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The constitutionalization of what?

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Abstract: There are difficult global challenges that need to be addressed. In response, many have argued for the increased constitutionalization of international law. An argument is often also made that the international order is already constitutionalized in some meaningful sense and that there are founding conditions within the international order that represent something like a global constitution. Nevertheless, when surveying the literature on constitutionalization one is often struck by a general ambiguity about what the term means and with how constitutionalization is meant to operate between theory and institutional practice. In particular, there seems to be an overall ambiguity regarding what is being constituted by the processes of constitutionalization, about how these processes operate, and with whether this legal order is in fact creating the type of progressive cosmopolitanism that is often assumed. To address these ambiguities, this article will seek to better understand what appeals to constitutionalization generally mean and to expose key conceptual problems. The goal in doing so is to highlight areas that need greater conceptual attention and to recommend potential solutions, so that more cosmopolitan minded scholars can feel more confident in prescribing constitutionalization as part of their normative catalogue.

Keywords: constitutionalization; global constitution; international legal theory; legal cosmopolitanism

As climate change, global infectious disease and the global financial crisis continue to highlight, there are difficult global crises that need to be managed or resolved. Furthermore, as is often pointed out, these crises transgress the jurisdiction of state boundaries and reach beyond the sovereign capacity of individual nation states. In response to these global challenges, many scholars of International Relations, International Law and Global Governance have argued for the increased constitutionalization of international law and for the creation of more robust global institutions. It is often claimed that without robust global institutions and the corresponding constitutionalization of a global rule of law, then unilateral policies will continue to prevail and that this will hinder efforts for a coordinated response to global collective action problems. In relation, an argument is also often made that the international order is already constitutionalized

in some meaningful sense and that there are founding conditions within the existing international order that represent something like a global constitution. Like above, these scholars argue that it is necessary to strengthen these existing international regimes in order to build upon this legal condition and to bring nation states closer to a cosmopolitan order.

Nevertheless, when surveying the literature on constitutionalization one is often struck by a general ambiguity about what the term means and with how this 'constituting' process operates from theory to institutional practice. In particular, there seems to be a general neglect regarding what exactly is being constituted by the processes of constitutionalization, about how these processes operate, and with whether this legal and institutional order is in fact creating the type of legal cosmopolitanism that is often assumed. This continued ambiguity has serious implications for the concept of constitutionalization when used as a normative claim. This is because, by side-stepping certain contradictory aspects that seemingly lurk within the processes of constitutionalization, the concept can obscure what it is we might be actually constituting, how this order is being constituted, and whether we *should* be enthusiastic about the concept of constitutionalization as globally minded cosmopolitans. Because of these ambiguities, and in order to emphasis some lingering conceptual problems that we should be mindful of, this article will seek to locate what appeals to constitutionalization generally mean and to expose various contradictions that remain problematic in its current form. By doing so, the goal is not to render constitutionalization as untenable, but to bring particular issues to light, in order to highlight key areas that need greater examination if more cosmopolitan minded scholars are to feel confident in prescribing constitutionalization as part of their normative catalogue.

However, before beginning it is necessary to set some conceptual parameters. In particular, it is important to highlight that this article is primarily focused on providing a critical investigation of constitutionalization as it pertains to its empirical and normative application in explaining and making sense of the processes of an increased political and legal 'constitutional' global order. In this regard, this article makes a distinction between *constitutionalization* as a particular scholarly exercise in 'mapping' and 'explaining' various processes of global 'constitutionalism beyond the state' and, *global constitutionalism* writ large, which often incorporates a theory of constitutionalization, but which also, as a broad interdisciplinary area of research, includes more moral and normative aspects that are aimed at 'shaping' and/or improving the foundations and practices of global constitutionalism more generally.[1] Although maintaining this sharp

[1] A Wiener, AF Lang Jr., J Tully, MP Maduro and M Kumm, 'Global Constitutionalism: Human Rights, Democracy and the Rule of Law' (2012) 1 *Global Constitutionalism* 1–15.

analytical distinction between 'mapping' and 'shaping' within the discipline of global constitutionalism is tricky – and as it will be argued, these practices are often seemingly blurred, rendered ambiguous and/or conflated – it is nonetheless useful to give disclosure in terms of this article's approach and attempted focus. To reiterate, the aim of this article is to locate the ways in which constitutionalization has been employed as an empirical and normative device and to expose some residual conceptual hurdles, so as to emphasize what more cosmopolitan minded scholars should continue to be mindful of and how these hurdles can potentially be mitigated.

Theories of constitutionalization and the idea of global constitutionalism

There is growing literature regarding the constitutionalization of international law and international institutions. In its most basic form, the term constitutionalization is often deployed as a way to recognize an empirical phenomenon surrounding the growth of international law,[2] the enlargement and saliency of global legal regimes,[3] and as a way to describe the exponential expansion and impact of international organizations.[4] In this regard, constitutionalization is often used first as an empirical reference, which symbolizes the expansion of international law and its correlative statistical indicators. Some examples of these indicators relate to the fact that between 1648 and 1945 there were a total of 12,000 international treaties, whereas in the 50-year period between 1945 and 1995 alone, the number of new treaties grew by a multiple of five to reach 55,000.[5] This phenomenal growth in treaty law is also reflected in customary legal regimes and the expansion of international political institutions, where in 1909 there were 37 Intergovernmental Organizations (IGOs) and 176 Non-governmental Organizations (NGOs), this grew to over 260 IGOs and 5,500 NGOs by 1995.[6]

In addition, an appeal to constitutionalization is often made as a method to understand this increased interconnectedness at the global level and is often presented as a normative response to the negative effects

[2] A Hurrell, *On Global Order: Power, Values, and the Constitution of International Society* (Oxford University Press, Oxford, 2007).

[3] J Weiler, 'The Geology of International Law: Governance, Democracy, and Legitimacy' (2004) 64 *Heidelberg Journal of International Law* 547–62.

[4] J Alvarez, 'International Organizations: Then and Now' (2006) 100 *American Journal of International Law* 324–47.

[5] D Johnson, *Consent and Commitment in the World Community: The Classification and Analysis of International Instruments* (Transnational, New York, 1997) 8.

[6] D Held, A McGrew, D Goldblatt and J Perraton, *Global Transformations* (Stanford University Press, Stanford, 1999) 53.

of globalization. As issues of 'global crisis', global warming, increased nuclear proliferation, H1N1 and global economic meltdown capture our headlines, many scholars have suggested that these problems result from a failure to appropriately regulate these concerns at the global level and that they are indicative of a lack of unified authority and institutional accountability.[7] As a response, many argue that what is needed is the increased constitutionalization of international law and international institutions, which can rein in states,[8] create compliance pull,[9] and generate a more appropriate response to collective concerns of global crisis.[10]

Furthermore, many constitutionalization scholars have suggested that we are in some sense already moving positively in this direction, where the slow accumulation of international law and international institutions has started to display aspects of a more robust constitutional order.[11] As highlighted above, the growth of international law and international organizations has greatly increased as a statistical fact and, as Jan Klabbers suggests, 'constitutionalism carries the promise that there is some system in all the madness, some way in which the whole system hangs together and is not merely the aggregate of isolated and often contradictory movements.'[12] In this sense, many convinced constitutionalization scholars have used the language of constitutionalization as a method to legitimate the expansion of international regimes at the global level. As is often noted, the concept of constitutionalization 'is drawn from international legal theory as a means of defending the legitimacy of international law despite its expanded scope and increasing distance from the consent of states'.[13] As is argued, international legal regimes can have positive impacts upon the lives of ordinary people despite their state citizenship and there is compelling evidence to suggest that international regimes can command compliance to international covenants.[14]

[7] D Archibugi, *The Global Commonwealth of Citizens: Toward Cosmopolitan Democracy* (University Press, Princeton, 2008); U Beck, *World Risk Society* (Polity Press, Cambridge, 1999); D Held, *Cosmopolitanism: Ideals and Realities* (Polity Press, Cambridge, 2010).

