The Contested Freedom of the Moderns

Conceiving Norm Contestation as the "Glue"
for Reordering the Globalized World

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Fundamental norms such as democracy, sovereignty, citizenship, and the rule of law are both foundational and deeply contested concepts at the same time. Their foundational role has been extensively discussed with reference to modern nation-states, and constitutional orders in national, regional and global contexts, respectively. Today, fundamental norms, and their contestations, bear the potential for fleshing out the future of democracies within a global order. While these norms' contested quality has been conceptually acknowledged in Philosophy and Political Theory, it has only come to the fore as a topical issue in current debates of international politics and international law through contestation in practice. These contestations have questioned heretofore well-established political and legal orders. The role of fundamental norms has thus moved, one could claim, from taking a *rear-seat* in Political Theory toward making *headlines* in everyday politics of global governance. Tasked with the project of flagging issues that mark the potential 'future of democracies',[1] this contribution takes this move into the political limelight as an opportunity. It argues that, despite their purposes of warranting freedom and justice within and through modern constitutional frames, due to their value-based and practice-based roots the contestedness of fundamental norms does not come as a surprise. Instead, it is to be expected, for all norms are in principle contested. This implies that in order to counter potentially disruptive effects of norm contestation in light of the multitude of those affected by the norms of governance, norms have been 'bound' by constitutional means. The trajectory of emergent forms of modern constitutionalism has demonstrated this process in detail.

Yet, modern constitutionalism faces a dual challenge that raises a number of conceptual and political questions with regard to the future of democracies.

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[1] See Tully, Introduction, this volume.

This dual challenge is enhanced by the increasingly globalized nature of politics and policy-making. The first challenge emanates from its 'locally bound' organization within modern nation-states. As the canon of contributions to this volume demonstrates, this local boundedness of constitutional norms is challenged by processes of societal alienation, regional dis-/integration, and political fragmentation. As the limits of constitutional rule are perforated, the taming power of modern constitutions has been weakened. Globally, the political effects of this change range from regression into nationalism to progression into novel forms of multilateralism.[2] The second challenge emanates from modern constitutionalism's 'globally unbound' organization beyond the state. As International Relations (IR) and International Law (IL) scholarship on global governance and global constitutionalism has shown, especially with reference to the "power" of norms, this political and legal weight of fundamental norms of governance in the global realm has been weakened. The crisis of the rule of law and the role of law are the expressions of a weakening liberal order.[3]

This chapter addresses both challenges as related. The argument builds on norms research in IR, especially the strand which represents a wider societal and political approach (compare, by contrast, the narrower policy-focused approach). Accordingly, norm contestation is developed as the constitutive 'glue' of societies and orders, quite in the Polanyian sense, rather than a 'means' to implement governance rules. The remainder of this chapter develops the argument in four sections. The first section highlights the research gap between state-negotiated norms of global governance on the one hand, and societal contestations of norms on the other. It argues that the gap has been created by the separate development of two literatures, namely the IR literature on global governance and the literature on democratic theory, in conceptual isolation. To demonstrate the point, section two recalls James Tully's claim about the "Unfreedom of the Moderns,"[4] which I summarize as the notorious absence of "elucidating dialogue" among affected agents of

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[2] Gráinne de Búrca, Robert O. Keohane, and Charles F. Sabel, "New Modes of Pluralist Global Governance," *New York University Journal of International Law & Politics* 45 (2013): 723–86. Julia C. Morse and Robert O. Keohane, "Contested Multilateralism," *Review of International Organizations* 9 (2014): 385–412.

[3] Tanja Börzel and Michael Zürn, "Contestations of the Liberal International Order: From Liberal Multilateralism to Postnational Liberalism," *International Organization* 75, no. 2 (2021): 282–305; Heike Krieger and Andrea Liese, "A Metamorphosis of International Law?: Value Changes in the International Legal Order from the Perspectives of Legal and Political Science," *KFG Working Paper Series 'The International Rule of Law – Rise or Decline?'* (2016), 27; Georg Nolte and Heike Krieger, "The International Rule of Law – Rise or Decline? Points of Departure" (KFG Working Paper Series, KFG International Law – Rise or Decline?, Freie Universität Berlin, Berlin, 2016), 1; and Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink, *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge: Cambridge University Press 2013).

[4] James Tully, "The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy," *The Modern Law Review* 65 (2002): 204–28.

governance. The third section follows up from this normative context and summarizes the core assumptions about norm contestation as a condition for "sustainable normativity" in a society.[5] It details contestation as a twofold practice which distinguishes access to reactive and proactive engagement with norm(ative) change, thereby shedding light on societal interactions vis-à-vis order-building. Section four flags implications for framing a practice-based, bottom-up perspective on the future of democracies.

ENGAGING SOCIETAL INTERACTION: THE DUAL QUALITY OF NORMS AND SOCIETAL MULTIPLICITY

This section identifies a conceptual gap between state-negotiated norms of global governance and societal contestations of norms (i.e. a lacking focus on the ontology of societal multiplicity).

This dual challenge bears the danger of the fall of the global liberal order which has come to be represented by the United Nations' role in global politics for seventy-five years now, in light of the rise of authoritarian rule in a growing number of national states. Yet, this picture frames context in which democratic development stands to be addressed in a state-centered view, leaving the role of societal actors and their potential for advancing and shaping the future of democracies largely to one side. For example, society-based research on global change has addressed the rise of social movements addressing a wide range of grievances both within and across national boundaries. Is there, then, potential for countering the challenges of modern constitutional arrangements in a globalized world from a societal perspective? This chapter suggests that there is. Not all is lost.

The following elaborates on this claim. I argue that there are potential opportunities for shaping future democracies as options for a more inclusive and just form of governance. The argument is developed against two literatures. These are highlighted by, first, critical public philosophy's claim about the "unfreedom of the moderns"[6] that results from negating the constructive potential of society's "strange multiplicity" within modern constitutional settings,[7] and, second, by the notion of "contested compliance"[8] and the definition of norms as having a "dual quality"[9] in global governance settings.

[5] Antje Wiener, *Contestation and Constitution of Norms in Global International Relations* (Cambridge: Cambridge University Press, 2018).

[6] Tully, "Unfreedom," 204.

[7] James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995).

[8] Michael Byers, "Policing the High Seas: The Proliferation Security Initiative," *The American Journal of International Law* 98 (2004): 526–45; Antje Wiener, "Contested Compliance: Interventions on the Normative Structure of World Politics," *European Journal of International Relations* 10 (2004): 189–234.

