RULING THE WORLD?
Constitutionalism, International Law, and Global Governance

Ruling the World? Constitutionalism, International Law, and Global Governance provides an interdisciplinary analysis of the major developments and central questions in debates over international constitutionalism at the United Nations, European Union, World Trade Organization, and other sites of global governance. The essays in this volume explore controversial empirical and normative questions, doctrinal and structural issues, and questions of institutional design and positive political theory. Ruling the World grows out of a three-year research project that brought leading scholars from around the world together to create a comprehensive and integrated framework for understanding international constitutionalization.

Ruling the World is the first volume to explore in a crosscutting way constitutional discourse across international regimes, constitutional pluralism, and relations among transnational and domestic constitutions. The volume examines the fundamental assumptions and critical challenges in contemporary debates over international constitutionalization.

Jeffrey L. Dunoff is Professor of Law and Director of the Institute for International Law and Public Policy at Temple University Beasley School of Law. In 2008 and 2009, he was the Nomura Visiting Professor of International Financial Systems at Harvard Law School. During 2007 and 2008, he served as a Senior Visiting Research Scholar in the Law and Public Affairs Program at the Woodrow Wilson School at Princeton University and, in 2005, as a Visiting Fellow at the Lauterpacht Research Centre for International Law at Cambridge University. Dunoff is coauthor (with Steven Ratner and David Wippman) of the leading textbook International Law: Actors, Norms, Process, and his writings have appeared in journals such as American Journal of International Law, European Journal of International Law, and Journal of International Economic Law.

Joel P. Trachtman is Professor of International Law at The Fletcher School of Law and Diplomacy at Tufts University. From 1998 to 2001, he was Academic Dean of the Fletcher School, and, during 2000 and 2001, he served as Dean ad interim. In 2002, he was Manley O. Hudson Visiting Professor of Law, and in 2004 he was Nomura Visiting Professor of International Financial Systems at Harvard Law School. The author of more than seventy scholarly publications, Professor Trachtman is a member of the boards of the American Journal of International Law, European Journal of International Law, Journal of International Economic Law, and Singapore Year Book of International Law. Prior to joining the faculty of the Fletcher School in 1989, he spent nine years in the private practice of international commercial law in New York and Hong Kong.
Ruling the World?
Constitutionalism, International Law, and Global Governance

Edited by

JEFFREY L. DUNOFF
Temple University Beasley School of Law

JOEL P. TRACHTMAN
Fletcher School of Law and Diplomacy, Tufts University
Ruling the world?: constitutionalism, international law, and global governance
Edited by Jeffrey L. Dunoff and Joel P. Trachtman
Frontmatter

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo, Delhi

Cambridge University Press
32 Avenue of the Americas, New York, NY 10013-2473, USA

www.cambridge.org
Information on this title: www.cambridge.org/9780521735490

© Cambridge University Press 2009

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2009

Printed in the United States of America

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication data
Ruling the world?: constitutionalism, international law, and global governance / edited by Jeffrey L. Dunoff, Joel P. Trachtman.

p. cm.
Includes bibliographical references and index.
K3165.R86 2009
342–dc22 2009002760

ISBN 978-0-521-73549-0 paperback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party Internet Web sites referred to in this publication and does not guarantee that any content on such Web sites is, or will remain, accurate or appropriate. Information regarding prices, travel timetables, and other factual information given in this work are correct at the time of first printing, but Cambridge University Press does not guarantee the accuracy of such information thereafter.
# Contents

**Contributors**

*page ix*

**Preface: International Institutions: Why Constitutionalize?**

*xi*

**Thomas M. Franck**

**Acknowledgments**

*xv*

## PART I: WHAT IS CONSTITUTIONALIZATION BEYOND THE STATE?

**Understanding the Demand for International Constitutionalization**

*3*

1. **A Functional Approach to International Constitutionalization**

   *Jeffrey L. Dunoff and Joel P. Trachtman*

**Is the International Legal System a Constitution for International Society?**

*37*

2. **The Mystery of Global Governance**

   *David Kennedy*

3. **The International Legal System as a Constitution**

   *Andreas L. Paulus*

## PART II: THE CONSTITUTIONAL DIMENSIONS OF SPECIFIC INTERNATIONAL REGIMES

**The United Nations**

*113*

4. **The UN Charter – A Global Constitution?**

   *Michael W. Doyle*
Rediscovering a Forgotten Constitution: Notes on the Place of the UN Charter in the International Legal Order
Bardo Fassbender