[8] M Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 *European Journal of International Law* 907–31.

[9] G Teubner, 'Societal Constitutionalism: Alternatives to State Centered Constitutional Theory' in C Joerges et al (eds), *Transnational Governance and Constitutionalism* (Hart Publishing, Portland, 2004) 3–28.

[10] J Rosenau, 'Governance in a New Global Order' in D Held and A McGrew (eds), *Governing Globalization* (Polity Press, Cambridge, 2002).

[11] J Waldron, 'Cosmopolitan Norms' in R Post (ed) *Another Cosmopolitanism* (Oxford University Press, Oxford, 2006); J Habermas, *The Divided West* (Polity Press, Cambridge, 2006).

[12] J Klabbers, 'Constitutionalism Lite' (2004) 1 *International Organizations Law Review* 31–58.

[13] R Fine, *Cosmopolitanism* (Routledge, Abingdon, 2007) 69.

[14] T Franck, *The Power of Legitimacy Among Nations* (Oxford University Press, Oxford, 1990).

Nevertheless, when surveying this literature, it is not always exactly clear what is meant when one invokes the term constitutionalization or how this constitutionalization process works, for it seemingly has multifarious applications with broadly different descriptive and normative dimensions.[15] It is because contemporary uses of the term constitutionalization have manifold meanings, which are not always specified, that it is necessary to examine what is being invoked when claims of constitutionalization are made and when more globally minded scholars make normative appeals for robust forms of global constitutionalism. By doing so, it can provide a more salient location for what an appeal to constitutionalization is meant to suggest as well as to allow further examination of why these current appeals for constitutionalization may remain underdeveloped and normatively impoverished.

So what is meant by constitutionalization? In terms of empirical description, the etymology of constitutionalization seemingly refers to explanatory notions of *legal process*, *subjectification* and *objectification* and makes reference to at least three corresponding empirical features. First, the most common understanding and use of constitutionalization is in relation to describing the formal legal and political processes involved in constituting a global legal order of some kind. The objectification of this legal order can be expressed through a singular hierarchical structure or it can be expressed through a network of interconnecting and iterative legal regimes that act as a procedural structure for some form of authoritative legal order. In this regard, to 'constitutionalize' something is to establish formal legal processes where legal rights and duties are codified and where the authoritative mechanisms for legal adjudication are clearly delineated.[16] Second, the term constitutionalization also refers to the act of making an entity subject to the legal jurisdiction of an established constitutional order. In relation to the first definitional property, legal regimes or entities that were once independent of this constitutional process (or in an unclear legal relationship) are explicitly brought under the jurisdiction of this formal legal system, which in effect supercedes prior legal relationships and which ultimately secures a sense of mutual legal obligation.[17] Third,

[15] T Schilling, 'On the Constitutionalization of General International Law' (2005) Jean Monnet Working Paper 05/05.

[16] B Ackermann, 'The Rise of World Constitutionalism' (1997) 83 *Virginia Law Review* 771–97; W Werner, 'The Never-ending Closure: Constitutionalism and International Law' in N Tsagourias (ed), *Transnational Constitutionalism: International and European Perspectives* (Cambridge University Press, Cambridge, 2007) 329–67.

[17] F Schorkopf and C Walter, 'Elements of Constitutionalism: Multilevel Structures of Human Rights Protection in General International and WTO-Law' (2003) 4 *German Law Journal* 1359–74.

the term constitutionalization can additionally refer to informal and extra-legal processes of norm solidification and normative convergence. This is where common norms emerge from various processes of legal and political interaction that act as extra-legal iterations toward a more procedurally authoritative and constitutionalized legal order. Although similar to the first definition, the difference is that under this understanding of constitutionalization, what matters is the continued building of norms and extra-legal commitments, which over time, provide the juridical material necessary for the establishment of a more objectified constitutive order.[18]

We can see these meanings played out within the literature and it is common to see repetition of these three descriptive elements within most debates about the constitutionalization of international law and international institutions. For example, in relation to the first element outlined above, many scholars have suggested that constitutionalization represents the extent to which the international legal system has constitutional features comparable to the legal frameworks found in national structures.[19] In this case, constitutionalization at the international level refers to formal and objectified legal arrangements and their corresponding authority mechanisms, which in comparison to the legal orders found within nation states, are seen to generate compliance pull, a rule of law and formal legal obligation. This form of constitutionalization has found particular salience within the study of European integration and in debates about European Union law.[20] As is often noted, there are interesting analogies between domestic constitutional orders and the emerging legal order at the European level and it is often believed that the EU offers heuristic insights in relation to broader processes of international constitutionalization.[21]

In other cases, global constitutionalization is defined as a phenomenon occupying the legal spaces that result from various transformations associated with globalization and the subsequent 'de-constitutionalization' of domestic legal structures in an increasingly interdependent world.[22]

[18] K Milewicz, 'Emerging Patterns of Global Constitutionalization: Toward a Conceptual Framework' (2009) 16 *Indiana Journal of Global Legal Studies* 413–36; J Habermas, *The Divided West* (Polity Press, Cambridge, 2006); E. de Wet, 'The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order' (2006) 19 *Leiden Journal of International Law* 611.

[19] J Klabbers, A Peters and G Ulfstein, *The Constitutionalization of International Law* (Oxford University Press, Oxford, 2009); Werner (n 16).

[20] JHH Weiler and M Wind (ed), *European Constitutionalism Beyond the State* (Cambridge University Press, Cambridge, 2003).

[21] E Eriksen, J Fossum and A Menendez (eds), *Developing a Constitution for Europe* (Routledge, London, 2004).

[22] A Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 *Leiden Journal of International Law* 579.

According to this argument, states remain key actors within the international system, but because of global interconnection, the ability for states to remain as a self-contained constitutional entity is no longer practically feasible or legally tenable. As a result, many constitutionalization scholars argue that domestic state constitutions can no longer act as a 'total constitution' in the strictest sense, since state constitutional mechanisms are unable to regulate the entirety of governance structures that affect them in a thoroughgoing and comprehensive fashion.[23] In other words, this conceptualization holds that globalization is challenging the saliency of domestic constitutions and as a result obliges states to increasingly operate in legal systems outside of traditionally prescribed domestic constitutional spheres. In scholastic debate, these arguments have also found particular relevance in discussions explaining the expanding law-making capacities of the EU,[24] the supra-constitutionalism involved with the European Court of Human Rights,[25] and within debates about the limits to which states should willingly abdicate autonomy to external authorities.[26]

Yet for others, international constitutionalization represents 'a vertically integrated legal regime conferring judicially enforceable rights and obligations on all legal persons and entities, public and private, within the sphere [of a mutually applied rule of law]'.[27] Similar to the first definition above, this conception of constitutionalization refers to a hierarchical system of law that establishes legal authority while clearly delineating and codifying the legal rights and obligations that are to exist between all constitutional parties. Again, like the aforementioned use of constitutionalization, these discussions about the codification and specification of rights and duties into international law have been seen to have significance in relation to the European Union. For it is often argued that Article 49 of the EU Maastricht Treaty provides a mechanism for EU integration and constitutionalization, which clearly sets out legal rights and obligations while also bringing all member states under the umbrella of EU law.[28] Furthermore, as is commonly argued, the 1963 Rome Treaty in essence created a 'constitutional

[23] O Gerstenberg, 'Denationalization and the Very Idea of Democratic Constitutionalism: The Case for the European Community' (2001) 14 *Ratio Juris* 298–325.

[24] B Rittberger and F Schimmelfennig, 'Explaining the Constitutionalization on the European Union' (2006) 13 *Journal of European Public Policy* 1148.

