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Between Law and Language: When Constitutionalism Goes Plural in a Globalising World[♦]

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Abstract

Riding the wave of globalisation, scholars and practitioners envision global governance as a legalised world order. This international rule of law movement is centred on the idea of global constitutionalism. However, the constitutional view of global governance raises fundamental questions pertaining to the nature of international law, the culture of constitutional orders, and the future of global governance: What is the added value for the international legal system to be viewed in constitutional terms? How would comprehensiveness characteristic of traditional constitutional orders figure in an increasingly fragmented world order? Does the new era of constitutionalism herald a paradigm shift in thinking constitutionalism? Ruling the World? Constitutionalism, International Law, and Global Governance, edited by Jeffrey L. Dunoff and Joel P. Trachtman, attempts to illuminate the idea of global constitutionalism. Engaging with the

[♦] A review of J.L. Dunoff and J.P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge, UK and New York, NY: Cambridge University Press, 2009).

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contributors to the collection, this article aims to achieve two goals. In addition to providing a typology of global constitutionalism to help discern the distinct locales where global constitutionalism emerges and dissect its plural meanings, this article argues that global constitutionalism sits at the crossroads of law and language. The ambiguity between legal nomos and narrative language lies at the heart of the current debates surrounding global constitutionalism.

Key words: typology of global constitutionalism, supranational legality, conflict of constitutional laws, constitutionalised international law, global governance, constitutional pluralism, constitutional self-aggrandisement, constitutional mindset, legal nomos and narrative language

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I. INTRODUCTION

Riding the wave of globalisation, discussions on the ‘the juridification of the new world order’ have spread through academic circles.¹ Law is now expected to reign in international relations that used to be conducted according to the realist logic of power and interest.² Although the new legalised world order envisioned by these discussions has been given different names such as ‘legal and constitutional pluralism’,³ ‘multilevel governance’,⁴ ‘societal constitutionalism’,⁵ or ‘transnational government networks’,⁶ the common thread that runs through these designations is a constitutional version of global

¹ See J. L. Cohen, ‘Whose Sovereignty? Empire Versus International Law’ (2004) 18 *Ethics & International Affairs* 1, 2. See also J. L. Goldstein et al. (eds), *Legalization and World Politics* (Cambridge, MA: MIT Press, 2001).

² For the project of building a global rule of law in the development of modern international law, see M. Koskenniemi, ‘The Fate of Public International Law: Between Techniques and Politics’ (2007) 70 *MLR* 1, 1-3. For the predominance of national interest in realist international relations theories, see M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge: Cambridge University Press, 2001) 413-509.

³ See N. Walker, ‘The Idea of Constitutional Pluralism’ (2002) 65 *MLR* 317-359. See also G. W. Anderson, *Constitutional Rights after Globalization* (Oxford: Hart, 2005) 39-151.

⁴ See eg C. Joerges and E.-U. Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Oxford, UK and Portland, OR: Hart, 2006); I. Pernice, ‘The Treaty of Lisbon: Multilevel Constitutionalism in Action’ (2009) 15 *Columbia Journal of European Law* 349; S. Picciotto, ‘Constitutionalizing Multilevel Governance?’ (2008) 6 *I•CON* 457.

⁵ See G. Teubner, ‘Fragmented Foundations: Societal Constitutionalism beyond the Nation State’ in P. Dobner and M. Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford: Oxford University Press, 2010) 327-341; G. Teubner, ‘Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory’ in C. Joerges et al. (eds), *Transnational Governance and Constitutionalism* (Oxford: Hart, 2004) 3-28.

⁶ See A.-M. Slaughter, *A New World Order* (Princeton, NJ: Princeton University Press, 2004) 8.

governance.⁷ At its core is to build constitutional ordering beyond nation-states with an eye to constitutionalising the world order in the global era.⁸ Echoing these institutional aspirations for constitutional ordering on a global scale is the idea of global constitutionalism: the normative ideals of constitutionalism such as the protection of human rights and the rule of law are to be projected onto the world, governing the nascent global arrangement of constitutional ordering.⁹ In the eyes of aspiring globalists, the envisioned constitutionalised world is a place where Leviathans would be caged by global constitutionalism, bidding farewell to the Hobbesian international relations of the Westphalian age.¹⁰

Apparently a new era of constitutionalism is arriving.¹¹ However, the transnational

⁷ See Cohen, n 1 above, 1-11. See also *Transnational Governance and Constitutionalism*, n 5 above; K.-H. Ladeur (ed), *Public Governance in the Age of Globalization* (Aldershot: Ashgate, 2004); D. Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Stanford, CA: Stanford University Press, 1995); J. N. Rosenau and E.-O. Czempiel (eds), *Governance Without Government: Order and Change in World Politics* (Cambridge: Cambridge University Press, 1992).

⁸ See eg D. J. Elazar, *Constitutionalizing Globalization: The Postmodern Revival of Confederal Arrangements* (Lanham, MD: Rowman and Littlefield, 1998); C. Walter, 'Constitutionalizing (Inter)national Governance: Possibilities for and Limits to the Development of an International Constitutional Law' (2002) 44 *German Yearbook of International Law* 170.

⁹ See N. Tsagourias (ed), *Transnational Constitutionalism: International and European Perspectives* (Cambridge: Cambridge University Press, 2007); A. Peters, 'The Merits of Global Constitutionalism' (2009) 16 *Indiana Journal of Global Legal Studies* 397.

¹⁰ See generally R. St. J. MacDonald and D. M. Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Leiden: Martinus Nijhoff, 2005). See also R. A. Falk et al., 'Global Constitutionalism and World Order' in R. A. Falk et al. (eds), *The Constitutional Foundations of World Peace* (Albany, NY: State University of New York Press, 1993) 3-12.

¹¹ See eg M. Rosenfeld, 'Rethinking Constitutional Ordering in an Era of Legal and Ideological

parallel between institutions and norms in terms of constitutionalism is not entirely beyond dispute, posing more questions than answers to how constitutional ordering would configure beyond its traditional domain of nation-states.¹² Notably, the idea to conduct international relations in accordance with the law has a long history in modern international law.¹³ Despite the different motives behind the intellectual movement for the international rule of law and the divergent visions for a new world order, substituting order for anarchy has been the main theme in this movement.¹⁴ Thus, as the latest wave of the international rule of law movement, global constitutionalism raises the questions pertaining to the nature of international law, the culture of constitutional orders, and the future of global governance. What is the ‘added value’ for the international legal system to be viewed in constitutional terms? What exactly is ‘constitutional’ about current global governance? How would comprehensiveness characteristic of traditional constitutional orders figure in an increasingly fragmented world order? Does global constitutionalism simply suggest a global expansion of constitutional democracy or herald a paradigm shift in thinking constitutionalism? Are we entering a new era of constitutionalism, or instead are we facing the end of constitutionalism as we know it? These are the central concerns not only to policy makers but also to legal scholars and

Pluralism’ (2008) 6 I•CON 415. Notably, Hauke Brunkhorst traces the idea of global constitutionalism to the revolutionary changes that began in the 1940s and were already observed by Talcott Parsons in 1960. See H. Brunkhorst, ‘Dialectical Snares: Human Rights and Democracy in the World Society’ (2009) 2 *Ethics & Global Politics* 219, 231.

¹² See generally Dobner and Loughlin (eds), n 5 above.

¹³ See Koskeniemi (2007), n 2 above, 2-3.

political scientists in the face of variegated proposals for a global version of constitutionalism. Before jumping on board the globalist bandwagon, we need to think through these issues so that the idea of global constitutionalism can be better grasped without being reduced to nothing but a fashionable label for the continuing movement for the international rule of law.

Ruling the World? Constitutionalism, International Law, and Global Governance, edited by Jeffrey L. Dunoff and Joel P. Trachtman, is a timely and important intervention among scholarly attempts to throw illuminating light on the landscape of constitutionalism in our globalising world. Bringing together leading legal scholars of different educational backgrounds on both sides of the Atlantic, this book, which comprises thirteen chapters and a preface by the late international law scholar Thomas M. Franck, covers a wide range of issues concerning global constitutionalism. Each chapter aims to address the practical and theoretical cutting edge issues of global governance in relation to constitutionalism as noted above. Moreover, as reflected in its structure and selected themes, the book points to a typology of global constitutionalism, shedding light on the diversity of perspectives on and approaches to this emerging field.

While the breadth of the topics discussed and the typology of global constitutionalism portrayed in the book seem to provide a definitive guide to the studies of global constitutionalism, the question mark at the end of its main title '*Ruling the World?*' suggests the ambivalence the contributors to this collection harbour about global

¹⁴ See Koskenniemi (2001), n 2 above.

constitutionalism. In contrast to traditional constitutionalism rooted in national political communities,¹⁵ the nature of global constitutionalism, which is not underpinned by a global political community,¹⁶ is unclear. Does global constitutionalism mean a set of emerging global legal norms? Or does it amount to a new narrative framework within which the stories about global governance would be told? The ambiguity between legal nomos and narrative language,¹⁷ this article contends, not only constitutes the central concern of this book but also lies at the heart of the current debates surrounding the idea of global constitutionalism.

This article argues that when constitutionalism goes global, its meaning cannot be adequately understood within the confines of traditional constitutionalism. Rather, global constitutionalism has plural meanings, which need to be dissected to do justice to the novel, emerging global version of constitutionalism. This article aims to cast theoretical light on the ambiguity concerning the identity of global constitutionalism by situating global constitutionalism at the crossroads of law and language: sometimes global constitutionalism in light of conflict of laws is considered a rule of engagement or

¹⁵ See eg U. K. Preuss, 'The Exercise of Constituent Power in Central and Eastern Europe' in M. Loughlin and N. Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2007) 211, 213.

¹⁶ See A. von Bogdandy, 'Constitutionalism in International Law: Comment on a Proposal from Germany' (2006) 47 *Harvard International Law Journal* 223, 233-236. Cf U. K. Preuss, 'Equality of States—Its Meaning in a Constitutionalized Global Order' (2008) 9 *Chicago Journal of International Law* 17, 41-45 (2008).

