Ruling the World? Constitutionalism, International Law, and Global Governance. Edited by Jeffrey L. Dunoff and Joel P. Trachtman. Cambridge, New York: Cambridge University Press, 2009. Pp. xvi, 414. Index. $112, cloth; $41, paper.

Ruling the World? Constitutionalism, International Law, and Global Governance, edited by Jeffrey Dunoff, professor of law at the Beasley School of Law, Temple University, and Joel Trachtman, professor of international law at the Fletcher School, Tufts University, is one of a cluster of recent books on the topic of constitutionalism and constitutionalization in international law. Featuring a substantive framing chapter by the two editors, a preface by Thomas Franck, and twelve further chapters from a distinguished set of U.S. and European authors, the volume sets out to be "an extended and richly textured dialogue over a number of critical questions," including:

- What is international legal constitutionalization, and how is it measured?
- How does international legal constitutionalization relate to globalization and the fragmentation of international law?
- What are the relationships between international legal constitutionalization and domestic constitutionalization?
- What are the relationships among international legal constitutionalization, fundamental rights, democracy and legitimacy? (P. 33)

Like most successful edited collections, the strength of this book lies in the diversity and quality of its individual chapters, rather than in the presentation of a single coherent and compelling vision. For this reviewer, particular highlights are Dunoff's no-nonsense debunking of the case that the World Trade Organization has been constitutionalized (at least as he understands the term); David Kennedy's characteristically sharp insights about the blind spots of constitutional discourse, including its failure to take account of "the habits of mind and patterns of argument, of people with projects operating with expertise" as structures of global governance (p. 54); Mattias Kumm's devastating exposure of the internal incoherence and inconsistency of the statist critique of international constitutionalism; and Miguel Poiares Maduro's careful explanation of the form of judicial interpretation appropriate to a fragmented and plural international legal order, the latter of which merits close reading by present and future members of all international tribunals. Others will find different and equally rewarding gems elsewhere in the volume. Instead of dwelling on each chapter individually, however, this review will offer some reflections on three crosscutting themes and issues—the definition of constitutionalism, the question of the allocation of authority, and the historically situated nature of constitutional discourse—that seem to be relevant to many of the chapters.

The first theme has to do with the various ways that different contributors to this volume tackle the problem of defining such core terms as "constitutional" and "constitutionalism" in the international context. How do we know the "constitutional" when we see it? What kinds of international legal forms and legal practice are worthy of that label, and how is international constitutional law different from "regular" international law? Some authors adopt normatively "thick" definitions—that is, value-rich definitions that place great weight on such material elements as human rights, the rule of law, separation of powers, and redistributive mechanisms as core indicia of international constitutionalism. Thus, for example, Andreas Paulus explicitly resists locating the constitutional character of the international legal order in its procedural or formal elements, arguing instead for a substantive approach to the question:

> I do not think that we can have an international constitutionalism worthy of that name that would not even remotely take up the insights of several centuries or so of domestic development of constitutional principles. . . . The principles this contribution thereby derives from the Western constitutional tradition are democracy, separation of powers, rule of law and Rechtsstaat, as well as states' rights and human rights. (Pp. 91–92)

Bardo Fassbender also sees constitutional language as necessarily normatively charged in a similar way:

> Taking the constitutional character of the [UN] Charter seriously can . . . be a starting point for moving towards conditions in

> which the values pronounced in the Charter—life in peace and tolerance, the protection of human rights and freedoms, justice, social progress, equality of states and peoples—are better and more evenly realized. "The use of the term 'constitutional' in a descriptive way . . . will have a normative connotation, implying a commitment to managing public affairs in accordance with fundamental values and through certain formally legitimate procedures." (P. 147, footnote omitted)

Samantha Besson, too, suggests that such thick definitions of constitutionalism are the most analytically useful and describes the "main and common claim" of constitutionalism as the claim that "political and legal power should be exercised only within the limits of a constitution, such as the separation of powers, checks and balances, the rule of law, democracy, and fundamental rights" (p. 387).

Whatever their attractions, these approaches bring with them some obvious risks. One is the risk of parochialism, treating the domestic constitutional arrangements with which we are most [illegible]

greater the risk of losing this crucial openness of constitutional language and therefore of short-circuiting precisely the debate that ought to be promoted. Instead, the broader discussion comes to be focused more on whether these institutional arrangements should be transposed to the international level and how best to do so.

