

**Manuscript version: Author's Accepted Manuscript**

The version presented in WRAP is the author's accepted manuscript and may differ from the published version or Version of Record.

**Persistent WRAP URL:**

<http://wrap.warwick.ac.uk/114326>

**How to cite:**

Please refer to published version for the most recent bibliographic citation information. If a published version is known of, the repository item page linked to above, will contain details on accessing it.

**Copyright and reuse:**

The Warwick Research Archive Portal (WRAP) makes this work by researchers of the University of Warwick available open access under the following conditions.

Copyright © and all moral rights to the version of the paper presented here belong to the individual author(s) and/or other copyright owners. To the extent reasonable and practicable the material made available in WRAP has been checked for eligibility before being made available.

Copies of full items can be used for personal research or study, educational, or not-for-profit purposes without prior permission or charge. Provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way.

**Publisher's statement:**

Please refer to the repository item page, publisher's statement section, for further information.

For more information, please contact the WRAP Team at: [wrap@warwick.ac.uk](mailto:wrap@warwick.ac.uk).

# **Control by Aggregation? Critical Reflections on Global Constitutionalism in the Shadow of Looming Transnational Emergency Powers**

Ming-Sung Kuo

<Abstract>

*This paper rethinks the relationship between rights protection and global constitutionalism by taking on the issue of the latter's corresponding political order in the light of looming transnational emergency powers. By removing the veil from the aggregate power structure underlying global constitutionalism, it makes a twofold argument about global constitutionalism. First, in contrast to the separation of powers in domestic constitutional orders—which operates as a structure of “articulated governance” based on the logic of articulation—the structure of aggregate power prevents transnational governance from growing into another all-powerful sovereign creature—what will be called “control by aggregation.” Yet such control is limited. With respect to a transnational state of emergency such as that illustrated by the Eurozone crisis, this paper further argues that the structure of control by aggregation founders when constituent sovereign states continue to be the masters of international relations. To tame transnational executive power, a rethinking of global constitutionalism along the lines of articulation is suggested. Non-sovereign constituent regimes under multilevel constitutional ordering can act as an irritant to force sovereign states to articulate emergency actions, paving the way to opening shadowy transnational administration to public scrutiny.*

**Keywords:** global constitutionalism, federation, articulated governance, multilevel constitutional ordering, global governance, aggregate power, transnational state of emergency, constitutional project

<Table of Contents>

|  |           |
|--|-----------|
| <b>1. INTRODUCTION.....</b>  | <b>2</b>  |
| <b>2. DISCOVERING THE POWER: THE POLITICAL QUESTION IN<br/>GLOBAL CONSTITUTIONALISM REVISITED .....</b>    | <b>4</b>  |
| <b>3. UNVEILING THE AGGREGATE STRUCTURE: CONSTITUTIONALISM<br/>IN A MULTILEVEL POLITICAL ORDERING.....</b> | <b>8</b>  |
| <b>4. LOSING CONTROL: THE STATE OF EMERGENCY AND GLOBAL<br/>CONSTITUTIONALISM .....</b>                    | <b>15</b> |
| <b>5. TAMING BY ARTICULATION? THE FUTURE OF MULTILEVEL<br/>ORDERING IN GLOBAL CONSTITUTIONALISM.....</b>   | <b>24</b> |
| <b>6. CONCLUSION .....</b>   | <b>27</b> |

# 1. INTRODUCTION

Having emerged as a rallying cry for contemporary idealists following its successes in displacing racism, communism, and other totalitarian ideologies within the political space of the nation-state (Somek, 2014, p. 10), constitutionalism<sup>1</sup> is now in trouble around the globe. “Populist demagoguery” (Manent, 2017), “constitutional capture” (Scheppelle, 2017), and other tricks have resulted in widespread “democratic backsliding” among constitutional democracies both old and new, North and South (Bermeo, 2016). With the focus shifting toward how to stop populist authoritarianism from engulfing domestic constitutional orders, talk of “global constitutionalism”<sup>2</sup> sounds more like untimely shoe-gazing than like a development plan for new frontiers of constitutionalism. Worse still, transnational governance—the new frontier where global constitutionalism is expected to thrive—turns out to be no less wild than the nation-state. And, as will be further discussed, in those new constitutional frontiers lying beyond the national political space, emergency powers are also exercised at the expense of human rights (cf. Kreuder-Sonnen and Zangl, 2015; Kahn, 2000, pp. 34-6). Failing to compensate, as had been hoped, for the weakening of national constitutions that has resulted from regional integration and from other moves toward transnational governance (cf. Peters 2006), global constitutionalism demonstrates the faults in its control of political power and protection of fundamental rights. Constitutionalism, national and global, appears to be entering a long winter.

As the global constitutional landscape turns gloomy, then, it is high time to reckon with the vision of taking constitutionalism beyond the nation-state. In light of a transnational state of emergency, in this paper I rethink the relationship between rights protection and global

constitutionalism by taking on the issue of the latter's corresponding political order.<sup>3</sup> I shall argue that the idea of *aggregate power* holds the key to understanding the political logic of global constitutionalism. Yet, to be more than an aspirational discourse, global constitutionalism must move beyond the thinking of *aggregation* that undergirds proposals for recasting transnational political ordering as a “multilevel constitutional compound”<sup>4</sup> and instead provide an answer to the question of power structure.

By lifting the veil on the underlying structure of aggregate power, I make a twofold argument about global constitutionalism. First, in contrast to the separation of powers in domestic constitutional orders—which operates as a structure of “articulated governance” based on the logic of *articulation* (Waldron, 2016, pp. 62-5)—the structure of aggregate power holds back transnational governance from growing into another all-powerful sovereign creature. This is what I call “control by aggregation.” Yet such control is limited. With respect to the transnational state of emergency as illustrated in the Eurozone crisis, I further argue that the structure of control by aggregation founders when constituent sovereign states continue to be the masters of international relations and thereby allow themselves to create new governance regimes outside the existing constitutional compound. To tame transnational executive power, I suggest realigning global constitutionalism with thinking on *articulation*. Though reconfiguring a multilevel constitutional order as one of articulated governance is still a distant dream, non-sovereign “constituent regimes”<sup>5</sup> might act as an “irritant” so as to force their sovereign masters to articulate their emergency actions, paving the way to opening shadowy transnational administration to public scrutiny.