¹⁷ This ambiguity bears greatly on the Coverian nexus of nomos and narratives. See R. M. Cover, 'The Supreme Court, 1982 Term-Foreword: Nomos and Narrative' (1983) 97 *Harvard Law Review* 4-68. This

conflict, which would provide clear guidance for human and societal interactions as the legal system does; at other times, however, global constitutionalism amounts to a new language in which issues surrounding global governance and its corresponding legal order are framed and examined. Before going to the two-faced identity of global constitutionalism, this article first reveals the typology of global constitutionalism as suggested in the book, which would help to discern the distinct locales where global constitutionalism arises and thus to illuminate its plural meanings.

II. CONSTITUTIONALISM IN PLURALITY: TOWARDS A TYPOLOGY OF GLOBAL CONSTITUTIONALISM

A. Re-imagining international organisations: global constitutionalism as supranational legality

The first new frontier where global constitutionalism emerges is traditional international organisations and other legal regimes, which constitute the theme of the second part of the book (chs 4-8). International organisations and other international legal regimes such as the United Nations (UN) human rights system are traditionally regarded as established and operating under the framework of international law. What is characteristic of these international law regimes is that their authorities are attributed to the volition of their contracting parties.¹⁸ They are binding only when the states have consented to

subject will be further addressed later.

¹⁸ See M. Koskenniemi, 'Introduction' in M. Koskenniemi (ed), *Sources of International Law*

subjecting themselves to the jurisdiction and authority of these international legal bodies.¹⁹ Thus, international treaties that ground the authority of international organisations tend to be lacking in brevity and more detailed than state constitutions.²⁰ Moreover, in contrast with traditional constitutional interpretation, in which the purposive or teleological methods are adopted and the doctrine of implied powers is well received,²¹ strict textualism is preferred in interpreting international treaties.²²

However, paralleling the pursuit of legalising international relations, traditional

(Aldershot: Ashgate/Dartmouth, 2000) xi, xii.

¹⁹ It is noteworthy that the UN Security Council resolutions passed under Chapter VII of the UN Charter have long been advocated as binding on non-members and members alike. See S. Bohr, 'Sanctions by the United Nations Security Council and the European Community' (1993) 4 EJIL 256, 262.

²⁰ Cf J. H. H. Weiler, 'On the Power of the Word: Europe's Constitutional Iconography' (2005) 3 I•CON 173, 174. Undeniably, the actual length of a constitution and that of a treaty of an organisational type may vary. Yet, in terms of style, brevity weighs more in a constitution than in a treaty. See S. C. Siberson, 'Worth Doing Well—The Improvable European Union Constitution' (2005) 26 *Michigan Journal of International Law* 587, 600-601. Many thanks to Tom Poole for drawing my attention to the delicacy in comparing the styles of constitutions and treaties.

²¹ See generally A. Barak, *Purposive Interpretation in Law* (Princeton, NJ: Princeton University Press, tr S. Bashi, 2005). Stephen Gardbaum in another place identifies the lesser use and legitimacy of the purposive or teleological method of judicial reasoning as a feature of 'U.S. interpretive exceptionalism'. See S. Gardbaum, 'The Myth and the Reality of American Constitutional Exceptionalism' (2008) 107 *Michigan Law Review* 391, 410. For the doctrine of implied powers in the United States, see *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

²² See A. Glashauser, 'What We Must Never Forget When It Is a *Treaty* We Are Expounding' (2005) 73 *University of Cincinnati Law Review* 1243, 1255-1269. Notably, the European Court of Justice (ECJ) jurisprudence concerning the interpretation of the basic treaties of the European Union (EU) and its predecessors is quite the opposite. The opposite direction in which the ECJ has gone in interpreting the EU and other basic treaties has been taken as an evidence of the constitutionalisation of the EU. The relationship between the ECJ jurisprudence and the EU's constitutionalisation will be addressed later.

international organisations and other legal regimes have been undergoing the processes of constitutionalisation.²³ The foremost example of those that take the path of constitutionalisation is the EU. According to Joseph Weiler, the constitutionalisation of the EU consists mainly of four substantive judge-made doctrines concerning the status and nature of Community law *vis-à-vis* the municipal legal systems of the member states:²⁴ direct effect,²⁵ supremacy,²⁶ human rights,²⁷ and implied powers.²⁸ Through these doctrines of the ECJ, the legal relationship between the Community and member states are no longer international but rather has become supranational, transforming the EU legal

²³ For the ambiguous meaning of constitutionalisation, see D. Z. Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System* (Oxford: Oxford University Press, 2005) 15-18; K. Milewicz, 'Emerging Patterns of Global Constitutionalization: Toward a Conceptual Framework' (2009) 16 *Indiana Journal of Global Legal Studies* 413-436. Cf M. Loughlin, 'What Is Constitutionalisation?' in *The Twilight of Constitutionalism?*, n 5 above, 47-69.

²⁴ The EU as an umbrella regime consisted of three 'pillars' during the pre-Lisbon Treaty era, which had been in place since the Maastricht Treaty of 1991. In a strict legal sense, Community law, which resided in the first pillar, ie European Community, was distinct from the EU (or Union) law. However, the entry into force of the Lisbon Treaty on December 1, 2009 has brought about the 'de-pillarisation' of the EU structure. It is noteworthy that the de-pillarisation will not completely eradicate the traces of the pillar structure. See R. A. Wessel, 'The Constitutional Unity of the European Union: The Increasing Irrelevance of the Pillar Structure' in J. Wouters at al. (eds), *European Constitutionalism beyond Lisbon* (Antwerp: Intersentia, 2009) 283-306.

²⁵ Case 26/62 *NV Algemene Transporten Expeditie Onderneming Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1.

²⁶ Case 6/64 *Costa v. ENEL* [1964] ECR 585.

²⁷ Case 29/69 *Stauder v. City of Ulm* [1969] ECR 419.

²⁸ Case 22/70 *Commission v. Council (AETR)* [1971] ECR 263.

system into a constitutional order.²⁹ Thus, what characterises global constitutionalism in relation to international organisations is the move from the state consent-based international treaty law to a *sui generis* but autonomous legal order independent of international and municipal law, which this article calls ‘supranational legality’.³⁰

Continuing to elaborate on the development of ‘supranational constitutionalism’ (151) in the EU, Neil Walker’s chapter further notes that the EU itself is in the process of constitutional transformation.³¹ Taking up the issue, Walker reflects on the ‘framing logic’ of modern constitutionalism. He points out that the constitutional way of thinking ‘the collective forms of practical reasoning we call “politics”’ operates through five ‘framing registers’, ie ‘juridical’, ‘political-institutional’, ‘authorising’, ‘social’, and ‘discursive’ (152). Under the ‘framing logic’, modern constitutionalism assumes ‘certain clearly differentiated containers of social space’ and centres on the ‘demarcation and

²⁹ See J. H. H. Weiler, *The Constitution of Europe: “Do the New Clothes Have an Emperor?” and Other Essays on European Integration* (Cambridge: Cambridge University Press, 1999) 19-25. Literature on the constitutionalisation of the EU is enormous. See eg T. Christiansen and C. Reh, *Constitutionalizing the European Union* (Basingstoke: Palgrave Macmillan, 2009); B. Rittberger and F. Schimmelfennig, *The Constitutionalization of the European Union* (London: Routledge, 2007); A. Stone Sweet, *The Judicial Construction of Europe* (Oxford: Oxford University Press, 2004).

³⁰ What is characteristic of the constitutionalisation of an international organisation is the transformed relationship between it and its member states: from international to supranational. See A. Stone Sweet, ‘The Constitutionalization of the EU: Steps towards Supranational Polity’ in S. Fabbrini (ed), *Democracy and Federalism in the European Union and the United States: Exploring the Post-National Governance* (Abingdon: Routledge, 2005) 44-56. Given that the rule of law plays a central role in the efforts of reshaping international relations by international law, the constitutionalisation of international organisations is characterised as supranational legality in this article.

³¹ See eg M.-S. Kuo, ‘From Myth to Fiction: Why a Legalist-Constructivist Rescue of European

organization of social space' (153-162). Walker's contribution illustrates how the EU example of global constitutionalism reveals the possibility and limitation of the self-transformative potential of bounded modern constitutionalism in redrawing the boundaries of social space (151-152, 162-176).³²

In addition to the EU regional body, the UN and the World Trade Organisation (WTO) are showcases of how 'constitution talk' (161) spreads into traditional international organisations. These two examples are representative. The one has long been taken as the prototype of world government;³³ the other is emerging as the most powerful global regulatory regime that includes a mandatory judicial type of dispute resolution mechanism.³⁴ Nevertheless, reading these two international bodies through constitutional lens is not out of question, as reflected in the distinct attitudes towards them in the book. Raising the question *The UN Charter – A Global Constitution?* in the title of his contribution, Michael W. Doyle restricts the constitutional reading of the UN Charter to the practice of 'supranationality' in UN operations such as the Millennium

Constitutional Ordering Fails' (2009) 29 OJLS 579-602.

³² For the boundedness of modern constitutionalism, see M.-S. Kuo, 'Reconciling Constitutionalism with Power: Towards a Constitutional Nomos of Political Ordering' (2010) 23 *Ratio Juris* (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1533483 (last visited 23 March 2010). See also U. K. Preuss, 'Disconnecting Constitutions from Statehood: Is Global Constitutionalism a Viable Concept?' in *The Twilight of Constitutionalism?*, n 5 above, 23, 26-29, 32-33; H. Lindahl, 'A-Legality: Postnationalism and the Question of Legal Boundaries' (2010) 73 MLR 30-56.

³³ See generally G. Clark and L. B. Sohn, *World Peace through World Law* (Cambridge, MA: Harvard University Press, 3rd ed, 1966).

³⁴ See D. Z. Cass, 'The 'Constitutionalization' of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade' (2001) 12 EJIL 39, 49-52.