[9] Antje Wiener, "The Dual Quality of Norms and Governance Beyond the State: Sociological and Normative Approaches to Interaction," *Critical Review of International Social and Political*

Together, these claims point to a problematique with regard to the future of democracies in a globalized world, in light of a liberal global order which has been established on the foundation of modern freedoms (i.e. the foundational norms of constitutionalism) which have become globalized through the transfer of norms from local (national) into global (regional, transnational, international) contexts. Notably, this transfer – albeit mediated by heads and representatives of states – has bracketed the possibility of societal engagement during the process. This bracketing has caused a double alienation from the value-based quality of these fundamental norms. The first consists in the exclusion of local cultural knowledge from norm generation in the national constitutional context. This is enhanced by the second step of transferring a selection of fundamental norms into international organizations with no warranties to remove them on behalf of those who are directly affected. Against this background, *contestations* of fundamental norms in IR are understood as questioning the (proclaimed) freedom of the moderns, which, as Tully has demonstrated convincingly, must actually be conceived as 'unfreedoms' given their bracketing of cultural values. This bracketing of societally devised cultural values precludes the value-based dimension of fundamental norms.

A brief example helps to illustrate the point. From a global governance perspective, the transfer of norms from national constitutional contexts into the global context of international organizations could be dubbed as 'uploading'. Conversely, following international negotiations, agreements, and treaties, the implementation of these norms by norm-followers around the world could be dubbed 'downloading'. Most of the compliance literature has sought to enforce the latter through shaming, sanctioning, or coercion of states that were unwilling to comply. The point of this illustration is the reification of a norm's formal validity whilst neglecting its substantive content, and, therefore, its potential for change. A number of studies highlighted the role of transnational litigation networks, crisscrossing global orders, and norm contestation, and have generated novel research that highlighted the societal dimension. The concept of the 'dual quality' of norms sought to debracket normative quality by identifying norms as both socially constructed and structuring. Yet, addressing the socially constructed quality has proved a challenge to state-based norms research. Here, practice-based norms research has offered promising new perspectives on the societal input of norms, and their impact on political ordering. And Rosenberg's proposed shift toward "societal multiplicity," which takes account of the consequences of inter- and inner-societal relations,[10] offers a welcome counterpoint to state-centered perspectives norms.

Philosophy 10 (2007): 47–69; Carla Winston, "The Nature of Norms and the Evolution of Transitional Justice" (PhD thesis, University of British Columbia, 2016).

[10] Justin Rosenberg, "International Relations in the Prison of Political Science," *International Relations* 30 (2016): 127–53; Justin Rosenberg, "Internationale Beziehungen und die Konsequenzen der Multiplizität," *Zeitschrift für internationale Beziehungen* 26 (2019): 107–22.

To shed light on norm contestedness as an opportunity insofar as it facilitates research on the potential substantive change of norms that emerges through inner- and inter-societal interaction, therefore, this contribution begins from the contestation of fundamental norms (aka the freedom of the moderns) at different sites in global society. While the contestedness of fundamental norms is common knowledge, it is nonetheless notable that there is little systematic research which analyzes how this contestedness plays out. Second, this contestedness has implications for how we relate to norms in everyday practice and how we conceptualize norms in theory.[11] The questions are, therefore, what are the effects for politics and policy-making (i.e. democracy in practice), on the one hand, and for conceptualizations of democracy as a foundational norm of (modern) constitutionalism (i.e. democracy in theory), on the other? This contribution takes these as guiding questions in order to explore the future of democracies in a globalized world, and specifically with regard to global society against the background of the literature on norm contestation in IR theory. Accordingly, 'democracy' is defined as a value-based "fundamental norm" with little specification with regard to its implementation, yet with wide-ranging claims about its universal reach.[12]

This tension between the norm's substantively elusive frame and claims about its normative universal validity, would per se generate contestation with regard to implementation in policy and politics. The tension has been demonstrated by empirical research that locates contestation at multiple local sites in world society.[13] In Political Theory, such tensions have been identified as conflicts that emerge between the wider "civic" and the narrower "civil" spaces of society,[14] or between everyday "ordinary" and "universal virtues,"[15] respectively. In the context of nation-states, the tensions are kept at bay by constitutions that set the rules of engagement which regulate political disagreement or conflict. While specific normative opportunity structures vary, liberal democracies share a core of foundational norms. In these national contexts, norm-following is regulated by politics and sanctionable by law. By contrast, in global society, where no such matching constitutional settings exist, the tensions pose a different challenge. And, if and when they are not addressed in time, contestations may potentially spark wider global conflict, including diplomatic rows, weaponized conflict, and institutional decline. To counter these tensions, international relations are routinely

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[11] Owen, Chapter 2, this volume.
[12] Compare the norm-typology in Wiener, *Contestation and Constitution*, 58–63.
[13] Amitav Acharya, "How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism," *International Organization* 58 (2004): 239–75; Wiener, *Contestation and Constitution*; and Lisbeth Zimmermann, *Global Norms with a Local Face: Rule-of-Law Promotion and Norm Translation* (Cambridge: Cambridge University Press, 2017).
[14] Owen, Chapter 2, this volume.
[15] Michael Ignatieff, "Human Rights, Global Ethics, and the Ordinary Virtues," *Ethics & International Affairs* 31(2016): 3–16.

confronted with establishing and/or improving the means to facilitate norm implementation. With regard to the normatively most far-reaching fundamental norms, this process is backed with resort to adjacent or sustaining norms and policies, such as, for example, "organizing principles" that identify procedures and means in the context of selected policy areas, and "standards and regulations" that define their specific rules of implementation.[16]

IR scholarship has addressed the point that fundamental norms are deeply contested in conversations with the neighboring disciplines of European integration, international organization, international law, and migration studies. The contestation of norms is regularly presented as a problem (i.e. of norm-following), which must be dealt with in order to develop effective means toward achieving compliance.[17] At the same time, however, others have argued that norm contestation is an integral part of the process of legitimation in IR.[18] This argument builds on "agonism" as Tully's third of "six features of constitutional democracy."[19] In doing so, it frames norm conflicts in today's globalized world as 'contested freedoms of the moderns'. The point is demonstrated against Tully's 'unfreedom of the moderns'. Empirically, it suggests turning toward local sites where 'modern' freedoms (i.e. fundamental norms of governance) are contested by affected stakeholders, in order to reveal the work of these unfreedoms, and relatedly, to flag ways of countering them. Conceptually, the aim is to explore opportunities for mutually elucidating dialogue among a plurality of unequal global stakeholders to bring the diversity of sociocultural experiences to bear on their expectations toward democracy on a global scale. The next section addresses this point.