Perhaps for precisely these reasons, the editors of the volume propose a definition of constitutionalism which drains it of some of this thick normative content. They adopt an approach that is explicitly "taxonomic, rather than normative" (p. 4), and their aim is to provide a "vocabulary and a conceptual apparatus for the identification, classification, and comparison of different constitutional orders" (p. 18). Thus, they adopt a "functional methodology" (p. 9), essentially defining international legal processes as "constitutional" when they perform at least one of three broadly defined international constitutional functions or purposes: "(1) enabling the formation of international law (i.e., enabling constitutionalization), (2) constraining the formation of international law (i.e., [illegible]

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projects and as an attempt to rescue the language of constitutionalism for a pluralist sensibility. (It is no answer, of course, to say that no definition of constitutionalism is normatively neutral, since everyone in the conversation understands this perfectly well; the question is whether a particular definition of constitutionalism preserves or removes the ability of constitutional language to create a space for productive political-ethical debate.)

Even so, Dunoff and Trachtman's definition has its own problems. For one thing, the very abstractness and generality of the constitutional functions that they suggest may leave the reader cold. Why should we be interested in whether or not a legal order performs these functions? Why are these functions important, while others are not? Normative desaturation, in other words, masks the stakes of the debate. Moreover, openness can be bought at the cost of a degree of analytical purchase. Do these lists of functions and mechanisms provide an adequate basis for distinguishing between different international legal orders? Don't all international legal orders, for example, in some sense allocate authority vertically and horizontally, and don't all legal orders in practice have some form of hierarchy of norms embedded in them in practice? If what is meant is *formal* allocation or *formal* hierarchy, then presumably it would have to be accompanied by a justification for focusing on formal—rather than informal, indirect, de facto, or other—means.

I mention all these questions not so much as a criticism of the approach that Dunoff and Trachtman take, but rather as an illustration of one of the core tensions that seems to me to lie at the heart of much contemporary writing on constitutionalism. Dunoff and Trachtman offer one way of managing that tension, which has its advantages and disadvantages like any other. But it is also worth noting that another, perhaps more promising, approach is also exemplified in this volume in the chapter by Kumm. Instead of starting off by defining constitutionalism and then proceeding to measure existing governance practices against that definition, he suggests that we are witnessing a clash of competing visions of constitutionalism—a "clash of constitutional paradigms," namely the "statist paradigm" on the one hand and the "cosmopolitan paradigm" on the other (p. 263). Rather than holding constitutionalism steady as the core term of the debate, he deliberately destabilizes it, arguing that "it is necessary to rethink the basic conceptual framework that is used to describe and interpret national constitutional practice in order to make sense of the idea of constitutionalism beyond the state" (*id.*). His chapter represents a committed engagement in this clash of competing visions of constitutionalism and represents an impassioned and in many ways compelling defense of cosmopolitan constitutionalism against what he sees as a dangerously misguided and illegitimate statist paradigm. I am less interested here in the content of his argument than its shape: what Kumm manages to do, in my view, is to successfully marry the benefits of an explicit and self-conscious awareness of the normative stakes of constitutional language with a style of argument that both foregrounds contestation and opens up deeper debates, avoiding the normative closure associated with so many other constitutional projects. That is some feat, and one that could usefully act as an example to others.

The second theme that I wish to raise relates to the allocation of formal legal and political authority. For many of the authors in this volume, the study of international constitutionalism is in significant part the study of the formal structures by which political authority is divided among different individuals, organizations, and institutions at the international level. As just noted, the constitutionalization of the international legal order is understood to be evidenced in significant part by the emergence of additional and more powerful sites of formal legal authority above the state, legal principles that constrain and limit the exercise of that formal authority, and structures that allocate it vertically (as between domestic and international institutions) and horizontally (as between different international institutions). This focus on the formal allocation of political and legal authority is unremarkable in itself: the point that I wish to make here is that while such a focus captures some important changes in the way that global governance has transformed in recent decades, it runs the risk of missing a great deal. In particular, it misses the operation of forms of authority that

are in some meaningful sense "unallocated" but that are nevertheless effective in producing outcomes in the world.

