundational questions, such as the What of democracy.

Global constitutionalist scholarship is cross-disciplinary in nature, influenced by international law, constitutionalism and international organisational law. These sub-disciplines prioritise particular research questions, which have the impact of focusing on certain Circumstances. This organisational wave exhibits an overlap with international organisational law, making it unclear what is 'constitutionalist' about this wave. The organisational wave adopts international and international organisational law perspectives with little engagement with constitutional discourse, allowing international structures, such as sovereignty, to frustrate democracy.

4.3 The Circumstances of Democracy

4.3.1 Who

The plausibility of a *demos* beyond the state preoccupies global constitutionalist scholars.[105] From the discussions on democracy in the previous chapter, it is

[104] Franck, *Fairness in International Law and Institutions* (n 7) 482.
[105] Peters, 'Dual Democracy' (n 13) 303; Weiler, 'The Geology of International Law' (n 10); Paulus, 'The International Legal System' (n 1) 94. Trachtman discusses a WTO demos, see Trachtman, 'Constitutional Economics' (n 13) 227. Besson discusses the option of *demoi,* see Besson, 'Institutionalising Global *Demoicracy*' (n 16) 69. Cf Klabbers, 'Setting the Scene' (n 94) 23.

derived that the *demos* is a group of individuals that may be constructed through territory, nationality, or some looser sense of commonality.[106] Who falls within the *demos* is unclear in the organisational wave of global constitutionalist literature. This section considers the actors that are discussed with reference to democracy and the role of the international community in demarcating a *demos.*

The role of individuals within the *demos* is contested. Whilst a classical and republican model would prioritise the group over the 'active' individual, a liberal model focuses on the rights of individuals.[107] When democracy is discussed beyond the state, the fixation on the lack of *demos* means that these nuances are sometimes lost. This section will discuss the role of states and individuals within the construction of democracy. This section first considers the role of the international community in the discourse. It will then use Peters' distinction between an individual and a statist-track of democracy to explore the role of states. Finally, it explores the role of individuals and their relationship with the community, within this wave of global constitutionalist scholarship.

The International Community

The international community plays a central role within international and global constitutionalist discourse.[108] But, who falls within the community is contested.

[106] Chapter 2, section 2.3.2. Dobner argues that the idea of a homogenous society – or a 'closed society' – is a political fiction of democratic theory. Petra Dobner, 'More Law, Less Democracy? Democracy and Transnational Constitutionalism' in Petra Dobner and Martin Loughlin (eds), *The Twilights of Constitutionalism* (OUP 2010) 147.
[107] Chapter 2, section 2.3.2, text at fn 208-209.
[108]Alfred Verdross, 'Fundamental Human Rights, The Journey of an Idea' (1979-80) 8 Human Rights 20, 23; Hermann Mosler, *The International Society as a Legal Community* (Brill 1980) 15-16; Bruno Simma, 'From bilateralism to community interest in international law' (1994) 250 Recueil Des Cours 217, 244-245; Christian Tomuschat, 'Obligations arising for states without or against their will' (1993) 241 Recueil Des Cours 1, 307; Fassbender, 'The United Nations Charter

Whether it includes just states or also international organisations and non-state actors is debated. A pertinent question to this inquiry is whether the international community is an appropriate starting point for the Who of democracy.[109]

There is ambiguity around the meaning of the international community; whilst it can mean states,[110] it can also mean individuals of the world,[111] or it can also mean a collection of normative values.[112] Fassbender draws a distinction between the international society and community to show that community goes beyond actors, and suggests a commonality.[113] He argues that the international community can be said to be constituted of states, international organisations, peoples and minorities, belligerent parties, individuals, and special entities, which he states includes the Holy See.[114] Peters discusses the 'global' community as including states, organisations, individuals, transnational corporations, public-private partnerships, and NGOs.[115] The lack of clarity on the members of the international community makes it difficult to identify the Who of democracy.

Arguably, both the international community and the participants referred to in debates on global democracy are constructed from the same actors: namely a

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As Constitution of the International Community' (n 83). See also Besson, '*Ubi Ius, Ibi Civitas*' (n 20).

[109] O'Donoghue has already critiqued the use of community. Aoife O'Donoghue, *Constitutionalism in Global Constitutionalisation* (CUP 2014) ch 7.

[110] E.g. Mosler (n 108).

[111] See Philip Allott, *Eunomia: New Order for a New World* (OUP 1990) 415.

[112] von Bogdandy, 'Constitutionalism in International Law' (n 74) 234-235. See also, Samantha Besson, 'Whose Constitution(s)? International Law, Constitutionalism, and Democracy' in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009) 394-395.

[113] Fassbender, 'The United Nations Charter As Constitution of The International Community' (n 83) 564. For a discussion on the difference between society and community, see Besson, '*Ubi Ius, Ibi Civitas*' (n 20) 221-222.

[114] Fassbender, 'The United Nations Charter As Constitution of The International Community' (n 83) 597. Yet, on page 552 he had argued that international constitutionalism was concerned with states and the organisational structures.

[115] Peters, 'Membership' (n 13) 155. She argues that there is a need for a closeness and common objectives.

mix of individuals, states, NGOs. However, for Peters the roles of these actors are different. In relation to the international community, the relationship between individuals and states is conceptualised as follows: individuals are 'the ultimate normative source of international law' and the state acts for the benefit of its people.[116] In contrast, when democracy is the topic, it is *citizens* (and not individuals) that are conceived as the 'ultimate source of *political authority*'.[117] This change between individuals and citizens needs to be unpacked. It constructs a disconnect as 'citizens', rather than individuals, implies some form of membership (however loosely enforced) and this raises questions about how people are excluded.

Moreover, democracy is built from the *demos* – which means a group of people and not just individuals – and this can sit at odds with the protection of the individual.[118] The use of human rights provisions to revise sovereignty in light of the rights of the individual has the potential to shift the discussion away from groups of people (i.e. *demos*) towards individuals. However, as shown, democracy and constitutionalism work together to protect individual rights and collective decision-making.[119] Conflating democracy and constitutionalism, to prioritise the protection of the rights of individuals, undermines the idea of collective self-government.[120]

[116] Peters, 'Membership' (n 13) 155.
[117] Peters, 'Dual Democracy' (n 13) 264 (emphasis added).
[118] Besson, 'Sovereignty, International Law and Democracy' (n 61) 383; Cf Petersmann, 'European and International Constitutional Law' (n 61) 86.
[119] Chapter 2, section 2.2.1. Jürgen Habermas, 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles?' (2001) 29(6) Political Theory 766, 767.
[120] Volk argues that global constitutionalism places undue weight on individuals, and he criticises this individualism as it is evocative of a liberal approach. See Christian Volk, 'Why Global Constitutionalism Does not Live up to its Promises' (2012) 4(2) Goettingen Journal of International Law 551, 560. For a discussion on the tension between individuals and community, see Besson, 'Sovereignty, International Law and Democracy' (n 61) 383.

Furthermore, Peters talks of state responsibility in relation to the international community, but popular sovereignty when discussing democracy.[121] This suggests that citizens as actors within global democracy are considered sovereign, but sovereignty within the international community is contested, and is more likely to lie with the state. The relationship between democracy and popular sovereignty is contested,[122] but if the people are not sovereign they lack power over governments.

If the international community prioritises citizens rather than *demoi* and negates the sovereignty of the people, it is not an appropriate foundation for a discussion on democracy. To the extent that the international community refers to individuals, there is a concern about how the organisational wave seeks to balance the individual's interests with the collective decision-making of democracy. Furthermore, where the people are included, they are not considered to be sovereign. Constructing the international community in this way and using it as a unit of democracy within global constitutionalist scholarship, raises problems if democracy is a form of collective governance.

State and Individual

Peters argues that there are two tracks that can explain the approach to *demos* in global constitutionalism; the statist and the individualistic track.[123] Within the broad church of global constitutionalist scholarship, some favour a statist-track

[121] See above, section 4.2.1, text at fn 64-77.
[122] Chapter 1, section 1.5.1.
[123] Peters, 'Dual Democracy' (n 13) 264 - 265; See also, Thomas Giegerich, '"A Fork in the Road" – Constitutional Challenges, Chances and *Lacunae* of UN Reform' (2005) 48 German Year Book of International Law 29, 38.

and others favour a hybrid of the two tracks.[124] This sub-section outlines the two tracks and considers the relationship between the state and individual within global constitutional thought.

The 'statist-track' starts from the position that states are 'the ultimate reference point' in international law[125] and it prioritises the sovereign equality between states.[126] In other words, this track is developed from positivist international law, where the state is considered the dominant actor in global governance.[127] Whilst Peters challenges this position, and argues that within global constitutional law, there are differing obligations across the different actors and states are not 'the "primary" subjects of international law',[128] state-centricity underpins the approaches in this organisational wave.

The first way to discuss democracy in the statist-track is through the idea of the equality between sovereign states.[129] Franck, when initiating a discussion on democratic governance in international law, equated states with people, saying that states were 'free, equal, and autonomous beings'.[130] States could then be the unit of inter-state democracy.[131] The argument then runs that the representation of different *states* at international organisations is sufficient for

[124] Habermas, for example, has suggested that the UN Charter 'established a new constitutional order' and in this order states 'together with their citizens, [are] constitutive elements'. See Jürgen Habermas, 'Hat die Konstitutionalisierung des Volkerrechts noch eine Chance?' in Jürgen Habermas (ed), *Der gespaltene Westen* (Suhrkamp 2004) 113 cited in Gunther Teubner, 'Constitutionalising Polycontexturality' (2011) 20(2) Social and Legal Studies 210, 218.
[125] von Bogdandy, 'Constitutionalism in International Law' (n 74) 234.
[126] See Giegerich, '"A Fork in the Road"' (n 123) 38.
[127] Dieter Grimm, 'The Achievement of Constitutionalism and its Prospects in a Changed World' in Martin Loughlin and Petra Dobner (eds), *The Twilight of Constitutionalism?* (OUP 2010) 24; Volk (n 120) 560.
[128] Peters, 'Membership' (n 13) 179.
[129] ibid 190.
[130] Franck, *Fairness in International Law and Institutions* (n 7) 27. Cf Jeremy Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (2011) 22(2) EJIL 315, 323.
[131] For a discussion on this sort of inter-state democracy at the WTO, see Trachtman, 'Constitutional Economics' (n 13) 220.

international democracy.[132] However, within this approach, there is little connection to the people.[133] It is becoming apparent that states cannot be assumed to represent their citizens,[134] and in this model such representation is not even required. Whilst the modalities, such as participation and deliberation of actors are part of the discussion, the people are obscured.

A second way to approach democracy within the statist-track is to conceptualise the state as a conduit between international organisations and citizens of a state.[135] In this approach, states act on behalf of their citizens, with their legitimacy being derived from 'how they serve individuals as members of humanity'.[136] For this to amount to democratisation, the argument goes that states need to be democratic.[137] Tomuschat argues that any democratic legitimacy of international law is derived from the democratic nature of states.[138] The international organisations are 'democratised' to the extent that the Member States are democratic. Whether a state is democratic could be assessed using the range of democracy indices, but in the literature, reference is made to the literature on the 'norm of democratic governance', discussed in Chapter 3.[139]

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[132] See Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (Martinus Nijhoff Publishers 2009) 146. See also Trachtman who argues that democracy can include the empowerment of states at the WTO. Trachtman, 'Constitutional Economics' (n 13) 220. Buchanan notes that 'state majoritarian' democracy is considered a panacea for the dominance of the UN by some states. See, Buchanan, 'The Legitimacy of International Law' (n 92) 79, 86.
[133] Trimble (n 90) 1958-1959.
[134] See above at section 4.2.1.
[135] Peters, 'Dual Democracy' (n 13) 264.
[136] Peters, 'Membership' (n 13) 179.
[137] Peters, 'Dual Democracy' (n 13) 264; Giegerich, '"A Fork in the Road" (n 123) 40. See also, Duxbury (n 7) 299-301.
[138] See von Bogdandy, 'Constitutionalism in International Law' (n 74) 236.
[139] The international legal literature discussed in Chapter 3. For example: Peters, 'Dual Democracy' (n 13) 264; Brunkhorst, 'Constitutionalism and Democracy in the World Society' (n 61) 191; Petersmann, 'European and International Constitutional Law' (n 61) 86; Besson, 'Institutionalising global *demoi*-cracy' (n 16) 61-62; Besson, 'Sovereignty, International Law and Democracy' (n 61) 382.

Peters, for example, looks at the potential requirements for democracy in statehood and the recognition of governments.[140]

This approach was critiqued previously and it assumes that individuals are represented by the states and that states are appropriate sites for decision-making.[141] There is an assumption within the statist-track that individuals are 'entirely and properly "mediated" by their states in international organizations'.[142] However, as the previous chapter demonstrated, the human rights framework restricts the right to vote to citizens,[143] thus potentially ostracizing other persons in the population. Moreover, within international law the executives, rather than parliaments act as state representatives and as is discussed in more detail below, parliaments' role can be fairly limited.[144] This means that the link between populations and international organisations is stretched. Furthermore, even if states are democratic, Dahl argues, domestic democratic procedures are not concerned with foreign relations, and he argues that populations can be poorly informed about inter-state decisions.[145] Thus, states are not appropriate conduits.

The state-based framework also excludes those persons that fall outside states (e.g. diaspora, stateless persons) or are not represented by states as in some cases the rights of minority groups are not protected. Moreover, the interconnectedness of globalisation means that decisions in one country can impact on another and yet, a state's domestic democracy does not represent or

[140] Peters, 'Membership' (n 13) 182.
[141] See above, section 4.2.1.
[142] Peters, 'International Organizations: Effectiveness and Accountability' (n 21).
[143] See Chapter 3, section 3.3.1.
[144] See below, section 4.3.3, text at fn 247-255.
[145] Robert A Dahl, *On Democracy* (Yale University Press 1998) 115-116.

necessarily consider another state's population.[146] As noted by Paulus, transnational decision-making cannot be fixed by democracy within the states.[147] The states are no longer sufficient containers of decision-making. Transnational concerns, such as terrorism, global poverty and climate change, mean that domestic states are unable to provide 'the collective answer' necessary to address these problems.[148] So the statist-track is not conducive to the type of *global* democracy that is proffered in this organisational wave.

One of the implications of the statist-track and the idea that states act as conduits is that democracy becomes bounded by the state. For Petersmann, initially, democracy takes place within the state and the role of the international organisation (in this case the WTO) is to promote democracy within the state.[149] It is not sufficient for global constitutionalists to end their inquiry at state-level democracy because the state is not the sole locus of decision-making, and to limit the inquiry to states excludes persons within states who are not citizens and persons outside of the state framework that might be affected by decisions.

The individualist-track places individuals at the core of international law.[150] Traditionally, in international law, individuals are objects of international law.[151] This individualist-track builds on a trend within international legal scholarship both to revise this conceptualisation of individuals and the importance of state

[146] Paulus, 'The International Legal System' (n 1) 96.
[147] ibid 96.
[148] ibid 95.
[149] Ernst-Ulrich Petersmann, 'Constitutionalism and International Organizations' (1996-1997) 17 Northwestern Journal of International Law and Business 398, 398, 405 and 435.
[150] See Petersmann, 'European and International Constitutional Law' (n 61) 96; Peters, 'Membership' (n 13); Peters, 'Dual Democracy' (n 13).
[151] See Lassa Oppenheim, *International Law* (vol 1, Longmans 1905) 341; Hersch Lauterpacht, 'The Subjects of International Law' in E Lauterpacht (ed), *International Law: Collected Papers* (vol 5, CUP 2004) 279; James Crawford (ed), *Brownlie's Principles of Public International Law* (OUP 2012) 115-121.

sovereignty.[152] On this track, international organisations should be accountable to the individuals and individuals should participate or be represented at the international level.

There is an ambiguity around the meaning of individual and how these individuals are grouped, if at all.[153] On the one hand, they are conceptualised as individuals.[154] Individuals (or natural persons) as a collective constitute humanity.[155] On the other hand, they are conceptualised as citizens.[156] The discussion in the previous chapter on citizens, demonstrated that there is a disconnect in human rights law between the population as a whole and citizens.[157] Llanque critiques the distinction between individuals and citizens; he exposes that the citizenry is a section of the population, whereas individuals can be said to constitute the people or the population.[158] Focusing on citizens has the potential to exclude persons. The organisational wave of global constitutionalist literature suggests its notion of democracy encompasses humanity, and yet building this idea of democracy on citizenship limits the franchise.

[152] See for example, Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1995) 50*;* Robert McCorquodale, 'The Individual in the International Legal System' in Malcolm Evans (ed), *International Law* (OUP 2006) 311. For a discussion see, Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (CUP 2011) 38-44 and 355-356.
[153] Besson argues that the International Community includes a 'community of individuals' and 'groups of individuals'. Besson, 'Whose Constitution(s)?' (n 112) 395. For a discussion on the tension between individuals' and groups of individuals, see Besson, 'Sovereignty, International Law and Democracy' (n 61) 379 and 383.
[154] Peters, 'Dual Democracy' (n 13) 265.
[155] This is a cosmopolitan ideal. See David Held, *Cosmopolitanism: Ideals and Realities* (Polity Press 2010) 70.
[156] See Peters, 'Dual Democracy' (n 13); Føllesdal uses individuals and citizens interchangeably. Føllesdal (n 13) 601-604.
[157] Chapter 3, section 3.3.1.
[158] Marcus Llanque, 'Constitutional Membership' in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (OUP 2010) 162 – 163.

Within global constitutionalist thought there are several approaches to citizenship. Firstly, there is domestic citizenship and as such, the individuals are still conceptualised as being within a state.[159] Secondly, there is discussion on a global citizenry.[160] Cosmopolitanism is built on an 'all-inclusive citizenship', [161] in which all of humanity is a member. Building on the cosmopolitan approach, Peters discusses a global citizenry, and although she claims that the global citizen should sit alongside state citizenry, she then dismisses the global idea as too abstract.[162] Thirdly, there is an acknowledgement of multiple *demoi.*[163] For example, the EU is described as constituted of multiple *demoi* rather that a single *demos*. Within this approach, the global citizenry sits alongside other allegiances, including state citizenship and local or regional identities.[164] The fluidity of *demoi* offers an attempt to move away from the state-contained *demos*. Peters' discussion revolves around rights and duties of citizens,[165] so it is imperative to reflect on how ideas of citizenship can limit the franchise, especially as scholars rarely indicate what is meant by 'citizen' and the term 'citizen' is used interchangeably with individuals.

In addition to individuals and citizens, other non-state groups are raised as the relevant unit of democracy. One such group is the idea of relevant stakeholders.[166] Macdonald and Macdonald use the term 'stakeholder' to refer to 'individuals affected (in ways that implicate democratic values of autonomy and

[159] Petersmann, 'Constitutionalism and International Organizations' (n 149) 433.
[160] Peters, 'Dual Democracy' (n 13) 297.
[161] Llanque, 'Constitutional Membership' (n 158) 166.
[162] Peters, 'Dual Democracy' (n 13) 298-300.
[163] See for example, Besson, 'Institutionalising Global *Demoi*-cracy' (n 16). For a discussion on *demoi*, see James Bohman, 'From *Demos* to *Demoi*: Democracy Across Borders' (2005) 18(3) Ratio Juris 293.
[164] Peters, 'Dual Democracy' (n 13) 297.
[165] ibid 298-300.
[166] See Paulus, 'The International Legal System' (n 1) 95; Besson, 'Whose Constitution(s)?' (n 112) 396.

equality)'.[167] The use of stakeholder as a unit will require a method of determining those that are 'affected', and political scientists have proposed a number of different methods.[168] This is another mechanism to demarcate the *demos* without relying on the state boundaries. However, it is not always clear what is meant by a stakeholder, they are not necessarily individuals as companies and private actors can have a stake in a decision. Though stakeholder is predominantly invoked to refer to relevant individuals, it can also be used to refer to private actors and thus exclude persons.[169] This complexity around the use of stakeholder is illustrative of the problem of ascertaining the Who in global constitutionalist literature. The lack of clarity around Who risks talking about different actors without linking them back to the people.

Take, for example, the WTO. The WTO is criticised for its democratic deficit.[170] To rectify this, Shaffer proposes a consultative inter-parliamentary body, where national politicians (most likely members of 'trade committees of national parliamentary bodies') attend.[171] He argues that a WTO parliamentary body would facilitate the participation of stakeholders.[172] Yet, as discussed above, the meaning of stakeholder is contested within this wave and Shaffer refers to countries, persons, and businesses as potential stakeholders.[173] He proposes to

[167] Macdonald and Macdonald (n 48) 94.
[168] Robert E Goodin, 'Enfranchising All Affected Interests, and Its Alternatives' (2007) 35(1) Philosophy and Public Affairs 40, 48; Nancy Fraser, *Scales of Justice: Reimaging Political Space in a Globalizing World* (Columbia University Press 2010) 95-96; Laura Valentini, 'No global demos, no global democracy? A systematization and critique' (2014) 12(4) Perspectives on Politics 789; Thomas Christiano, 'Is Democratic Legitimacy possible for International Institutions?' in Daniele Archibugi, Mathias Koenig-Archibugi and Raffaele Marchetti (eds), *Global Democracy: Normative and Empirical Perspectives* (CUP 2011) 7.
[169] James Tully, Jeffrey L Dunoff, Anthony F Lang JR, Mattias Kumm and Antje Wiener, 'Editorial: Introducing global integral constitutionalism' (2016) 5(1) Global Constitutionalism 1, 8.
[170] Mendes (n 89) 152.
[171] Gregory Shaffer, 'Parliamentary Oversight of WTO Rule-Making: The political, normative, and practical contexts' (2004) 7(3) Journal of International Economic Law 629, 651-652.
[172] ibid 629.
[173] ibid 649.

assess the democratic nature of this assembly by the extent to which 'less powerful stakeholders' participate, but given that this could be countries or businesses, it does not ensure a genuine link to the people.[174]

Moreover, this proposal is predicated on a state-based idea of democracy. The representatives are elected for their role as national politicians and not international politicians. Although the Where shifts beyond the state, the Who is girded by the state, thus potentially excluding relevant members of the *demos*. If the Circumstances of Democracy are to align, the Who must move beyond the state as well. How this is achieved is subject to much controversy, with debates ranging from all-affected and all-subjected principles to new ideas of constituency.[175] This thesis does not offer the answer, but rather initiates a discussion on the types of questions that should be asked to avoid the sorts of pitfalls made in the current literature.

Moreover, this discussion on stakeholders raises a question about the role of the individuals. As noted previously, classical and republican democratic theory subsumes the individual within the community.[176] Whilst the liberal approach focuses on rights, the republican approach constructs an active concept of citizenship.[177] Llanque outlines that within a constitution, citizens are given various roles and attributes: rational thought, dedication to the common good, and indifference to their own personal benefit.[178] In republican thought, where the

[174] ibid 629.
[175] Goodin (n 168) 49; Jane Marian Rooney, 'The Paradox of Extraterritoriality at the European Court of Human Rights: A Global Constitutionalist Approach' (PhD thesis, Durham University 2016) section 3.3.2; O'Donoghue, *Constitutionalism in Global Constitutionalisation* (n 109) 77.
[176] Chapter 2, section 2.3.2, fn 208-217.
[177] Llanque, 'Constitutional Membership' (n 158) 170-171.
[178] ibid 165.

citizen is virtuous, the individual has to go through a process to transform into a citizen.[179] Liberalism rejects this for it potentially limits who is a citizen and taken to the extreme could become an 'educational dictatorship', where individuals are taught how to behave as citizens.[180] This demonstrates tensions around how to reconcile the individual and the collective. Even within the cosmopolitan ideal of an all-inclusive citizenry, there is a standard of rationality and responsibility required.[181] Focusing on individuals, as the organisational wave does, overlooks this problem.

The global constitutionalist scholars in this organisational wave do not explicitly engage with how the relationship between the individual and the collective impacts on democracy. Rather a liberal model is adopted, where the individual is prioritised.[182] The idea of individuals having particular roles or character traits within the community is also not challenged by the global constitutionalists. It is not sufficient, as von Bogdandy suggests, to say that the international community merely amounts to a 'self-aware and organized group of human beings'.[183] For the individuals and the citizens within such a community have particular roles and competencies attached to them.[184] Global constitutionalist scholarship should engage with the relationship between the individual and the collective, which is part of the broader tension between constitutionalism and democracy.

[179] ibid 173.
[180] ibid 174-175.
[181] See Ernst-Ulrich Petersmann, *Multilevel Constitutionalism for Multilevel Governance of Public Goods: Methodology Problems in International Law* (Bloomsbury Publishing 2017) 328; Peters, 'Dual Democracy' (n 13) 299.
[182] See, Volk (n 120) 560. Besson, 'Sovereignty, International Law and Democracy' (n 61) 383.
[183] von Bogdandy, 'Constitutionalism in International Law' (n 74) 234.
[184] Feminist approaches to citizenship critique the values attached to membership. See Kathleen B Jones, 'Citizenship in a woman-friendly polity' (1990) 15(4) Signs 781, 784; Ruth Lister, 'Citizenship: Toward a feminist synthesis' (1997) 57 Feminist Review 28, 31.

