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Between Fragmentation and Unity: The Uneasy Relationship Between Global Administrative Law and Global Constitutionalism

MING-SUNG KUO*

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I. INTRODUCTION

Administrative law and constitutional law, which together constitute what we call “public law,” are closely related in many ways.¹ For one thing, constitutional law refers to the body of the law that sets out the powers of public authorities by establishing the political system and stipulates the relationship between individuals and public authorities, while administrative law concerns “the ways in which the exercise of public power may be held to constitutional account.”² Thus, “it [is] difficult to distinguish the values and principles of constitutional and administrative law.”³ However, this does not mean that administrative law is simply a synonym for constitutional law. Rather, constitutional law constitutes the “background theory” under which administrative law functions, *and not the other way around*. This is the reason why leading administrative law casebooks begin with the issues centering on how administrative law, or rather the administrative state, should be viewed through a constitutional lens.⁴ Put differently, constitutional law, as the reference point of the legal system,⁵ stands apart from administrative laws, setting the perimeters of values and principles for the latter to

1. Due to the obscure distinction between public and private law in the common law tradition, the idea of public law in the common law world is not as clear as in the civil law system. See R.C. VAN CAENEGEM, *EUROPEAN LAW IN THE PAST AND THE FUTURE: UNITY AND DIVERSITY OVER TWO MILLENNIA* 41–44 (2002). However, with the global rise of the administrative state in the twentieth century, academic communities in Anglo-American legal scholarship have accepted public law. See, e.g., MARTIN LOUGHLIN, *THE IDEA OF PUBLIC LAW* (2003) [hereinafter LOUGHLIN, *PUBLIC LAW*]; JERRY L. MASHAW ET AL., *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM, CASES AND MATERIALS* (5th ed. 2003).

2. See DAMIAN CHALMERS & ADAM TOMKINS, *EUROPEAN UNION PUBLIC LAW: TEXT AND MATERIALS* 311 (2007).

3. See Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 *EUR. J. INT’L L.* 187, 208 (2006).

4. See, e.g., MASHAW ET AL., *supra* note 1, at 59–304 (discussing the constitutional roles of the legislative and executive powers in controlling administrative agencies); STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES* 31–140 (6th ed. 2006) (addressing the constitutional position of administrative agencies); PETER L. STRAUSS ET AL., *ADMINISTRATIVE LAW: CASES AND COMMENTS* 48–225 (Rev. 10th ed. 2003) (setting up the constitutional framework for administration).

5. See also Bruce Ackerman, *2006 Oliver Wendell Holmes Lectures: The Living Constitution*, 120 *HARV. L. REV.* 1737, 1756 (2007).

implement in the context of public administration.⁶ Taken together, constitutional law and administrative law are closely linked but stand as distinct sets of legal values in our traditional legal thinking.⁷

However, the relationship between constitutional and administrative law seems to be undergoing a great transformation in the global context. On the one hand, as an original act of “naming,” the term “global administrative law” has been given to the attempt to systematize and rationalize the results of transboundary regulations in terms of global governance, without looking for its constitutional underpinnings.⁸ On the other, constitutionalism has been proclaimed to go beyond national borders and prevail over the Westphalian assumption of international relations by taking the practice of global governance as its own birth certificate.⁹ For this reason, the relationship between constitutional law and administrative law seems to become inverted when set against the backdrop of global governance. Whether this inversion heralds a new epoch of legal thinking and the coming of a global rule of law, or whether it exemplifies a challenge to the rule of law in the global era, lies at the center of this Article.

By critically examining the status of global administrative law within the already widely acknowledged notion of “global constitutionalism,” I aim to explore the theoretical as well as normative fragmentation

6. See Harlow, *supra* note 3, at 207–08. For how the separation of constitutional law from the body of nonconstitutional law plays out in legal epistemology and the institutional structure of constitutional democracy, see Frank I. Michelman, *Constitutional Legitimation for Political Acts*, 66 MOD. L. REV. 1, 9 (2003) (identifying an epistemic duality—the body of constitutional law and the residual body of “ordinary” legal acts—inherent in the *corpus juris*). It should be noted that through the lens of legal realism, this distinction between constitutional law and nonconstitutional law is the epitome of “conceptual jurisprudence.” See also GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY’S END* 24–33 (1995). Whether conceptual or empty, this epistemic duality has influenced the way our inherited legal system functions and our legal thinking. See Michelman, *supra*. I thank Professor Francesca Bignami for bringing the perspective of legal realism to my attention.

7. British scholar S.A. de Smith noted that “constitutional law and administrative law . . . occupy[] distinct provinces, but also a substantial area of common ground.” See Michael Taggart, *The Province of Administrative Law Determined?*, in *THE PROVINCE OF ADMINISTRATIVE LAW* 1, 1 (Michael Taggart ed., 1997) (quoting S.A. DE SMITH, *THE LAWYERS AND THE CONSTITUTION* 16 (1960)).

8. See generally Susan Marks, *Naming Global Administrative Law*, 37 N.Y.U. J. INT’L L. & POL. 995 (2005).

9. See, e.g., Kanishka Jayasuriya, *Globalization, Law, and the Transformation of Sovereignty: The Emergence of the Global Regulatory Governance*, 6 IND. J. GLOBAL LEGAL STUD. 425 (1999). See also Joshua Cohen & Charles F. Sabel, *Global Democracy?*, 37 N.Y.U.J. INT’L L. & POL. 763, 763–72 (2005).

between global administrative law and global constitutionalism.¹⁰ While global constitutionalism refers to the process of “constitutionalizing” an increasingly globalized world by way of the values implicit in cross-border regulatory cooperation, the global regulatory practice at the heart of global administrative law appears to take the place of “We the People” as the creative force behind global constitutionalism. This relationship between global administrative law and global constitutional law suggests a unity of global legality, whether it be called administrative law or constitutionalism. I argue that this “identitarian unity” between administrative law and constitutional law in the global context poses challenges to the ideal of the global rule of law. On the one hand, global administrative lawyers focus on the global coordination or rationalization of administrative policies without paying sufficient attention to their impacts on the development of global constitutionalism. On the other hand, by premising global constitutionalization on the practices of global regulation, global constitutionalists overlook the problems inherent in global administrative law itself. My analysis of these positions shows that the status quo of global administrative law can only be maintained by “outsourcing” the fundamental challenges to global constitutionalism. That is, global legality is saved from fragmentation not by a unitary global public law, but instead by assuming “legal duality” as is customary in traditional legal thinking.

My argument proceeds as follows: Part II explores the conceptualization of global administrative law and global constitutional law. It also discusses whether the ways they are distinctly conceptualized point to a unitary public law, dissolving the traditional distinction between constitutional and administrative law. Part III examines some issues embedded in the discourse on global administrative law and global constitutionalism. I argue that constitutional law does not disappear from the discourse on global administrative law but rather stands as the background against which it is self-referentially rationalized and legitimated. In Part IV, besides summarizing the main arguments, I conclude by suggesting that normative issues concerning global governance cannot be fully addressed until the relationship between global administrative law and global constitutional law is brought to the fore in the discussion on the global rule of law.

II. THE STATE OF GLOBAL LEGALITY

The buzzword “globalization” characterizes myriads of developments that started prior to, or in the wake of, the collapse of the Berlin Wall,

10. See Symposium, *Global Constitutionalism*, 59 STAN. L. REV. 1153 (2007).

and has since become virtually irresistible to academic disciplines. Law is no exception. “Legal globalization,”¹¹ “the globalization of law,”¹² or anything with an epithet evoking globalization such as the “global rule of law,”¹³ and “globalized judiciary,”¹⁴ to name just a pair, are widespread in legal scholarship. In this Part, I first discuss how administrative law has been brought into the fold of globalization scholarship. Next, I proceed to explore the way that constitutionalism has been projected beyond state boundaries. This Part concludes with the suggestion that in terms of the development of global administrative law and global constitutionalism, a unitary global public law seems to be emerging, subsuming the administrative and constitutional provinces into its territory.

A. Making Sense of Global Administrative Law: The Bootstrapping of Global Governance

While administrative law is conventionally discussed in the domestic context, it has been noted that it also exists in international settings.¹⁵ In contrast to the old “international administrative law,” the identity of global administrative law is constructed against the backdrop of emerging global governance that transcends the boundaries of nation-states. Global administrative law is to global governance as international administrative law is to “international administration.”¹⁶ The notion of international administration, the object that international administrative law aims to rein in, is broad, including not only international institutions but also domestic administrative actors when they function in relation to

11. See, e.g., David Levi-Faur, *The Political Economy of Legal Globalization: Juridification, Adversarial Legalism and Responsive Regulation: A Comment*, 59 INT'L ORG. 451 (2005).

