# Introduction: Who recognizes the emperor's clothes anymore?

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*This Introduction to the Symposium on Constituent Power reflects on the changes subsequent to the transfer of fundamental constitutional norms from domestic to global contexts. This transfer raises the issue of legitimate global order. Is it possible to address this issue of legitimacy of global governance by shifting the conceptual focus from debates about global constitutionalization towards the involved multiple actorship as a potential constituent power? Is asking a question about the* pouvoir constituant *helpful in analyzing global constitutionalism as a remedy for the shortcomings of global governance? All contributions to this symposium elaborate on the insight that the concept of constituent power offers a crucial conceptual tool for mapping "unbound" constitutional quality. The developing process of global constitutionalization appears to go hand in hand with a contestation of the very norms promoted by global constitutionalism. This observation raises some general issues about the ultimate effectiveness of global constitutionalization which this symposium attempts to cope with.*

## 1. Questioning constituent power

This Symposium brings together a selection of articles by leading scholars of global constitutionalism.[1] Reflecting on the advanced state of global constitutionalization as a phenomenon that has brought specific nominal changes in the wake of the transfer of fundamental constitutional norms from domestic to global contexts, the contributors share an interest in the contested legitimacy of global governance. Given

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some notable claims to public authority by a range of international organizations, the contributors focus on the looming issue of legitimate global order. All contributions explore the question whether this issue might be addressed by shifting the conceptual focus from debates about global constitutionalization as a measure steering global governance (i.e., adopting the emperor's perspective, as it were) towards an involved, multiple actorship as a potential constituent power (i.e., seeking to adopt a bottom-up perspective of the beholder). In doing so, they explore a principled analytical approach to global constitutionalism as a framework theory enabling an analysis of the processes of global constitutionalization and their effects.

To that end, the contributions address the leading research objective, i.e., whether asking a question about the *pouvoir constituant* (constituent power) is helpful in analyzing global constitutionalism as a remedy for the shortcomings of global governance. This is done from their respective home disciplines in global governance, international relations theories, and European and international public law. Taking up this core concept of constitutional theory might appear analytically rather far-fetched for its highpoint of development is squarely linked with twentieth-century modern state building. Yet, as the workshop's discussions revealed, the concept of constituent power often provides a helpful conceptual tool for mapping "unbound" constitutional quality, that is, constitutional quality that is not bound by either the constitutional matrix or the constitutional trajectory of the state. Global constitutionalization is often referred to as a process which leads to a growing constitutional quality of institutional settings in the global realm.[2] However, a closer look tells us that whether the typical phenomena that are described as instances of constitutionalization actually do lead to something akin to constitutional quality remains a question to be answered through empirical research.

With a view to conducting that kind of research, the contributors to this symposium begin from the general assumption that constitutional quality reflects normative meanings generally shared by a given group of people. For this ground principle to be transferred into a global realm, the major challenges of both multiple actorship (i.e., *pouvoir constituant*) and shared normative roots (i.e., the acknowledged external constitutional authority) remain to be addressed. Given the limited scope of this symposium, we begin with a discussion of the former. To that end, all contributions start from the insight that the concept of constituent power offers a crucial conceptual tool for mapping "unbound" constitutional quality. Each author advances the argument that asking a question about constituent power in global institutional environments that are not state-bound offers a novel and meaningful perspective on addressing legitimacy-related problems of global governance. The starting point of this argument is a growing gap between the significantly rising number and relevance of legal

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[2]   *Cf., e.g.*, Jeffrey L. Dunoff & Joel P. Trachtmann, *A Functional Approach to International Law*, in Ruling The World? Constitutionalism, International Law, and Global Governance 3 (Jeffrey L. Dunoff & Joel P. Trachtmann eds., 2009); Anne Peters & Klaus Armingeon, *Introduction to Global Constitutionalism from an Interdisciplinary Perspective*, 16(2) Ind. J. Global Legal Stud. 397 (2009); Petra Dobner & Martin Loughlin, The Twilight of Constitutionalism (2009).

opinions, for example in the human rights treaty regime, and the lack of compliance with them.[3] In other words, the process of development of global constitutionalization appears to go hand in hand with a contestation of the very norms promoted by global constitutionalism, i.e., the establishment of constitutional principles and norms in an environment of global institutions.[4] This observation raises some general issues about the ultimate effectiveness of global constitutionalization. For one, it could be argued that, if adding fundamental constitutional norms to entities such as international organizations or treaty regimes that, generally speaking, operate within the global realm and therefore differ considerably from domestic constitutional settings, does not generate the intended legitimacy push, then the concept of "constitutionalism beyond the state"[5] may require qualification. This qualification depends on both the *practice* and, relatedly, on the *context*, of global constitutionalization. Without substantiating both the practice and the context through systematic and comparative empirical research, constitutionalization remains an elusive normative claim, even though it appears to be possible in practice. Whether or not this practice is necessarily desirable as an effective and welcome measure stands to be explored in more detail.