There is no one approach to the Who within global constitutionalist literature. A range of actors, from states, individuals, relevant stakeholders, and non-state actors are discussed. A problem with this is that these actors do not ensure people have power in decision-making. The link to the *demos* as the unit of democracy, so that it is people who have the power over decision-making, is often stretched to accommodate the role of states and NGOs in current global decision-making.

4.3.2 What

When it comes to the question of the extent of the power of the people, there is no one answer in the organisational wave. Building on the assumption that democracy within the state cannot be directly transferred to the global level, global constitutionalists in this wave seek to revise democracy, and as such different definitions of democracy are proffered, from the idea that people should influence political decisions, to the notion that people should decide the rules that 'govern their collective life'.[185] Whilst some scholars argue that democracy requires popular sovereignty, others are more concerned with the influence of people within decision-making. This section considers the difference between voice and vote to explore how the organisational wave approaches the What of democracy.

Popular Sovereignty

[185] Dunoff and Trachtman, 'A Functional Approach to International Constitutionalization' (n 14) 25.

The meaning of popular sovereignty in this wave of global constitutionalist scholarship is unclear as invocations of popular sovereignty are infrequent and lack detail. Whilst Dobner argues that democracy is concerned with popular sovereignty within states,[186] it is not discussed by Trachtman and Dunoff, nor Fassbender, and mentioned only in passing by Cottier.[187] In this wave, popular sovereignty can be the source of governmental legitimacy,[188] and it can invoke the idea of an absolute and indivisible idea of sovereignty located in the people.[189] Petersmann, however, draws distinctions between political sovereignty, constitutional sovereignty, democratic sovereignty and individual sovereignty.[190] Though he does not define popular sovereignty, he argues that 'human rights and popular sovereignty include citizens' rights to participate in the election of governments and in the exercise of government power which must be based on "the will of the people"'.[191] Whilst the idea of participating in elections invokes a liberal idea of popular sovereignty, the suggestion that the will of the people underpins the exercise of government is suggestive of a republican ideal.[192] Conflating the liberal and republican approaches to popular sovereignty, gives rise to an ambiguity of the scope of power held by the people. This lack of clarity means that it is difficult to ascertain the What of democracy.

[186] Dobner, 'More Law, Less Democracy?' (n 106) 146. See also, Petersmann, 'European and International Constitutional Law' (n 61) 85.
[187] Dunoff and Trachtman, 'A Functional Approach to International Constitutionalization' (n 14); Fassbender, *The United Nations Charter as the Constitution of the International Community* (n 132); Thomas Cottier, 'Multilayered Governance, Pluralism, and Moral Conflict' (2009) 16(2) Indiana Journal of Global Legal Studies 647, 651.
[188] Cottier, 'Multilayered Governance, Pluralism, and Moral Conflict' (n 187) 651.
[189] Stephen Gardbaum, 'Human Rights and International Constitutionalism' in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World?: Constitutionalism, International Law, and Global Governance* (CUP 2009) 255; Peters, 'Dual Democracy' (n 13) 277 fn 73.
[190] Petersmann, 'State Sovereignty, Popular Sovereignty and Individual Sovereignty' (n 14).
[191] Petersmann, 'European and International Constitutional Law' (n 61) 86.
[192] See Chapter 1, section 1.5.1. For a discussion on the difference, see Jürgen Habermas, 'Human Rights and Popular Sovereignty: The Liberal and Republican Versions' (1994) 7(1) Ratio Juris 1.

Voice or Vote

As a political process of decision-making, democracy is traditionally defined as 'government of the people, by the people, for the people'.[193] Yet, there are repeated attempts to weaken the role of people within democracy in this wave of global constitutionalist literature. Peters, for example, cites this quote by Lincoln, and then states that this means; 'democratic government requires that the citizens can give their input to decisions of law and policy, and that political processes produce outputs in the interests of the citizens'.[194] 'Input' is weaker than 'by the people' or self-government and it facilitates a discussion on deliberation or participation without the need for the assurance that the individuals have power in the decision-making process or over their representatives.

This weaker approach to democracy is manifested in the tension between voice and vote.[195] The idea of giving persons 'voice' reoccurs throughout the global constitutionalism debates.[196] Cottier argues that '[a]ll polities have a voice and modes of such voice can vary, ranging from direct democracy to representation by elected government'.[197] Peters argues that individuals should have a right to

[193] Abraham Lincoln, 'Gettysburg Address' of 19 November 1863.
[194] Peters, 'Dual Democracy' (n 13) 265. See also Zürn and Walter-Drop who argue that democracy refers to the idea of people being able to exert influence. See, Michael Zürn and Gregor Walter-Drop, 'Democracy and representation beyond the nation state' in Sonia Alonso, John Keane, Wolfgang Merkel (eds), *The Future of Representative Democracy* (CUP 2011) 260.
[195] Franck used voice and vote interchangeably when he discussed processes at international institutions. See Thomas Franck, *Fairness in International Law and Institutions* (n 7) 479. Trachtman also uses voice and vote interchangeably, see Trachtman, 'Constitutional Economics' (n 13) 221.
[196] Thomas Cottier, 'Towards a Five Storey House' in Christian Joerges and Ernst-Ulrich Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and International Economic Law* (Hart Publishing 2011) 530; Paulus, 'The International Legal System' (n 1) 96; Peters, 'Dual Democracy' (n 13) 301; Daniel Halberstam, 'Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States' in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009) 337; Besson, 'Whose Constitution(s)?' (n 112) 399.
[197] Cottier, 'Towards a Five Storey House' (n 196) 530.

be heard and NGOs should be given a voice because they operate as an opposition.[198] But, this focus on 'voice' raises questions about how the What of democracy is conceptualised in this wave of global constitutionalist scholarship.

Peters sets up a distinction between voice and vote. In her emphasis on voting, she suggests that the vote is the core of democracy and voice is a weaker alternative. Deliberative and participatory models of democracy, for Peters, are not sufficient because they do not end in a vote and democracy requires both deliberation and voting.[199] One of the problems with this approach is that placing a liberal democratic model, which focuses on elections, on a pedestal has the disadvantage of mythologizing voting. In fact, decisions can be made without voting; deliberative democracy proposes that decisions are made through consensus or negotiation.[200] The tension between voice and vote exposes a conflation of the Circumstances. Focusing on voting is an example of prioritising the How over the What. The What asks about the scope of the power of the people; for democracy people should have the power to make decisions. For Peters, voting as a How is offered instead of a reflection on the scope of power.

Voice is used as a weaker alternative to voting, but how voice is allocated exposes a lack of reflection on the What of democracy. The participation of NGOs in international law and governance is a trope of global constitutionalist scholarship.[201] Peters argues that NGOs are not accountable to the people, so

[198] Peters, 'Dual Democracy' (n 13) 300.
[199] Peters, 'Dual Democracy' (n 13) 270. Føllesdal also prioritises electoral mechanisms. See, Føllesdal (n 13) 600.
[200] Wheatley, *The Democratic Legitimacy of International Law* (n 7) 106.
[201] Simma, 'From bilateralism to community interest in international law' (n 108) 262; Peters, 'Dual Democracy' (n 13) 315. Klabbers debates whether the participation of civil society actors is constitutional. See Jan Klabbers, 'Autonomy, constitutionalism and virtue in international institutional law' in Nigel D White and Richard Collins (eds), *International Organizations and the*

they cannot vote.[202] For Peters, giving NGOs a voice strikes an appropriate balance and she acknowledges that the participation of NGOs is not democracy *per se.* [203] NGOs are not necessarily accountable to the people, they therefore break the link to the people. Their voice does not amount to people having the power to make collective decisions because the link between the people and the NGO is weak and NGOs are not involved in decision-*making* if they only have a voice. In this wave, NGO participation is used as a How, without reflecting on the Who and What of democracy.

The What of democracy is not consistent across global constitutionalist scholarship. Choices are made by scholars on the types of decisions that the people can make. There is a suggestion that the people are involved in the creation of constitutional norms (which would make them constituent power holders). Armingeon et al., argue that the people are involved in the creation and development of 'global constitutional norms'.[204] They go on to argue that people should also be part of the development and implementation of 'global norms',[205] which may not be constitutional. This raises questions about whether people are involved in constitutional or ordinary law-making or governance more broadly. Though positivist international lawyers argue that states, as legal persons, are the definitive actors within law-making, global constitutionalist scholars challenge this to make individuals 'co-law makers'.[206] What sorts of decisions the people

Idea of Autonomy: Institutional Independence in the International Legal Order (Routledge 2011) 130.

[202] Peters, 'Dual Democracy' (n 13) 317.

[203] ibid 317.

[204] Klaus Armingeon, Karolina Milewicz, Simone Peter and Anne Peters, 'The constitutionalisation of international trade law' in Thomas Cottier and Panagiotis Delimatsis (eds) *The Prospects of International Trade Regulation: From Fragmentation to Coherence* (CUP 2011) 78.

[205] ibid 79.

[206] See Peters, 'Dual Democracy' (n 13) 300; Thomas Kleinlein, 'Non-state actors from an international constitutionalist perspective: participation matters!' in Jean d'Aspremont (ed),

can make is left open. Moreover, the people's ability to exercise this role is frustrated given the weak links to them.

The What is under-theorised in the organisational wave. There are different perspectives on what decisions people have power over, and a lack of agreement on the size of people's power. The role of popular sovereignty in democracy is not sufficiently engaged with, and the impact of shifting between voting and voice is not debated in relation to the changing scope of the power of the people. This means that whilst the discourse prioritises processes, there is a deficit of debate on *why* these procedures are 'democratic'; global constitutionalist scholarship must reflect on all of the Circumstances.

4.3.3 When

Considering When democracy takes place requires a reflection on both everyday decision-making and constitutional moments. Within the organisational wave of global constitutionalist scholarship, the emphasis on reform procedures (such as, parliamentary assemblies and changes to voting structures) are geared towards everyday decision-making. Where there are reflections on the constitutional moment, and questions of constituent power, they are *ex post facto* considerations of already established international organisations. The everyday decision-making dominates discussions on democracy.[207] This section first considers the discourse on parliamentary assemblies, as it reoccurs through the wave, and then it will explore how the wave discusses constituent power.

Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law (Routledge 2011) 41-42.

[207] de Búrca, 'Developing Democracy' (n 39) 123.

The organisational wave is preoccupied with parliamentary-esque bodies.[208] Scholars discuss the potential for a Parliamentary Assembly at the UN and parliamentary bodies at the WTO. Scholars debate what actors would participate in the assembly, the types of processes, and the powers of the assembly. This focus on parliamentary bodies is criticised and Brunkhorst argues that parliaments are no longer 'the one and only true representative of the general will of the people'.[209]

At the UN, there are two prominent proposals; the UN Parliamentary Assembly (UNPA), championed by Bummel and supported by Peters,[210] and a second chamber of the UN General Assembly. The UNPA would be a subsidiary organ of the UN General Assembly, created by a decision of the UN General Assembly under Article 22. For Bummel, and the UNPA campaign, representatives will eventually be directly elected and grouped according to political disposition (something akin to but falling short of formal political parties).[211] The UNPA would initially be a consultative body, and it is envisioned that it would operate as a watchdog for the UN.[212]

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[208] For example, Jost Delbrück, 'Exercising Public Authority Beyond the State: Transnational Democracy and/or Alternative Legitimation Strategies' (2003) 10(1) Indiana Journal of Global Legal Studies 29, 36. See also Peters, 'International Organizations: Effectiveness and Accountability' (n 21); See Thomas Christiano, 'The Legitimacy of International Institutions' in Andrei Marmor (ed), *The Routledge Companion to Philosophy of Law* (Routledge 2012) 391-392.
[209] Brunkhorst, 'Constitutionalism and Democracy in the World Society' (n 61) 197.
[210] Peters, 'Dual Democracy' (n 13) 325; Andreas Bummel, 'The Composition of a Parliamentary Assembly at the United Nations: A Background Paper of the Committee for a Democratic UN' (3rd edn, Committee for a Democratic UN 2010) < https://www.democracywithoutborders.org/resources/2010seats_en.pdf> accessed 9 September 2017.
[211] UNPA Campaign, 'The proposal of a UN Parliamentary Assembly' <http://en.unpacampaign.org/proposal/> accessed 9 September 2017.
[212] Ibid.

The alternative is to create an additional chamber at the UN General Assembly. Franck proposes that the UN General Assembly becomes a two-chamber parliament, and the new chamber would be directly elected on the basis of universal suffrage.[213] He suggests that decisions might be adopted on a simple majority of both chambers, rather than the two-thirds majority set out in the UN Charter.[214] Franck does not grant this chamber law-making powers, rather the assembly can make recommendations.[215] He acknowledges that the powers granted to this second chamber are limited, and that state consent would still be required to pass resolutions.[216] For Franck, representation by governments is insufficient, as it excludes the voices of indigenous communities.[217] He argues that elected representatives would have to be responsive to the interests of these communities.[218] Peters also proposes to introduce a second chamber of the UN General Assembly that is constituted of representatives of peoples or citizens.[219]

These reforms can be critiqued using the Circumstances of Democracy. The Who, for both Franck and Peters, attempts to move away from the inter-state conceptualisation of democracy as there is a focus on citizens electing representatives. However, as is noted above the use of citizens here is ambiguous and might refer to states' citizens or a global citizenry.[220] If it refers to states' citizens, the *demos* is still state-based. As noted above, state-based *demoi* are insufficient for transnational democracy, because they exclude

[213] Franck, *Fairness in International Law and Institutions* (n 7) 483.
[214] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Article 18(3); Franck, *Fairness in International Law and Institutions* (n 7) 484.
[215] Franck, *Fairness in International Law and Institutions* (n 7) 484.
[216] ibid 484.
[217] ibid 480.
[218] ibid 483.
[219] Peters, 'Membership' (n 13) 196.
[220] See above, section 4.3.1, text at 161-167.

persons.[221] Furthermore, Franck argues that elected representatives will be responsive to minorities, but the discussion on the relationship between the majority and minority in a *demos* is more complicated, with the minority potentially being subsumed within a majoritarian model. To avoid this, more than elections is needed to ensure that the views and interests of disadvantaged minorities are protected. The What of democracy is not adequately considered as these are consultative bodies with limited power and there is little detail to explain why there is a shift from super to simple majority, which influences the scope of the people's power. The focus on the construction of an institutional model, is a focus on How and this institutional focus is at the expense of reflecting on the What questions.

Reforms to the UN General Assembly include changes to voting. Peters proposes to introduce a voting system within the UN General Assembly that is based on population size, but also potentially Gross Domestic Product (GDP).[222] Using the Circumstances, these reforms can be critiqued. This would still be a state-bound conceptualisation of the Who, and thus persons excluded or marginalised by that state-based system would remain on the peripheries and unrepresented. With respect to What, it is still not the people who have power in decision-making, but governments. As Simma argues, government representatives 'have their own logic',[223] they operate to defend the national interest and the interest of the organisation,[224] which could undermine the will of the people. Furthermore, her suggestion to introduce voting according to GDP is not further elaborated on. Voting based on GDP sits uneasily with the Circumstances, because the Who is states and not people, and the What is restricted according to finances. Whilst it

[221] Paulus, 'The International Legal System' (n 1) 96.
[222] Peters, 'Membership' (n 13) 196.
[223] Simma, 'From bilateralism to community interest in international law' (n 108) 262.
[224] Peters, 'Dual Democracy' (n 13) 294-295.

is arguable that the GDP of a state could make it more or less affected by a decision, it requires further analysis to equate this voting structure with ideas of people having power. It would need to be argued that an all-affected principle was being used to demarcate the *demos* and that GDP was a criterion. This highlights the lack of reflection on the Who and What, and the need to ask about these Circumstances.

The controversy surrounding the creation of a parliamentary body highlights how the scholarship in this wave rejects a role for democracy in constitutional decision-making. Reform to an organisation so as to introduce a parliamentary assembly, for the most part, would require treaty amendment.[225] International treaties are adopted and amended by states and not individuals. If global constitutionalist scholarship was concerned with the role of democracy in the creation of foundational law, there would be a discussion on whether individuals can hold the power to create international organisations. Peters briefly explores whether civil society could construct a Parliamentary Assembly.[226] She argues that civil society, at present, is not strong enough to construct such a body.[227] She then goes on to question whether this Parliamentary Assembly, constructed by civil society, would have a foundation in law. This implies that for a body to have a foundation in law it must be constituted by states. In international law, states are the only subjects and only states can make law. Nevertheless, a global constitutionalist discourse that advocates democracy, would surely reflect on the problem of placing states as constituent power, and the need for constituent power to shift to the people.

[225] Peters does give the example of changes to the UN General Assembly that could be adopted under Article 22 of the UN Charter. Peters, 'Dual Democracy' (n 13) 325.
[226] Peters, 'Dual Democracy' (n 13) 320.
[227] ibid 320.

Moreover, there are a number of instances in Peters' discussion on the construction of a Parliamentary Assembly where the state interests are allowed to trump the hypothetical will of the people. She argues that civil society would not be able to construct a Parliamentary Assembly because 'numerous governments would not allow elections in their countries',[228] that even if such a body was created, its powers of law-making would be limited because, she argues, texts of treaties would 'still be subject to ratification by states'.[229] Peters tries to construct a model where people and states are 'co-lawmakers'.[230] The problem is that states are still given priority. Her normative position, to introduce democracy, is then restricted by her assessment of the reality of international law. The reliance on state consent and state sovereignty undermines a role for democracy in constituent power.

The question of constituent power is most prominent in Fassbender's discussion on the foundation of the UN Charter as the international constitution. For Fassbender, there is a dialectal relationship between the international community and the international constitution;[231] as such he does not need to 'presuppose the existence of the community' as all that is required is that the states agree to establish a constitution.[232] Peters adopts a similar approach.[233] Peters argues that the global community and the global constitution are in a dialectical relationship and that the *demoi* of global democracy are not pre-established, but

[228] ibid 320.
[229] ibid 320.
[230] ibid 300.
[231] Fassbender, 'The United Nations Charter As Constitution of The International Community' (n 83) 561. See also Peters, 'Membership' (n 13) 154.
[232] Fassbender, 'The United Nations Charter As Constitution of The International Community' (n 83) 561.
[233] Peters, 'Membership' (n 13) 153-154.

constructed. This dialectic approach between community and constitution helpfully contests the argument that democracy is not possible at the global level because it lacks a global *demos*. In this dialectical approach, the global *demos* does not have to be pre-established, but can be constructed via constitutionalisation.

However, Besson argues, that there are two parts to the creation of a constitution; the creation of the community and the creation of the constitution.[234] How the community is demarcated, whether through nationality, ethnicity, other forms of commonality, is not necessarily democratic.[235] For Besson, the process of creating and adopting a constitution, from the democratic perspective, needs to be democratic.[236] For democratic constitutionalists, the constitution is written 'by the people', there is a constituent power expressed at a particular moment and this process has to be democratic.[237] Besson argues that there needs to be a process of democratic decision-making, both in the design and adoption of the constitutional system.[238] Armingeon et al., for example, argue that 'a global constitutional order needs a democratic decision-making system for producing and developing global constitutional norms';[239] or in other words, a democratic foundation to a global constitutional system.

Adopting the dialectic approach conflates these two stages. Arguing that the people are constructed through a process of constitutionalisation, conflates the

[234] Besson, 'Whose Constitution(s)?' (n 112) 397.
[235] ibid 397.
[236] ibid 397.
[237] See Chapter 2, section 2.2.2.
[238] See for example, Besson, 'Whose Constitution(s)?' (n 112) 389.
[239] Armingeon et al., (n 204) 78. See also Dunoff and Trachtman, 'A Functional Approach to International Constitutionalization' (n 14) 25.

two issues of community and constitution, and allows global constitutionalists to sidestep questions about whether the people construct the constitution and whether it was adopted democratically.[240]

For Fassbender, what is required is that the states agree to establish a constitution.[241] There are two implications of this for democracy. The international community for Fassbender is more than just the states (and for other scholars it includes a plethora of actors).[242] Focusing on the consent of states, excludes the other actors within the international community, so, for Fassbender, whilst such actors are considered to form part of the international community, they do not have to consent to the constitution. Fassbender's argument presupposes that states act as conduits for their citizens. Indeed, he argues that the states acted as representatives of the nations at the San Francisco Conference in 1945.[243] The Charter states 'We, the Peoples of the United Nations' and Fassbender argues that this refers to the 'nations' or the peoples, rather than just the states. Constituent power, he argues lies with the people and he endorses the idea that this reflects a 'democratic basis' of the UN Charter.[244] Yet, he argues that it would be impractical and unnecessary to require direct action or direct representation of the people of the world because the states are sufficient representatives.[245] However, this is not self-evident as the Coordination Committee of the UN

[240] For example, Peters argues that there is a global constituent power, but not does outline who this refers to. Peters, 'Membership' (n 13) 154.
[241] Fassbender, 'The United Nations Charter As Constitution of The International Community' (n 83) 561.
[242] ibid 532, 563-564. See above, section 4.3.1, text of fn 113-117.
[243] Fassbender, *The United Nations Charter as the Constitution of the International* Community (n 132) 91-92.
[244] Bardo Fassbender, '"We the Peoples of the United Nations": Constituent Power and Constitutional Form in International Law' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (OUP 2012) 286-288.
[245] Fassbender, *The United Nations Charter as the Constitution of the International* Community (n 132) 93.

Charter stated that it was the governments that were represented and not the people.[246] Furthermore, and as noted above, states and governments cannot be assumed to be representative of affected persons. Thus, the link to the people and to democratic decisions is weak.

Continuing his discussion on constituent power, Fassbender argues it is sufficient for democracy that there is a process of ratification that is 'in accordance with respective constitutional processes'.[247] Yet, the ratification process Fassbender speaks of does not necessarily have to link to the people or parliaments,[248] thus potentially denying a link to people. Within this wave of global constitutionalist scholarship, emphasis is often placed on the ratification of the treaty establishing the international organisation.[249] In particular, there is an argument that the role of parliament in the ratification of a treaty is democratising.[250] Merkel argues that democratic legitimacy can be derived from 'the process of approval by parliaments and citizens of Member States through referenda on acceptance of the organisation's founding treaty'.[251] If this were accurate, it would provide an example where democracy takes place with respect of fundamental law. However, this role of parliaments within the ratification process needs to be unpacked. There are varying practices with respect to the parliament in the

[246] Summary Report of Thirty-fifth Meeting of Coordination Committee (20 June 1945) 17 United Nations Information Organisation 276 cited in Fassbender, '"We the Peoples of the United Nations"' (n 244) 287-288. See also Hans Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (Stevens 1950) 7.
[247] UN Charter, Article 110 para 1. Fassbender, '"We the Peoples of the United Nations"' (n 244) 289
[248] As the International Law Commission notes in its guidance, states adopt their own ratification processes. International Law Commission, 'Draft Articles on the Law of Treaties with Commentaries' (1966) II Yearbook of the International Law Commission 187, 189-190.
[249] Petersmann, 'Constitutionalism and International Organizations' (n 149) 433. See also Fassbender, '"We the Peoples of the United Nations"' (n 244) 289.
[250] Petersmann, 'Constitutionalism and International Organizations' (n 149) 433.
[251] Wolfgang Merkel, 'Legitimacy and Democracy: Endogenous Limits of European Integration' in Jeffrey Anderson (ed), *Regional Integration and Democracy – Expanding on the European Experience* (Lanham, MD: Rowland and Littlefield 1999) cited in Duxbury (n 7) 285.

ratification process.[252] Whilst there is a shift to increase the role for parliaments,[253] this is often limited to specific occasions.[254] Moreover, in dualist systems, parliaments are often only brought into the negotiations at the end and cannot amend or debate the content of the treaty.[255]

If the national parliament does play a role in the ratification of the treaty, there is arguably a '"transmission belt"' from the citizens to the international organisations, which implies that the citizens pass on their consent for the treaty.[256] This could be said to be a weak, 'transitive' democracy[257] as this is a one-way process. Peters argues that the 'transmission belt' is one of accountability,[258] but the ratification process is a one-off, after which, national parliaments give way to the executive. Thus, the international organisations are not made accountable to a states' citizens on an ongoing basis through this ratification process.

The lack of a genuinely democratic constituent power in this wave arises, in part, because of the approach to constitutionalism. Within the Kelsian German constitutionalism tradition, the constituent power is not discussed as a democratic

[252] Dinah Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP 2011) 8; Pierre-Hugues Verdier and Mila Versteeg, 'International Law in National Legal Systems: An Empirical Investigation' (2015) 109 AJIL 514.
[253] See for example, the Constitutional Reform and Governance Act 2010 (UK); Verdier and Versteeg (n 252) 515.
[254] For a discussion on the state practice see, Shelton, *International Law and Domestic Legal Systems* (n 252).
[255] Shelton states, the role of parliaments is often to approve and not amend. Shelton, *International Law and Domestic Legal Systems* (n 252) 8; C Bellmann and R Gerster, 'Accountability in the World Trade Organization' (1996) 30 Journal of World Trade 31, 54. Furthermore, in the discussion on amendment of constitutive documents, Peters does not discuss the role of the people. See, Peters, 'Membership' (n 13) 209.
[256] Peters, 'Dual Democracy' (n 13) 272.
[257] Armingeon et al., (n 204) 80.
[258] Peters, 'Dual Democracy' (n 13) 272.

form.[259] In contrast, the French tradition draws on an exercise of constituent power by the people.[260] Building on the German tradition,[261] this wave of global constitutionalist thought de-prioritises the democratic constituent power.