12. See, e.g., Sabino Cassese, *The Globalization of Law*, 37 N.Y.U. J. INT'L L. & POL. 973 (2005) [hereinafter Cassese, *Globalization of Law*]; Martin Shapiro, *The Globalization of Law*, 1 IND. J. GLOBAL LEGAL STUD. 37 (1993). See also Duncan Kennedy, *Two Globalizations of Law and Legal Thought: 1850–1968*, 36 SUFFOLK U.L. REV. 631 (2003).

13. See, e.g., Ruti Teitel, *The Alien Tort and the Global Rule of Law*, 57 INT'L SOC. SCI. J. 551 (2005).

14. See, e.g., Ken I. Kersch, *The “Globalized Judiciary” and the Rule of Law*, 13 GOOD SOC'Y 17 (2004).

15. See Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 19–20 (2005). See also Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490, 1493–95 (2006).

16. See Kingsbury et al., *supra* note 15, at 18–19.

transboundary regulations.¹⁷ In contrast, global governance, or global administration to which global administrative law is seen to respond, is more complex and multifarious.

In a pioneering work on the concept of global administrative law, Benedict Kingsbury, Nico Krisch, and Richard Stewart identify five types of global administration, which they argue set the emerging global administrative law apart from traditional international administrative law.¹⁸ In addition to international administration and what they call “distributed administration,” both of which were formerly the objects of international administrative law,¹⁹ they identify three other types of global administration: “transnational networks and coordination arrangements,” “hybrid intergovernmental-private administration,” and “private bodies.”²⁰ To address the issues arising from global governance, traditional administrative law tools such as procedural fairness, transparency requirement, and accountability control are deployed in the global setting, giving rise to “global administrative law.”²¹

17. *See id.* at 18–20.

18. *See id.* at 20–23. *See also* Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 *EUR. J. INT’L L.* 1, 2–3 (2006).

19. According to Kingsbury, Krisch, and Stewart’s definition, “distributed administration” refers to the type of administration in which “domestic regulatory agencies act as part of the global administrative space . . . tak[ing] decisions on issues of foreign or global concern.” *See* Kingsbury et al., *supra* note 15, at 21. Also, they note that the pre-1945 “broad notions of ‘international administration’” included not only “international institutions” but also “domestic administrative actors when taking actions with transboundary significance.” *See id.* at 19–21. Taken together, what Kingsbury, Krisch, and Stewart calls “distributed administration” constitutes part of “broad notions of ‘international administration’” in the pre-1945 international administrative law, while “international administration” in their definition refers to the narrower notion of “international institutions.” *See id.*

20. In Kingsbury, Krisch, and Stewart’s definition, “transnational networks and coordination arrangements” as “horizontal form of administration” are “characterized by the absence of a binding formal decisionmaking structure and the dominance of informal cooperation among state regulators.” *See id.* at 21. An example of this type of global administration is the Basel Committee, under which the heads of various central banks, “outside any treaty structure,” are brought together in order to coordinate their policies on capital adequacy requirements for banks among other things. *See id.* “Hybrid intergovernmental-private administration” refers to bodies, which combine private and governmental actors, in charge of various transboundary regulatory matters. *See id.* at 22. For example, the Codex Alimentarius Commission, which produces standards on food safety that gain a quasi-mandatory effect via the SPS Agreement under the WTO law, is composed of non-governmental actors as well as governmental representatives. *See id.* As regards “private bodies” in global administration, Kingsbury, Krisch, and Stewart discuss the private International Standardization Organization (ISO) among other examples. *See id.* at 22–23. The over 13,000 standards that the ISO has adopted to harmonize product and process rules not only have major economic impacts but are also used in regulatory decisions by treaty-based authorities such as the WTO. *See id.*

21. *See id.* at 37–41; Esty, *supra* note 15, at 1524–37.

As Kingsbury, Krisch, and Stewart note, informality and pluralism, among other things, distinguish global administrative law from traditional administrative law, both domestic and international.²² This is not surprising given that global administrative law aims to tame and improve global administration, which, as noted above, includes conventional international administration and new types of administration. Thus, the novelty of global administration lies not only in its containing new types of administration but also its reconfiguring of the conventional types of international administration in the global context. While the new types of administration reflect the informal nature of global governance, the coexistence of new and conventional types of administration in global governance indicates the multifaceted constitution of global governance. Yet, to make sense of global administrative law, a closer look at the constitution of global governance and its role in theorizing global administrative law is required.

New types of administration require corresponding new visions of administrative law. Thus, with the emergence of informal types of administration such as transnational networks and coordination arrangements, hybrid administration, and private bodies, an informality-oriented administrative law, coexisting with traditional administrative law in which international administrative law and domestic administrative law occupy distinct territories, seems to be necessary.²³ Nevertheless, these new types of administration, together with conventional international administration, are subsumed under the rubric of global governance, calling for global administrative law in the place of traditional international administrative law.

Kingsbury, Krisch, and Stewart regard the pre-1945 paradigm of international administrative law, which can be traced back to the mid-nineteenth century, as the predecessor of global governance.²⁴ Still, it differs from the emerging global administrative law in an important way. International administration, which was at the center of traditional international administrative law, did not go beyond the Westphalian system and thus international administrative law did not take the place of domestic administrative law. On the one hand, international administrative law focused on areas such as postal services, navigation, and

22. See Kingsbury et al., *supra* note 15, at 53–54.

23. See *id.*; Esty, *supra* note 15, at 1537–42. See also Cassese, *Globalization of Law*, *supra* note 12, at 976–77.

24. See Kingsbury et al., *supra* note 15, at 19–20 & n.11.

telecommunication, which gave rise to “international unions,”²⁵ and indeed derived from the international union-creating treaties that were concluded under the Westphalian system. On the other hand, international administrative law extended to domestic administrators only when they took actions with transboundary significance.²⁶ Specifically, although it has been argued that international unions were trusted “with significant powers of secondary rulemaking which did not require national ratification to be legally effective,” these autonomous secondary rulemaking powers only existed in fields whose regulatory framework had been set out in treaties.²⁷ The drive to extend international administration beyond international institutions to include domestic administrators comes from the fact that their cooperation is crucial to the implementation of unratified secondary rules.²⁸ The development of international administrative law is thus rooted in the central role of domestic administrators in the success of international administration.

In contrast, the position of domestic administrators in global governance, from which global administrative law is derived, is not distinct from that of other regulatory players. Rather, these administrators share the center stage as the main players with other actors from the private realm and international civil service. Domestic administrators, both in international administration that involves intergovernmental organizations established by treaties or executive agreements and in distributed administration or other types of global administration, and other actors are equal players in an extended sphere of global administration.²⁹ This new “global administrative space” makes global administrative law post-Westphalian and post-Hobbesian.³⁰

Global administrative law is post-Westphalian because nation-states and their representatives do not play dominant roles in the administrative space. In order to resolve diverse transboundary issues ranging from core concerns such as antiterrorism responses and other national security questions to everyday routine matters like fishery supply, national governments need to cooperate with all possible players, regardless of whether they operate within the national boundary.³¹ Nation-states in

25. *See id.* at 19.

26. *See id.*

27. *See id.*

28. *See id.*

29. *See id.* at 20–27.

30. *See generally* Mathias Albert & Tanja Kopp-Malek, *The Pragmatism of Global and European Governance: Emerging Forms of the Political ‘Beyond Westphalia’*, 31 *MILLENNIUM – J. INT’L STUD.* 453 (2002).

31. *See* Cassese, *Globalization of Law*, *supra* note 12, at 973–77. *See also* Sabino Cassese, *Administrative Law Without the State? The Challenge of Global Regulation*, 37

the traditional form, which occupy the center of the Westphalian world system, no longer hold a monopoly on transboundary regulatory issues. Instead, nation-states are disaggregating.³² Moreover, the relationship among the players in the global administrative space is post-Hobbesian, in that national self-interest plays a lesser role in global administration. The problem-solving attitude of pragmatism takes the place of realism in addressing transboundary regulatory issues.³³ Certainly, transnational cooperation in tackling transboundary issues is no novelty, yet what distinguishes the concept of global administrative space and the corresponding global administrative law is that cooperative efforts are reinterpreted through a pragmatic lens.

Specifically, this pragmatism at the heart of global administrative law and global governance involves a twofold conceptual shift. First, given the transboundary or global nature of contemporary regulatory issues, administrative space, which previously centered on the nation-state, has been reconceptualized. While traditional nation-state-centered administrative space covers the area of the politico-juridical authority of the nation-state, this new administrative space is conceptualized in accordance with the nature of the subject matter at issue. In other words, in traditional administrative law, administrative space, the object of administrative law, is defined by the source of its delegated authority.³⁴ Thus, nation-states, as the only source of legitimate power in the Westphalian world system, determine the scope of administrative space. In terms of domestic law, the nation-state constitutes the prototype of domestic administrative space, while internationally the scope of administrative law extends only to the subject matters that nation-states consent to delegate to international institutions or other treaty-based regulatory mechanism.