Considering this state of the art of global constitutionalism as an emerging theoretical framework, this symposium explores the new analytical potential afforded by global constitutionalism as a novel theoretical approach to global governance. Notably, global governance has moved beyond a mere analysis of international relations as inter-state relations, for example by adding regulative and principled dimensions of governance in order to monitor, steer, and control politics and policy beyond the state.[6] By contrast, the matrix of global constitutionalism includes a normative move towards the dimension of legitimate public authority.[7] As such, it promises novel theoretical tools for analyzing the potential impact of multiple actorship and claims to authority and participation. Given this symposium's focus on the concept of *constituent power* as a starting point for research on changing global constitutional quality, the contributions discuss processes of constitutionalization and their effect as well as critically assess the foundations of global constitutional quality. In doing so, they address anew longstanding critical questions regarding the relation between *pouvoir constituant* and *pouvoir constitué*.[8]

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[3]   Reference to Andreas von Staden's inaugural lecture in May 2014 at the University of Hamburg (CGG Lecture Series 2014).

[4]   *See* Jean L. Cohen, *Whose Sovereignty? Empire Versus International Law*, 18(3) Ethics & Int'l Aff. 24 (2004); Jean L. Cohen, Globalization and Sovereignty. Rethinking Legality, Legitimacy, and Constitutionalism (2012).

[5]   Joseph H. H. Weiler & Marlene Wind, European Constitutionalism Beyond the State (2003); Gráinne de Búrca & Joseph H. H. Weiler, The Worlds of European Constitutionalism 2 (2012).

[6]   Michael Zürn, André Nollkaemper, & Randall P. Peerenboom, Rule of Law Dynamics—In an Era of International and Transnational Governance (2012).

[7]   *Cf.* Mattias Kumm et al., *Editorial. How Large Is the World of Global Constitutionalism?*, 3(1) Global Const. 1 (2014); Nico Krisch, Pouvoir Constituant *and* Pouvoir Irritant *in the Postnational Order*, 14(3) Int'l J. Const. L. 657 (2016).

[8]    J. Donald Galloway, *Citizenship: A Jurisprudential Paradox*, *in* European Citizenship: An Institutional Challenge 65–82 (Massimo La Torre, ed.,1998); Peter Niesen, Transnationale Gerechtigkeit und Demokratie: Ein exploratives Forschungsprogramm 7–25 (2012); Markus Patberg, *Against Democratic Intergovernmentalism—The Case for a Theory of Constituent Power in the Global Realm*, 14(3) Int'l J. Const. L. 622 (2016).

To introduce the theoretical background to this issue's contributions, the remainder of this introduction proceeds in three steps: First, we present the concept of "unbound" constitutional quality as opposed to state-bound constitutional quality, and hold that it is indicated by multiple actorship (rather than the people) as constituent powers, on the one hand, and by shared normative roots indicated by shared meanings-in-use (rather than a common external authority), on the other (Section 2). Second, we recall core definitions of global constitutionalism such as the distinction between the process of global constitutionalization, the theoretical framework of global constitutionalism, as well as the conceptual distinction of constitutionalism "beyond" the state, on the one hand[9] from constitutionalism that is "unbound" from the state, on the other (Section 3).[10] And, third, we introduce each contribution to the symposium in its turn (Section 4).

## 2. A bifocal approach to constitutional quality

By raising the question of a normative role of the constituent power in the global realm as an area where constitutionalization is literally "unbound" from the state, and therefore placing constitutional quality outside state-bound authority and practices, we take a reflexive perspective on constitutionalization in the global realm. However, this perspective does not altogether abandon the normative dimension of constitutionalism, although studies on global constitutionalism face a significant dilemma. The entire debate about constitutionalization demonstrates that constitutional elements are not limited to the nation-state, but are increasingly observable in the global realm "beyond the state." Traditional constitutional theory, however, has developed in the context of the nation-state and is not easily transferable from state-bound contexts to the global realm. The concept of constituent power has suffered from strong ambiguities right from its original contextual frame:[11] it is still open to debate whether it constitutes a normative or a sociological concept. Prominent authors have argued that the position of the people as rights holders, which was the traditional meaning of the doctrine of "constituent power" in the theory of popular sovereignty, essentially constitutes a projection of the legal order, and has never worked out in a historical perspective in the sense that the widespread naturalistic understanding seems to suggest.[12]

The problem becomes even more apparent once we try to export the concept into the global realm. For, given the novelty of this kind of transfer, it is hard to anticipate whether moving traditional elements of constitutional theory into the global realm will

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[9] WEILER & WIND, *supra* note 5.

