

A Conspectus of the Issues Relating to International Constitutionalism

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Abstract

The constitutionalization of international law is a topic that is rapidly gaining much prominence in the field of international law scholarship. A plethora of recent books and articles in prominent legal journals have sought to explore the various aspects of this subject. The literature on the topic is growing rapidly and has already covered extensive ground. A particularly noteworthy recent work is the collaborative effort of a team of scholars who have contributed scholarly articles that delineate the contours of the modern thinking on this subject. The book is entitled *Ruling the World? Constitutionalism, International Law and Global Governance*, edited by Jeffrey Dunoff and Joel Trachtman. This paper seeks to offer a brief critique of the articles contained in this latest work. It sets out the principal issues relating to international constitutionalism, some of which have been acknowledged and sought to be addressed by the scholars in this latest work. The paper raises questions regarding both the descriptive as well as the normative aspects of the scholarship on the subject. The terms “constitution” and “constitutionalism” have a multiplicity of meanings even in the domestic sphere. Any attempt to casually utilize these terms in the international context inevitably invites lexical and semantic confusion. The processes presently afoot in the international sphere have no precedent or parallel either in the domestic or international spheres. Thus the use of the term “constitutionalization,” even as a heuristic device, exacerbates rather than alleviates the epistemic difficulties. Among other things, the paper urges the need to attend to F. A. Hayek's use of the concepts of “taxis,” “cosmos,” and “nomos,” and the legal extension of the idea of “fallibilism” from pragmatic epistemology, as possibly relevant concepts pertaining to this subject. Drawing upon these concepts, this paper urges a cautious and, for the time being, an extension of Cass Sunstein's “incompletely theorized agreement” regarding the constitutionalization of international law project.

The Purposes of the United Nations are:

1. *To maintain international peace and security...*
2. *To develop friendly relations among nations...*
3. *To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character ...*
4. *To be a centre for harmonizing the actions of nations in the attainment of these common ends.*¹

Charter of the United Nations

I . Introduction :

The constitutionalization of international law is a topic that is rapidly gaining much prominence in the field of international law scholarship. The concept itself is not a new one. Early attempts to promote the idea can be traced to the pre-Second World War era.²

A plethora of recent books and articles in prominent legal journals have sought to explore the various aspects of this complex subject.³ A particularly noteworthy recent work is the collaborative effort of a team of scholars who have contributed scholarly articles that delineate the contours of the modern thinking on this subject. The book is entitled *Ruling the World? Constitutionalism, International Law, and Global Governance*.⁴ This recent work follows up on the work of a spate of other books on this subject.⁵

¹ Article 1, Charter of the United Nations.

² Herman Mosler, *The International Society as a Legal Community*, 140 *Recueil Des Cours* 1 (1974).

³ See e.g., *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Ronald St. J. MacDonald & Douglas M. Johnston, editors., 2005); Bardo Fassbender, *Sovereignty and Constitutionalism in International Law, in Sovereignty in Transition* (Neil Walker editor, 2003), Erika De Wet, *The International Constitutional Order*, 55 *International and Comparative Law Quarterly* 51 (2006).

⁴ *Ruling the World? Constitutionalism, International Law, and Global Governance*, Edited by Jeffrey L. Dunoff and Joel P. Trachtman (Cambridge University Press, 2009).

⁵ The more prominent among these are the following: *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Ronald St. J. Macdonald & Douglas M. Johnston, editors 2005); Francisco Orrego Vicuna, *International Dispute Settlement in an Evolving Global Society: Constitutionalization, Accessibility, Privatization* (2005); *Transnational Governance and Constitutionalism* (Christian Joerges and Gunther Teubner, editors, 2004).

One scholar has gone to the extent of declaring that “[t]he problem of international constitutionalism is the central challenge faced by international philosophers in the 21st century.”⁶

In this paper, I seek to present a brief critique of the essays and papers collected in *Ruling the World? Constitutionalism, International Law, and Global Governance* with the aim of delineating a conspectus of the issues raised by the international constitutionalism project. I will also suggest issues and concepts which, though by no means novel, have not been explored in depth in relation to the subject of international constitutionalism.

For this purpose, this paper has been structured in the following manner. Part II presents an overview of the various meanings and understandings commonly assigned to the terms “constitution” and “constitutionalism.” Part III presents the principal thrust of the scholarly papers collected and published in the work by Dunoff and Trachtman mentioned above along with a few personal comments and thoughts thereon. Part IV presents an outline of some of the principal issues raised by the international constitutionalism project. Finally, Part V presents the conclusion.

II. “Constitution” and “Constitutionalism” :

The terms “constitution” and “constitutionalism” have traditionally been used in the domestic context of the nation-state. In the post-Second World War era, the idea of constitutionalism has come to be adopted by more and more nation states around the world..⁷

A. “Constitution” :

In its most basic conception, the constitution of a nation-state is its highest law, and is designed to serve a myriad functions. The constitution defines the contours of its governmental and administrative structure; it adumbrates the scope and bounds of the civil, political, and human rights that individuals possess as against the governmental authorities; and it sets out the metrics for evaluating the legality and

⁶ Philip Allot, *The Emerging Universal Legal System*, 3 Int’l L.F. 12, 16 (2001) cited in Dunoff and Trachtman, *supra* note 3, at 3.