As part of my conceptual exploration of the as-yet-rudimentary political ordering of

global constitutionalism, I have chosen multilevel constitutionalism as the case in point, for it has been developed and debated with corresponding political ordering in mind (vis-à-vis the nation-state) among varieties of global constitutionalism.

The argument set out in this paper will unfold as follows. It will first bring to the fore the question of political power in global constitutionalism (Section 2), and then explain why thinking on aggregation undergirds power structures in multilevel political ordering (the predominant political model of global constitutionalism), by comparing it to the constitutional structure of articulated governance in the domestic context (Section 3). With the aggregate structure of multilevel political ordering thus brought to light, its limitations will be revealed through a discussion of EU-steered emergency responses to the Eurozone crisis (Section 4). As a response to a transnational state of emergency, answers to the challenges facing multilevel political ordering in general will then be further considered (Section 5).

## **2. DISCOVERING THE POWER: THE POLITICAL QUESTION IN GLOBAL CONSTITUTIONALISM REVISITED**

One of the most salient facts about global constitutionalism is that not all constitutional scholars embrace the world it envisages (but cf. Hirschl, 2018). Who would reject the better rights protection and the reining-in of global governance power that are supposed features of global constitutionalism? Yet such discord is no mystery if we take a closer look at the reasons held by those skeptics. It is true that some of them take the view that global constitutionalism is merely a repackaging of the idea of “world government” and should be resisted. A world government even in the guise of global constitutionalism suggests the end of self-government, casting a shadow over human rights (Posner, 2009; see Kuyper, 2015; Rabkin, 2005, pp. 18-19). And beside these hard skeptics stands a loyal opposition, so to speak. Though these loyal

dissenters have no doubt about the centrality of human rights to global constitutionalism, they remain unpersuaded that it is a cause worth pursuing. Some are troubled by the loosely-defined idea of global constitutionalism, fearing that it will do more harm than good to the constitutional project because of its very elusiveness and malleability (e.g., Grimm, 2016, pp. 337-44); others question attempts to transpose the national constitutional order to the global level because of the fundamental differences between the transnational space of global governance and nation-states (Krisch, 2010, pp. 52-66; Loughlin, 2010a, pp. 66-7). Notably, it is the question of political ordering that separates hard skeptics from loyal dissenters: can we conceive of a political order within the conceptual framework of global constitutionalism without signing up to the idea of world government underpinned by a worldwide large-C Constitution? For hard skeptics, the answer is no; for loyal dissenters, global constitutionalism is still a utopian dream so long as that political question continues to be dodged. As history shows that constitutionalism is a political project in response to a new modality of political power (Grimm, 2016, pp. 6-12, 45-52), the question of how political power is structured within the framework of global constitutionalism with no worldwide Constitution in sight must be answered if global constitutionalism is to be taken forward (Cohen, 2012, pp. 1-5; Krisch, 2016, pp. 668-71; Kennedy, 2009, pp. 65-8).

To address this issue, constitutional scholars and political theorists turn to the prototype of global constitutional ordering—the EU project—for inspiration (Cohen, 2012, p. 10; Müller, 2010, p. 240; see also Krisch, 2016, pp. 663-5). As has already been well discussed in the literature, the EU project is best captured by the concept of “multilevel constitutionalism” (*Verfassungsverbund*) (Mayer and Wendel, 2012, pp. 129-30; Pernice, 1999, 2009, 2015; Voßkuhle, 2010, p. 183; but see Barents, 2012; Lindseth, 2010, p. 265). Looked at through this

lens, the EU project, pivoting on the normative values enshrined in the EU's foundational treaties, functions as a multilevel constitutionalized political order that comprises layers of constitutional regimes, including the EU in the strict sense, its member states, and other institutional affiliates both formal and informal (Mayer and Wendel, 2012, pp. 129-30; Pernice, 1999, 2009, 2015; Voßkuhle, 2010, p. 183; see also Isiksel, 2016; Tuori, 2015; but cf. Lindseth, 2016). By analogy with the experience of European integration, Jean Cohen, among others, tackles the political question of global constitutionalism head-on. In view of the interlocking of nation-states, regional bodies, international organizations, and other global governance authorities, including the United Nations (UN), she contends that it is not only a natural result of the overlapping of regulatory needs and function but also suggests a rudimentary global political ordering that needs to be recast in constitutional terms (Cohen, 2012, pp. 21-6). Focusing on the UN Charter system in global governance, she further asserts that, as each constituent regime thereunder operates on a set of rules and standards, the UN and its member states, as well as other governance regimes, jointly constitute a global federal union, or a compound of multiple constitutional regimes (ibid., pp. 84-5). By analogy to the EU project as a multilevel political order that works under the guidance of constitutional pluralism, the relationships between the distinct constituents of the global multilevel constitutional compound can be considered coordinate rather than hierarchical (ibid., pp. 66-76.). Moreover, it can even be argued that such coordinate interrelationships are steered according to principles such as proportionality, subsidiarity, procedural propriety, and human rights (see Kumm, 2009, pp. 290-303). In other words, not only each constituent regime but also their inter-regime relationships are constitutionally structured (cf. Walker, 2012; but see Cohen, 2012, pp. 321, 402 n.1).

Notably, such a multilevel constitutional compound is not the creation of a single constituent power, as no global *demos* exists (see Krisch, 2016, pp. 675-8).<sup>6</sup> Rather, the very functional intertwinement in global governance can be seen as framing the interactions among its constituent regimes in a similar way to how a treaty (or a contract) shapes the relationship between contracting parties.<sup>7</sup> In this light, a global constitutional compound makes it appear as if a global composite polity is operating on a treaty-like arrangement among constitutional constituents. Drawing inspiration from theories of federation, Cohen, for example, explicitly recasts the political ordering of global governance, as illustrated in the complex UN Charter system, in constitutional terms (Cohen, 2012, pp. 80-158). “Federation” is the political form of global constitutionalism (ibid., pp. 157-8).

Taken as a whole, the idea of global constitutionalism is operationalized in the following terms. The global composite polity—modeled on the federation, pivoting on the UN Charter system, and conceived as a multilevel political order—comprises layers of coordinate constituents such as nation-states, regional regimes, international organizations, and other global governance bodies (ibid., pp. 48-9, 157-8); by this view, the constitution of the globalized political landscape is not the UN Charter as some commentators have suggested (see Fassbender, 1998; Fassbender, 2009; cf. Habermas, 2006, pp. 102, 104-5, 158-61). Rather, the working global constitution amounts to a multilevel constitutional compound consisting of all the constitutions of its coordinate constituents, overlaid by the UN Charter as an overarching component constitution (Cohen, 2012, pp. 288-91). Out of this we see emerge a multilevel constitutional ordering as the epitome of global constitutionalism, envisaging a world of controlled political power aimed at the enhancement of human rights (Dunoff and Trachtman, 2009b, pp. 11-13).