[10] Antje Wiener & Stefan Oeter, *Constitutionalism Unbound: Developing Triangulation for International Relations*, Project, Wissenschaftsstiftung des Senats der Stadt Hamburg, 2011, *available at* http://www.wiso.uni-hamburg.de/professuren/global-governance/forschung/abgeschlossene-projekte/constitutionalism-unbound/.

[11] MARTIN LOUGHLIN & NEIL WALKER, THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM (2007).

[12] Christopher Thornhill, *Contemporary Constitutionalism and the Dialectic of Constituent Power*, 1(3) GLOBAL CONST. 369 (2012).

work at all, let alone whether it will generate similar effects as in the domestic realm in the sense of creating an effective constitutional order. We observe the evolution of new modes of governance beyond the state, but it is an open question whether the transfer of constitutional "bits and pieces"[13] is capable of fulfilling the classical functions attributed to them by modern constitutionalism (i.e., the functions of constituting and limiting governance). In particular, two core questions remain unanswered: One is the question of constituent power, i.e. who forms the community that might legitimate the existence of a constitutional order? The other is the question of normative roots, i.e., what kind of normative baggage is actually present as multiple actors encounter one another in the global realm, and what shared normative meanings-in-use enable these actors to agree on a set of ground rules? We hold that, as long as the answers to these two questions are pending, global constitutionalism is at best enigmatic. In the context of the European Union (EU), Joseph H. H. Weiler addressed the problem spot on when asking whether the "new (constitutional) clothes" had an "emperor"?[14] With regard to the current move towards global constitutionalization, the question at hand is whether the multiple emperors' (constitutional) clothes are actually visible in the eyes of the people? We argue that to answer this question it is necessary to begin by raising a question about the actors that are likely to take the place of something akin to the familiar constitutional concept of constituent power; and if they are, it remains to be established whether they actually share normative roots. Only once both such actors and their normative roots are identified, we are likely to obtain a more solid assessment of the substance of global constitutional quality.

To lift this conceptual veil and add a substantive content, we suggest taking a bifocal—empirical and normative—research perspective. For, normatively speaking, contestations of fundamental constitutional norms in the global realm such as, for example, contestation of compliance with specific norms, are expected to reveal an access point for assessing constitutional quality beyond the state. In moments of contestation, the normative structure of meaning-in-use is enacted.[15] Therefore we suggest taking moments of contestations as an empirical point of departure for mapping specific normative claims as well as identifying the actorship involved in raising these claims. According to the bifocal approach, which conceptualizes normative claims and empirical research as relational and therefore constitutive of the research result, contestation performs a dual analytical role.[16] Accordingly, the concept of contestation

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[13]    Deidre Curtin, *The Constitutional Structure of the Union: A Europe of Bits and Pieces*, 27 Common Mkt L. Rev. 709 (1993).

[14]    Joseph H. H. Weiler, The Constitution of Europe: Do the New Clothes Have an Emperor? And Other Essays on European Integration (1999).

[15]    Jennifer Miliken, *The Study of Discourse in International Relations: A Critique of Research and Methods*, 5(2) Eur. J. Int'l Relations 225 (1999); Antje Wiener, The Invisible Constitution of Politics: Contested Norms and International Encounters 62 (2008).

[16]    James Tully, Strange Multiplicity: Constitutionalism in an Age of Diversity (1995); Wiener, *supra* note 15, at 62; Nicole Deitelhoff & Lisbeth Zimmermann, *Things We Lost in the Fire: How Different Types of Contestation Affect the Validity of International Norms*, PRIF Working Paper No. 18 (2013), *available at* http://www.ssoar.info/ssoar/handle/document/45520; Christopher Daase & Nicole Deitelhoff, *Internationale Dissidenz—Ein Forschungsprogramm*, *in* Macht und Widerstand in der Globalen Politik 163 (Julian Junk & Christian Volk, eds., 2013).

entails a reflexive and a normative dimension: As a *social practice*, contestation provides discursive access to the constitution of normative claims. As a *normative principle*, access to contestation is an organizing principle of legitimate political order.[17]

We argue that if and when these claims can be identified as meaningful to a specific group, and if this group shares solid normative roots based on shared normative meaning-in-use, then constitutional quality is indicated *through practice*. That is, while cosmopolitans would expect fundamental constitutional norms to derive their normative force from the universal quality of the norm itself—which may or may not be valid to actors in the global realm—we contend that constitutional quality in the global realm derives its normative force predominantly from the practice of (re)enacting normative structures of meaning-in-use which acquires validity through "cultural validation," i.e., the specific normative interaction generated by an individual's spontaneous reference to their own background experience.[18]

