Introduction

As appears from the title, *Deconstructive Constitutionalism: Derrida Reading Kant* seeks to explore the relationship between the thinking of Immanuel Kant (1724–1804) and Jacques Derrida (1930–2004) with respect to constitutionalism. In what follows, the elements of the title are briefly unpacked to show their interrelation and significance. *Constitutionalism* at its most basic level refers to the definition and limitation of state powers through a constitution (Currie and De Waal 2013, 8; De Vos 2021, 42–3). *Kant* is widely recognized as one of the philosophical forebears of this idea, together with John Locke (1632–1704), Montesquieu (1689–1755), and Jean-Jacques Rousseau (1712–1778). Although Kant did not, like some of his predecessors, inspire the American and French revolutions of the eighteenth century, which gave birth to the modern constitution, he played a pivotal role in explaining these events philosophically after the fact (Reiss 1991, 3–4). Kant is of course best known as a founding figure of the Enlightenment through his three Critiques, which have tended to overshadow his politico-legal writings (3). The latter texts, which flow from the Critiques, have however received greater attention in recent years, as can, for example, be seen in the influential writings of John Rawls and Jürgen Habermas.[1] With respect to constitutionalism, and as appears in more detail later, Kant championed the notions of human freedom and of self–government as well as the limitation and separation of state powers. Kant furthermore proposed a constitutional-type arrangement on the international and cosmopolitan levels for the sake of securing peace.

Jacques *Derrida* is known for his *deconstruction* of the Western philosophical tradition. He is regarded by many as one of the most important philosophers of the twentieth century. Kant plays a central role in Derrida's readings, whom he both follows and challenges. As we will see in what follows, this often happens through an analysis of Heidegger's engagement with Kant. With respect to constitutionalism, Derrida's 1990 essay "Force

of Law: The 'Mystical Foundations of Authority' " is probably the best known (Derrida 2002a, 230–98).[2] In the first of the essay's two parts, Derrida draws a distinction between law and justice, and defines the latter in excessive terms as a gift without exchange and as entailing a madness beyond reason. Whereas for Kant, as we will see, justice can be attained by the state if it adheres to certain principles, this is not possible in Derrida's thinking on justice. In the second part of the essay, a close reading of Walter Benjamin's essay "Critique of Violence" takes place, with Derrida pointing to the moment of the founding of a constitution as well as its subsequent enforcement, as occasioning an abyssal, self-destructive, a-legal "moment," where no existing law is in place to regulate what takes place. Kant likely would not have denied this, but he did not explicitly attach any consequence to this "moment," apart from prescribing that the new constitutional order so established should be respected irrespective of the a-legal manner in which it came about (Kant 1996b, 6:318–23). The second part of "Force of Law" thus ties in closely with the first part and opens the way to a radically different approach to modern constitutionalism, which is explored further in *Deconstructive Constitutionalism*.

Derrida's texts on politico-legal issues indicate that the structure of decision-making in "Force of Law" is not restricted to the judiciary, but necessarily extends also to the other state branches (Derrida 1997c, 2005c). "Force of Law" is not further analyzed here, but it serves as an important source of reference for the analysis that is to be undertaken. The focus in *Deconstructive Constitutionalism* is on texts of Derrida that touch either directly or indirectly on what is at the heart of Kant's ethical, political and legal thinking. Justice nevertheless remains at the forefront here, as appears from the first chapter on Derrida's engagement with Kant's moral law. In addition to this engagement with the moral law, *Deconstructive Constitutionalism* explores the way in which Derrida reads other central Kantian notions such as freedom, reason, and the pursuit of peace within the context of modern constitutionalism. The aim is to investigate how the foundations of modern constitutionalism, as spelled out in Kant's thinking, can be differently conceived to address some of the challenges of the twenty-first century. We now explore these elements of the title and their significance in more detail.

Kant and Modern Constitutionalism

Writing between the First and the Second World Wars, Carl Schmitt identified the aim of the modern constitution as the protection of the sphere

of freedom of the individual, which is in principle unlimited, and which precedes the establishment of the state:

> The modern, civil, rule-of-law constitution is, in respect of its historical development and its basic structure, which still dominates today, in the first place a liberal (*freiheitliche*) constitution, particularly in the interests of civil freedom (*bürgerlichen Freiheit*). Its meaning and purpose, its *telos*, is not in the first place the power and splendor of the state, not glory (*gloire*) according to the classification of Montesquieu . . . , but liberty (*liberté*), protection of the citizen from the abuse of state power. It is, as Kant said, established "in the first place according to the principles of the freedom (*Prinzipien* der *Freiheit*) of the members of a society as human beings." (Schmitt 2008, 170, trans. modified)

