



## Global Constitutionalism

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### Introduction

There are two c's in "global constitutionalism": constitutionalization and constitutionalism. A third c, constitution, comes to mind; however, it is traditionally established to keep the politics of governments in check. The constitutional norms, principles, and procedures provide a reference frame that operates as a third angle to two conflicting parties. Typically, the notion of global constitutionalism or its precursors emerges in the environment of international organizations and reflects the need to qualify regulatory practices or to put constitutional principles in place. The European Union (EU), the World Trade Organisation (WTO), and the United Nations (UN) have been among the first organizational contexts in which constitutionalization has become a common feature, with the intention of qualifying world trade, environmental, human rights, and postconflict policies based on constitutional principles. These changes reflect a shift from globalized toward constitutionalized international relations. Politically, this development indicates potential conflict following contested constitutional norms, principles, and procedures. This situation raises the question of whether and to what extent the familiar (modern) constitutional reference frame is suitable for assessing and understanding constitutionalism beyond the state. In the absence of government in the global realm, reference to any of the three c's in international relations (IR) theory and international law discourse, respectively, presents both a puzzle and a trigger for the emerging debate about global constitutionalism. For the developing interdisciplinary research program on global constitutionalism, it is most important to distinguish between the central concepts of constitutionalism and constitutionalization. "Constitutionalization" is defined as a process by which institutional arrangements in the nonconstitutional global realm have taken on a constitutional quality. This process frequently occurs in a relatively spontaneous, little coordinated, and even elusive manner. Therefore the emergence and the very constitutional quality of this process remain to be established by further empirical research. In contrast, "constitutionalism" is a theoretical approach; it is a framework rather than a phenomenon. As a framework, it allows for studying and understanding the phenomenon being observed—the shift from globalized toward constitutionalized international relations. However, it is important to keep in mind that because theories, such as constitutionalism, always reflect their context of emergence (time, place, agency), it is possible—and important—to distinguish between different types of constitutionalism, for example, ancient, modern, European, Confucian, late modern.

### General Overviews

Given that the field of global constitutionalism emerged only in the early 21st century, no general overviews of the topic have been published. Instead, the unfolding academic discussion encompasses selected discursive interventions regarding international relations as well as international and European law. As decisive events that triggered an ever more focused debate and discussions about global constitutionalism as a subdiscipline in the social sciences and law, it is possible to identify three distinct changes in world politics: first, the growing impact of principles of fundamental rights on decision-making processes in international organizations considering, for example, trade policy, environmental policy, or fisheries; second, the influence of constitutionalization in the process of European integration; and third, the contested role of the UN Security Council in decisions about military interventions and the application of smart sanctions that have become almost routine practices following the watershed World Trade Center attacks of 11 September 2001. The latter provided the kickoff of a return to the larger questions in international relations (IR) theory as well as an enhanced interdisciplinary collaboration that raised awareness about law and politics across disciplinary boundaries. The sections in this bibliography serve as a systematic map of the emerging field of global constitutionalism.

### LEADING QUESTIONS

The most important references that offer an understanding of and a better focus on what is at stake when discussing global constitutionalism are key articles by leading social scientists that spurred debate by asking big questions. Among them are a number of seminal articles that have generated key conceptual impact and subsequently triggered often interdisciplinary international debate, such as Dieter Grimm and Jürgen Habermas's discussion "Does Europe Need a Constitution?" (see Grimm 1995, cited under the Normative School). This section includes a selection of articles that have made seminal contributions to the debate. Different from international law, in which global constitutionalism has been discussed broadly and intensely since the turn of the 21st century, political science and here especially IR came late to the topic. This is not surprising, as IR scholars have referred to global governance. Yet in light of accountability and democracy issues that reveal the shortcomings of governance approaches, global constitutionalism is gradually finding an entry into that field as well (Manners 2002, Tully 2002, Isiksel 2010; see also Dobner and Loughlin 2010, cited under Edited Volumes and Special Issues, and Global Constitutionalism, cited under Journals; for an early seminal article, see Forst 1999). Leading up to this wider interdisciplinary discussion were especially Walker 2002, Cohen 2004, De Búrca 2010, and Slaughter and Burke-White 2002, which have been particularly vital for defining leading questions about constitutionalism beyond the state. By doing so these works were

instrumental to the debate about global constitutionalism as an approach with relevance for both international relations and international law. The articles in this section were selected for their reach beyond their root disciplines in European law, international law, political theory, IR, or European integration theory. Each is noted for establishing interdisciplinary bridges and for highlighting the relevance of the topic as an academic approach that is necessary in order to grapple with the shift from globalization to constitutionalization that has occurred in the global realm in the early 21st century.