With the establishment of the international community through international conferences, conventions, and treaties and, in parallel, through the strengthened and growing political authority of modern nation-states,[19] constitutionalized communities emerged as "state-bound."[20] Throughout the period of modern state-building, a constitution—whether written or unwritten—was expected to refer to a specific population, a territory, and a government.[21] Classical international law was grounded in state-bound constitutionalism and the exclusive role of states in forming "law beyond the nation-state." In order to understand the legacy of this school one might consider the current debate on global constitutionalism and the "sovereigntist" strand of international law.[22] However, we contend that the paradigm of state-bound constitutionalization entails two serious political shortcomings dating back to its very origins. First, state-bound constitutionalization involves drawing political boundaries that do not overlap with given social and territorial borders (especially in Africa), and, second, it sets aside constitution-making that was not linked to the central institutions of the state. This marginalization of constitution-making not linked to state institutions has been well demonstrated, for example, by the cases of the Canadian First Nations, Latin and South American Indian nations, for example in Mexico or Bolivia, or the Maoris in New Zealand.[23] The borders constituted in the process of colonial state-building persist as a burdensome legacy, framing "nation states" that experience difficulties in

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[17] *Cf.* Antje Wiener, A Theory of Contestation (2014).

[18] Wiener, *supra* note 15, at 62; Kotzur, *supra* note 7.

[19] Charles Tilly, The Formation of National States in Western Europe (1975).

[20] Hauke Brunkhorst, Legitimationskrisen. Verfassungsprobleme der Weltgesellschaft (2012); Thornhill, *supra* note 12.

[21] Thomas Paine, Rights of Man: Answer To Mr. Burkes's Attack on the French Revolution (repr. 2nd ed., Hackett 1992) [1791/92].

[22] Eric A. Posner, The Perils of Global Legalism (2009); Cohen, *supra* note 4.

[23] Jane Jenson, De-Constructing Dualities: Making Rights Claims in Political Institutions. New Approaches to Welfare Theory 127–142 (1993); Tully, *supra* note 16; Almuth Schilling-Vacaflor, *Democratizing Resource Governance through Prior Consultations? Lessons from Bolivia's Hydrocarbon Sector*, GIGA Working Paper No. 184 (2012); Cris Shore, *"Multi-Level Governance, or Governmentality"? Reflections on the EU's System of Governance*, 3 ConWEB Research WebPapers on Constitutionalism and Governance Beyond the State (2009).

understanding themselves as political communities.[24] Traditional strategies of nation-building have proven to be more than ambivalent, with the temptation to force rather diverse cultures and groups into the framework of an "imagined" homogeneous nation,[25] be it by genocide or "ethnic cleansing."[26] Competing attempts by existing communities, such as First Nations and indigenous peoples, to constitute their own social orders and political communities, were heavily contested by post-colonial states. Only rather recent developments have brought a wave of constitutional change trying to accommodate such sub-state constitutionalism.

## 3.  From "beyond" the state to "unbound" by the state

In order to take stock of the potential processes of constitutionalization that emerge in the absence of a central authority of a nation-state, we argue that with the transfer of constitutional norms and principles from the domestic realm into the global realm, the process of state-bound constitutionalization has become conceptually "unbound." This process involves, for example, attaching norms, principles, and procedures to international organizations. While the relevant literature, which—with notable exceptions (e.g., Cohen, Isiksel, Thornhill, Brunkhorst, Habermas, and others)—has been developed largely by international lawyers, has dubbed this process "global constitutionalization" or "constitutionalization beyond the state,"[27] we refer to this transfer as global constitutional spillover under the conditions of unbound constitutionalism. Against this background, we subsequently raise a critical question about the substantive implications that have been triggered by this development.

Given the relative novelty of the emerging field of global constitutionalism, and especially taking into account this field's interdisciplinary nature, we elaborate on the definitions used by the contributions in this symposium. In accordance with the leading literature in the field of European constitutionalism,[28] the term constitutionalism is defined as a theoretical framework (rather than a phenomenon) that guides research on constitutionalization. As the sociology of knowledge holds, theories reflect their context of emergence. This condition of contingency is reflected in the academic

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[24]  BASIL DAVIDSON, THE BLACK MAN'S BURDEN: AFRICA AND THE CURSE OF THE NATION-STATE (1992); Paul Nugent, *Arbitrary Lines and the People's Minds*, *in* PAUL NUGENT, AFRICAN BOUNDARIES: BARRIERS, CONDUITS AND OPPORTUNITIES 35 (1996).

[25]  BENEDICT ANDERSON, IMAGINED COMMUNITIES (1983).