Schmitt then quotes from "Toward Perpetual Peace," where Kant refers to the principles of the civil condition, that is, the freedom and the equality of everyone before the law, as well as the independence of citizens. He further notes the importance of Kant's formulations in this respect, seeing that "they contain the clearest, most definitive expression of the principal ideas of the civil Enlightenment, which until now have not been replaced by any new, ideal foundation" (170, trans. modified). According to Schmitt, the modern constitution seeks to protect freedom from state abuse in two primary ways: by entrenching fundamental rights and by way of the separation of powers. State power is in other words distributed among the various branches and is in principle limited and calculable in terms of a previously enacted law. The traditional state forms, that is, monarchy, aristocracy, and democracy, are all retained, but modified for the sake of the protection of freedom (235).

There can be little doubting the accuracy of Schmitt's assessment at the time. Kant (1996b, 6:237) regarded freedom as the only innate right, and the classical liberal constitution was indeed focused primarily on protecting the freedom (and property) of the individual against the state.[3] The classical liberal constitution lost its dominance after World War II, yet the constitutionalism that arose in its wake is still fully aligned with Kant's thinking.[4] Kant's influence on constitutionalism today is most frequently described with reference to human dignity.[5] This shift in emphasis from freedom toward human dignity corresponds with the shift in emphasis in constitutional discourse after World War II from the "formal" to the "material" elements of the constitutional state (*Rechtsstaat*).[6] It is however important to note that the notion of human dignity, which has become so central to modern

constitutional thinking, is very closely related to freedom in Kant's thinking and that the material elements of the constitutional state did not replace the formal elements, but were added to the latter.[7] Freedom in Kant, in other words, is inherently linked to practical reason and the moral law, and therefore it is perhaps not strange that after the atrocities of World War II, Kant's thinking on human dignity would come to play a central role in constitutionalism. After 1945, a number of international and transnational legal instruments as well as national constitutions gave explicit recognition to human dignity, with Kant generally being credited as one of the main sources for this inclusion.[8] Kant's own understanding of dignity furthermore has been important in interpreting the relevant human dignity provisions within these documents, both in the courts and in scholarly reflection.[9] This development is nonetheless somewhat peculiar, as Kant developed the notion of human dignity within a discussion of the moral law and never argued for, or seems to have envisaged, the constitutionalization of this notion.[10]

The German Basic Law was one of the first constitutions to recognize human dignity, not simply as a right, but as a foundational value of the whole constitutional order (Botha 2009, 178–82). Article 1 of the Basic Law, echoing the preamble of the United Nations Charter and the Universal Declaration of Human Rights, posits the respect and protection of human dignity at the basis of all human rights. It furthermore links human dignity to "peace and justice in the world," in a similar way that Kant does with freedom.[11] The German Basic law has become paradigmatic in the design of constitutions since World War II (Ackermann 2012, 1, 13). This happened, for example, in South Africa, also because of the similarities between the policy and practices of apartheid and the atrocities in Nazi Germany. The German Basic Law served as a model for the South African constitution in a number of respects, for example, in the establishment of a Constitutional Court, the institutionalization of a quasi-federal system, and the foundational value of human dignity.[12] Human dignity indeed became a central value and principle within the post-apartheid constitutional dispensation.[13] In the early years of the post-apartheid era, the South African Constitutional Court both explicitly and implicitly relied on Kant in expounding the notion of human dignity as well as its interconnection with freedom.[14] To be noted, with respect to the discussion in chapters 2, 4, and 5, is that human dignity is, similar to the position in Germany, regarded as central to the objective normative value system established through the Constitution, and thus also to legal reasoning.[15] This objective normative value system "acts as a guiding principle and stimulus" for the legislature, the executive, and the judiciary,

and all law and action need to comply therewith (Ackermann 2012, 49, 97). In view of the discussion in chapter 5, it is furthermore interesting to note that the South African Constitutional Court has declared the death penalty unconstitutional, inter alia on the basis of human dignity. This is ironic, of course, as Kant was a strong, principled defender of the death penalty, precisely on the basis of human dignity. The Constitutional Court has furthermore, in relation to the propriety of imprisonment, viewed human dignity as conceived by Kant to be a central consideration.[16] The notions of criminal guilt and punishment as such have not, however, as yet been placed in question on constitutional grounds. The obviously exclusionary nature of the Kantian notion of human dignity, that is, the exclusion of everything non-human from the protection and respect it accords, was furthermore not regarded as a problem in the early years of the post-apartheid state.[17]