**Cohen, Jean L. "Whose Sovereignty? Empire versus International Law." *Ethics and International Affairs* 18.3 (2004): 1–24.**

In a thorough and critical survey of the literature, Cohen explores the impact of globalization on international law. In particular, she develops a critical assessment of the role of state sovereignty with regard to the UN's impact on global governance. Her recommendation to revise the UN's principled organization draws on constitutionalism and offers an important suggestion that the organization of constitutionalized international relations be scrutinized. Available online for purchase or by subscription.

**De Búrca, Gráinne. "The EU, the European Court of Justice, and the International Legal Order after Kadi." *Harvard International Law Journal* 51.1 (2010): 1–49.**

This article is arguably the most significant intervention in the debate on constitutionalism beyond the boundaries of modern (constitutional) states that ensued from the European Court of Justice (ECJ) ruling in the 2008 case *Kadi and Al Barakaat Foundation v. Council and Commission* (ECJ, cases C-402/05 P and C-415/05 P, 3 September 2008). The *Kadi* ruling brought the European normative legal order to bear in the protection of the fundamental rights of individuals, which had been undermined by the UN Security Council's policy of blacklisting individuals suspected of supporting terrorist activities. The article critically discusses the novel interaction between international law and European law in light of a strengthened European constitutional quality.

**Forst, Rainer. "The Basic Right to Justification: Towards a Constructivist Conception of Human Rights." *Constellations* 6.1 (1999): 35–60.**

From a moral philosophical perspective, Forst develops a constructivist approach that argues for placing the "right to justification" at the center of a revised theory of justice. This theoretical move allows for linking the key elements of freedom, democracy, equality, and tolerance based on human practice. The connection between practice and moral philosophy is a most welcome shift in theories of social and political justice that provides important and innovative theoretical pointers for the emerging approach of global constitutionalism. Available online for purchase or by subscription.

**Isiksel, N. Türküler. "Fundamental Rights in the EU after Kadi and Al Barakaat." *European Law Journal* 16.5 (2010): 551–577.**

Isiksel develops a brilliant rebuttal to De Búrca 2010, the seminal article on *Kadi*, querying whether international organizations, such as the European Court of Justice (ECJ), have taken to committing "acts of disobedience" in defense of fundamental rights, as in *Kadi*. She asserts that such acts are constitutive of a strengthened "supranational constitutional architectonic" in the European Union. Available online for purchase or by subscription.

**Manners, Ian. "Normative Power Europe: A Contradiction in Terms?." *Journal of Common Market Studies* 40.2 (2002): 235–258.**

In this article Manners references Hedley Bull's famous claim that the European Community represents a "civilian power in international relations" ("Civilian Power Europe: A Contradiction in Terms?" *Journal of Common Market Studies* 21.2 [1997]: 235) in making the argument for the EU as a "promoter of norms which displace the state as the centre of concern" (p. 236). Manners claims that civilian power is a valuable addition to the EU's power in international relations. The article refers to the abolition of the death penalty as a case and concludes that normative power is not a contradiction in terms after all.

**Slaughter, Anne-Marie, and William Burke-White. "An International Constitutional Moment." *Harvard International Law Journal* 43.1 (2002): 1–21.**

Slaughter and Burke-White contend that the 11 September 2001 attacks on the World Trade Center have made an impact on global international relations that should be seen as harboring the quality of a "constitutional moment" akin to decisive moves heretofore predominantly observed in the process of national constitutionalization. The suggested analogy has been a vital trigger for the emerging interdisciplinary debate about global constitutionalism. Available online for purchase or by subscription.

**Tully, James. "The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutionalism and Democracy." *Modern Law Review* 65.2 (2002): 204–228.**

In this contribution to the debate about democratic constitutionalism in contexts other than modern, Tully claims that as a central element of democratic constitutionalism, which respects the equiprimordiality of democracy (sovereignty of the people) and constitutionalism (the rule of law), contestation has to be conceptualized as an ongoing process; all individuals must be seen as entitled to access to contestation. Available online for purchase or by subscription.

**Walker, Neil. "The Idea of Constitutional Pluralism." *Modern Law Review* 65.3 (2002): 317–359.**

This article was written in reference to the European experience. By emphasizing the possibility and desirability of the parallel emergence and existence of various types of constitutionalism that are likely to be interconnected or even at times overlapping, Walker develops the central argument of the pluralist school of constitutionalism. As such, the article has been cited as a reference source leading far beyond its original focus on European constitutionalism. Available online for purchase or by subscription.