THE UNFREEDOM OF THE MODERNS, AGONISM, AND THE PROMISE OF ELUCIDATING DIALOGUE

This section recalls Tully's claim about the "Unfreedom of the Moderns" and the central role of agonism (contestation) for the purpose of including the multitude of affected stakeholders in establishing norms of governance.

Tully situates his seminal claim about the 'unfreedom of the moderns' against a conceptual debate between Jürgen Habermas and John Rawls. As he argues, in essence this debate established that "two critical and abstract principles have been singled out as *guiding norms* for the critical discussion of the conditions of legitimacy of contemporary forms of political association. These are the principle of *constitutionalism* (*or the rule of law*) and the principle of *democracy*

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[16] Antje Wiener, *A Theory of Contestation* (Berlin: Springer, 2014). Compare also Hart's primary and secondary rules of international law: H. L. A. Hart, *The Concept of Law* (Clarendon Press/Oxford University Press, 1994).

[17] Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, MA: Harvard University Press, 1995).

[18] Wiener, *A Theory of Contestation*.   [19] Tully, "Unfreedom," 205.

(*or popular sovereignty*)."[20] Against this backdrop, Tully's claim about the "unfreedom of the moderns" is guided by six specific features, and it is illustrated by engaging a mutually "elucidating dialogue" between two distinct constitutional orders – in this case, Europe and North America. A project that seeks to address the considerably larger variety of constitutional orders within a global context faces two additional challenges: the first consists in taking account of a quantitative "plurality" of sites and agents;[21] the second consists in accounting for the "diversity" of qualitatively distinct experiences and expectations. Both are relevant for reordering governance in a globalized world. The challenges are addressed by Tully's third feature, which he identifies as

the *'agonistic' dimension* of constitutional democracy because it entails that *no rule of law, procedure or agreement is permanently insulated from disputation in practice in an open society*. The *democratic practices of disputation and contestation* that were previously assumed to rest on permanent constitutional arrangements, to which the people were supposed to have agreed once and for all, are now seen to apply to those arrangements as well, and thus *'agonism' (the Greek word for contest) is seen to be a defining feature of democratic constitutionalism*, one which partly explains and also reinforces the co-equal status of the two principles.[22]

This chapter dwells on this feature. Following from the conception of contestation, as a 'defining feature of democratic constitutionalism' it conceives the practice of contestation as the 'glue' for democratic governance in a globalized context.[23] It further argues that more systematic research on norm contestation would therefore offer an important means toward filling the gap between the formal validity of global governance norms, on the one hand, and their cultural and social validations in the global multitude of everyday experience, on the other. Framing contestation in this way thus offers an analytical angle on the crucial – and often bracketed – relation between fact-based and value-based dynamics of norms.[24] As will be demonstrated in the following section, the angle is taken up and more systematically framed by contestation research in IR theory.

Before turning to that analytical frame, the following elaborates on the rationale that by presenting the two principles of modern constitutionalism as fundamentally

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[20] Tully, "Unfreedom, " 205 (emphasis added).
[21] Amitav Acharya, "After Liberal Hegemony: The Advent of a Multiplex World Order," *Ethics and International Affairs* 31 (2017): 271–85; and Amitav Acharya, "Global International Relations (IR) and Regional Worlds: A New Agenda for International Studies," *International Studies Quarterly* 58 (2014): 647–59.
[22] Tully, "Unfreedom," 208 (emphasis added).
[23] Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Boston: Beacon Press, 1957).
[24] Jonathan Havercroft, "Social Constructivism and International Ethics," in *Routledge Handbook on Ethics and International Relations*, ed. Brent Steele and Eric Heinze (London: Routledge, 2018), 116–29; Jason Ralph, "On Norms and Practice: Crypto-Normativity" (paper, International Studies Association Annual Conference, International Studies Association, March 24, 2020).

contested, Tully offers an invaluable conceptual angle toward this analytical framing from IR theory. By shedding light on practices of norm- and value-construction that are "prior to" and/or "outside of" a modern conceptual frame, Tully shows that adopting a modern standpoint therefore bears the danger of overlooking the underlying set of customary norms and values. This angle offers a mediated lack of societal reflection that undermines these two principles' universal validity, for their perception of 'freedom' rests on false assumptions. Thus, the conception of the 'unfreedom of the moderns' sheds light on the mediated effect of bracketing sociocultural practices and background experience in the constitutive process of fundamental constitutional norms. It follows that any attempt to resolve, enhance, or expand democratic legitimacy, and that begins from a 'modern' standpoint, is likely to bracket cultural diversity. This implies two types of exclusion from the process of constitutional ordering in a globalized world (i.e. quantitative exclusion with regard to a plurality of affected stakeholders from the democratic process in national societies, as well as qualitative exclusion with regard to the diversity of sociocultural background knowledge and its impact on normative substance), from which will be addressed in detail here. The only way to overcome the dilemma of the 'unfreedom of the moderns' therefore consists in taking modern freedoms themselves as profoundly contested. Enabling those affected by the norms of governance to contest them would be the way forward, for it is through this practice of contestation on and from the ground that norm(ative) change becomes possible.

The litmus test of the lasting effect of enhanced access to contestation in a globalized world consists in the question of how the effects of these contestatory practices work within societal boundaries and across them in IR. From international norms research we know that norms do not travel well, and individual agents tend to carry their normative baggage across borders, only to run into conflicts on the other side, as it were,[25] as individuals carry distinct "normative baggage" across manifold boundaries.[26] It is here where an ontological shift toward "societal multiplicity" matters,[27] for it highlights the consequences of inter-societal and inner-societal interactions, with reference to both quantitative and qualitative drivers of multiplicity.[28]

In a nutshell, then, Tully's take on fundamental norms and their role in generating and maintaining the legitimacy of political associations reveals two

[25] Thomas Risse, "Transnational Actors and World Politics," in *Corporate Ethics and Corporate Governance*, ed. Walter Zimmerli, Markus Holzinger, and Klaus Richter (Berlin, Heidelberg: Springer, 2007), 251–86.