Development Goals (115, 131). Defined as the institutional feature that ‘permits authoritative decisions without continuous [state] consent’ (115),³⁵ Doyle notes, ‘supranationality’ suggests moving the UN regime beyond the definition of traditional international organisations (125-131). In contrast to Doyle’s cautious identification of supranationality in UN practices, Bardo Fassbender unreservedly defends a constitutional rendering of the UN Charter, which he helped to initiate in the 1990s,³⁶ by a comparative examination of the UN Charter and existing state constitutions (137-141).³⁷

Corresponding to Doyle’s and Fassbender’s contrasting assessments of the UN in constitutional terms, Dunoff’s and Trachtman’s contributions illustrate the opposite attitudes towards the constitutionalisation of the WTO. Although both Dunoff and Trachtman address the role of politics in the constitutional discourse regarding the WTO, they argue from different perspectives. While Dunoff adopts a critical stance (192-202), Trachtman argues from a rationalist perspective of ‘constitutional economics’ (212-216, 228). Moreover, the difference in their political perspectives leads to their opposite appraisals of the WTO. From a rationalist perspective, Trachtman unreservedly embraces the WTO in constitutional terms (216-228). He attributes the constitutionalisation of the WTO, the characteristic of which is its supranational feature of

³⁵ In chapter 3, Andreas L. Paulus questions Doyle’s broad definition of supranationality (104).

³⁶ See B. Fassbender, ‘The United Nations Charter as the Constitution of the International Community’ (1998) 36 *Columbia Journal of Transnational Law* 529-619.

³⁷ Although Fassbender focuses attention on the similarity of the UN Charter to a national constitution, he does not equate the Charter with its national counterpart. Rather, he argues that ‘[t]he Charter is part of a more inclusive constitutional process’, which involves “the constitutional bylaws” of the international

dispute settlement (217),³⁸ to the motives to resolve transaction costs and strategic problems in international trade by constitutional means (213). In contrast, Dunoff focuses attention on the politics behind the movement to rethink the WTO as being on the path of constitutionalisation and shows scepticism with respect to various theories to characterise the WTO as a constitutionalised body.³⁹ Disputing Trachtman's functionalist approach to constitutionalising the WTO (182-83), Dunoff suggests that we understand efforts to constitutionalise the WTO more prescriptively than descriptively (201-202). Seen in this light, the constitutionalisation of the WTO is intertwined with the politics to 'give [the WTO] "the legitimacy of higher law – irreversible, irresistible, and comprehensive"' (201).

In addition to the regional and global organisations, international human rights regimes stand at the centre of the discourse on global constitutionalism. Less institutionalised and centralised than formal international organisations such as the UN, the WTO, and the EU (239-240), international human rights regimes play an equally pivotal role in the development of global constitutionalism because of their normative importance. This theme runs through Stephen Gardbaum's contribution. Gardbaum

community' (145).

³⁸ In contrast to intergovernmental mechanism, Trachtman characterises the dispute settlement of the WTO as 'transnational' rather than 'supranational' (217).

³⁹ On the one hand, Dunoff questions whether the three primary functions of constitution, which are dubbed with 'enabling', 'constraining', and 'supplemental' constitutionalisation, respectively, apply to the WTO (180-184). Rejecting the functionalist approach to constitutionalising the WTO, Dunoff also disputes the institutionalist, normativist, and juristocrat conceptions of constitution in conceptualising the WTO as a constitutional body (184-192).

notes that there are two dimensions in the constitutionalisation of international human rights regimes. First, he regards the recent efforts of giving international human rights law the specific status of (quasi-)constitutional law in municipal legal systems as an advancement of the traditional discussion on the domestic incorporation of international human rights treaties (238-244). However, Gardbaum's focus is on the second dimension of constitutionalising human rights regimes. Resting this second constitutionalisation of human rights on the distinction between treaty and constitution, Gardbaum attributes constitutional character to international human rights law because human rights regimes penetrate municipal legal systems and impose legal obligations on states that are not fixed in the constitutive treaties of international human rights regimes (245-251). With the enhancement of the doctrine of direct effect and the departure from strict textualism in interpretation, international human rights treaties are constitutionalised,⁴⁰ 'mak[ing] a transition from being...horizontal, intergovernmental [bodies] to a more vertical supranational, or autonomous [regime]' (245).⁴¹

B. Emerging from the imbroglio of constitutional orders: global constitutionalism as conflict of laws

As a point of departure for the third part of the book, the theme of the constitutionalisation of international human rights regimes points to the second frontier opened up by global

⁴⁰ Franck also noted the relationship between the changing method of treaty interpretation and the constitutionalisation of treaty law in the preface (xi).

⁴¹ In his contribution, Paulus holds doubts about the supranationality of international human rights

constitutionalism: the crisscrossing of constitutional domains. To be sure, the imbroglio of distinctive constitutional orders is not new to constitutional theory. A central topic in comparative constitutional law literature is concerned with the delineation of and the negotiation between constitutional jurisdictions.⁴² However, global constitutionalism complicates and sharpens comparative constitutional law scholarship: global constitutionalism functions as a special conflict of laws in mediating distinct constitutional orders, whether they are national or transnational.⁴³

While Gardbaum suggests that a constitutionalised international human rights regime seems to attain a higher normative status *vis-à-vis* state constitutions (245),⁴⁴ the landscape of global constitutionalism is much more complex than a hierarchical legal order. As part of his grand project on the cosmopolitan turn in constitutionalism (261-262), Mattias Kumm's chapter takes up the issue of the relationship between constitutional orders. Kumm reconceptualises the relationship between international and

regimes (104).

⁴² See S. Choudhry, 'Migration as a New Metaphor in Comparative Constitutional Law' in S. Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2006) 1-36.

⁴³ See C. Joerges, 'Constitutionalism in Postnational Constellations: Contrasting Social Regulation in the EU and the WTO' in *Constitutionalism, Multilevel Trade Governance and Social Regulation*, n 4 above, 491; C. Joerges, 'Reconceptualizing the Supremacy of European Law: A Plea for a Supranational Conflict of Laws' in B. Kohler-Koch and B. Rittberger (eds), *Debating the Democratic Legitimacy of the European Union* (Lanham, MD: Rowman and Littlefield, 2007) 311. See also V. C. Jackson, *Constitutional Engagement in a Transnational Era* (Oxford: Oxford University Press, 2009). The argument here is inspired by Christian Joerges's comments on the author's 'Reconciling Constitutionalism with Power: Towards a Constitutional Nomos of Political Ordering', n 32 above.

⁴⁴ See also Koskeniemi (2007), n 2 above, 15.

municipal legal systems as one involving different constitutional domains, which is to be governed according to constitutional pluralism without being trapped in the monism vs. dualism debate in traditional international law (274-288). As a ‘rule[] of engagement’ for distinct constitutional domains (289), constitutional pluralism rests its legitimacy on procedures. What he calls ‘complex procedural legitimacy’ comprises jurisdictional legitimacy and due process (290-291). The former is embedded in the departure from the idea of sovereignty to the principle of subsidiarity (291-295); the latter is a twofold concept, comprising electoral accountability and standards of good governance derived from domestic administrative law (296-303). Taken together, Kumm suggests a conflict-of-laws understanding of global constitutionalism, albeit in the name of the rule of engagement (278, 289-290, 307-310).

While addressing other issues regarding global constitutionalism, Kumm’s foregrounding the idea of constitutional pluralism sets the stage for the next two interventions in how to navigate the crisscrossing constitutional landscape in the postnational era.⁴⁵ On his part, Daniel Halberstam argues that constitutional pluralism is characteristic of both the European legal order and the separation of powers in the United States constitutional system. At the heart of constitutional pluralism in Europe is the unsettled relationship between the EU and member state legal orders (330-331), whereas

⁴⁵ See J. Habermas, *The Postnational Constellation: Political Essays* (Cambridge, MA: MIT Press, ed and tr M Pensky, 2001). Samantha Besson also discusses constitutional pluralism to conclude her chapter (399-406), which will be addressed later. Other chapters that also note the role of constitutional pluralism in global constitutionalism include Dunoff and Trachtman (32), Walker (165), and Dunoff (203-204).

the American version of constitutional pluralism, ie departmentalism, refers to the contestation around claims to being the final arbiter of constitutional controversies among the three branches of the federal government as well as the people (331-332).⁴⁶ What is common between these two examples of constitutional pluralism is that ‘the unsettled nature of final legal authority is an enduring and essential characteristic of each system’ (336). Taking constitutional pluralism seriously, Halberstam proposes ‘constitutional heterarchy’ as the form of managing potential constitutional conflicts among different institutional actors (328). Instead of grounding the management of conflicts in any hierarchy outside the system, constitutional conflicts involved in the ‘intersystemic’ engagement in Europe (328) and the ‘interinstitutional’ engagement in the United States (337) are managed within a nonhierarchical structure. In other words, Halberstam highlights the role of global constitutionalism in managing constitutional conflicts through the values of voice, expertise, and rights within the spontaneous, decentralised, and immanent ordering of constitutional heterarchy (336-355).

Following this line of thinking, Miguel Poiars Maduro focuses attention on the changing role of the judiciary in the face of constitutional pluralism. In addition to the

⁴⁶ A distinction should be noted between constitutional pluralism in European constitutionalism and constitutional departmentalism in American constitutional theory. In Europe, constitutional pluralism is proposed in response to the competition between the ECJ and national constitutional jurisdictions regarding who should have the final say in interpreting the constitutive legal texts of the EU and member states. It is aimed at dissolving the issue of judicial *Kompetenz-Kompetenz*. See Walker, n 3 above, 348-350. In contrast, constitutional departmentalism in the United States is concerned with the issue of judicial supremacy itself. See R. Post and R. Siegel, ‘Popular Constitutionalism, Departmentalism, and Judicial Supremacy’ (2004) 92 *California Law Review* 1027-1043.

required changes of the modalities of judicial reasoning in response to constitutional pluralism (361-371), Maduro emphasises the role of judicial dialogues in institutional choice (371-374).⁴⁷ Moreover, he indicates that the constitutionalisation of international law bodies complicates the relationship between constitutional domains. Thus, Maduro distinguishes between the *teloi* of the judiciary in the face of internal and external constitutional pluralism. In the context of internal constitutional pluralism where a certain legal order supported by its own political community is supposed,⁴⁸ the *telos* of courts is to maintain the integrity and coherence of that legal order (374). In contrast, faced with external constitutional pluralism,⁴⁹ courts are concerned with minimising potential jurisdictional conflicts (375). Aided by (meta-)teleological reasoning and a systematic understanding of the legal order (368-370), Maduro argues, judicial interpretation and dialogues emerge as the institutional response to the mediation of the possible constitutional conflicts resulting from constitutional pluralism (370).