## BOOKS

Given that in the early 21st century global constitutionalism is not considered a proper discipline or subdiscipline in either law or the social sciences, there are very few books that could be regarded as textbooks. Instead, some Edited Volumes and Special Issues and a number of Monographs and single articles have made a notable impact and have contributed to putting the concept on the map. The subsections here collect the most influential writings on global constitutionalism as an interdisciplinary field in the making.

### Monographs

The concept of global constitutionalism has become a regular if often critically applied reference in international law only since the turn of the 21st century. To political scientists and especially international relations theorists, the concept's application is unfamiliar and arguably suspicious. A literature review shows the recurring efforts to provide definitions, thus sustaining the observation that the field is still unwieldy and in the making. As an approach rather than a phenomenon, global constitutionalism remains confusing to some, raises skepticism among many others, and inspires constructive debate among still others. Here global constitutionalism is defined as an interdisciplinary academic research field. The selected monographs in this section address central issues of global constitutionalism, such as legality, diversity and different types of constitutionalism, and unity versus functional differentiation (both of which lead the authors to focus on a global constitution). These works represent a range of disciplinary perspectives and approaches, including international interactional law, a constitutional perspective of the UN, and a global constitution; the reflection of diversity in constitutionalism shows the interdisciplinary roots of global constitutionalism. Brunnée and Toope 2010 is of particular relevance to students of IR because it succeeds in linking key concepts of international law with leading concepts in (constructivist) IR. In contrast, Cohen 2012 takes up developments in international legal theory and discusses them from a political science perspective. This book is concerned with the changing role of sovereignty (of states and political communities) in light of the constitutionalization of international law in the constellation of global politics. Although written by a German lawyer and in German, Fischer-Lescano 2005 is included because it gives a book-length elaboration of a distinct system-theoretical perspective on global constitutionalism that was developed in collaboration with other leading scholars, such as Gunther Teubner and Ernst-Ulrich Petersmann, who have themselves been offering important contributions to the debate about constitutionalism. With the focus on justice in the context of globalized international relations and its query concerning the core rights of individuals within a global normative order, Forst 2012 fills a significant gap in the discussion of global constitutionalism. Kratochwil 1989 is to be understood as a precursor to early 21st-century interdisciplinary scholarship that engages law and political science when examining global constitutionalism. Written by a lawyer, Krisch 2010 presents a quite balanced and therefore accessible take on constitutionalism. In Tully 1995 James Tully highlights hidden practices of constitutionalism that reflect the diversity of constitutional arrangements that exists beyond leaner assumptions of modern constitutionalism. In the two-volume Tully 2008, he develops his critical approach to democratic constitutionalism further and demonstrates its value for the study of real-world politics. Weiler 1999 is one of the classics of European integration theory and is a seminal reference for lawyers and political scientists alike. Wiener 2008 offers a political science perspective on emerging constitutional quality beyond the state.

**Brunnée, Jutta, and Stephen J. Toope. *Legitimacy and Legality in International Interactional Law: An Interactional Account*. Cambridge Studies in International and Comparative Law. Cambridge, UK: Cambridge University Press, 2010.**

This book addresses the legitimacy of international law with reference to interactions that publicly deliberate the moral quality of norms. By drawing on Lon L. Fuller's concept of legality and on the constructivist debate about norms in international relations, the book offers a practice-based perspective on interactional law that develops Fuller's ideas into an interactive approach to the discipline. Key case studies examine the question of legality with regard to the themes of climate change, torture, and the use of force.

**Cohen, Jean L. *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism*. Cambridge, UK: Cambridge University Press, 2012.**

Cohen observes a tension between policy implementing the principle of human rights, which is increasingly decided by the UN Security Council, and a related threat of the principle of equal sovereignty, which prepared the normative ground for the UN. Although political globalization suggests abandoning the ideal of the sovereign state, it is considered of central importance to maintaining and reforming rights that have come under duress through legalization and political globalization. The book suggests rethinking the concept of federation as a union of states and peoples, a type of constitutional polity that is not itself a state.

**Fischer-Lescano, Andreas. *Globalverfassung: Die Geltungsbegründung der Menschenrechte*. Weilerswist, Germany: Velbrück, 2005.**

This German book on a global constitution takes a Luhmannian systems approach toward constitutionalization. The book argues that especially human rights references have demonstrated a process of functional differentiation on a global scale, which has brought the subsystem of courts to the center of world society.

**Forst, Rainer. *The Right to Justification: Elements of a Constructivist Theory of Justice*. Translated by Jeffrey Flynn. New Directions in Critical Theory. New York: Columbia University Press, 2012.**

This book offers a practice approach to the moral basis of social and political justice. The right to justification as a basic human right qualifies and enables (human) interaction in the global realm and as an organizing principle is likely to become a lead concept of global constitutionalism. This practice-based constructivist approach that allows for including the influential thoughts of both John Rawls and Jürgen Habermas squarely places Forst within the Pluralist School while also speaking to the Normative School of global constitutionalism.