In contrast, in global administrative law, the targeted administrative space is determined by how and where global regulatory issues will be best tackled.³⁵ Thus, the scope of global administrative space is not

N.Y.U. J. INT'L L. & POL. 663, 663–670 (2005) [hereinafter Cassese, *Administrative Law Without the State*].

32. See generally ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004) [hereinafter SLAUGHTER, *NEW WORLD ORDER*]; Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, 24 MICH. J. INT'L L. 1041 (2003).

33. See Kingsbury et al., *supra* note 15, at 54–57.

34. See generally Jack M. Beermann, *The Reach of Administrative Law in the United States*, in *THE PROVINCE OF ADMINISTRATIVE LAW*, *supra* note 7, at 171.

35. See Andreas Fisher-Lescano & Gunther Teubner, *Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999,

embedded in the source of legitimate power but is functionally determined instead. As a result, nation-states function in regard to global administration as subnational administrative districts function in regard to national administration, except that the national constitution serves as the reference point for the relationship between subnational administrative districts and national administration, whereas the superimposition of global administration on existing administrative spaces is functionally motivated.

Second, global administrative law serves to improve the functionality of global governance. Given that global administrative space provides a better arena for dealing with global regulatory issues, global administrative law adopts administrative legal tools from national experiences, with an eye to making the decisions of global administrative players more acceptable to those under regulation.³⁶ It should be noted, however, that these tools were developed to address the normative position of regulatory administration in relation to other branches of power in national constitutional systems.³⁷ Even though there may be common procedural mechanisms and substantive values in terms of comparative administrative law, they materialized with reference to individual constitutional norms and legal traditions.³⁸

In contrast, in the global administrative space, which lacks a common set of constitutional norms and a shared legal tradition, global administrative law focuses on making people receptive to the decisions of global governance. Global administrative law works to improve the rationality of the decisions by enhancing the role of reason and rationality in the decision-making process. Also, by providing for reviewing mechanisms through which not only arbitrary or capricious decisions but also irrational policies can be detected and set aside, reason and rationality are expected to duly function in global administration.³⁹ Global administrative law, as a discipline and as a practice, by combining its function-driven nature and the configuration of the global administrative

1021 (2004). Cf. LOUGHLIN, PUBLIC LAW, *supra* note 1, at 97 (noting the emergence of “a ‘systems-oriented’ framework of regulatory law operating in accordance with a ‘single logic of rule,’ which transcends territorial units, in the post-nation-state age of ‘imperial sovereignty.’”).

36. See Esty, *supra* note 15, at 1524–37.

37. For example, the enactment of Administrative Procedure Act in the United States and the jurisprudence of the Supreme Court on administrative law are aimed to address the needs of the administrative/regulatory state under the separation-of power structure conceived in the American constitutional system. See BREYER ET AL., *supra* note 4, at 13–37.

38. See Beermann, *supra* note 34. See also Peter L. Lindseth, *The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s*, 113 YALE L.J. 1341, 1345–49 (2004).

39. See Kingsbury et al., *supra* note 15, at 37–41; Esty, *supra* note 15, at 1529–30.

space transcending existing politico-judicial spaces defined by national constitutions, is part of the bootstrapping of global governance.⁴⁰ Global administrative law helps a function-driven, pragmatic global administration to fulfill its self-imposed telos of ushering in the global era of the rule of law by increasing the acceptability of its decisions concerning global regulatory issues.

*B. From Functional Administration to Global Constitutionalization:
A Global Constitutionalist Initiative*

As noted in the preceding section, global administrative law is conceived without presuming a positive code of general administrative law. Likewise, global constitutionalism emerges independently of a world constitutional charter.⁴¹ Rather, aspiring to a world order based on the idea of the rule of law, global constitutionalists argue that even without a world constitutional charter, the post-Cold War era has witnessed the “constitutionalization” of the world order.⁴² At the heart of the constitutionalized world order is the notion of constitutionalism, which assumes a higher law as the reference point for the rest of the body of the law. Along this line of thinking, global constitutionalists claim to have discerned a set of normative values among the practice of global governance. Moreover, they argue that together with normative principles rooted in traditional sources of international law, the normative values implicit in the practice of global governance constitute the “higher law” of the world order.⁴³ Corresponding to the constitutionalization of the European Union, global constitutionalism

40. In line with Jon Elster’s use of “bootstrapping,” which involves a clean break with a preconstitutional past in constitutional politics, I adopt the term here to refer to the disconnection of theorizing a global administrative space and a corresponding global administrative law from the existing norm-laden politico-judicial space centering on nation-states. See Jon Elster, *Constitutional Bootstrapping in Philadelphia and Paris*, in CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY: THEORETICAL PERSPECTIVES 57 (Michel Rosenfeld ed., 1994).

41. A notable exception is German legal scholar Bardo Fassbender, who argues for the United Nations Charter as the world constitution. See Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUM. J. TRANSNAT’L L. 529 (1998).

42. See Armin von Bogdandy, *Constitutionalism in International Law: Comment on a Proposal from Germany*, 47 HARV. INT’L L.J. 223, 224–25 (2006).

43. See also Mark Weston Janis, *The Quest for a Higher Law*, 116 YALE L.J. 317 (Supp. 2007) (book review), available at <http://yalelawjournal.org/2007/04/07/janis.html>.

extends the idea of constitutionalization without a constitution to the global scale.⁴⁴

At the core of the global constitutionalist project of constitutionalizing the world order without a constitution lies an “external” sociological perspective on law, necessary to understand the new world order: “there is a continuum between legal and nonlegal obligations and a broad spectrum of norms that ranges from soft to hard law.”⁴⁵ Outside municipal legal systems and traditional international law, it is not a lawless wilderness but instead “a world full of law” that results from an independent process of global lawmaking.⁴⁶

Various designations have been attached to the phenomenon of global lawmaking such as “legal and constitutional pluralism,”⁴⁷ “multilevel governance,”⁴⁸ “societal constitutionalism,”⁴⁹ “transnational government networks,”⁵⁰ and “cosmopolitan human rights law enforced by humanitarian

44. See, e.g., Frank Schorkopf, *Constitutionalization or a Constitution for the European Union?*, in *THE EMERGING CONSTITUTIONAL LAW OF THE EUROPEAN UNION: GERMAN AND POLISH PERSPECTIVES 1* (Adam Bodnar et al. eds., 2003); Susan C. Breau, *The Constitutionalization of the International Legal Order*, 21 *LEIDEN J. INT’L L.* 545 (2008) (book review).

45. Jean L. Cohen, *Whose Sovereignty? Empire Versus International Law*, 18 *ETHICS & INT’L AFF.* 1, 7 (2004). See also SLAUGHTER, *NEW WORLD ORDER*, *supra* note 32, at 178–81; Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, in *LEGALIZATION AND WORLD POLITICS 37* (Judith Goldstein et al. eds., 2001); Gunther Teubner, ‘Global Bukowina’: *Legal Pluralism in the World Society*, in *GLOBAL LAW WITHOUT A STATE 3*, 21 (Gunther Teubner ed., 1997).

46. See Cohen, *supra* note 45, at 7. See also Abbott & Snidal, *supra* note 45, at 38–39. Cf. Karl-Heinz Ladeur, *Post-Modern Constitutional Theory: A Prospect for the Self-Organising Society*, 60 *MOD. L. REV.* 617, 623–26 (1997) [hereinafter Ladeur, *Post-Modern Constitutional Theory*] (discussing how a switch of focus from individual liberty to group autonomy would help to overcome the regulatory challenges resulting from the uncertainty and complexity of contemporary society in the context of liberal democracy); Karl-Heinz Ladeur, *Towards a Legal Theory of Supranationality—The Viability of the Network Concept*, 3 *EUR. L.J.* 33, 49–52 (1997) [hereinafter Ladeur, *Towards a Legal Theory of Supranationality*] (regarding the networked self-regulation of private players in the supranational regulatory context of the EU as the predecessor of a new type of transnational regulation).

47. See Neil Walker, *The Idea of Constitutional Pluralism*, 65 *MOD. L. REV.* 317 (2002). See also GAVIN W. ANDERSON, *CONSTITUTIONAL RIGHTS AFTER GLOBALIZATION* 39–151 (2005).

48. See Markus Perkmann, *Policy Entrepreneurs, Multilevel Governance and Policy Networks in the European Polity: The Case of the EUREGIO* (2003), <http://www.lancs.ac.uk/fss/sociology/papers/perkmann-policy-entrepreneurs.pdf>. See also Ingolf Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?*, 36 *COMMON MKT. L. REV.* 703 (1999).

49. See Gunther Teubner, *Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory?*, in *TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM 3* (Christian Joerges et al. eds., 2004) [hereinafter Teubner, *Societal Constitutionalism*].