Despite assuming different names, contributions from Kumm, Halberstam, and Maduro converge on managing to resolve the issue of regime collision as a result of complex constitutionalisation.⁵⁰ Their focus on constitutional pluralism revolves around

⁴⁷ The role of judicial dialogues in global constitutionalism is also noted in the following chapters: Dunoff and Trachtman (35) and Besson (405-406).

⁴⁸ In her contribution to the collection, Besson defines internal constitutional pluralism differently, referring to the coexistence of constitutional norms stemming from different sources or regimes within the international order instead of a national or transnational political community (399-400).

⁴⁹ Besson also discusses external constitutional pluralism in a similar way (402-406).

⁵⁰ See A. Fisher-Lescano and G. Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999, 1014-1017. See also

the role of global constitutionalism as a special conflict of laws in resolving the imbroglio of constitutional orders.⁵¹

C. Remaking the international legal system: global constitutionalism as constitutionalised international law

In addition to the constitutionalisation of distinct international law regimes as supranational bodies and the management of the collision between constitutional regimes, another dimension of global constitutionalism is concerned with the world legal order itself.⁵² In this third frontier, global constitutionalism figures as constitutionalised international law by remaking the general international legal system on the domestic model of constitutional ordering.⁵³ In this way, the international legal system is not merely a set of norms based on state consent with an eye to regulating the relations between states. Rather, international law has evolved into the fundamental law that governs international relations and constrains state behaviours in the name of

M. Koskeniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization' (2007) 8 *Theoretical Inquiries in Law* 9, 12-13.

⁵¹ Global constitutionalism as a special conflict of laws or its equivalent is also noted in the following contributions: Dunoff and Trachtman (14, 30-35), Paulus (85), Trachtman (225) as well as Besson (405).

⁵² Cf D. Grimm, 'The Constitution in the Process of Denationalization' (2005) 12 *Constellations* 447, 458.

⁵³ See Peters, n 9 above; von Bogdandy, n 16 above; Preuss, n 16 above, 35-41; S. C. Breau, 'The Constitutionalization of the International Legal Order' (2008) 21 *Leiden Journal of International Law* 545. See also J. Habermas, *The Divided West* (Cambridge: Polity, ed and tr C. Cronin, 2006) 115-193.

‘international constitution’.⁵⁴

The effort to remake the general international legal system into an international constitution can be examined from functional and historical perspectives. In chapter 1, Dunoff and Trachtman give a functionalist account of the rise of global constitutionalism in relation to constitutionalising the international legal system. Their joint contribution attributes the demand for international constitutionalisation to globalisation and fragmentation (5-9). On the one hand, the denser legal and institutional interactions among state and non-state actors as a consequence of globalisation increase the needs for new transnational organisations and the corresponding constitutionalised transnational legal order (5-6). As international constitutional law, the international legal system not only functions to enable and constrain the new international organisations but also to supplement the insufficiency of state constitutions (9-18). On the other hand, Dunoff and Trachtman’s introductory chapter notes the emergence of international constitutionalisation as a response to concerns over the fragmentation of international legal system (6-7).⁵⁵ With the growth of international tribunals, the increase of international *lex specialis*, and the multiplication of transnational regulatory regimes, the international legal system becomes fragmented, giving rise to the demand for an

⁵⁴ See Breau, n 53 above, 547-557. See also B. Fassbender, ‘The Meaning of International Constitutional Law’ in *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*, n 10 above, 837.

⁵⁵ The relationship between the fragmentation of the international legal system and the rise of global constitutionalism is also noted by the following contributors: Dunoff (197), Trachtman (223-226), Kumm (279), and Halberstam (326, 355).

international constitution (6-9). Under a constitutional system, legal unity rather than fragmentation is expected to emerge from the variegated transnational legal fora.⁵⁶

Picking up the constitutional response to the fragmentation of the international legal system (82-87), Paulus considers the drive for international constitutionalism from a historical perspective. Paulus first traces the origin of international constitutionalism to the debate on the legality of international 'law' in the early twentieth century (72-74).⁵⁷ From the perspective of 'formal' constitution, the systematic nature of international law, which is ascribed to the political choices of sovereign states as the secondary rules on international lawmaking, appears to be sufficient to found its constitutional structure (74). Considering the horizontal, interstate quality of sovereignty underlying the formal coherence of international law, however, Paulus points out that 'superior unity' is still missing in the international system of formal rules (75). As a result, a mere systematic reading of the international legal system does not amount to international constitutionalism. Rather, a constitutional rendering of international law must presuppose the existence of its corresponding institutions (75).

Nevertheless, looking closely at the relationship between institutionalism and constitutionalism, Paulus is cautious about the formal approach to international constitutionalism. He notes the ineffectiveness of international institutions in enforcing international law in comparison with the domestic constitutional model. This institutional weakness compromises the constitutional character of the international legal

⁵⁶ Cf Picciotto, n 4 above, 461.

system (76-81). On the other hand, the increasing institutionalisation and organisation in the international legal system only results in '[p]artial constitutionalizations' (82), intensifying the fragmentation of the world legal order (69-70). *Pace* Dunoff and Trachtman's joint work, Paulus argues that a formal understanding of international constitutionalism associated with institutionalism is not a necessary response to the fragmentation debate (85-86). Departing from the formalist position, Paulus urges an understanding of the international legal system under the substantive paradigm of constitutionalism (87). On this view, what matters to the debate on international constitutionalism is whether the international legal order measures up to *jus cogens*, the basic principles of international law, and constitutional principles (87-107). In other words, from Paulus's point of view, the debate surrounding global constitutionalism should be focused on whether the international legal system actually operates in accordance with constitutional values, including democracy, rule of law, separation of powers, human rights, equality, solidarity, and the division of competences at the different levels of constitutional orders (94-106).

To sum up, with respect to the world legal order itself, global constitutionalism materialises as the international legal system is rendered in the constitutional mould. However, as Paulus admits, 'international law may never possess a constitution in the strict sense of domestic constitutions' (88), even if he envisions international constitutionalism as substantiated with constitutional principles on the domestic model.

⁵⁷ Besson also points out this historical fact in her chapter (381-382).

The tension implicit in the constitutional rendering of international law concerns the issues of translation and mindset surrounding the identity of global constitutionalism, which are discussed next.

III. TRANSLATION AND MINDSET: OF THE IDENTITY OF GLOBAL CONSTITUTIONALISM

Among the many questions resulting from global constitutionalism is whether global constitutionalism is simply a global extension of the state model of constitutionalism as we know it. As Paulus has suggested, the answer is probably not (88). If global constitutionalism is not a simple constitutional transplant from the domestic constitutional order to the world legal order, it requires translation and a change of constitutional mindset to make sense of the meaning of constitutionalism in the globalising world, ie the identity of global constitutionalism.⁵⁸

Relating her concluding chapter to the constitutional rendering of the international legal system, Besson brings the issue of translation to the fore by revisiting the idea of constituent power (383, 388-389).⁵⁹ Aware of its ties to a political community (396),⁶⁰ she reframes the concept of constituent power on her innovative model of international

⁵⁸ See also N. Walker, 'Postnational Constitutionalism and the Problem of Translation' in J. H. H. Weiler and M. Wind (eds), *European Constitutionalism beyond the State* (Cambridge: Cambridge University Press, 2003) 27-54. Cf Koskenniemi, n 50 above, 12-23.

⁵⁹ Dunoff also notes 'the problem of translation' in his chapter (203).

⁶⁰ See generally Loughlin and Walker (eds), n 15 above.

community whose members include states and individuals (395).⁶¹ In this way, she argues for ‘demoi-cratic legitimacy’ in the place of traditional democracy (388-389, 393-399). Specifically, considering the continuing existence of states and the coexistence of multiple national political communities in a constitutionalised international order, Besson acknowledges the importance of the idea of constituent power and adapts it to the complex multilayered ‘international community of communities’ (395-398).

In showing the way out of the democracy deficit facing global constitutionalism through a revised conception of constituent power (384), she further addresses the issues regarding the relationship among different legal regimes in the international legal order and that between the international legal order and state constitutional orders. Although she conceptualises these two relationships as internal constitutional pluralism and external constitutional pluralism respectively (399, 402), at the core of her proposal is to manage both relationships in terms of the democratic quality of each legal regime or order involved on a case-by-case basis (400-406). Based on her revised conception of constituent power, Besson further argues that international law is not *prima facie* less democratic than national constitutions (404). Thus, she not only manages to translate the idea of constituent power to global constitutionalism but also suggests a different mindset in dealing with the potential regime collisions as a result of the multiplication of constitutional orders.

In concluding both her contribution and the collection, Besson highlights the issues

⁶¹ Cf Preuss, n 16 above, 41-45.

arising from global constitutionalism: the unity vs. fragmentation debate on the international legal system, the global legal empire vs. non-constitutional international law divide, the relationship among the national, regional, and international constitutional orders, and the future of the EU constitution as well (406-407). While she tries to translate these questions into one about constitutional pluralism and thus breathe new life into constitutionalism in the postnational era, she concedes that global constitutionalism concerns more than good translation. It requires a new understanding: '[T]he multilateral and multilevel international political community [be] understood as a pluralistic community of communities and as a hybrid community of states and individuals' (406). Only when the changes in the concept of political community and the relationship between states and citizens are 'realised' will global constitutionalism get going.