[26] Uwe Puetter and Antje Wiener, "The Quality of Norms is What Actors Make of It: Critical Constructivist Research on Norms," *Journal of International Law and International Relations* 5 (2009): 1–16.

[27] Rosenberg, "Internationale Beziehungen," 107–22.

[28] Antje Wiener, "Norm(ative) Change in International Relations: A Conceptual Framework" (KFG Working Paper Series, KFG International Law – Rise or Decline?, Freie Universität Berlin, Berlin, 2020), 44.

important insights. Both matter for this chapter's task of assessing the future of democracies in a globalized world. First, constitutionalism and democracy are perceived as *guiding norms* of modern constitutionalism and, as such, they are, secondly, devised *from* given constitutional orders. As Tully shows, following a research logic that extends from the order to the norm actually implies a twofold mechanism with the effect of maintaining, sustaining, and – with a view toward global governance – extending the 'unfreedom of the moderns'. This effect implies that the inability to engage with the wealth of cultural diversity is prolonged rather than challenged.

Given that cultural diversity is constructed through everyday social practices which generate knowledge that is represented individually as background knowledge,[29] benefiting from that knowledge requires the means to represent its effect for normative reordering within a globalized world. This is achieved neither through inclusion of culturally diverse groups within a given order, nor by establishing enhanced participation of individuals according to the given norms of current orders, for both prevent the possibility to critique, change, and rethink, through learning from this 'strange multiplicity'.[30] To activate that learning potential therefore calls for more systematic and reflexive engagement with cultural diversity as an enabling condition for rethinking the future of democracies in a globalized world. The cycle-grid model which is presented below targets this challenge based on the interlinked practices of contestation and validation.[31]

To that end, a more consistent and rigorous research focus on cultural diversity and its effect on transformative change (and hence the normative structure of meaning-in-use that sustains any political order) therefore takes the reverse direction and conceptualizes constitutional reordering *from norms toward order*.[32] As Tully has demonstrated with reference to the repertoire of distinct Canadian constitutional traditions, this bottom-up approach is the condition for devising the parameters of 'contemporary constitutionalism'.[33] A practice-based logic of inquiry then would contribute to re-establishing the freedom *for* the moderns, enabling them to learn from experience and change their concepts of (liberal) order accordingly. This remains hypothetical, to be

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[29] Emanuel Adler, *World Ordering: A Social Theory of Cognitive Evolution* (Cambridge: Cambridge University Press, 2019); and Etienne Wenger, *Communities of Practice: Learning, Meaning, and Identity* (Cambridge: Cambridge University Press, 1998).

[30] Research on global knowledge generation offers one promising research focus. Compare, for example, studies that address the social construction of "global space" and the role of the "global" in IR theory. See Karin M. Fierke and Vivienne Jabri, "Global Conversations: Relationality, Embodiment and Power in the Move Towards a Global IR," *Global Constitutionalism* 8, no. 3 (2019): 506–35.

[31] Compare Figure 17.1.

[32] Antje Wiener et al., "Global Constitutionalism as Agora: Interdisciplinary Encounters, Cultural Recognition and Global Diversity," *Global Constitutionalism* 8 (2019): 1–11.

[33] James Tully, *Strange Multiplicity*.

sure, for it pre-empts a scenario in which the 'moderns' actually wish to be freed from the blurred vision that is implied by the top-down order-to-norm perspective. And it is here, where the contestations of norms that we observe in everyday politics, come onto the – research – stage, for these contestations essentially take issue with the 'freedom of the moderns' by contesting fundamental norms. To provide an example, let us return to contemporary IR theory, and especially the field of norms studies, where two opposing research logics contribute to the reification of these norms, and, vice-versa, the reconstitution of these norms. Both logics are applied by distinct standpoints, and both are currently at work. The first – *reifying* – standpoint holds that contestation affects norm robustness. Accordingly, it is considered as a 'danger' which potentially undermines the liberal order. The second – *rethinking* – standpoint contends that norm contestation is a precondition for the democratic legitimacy of norms in global society. Accordingly, it is considered as an opportunity with a view to making the global order more inclusive and more just.

The reifying standpoint applies a logic of inquiry that centers on national interest in security[34] that depends on the stability of a given international order. The rethinking standpoint applies a logic of inquiry that centers on the challenge of access to contestation for those affected by the norms that govern them, applying the *quad omnes tangit principle* (i.e. what touches all must be approved for all)[35] as a minimal condition for legitimacy in global society.[36] As norms studies in IR theory have highlighted, it is not altogether obvious whether the goal of this discussion about the potential benefits of cultural diversity for democratic legitimacy on a global scale consists in re-establishing freedom *for* the moderns (wearing a veil of innocence about the promises of cultural diversity) or whether, in fact, it brings with it the challenge of establishing freedom *from* the moderns (as representatives of dominant Western political thought). The former typically focuses on policy, the latter on politics. The following section details a model toward more systematic studies of norm contestation and their effect in a globalized world.

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[34] J. Ann Tickner, "The Disciplining of International Studies," in Brett Ashley Leeds et al., "Forum: Power and Rules in the Profession of International Studies," *International Studies Review* 21 (2019): 193–96.

[35] Compare Landau: "When Bartholomé de Las Casas dealt with the question of legitimizing the Spanish rule over American Indians in his book De Thesauris in Peru around 1545, he considered submission of the Indians to Spanish rule by force would be a servitude contrary as well to natural law as to human reason. According to Las Casas 'a free people or community accepting a burden had to give their free consent; all whom the matter touched should be called.' Las Casas combined the legal maxim 'Quod omnes tangit' with the idea of a natural right of liberty shared by the Indians." See Peter Landau, "The Origin of the Regula iuris 'Quod omnes tangit' in the Anglo-Norman School of Canon Law during the Twelfth Century," *Bulletin of Medieval Canon Law* 32 (2015): 19.

[36] David Owen and James Tully, "Redistribution and Recognition: Two Approaches," in *Multiculturalism and Political Theory*, ed. Anthony Simon Laden and David Owen (Cambridge: Cambridge University Press, 2007), 265–91.

THE DUAL QUALITY OF NORMS AND SUSTAINABLE NORMATIVITY

This section presents the *cycle-grid model* to frame democracy from below. It details practices of contestation (i.e. reactive and proactive) and validation (formal, societal, cultural) to address the gap between societal interactions and global order-building.