50. See SLAUGHTER, *NEW WORLD ORDER*, *supra* note 32, at 8; Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 *STAN. J. INT’L L.* 283, 288 (2004).

intervention.”⁵¹ At its core is what political theorist Jean Cohen calls “the juridification of the new world order.”⁵² In traditional international law, state consent is the legal basis for the authority of international legal regimes⁵³ and national constitutions provide the framework within which controversies regarding state consent are resolved.⁵⁴ In contrast to this Westphalian world composed of national jurisdictions, the world order envisioned by legal globalists does not rest on state consent. Rather, it emerges out of a global process of juridification independent of an individual state’s will and also of its constitutional framework.

What sets the global process of juridification apart from the development of “juridification” in terms of municipal law is the way that the law is conceived. In contrast to the court-centered concept of domestic juridification,⁵⁵ the global process of juridification extends to the operation of nonjudicial actors in global governance. Through the lens of global juridification, the *modus operandi* of each subject field that emerges from the practice of everyday governance is institutionalized through myriad self-regulatory networks, developing into a networked global legal regime. Moreover, the global legal regime generalizes and stabilizes normative expectations in each sector of subject matter and

51. See Michael W. Doyle, *The New Interventionism*, in GLOBAL JUSTICE 219 (Thomas W. Pogge ed., 2001). See also SEYLA BENHABIB, ANOTHER COSMOPOLITANISM 29, 72 (Robert Post ed., 2006).

52. Cohen, *supra* note 45, at 2.

53. See Martti Koskenniemi, *Introduction* to SOURCES OF INTERNATIONAL LAW, at xi, xii (Martti Koskenniemi ed., 2000).

54. Compare BRUCE ACKERMAN & DAVID GOLOVE, IS NAFTA CONSTITUTIONAL? (1995), with Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995) (debating on the constitutionality of the ratification procedure of the NAFTA, through which the United States expressed its consent to that international “treaty”). This corresponds to the modern international law principle of sovereign equality in that constitutions as the embodiment of national sovereignty are equally weighted in regard to the domestic recognition of international law. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 287 (6th ed. 2003). That the domestic recognition of international law is controlled by national constitutions can be exemplified by Article 48 of the defunct draft EU Constitutional Treaty, which provides that the draft Treaty shall be ratified by all party states according to their constitutional requirements. See Bruno de Witte, *The Process of Ratification and the Crisis Option: A Legal Perspective*, in THE EU CONSTITUTION: THE BEST WAY FORWARD? 21, 21 (Deidre Curtin et al. eds., 2005).

55. See also Lars Trägårdh & Michael X. Delli Carpini, *The Juridification of Politics in the United States and Europe: Historical Roots, Contemporary Debates and Future Prospects*, in AFTER NATIONAL DEMOCRACY: RIGHTS, LAW AND POWER IN AMERICA AND THE NEW EUROPE 41 (Lars Trägårdh ed., 2004).

thus enhances global governance.⁵⁶ In other words, the networked norm-making regime amounts to the function of norms autonomously materializing in the process of globalizing governance.

To global constitutionalists, this new model of norm-making functions noticeably as a “constitutional” order for the world,⁵⁷ constituting the “ultimate rule of recognition” on a global scale.⁵⁸ In this view, the question of what is law and *non-law* in the traditional municipal legal system is no longer decided solely by reference to national constitutions.⁵⁹ Rather,

56. Compare Bernhard Zangl, *Is There an Emerging International Rule of Law?*, in TRANSFORMATIONS OF THE STATE? 73 (Stephan Leibfreid & Michael Zürn eds., 2005) (noting the wide acceptance of dispute settlement procedures in four issue areas in international law—international trade, security, labor, and environmental law—as indicative of an emerging (quasi)international rule of law complementing modern states’ domestic rule of law), with Daniele Archibugi & Iris Marion Young, *Envisioning a Global Rule of Law*, in TERRORISM AND INTERNATIONAL JUSTICE 158 (James P. Sterba ed., 2003) (arguing that an international criminal justice centered strategy in the place of “war on terror” in response to global terrorism would contribute to a global rule of law that goes beyond the existing focus on international trade, investment, and environmental protection). This networked global legal regime results either from intergovernmental networks of regulatory cooperation or from *lex mercatoria* (merchant law) and its variations. See generally GLOBAL LAW WITHOUT A STATE, *supra* note 45. See also Teubner, *Societal Constitutionalism*, *supra* note 49, at 21–23 (*lex electronica* and *lex mercatoria*); Andreas Fischer-Lescano, *Themis Sapiens: Comments on Inger-Johanne Sand*, in TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM, *supra* note 49, at 67, 72–73 (*lex mercatoria*, *lex informatica*, and *lex sportiva*); Michelle Everson, *Law and Non-Law in the Constitutionalisation of Europe: Comments on Eriksen and Fossum*, in TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM, *supra* note 49, at 147, 155 (*lex mercatoria* and *lex digitalis*); Alec Stone Sweet, *The New Lex Mercatoria and Transnational Governance*, 13 J. EUR. PUB. POL’Y 627 (2006) (*lex mercatoria*).

57. See TOWARDS WORLD CONSTITUTIONALISM: ISSUES IN THE LEGAL ORDERING OF THE WORLD COMMUNITY (Ronald St. John MacDonald & Douglas M. Johnston eds., 2005); Constance Jean Schwindt, *Interpreting the United Nations Charter: From Treaty to World Constitution*, 6 U.C. DAVIS J. INT’L L. & POL’Y 193 (2000). See also BENHABIB, *supra* note 51, at 71–72. Cf. Christian Walter, *Constitutionalizing (Inter)national Governance—Possibilities for and Limits to the Development of an International Constitutional Law*, 44 GERMAN Y.B. INT’L L. 170 (2001) (proposing a segmented, as opposed to comprehensive, version of international constitutional law). This “conceptual shift” is related to the globalist epistemological shift to an external sociological perspective of the law. See Cohen, *supra* note 45, at 7.

58. As Joseph Raz emphasizes, the rule of recognition in H.L.A. Hart’s legal theory exists as “a practice of the legal officials” and stands apart from constitutions. See Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 152, 160–62 (Larry Alexander ed., 1998). Nevertheless, the sociological view of global constitutionalization brings the practice-embedded world constitutional order closer to the Hartian rule of recognition. The term “rule of recognition” is adopted here in a metaphorical sense. Cf. Bert van Roermund, *Sovereignty: Unpopular and Popular*, in SOVEREIGNTY IN TRANSITION 33, 42 (Neil Walker ed., 2003) (identifying Rousseau’s notion of “general will” and popular sovereignty as “the ultimate rule of recognition” in the normative system of democracies).

59. See Cohen, *supra* note 45, at 7. See also Teubner, *Societal Constitutionalism*, *supra* note 49, at 8.

national constitutions are part of a multilevel constitutional order in which the distinction between law and *non-law* is made.

As pointed out in the preceding section, global administrative law is tied to global governance. Moreover, the central goal of global governance is to effectively resolve global regulatory issues through reasonable and rational measures. Driven by this problem-solving mentality, administrative actors in the global administrative space develop different patterns of measures, or sector-oriented, self-referential “*modi operandi*,” in response to regulatory needs. Through the lens of administrative law, many of these responsive patterns and “*modi operandi*,” which help administrative actors, focused on legality and consistency, to better tackle global issues, look like an “internal administrative law” or “internal law of administration” within the global administrative space.⁶⁰ These administrative practices concerning global governance in the eyes of global constitutionalists are, however, transposed to the constitutional order of the globalized world. In other words, through the theoretical initiative of global constitutionalists, a practice that is driven by a problem-solving mentality to make global administration functional in the eyes of global administrative law is layered with normative implications, laying the foundations for global constitutionalism.⁶¹

C. Towards a Unitary Global Public Law?

Taken as a whole, global governance constitutes the point of convergence of global administrative and constitutional law. Granted, administrative law tools are adopted to better global governance, yet the values underpinning the traditional administrative law tools rather than those tools themselves lie at the center of global administrative law.⁶² Moreover, it has been further argued that the practice resulting from the particular character of global governance, which focuses on informality and pluralism, represents a better translation of common administrative law values into global administrative law.⁶³ In other words, global governance itself is regarded as embodying the normative administrative

60. For the idea of “internal administrative law” or “internal law of administration,” see Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Federal Administrative Law in the Republican Era, 1801–1829*, 116 *YALE L.J.* 1636, 1686, 1737–40 (2007).

61. See Cassese, *Administrative Law Without the State*, *supra* note 31, at 687–89. See also Cassese, *Globalization of Law*, *supra* note 12, at 985–86.