Insofar as the international legal order is concerned, it is generally acknowledged that it today reflects Kant's eighteenth-century vision of a voluntary association of states, in the form of the United Nations, as well as of a cosmopolitan order through the recognition of universal human rights.[18] The transnational and international legal orders are furthermore today increasingly thought of in terms of constitutional orders, and thus as different levels of multilevel constitutionalism.[19] A discussion of Kant's essay on "Perpetual Peace" (chapter 6) therefore is not out of place in *Deconstructive Constitutionalism*, also because this text and other texts of Kant continue to play an important role in contemporary thinking on the development of such a global constitutional order.[20]

Context, Challenges, and Alliances

Despite the references earlier to the German and South African constitutions, *Deconstructive Constitutionalism* does not focus on any specific country's constitution. *Deconstructive Constitutionalism* was nonetheless written within the context of a specific constitutional order, and it may be useful to briefly convey that background, as it inevitably informs the arguments presented here. The writing of *Deconstructive Constitutionalism* started during a three-month stint in Berlin, Germany, but was written for the most part in and around Cape Town, South Africa. As noted earlier, South Africa underwent a constitutional transformation in the 1990s and today is governed by a supreme constitution, which entrenches fundamental rights, the rule of law, separation of powers, and democracy. This constitutional transformation is

often described in Kantian terms as a movement away from a culture of authority to a culture of justification, that is, requiring that every exercise of state power must be justifiable (Mureinik 1994, 32). The Constitution is furthermore frequently referred to as being "transformative" or as "post-liberal" in nature (Klare 1998, 150–51). Despite the democratic transition almost thirty years ago, the country today is still marked by acute poverty, food insecurity, stark inequality, and high unemployment. There furthermore is evidence of endemic corruption and a dysfunctional public service on all three levels of government. South Africa moreover has one of the highest crime rates in the world. Anticipating the analysis in chapter 4 of this volume, violence against animals is increasing at a rapid pace, as is the case almost everywhere else in the world. This country, on the southernmost tip of Africa, is of course not immune from other global currents such as climate change, which in 2017–18 contributed to taps in the second-largest city (Cape Town) almost running dry. South Africa moreover has been severely affected by the COVID-19 pandemic, which was responded to by the declaration of a state of national disaster with sometimes draconian regulations, and which has further exacerbated the poverty, unemployment, and inequality mentioned earlier. Because of its relative economic strength on the African continent, South Africa attracts large numbers of migrants, which in turn has led to violent and deadly xenophobic incidents on a large scale.[21] Recent technological developments likewise pose fundamental challenges to democracy today, also in South Africa. This is due, inter alia, to the possibility of the manipulation of elections through propaganda, an increase in the spread of conspiracy theories and disinformation, as well technology's enabling of extremism and increasing polarization (including racial polarization) within society. Further challenges to democracy in South Africa and elsewhere include the demise of traditional and independent news media, voter apathy and loss of trust in public institutions, censorship, as well as power imbalances, specifically between big tech companies and state powers with respect to technology. The impact of other developments on the international level is also felt in South Africa. These include globalization, which is evoking vehement responses, such as religious fundamentalism and authoritarian populism, the latter which appears to combine itself with a peculiar form of capitalism (Scheuerman 2019, 1175–78). In addition, authoritarianism in rising global powers such as Russia and China, as well as authoritarian populism in "democratic" countries, is placing the international legal order under severe strain.[22]

Returning to the theme of constitutionalism within the South African context, the lack of progress in addressing inequality, specifically systemic

racial inequality, as well as historical injustice, especially the failure to address the issue of land restoration to the original inhabitants, has recently led to calls for the amendment or even the abolition of the constitution, which is regarded as still being rooted in colonialism.[23] The Enlightenment, German, and Kantian "presence" within the South African constitution, as outlined earlier, would seem to provide further evidence of its Western, colonial heritage.[24] Indeed, it can hardly be denied that the South African constitution, and the same most likely can be said of most, if not all modern constitutions, is the product of a long history of Western metaphysical thinking.

