



What Is at Stake in the Global Constitutionalism Debate?

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Ruling the World? Constitutionalism, International Law, and Global Governance. Edited by Jeffrey L. Dunoff and Joel P. Trachtman. New York: Cambridge University Press, 2009. 414 pp., \$38.99 paperback (ISBN-13: 978-0-521-73549-0).

International legal scholarship, the editors of this volume tell us, is possessed of a current fascination with things constitutional: an intensification of *constitutional discourse* at sites of transnational governance (in which international law as a whole or specific international regimes are described using constitutional language); empirical and normative exploration of *international constitutions*, or at least the constitution-like features of certain regime-specific multilateral treaties; the advancement of *international constitutional debates* (Can, or should, constitutionalism be taken beyond the state? What can the idea of constitutionalism add to governance beyond the state?); and patterns of *constitutionalization* within the structures and processes of global governance.

In its entry to the fray, this dense and sophisticated, though somewhat unfocused, collection of essays by scholars of international law from Europe and the United States exemplifies the complex diversity of perspectives on and questions raised by this recent constitutional turn. Taken as a compendium of current international legal thinking on constitutionalism and the variety of concerns and approaches this concept raises for grappling with the puzzles of global governance, institutional efficacy, and democratic legitimacy in international law, this is a wide-ranging, cutting-edge, and highly recommended contribution. On the downside, *Ruling the World?* lacks a coherent theoretical or organizational frame. Taken as a whole, the volume offers no clear statement of what is at stake in these debates, nor does it articulate (this is not to say resolve) divisions in the literature as helpfully as one might hope.

The book is organized into three sections. In the first section, the authors address the central theme of constitutionalization beyond the state, from three different perspectives. The volume's editors, Jeffrey Dunoff and Joel Trachtman, introduce a "functional approach" to the analysis of global constitutionalism, whose conceptual tools highlight how constitutions at the global level might variously constrain or enable the production of international legal rules as well as supplement domestic constitutions in ways that functionally promote efficient outcomes in global governance. To the extent that an international legal measure performs these enabling, constraining, and supplementing functions, according to Dunoff and Trachtman, it can be distinguished from ordinary international law and identified as constitutional.

David Kennedy and Andreas Paulus, in contrast, address constitutionalism in global governance studies and in international law as one among many ways of thinking about global patterns of power and influence, a particular lens or "mindset" through which to consider the definition of and limits on power beyond the state. For Kennedy, this constitutional lens is hampered by important biases and thus fairly useless (if not nefarious) as a guide to just global order.

For Paulus, a “constitutional reading” of international law provides a welcome opportunity to assess substantive progress toward democracy, human rights, separation of powers, and rule of law in the international sphere. As a programmatic attempt to establish and control international power, concludes Paulus, international constitutionalism “remains a worthy endeavor” (p. 88).

The second section concerns itself with the constitutional dimensions of specific international regimes, namely the United Nations (UN), the European Union (EU), and the World Trade Organization (WTO). In these chapters, only Bardo Fassbender on the UN Charter and Trachtman on the WTO make use of the volume editors’ functional approach, arguing, respectively, that the UN charter “is a constitution in the clothes of a treaty” (p. 133) and that the WTO can best be analyzed with the “method of constitutional economics” (p. 212). In contrast, Michael Doyle rejects the constitutionality of the UN charter, Jeffrey Dunoff rejects constitutional descriptions of the WTO (but offers interesting directions for ongoing constitutional approaches), and—in reference to the EU—Neil Walker focuses his analysis less on this body’s constitutionality than on how the idea of constitutions as “multifaceted framing mechanisms” highlights the uncertain future of the project of European constitutionalism (p. 151).

The volume’s third, concluding section explores crosscutting issues: the relationships among international and domestic constitutions, in essays on human rights (Stephen Gardbaum) and cosmopolitanism (Mattias Kumm); the challenge of constitutional pluralism (Daniel Halberstam, Miguel Poiars Maduro); and the puzzle of democratic legitimacy (Samantha Besson). By the time we get here, the functional approach is long out of sight.

Is the constitutional turn a fruitful avenue for international legal scholarship and the development of international law? If we are to go by this volume, the answer clearly is yes. The most thoughtful and original essays in this collection take constitutionalism as an opportunity to reflect on the deep questions of fragmentation, consolidation, power, and legitimacy that bedevil attempts to promote international law as a coherent source of justice in the international realm. Several of the authors tell us that where the concept of constitutionalism—derived as it is from state-based, national-level legal orders—seems a poor fit with the conditions of international law, the problem lies with the initial conception of constitutionalism itself and not with any inherent weakness, illegitimacy, or unredeemable fragmentation in international law. In his wildly original contribution, Kumm, for instance, suggests nothing less than a wholesale reconceptualization of national-level constitutionalism as a way toward radically reimagining the legal world order:

It is not the discipline of international law that has misleadingly appropriated the vocabulary of constitutionalism; it is the discipline of national constitutional law that has ... inappropriately narrowed, morally misconstrued, and falsely aggrandized national constitutionalism by analytically connecting it to a statist paradigm of international law. (p. 263)

Halberstam, likewise, prods us to consider constitutionalism (particularly as manifest in the United States and in the EU) as a system of heterarchy, where pluralism, conflict, and accommodation are as much a part of the system as the hierarchy, coherence, and consolidation usually associated with constitutional systems of law. Thus reconceived, constitutionalism as a system of international governance makes more sense.

These re-imaginings of constitutionalism go some way—though not all the way—toward responding to David Kennedy’s smart warning at the outset of this volume: constitutionalism in the international realm reads as a project of normalization, of imposing a sense of orderliness and settled-ness (the “ruling

the world” questioned in the book’s title) upon a scene more accurately described as fractured, deeply unjust, and in urgent need of change.

As Besson observes, the idea of constitutionalism in international law usually serves one of two functions: a heuristic device of unification and coherence in times of legal fragmentation in international law, or a program of change and a promise of increased legitimacy both of and within international law. The smartest and most thoughtful contributions in this collection are exquisitely aware of these uses and attempt to resolve their problems.

Thus, what is at stake in the current constitutional debate is not only our conception of the character of international law as it stands (coherent or fragmented, state-based or cosmopolitan) but also of the underlying ideologies, values, and power relations upon which the international legal order rests and upon which transformation will depend. It is disappointing that the editors declined to add introductory and concluding chapters to the volume, which might have pulled out such key themes. An overview of the extant literature and some conceptual clarification—what do the authors intend by constitutions, constitutionalism, constitutionalization, and so on—at the outset would have been good, too. As it stands, the thoughtful essays in *Ruling the World?* will be appreciated by experts in international law already grappling with constitutional concerns. Students and non-experts (including scholars of political science and international relations) looking for a helpful entry into this interesting body of literature are likely to find this book difficult to penetrate.