There is no denying that the global political order as sketched above is futurist in character, in that it is far from complete yet is incubating amid the existing dynamics of transnational governance. Yet, as a conceptual framework, this avant-garde constitutional reimagining has the potential to shape the direction of the world political order and should not be dismissed out of hand (Walker, 2012, pp. 32-6). The question then arises: does an envisaged multilevel constitutional compound provide a satisfactory answer to the question of political ordering in global constitutionalism? The answer lies in its underlying structure and logic of political power.

### **3. UNVEILING THE AGGREGATE STRUCTURE: CONSTITUTIONALISM IN A MULTILEVEL POLITICAL ORDERING**

As suggested above, constitutionalism is a political project in response to a changing political landscape at the dawn of the modern age. To see more clearly the structure and logic of political power in the envisaged multilevel constitutional ordering, we need to retrace the path of modern constitutionalism by starting with the concept of the constitution. As an idea (or ideology) centering on the normative framing of political power with “the constitution” (Somek, 2014, p. 1),<sup>8</sup> constitutionalism is of course tied to the modern concept of the constitution (Böckenförde, 2017, pp. 152-7; Grimm, 2016, pp. 3-6, 43-4). What distinguishes the modern constitution from its premodern predecessors is that it (re)shapes rather than mirrors the exercise of political power. Providing for governmental organization and the conditions for its exercise of power, the modern constitution not only limits but also creates and legitimates political power (Böckenförde, 2017, pp. 161-2; Grimm, 2016, p. 145; Preuss, 1995, pp. 5-6; see also Loughlin, 2010b, p. 106). Looming from this modern constitution is an

image of autonomous political power that is able to steer and reshape society without being harnessed by non-governmental forces (Böckenförde, 1991, p. 27; Grimm, 2016, pp. 4-15; Krisch, 2016, pp. 659-62; Loughlin, 2010b, pp. 102-7). I hasten to add that this does not suggest that the modern constitution conceives a government with unlimited power; instead, the dominant role of the government in steering social relations itself gave rise to the modern constitutional movement in the seventeenth century (Böckenförde, 2017, pp. 155-7; Grimm, 2016, pp. 7-10, 50-52; see also Loughlin, 2010b, pp. 164-79, 228-31; Preuss, 1995, pp. 109-13). When the modern state gradually distinguished itself from other sites of authority as the autonomous center of political power following the winding process of centralization set out in the thirteenth century, it found itself at first equipped with premodern constitutional arrangements (Böckenförde, 1991, pp. 26-7; Grimm, 2016, pp. 45-9; see also Glenn, 2013, pp. 17-85). Under this premodern constitutional order, the political power of early modern states was indeed autonomous, but also absolutist as connoted in the concept of sovereignty as the premodern “constitution” simply mirrored power (Grimm, 2016, pp. 43-4; Somek, 2014, p. 37). Since the emergence of civil society in the predawn of the modern constitutional movement, how to strike a balance between a steering government and a free society has been central to the constitutional design of political power (Böckenförde, 2017, pp. 155-7; Loughlin, 2010b, pp. 164-79; see also Kuo, 2010).

Departing as they do from unlimited political power, modern constitutions carve out a free space for civil society which can be tapped for political replenishment and constitutional refounding (see Preuss, 1995, pp. 2-4, 52-53). Through political representation, citizens are included in the collective authorship of the laws that steer their lives (Kahn and Brennan-Marquez, 2014). As the medium through which citizens turn political ideas and visions into

workable policies and legal commands, separation of powers came to characterize the modern constitutional government of the sovereign state (see generally Möllers, 2013). Modern constitutionalism manages the tension between absolutism and autonomy in political sovereignty through a structure of what might be called institutional reflexivity (Preuss, 1996, pp. 16-7). Notably, as Jeremy Waldron (2016) observes, what lies at the heart of the separation of powers is a “stepwise” decision-making process: by way of intense debate, repeated reflection, and close scrutiny within and between the administration, legislature, and courts, ideas and visions can be turned into political reality (pp. 62-70). Seen in this light, the relationship between government and civil society is not one of conflict; rather, as government and civil society articulate with one another, it is reflexive as the government and the civil society are articulated to each other (see generally Rosanvallon, 2008; Grimm 2016, pp. 50-52; Loughlin, 2010b, pp. 228-31). Moreover, the organization of government power is not so much one of separation as one of articulation. Not only are distinct government departments mutually articulated, but the multiple stages of reflexive decision-making across the three constitutional powers jointly constitute a structure of articulated governance aimed at the realization of “self-determination” in constitutional form (Waldron, 2016, pp. 62-5; see also Möllers, 2013, pp. 51-109). As it turns out, then, “controlling the state”—the main theme of constitutionalism (Gordon, 1999)—is more about the constitution of articulated governance than about that of limited government.

In contrast to the path toward modern constitutionalism, the multilevel ordering envisaged in global constitutionalism does not emerge in the face of yet another centralization of political power. Rather, it is an attempt to place the already existing overlapping units of political power beneath an overarching constitutional framework (Cohen, 2012, pp. 66-76).

What is the state of political power that requires such a recasting in constitutional terms?

Noticeably, sovereign states are not the only exercisers of political power in international relations. International organizations have long existed alongside their sovereign masters (Weiler, 2004, pp. 553-61). Though international organizations still owe their existence to the will of sovereign states, power continues to be transferred from the latter to the former in the face of more and more issues of a transboundary nature (Somek, 2012, pp. 47-8). Remaining masters *de jure*, however, sovereign states rely on international organizations to achieve their governance goals (Cassese, 2005, pp. 671-3). Seen in this light, the matter of governance is *trans-national* in nature. Moreover, variously labeled as “regimes”, “arrangements”, “networks” or other obscure names, unconventional forms of governance have mushroomed alongside sovereign states and international organizations to address new challenges (Kingsbury, Krisch and Stewart, 2005, pp. 18-27). Through this prism, the political landscape of global governance is fragmented, and filled with diverse power-exercisers with overlapping competences (ibid.); a “non-mediated relationship” is emerging between individuals and the variegated regimes of global governance (Somek, 2012, p. 47). With the role of the sovereign state in steering society thus weakened, global governance today appears to be a substitute for autonomous political power.