[26]  Veena Das, *Collective Violence and the Shifting Categories of Communal Riots, Ethnic Cleansing and Genocide*, *in* THE HISTORIOGRAPHY OF GENOCIDE 93 (Dan Stone ed., 2010); MICHAEL MANN, THE DARK SIDE OF DEMOCRACY: EXPLAINING ETHNIC CLEANSING (2005).

[27]  RULING THE WORLD?, *supra* note 2; JAN KLABBERS, ANNE PETERS, & GEIR ULFSTEIN, THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW (2009); Anne Peters, *The Merits of Global Constitutionalism*, 16(2) IND. J. GLOBAL LEGAL STUD. 397 (2009); WEILER & WIND, *supra* note 5.

[28]  Paul Craig, *Constitutions, Constitutionalism, and the European Union*, 7(2) EUR. L.J. 125 (2001); GRÁINNE DE BÚRCA & JOANNE SCOTT, CONSTITUTIONAL CHANGE in the EU (2000); DE BÚRCA & WEILER, *supra* note 5; Miguel Poiares Maduro, *Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism*, *in* RULING THE WORLD?, *supra* note 2, 356; Neil Walker, *Flexibility Within a Metaconstitutional Frame*, *in* CONSTITUTIONAL CHANGE IN THE EU: FROM UNIVERSALITY TO FLEXIBILITY 9 (Gráinne De Búrca & Joanne Scott eds., 2000); WEILER, *supra* note 14; WEILER & WIND, *supra* note 5.

community which shares knowledge through empirical observation and exchange. It is particularly helpful to refer to this condition when the observation of phenomena eludes available theoretical frameworks. Accordingly, it is helpful to take the different contexts and cultures of constitutionalism into account when trying to understand unbound constitutionalization.[29] Thus, global constitutionalism is defined as a framework approach for a study of constitutionalization in the global realm. Based on a, by now thriving, literature on global constitutionalism, we can observe the emergence of an interdisciplinary field of global constitutionalism.

Preliminary attempts at mapping this field suggest that it may be roughly subdivided into "three strands": functionalist, normative, and pluralist.[30] The first strand entails a transfer, motivated by a functionalist rationale, of fundamental constitutional norms from the domestic realm into the global one. According to major scholars of this school of thought, the functionalist approach has been developed with reference to "taxonomic" rather than "normative" criteria.[31] It is to be understood as an attempt to describe the spread beyond the state of constitutional elements that might help to enhance the legitimacy of global governance institutions.[32] The second strand takes the opposite view. It argues that global constitutionalization is a necessary normative corrective to the emergence of global governance, given that through the transfer of constitutional norms and principles into the global realm, state-bound constitutionalization has lost its normative quality.[33] While the first view can therefore be considered as "positive sum" constitutionalization, the second view is working with a concept of "zero sum" constitutionalization. By contrast, the third strand includes scholars who prefer a pluralist view that expects, and endorses, the parallel existence of different types and degrees of constitutionalization.[34] Not surprisingly, this strand covers a relatively wide range of theoretical perspectives, which do not always interact.[35] Accordingly, the pluralist strand's understanding of constitutionalization is neither that of a "positive sum" nor that of a "zero sum" game, for it takes a relational perspective on constitutionalization and considers the normative potential of constitutionalization to reflect the conditions in the context of which constitutional norms are enacted. In other words, the pluralist approach conceptualizes constitutional quality

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[29] CHARLES H. MCILWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN (1975); TULLY, *supra* note 16; Antje Wiener, *Why a New Journal on Global Constitutionalism?*, 1(1) GLOBAL CONST. 1 (2012).

[30] WIENER, *supra* note 29.

[31] Dunoff & Trachtman, *supra* note 2.

[32] Allen Buchanan & Robert O. Keohane, *The Legitimacy of the Global Governance Institutions*, 20 (4) ETHICS & INT'L AFF. 405 (2006); Anne-Marie Slaughter, *International Law and International Relations Theory*, *in* THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION: THEORETICAL PERSPECTIVES 16 (Eyal Benvenisti & Moshe Hirsch eds., 2004); *contra* COHEN, *supra* note 4.

[33] JÜRGEN HABERMAS, ZUR VERFASSUNG EUROPAS: EIN ESSAY (2011); Peters, *supra* note 27.

[34] Daniel Halberstam, *The Promise of Comparative Administrative Law: A Constitutional Perspective on Independent Agencies, Comparative Administrative Law*, University of Michigan Public Law Working Paper (2010); Walker, *supra* note 28.