The "radical" critique expressed by certain South African scholars against the "colonial" constitution, that is, a constitution based on Western, and thus metaphysical, thinking, and the search for an alternative jurisprudence, in a strange way resonates with the analysis undertaken here. Similar to these "radical" critics, *Deconstructive Constitutionalism* is concerned with the mostly unnoticed and unstable foundations, the injustices, failures, complicities, and exclusions of not only the South African constitution, but of modern constitutions in general.[25] It follows Derrida, who has argued that the "origin" of the modern constitution does not only lie in Western metaphysical thinking, but in a certain beyond to metaphysics (Derrida 2014a, 9–30; Goosen 2010, 255–59). It is arguably from this "beyond" that a challenge to existing constitutional arrangements, principles, and values needs to be launched. *Deconstructive Constitutionalism* agrees that "interpretation" as traditionally conceived may not be adequate to bring about justice, and that a certain kind of "abolition" of the modern constitution may be needed. It is, however, contra these critics, somewhat skeptical of the possibility of establishing a truly post-colonial constitution, which would succeed in completely freeing itself from the metaphysics of presence. This is because simply opposing and overturning Western metaphysical thinking as it finds expression in modern constitutionalism risks simply replicating the system (Derrida 1981, 41–42). Such a strategy, more specifically, risks retaining the founding belief in the value of "presence," here of a collective subject with the power to enact a postcolonial constitution for itself (Maris and Jacobs 2011, 322–24; chapter 3 of this volume). Moreover, as Derrida (1981, 12; 1998b, 39; 2001a, 86, 88) has pointed out, neither metaphysics nor colonialism can be completely escaped from. Deconstructive constitutionalism arguably presents the only chance for such an "escape," even though this "escape" cannot be experienced in time and space.[26]

The analysis undertaken here furthermore resonates with the North American variants of critical legal scholarship, or what is now sometimes called "critical realism," and finds itself in alliance with the efforts of

these movements to bring about egalitarian and democratic social change. *Deconstructive Constitutionalism* thus aligns itself in broad terms with the political stance taken by those belonging to these movements.[27] Albertyn and Davis (2010, 202) capture this stance succinctly as follows with respect to the South African constitution: "In our view, the best interpretation of the Constitution and its transformative impulse is an egalitarian one. This requires, inter alia, achievement of socio-economic equality and individual well-being through the dismantling of structures of exclusion and oppression and the development of a caring and inclusive society." *Deconstructive Constitutionalism* further agrees with the view of these critical legal scholars that adjudication inevitably involves lawmaking and that law cannot be rigorously distinguished from politics. Yet it takes a distance from these critics concerning the way in which such lawmaking should be conceived, how "politics" should be understood, and the central role that subjectivity continues to play in much critical legal writing.[28] *Deconstructive Constitutionalism* finds itself philosophically closer to the UK variants of critical legal thinking that rely primarily on continental philosophical and psychoanalytical thinking in reflecting on law, though slight differences remain.[29] These differences are due mostly to variations in interpretation of the same texts and reliance on other thinkers.

"Method" and Limitations

The challenges faced by South Africa and the South African constitution of course are not unique. Similar challenges, with variations on the themes outlined previously, exist in many countries today, as well as transnationally and internationally. The challenges facing modern constitutionalism include injustices that often go unnoticed, yet that Kant seemed to find more or less unproblematic, such as the exclusionary practices of democratic constitutionalism, material inequality, criminal punishment, the human-animal relation, and war in its many forms.

It should by now be clear that the aim of the reading undertaken here is not to simply restate and confirm the foundations of constitutionalism established by Kant, but a radical reconceptualization thereof. *Deconstructive Constitutionalism* thus differs from other sympathetic readings of Kant, such as a "pure" reading à la Geismann or an "updated" reading à la Habermas and Rawls. *Deconstructive Constitutionalism* adopts a different approach, because it is not certain that these and other, similar readings of Kant go far enough

in exposing the realities of the current age and in the search for justice in the current age. *Deconstructive Constitutionalism* thus proceeds through a close reading of Kant, primarily by way of Derrida, a reading that explores not only the unity of Kant's thinking, but specifically the tensions within Kant's texts, and that seeks to go beyond Kant's conscious intentions. This is arguably the only way in which Kant can remain relevant in relation to the questions that need to be addressed by constitutionalism today. The analysis undertaken here is informed by a particular reading of Derrida's texts, as elaborated on and explored in earlier publications.[30] This reading differs in various respects from many of the perhaps more well-known readings of Derrida within the field of law.[31] *Deconstructive Constitutionalism* does not lay claim to being the only correct reading of Derrida in the constitutional context, though it does modestly lay claim to a contextual and coherent understanding of Derrida's texts. This understanding takes account of Derrida's "project" as well as his reliance on other important thinkers, such as Heidegger and Freud. For Derrida, as pointed out elsewhere, metaphysics is never at one with itself, and exceeds itself.[32] The same is true of Kant's texts. As shown in the discussion that follows, Heidegger's reading of Kant is very influential in Derrida's own reading, specifically with respect to reason and freedom (chapters 2 and 3). These Kantian notions are read by Heidegger as reflections on the Being of beings, thereby bringing about a radical shift in the meaning of Kant's texts. The groundlessness of Being in Heidegger's texts furthermore resonates with Freud's equally abyssal reflections on the death drive in "Beyond the Pleasure Principle" (2001, 18:3–64), which likewise plays an important role in Derrida's reading of Kant. This drive involves a radical dislocation or interruption of the self and thereby also of Kantian notions such as freedom, responsibility, autonomy, reason, the subject, and the decision (Derrida 1990, 4).