**Kratochwil, Friedrich V. *Rules, Norms, and Decisions on the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs*. Cambridge Studies in International Relations 2. Cambridge, UK: Cambridge University Press, 1989.**

Kratochwil makes an effort to make sense of and explain the role and rule of norms in arenas other than modern nation-states. Noting that students of international relations still need to better understand how norms work, he develops his critical constructivist approach to norms in international relations from a succinct scrutiny of the largely positivist regimes literature in international relations and international law with reference to political theory and public law. The book offers an important conceptual basis for developing global constitutionalism.

**Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford Constitutional Theory. Oxford: Oxford University Press, 2010.**

Apart from developing Krisch's own "postnational approach," which leads beyond constitutionalism, this book provides an excellent review of literature on constitutionalism beyond the state. The text is among the most suitable companions for classes on global constitutionalism.

**Tully, James. *Strange Multiplicity: Constitutionalism in an Age of Diversity*. John Robert Seeley Lectures. Cambridge, UK: Cambridge University Press, 1995.**

With this groundbreaking study, Tully shows that as an approach constitutionalism always bears contextualized meanings, asserting that research on constitutionalism is therefore well advised to distinguish among different types of constitutionalism, for example, ancient,

modern, or contemporary. The contingent quality of constitutionalism as a reference frame requires reconstructive studies to make hidden practices of constitutionalism accountable for constitutional politics. The relevance of the distinctive types of constitutionalism for both political theory and politics is demonstrated with reference to two sets of social practices, which can be distinguished as customary and regulatory, respectively.

**Tully, James. *Public Philosophy in a New Key. 2 vols. Ideas in Context.* Cambridge, UK: Cambridge University Press, 2008.**

These volumes build on Tully's encompassing work on the interplay among individual social practices, political institutions, and philosophical principles of constitutionalism. Tully holds that in order to scrutinize the validity of leading normative constitutional values, it is essential to understand the conceptual limits of the present, such as the neo-Kantian regulative ideal of political communities. He contends that while playing a central role for modern constitutionalists, these conceptual limitations are made visible by political struggles for recognition. This approach highlights hidden constitutional practices and serves as a conceptual vantage point for developing a critical ideal. The work is likely to become a milestone in the emerging approach of global constitutionalism.

**Weiler, J. H. H. *The Constitution of Europe: "Do the New Clothes Have an Emperor?" and Other Essays on European Integration.* Cambridge, UK: Cambridge University Press, 1999.**

With this collection of seminal essays, Weiler makes masterful use of the multiple meanings of "constitution" as "constituting," "contextual," and "constructive." Fittingly, this is the context in which the concept of constitutionalism as an "academic artifact" is introduced.

**Wiener, Antje. *The Invisible Constitution of Politics: Contested Norms and International Encounters.* Cambridge, UK: Cambridge University Press, 2008.**

This book proposes an encompassing approach to norms that allows for the study of distinct political arenas in the global realm. These are generated through individual iterated practices of enacting normative structures of meaning in use. The book focuses on the reconstruction of these normative structures. The impact of individual background experience on normativity in international relations (understood as relations among all types of actors, including individuals) is revealed by a case study distinguishing formal validation, social recognition, and cultural validation of norms. Wiener's approach builds on the normative approach to norms of Kratochwil 1989 and the pluralist approach to democratic constitutionalism of Tully 2008.

## Edited Volumes and Special Issues

As a novel phenomenon in the global realm, global constitutionalism has evolved from more familiar observations of modern constitutionalism (Dobner and Loughlin 2010), constitutionalism beyond the state (Weiler and Wind 2003; Klabbers, et al. 2011; Peters and Armingeon 2009; Dunoff and Trachtman 2009), postnational constitutionalism (Shaw 1999, cited under Combined Perspectives; Krisch 2010, cited under Monographs), and European constitutionalism (Walker 2002, cited under Leading Questions; Loughlin and Walker 2007). Similar to political scientists' attempts to theorize "governance without government" in the 1990s, global constitutionalism grapples with the consequences of globalization as a process that transgresses and perforates national or state borders, undermining familiar roots of legitimacy and provoking a call for new forms of checks and balances.