Thus, a change of constitutional mindset, on which is pinned the hope for 'realising' the coming of a global era of constitutionalism, constitutes a necessary condition for global constitutionalism. In line with this thinking, Kumm emphasises that what underlies global constitutionalism is a 'cosmopolitan cognitive frame for imagining public law' within which the whole structure of public law is made sense of, leading to a cosmopolitan perspective on traditional issues of comparative constitutional law (262-272). For this reason, global constitutionalism opens up new opportunities for constitutionalism.

Here the discussion on global constitutionalism in the collection comes full circle. Seizing the opportunities opened up by global constitutionalism, David Kennedy urges a fundamental rethinking of constitutional thinking in the endless project of reforming

global governance. Contrary to the functionalist reading of global constitutionalism in the Dunoff-Trachtman chapter (5-18), Kennedy provides critical perspectives on global constitutionalism. Situated in the history of international law, global constitutionalism is regarded as one among various efforts in the latest wave to bring the international system under the rule of law (44-53).⁶² For this reason, Kennedy questions the embeddedness of the advocacy for global constitutionalism in the intellectual class that dominates the current international rule of law movement (53-58). In this train of thought, Kennedy's intellectual history of global governance raises the same question as Franck asked in the preface, *'International Institutions: Why Constitutionalize?'* (xi-xiv).

Bearing the role of the knowledge production system in global governance in mind, Kennedy 'worr[ies] that those who work in the constitutionalist vernacular are often dressing up normative projects in sociological terms' (60). As a point of departure, Kennedy distances himself from the tendency towards 'sacralizing the [current] institutional forms' in the constitutionalist discussions of global governance (60-61). On the one hand, Kennedy envisions global constitutionalism as getting rid of the straitjacket of state constitutionalism (62-65). On the other hand, he urges that global governance be transformed even at the cost of the label of global constitutionalism (65-68). In other words, what is at stake in the move towards recasting global governance in constitutional

⁶² Kennedy relates global constitutionalism and global governance to the evolution from the Yale project on the World Order, to the Manhattan school (Columbia University and New York University) on international institutions, to the legal process tradition at Harvard, to the new project on Global Administrative Law, to the new-governance ideas, and up to the critical position on the relationship between the third world and international law (44-51).

terms is a new mindset, which would enable us to see the injustice of the political economy underlying the world order and give us ‘a new spirit of management’ (58, 66-67). Seen in this light, global constitutionalism, or, rather, a transformed global governance, will ‘encourag[e] the human experience of freedom throughout the world of corporate, private, public, and technical expertise’ and thus remake global politics in the twenty-first century (66-68).

To sum up, Kennedy’s critical position not only translates constitutional ideas and suggests a new constitutional mindset but also radicalises global constitutionalism itself.⁶³ In this way, global constitutionalism can be regarded as the bridge to a new politics, which may come even from tribal nationalism or religious fundamentalism among other sources of ‘revolutionary energy’ (66).⁶⁴ If global constitutionalism is inflated to include anything and everything that we may tend to associate with the bringing forth of a new type of global governance, here comes the fundamental question: Do we even need the idea of global constitutionalism at all? Is global constitutionalism just a new bottle for old wine? The emerging global constitutionalism seems to be facing its own identity crisis soon after its new birth.⁶⁵

⁶³ It should be noted that Kennedy holds a less than sympathetic view of global constitutionalism. The author thanks Jeff Dunoff for pointing out this aspect.

⁶⁴ According to Kennedy, other possible sources of political force include the Iraq War, the emergence of new leadership across Latin America, the decline of the European project, the rise of China, and the erosion of confidence in humanism and development (66).

⁶⁵ Besson in her contribution notes the origin of international constitutionalism in the 1930s and its rediscovery in the 1990s (381).

IV. LAW AND LANGUAGE: THE TWO FACES OF THE EMERGING GLOBAL CONSTITUTIONALISM

While global constitutionalism is different from the traditional state model of constitutionalism, the typology of global constitutionalism further indicates that global constitutionalism itself has plural meanings.⁶⁶ As Kennedy notes, the plurality of meanings centred on global constitutionalism not only shows the complexity in translating constitutionalism into what is expected to give form and substance to the juridified view of the world order (60-65).⁶⁷ Moreover, it suggests the ambiguity concerning the identity of global constitutionalism, which sits at the crossroads of law and language. To pursue

⁶⁶ Although this article concentrates only on the types of global constitutionalism discussed in the Dunoff and Trachtman collection, it is noteworthy that there may be another type of global constitutionalism, which is centred on the idea of ‘societal constitution’. See Teubner (2010), n 5 above; Teubner (2004), n 5 above. What is characteristic of this constitutional avant-gardism is a practice-based concept of socio-legal norms of the transnational regulatory networks, public and private. To the extent that the transnational regulatory norms supplement or even supplant positive legal norms, they may be regarded as obtaining a constitutional status *vis-à-vis* existing transnational or domestic regulatory legal frameworks. See Teubner (2010), n 5 above, 331-334. Whether this private or hybrid networked regime can be understood as a source of authority and categorised as another type of global constitutionalism is beyond the scope of this article. Cf D. Grimm, ‘The Achievement of Constitutionalism and Its Prospects in a Changed World’ in *The Twilight of Constitutionalism?*, n 5 above, 3, 19-20. For a critical view of the role of private regulatory regimes in global governance, see C. Offe, ‘Governance: An “Empty Signifier”?’ (2009) 16 *Constellations* 550, 551-554. For a critique of legal scholarship on the relationship between global regulatory regimes and global constitutionalism, see M.-S. Kuo, ‘Between Fragmentation and Unity: The Uneasy Relationship between Global Administrative Law and Global Constitutionalism’ (2009) 10 *San Diego International Law Journal* 439-467.

⁶⁷ For the relationship between juridification/ legalisation and constitutionalisation, see Grimm, n 52 above, 458-459. See also Grimm, n 66 above, 19.

this line of inquiry, constitutional pluralism, which has occupied centre stage in the contributions from Kumm, Halberstam, and Maduro,⁶⁸ is brought to the fore, providing the prism through which the state of global constitutionalism can be duly assessed. A close inspection on how constitutional pluralism is considered an answer to potential constitutional conflicts not only shows the possibilities and limitations of constitutional pluralism but also illuminates global constitutionalism as sitting at the crossroads of law and language. Before showing how global constitutionalism is related to nomos and narratives, let us focus on the issue of constitutionalism in plurality again, albeit through the lens of constitutional pluralism this time.

A. Constitutionalism in plurality redux: constitutional pluralism as the keynote of global constitutionalism

The idea of constitutional pluralism is centred on the plurality of constitutional orders in today's globalising world (chs 10-13). Specifically, global constitutionalism adds four layers of complexity to the imbroglio of constitutional orders over traditional issues addressed in comparative constitutional law literature.⁶⁹

First, the supranational legality of international/ regional legal bodies as a result of their constitutionalisation transforms the relationship between the constitutionalised

⁶⁸ In sum, seven out of the thirteen chapters note the idea of constitutional pluralism. See n 45 above and accompanying text.

⁶⁹ See Rosenfeld, n 11 above, 418-427.

supranational entities and their member states (234).⁷⁰ The much discussed jurisdictional disputes between the ECJ and national constitutional courts of the EU member states in regard to the interpretation of the EU law and its foundational treaties are exemplary.⁷¹

Second, as a treaty-based regime becomes constitutionalised, the relationship among its constituent state members is placed under a supranational umbrella, thereby moving away from the international system towards constitutional ordering.⁷² While not all aspects of the inter-member state relationship in the EU have moved to the constitutional domain, police and judicial cooperation in criminal matters among the member states, for example, have not been entirely exempt from the constitutional scrutiny of the ECJ, even when the so-called third pillar in the pre-Lisbon Treaty structure was in place and not supranational per se.⁷³

Third, with the possible burgeoning of constitutionalised supranational bodies, their interactions with each other and other extramural constitutional orders further complicates the crisscrossing of constitutional orders (279-288). The foremost example is the relationship between the European Court of Human Rights (ECtHR) and the ECJ. With

⁷⁰ See also M. Claes, *The National Court's Mandate in the European Constitution* (Oxford: Hart, 2006).

⁷¹ See generally A.-M. Slaughter et al. (eds), *The European Courts and National Courts: Doctrine and Jurisprudence* (Oxford: Hart, 1998). See also Claes, n 70 above.

⁷² Cf L. Gruber, *Ruling the World: Power Politics and the Rise of Supranational Institutions* (Princeton, NJ: Princeton University Press, 2000) 10.

⁷³ See J. Wouters et al., 'European Constitutionalism beyond Lisbon: Introductory Remarks' in *European Constitutionalism beyond Lisbon*, n 24 above, 1, 8. See also Claes, n 70 above, 575-591.

the constitutionalisation of the European Convention on Human Rights (ECHR) system,⁷⁴ the delineation of the jurisdiction between the ECtHR and the ECJ in interpreting the ECHR poses new challenges to the plurality of constitutional orders in Europe.⁷⁵

Fourth, overlaying the imbroglia of constitutional orders is the complex relationship between different international law regimes and their status *vis-à-vis* national or supranational legal orders under the constitutionalised international legal system (400-401). As Paulus has noted, international constitutionalism does not speak to a systematically constitutionalised international legal system. Rather, looming from the talks of international constitutionalism is ‘[p]artial constitutionalizations’ (82). The de-territorialised, functionally defined regimes such as the WTO and the 1982 UN Convention on the Law of the Sea (UNCLOS) system parallel the territory-based supranational or national entities.⁷⁶ In addition to the regime collision between these partially constitutionalised functional regimes,⁷⁷ as the recent *Kadi* case of the ECJ

⁷⁴ See A. Stone Sweet and H. Keller, ‘The Reception of the ECHR in National Legal Orders’ in A. Stone Sweet and H. Keller (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford: Oxford University Press, 2008) 3, 7. See also W. Sadurski, ‘Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments’ (2009) 9 *Human Rights Law Review* 397, 398-403, 423-450.