The reading of Kant via Derrida engaged in here does not seek in the first place to address or provide solutions to the previously mentioned national and transnational issues. The issues and context of every country and region are furthermore different, and the seeking for solutions needs to take account of that context. Such solutions will furthermore always entail restrictions of the "unconditional," which as we saw is at stake in Derrida's texts and is his main concern. The aims of *Deconstructive Constitutionalism* are therefore more modest. It is concerned first of all with a conceptual analysis of the Kantian foundations of the modern constitution, namely the moral law, reason, freedom, democracy, and peace. In line with Derrida's thinking, the analysis undertaken here challenges some of the traditional

and intuitive understandings of these concepts, which we tend to take for granted. These concepts furthermore are explored with reference to, inter alia, the human-animal relation, as well as criminal law and punishment, that is, with reference to some of the marginalized issues of inclusion/exclusion within the context of constitutionalism. The reconceptualization at stake here nevertheless has potentially important implications for a wide range of constitutional and societal questions, including those alluded to earlier. The conceptual analysis can in other words assist in framing a "theoretical starting point," or by providing a "normative framework" through which answers to these questions can be sought. This "normative framework" ties in closely with Kant's thinking, which as indicated, has been highly influential in modern constitutionalism (Ackermann 2012, 54, 60). Yet it seeks to bring about fundamental changes to the Kantian normative framework so as to enable modern constitutionalism to meet some of the challenges of the twenty-first century. Because of its main focus and aims, *Deconstructive Constitutionalism* restricts itself to providing the broad outlines of the possible implications of such a reading of Kant. The discussion that follows starts with a brief overview of Kant's thinking—adopting a fairly standard reading for this purpose—insofar as it is relevant for the rest of the analysis.

From Kant's Moral Law to Perpetual Peace

In the *Critique of Pure Reason*, Kant seeks to establish whether or not all phenomena can be said to be subject to the laws of causation. If that were to be the case, there of course would be no room left for freedom or morality. Kant shows through what he refers to as the "transcendental method" that our relation to the world is based on certain necessary conditions, or ways in which we view the world, including by way of our a priori intuition of space and time and by way of the a priori categories of understanding (such as causality). We do not therefore have direct access to the world, but only by way of our perception of it, or the way in which it appears to us. This happens, in short, through the interaction between reason and the senses (Maris and Jacobs *Law* 2011, 177–78). Reason thus cannot on its own provide theoretical knowledge of the world—this easily leads to illusionary ideas (Reath 1997, vii)—and neither can empirical observation. Although reason structures observation, the content or material of such observation is provided by sensory experience (Maris and Jacobs 2011, 171). Scientific observation, as we saw, is restricted to the phenomenal world, and there-

fore cannot provide knowledge of the nonobservable or noumenal world, examples of which are God, the soul, freedom, and morality (Maris and Jacobs 2011, 178; Reath 1997, xi). These matters cannot be observed by the senses, and their existence therefore cannot be proved or disproved, at least not by theoretical reason. By establishing the existence of synthetic a priori reason, Kant nevertheless shows that pure reason provides us with knowledge about the world independent of experience (Korsgaard 1997, ix–xi). This opens the door for reason to give insight into the noumenal world. In the *Critique of Pure Reason*, the focus is on that which theoretical reason tells us of the world as it is, or rather, as it appears to us, whereas in the *Groundwork* and the *Critique of Practical Reason*, the focus is on practical reason, which provides us with knowledge about the way things ought to be (Korsgaard 1997, x–xi). Practical reason can in other words provide us with the necessary grounds to draw conclusions about the noumenal world (Reath 1997, xi–xii).

As outlined by Kant in the *Groundwork* and in the *Critique of Practical Reason*, our conscience suggests that there is a domain beyond the phenomenal world, that is, some *noumenal* or intelligible world that is not subject to natural causation. Although the existence of this "world" cannot be proved through scientific observation, and therefore we cannot have empirical knowledge of it, it can and must be assumed for practical or moral purposes. Looking specifically at the human being, our conscience imposes unconditional obligations on us irrespective of the benefits to us or the consequences for us of performing such obligations (Maris and Jacobs 2011, 179). Human beings thus appear, at least to a certain extent, to be free from the causal determinations of nature. One can also say that, as beings belonging to the intelligible or noumenal world, the conduct of human beings is not completely determined by the sensible world of which they are nevertheless likewise members. They can act on the basis of duty rather than simply on the basis of their inclinations, from which they can distance themselves by subjecting these inclinations to a moral judgment (180–81). The moral "world" at stake here allows for self-legislation, that is, the ability by way of reason to adopt maxims for one's actions, which can be applied universally. To act in an ethical manner, one should ask oneself namely whether the maxim for one's actions in a specific case is such that it could become a general rule, that is, a rule that applies to everyone under similar circumstances. In another formulation of what Kant terms the "categorical imperative," which, as we saw earlier, was influential in the role that human dignity has come to play in modern constitutionalism, each

person should be treated as an end in him- or herself and not as a mere means.[33] This is the terrain of virtue or ethics and is aimed at regulating the *internal* freedom of human beings. No one can, however, be forced to act ethically (184).