[25] J Lacroix, 'For a European Constitutional Patriotism' (2002) 50 *Political Studies* 944.

[26] R Collins and N White (eds), *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Routledge, London, 2011).

[27] U Haltern, 'Pathos and Patina: The Failure and Promise of Constitutionalization in the European Imagination' (2003) 9 *European Law Journal* 14–44, 15.

[28] A von Bogdandy (ed), *Europäisches Verfassungsrecht* (Springer, Heidelberg, 2003). Especially the Introduction by Christoph Mollers.

instrument' to promote greater legal obligation between member states and sought to create direct legal relationships via a formal constitutional process.[29]

Alternatively, some have attempted to broaden the idea of constitutionalization to include a more customary dimension of legal and extra-legal coordination at the global level. This is exemplified in its most expansive form by the work of Jürgen Habermas, who argues that through continued reiterative processes the expanding body of international law and institutional regimes come to resemble a form of global constitutionalism. As Habermas suggests, it is from these processes that a more robust form of cosmopolitan order can be established from current legal regimes. According to Habermas, these legal processes create 'a rule of law that can normatively shape existing power relations, regardless of their democratic origins, and direct the exercise of political power into legal channels'.[30] Thus, in this way, international law creates legal and extra-legal norms that become increasingly 'self-referential', 'constructive' and 'part of a circular learning process'.[31] It is through this learning process that states become increasingly 'constitutionalized' toward a more legally constituted order by way of 'stages and degrees of constitutionalization'.[32] As Habermas claims, this process of constitutionalization is not dependent on a single authoritative body of positive law, like those found in the constitutional structures of nation states, but is reliant on something like an Schachterian notion of an already established 'proto-constitution' of international law and international legitimacy.[33] It is from these proto-constitutional legal tenets that duties and obligations to the international legal community become reiterative principles for further supranational organization, which in turn, generate new procedural principles of world community.[34] In this sense, constitutionalization represents a socializing 'process' where present norms shape and influence the creation of new norms and legal relationships, from which more formal constitutional properties can begin to emerge and to eventually be objectified into international covenants.

Finally, constitutionalization can sometimes be used less as a description of its legal processes (although the suffix 'ization' still denotes that some legal process is taking place) to instead focus on its heuristic, hermeneutic and critical qualities in scholarly discourse. It is here where a distinction

[29] J Shaw, *The Law of the European Union* (Palgrave, Basingstoke, 2000).

[30] J Habermas, *Between Naturalism and Religion* (Polity Press, Cambridge, 2008) 316.

[31] Ibid 321.

[32] Ibid 318.

[33] O Schachter, *International Law in Theory and Practice* (Martinus Nijhoff, The Hague, 1991).

[34] See Habermas (n 11) 141.

can be, and often has been, made between constitutionalization (mapping the shifts from globalized to constitutionalized relations and identifying their constitutional substance) and global constitutionalism (a broader focus on shaping and 'improving' the constitutional conditions through normative reflection).[35] In these more critical, reflective and global constitutional approaches, constitutionalization is (re)examined in such a way so as to draw attention to various shortcomings and injustices associated with contemporary international law. By exposing these shortcomings, these approaches usually attempt to tie key normative principles to the valuation of what a 'global constitution' *ought* or *ought not* to capture. In general, but certainly not representationally exhaustive, it is possible to locate three critical/reflective themes. First, for scholars like Marrti Koskenniemi, the 'virtue of constitutionalism in the international world' is to expose fundamental global injustices so as to then exercise critical judgment upon these existing features of global order. In other words, by thinking in terms of constitutionalization and a global constitution, it can help to generate a 'universalizing focus' within legal debates, from which critical reflections and global reforms could be generated.[36] Second, some scholars have suggested that the idea of constitutionalization should be made synonymous with corresponding elements of democratization and democratic legitimacy. For scholars like Anne Peters, an appeal to 'global constitutionalism requires dual democratic mechanisms … these should relate both to government within nation states and to governance "above" states, thus to multiple levels of governance'.[37] Without pegging the process of constitutionalization to the legitimization of law via democratic inclusion,[38] participatory law making[39] or to a form of republican virtue ethics,[40] it opens the potential to 'fraudulently create the illusion of legitimate global governance' and universalizable principles of international law despite remaining inequalities and structural abuses of power. Third, some scholars have agreed that the language of constitutionalism has the potential to incorporate a 'responsibilizing' agenda into the legal discourse,

[35] See (n 1).

[36] M Koskenniemi, 'Constitutionalism as a Mindset: Reflections on Kantian Themes about International Law and Globalization' (2007) 8 *Theoretical Inquiries in Law* 35.

[37] A Peters, 'Dual Democracy' in J Klabbers, A Peters and G Ulfstein, *The Constitutionalization of International Law* (Oxford University Press, Oxford, 2009) 264.

[38] D Held, 'Reframing Global Governance: Apocalypse soon or Reform!' in GW Brown and D Held (eds), *The Cosmopolitanism Reader* (Polity Press, Cambridge, 2010) 293–311.

[39] G de Búrca, 'Developing Democracy Beyond the State' (2008) 46 *Colombia Journal of Transnational Law* 221–78.

[40] J Klabbers, 'Possible Islands of Predictability: The Legal Thoughts of Hannah Arendt' (2007) 20 *Leiden Journal of International Law* 1–23; J Klabbers (n 12).

but have remained less enthusiastic about the prospects for a truly 'progressive' global constitutional authority. As an alternative, these scholars suggest that the lessons to be taken from critically examining the processes of constitutionalization is to favour conceptualization in terms of plural constitutionalism or metaconstitutionalism, which conceives constitutional authority as distributed horizontally between a plurality of constitutional structures, which are tied loosely to a metaconstitutional mechanism that can act like an instrument for intersubjective deliberative adjudication.[41]

In an attempt to collect these formulations together, it is possible to understand that constitutionalization, when used as a descriptive and reflective device, is meant to denote the *processes* of legal codification toward the establishment and incorporation of entities into a coherent and legally objectified body of law, where legal parties, legal rights, legal obligations and legitimate centres of adjudicating power are specified. This process of legal codification and objectification can take place through two interrelated processes of constitutionalization. It can take place via traditional contractarian principles of consent, treaty and formal contract, or, it can be generated by way of a more sociologically iterative process of mutual norm compliance that, with time, starts to resemble legal and extra-legal conditions that are similar to more robust constitutional orders. In addition, constitutionalization refers explicitly to processes of compliance and/or vertical legal authority (with varying levels of authority), whether to international institutions or to international law. In this regard, whatever constitutionalization is as an empirical phenomenon, it relates to structural processes and to how these processes generate legal, institutional and normative authority at the international level. However, as alluded to above, it is not always clear what exactly these processes are and in what ways these constitutional processes for 'the rule of law' are regenerated (something I will return to in the third section). Furthermore, it would seem that current discussions regarding increased constitutionalization are based on unsettled empirical and normative assumptions about the socializing forces of international law and its corresponding ability to generate state compliance and cosmopolitan sympathies. This raises questions about the normative claims often made by advocates of constitutionalization and gives merit to those who advance more critical reflections. For as it will be explored below, it is not immediately clear whether more constitutionalization is always better and that it would be misguided to assume a progressive trajectory within the processes of constitutionalization.

[41] N Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *Modern Law Review* 385.

Constitutionalization: The hegemony of norms and the question of whether more is better

Within the constitutionalization literature it is sometimes possible to find a prevailing logic. This logic posits that more international law and more international institutions represent a more robust form of constitutionalization. In addition, it is also possible to find an almost teleological presupposition that more constitutionalization is better and an idea that the more states are brought under the normative influence of customary law and international institutional practice the better this will be for the international environment in general. However, there are many interrelated theoretical and empirical challenges that should temper an immediate enthusiasm about this calculation.