As this chapter's argument about closing the gap posits, freedom from the moderns requires a better concept of transformative change through politics. The point is substantiated by a practice-based approach to norms which facilitates a fresh view on the culturally diverse roots of contemporary order. Approached from this agonistic standpoint, a contemporary order is always to a certain extent in-the-making, driven by contestation. Through this process, norm change and transformative change will be perceived as coconstitutive practices that work at difference scales of global society, thereby connecting localized normative opportunity structures representing norms as tangible features of political order, on the one hand, and global normative structures of meaning-in-use representing knowledge constellations as the more intangible cultural features, on the other.

The making of order thus remains ongoing and in-progress, and its legitimacy depends on the degree to which it is capable of responding to everyday challenges and crises. Against this background, it follows that what is often called the 'recognition problem' or the 'diversity dilemma' – that is, the challenge of acknowledging cultural diversity in a constitutional frame – may become less of a dilemma and more of a virtue.[37] For scholars coming to the discussion about cultural diversity from IR theory, this observation about cultural diversity as vice vs. virtue allows for critical scrutiny regarding the effect of research logics that engage in *uploading* guiding norms of Western liberal order(s) to the 'global level' (i.e. constituting the modern global liberal order) to then engage in *downloading* the same norms to any domestic political order (i.e. diffusing the norms of the global liberal order). The process leaves the 'rest' to comply with the guiding norms of the West. It reflects the unfreedom of the moderns that rests on two grounds. According to Tully, this exclusion takes two forms.

The first and "most outstanding form of exclusion remains the one Dewey identified as paramount: the exclusion of those subject to national and transnational corporations from *having a democratic say* over them";[38]

The second form of unfreedom is brought about by *relations of assimilation*. Subjects are permitted and often encouraged to participate in democratic practices of deliberation yet are constrained to deliberate in a particular way, in a particular type of institution and over a particular range of issues so their agreements and disagreements serve to reinforce rather than challenge the status quo.[39]

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[37] Hannes Hansen-Magnusson, Antje Vetterlein, and Antje Wiener, "The Problem of Non-Compliance: Knowledge Gaps and Moments of Contestation in Global Governance," *Journal of International Relations and Development* 23 (2018): 636–56.
[38] Tully, "Unfreedom," 202.   [39] Tully, "Unfreedom," 116 (emphasis added).

A growing literature on globalized conditions of unequal access to democratic participation and representation questions the universal validity of these fundamental norms. Given that norms are by definition not only structuring but also socially constructed through interaction at local sites, this literature argues that norms are always in principle contested. It thus calls for more research on the emergence of norms through practice. With regard to the contested validity of norms, therefore, all norms are treated as coming from 'somewhere', including 'liberal norms'. The legitimacy of norms is thus not enhanced by claiming the validity of liberal norms of the moderns for actors 'everywhere', but by first, unveiling the freedoms promoted by the moderns through global governance; second, contesting them; and third, re-constructing normative validity through these local practices. This point is sustained by norms research in IR, which has demonstrated that contestation and its effects must be understood 'all the way down' and 'all the way up'[40] in order to take full account of these conditions of diversity and plurality. It is sustained by the claim that norms are social facts. That is, even though they are regularly framed in constitutional, political, and/or legal institutional terms which aspire to bear universal claims, their implementation always requires a sociocultural fit. As Finnemore and Toope have emphasized in their reply to modernist neo-institutionalist claims about compliance,[41] successful norm implementation depends on the social environment in which they are expected to 'work'.[42] As further studies have demonstrated, this is well documented by cases in IR where norms were contested, despite their constitution in treaties and other kinds of international agreements.[43]

International relations and global governance institutions derive their democratic legitimation from their appropriation of fundamental modern norms as their constitutional foundation. These are the warrantors of the 'freedom of the moderns.' The contestedness of norms has developed in tandem with this 'modern' background at the organized, macro-scale of global order. To address what democracy might become, therefore, does not begin from considering contestation a problem ('danger') and aiming to counter contestedness in order for the foundational norms of this order to 'function'

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[40] Holger Niemann and Henrik Schillinger, "Contestation 'All the Way Down'? The Grammar of Contestation in Norm Research," *Review of International Studies* 43 (2017): 29–49.

[41] Kenneth W. Abbott et al., "The Concept of Legalization," *International Organization* 54, 3 (2000): 401–19.

[42] Martha Finnemore and Stephen J. Toope, "Alternatives to 'Legalization': Richer Views of Law and Politics," *International Organization* 55 (2001): 743–58.

[43] Jutta Brunnée and Stephen J. Toope, "Constructivism and International Law," in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, ed. Jeffrey L. Dunoff and Mark A. Pollack (Cambridge: Cambridge University Press, 2012), 121–25; Byers, "Policing the High Seas," 526–45; Jennifer M. Welsh, "Norm Contestation and the Responsibility to Protect," *Global Responsibility to Protect* 5 (2013): 365–96; Wiener, *A Theory of Contestation*, 69; and Wiener, "Contested Compliance," 189–234.

more smoothly (i.e. using the political tools of sanctioning, shaming, or coercion). Instead, it begins from the opposite assumption and conceives contestation as an opportunity for achieving democratic legitimacy in the global realm. This is achieved with reference to the concept of "sustainable normativity."[44] Rather than improving ways of implementing fundamental norms of global governance, the goal is to generate the link between societal practices and these removed norms of global governance. In order to identify these links (i.e. fill the gap), Tully's central proposition to engage the potential of cultures of diversity more assertively in current social science theory is applied as the guiding standard. It rests on the proposition that "different practices of reasoning-with-others are grounded in *distinctive customary local knowledges*, repertoires of practical skills, genres of argumentation and tacit ways of relating to one another. These culturally and historically diverse genres of practical know-how or savoir-faire (*metis* in Greek) are the *intersubjective bases of culturally diverse practices of deliberation.*"[45]