At least three chapters in the volume suggest that such "unallocated authority" may in some circumstances overwhelm more formal authority structures in their prevalence and significance. A passage from Kennedy's contribution is worth citing at length:

> I have always felt constitutionalism a rather weak sociology of the way power functions. The U.S. Constitution is fascinating as a meditation on the possible relationships among a series of legal authorities. As a text, it could be the stuff of normative imagination or political philosophy. I am sure it is sometimes a useful textual reference for interpretive practice in quite specific institutional settings. But it is a lousy description of power in American society and a quite inaccurate map of how Washington works. Private power and economic form are altogether missing from the story, as are the role of political parties and money, the dynamics of social dualism in American life, changing ethical and political fashion, the world of background norms, informal and customary arrangements, and much more. The document reads as if power outside the territory and entities outside the text are irrelevant to public order. If we imagine the world it constitutes as our political world, we will miss a great deal. (P. 61)

For Kennedy, one of the core elements of global governance that tends to be missed in constitutionalist literature is the activity of "experts" (understood broadly) operating in the background of decision-making: "We focus on statesmen and public opinion, and not enough on the ways in which their choices, their beliefs, are shaped by background players" (p. 53). From a different perspective—though one which in my view points in the same direction—Michael Doyle's chapter usefully complicates prevalent understandings about the way that the UN Charter constitutes and allocates authority, in part by emphasizing the dynamic and unexpected character of that allocation. He shows how the establishment of the Millennium Development Goals effectively led to "inadvertent transfers of authority within the wider UN system," particularly to the experts and specialized agencies tasked with their definition and implementation (p. 116). In addition, he uses the examples of the UN secretary-general and the establishment of transitional peace operations authorities to illustrate "the manner in which seemingly pure administrative agency becomes inherently political and delegates executive powers" (*id.*). In addition, Daniel Halberstam's chapter, "Constitutional Heterarchy," makes the claim that even in fully constitutionalized legal orders "important questions of final legal authority remain unsettled" and that "[t]his lack of settlement is neither a defect nor a temporary inconvenience but, instead, forms an essential characteristic of each system" (p. 328). In his careful study of the European and U.S. constitutional orders, he argues that a "spontaneous, decentralized ordering" emerges among the various actors within the system at different points in time and that, in significant part, it is in the dynamics and principles of that spontaneous ordering that we find the "constitution" of those political systems (p. 337).

These chapters consequently provide at least three insights that act as a counterweight to the preoccupation of constitutional discourse with formal structures of authority allocation: that authority is structured even before it is allocated; that formal allocations of authority are never final but contested and continually renegotiated; and that many significant forms of authority are never allocated, at least not in the way that term is typically understood. These insights can no doubt be integrated into sophisticated constitutionalist literature; indeed, Halberstam's chapter shows that such an integration is possible. But there is certainly a case to be made that they push us in a different direction entirely. Perhaps we should be far less focused on the structures by which authority is allocated and far more focused on the practices and processes through which authority is actually exercised. Who is actually exercising authority in specific contexts, what background structures shape the choices that are made in the foreground, what forms of authority are in play, and what are their concrete effects in and on the world? These

questions are precisely the ones that are highlighted by Kennedy's call for better and more comprehensive maps of global power that identify a greater range of channels and levers of influence at work in global governance. Ultimately, the point of such a mapping exercise is to broaden the experience of responsibility that comes with the act of governing far beyond formal centers of political authority: to "multiply the sites at which decisions could be seen and contested," and to "awaken a sense among actors outside the spotlight of leadership . . . that they also govern" (pp. 66–67). The danger of international constitutionalist discourse, conversely, is that its strong focus on formal structures of authority allocation—and on the accountability of those to whom authority is formally allocated—may inadvertently have the effect of narrowing this experience of responsibility and reducing the range of governance practices that are subject to scrutiny, accountability, and the democratic promise.

Let me turn now to my third and final theme. Four authors represented in this volume (Dunoff, Franck, Kennedy, and Kumm) make explicit that the scholarly literature on international constitutionalism can usefully be understood not only as description but also as a *program*, motivated not only by the desire to depict already existing transformations of the international legal order but also by the belief that thinking about these changes in constitutional terms is useful or desirable in some significant sense and might help propel us towards a better international legal and political order. Whatever else it is, these authors claim, the constitutional project is in part a scholarly project of creative reimagination that has emerged in a particular historical context in response to specific historical and social forces.