⁷⁵ See S. O’Leary, ‘Aspects of the Relationship between Community Law and National Law’ in N. A. Neuwahl and A. Rosas (eds), *The European Union and Human Rights* (The Hague: Martinus Nijhoff, 1995) 23, 33-38.

⁷⁶ See Koskenniemi, n 50 above, 17. See also Koskenniemi (2007), n 2 above, 5, 10.

⁷⁷ See Fisher-Lescano and Teubner, n 50 above. See also Breau, n 53 above, 551-557.

illustrates,⁷⁸ the status of the UN security antiterrorism regime in the EU constitutional order has become a central concern.⁷⁹

Thus, the plurality of constitutional orders, which is the underlying theme of constitutional pluralism, sits at the convergence of the different types of global constitutionalism.⁸⁰ Nevertheless, what lies underneath this plurality of constitutional orders are more serious questions: Is comprehensiveness still constitutive of constitutional ordering in terms of the increase of constitutional domains? If comprehensiveness is definitional of constitution ordering,⁸¹ does the idea of constitutional pluralism suggest that constitutional conflict or regime collision is the inevitable fate of global constitutionalism? At the final analysis, the plurality of constitutional orders as constitutional pluralism embraces appears to implicate the existential issue to global constitutionalism. Does global constitutionalism suggest ordered global governance or a

⁷⁸ Joined Cases C-402/05 P & C-415/05 P. *Kadi & Al Barakaat v. Council of the European Union* [2008] 3 CMLR 41.

⁷⁹ Compare P. D. Sena and M. C. Vitucci, 'The European Courts and the Security Council: Between *Dédoublement Fonctionnel* and Balancing of Values' (2009) 20 EJIL 193 with G. de Búrca, 'The European Courts and the Security Council: Between *Dédoublement Fonctionnel* and Balancing of Values: Three Replies to Pasquale De Sena and Maria Chiara Vitucci' (2009) 20 EJIL 853. Another example of the interrelationship between multiple functional regimes and a constitutionalised regional body is the case of the 'MOX Plant' nuclear facility at Sellasfield, United Kingdom. After a complaint had been raised by Ireland against the United Kingdom on account of the potential environmental effects of the plant, three jurisdictions under three distinct institutional regimes were involved: an Arbitral Tribunal set up under the UNCLOS, another tribunal under the Convention on the Protection of the Marine Environment of the North-East Atlantic, and the ECJ under the European Community and Euratom Treaties. See Koskeniemi (2007), n 2 above, 7.

⁸⁰ See Rosenfeld, n 11 above, 437-452.

new era of constitutional conflicts?⁸² In response to this fundamental question, constitutional pluralism promises to move global constitutionalism on the road to ordered global governance. Yet, it remains to be further analysed whether and to what extent global constitutionalism is able to prevent constitutional conflicts.

B. In the shadow of constitutional pluralism: from constitutional self-aggrandisement to constitutional conflicts?

Several contributors to the book raise the question of whether comprehensiveness is a necessary condition for constitutional ordering.⁸³ Suppose that it is. Thus, as Paulus suggests, constitutional ordering tends to be ‘totalizing’ (109) in the sense that it provides a comprehensive reference framework for public authority and social life under a legal ordering.⁸⁴ However, comprehensiveness seems to cease being associated with global constitutionalism. As Gardbaum points out, the relationship between the supranational regime and its constituent state members indicates that state constitutional ordering is no longer ‘total’ because it is not only supplemented by but also subjected to the

⁸¹ See Grimm, n 52 above, 449-453; Grimm, n 66 above, 7-11.

⁸² See also N. Walker, ‘Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders’ (2008) 6 *I•CON* 373-396.

⁸³ In addition to Paulus (75-80, 90, 97, 108-109), Walker (155, 157), and Dunoff (201-202), who consider comprehensiveness characteristic of traditional state constitutionalism, Kumm and Besson suggest that constitutionalism as a reference framework, within which to theorise and justify public authority, must be ‘comprehensive’ (322) or ‘encompassing’ (389).

⁸⁴ See Kuo, n 32 above. See also M. Kumm, ‘Who Is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law’ (2006) 7 *German Law Journal* 341-369.

supranational constitutional regime (234). On the other hand, despite the discourse on the constitutionalisation of international organizations and the international legal system itself, as Paulus has noted, their processes of constitutionalisation are partial and still ongoing (82).⁸⁵ Taken together, as Walker indicates, what is characteristic of global constitutionalism is the coexistence of multiple constitutional orders, each of which figures only as an ‘incomplete authority system’ (165). Walker thus urges scholars and practitioners to depart from the paradigm of ‘holistic constitution’ for a postnational, nonexclusive and nonunitary constitutional model (164-167).⁸⁶

As a corollary, given that constitutional orders are incomplete and partial, constitutional orders are not set to collide with each other. Rather, their relationship can be governed under a rule of engagement or conflict. On this view, the judicial *Kompetenz-Kompetenz* question concerning jurisdictional conflicts between partial constitutional regimes is a misconception because judicial *Kompetenz-Kompetenz* is associated with legislative *Kompetenz-Kompetenz* and the notion of partial constitutional regime is incompatible with legislative *Kompetenz-Kompetenz*.⁸⁷

Specifically, judicial *Kompetenz-Kompetenz*, the supreme authority concerning judicial interpretations of the fundamental legal rules of a polity, is necessary for a polity to claim legislative *Kompetenz-Kompetenz*, ie a polity’s full capacity to legislate, or,

Cf Preuss, n 32 above, 26.

⁸⁵ Cf Picciotto, n 4 above, 475-476.

⁸⁶ See also N. Walker, ‘Beyond the Holistic Constitution?’ in *The Twilight of Constitutionalism?*, n 5 above, 291-308.

rather, determine its own competence.⁸⁸ Without the judicial *Kompetenz-Kompetenz*, a polity's claim to the full capacity to determine its own competence would be compromised to the extent that its predetermined competence could be changed as a result of judicial interpretations.⁸⁹ Thus, lacking the legislative *Kompetenz-Kompetenz*, none of the plural constitutional orders in the era of global constitutionalism are entitled to assert a comprehensive jurisdiction of constitutional interpretation, thereby dissolving the question of the judicial *Kompetenz-Kompetenz*.⁹⁰ In this way, the idea of constitutional pluralism appears to offer guidance on how to manage the engagement between distinct constitutional orders.

Yet, as Maduro duly points out in another place, legacies of national constitutions have been taken as 'the proxy of constitutionalism'.⁹¹ In other words, the trend to

⁸⁷ See Walker, n 3 above, 349.

⁸⁸ *ibid.*

⁸⁹ For the dialectical tension between constitutional lawmaking and judicial interpretation, see F. I. Michelman, 'Morality, Identity and "Constitutional Patriotism"' (1999) 76 *Denver University Law Review* 1009, 1023. See also M.-S. Kuo, 'Cutting the Gordian Knot of Legitimacy Theory? An Anatomy of Frank Michelman's Presentist Critique of Constitutional Authorship' (2009) 7 *I•CON* 683, 687-688.

⁹⁰ See Walker, n 3 above, 349. In discussing the doctrine of implied power in his contribution to the book, Walker rests his confidence in constitutional pluralism on the ECJ's restrictive interpretation of textually conferred power and the readiness of national constitutional courts to intervene (165). The constraints of textually conferred power, however, are not very reliable in light of a comparative study of the United States Supreme Court jurisprudence regarding Congress's enumerated powers in the United States Constitution. See eg C. H. Johnson, 'The Dubious Enumerated Doctrine' (2005) 22 *Constitutional Commentary* 25, 72-89. On the other hand, Walker's reliance on the intervention of the national courts suggests his submission to a residual claim to the judicial *Kompetenze-Kompetenze* on the national part, contradicting his partialist view of constitutionalism.

⁹¹ See M. P. Maduro, 'From Constitutions to Constitutionalism: A Constitutional Approach for Global

constitutionalise global governance needs to be analysed in light of our constitutional experiences, which are embedded in state constitutionalism. Among the legacies of national constitutions, citizens' inclination to turn to the guardian of the constitution, mostly the (constitutional) courts, to hold the government to account for implementing constitutionalism in its fullness is the underlying cause of the contemporary expansion of constitutionalism, driving the constitutionalisation of politics.⁹² There emerges the trend towards 'juristocracy', which not only contributes to the post-World War II constitutional developments but also defines the processes of constitutionalisation in regard to supranational regimes.⁹³ The role of the ECJ in the EU decades-long process of constitutionalisation stands out among other examples.⁹⁴

It should be noted that the inclination to turn to the court to implement constitutionalism in its fullness by interpreting the constitution in light of the idea of justice is rooted in a modernist state of mind, within which the relationship between

Governance' in D. Lewis (ed), *Global Governance and the Quest for Justice, Volume I: International and Regional Organizations* (Oxford: Hart, 2006) 227, 238-241.

⁹² See Kumm, n 84 above.

⁹³ See generally R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2004).

⁹⁴ See generally M. Everson and J. Eisner, *The Making of a European Constitution: Judges and Law Beyond Constitutive Power* (Abingdon: Routledge-Cavendish, 2007). Ran Hirschl notes the establishment of 'judicial or quasi-judicial binding adjudication apparatuses' in NAFTA (North American Free Trade Agreement) regime, MERCOSUR (Southern Common Market) in South America, and ASEAN (Association of Southeast Asian Nations) and the International Monetary Fund alongside the prime examples of the ECJ, the Inter-American Court of Human Rights, and the Appellate Body in the WTO. See Hirschl, n 93 above, 214-216.

constitutionalism and political power is reconciled.⁹⁵ On this view, the state power ordained by the constitution is conceived of as part of ‘a project of theory, as well as of practice’.⁹⁶ The state, or, rather, the polity, cannot be disassociated from the idea of justice but is rather considered the means to complete the pursuit of justice. Correspondingly, the constitution that underlies the state and its equivalent is to be read and interpreted through theories of justice.⁹⁷ As the multiplication of the functions of fundamental rights and the expansion of the catalogue of constitutional rights suggest, constitutionalism in its fullness is implemented by reading theories of justice into the constitution.⁹⁸ This justice-oriented constitutional mindset implicates that the political system under the constitutional order is assumed to acquire all the powers necessary to deliver on the constitutional promises.⁹⁹ As a result, as Paulus and Walker respectively suggest, constitutional orders that match constitutionalism tend to develop into a totalising system, not only providing a comprehensive blueprint for social life but also functioning as a complete order of public authority (108-109, 157-161). This is the underlying cause for comprehensiveness to be regarded as characteristic of modern constitutionalism.