Against this background, the chapter now turns to a frame that enables more systematic empirical research on norm contestation and its effect on rethinking and reordering political organization in a globalized world. To that end, it identifies the concept of contestation as a twofold practice which has been developed by the literature on norms research in IR theory and illustrates how this practice-based approach may be applied to counter the unfreedom of the moderns in global society. It aims seeks to account for norm validation as a principled practice that originates from 'somewhere'. To that end, it 'places' contestations of fundamental norms in the context at local 'sites'. By doing so, it aims to arrive at a more 'contemporary' understanding of democratic legitimacy that reflects the conditions of 'diversity' and 'multiplicity'[46]. The model has been developed against Tully's critique. Accordingly, it offers a frame for critical practice-based research with the aim to counter the perpetuation of the 'unfreedom of the moderns' and its diffusion from and by liberal orders. It brings to bear the critique of Western roots of the global liberal order and centers on that order's lacking capability to include 'all affected' by its norms[47] – that is, the modern setting in which stakeholders' access to the constitution of guiding norms of global order has long-remained restricted. Due to the underlying principles (i.e. the two guiding norms of the rule of law and democracy) of this liberal global order, the only mechanisms of change include inclusion and participation according to the given norms of that order, for, in today's contested liberal global order, these norms still represent the modern constitutive prototypes of the constitutional

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[44] Wiener, *A Theory of Contestation*, 69.   [45] Tully, "Unfreedom," 223.
[46] Acharya, "Global International Relations," 647–59; Rosenberg, "International Relations," 127–53; and Tully, *Strange Multiplicity*.
[47] Acharya, "After Liberal Hegemony," 271–85; Owen and Tully, "Redistribution and Recognition," 265–91.

frame that defines normative opportunity structures and the rules of political engagement *on site*.

To counter this logic therefore involves rethinking these rules of engagement with a view to enabling access to norm contestation "all the way"[48] in order to achieve "sustainable normativity" in a re-ordered globalized world.

By developing the concept of "sustainable normativity" against the background of T. H. Marshall's "Citizenship and Social Class,"[49] Wiener has drawn attention to the central question of "access" to citizenship rights and, subsequently, "access" to proactive norm contestation.[50] To address unequal access conditions that shape the possibilities and constraints for political participation of the multitude of affected stakeholders in global society, she proposes drawing on the *quod omnes tangit* principle (what touches all must be approved by all) for framing central normative questions for norms research, such as "whose practices count?" (observation) and "whose practices ought to count?" (evaluation).[51] Following this frame, empirical research begins from observing global norm contestations and traces them to local sites in order to evaluate affected stakeholders' access to norm contestation. Following Marshall, this access is conditioned by the normative opportunity structure on site. Its qualitatively distinct realization is identified by two distinctions. First, access to contestation is qualified with reference to political effects as (a) reactive contestation (i.e. objection), and (b) the politically far more effective proactive contestation (i.e. critical engagement with these norms' substance). Second, and accounting for knowledge as value-based, three types of norm validation, to which diverse and multiple stakeholders have access, are to be distinguished: formal validation (in a position of political/legal power), social validation (in a position of a solid social group/community), and cultural validation (individually generated cultural knowledge, aka normative baggage). The types of validation therefore provide a key to societally qualified access to the two practices of contestation in light of the normative opportunity structures that set the conditions for norm(ative) change locally. Both help to map distinct degrees of sustainable normativity on site. To counter unequal access – which is the given condition in global society – it then engages selected stakeholder groups' respective discursive interventions in a global multilogue to identify norm(ative) change. Here, more systematic research on societal multiplicity would facilitate helpful and more detailed insights.

A starting point which takes account of inter- and inner-societal relations has been offered by norms research that seeks to "reverse this bracketing of

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[48] Niemann and Schillinger, "Contestation 'All the Way Down'?," 29–49.

[49] Thomas H. Marshall, *Citizenship and Social Class* (London: Cambridge University Press, 1950).

[50] Antje Wiener, "The Embedded *Acquis Communautaire*: Transmission Belt and Prism of New Governance," *European Law Journal* 4 (1998): 294–315; Wiener, *Contestation and Constitution*, 71–72.

[51] Wiener, *Contestation and Constitution*, 1.

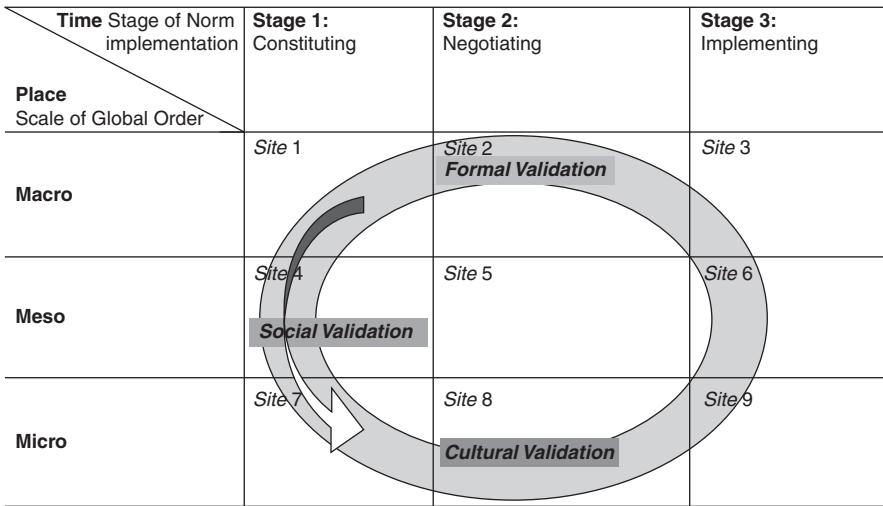| Time Stage of Norm implementation	Stage 1: Constituting	Stage 2: Negotiating	Stage 3: Implementing
Place Scale of Global Order			
Macro	Site 1	Site 2 **Formal Validation**	Site 3
Meso	Site 4 **Social Validation**	Site 5	Site 6
Micro	Site 7	Site 8 **Cultural Validation**	Site 9

FIGURE 17.1 Cycle-grid model
Source: Antje Wiener, *Contestation and Constitution of Norms in Global International Relations* (Cambridge: Cambridge University Press, 2018), p. 44.

a value-based perspective on norms, and to sketch a conceptual framework that centers on practice-based norm(ative) change."[52] To that end, practices of contestation are distinguished according to their normative effect. This research builds on the theories of contestation and interactive international law. It argues that a turn toward practices of contestation and validation enables us to assess degrees of "sustainable normativity"[53] that reflect the state of legitimacy in the global order. These degrees are read off empirical research on reactive and proactive contestation on locally defined sites. As long as both practices of contestation are in balance, the conditions of sustainable normativity are satisfied. As soon as either reactive or proactive contestation develops the strong-hand, sustainable normativity is challenged – that is, an imbalance in favor of reactive contestation is expected to lead to political conflict (which may trickle across societal boundaries, igniting conflicts elsewhere), and an imbalance in favor of proactive contestation may imply a decline in opportunities for political protest. The following summarizes a possible way of framing political practices of contestation as interactions with reference to the "cycle-grid model."[54]