**Dobner, Petra, and Martin Loughlin, eds. *The Twilight of Constitutionalism? Oxford Constitutional Theory.* Oxford: Oxford University Press, 2010.**

This book brings together a leading group of lawyers and political scientists to discuss the question of the desirability of constitutionalism beyond the state, a topic that was first raised by the Jürgen Habermas–Dieter Grimm debate on the necessity of a European constitution. The text nicely reflects the opposing normative (Grimm, Loughlin) and pluralist (Neil Walker) schools and their respective standpoints in the debate.

**Dunoff, Jeffrey L., and Joel P. Trachtman, eds. *Ruling the World? Constitutionalism, International Law, and Global Governance.* Cambridge, UK: Cambridge University Press, 2009.**

This volume offers an excellent overview of the main arguments of the three schools of global constitutionalism (see Current Developments). The introduction summarizes the what, when, and how of constitutionalism as a phenomenon and an approach, stressing its emergence in close interrelation with globalization. The introduction also identifies the specific tasks and issues that arise for

international organizations. With its accessible style, this book probably comes closest to a textbook on global constitutionalism.

**Klabbers, Jan, Anne Peters, and Geir Ulfstein, eds. *The Constitutionalization of International Law*. Oxford: Oxford University Press, 2011.**

This edited volume provides excellent assessments and summaries of the debate that are accessible for social scientists and lawyers alike. Klabbers's chapter on pluralist constitutionalism and Peters's chapter on the global constitutional community in particular offer cutting-edge input into the debate, elucidating the standpoints of the pluralist and normative constitutionalist schools, respectively.

**Loughlin, Martin, and Neil Walker, eds. *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*. Papers presented at a seminar held at the European University Institute, March 2006. Oxford: Oxford University Press, 2007.**

This edited volume presents a perspective on the development of constitutionalism that draws predominantly on the history of ideas. Leading scholars in the field discuss the concepts of constituent power from different standpoints.

**Peters, Anne, and Klaus Armingeon. "Introduction: Global Constitutionalism from an Interdisciplinary Perspective." In *Special Issue: Symposium; Global Constitutionalism—Process and Substance, Kandersteg, Switzerland, January 17–20, 2008*. Edited by Anne Peters and Klaus Armingeon. *Indiana Journal of Global Legal Studies* 16.2 (2009): 385–395.**

Peters argues "that *global constitutionalization* is likely to compensate for globalization-induced constitutionalist deficits on the national level. . . . *Global constitutionalism*, therefore, has a responsibility and much-needed critical potential" (p. 397; emphasis added). Available online by subscription.

**Weiler, J. H. H., and Marlene Wind, eds. *European Constitutionalism beyond the State*. Cambridge, UK: Cambridge University Press, 2003.**

One of the first collections to use the concept of constitutionalism beyond the state. The volume contains a range of perspectives on the constitutional processes of European integration that have been brought to the fore, especially by the process of the massive European Union enlargement that followed the fall of the Berlin wall and effectively the political remapping of Europe.

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## Journals

The contributions of lawyers to the development of global constitutionalism as an approach outweigh those by political scientists by far. This creates a situation in which much of the analysis is generated from within the legal discipline. Accordingly, most academic work on global constitutionalism is published in legal journals, such as *International Journal of Constitutional Law*, *Indiana Journal of Global Legal Studies*, *American Journal of International Law*, *European Journal of International Law*, *European Law Journal*, and *Global Constitutionalism*.

### **American Journal of International Law. 1907–.**

This law journal mainly publishes contributions from international law, including a selection of interdisciplinary work that offers important background knowledge about constitutional quality in the global realm.

### **European Journal of International Law. 1990–.**

*European Journal of International Law* has long been the cutting-edge journal in the field, providing interdisciplinary access points and basic information about constitutional quality beyond the state. The journal covers international and European law.

### **European Law Journal. 1995–.**

This law journal emphasizes the European Union's process of legal integration and constitutionalization. The journal includes an impressive range of important interdisciplinary and political science contributions on the topic of constitutional quality beyond the state.

**Global Constitutionalism. 2012–.**

This is the only journal with a specific focus on global constitutionalism. The journal is explicitly interdisciplinary and invites contributions from political science and law that analyze and discuss the shift from globalization toward constitutionalization and the emerging constitutional quality beyond the state.

**Indiana Journal of Global Legal Studies. 1993–.**

*Indiana Journal of Global Legal Studies* features interdisciplinary articles on global legal studies, including contributions from political scientists. The journal has published some of the leading work that triggered the emerging interdisciplinary debate on global constitutionalism.

**International Journal of Constitutional Law. 2003–.**

This law journal mainly publishes articles from international constitutional law.