Where there is focus on the question of constitutional moments, space for discussion on democracy is obscured. Either the global constituent power is unidentified,[262] or emphasis is placed on states as representatives of the constituent power in the creation of international organisations.[263] The failure to engage sufficiently with the constitutional moment weakens the approach to democracy. Without a discussion on the democratic constituent power, arguments that build democracy from a constituent act are weak and there is little space to reform international organisations.

The extent of the discussion on voting procedures,[264] the participation of NGOs,[265] and parliamentary assemblies demonstrates that global constitutionalist scholarship when discussing international organisations is concerned more with everyday decision-making. The debate on the creation of a

[259] Christoph Möllers, '"We are (afraid of) the people": Constituent Power in German Constitutionalism' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (OUP 2012) 87, 94, 97-98.
[260] See Chapter 2, section 2.2.2. For a discussion on how the American tradition of constitutionalism engaged with constituent power, see Michael W Dowdle and Michael A Wilkinson, 'On the Limits of Constitutional Liberalism: In Search of Constitutional Reflexivity' in Michael W Dowdle and Michael A Wilkinson (eds), *Constitutionalism Beyond Liberalism* (CUP 2017) 18
[261] von Bogdandy, 'Constitutionalism in International Law' (n 74) 223; Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (OUP 2016) 44-46.
[262] Peters, 'Membership' (n 13) 154.
[263] Fassbender, *The United Nations Charter as the Constitution of the International* Community (n 132) 93.
[264] Trachtman, *The Future of International Law* (n 9) 282; Peters, 'Dual Democracy' (n 13) 287-288 (on weighted voting); Trachtman, 'Constitutional Economics' (n 13) 221 (majority voting at the WTO).
[265] Simma, 'From bilateralism to community interest in international law' (n 108) 262; Peters, 'Dual Democracy' (n 13) 315. Klabbers, 'Autonomy, constitutionalism and virtue in international institutional law' (n 201) 130.

parliamentary assembly is a good example that demonstrates how the focus is skewed in favour of everyday decision-making. Much more emphasis is given to the question of everyday decision-making in this wave of global constitutionalist literature.

4.3.5 How

The preceding sections show that within the organisational wave there is a commitment to institutional reform. This gives rise to a tendency to prioritise discussion on processes and institutions. Peters argues that focus on themes, such as representativeness, inclusion, and participation 'reflect democratic concern'.[266] But, approaching these processes through the Circumstances of Democracy exposes questions and debates that do not form part of their discussions on democracy. These next sub-sections consider participation and representation to explore the gaps within the Circumstances of Democracy.

Participation

Participation in decision-making is a common trope in the organisational wave. Invoked as a mechanism of democratisation, there are proposals for participation at international organisations, often through parliamentary-style bodies.[267] Scholars advocate the participation of NGOs.[268] Yet, participation is not synonymous with democracy and using the Circumstances of Democracy can

[266] Anne Peters, 'Dual Democracy' (n 13) 287.
[267] Shaffer, 'Parliamentary Oversight of WTO Rule-Making' (n 171) 629; Peters, 'Dual Democracy' (n 13) 322-326. See also Franck, *Fairness in International Law and Institutions* (n 7) 477-484.
[268] Simma, 'From bilateralism to community interest in international law' (n 108) 262; Peters, 'Dual Democracy' (n 13) 316.

expose this disconnect. The inconsistency comes in relation to what is meant by participation, who is to participate and how.

There is a lack of clarity around what is meant by participation. Participation can be direct or indirect, where direct is usually used to invoke the participation of natural persons and indirect indicates the involvement of representatives. Such a divide is not as clear within this wave of global constitutionalist literature. For Petersmann, participation or 'democratic' participation as he refers to it, is how democracy should be understood within the international organisation.[269] Discussions on the role of particular actors, raises questions about the scope of power. He discusses the 'participation of private citizens in international organizations', as well as the representation of employers, workers and governments within the tripartite structure of the International Labour Organization (ILO).[270] Petersmann puts forward two conceptualisations of participation (direct and indirect) without considering whether one form is more democratic than the other.

For Petersmann direct participation refers to natural persons. Others, such as Peters and Simma encourage the participation of NGOs,[271] but there is ambiguity around whether they are conceptualised as direct or indirect participants. Simma suggests that NGOs are agents of the community interests, and they have a role in participation without being representative of persons.[272] Peters conceives of NGOs as representative, to an extent, but she argues that their function as a

[269] Petersmann, 'Constitutionalism and International Organizations' (n 149) 433.
[270] ibid 433.
[271] Peters, 'Dual Democracy' (n 13) 316; Simma, 'From bilateralism to community interest in international law' (n 108) 262.
[272] Simma, 'From bilateralism to community interest in international law' (n 108) 262.

watchdog or opposition outweighs their lack of representative credentials.[273] The disconnect between non-state actors, such as NGOs, and the people is also well documented in the literature.[274] In essence, NGOs become direct participants, rather than the natural persons. It would be beneficial to reflect on the difference between direct and indirect participation as it is a question that goes to the scope of power.

There is also no agreement on the processes of participation. Much of the discussion is on participating within decision-making, which could be law-making or policy-making.[275] Petersmann, however, also discusses access to international courts and tribunals.[276] The participation of individuals within judicial procedures is a crucial aspect of constitutionalism; it is a form of legal accountability that enhances the rule of law, and public access to such processes can enhance the transparency of legal decision-making. However, participating in a judicial process is not a form of collective decision-making done by the people.[277] Similarly, other methods of participation can aid democracy but are not sufficient; consultation procedures, which are advocated for by Peters,[278] are part of accumulating a common position (or general will), but as the people are then not involved in the decision-making itself, an element of democracy is missing. Asking the What Circumstance exposes the indiscreet use of participation. Not

[273] Peters, 'Dual Democracy' (n 13) 315- 316. Volk argues that this means the participation of civil society groups, for Peters, forms part of 'the formal accountability mechanisms'. See, Volk (n 120) 564.
[274] Peters, 'Dual Democracy' (n 13) 316. See also, Jan Aart Scholte, 'Civil society and democratically accountable global governance' (2004) 39(2) Government and Opposition 211, 231; Magdalena Bexell, Jonas Tallberg and Anders Uhlin, 'Democracy in Global Governance: The promises and pitfalls of transnational actors' (2010) 16 Global Governance 81, 87.
[275] Peters, 'Dual Democracy' (n 13) 265.
[276] Petersmann, 'Constitutionalism and International Organizations' (n 149) 433.
[277] For a discussion on judicial review and democracy, see Jeremy Waldron 'The Core of the Case against Judicial Review' (2006) 115(6) The Yale Law Journal 1346.
[278] Peters, 'Dual Democracy' (n 13) 300.

only can participation refer to very different processes, as in the case of participation in judicial processes, it can also fail to link back to the people or facilitate the people having power in decision-making.[279]

Representation

There is an overlap between participation and representation and the discussion on the complexity of direct and indirect participation exposes some of the issues with representation. This sub-section views global constitutionalist discussions on representation through the Circumstances of Democracy to expose how representation is used in discussions on democracy. This sub-section will discuss the choice of the representative and what is being represented.

Who acts as the representative is contested within this wave. As discussed above, there is a plethora of actors discussed in global constitutionalist literature, and their status is not always clear.[280] Within global constitutionalist scholarship, states and NGOs are common choices for representatives.[281] How the state acts as a representative has been unpacked previously.[282] As discussed, states are not strong representatives of their citizens. Within democratic states, citizens do not necessarily participate in elections on the basis of international affairs.[283] Moreover, the states are not representative of all people; where there is a

[279] For a critique of participation see Petra Dobner, 'On the Constitutionability of Global Public Policy Networks' (n 30) 609. She argues that participation does not necessarily amount to 'the equal representation of all stakeholders'.
[280] See above, section 4.3.1.
[281] For example, Simma, 'From bilateralism to community interest in international law' (n 108) 262; Peters, 'Dual Democracy' (n 13) 316; Paulus, 'The International Legal System' (n 1) 95. Cf Petersmann referred to the tripartite representation at the ILO as democratic, meaning that employers and workers representatives are also possible representatives. Petersmann, 'Constitutionalism and International Organizations' (n 149) 433.
[282] See above, section 4.2.1 and 4.3.1.
[283] Robert A Dahl, *On Democracy* (Yale University Press 1998) 115-116.

weakness in the human rights protection of minority groups, stateless persons, diaspora, and other groups not within a state, fall outside the representation of a state. The executive act as representatives, and this is criticised for being undemocratic.[284] Non-democratic states cannot be said to represent the collective interests of the citizens.[285] Furthermore, as noted above, this idea of representation is built on a revision to state sovereignty that uses the international legal scholarship to assume states are representative.[286] Debates need to be had on how ideas of representation feed into democracy.

A discussion on NGOs as representatives exposes the way that elements of the Circumstances of Democracy are conflated. Within global constitutionalist scholarship, NGOs have been given a number of functions; NGOs have been labelled the global civil society, a form of opposition, and a watchdog.[287] However, NGOs are not necessarily democratic. Peters argues that NGOs are accountable to their donors and their members; she argues that '[d]onor's "vote" with their cheque book' and members can leave.[288] This accountability is said to be 'democratic', yet the accountability chain has to be between the governed and governor or the representative and represented.[289] Within the UN, NGOs have to have accreditation to participate.[290] The lack of assessment of democratic structures of NGOs within the UN system of consultative status is discussed

[284] Chapter 3; Nigel D White, *The Law of International Organisations* (3rd edn, OUP 2016) 201.
[285] Christiano, 'Democratic Legitimacy and International Institutions' (n 22) 125.
[286] See above, section 4.2.1.
[287] Peters, 'Dual Democracy' (n 13) 315.
[288] ibid 317.
[289] Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century' (n 70), 155.
[290] UN Economic and Social Council, Resolution 1996/31 'Consultation relationship between the United Nations and non-governmental organizations' (25 July 1996) UN Doc Res 1996/31.

elsewhere,[291] but suffice to say NGOs are not always accountable to the people they claim to represent. Scholars have argued that the participation of NGOs is not legitimate because the majority of organisations are located and funded by the Global North[292] and it is these Global North elites, these funders and stakeholders, which get to dictate what interests the NGO supports.[293] There is little connection to the people, so it is not the people who have power in decision-making. In the discussion on NGOs, the How of democracy is prioritised over the Who and the What.

This section on How has shown that democracy at the international organisational level is often equated with participation, representation, and as the previous discussion demonstrated the relationship between democracy and accountability.[294] On the one hand, this can be evidence of a thicker conceptualisation of democratic governance. Peters argues that transparency, participation, and access to justice form the basis of 'a *tryptichon of international procedure'*.[295] However, concepts such as transparency, accountability and participation can also be considered 'surrogate' for democracy.[296] This can be problematic because they are not synonymous with democracy.[297] Accountability, participation and representation are types of processes, which

[291] See for example. Peter Willets, 'The Cardoso Report on the UN and Civil Society: Functionalism, Global Corporatism, or Global Democracy?' (2006) 12(3) Global Governance: A Review of Multilateralism and International Organizations 305.
[292] See Bexell et al., 'Democracy in Global Governance' (n 274) 87-93.
[293] For a discussion on the elite nature of NGOs and civil society see, Dobner, 'On the Constitutionability of Global Public Policy Networks' (n 30) 609-610.
[294] See above section 4.2.1.
[295] Peters, 'International Organizations: Effectiveness and Accountability' (n 21).
[296] See Thomas Risse, 'Let's Argue! Communicative Action in World Politics' (2000) 54 International Organization 1, 15; Delbrück, 'Exercising Public Authority Beyond the State' (n 210) 1040; Peters, 'International Organizations: Effectiveness and Accountability' (n 21); de Búrca, 'Developing Democracy' (n 39) 124.
[297] Bodansky, 'The Legitimacy of International Governance' (n 92). Cartledge argues that there is a distinction between the ancient Greek idea of democracy that referred to power and the modern ideas that rely on public argument, deliberation and participation. See Paul Cartledge, *Democracy. A Life* (OUP 2016) 3; de Búrca, 'Developing Democracy' (n 39) 124.

should work to ensure the other Who and What of democracy are connected. Whilst accountability can be understood to establish a relationship between an 'accountee' and 'accountor', these processes say little about who should participate, how they should participate, and their respective roles in decision-making. Moreover, the processes say little about what decisions are being made and when. Such an indiscriminate use of these processes risks excluding members of a *demos*, as well as shutting down discussions on questions of power. The organisational wave of global constitutionalist scholarship would benefit from reflecting on how the Circumstances of Democracy should align.

4.4 Chapter Conclusion

This chapter asked how one wave of global constitutionalist scholarship discusses democracy. The organisational wave, which focuses on the reform of international organisations, is closely associated with the international organisational literature on legitimacy, which leads to an overemphasis on formal international organisations and accountability as a proxy for democracy. Within this wave, the What of democracy is under-theorised and replaced with mechanisms that are analogous to democracy at the domestic level, such as voting and parliaments and modalities such as, accountability and participation. This chapter identified that this wave of global constitutionalist literature lacks convincing engagement with the Circumstances of Democracy.

With the reform of international organisations as the focal point of this wave of global constitutionalist literature, institutions and mechanisms of democratisation are prioritised. Discussions on the reform of international organisations, such as

the constitutionalisation of the WTO, means that this wave tends to prioritise the How of democracy. Scholars propose a number of different reforms, which can include new institutional arrangements to increase the direct participation, but also the representation or indirect representation of people. How, in this thesis, is not just about mechanisms, it should ensure that the Circumstances of Democracy are amalgamated.

The Who of democracy within the organisational wave is complex. There are a number of actors related to the discussion on democracy, and it is unclear whether they are considered part of the *demos* or as the governing power and whether they have constituent power or are constituted power. The lack of clarity is suggestive of a failure to link the *demos* and constituent power to the people. The relationship between individuals and the state, which is a crux within global constitutionalist scholarship, is problematic for a discussion on democracy. Whilst at times, individuals are the core unit, at others, states can trump their collective will, which again suggests a denial of the people as the Who in democracy.

Moreover, focusing on individuals, at the expense of the collective, highlights the need to reflect on the relationship between constitutionalism and democracy. Constitutionalism (in particular, fundamental human rights) can protect the interests of the individual. In so doing, it can place limits on democracy. The justification for the individualisation is based on the idea that collective rights are derivative of individual rights,[298] but the tension between the individual and the collective is well-documented in democratic theory.[299] Discussions on democracy

[298] Peters writes that her approach is based on methodological individualism and normative pluralism. Peters, 'Dual Democracy' (n 13) 307.
[299] Chapter 2, section 2.2.1 and 2.3.2.

within the constitutionalist lens would benefit from a reflection on the relationship between constitutionalism and democracy.

Within this wave, there is little reflection on the What of democracy. Ideas about the people having power to make decisions are largely absent. The impracticalities of decision-making on a global scale are offered as defences against stronger powers of the people. But, the relocation of the Where of democracy, from the state to the global level, should not automatically change the meaning of What.

The When of democracy becomes limited to everyday decision-making in this wave of global constitutionalist literature. Concerns with the reform of current practices at international organisations situate democracy within the sphere of everyday politics. There is limited engagement with the democratic constituent moment. Peters' argument that a Parliamentary Assembly constructed by civil society actors alone would not have a legal basis is suggestive of a normativist approach to constituent power in this wave,[300] which means that the people, and democracy, are not considered as part of a constituent moment. Focusing on one element of When gives a partial account of democracy. Chapter 5 explores the approach taken by the principled wave, and the shift in favour of the constituent moment, generates a disconnect between the two waves.

The organisational wave focuses on quasi-parliamentary bodies as the location for democracy at international organisations. Parliamentary bodies are used as indicators of democracy, even where the power of the people is severely limited

[300] Peters, 'Dual Democracy' (n 13) 321.

– as in the case of purely consultative bodies – and where the link to the people is minimal.

The organisational wave started a constitutionalist discussion on democracy, but this chapter has shown that the way democracy is conceptualised is restrictive. Whilst attention is paid to the plausibility of a Who of democracy beyond the state, the people are not constructed as the core of democratic mechanisms, rather states and non-state actors are proffered as substitutes. Using the Circumstances of Democracy avoids narrowly focusing on the How and facilitates a debate on the people's power in decision-making.

Chapter 5: Global Constitutionalism and Democracy: A Principled Approach

5.1 Introduction

Contemporary scholarship witnesses commitments to a more principled approach to global constitutionalism. For example, O'Donoghue calls on global constitutionalist scholars to give meaning to constitutionalism.[1] A principled approach engages with the norms of modern constitutionalism, so there are discussions on the rule of law, the separation of powers, and constituent and constituted power. Scholars have engaged with traditional aspects of constitutionalism and discussed what constitutionalism means at the global level, and critical legal scholars within this wave have convened a debate on the relation between law and politics.[2] There is a shift towards a 'bottom-up' approach to constitutionalism that centres on a debate about constituent power.[3] This shift towards a discussion on constitutionalism creates a new environment for a discussion on democracy. This chapter identifies the progress that has been made, but also demonstrates the limitations of current approaches.

[1] Aoife O'Donoghue, *Constitutionalism in Global Constitutionalisation* (CUP 2014) ch 6. See also Kumm's discussion on 'Big C' constitutionalism. Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the relationship between constitutionalism in and beyond the state' in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009) 260.

[2] See Emilios Christodoulidis, 'On the Politics of Societal Constitutionalism' (2013) 20(2) Indiana Journal of Global Legal Studies 629; Gavin W Anderson, 'Societal Constitutionalism, Social Movements, and Constitutionalism from Below' (2013) 20(2) Indiana Journal of Global Legal Studies 881.

[3] Antje Wiener and Stefan Oeter, 'Introduction: Who recognizes the emperor's clothes anymore?' (2016) 14(3) I·CON 608, 609; Geneviève Nootens, 'Constituent power and the people-as-the-governed: About the "invisible" people of political and legal theory' (2015) 4(2) Global Constitutionalism 137; Neil Walker, 'The return of constituent power: A reply to Mattias Kumm' (2016) 14(4) I·CON 906.

This shift towards a broader set of constitutionalism questions, is not indicative of a unified response. Rather, the category of principled constitutionalism is an attempt to demarcate the scholarship according to research question and not by ideological position. This also means that the principled wave is not necessarily committed to the idea of democracy beyond the state, rather there are disagreements: whilst Habermas critiques the trend to deny democracy beyond the state,[4] Kumm situates democracy within the state and is hesitant to use the language of democracy to analyse international processes.[5] The principled approach spans different discussions and it includes the principled approach taken by O'Donoghue,[6] Walker's constitutional pluralism,[7] de Búrca's 'democratic-striving approach' to global governance,[8] and Teubner's approach to societal constitutionalism.[9] This chapter uses all the Circumstances of Democracy to analyse this principled wave.

The principled approach to global constitutionalism engages in a number of discussions about the viability and shape of global constitutionalism. Two competing approaches are singled out within this chapter to explore how the competing conceptualisations of constitutionalism can influence the discussions on the Who and Where democracy. The two strands of global constitutionalist

[4] Jürgen Habermas, 'The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society' (2008) 15(4) Constellations 444, 445.
[5] Kumm, 'The Cosmopolitan Turn in Constitutionalism' (n 1) 260.
[6] O'Donoghue, *Constitutionalism in Global Constitutionalisation* (n 1) ch 6.
[7] Neil Walker, 'Constitutionalism and the Incompleteness of Democracy: An Iterative Relationship' (2010) 39(3) Rechtsfilosofie & Rechtstheorie 206, 230; Neil Walker, 'Beyond the Holistic Constitution?' In Petra Dobson and Martin Loughlin (eds) *The Twilight of Constitutionalism?* (OUP 2010) 298.
[8] Gráinne de Búrca, 'Developing Democracy Beyond the State' (2008) Columbia Journal of Transnational Law 101.
[9] Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (OUP 2014).

literature considered in depth in this chapter are constitutional pluralism and societal constitutionalism.

The constitutional pluralist debate is situated within a reconstruction of the relationship between constitutionalism and the state. It abstracts the meaning and elements of constitutionalism and proposes that the unified constitution of the state is not necessarily replicable or desirable at other constitutional sites. These debates at times cross into the literature on global legal pluralism, which is beyond the scope of this thesis. The constitutional pluralist literature enhances a discussion on principled global constitutionalism because of its commitment to thinking about the meaning and institutionalisation of constitutionalism. The constitutional pluralist debates facilitate a discussion on the Where of democracy and constitutionalism.

Societal constitutionalism rejects the narrow-mindedness of liberal, political or republican constitutionalism; it challenges the focus on forms of government and on 'the division of powers',[10] the divide between state and civil society, as well as questioning the principal focus on individuals and the state.[11] For Teubner, societal constitutionalism is the 'legally institutionalized guarantees of a self-restraint of politics'.[12] In essence, importance is placed on legal rules to restrain politics. Societal constitutionalism has two phases.[13] The first phase proposes a

[10] David Sciulli, *Theory of Societal Constitutionalism: Foundations of a non-Marxist critical theory* (CUP 1991) 7.
[11] Anderson, 'Societal Constitutionalism, Social Movements, and Constitutionalism from Below' (n 2) 884-885
[12] Gunther Teubner, 'Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?' in Christian Joerges, Inger-Johanne Sand and Gunther Teubner (eds) *Transnational Governance and Constitutionalism* (Hart 2004) 3, 12.
[13] See Gunther Teubner, 'Societal constitutionalism: nine variations on a Theme by David Sciulli' in Paul Blokker and Chris Thornhill (eds), *Sociological Constitutionalism* (CUP 2016).

shift away from formal political institutions towards the societal sphere.[14] The second phase, led by Teubner, builds on Luhmann's 'autopoietic systems theory'. Societal constitutionalism offers a radical alternative to ideas of democracy, as it challenges the Who, What, and Where of constitutionalism and democracy. In this chapter, societal constitutionalism is used to explore potential alternatives of discussing democracy within global constitutionalist literature.

This chapter uses the Circumstances of Democracy as a matrix to analyse how the principled wave approaches democracy. A comparison between the organisational and principled waves exposes which Circumstances are prioritised, exposing gaps in the literature, and highlighting limitations. The first part of the chapter will focus on two aspects of the current literature to consider how the disciplinary frames of constitutionalism and international law influence the discourse. It will reflect on the relationship between constitutionalism and democracy as conceptualised within this wave of scholarship and the role of international law. It will then initiate a comparison between the organisational and principled wave. In the second part of the chapter, the Circumstances are used to explore the approach of the principled wave to fundamental questions of democracy.

5.2 Aspects of the Current Discourse in the Principled Wave

The principled wave of global constitutionalist scholarship uses constitutionalism as its starting point. Previously, it was shown how the organisational wave is

[14] Dieter Grimm, 'The Achievement of Constitutionalism and its Prospects in a Changed World' In Petra Dobner and Martin Loughlin (eds) *The Twilight of Constitutionalism?* (OUP 2010) 19.

influenced by its connections with international and international organisational law.[15] This section will investigate how the approach to democracy adopted by the principled wave is informed by the cross-disciplinary nature of global constitutionalist scholarship. To investigate how the disciplinary biases structure democracy, this section will discuss two aspects of the current discourse. Firstly, it will discuss the concerns around the relationship between constitutionalism and democracy. Secondly, it will explore the relationship between global constitutionalist literature and the other sub-disciplines.

5.2.1 Constitutionalism and Democracy

In adopting a starting position that engages with the meaning of constitutionalism, the principled wave offers a new environment for discussions on democracy. Within the principled approach there is an acknowledgement of a relationship between constitutionalism and democracy, but a lack of agreement as to the nature of that relationship. Whilst Walker diagnoses a tension between constitutionalism and democracy,[16] Habermas, O'Donoghue and de Búrca conceive of a complementary relationship.[17] This section considers how the focus on constitutionalism can influence the shape of democracy.

One approach to democracy within the principled wave, is to consider it in functional terms. Functions include the demarcation of a polity and the legitimisation of governance. One of the problems with the functional approach is

[15] See Chapter 4, section 4.2.1.
[16] Walker, 'Constitutionalism and the Incompleteness of Democracy' (n 7).
[17] Jürgen Habermas, 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles?' (2001) 29(6) Political Theory 766, 767; Aoife O'Donoghue, 'International constitutionalism and the state' (2013) 11(4) I·CON 1021, 1040; de Búrca, 'Developing Democracy' (n 8) 129.

that there is little agreement on the functions. For Walker, constitutionalism (and the idea of constituent power) rather than democracy defines the Who.[18] In contrast, O'Donoghue argues that democratic legitimacy is part of constitutionalism and thus alongside the rule of law and the separation of powers, democratic legitimacy plays a role in determining the constituents.[19]

An additional problem with a functional approach to constitutionalism and democracy, is that the functions can change when moved across governance systems and as such distort the meaning of democracy. For Thornhill, a constitution is '*the legally articulated form of a society's inclusionary structure*'.[20] The priority then becomes inclusion. He argues that global constitutionalism (or as he refers to it 'transnational judicial constitutionalism') is more inclusive than national 'pure' democracies because international human rights law is universal.[21] Democracy located within the state, for Thornhill, does not emphasise inclusion to the same extent. This shows how the values and characteristics of democracy can change. It also demonstrates a need to reflect on the relationship between constitutionalism and democracy: the contentious relationship between human rights and democracy was noted above.[22] Constructing a functional relationship between constitutionalism and democracy is problematic as there are conflicting functions that shape the approach to democracy, and it side-lines the tension between constitutionalism and democracy.