⁷ See Bruce Ackerman, *The Rise of World Constitutionalism*, 83 Va.L.Rev. 771,772 (1997).

validity of the actions of the government.⁸

A constitution could either be written or unwritten. The United Kingdom is usually described as having an unwritten constitution. It consists of the interplay of laws, customs, practices, principles, and institutions whereby the political and governmental functions of the state are conducted. Although certain important documents such as the Magna Carta enjoy a special privileged status, it is essentially embodied in a collection of statutes, beliefs, and institutional practices.⁹

Drawing upon the western tradition of natural law, and the English notion of fundamental law, constitutionalism in the United States essentially sought to protect legal rights by placing fetters on legislative power through positive expression in a written constitution.

Even in the case of a written constitution such as the U.S. Constitution, scholars have argued that the text ratified at the Philadelphia Convention in 1789 along with the subsequent amendments are insufficient to provide an understanding of how the provisions of the Constitution actually come to be implemented in practice. And therefore, it has been argued, the U.S. Constitution should be deemed to subsume momentous judicial precedents, political practices that have been consistently followed for a long time, together with “fundamental documents such as the Declaration of Independence and the Gettysburg Address and, beyond that, aspects of the American experience that cannot be reduced to a text at all.”¹⁰

Jack Balkin has urged his belief that apart from its basic functions, a constitution must also epitomize the values and aspirations of the people of a nation, and be something that they can identify with.¹¹ The written and unwritten subject matter that collectively make up the constitution are the subject matter of contending and

⁸ See Ernest A. Young, *The Constitution Outside the Constitution*, 117 Yale L.J. 408, 411-412 (2007).

⁹ See generally: Colin Turpin and Adam Tomkins, *British Government and the Constitution: Text and Materials* (Cambridge University Press, 2007); But also see: David Jenkins, *From Unwritten to Written: Transformation in the British Common-Law Constitution*, 36 Vanderbilt Journal of Transnational Law 863.

¹⁰ Sanford Levinson, *Constitutional Faith* 185 (1988).

¹¹ Jack M. Balkin, *Original Meaning and Constitutional Redemption*, Constitutional Commentary, Vol.24, 427, 461-466.

often contentious theories of constitutional interpretation that seek to shape the understanding of prevailing constitutional practices.¹²

B. “Constitutionalism” :

Constitutionalism is the systematization of thinking about constitutions and provides the conceptual framework for evaluating the indicia of governmental legitimacy.¹³ A constitution is different from the concept of constitutionalism which is a means for evaluating the form, substance and legitimacy of the constitution of a nation.¹⁴ Constitutionalism is deemed to perform a plethora of functions. It is used as a system of classification for the purpose of defining the characteristics of constitutions (meaning thereby those documents organizing political power within an institutional

¹² Jack M. Balkin, *id.*, at 516-517. For an early example of “originalist” interpretation, see Charles Fairman, *Does the Fourteenth Amendment incorporate the Bill of Rights? The Original Understanding*, 2 Stanford Law Review 5 (1949); for a view canvassing the framers’ original intentions, see Raoul Berger, *Government by Judiciary* (Harvard University Press 1977); for a view canvassing the ratifiers’ original understanding, see Richard Fallon, *Judicially Manageable Standards and Constitutional Meaning*, 119 Harvard Law Review 1274, 1317 (1996); for a view urging the original meaning of the constitution, see Antonin Scalia, *Common Law Courts in a Civil Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, in *A Matter of Interpretation* (Amy Gutmann, ed. 1998); for a view urging the “original public meaning,” see Gary Lawson, *Proving the Law*, 86 Nw.U.L.Rev. 859, 875 (1992); and S.G.Calabresi, *The President's Power to Execute the Laws*, 104 Yale L.J., 541, 553 (1994); for the theory of “original objective-public meaning textualism,” see Gary Lawson and Guy Seidman, *When Did the Constitution Become Law?* 77 Notre Dame L.Rev.1 (2001); for “common law originalism” see Bernadette Meyler, *Towards a Common Law Originalism*, 59 Stan.L.Rev. 551; for the theory of “text and principle” see Jack M. Balkin, *Original Meaning and Constitutional Redemption*, Constitutional Commentary, Volume 24 (2007); for “living constitutionalism” see Bruce Ackerman, *Our Living Constitution*, 120 Harv.L.Rev. 1737 (2007); for traditional considerations such as *stare decisis*, see S. M. Griffin, *American Constitutionalism: From Theory to Politics* (1996); for the theory of “constitutional moments” see Bruce Ackerman, *We the People: Foundations* (Harvard University Press 1991) and *We the People: Transformations* (Harvard University Press 1998); for the theory of “partisan entrenchment,” see Jack M. Balkin and Sanford Levinson, *Understanding the Constitutional Revolution*, 87 Va.L.Rev. 1045, 1066 (2001); for the theory of the constitution as an institution, see Karl Llewellyn, *The Constitution as an Institution*, 34 Colum.L.Rev. 1 (1934); for the theory of “constitutional construction,” see Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (1999); for the “institutional theory of constitutional change,” see S. M. Griffin, *Constitutional Theory Transformed*, 108 Yale L.J. 2115 (1999).