62. See, e.g., Cassese, *Globalization of Law*, *supra* note 12, at 976–77.

63. See Kingsbury et al., *supra* note 15, at 55.

law values in the global context. In this way, the practice of global governance rather than normative ideals of traditional administrative law defines the contents of global administrative law. Global governance and global administrative law, which connotes the efforts to apply traditional administrative law tools to rein in and reform global governance, are in a relationship of reflexivity.⁶⁴

It has been argued that global administrative law leaves out those decisions concerning “important questions of principle (who should have ultimate authority?)” and thus falls short of a “framework[] of a more constitutionalist character.”⁶⁵ Nevertheless, driven by intellectual effort and regulatory experiences, global administrative law has been equated with “all the rules and procedures that help ensure the accountability of global administration.”⁶⁶ Despite the ambiguity of scope of global administrative law, global constitutionalists make much of “all the rules and procedures that help ensure the accountability of global administration” in their effort of constitutionalizing the globalizing world. From the perspective of global constitutionalists, the pragmatic norm-making process of global governance emerges as the source of higher normative principles for the world order. In this way, global governance, which drives the constitutionalization of the post-Westphalian world order, also becomes the basis for global constitutionalism.⁶⁷

In sum, while global administrative law scholars and global constitutionalists occupy distinct academic legal disciplines and focus on two distinct parts of the legal order, their fields seem to fuse into a unitary branch of global law: global public law.⁶⁸ Is this the state of global legality? What questions arise from this fusion, which defies the

64. Cf. Neil Walker, *EU Constitutionalism and New Governance*, in *LAW AND NEW GOVERNANCE IN THE EU AND THE US* 15, 33–36 (Gráinne de Búrca & Joanne Scott eds., 2006) (discussing the reciprocal relationship between constitutionalism and governance in the supranational context of the European Union).

65. See Krisch & Kingsbury, *supra* note 18, at 10. See also Nico Krisch, *The Pluralism of Global Administrative Law*, 17 *EUR. J. INT’L L.* 247 (2006).

66. See Kingsbury et al., *supra* note 15, at 28. See also Neil Walker, *Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders*, 6 *INT’L J. CON. L.* 373, 381 (2008) (noting the expansive character of “the Global Administrative Law project”).

67. See Cohen, *supra* note 45, at 8. See also Fisher-Lescano & Teubner, *supra* note 35, at 1014–17; Teubner, *Societal Constitutionalism*, *supra* note 49, at 7–9; Walter, *supra* note 57, at 191–96. Cf. Ladeur, *Post-Modern Constitutional Theory*, *supra* note 46, at 623–26 (discussing how a shift to problem-solving in regulatory strategies would emerge as a new paradigm for the organization and exercise of public power in the post-national liberal state).

68. Cf. Gunther Teubner, *Global Private Regimes: Neo-Spontaneous Law and Dual Constitution of Autonomous Sectors?*, in *PUBLIC GOVERNANCE IN THE AGE OF GLOBALIZATION* 71 (Karl-Heinz Ladeur ed., 2003) [hereinafter Teubner, *Global Private Regimes*] (noting the emergence of global law as laying the constitutional foundations for the globalized world order, but embedding it in private regimes).

traditional view of the relationship between administrative and constitutional law?⁶⁹ These are the issues answered in Part III.

III. AN ANATOMY OF GLOBAL LEGAL UNITY: TOWARDS A FRAGMENTED GLOBAL LAW OR BACK TO LEGAL DUALITY?

The above discussion on the emergence of global administrative and constitutional law within global legality suggests that these two distinctive provinces of public law seem to be indistinct and fused into a unitary global public law, creating what I call “global legal unity.” To clarify, by global legal unity I do not mean that a unitary public law following the traditional pyramid structure of national legal systems has been set up in the globalized world. The state of global legality is diverse, pluralist, and multilayered, without an identifiable unitary source of law.⁷⁰ Rather, global legal unity here refers to the identitarian relationship between administrative law and constitutional law in regard to the exercise of public power concerning global governance.

Despite the unity between global administrative and constitutional law, a closer inspection of this global legal unity will expose the complexity lying beneath the unitary global public law. In this Part, I aim to establish that neither unity nor fragmentation or separation accounts for the relationship between global administrative law and global constitutional law. I first discuss how administrative law is constructed by leaving the central concerns of global constitutionalism unaddressed. I then proceed to explore the way that the issues concerning global governance and global administrative law are left out of the discourse on global constitutionalism. To conclude, I argue that from the perspective of global administrative lawyers, global administrative law does not lose sight of its constitutional counterpart. Rather, global constitutionalism stands in the background as the “constitutive other” to the construction of the identity of global administrative law, pointing to a relationship of duality in global public law.

69. *See supra* text accompanying notes 1–7.

70. *See* Krisch, *supra* note 65, at 269–74.

A. Rationalization and Legitimation Untied

Global administrative law aims to make decisions on global regulatory issues more rational, acceptable, and thus legitimate, by making global administration more transparent, more participatory, and more accountable. However, participation in global administration is different from the model of traditional political participation. Global administrative law characteristically insulates global administration from the ordinary traditional political process. Reasonableness and rationality constitute the central concerns of enhancing the participation in global administration, while reasoned analysis is the common language in the policymaking network of global governance.⁷¹

Specifically, global governance does not derive its legitimacy from a higher law in the way domestic administration refers to national constitutions. Nor does it base its legitimacy on the paradigm of representative democracy on which the principal-agent model of accountability centers.⁷² Legitimacy does not take the center stage in the discussion on global governance anymore but is instead addressed in a more nuanced way. What characterizes global administrative law is that policy choices result from multiple dialogues among administrative actors in the five types of global administration in response to social needs.⁷³ On the one hand, a transparent and participatory global administrative process is regarded as an effective check on arbitrariness and caprice by exposing possible irrational policy choices to public scrutiny. Aided by the substantive principle of proportionality, the regulatory decisions of global governance will come close to reason and rationality. In contrast to traditional types of dialogue, these dialogues are conducted among various special knowledge groups, constituting separate “epistemic communities,” so to speak. Given the prominence of reason and rationality in the making of “sound polic[ies]” in transnational regulation,⁷⁴ the entire network can be seen as consisting of “epistemic communities,” including officials and civilians with “rival expertise.”⁷⁵

71. See Peter L. Lindseth, ‘Weak’ Constitutionalism? Reflections on Comitology and Transnational Governance in the European Union, 21 OXFORD J. LEGAL STUD. 145, 148–51 (2001) (book review) [hereinafter Lindseth, ‘Weak’ Constitutionalism]. See also Cohen & Sabel, *supra* note 9, at 764–65, 778–82.

72. Cohen & Sabel, *supra* note 9, at 772–84.

73. Joshua Cohen and Charles Sabel term this practice “deliberative polyarchy.” See *id.* at 779–84.

74. See Lindseth, ‘Weak’ Constitutionalism, *supra* note 71, at 148 (noting that participants in “[t]he process of ‘transnational’ deliberative interaction” concerning the making of public policies “must now justify their positions as ‘sound policy’”).

75. For the issues concerning the rule by “epistemic communities,” see Martin Shapiro, *Administrative Law Unbounded: Reflections on Government and Governance*, 8

On the other hand, from the perspective of global administrative lawyers, enhancing the accountability of global governance makes its reasonable and rational regulatory choices more acceptable and thus legitimate. Although policy discourse among experts and professionals is more technical and goes beyond the comprehension of nonexperts,⁷⁶ it is argued that expertise-based dialogue within the network is conducted in a deliberative, rather than prejudiced, way compared to parliamentary debate and street talk.⁷⁷ On this view, the ideal of deliberative democracy seems to find its institutional embodiment in global governance.⁷⁸ For this reason, despite lacking global democracy and deviating from the principal-agent model of accountability, an accountable, rational, transparent model of global administration is not undemocratic but instead legitimate.⁷⁹

As described above, global administrative law appears to address both the rationality and legitimacy of global governance. It is true that democratic legitimacy built on representative democracy is not the only working model of legitimacy. Rather, legitimacy can be a product of different mechanisms such as procedural fairness, systematic consistency in policy decisions and rational results, to name just three.⁸⁰ It is also true that these multiple models of legitimacy are not mutually exclusive, but instead jointly enhance the legitimacy of administration. Multiple models of legitimation notwithstanding, it is democratic legitimacy under the

IND. J. GLOBAL LEGAL STUD. 369, 373–74 (2001) [hereinafter Shapiro, *Administrative Law Unbounded*]. But see Ladeur, *Towards a Legal Theory of Supranationality*, *supra* note 46, at 50–51 (welcoming the increasing institutionalization of “epistemic community” through the “comitology” process in the EU.). For the issue of “rival expertise” resulting from the expert-centered model of administration, see Martin Shapiro, “Deliberative,” “Independent” Technocracy v. Democratic Politics: Will the Globe Echo the E.U.?, 68 LAW & CONTEMP. PROBS. 341, 343–49 (2005) [hereinafter Shapiro, “Deliberative,” “Independent” Technocracy].

76. See Shapiro, “Deliberative,” “Independent” Technocracy, *supra* note 75, at 343. Cf. J.H.H. WEILER, THE CONSTITUTION OF EUROPE: “DO THE NEW CLOTHES HAVE AN EMPEROR?” AND OTHER ESSAYS ON EUROPEAN INTEGRATION 349 (1999) (identifying “a general sense of political alienation” with the EU comitology).