[18] Walker, 'Constitutionalism and the Incompleteness of Democracy' (n 7) 215.
[19] O'Donoghue, *Constitutionalism in Global Constitutionalisation* (n 1) 110.
[20] Chris Thornhill, *A Sociology of Transnational Constitutions: Social Foundations of the Post-National Legal Structure* (CUP 2016) 7.
[21] ibid 422.
[22] Chapter 2, section 2.2.1.

Rather than a functional approach, O'Donoghue demonstrates how the separation of powers, the rule of law, and democratic legitimacy have to work together; the relationship between constituent and constituted power is to be constructed with the norms of constitutionalism working together.[23] Democracy is considered to be in a dialectic and iterative relationship with constitutionalism. Walker, as explored above, argues that democracy and constitutionalism are in tension.[24] What Walker attempts to show is that constitutionalism and democracy are in an 'iterative and indeed irresoluble' relationship.[25] He argues that democracy is incomplete and as such constitutionalism both realises and qualifies democracy.

One of the advantages of acknowledging the tension between constitutionalism and democracy is that it generates a discussion on the appropriate work of democracy. Within global constitutionalist literature, there is a tendency to use democracy to provide a multitude of outcomes; the legitimacy of governance, development,[26] individualisation of international law and individual human rights protection.[27] Peters, for example, places the individual at the core of international law[28] and yet, the literature on democracy demonstrates that the role of the individual is subsumed within the collective.[29] Rather than making democracy do all the work and then being disappointed when it cannot deliver everything, Walker demonstrates the role of constitutionalism to balance individual liberties

[23] O'Donoghue, *Constitutionalism in Global Constitutionalisation* (n 1) 110.
[24] Walker, 'Constitutionalism and the Incompleteness of Democracy' (n 7) 213.
[25] ibid 213.
[26] Deborah Z Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System* (OUP 2005) ch 8.
[27] Anne Peters, 'Dual Democracy' in Jan Klabbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (OUP 2009) 278-279.
[28] Anne Peters, 'Membership in the Global Constitutional Community' in Jan Klabbers, Anne Peters, and Geir Ulfstein (eds), *The Constitutionalization of International Law* (OUP 2009) 157.
[29] Chapter 2, section 2.3.2, text at fn 208-217.

and collective decision-making. Democracy and constitutionalism have to work together to ensure the individual is protected and the collective have power to make decisions. But in so doing, constitutionalism can limit democracy. Constitutionalism can infuse democracy with human rights, it can mitigate the power of the people using norms such as the rule of law and the separation of powers, and the constitutional frame can impose restrictions on When and Where people can exercise their power.

The principled approach to global constitutionalism proffers rich, conceptual discussions on the meaning of democracy beyond the state. Moreover, there is an engagement with the tension between constitutionalism and democracy. However, going forward there needs to be a more explicit acknowledgement of the impact of constitutionalism on the meaning of democracy.

5.2.2 Disciplinary Boundaries

In addition to the role of constitutionalism, this thesis shows that global constitutionalist scholarship is in parts informed by international law. The previous chapter demonstrated the extent to which the organisational wave builds on assumptions in international law with respect to the state and democracy.[30] This section considers the differences between the organisational and principled wave of global constitutionalist literature, and the extent to which the principled wave continues to accommodate the undemocratic features of international law.

[30] Chapter 4, section 4.2.1.

Organisational Wave and Principled Wave

The organisational and the principled wave have different disciplinary focuses. The organisational wave is committed to reforming or constructing representational bodies (such as quasi-parliamentary structures). In contrast, the principled approach to constitutionalism and democracy is not as concerned with the institutionalisation, but with conceptual debates. These different disciplinary focuses influence the Circumstances of Democracy. The organisational wave is focused on the How of constitutionalism and democracy. Moreover, the emphasis on How gives rise to a focus on the institutional dimension of the Where question. The principled wave is concerned with constitutionalism, and there is a commitment to constituent power and constitutional moments, which places emphasis on Who. The emphasis placed on different Circumstances means that there is a disconnect between the organisational and principled waves.

The siloed nature of the two waves of global constitutionalist scholarship gives rise to gaps. This is most obvious with respect to the shift to discuss constituent power. The organisational wave either side-lines the question of constituent power or places it in the hands of states.[31] Scholars within the principled wave challenge this and advocate non-state actors and individuals as constituent power holders.[32] The focus on constituent power shifts the When from everyday decision-making to constituent moment. As will be explored, the shifting emphasis gives rise to incomplete discussions on democracy.

[31] Chapter 4, section 4.3.3.
[32] Nele Noesselt, 'Contested global order(s): Rising powers and the re-legitimation of global constitutionalization' (2016) 14(3) I·CON 639, 640; Saki Bailey & Ugo Mattei, 'Social movements as Constituent Power: The Italian Struggle for the Commons' (2013) 20 Indiana Journal of Global Legal Studies 965.

Principled Wave of Global Constitutionalist Scholarship and International Law

The principled approach to global constitutionalism, adopting constitutionalism and constitutional theory as the starting point, circumvents the international law discussion of the organisational wave. This is laudable because it moves away from state-defined *demos* and from the assumptions that underpinned the international legal debate on democracy, such as the territorial integrity of the state and the reification of elections. However, if questions are not asked about domestic democracy, the limitations of the democracy discussion in international law and in the organisational wave are not addressed. This means that potentially the assumptions of international law with respect to the state and democracy go unchallenged.

One of the examples of the troublesome relationship between international law and global constitutionalist literature is the approach to self-determination. The meaning of self-determination is not the same in international law and global constitutionalist scholarship.[33] As noted, within international law self-determination is considered a starting point for a discussion on democracy.[34] But, the complex relationship between sovereignty and territory means that territorial integrity trumps the will of the people.[35] Within the principled wave, self-determination is used by Habermas to denote self-government.[36] Furthermore,

[33] For Brunkhorst, for example, self-determination is used as an adjective to show that the polity demarcated itself. Hauke Brunkhorst, 'Constitutionalism and Democracy in the World Society' in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (OUP 2010) 198.
[34] Chapter 3, section 3.3.1.
[35] Chapter 3, section 3.3.1.
[36] Jürgen Habermas, *The Divided West* (ed. Ciaran Cronin, Polity Press 2006) 157.

where in international law, the people are defined using territory,[37] in certain strands of constitutionalism, especially where a relationalist approach to constituent power is adopted, the people is not defined by territory.

Without reflecting on the relationship between constitutionalism and international law, the global constitutionalist approach cannot challenge the state-centric conceptualisation of the people within international law. Habermas argues that states ensure 'the political self-determination of their citizens'.[38] This potentially improves upon the trend in global constitutionalist literature to revise sovereignty as a form of responsibility; it creates a space to investigate the representativeness of states. But, he relies on President Wilson's approach to self-determination as self-government,[39] rather than explore the implications of self-determination in international law, which leaves the liberal approach to democracy, which was discussed previously,[40] without critique. The principled wave of global constitutionalist scholarship does not engage with the way that international law predetermines the *demos* and limits the people's power using self-determination. Using the Circumstances of Democracy, a discussion across disciplinary boundaries is facilitated, ensuring the limitations are raised.

This fragmentary nature of global constitutionalist scholarship is one of the key limitations of the debates on democracy. The organisational and principled waves place varying emphasis on international law and constitutionalism and these waves stress different aspects of the Circumstances of Democracy. This section showed that whilst the international law literature on democracy does not have a

[37] *Frontier Dispute case (Burkina Faso v Republic of Mali)* [1986] ICJ Reports 554.
[38] Habermas, 'The Constitutionalization of International Law' (n 4) 449.
[39] Habermas, *The Divided West* (n 36) 157.
[40] Chapter 3, sections 3.3.1 and 3.3.2.

prominent role in the principled wave, there is a failure to challenge the state-centricity of the international legal scholarship. Although democracy within the state is important within this wave,[41] scholars do not question the approach within international legal scholarship, which leaves this global constitutionalist wave vulnerable to the impacts of state sovereignty.

5.3 The Circumstances of Democracy

5.3.1 Who

Within the principled wave of global constitutionalist literature, there are attempts to move away from conceptualisations of the polity that rely too heavily on commonality, ethnos and nationality. There is a shift towards constituency and constituent power as appropriate tools to demarcate the polity for constitutionalism.[42] This move disconnects the state and constitutionalism and it facilitates a discussion of democracy and constitutionalism beyond the state. However, focusing on constituent power has the potential for conflation of constituent power and *demos*.[43] If constituent power relates to constitution-making, then it is a greater power than that afforded to a *demos,* which is usually conceptualised as situated in everyday governance and relates to the creation of ordinary law.[44] The powers of constituent power holders are more radical than those of the *demos,* which are usually prescribed under the constitution.[45] To

[41] O'Donoghue, *Constitutionalism in Global Constitutionalisation* (n 1) 254; Habermas, 'The Constitutionalization of International Law' (n 4) 449; Walker, 'Constitutionalism and the Incompleteness of Democracy' (n 7) 219.
[42] O'Donoghue, *Constitutionalism in Global Constitutionalisation* (n 1) ch 3.
[43] Chapter 2, section 2.2.2.
[44] Chapter 2, section 2.2.2.
[45] For a discussion on the role of the constitution in this relationship between constituent power and democracy, see Walker, 'Constitutionalism and the Incompleteness of Democracy' (n 7) 215-216 and 221-222.

avoid the potential for conflation, the Who needs to be considered alongside the What; the people and their respective powers and roles need to be explored.

As the principled wave shifts the Who question from *demos* to constituent power, this section discusses the relationship between constituent power and democracy. In particular, this section investigates the distinct roles of constituent power and the respective power of people within democracy in the principled wave. To evaluate the utility of shifting the discussion towards constituent power, this section will discuss: the different types of actors that are said to have constituent power; the demarcation of the constituent power; the extent of the power; and, the relationship between constituent power and democracy in this principled wave of global constitutionalist scholarship.

Identity of Constituent Power Holders

One issue to consider is the identity of constituent power holders within the principled wave. There is a trend to include people as constituent power holders.[46] This trend responds to the unsatisfactory discussion on constituent power within the organisational wave; rather than adopting a normativist position, or assuming constituent power sits with states, the principled wave places individuals at the core of the discussion.[47] Collectives of individuals, as well as non-state actors (such as networks of states,[48] and NGOs[49]) are also considered

[46] Wiener and Oeter, 'Introduction' (n 3) 609; Noesselt argues that it is humanity, see Noesselt (n 32) 640.
[47] See Chapter 4, section 4.3.3.
[48] Noesselt (n 32) 640-642.
[49] Bailey & Mattei (n 32) 965.

as potential constituent power holders within this wave.[50] However, Kumm argues that constituent power has to be revised to include citizens and the international community.[51] As noted previously, who constitutes a member of the international community is not clear; if it is just states, these are not responsive to citizens, and citizen-based approaches to *demos* are restrictive,[52] but the international community could also include other unaccountable non-state actors. Using Kumm's approach, there is both a lack of clarity around the identity of constituent power holders and the potential for unaccountable, unrepresentative actors to hold constituent power. Moreover, NGOs, for example, can be unrepresentative and unaccountable, so the role of individuals as the ideal constituent power holders within these collectives is not clear. Krisch warns that the link to the people is weak,[53] and scholars do not demonstrate genuine links to the people.[54]

Although the conceptualisation of states as constituent power holders is critiqued, states are still given a constituting role within this principled wave.[55] The relationship between states and citizens for the purposes of constituent power in this wave is not clear. Whilst on the one hand, states are included because they ensure the 'political self-determination of their citizens'.[56] On the other hand, it is just assumed that states as prominent actors have constituent power.[57]

[50] See Nico Krisch, '*Pouvoir constituant* and *pouvoir irritant* in the postnational order' (2012) 14(3) I·CON 657, 674.
[51] Mattias Kumm, 'Constituent power, cosmopolitan constitutionalism, and post-positivist law' (2016) 14(3) I·CON 697, 698.
[52] See Chapter 3, section 3.3.1.
[53] Kumm, 'Constituent power, cosmopolitan constitutionalism, and post-positivist law' (n 51) 677.
[54] Noesselt refers to BRICS countries to argue that the Westphalian model has ignored these regional groups but such groups are resisting. Moreover, it is government ministers acting. This is still a state-based constituent power that does not move the discussion on from Fassbender's use of constituent power. Noesselt (n 32) 643.
[55] See, Habermas, 'The Constitutionalization of International Law' (n 4) 449 (states 'qualify as founding members already in virtue of their current role in guaranteeing the political self-determination of their citizens'); Krisch, '*Pouvoir constituant* and *pouvoir irritant* in the postnational order' (n 50) 674.
[56] See, Habermas, 'The Constitutionalization of International Law' (n 4) 449.
[57] For example, Noesselt is about different state interests. Noesselt (n 32).

Habermas argues that states and citizens can hold constituent power, but he is clear that this is because states ensure the self-determination of citizens.[58] This is suggestive of a move way from sovereignty as responsibility, where states act on behalf of their citizens.[59] This then facilitates a move away from state-centric approaches to constituent power.

Societal constitutionalism offers an alternative method of distancing constituent power from the state. For societal constitutionalism, the constituent power is 'a *communicative potential*'.[60] Systems theory, which underpins societal constitutionalism, does not associate constituent power with individuals or the population.[61] This communicative power acts as a 'permanent irritant to the constituted power'.[62] The idea of 'irritant' that characterises this rewriting of constituent power alters the scope of the power, which will be discussed below.[63] With respect to the identity of constituent power holders, it is clear that within societal constitutionalism, constituent power is not located within collectives of people *per se*, but who can harness this 'communicative potential' is not made clear. The risk is that constituent power is moved away from the people.

Within this principled wave there is a conscious effort to discuss the role of constituent power and to place people at the core. However, there is a plethora of non-state and state actors that are still holders of constituent power within this

[58] Habermas, 'The Constitutionalization of International Law' (n 4) 449.
[59] Jürgen Habermas, 'Plea for a constitutionalization of international law' (2014) 40(1) Philosophy and Social Criticism 5, 9.
[60] Teubner, *Constitutional Fragments* (n 9) 62.
[61] ibid 62.
[62] ibid 62.
[63] see text at fn 86-89.

wave. The inconsistency with which constituent power links back to the people highlights the need to reflect on the Who.

Demarcation of Constituent Power

With respect to the demarcation of Who, the principled wave seeks to challenge the role of state-boundaries. Habermas, in particular, seeks to disconnect the state, national identity, and the *demos.*[64] This concern to move away from state-centric conceptualisations of constituent power,[65] leads to revising constituent power. This sub-section will outline two approaches: O'Donoghue's discussion on the role of process and Walker's 'Beyond the Holistic Constitution'.

The relational approach to constituent power argues that the interrelation between constituent power and constituted power means that the identity of constituent power holders is determined through a process. O'Donoghue argues that understanding constituent power as demarcated by a process means that it can change over time, it can be re-evaluated and new demarcations can be made.[66] The relational idea is useful because it can be used at different sites of governance, and at more flexible sites where processes are taking place but perhaps lack the organisation of a state-like system. The relational idea builds on the myth of constituent power, so that constituent power holders can be constructed in the moment (or through the process) rather than relying on a pre-legal society to coalesce and claim constituent power. In this respect, it is useful

[64] Jürgen Habermas, 'Toward a Cosmopolitan Europe' (2003) 14(4) Journal of Democracy 86, 88-89; Ulrich K Preuss, 'Constitutional Powermaking for the New Polity: Some deliberations on the relations between constituent power and the constitution' (1992-1993) 14 Cardozo Law Review 639.
[65] Krisch, '*Pouvoir constituant* and *pouvoir irritant* in the postnational order' (n 50) 657.
[66] O'Donoghue, *Constitutionalism in Global Constitutionalisation* (n 1) 110.

for discussing constituent power beyond the state, where it is not practical to speak of such a community.[67] One of the questions is what type of process is necessary. For O'Donoghue law determines the process, and that process determines the relationship between constituent and constituted power. This will be further discussed in the section on When, but there are two broad categories of process: constitutional (both creation and reform) and everyday decision-making processes. Yet, constituent power is traditionally conceptualised as being before the law and tied to constitutional processes,[68] which means that O'Donoghue's process is an example of constituted power. This use of process suggests that constituent power can be limited. It raises questions about the scope of constituent power and demonstrates the importance of asking the What question.

Walker discusses constituent power and democracy in a series of publications and there are differences in his approach.[69] This chapter explores these. Though responding to whether constitutionalism is a useful moniker for governance beyond the state, and thus addressing a different question, Walker's 'Beyond the Holistic Constitution?' is useful for a discussion on the Who of democracy. Walker outlines four frames of constitutionalism: juridical, politico-institutional, popular and societal.[70] Though all four-layers are needed for the integrity of the whole,[71] how these layers are arranged is not dictated. State-constitutionalism has a particular 'formulation' of the layers, post-state constitutionalism might have a

[67] The difference between this and the approach adopted by Fassbender and Peters is that this approach links to the people, it is an ongoing formation of the polity and constituted power holders, rather than the constitution demarcating the people.
[68] See Chapter 2, section 2.2.1.
[69] Walker, 'Constitutionalism and the Incompleteness of Democracy' (n 7); Walker, 'Beyond the Holistic Constitution?' (n 7).
[70] Walker, 'Beyond the Holistic Constitution?' (n 7) 298.
[71] ibid 298.

different model.[72] Walker makes use of the framework to analyse whether governance systems are constitutional; for example, he argues that the EU has a 'thin' constitutionalism as elements of the juridical and politico-institutional layers are present, but as it lacks the popular and societal layer there is not 'thick' constitutionalism and other 'transnational societal actors' do not exhibit any elements of the four-layers.[73] This framework can be repurposed to explore how democracy is conceptualised within the principled wave.

Walker constructs a divide between a popular and societal frame.[74] The societal frame contains questions about the demarcation of the requisite polity, which could include the ideas of commonality that have been used to construct *demoi*.[75] The popular frame concerns the 'democratic self-constitution and self-authorship' of a public.[76] In disconnecting the authority of the public from ideas of commonality, Walker offers a way of demarcating a *demos* without relying on territory and nationality. In disconnecting the two frames, Walker, like Besson, asks two questions: the formation of constituent power holders, and the formation of the constitution.[77]

Previously it has been shown that for Walker, when a society comes together this does not have to be democratic,[78] but the expression of constituent power in this model does involve democracy. What is meant by 'democratic' needs unpacking. In his article on the 'Incompleteness of Democracy', Walker argues that the

[72] ibid 298.
[73] ibid 301.
[74] ibid 291.
[75] ibid 299.
[76] ibid 298-299.
[77] Samantha Besson, 'Whose Constitution(s)? International Law, Constitutionalism, and Democracy' in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009) 397.
[78] Chapter 2, section 2.2.2.

creation of the polity and the adoption of the constitution is not informed by democracy,[79] and yet here he seems to be suggesting constituent power is 'democratic'. If he seeks to argue that constituent power is not expressed democratically, nor destined to construct a democratic outcome, as he suggests in the 'Incompleteness' article, then the meaning of 'democratic' here is unclear. It would seem that Walker is referring to the idea that the people have some role in constitution-making.

Separating the frames can also risk obscuring the Who. Across global constitutionalist scholarship, the people are not always at the core of decision-making. Whilst a polity does not necessarily need to be demarcated using national identity, ethnos, or territorial boundaries, there does need to be a polity. A process that facilitates popular participation raises questions about democracy if those processes do not link to the individuals within the societal frame. What Walker proffers is an attempt to problematise the relationships between the frames, but it also demonstrates how it is possible to treat the frames in the abstract without acknowledging the need to connect to the people.

Scope of power

Another issue is the extent of constituent power. This can be determined both in terms of the powers and roles, but also temporally. Previously, it was noted that constituent power can manifest itself at the foundational moment alone or it can lie dormant as a threat to government that could reappear.[80] Within the principled

[79] Walker, 'Constitutionalism and the Incompleteness of Democracy' (n 7) 216.
[80] Chapter 2, section 2.2.2.

wave of global constitutionalist scholarship, the scope of constituent power is unclear. Nootens' discussion on constituent power highlights the ambiguity. She argues that the concept of constituent power embodies the idea that persons within a polity 'are to be the source of the [regime's] arrangements (constitutional and institutional)'.[81] Whilst it is generally agreed that constituent power is the power to make and change constitutional arrangements, the meaning of 'institutional', as used by Nootens, is less clear. What is meant by institutional will determine the scope of constituent power; if it means constitutional institutions then constituent power still has scope for foundational changes, if on the other hand it is evocative of everyday processes, then constituent power extends beyond constitutional moments.

Patberg argues that '[c]onstituent power then describes the citizens' ongoing entitlement to shape the constitutional order through democratic procedures'.[82] If 'democratic procedures' refers to institutionalised processes under the constitution, then there is a misunderstanding of constituent power. In other words, 'democratic procedures' could refer to voting, elections, or other participatory procedures that are outlined in the constitution to legitimatise governmental decision-making. As noted above, Sieyès vehemently rejected the conflation of constituent power and legislative processes; the constituent power predates those processes, it creates the constitution that provides for those processes.[83] Constitutional amendments blur the lines between constituent power and everyday governance, because scholars have referred to amendment

[81] Nootens (n 3) 137-138.
[82] Markus Patberg, 'Against democratic intergovernmentalism: The case for a theory of constituent power in the global realm' (2016) 14(3) I·CON 622, 632. See also, O'Donoghue, 'International constitutionalism and the state' (n 17) 1040; Nootens (n 3) 153 (constituent power is about contestation 'within actual practices of governance').
[83] See Chapter 2, section 2.2.2.

powers as constituent power.[84] Yet, constituent power is not expressed through processes *within* the constitution; constituent power sits outside the constitution, and so if amendment procedures are provided for within the constitution, implementing them is not an expression of constituent power.[85] Alternatively, Patberg's use of 'democratic procedures' could refer to the idea that constituent power has to be expressed democratically. This ambiguity around the meaning of 'democratic procedures' highlights that constituent power is not just a Who question, but also a When question.

The open nature of constituent power, or the idea that it continues to resist constituted power is mooted within global constitutionalist discourse. Krisch argues that social movements and NGOs have a function as a *pouvoir irritant*.[86] What it means to be an 'irritant' needs to be unpacked. 'Irritant' is evocative of the threat of the return of constituent power, this refers to a power that still exists outside of the constitution. Care needs to be taken here to stress that even the *irritant* function is a radical power. It is not mere resistance, opposition, or objection, but a threat or attempt to rewrite the constitutional system. However, for Krisch this irritant function is akin to resistance; he argues that when states refer to their domestic situation to threaten to renegotiate their international obligations, this is potentially an example of constituent power.[87] The constituent power is held by the state, and invoked at the international level; despite Krisch

[84] See above, Chapter 2, section 2.2.2. See Stephen M Griffin, 'Constituent Power and Constitutional Change in American Constitutionalism' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (OUP 2012) 49, 50 (In the American tradition, amendments to the constitution under Article V are an expression of constituent power).
[85] Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (CUP 2012) 310.
[86] Krisch, '*Pouvoir constituant* and *pouvoir irritant* in the postnational order' (n 50) 675-676.
[87] ibid 674-675.

calling for a popular process for constituent power,[88] a specific role for the people is not made out in this state-based example. Moreover, renegotiating international obligations is not necessarily constitutional for the global level of governance. It would only fall within the ambit of constituent power if the international obligations were 'constitutional', and there was not a pre-ordained amendment procedure that the state was following.[89] Using irritant in this manner means that the lines between political and constituent power are blurred.

This shift to conceive of constituent power as an irritant, highlights that the constituent power raises questions of What. The scope of the power depends on how constituent power is conceptualised; the shift to view constituent power as a form of irritation weakens the scope of the power. Whilst the principled wave draws attention to constituent power as a means of constructing a Who for global constitutionalism, the question of constituent power should also be seen as offering an alternative approach to What and When.

Relationship between Constituent Power and Democracy

Within the relational and decisionist approaches to constituent power, there is an assumption that constituent power is a 'democratic entitlement'.[90] Yet, as noted, there is a more complex relationship between constituent power and democracy.[91] There are multiple sites at which democracy and constituent power

[88] ibid 677.
[89] See Chapter 2, section 2.2.2.
[90] See Patberg, 'Against democratic intergovernmentalism' (n 82) 631; Stephen Tierney, 'Sovereignty and the Idea of Public Law' in Christodoulidis and Stephen Tierney (eds), *Public law and Politics: The Scope and Limits of Constitutionalism* (Routledge 2008) 15; O'Donoghue, *Constitutionalism in Global Constitutionalisation* (n 1) 80-81.
[91] Martin Loughlin, 'The Concept of Constituent Power' (2014) 13(2) European Journal of Political Theory 218, 232; Nootens (n 3) 137.

can potentially intersect: the demarcation of the polity, the manifestation of constituent power, and everyday governance. As will be explored in more detail below, scholars disagree about the role of democracy at these moments. This sub-section uses Walker's approach to constituent power to highlight the potential disconnects between democracy and constituent power, raising questions about whether constituent power is an appropriate basis for a global constitutionalist discussion on democracy.