In view of the aforesaid, human beings thus belong to two domains: first, to the domain of natural causality with respect to their inclinations, and, second, to the domain of reason, morality, and freedom, which distinguishes them from non-human animals (Kant 1997b, 4:453–55; Korsgaard 1997, xxix). It is especially the second, noumenal domain to which human beings belong that determines Kant's conception of law, although he takes due account of the first domain. Prior to the civil condition (*bürgerlichen Zustand*), human beings find themselves in a state of nature and thus in a potential state of irresolvable conflict with others. This is because in the state of nature everyone acts as his or her own judge with respect to the scope and limitation of rights, and there is no higher power, which can provide clarity through positive laws or resolve conflicts by adjudication.[34] What then is the relation between the laws established in the civil condition and the moral law? In the *Metaphysics of Morals*, the doctrines or theories of law and of virtue are treated separately, but as two elements of a general morality. By virtue of this morality, practical reason places certain demands on law, in the first place, the establishment of a civil condition, which regulates the scope and protection of everyone's external freedom, thereby making possible their peaceful coexistence. This happens through a constitution, the idea of which Kant describes as "an absolute command [*absolutes Gebot*] that practical reason . . . gives to every people" and which is "*sacred* and irresistible [heilig *und unwiderstehlich*]" (Kant 1996b, 6:372). As we saw earlier, the constitution in question should be republican in nature, providing for a separation between the three spheres of power, recognizing the lawful freedom of all human beings, equality of everyone before the law, and the independence of citizens (Kant 1996a: 8:290–97 ["On the Common Saying," 1996b, 6:313–18 (para. 45–49]).[35] Although, according to Kant (1979, 159, 165; 1996a: 8:297), pure reason does not necessarily prescribe a democratic constitution, the laws enacted should be such that every citizen could have rationally agreed thereto. A similar structure thus applies here as regards moral self-legislation: the laws enacted by the state should be universalizable (Kersting 1992, 344, 355; 2007, 26). This requirement at the same time makes possible a distinction between legislation that is just and unjust, which in Kant's thinking takes place primarily by way of the principles of equality and freedom (Kersting 1992, 355–56; 2007, 26, 275–77). A law that, for

example, imposes an obligation only on a certain part of the population cannot be said to comply with the requirement of universalizability (Kersting 1992, 355). The same would apply to paternalistic legislation that seeks to improve the morality of the population, thereby violating their freedom (356). Citizens may indeed criticize such injustices, but they may not revolt against them so as to seek the violent overthrow of the constitution (Kant 1996a, 8:299; 1996b, 6:319–22). This would lead to the annihilation of the lawful condition established by such constitution, even if only for an interim period (Kant 1996b, 6:355). Whereas Kant's moral law is perfectionist in nature, as noted, this only applies in the internal sphere, that is, with respect to inner freedom. The state's actions should be restricted to the external relations between individuals and refrain from regulating their internal thoughts and pursuits, even indirectly (Geismann 1996, 9–10).[36] The state should, in other words, as we saw earlier, not attempt to make its citizens morally good, but simply protect their freedom through laws. This necessarily means that it can enforce the law and impose punishment after a finding that someone has broken the law. As Kant (1996b, 6:362) puts it in the *Metaphysics of Morals*, "the mere idea of a civil constitution among human beings carries with it the concept of punitive justice belonging to the supreme authority." Such punishment may include the imposition of the death penalty under certain circumstances, for example, in the event of murder or a revolt against the state (6:320 and 6:334). The citizens of a state are thus assumed to possess the freedom to choose and to take responsibility for their actions (Maris and Jacobs 2011, 172–73).