77. See Christian Joerges, “Good Governance” Through Comitology?, in E.U. COMMITTEES: SOCIAL REGULATION, LAW AND POLITICS 311, 312–16 (Christian Joerges & Ellen Vos eds., 1999).

78. See Lindseth, ‘Weak’ Constitutionalism, *supra* note 71, at 150–51. See also Shapiro, “Deliberative,” “Independent” Technocracy, *supra* note 75, at 350–51. Cf. Cohen & Sabel, *supra* note 9, at 779–84 (“deliberative polyarchy”). For criticism, see WEILER, *supra* note 76, at 283–85.

79. See Cohen & Sabel, *supra* note 9, at 773–84.

80. See Esty, *supra* note 15, at 1518–20, 1521–23.

principal-agent paradigm that lies at the center of polemics concerning legitimacy. The other models of legitimacy are designed to address the challenges from democratic legitimacy. As Joshua Cohen and Charles Sabel note, even the nascent models of accountability that are considered to enhance the legitimacy of global governance still center on the concept of democratic accountability based on the principal-agent model.⁸¹

This principal-agent relationship-centered concept of accountability and democratic legitimacy is characteristic of traditional domestic administrative law. The United States provides an example of this phenomenon. While the accountability model has long departed from the transmission-belt type in the development of American administrative law, the Supreme Court has never formally abandoned the nondelegation doctrine.⁸² That it has managed to reinterpret the jurisprudence of nondelegation to allow more models of accountability to evolve to enhance the legitimacy of administration bears testimony to the grip of the principal-agent model in the conception of accountability and legitimacy.⁸³ Another example of the centrality of the principal-agent model to administrative law is the *Chevron* doctrine.⁸⁴ Considered one of the most influential decisions in modern American administrative law,⁸⁵ the Court in *Chevron v. Natural Resources Defense Council* held that the judiciary should defer to administrative agencies in statutory interpretation when the statutory provision at issue is unclear.⁸⁶ While this judicial deference is based on the expertise of administrative agencies and their accountability to the people by way of the President, the Court notes the premise on which administrative agencies play the central role in interpreting statutes: “Congress has delegated policymaking responsibilities” and agencies exercise interpretive power “within the

81. See Cohen & Sabel, *supra* note 9, at 773–79.

82. See generally Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine’s Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297 (2003); see also Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975).

83. See Alexander & Prakash, *supra* note 82. For a theoretical discussion on the grip of the principal-agent model on the conception of accountability and legitimacy, see Cohen & Sabel, *supra* note 9, at 774–76.

84. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

85. See, e.g., Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 823 & 824 (2006) (pointing out that *Chevron* is “the most cited case in modern public law” and “one of the most important rulings in the past quarter century in American public law”); Cass R. Sunstein, *Chevron Step Zero*, 92 VA L. REV. 187, 188 (2000) (noting the *Chevron* decision as a “foundational, even a quasi-constitutional text”).

86. *Chevron*, 467 U.S. at 837. It should be noted that even under such circumstances, it does not mean that the agency has a *carte blanche* in interpreting statutes. Instead, agency interpretations must be reasonable.

limits of that delegation.”⁸⁷ Without Congressional delegation or beyond the defined limits of delegation by Congress, administrative agencies will lose the legitimacy for playing a broad role in statutory interpretation.

Leaving aside the issue of the principal-agent model of accountability and legitimacy, noticeably there is a twofold presumption behind the assumption of self-legitimizing global governance through policy rationality and enhanced accountability. To take the policy decisions resulting from deliberation among epistemic committees involved in global administration as “legitimate,” first, a model rational citizenry equipped with sufficient scientific knowledge must be presumed. Such a citizenry dissolves the question of transparency to the extent that the highly expertise-oriented policy discourse will no longer lie beyond the comprehension of the public. For a multilayered, reason-centered global administration to self-legitimate its own decisions, however, requires more than accessibility and transparency of its policy deliberations to the citizenry. A correspondence between the global administration and public concerns is also needed. A multilayered global regulatory regime self-legitimizes its decisions only inasmuch as the “heavily-committed true believers” sitting on the myriad epistemic committees involved in global administration can be considered trustees of the general citizenry.⁸⁸ Thus, on this rationalist model of legitimation, as opposed to one based on electoral representation, is presumed a general personality of the citizenry: citizens assume the common personality of expert, albeit with many bodies, which is characterized by a heavily-committed true belief in the rational and reasonable solution of public issues regardless of who makes the decision.⁸⁹

Taken together, global administrative law does not address the rationality and legitimacy of global governance as equally as it claims. As discussed

87. *Id.* at 865. See also David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 S. CT. REV. 201 (2002). For how the Supreme Court subsequently reinterpreted *Chevron* and limited its scope of application by an implicit invocation of the nondelegation doctrine, see Sunstein, *supra* note 85, at 244–47.

88. See Shapiro, *Administrative Law Unbounded*, *supra* note 75, at 373–74 (questioning the model of governance based on “networks consist[ing] of professionals, specialists, and heavily-committed true believers”). According to Cohen and Sabel, a trustee-based model of accountability turns out to be no accountability. See Cohen & Sabel, *supra* note 9, at 776–77.

89. See Cassese, *Administrative Law Without the State*, *supra* note 31, at 691 (suggesting scientific rationality); von Bogdandy, *supra* note 42, at 238 (“practical reason”); see also Gráinne de Búrca & Oliver Gerstenberg, *The Denationalization of Constitutional Law*, 47 HARV. INT’L L.J. 243, 247, 254 (2006) (“reason of the thing”).

above, the legitimacy of global administration, which global administrative law aims to satisfy by enhancing its accountability, is premised on the aforementioned twofold presumption. However, a conception of legitimacy based on presumption comes close to an attempt to “rationalize” the status quo of global governance, which is oriented toward rational and reasonable policy choices.⁹⁰ In sum, the incorporation of the values that derive from national constitutional experiences and constitute an integral part of a global administrative law into a multilevel global constitutional order only results in untying the rationalization of global governance from the issue of its legitimation.

B. *Technocratic Constitutionalism without the People*

In traditional legal thinking centering on a domestic legal system, the constitution is distinguished from the residual body of ordinary legal acts. Related to this conceptual duality is another evaluative duality: the legitimacy of ordinary legal acts is translated into the question of constitutionality; the legitimacy of the constitution itself refers to the conceptual rubric of the constituent power, despite its multiple formations.⁹¹ That the constitution stands as “the ultimate rule of recognition” for domestic and international law rests on its origin in the people’s lawgiving, constituent power.⁹²

In contrast, the constitutionalization of the global legal regime by giving normative meanings to the practice of global governance suggests a new configuration of the legal order. The binding effect of the emerging juridified, transnational, global regime does not rest on state

90. See Marks, *supra* note 8, at 997–98; Shapiro, “*Deliberative*,” “*Independent*” *Technocracy*, *supra* note 75, at 346–51; see also B.S. Chimni, *Co-Option and Resistance: Two Faces of Global Administrative Law*, 37 N.Y.U.J. INT’L L. & POL. 799 (2005). Global administrative law may arguably function as a mechanism of contestation rather than cooption, opening a new front for fighting for justice. See Kingsbury et al., *supra* note 15, at 52–57; Krisch, *supra* note 65, at 263–74. Still, the possibility of contesting the result from the expert-minded, rationality-oriented policy-making mechanism presumes the persona of contestants, who are equally rational and acquire rival expertise.

91. See Michelman, *supra* note 6, at 9. For different interpretations of constituent power, see THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM (Martin Loughlin & Neil Walker eds., 2007).

92. See Ulrich K. Preuss, *The Exercise of Constituent Power in Central and Eastern Europe*, in THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM, *supra* note 91, at 211. In traditional international law, state consent is the legal basis for the authority of international legal regimes. National constitutions provide the framework within which controversies regarding state consent are resolved. See *supra* text accompanying notes 53–54. In this sense, the constitution also functions as the ultimate rule of recognition in deciding whether international law is binding on particular constitutional systems. For the meaning of the ultimate rule of recognition, see *supra* note 58.

consent. Rather, its legitimacy arises out of a dynamic process in which players in various fields resolve a myriad of issues among themselves in response to functional demands and the norm of efficiency.⁹³ These commonly accepted solutions can take various forms, including precedents, decisions, and standardized regulations.⁹⁴ What is important is that these effective solutions-turned-norms are also “constitutionalized,”⁹⁵ supplanting national constitutions as the “ultimate rule of recognition” in deciding what is law and non-law.⁹⁶ Unlike the relationship between the constitution and ordinary legal acts, the process by which global governance is juridified is regarded as the origin of global constitutionalization, blurring the distinction between constitution-making and ordinary lawmaking.⁹⁷

93. See Cohen, *supra* note 45, at 8, 13–15; see also Karl-Heinz Ladeur, *Globalization and the Conversion of Democracy to Polycentric Networks: Can Democracy Survive the End of the Nation State?*, in PUBLIC GOVERNANCE IN THE AGE OF GLOBALIZATION, *supra* note 67, at 89, 104 [hereinafter Ladeur, *Conversion of Democracy to Polycentric Networks*].