The character of constitutional omnipotence inherent in modern constitutionalism as

⁹⁵ See P. W. Kahn, *Putting Liberalism in Its Place* (Princeton, NJ: Princeton University Press, 2004) 265-279. See also Kuo, n 32 above.

⁹⁶ Kahn, n 95 above, 270.

⁹⁷ See *ibid* 258, 268-272.

⁹⁸ See Kuo, n 32 above.

⁹⁹ See *ibid*.

described above is the matrix for expanding constitutionalism.¹⁰⁰ It is true that the relationship between constitutionalism and comprehensive constitutional ordering characteristic of state constitutionalism cannot be generalised and even projected onto the global context. Moreover, as the variegated processes of constitutionalisation are partial and still ongoing, what is lacking in global constitutionalism is a constitutional regime that can make a comprehensive claim to be a complete order of public authority.¹⁰¹ Nevertheless, as the expansive, revolutionary interpretations of fundamental rights in state constitutions indicate, the tendency of constitutional self-aggrandisement, which is driven by the urge to perfect a particular constitutional order and to maintain the integrity of its value system, is characteristic of our experiences of constitutionalism.¹⁰² What is more important, the current campaign to deliver constitutionalism beyond national borders originates in the same urge to perfect the particular transnational as well as global constitutional regime and to consolidate the values its constituent members hold dear.¹⁰³ Thus, what accompanies the processes of further constitutionalisation with respect to supranational regimes and the international legal system is the tendency of self-aggrandisement, or, rather, ‘the [individual constitutional regime’s] urge to translate

¹⁰⁰ See *ibid.*

¹⁰¹ See Walker, n 3 above, 349.

¹⁰² See Kuo, n 32 above. See also F. I. Michelman, ‘Integrity-Anxiety?’ in M. Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton, NJ: Princeton University Press, 2005) 241-276.

¹⁰³ See also Peters, n 9 above, 397. But cf M. P. Maduro, ‘Europe and the Constitution: What If This Is As Good As It Gets?’ in *European Constitutionalism beyond the State*, n 58 above, 74-102.

everything on sight to [its] preferred idiom'.¹⁰⁴

Seen in this light, the partialist version of constitutional orders conceived in constitutional pluralism may well be simply a transient phenomenon. What would loom from the plurality of constitutional orders is the collision between the self-aggrandising constitutional regimes that compete to assert comprehensive claims on the constitutional rules governing global governance.¹⁰⁵ Thus, the idea of constitutional pluralism overshadows the tendency to self-aggrandise among constitutional regimes.¹⁰⁶ In other words, constitutional pluralism succeeds in resolving the inter-order constitutional conflicts not by its ability to guide the operation of constitutional orders but rather by presupposing the incompleteness and partiality of constitutional orders in the context of globalization. For this reason, the rule of engagement or conflict in the name of constitutional pluralism is not so much a law-like guidance as a cognitive frame that resembles language.¹⁰⁷ The ambiguity concerning the identity of constitutional

¹⁰⁴ M. Koskenniemi, 'The Politics of International Law – 20 Years Later' (2009) 20 *EJIL* 7, 13. Alexnader Somek characterises the ECJ constitutional jurisprudence in this regard as 'market holism'. See A. Somek, *Individualism: An Essay on the Authority of the European Union* (Oxford: Oxford University Press, 2008) 111-137.

¹⁰⁵ This is illustrated in Advocate General Maduro's opinion in the *Kadi* decision, which indicates a robustly pluralist approach to the relationship between the EU and the international order. See G. de Búrca, 'The European Court of Justice and the International Legal Order After *Kadi*' (2010) 51 *Harvard International Law Journal* 1, 31. See also J. d'Aspremont and F. Dopagne, '*Kadi*: The ECJ's Reminder of the Elementary Divide between Legal Orders' (2008) 5 *International Organizations Law Review* 371, 372.

¹⁰⁶ Although Waker notes that constitutional pluralism may encourage 'a striving for metaconstitutional roots...to entrench [the plural constitutional orders'] self-righteous superiority', he ascribes this 'fundamentalist inclination' to the ties to sovereignty in state constitutionalism. See Walker, n 3 above, 358.

¹⁰⁷ Cf de Búrca, n 105 above, 33. For a discussion on the relationship between language and cognition,

pluralism, law or language, epitomises the current condition of global constitutionalism.

C. Legal nomos or narrative language? global constitutionalism at a crossroads

What has been argued about the issues resulting from constitutional self-aggrandisement by no means suggests that the idea of constitutional pluralism itself is a misconception. Nor is it aimed at portraying a doomsday scenario of constitutional conflicts following the rise of global constitutionalism. Rather, the point here is to show that if the objective of constitutional pluralism is to provide the rule of engagement or conflict to enhance global constitutionalism, it may function less like legal rules than Kumm, Halberstam, and Maduro as well as Besson suggest in their chapters. In the shadow of constitutional self-aggrandisement, the success of the mission of constitutional pluralism pivots more on a novel constitutional cognition than an innovative law of constitutional conflicts. Only inasmuch as constitutional orders are conceptualised as incomplete and partial through the lens of constitutional pluralism can constitutional conflicts be avoided. In other words, despite speaking in the tone of conflict of laws,¹⁰⁸ the character of constitutional pluralism amounts to a constitutional language, providing a cognitive frame in which constitutional thinking would be rethought without being straightjacketed by the

see G. Fauconnier, 'Methods and Generalizations' in T. Janssen and G. Redeker (eds), *Cognitive Linguistics: Foundations, Scope, and Methodology* (Berlin: Mouton de Gruyter, 1999) 95-128. See also R. Hyland, 'The Spinozist' (1992) *77 Iowa Law Review* 805, 832.

¹⁰⁸ For example, Kumm notes 'complex procedural legitimacy' as constitutional pluralism, which comprises jurisdictional legitimacy and due process (290-291).

experiences and memories surrounding state constitutionalism. Thus, if constitutional pluralism operates mainly through the renovation of constitutional language, does it suggest that global constitutionalism as portrayed in the book turns out to be a constitutional heuristics, which is underpinned by a new narrative language, rather than the legal nomos for global governance?

That global constitutionalism functions as language or rhetoric is an idea scattered through the collection. On this view, global constitutionalism is envisioned as imbued with heuristic values. On the one hand, it relieves international law of what Kumm calls ‘disciplinary anxiety’ (260). On the other hand, global constitutionalism prepares a cognitive framework for making new constitutional narratives about global governance.¹⁰⁹ Nevertheless, as Kumm’s contribution indicates, global constitutionalism is considered to be a ‘jurisprudential account’ of ‘hard law’ (262, 311-313) as constitutional pluralism assumes the character of a conflict of constitutional laws. To make sense of the ambiguity between law and language concerning global constitutionalism, it is necessary to take a closer look at the relationship between legal nomos and narrative language.

Law is language to the extent that the law as a ‘symbolic form’ provides a totalising framework of reference within which the world is to be narrated, interpreted, and thus understood.¹¹⁰ As Sanford Levinson speaks of the United States Constitution, ‘The

¹⁰⁹ The contributions to the book that note global constitutionalism as a new language or its conceptual equivalents include Dunoff and Trachtman (22), Fassbender (137), Walker (161-162, 172-173), Dunoff (198), Kumm (258-264, 305 n 86, 316-323), and Besson (392).

¹¹⁰ See P. W. Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (Chicago, IL:

Constitution is a linguistic system... It has helped to generate a uniquely American form of political rhetoric that allows one to grapple with *every important political issue imaginable*'.¹¹¹ Yet, law is more than language. It is aimed to guide human behaviours even by appealing to legal force when necessary, apart from providing a linguistic system in which the meanings of behaviours can be narrated.¹¹² To command the necessary force without degenerating into pure violence, the law needs legitimacy.¹¹³

Thus, while law can be analogised to a linguistic system, the relationship between law and language is more complex than that analogy. As Robert Cover incisively argued, a thick understanding of constitutional law requires taking into account the role of narratives in the jurisgenerative process.¹¹⁴ Without the underlying narratives of legal norms, constitutional law would be thin and stripped down to force, failing to ground the legitimacy of the entire political ordering.¹¹⁵ In contrast, the process of lawmaking in which legal *nomos* is open to narratives is jurisgenerative. A thick version of

University of Chicago Press, 1999) 34-35 (citing and discussing E. Cassirer, *Philosophy of Symbolic Forms, vols. 1-3* (New Haven, CT: Yale University Press, tr R. Manheim, 1953-1957)). See also J. B. White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (Madison, WI: University of Wisconsin Press, 1989) 77-106. For a cautious attitude towards the analogy between language and law, see J. Chin, 'Law as a Species of Language Acquisition' (1995) 3 *Washington University Law Quarterly* 1263, 1290.

¹¹¹ S. Levinson, *Constitutional Faith* (Princeton, NJ: Princeton University Press, 1989) 191 (emphasis added).

¹¹² Contrast R. M. Cover, 'Violence and the Word' (1986) 95 *Yale Law Journal* 1601-1629 with P. P. Frickey, 'Faithful Interpretation' (1995) 3 *Washington University Law Quarterly* 1085, 1093-1094.

¹¹³ See F. I. Michelman, 'Ida's Way: Constructing the Respect-Worthy Governmental System' (2003) 72 *Fordham Law Review* 345, 346.

¹¹⁴ See Cover, n 17 above, 25-40.