Kant further realized that establishing a peaceful order within the state under a republican constitution is an important but insufficient step to ensure human autonomy. Sovereign states, similar to human beings prior to entering the civil condition, find themselves in a state of nature without anyone independent to judge who is in the right (Kant 1996b, 6:349 (para. 60); 1996a, 8:355 ["Perpetual Peace"]). War and the constant threat of war with other states thus constantly threaten the civil condition brought about by the national legal system, and thereby human autonomy. Practical reason also demands peace on the international level (Kant 1996b, 6:354) that should be brought about by forming a voluntary and continually expanding federation of sovereign republican states, which in terms of an agreement reached between them do not wage war against each other and protect each other from external attack (Kant 1996a, 8:356; 1996b, 6:344, 6:350, 6:354). To attain eternal peace, a further step however seems to be required by reason, that is, the establishment of a world republic with

powers of coercion similar to those that exist on a national level.[37] Kant approaches the latter with some caution, inter alia because a world state poses the threat of despotism on the global level, which could lead to the abolition of the civil condition attained at the national level. The attraction of external sovereignty on the part of states poses a further obstacle. He therefore appears to settle, at least for the interim, for a voluntary federation of states that retain their sovereignty. To attain perpetual peace, Kant finally makes suggestions for what he terms "cosmopolitan law," for an era where state sovereignty will remain in place. In this respect, he proposes a right of foreign visitors to be treated with hospitality in the states they visit, and at the same time a prohibition against the inhospitable conduct of many colonial and imperial states to conquer foreign territory and oppress the inhabitants (1996a, 8:359; 1996b, 6:353).

Outline of Chapters

From the previous discussion, it is clear that Kant's "Theory of Law"[38] stands in a close relation with the moral law, as well as with his conceptions of freedom and reason. In the preface to the *Critique of Practical Reason* (5:4), Kant notes in this regard that the reality of the concept of freedom "is proved by an apodictic law of practical reason," which "constitutes the *keystone* of the whole structure of a system of pure reason, even of speculative reason," and further that the idea of the reality of freedom "reveals itself through the moral law." These three foundational and closely interlinked elements of Kant's thinking (the moral law, reason, and freedom) are given attention to in chapters 1, 2 and 3. Chapter 3, which engages with freedom, also explores the relation between freedom and democracy. Chapters 3 to 6 more specifically explore the way in which these foundational elements play themselves out in modern constitutionalism, as well as the implications of Derrida's reading of Kant for modern constitutionalism. In chapters 4 and 5, the focus is on non-human animals and criminal law, respectively, and in chapter 6, on global constitutionalism. A somewhat more comprehensive outline of the chapters to follow is provided next.

In chapter 1 of *Deconstructive Constitutionalism*, we look at the way in which Derrida, in a variety of texts, engages directly or indirectly with the Kantian moral law, which as we saw rests on the assumption of the human being's autonomy or freedom vis-à-vis his or her natural inclinations. In the background of this analysis is Derrida's engagement with Freud, the

latter having argued that the Kantian moral law is located in, and can be equated with, the superego. Derrida challenges Freud's assignation of the moral law (solely) to the superego and suggests that what appears to Kant as the moral law and to Freud as the demands of the superego already involves a limitation of a much more radical demand on the self: that of absolute sacrifice, and which can be understood with reference to Freud's death drive. Derrida refers to this demand as the law of law, that is, the law that makes of the moral law a law. Derrida thus seeks to show that in Kant's portrayal of the moral law, there is already a split, or indications of some law that precedes the moral law—as its origin. The chapter explores in detail Kant's notion of respect that is owed to the moral law, the notion of duty, and the formulation of the categorical imperative by Kant in terms of an "as if." The implications for the legal system of such a split in the moral law are of course profound and go far beyond the demand for the protection of human dignity that we find in modern constitutionalism.

In chapter 2, at stake is the demand of the principle of reason (*nihil est sine ratione*), which was formulated by Leibniz, and the way in which it finds application in the thinking of Kant. The discussion here takes place by way of the analysis of Heidegger in *Der Satz vom Grund* (*The Principle of Reason*). Heidegger in the latter text listens to the statement of the principle in two ways: first as an expression of the demand that reason must be rendered for everything that exists, and, second, as a statement about the Being of beings, in other words, that Being itself plays the role of ground, but that it is itself groundless. At stake in the second tonality is the "origin" of the principle of reason in modernity, which essentially involves calculation, and which finds expression inter alia in Kant's transcendental method. In Derrida's reading, the inherent relation between reason and force is emphasized, also in the legal field. Derrida's reading takes place also by way of a certain psychoanalysis, and the groundlessness of reason, identified by Heidegger, takes on a "moral" dimension. It does so through the notion of the gift, which, also in Heidegger's thinking, "precedes" and "gives" Being and time. Reason, within Kant's thinking and in the legal field as well, thus finds its origin in the pure or immeasurable gift, which involves no return to the self. This places an infinite responsibility on those entrusted with reason in terms of the modern constitution, to calculate with the incalculable. The demands of the pure gift should in other words be the abyssal starting point before starting to engage in politico-legal calculations.