In his discussion on the tension between constitutionalism and democracy, Walker adopts a distinction between constitutionalisation and everyday governance. For Walker, the question of authority, is answered by constituent power and constituent power is tied to the formation of the polity, the writing and the acceptance of the constitution.[92] This act of constituent power determines the constitution and the shape of the polity. The second question, for Walker, is about representation and it concerns Who counts within the *demos*.[93] Walker notes that it is the constitutional framework that determines the identity of those eligible to participate in democratic process.[94] In other words, the constitution provides the rules on the eligibility of the electorate. He argues that this is not 'derived from democratic principles'.[95] Walker argues that processes of constitutionalism operate to create a system in which democracy can then flourish. For Walker, the constitutionalisation process is not informed by democracy, democracy is an everyday governance concern.[96]

[92] Walker, 'Constitutionalism and the Incompleteness of Democracy' (n 7) 216. cf Walker, 'Beyond the Holistic Constitution?' (n 7) 299.
[93] Walker, 'Constitutionalism and the Incompleteness of Democracy' (n 7) 216.
[94] ibid 216.
[95] ibid 216.
[96] Cf Walker, 'Beyond the Holistic Constitution?' (n 7) 299.

Constructing a divide between authority and representation raises questions about the utility of using constituent power in the Who of a democracy discussion. Walker creates a distinction between the constituent power holders and the people participating in the democratic process; they are not necessarily the same actors as the constitutional order could limit the number of people who participate. In excluding democratic principles in determining the Who of the *demos*, Walker suggests that democracy is merely a process, where the question of political equality arises only after the people are demarcated by constitutionalism. The divide between constitutionalisation (constituent power) and democracy, where democracy does not have a role in the constitutionalisation process, undermines the utility of constituent power as a basis for democracy in global constitutionalism.

The process of constitutionalisation can be broken down into a series of phases: formation of the polity, writing the constitution, accepting the constitution, and amending the constitution. The role for constituent power and democracy at these phases is contested within global constitutionalist literature. Adopting the position he takes in the 'Incompleteness of Democracy', Walker would argue that democracy is not necessary at the formation of the polity, nor the writing and acceptance of the constitution.[97] But, he acknowledges that democracy plays a role in changing the constitutional arrangement.[98] In contrast, Besson requires democratic processes at each stage and O'Donoghue argues that democracy

[97] Walker, 'Constitutionalism and the Incompleteness of Democracy' (n 7) 216. See also, Hans Lindahl, 'Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism* (OUP 2008) 19.
[98] Walker, 'Constitutionalism and the Incompleteness of Democracy' (n 7) 216.

informs constituent power.[99] There is a real complexity to the relationship between constituent power and democracy, and this needs to be appreciated before constituent power is used as a basis for democracy.

Within the principled wave of global constitutionalist literature, scholars have latched onto constituent power as a method of expanding the Who beyond the state-centricity of international law; non-state actors such as collectives of individuals, social movements, and NGOs are discussed as potential constituent power holders to bring them into the relevant actors of international law. This section has considered the utility of such a move and raised the limitations of focusing on constituent power. Within this wave, constituent power is treated as a Who question, as a lens to expose potential actors currently disadvantaged or ignored by the international legal system. But, as this section has demonstrated, constituent power must also be addressed as a What and When question as doing so highlights the differences between constituent power and democracy.

5.3.2 What

The broad umbrella nature of the principled approach to global constitutionalism means that there is no consensus on the What of democracy; in other words, the scope of the power of the people within democracy is not agreed. Whilst the shift to constituent power, and to investigating the allocation of power within constitutionalism, means that there are fruitful discussions on popular sovereignty and democracy, there are limitations to this discussion. In particular, the moniker

[99] Besson, 'Whose Constitution(s)?' (n 77) 397; O'Donoghue, *Constitutionalism in Global Constitutionalisation* (n 1) 110. See also, Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity Press 2016) 457.

of democratic legitimacy used in the scholarship further complicates matters. To explore how this wave conceptualises the What of democracy, and to investigate where limitations arise, this section will explore the extent to which democracy is considered foundational, then it will discuss the limitation of the democratic legitimacy moniker.

Popular Sovereignty; the scope of the power?

This sub-section explores how this wave of global constitutionalist scholarship approaches the What of democracy. Within the principled approach, there is an acknowledgement that democracy is about popular sovereignty. But, there are certain discussions that question the relationship between population sovereignty and democracy; namely, the fact that state sovereignty still has prominence in global constitutionalist discourse. In addition, within this principled wave there is disagreement as to the types of decisions people are given control over.

What popular sovereignty and democracy means for the principled wave is unclear. For Walker, questions of popular sovereignty are located within the constituent power, which he argues is disassociated and in a contested relationship with democracy.[100] Furthermore, he distances democracy from popular sovereignty as he ties democratic politics to voting and standing for election.[101] Walker's approach fits with the tradition that ties popular sovereignty to the constitutional moment.[102] In contrast, for Habermas, democracy and

[100] Walker, 'Constitutionalism and the Incompleteness of Democracy' (n 7) 229.
[101] ibid 216.
[102] See Chapter 1, section 1.5.1 and Chapter 2, section 2.3.3.

popular sovereignty are equated.[103] He argues that popular sovereignty is proceduralised, which means it 'retreats into democratic procedures'.[104] But, in proceduralising popular sovereignty, Habermas makes it into a communicative power; a power that falls short of republican notions of popular sovereignty.[105] The wave encompasses different positions on popular sovereignty, leading to an incoherent discourse on democracy.

Popular sovereignty, even within the principled approach to global constitutionalism, can get overlooked as there is an unclear relationship between popular and state sovereignty.[106] In international law, whilst there is an attempt to incorporate ideas of popular sovereignty, the territorial integrity of the state trumps the will of the people,[107] and there is still a commitment within the organisational wave to state sovereignty.[108] The principled wave fails to explicitly challenge this tension between popular and state sovereignty. Discussions on the state highlight this. Habermas argues that there are two subjects within global constitutionalism, states and individuals. O'Donoghue, building on Habermas, argues that it is practical to acknowledge the role of states: '[a]cknowledging states and individuals as subjects in combination with international organisations and structures for the maintenance of the legal order is perhaps a more realistic proposition than what is first apparent.'[109] This realistic position is evocative of Peters' approach in the organisational wave. Despite normative approaches to

[103] Jürgen Habermas, 'The Crisis of the European union in the Light of a Constitutionalization of International Law' (2012) 23(2) EJIL 335, 339; de Búrca, 'Developing Democracy' (n 8) 107.
[104] Jürgen Habermas, 'Three Normative Models of Democracy' (1994) 1(1) Constellations 1, 9-10.
[105] ibid 9-10.
[106] Jürgen Habermas, 'Citizen and State Equality in a Supranational Political Community: Degressive Proportionality and the *Pouvoir Constituant Mixte*' (2017) 55(2) Journal of Common Market Studies 171.
[107] Chapter 3, section 3.3.1.
[108] Chapter 4, section 4.2.1.
[109] O'Donoghue, *Constitutionalism in Global Constitutionalisation* (n 1) 254.

democracy requiring a challenge to state sovereignty, Peters protects state sovereignty because it is a foundation of international law.[110] O'Donoghue does, however, note that classical approaches to the state are no longer sufficient,[111] which leaves space to discuss how states are representative of their populations, rather than merely assume, which is the position adopted within the organisational wave.[112]

Preuss, who argues that constitutionalism is about popular sovereignty, does not challenge state sovereignty. Preuss uses *jus cogens*, *erga omnes* norms, 'world-order treaties' and an independent international judiciary as evidence of international constitutionalisation.[113] Whilst *jus cogens* norms, *erga omnes* norms, and an independent judiciary witness a move away from state consent, they are not generated by the people, and furthermore treaties are predicated on state consent. Incorporating the idea of 'word-order treaties', which locates the discussion in state sovereignty, Preuss does not engage with how state sovereignty can quell popular sovereignty. In balancing the interests of individuals and the role of the state in international law, this wave of global constitutionalist literature can fail to negate the impact of state sovereignty and territorial integrity on democracy.

What decisions will be subject to democratic processes are inconsistent in this wave. Whilst Føllesdal argues that the constitution as a whole should be subject to democratic scrutiny, he allows for select agencies and organisations to act

[110] Chapter 4, section 4.2.1, fn 61-77.
[111] O'Donoghue, *Constitutionalism in Global Constitutionalisation* (n 1) 254.
[112] Chapter 4, section 4.2.1, fn 61-77.
[113] Ulrich K Preuss, 'Disconnecting Constitutions from Statehood: Is Global Constitutionalism a Viable Concept?' in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (OUP 2010) 44-45.

independently provided they maintain public trust.[114] Walker similarly argues that democracy cannot extend to the 'very nook and cranny of decision-making', and that other non-democratic mechanisms such as expertise should determine some decisions.[115] The idea that some discreet exercises of power can be measured against non-democratic mechanisms, raises questions about the What of democracy. Both Føllesdal and Walker introduce non-democratic mechanisms because legitimacy is socially constructed and thus not necessarily tied to democracy.[116] Legitimacy can be derived from trust and expertise as they suggest. Other norms and processes within constitutionalism can generate legitimacy, such as the rule of law. Where democracy is facilitated and where non-democratic mechanisms are used can be explained by the tension between constitutionalism and democracy; constitutionalism can place limits on democracy. But, what is missing from the principled wave is an acknowledgement of the disagreements on the scope of democracy, and the role of constitutionalism in demarcating this scope.

In principle, the competing approaches to popular sovereignty or political equality are not problematic. Terms, such as popular sovereignty and democracy, are nebulous and can therefore be used as part of different constitutional projects. The problems arise where there is no explicit acknowledgement of the changes to the scope of people's power. Using the Circumstances exposes the shifts to

[114] Andreas Føllesdal, 'When Common Interests Are Not Common: Why the Global Basic Structure Should Be Democratic' (2009) 16(2) Indiana Journal of Global Legal Studies 585, 602-603.
[115] Walker, 'Constitutionalism and the Incompleteness of Democracy' (n 7) 222. See also Habermas' distinction between transnational and supranational decision-making; transnational decision-making concerns technical issues and supranational decision-making concerns political issues. Habermas, 'The Constitutionalization of International Law' (n 4) 446.
[116] See Chapter 4, section 4.2.2.

the scope of power and how subtle modifications to the When and Where can influence the What of democracy.

Democratic Legitimacy

A common moniker within the principled wave of global constitutionalist literature is 'democratic legitimacy', but there is a lack of clarity around what democratic legitimacy means and what roles and powers it gives to the people. Democratic legitimacy might indicate the When of democracy, to the extent that it can indicate that decision-making has to be rooted in a democratically legitimate authority. In this sense, democratic legitimacy is tied to popular sovereignty as a constituent moment, where representatives can operate provided they link back to some mythical idea of the people as sovereign.[117] O'Donoghue seems to incorporate an idea of democratic legitimacy as a foundational question as she draws a distinction between democracy and democratic legitimacy, and democratic legitimacy is concerned with the recognition of constituent power holders and linking them to constituted power holders.[118] Potentially then, democratic legitimacy is tied to the question of When and in particular, to foundational moments.

Using democratic legitimacy as a foundational question, ignores the everyday decision-making. That said, the distinction in the principled wave is not so clear cut. O'Donoghue blurs the lines between constituent and everyday moments as the relationship between constituent and constituted power is iterative.

[117] See Chapter 1, section 1.5.1 and Chapter 2, section 2.3.3.
[118] O'Donoghue, *Constitutionalism in Global Constitutionalisation* (n 1) 56.

Furthermore, Habermas refers to democratic legitimacy with respect to both everyday governance and constituent moments.[119] He argues that international organisations have to construct processes that secure 'democratic legitimation', by which he means that they link back to the legitimacy of the state.[120] He seems to be suggesting that democratic legitimacy within the state refers to the foundation, but at the international level it refers to processes that build on this state-based legitimacy.[121] This risks returning to the approach within the organisational wave, which is to assume state-based processes are democratically legitimate.[122] If the meaning of democratic legitimacy is not clear, and if it can be used interchangeably without explanation as to its meaning, then the scope of the power of the people within democracy is not clear.

Linking democracy and legitimacy impacts on the scope of democracy as it can give democracy a very particular function.[123] Democracy can be considered 'indispensable normative component [sic] for the legitimacy of a legal order'.[124] As legitimacy can be disaggregated into a cluster of input, output, and process values, scholars can focus on one or other to generate legitimacy.[125] The problem with democratic legitimacy is the use of democracy descriptively; democratic can be disaggregated from the general concept of democracy, such that certain values and/or processes of democracy can be selected without referring to 'the full range of democratic values and institutions'.[126] For example, O'Donoghue, when discussing democratic legitimacy, conceptualises democracy as 'linking

[119] Habermas, 'The Constitutionalization of International Law' (n 4) 452.
[120] ibid 445.
[121] ibid 445.
[122] Chapter 4, section 4.2.1, fn 61-77.
[123] See O'Donoghue, *Constitutionalism in Global Constitutionalisation* (n 1) 56.
[124] J H H Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy' (2004) 64 ZaöRV 547, 547. Cf Chapter 4, section 4.2.2.
[125] Chapter 4, section 4.2.2, text at fn 89-101.
[126] de Búrca, 'Developing Democracy' (n 8) 120.

constituent and constituted power holders together'.[127] According to O'Donoghue, this 'ensures that power is exercised in a transparent and justifiable basis'.[128] Here, arguably, elements of democracy are focused on, rather than democracy as a concept. This means that the moniker of democratic legitimacy can be used, but it can be referring to selected aspects of democracy.

The scope of democracy is contested so at present scholars can exchange different definitions of democracy, with particular elements emphasised over others, or aspects of governance included at the expense of others. There is nothing wrong with choosing to shape democracy into democratic legitimacy to form a norm within constitutionalism, but going forward global constitutionalist scholarship should be explicit about where it seeks to limit, shape, and constrain democracy.[129]

5.3.3 When

As the discussion on constituent power above demonstrates, this principled approach shifts focus towards the constituent moment.[130] This is in contrast with the organisational wave of global constitutionalist scholarship that sidestepped the issue of the foundational moment. As the discussion on constituent power demonstrated, When the constituent power is manifested is unclear; whilst some scholars restrict it to foundational moments, others have an evolutionary understanding, and others equate it with the processes of everyday

[127] O'Donoghue, *Constitutionalism in Global Constitutionalisation* (n 1) 56.
[128] ibid 62.
[129] Cf O'Donoghue where she argues against majoritarianism. O'Donoghue, *Constitutionalism in Global Constitutionalisation* (n 1) 44.
[130] See above, section 5.3.1.

governance.[131] As such, the question of When democracy takes place is unclear. This section will first explore the impact of the shift to constituent power on the When of democracy and then it will consider Walker's model of constitutionalism, which seeks to divide constitutionalism into four-layers. Splitting constitutionalism, as Walker does, raises questions about the When of democracy.

Shift to constituent power

The focus on constituent power shifts democracy away from everyday governance and towards constituent moments. Patberg criticises the debate on democracy at the global level because it is 'dominated by proposals', with 'blueprints for legitimate institutions and procedures'.[132] As the exploration of the organisational wave demonstrated, aspects of the global constitutionalist literature advocate the reform of existing international organisations. Patberg argues that the issue of institutional change is ignored.[133] He argues that for 'normal politics' to be democratic, the institutions need to be 'set up legitimately' and constituent power helps to address who has the right to found or reform institutions.[134] As this broadens the application of democracy, it is a welcome shift.

Unlike Sieyès, who drew a distinction between constituent and constituted power, the principled wave adopts a more complex relationship between constituent

[131] Chapter 2, section 2.2.2.
[132] Markus Patberg, 'Constituent Power beyond the state: an emerging debate in international political theory' (2013) Millennium 224-238, 230.
[133] ibid 230.
[134] ibid 230.

power and democracy. Walker argues that democracy does not inform the creation of the polity nor the creation of the constitutional arrangement, but he does argue that democracy is a reflexive process that can act to question the constitutional order; it facilitates the 'continuously self-amending relationship of a collective self to itself'.[135] For O'Donoghue, the role of constituent power is to 'choose the form and substantive character of the governance system' and changes to it.[136] She argues that democracy is part of the constituent moment and changes to the subsequent expressions of constituent power. O'Donoghue argues that change of the constitutional order is an expression of constituent power and democracy plays a role in this process. She argues that 'constitutionalism is reliant on democracy to legitimately change the content of its own order'.[137] The differing roles Walker and O'Donoghue give democracy and constituent power in constitutional change could be evocative of Tully's 'democratic constitutionalism' or Krisch's weaker *pouvoir irritant*.[138] On a stricter approach to constituent power, these discussions are at odds with the idea that amendment procedures are not an expression of constituent power.[139] The complexity demonstrates the magnitude of the challenge in discussing democracy in global constitutionalism.

The problem is that it is not clear when constituent power manifests itself. Though not explicitly, O'Donoghue discusses democratic legitimacy at both the

[135] Walker, 'Constitutionalism and the Incompleteness of Democracy' (n 7) 216.
[136] O'Donoghue, *Constitutionalism in Global Constitutionalisation* (n 1) 77.
[137] O'Donoghue, 'International constitutionalism and the state' (n 17) 1021; O'Donoghue, *Constitutionalism in Global Constitutionalisation* (n 1) 61.
[138] James Tully, 'The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy' (2002) MLR 204, 207; Krisch, '*Pouvoir constituant* and *pouvoir irritant* in the postnational order' (n 50).
[139] Chapter 2, section 2.2.2.

foundational moments and everyday governance.[140] With respect to everyday governance, she discusses the operation of a legitimate governance order and the distribution of the benefits of the constitutional order.[141] On the one hand, the idea that benefits are distributed gives democracy a distributive role, on the other hand, she writes that the benefits have to be 'functional'[142] or, in essence, that people are able to exercise their power. Whilst predominantly she discusses constituent power and democracy as manifested in constitutional moments and changes, there is a suggestion here that both can have a role in everyday governance.

Conflating the constitutional moment and the everyday can cause problems. As noted, Sieyès warned against such a conflation because if every act of decision-making is an act of constituent power, all law or policy becomes constitutional law.[143] On the one hand, constitutional laws are typically above the contestation of the people and difficult to amend. On the other hand, if every act is an act of constituent power, this grants the people a radical power to reconstitute the constitutional order on a frequent basis. It is this shift in the scope of the power that the principled wave needs to be explicit about.

In contrast, de Búrca explicitly discusses the everyday governance. In her democratic striving approach, she applies aspects of democracy to everyday governance. When she discusses the construction or reform of international organisations, she argues that democracy requires the reform of international

[140] O'Donoghue, 'International constitutionalism and the state' (n 17) 1021; O'Donoghue, *Constitutionalism in Global Constitutionalisation* (n 1) 61-63 (changing constitutional order) and 254 (everyday).
[141] O'Donoghue, *Constitutionalism in Global Constitutionalisation* (n 1) 254.
[142] ibid 63.
[143] Chapter 2, section 2.2.2, text at fn 99-100.

organisations and their processes.[144] It is not clear what types of reforms are required, but her discussion on the proposals for reforming the institution focuses on states.[145] de Búrca's reliance on states echoes the approach adopted by Fassbender and Peters in the organisational wave.[146] She outlines the proposal to ensure the increased participation of governments from developing countries, but does not critique that states are a weak form of representative for people. The presence of intergovernmental democracy at the foundational moment, and the disconnect between state and people, weakens democracy's role at the foundational moment.

As the work of O'Donoghue, Walker and de Búrca demonstrate, there is little clarity over When democracy should take place in this principled wave. Albeit there is a shift towards taking seriously the foundational moment, the role of democracy at those moments is still contested. As discussed above, there are three questions to consider when investigating When: the role of democracy in the demarcation of the polity; the role of democracy in the expression of constituent power; and the role of democracy in everyday governance. At each instance, there is a lack of agreement. For Walker, the demarcation of a polity is not necessarily democratic,[147] but de Búrca and O'Donoghue argue democracy should be taken into account on an ongoing basis to determine the *demos*/constituency.[148] Whilst O'Donoghue would ensure that democracy played a role in the expression of constituent power,[149] Walker has shifted democracy to

[144] de Búrca, 'Developing Democracy' (n 8) 156.
[145] ibid 145.
[146] Chapter 4, section 4.3.3, fn 225-261.
[147] Walker, 'Constitutionalism and the Incompleteness of Democracy' (n 7) 215. cf Walker, 'Beyond the Holistic Constitution?' (n 7) 299.
[148] de Búrca, 'Developing Democracy' (n 8) 123-134; O'Donoghue, *Constitutionalism in Global Constitutionalisation* (n 1) 110.
[149] O'Donoghue, *Constitutionalism in Global Constitutionalisation* (n 1) 110.

a phase after the constituent moment.[150] With respect to the everyday governance, all three place democracy within this phase, but not necessarily as part of a constituent power; whilst O'Donoghue interrelates democracy and constituent power, Walker distinguishes them so that constituent power still denotes the radical power to constitute, and de Búrca does not reflect on constituent power in everyday governance. Within the principled wave there are different approaches to the When of democracy, but the scholars do not respond to one another. Rather, these approaches to When are co-existent and there is little reflection on how this shift in When shapes the approach to democracy.

The shift to constituent power creates gaps with respect to everyday governance. Patberg uses constituent power to challenge and reform 'intergovernmental democracy'.[151] Rather than relying on states as constituent power holders, Patberg calls for a shift to citizens.[152] But, constituent power (traditionally understood) speaks to the constituent moment and not everyday governance. Patberg does not discuss who would represent citizens in everyday decision-making. In other words, he critiques how the parliamentary body is established but then leaves the state-based representatives intact, thus not moving beyond the statist-track outlined in the organisational wave.[153] Separating constituent power from democracy exposes the limitation of Patberg's argument, and highlights the need to conceptualise constituent power as a When and What question, rather than just a Who question.

[150] Walker, 'Constitutionalism and the Incompleteness of Democracy' (n 7) 215.
[151] Patberg, 'Against democratic intergovernmentalism' (n 82) 622.
[152] ibid 632.
[153] Chapter 4, section 4.3.1.

In his discussion on whether there is a *Pouvoir Constituant Mixte* at the EU, Habermas demonstrates the complex relationship between constituent power and democracy.[154] For Habermas, the constituent power of the EU is divided as individuals are both citizens within Member States and part of the European people, it is in both of these roles that they have constituent power.[155] He draws a distinction between constituting power, which is concerned with creation and change to constitutions, and the legitimacy of political processes within a constitutional system.[156] In the European Parliament, the voting practices are at odds with political equality; the degressive proportional allocation of seats means that votes are not counted equally. Habermas uses the idea of the divided constituent power to justify this rejection of political equality in the European Parliament; state equality is protected as a part of the act of constituent power, when the people chose to project their status as citizens in Member States. A former act of constituent power justifies the undemocratic decision-making processes.

The problem with Habermas' discussion on constituent power is that it prioritises only one aspect of the When of democracy. Limiting the discussion to the constituent power negates the power of the *demos*. If, as Tully argues, democracy requires an iterative challenge to constitutionalism, Habermas' argument ignores this reflexive role for democracy.[157] This approach to constituent power focuses on the constituent moment at the expense of the everyday decision-making. This thesis argues that the role for democracy should

[154] Habermas, 'Citizen and State Equality in a Supranational Political Community' (n 106) 171.
[155] ibid 179.
[156] ibid 174.
[157] Tully (n 138) 207.

be considered in relation to both the constituting power and the political process.[158]

Layers of constitutionalism

Walker's four layers (the juridical, the societal, the popular, and the politico-institutional)[159] do not have a fixed formation, but rather iteratively interact according to the context.[160] When this is paired with Walker's idea of the constitutional constellation, which is the idea that within global constitutionalism different sites can interact to form constitutionalisation,[161] it raises questions about When democracy is located within constitutionalism.

The juridical layer is concerned with a self-contained legal order.[162] The politico-institutional layer concerns the 'differentiation of the sphere of the public and the political'.[163] As noted above, the popular layer 'refers to the dimension of "we the people"' and the societal layer 'refers to the idea that the constitution pertains to a particular "society" self-understood and self-identified as such'.[164] It is within the 'popular' layer that Walker explicitly engages with questions of democracy: the constitutional order is underpinned by 'its democratic self-constitution and self-authorship'.[165]

[158] Habermas argues that lawyers focus on the political process and democratic theory focuses on constituent power. Habermas, 'Citizen and State Equality in a Supranational Political Community' (n 106) 174.
[159] Walker, 'Beyond the Holistic Constitution?' (n 7) 298.
[160] ibid 298.
[161] Walker, 'Constitutionalism and the Incompleteness of Democracy' (n 7) 230.
[162] Walker, 'Beyond the Holistic Constitution?' (n 7) 298-299.
[163] ibid 299.
[164] ibid 299.
[165] ibid 299.