By calculating constitutionalization in this fashion, it seemingly ignores alternative interpretations that suggest that more law and the creation of more international institutions can actually disperse legal authority horizontally in ways that can contradict a 'vertical' constitutionalization process.[42] Specifically, the creation of more institutions and international law can often create blurred institutional and legal jurisdictions, which create multiple channels for non-compliance and which create alternative avenues for unilateral expressions of political power.[43] As many scholars of Global Governance and International Political Economy rightfully suggest, powerful states often create new international institutions,[44] or switch allegiance to an alternative institutional or legal body,[45] in order to sidestep existing legal and institutional regimes that no longer serve their interests.[46]

[42] There is also significant empirical evidence to suggest that the processes of constitutionalization are not as thoroughgoing a global phenomenon as is often assumed, but that the constitutionalization process is seemingly uneven in terms of sectorial relevance and regional application. For this see, K Armingeon and K Milewicz, 'Compensatory Constitutionalism: A Comparative Perspective' (2008) 22 *Global Society* 179–96.

[43] J Goldsmith and E Posner, *The Limits of International Law* (Oxford University Press, Oxford, 2005).

[44] GW Brown, 'Safeguarding Deliberative Global Governance: The Case of the Global Fund to Fight AIDS, Tuberculosis and Malaria' (2010) 36 *Review of International Studies* 511–30.

[45] D Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (Oxford University Press, Oxford, 2005); N Krisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order' (2005) 16 *European Journal of International Law* 369–408.

[46] C Cutler, 'Locating "Authority" in the Global Political Economy' (1999) 43 *International Studies Quarterly* 59–81; D Johnson, 'World Constitutionalism in the Theory of International Law' in R MacDonald and D Johnson (eds), *Toward World Constitutionalism: Issues in the Legal Ordering of the World Community* (Martinus Nijhoff, Leiden, 2005); S Scott, 'The Impact on International Law of U.S. Non-compliance' in M Byers and G Nolte (eds), *Hegemony and the Foundations of International Law* (Cambridge University Press, Cambridge, 2003) 427.

One interesting example of this is found within global health governance, when in 2000 G8 countries showed their dissatisfaction with UNAIDS and the UN system by creating the independent Global Fund to Prevent AIDS, Tuberculosis and Malaria (GFATM). As was reported by many of those involved with the establishment of the Global Fund, this was done in order to better control policy implementation, to better represent the interests of certain key states, and in order to establish direct accountability to G8 donors. Ironically, it was only two years later that George W Bush himself grew dissatisfied with Global Fund policy and created his own global AIDS initiative titled the President's Emergency Plan for AIDS Relief (PEPFAR).[47] In addition, it is also not uncommon for certain powerful states to explicitly pursue this strategy of disengagement as a tool of foreign policy and do so as a direct rejection of international constitutionalization.[48] Because of the political, economic and legal complexities involved with what constitutes constitutionalization (no pun intended), it would be fallacious to assume that more international law and the creation of more international institutions *automatically* represent a condition of robust constitutionalization.

In relation, calculating constitutionalization in this way also seemingly ignores a pathway-dependent dark-side associated with constitutionalism. As defined in the first section, constitutionalization refers to the establishment of formal legal processes where legal rights and duties are codified and where the authoritative mechanisms for legal adjudication are clearly delineated. In this regard, not only does a constitutionalization process bring subjects into a legal relationship, but it also locks them into this relationship.[49] This is because constitutional arrangements are notoriously conservative in the sense that once this legal relationship has been codified

[47] A Barnes and GW Brown, 'The Global Fund to Fight AIDS, Tuberculosis and Malaria: Expertise, Accountability and the Depoliticisation of Global Health Governance' in O Williams and S Rushton (eds), *Health Partnerships and Private Foundations: New Frontiers in Health and Health Governance* (Palgrave, Basingstoke, 2011).

[48] For a general overview of this position and how it has influenced foreign policy see P Spiro, 'The New Sovereigntists: American Exceptionalism and Its False Prophets' (Nov/Dec 2000) *Foreign Affairs* 1–5. For the direct articulation of this policy stance see JR Bolton, 'Should We Take Global Governance Seriously?' (2000) 1 *Chicago Journal of International Law* 205–21; C Bradley, 'International Delegations, the Structural Constitution, and Non-Self-Execution' (2003) 55 *Stanford Law Review* 1557–96; J Rabkin, *Law without Nations? Why Constitutional Government Requires Sovereign States* (Princeton University Press, Princeton, 2005); Rep. B Barr, 'Protecting National Sovereignty in an Era of International Meddling: An Increasingly Difficult Task' (2002) 39 *Harvard Journal on Legislation* 299; C Bradley and J Goldsmith, 'Customary International Law as Federal Common Law: A Critique of the Modern Position' (1997) 110 *Harvard Law Review* 815; J Yoo, 'Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding' (1999) 99 *Columbia Law Review* 1955–2094.

[49] J Elster, *Ulysses Unbound* (Cambridge University Press, Cambridge, 2000).

and objectified, then any alteration of this constitutional arrangement must be performed within the 'pathways' of this legal order.[50] In other words, constitutional arrangements are by definition conservative and restrictive. As a result, a potential negative feature of this 'locking-in' is that there is no reason to assume that an already existing constitutional arrangement at the global level is not antithetically predisposed to the kind of positive change many constitutionalization scholars seem to want. One classic example of this tension between restrictiveness and normative aim within constitutionalization theory involves the robust debate surrounding whether or not the World Trade Organization (WTO) should be framed in constitutional terms. For most global constitutionalists, the WTO and its dispute-settlement mechanism represent a form of legal authority with enforceable countermeasures to regulate noncompliance. Because of this level of authority, some scholars have suggested that the WTO represents an evolving 'global economic constitution' and that it can generate a high level of legal certainty and adjudication between various global interests. For more progressive constitutionalists, the WTO has even greater capacity to become a global regulator that could irreversibly and comprehensively bring about 'social rights … developmental concerns and realizing deliberative justice at the global level'.[51] For this contingent, considerations for transforming the WTO into a federal entity should be taken seriously because the WTO presents an excellent opportunity to construct a global economic constitution.[52] Yet, as Robert Howse and Kalyspo Nicolaidis have recommended, 'characterizing the WTO treaty system as a constitution' fails to capture the 'complex, messy, negotiated bargain of diverse rules, principles and norms' that underwrite the governance structure. This raises some concern since it seemingly simplifies and ignores the question of whether or not this set of constitutionalized tenets have any form of democratic legitimacy or mutual consistency. As they suggest, 'the legitimacy of the multilateral trading order requires greater democratic contestability and a more inclusive

[50] Nico Krisch has suggested that international law 'allows dominant states to protect their visions of world order into the future, since once they are transformed into law, the backward looking character of international law makes them reference points for future policies. And oftentimes, concepts strongly rooted in international legal norms create a new normality: Over time, they modify the conceptions of legitimacy of international society, which makes later changes all the more difficult.' See N Krisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order' (2005) 16 *European Journal of International Law* 377.

[51] R Howse and K Nicolaidis, 'Enhancing WTO Legitimacy: Constitutionalism of Global Subsidiarity?' (2003) 16 *Governance: An International Journal of Policy, Administration, and Institutions* 73.