It is of course true that these diverse, overlapping governance regimes can be treated as they are without placing them under an overarching constitutional framework or within any single institutional arrangement; with erudite legal analysis, they can find their own place in international law (cf. de Witte, 2011, pp. 42-9). Yet two issues stand out, to which international law offers no satisfactory answers. First, as interactions between diverse and overlapping

governance regimes becomes more frequent and complex, international law only manages through extraordinary lawyerly gymnastics to address those inter-regime relationships (Somek, 2012, pp. 47-8). As a result, potential conflicts between the distinct power-exercisers of overlapping competences have become a major concern of global governance (Koskenniemi, 2007; Young, 2012, p. 2; see also Roughan, 2013, pp. 61-81). Second, the function of national constitutions in reshaping political power by controlling the state and protecting rights has become increasingly stretched, with political power continuously transferred to other governance regimes (see Dunoff and Trachtman, 2009b, pp. 5-9; Grimm, 2016, pp. 321-7; see also Böckenförde, 2017, p. 340). And here is where the project of multilevel constitutionalism comes into play.

Given the centrality of the question of political ordering to her rethinking of the fragmented landscape of transnational governance,<sup>9</sup> let us look closer at Cohen's neo-federalist global constitutional project. As global governance continues to weaken the role of sovereign states as autonomous centers of political power, Cohen aims to answer the constitutional question on the global scale with the UN Charter reconceived now as the overlay to a Charter-centered, composite, global constitutional framework. Within such a global constitutional compound, all power-exercisers—be they sovereign states, supranational regimes, international organizations, or other governance units—interact with one another (Cohen, 2012, pp. 6-7; see also Habermas, 2006, pp. 158-61; cf. Mayer and Wendel, 2012, pp. 129-30). In this way, issues of inter-regime relationships and transfer of political power are resolved as if re-examined through constitutional lenses (see also Dunoff and Trachtman, 2009b, pp. 6-9; Paulus, 2009, pp. 69-70). In Cohen's view (2012), the UN Charter, as the constitutional overlay to a UN-centred global constitutional compound, is not to be considered

a “higher” law vis-à-vis national constitutions or the functional equivalents of non-state power-exercisers. Instead, as one of the myriad components of the global composite constitutional framework, the UN Charter plays a dual role: it is the constitutional document of the UN proper, while also functioning as the constitutional instrument defining the relationship between the UN and other related power-exercisers in that system of global governance (pp. 69-76, 288-91).

Cohen’s general constitutional characterization of the UN Charter is not without question, however. Apart from the contradictory constitutional character of its provisions (Kuo, 2014a, pp. 287-8), it is incredible that the UN Charter actually defines the relationship between the UN and other related power-exercisers in the same way as would a (global) constitutional contract in a (global) federation (Krisch, 2016, pp. 669-70). Nevertheless, this does not mean that federation fails to account for the political ordering of global constitutionalism. Rather, contrary to her contention, the constitutional linchpin of Cohen’s envisaged global federation must be located somewhere else than within the UN Charter. To fully account for a UN-centered global constitutional ordering, the UN Charter must be joined by all the constitutional arrangements governing the numerous constituent regimes of global governance, not to mention national constitutions (cf. Mayer and Wendel, 2012, pp. 129-31). More importantly, interrelationships between component constitutional units are defined neither by the UN Charter nor by other treaties but are instead worked out in a spirit of “constitutional tolerance” (see also Weiler, 2011, pp. 8-9, 12-13; but cf. Cohen, 2012, pp. 65, 73-4). In other words, the overarching constitutional “contract” of the global federation is more convention-based than treaty-defined (Somek, 2014, pp. 50-2), while the overarching composite constitution of global governance results from the constitutional add-ons of its

constituent regimes. Hence a multilevel constitutional compound.

Juxtaposed with the modern constitution in response to the rise of the sovereign state as the predominant political actor, the structure and logic of multilevel constitutionalism becomes clear. As discussed above, modern constitutionalism conceives of a government of articulated powers by tying the sovereign state to a constitutional form (Böckenförde, 2017, pp. 152-4; Loughlin and Walker, 2007, pp. 1-4; Somek, 2014, pp. 36-9, 47-51; see also Loughlin, 2010a, pp. 209-57). While global constitutionalism echoes the normative calls of its modern predecessor, the multilevel constitutional compound at the core of global constitutionalism more *reflects* than *reshapes* the state of the political power in the present world. Specifically, guided by the ethos of constitutional tolerance instead of normative constitutional provisions, it is interactions between the constituent regimes of the multilevel constitutional compound that in practice work out potential inter-regime conflicts. Of particular pertinence to the present discussion, global governance is far from being an entity of unlimited power, despite its lack of separation of powers (that defining feature of the modern constitution). Indeed, transnational governance regimes have been criticized for being weak in responding to global issues (see generally Hale, Held and Young, 2013; see also Heath, 2016, pp. 27-8), though, as will be further discussed, their responsive measures can be forceful. Viewed in this way, the multilevel constitutional compound appears to deliver on the normative promise of modern constitutionalism—the control of political power—by pivoting its envisaged political ordering upon the complex practice of global governance.

Yet the limited power of global governance does not result from this multilevel constitutional compound. Rather, it is inherent in the power structure and logic of global

governance. As it stands, global governance is anything but the holder of autonomous political power but instead simply the aggregation of the fragmented, diverse units of individual governance. Power in global governance is thus aggregate in nature. More importantly, under this aggregate power structure, constituent units remain distinct and in potential competition, if not collision, with each other. The flipside to the aggregate structure of global governance is the balancing provided by myriad power-exercisers. As constituent units compete with and check each other, a balance of power seems to take shape in global governance, evoking the checks and balances function of separation of powers (Waldron, 2016, p. 49). Thanks to this balance, an all-powerful transnational sovereignty fails to arise within the multilevel constitutional compound (Somek, 2014, pp. 176-8, 225-32). To put it differently, as was seen in the *antebellum* United States as well as in the Second German Reich, a global federation as Cohen envisages functions inasmuch as the question of sovereignty is left unanswered in the corresponding constitutional arrangement (see Cohen, 2012, pp. 116-50; see also Böckenförde, 2017, pp. 159-61; Schmitt, 2008, pp. 383-407). In sum, it is the structure and logic of aggregate power—not the constitution of articulated governance and separated powers—that rein in the federation of global governance. Just how effective this aggregate structure of power can be in keeping sovereign-like forces out of the new global constitutional space was put to the test in the Eurozone crisis, to which I now turn.