The way in which the four layers are constructed raises questions about When democracy is conceptualised. Walker places democracy in the 'popular' frame, but he argues that there is interaction between the four frames as they are 'dependent on the integrity of the whole'.[166] What is not explicitly addressed in his chapter is how issues, such as democracy, move across the four layers. For example, if there is a disconnect between the 'popular' and 'societal' layer this suggests, as argued above, that Walker does not envisage a role for democracy in the construction of the polity.[167] He addresses the ways in which the juridical and the politico-institutional might relate to each other, raising issues such as decision-making,[168] but, not how these layers interact with the popular frame. In suggesting that the constitution is underpinned by democracy it is possible that the governance must link back to the people, but this is not explicit. This is symptomatic of shifting the discussion to constituent power, without addressing everyday governance.

In global constitutionalist scholarship, there is a shift from the organisational wave dealing with everyday governance in international organisations, to the principled wave, which focuses on constitutional moments. Whilst the focus on constituent power adds the additional element of the foundational moment, it necessitates a reflection on the other Circumstances of Democracy as constituent power is a question of Who, What and When.

A shift in the When can influence the Who and the What of democracy. Not appreciating the impact of shifting the When, has the potential to conflate the

[166] Walker, 'Beyond the Holistic Constitution?' (n 7) 298.
[167] Walker, 'Constitutionalism and the Incompleteness of Democracy' (n 7) 216.
[168] Walker, 'Beyond the Holistic Constitution?' (n 7) 299-300.

demos and constituent power. The *demos* and constituent power have different roles and powers; whilst the powers of the *demos* are prescribed by the constitution, the constituent power is a radical power to rewrite the constitutional frame. Global constitutionalist scholarship needs a reflection on the different roles and powers of the constituent power holders and the *demos*. If democracy is to be conflated with constituent power, then this more radical notion of democracy should be explicitly acknowledged.

5.3.4 Where

Walker approaches the Where of global constitutionalism from four angles: unity, sectoral, societal and then constitutional pluralism. Walker, who advocates a constitutional pluralism, places the other approaches on a continuum, with unity at one end and societal constitutionalism at the other.[169] The unity approach argues that there is a single constitutional system, such as the UN Charter as the constitution of the international community. The sectoral angle acknowledges the fragmentation of international law and discusses constitutionalisation within different sectors of international law. The principled approach includes a shift in favour of a pluralist or sociological approach, and this section considers the influence of this shift on discussions of democracy.

Constitutional Pluralism

[169] Neil Walker, 'Constitutionalism and Pluralism in Global Context' in Matej Avbelj and Jan Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012) 27.

Constitutional pluralism originated in debates on membership to the EU,[170] and though it is criticised for misconceptions of sovereignty or constructing a new form of anarchy,[171] it is used as a framing device in aspects of global constitutionalist literature. What constitutional pluralism means is debated. Whilst some argue that it amounts to interactions between autonomous legal orders,[172] others have constructed a constellation from *elements* of legal orders.[173] Maduro demonstrates that there are empirical and normative claims of constitutional pluralism. The empirical claim is that there are a 'plurality of constitutional sources and claims of final authority'.[174] The normative claim is that final authority should be left open.[175] In other words, neither system could claim superiority over the other.[176] This sub-section uses Walker's constitutional pluralism.

For Walker, constitutionalism and democracy can take place across levels. He uses constitutional pluralism to argue that constitutional 'points' can interact with 'strongly democratic settings', forming a constellation where one point will democratise the other.[177] As an example, he suggests that the democratic Member States of the Council of Europe can act to democratise the European Convention on Human Rights (ECHR).[178] Walker acknowledges that this model

[170] Neil MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (OUP 1999); Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65 MLR 317.
[171] See for example, Martin Loughlin, 'Constitutional pluralism: An oxymoron?' (2014) 3(1) Global Constitutionalism 9. For a discussion on pluralist approaches as anarchy, see Neil Walker, 'Beyond boundary disputes and basic grids: Mapping the global disorder of normative orders' (2008) 6 (3&4) I·CON 373, 390.
[172] Alec Stone Sweet, 'The Structure of Constitutional Pluralism' (2013) 11(2) I·CON 491, 497; Armin von Bogdandy, 'Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic law' (2008) 6 I·CON 397, 401.
[173] See Walker, 'The Idea of Constitutional Pluralism' (n 170) 359.
[174] Miguel Poiares Maduro, 'Three Claims of Constitutional Pluralism' in Matej Avbelj and Jan Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012) 69.
[175] ibid 75.
[176] Neil MacCormick, 'The Maastricht Urteil: Sovereignty Now' (1995) 1 European Law Journal 259, 265.
[177] Walker, 'Constitutionalism and the Incompleteness of Democracy' (n 7) 230.
[178] ibid 230.

can be criticised for constructing an 'attenuated' link between the international organisation and the *demos*.[179] But, he responds by arguing that constitutionalism and democracy are in tension. The argument is that the constitutionalism offered by a body such as the Council of Europe through the ECHR realises democracy within a state.[180] But, as Tully in his use of 'democratic constitutionalism' argues, constitutionalism should be infused with democracy.[181] This means that the Council of Europe would need democratisation. To argue that constitutionalism can work to limit democracy without demonstrating how democracy works on constitutionalism, effectively shuts down claims for democratising international and supranational organisations. Within this model, the role of democracy is diminished.

Walker attempts to address the weak link between the people and the constitutional point. Walker argues that Member States provide democratic legitimacy by adopting the norms of the ECHR.[182] Firstly, this lacks a discussion on the What, as the people have limited decision-making capacity in relation to the adoption of such norms, especially as the ratification process does not have to involve Parliament.[183] Secondly, the adoption of norms is ambiguous with respect to When; adoption could mean the ratification of the ECHR, or the continuous engagement with the jurisprudence of the European Court of Human Rights. If the argument is that Member States ratified the ECHR this echoes with the reliance on 'intergovernmental democracy' in the organisational wave, where

[179] ibid 230.
[180] ibid 231-233.
[181] Tully (n 138) 207.
[182] Walker, 'Constitutionalism and the Incompleteness of Democracy' (n 7) 230.
[183] International Law Commission, 'Draft Articles on the Law of Treaties with Commentaries' (1966) II Yearbook of the International Law Commission 187, 189-19.

states are key actors and there is limited engagement with the people.[184] In contrast to the organisational wave, which merely assumed the state was representative, Walker outlines that to be democratic a state must meet 'minimal conditions of political and personal freedom on the part of its stakeholders and office-holders'.[185] This is an improvement on the approach in the organisational wave, which reconceptualised the sovereign state as responsible to its citizens, as it is suggestive of a need to investigate the state's political methods. Whilst this is a move in the right direction, there is a need to reflect on the Who, What, and When. In principle, the constitutional constellation could work, provided that there was genuine input of the people.

The flexibility of Walker's constitutional pluralism moves the discussion on democracy forward. It moves beyond state-contained ideas of constitutionalism and looks for genuine responsiveness of states to people, rather than relying on international legal debates on the revision of sovereignty as responsibility. The problem with Walker's constellation lies in the lack of procedural details; more needs to be done to ensure genuine links to the people and a more nuanced relationship between constitutionalism and democracy.

Societal Constitutionalism

Societal constitutionalism argues that the state is not the only location for constitutionalisation, rather autonomous systems can develop as constitutional orders. Societal constitutionalism examines constitutionalism in non-state

[184] See 'statist-track', Chapter 4, section 4.3.1.
[185] Walker, 'Constitutionalism and the Incompleteness of Democracy' (n 7) 219.

examples,[186] such as civil society, business corporations and private organizations.[187] Teubner argues that sectors of society (economy, science, arts etc.) have their own autonomous identity.[188] Societal constitutionalism challenges the public private divide and argues for the constitutionalisation of private sectors. The commitment to autonomous constitutions within different sectors of society, means that in principle constitutionalism can take place across the levels of governance and within them. It opens spaces for constitutionalism and discussions on democracy.

Within Walker's four layers of constitutionalism that were outlined in the previous section, one of the layers was the politico-institutional layer.[189] This layer is predicated on a public/private divide, as it locates the political within a public sphere.[190] The very premise of Walker's politico-institutional layer places the Where of democracy in the public sphere, thus limiting the types of international institutions people have power over. de Búrca limits her enquiry to 'public governing institution[s]'.[191] She argues that the International Monetary Fund (IMF) should be subject to democratic legitimacy because it has public goals and is an authoritative public policy-maker.[192] For de Búrca, authoritative decision-making should be subject to democratic legitimacy.[193] This is broad criteria, which facilitates discussions on bodies other than formal international organisations,

[186] See also Preuss, who uses the example of voluntary associations. Preuss, 'Disconnecting Constitutions from Statehood' (n 113) 32; Gunther Teubner, 'Fragmented Foundations: Societal Constitutionalism Beyond the Nation State' in Petra Dobner and Martin Loughlin (eds) *The Twilight of Constitutionalism?* (OUP 2010) 328; Teubner, *Constitutional Fragments* (n 9) 25.
[187] Teubner, *Constitutional Fragments* (n 9) 26.
[188] ibid 28.
[189] Walker, 'Beyond the Holistic Constitution?' (n 7) 299.
[190] ibid 299.
[191] de Búrca, 'Developing Democracy' (n 8) 140.
[192] de Búrca, 'Developing Democracy' (n 8) 139-140. Cf Terry Macdonald and Kate Macdonald, 'Non-Electoral Accountability in Global Politics: Strengthening Democratic Control within the Global Garment Industry' (2006) 17(1) EJIL 89, 93 (define public power according to control).
[193] de Búrca, 'Developing Democracy' (n 8) 113.

and thus moves beyond the organisational wave. However, it is still situated within the public sphere, leaving the private sphere unaccountable. Using functions of a body to demarcate the location of democracy can exclude those bodies that wield power over persons but do not exhibit such functions.[194] An alternative argument is that state authority is subjected to democracy because of its coercive force and another approach is that all exercises of power should be subject to democratic control.[195] The public/private divide exhibited by Walker and de Búrca is criticised by scholars such as, Teubner and Thornhill in societal constitutionalism,[196] as it overly restricts the application of constitutionalism and democracy.

Societal constitutionalism questions the primacy of the state constitution and examines constitutionalism in non-state examples.[197] This includes civil society as well as business corporations and private organisations.[198] For Teubner this is about developing a theory of constitutionalism without the state.[199] This means that in theory democratic decision-making is located across society and other organisations.[200] However, as Teubner argues, these sectors of society (economy, science, arts etc.) have their own autonomous identity; in other words, the state constitution should not be a blueprint, rather each sector has a process of constitutionalisation.[201] How each system self-constitutionalises is specific to that system, which could potentially exclude democracy.

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[194] Macdonald and MacDonald (n 192) 93.
[195] de Búrca, 'Developing Democracy' (n 8) 110.
[196] Teubner, *Constitutional Fragments* (n 9) 29; Chris Thornhill, 'The autonomy of the political: A socio-theoretical response' (2009) 35(6) Philosophy & Social Criticism 705, 707.
[197] See also Preuss, who uses the example of voluntary associations. Preuss, 'Disconnecting Constitutions from Statehood' (n 113) 32; Teubner, 'Fragmented Foundations' (n 186) 328; Teubner, *Constitutional Fragments* (n 9) 25.
[198] Teubner, *Constitutional Fragments* (n 9) 26.
[199] Teubner, 'Fragmented Foundations' (n 186) 328.
[200] Teubner, *Constitutional Fragments* (n 9) 26-27.
[201] ibid 28.

In societal constitutionalism, the focus on constitutionalisation as a process gives a different approach to the question of Where. Societal constitutionalism is concerned with the *constitutionalisation* of self-limiting autonomous spheres, which is an ongoing process. Teubner distinguishes between *'La politique'* and '*le politique*'.[202] *La politique* refers to 'institutionalized politics' and *le politique* refers to 'politics in society' or other potential autonomous spheres.[203] The relationship between *La politique* and *le politique* is defined in the negative; Teubner argues that *La politique* cannot represent the whole of *le politique*.[204] The role for *le politique* within *La politique* is unclear.[205] With respect to the Where of constitutionalism, he argues that both *La politique* and *le politique* experience the paradox of constituent power and constituted power as both self-constitute.[206] But, Teubner does not explicitly introduce democracy to this question of constituent power.[207] For Teubner, constituent power is a process that is not tied to democracy and whilst he introduces ideas of participation in *le politique,* it is not clear that participation is equivalent to democracy.[208] Societal constitutionalism offers a different Where for constitutionalism and democracy; the constitutionalisation of *le politique*. But, as it falls outside of Teubner's project, there is no exploration of the ramifications for the When of democracy.

Together Teubner and Walker offer a more integrated model of global governance, which has the potential to expand into the private sphere. However,

[202] ibid 114.
[203] ibid 114.
[204] ibid 116.
[205] Though he does argue that the idea that part of society participate in state-level politics should be abandoned. Teubner, *Constitutional Fragments* (n 9) 116.
[206] Teubner, *Constitutional Fragments* (n 9) 65 and 114.
[207] ibid 61-66.
[208] ibid 116 and 122.

the discussions on Where demonstrate a failure to connect the Circumstances of Democracy. There is scope for a disconnect between Where and the requisite Who. Teubner is ambiguous about the place of people in his conceptualisation of constituent power and democracy. Whilst Walker offers a non-holistic concept of the constitution as a way of disassociating from the state but still ensuring that the different elements of constitutionalism are present, the idea of the people making collective decisions can still get lost. There needs to be explicit debates on the links between the people and their genuine power in decision-making for democracy.

5.3.5 How

The commitment to both an integrated concept of global governance and the need to incorporate the private sphere within the principled wave, has implications on the How of democracy. This wave acknowledges that international organisations are not the only sites in need of reform, parliamentary style bodies are not sufficient, and the focus on Member States is not plausible. Alongside models that are predicated on elections,[209] there are innovative approaches, such as de Búrca's 'democratic-striving' approach. Nevertheless, the institutionalisation of democracy within global constitutionalist literature is not as prominent within the principled approach.[210]

[209] Grimm's understanding of democracy is predicated on free elections, but also a free media, political freedom of citizens, and individual freedom in the private sphere. Dieter Grimm, 'The Democratic Costs of Constitutionalisation: The European Case' (2015) 21(4) European Law Journal 460, 463.

[210] Neil Walker, 'Postnational Constitutionalism and the challenge of contested multilateralism' (2016) 5(3) Global Constitutionalism 309; O'Donoghue, *Constitutionalism in Global Constitutionalisation* (n 1) 270. For Walker, this is because constitutionalism determines the choice of the system (i.e. whether it is representative, majoritarian or unitary etc.). Walker, 'Constitutionalism and the Incompleteness of Democracy' (n 7) 218.

This section will explore how representation and participation are used within the principled wave. It focuses on the contrasting models proffered by de Búrca, Teubner, and Brunkhorst. These different approaches to representation and participation expose how scholars can offer alternative debates on democratisation, without debating democracy and how the questions of Who and What are side-lined.

'Democratic-Striving' Approach

One of the clearest examples of a discussion on How in the principled wave appears in de Búrca's 'democratic-striving' approach, but even she states that her aim was not to offer detailed proposals.[211] Her discussion is on decision-making processes at the IMF and World Bank, with respect to development projects. The democratic-striving approach encompasses the idea of democracy as iterative.[212] She argues for the 'fullest-possible participation in effective processes of decision-making by those concerned'.[213] For de Búrca, Who is purposefully left open.[214] The Who should be iteratively established and challenged to ensure the greatest participation of affected actors. de Búrca innovates around the Who,[215] but the processes can still be subjected to the critiques of the organisational wave.

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[211] de Búrca, 'Developing Democracy' (n 8) 158.
[212] de Búrca's approach needs to be distinguished from Benhabib's democratic iteration, where the focus is on rights claims. For Benhabib, democratic iteration means 'complex processes of public argument, deliberation and exchange through which *universality rights claims* are contested and contextualised, invoked and revoked, posited and positioned throughout legal and political institutions as well as in the associations of civil society'. Seyla Benhabib, 'The new sovereigntism and transnational law: Legal utopianism, democratic scepticism and statist realism' (2016) 5(1) Global Constitutionalism 109, 122.
[213] de Búrca, 'Developing Democracy' (n 8) 133.
[214] ibid 133-134.
[215] de Búrca notes this limitation, but seems to suggest that it is not a problem with the process but with engagement with the process. de Búrca, 'Developing Democracy' (n 8) 150-152.

de Búrca's discussion on democracy within the IMF and World Bank is illustrative of the importance of asking the Circumstances. She argues that the 'participatory-representative dimension of democracy' is needed to promote a 'public-oriented character' of governance.[216] If the What Circumstance is reflected on here, there is a concern with the meaning of 'oriented'. As noted above, defining a body by its aims and functions restricts the types of decisions the people have power over and the types of bodies that the people can hold accountable.[217] By participation, she includes the participation of civil society actors.[218] Yet, she does not reflect on whether these actors are accountable to the people. The Circumstances would require an investigation on how NGOs link back to the people. Furthermore, the participatory-deliberative model is compared to elections as de Búrca argues that such a model is crucial in the absence of elections at the transnational level.[219] In doing so, she suggests that the participatory-representative element of democracy is second to elections, which work to 'throw the rascals out'.[220] This comparison of processes is not as useful as asking the foundational questions and in particular, exploring the scope of the people's power.

Through her model, de Búrca illustrates the importance of reflecting on constitutionalism and democracy. She acknowledges that participation and representation are just one element of democracy.[221] The other elements she argues are: 'protection for human rights and minority rights, equality, pluralism

[216] ibid 130.
[217] see above text at fn 191-194.
[218] de Búrca, 'Developing Democracy' (n 8) 157.
[219] ibid 130.
[220] ibid 130.
[221] ibid 129. Cf Gráinne de Búrca, Robert O. Keohane and Charles F. Sabel, 'Global Experimentalist Governance' (2014) Working Paper No. 14-44, 15 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2423810> accessed 19 September 2017 ('to increase participation in, and thus the democratic legitimacy of, institutions').

and due process guarantees'. This could be labelled a thick conceptualisation of democracy, as it considers human rights.[222] She conceptualises it as discussing constitutional democracy, where constitutionalism and democracy are seen to work in harmony. Yet, this thesis has demonstrated that the relationship between constitutionalism and democracy is more complex.[223] Human rights and norms of constitutionalism interact.[224] Whilst democracy and constitutionalism can be considered together, to understand democracy, it needs to be treated separately first. de Búrca, in adopting constitutional democracy as her model, does not elaborate on how the norms of constitutionalism shape democracy.

de Búrca's discussion on participation and representation is more nuanced than the organisational wave. She highlights that such processes are not definitive of democracy and her iterative conceptualisation of Who moves the conversation forward, away from state-centric notions of *demos.* Yet, this discussion still falls into the same problems as the organisational wave with respect to NGOs, as the role of these non-state actors is not fully explored. Participatory practices are advocated within the principled wave, but, as argued previously, participation is not necessarily akin to democracy.[225] As de Búrca's model of participation demonstrates, further questions need to be asked about the scope of the power of people in these processes.

Societal Constitutionalism

[222] Chapter 2, section 2.2.1.
[223] Chapter 2, section 2.2.1.
[224] Chapter 2, section 2.2.1.
[225] Chapter 2, section 2.4.3.

The societal constitutionalism perspectives are illustrative of the potential conflation between the Circumstances. Societal constitutionalism mandates a reflection on the Who and the Where; it provides a 'communication' approach to constituent power and priorities society, rather than state-based institutions. However, the societal constitutionalism lacks a convincing theorisation of the What. This is demonstrated mostly clear in Teubner's discussion on 'reflection centres'. This sub-section considers how Teubner's discussions conflate the Circumstances.

The 'reflection centres' are an alternative to political institutions in the state.[226] These centres operate to self-limit an autonomous system; the centre 'allows systems to channel their societal responses to their expansion in the direction of their own self-limitation'.[227] Where in liberal constitutionalism, checks on expansion might be done through the people or the courts, and in republican constitutionalism by the people, societal constitutionalism discusses auto-limitation. This means that the decision is made by the system itself (for example, the corporate structure) or in other words, by an elite.[228] Critics of societal constitutionalism note that without a central figurehead, 'self-limitation [will be] guided by the actor's interest, not the common interest'.[229] Through these reflection centres, the role of the people in placing limits on power is side-lined. Teubner associates these reflection centres with democracy, as they are a 'criterion of a democratic society'.[230] But, this is to ignore the What of democracy. In this model, democracy loses its link to the idea of the sovereignty of the people,

[226] Teubner, *Constitutional Fragments* (n 9) 88.
[227] Christodoulidis, 'On the Politics of Societal Constitutionalism' (n 2) 652.
[228] ibid 653 (e.g. an ethical committee).
[229] Grimm, 'The Achievement of Constitutionalism' (n 14) 21.
[230] Teubner, *Constitutional Fragments* (n 9) 89.

or of self-government, and potentially becomes a series of participatory processes, in which it is not necessarily people participating but an elite.

What Teubner means by democracy is not explicitly outlined, rather it has to be derived from the different iterations of democracy through his scholarship. On the one hand, democracy is 'realized through procedures which are oriented toward the social responsibility of decentralized collective actors', which is both advocating a plurality of actors/voices as well as increased participation.[231] There is an argument within societal constitutionalism that conceptualises democracy as overlapping networks.[232] Citizens participate in different networks and have different roles within these networks,[233] but it is not clear what these roles are. The lack of clarity around the role of the people shows a need to reflect more on the scope of the power of the people within democracy.

On the other hand, Teubner constructs a divide between the 'organized-professional sphere' and the 'spontaneous sphere'[234] and democracy can be achieved through the interaction between these spheres.[235] For Teubner, democracy is about the spontaneous sphere placing controls on the organised sphere. He writes:

> if one wants to enhance the democratic potential beyond the classical constitutional institutions (participation, deliberation, electoral

[231] ibid 122.
[232] Achilles Skordas 'Self-determination of peoples and transnational regimes: a foundational principle of global governance' in Nicholas Tsagourias (ed), *Transnational Constitutionalism: International and European Models* (CUP 2007) 230.
[233] ibid 230.
[234] Teubner, *Constitutional Fragments* (n 9) 89.
[235] Andreas Fischer-Lescano and Moritz Renner, 'Europäisches Verwaltungsrecht und Völkerrecht' in Jörg P Terhechte (ed), *Verwaltungsrecht in der Europäischen Union* (Nomos 2011) 370 cited in Teubner, *Constitutional Fragments* (n 9) 123.

> mechanisms in politics, and decentralized market mechanisms in the economy) then one would need to extent the means by which the spontaneous sphere can control the organized sphere.[236]

In politics, the organised sphere refers to political parties and state institutions, and the spontaneous sphere refers to the electorate and public opinion.[237] Though Teubner refers to the spontaneous sphere 'controlling' the organised sphere, he then limits the role of the spontaneous sphere to one of iteration and challenge; the organised sphere makes the decisions, and the spontaneous sphere can challenge these.[238] He states that the organised sphere does not receive 'clear signals' from the spontaneous sphere.[239] This seems to suggest that the scope of the people's power here is limited to resistance.

Democracy, for Teubner, has three main ideals: irritation of the organised sphere by the spontaneous sphere;[240] plurality of opinion; and some form of participation (though not of people *per se*, but of autonomous systems).[241] Given that the constituent power is communicative, rather than necessarily located in a people, and that participation is disconnected from the people, Teubner disconnects the people from the Who of democracy. Furthermore, the What of democracy is limited to irritation and participation. These are processes that are notionally 'democratic', to the extent that participation is commonly associated with democracy. The problem is that it does not link to the people, as it is participation of systems, and for Teubner, participation is the end-goal rather than a process of democratisation. For Teubner, mere participation is sufficient without the

[236] Teubner, *Constitutional Fragments* (n 9) 90.
[237] ibid 90.
[238] ibid 90.
[239] ibid 90.
[240] ibid 89-91 and 123; Fischer-Lescano and Renner (n 235) 370.
[241] Teubner, *Constitutional Fragments* (n 9) 38.

additional aspect of power in decision-making. Christodoulidis argues that Teubner's approach is 'functionally equivalent' to democracy.[242] But this is troubling, as without the link to the people and the reflection on the power they might have in decision-making, Teubner is not discussing democracy *per se*, but mere participation.

The societal constitutionalism debate on participation highlights the importance of asking the Circumstances, rather than relying on proxies and well-known modalities of democracy. Teubner's discussions on participation fail to adequately address the What and he disassociates the people from his conceptualisation of the Who. Asking the Circumstances highlights that participation, rather than democracy, is the end-goal in societal constitutionalism.

Brunkhorst's Weak and Strong Publics

Brunkhorst critiques the approach to democracy in global constitutional scholarship by distinguishing between a weak and strong public.[243] A weak public has only moral influence through 'communicative power'.[244] This means that whilst they can have a political impact,[245] they do not make political decisions. A strong public has both moral and political influence; discursive practices are linked to decisions through legal procedures.[246] Such a distinction helpfully starts to unpack the extent of the people's power within democracy and global constitutionalism. Brunkhorst argues that at the global level, there is only a weak

[242] Christodoulidis, 'On the Politics of Societal Constitutionalism' (n 2) 653.
[243] Hauke Brunkhorst, 'Globalising Democracy Without a State: Weak Public, Strong Public, Global Constitutionalism' (2002) 31(3) Journal of International Studies 675, 675.
[244] ibid 677.
[245] ibid 677.
[246] ibid 676.

public.[247] The focus placed on deliberation and participation, without emphasising the decision-making element of democracy renders the approach within global constitutionalist scholarship weak.