[52] EU Petersmann, 'The WTO Constitution and Human Rights' (2000) 3 *Journal of International Economic Law* 19–25.

view of those who are entitled to influence the shape of the system. … [Otherwise the] constitutionalization of the WTO will only exacerbate the legitimacy crisis or constrain appropriate responses to it.'[53]

Relatedly, and as a thought experiment, let us assume that the world is currently operating under conditions of ongoing constitutionalization and that this order represents a constitutional order in some fairly meaningful sense, as many constitutionalization scholars suggest. If this is so, then it is arguable that this same order propagates and 'locks-in' the very institutional arrangements that have led to the collective action problems of global crisis that currently dominate our headlines. This is because, historically speaking, it is this same constitutional regime that has been ineffective in tackling climate change, unable to prevent genocide, unable to secure people from poverty, to stop preventable diseases, and, of current importance, has been unable to defend states or peoples from the present economic meltdown. In fact, and to stay on the topic of the economic crisis, it could be argued that the entire reason the economic meltdown occurred is because the current 'global economic constitution' upholds the legal and institutional mechanisms that allow the opportunities for economic bubbles to take place.[54] For it is not unreasonable to suggest that this constitutionalized system is not only ineffective in regulating such a crisis (despite our knowledge of past ones), but that the neo-liberal economic policies embedded within current constitutionalization processes actively 'channel' the kind of accelerated economic regulatory conditions where meltdowns can happen.[55] Again, this raises theoretical and empirical questions about whether more constitutionalization creates a more progressive constitutionalism, or whether more constitutionalization simply equates to just more of the same.

Interestingly, and related to the former points, calculating constitutionalization descriptively as 'more is better' says little about the substance or quality of the constitutionalization process or about what it is we are in fact constitutionalizing. For example, the TRIPS agreement clearly creates a body of international law and institutional structure that regulate intellectual copyrights, protects corporate patents, and creates a series of legal norms that demand international compliance through

[53] See (n 51) 74.

[54] A Gamble, *The Spectre at the Feast: Capitalist Crisis and the Politics of Recession* (Palgrave, Basingstoke, 2009).

[55] J Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism and the Post-War Economic Regimes' (1982) 36 *International Organization* 195–232; J Cohen, 'Whose Sovereignty? Empire versus International Law' (2004) 18 *Ethics and International Affairs* 1–24.

enforcement by the WTO.[56] However, as it is often noted, this body of law arguably favours the protection of the interests of certain economically powerful states and corporations and it has not been to the mutual benefit of a majority of human interests.[57] This is because, under TRIPS and bilateral TRIPS-Plus free trade agreements, pharmaceutical firms are entitled to 20-year product patents (or more) to suppress generic competition and as a result there have been documented problems regarding 'access to medicines' in developing and middle-income countries.[58] Furthermore, even though there are national health safeguards provided by the Doha Declaration for the use of generics in cases of extreme health emergencies, these cases require long processes of litigation, which often receive strong lobbying resistance from pharmaceutical firms (and their states), and which in most cases are ultimately rejected by the WTO.[59] This raises important questions in regard to the processes of constitutionalization and in relation to what norms are being objectified.[60] Namely, this raises the question as to whether all international law and institutional regulation act as part of the constitutionalization process, and if so, can the normative claim that more is better always hold? In response to this, it is my suspicion that most globally minded scholars would intuitively reject TRIPS as forming an integrally normative part of an expanding constitutionalization process and that many scholars involved with global constitutionalism would critique TRIPS in relation to the demands of global justice.[61] Nonetheless, this still begs the question as to whether constitutionalization as a descriptive tool *should* refer to all laws and institutions or whether it *should* refer to only those instruments that capture a certain normative

[56] V Muzaka, *The Politics of Intellectual Property Rights and Access to Medicines* (Palgrave, London, 2011).

[57] C Deere, *The Implementation Game: The TRIPS Agreement and the Global Politics of International Property Reform in Developing Countries* (Oxford University Press, Oxford, 2009); C Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement* (Lavoisier, Paris, 2007). For arguments regarding the use of international law as political tool, see N Kirsch, 'Weak as Constraint, Strong as Tool: The Place of International Law in U.S. Foreign Policy' in D Malone and Y Khong (eds), *Unilateralism and U.S. Foreign Policy* (Lynne Rienner, London, 2002).

[58] S Sell, *Private Power, Public Law: The Globalisation of Intellectual Property Rights* (Cambridge University Press, Cambridge, 2003).

[59] P Drahos, 'Four Lessons for Developing Countries from the Trade Negotiations Over Access to Medicines' (2007) 28 *Liverpool Law Review* 11–39; S Basheer, 'India's Tryst with TRIPS: The Patents Amendment Act 2005' (2006) 1 *The Indian Journal of Law and Technology* 15–46.

[60] A Deardorff, 'Should Patent Protection be Extended to All Developing Countries?' (1990) 13 *World Economy* 497–508.

[61] R Steinberg, 'In the Shadow of Law or Power?: Consensus-based Bargaining and Outcomes in the GATT/WTO' (2002) 56 *International Organizations* 360–5.

component.[62] However, making a further distinction in this way will require a better discussion about what is actually being constitutionalized, how it is being constitutionalized, and with whether this process actually resembles any sense of justice or mutual benefit. In other words, what is seemingly missing from many discussions about constitutionalization are the crucial questions about whether we are constitutionalizing the right legal tenets, if we are creating the right international institutions, and whether these regimes actually reflect any sense of justice or legal reciprocity. For without this better distinction, as Stephen Gill aptly notes, the constitutionalization process will represent 'binding constraints' on various forms of human conduct and these constraints will remain largely favourable to some while remaining systematically repressive to most others.[63]

Lastly, and in immediate relation to the last point, there is a concern about the role of power within the socializing processes of constitutionalization. As many post-colonialists, Marxists, and post-structuralists argue, it is not wholly unreasonable to view the current process of constitutionalization as simply entrenching Western political and economic power.[64] Furthermore, as some have argued, constitutionalization could represent nothing more than a form of neo-imperialism and the legal and institutional dominance of the most powerful states.[65] Or that constitutionalization represents a possible form of civilizing mission that potentially threatens a plurality of cultural traditions through its universalizing and pro-Western orientation.[66] These opinions are not limited to those who usually critique all things neo-liberal, for even more liberally minded scholars suggest that by conceptualizing constitutionalization as being universally oriented, it runs a risk of also 'dressing up strategic power-plays' as having a progressive

[62] A Peters, 'Membership in the Global Constitutional Community' in J Klabbers, A Peters and G Ulfstein, *The Constitutionalization of International Law* (Oxford University Press, Oxford, 2009) 126–50.

[63] S Gill, 'Globalization, Market Civilization, and Disciplinary Neoliberalism' (1995) 24 *Millennium: Journal of International Studies* 412.

[64] G Thomson, 'The Limits of Globalization' in D Held (ed) *Debating Globalization* (Polity Press, Cambridge, 2005); R Cox, *Production, Power and Global Order: Social Forces in the Making of History* (Colombia University Press, New York, 1987); R Cox and T Sinclair, *Approaches to World Order* (Cambridge University Press, Cambridge, 1996); S Gill, 'Constitutionalizing Inequality and the Clash of Globalizations' (2002) 4 *International Studies Review* 47–65; S Gill, 'The Question Is.' (1997) 26 *Millennium* 483–5; N Krisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order' (2005) 16 *European Journal of International Law* 369–408.

[65] J Hobson, *Defending the Western Interest* (Cambridge University Press, Cambridge, 2012).

[66] C Harlow, 'Global Administrative Law: The Quest for Principles and Values' (2006) 17 *European Journal of International Law* 187–214.

form and that this can obscure a more insidious hidden agenda.[67] As Deborah Cass has suggested, it is important to be aware that 'social legitimacy is being artificially constructed through the use of constitutional language' and that this may be painting a highly unrealistic portrait in regard to the legitimacy of global governance and international law.[68] Once again, this raises questions about what is actually being constitutionalized, who is it constitutionalized for, and what normative and moral implications this has on the long-term socialization of global order.