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**Root Disciplines**

The root disciplines of global constitutionalism are international law, European law, European studies, political theory, and international relations (IR) theory. The most promising approaches for developing a research program on global constitutionalism in conjunction with constitutional theory are the global governance approach, the world society approach, and international law. Each of these three approaches is well equipped to study the emergence and effects of globalization from its own legal, sociological, or political science perspective. However, all are hard-pressed to address the normative challenge that is part of the phenomenon of constitutionalization (see Grimm 1995, cited under the Normative School, and Cohen 2012 and Forst 2012, both cited under Monographs). Constitutional rules are seen as commonly agreed; constitutional legitimacy follows from the assumption, albeit hypothetical, that the constitution has been put into place by the *pouvoir constituant*, that is, members of a community who are conceptualized as the constitution's constituent power. Not surprisingly, this concept typically carries greater weight with lawyers than with political scientists and sociologists (see Weiler 1999 and Krisch 2010, both cited under Monographs, Walker 2002, cited under Leading Questions, and Weiler and Wind 2003, cited under Edited Volumes and Special Issues). However, with the debate turning to constitutional change beyond the state, social scientists are increasingly joining in the discussion (see Peters and Armingeon 2009, cited under Edited Volumes and Special Issues). And as attention is directed toward global constitutionalism as an approach, an interdisciplinary debate is taking shape (see Dunoff and Trachtman 2009 and Dobner and Loughlin 2010, both cited under Edited Volumes and Special Issues, and *Global Constitutionalism*, cited under Journals). This debate demonstrates that the academic literature alone (notwithstanding media reports, which often add yet another, altogether different line of meanings) diverges widely in terms of interest and understanding of global constitutionalism. If interdisciplinarity is to become a success, it is crucial to agree on definitions and concepts early on.

**CURRENT DEVELOPMENTS**

Given the range of expectations and approaches to global constitutionalism, it is important to establish conceptual clarifications and some common definitions that provide a common reference. In this way it will be possible to flesh out global constitutionalism as a much-needed research program in the social sciences and law. This section suggests that contributions to the debate are distinguishable with reference to three schools, which can be roughly classified according to their respective functionalist, normative, or pluralist approaches. Although all the schools share in observing a qualitative shift from globalized toward constitutionalized relations and take a historically sensitive approach to constitutionalism, the concept of global constitutionalism, as applied and developed by the contributors to each school, reflects different expectations. A notable quality of global constitutionalism as a field in the social sciences and law is that the distinct perspectives are not informed predominantly by single disciplinary approaches. Instead, the unique characteristic of each school is based on the way the concept is approached and applied and is hence practice based. The main features of the schools have developed through a choice of either mapping or shaping the global realm according to constitutional standards. This practice-based distinction of the three schools can be summarized according to the main standpoints, interests, and principles that situate each school within the field of global constitutionalism. Leading questions address the purpose and possibilities of constitutionalism with regard to developing the most feasible approach to justice and legitimacy in the global realm. Although all three schools generally share in observing an enhanced constitutional quality beyond the nation or state as a result of process, which can be seen as a major shift from globalized toward constitutionalized international relations, and hence agree that global constitutionalism is a social phenomenon, the consequences derived from this observation could hardly be more opposed. The dividing line between the groups emerges according to their answer to the question of whether they consider mapping or shaping the central activity of global constitutionalism. Depending on its standpoint, each school harbors different intentions with regard to global constitutionalism.

## The Normative School

The normative school would view global constitutionalism as a strategic move toward establishing or accommodating a global constitution or at least toward compensating for constitutional loss at the national or subnational level through purposeful constitutionalization in the global realm. Although its contributors share a common interest in shaping the world order according to modern principles of constitutional law and justice, the normative school is sharply divided between supporters and opponents of a global constitution. In sum, this school engages in the project of shaping the global order according to specific normative principles. The key conceptual approach of this group thus rests on the extension of principles, norms, and rules of modern constitutionalism beyond the modern state with the goal of constructing a global order. Good examples of the approach are included in this section. Habermas 2011 puts forward Jürgen Habermas's longtime argument that whereas a global constitution is neither necessary nor desirable, a neo-Kantian, politically constituted world society is. Peters and Armingeon 2009 stands out as an interdisciplinary collection of articles edited by a political scientist and a lawyer. As such, it offers a succinct vantage point on the emerging debate about global constitutionalism and constitutionalization. Fassbender 2009 represents what might be called a stand-alone perspective in the debate by maintaining the argument that the UN Charter should be seen as a global constitution. Quite the opposite position is expressed in Grimm 1995, which does not consider constitutions other than the modern constitutions of nation-states possible or desirable.

**Fassbender, Bardo.** *The United Nations Charter as the Constitution of the International Community*. Leiden, The Netherlands: Nijhoff, 2009.