¹³ For a comprehensive account, see Larry Alexander, editor, *Constitutionalism* (Cambridge University Press, 1998).

¹⁴ Karl Loewenstein, *Political Power and the Government Process* 147 (1957).

apparatus). It also serves the functions of determining the legitimacy of a constitutional system as conceived or as implemented on the footing that the rule of law is the basis of legitimate government. It seeks to place limits on government powers so as to restrain it from lapsing into arbitrary uses of those powers.¹⁵

A definitive historical account of the development of constitutionalism is set out in *Constitutionalism: Ancient and Modern* by Charles Howard McIlwain.¹⁶ McIlwain traces the evolution of the conception of a constitution from the older traditional view to the relatively modern understanding of the term.

In the traditional view, the term “constitution” referred to “the substantive principles to be deduced from a nation’s actual institutions and their development.”¹⁷ McIlwain quotes the following passage by Lord Bolingbroke as representative of the older view:

By constitution we mean, whenever we speak with propriety and exactness, that assemblage of laws, institutions and customs, derived from certain fixed principles of reason, directed to certain fixed objects of public good, that compose the general system, according to which the community hath agreed to be governed ... We call this a good government, when ... the whole administration of public affairs is wisely pursued, and with a strict conformity to the principles and objects of the constitution.¹⁸

On the other hand, in the modern view, a constitution is a self-conscious and deliberate act by the people forming the *demos* of a nation. McIlwain quotes Thomas Paine as representing the modern view that “[a] constitution is not the act of a government, but of a people constituting a government, and a government without a constitution is power without right.” And also that “[a] constitution is a thing antecedent to a government; and a government is only the creature of a constitution.”¹⁹

¹⁵ Ronald St. John Macdonald & Douglas M. Johnston editors, *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* 31 (2005).

¹⁶ Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (Liberty Fund, Inc. 1975) (First Published by Cornell University Press in 1940).

¹⁷ McIlwain, *Id.* at 2.

¹⁸ McIlwain *id.* at 2-3, quoting Lord Bolingbroke, *A Dissertation upon Parties* (1733-34) in *The Works of Lord Bolingbroke* (1841), II, p.88.

¹⁹ McIlwain *id.* at 2, quoting Thomas Paine, Rights of Man, in *The Complete Works of Thomas Paine* (London), at 302-3, 370.

Neil Walker has pithily set out some of the most widely held conceptions of constitutionalism (albeit in the specific context of the European Union).²⁰ He terms these as “constitutional scepticism,” “constitutional historical-contextualism,” “constitutional serialism,” and “constitutional processualism.” In addition he discusses a form of transformative constitutionalism flowing from Bruce Ackerman’s theory of “constitutional moments.” Herewith is a brief explanation of Walker’s account of these conceptions:

(i) Constitutional Scepticism:²¹

Constitutional skeptics maintain that the regulatory structures that establish and maintain social and political order are embedded in processes and practices established at a micro level. To them, state-designed documents and institutions expressly designed to be constitutional have little actual efficacy in the regulation of the social and political community.

(ii) Constitutional Historical-Contextualism:²²

In this view, constitutionalism is self-constitutive inasmuch as constitutional discourse together with practices and institutions designated as constitutional are ipso facto indicia of a constitutional order.

(iii) Constitutional Serialism:²³

This view conceptualizes constitutionalism as a step-by-step progression of events leading to the fulfillment of the constitutionalist agenda.

(iv) Constitutional Processualism:²⁴

This view, which could also be described as constitutional functionalism, believes

²⁰ Neil Walker, *After the Constitutional Moment*, The Federal Trust Constitutional Online Paper Series No. 32/03. Available at SSRN: or doi: 102139/ssrn.516783. Although Walker’s article relates to the development of constitutionalism in the context of the European Union, his exposition provides a useful overview of concepts that are relevant in other contexts as well.

²¹ Neil Walker, id., at 4. Walker cites K.H.Ladeur, *Towards a Legal Theory of Supranationality ? The Viability of the Network Concept*, 37 European Law Journal 3 (1997); and Neil Walker, *The Idea of Constitutional Pluralism*, 65 Modern Law Review (2002).

²² Id. at 4.

²³ Id. at 5.

²⁴ Id. at 5.

that the real indicia of constitutionalism lie in the processes and practices relating to the structures of the political order rather than in large events which usually generate publicity and attract attention.

(v) Transformative Constitutionalism:²⁵

This view is based upon Bruce Ackerman's thesis of "constitutional moments" in the context of American Constitutional history.²⁶ In Ackerman's formulation, "constitutional moments" are transformative periods of "higher lawmaking" when the people rise above mundane quotidian concerns and think about more lofty ideals. This results in popular sovereignty expressing itself in social and political movements that lead to constitutional change and development.