[35] *See* Maduro, *supra* note 28; Gráinne De Búrca, *The EU, the European Court of Justice and the International Legal Order after Kadi*, 1 HARV. INT'L L.J. 51 (2009); DE BÚRCA & WEILER, *supra* note 5; *compare with* NICO KRISCH, BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW (2010); Halberstam, *supra* note 34; 1 JAMES TULLY, PUBLIC PHILOSOPHY IN A NEW KEY: DEMOCRACY AND CIVIC FREEDOM. IDEAS IN CONTEXT (2008).

as socially constituted rather than given meta-theoretically. It expects to uncover thus far unnoticed indicators of constitutional quality, akin to the "hidden" constitutional processes identified by Tully in Canada[36] as well as the "invisible" structure of normative meaning-in-use that generates both a shared reference to a selected few and a source of contestation for many others.[37]

Against this background, we define *unbound* constitutionalization as a process that is either unbound or distinct from state-bound principles and norms, and we raise the question of constitutional quality. Namely, if constitutional quality is authoritative within state-bound contexts where constitutional norms, principles, and procedures are relatively stable and enduring over time, does the transfer of constitutional norms beyond state borders change constitutional quality? Given the state-bound character of traditional constitutional theory, one might intuitively assume that such constitutional quality must change. However, if one is honest, one must admit that we do not know much about such change of constitutional quality. To answer the question of (changing) constitutional quality, rather than working with the assumption of a bounded plurality of constitutional authority including internal and external constitutional pluralism pending on given "sites of power"[38] or "sites of contestation" in a federal system,[39] we elaborate on a pluralist approach to global constitutionalism, which includes a potential global plurality of constituent powers and external sources of authority. As long as it was undisputedly bound to the nation-state, traditional constitutional theory departed from the assumption of such a bounded community with given sites of power. But even in state-bound constitutionalism, such an assumption proves to be much less reliable than might be taken for granted in traditional theory, as demonstrated again and again by struggles over secession which question precisely the seemingly natural character of bounded communities and fiercely contest the character of the constituent power.

The underlying question gains urgency as we look to unbound processes of constitutionalization, where no bounded, pre-given community exists that could easily serve as a point of reference for constitutional discourses. Notably, in the absence of such a community, constitutional quality as an emperor's "clothes" is no longer visible. It is this lack of visibility that thrusts the concept of constituent power into the limelight. For this context is conducive towards raising a question about constituent power, which is, after all, indispensible to acknowledging the emperor's garment cut from a constitutional fabric that is usually visible exclusively to a specific community. Crucially, therefore, this novel situation which has been brought to the fore through processes of global constitutionalization, questions the legitimacy of long-held assumptions about the unquestioned existence of the *mythical* existence of constituent power (except the reference to "humankind" as the projected subject of attribution

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36    Tully, *supra* note 16.
37    Wiener, *supra* note 15.
38    See Maduro, *supra* note 28, at 357.
39    Seyla Benhabib, *Twilight of Sovereignty or the Emergence of Cosmopolitan Norms?, Rethinking Citizenship in Volatile Times*, 11(1) Citizenship Stud. 19 (2007); Brunkhorst, *supra* note 20.

in the case of global commons regimes). By entering into a recursive process of normative claims working with constitutional elements, on the one hand, and contestations of such claims which again rely on constitutional elements, on the other hand, a discursive community constitutes itself gradually as a community that struggles about questions of transfer of constitutional elements into the global realm.

Such a recursive process of normative claims and contestation, however, is analytically observable only when we look to questions of constituent power, in the sense of actor-constellations that characterize the process of constitutionalization. What we have elsewhere called "state-plus actorship"[40] is constitutive of such normative discourses, since it is no longer traditional state actors alone that dominate normative discourses in the global realm; non-state actors have already entered the realm a long time ago and put pressure on state actors by contesting the validity of their normative claims. The reference to an imagined community as a collective subject, onto which the role of the ultimate holder of power is projected, now figures prominently in the rhetoric of international law (compare, for example, references to the common heritage of humankind) and is not an object of dispute. What is disputed, however, is the question who may legitimately speak for such an imagined collective (as the projected constituent power): is this function still an exclusive prerogative of states and their organs, or are states (as civil society actors claim) not representative enough and is there a need for voices complementary to non-state actors in order to represent the entire collective? Accordingly, a purely normative theory cannot tell us anything sensible about the sources of authority, linked to any given sites of power. The question of the construction of the ultimate source of authority (and of the agents representing it) is in constant renegotiation. Following the law-in-context approach,[41] we therefore define constitutionalization as *a practice category*, i.e., a phenomenon, which remains to be assessed through empirical observation. In turn, constitutionalism is understood as a *theoretical framework* including different cultural and temporal contexts, an academic "artifact,"[42] or as Nick Onuf has it, both a "process" and "thing"[43] that comprises the stipulation of constitutional norms, principles, and procedures in environments other than state-bound.