94. Cf. Fisher-Lescano & Teubner, *supra* note 35, at 1039–40 (suggesting that “default deference” through “mutual observation” among participants in the global governing network plays a similar role to “stare decisis”). For the constitutionalization of the private standard-setting process, see Harm Schepel, *Constituting Private Governance Regimes: Standards Bodies in American Law*, in TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM, *supra* note 49, at 161, 164–67; Errol Meidinger, *Law and Constitutionalism in the Mirror of Non-Governmental Standards: Comments on Harm Schepel*, in TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM, *supra* note 49, at 188, 196–97.

95. See Cohen, *supra* note 45, at 8. See also Fischer-Lescano & Teubner, *supra* note 35, at 1014–17; Teubner, *Societal Constitutionalism*, *supra* note 49, at 7–9. Cf. Ladeur, *Post-Modern Constitutional Theory*, *supra* note 45, at 625–26 (suggesting that a post-modern constitution be based on the “pre-constituted” condition of today’s “experimenting society”). *But cf.* Walter, *supra* note 57, at 191–96 (arguing that constitutionalization of international law is limited to the “various sectoral regimes, but fails to reach the international community as a whole”).

96. See *supra* note 58.

97. At first blush, it does not look very different from the British unwritten constitution, which has no clear distinction between constitutional and non-constitutional laws. Two distinctions between global constitutionalism and British constitutionalism need to be emphasized, however. First, only the acts passed by the Parliament rather than the practices embedded in an amorphous dynamic process of governance are capable of changing the substance of constitutional law. Relatedly, the second difference is in the distinction between institution and conception. It is one thing to say that due to the institutional doctrine of parliamentary sovereignty in British constitutionalism, constitutional acts and nonconstitutional acts, both enacted by the Parliament, are hard to tell apart; it is quite another to say that constitutional and nonconstitutional laws in the British legal order are conceptually identical. I thank Mr. David Frank Barnes for bringing the example of British common law constitutionalism to my attention. Moreover, considering the tradition of “ancient constitution” in British constitutionalism,

From this view, global constitutionalism arises from, and is legitimated by, the very process through which the various functional systems of global governance interactively seek the most efficient solution to the problems of globalization.⁹⁸ The global legal regime's self-legitimation does not take place at the exceptional time of a "constitutional moment."⁹⁹ Rather, global constitutionalization is embedded in the routine operation of the institutions involved in global juridification.¹⁰⁰ Thus, the regular adjudications by judicial bodies, the specific decisions by regulatory agencies, and the routine negotiations among private actors all play a role in the constitutionalization of the global legal regime.¹⁰¹ As a result, autonomous political will, which is traditionally embodied in the exercise of constituent power in the making of a constitution, is not only reined in by professional and technocratic rationality, but also "deformalized" into the pragmatic calculation of concrete solutions to particular issues.¹⁰²

Global constitutionalism takes multiple forms. Not all constitutionalists pin the prospect of global constitutionalism on the autonomous norm-making process of administrative law. Rather, substantive values that have been associated with the experiences of constitutional democracies are the core of global constitutionalism.¹⁰³ Even so, to set themselves

"[Britain's] history [of parliamentary sovereignty] may be understood as a struggle to rid the English of the Norman yoke and return to the fair simplicity of the Anglo-Saxon constitution" rather than a succession of relaunching the people's constituent, lawgiving power. See MARTIN LOUGHLIN, *SWORD AND SCALES: AN EXAMINATION OF THE RELATIONSHIP BETWEEN LAW AND POLITICS* 139 & n.67 (2000) (citing J.G.A. Pocock, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW* (Cambridge: Cambridge U.P., rev. edn. 1987)).

98. See Ladeur, *Conversion of Democracy to Polycentric Networks*, *supra* note 93, at 92–97; see also Ladeur, *Towards a Legal Theory of Supranationality*, *supra* note 46, at 43–49.

99. See generally BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991) [hereinafter ACKERMAN, *WE THE PEOPLE*]; see also Joseph H.H. Weiler, *On the Power of the Word: Europe's Constitutional Iconography*, in *THE EU CONSTITUTION: THE BEST WAY FORWARD?*, *supra* note 54, at 3, 13; Dieter Grimm, *Integration by Constitution*, 3 *INT'L J. CONST. L.* 193, 200–01 (2005).

100. See also Ming-Sung Kuo, *A Farewell to Constitutional Authorship? A Critique of the Presentist Turn in the Legitimacy of Constitutional Democracy* (Eur. Univ. Inst. Working Paper MWP No. 2008/28), available at http://cadmus.eui.eu/dspace/bitstream/1814/9014/1/MWP_2008_28.pdf.

101. See Ladeur, *Conversion of Democracy to Polycentric Networks*, *supra* note 93, at 93–99; see also Teubner, *Societal Constitutionalism*, *supra* note 49, at 15–27.

102. See Cohen, *supra* note 45, at 18–19; Martti Koskenniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization*, 8 *THEORETICAL INQUIRIES L.* 9, 20–21 (2007). See also Teubner, *Societal Constitutionalism*, *supra* note 49, at 24–27. For the relationship between Schmittian autonomy of the political and the concept of constituent power, see generally Ernst-Wolfgang Böckenförde, *The Concept of the Political: A Key to Understanding Carl Schmitt's Constitutional Theory*, 10 *CAN. J. L. & JURIS.* 5 (1997).

103. See, e.g., Alec Stone Sweet & Jud Matthews, *Proportionality Balancing and Global Constitutionalism*, 47 *COLUM. J. TRANSN'L L.* 73 (2008).

apart from moral cosmopolitans, global constitutionalists make a point of the juridification of global governance. The world not only becomes interdependent and globalized but is also effectively ordered in accordance with a set of shared norms (i.e., constitutionalized). In the face of an elusive, although not inexistent, global demos, and because of the lack of a world constituent assembly, constitutionalists look to other sources to make the case that cosmopolitan values are not merely moral aspirations but have already exerted an influence on our behavior.¹⁰⁴ Thus, the problem-solving administrative actors, national and transnational, public and private, involved in global administration, obviously set the best example for how the world order should be constitutionalized.¹⁰⁵ They are the model world citizens who realize how making polices in the light of traditional rule-of-law values will contribute to the development of global governance. Global constitutionalists are enchanted with how administrative actors in particular regulatory fields resolve the issues they face effectively and acceptably, while “sectoralism” seems to dominate the discourse on the constitutionalization or juridification of global governance.¹⁰⁶

104. Even if current international law suggests the possibility of its evolving into a “common law of humankind,” it should be noted that “this evolution will occur only if most human beings acquire a global perception of themselves as part of a common group,” attaining the status of a global demos. See von Bogdandy, *supra* note 42, at 233-37 (citing and discussing Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century, General Course on Public International Law, in* 281 RECUEIL DES COURS 10 (1999)). Yet, as German legal scholar Armin von Bogdandy acknowledges, “[t]here are hints that such a shift in self-perception is under way, but the new perception has not yet established itself to such an extent that it substantially informs many decisions on the international plane.” See *id.* at 237. See also Cohen & Sabel, *supra* note 9, at 796-97.

105. Cf. Teubner, *Global Private Regimes*, *supra* note 68, at 72-75 (arguing that the growing private regulation, agreements, and dispute resolution mechanisms focused on “security of expectation and solution of conflicts” as “sources of law without the state”).

106. Compare Harold J. Berman, *The Western Legal Tradition in a Millennial Perspective: Past and Future*, 60 LA. L. REV. 739, 763 (2000) (indicating that in order to form “world legal tradition,” legal cultures and traditions will need to commit to integration and to examine their belief systems in order for the “forces of world integration [] to overcome the forces of disintegration”), with JOHN P. MCCORMICK, WEBER, HABERMAS, AND TRANSFORMATIONS OF THE EUROPEAN STATE: CONSTITUTIONAL, SOCIAL AND SUPRANATIONAL DEMOCRACY 231-86 (2007) (theorizing how the new constitutional democratic model of Europe that goes beyond the nation-state tradition can build up in distinct social and functional “sectors”). See also Cassese, *Administrative Law Without the State*, *supra* note 31, at 679-80; Teubner, *Global Private Regimes*, *supra* note 68.

While the values cherished in global administrative law are widely accepted, how they are implemented and translated into diverse administrative fields is not beyond contestation. “Who governs and how,” the central issue concerning the legitimacy and organization of power, not only looms in the creation of values but also in their articulation and implementation.¹⁰⁷ In traditional constitutionalism, this issue lies in the hands of “We the People,” whether in the form of a constituent assembly, a referendum, or the procedural mechanisms centering on electoral representation.¹⁰⁸ In contrast, global constitutionalists turn to the routine operation of functional systems and the everyday adoption of traditional rule-of-law values by players in the process of global governance without reference to another external source of ultimate authority such as the people. While a process of everyday constitutionalization appears, to global constitutionalists, to be heralding a new era for legal thinking by conflating the constituent-constituted distinction,¹⁰⁹ on close inspection the attempt to derive constitutionalism from governance and administrative law on the global scale looks technocratic in the absence of the people from the scene of global constitutionalization.