However, a critique of Brunkhorst's discussion on the potential for a strong public demonstrates the conflation of What and Who, and the need for a Circumstances approach to global constitutional democracy. The weak public on the global level, for Brunkhorst, is a select group of social movements and networks of associations.[248] He then argues that if this weak public were accompanied by NGOs, 'a global professional class and an emerging human rights culture', a strong global public could emerge.[249] Rather than addressing the question of power, Brunkhorst introduces a new Who. The question of What is replaced by an extension of the Who.

Moreover, in Brunkhorst's publics, the people of both the weak and strong public can be represented by non-state, non-representative and non-accountable actors. He does, however, suggest that the stronger public would not be *democracy* because it lacks representative processes and discussions are not related to decisions.[250] Arguing that discussions should link to decisions demonstrates a commitment to reflecting on the What of democracy. But, Brunkhorst does not engage explicitly in a discussion as to whether these NGOs, social movements and networks are representative of or accountable to either type of public. This highlights the need for more reflection on the Who and What

[247] ibid 680.
[248] ibid 683.
[249] ibid 690.
[250] Brunkhorst, 'Globalising Democracy Without a State' (n 243) 690.

of democracy and for a discussion on the people having power in decision-making.

Within the principled wave closer attention is paid to questions of democracy. Walker and O'Donoghue and Habermas open up space to ask about the state's processes for representation,[251] and there is an acknowledgement that democracy is an ongoing process that needs to continually address the demarcation of the Who.[252] But this section demonstrated that work still needs to be done to ensure that democracy is at the fore of the debates. Across the principled wave, there are instances of inadequate attention to the Circumstances and in places the Circumstances are conflated. Whilst the organisational wave replaces What with How, in the principled wave questions of What are replaced with debates on Who.

5.4 Conclusion

The shift towards a principled approach to constitutionalism enhances the discussion on democracy. The principled wave initiates a debate on the relationship between democracy and constitutionalism and there is now a genuine engagement with the question of constituent power within global constitutionalism. Within this wave, democracy is not expressed in terms of processes and institutions (i.e. voting and elections), rather there is an attempt to extract the values and principles of democracy. However, there is still room for improvement.

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[251] O'Donoghue, *Constitutionalism in Global Constitutionalisation* (n 1) 254; Habermas, 'The Constitutionalization of International Law' (n 4) 449; Walker, 'Constitutionalism and the Incompleteness of Democracy' (n 7) 219.
[252] de Búrca, 'Developing Democracy' (n 8) 133-134.

The discussion on How demonstrates that there is still a need to ask the Circumstances in turn. Within the principled wave, non-state actors are still presented as appropriate representatives despite the lack of investigation into their democratic credentials. The power of the people is obscured in this wave, as Teubner fails to link processes to the people or to decision-making and the conflation of Who and What is suggestive of a lack of concern for ensuring people have power. To address this, the Circumstances should be taken in turn to ensure that each element of democracy is addressed.

This chapter used the Circumstances of Democracy to investigate how the principled wave of global constitutionalist literature approaches democracy. The principled wave is concerned with constituent power. Whilst the actors within the wave are similar to those in the organisational wave, their roles and powers are different. Constituent power is not just a question of Who, but also of What. In this wave, questions of popular sovereignty exist alongside discussions on democratic legitimacy so the What of democracy is difficult to ascertain. There is uncertainty around the When of democracy when constituent power is used as a frame for the Who. There is a disconnect between constituent power and everyday governance, and there is an indiscriminate use of constituent power where it is not identified as a radical power to (re)write a constitutional system. With respect to the Where, Teubner's attempt to relocate constitutionalism in autonomous spheres, results in an ambiguous Who and a weak understanding of What, and whilst Walker's constellation idea is useful for thinking through the Where of constitutionalism, the link to the people is weak.

The deeper engagement with the relationship between constitutionalism and democracy is laudable. But, one of the persistent limitations is the speed with which global constitutionalist scholarship assumes democracy means *constitutional* democracy.[253] Whilst it is an important and relevant manifestation of democracy, presenting it as uncontested overlooks the tensions between constitutionalism and democracy, and the way in which democracy is modified to be accommodated by constitutionalism. Furthermore, constituent power is addressed as a Who question within the scholarship, but it raises questions about When and What. Failure to engage with the changing When and What of constituent power risks the conflation of constituent power and democracy.

Analysing both the organisational and the principled wave of global constitutionalist literature shows the variation in approaches. Both waves prioritise certain Circumstances and ask different questions. In particular, the principled wave focuses on the question of constituent power, focusing on a new Who and When. The principled wave in moving the debate to constituent power does not address the limitations of the organisational wave with respect to everyday governance. The principled approach to global constitutionalism is less situated in concerns about the practicalities. Where Peters proposes detailed models of assemblies, O'Donoghue and Walker focus on the theoretical questions, which means the institutionalisation of democracy within global constitutionalist thought is not at the forefront of this principled debate. The difference in approach between the organisational and the principled waves leads to gaps, as the shift in focus means that the waves do not necessarily address

[253] For example: de Búrca, 'Developing Democracy' (n 8); Walker, 'Constitutionalism and the Incompleteness of Democracy' (n 7).

one another, but rather offer alternative discussions on democracy. By asking the foundational questions, rather than participating in siloed discourses, the Circumstances of Democracy can overcome these gaps.

Chapter 6: Global Constitutionalist Scholarship and Democracy: Using the Circumstances of Democracy

6.1 Introduction

Global constitutionalist scholarship has made great strides in discussing democracy beyond the state. Where previously, democracy was not considered part of a discussion on international constitutional law, it is now frequently debated. Democratic legitimacy is an important point of reference, not just for this discourse, but for international law as well. Detailed models on how to do democracy beyond the state are proffered. Hard questions are being brought to the fore, and the principled wave of global constitutionalism has begun to unpack the relationship between constitutionalism and democracy.

Democratic legitimacy is now a frame of reference in international law and international organisations literature. In international law, democratic legitimacy is discussed in relation to government recognition, state recognition, and the processes of international organisations.[1] The International Public Authority school considers ways of constructing democratic legitimacy within international law and international decision-making,[2] and within EU constitutional law democratic legitimacy has become a common standard. The legitimacy of

[1] Jean d'Aspremont, 'Legitimacy of Governments in the Age of Democracy' (2006) 28 New York University Journal of International Law and Politics 878; James Crawford, *The Creation of States in International Law* (OUP 2006); Alison Duxbury, *The Participation of States in International Organisations: The Role of Human Rights and Democracy* (CUP 2011).

[2] See Armin von Bogdandy, Matthias Goldmann, Ingo Venzke, 'From Public International to International Public Law: Translating World Public Opinion into International Public Authority' (2016) *Max Planck Institute for Comparative Public Law & International Law Research Paper No. 2016-2* < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2770639> accessed 19 September 2017.

international and supranational institutions is informed by democracy to the extent that democratic legitimacy is the desired benchmark, from which other forms of legitimacy must be measured.[3]

Ways of doing democracy beyond the state are now debated in both the organisational and principled waves of global constitutionalist scholarship. There are detailed models on parliamentary bodies and voting mechanisms in the organisational wave.[4] Attempts to institutionalise deliberative and participatory democracy offer sophisticated reflections on what democracy could mean beyond the state.[5] Debates on the global *demos* across both waves, and the recent trend to debate constituent power, are evidence of the scholarship grappling with the hard questions.

There is partial acknowledgement, in the principled wave, of the complex relationship between constitutionalism and democracy. Walker, in his discussion on the iterative relationship between democracy and constitutionalism, brings to the fore relevant questions,[6] and Tully reflects on the relationship in light of globalisation.[7] These scholars offer useful starting points, but there is still more that needs to be done to expose the role of this complex relationship in a discussion on global constitutionalism and democracy.

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[3] Daniel Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' (1999) 93 AJIL 596, 599 (democracy is the 'touchstone of legitimacy').
[4] Anne Peters, 'Dual Democracy' in Jan Klabbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (OUP 2009).
[5] For example, Steven Wheatley, *The Democratic Legitimacy of International Law* (Hart 2010); Peters, 'Dual Democracy' (n 4).
[6] Neil Walker, 'Constitutionalism and the Incompleteness of Democracy: An Iterative Relationship' (2010) 39(3) R&R 206, 213.
[7] James Tully, 'The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy' (2002) MLR 204.

Current discussions on democracy have begun to break down the divide between disciplines as constitutional language is utilised in international legal scholarship. Although global constitutionalist literature is criticised for using international law as its starting point, and for failing to engage genuinely with constitutional literature,[8] there is a change in the research agenda towards questions about legitimacy and accountability as well as the rule of law and democratic legitimacy.[9] These sorts of questions are evidence of a cross-fertilisation between international legal scholarship and constitutional discourse.

Global constitutionalist scholarship now takes the issue of democracy seriously. As debates spark about the need for a global *demos*, or the inappropriateness of elections and the substitution of deliberative processes, the debate needs to be reframed to ensure that democracy is at the core. This chapter provides a guide for how a discussion on democracy in global constitutionalism ought to be constructed if democracy is to be prioritised. The two waves of the global constitutionalist literature prioritise different research questions, focusing on some Circumstances and not others. They utilise different source materials, with the organisational wave taking international law as its starting point and the principled wave engaging with constitutional literature. The diverse approaches cause a polarisation of the debate on democracy. It is proposed that these gaps in the literature can be overcome through the Circumstances of Democracy, and this chapter demonstrates how.

[8] Aoife O'Donoghue, *Constitutionalism in Global Constitutionalisation* (CUP 2014) ch 6.
[9] Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the relationship between constitutionalism in and beyond the state' in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009) 260; Christine E J Schwöbel, *Global Constitutionalism in International Legal Perspective* (Martinus Nijhoff Publishers, 2011) 110; See O'Donoghue, *Constitutionalism in Global Constitutionalisation* (n 8) 24.

The current discourse lacks a reflection on the concept of democracy and its foundational component parts. This thesis used the matrix of the Circumstances of Democracy to demonstrate that at present, within global constitutional scholarship, the concept of democracy is not the benchmark. The thesis highlighted a lack of attention to the fundamental elements of democracy, as well as a need to reflect on how the methodological choices shaped the approach to democracy. The next section draws together the limits of the global constitutionalist scholarship. It first reflects on the unconvincing discussions on the relationship between constitutionalism and democracy and then it demonstrates how the cross-disciplinary nature of global constitutionalist scholarship shapes the discussion on democracy.

6.2 Are we there yet?

6.2.1 Constitutionalism and Democracy

Global constitutionalist literature oscillates between a position that assumes democracy is a norm of constitutionalism,[10] to an approach that attempts to remove democracy.[11] Both the approach to constitutionalism, and the perceived relationship between constitutionalism and democracy, influences how democracy is constructed. This section will compare the approaches to

[10] For example: Peters, 'Dual Democracy' (n 4) 263; Antje Wiener, 'Contested Meanings of Norms: A Research Framework' (2007) 5 Comparative European Politics 1, 3; Andreas Føllesdal, 'When Common Interests Are Not Common: Why the Global Basic Structure Should be Democratic' (2009) 16(2) Indiana Journal of Global Legal Studies 585, 586.
[11] Erika de Wet, 'The International Constitutional Order' (2006) 55 International & Comparative Law Quarterly 51, 72.

constitutionalism within global constitutionalist thought to show the competing roles for democracy.

The normative strand of international constitutionalism removes democracy from discussions on constitutionalism beyond the state. Both de Wet and Tomuschat offer a discussion on constitutionalism that does not derive its legitimacy from democracy.[12] de Wet argues that the national, liberal democratic model is inappropriate for the international level and, democracy does not necessarily equate with legitimacy.[13] Within her framework, constitutionalisation is about the supremacy of constitutional norms, such as *jus cogens* and *erga omnes* norms. One of the reasons de Wet gives for rejecting democracy as part of the constitutionalisation discussion is that there is no consensus on democracy as an *erga omnes* norm of international law.[14] This suggests that where constitutionalism is equated with hierarchy, democracy can only have a role if it amounts to a higher norm.

In Fassbender's discussion on the UN Charter as a constitution, democracy is part of constitutionalism. Using American and French revolutionary thought, Fassbender acknowledges that constitutionalism is given normative content, such as democracy, the rule of law and self-determination and he argues the people are sovereign in a democracy.[15] There are many nebulous and overlapping terms within Fassbender's argument that obscure the meaning of

[12] ibid 72; Christian Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century', General Course on Public International Law (1999) 281 Recueil Des Cours 10, 184.
[13] de Wet, 'The International Constitutional Order' (n 11) 72. Cf Petra Dobner, 'More Law, Less Democracy? Democracy and Transnational Constitutionalism' in Petra Dobner and Martin Loughlin (eds) *The Twilight of Constitutionalism?* (OUP 2012) 141.
[14] de Wet, 'The International Constitutional Order' (n 11) 63.
[15] Bardo Fassbender, 'The United Nations Charter As Constitution of The International Community' (1998) 36 Columbia Journal of Transnational Law 529, 537.

democracy: intertwining popular sovereignty and democracy can restrict democracy to constitutional moments and it is not clear if Fassbender relies on an international legal idea of self-determination, or a constitutionalist idea of people having power over constitutional arrangements and everyday governance.[16] Though Fassbender argues that in a democracy the people are sovereign, he then draws a distinction between sovereignty and democracy. Separating sovereignty and democracy ensures that democracy is not tied to the constituent moment, but it suggests that democracy has additional roles, which he does not elaborate upon. It is frustrating that the role for democracy in Fassbender's constitutionalism is unclear, because it leaves unanswered the scope of people's power in democracy.[17]

In an attempt to move away from the small 'c' approach to constitutionalism, a new wave of global constitutionalism focuses on the allocation and limitation of power,[18] which shapes the approach to democracy. Within the organisational wave, democracy is not discussed in relation to constitutional moments, rather it is located within everyday governance.[19] This is in contrast with the principled wave, where focus is placed on the allocation of power and the question of constituent power.[20] Debating the allocation of power through constituent power adds a new dimension to When, and given the scope of constituent power as the

[16] See Chapter 1, section 1.5.1.
[17] Fassbender, 'The United Nations Charter As Constitution of The International Community' (n 15) 536-537.
[18] Schwöbel has called this institutional constitutionalism. Schwöbel, *Global Constitutionalism in International Legal Perspective* (n 9) 21.
[19] See Chapter 4, section 4.3.3.
[20] Andreas Kalyvas, 'Popular Sovereignty, Democracy, and the Constituent Power' (2005) 12(2) Constellations 223, 237; Yaniv Roznai, 'We the Limited People' (NYU Global Fellows Forum, 10 March 2015) 15 <http://www.law.nyu.edu/sites/default/files/upload_documents/Roznai%20-%20March%2010th%20Forum%20draft.pdf > accessed 19 September 2017.

power to deconstruct and (re)constitute a governance system, it also adds a new aspect of the What.

The very research questions associated with constitutionalism can construct a role for democracy, as constitutionalism can indicate which aspects of democracy are prioritised. Walker initiates a discussion on the relationship between constitutionalism and democracy, which suggests how democracy can be shaped by constitutionalism. Walker draws a distinction between questions of authority and of representation.[21] Democracy, for Walker, is located in representation, whilst the authority question is a matter of constituent power.[22] His idea of constitutionalism creates the institutions and processes through which democracy acts, thus restricting democracy to these processes.[23] In contrast, Tully argues that democracy is needed to challenge constitutional frameworks. Tully asks about popular sovereignty and democracy at the constitutional moments. He argues that democracy is required to continually question constitutional arrangements and processes.[24] Whether a constituent power question is asked, or if the focus is on popular sovereignty, or whether the scholar focuses on limiting or allocating power can change the What and When of democracy.

There are risks associated with giving people the scope of power associated with democracy. The people wielding such power can obfuscate the checks and balances and human rights protections that ensure the equality of all. This is

[21] Walker, 'Constitutionalism and the Incompleteness of Democracy' (n 6) 216.
[22] ibid 216.
[23] ibid 215-216.
[24] Tully, 'The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy' (n 7) 205.

where the relationship between constitutionalism and democracy comes into its own. The complexity between constitutionalism and democracy ensures maximum democracy, without risking the individual rights of persons. Constitutionalism can place restrictions on the types of institutions, the processes and the substance of decisions. It is the iterative relationship between constitutionalism and democracy, which provides an understanding of how norms of constitutionalism (such as the rule of law and human rights) place limits on democracy to protect the autonomy of the individual, whilst also allowing a role for democracy to antagonise constitutional arrangements. Whilst such limits are valid, where theorists seek to place limits on the people's power, they should explicitly indicate as such.

Democracy is shaped by its interaction with constitutionalism. It is not sufficient for the global constitutionalist discourse to adopt an idea of democracy that is co-existent with constitutionalism, as this overlooks how constitutionalism places limits on democracy. Not reflecting on the role of the constitutionalist lens, risks ignoring how adopting such a lens can alter the When and What of democracy.

6.2.2 Fragmented Discourse

Fragmentation arises across global constitutionalist scholarship. There is a lack of coherence as to the object study; the Where of constitutionalism and democracy is contested as scholars use the idea of 'global constitutionalism' to discuss a range of different processes, institutions, and levels of governance.[25] This raises challenges for a discussion on democracy as it is difficult to ascertain

[25] See Chapter 5, section 5.3.4.

both the location of democracy and the types of actors involved. More importantly, there are methodological inconsistencies. There is disagreement as to the sources used,[26] and exploring both the organisational and principled wave has shown that the waves adopt different research questions.[27] The consequences of this fragmentation are crucial to understand.

The sources used by the respective waves of global constitutionalist thought impact on how the debate on democracy is structured. The reliance on international law negatively influences the discussion on democracy. The 1990s international legal literature constructs an approach to democracy predicated on the state; the *demos* is constructed through a link to the state and the power of the people is mitigated by the territorial integrity of the state.[28] By assuming that Franck's thesis on an emerging norm of democracy is accurate, scholars within the organisational wave rely on international legal scholarship, rather than interrogating democracy within the state.[29] This means that scholars are not necessarily considering democracy within states and furthermore, they adopt a state-based model of the *demos,* which is criticised for failing to respond to transnational threats and realities.[30] In contrast, the use of constitutionalist literature, such as references to *The Federalist Papers* and Locke,[31] reveal the start of an intra-disciplinary discourse. Using the constitutional literature opens

[26] See Chapter 4, section 4.2.1 and Chapter 5, section 5.2.1.
[27] See Chapter 4 and Chapter 5.
[28] Chapter 3, section 3.3.1.
[29] See Chapter 4, section 4.2.1, text at fn 61-63.
[30] Andreas L Paulus, 'The International Legal System as a Constitution' in Jeffrey L Dunoff and Joel P Trachtman (eds), Ruling the World? Constitutionalism, International Law, and Global Governance (CUP 2009) 95.
[31] See Bardo Fassbender, '"We the Peoples of the United Nations" Constituent Power and Constitutional Form in International Law' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (OUP 2012) 288-289; Fassbender, 'The United Nations Charter As Constitution of The International Community' (n 15) 534. Cf Dobner's discussion on *The Federalist Papers* and sovereignty. Dobner, 'More Law, Less Democracy?' (n 13) 145.

the debate on constituent power, the relationship between the individual and the community, as well as the difference between constitutional politics and everyday governance.

Where previously, international constitutionalist literature relied heavily on international legal literature and international law,[32] there is a shift towards sources on constitutionalism. Related to the change in sources is the different types of research questions across the waves of global constitutionalist scholarship.[33] The focus on accountability mechanisms and on legitimacy result in a functional approach to democracy, where aspects of democracy can be extracted.[34] Asking how democracy can achieve a particular aim is the wrong focus, as it places restrictions on democracy. Rather, the scholarship should be asking questions about the sort of power people must have in democracy.

Another instance is the shift to debate constituent power in the principled wave. The organisational wave places little emphasis on the question of constituent power and the issue of constitutional politics, so discussing the allocation of power, and not just the limiting of power, is welcome. Within the organisational wave, the failure to adequately engage with When, builds a discussion without a genuine reflection on the democratic nature of the constitutional system. The focus on constituent power moves the discussion on democracy forward because it opens the debate on whether the people should have a role in constitution-making within global governance. However, this shift in research question gives

[32] See Neil Walker, *Intimations of Global Law* (CUP 2015) 93-94; Erika de Wet, 'The Constitutionalization of Public International Law' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 1209
[33] Kumm, 'The Cosmopolitan Turn in Constitutionalism' (n 9) 260; O'Donoghue, *Constitutionalism in Global Constitutionalisation* (n 8) ch 6.
[34] See Chapter 4, section 4.2.2 and Chapter 5, section 5.3.2.

rise to siloed debates. As Patberg's discussion on constituent power demonstrates, gaps remain when the debate shifts to constituent power.[35] Using constituent power to legitimise the creation of a decision-making body, but failing to address how democracy is achieved in the everyday governance is a significant problem. Initiating a discussion on constituent power, but failing to debate everyday governance, constructs two incomplete narratives of democracy in global constitutionalism. By acknowledging the constraints that disciplinary boundaries place on the global constitutionalist discourse and by asking a series of foundational questions instead, this thesis brings democracy to the fore.

Currently, the global constitutionalist literature seeks to fit a discussion on democracy into the pre-existing disciplinary structures. However, this gives rise to functional conceptualisations of democracy, debates on democracy that miss elements, or approaches to democracy that are frustrated by state sovereignty and state-centricity. To get closer to democracy, the scholarship must ask fundamental questions about the people and the scope of their power.

6.3 Getting there

There are a series of crucial questions that the scholarship needs to engage with to ensure that democracy is at the forefront. The Circumstances of Democracy ensure that all the component parts of democracy are considered *and* that they interrelate. Each Circumstance is disputed and acts as a prompt to guide the discussion on democracy. The Who acted as a reminder that democracy is about people. The What prompts a discussion on the power of the people within a

[35] See Chapter 5, section 5.3.5.

democracy. If the When of democracy is skewed in favour of constitutional politics, the people have little or no power in the everyday governance decisions. If the When refers only to everyday governance, there is little potential to change the constitutional framework. If the frequency of people's engagement is irregular, then the idea that the people have power over decision-making is a façade. The Where offers a reflection on actors within the private sphere or transnational arrangements that can have an impact on the autonomy and freedom of people, without people having the power to challenge this. The Circumstances interrelate to ensure democracy is a discussion about people and the scope of their power over constitutional arrangement and their own self-government.

6.3.1 Crucial Questions to Consider

Who: Individuals v Community

Much scholarly attention is paid to the demarcation of the *demos* within global constitutionalist literature and global governance but other pertinent questions must be considered, including the actors that fall within the *demos* and their role. This section reflects on the importance of ascertaining the types of actors being discussed, how they are conceptualised, and the role afforded to them.

There is a plethora of actors referred to within global constitutionalist debates on democracy.[36] One key concern is the interchangeable use of individuals and citizens as the core unit of democracy.[37] Typically, the term 'citizen' within global

[36] See Chapter 1.
[37] See Chapter 4, section 4.3.1, text at fn 153-158.

constitutionalist literature can be state-based or can fall within a cosmopolitan project of global citizenship.[38] When tied to the state, the term 'citizen' is a restricted basis on which to build global constitutionalist democracy, it constructs the state as quasi-representative and yet, excludes persons without citizenship within that state.[39] In contrast, the term 'individual' is suggestive of a less restricted category to the extent that it could invoke humanity as a whole. The interchangeable use of individual and citizen is a failure to reflect on how the conceptualisation of the unit of democracy operates to restrict the application of democracy.

Within global constitutionalist scholarship some prioritise the individual. Building on the increasing individualisation of international law, with individuals being recognised as the bearers of rights in international law, the individual is presented as the unit of democracy.[40] Yet, this overlooks the collective nature of democracy. The relationship between the individual and the community is an example of constitutionalism and democracy working against each other. Constitutionalism, and fundamental rights, must work to protect the individual within the collective. The individual might be at the core of a liberal constitutionalist frame, but democracy can be a collective decision-making process.

Who invites a discussion on the role of the people within the *demos.* The example of NGO participation is illustrative of the complex functions of actors within global constitutionalist literature and how this can influence democracy. NGOs can be representatives or direct participants.[41] For the most part, NGOs are

[38] Chapter 4, section 4.3.1, text at fn 159-165.
[39] Chapter 3, section 3.3.1.
[40] Chapter 4, section 4.3.1.
[41] Chapter 4, section 4.3.5, text at fn 271-274.

conceptualised as representing the interests of persons. But, for Simma NGOs are agents of the community interests, and thus are direct participants without being representative of persons.[42] This creates a problem, as rather than representing the people, NGOs form part of the *demos*. The relevant people are missing from decision-making and furthermore, the interests of the NGOs collide with those of the people. Though NGOs are said to be actors within global constitutionalism, there is no defined role that ensures these actors genuinely represent the relevant people for the purposes of democracy.

Global constitutionalist scholarship overly focuses on a question of demarcation. But, Who is not just a question of constructing a *demos*. Not asking questions about the role of the people, facilitates discussions that apply the language of democracy to the participation of states or non-state actors, which have weakened links to the relevant people. Without reflecting adequately on the Who of democracy, the global constitutionalist discussions of democracy are bereft of important aspects.