#### **4. LOSING CONTROL: THE STATE OF EMERGENCY AND GLOBAL CONSTITUTIONALISM**

The measures fashioned by the EU, the exemplary multilevel constitutional order in global constitutionalism, to respond to the Eurozone crisis have been criticised for reasons relating to the rule of law principle. First, they are blamed for subverting human rights and



undermining the European social model (Baraggia, 2015, p. 277; White, 2015a, p. 306). Apart from the mandatory individual “bail-ins” introduced as part of the Cypriot rescue package, the lowering of living standards resulting from national austerity measures was ascribed to the conditionality requirements tied to the bailouts for Greece, Ireland, Portugal, Cyprus as well as Spain (see Baraggia, 2015, pp. 278-9; Kuo, 2014b, p. 85). Second, the dominant role of member states’ national administrations, aided by the technocrats of the Commission and the European Central Bank (ECB), have invited criticism of “authoritarian managerialism” (Joerges and Weimer, 2013, p. 296; see also Curtin, 2014, pp. 4-23). Not only did the legislative role of national parliaments in vetting the bailout conditionality instruments become nominal, but democratic will, as manifested in the referendum before the Greek government’s reluctant acceptance of the second bailout in July 2015, was also pushed aside under pressure from creditors (Baraggia, 2015, pp. 281-3; Kuo, 2014b, p. 85; Scicluna, 2017, pp. 104-6). Third, the multifarious legal instruments governing responses to the Eurozone crisis have fallen far short of the standards of transparency, predictability, and certainty as required by the rule of law (Kilpatrick, 2015). Among the issues concerning the formal rule of law requirements, the ambiguous legal status of the Memorandum of Understanding (MOU), which was instrumental in individual bailouts, has made judicial oversight even more difficult (ibid., pp. 337-40). Moreover, uncertainties as to the sources of bailout legal instruments have added to the complexity (ibid., pp. 344-5). Related to this complexity issue has been the tendency of the EU and member states to act around, beyond, or even outside the existing EU constitutional framework amid the Eurozone crisis (ibid. pp. 333-7; White, 2015b, p. 588). It is debatable whether the tendency toward extraconstitutional choices has resulted in a genuine state of emergency or exception at the transnational level (compare Joerges, 2016, pp. 317-22; Kuo,

2014b; Scicluna, 2014, p. 563; White, 2015a, pp. 308-15; but see Kilpatrick, 2015, p. 328). Nevertheless, its extraordinary character speaks to the EU as a constitutional order of aggregate power and thus warrants close examination.

According to Claire Kilpatrick, the EU's choice of foundational bailout instruments evolved in four stages, following on from the EU-law-based bailouts to several member states outside the Eurozone at the early stage of the sovereign debt crisis (Kilpatrick, 2015, pp. 333-6). The first stage was the loan agreement involving Greece, other Eurozone states, and the International Monetary Fund (IMF) that underpinned the first Greek bailout in May 2010 (Ruffert, 2011, p. 1779; see also Kilpatrick, 2015, p. 334). Concerned about the evident incompatibility of the first Greek bailout with the "no bail clause" of Article 125 (1) of the Treaty on the Functioning of the European Union (TFEU) (Ruffert, 2011, pp. 1785-87), the EU and member states wasted no time in moving to the later stages in their evolving design of the foundational bailout instrument. Council Regulation 407/2010 of May 10, 2010, which established the European Financial Stabilisation Mechanism (EFSM) under the "emergency clause" of Article 122 (2) of the TFEU, marked the second stage (Kilpatrick, 2015, p. 334). The third stage was contemporaneous with the second: given the EFSM's limited capacity, the temporary European Financial Stability Facility (EFSF) was created as a parallel entity based on assorted legal instruments, which distinguished the third stage from the EU-law-based second stage. The EFSF, formally a limited liability company incorporated under Luxembourg private law, actually originated in an international agreement among the representatives of the Eurozone states meeting within the existing framework of the Economic and Financial Affairs Council (ECOFIN) on May 11, 2010 (ibid.). The EFSM was applied only to the Irish and Portuguese bailouts, whereas the EFSF played a role both in those two instances and in the

evolving Greek rescue packages (*ibid.*, pp. 334-5). Notably, despite its ostensible legal basis in Article 122 (2), the EFSM's role in the Irish and Portuguese bailouts of the second stage was received differentially with respect to their conformity to the emergency clause (Ruffert, 2011, p. 1787). Moreover, the third stage's EFSF was seen as a legal maneuver to circumvent the ban on bailouts in Article 125 (1) (*ibid.*, p. 1785). In sum, then, doubt continued to be cast on the compatibility with the EU constitutional order of the foundational bailout instruments adopted in the second and third stages.

To dispel legal uncertainty surrounding the temporary EFSF and the limited EFSM and to enhance the capacity to address an unrelenting crisis, the choices as to foundational bailout instruments proceeded to a fourth stage, wherein the focus was on the establishment of a permanent European Stability Mechanism (ESM), formally established under a treaty among the Eurozone states. Notably, when the foundational ESM Treaty was adopted on February 2, 2012,<sup>10</sup> the amendment of the TFEU, which was meant to clear up remaining doubts over the legal basis for a permanent mechanism, was yet to be completed under a simplified revision procedure as provided for in the Treaty on the European Union (TEU).<sup>11</sup> Since its establishment in 2012, the ESM has funded bailouts to Cyprus and Greece and the limited financial sector Spanish loan assistance (Kilpatrick, 2015, pp. 335-6). Leaving aside the problematic invocation of the simplified revision procedure to introduce such a profound institutional change, the very creation of the ESM as an international organization under public international law outside the EU has culminated in the growing complexity of the EU constitutional compound (Ruffert, 2011, pp. 1788-9).