However, differences about the minutiae and details about the import of the term "constitutionalism" and the means for understanding it can be found aplenty in contemporary constitutional discourse. By way of example, four such differences can be found in the collected volume of papers edited by Dunoff and Trachtman.²⁷

Dunoff and Trachtman seek to frame the understanding of the term constitutionalism through the lens of seven mechanisms that they identify as: "(1) horizontal allocation of authority, (2) vertical allocation of authority, (3) supremacy, (4) stability, (5) fundamental rights, (6) review, and (7) accountability."²⁸

Mattias Kumm argues that the essence of constitutionalism is a "constitutional cognitive frame," which consists of four requirements: (1) it must allow for an all-embracing structure for legitimation of public authority, (2) it should be foundational, (3) it must be conducive of the ideas of human freedom and equality, and (4) it must provide a mechanism for discourse regarding (i) constraints on public authority through law, (ii) procedural legitimacy, and (iii) restraints on encroachment on human and constitutional rights.²⁹

²⁵ Id. at 3-4.

²⁶ Ackerman has propounded his thesis in: Bruce Ackerman, *We the People: Foundations* (Harvard University Press, 1991); and Bruce Ackerman, *We the People: Transformations* (Harvard University Press, 1998).

²⁷ *Supra* note 3.

²⁸ Dunoff and Trachtman, in Dunoff and Trachtman, *supra* note 4, at 10. Also at 19 to 21.

²⁹ Mattias Kumm, in Dunoff and Trachtman, *id.* at 323 to 325.

Daniel Halberstam identifies the fundamental values of constitutionalism as “voice, expertise, and rights.” He uses these to refer to the right to participate in governance, individual rights, and legitimacy of the governing authorities based on governing capability.³⁰

Transnational constitutionalism builds upon the idea of constitutionalism on an international scale. Transnational constitutionalism seeks to foster the development of institutionalized organizations among the community of nations which are independent of and larger than the sum of their members. Prominent examples of such transnational constitutionalism are the institution of the United Nations Organization, the World Trade Organization, and the European Union.³¹ The European Union has been described as a federalist system that has its basis in international law, but has been constitutionalized through the acts of the very institutions that have been constitutive in its making, and that has been acquiesced to by the various Member States.³²

Cottier has urged that for effective governance on an international scale, it is necessary that there be “an attitude and a framework capable of reasonably balancing and weighing different, equally legitimate and democratically defined basic values and policy goals of a polity dedicated to promote liberty and welfare in a broad sense.”³³

And as Neil Walker has stated:

Institutional design, even in the most venerable and venerated constitutional settlements, must always be viewed as a derivative and contingent exercise, always at the service of the core values and the changing detail of material and cultural conditions and of diversely located solutions which influence the articulation and optimal balance of these core values.³⁴

³⁰ Daniel Halberstam, in Dunoff and Trachtman, *id.* at 338 to 353.

³¹ See generally: Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community*, 36 Columbia Journal of Transnational Law 529(1998); and Erika De Wet, *The International Constitutional Order*, 55 International and Comparative Law Quarterly 51(2006).

³² Bruno Simma and Philip Alston, *The Sources of Human Rights Law: Jus Cogens and General Principles*, 12 Australian Yearbook of International Law 81 (1992).

³³ Thomas Cottier, *Limits to International Trade: The Constitutional Challenge*, 94 *American Society of International Law Proceedings* 220,221 (2000).

³⁴ Neil Walker, *Postnational Constitutionalism and the Problem of Translation*, in *European Constitutionalism Beyond the State* 27,54 (H.H.Weiler and Marlene Wind editors, Cambridge University Press 2003).

Transnational regulatory networks refer to arrangements whereby governmental authorities in one nation cooperate directly with their counterparts in other nations to effectively govern matters within their jurisdiction and zone of expertise. They do so without a central governing authority. One example is the Organization of Securities Commission which deals with international securities transactions. The functional arrangement of a Transnational Regulatory Network could be viewed as an unconstitutionalized regime set up to perform specified regulatory tasks. Such Transnational Regulatory Networks serve the useful purpose of tackling issues where states have common interests. Their effectiveness is, however, hampered by legal and political constraints that regulators are confronted with in the implementation of rules.³⁵

III. A Brief Overview of *Ruling the World? Constitutionalism, International Law, and Global Governance*:

The opening paper by Jeffrey L. Dunoff and Joel P. Trachtman is entitled “A Functionalist Approach to International Constitutionalization.”³⁶ The paper sets out the scope and purpose of the entire book. To them, this is to “examine the conceptual coherence and normative desirability of constitutional orders beyond the state and explore what is at stake in debates over global constitutionalism.”³⁷ They seek to circumvent the problem of definition inevitably raised by international constitutionalism by seeking to highlight instead the functions that international constitutional norms perform. To them, these are: the fostering of the creation of new rules of international law, which they term “enabling constitutionalization”; the inhibition of the creation of new rules of international law, which they term “constraining constitutionalization”; and the filling up of lacunae in domestic international law, which they term “supplemental constitutionalization.” They then relate these to the conventional modes through which constitutional law is designed to fulfill its functions. Although deep and well-textured, the analysis offered by Dunoff

³⁵ Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 Yale Journal of International Law 1(2009); Also see: J. Braithwaite & P. Drahos, *Global Business Regulation* (Cambridge University Press, 2000).

³⁶ Dunoff and Trachtman, *supra* note 4, Chapter 1, pages 3 to 35.

³⁷ *Id.*, at 3.

and Trachtman appears to end up as an elaborate new way to define international constitutionalism. Thereby it gets entangled in the definitional problem which they seek to avoid.