An explanation for why these questions have been seemingly neglected within the mainstream constitutionalization literature is threefold. First, most scholarship on constitutionalization has taken place between international lawyers and scholars of International Relations who employ a positivist methodology that often looks specifically at the formation of legal regulation, international law and with how these legal tenets have been complied with or rejected by states. Traditionally, this maintains a rather narrow focus that looks specifically at positive interpretations of law, the mechanisms for legal enforcement and the empirical existence of legal compliance.[69] In this regard, International Relations and legal scholarship have often avoided many normative considerations and the moral implications involved within constitutionalization, preferring to operate within the strict disciplinary boundaries of legal realism and legal positivism.[70] Furthermore, it has only been within the last 20 years that a more substantial shift toward the importance of customary law has been made. Nevertheless, even here, the focus has tended to be limited to issues of law formation and compliance in the absence of an overarching world authority and there is still considerable debate between international lawyers and international relation theorists regarding the significance and empirical robustness of customary law.[71]

Second, a significant amount of the scholarship on constitutionalization seems to have been primarily focused on the European Union and on the legal and institutional processes involved with European integration. This research has certainly provided useful and interesting debates about constitutionalization and about the development of a constitutional Europe. Nevertheless, it could be argued that studying the constitutional processes

[67] See Cohen (n 55) 10.

[68] D Cass, *Constitutionalization of the WTO* (Oxford University Press, Oxford, 2005) 208.

[69] See Krisch (n 64) 372.

[70] A Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* (Oxford University Press, Oxford, 2004).

[71] B Cali, *International Law for International Relations* (Oxford University Press, Oxford, 2010).

of European integration relies on a different set of cultural, legal, economic, historical and sociological foundations.[72] In this regard, as it has been argued, it is not immediately clear that transplanting these analytical tools to the global order provides the best way to examine the processes of global constitutionalization.[73] For it may very well be the case that the empirical background conditions involved with the constitutionalization of Europe far exceed those available at the global level and that transplanting this set of constitutionalization criteria to the global level is methodologically inappropriate and normatively deceptive.

Third, many theorists in International Relations, international law and political theory have seemingly conflated increased globalization with a process of increased constitutionalization.[74] This is because there has traditionally been an assumption that increased interconnectedness equates to an increased constitutionalization of global norms.[75] However, by making this move, it is possible to downplay the fact that globalization and constitutionalization are both dialectical, in the sense that their processes are positive and negative, and/or, that they may actually be in opposition to one another. In this regard, although the processes of globalization and constitutionalization are certainly connected, and have both promoted more interconnectedness, economic markets, democracies and peaceful legal relations between global powers, these same forces have also produced greater economic inequality, increased cultural tension, legitimated corporate exploitation, and resulted in a general failure to secure human development. In other words, globalization and the resulting iterations of constitutionalization have made the opportunities for a more robust constitutional process possible and in many ways visible, but this does not necessarily represent a progressive constitutionalization trajectory. In addition, there is also considerable evidence to support the argument that an opposite trajectory is true.[76] In particular, and as mentioned before, it is not hard to find research which suggests that what is actually being

[72] R Howse and K Nicolaidis, 'Enhancing WTO Legitimacy: Constitutionalism of Global Subsidiarity?' (2003) 16 *Governance: An International Journal of Policy, Administration, and Institutions* 75–6.

[73] See (n 43).

[74] A Peters, 'The Globalization of State Constitutions' in Janne Elisabeth Nijman and Andre Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (Oxford University Press, Oxford, 2007).

[75] W Greider, *One World, Ready or Not: The Magic Logic of Global Capitalism* (Penguin, London, 1997); M Wolf, *Why Globalization Works* (Yale University Press, New Haven, 2004).

[76] JE Lane, *Globalization and Politics: Promises and Dangers* (Ashgate, Aldershot, 2006); S Gill, 'Constitutionalizing Inequality and the Clash of Globalizations' (2002) 4 *International Studies Review* 47–65.

constitutionalized at the global level is nothing more than the hegemonic norms and interests of Western power and that globalization (and its growth of legal and institutional components) represent only a form of neo-liberal triadization and does not translate into a meaningful sense of unifying globalism.[77]

Consequently, there are many unanswered questions involving the substantive issues of constitutionalization and that its current conceptualization remains underdeveloped in relation to the nature of its processes and in regard to its positive or negative socializing effects. Because of this, it is not entirely unreasonable for critics of constitutionalization to argue that it remains an under-evaluated concept and that it currently rests on questionable empirical and sociological foundations.[78] This unfortunately renders constitutionalization as a rather unpersuasive normative concept, for it is not always clear what processes we *should* be adopting and how those processes can effectively produce a legitimate source of constitutionalization. In order to rectify this, constitutionalization scholarship will need to better clarify the relationship between globalization and constitutionalization and to untangle the various processes that are often assumed to interconnect and similarly motivate the two. In addition, there needs to be a more effective delineation between having more constitutionalization and having better constitutionalization and that this will need to be clarified before the concept can have a high level of persuasiveness. Although scholars are beginning to make better conceptual distinctions between constitutionalization (as a mapping exercise) and with global constitutionalism (how to normatively 'shape' it) in order to prompt a more effective delineation, these efforts are relatively new and there remain many prickly and muddy points of conceptual overlap that will require greater scholarly clarity.

Nevertheless, to do so, this understanding will ultimately have to start from an ontological position that understands that the processes of constitutionalization can be as constitutionally reinforcing of domination and power as they might be progressively cosmopolitan. Thus, an effective response to these challenges will require a greater sensitivity about the legitimacy of global legal and institutional norms as well as a better understanding regarding the colonizing forces of power and wealth that exist within current forms of constitutionalization.[79] However, this is only

[77] P Hirst and G Thomson, *Globalization in Question* (Polity Press, Cambridge, 1996).

[78] D Hirsh, 'Cosmopolitan Law: Agency and Narrative' in Michael Freeman (ed), *Law and Sociology* (Oxford University Press, Oxford, 2006).

[79] N Walker, 'Making a World of Difference? Habermas, Cosmopolitanism and the Constitutionalization of International Law' in O Shabani (ed), *Multiculturalism and Law: A Critical Debate* (University of Wales Press, Cardiff, 2007).

part of the story, for these issues only pertain to substantive issues of constitutionalization and say nothing about how its causal processes move legal theory to constitutional practice. In other words, to better ground the normative appeal of constitutionalization, it is also necessary to identify how constitutionalization creates structural and socializing pathways toward compliance. This is certainly a difficult task and one that cannot be resolved in this article. Nevertheless, in some effort to examine this, the next section will attempt to briefly outline two influential constitutionalization models employed by more cosmopolitan minded scholars and to highlight what we should continue to keep in critical perspective.

The processes of constitutionalization as a normative good: Constitutional patriotism, jurisgenerative politics and the question of moving theory to practice

Up until now the focus of this article has been with an attempt to understand what an appeal to constitutionalization means and with trying to understand the empirical and normative dimensions involved within this constitutionalization process. Nevertheless, by doing so, the discussion has primarily focused on substantive issues about what is constitutionalization, what is being constitutionalized, and whether more constitutionalization is always better constitutionalization. As a result, I have said nothing about how scholars see the process of constitutionalization working, with how it can come to ground a constitutionalized order, or with how this constitutional order could move from legal theory to legal practice. As with the substantive concerns outlined in the last section, these further questions are important to investigate. This is especially true if more cosmopolitan minded scholars are to understand the processes of constitutionalization as an effective response to increasing problems of global crisis. In addition, if constitutionalization is to reasonably signify a move away from traditional realist paradigms, as is often argued, then it is also crucial to investigate how this move from theory to practice is possible, while understanding what limitations may still remain for the cosmopolitan legal enthusiast.

As a way to think about these questions it is useful to explore two influential models that have been recently employed by cosmopolitans to explain the processes of constitutionalization and its ability to socially reinforce a global rule of law. The first model, labelled *jurisgenerative politics*, specifically focuses on processes of domestic law and how internal processes of democratic jurisprudence within a state can provide for progressive modifications to an international constitutionalization process.