This practice approach allows for studying unbound constitutionalization from a comparative perspective that takes into account cultural diversity as a formative and distinctive dimension of constitutionalism. Rather than applying what the involved disciplines often dub a "Westphalian discourse" of state-bound constitutional communities, we therefore encourage alternative visions of community. For processes of attaching norms, principles, and procedures to international organizations reveal a shift towards processes of constitutionalization that are unbound from the state. These processes are defined as unbound from the state also in order to indicate that actors

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[40] Wiener & Oeter, *supra* note 10.

[41] Friedrich V. Kratochwil, Rules, Norms, and Decisions: On the Conditions of Practical and Lregal Reasoning in International Relations and Domestic Affairs (1989); Nicholas G. Onuf, *The Constitution of International Society*, 5(1) Eur. J. Int'l L. 1 (1994); Francis Snyder, New Directions in European Community Law (1990).

[42] Weiler, *supra* note 14.

[43] Onuf, *supra* note 41.

other than the state are involved. Unbound constitutionalization involves "state-plus" actorship, yet it is increasingly distinct from the group of citizens as the constituent power of nation-state communities. We therefore consider a plurality of actors (state-plus) as a distinctive characteristic of unbound constitutionalization.

To summarize, unbound constitutional quality includes the more familiar reference to the "humankind" as a potential constitutional community (compare the United Nations Convention on the Law of the Sea, UNCLOS), as well as access to contestation for its constituents, thus referring to the process of self-constituting community constituting itself in a recursive process. The innovative move of the research program consists in focusing on a process that includes both transfer and generation of "state bound" constitutional elements into the global realm, Such focus on the transfer of constitutional elements indicates a routine reference to statehood when speaking of constitutionalism, which has been shaped over the past two centuries by normative theorizing as well as social, political, and legal practice.[44] According to this approach, we do not expect constitutionalization to generate necessarily constitutional quality—by any means and on all accounts. Instead, we argue that it needs to be proven empirically whether or not unbound constitutionalization is actually constitutive of constitutional quality, given the shift of context from the familiar national or domestic political realm to the global realm. As such, unbound constitutionalization includes the acts of, for example, solemnly declaring a collective reference to shared *principles*, setting *norms* following public deliberation or legal contestation, or stipulating constitutional *procedures* in an official document

In order to map constitutional quality, we will have to dive deeply into the question of constituent power. Who are the actors involved in the process of self-constituting a community in a recursive process? We expect actor constellations to extend far beyond the ambit of state actors to include a considerable array of societal actors. While derived from the experience of modern constitutionalization (i.e., cases of national constitution-building), the innovative contribution of this symposium is to assert that *pouvoir constituant* is not merely derived from normative prior assumptions. Instead, the bifocal approach allows us to identify the type of actorship, as well. Accordingly, we ask what actors set up what normative claims, and in what discursive arrangements are these normative claims contested and thereby rejected or validated by other actors? Contestation within the perspective of constituent power may indicate severe discrepancies in terms of who should have a legitimate voice in constitutional discourse, but may also point to a consensus as to who should be heard in such discourse. The reference to constitutional norms may indicate a strong dissent concerning norms and underlying values, but may also be an expression of shared normative underpinnings, with the discussion focusing only on the concrete meaning of such (shared) norms. As a result, not only is contestation an empirical category, which might be examined by means of empirical research, but it is also a constituent power and an external source of authority legitimating a normative text. Both categories still call for in-depth empirical research—and they need a methodological toolkit

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[44] Ulrich Beck & Edgar Grande, Das kosmopolitische Europa (2005).

that enables researchers of global constitutionalism to approach them successfully as issues of empirical research.

The following contributions concentrate on the question of constituent power, but should be also viewed in light of a parallel conundrum of the external source of authority that legitimates a constitutional text. These contributions further develop the question as to what happens with the traditional concept of constituent power when elements of constitutionalism are severed from statehood (and the underlying assumption of a bounded community serving as constituent power of the state's constitution) and are transferred into the global realm. Traditional ideas of constituent power are no longer operative; but at the same time it is obvious that constitutionalism entails the assumption that there must be a social community that legitimates a constitutional order. More traditional conceptualizations of the international legal order have departed from the understanding that it is the community of states that legitimizes international law, i.e., states and state actors, and no one else. The debate on global governance has demonstrated, however, that it is not just government that structures world order. We now know a lot about hybrid structures involving state actors as well as other types of actors that frame the structures of governance in the global realm. But we do not know all that much about the interplay of such different kinds of actors in the process in which the self-constitution of a "global community" occurs as a recursive process. Accordingly, we must look carefully to issues of constituent power in the global realm, without falling into the trap of "methodological nationalism" by simply transferring state-bound concepts of constituent power into the global realm. The self-constitution of a "global community" implies an (often hidden) disagreement and a process of contestation regarding the claims of participation in the underlying normative debates on constitutional ordering—claims that initially will be contested by state actors, claiming an exclusive position in the process of international law formation, but that over time will be increasingly accepted because certain types of constitutional norms require shared meaning over a wide array of actors. Looking into these changing actor constellations and their normative relevance for global constitutionalism is one of the most fascinating fields of research in constitutional studies, as the contributions to this symposium will demonstrate.