Mirroring extraconstitutional choices as to foundational bailout instruments, the parallel

economic governance reforms have likewise demonstrated the self-same tendency of the EU and its member states to circumvent the existing EU constitutional framework. Take for example the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG, also known as the Fiscal Stability Treaty)—the very pillar of Euro-crisis-induced governance reform. Initially planned as a revision of the EU’s foundational treaties, the TSCG was eventually signed as a separate treaty outside the EU constitutional framework because of the UK’s opposition,<sup>12</sup> despite its dubious deviation from the CJEU jurisprudence (see de Witte, 2011, p. 35). Taken together, the assorted approaches adopted by the EU and its member states to the choice of foundational bailout instruments and institutional reform amid the Eurozone crisis has indicated a deliberate circumvention of EU constitutional requirements, only adding the EU’s constitutional complexity.

I hasten to note that such EU-steered extraconstitutional responses have not resulted in separation from the EU constitutional compound. Rather, those constitution-circumventing mechanisms have continued to be associated with the EU in varying degrees (Kilpatrick, 2015, pp. 336-7). As suggested above, in addition to the EU-law-based EFSM, the decision to establish the corporate EFSF was taken in the same ECONFIN wherein the regulation establishing the EFSM was passed, whereas the ESM’s foundational treaty was adopted following the initiation of a choreographed amendment to the TFEU. Moreover, EU institutions have been borrowed to facilitate the ESM. The Commissioner for Economic and Monetary Affairs and the President of the ECB are recruited as observers to the ESM’s board of governors, which comprises the ministers of finance of all the Eurozone states (Ruffert, 2011, p. 1783). Also, the Court of Justice (CJEU) is borrowed to adjudicate on internal disputes of the ESM, albeit only under the restrictive procedure in Article 273 of the TFEU (*ibid.*). The

TSCG is even set to be integrated into the EU.<sup>13</sup> Apart from such formal affiliations, some informal institutional arrangements have emerged and have stayed outside the EU legal framework, but with institutional elements of the EU involved. The so-called “troika”, which comprises the IMF, the ECB, and the Commission, is the foremost example (Kilpatrick, 2015, p. 336).<sup>14</sup>

Apart from the substance of the extraordinary measures taken by the EU and its member states, the extraconstitutional form of its actions in response to the Euro crisis merits further investigation in its own right. In reaction to the extraconstitutional choices made by the EU and its member states, adherents of the European project and its multilevel constitutional ordering have deplored the deviation from the path of “integration through law” (Joerges, 2016). Some blame executive dominance and advocate enhanced parliamentary oversight (Curtin, 2014, pp. 29-32); others point the finger at technocratic proclivity and pin hopes on a more democratic Europe (Scicluna, 2014); still others regard this extraconstitutional tendency to more intergovernmentalism as a nationalist turn on the constitutional path to integration (Weiler, 2012; but cf. Joerges, 2016). Despite the tactical differences between these analyses and prescriptions, all agree on the strategy needed to bring such extraconstitutional choices into the fold—the EU’s current constitutional malaise can be overcome by fixing the design flaws inherent in its compound constitution (cf. Joerges, 2016, pp. 313-31; Scicluna, 2014, p. 557). Yet, before setting out a way forward, an accurate diagnosis of the problem is needed. Structural constitutional issues have not escaped the eyes of students of the EU project. The structural asymmetry between a centralized monetary policy and the autonomy of member states in economic policy and other affairs is considered responsible for the current extraconstitutional condition (Joerges, 2016, pp. 299-301, 313-16). Nevertheless, this view

does not quite tell us why a crisis-induced state of economic emergency has taken the form of constitutional complexity.

Actually, the fundamental reason behind the decisions to create a plethora of new institutional arrangements outside and around—but not separate from—the EU proper is not hard to understand. As the EU (or, to be more precise, its predecessor) was not designed to become the “supranational polity” that it is (Stone Sweet and Caporaso, 1998; see also Lindseth, 2010), its multifaceted functions have grown like add-ons on the assumption of conferred powers (Davies, 2015, pp. 7-12). Driven by functional optimization, the EU has gradually received powers transferred from member states and has grown into a quasi-polity well beyond a transnational administration of strategic resources or free-trade area (see Genschel and Jachtenfuchs, 2013). Nevertheless, when the sovereign debt crisis struck, the EU found difficulty tackling it from within those conferred legal competences. To save the Euro, the symbol and linchpin of the EU project, the EU and member states decided to act outside the EU constitutional compound, suggesting that “self-preservation [is] of higher obligation” than “strict observance of the written law.” Echoing Thomas Jefferson’s extraconstitutional justification of the Louisiana Purchase in the face of the enumerated powers in the US Constitution (Levinson and Sparrow, 2005, p. 10), the federation-like EU quasi-polity introduced a *de facto* transnational state of emergency that was not contained in its foundational treaties (Kuo, 2014b; see also White, 2015a, pp. 304-8).

The EU constitutional compound, supported by the pillars of its foundational treaties, cannot *contain* emergency powers in a deeper sense. With the European project evolving, the EU’s legal competences may appear comprehensive in light of its growing functions. Yet its

underlying multilevel constitutional compound is not as “complete” as a constitution in the domestic context, since the creation and legitimacy of the EU’s federation-like political order does not result from the compound constitution itself (see Kuo, 2014a, pp. 392-3; cf. Böckenförde, 2017, p. 165; Loughlin, 2010b, p. 67; Paulus, 2009, p. 76). On the contrary, as suggested above, the EU’s composite constitution turns out to be a reflection of the aggregated powers held by the various constituent regimes of a multilevel political order. For this reason, facing the institutional constraints enshrined in the EU’s foundational treaties amid the crisis, the member states simply resorted to their prerogatives under public international law to tackle the crisis. As sovereign states, they are vested with the competence to enter into any agreement and to create international organizations by concluding treaties. Despite subscribing themselves to the EU project, the member states remain the masters of the treaties and the international organizations of their creation—including the EU—with their sovereign status left reasonably intact (de Witte, 2011, pp. 36-7; White, 2015a, pp. 305-6). As noted above, under the multilevel structure of aggregate power, unlimited power may be prevented from emerging from the EU’s constitutional landscape with constituent power-exercisers checking each other under its multilevel political order. Yet, the resulting balance of power is provisional in character and tends to be precarious, since (sovereign) member states are never really articulated with other governance entities and so contained by the EU’s composite constitution. The existing EU constitutional framework can easily be bypassed if its sovereign masters see fit.