The European Union

Reframing EU Constitutionalism
Neil Walker

The World Trade Organization

The Politics of International Constitutions: The Curious Case of the World Trade Organization
Jeffrey L. Dunoff

Constitutional Economics of the World Trade Organization
Joel P. Trachtman

PART III: CROSSCUTTING ISSUES

Exploring the Relationships among International and Domestic Constitutions

Human Rights and International Constitutionalism
Stephen Gardbaum

The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State
Mattias Kumm

Navigating Constitutional Pluralism

Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States
Daniel Halberstam

Miguel Poiares Maduro
## Contents

### The Puzzle of Democratic Legitimacy

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>13</td>
<td>Whose Constitution(s)? International Law, Constitutionalism, and Democracy</td>
<td>381</td>
</tr>
<tr>
<td></td>
<td>Samantha Besson</td>
<td></td>
</tr>
</tbody>
</table>

### Index

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>409</td>
</tr>
</tbody>
</table>
Contributors

Samantha Besson, Professor of Public International Law and European Law, University of Fribourg, Switzerland

Michael W. Doyle, Harold Brown Professor of International Affairs, Law and Political Science, Columbia University

Jeffrey L. Dunoff, Professor of Law and Director, Institute for International Law and Public Policy, Temple University Beasley School of Law

Bardo Fassbender, Professor of International Law, University of the Armed Forces, Munich, Germany

Thomas M. Franck, Murry and Ida Becker Professor of Law Emeritus, New York University School of Law

Stephen Gardbaum, Professor of Law, UCLA School of Law

Daniel Halberstam, Eric Stein Collegiate Professor of Law and Director, European Legal Studies Program, University of Michigan

David Kennedy, University Professor of Law and David and Mariana Fisher University Professor of International Relations, Brown University, and Manley O. Hudson Visiting Professor of Law, Harvard Law School

Mattias Kumm, Professor of Law and Director Program in International and Comparative Law, New York University School of Law
Miguel Poiares Maduro, Advocate General, Court of Justice of the European Communities

Andreas L. Paulus, Chair of Public and International Law, Georg-August-University Göttingen, Germany

Joel P. Trachtman, Professor of International Law, The Fletcher School of Law and Diplomacy, Tufts University

Neil Walker, Professor of Public Law and the Law of Nature and Nations, School of Law, University of Edinburgh
Preface: International Institutions: Why Constitutionalize?

THOMAS M. FRANCK

[I]t can feel like a project of the utmost seriousness and urgency to interpret the world in constitutional terms.

–David Kennedy
“The Mystery of Global Governance”

International institutions, with a few minor and ad hoc exceptions, are firmly grounded in treaties that establish their objectives, conditions of membership, and internal and external operational parameters. These treaties are binding on their party members and, perhaps – in the instance of near-universal organizations – also on nonmembers.

It could be argued that it little matters whether such an institution’s foundational instrument is regarded as a constitution. Yet leading thinkers, such as the authors of this volume, seem to think the issue is worth serious examination. They express strongly held views as to why the issue is important and argue that how it is answered can have a significant impact on the role and operation of leading international organizations.

An international organization grounded in a constitution, they believe, has a different gravitas from the many purely ad hoc reciprocal arrangements made for the passing convenience of states.

The authors of these chapters do not merely note the phenomenon of greater gravitas but also explore how constitutionalization affects the practice of an institutionalized system of cooperation. For one thing, it determines how the institution absorbs the need for change. Whereas a constitutionally based system accommodates and adapts to its own practice, lesser consensual arrangements tend to insist on strict literal construction of their terms and resist their transformation through interpretative practice.