   The model consists of a graph which comprises a three-by-three grid to indicate local sites of interaction (in relation to norm development and global order), and an overlay of a spinning cycle which entails distinct modes of validation (in relation to political power). The model allows for applying the ethnographic

[52] Ibid.   [53] Ibid., chap. 3.   [54] Ibid., 23–24, 61.

method of "following the conflict" based on sensitizing reading of news, reports, documents, and then subsequently "zooming in" on local sites. In detail, the model frames the task of mapping local practices on distinct "sites" (Who are the agents? Where are they engaging? What are their demands?). Each of these sites is conditioned by a "normative opportunity structure" that entails the "rules of engagement" and sets enabling and constraining conditions for stakeholders' "access to contestation." The sites are grouped along the two dimensions of global order, which are distinguished according to scope as part of the micro-, meso-, and macro-scales along the vertical dimension, and the process of norm development, including constitution, negotiation, and implementation, along the horizontal line of the grid. The cycle indicates the potential for access to validation, which depends on an individual agent's position in society and which are therefore distinguished as formal, social, and cultural practices of validation on the cycle.[55]

To summarize, the characteristic interplay between the quantitative and qualitative dimensions of the multitude of affected stakeholders who take part in the practice is demonstrated thus: While reactive contestation can be observed quantitatively with regard to agents, sites, and times where norm compliance or norm violation is objected, in turn proactive contestation needs to be evaluated qualitatively according to the conditions that facilitate access to critical engagement with norms and their meaning-in-use. The practices of contestation nicely pinpoint Rosenberg's point about consequences of multiplicity that potentially consist in either 'danger' or 'opportunity'. For, if reactive contestation – expressed by the spectrum of political activities including the spectrum of contentious politics (social movements, protest, and so on) to the more silent neglect of norms[56] – is not met by favorable conditions of access to proactive contestation, the necessary balance between both practices becomes lopsided. The likely result is conflict, which may represent a danger to societal stability, security, and so on. In turn, if reactive contestation is met by favorable conditions of access to proactive contestation, the diversity of voices is able to engage in deliberations to negotiate a compromise. The latter entails the potential of an opportunity, in so far as the political opportunity structure may be changed, for example, by offering access to previously neglected groups of stakeholders, establishing new pathways to participation for societal groups, or revising normative substance. Taken together, therefore, both practices reflect the quantitative–qualitative challenge raised by a multiplicity-ontology. Reactive contestation highlights affected agents' objection vis-à-vis a given order and/or its rules of engagement (i.e. the local normative opportunity structure). In turn, proactive contestation allows for shaping conditions for qualitative change of that order (i.e. reflecting the global normative structure of meaning-in-use). It is

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[55] Compare Wiener, *Contestation and Constitution*, 23–24, 61.

[56] Charles Tilly, "Social Movements as Historically Specific Clusters of Political Performances," *Berkeley Journal of Sociology* 38 (1993): 1–30; Anette Stimmer and Lea Wisken, "The Dynamics of Dissent: When Actions Are Louder than Words," *International Affairs* 95 (2019): 515–33.

argued that reactive and proactive practices of contestation provide a helpful vantage point for framing the interplay between quantitative and qualitative multiplicity and its impact on international ordering.

To summarize, the norm-typology distinguishes three types of norms, and the cycle-grid model distinguishes two kinds of practices. The wider societal approach to norms centers on the dictum that in order to achieve sustainable normativity, access to contestation is a sine qua non. And, the possibility of achieving and maintaining sustainable normativity depends on the (re) constitution of globally recognized norms at local sites. They need to be read off these practices. To assess these practices' effects, these are distinguished as reactive and proactive contestation in order to facilitate the empirical study of *mapping contestations* with the normative evaluation of distinct *practices of validation*. Both practices play a distinct role with regard to understanding and engaging with affected stakeholders' access to participation in shaping order in global society. The first enables us to account for stakeholder (or citizen) engagement through empirical observation by desk- and/or field-study; the second offers standards for normative evaluation of access to engagement according to the all-affected principle.

FREEDOM FROM THE MODERNS: CONTESTATION AS A VIRTUE

This section provides an outlook on the future of democracies in a globalized world.

The argument advanced by this chapter began from this volume's preceding discussions at the Victoria workshop and the three leading questions about problems of contemporary democracies, their connections, and ways to counter them, respectively. It began from Tully's warning to perpetuate the two unfreedoms of the moderns by including previously excluded stakeholders and then assimilating their distinct democratic practices. The argument centered on the problem that follows from these unfreedoms, namely the deeply undermined civic freedoms of affected stakeholders and their perpetual exclusion as a problem which cannot be solved by enhancing inclusion and democratic participation, but which must be addressed by a logic of inquiry that aims at means *other than* inclusion. These other means, it was suggested, consist in bringing cultural knowledge to bear in its own right where diversity becomes a "virtue rather than a vice."[57]

It was argued that, notwithstanding the modern canon of constitutional norms and its representation in a plurality of national constitutional orders and global governance institutions, it is important to note that the contestedness of a norm depends on contingent local practice. In a global context, it follows that it is not only highlighted through *practice* on the ground, but it increases in relation to the plurality of sites that we wish to account for. Following this contribution's

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[57] Hansen-Magnusson et al., "The Problem of Non-Compliance," 636–56.

particular focus on addressing *democracy within a global frame*, this implies accounting for *multiple futures* of democracy. To explore this focus and flag conceptual challenges and how to address them analytically, the chapter centered on the *practice* of norm contestation at a multiplicity of *sites*. Following leading concepts in the field of norms research in IR theory, then, the constructive dynamic is one that evolves from practice to a norm's meaning-in-use. The argument was developed against the *quod omnes tangit* principle, which allows for the most far-reaching questions to that end: namely, "Whose practices count?" and, relatedly, "Whose practices ought to count?"[58] The practice-based dynamic of this driver (i.e. practices of contestation) is pitched against the conception of democracy as a foundational norm of modern constitutionalism.