Given the heightened awareness of this aspect of scholarly practice among the authors in this volume, a reader would be forgiven for expecting a detailed, reflexive account and analysis of the social conditions in which contemporary constitutionalist conversations have arisen, as well as a clear expression of what is at stake in the debate. When have constitutional claims been made, by whom, in what contexts, in response to what developments, and for what purposes? Why does it matter whether or not we describe a particular legal order or institutional structure as "constitutional" in nature? What follows from that description, not just logically, but also practically as a situated claim in particular substantive debates about the content and operation of international law? In their introductory chapter, the editors promise something along these lines, including a specific promise of an analysis of the historical relationship between constitutionalization, globalization, and fragmentation, but in the end the volume as a whole does not quite deliver fully on this promise. Some authors (Besson, Fassbender, Kennedy, and Paulus) provide some useful histories of various schools and periods of constitutional thinking over time, but none is fully developed (in this volume at least), and most are more in the nature of intellectual history rather than the reflexive sociological inquiry in which I am interested here. Fassbender's reflection on the particular institutional project that he had in mind when he originally formulated his ideas about international constitutionalism in the 1990s is very helpful but again cannot substitute for a fuller inquiry into the stakes of constitutionalism more broadly.

The two main exceptions are the substantive chapters by Dunoff and Trachtman themselves, in the section on constitutionalism in and around the World Trade Organization (WTO). Dunoff's chapter provides a rich set of insights about how and why constitutional claims have arisen in debates about the WTO and what the effects of these claims have been. He notes, for example, that leading constitutional claims arose in the context of heightened contestation of WTO and trade politics more generally at the turn of the millennium, and he sees in these claims a deliberate turn away from politics—a search for "a corrective or replacement for unruly and potentially destructive trade politics" (p. 195). He also argues that, in the context of debates about the relationship between WTO law and other bodies of public international law, constitutional claims have been deployed in ways which valorize the WTO as "first among equals" (p. 197, capitalization adjusted). More generally, he sees the constitutional turn as a response to a disciplinary crisis in

international law, precipitated by trenchant contemporary critiques of international law's legitimacy, effectiveness, and coherence. Constitutional thinking, in this view, helps to refound international law's legitimacy on firmer ground.

These claims have much truth, but let me offer two modest responses in the hope of provoking their further development. First, I am not fully convinced either that "judicial constitutionalization" of the WTO (represented in this account largely by the writings of Deborah Cass) is as depoliticizing as Dunoff makes out or that it necessarily "center[s] constitutional power and authority on the WTO's judicial actors" at the expense of other bodies (p. 195). In my understanding, that literature is focused on identifying an emerging constitutionalist style and mindset in the jurisprudence of the WTO's Appellate Body, and one need look no further than the chapters by Maduro and Halberstam in this volume for compelling arguments that such a style can be the very opposite of depoliticizing and self-aggrandizing. Second, and more generally, I am no longer sure that constitutional language is fundamentally depoliticizing even in the specific context of debate about the WTO. It is certainly possible to understand attempts to constitutionalize the WTO as attempts to *re*-politicize trade relations and to open them up to more effective contestation—or more precisely to institute a different kind of trade politics, which is more principled, more structured, less ad hoc, and less subject to the kinds of legitimacy concerns that Kumm sets out so clearly in his chapter. Dunoff, it should be said, acknowledges this way of deploying constitutional language as a possibility, though really only as a future possibility. Suffice it to say that my reading of this volume as a whole has left me less convinced that it is solely a future possibility and more convinced that it is, happily, already a part of contemporary discourse about the constitutionalization of the WTO and more generally.

For his part, Trachtman offers a more schematic vision of the historical causes and consequences of contemporary international constitutionalization, which has four primary stages. First, increasing economic interdependence and other forms of integration give rise to greater demands for liberalization, particularly from business interests. Second, this demand for liberalization leads to demand for an "international law of liberalization," both to discipline national measures and to fill gaps in international regulatory structures (p. 210, capitalization adjusted). This progression in turn leads to the third stage: demand for other kinds of international law to complement, shape, or resist the international law of liberalization, which is best satisfied through the creation of formal authority structures at the international level (enabling international constitutionalization). Fourth, the emergence of these new international authority structures in turn gives rise to demands to limit or constrain their power (constraining constitutionalization). In telling this story, Trachtman explicitly adopts a perspective based on constitutional economics, which sees constitutionalization as a functional response to demands for coordination: "mechanisms by which to share authority in order to facilitate the establishment of rules" and "political settlements designed to maximize the achievement of individual citizens' preferences" (p. 212). Again, there is much to like in this account, and to a large extent any weaknesses that it has are merely the flip side of its strengths. One difficulty, for example, is that, like many functionalist accounts, it usefully highlights the material and other interests to which constitutional developments respond, but it fails to fully explain why one among many possible functional responses is chosen. Furthermore, like all macrolevel accounts, the ability to identify core structural dynamics is bought at the expense of the degree of realism that comes with microlevel explanation. Did the Uruguay Round of GATT/WTO negotiations really resemble a moment of constitutional politics conducted under something approximating the famous "veil of uncertainty" as to its distributional consequences? (p. 213).