In other words, the way the institution created by a constitutional treaty is authorized to operate can be affected by the way it actually discharges
its responsibilities in practice. Consistent patterns in institutional practice may affect the ambit of the institution’s jurisdiction and its modus operandi. Other more purely functional cooperative arrangements, when based on a treaty, are literally tied to the text that establishes their mandates.

One need but examine the evolving scope of jurisdiction exercised by the UN Security Council to see how the Charter’s license, set out in article 2(7), to deal with matters not “essentially within the domestic jurisdiction of any state” has evolved and broadened in practice. Who, in 1945, would have thought that this jurisdictional formula could evolve to authorize collective military intervention in situations such as racism and anarchy occurring solely within a single state? Yet when it came to dealing with apartheid in Southern Rhodesia and South Africa or social anarchy in Somalia, the Charter, in the practice of the principal organs of the United Nations, has been definitely construed to permit intervention. This has been based not on a strict reading of text but rather on a clearly defining, gradually accruing body of institutional practice. Because the UN Charter is widely recognized as constitutional in nature, such adaption in practice is treated as inevitable.

The greater capacity of constitutionalized systems of cooperation to accommodate such operational evolution is the reason why keen observers of global governance insist on the “constitutionalization paradigm.” There is, however, another valid reason for such insistence. Constitutions, in contrast to lesser arrangements for ongoing cooperation, contain elements of checks and balances intended to operate autonomously to prevent abuses of power by the institution. This may take the form of resisting the incorporation of new practices that seem to lead in erroneous directions. Precisely because constitution-based systems are understood to be, like a tree, capable of gradual growth, extra care is taken to trim the branches.¹ Constitutionalized systems ensure that the power of organic growth does not go institutionally unchecked and unbalanced.

In practice, this means that constitution-based systems of cooperation are structured to accommodate a form of separation of powers. This hallmark of constitutionalization further distinguishes these foundational instruments from such lesser forms of systematic cooperation as bilateral treaties and memoranda of understanding.

In the instance of the UN Charter, chapters 4, 5, 10, and 14 set out, respectively, the jurisdictional parameters of the General Assembly, Security Council, Economic and Social Council, and International Court of Justice.

¹ The expression “living tree” was first applied to describe the constitutional capacity for organic growth in Edwards v. Attorney-General for Canada, [1930] AC 124 (PC), at 136 (Lord Sankey).
Besides these black-letter texts, the constitutionally based institutions regularly refer to institutional practice to legitimate the evolving delineation that separates and coordinates the inevitably overlapping jurisdictions of the respective organs.

An example is the practice that has propelled the Security Council into responsibility for administering territories in transition. This used to be an exclusive prerogative of the Trusteeship Council and the 73(e) Committee of the General Assembly. More recently, however, in response to the challenge of an array of civil wars and failed states (Yugoslavia, Somalia, East Timor) the role of intervenor has increasingly devolved to the Security Council.

Practice and text, in a constitutionally based system, are supplemented by jurisprudence. When an institution is constitutionally based, the jurisdictional boundaries are usually policed and supervised by a tribunal. In the instance of the United Nations, this function is performed by the International Court of Justice, which, for example, has rendered opinions as to the respective (and overlapping) powers of the Security Council and General Assembly, and those of the Security Council vis-à-vis the International Court of Justice itself.

Implicit in such a constitutionalized system is the idea of judicial review, which subordinates assumptions of institutional jurisdiction to review for excès de pouvoir to prevent those powers given to international institutions from incurring the self-aggrandizement that afflicts all concentrations of power. This notion of judicial review acts as a balance to correct practices that, if left unrestrained, would facilitate excessive jurisdictional imperialism.

It is the institutional capacity to limit evolutionary development through judicial review that justifies and legitimates the capacity of constitutionally based institutions to evolve in practice. It thus appears, paradoxically, that the constitutionalization of international systems of ongoing cooperation has the effect both of facilitating reform through the accommodation of institutional practice and of containing that impetus within limits impartially deducible from the tenor of the foundational instrument. The UN Charter is dramatic evidence of the capacity to achieve institutional reform through institutional practice, something richly illustrated by the ensuing chapters of...