This book maintains that a global constitution does already or should exist in the form of the UN Charter or the European Union's treaty framework, thus mobilizing Kantian regulative ideas with a view to enhancing the constitutional quality of international conventions. As Fassbender argues, "The UN Charter is a constitution in the clothes of a treaty" (p. 133).

**Grimm, Dieter.** "Does Europe Need a Constitution?" *European Law Journal* 1.3 (1995): 282–302.

Grimm holds that a constitution requires the authority that is granted by a national demos (*pouvoir constituant*) and that therefore a constitution outside modern nation-states is neither required nor desirable. The distinct positions are well delineated in the ensuing debate, which was triggered by Habermas in "Remarks on Dieter Grimm's 'Does Europe Need a Constitution?'" *European Law Journal* 1.3 (1995): 303–307. Available online for purchase or by subscription.

**Habermas, Jürgen.** *Zur Verfassung Europas: Ein Essay*. Berlin: Suhrkamp, 2011.

Habermas argues that this world society is part of the process of constitutionalization beyond the state. A vital element of this process is the almost constitutional treaty of the EU. Similar to European democratic legitimacy, which stems from the equiprimordiality of modern member state citizenship and union citizenship of the federal EU polity, world society is legitimated by different types of citizenship and a world parliament.

**Peters, Anne, and Klaus Armingeon, eds.** *Special Issue: Symposium; Global Constitutionalism—Process and Substance, Kandersteg, Switzerland, January 17–20, 2008*. *Indiana Journal of Global Legal Studies* 16.2 (2009).

This special journal issue stresses the editors' normative take on global constitutionalism, as in Peters's assertion that "*global constitutionalization* is likely to compensate for globalization-induced constitutionalist deficits on the national level. . . . *Global constitutionalism*, therefore, has a responsibility and much-needed critical potential" (p. 397; emphasis added). This normative perspective is reflected by a range of authors who are both supportive and critical of this approach. Articles available online by subscription.

## The Functionalist School

The functionalist school typically studies processes of constitutionalization that are revealed through bargaining and negotiations in the environment of international organizations, such as the World Trade Organization. This school focuses on the impact of constitutionalism on mapping the global terrain according to new standardized procedures and regulatory agreements. The key concept for this school is therefore constitutionalization. Dunoff and Trachtman 2009 offers a good example of the school.

**Dunoff, Jeffrey L., and Joel P. Trachtman, eds.** *Ruling the World? Constitutionalism, International Law, and Global*



**Governance. Cambridge, UK: Cambridge University Press, 2009.**

While this volume offers an overview of the main arguments of the three schools of global constitutionalism (see Current Developments), the editors' introductory chapter gives an excellent summary of the functionalist school's approach.

## The Pluralist School

The pluralist school emphasizes the importance of distinct ancient, modern, and postmodern eras of constitutionalism. This school takes a critical approach to universalist assumptions and theorizes constitutional change as contextualized, contingent, and constitutive. The school's authors would typically question the uncritical reference to the regulative ideal of neo-Kantian federalism or liberal community ideals as stable regulative frames for constitutional change in the global realm. In sum, this school combines mapping and shaping, taking a reflexive approach that integrates the process of structured observation (mapping) with that of normative construction (shaping). That is, the school takes into account the social practices of constitutionalism as they extend beyond modern state boundaries with the intention of identifying the variety of possible and desired principles, norms, and rules of constitutionalism that are considered appropriate by a plurality of global actors. Accordingly, this group involves mostly pluralists, pragmatists, and critical scholars. Good examples of the school are Krisch 2010 (cited under Monographs) and Halberstam and Stein 2009. In Tully 1995, James Tully develops a critical approach to democratic constitutionalism and demonstrates its value for the study of real-world politics. This approach is substantiated further by his *Public Philosophy in a New Key*, which was published in two volumes by Cambridge University Press (Tully 2008, cited under Monographs).

**Halberstam, Daniel, and Eric Stein. "The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order." *Common Market Law Review* 46.1 (2009): 13–72.**

This impressive essay provides one of the most encompassing overviews of the development of constitutionalism beyond the state and as such is a must-read for students of global constitutionalism. As a contribution to the pluralist school, the essay also offers a specific focus on legal pluralism. This is a concept that has been developed in more detail by Jürgen Halberstam in a number of his works. Available online for purchase or by subscription.

**Tully, James. *Strange Multiplicity: Constitutionalism in an Age of Diversity*. John Robert Seeley Lectures. Cambridge, UK: Cambridge University Press, 1995.**

The argument of this groundbreaking book is firmly rooted in the pluralist school.