## 4. The contributions

Generally speaking, the situation of unbound constitutionalization raises some core questions: What is the role and impact of constitutional change in the global realm? Can we expect unbound constitutionalization to change the "constitutional architectonic" as the underlying structure of global, regional, or local constitutional constellations?[45] And who has the power to influence this change? Can we expect a new type of constitutional quality in the global realm that works akin to state-bound contexts? We hold that shedding light on these issues requires a practice-oriented perspective

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[45]  Turkuler Isiksel, *Fundamental rights in the EU after* Kadi *and* Al Barakaat, 16(5) Eur. L. J. 551, 552–577 (2010).

that allows for approaching the global constitutional architectonic from below. If constitutional quality plays a substantial role in shaping (and taming) political power in national contexts, knowledge about changing or emerging constitutional quality in the global realm is expected to provide new information about potential power shifts. Such empirical knowledge would include research on "multiple claims of authority"[46] and focus on multiple claims to participation made by a plural group of actors. Better, and more detailed, empirical knowledge is therefore required for a critical analysis of predominantly "evolutionary studies" of constitutionalization.[47]

The contributors to this issue were invited to explore the question whether raising the issue of constituent power is helpful to accomplish the task of shedding new light upon changing or emerging constitutional quality in the global realm. To that end, each contribution addresses social practices involved in triggering constitutional change and sheds light on the multiple claims made by new (as well as previously hidden) actor constellations, whether from a bifocal or from a purely normative theoretical standpoint (for the latter, see, e.g., Patberg). These new state-plus actor constellations include, among others, the group of emerging powers that is now commonly known as the BRICS countries (see Noesselt) and the transformations of the *pouvoir constituant* into a *pouvoir irritant* (see Krisch). Notwithstanding their differences, all novel state-plus actors are considered as having a role to play in countering the legitimacy deficit of global governance. They insist on the importance of the question of constituent power. Without raising this question, and asking about the ultimate source of authority that legitimates a constitutional order, we cannot address the issue of democratic legitimacy in the global realm in a satisfying manner (see Patberg).

An overview of the history of European constitutionalism tells us that it is not a new phenomenon that normative ordering "beyond the nation-state" involves a plurality of actors, far beyond states and their agents. And, as Brunkhorst argues, European constitutionalism has always contained strong elements of a constitutionalism "from below," but at the same time demonstrated a Janus-face by showing the traits of both the "Kantian" and a "managerial" mind-sets which dialectically condition each other. Revolutionary change from below cannot be constantly destroying and rebuilding the social fabric and its normative ordering; it needs the self-referential closure of a constitution to enable the agents of managerialism to process the results of radical change and to organize evolutionary learning, bounded by normative constraints (see Brunkhorst). A constitutional setting thus keeps the memory of the idea of freedom exercised in constitutional moments, while at the same time organizing the (managerial) reprocessing of normative constraints that makes evolutionary learning possible. It is this function that constitutional fragments attempt to fulfill also in the global realm; but whether the self-referential closure with its shift to managerialism, which accompanies constitutionalization, keeps alive democratic freedom or hands over all

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[46] De Búrca & Weiler, *supra* note 5, at 2.

[47] Judy Goldstein, Oral comment to the panel *Global Constitutionalism: Contributions from International Law and International Relations* at the International Studies Association meeting, San Francisco, Apr. 2–7, 2013.

powers to states as the *pouvoir constitué*, remains an open question. A perspective on constituent power helps shed light on these fundamental questions, although—as Mattias Kumm stresses in his contribution—the point of constituent power is normative and justificatory, rather than sociological and explanatory. Such a normative concept of constituent power is not a stand-alone concept in specific national contexts; instead, it must react to the "problem of justice-relevant negative externalities" of national legal orders. Constituent power is thus inherently circumscribed, embedded in what Kumm calls the "Trinitarian constitutionalist formula of human rights, democracy and the rule of law." In a "post-positivist" constitutionalist conception of law, he argues, constituent power has an important role to play in the construction of constitutionalism, both within nation-states as beyond the nation-state.