We saw earlier that freedom is central in Kant's thinking, and that specifically human freedom provides the foundation for his theory of law.

Chapter 3 inquires by way of the reading of Kant's texts by Heidegger, Nancy, and Derrida into the notion of freedom. It looks into Kant's understanding of freedom, specifically in the *Critique of Pure Reason* and the *Critique of Practical Reason*, as well as the relation he posits between freedom and causality. The understanding and location of freedom in these analyses hold important implications for our understanding of democracy today. If "freedom" does not belong to the human subject, but is instead located beyond Being, as the event or gift of Being, it would mean that we have to look beyond the variety of forms taken by democracy today, toward the democracy to come. The latter would no longer be characterized by mastery, sovereignty, and power, but instead by a welcoming of the unforeseeable and incalculable event. Such an understanding of freedom and democracy would in turn have important implications for the exclusions and limits traditionally imposed by democracy, as well as for its location beyond the nation-state.

In chapter 4, an inquiry is undertaken of Kant's thinking on the non-human animal and Derrida's reading thereof. Derrida shows how the subjection, mastery, and domestication of the non-human animal is at the heart of Kant's thinking on morality, as well as of his construction of subjectivity and of the establishment of society. One could indeed say that Kant's whole thinking on morality and law is based on the human-animal distinction. It is after all only human beings who share in two worlds: the sensible and the intelligible, which enable them to give themselves practical laws by their own reason and not be led purely by their senses, as animals are presumed to be. Subjectivity and the civil constitution, according to Kant, are both made possible by a certain power or ability that the human being has in comparison with animals. In his reading of Kant's *Anthropology from a Pragmatic Point of View*, Derrida points to the underlying assumptions of Kant's analysis, as well as certain tensions in Kant's text, which undermine the foundations of the dominant Kantian discourse. It appears that the subjection of the animal in Kant takes place through the "repression" of a certain otherness, abyss, or "animal" within the (human) self. Derrida's analysis of Kant has potentially important implications for the scope of protection afforded by constitutions as well as for democratic participation.

Chapter 5 inquires into the implications for criminal law of Derrida's analysis in the Death Penalty seminars. The seminars include a reading of Kant's *Metaphysics of Morals*, specifically Kant's reflections on legal responsibility, the sovereign right to punish and grant clemency, the purpose and measure of punishment, as well as the possibilities of reform of the criminal

justice system. Kant's texts are read in conjunction with the reflections of Freud and Reik on the relation between the unconscious and crime, as well as Nietzsche's reflections on morality, punishment, and cruelty. What comes to the fore in Derrida's analysis is a system of economic exchange operating on an unconscious level, of which criminal law forms an intrinsic part. Derrida's analysis of the "origin" of crime in the seminars poses serious questions to the assumption of freedom underlying modern criminal law. The links that Derrida posits between sovereignty, cruelty, and forgiveness, and between punishment and political theology, as well as his exposure of the incalculability of punishment, likewise challenge the existing theories and forms of punishment. What the seminars call for in the name of the Kantian Enlightenment is a radical break with economic circularity as it operates with respect to crime and punishment.

Chapter 6 discusses Kant's essay on perpetual peace, looking specifically at the preface of the text, Kant's definition of peace, as well as his proposals for the reform of international law and cosmopolitan law in seeking to secure peace. Derrida analyzes Kant's "Toward Perpetual Peace" in a number of his texts, usually in the context of a discussion of the concept of hospitality, but also of the democracy to come. Whereas Kant's concept of hospitality, invoked within the context of a discussion of cosmopolitan law, is a restricted one in a number of ways, Derrida seeks to show that this concept also has an unconditional dimension by exploring the tensions in Kant's text. These tensions are, for example, to be seen in Kant's notion of perpetual peace, which has both a political dimension and a dimension beyond the political, the latter of which Derrida reads as a reference to absolute hospitality. Derrida's reading of Kant has important implications for the principles as well as institutions of international/cosmopolitan law, which require radical reform, in order to come closer to this demand of absolute hospitality and of the democracy to come.

"Kant after Derrida" summarizes the findings of *Deconstructive Constitutionalism* in relation to the reading of Kant undertaken here. It looks at the consequences of Derrida's reading of Kant for the foundations of modern constitutionalism. As we saw, these include justice, reason, freedom, self-government, legal personality, rights, criminal responsibility, and peace. Derrida's reading of Kant does not lead to the confirmation of these foundations or to the establishment of new foundations. It instead brings to the fore the abyssal nature of the Kantian foundations, thereby enabling us to approach the challenges of the twenty-first century in a different, and perhaps more just, way.