¹¹⁵ See *ibid* 19-24.

constitutionalism rests on a broad understanding of the legal nomos beyond the law books. For example, it is true that citizenship is substantiated with the catalogue of fundamental rights.¹¹⁶ Nevertheless, the meanings emanating from citizenship are revealed through the matrix of nomos and narratives. The inflated catalogue of constitutional rights not only corresponds to the unflinching pursuit of justice but is also the legal translation of the enriching history of the status of citizens in the state as recorded in national narratives.¹¹⁷ Thus, the meaning of constitutional nomos can be fully made sense of only by reading its background narratives, while the abundant narratives surrounding the thick concept of citizenship tend to drive the expansion of constitutional normativity.¹¹⁸ It is necessary to bring into the fold of constitutionalism the narratives that surround the initiation, enactment, interpretation, and enforcement of the law in order to understand the meanings contained in the legal nomos.¹¹⁹ Thus emerges a thick version of constitutionalism.

This Coverian nexus of legal nomos and narrative language casts light on the identity of global constitutionalism. As discussed above, constitutional pluralism pins the hope of success more on its appeal to a cognitive transformation than on its status as law.

¹¹⁶ See A. P. Harris, 'Loving Before and After the Law' (2008) 76 *Fordham Law Review* 2821, 2836-2838.

¹¹⁷ For the relationship between national military conscription and universal suffrage following the French Revolution, see P. Bobbitt, *The Shield of Achilles: War, Peace, and the Course of History* (New York, NY: Knopf, 2002) 151-178.

¹¹⁸ For the relationship between the expansion of American political citizenship and the history of national sacrifice, see J. N. Shklar, *American Citizenship: The Quest for Inclusion* (Cambridge, MA: Harvard University Press, 1991) 15-29. See also A. R. Amar, *America's Constitution: A Biography* (New York, NY: Random House, 2005) 395-401, 419-428, 445-447.

Even so, as the contributions from Paulus, Kumm, Halberstam and others suggest,¹²⁰ the emphasis is still on the emergence of global constitutionalism as a new legal nomos (139, 147, 311-313, 333). In light of the matrix of nomos and narratives, however, global constitutionalism would fail to function as a reliable conflict of constitutional laws until it acquires its distinctive narratives with respect to constitutionalism.¹²¹

There is no denying that the legalist stance on global constitutionalism is a strategic choice with an eye to boosting the current movement of projecting constitutionalism beyond the confines of state constitutional law as exemplified in Kumm's chapter (266, 290, 316-317).¹²² Yet, the concern here is about the deflecting effect this strategic emphasis on the legal side may have on reconsidering and thus enriching the necessary narrative language to support a robust version of global constitutionalism.¹²³ By putting out global constitutionalism as an already 'jurisprudential account [of] hard law' as Kumm claims (262, 311-313), this strategy appears to suggest that the final victory of global constitutionalism pivots simply on a change of constitutional mindset: from comprehensivist to partialist, from statist to globalist, from sovereignty to subsidiarity,

¹¹⁹ See Cover, n 17 above, 11-40.

¹²⁰ See n 45 above.

¹²¹ For a critique of narratives and counter-narratives of global constitutionalism concerning the fragmentation vs. unity debate, see Koskenniemi (2007), n 2 above, 24-25.

¹²² In terms of the WTO, Dunoff also notes the strategic motive behind the discourse in its constitutionalisation (202-204).

¹²³ The reconsidering and the enriching of constitutional narratives are political. Cf M. Koskenniemi, 'International Law in Europe: Between Tradition and Renewal' (2005) 16 EJIL 113-124.

and etc.¹²⁴

Without reconstructing the structure of constitutional narrative language embedded in the tradition of state constitutionalism, however, the constitutional ethos that nurtures constitutional self-aggrandisement would remain intact and may resurge unexpectedly, challenging the cognitive frame of global constitutionalism. If the cognitive frame of global constitutionalism only eyes the partialist view of constitutional regimes, the version of constitutionalism it implies would leave the underlying causes of constitutional self-aggrandisement unaddressed. For example, if a strong version of judicial review focused on perfecting constitutional order still frames the contemporary campaign to expand constitutionalism,¹²⁵ global constitutionalism would still live in the shadow of constitutional conflicts as the judiciary-centred process of constitutionalisation is deepening, despite the aspiration towards constitutional pluralism. In this way, global constitutionalism would be ignorant of added values and new meanings that would result from innovative constitutional narratives, thereby becoming ‘jurispathic’.¹²⁶

¹²⁴ This is similar to Philip Allott’s prescription for a better world order. See P. Allott, *The Health of Nations: Society and Law beyond the State* (Cambridge: Cambridge University Press, 2002). For an analysis of the a-political view expressed in Allott’s work, see M. Koskeniemi, ‘International Law as Therapy: Reading *The Health of Nations*’ (2005) 16 EJIL 329-341.

¹²⁵ See eg Cass, n 34 above; Everson and Eisner, n 94 above.

¹²⁶ See Cover, n 17 above, 40-44, 54-55. For an observation of a jurispathic view of law in global administrative law scholarship, see M.-S. Kuo, ‘The Concept of “Law” in Global Administrative Law: A Reply to Benedict Kingsbury’ (2009) 20 EJIL 997, 1002. It may be argued that as a matter of strategic choice, a jurispathic conception of global constitutionalism should take the place of a jurisgenerative one that is based on the Coverian concept of ‘redemptive narrative’. See Cover, n 17 above, 34. Specifically, given the poverty of narratives in the international legal order, being jurisgenerative – nomos buttressed by

Moreover, without developing its own narratives in support of its normative claims, the ‘hard law’ of global constitutionalism is not as certain as Kumm contends (311-313), even if it can get rid of the straightjacket of state constitutionalism. Take Kumm’s ‘complex procedural legitimacy’ again. A central element to this rule of engagement regarding competing claims of constitutional jurisdictions is the principle of subsidiarity. From Kumm’s perspective, through the cosmopolitan cognitive frame, the principle of subsidiarity will take the place of the notion of sovereignty, dissolving jurisdictional conflicts (291-295). However, without taking the narratives surrounding the idea of subsidiarity seriously, the principle of subsidiarity may well fall far short of its assigned mission to constrain the tendency towards centralisation in the allocation of the competences between the higher level and the lower level in a polity.¹²⁷ As Somek points out, the principle of subsidiarity is rooted in a Roman-Catholic doctrine, by which ‘faith in concordance’ is presupposed and there is no antagonism within a community.¹²⁸ Thus, the takeover of the lower level’s competence by the higher level may not contravene

(redemptive) narratives – would virtually become a mission impossible for constitutional pluralism, rendering the conflicts between constitutional orders unresolved. To answer this challenge, Jeff Dunoff suggests departing from Cover’s jurisgenerative position, reconstructing a jurispathic conception of constitutional pluralism – a constitutional conflict of laws without the underpinnings of corresponding narratives – as a redemptive narrative in the sense that the language of global constitutionalism provides a justificatory rhetoric for resolving the issues concerning regime collision. The author thanks Jeff Dunoff for sharing this intriguing reconstruction of Cover’s argument. The argument for a jurispathic conception of global constitutionalism as a redemptive narrative is made in J. Dunoff, ‘A New Approach to Regime Interaction’ (2010) (unpublished manuscript on file with the author).

¹²⁷ See Somek, n 104 above, 144-149.

¹²⁸ *ibid* 149.

the principle of subsidiarity because the acts of the higher level are still ‘part of the *same order*’ in which both the higher and the lower levels coexist.¹²⁹ In this way, the constitutional principle of subsidiarity is like a tiger without teeth, becoming futile. It turns out that in contradiction to Kumm’s confidence, the principle of subsidiarity, a central element to global constitutionalism, may ‘present[] a centralising polity in a decentralising light’.¹³⁰

Although the foregoing position may weaken the legal claim that is currently made about global constitutionalism, it does not negate the cause of global constitutionalism. Rather, admitting that global constitutionalism falls short of hard law, at least at this point of time, but is still in the midst of a jurisgenerative process would bring the necessity of narratives and the corresponding efforts to the fore.¹³¹ While the current versions of global constitutionalism sit at the crossroads of law and language, facing the nexus of legal nomos and narrative language head on will help global constitutionalism to develop into the fundamental law for global governance.

V. CONCLUSION

The rise of global constitutionalism answers the call for a more solid foundation for global governance. It reflects the continuous expansion of modern constitutionalism.

¹²⁹ *ibid* (emphasis in original).

¹³⁰ See G. Davies, ‘Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time’ (2006) 43 *Common Market Law Review* 63, 77.

¹³¹ Cf Koskenniemi, n 123 above, 121-123.

However, the popularity of global constitutionalism cannot be adequately understood without viewing the long history to rein in international politics by the rule of law. Seen in this light, global constitutionalism turns out to be multifaceted and is thus tied to different purposes and imbued with multiple meanings. The many-sidedness of global constitutionalism is enchanting to those who are eager to lend stronger theoretical support to global governance from different vantage points but hard to entail a systematic view of the legal nomos in the global era.

Through a dissection of the Dunoff and Trachtman collection, this article presents a typology of global constitutionalism, which would help to distinguish between the distinct forms of global constitutionalism and thus to understand the multiple meanings of global constitutionalism. In addition, the foregoing analysis shows that there is an ambiguity concerning the identity of global constitutionalism. As illustrated by the idea of constitutional pluralism, global constitutionalism sits at the crossroads of law and language.

To do justice to the prospect of global governance and its corresponding legal order, this article urges that the two faces of the emerging global constitutionalism – law and language – be taken seriously. Undeniably, giving a full account of the dynamics between legal nomos and narrative language in relation to global constitutionalism without being trapped by the tradition of state constitutionalism requires a grand project, which goes well beyond the scope of this article. Also, it may turn out that the normative substance of global constitutionalism brought about by its underlying narratives may not be different from that advocated by contributors to the book. However, a nomos of global constitutionalism rooted in narratives will be more solid than one that pivots merely

on a change of constitutional mindset. A straightforward acknowledgement of the complex nexus of legal nomos and narrative language rather than a strategic movement to juridify the idea of global constitutionalism will be the first step towards a robust version of constitutionalism across the globe.