In "The Mystery of Global Governance,"³⁸ David Kennedy offers a balanced and restrained view of the international constitution project. He recognizes it as a normative as well as descriptive exercise. He situates it among attempts being made by proponents of other disciplines to offer their own *weltanschauung* of contemporary structures of international power and influence, as well as earlier attempts by scholars of international law to describe the structuring of the international rule of law.

In "The International Legal System as a Constitution,"³⁹ Andreas L. Paulus starts from the premise that the recent fragmentation of international law leads to a refutation of the argument that international constitutionalization flows inevitably from the growth of international institutions. He then offers ways in which it might become possible to read constitutionalism into areas of international law, because, to him, that would foster the rule of law internationally as opposed to a rule of crude power.

In "The UN Charter - A Global Constitution?"⁴⁰ Michael W. Doyle attempts to answer the question whether the UN Charter could properly be described as a constitution of the world. He views the Charter as being less than a constitution when compared to the U.S. Constitution, but something more than a typical multistate treaty. He briefly sketched the self-interested contestation and *realpolitik* that is played out in the working of the Charter.

In "Rediscovering a Forgotten Constitution: Notes on the Place of the UN Charter in the International Legal Order"⁴¹ Bardo Fassbender too evaluates the UN Charter in constitutional terms. He argues that the concept of constitutional law in the international context should be interpreted as having an autonomous sense, and aspirationally believes that treating the Charter in constitutional terms could be the means of realizing the high ideals embodied therein.

In "Reframing EU Constitutionalism,"⁴² Neil Walker examines the European

³⁸ *Id.*, Chapter 2, at pages 37 to 68.

³⁹ *Id.*, Chapter 3, at pages 69 to 109.

⁴⁰ *Id.*, Chapter 4, at pages 113 to 132.

⁴¹ *Id.*, Chapter 5, at pages 133 to 147.

⁴² *Id.*, Chapter 6, at pages 149 to 176.

Council's abortive attempt to get a constitutional treaty ratified for the European Union. He recognizes the descriptive and normative dimensions of constitutionalism and offers five frames through which the constitutional idea can be seen, and raises further questions about the constitutional project in Europe.

In "The Politics of International Constitutions: The Curious Case of the World Trade Organization,"⁴³ Jeffrey L. Dunoff uses the "enabling," "constraining," and "supplemental" constitutionalization lens to examine the constitutional functions of the WTO's constitution, and suggests that it is barely constitutionalized. He then ruminates about the reasons why constitutional discourse has come to occupy such an important place in WTO scholarship.

In "Constitutional Economics of the World Trade Organization,"⁴⁴ Joel P. Trachtman uses the tools of constitutional economics to examine the nature of constitutionalization and comes to the conclusion that the WTO constitution does have constitutional features.

In "Human Rights and International Constitutionalism,"⁴⁵ Stephen Gardbaum compares the systems of constitutional law and international human rights law and concludes that notwithstanding issues such as state consent, a case could be made that certain aspects of international human rights law could be termed as quasi-constitutional.

Mattias Kumm offers a radical redescription of the conceptual framework of constitutionalization in "The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State."⁴⁶ Under his proposed "cosmopolitan paradigm" it would be possible to evaluate claims to constitutionalism in both the domestic and international contexts notwithstanding the inherent structural differences. He urges the adoption of the cognitive frame provided by his cosmopolitan paradigm as opposed to the traditional statist paradigm to understand better present constitutional practices and also as a mean to shape the development of future practices.

In "Constitutional Heterarchy: The Centrality of Conflict in the European Union

⁴³ *Id.*, Chapter 7, at pages 178 to 205.

⁴⁴ *Id.*, Chapter 8, at pages 206 to 229.

⁴⁵ *Id.*, Chapter 9, at pages 233 to 257.

⁴⁶ *Id.*, Chapter 10, at pages 258 to 324.

and the United States,”⁴⁷ Daniel Halberstam notes the legal pluralism inherent in the European legal system and makes the claim that “heterarchy” or a non-hierarchy is a basic condition of the systems of governance in the United States and the European Union. This causes conflict which in turn, leads to a system of order based on mutual compromise among the various parties involved regarding the values of representation, rights, and governing expertise.

In “Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism,”⁴⁸ Miguel P. Maduro examines the effect of legal and constitutional pluralism on judicial interpretation and adjudication.

Finally, in “Whose Constitution(s)? International Law, Constitutionalism, and Democracy,”⁴⁹ Samantha Besson argues for an exploration of the connection between democracy and constitutionalism as an essential prerequisite to a clearer understanding of constitutionalism in the international context.

IV. An Overview of the Issues Relating to International Constitutionalization:

The constitutionalization of international law is no straightforward matter. It raises a host of complex issues. U.S. Supreme Court Justice John Marshall famously urged in *McCulloch v. Maryland* to “never forget that it is a constitution that we are expounding.”⁵⁰ Although it may seem unusual for this statement to be invoked in reference to international constitutionalism in the twenty-first century, it nevertheless encapsulates an essential element of the difficulty raised by the international constitutionalization project.