## Combined Perspectives

Despite the distinct standpoints on how to use global constitutionalism (see Current Developments), it is important to acknowledge that the boundaries between the schools are fuzzy. Often a scholarly perspective is developed from a two-tiered perspective that comfortably combines two schools. Examples for this approach are Anne Peters's call for purposeful constitutionalization to compensate for normative deficits following globalization (Peters 2009); Matthias Kumm's functionalist distinction between lowercase *c* and capital *C* constitutionalism, on the one hand, and his cosmopolitan claim for constitutionalism "as a jurisprudential account claiming to describe the deep structure of public law" (Kumm 2009, p. 262), on the other; Jo Shaw's postnational approach to European constitutionalism, which advances a normative argument for responsibility while discarding the modern constitutional architecture favored by the normative school's main protagonists (Shaw 1999); and Nico Krisch's combination of the functionalist and pluralist schools when writing on global administrative law (Kingsbury, et al. 2005) and his development of the concept of postnational constitutionalism (see Krisch 2010, cited under Monographs). Another way two schools combine is the shared focus of some members of the normative and pluralist schools on the way nonstate actors are able to exercise agency, that is, to shape the development and modification of constitutional norms (Forst 2012 and Wiener 2008, both cited under Monographs). There is, in sum, sufficient potential for arguments to be had and positions to be refined. All this should be achieved based on more systematic interdisciplinary research. The scholarship contributing to the interdisciplinary field of global constitutionalism will need to keep its two constitutive dimensions of mapping—describing the shift from globalized toward constitutionalized relations while identifying their constitutional substance and shaping (i.e., improving) the conditions and substance of this shift according to normative standards—analytically apart. From this background it will be possible to identify the critical juncture in the relational processes of mapping and shaping constitutional development with global reach. Weiler and Wind 2003 demonstrates well that contributions to the pluralist school often draw on studies of regional or subnational processes of constitutionalization beyond the state.

**Kingsbury, Benedict, Nico Krisch, and Richard B. Stewart.** "The Emergence of Global Administrative Law." *Law and Contemporary Problems* 68.3 (2005): 15–61.

This article takes a lead in promoting a more pragmatic than normative approach to global constitutionalism dubbed "global administrative law." In doing so the article connects functionalist and pluralist school arguments while refraining from more specific engagement with a discussion of constitutional quality as the normative dimension underpinning order in the global realm.

**Kumm, Mattias.** "The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State." In *Ruling the World? Constitutionalism, International Law, and Global Governance*. Edited by Jeffrey L. Dunoff and Joel P. Trachtman, 258–324. Cambridge, UK: Cambridge University Press, 2009.

Drawing on the distinction between lowercase *c* and capital *C* concepts of constitutionalism, this chapter makes a pluralist cosmopolitan argument while taking a strong normative stance on the interrelation between international and domestic law. As such, the chapter has already become a major reference for global constitutionalism.

**Peters, Anne.** "The Merits of Global Constitutionalism." In *Special Issue: Symposium; Global Constitutionalism—Process and Substance, Kandersteg, Switzerland, January 17–20, 2008*. Edited by Anne Peters and Klaus Armingeon. *Indiana Journal of Global Legal Studies* 16.2 (2009): 397–411.

This is the lead article of the first special journal issue on global constitutionalism that brings together lawyers and political scientists in a law journal. Although based within the normative school, Peters's argument reflects the functionalist, or utilitarian, logic of filling the domestic gap of constitutional quality that emerged in the process of global constitutionalization. Available online by subscription.

**Shaw, Jo.** "Post-national Constitutionalism in the European Union." In *Special Issue: The Social Construction of Europe 1999*. Edited by Thomas Christiansen, Knud Erik Jorgensen, and Antje Wiener. *Journal of European Public Policy* 6.4 (1999): 579–597.

This article was published in a special issue on social constructivism in international relations. The article's claim that the particular normativity of the European Union's constitutionalism was to be conceptualized as postnational was a much-noted move. Shaw highlights an important conceptual link between the normative and the pluralist schools of global constitutionalism. The article has become a standard reference for the debate about emerging European constitutional quality, especially concerning citizenship and constitutional change in the European Union. Available online for purchase or by subscription.

**Weiler, J. H. H., and Marlene Wind, eds.** *European Constitutionalism beyond the State*. Cambridge, UK: Cambridge University Press, 2003.

This edited volume brings together a group of scholars who reflect on the phenomenon of constitutional quality beyond the state from an interdisciplinary perspective. The text is an expression of what is best summarized as the Florence school of constitutionalism and offers important pointers for the developing approach to global constitutionalism from a regional perspective.

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[BACK TO TOP](#)