It is noteworthy that the sovereign status of member states does not exculpate the EU proper in its swerving toward “constitutional exceptionalism” (White, 2015b, p. 603; cf. Joerges, 2016, pp. 306-11). Rather, the EU has cooperated with its sovereign masters by

lending its institutions and internal technocrats to those extraconstitutional parallel mechanisms in carrying out crisis responses. Under the wings of the EU framework, these international civil servants have thus been insulated from parliamentary oversight by member states (Riekmann and Wydra, 2013; but cf. Wendler, 2017). Moreover, by turning to the IMF, the EU and its sovereign masters have been able to tap into an external source of expertise which is accountable neither to the EU nor its member states. Together, these internal and external civil servants have become the faceless technocratic enforcers of emergency policies (Kuo, 2014b, p. 96). Apart from such expertise, the CJEU has lent further legitimacy to this extraconstitutional turn by effectively keeping the parallel mechanism ESM out of the reach of EU constitutional requirements in the *Pringle* case (see Chalmers, 2013; Dimopoulos, 2015).

To be sure, the EU is not synonymous with global governance. Nor does its multilevel constitutional compound account for the complexity of global constitutionalism. As indicated in the World Health Organization's declaration of a global public health emergency over the Ebola outbreak of 2014 (Heath, 2016), not every global state of emergency has ended up exceeding the confines of a foundational treaty (ibid., pp. 27-33). Nevertheless, the response of the EU and member states to the Eurozone crisis has exposed the weaknesses and dangers of the structure of aggregate power in a multilevel political order. In a multilevel constitutional compound, sovereign states remain masters who are free to create parallel institutions outside the existing constitutional framework, rendering ineffectual the normative framing of global governance. By enlisting a corps of faceless international civil servants as their policy enforcers, sovereign masters can thus be omnipotent and invisible at the same time. As a whole, the extraconstitutional choices made under the aggregate power structure of the composite EU



quasi-polity evoke an “emergency without a [s]overeign” (White, 2015a, p. 308; see also Kuo, 2014b, p. 96).

## **5. TAMING BY ARTICULATION? THE FUTURE OF MULTILEVEL ORDERING IN GLOBAL CONSTITUTIONALISM**

If global constitutional ordering is not immune from swerving to the state of emergency, which is regraded as the embarrassing otherness of the rule of law under constitutionalism and its guarantor at the same time (Agamben, 2005, pp. 1-11), then, how can transnational emergency powers be harnessed to global constitutionalism? As reflected in commentary on the Eurozone crisis, the way forward seems to be more constitutionalism. But what kind of constitutionalism is the antidote to a transnational state of emergency? Looking to constitutional achievements at the nation-state level, we can perhaps think further in the direction of articulation.

Let us take a closer look at the structure of articulated governance that undergirds the constitutional separation of powers. According to Waldron (2016), separation of powers is not only about checks and balances or dispersal of power, as conventional wisdom has it (pp. 49-54). Breaking down the constitutional decision-making process into ten stages (including envisaging an action, follow-up planning, formulation as legislative bills, choice of methods of inspection and enforcement, and post-legislation/adjudication compliance),<sup>15</sup> he argues that separation of powers is oriented toward a structure of articulated governance. Each stage in the “stepwise” decision-making process is distinctive in its contributing to the “incorporation of new norms [in the form of which political power is exercised] into the lives and agency of those who are to be subject to them” (ibid., p. 64). Together, all these stages not only help people to “internalize” norms but also allow norms themselves to “‘settle in’ and become a

basis” upon which both people and government agencies plan their next step (ibid., pp. 63-4). In this way, stepwise realization of power in political life “embodies the concerns about liberty, dignity, and respect that the rule of law represents” (ibid.).

In this light, global constitutionalism and its corresponding political architecture are still a long way from articulated governance. As things stand, the multilevel/global constitutional landscape is unlikely to come to terms with the structure of articulated governance anytime soon. Nevertheless, another form of articulation which is pivotal to deliberation and political action at the heart of articulated governance may provide the antidote to the transnational state of emergency now running amok. As discussed above, management of the Eurozone crisis has been criticized for the aura of secrecy surrounding its technocratic method and executive dominance. In response, transparency and parliamentarianism have been at the centre of reform proposals. By this view, technocrats and the executive power can be held to account through more transparent decision-making and strengthened parliamentary control (Joerges, 2014a, pp. 40-2). Yet, in order to effect accountability and political responsibility, one prerequisite is that the decision itself, its underlying reasons, and its consequences must be made known to the public. For the principle of accountability and the ethic of political responsibility to function effectively, a decision-maker needs to articulate his or her choices to the public. Thus, besides more transparency and parliamentarianism in general institutional reform, we first need to think about what can be done to the multilevel political order to make the principle of articulation work within the multilevel constitutional compound.

It is argued that “irritants”—those disruptive actions taken by stakeholders, especially institutional actors—can be regarded as a force of resistance in curtailing self-aggrandizing

global governance (Krisch, 2016, pp. 672-8; Teubner, 2012, pp. 62-3, 91-2). Whether such institutional irritants signify a mutation of constituent power in the global constitutional landscape is not my present concern (compare Krich, 2016, with Teubner, 2012, pp. 61-6). Instead, my contention is that institutional irritants are not just disruptive or resistant for the purpose of contestation. Short of jurisgenerative political action (Krisch, 2016, p. 665), they can be a positive force to facilitate articulation. Take the Eurozone crisis one last time. To create a climate congenial for articulation, the EU, or rather its constituent institutions, should have resisted lending institutional resources or expertise to the parallel mechanisms created outside the EU constitutional framework. True, this would not prevent member states from stepping outside the EU to bypass constitutional instruments. Yet such an irritant might make member states think twice before adopting such an extraconstitutional strategy. If existing institutional and staff resources were unavailable to those parallel mechanisms, member states would have less incentive to bypass the governing constitutional instruments. More importantly, even if member states could still decide to “go extraconstitutional” despite institutional irritants from the constituent institutions of the EU, member states, especially ministers and other executive officials, would have to argue their case to the publics. They would need to articulate the reasons behind their decision not to work within the multilevel constitutional compound and explain how they could legally realign the new extraconstitutional mechanism with IMF technocrats from outside the EU. In this way, political decision makers could be subjected to tests of political responsibility while a shadowy international servant corps would be exposed to some public scrutiny.