In a recent law review article, Anne Peters has identified the epistemic, descriptive and normative arguments that have been raised to date against the constitutionalization of international law.⁵¹ The principal arguments are:

⁴⁷ *Id.*, Chapter 11, at pages 326 to 355.

⁴⁸ *Id.*, Chapter 12, at pages 356 to 379.

⁴⁹ *Id.*, Chapter 13, at pages 381 to 407.

⁵⁰ Justice John Marshall, *McCulloch v. Maryland*, 17 U.S. (4 Wheaton) 316,407 (1819).

⁵¹ Anne Peters, *The Merits of Global Constitutionalism*, 16 Indiana Journal of Global Legal Studies 397-411 (2009).

- i. The use of the term “constitutionalism” fosters unrealistic expectations.⁵²
- ii. “Constitutionalism” is a chimerical concept that invests global governance with unjustified legitimacy.⁵³
- iii. Talk about “constitutionalism” of international law is overblown in academic circles, and there appears to be no manifest trend in that direction on the political plane.⁵⁴
- iv. “Constitutionalization” on the international plane has a Eurocentric and Western bias that militates against legal pluralism and tends to deny the legitimacy of legal approaches that stem from other cultural and historical traditions.⁵⁵

Following are some other problems and issues associated with the international constitutionalization project. Some of these have been recognized and sought to be answered by the authors of the useful volume under discussion though not quite satisfactorily. Some of them have not been noted at all.

To begin with, the most important issue is the definitional problem. It is evident that many of the authors in the volume under discussion and other authors who have tackled the subject are using the terms “constitution” and “constitutionalism” in varying senses. This is understandable inasmuch as, these terms are sometimes interpreted in various ways even in the domestic context. The problem is considerably compounded when a term that has been hitherto used principally with reference to a political structure or arrangement in a domestic context is sought to be used with reference to a structure or arrangement in the international sphere.

The problem of state consent and the absence of a clear machinery for the enforcement of rules and norms in the domain of international law have no parallel in the domestic domain. Although international law theorists such as the proponents of the New Haven School of international law have demonstrated the effectiveness

⁵² Anne Peters, *id.* at 400, citing Ronald St. John Macdonald and Douglas M. Johnston, *Introduction to Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*, at xiii, xvii (Ronald St. John MacDonald & Douglas M. Johnston, editors, 2005).

⁵³ Anne Peters, *id.* citing Deborah Z. Cass, *Constitutionalization of the WTO* 8, 237 (2005).

⁵⁴ Anne Peters, *id.* at 401, citing Klaus Armingeon and Karolina Milewicz *Compensatory Constitutionalisation: A Comparative Perspective*, 22 *Global Society* 179 (2008).

⁵⁵ Anne Peters, *id.* at 404, citing Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 *European Journal of International Law* 187, 189 (2006).

of the enforcement of international rules and norms even in the absence of a defined implementation mechanism, the situation is nevertheless completely different. The constitutionalization of law in such a setting cannot but be fundamentally different from the traditional understanding of the term in the domestic setting.

This only leads to a confusion about what precisely is being sought to be done. Nor is it clear what purpose is sought to be achieved by using terms with a core of settled understandings, albeit unsettled at the margins, and using them in non-cognate contexts. It is no use simply saying that the terms “constitution” and “constitutionalism” as used in the international context are not intended to mean what they mean in the domestic context. Nor is it helpful, as Mattias Kumm has, with considerably ingenuity done, to reframe the terms to make them expansive enough to accommodate their use in both the domestic and international context. Until these redefined terms reach a critical mass of acceptance, their use will continue to meet with confusion and repudiation. The frame of reference will continue to be bounded by the circumference of the conventional understanding. What is being mooted is a new conceptual framework. Would it not be more useful then to coin a neologism to describe this new idea?⁵⁶

Dunoff acknowledges a time of “deep disciplinary anxiety” among theorists of international law.⁵⁷ Serious questions are once again being raised about the “realism” of international law by rational choice theorists such as Jack Goldsmith and Eric Posner.⁵⁸ They have, for example, offered an interpretation of customary international law which raises questions whether state compliance with CIL is based on legal or

⁵⁶ Jack Goldsmith and Daryl Levinson have also chalked out the areas of commonality shared by international law and constitutional law and made a cogent argument to support the thesis that it would be more useful to view the two as belonging to the same conceptual category, namely “public law.” See: Jack Goldsmith and Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 Harvard Law Review 1791 (2009).

⁵⁷ Dunoff, *supra* note 43, at 204.

⁵⁸ See Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford University Press, 2005). For a criticism of this book, see: Oona Hathaway and Ariel N. Lavinbuk, *Rationalism and Revisionism in International Law*, review of Posner and Goldsmith, in 119 Harvard Law Review 1404 (2006).

moral obligation.⁵⁹ It would be cynical to assume that it is this anxiety that is driving international law theorists to appropriate the cachet of constitutionalism. However, the coinage of a new term would direct the discussion from the appropriate labeling to the substantial core of the project.