That said, this absence (such as it is) is one of the few gaps in a collection which otherwise hits all the right notes—drawing together an impressive set of minds on an important topic, resisting the easy repetition of established truths, and moving the debate a number of meaningful steps forward. *Ruling the World? Constitutionalism, International Law, and Global Governance* will rightly take its place among the most important contributions to

the early twenty-first century literature on constitutionalism at the global level.

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Legitimacy and Legality in International Law: An Interactional Account. By Jutta Brunnée and Stephen J. Toope. Cambridge, New York: Cambridge University Press, 2010. Pp. xviii, 411. Index. $112, cloth; $58, paper.

The concept of "legitimacy" has had a difficult decade in international legal scholarship. Dominant rationalist approaches in North America have dismissed, bracketed, or downplayed it, while most formalists in Europe have continued to treat it as an issue of international politics rather than law. Attention to legitimacy has emanated largely from constructivist takes on international relations, though typically not with a focus on the legal sphere.

In their new book, Jutta Brunnée and Stephen Toope seek to tackle this gap and move legitimacy back to center stage. Brunnée is a professor of law at the University of Toronto; Toope is the president and vice-chancellor of the University of British Columbia. Both have long been at the forefront of engagements between international law and international relations, and in this book they take this interest a significant step further. They develop an "interactional" account of international law that uses constructivist work to elucidate the role of legitimacy in the practice of international law and international politics. They also seek to infuse the notion of international "law" with elements of procedural legitimacy by drawing on the legal theory of Lon Fuller, the legal philosopher and Harvard law professor (1902–78). Brunnée and Toope's undertaking is ambitious: it not only opens up new directions for international legal scholarship, but it also challenges rationalists, positivists, and formalists alike. As such, their work is bound to provoke resistance. But *Legitimacy and Legality* is also so well argued and thought-provoking that even staunch opponents of its starting points will draw much benefit from it. It has already won the American Society of International Law's 2011 Certificate of Merit, and it will surely inspire enough followers to remain a focal point in the literature for some time to come.

The book pursues two main, interwoven lines of argument, one concerning the dynamics of international law, the other concerning its concept. Both center on the interactional quality of the law and on the importance of the relationship between a system of rules and its subjects and participants. Fuller placed much emphasis on this aspect. Unlike what he perceived to be the background understanding of the positivists of his time, he did not see law as a "one-way projection of authority,"[1] but, instead, as dependent on a common engagement of government and citizens. Without such engagement, a system of rules would neither be effective nor, ultimately, deserve to be called law.[2] This approach offers a link with constructivist insights into the interactive shaping of the structures of international politics, a link that Brunnée and Toope take up and develop further. It provides them with a rich account of how, in the international sphere, norms are developed through the construction of shared understandings, and it serves as the basis for their own conceptualization of obligation in international law. Their approach enriches constructivist international relations scholarship through its focus on the distinct character of legality, and it develops Fuller's work further by transferring it to the international sphere and by using it to distinguish legal obligations from nonlegal norms. In Brunnée and Toope's interactional account, international law depends on a basis in shared understandings for its effectiveness, obligatory character, and quality as "law."

All three dimensions are linked through reference to Fuller's eight criteria of legality— generality, promulgation, nonretroactivity, clarity, noncontradiction, realism in demands, constancy, and congruence between rules and their administration—which reflect the "internal morality of law."[3] For Fuller as well as for Brunnée and Toope, these eight criteria serve to ground legitimacy and obligation in a normative sense, to provide the

[1] LON L. FULLER, THE MORALITY OF LAW 221 (rev. ed. 1969).

[2] *Id.*

[3] *Id.* at 200.