To bring cultural background knowledge as the experience of a 'strange multiplicity' that requires renegotiation through inter-societal and inner-societal dialogue, the chapter highlighted the added value of practice-based research on norm contestation. The conceptual proposal distinguishes between the two standpoints of reifying and rethinking the 'unfreedom of the moderns' (i.e. either locating norms in a given order or identifying norms through observed practices). And it proposed a more systematic empirical and normative frame to explore the project of rethinking and reordering constitutional settings in a globalized world with reference to the cycle-grid model and a general norm-typology that allow for zooming in on distinct sites of contestation. Accordingly, the effect of contestedness on the future of democracies (note the plural) stands to be assessed from these sites up. Two related steps illustrated this claim. The first sketched a practice-based approach toward exploring the meaningful use of norms from IR theory for research on democracy in the wider social sciences. The second framed the application of this approach with a view to exploring democracy as a fundamental norm, rather than focusing on democracy as a type of political system or regime. In addition to this contribution to democracy studies, this contribution proposed that this approach has an additional benefit for IR, for it speaks to a long-standing conceptual gap in IR. This gap was identified by extant IR theories' conceptualization of the global political order as an order of global governance that was established by inter-state negotiations. These negotiations at the top have been constitutive for a modern regulatory order with a lacking societal foundation.

In Tully's words, the structure of modern national constitutions was forged through regulatory practices. Leaving customary practices largely to one side in the process, the fundamental constitutional norms that expressed the basic agreement of social contracts were extracted from these societies. The first form of unfreedom has been incorporated into international law, for example, based on contract law and the principle of consent.[59] While the degree will

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[58] Wiener, *Contestation and Constitution*, 1.

[59] Friedrich Kratochwil, "The Limits of Contract," *European Journal of International Law* 5 (1994): 465–91.

differ pending on a given context, having new members comply with a set of given norms that establish the order of an international organization will invariably involve the subordination and suppression of cultural diversity.[60] The procedure has been perpetuated through countless contracts on membership in international organizations of the UN system, as well as regional organizations such as the quasi-constitutional nonstate polity of the European Union (EU), for example. While critical voices have pointed to the importance of taking "contested compliance" more seriously as "interventions in the normative structure of world politics" that matter for long-term assessments of normative sustainability in contexts of regional and global,[61] cultural recognition is predominantly approached as a problem rather than an opportunity for transformative change[62]. To reverse this process of progressive elimination of diversity, stakeholders require access to engage with the norms that govern them. Its success depends on stakeholders' access to the two practices of contestation and norm validation, respectively. Here, the distinction between reactive and proactive contestation – where reactive contestation restricts affected stakeholders to the practice of mere objection, whereas proactive contestation would allow affected stakeholders to critically engage with the norms that constitute the order – comes in helpful.

The second form of unfreedom may even be more damaging with regard to its effects. This is the case because it leads to the perpetual hollowing out of cultural background knowledge that is part of the top-down order-to-norm logic. It follows that, unless they are subjected to critical scrutiny, logics of inquiry that take the liberal order's universal hegemony for granted will invariably contribute to more exclusion despite the claim of, for example, seeking to enhance the 'diffusion' of and 'compliance' with 'democratic norms'. Here Wiener refers to three types of norm validation: formal validation, social recognition, and cultural validation, respectively. At best, each affected stakeholder has access to all three. However, in most concrete situations, stakeholders will have either access to social and cultural validation, or only to the latter. The *scalar model* allows for evaluating practice-based transformative change of normative orders in global society, and how to counter forms of exclusion with reference to the practices of contestation and validation.

To summarize, contestation practices indicate the quality of the direct relation between stakeholders and norms. By distinguishing between either reactive

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[60] Sundhya Pahuja and Anne Saunders, "Rival Worlds and the Place of the Corporation in International Law," in *The Battle for International Law: South-North Perspectives on the Decolonization Era*, ed. Philipp Dann and Jochen von Bernstorff (Oxford: Oxford University Press, 2018), 141–74.

[61] Antje Wiener, "Contested Compliance," 189–234; Jean L. Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism* (Cambridge: Cambridge University Press, 2012).

[62] Christian Reus-Smit, "Cultural Diversity and International Order," *International Organization* 71 (2017): 851–85.

contestation (i.e. objection to norms or their violation) or proactive contestation (i.e. critical engagement with norms and their interpretations), research is able to identify the 'sites' where norm conflicts occur, the involved stakeholders, and the normative opportunity structure that condition stakeholders' access to participation. In turn, validation practices are distinguished with reference to meta-theoretical considerations about the dimension of knowledge a stakeholder is enabled to apply when practicing norm contestation. Against the background of IR theory, three dimensions matter in this regard: formal validation, social recognition, and cultural validation. Formal validation – also called 'legal' validation[63] – follows the international law literature. Social recognition follows the social constructivist literature on norms. which holds that processes of reiterated interaction in social groups will generate shared norms, which are habitually acknowledged as appropriate.[64] Finally, cultural validation has been conceptualized against the background of the post-structural and critical constructivist literature on discursive practice in IR.[65]

While the order-to-norm approach perceives cultural validation as the least powerful of the three practices of norm validation, the opposite is the case with the bottom-up norm-to-order logic of inquiry. Against the latter and applied to the comparative study of the unfreedom of the moderns, cultural validation turns out to be the most important practice. In fact, its ability to counter the unfreedom of the moderns makes it a warden with regard to chances of developing genuinely 'contemporary' conditions for democracy.[66] The key role of cultural validation lies in its capability to mobilize individually held cultural background knowledge to bear in the constitution and change of norms. It thus turns into a sine qua non condition for preserving background experience as a common cultural heritage. The proposal therefore is to consider cultural diversity a global good (rather than a global problem). Finding the means to safeguard this cultural diversity based on strengthened representation in societal orders is thus central to establishing the future of democracies that respect the culturally diverse sources of global society and enable the plurality of agents.

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[63] Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law: An International Account* (Cambridge: Cambridge University Press, 2010).

[64] James G. March and Johan P. Olsen, *Rediscovering Institutions: The Organizational Basis of Politics* (New York: Free Press, 1989); James G. March and Johan P. Olsen, "The Institutional Dynamics of International Political Orders," *International Organization* 52 (1998): 943–69; Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," *International Organization* 52 (1998): 887–917.

[65] Jennifer Milliken, "The Study of Discourse in International Relations: A Critique of Research and Methods," *European Journal of International Relations* 5 (1999): 225–54; Wenger, *Communities of Practice*; Emanuel Adler, "Seizing the Middle Ground: Constructivism in World Politics," *European Journal of International Relations* 3, no. 3 (1997): 319–63.

[66] James Tully, *Strange Multiplicity*.