Halberstam raises an interesting point when he states that it is possible to “find constitutional order in spontaneous, mutual accommodation” in areas of governance at the international level.⁶⁰ The concept of “spontaneous order” and the cognate concept of “emergence” is widely associated with the writings of Nobel Prize winning economist F.A.Hayek, who was also trained in law. It refers to the spontaneous occurrence of order in a chaotic situation. Although the concept itself is of ancient origin dating back to the Pre-Socratics and can be seen in the writings of John Stuart Mill, Julian Huxley and others in areas as diverse as economics and biology, F.A.Hayek was the first to use the concept in connection with the subject of law. Along with his writings on economics for which he is most well-known, Hayek also sought to expatiate on the subject of the rule of law.⁶¹ Hayek considered constitutionalism to be the “American contribution to the rule of law.”⁶² F.A. Hayek propounded his theory of “emergence” and “spontaneous order” in his well-known work, *Law, Legislation and Liberty*.⁶³ The core of Hayek’s thesis is set out at length in Volume 1 entitled *Rules and Order*.⁶⁴ Hayek distinguishes between two types of order: One is an exogenous order that has been brought about by forces extraneous to a system, whereas another

⁵⁹ See: Jack L.Goldsmith III and Eric A. Posner, *A Theory of Customary International Law*, University of Chicago Law Review, Fall 1999. For Goldsmith and Posner’s reply to their critics, see Eric A.Posner and Jack L.Goldsmith III, *The New International Law Scholarship*, available at SSRN: <http://ssrn.com/abstract=901991>. Posner and Goldsmith commend the fact “that a new kind of international law scholarship is emerging, one that relies on more heavily on social scientific attitudes and methodologies than the international law scholarship that it is gradually displacing.”

⁶⁰ Daniel Halberstam in Dunoff and Trachtman, *supra* note 4, at 355.

⁶¹ See F.A. Hayek, *Constitution of Liberty* (1960).

⁶² Gerhard Casper, *Constitutionalism*, in *Encyclopedia of the American Constitution*, Volume 2, at 633 (Leonard W. Levy and Kenneth L. Karst, editors, Macmillan Reference, 2000).

⁶³ F.A.Hayek, *Law, Legislation and Liberty* (The University of Chicago, 1973).

⁶⁴ F.A. Hayek, *id.*, Volume 1 *Rules and Order* (The University of Chicago, 1973). See particularly Chapter 2 *Cosmos and Taxis*, Chapter 4 *The Changing Concept of Law*, Chapter 5 *Nomos: The Law of Liberty*, and Chapter 6 *Thesis: The Law of Legislation*.

is an endogenous order that has been brought about by forces internal to the system. Hayek refers to the exogenously created order as a “made” order or “taxis” and to the endogenously created order as a “spontaneous” order or “cosmos.” Spontaneous orders are the end result of a process of evolution and not of any deliberate intention. Such spontaneous orders are the result of the components within the system reflexively abiding by certain norms to comport with their environment. According to Hayek, the most durable and enduring social structures including the laws ordering society and social relations, or “nomos” are emergent and a manifestation of a spontaneous order.

Hayek’s thesis has its critics, and in its extreme form is difficult to accept in respect of vast areas of the law. One prominent critic is Judge Richard Posner who disagrees with Hayek’s view of the common law as a manifestation of a spontaneous order and of his view that the purpose of law is to maintain order. As a votary of the law and economics movement, Judge Posner places primacy on wealth maximization.⁶⁵

Nevertheless Halberstam’s reference to a spontaneous order carries with it an implicit note of caution which is welcome. Constitutionalism has both a descriptive as well as prescriptive dimension. The descriptive project is, whether well-founded or otherwise, a mostly academic exercise. However, the prescriptive project, if undertaken hastily without due consideration of the complex issues involved, could have unintended consequences.⁶⁶

Hayek’s thesis about the growth and nature of law also finds an echo in the idea of “legal fallibilism,” an extension of an idea from pragmatic epistemology, that was espoused by Justice Holmes of the United States Supreme Court.⁶⁷ As described by Kellogg, this entailed viewing the law as “the development of a consensual understanding, expressed in rules and principles,” and the legal process as “an extended intergenerational process of inquiry” with the aim of creating order among

⁶⁵ See Richard Posner, *Law, Pragmatism, and Democracy* (2003) (especially chapter 7).

⁶⁶ In their paper entitled *Choice, Emergence, and Constitutional Process: A Framework for Positive Analysis*, Petrick Runst and Richard E. Wagner have presented the view that “constitutions are subject to spontaneous ordering just as ordinary market processes.” Available at SSRN: <http://ssrn.com/abstract=1608235>.

⁶⁷ Frederic R. Kellogg, *Legal Fallibilism: Law (like Science) as a Form of Community Inquiry*. Available at SSRN: <http://ssrn.com/abstract=1484623>.

social relations.⁶⁸ Justice Holmes' s "legal fallibilism" also carries with it an implicit word of caution against an overly eager prescriptive constitutionalist project in the international sphere.