---


Of the several indicators of a constitutionalized system of institutionalized cooperation among states, this may be the most functionally significant: that it separates the respective areas of jurisdiction both among the organs of the institution and between the institution and its member states. In making this important move to a separation of powers, the foundational instrument, if it is to operate as a constitution, ensures that the lines separating the various concentrations of jurisdiction among the institution’s organs will be patrolled by an independent expert legal body, such as the International Court of Justice. So will be the allocation of powers between the institution and its members. These lines of demarcation are essential to the efficacy of the institution, to its ability to adjust to changing priorities and issues, and to prevent it from growing into a Leviathan.

If a body like the United Nations is to retain its vitality and relevance over many decades of changing agendas, the distribution of functions and powers among its principal organs must be amenable to change through innovative practice and without necessarily invoking the cumbersome process of formal treaty amendment. The system must be capable of spontaneous regeneration through modifications achieved by agreed practice. Yet such regeneration must not go unchecked and unbalanced. To that end, the system must be “constitutional” – capable of organic growth, yet growth controlled by checks and balances deployed by a legitimate institutional umpire. To that end, the UN system is constitutionalized by the inclusion of a legitimate organ authorized to render “second opinions” regarding issues of jurisdiction arising among the principal organs and between the institution and its state members.

Thus, it is apparent that the issue of constitutionalization, which is so thoroughly canvassed in this volume, is far from one purely of theory but rather concerns itself profoundly with institutional efficacy. Is the institution capable of gradual, autochthonous growth, and, paradoxically, is it capable of curbing the institutional appetite for unlimited expansion of its powers? If, as in the instance of the United Nations, the answer is “yes,” then its architects, almost certainly, have written a constitution. That makes it appropriate, as David Kennedy points out in his chapter, to think of the project of this book “not only as description but also as program.” The point of recognizing the UN Charter as a constitution is to unleash the institution’s capacity to evolve while subjecting that capacity to independent review for consistency with the institution’s stated, essential purposes.
Acknowledgments

This volume reflects the contributions and advice of many colleagues and friends who have shared our interest in constitutional developments at transnational sites of governance. We have been fortunate to work with an extraordinary group of scholars, and to have enjoyed significant support from the institutions with which we are affiliated.

Temple University Beasley School of Law generously sponsored a book workshop in December 2007. The workshop afforded an opportunity for authors to present their papers and receive feedback from one another, as well as an outstanding group of experts, including Robert Ahdieh, Dan Bodansky, Elizabeth Borgwardt, Rebecca Bratspies, Allen Buchanan, Grainne de Burca, Orfeo Fioretos, Carol Gould, Larry Helfer, Duncan Hollis, Vicki Jackson, R. Daniel Kelemen, Harold Koh, Andrew Lang, Peter Lindseth, Burt Neuborne, Gerald Neuman, Ernst-Ulrich Petersmann, Mark Pollack, Russell Powell, Mark Rahdert, Jaya Ramji-Nogales, Steve Ratner, Henry Richardson, Kim Lane Scheppelle, Joanne Scott, Peter Spiro, Andy Strauss, Mark Tushnet, and Joseph Weiler. We thank each of these individuals for their thoughtful comments and many constructive suggestions.

We are grateful to Temple Law School, and particularly to Dean Robert Reinstein, for supporting this event. We also thank Debbie Feldman, Dimitri Ferrell, Joel Houkom, and Dorothy Lee for their efforts in ensuring the success of the workshop.

Jeff Dunoff undertook research on this project while at Temple and during appointments as a Visiting Senior Research Scholar in the Program in Law and Public Affairs at the Woodrow Wilson School, Princeton University, and as a Visiting Professor at Harvard Law School. He is grateful for the support received from these institutions.

Joel Trachtman is grateful to The Fletcher School for its support during his work on this project, and to Jeremy Leong for his superb research assistance.
We express thanks to John Berger and the editorial team at Cambridge University Press for their support and guidance through the editorial and publishing processes.

Most of all, we thank our families – Theresa, Elizabeth and Joel, and Lauren, Hannah, Sam, and Aaron for their unflagging support of this project. They graciously tolerated the long hours during which this volume ruled our worlds, and we lovingly dedicate this book to them.