What and Where: Power

Currently across the global constitutionalist discourse, there is insufficient attention paid to the question of power. The organisational and principled waves replace questions of power with arguments of people having influence, voice and input.[43] Voting of states at international organisations can become a focal point,[44]

[42] Bruno Simma, 'From bilateralism to community interest in international law' (1994) 250 Recueil Des Cours 217, 262.
[43] See Chapter 4, section 4.3.2.
[44] See Peters, 'Dual Democracy' (n 4) 287-288 (on weighted voting); Joel P Trachtman, 'Constitutional Economics of the World Trade Organization' in Jeffrey L Dunoff and Joel P

whilst the idea that people have power over decisions is lost. This sub-section reflects on how state sovereignty frustrates discussions on power. The following discussion exposes the paucity of a debate on power within the current literature.

Some scholars have sought to expand the scope of the people's power to cover agenda setting[45] and constitutional decisions.[46] These arguments that individuals are 'co-law makers' with states,[47] that they set the agenda and can make constitutional decisions, challenge the traditional view of state sovereignty. However, throughout global constitutionalist scholarship, state sovereignty arguments frustrate the potential exercise of the will of the people. Whether it is Peters' reliance on state consent to avoid reforms to the UN[48] or Kumm's call for the international community to hold constituent power,[49] the state-centricity of international law prevails within the global constitutionalist literature.

Within global constitutionalist scholarship, there is a trend to reconceptualise the state as representative of its citizens. One approach is to *assume* that states are representative citizens. This approach leads to a trustee model of representation, where the state is assumed to act on behalf of the people. An alternative approach is to conceive of the state as a delegate for its population. Habermas, for example, discusses the state as the guarantor of the people's self-

Trachtman (eds), *Ruling the World?: Constitutionalism, International Law, and Global Governance* (CUP 2009) 221 (majority voting at the WTO).

[45] Robert A Dahl, *On Democracy* (Yale University Press 1998) 113.

[46] Klaus Armingeon, Karolina Milewicz, Simone Peter and Anne Peters, 'The constitutionalisation of international trade law' in Thomas Cottier and Panagiotis Delimatsis (eds) *The Prospects of International Trade Regulation: From Fragmentation to Coherence* (CUP 2011) 78.

[47] See Peters, 'Dual Democracy' (n 4) 300.

[48] See Chapter 4, section 4.2.1, text at fn 75-77.

[49] Mattias Kumm, 'Constituent power, cosmopolitan constitutionalism, and post-positivist law' (2016) 14(3) I·CON 697, 698.

determination;[50] within this model, the state must genuinely represent the views of its population. There is a power shift from the first approach to the second. Take the example of UN reform, if the 'trustee' model is adopted then states do not have to act on the wishes of their citizens, but rather act according to what the state believes is best and can then reject reform proposals. In contrast, with the 'delegate' model, the state acts upon the will of its population, should the population require reform, the state must act accordingly. The delegate model requires an investigation into how democracy is done within the state. Merely assuming that the state is representative of its population does little to weaken state sovereignty. Global constitutionalist scholarship needs to have these debates about the shifting changes to the scope of peoples' power within different conceptualisations of democracy.

The scope of the people's power is also influenced by the types of institutions that are subjected to democracy. Societal constitutionalism exposes the limitations placed on the scope of people's power when democracy is located within the public sphere. Societal constitutionalism challenges the public/private divide and experiments with applying constitutional norms to private bodies.[51] Arguably, societal constitutionalism is one approach to discussing democracy in global constitutionalism and there are other, separate projects. But, to treat these global constitutionalist discourses as separate projects is akin to the models' approach, which sees scholars exchanging models of democracy and debating

[50] Jürgen Habermas, 'The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society' (2008) 15 Constellations 444, 449. See also, O'Donoghue, *Constitutionalism in Global Constitutionalisation* (n 8) 254; Walker, 'Constitutionalism and the Incompleteness of Democracy' (n 6) 219.

[51] Gunther Teubner, 'Fragmented Foundations: Societal Constitutionalism Beyond the Nation State' in Petra Dobner and Martin Loughlin (eds) *The Twilight of Constitutionalism?* (OUP 2010) 328; Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (OUP 2014) 25.

about which is more democratic than the other. Conceiving of these strands of global constitutionalist literature as isolated models is to risk focusing enquiries on processes, rather than on power. What is really at stake is an alteration in the amount of power the people hold. Global constitutionalist scholars need to respond to the increasing influence of transnational and private institutions. It is not a matter of exchanging competing models of democracy, it is a question of whether the people should have power over certain institutions.

Debates on the power of the people are missing from the global constitutionalist debate. Power in decision-making is replaced were mere participation, input or voice. Arguments that it is not feasible or practical to give more power to the people, given the scale of global democracy, and that states are an appropriate answer to this challenge, are used to justify this limitation.[52] But, this obscures crucial debates on the scope of peoples' power.

When: Constitutional politics and everyday governance

Whether democracy takes place at constitutional moments or just within everyday governance is at the crux of the principled wave. Shifting the debate towards constituent power can suggest that democratic legitimacy is required in constitutional moments. Yet, scholars disagree on whether constituent power is a democratic power.

[52] Fassbender, *The United Nations Charter as the Constitution of the International* Community (Martinus Nijhoff Publishers 2009) 93; Peters, 'Dual Democracy' (n 4) 264 – 265.

Kumm argues that it is not plausible to debate whether an expression of constituent power is or was democratic.[53] For Kumm, the legitimacy of an expression of constituent power is established *ex post facto*, and what matters is that the current populace accepts the constitutional order as legitimate.[54] The problem with this argument in the global constitutionalist debate is that it does not explicitly provide mechanisms for the people to endorse the constitutional system. As the discussion below will elaborate, arguing that a constitutional system is legitimate if successive populations endorse it, is farcical within a global constitutional arrangement that lacks mechanisms for persons to express consent. At present academics are 'discovering' or creating the constitutional order as they look to the actions of states or non-state actors (e.g. NGOs and international organisations), rather than individuals or people.[55] Kumm's approach leaves little space for the people to endorse or challenge the emerging constitutional arrangements in global constitutionalism. It is paramount that scholars ask about constituent power and consider mechanisms for consulting the people on these potential constitutional developments.

Arguably, the initial non-democratic exercise of constituent power can be reconciled with democracy, through the reflexive construction of democracy over time.[56] This 'reflexive' approach can be achieved through amendment processes or expressions of constituent power. However, as the following discussion demonstrates, this still leads to a disconnect between the will of the people and the type of constitutional order envisaged in global constitutionalism.

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[53] Kumm, 'Constituent power, cosmopolitan constitutionalism, and post-positivist law' (n 49) 699-700.
[54] ibid 699-700; Walker, 'Constitutionalism and the Incompleteness of Democracy' (n 6) 215-216.
[55] David Kennedy, 'The Mystery of Global Governance' (2008) 34 Ohio Northern University Law Review 827, 832.
[56] Walker, 'Constitutionalism and the Incompleteness of Democracy' (n 6) 215-216.

A question then is whether it is possible for the people to reflexively democratise the global constitutional order, as it is currently understood within parts of global constitutionalist scholarship. To consider whether amendment processes alone could democratise the order, the example of reforming the UN can be used. Scholars, such as Peters, have already noted that amendments to the UN would require state consent.[57] But, states do not adequately represent the views of people and the amendment process would be restricted to UN Member States, thus denying representation of those persons who reside within non-Member States. The current amendment processes do not facilitate the questioning of processes, which Tully argues is required for democracy.[58]

To explore whether constituent power could be used to democratise the global constitutional order, this section considers Fassbender's use of the UN Charter. Fassbender argues that the Charter can be read so that '[w]e the peoples of the United Nations' means all peoples in the world.[59] He argues that this is testament to the idea that the people have constituent power. This approach to constituent power creates space for people within international law, as states become conceptualised as actors within international law because they represent the will of their people.[60] Taking this to its ultimate conclusion would mean that state consent would have to be an expression of the will of the people. Under this

[57] Peters, 'Dual Democracy' (n 4) 325.
[58] Tully, 'The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy' (n 7) 206.
[59] Fassbender, '"We the Peoples of the United Nations"' (n 31) 289.
[60] Peters, 'Dual Democracy' (n 4) 264; Anne Peters, 'Membership in the Global Constitutional Community' in Jan Klabbers, Anne Peters, and Geir Ulfstein (eds), *The Constitutionalization of International Law* (OUP 2009) 179; Jürgen Habermas, 'A plea for a constitutionalization of international law' (2014) 40(1) Philosophy and Social Criticism 5, 9.

model, the people would have space to reflexively reconstruct a democratic constitutional order.

Yet, Fassbender argues that the participation of people is not necessary, which leaves little room for the genuine participation of people in decision-making at the global level. Furthermore, the approach adopted by Fassbender still conceptualises people as being within and represented by states. For Fassbender, the ‘peoples’ hold constituent power by virtue of their grouping within a state. If people were constituent power holders, free from constraints, then hypothetically they could organise to rewrite the global constitutional order. This would include being able to undermine the state-centric structure of the order. However, if people hold constituent power by virtue of being a nation or peoples or even as citizens within states, then it is more difficult to envisage them being able to challenge that state-centricity. If global constitutionalist scholarship rests on the idea that the reflexive construction of democracy over time would democratise global governance, there would remain a fundamental gap between the potential will of the people and the constitutional system. The iterative democratic construction does not do enough to change the international legal system that underpins global constitutionalist thought.

A potential complication of introducing the democratic exercise of constituent power into the global constitutionalist discourse is the conflation between constitutional politics and everyday governance. Sieyès stressed the importance of a divide between constitutional and ordinary decision-making, and the relationalist perspective of constituent power blurs this divide. One implication of the blurred divide is that decisions are made constitutional and placed above the

people. The problem is that this reduces the scope of the power of the people; republican scholars, in particular, advocate democratic power over constitutional laws. The alternative implication is that democratic powers (whether that is to vote or to participate more broadly in decision-making) are considered expressions of constituent power, which would mean that the people have an ongoing radical power to frequently reconstitute. This radically changes the scope of the power that the people are believed to have in global constitutionalist arrangements. As the previous section highlighted, the people are often only said to have influence or input in decision-making, and not the power to overhaul and reconstitute. This conflation, whilst it facilitates more power for people, is problematic because it is not explicitly acknowledged in the global constitutionalist scholarship.

To date the constituent power debate is concerned with the demarcation of a polity, but this is only a partial use of the domestic literature on constituent power. Sieyès' theory and Loughlin's categorisations are linked to the amount of the people's power.[61] Constituent power differs from the powers associated with democracy and so, the global constitutionalist debate should be mindful of the consequences of conflating constituent power and everyday governance.

These questions around When need to be asked because it influences the scope of democracy and of the people's power. The relationship between constituent power and democracy is treacherous; whether constituent power requires democracy is an open question and reconciling constituent power with democracy is difficult. But, not reflecting on the When leads to parallel debates with various temporalities; some are not talking about democracy *per se*, but

[61] See Chapter 2, section 2.2.2.

about constituent power and others have constructed a limited idea of democracy by focusing on either constituent moments or everyday governance. A global constitutionalist debate on democracy is incomplete without attention being given to both the constituent moment and everyday governance.

6.4 Conclusion

The current approach to democracy in global constitutional law is fragmented and too quick to reconcile constitutionalism and democracy. The different approaches to democracy in the two waves of global constitutionalist scholarship gives rise to a fragmented discussion. Different Circumstances are prioritised: the organisational wave is concerned with How, but the principled wave is not; in relation to When, the organisational wave sidesteps the question of constituent power, and the principled approach risks conflating constituent power and everyday governance. The fragmented nature of the discourse means that if the principled global constitutionalists hope to respond to the limitations of the organisational wave, they fail. Rather than engaging in a critique of the organisational wave, the principled wave shifts the discussion from everyday governance to constitutional politics.

The relationship between constitutionalism and democracy is inadequately addressed. Walker initiates a discussion on the relationship, but how this complexity is manifested at the global level still needs to be considered. Understanding the relationship as one of complexity, exposes the undemocratic limits placed on democracy, whilst also subjecting constitutionalism to democratic critique. If global constitutionalist literature is to adopt a constitutionalist lens, then

it must engage with the relationship between constitutionalism and democracy. Failure to do so, ignores the way this frame manipulates democracy.

This thesis offers an alternative approach to navigate the complexity of translating the iterative nature of democracy to a global level, without the limitations found in the current scholarship. The Circumstances of Democracy, as a series of questions, reflect on the ways of doing democracy, but ensures that its key components are present. It also requires an engagement with the intra-disciplinary nature of the debate so that the complex relationship between constitutionalism and democracy is explored. This ensures not only that democracy as a concept is considered but also that the extent to which disciplinary frames shape and manipulate democracy is considered.

Chapter 7: Conclusion

The literature on global constitutionalism, its nebulous nature and biases, raise unique challenges for a discussion on democracy. Global constitutionalist scholarship is an intra-disciplinary project; the discussions on democracy are prompted by international law and theories of constitutionalism into asking certain questions and framing issues in particular ways. The distinct objectives of the two waves of global constitutionalist literature make it difficult to locate democracy. There are competing ideas about the location of constitutionalisation, the relevant actors and their powers within global governance, and the role of democracy in constitutionalisation. The two waves are siloed by their research agendas, leaving the fundamental aspects of democracy untouched.

This thesis analysed how global constitutionalist scholarship approaches democracy. It demonstrated how the intra-disciplinary nature of global constitutionalist scholarship influences the approach to democracy. It showed how international law constructions of democracy are assumed, and barely challenged, by the global constitutionalist literature. This thesis demonstrated how the principled wave seeks to address the limitations of the organisational wave, but risks an incomplete discussion on democracy. These two waves of global constitutionalist literature create siloed conversations, necessitating a new method of discussing democracy within and beyond the state.

The current global constitutionalist debate on democracy is fragmented and lacks a philosophical approach to democracy. Elements of democracy are isolated and

focused on, at the expense of others. Debates about the demarcation of a global *demos* and on the role of parliamentary assemblies abound in the literature, with the global *demos* debate in the organisational wave being replaced by a debate over the possibility of constituent power beyond the state in the principled wave. Across the waves of global constitutionalist thought, mechanisms for institutionalising democracy, such as participation, deliberation, and accountability, become synonyms for democracy. The prioritisation of certain elements of the Who and How of democracy means that other elements of democracy are side-lined. Connections to the people are often weak and there is little genuine commitment to the idea that people should have the power to govern.

Debates on democracy are fragmented, girded by disciplinary biases. Informed by international organisational law on accountability and building on the international legal paradigm, the organisational wave adopts a procedural conceptualisation of democracy predicated on elections. Even where alternative means of deliberation and participation are considered, elections are used as the benchmark.[1]

The principled wave adopts the constitutionalist frame as its starting point, and debates democracy as part of constitutionalism. As such, democracy becomes intertwined with the rule of law, the separation of powers, and fundamental human rights. Adopting the constitutional democracy model, this wave of scholarship

[1] See Peters discussion on deliberative and participatory models of democracy. Anne Peters, 'Dual Democracy' in Jan Klabbers, Anne Peters, and Geir Ulfstein (eds), *The Constitutionalization of International Law* (OUP 2009) 268-270.

subsumes debates on the complex relationship between democracy and constitutionalism.

The two waves of global constitutionalism prioritise different components of democracy. The organisational wave, influenced by international organisational law, is much more concerned with the How, whilst the principled wave, which seeks to engage with constitutional theory, shifts the discussion to new sites of governance and concentrates on novel methods of demarcating a *demos* beyond the states. Shaped by their respective biases, there is a disconnect between these two waves, resulting in a fragmented discussion. The matrix reorients discussions towards a philosophical basis for democracy and guides the debates on democracy.

This thesis offers a way of diagnosing why there are limitations in the global constitutionalist discussions on democracy. The Circumstances of Democracy, as an analytical matrix, identified where the literature falls short of engaging with the concept of democracy. It exposes where the scholarship conflates and ignores issues. Most importantly, these Circumstances show where mechanisms of democracy side-line the What question, thus constructing mere proxies of democracy. Using How to facilitate the interrelation of the Circumstances, ensures that issues are not ignored or conflated, and that the concept of democracy remains central.

Furthermore, the thesis argues that the global constitutionalist scholarship must accept its disciplinary biases. The ambiguity around whether global constitutionalist discourse is normative or descriptive, influences how democracy

is conceptualised as descriptions of reality answer normative questions about how democracy ought to be conceived beyond the state. The global constitutionalists have adopted different perspectives on constitutionalism, with the principled wave committing to a fuller understanding of constitutionalism. If the literature is to adopt a constitutionalist frame, it must engage with the relationship between constitutionalism and democracy. In particular, it must reflect on the impact of shifting the focus to constituent power.

The umbrella nature of the literature on global constitutionalism raises unique challenges for a discussion on democracy. There is a lack of clarity around the Who and Where of constitutionalism, and the methodological choices of global constitutionalist scholarship. Firstly, as global constitutionalism is a capacious discourse, there is a lack of clarity around the subjects and objects of constitutionalism. International organisations are conceptualised as both being subjected to, and evidence of, constitutionalisation. This ambiguity around subject and object is compounded by the range of actors included within global constitutionalist discourse. NGOs, for example, are conceived as both constituent power and constituted power.[2] There is disagreement around the Where and Who of constitutionalism and democracy. Consequently, scholars engage in siloed debates, giving rise to partial discussions. Secondly, the methodological choices in global constitutionalist literature structure debates. As an intra-disciplinary discourse, global constitutionalism is informed, to differing extents, by

[2] Compare Thornhill, who argues that NGOs have constituent power and Bailey and Mattei, who argue that NGOs are aligned with constituted actors. Chris Thornhill, *A Sociology of Transnational Constitutions: Social Foundations of the Post-National Legal Structure* (CUP 2016); Saki Bailey and Ugo Mattei, 'Social Movements as Constituent Power: The Italian Struggle for the Commons' (2013) 20(2) Indiana Journal of Global Legal Studies 965, 1005.

constitutional theory, international law, and international organisational law. The biases of these sub-disciplines inform approaches to democracy.

These sub-disciplines influence how global constitutionalist literature defines democracy. With respect to constitutional law, constitutionalism sits in a complex relationship with democracy, and ultimately the two concepts realise and limit each other.[3] Moreover, constitutionalism's concern with constituent power shifts discussions towards constitutional politics and away from everyday decision-making. The state-centrality paradigm in international law and the formalist concern with collecting evidence generates a weak, procedural form of democracy, where the people's power is contained within the state and tied to elections.[4] The organisational wave is influenced by the literature in international organisational law, which generates a conceptualisation of democracy tied to accountability mechanisms. This thesis demonstrated how these sub-disciplines modify the meaning of democracy and structure the approach adopted by global constitutionalist scholarship.

Chapter 2 outlines the content of the Circumstances of Democracy and how they work to ensure democracy is an iterative concept. Using historical examples from Ancient Athens, late 18th Century America and Revolutionary France, this chapter explores the component parts of democracy and the complex relationship

[3] Neil Walker, 'Constitutionalism and the Incompleteness of Democracy: An Iterative Relationship' (2010) 39(3) Rechtsfilosofie & Rechtstheorie 206.

[4] Gregory Fox in *National Sovereignty Revisited: Perspectives on the Emerging Norm of Democracy in International Law* (1992) 86 Proceedings of the American Society of International Law 249, 270-71; Thomas Carothers, 'Empirical Perspectives on the Emerging Norm of Democracy in International Law' (1992) Proceedings of the American Society of International Law 261, 264. For a discussion on the formalist approach in this area of international law, see Gerry J Simpson, 'Imagined Consent: Democratic Liberalism in International Legal Theory' (1994) 15 Australian Year Book of International Law 103, 118-119 and 124.

between constitutionalism and democracy, situating discussions within relevant philosophical literature.

Chapter 3 investigated the 1990s international law literature on democracy, which informed contemporary discussions and is taken for granted within parts of the global constitutionalist discourse. Applying the Who and What Circumstances of Democracy to this literature demonstrated biases, such as the centrality of state sovereignty and the reification of the liberal, electoral model of democracy. State sovereignty, initially used to obscure a discussion on democracy in international law, now informs the approach to democracy. Theories of democracy in international law buttress the state-centrality of international law; the principle of self-determination and the human rights regimes that are used to underpin a potential norm of democracy envision a state-bound *demos.* Elections are a crucial mechanism within this literature; elections-monitoring is used as evidence for a developing norm of democratic governance. This demonstrates a conflation of How and What; rather than reflecting on the scope of the power of the people, elections are assumed to bring about democracy. In the international legal scholarship, How is a mechanism, whereas the Circumstances demands that How facilitates the amalgamation of the other Circumstances. Understanding How in this broader way necessitates a reflection on the scope of the power of the people.

The organisational wave of global constitutionalism has made strides in debating the institutionalisation of democracy at international organisations. Chapter 4 demonstrates that global constitutionalist literature is influenced by the accountability discussion in international organisational law. Focusing on

accountability mechanisms gives rise to a thin conceptualisation of the How of democracy. How becomes about processes, and these processes become proxies for democracy. Rather How should ensure the Circumstances align, with the emphasis placed on debating the power of the people.

The organisational wave builds on the international legal paradigms, and in places adopts the democratic assumptions set out in the international legal discourse and the centrality of the state continues in this organisational wave. This gives rise to an under-theorisation of the Who. The state is still a central actor and for the purposes of democracy, the state is conceptualised as the container of the *demos*. Shifts to place individuals at the core of international law in this wave of scholarship, underplay the complex relationship between the individual and the collective in democratic and constitutional theory. This complex relationship demonstrates the need to reflect on the relationship between democracy and constitutionalism.

Chapter 5 investigated the principled wave of global constitutionalism. In this wave, the Where of decision-making is more diverse, legitimacy in constitutional politics is debated, and attempts are made to disconnect the Who from the state. In relation to Where, this wave moves beyond particular international organisations, to transnational sites of governance and across levels of governance. The shift to focus on constituent power influences the scope of the What and the When, as well as the Who of democracy. Constituent power is used in the principled wave as a means of disconnecting the *demos* from the state. But, discussing constituent power traditionally moves the focus of concern away from everyday decision-making to constitutional politics; the concern becomes

about people choosing a system of government. Constituent power then is not just a Who question, but a When and What question as well. This power of the people to choose is in addition to the power traditionally discussed in democratic theory, which is the power to govern themselves. Failure to conceive of constituent power as a When and What question risks overlooking the shift in power and focusing on constitutional politics at the expense of everyday decision-making.

Using the Circumstances of Democracy to examine both the organisational and the principled waves of global constitutionalism exposes the shift in relation to the question of When. The organisational wave is predominantly concerned with democracy in everyday governance, and in response to this, the principled wave focuses on constituent power, in part, to shift focus on the constitutional politics. The disconnect between these two waves on the question of When highlights how the scholars talk passed each other and ultimately, how a thin conceptualisation of democracy is constructed. One wave focuses on the everyday, side-lining the question of the legitimacy of the system, and the other wave focuses on the constitutional question, without further reflection on how democracy should be manifested in everyday decision-making.

Chapter 6 offers an alternative way to discuss democracy in global constitutionalist scholarship. Engaging with all the Circumstances is essential to strive for democracy. This chapter provides three prompts to guide future dialogue on democracy. With respect to Who, it is not sufficient to only debate the methods of demarcating the *demos*, the global constitutionalist literature must reflect on the role of the people within the *demos*. Both aspects of When need to

be debated: the democratic legitimacy of the system itself should be reflected upon as well as the democratic nature of everyday decision-making. The scope of the power of the people should not be automatically limited due to the impracticalities of doing governance at a global scale: the What of democracy demands a reflection on the idea that people govern.

Global constitutionalist discourse has started a discussion on democracy, but it needs to work towards a more conceptual understanding of democracy and acknowledge the impact of adopting a constitutionalist frame. The global constitutionalist scholarship should abandon the use of proxies for democracy, such as participation and accountability. The literature must avoid drawing analogies, such that elections and quasi-parliamentary bodies become the focal points for the institutionalisation of democracy. The Circumstances proffered in this thesis offers the best way of discussing democracy, informed by philosophical reflections on the concept of democracy.

In engaging with this more iterative democratic ideal, the global constitutionalist scholarship must be cognisant of the impact of the constitutionalist lens. Constitutionalism requires questions about constituent power. The relationship between democracy and constituent power is far from assumed, but shifting attention to constituent power reframes the When, the Who and the What of democracy. The When shifts to constitutional politics, the Who involves a reflection on the role of the constitution in constructing a *demos*, and the What becomes both the power to govern and the choice of constitutional system. Constitutionalism and democracy stand in a parasitic relationship, with each informing and modifying the other. Global constitutionalist discourse, where it

adopts a constitutionalist lens, must accept that it is discussing a modification of democracy.

How global constitutionalist literature conceptualises democracy is a result of disciplinary biases. The debates on democracy within this literature are structured by the influence of international law and constitutionalism, and girded by the research choices of the distinct waves of global constitutionalist thought. The different waves and influences give rise to fragmented discussions that lack a philosophical approach to democracy. Armed with the Circumstances of Democracy, global constitutionalist scholarship must now acknowledge and challenge the disciplinary-created limitations, and it can ask the fundamental questions that ensure democracy as a concept is at the core of enquiries. The Circumstances of Democracy bring global constitutionalist literature closer to debating democracy.

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