Another issue that is relevant to this subject is the consequences of the internationalization of constitutional law upon the constitutionalization of international law. In recent years, one marked developments in international has been the transnational convergence of norms of international law through the "transnational legal process." Harold Hongju Koh of Yale Law School describes this as a means

whereby an international law rule is interpreted through the interaction of transnational actors in a variety of law-declaring fora, then internalized into a nation' s domestic legal system. Through this three-part process of interaction, interpretation, and internalization, international rules become integrated into national law and assume the status of internally binding domestic legal obligations.⁶⁹

Due to a growing consensus among most nations regarding what constitutes good and effective government, constitutions are growing to be increasingly similar in various respects.⁷⁰ When the nations of the world have similar constitutions, there is likely to be a growing centripetalism regarding core understandings. This in turn could lead to fewer disagreements among the nations when they seek to form associations at the international level. Due to this growing cohesion in opinions on a multiplicity of issues, there is likely to be less of a need for constitutionalism at the international level. Equally, when the situation requires that a regime be constitutionalized, there is likely to be less difficulty in bringing this about.⁷¹

V. Conclusion:

The surge in scholarship relating to international constitutionalism is a marked recent development in the field of international law. It undoubtedly opens up exciting

⁶⁸ Kellogg, *id.*, at 1.

⁶⁹ Harold Hongju Koh, *Bringing International Law Home*, 35 Houston Law Rev. 623, 625-626 (1998) (internal citations omitted).

⁷⁰ M. Shaw, *Theory of the Global State* (Cambridge University Press 2001).

⁷¹ Ian Brownlie, *Principles of Public International Law* 287 (Oxford University Press, 2003).

lines of intellectual inquiry. The descriptive aspect of this intellectual exercise could be useful academically. The work that is presently being done will no doubt be reworked and refined as time goes by. It would be helpful to proceed with caution. Cass Sunstein's espousal of "incompletely theorized agreements" could be a useful pointer to guide present theoretical development of the subject.⁷² Sunstein has argued that in the numerous instances where people agree about constitutional practices but are unable to agree about the theories undergirding those practices, the interests of a harmonious polity require that there be an "incompletely theorized agreement" about those practices. It would be sensible to extend this principle to the realm of international constitutionalism. Let theory follow practice.

However, it is the prescriptive aspect of the international constitutionalism project which calls for a particular need for caution. As David Kennedy has so eloquently put it, we are presently in an era of "great unknowing."⁷³ Nation-states are learning to cope with powerful new forces set in motion by the liberalization of capital markets and the reconfigured environment in which economic, political, business, social, and cultural interactions are being played out in the international context.⁷⁴ The present era is being widely proclaimed as marking a major shift in the course of world events, comparable in scope and moment to the era of industrialization. International economic and political arrangements and structures are being altered at a fundamental level. As many proponents of international constitutionalism appear to be suggesting, it could lead to a situation similar to Bruce Ackerman's "constitutional moment" leading to "higher lawmaking" on an international scale. But equally, rather than centripetal forces it could propel centrifugal forces which resist the constitutionalization of international law. Hence it is necessary to proceed with care and caution in promoting the prescriptive aspect of the constitutionalization of international law project.

⁷² See: Cass R. Sunstein, *Incompletely Theorized Agreements in Constitutional Law*, available at SSRN: <http://ssrn.com/abstract=957369>. This has also been cited with seeming approval by Maduro at page 366 of Dunoff and Trachtman. *supra* note 4.

⁷³ Kennedy, in Dunoff and Trachtman. *supra* note 4, at 61,64.

⁷⁴ See Jagdish Bhagwati, *In Defense of Globalization* (Oxford University Press, 2007); Joseph E. Stiglitz, *Making Globalization Work* (W.W.Norton & Co., 2006).

国際憲法主義に関わる問題の概観

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要 約

国際法の憲法化というトピックは、国際法学の分野で、急速に顕著になりつつある。主要な法律関係のジャーナルで、非常に多くの最近の文献や論文が、このテーマの様々な面を突き詰めていこうとしている。このトピックについての文献は急速に増え続け、すでに大きな規模でカバーされている。特に一筆に値する最近の業績は、このテーマの現代の考えの輪郭を、正確に記述し学術的記事に貢献している学者たちの1チームの協力的なものである。その本の題名は、『Ruling the World? Constitutionalism, International Law and Global Governance』であり、Jeffrey DunoffとJoel Trachtman によって編集されている。この論文は、もっとも最近の業績に含まれる記事の短い批判を提供しようとしている。それは、国際憲法主義に関する主な問題を正確に記述しようとしており、その中のいくつかは、この最近の業績の中で、学者によって容認され、説明されようとしている。この論文では、このテーマにおける学問の記述的で標準的な面の両方に関する疑問を挙げている。“constitution”と“constitutionalism”という言葉は、国内の分野ですら、多様な意味がある。国際的な文脈で、これらの言葉を簡単に使おうとすると、語彙的意味の混乱を招くのは避けられない。国際分野で現在起こりつつあるプロセスは、前例もなく、国内や国際分野どちらにも、平行するものでない。このように、“constitutionalization”という言葉の使用は、発見的方法だとしても、知識の難しさを減らすよりも、むしろ悪化させるものである。他にある中でも、この論文では、“taxis”と“cosmos”と“nomos”のF. A. Hayek の使用概念と実用的な認識論からの“Fallibilism”の考えの法律的延長線が、可能な限りこのテーマに関わりのある概念であることを追求する必要性を促している。このような概念の下に、この論文では、慎重に暫定的で Cass Sunstein の“未完成な理論的同意”で、国際法プロジェクトの憲法化について述べている。