107. Compare Cassese, *Administrative Law Without the State*, *supra* note 31, at 692 (speaking of the potential jurisdictional conflicts with the increase of “global administrative courts (panels)” but leaving this issue unaddressed and emphatically taking this increase of global administrative courts as an indicator of “the high degree of institutionalization . . . of the global administrative system), with Shapiro, *Administrative Law Unbounded*, *supra* note 75, at 377 (noting that “who governs and how remains the central and pressing questions . . . in the [global] age of governance and emphasizing that “[t]he answers . . . are likely to be more complex”). See also Krisch & Kingsbury, *supra* note 18, at 10; Krisch, *supra* note 65, at 274–77.

108. See generally ANDREW ARATO, *CIVIL SOCIETY, CONSTITUTION, AND LEGITIMACY* (2000). To the extent that judicial landmark decisions stand as the lode star for government agencies and individuals to refer to in making decisions, the judiciary may be seen as another embodiment of “We the People.” See, e.g., MIGUEL POIARES MADURO, *WE THE COURT: THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN ECONOMIC CONSTITUTION* (1998). Still, a distinction needs to be drawn, at least in theory: a judicial interpretation to substantiate the general clause of the constitution and one that substitutes for a statutory or even constitutional provision. See Zenon Bankowski et al., *Rationales for Precedent*, in *INTERPRETING PRECEDENTS: A COMPARATIVE STUDY* 481 (D. Neil MacCormick & Robert S. Summers eds., 1997). See also ACKERMAN, *WE THE PEOPLE*, *supra* note 99, at 86–94 (arguing for a “preservationist” judiciary in constitutional democracy).

109. Cf. Neil Walker, *Post-Constituent Constitutionalism? The Case of the European Union*, in *THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM*, *supra* note 91, at 247 (proposing a “post-constituent constitutionalism,” which would assume “a classificatory division between ‘constitutive references’ and ‘constituted references,’” as an alternative to current constitutional discourses on the development of transnational constitutionalism in Europe).

C. From Fragmentation to Duality? Making Global Administrative Law with Global Constitutionalism as the Constitutive Other

Considered overall, the seeming unity of global public law identified in Part II consists of dual reflexivity, as suggested in the preceding two sections. In addition to the reflexive relationship between global governance and global administrative law,¹¹⁰ reflexivity exists between global constitutionalism and global administrative law. On the one hand, in attempting to go beyond organizational aspects to the normative issues of global governance, global administrative law incorporates values that are derived from national constitutional experiences, constituting an integral part of a multilevel global constitutional order.¹¹¹ On the other hand, global constitutionalism refers to the development of global administrative law as the evidence for the emerging constitutionalization of global governance.¹¹² In sum, the unity of global public law is embedded in the dual reflexivity between global administrative and constitutional law.

However, behind the guise of identitarian unity built on this dual reflexivity lies the fragmentation, or rather separation, between global administrative and constitutional law. At the heart of the reflexivity between global administrative law and global constitutionalism is the bracketing of the values and practices that emerge from the other branch of global public law. The problems haunting the other branch are filtered out in the reception of values and practices. As a result, global administrative law and global constitutionalism are fragmented or separated because they refer to, without critically reflecting on, each other.¹¹³

Nevertheless, from its own perspective, global administrative law does not lose sight of global constitutional law, despite bracketing the problems that accompany the values it adopts from the constitutional

110. See *supra* text accompanying 62–64.

111. See Frank Schorkopf & Christian Walter, *Elements of Constitutionalization: Multilevel Structures of Human Rights Protection in General International and WTO-Law*, 4 GERMAN L.J. 1359 (2003), available at http://www.germanlawjournal.com/pdf/Vol04No12/PDF_Vol_04_No_12_1359-1374_European_Schorkopf_Walter.pdf.

112. See Cassese, *Administrative Law without the State*, *supra* note 31, at 687–89. See also Cassese, *Globalization of Law*, *supra* note 12, at 985–86.

113. Cf. Gráinne de Búrca & Joanne Scott, *New Governance, Law and Constitutionalism*, in *LAW AND NEW GOVERNANCE IN THE EU AND THE US*, *supra* note 64, at 1, 10–11 (noting that constitutional framework has paid little attention to the “new governance” model of transnational administrative regulation in the EU context).

field. Global administrative law is constructed in consciousness of the issues of a legitimacy deficit and democratic legitimacy, which are embedded in the projection of traditional administrative law tools and values onto the global administrative space.¹¹⁴ Yet, to get global administrative law going and to address the day-to-day business of global governance pragmatically without being dragged down into complicated theoretical debates, the fundamental issues concerning legitimacy and democracy are left undecided, or “outsourced” to constitutional territory.¹¹⁵ In this view, global constitutionalism as a province distinct from global administrative law in the territory of global public law does not disappear from the perspective of those devoted to the making of global administrative law.¹¹⁶ Still, what differentiates global public law from domestic public law is that the legitimacy of the latter is presumed to be or to have been resolved in the constitutional sphere. In contrast, the legitimacy of global public law is contested either in the province of administrative law or in the space of global constitutionalism.¹¹⁷ Taken as a whole, global constitutionalism stands in the background as the constitutive other to the construction of the identity of global administrative law, pointing to the relationship of duality between constitutional law and administrative law that we find embedded in the traditional thinking of public law.¹¹⁸

IV. CONCLUSION

The global rule of law is an enterprise worth fighting for, not only for practitioners but also for scholars. There are a variety of ways in which scholars can contribute to its coming and consolidation. Both providing advice to practitioners and setting out a modality of new discourse by way of which the world can be seen and re-imagined in a positive light are equally important attempts in this joint enterprise. My contribution to this enterprise is to critically examine the status of global administrative law in the construction of global constitutionalism.

My investigation of the relationship between global administrative law and global constitutional law suggests the unity of global legality, whether it be called administrative law or constitutionalism. I argue that

114. See Esty, *supra* note 15, at 1502–11; see also ALFRED C. AMAN JR., *THE DEMOCRACY DEFICIT: TAMING GLOBALIZATION THROUGH LAW REFORM* (2004).

115. See Krisch, *supra* note 65, at 267–68, 276–78.

116. See *id.* at 248.

117. Compare Esty, *supra* note 15, at 1509–11 (discussing the legitimacy of supranational governance through the lens of administrative procedure), with von Bogdandy, *supra* note 42, at 233–37 (exploring the legitimacy of international order in light of the constitutionalization of world federalism).

118. See Harlow, *supra* note 3, at 208.

this identitarian unity between administrative law and constitutional law in the global context consists of dual reflexivity, while on close inspection underneath this reflexive unity is the fragmentation or separation between global administrative law and global constitutionalism, posing challenges to the ideal of the global rule of law. On the one hand, global administrative lawyers focus on the global coordination or rationalization of administrative policies without paying sufficient attention to its impacts on the development of global constitutionalism. On the other hand, by premising global constitutionalization on the practices of global regulation, global constitutionalists overlook the problems inherent in global administrative law itself. As a result, the status quo of global administrative law can hold up only by “outsourcing” the fundamental challenges to global constitutionalism. In sum, global legality is saved from fragmentation not by a unitary global public law but instead by assuming the “legal duality” we have been accustomed to in traditional legal thinking.

Returning to the enterprise of the global rule of law, the discovery of a presumed legal duality implicit in the construction of global administrative law does not devalue the contribution of global administrative law to the rationalization and legitimation of global governance because this discovery is evocative of traditional legal thinking rather than being a new beginning for jurisprudence. However, the danger lies in the fact that this duality shelters the fundamental issues from being critically reflected upon. In terms of global administrative law, they are relegated to the field of global constitutionalism as a perceived “other,” which is necessary for the construction of global administrative law. The strategy of making global administrative law by postulating a constitutive other makes the legalization of global governance possible, but also provisional, with difficult, fundamental issues undecided.¹¹⁹ If my observation is correct, it may be the case that normative issues concerning global governance cannot be fully addressed until the relationship between global administrative law and global constitutional law is brought to the fore in the discussion of the global rule of law.

119. Based on the EU experience, Nico Krisch considers this an asset in the development of the transnational rule of law. See Krisch, *supra* note 65, at 274–77. But see Ulrich Haltern, *A Comment on Von Bogdandy*, in *DEBATING THE DEMOCRATIC LEGITIMACY OF THE EUROPEAN UNION* 45, 52–53 (Beate Kohler-Koch & Berthold Rittberger eds., 2007) (questioning the fragility of contested political meaning in the EU.).