The other model, anchored in Habermas' concept of *constitutional patriotism*, focuses on the socializing structures of law at the global level and attempts to explain how these processes can be understood as representing an emerging constitutional order. In both cases, these models seek to provide a response to the question about 'how to create quasi-legal binding obligations through voluntary commitments … in the absence of an overwhelming sovereign power with the ultimate right of enforcement'.[80] As Habermas claims, this necessarily means examining the prospect of 'a rule of law that can normatively shape existing power relations, regardless of their democratic origins, and direct the exercise of political power into legal channels'.[81] Therefore, in both cases, these models specifically address the foundational socializing processes of constitutionalization. This is because both models seek to understand the *processes* of legal codification toward the establishment and incorporation of entities into a coherent and legally objectified body of law, where legal parties, legal rights, legal obligations and legitimate centres of adjudicating power are shaped and specified.

In relation to the first model, Benhabib has recently argued that domestic democratic law is imbued with reiterative processes that can act as a bridge between 'universal norms and the will of democratic majorities'.[82] This is because she believes that democratic law represents a self-reiterative process that slowly expands the parameters of legal inclusion to encompass those beyond its domestic borders. Schematically, this socializing process operates at two levels. First, democratic law constructively reinvents domestic law along progressive and universal lines, and second, it expands the boundaries for which these universal principles become applicable. Sociologically, through a process of repeated reiteration and reconstruction, democratic law engages in progressive modification by its democratic population, resulting in a *jurisgenerative politics* where domestic norms ground the creation of externally directed norms. Here Benhabib borrows from Frank Michelman, arguing that through continued reiterations 'a democratic peoples, which considers itself bound by certain guiding norms and principles, engages in iterative acts by reappropriating and reinterpreting these, thereby showing itself not only the subject but also the author of laws.'[83] Since democratic concerns for justice and individual

[80] S Benhabib, 'The Philosophical Foundations of Cosmopolitan Norms' in R Post (ed), *Another Cosmopolitanism* (Oxford University Press, Oxford, 2006) 23.

[81] See (n 30) 316.

[82] S Benhabib, 'Hospitality, Sovereignty, and Democratic Iterations' in R Post (ed) *Another Cosmopolitanism* (Oxford University Press, Oxford, 2006) 49.

[83] Ibid. For her inspiration, see Frank Michelman, 'Law's Republic' (1988) 97 *Yale Law Journal* 1493–537.

human rights are systematically incorporated into domestic positive law, these laws, in turn, come to guide the behaviour of democratic political bodies toward non-citizens. Therefore, according to Benhabib, through a process of jurisgenerative politics, democratic law can come to reflect and then expand the boundaries of legal universalism and that this has a positive socializing effect at the international level.

As Benhabib argues, this is best evidenced when domestic states provide legal protection to non-citizens who find themselves in a state's immediate legal jurisdiction. Furthermore, this process also takes place in terms of external relations, where democratic states, through a process of legislative iterations (which are generated from their own democratic norms) come to morally ground a state's commitment to these same principles within the system of international law. As Benhabib suggests, 'productive or creative jurisgenerative politics results in the augmentation of the meaning of rights claims and in the growth of the political authority by ordinary individuals, who thereby make these rights their own by democratically deploying them.'[84] As Benhabib argues, this has largely taken place within the processes of EU constitutional expansion and she suggests that the EU is an illustrative model of self-generated jurisgenerative politics. This is because, as Benhabib claims, the norms underpinning EU constitutionalization were directly influenced by its founding members, who have extended their own domestic principles to incorporate and protect non-citizens within the EU. In addition, this same process has translated beyond the confines of the EU to the global level. This is because democratic states continue to reinforce commitments to humanitarian intervention, the protection of universal human rights and to the punishment of crimes against humanity, which are consistent with their own democratic jurisgenerative commitments.

A second and more externally focused model of constitutionalization comes from the legal theory of Habermas, which is philosophically derived from, and normatively supportive of, his prior work on *constitutional patriotism*. Schematically, Habermas' socializing processes of constitutionalization and constitutional patriotism are meant to capture two corresponding features involved within a chronological development of international law. First, for Habermas, constitutionalization represents a form of juristic 'pathway-dependence' where political power is socially legitimized or reversed through established legal corridors. As legal tenets expand, the legitimate pathways for state behaviour become more restricted, which in turn force political power into legal channels that meet the legitimated standards of the global community. For Habermas, this represents an international socializing process, which in essence,

[84] See (n 82).

helps to create new iterations toward more robust forms of future constitutionalization. As Habermas himself claims, when examining the history of international law and international institutions, 'the temporal patterns of such a long-term process, in which political intervention is combined with systematic growth, suggest that we should speak here of stages or even degrees of constitutionalization.'[85] Although Habermas' model does not help to explain the substantive components of constitutionalization *per se*, his sociological history does say something about the pervasiveness of this socializing process and provides criteria for how it incorporates a progressive element. As Habermas goes on to suggest, this becomes empirically relevant, since 'many experts construe the accelerated development of international law as a process of "constitutionalization" promoted by the international community with the goal of strengthening the legal position of the individual legal subject, who is gradually acquiring the status of a subject of international law and a cosmopolitan citizen.'[86] Habermas sums up these socializing aspects of constitutionalization when he writes:

> The everyday experience of growing interdependency in an increasingly complex global society also imperceptibly alters the self-image of nation states and their citizens. Actors who previously made independent decisions learn new roles, be it that of participants in transnational networks who succumb to technical pressures to cooperate, or that of members of international organizations who accept obligations as a result of normative expectations and the pressure to compromise. In addition, we should not underestimate the capacity of international discourses to transform mentalities under the pressure to adapt to new legal construction of the international community. Through participation in controversies over the application of new laws, norms that are merely verbally acknowledged by officials and citizens gradually become internalized. In this way, nation states learn to regard themselves at the same time as members of larger political communities.[87]

Because of the socializing effects of constitutionalization, Habermas suggests that increased constitutionalization can create a sense of global legal identity, where a continued application of juridical procedures forge an identification relationship between individuals and the principles that underwrite a constitutional order. In this regard, constitutionalization develops a sense of constitutional patriotism that is engendered outside of

[85] See (n 30) 318.
[86] Ibid 335.
[87] See Habermas (n 11) 177.

local jurisdictions through the cultivated belief that these global legal practices have bearing and positive impact upon human existence.[88] As Habermas suggests, cosmopolitan citizenship will remain difficult to achieve unless 'populations can be shifted onto the foundation of constitutional patriotism'[89] for this sense of identification is necessary in order to create 'a common ethical-political dimension that would be necessary for a corresponding global community and its identity formation'.[90]

Although both models have a certain level of persuasiveness and capture many intuitive aspects involved with what is often associated with constitutionalization, they nevertheless remain susceptible to several of the concerns expressed in the second section. In the case of jurisgenerative politics, the concept seemingly rests on an intrinsic understanding of democratic law and its ultimate cosmopolitan validity. In this regard, teleological issues of jurisgenerative progressiveness seem to prevail and there is no theoretical reason to assume that democratic iterations will necessarily produce a fusion between universal ethics at the domestic level and their reappropriation at the international level. In this regard, two questions remain obscured. First, why is it that jurisgenerative politics automatically moves toward universal cosmopolitan principles and what keeps it from moving regressively toward an opposing nationalistic narrative? For example, there are several current cases where challenges to the existing 'global constitution' are being pursued via democratic procedures and as a result act in direct opposition to norm solidification and jurisgenerative expansion; cases such as those pursued by the anti-EU referenda movement in the United Kingdom[91] and by various Neo-Sovereignist movements in the USA, both of which seek to establish more domestic legislative control over treaties in order to temper further processes of constitutionalization.[92] Second, as Bonnie Honig has rightly argued, a simple reliance on jurisgenerative politics ignores a key empirical consideration involved within current processes of constitutionalization. Namely, that many of the injustices involved with the global system stem from the very same democracies that Benhabib relies upon to

[88] GW Brown, 'Moving From Cosmopolitan Legal Theory to Legal Practice: Models of Cosmopolitan Law' (2008) 28 *Legal Studies* 450.

[89] J Habermas, *Between Facts and Norms* (Polity Press, Cambridge, 1996) 499.

[90] J Habermas, *The Postnational Constellation: Political Essays* (MIT University Press, Cambridge, 2001) 76, 109.

[91] P Stephens, 'Was this the Moment UK Stumbled out of Europe?' (12 December 2011) *The Financial Times*; R Adler-Nissen, 'Opting out of an Ever Closer Union: The Integration Doxa and the Management of Sovereignty' (2011) 34 *West European Politics* 1092–113.

[92] JR Bolton and J Yoo, 'Restore the Senate's Treaty Power' (5 January 2009) *New York Times*.

constitutionalize a cosmopolitan rule of law.[93] As was argued earlier, the inequitable promotion of TRIPS and TRIPS-Plus agreements is largely the willing product of powerful democratic countries to secure corporate interests over principles of human rights and/or justice. An additional example of 'democracies behaving badly' is clearly evidenced by the willingness of many democratic states to engage in acts of extraordinary rendition and to wilfully render legal 'exceptions' from international law when it suits *reason of state*.[94] As these and other examples illustrate, although constitutionalization certainly plays a part in creating greater economic interdependence, peace between powerful states and some growth in humanitarian law, it is also this same constitutionalized order that continues to help generate massive inequality, underdevelopment, genocide and the policies that have led to economic and environmental global crisis.

Similarly, the model of constitutionalization presented by Habermas is also guilty of relying on what looks like a teleological assumption, where more constitutionalization is better constitutionalization and more will always create more. This is most evident in Habermas' assertion that the creation of legal pathways can control power by channelling it into legal corridors, which can be seen as legitimate in the eyes of the international community. As Habermas relates, 'constitutionalization reverses the initial situation in which law serves as an instrument of power.'[95] Nevertheless, like Benhabib, it is prudent to be weary of such claims. For as it was argued in the second section, these very same legal corridors have largely been created by states that have the greatest political and economic power. In many cases, such as with TRIPS, the goal of this legal device was not to restrictively channel a state's own power *per se*, but to lock certain states into a constitutional order that can then 'legitimately' demand compliance even when demanding compliance defiles the principles of justice. In this regard, although constitutionalization can produce many favourable global conditions, including the increased security between powerful states, economic regulations that promote more trade, and generate some general compliance with humanitarian values; it can also, negatively, lock in asymmetrical legal relationships that favour some states far more than

[93] B Honig, 'Another Cosmopolitanism? Law and Politics in New Europe' in R Post (ed), *Another Cosmopolitanism* (Oxford University Press, Oxford, 2006).

[94] M Satterthwaite, 'Rendered Meaningless: Extraordinary Rendition and the Rule of Law' (2007) 75 *George Washington Law Review* 1333; S Vladeck, 'National Security's Distortion Effects' (2010) 32 *Western New England Law Review* 285; M Desch, 'The More Things Change the More they Stay the Same: The Liberal Tradition and Obama's Counterterrorism Policy' (2010) 43 *Political Science and Politics* 425–9.

[95] See Habermas (n 11) 132.

others.[96] As Robert Fine points out, 'we should resist the temptation to overburden law by exaggerating its attractiveness and capabilities … and we have to leave space for the political field of judgement.'[97] In other words, international law, constitutionalization and legal cosmopolitanism will inevitably form a part of any future cosmopolitan order and it has tremendous heuristic value. However, it cannot be relied upon to be the sole cosmopolitical foundation, for this, as Fine suggests, will also require that we 'attach [international law] more firmly to a cosmopolitan politics'.[98]

Conclusion: Constituting the norms of constitutionalization

So where does this leave constitutionalization theory and what should more cosmopolitan minded scholars be mindful of when using it as a normative appeal? In the second and third sections, it was argued that an assumption often takes place within the constitutionalization literature that seemingly conflates more constitutionalization with better constitutionalization. As it was suggested, calculating constitutionalization in this fashion assumes that it has a progressive trajectory and it was suggested that more cosmopolitan minded scholars should be weary of conceptualizing constitutionalization in such a simplistic fashion. In addition, it was implied that there is a prevailing logic that can be seen to underpin this first assumption. Namely, that more constitutionalization provides for more constitutionalization. Nevertheless, it is questionable whether more constitutionalization necessarily produces a constitutionalized legal order in line with cosmopolitan principles. As was argued, more international law and more international institutions can actually disperse power horizontally over various institutional and legal jurisdictions, which can allow alternative avenues for states to sidestep legal compliance. Furthermore, as was alluded to in the last section, an over-reliance on constitutionalization can make it appear to have a teleological purpose and that this presupposition negates the inherent moral and political dimensions involved within its processes. This is because, whatever constitutionalization is, it is what we have made of it, and although this can involve some forms of a jurisgenerative 'circular learning process', there are also opposing political influences at work, which seek to resist and colonize this process.

[96] See (n 79)

[97] See (n 13) 77.

[98] See (n 13). For an expanded argument that moves the political argument into the realm of International Relations see R Beardsworth, *Cosmopolitanism and International Relations* (Polity Press, Cambridge, 2011).

As was argued earlier, this begs the question as to whether constitutionalization *should* refer to all laws and institutions or whether it *should* refer to only those instruments that can capture a certain normative component. It is my opinion that making a distinction of this type would be necessary before the concept of constitutionalization can have the kind of normative strength many globally minded scholars suggest it has. This is because constitutionalization as it is currently conceptualized lacks a moral compass that can help us differentiate between the various negative and positive aspects involved within its processes. One potential and recent development toward providing differentiated clarity is to make a conceptual and analytical distinction between *constitutionalization* – as an exclusive mapping exercise geared toward outlining ongoing shifts from a globalized order to a constitutionalized order – and *global constitutionalism* – as a more critical and normative 'shaping' activity that seeks to improve current and future constitutional conditions.[99] Although this distinction is heuristically viable, it nevertheless remains in its infancy and this research agenda still requires considerable clarification in terms of how global constitutionalism relies on its own assumptions concerning the processes of constitutionalization and in terms of what normative and moral components *ought* to ultimately underwrite global constitutionalism.

One potential way to better ground a more normatively sensitive global constitutionalism would be to make closer links with the philosophical traditions of legal and political cosmopolitanism. This is because cosmopolitanism as a political theory, with its focus on distributive and deliberative global justice, is well equipped to provide the additional moral and normative criteria needed to underpin this research agenda.[100] For cosmopolitanism, as a global political theory, has philosophical material made available through centuries of development that can provide the moral criteria from which the gaps between theory and practice can be measured as well as normatively 'shaped'.[101] Nonetheless, in the interim, a commitment to this move will first require a better conceptualization of what is actually being constitutionalized, how it is being constitutionalized, and with whether this process actually resembles any sense of global justice and mutual benefit. For as this article has suggested, what is seemingly lacking from much of the constitutionalization literature is a thorough response to key questions about whether we are constitutionalizing the

[99] See (n 1).

[100] GW Brown, *Grounding Cosmopolitanism: From Kant to the Idea of a Cosmopolitan Constitution* (Edinburgh University Press, Edinburgh, 2009).

[101] A Stone Sweet, 'A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe' (2012) 1 *Global Constitutionalism* 53–90.

right legal tenets, if we are creating the right international institutions, and, most importantly, whether these regimes actually reflect any sense of global justice. These shortcomings are important to be mindful of, especially if we are to understand constitutionalization as providing a foundation for an effective cosmopolitan response to increasing issues of global crisis. Otherwise, there is no guarantee that more constitutionalization is better, for without a reasonable moral component, it might be the case that we are simply constitutionalizing just more of the same.