Unfortunately, institutional reactions to the extraconstitutional parallel mechanisms created by member states amid the Eurozone crisis were anything but irritating. Not only did

the Commission midwife those extraconstitutional mechanisms and lend itself to their functioning, but the CJEU also acquiesced in this institutional coup. Failing in its irritant role in facilitating articulation and political responsibility, the CJEU has been criticized for deferring to the *raison d'état* of the EU in the *Pringle* case (Chalmers, 2013, pp. 209-10; Joerges, 2014b, pp. 780-3). By contrast, the German Federal Constitutional Court's (GFCC) serial decisions on the EU's emergency response might be seen as an instance of "interactive adjudication" in judicial resistance to the EU's extraconstitutional turn, despite its nationalist overtones.<sup>16</sup> To clarify, the institutional resistance as suggested above is not aimed at the judicialization of political decision-making,<sup>17</sup> but rather intended to facilitate the process of public articulation. Faced with extraconstitutional responses to a transnational crisis, the constituent institutions of the EU should have asserted themselves vis-à-vis member states to maintain the EU as a multilevel *constitutional* compound.

## 6. CONCLUSION

The challenges that the transnational state of emergency has posed to the multilevel constitutional compound of the EU speak to the fundamental weakness of the project of global constitutionalism. Sovereignty may be suspended in a global constitutional landscape. When push comes to shove, the control of political power through global constitutionalism is fragile. Leaving unaddressed the question of the structure of political power in multilevel constitutional ordering, global constitutionalism is susceptible to emergency thinking (cf. White, 2015a, pp. 312-13).

Taking on the question of power structure in global constitutionalism, I have argued that the asserted multilevel ordering of transnational/global governance rests on a structure of

aggregate power and is thus easily switched to constitutional exceptionalism amid a crisis. Learning from the development of modern constitutionalism as embodied in the structure of articulated governance, multilevel constitutional ordering can exert better control over power-exercisers under an aggregate structure of global governance. The contrast between articulation and aggregation sheds light on the structural weakness of the project of global constitutionalism without being entangled with the intractable question of *demos*, which has long dominated the debate as to whether global constitutionalism can be a practicable political project (Krisch, 2010, pp. 55-6; see also Besson, 2009). While it is beyond the scope of this paper to hammer out a constitutional design to tame transnational emergency powers, articulation, as discussed above, is nevertheless a direction for further thought in conceiving of the future of global constitutionalism.

The Eurozone crisis has become a moment in time when the values and purposes of a multilevel political order in global governance have needed to be articulated and put to the test of constitutionalism. Unfortunately, by submitting themselves to raw political decisions at a critical juncture, the EU's constituent institutions have not only thrown the EU's long-claimed vision of the rule of law into doubt but have also struck a blow at global constitutionalism. Yet we can perchance find a silver lining for the future of global constitutionalism in the clouds hanging over "emergency Europe" (ibid.). Individual stakeholders, especially institutional actors, in the existing multilevel constitutional order can help to buttress global constitutionalism by asserting themselves against the nationalist tendency toward bypassing the working transnational constitutional constraints through the creation of extraconstitutional parallel regimes. With such irritants in play, political decision-makers might be forced publicly to articulate their reasons for taking extraconstitutional emergency actions and thus shoulder

political responsibility. Before the multilevel political order can jump from the logic of aggregation to one of articulation, as embodied in the modern constitutional project, public articulation can play a role in lessening the problem of transnational emergency powers.

---

#### NOTES

<sup>1</sup> By “constitutionalism” I mean the set of ideas, the core of which is to give a form to political power and thereby control it through a fundamental law underpinned by a system of divided power and enshrined rights. Thus constitutionalism is normative in character, though it may accommodate various institutional designs such as Westminster parliamentarianism and US-style presidentialism (see Grimm, 2016, pp. 3-22). A state that rests on constitutionalism may have a limited or an interventionist government (cf. McIlwain, 1947, pp. 20-2). Also, constitutionalism is compatible with a wide range of socio-economic systems, including classical liberal economies and Nordic welfare states. Notably, such an understanding of constitutionalism, further discussed in Section 3, stands apart from the recent pluralist usage of the term such as authoritarian constitutionalism (e.g., Tushnet, 2015) or the Chinese style of constitutionalism (e.g., Fu and Zhai, 2018).

<sup>2</sup> Global constitutionalism refers to attempts in scholarship and practice to model multifarious arrangements responding to global or transnational governance after the idea of constitutionalism (see generally Dunoff and Trachtman, 2009a; see also Schwöbel, 2010). From the participant point of view, global constitutionalism is a reform project aimed at current practices of global governance under normative guidance. In contrast, some scholars adopt the same term in characterizing the convergence of the contents of national constitutions or the global phenomenon of constitutional supremacy (see Law, 2011; Hirschl, 2018).

<sup>3</sup> Notably, the role of politics has come to the attention of many participants in the debate over global constitutionalism. For example, drawing on systems theory, Gunther Teubner (2012) provides a sociological account of global constitutionalism with a focus on societal-forces-steered politics (pp. 51-72). In contrast, my present concern is with political ordering emanating from the debate surrounding global constitutionalism. Accordingly, my discussion of theories of global constitutionalism is not comprehensive but rather defined by their implications to political ordering as noted above.

<sup>4</sup> Terms such as “multilevel constitutionalism” and “constitutional compound” or “compound/composite constitution” are English translations of the German concept *Verfassungsverbund*, coined to refer to the unique, complex constitutional arrangement that encompasses the EU and member states (Mayer and Wendel, 2012, pp. 128-30; see also Pernice, 2015, 2009, 1999; Voßkuhle, 2010, p. 183). Such terms are also adopted to characterize other transnational or global constitutional developments (e.g., Petersmann, 2017; Cohen, 2012, pp. 48-9; Habermas, 2006, p. 135; cf. de Wet, 2006, p. 53; Cottier and Hertig, 2003, p. 264). I shall further discuss the idea of the multilevel constitutional compound later.

<sup>5</sup> By “constituent regime” I mean any (quasi)institutional unit that exercises power in global governance, regardless of whether or not it is based on formal legal instruments, including the sovereign state (cf. Krasner, 1982, p. 186; Young, 2012, p. 11). Constituent regimes and constituent (or component) power-exerciser are used interchangeably in the present paper.

---

<sup>6</sup> Alexander Somek (2012) dissociates the constituent power from the *demos* and conceives a transnational constituent power in terms of what he calls “interpassivity”, which is distinct from the interactive character of the constituent power in modern constitutionalism. Even so, Somek acknowledges that, instead of making judgments, the interpassive transnational constituent power amounts to following convention (pp. 48-59). For another transnational understanding of constituent power, see Teubner, 2012, pp. 62-3.

<sup>7</sup> For the role of the constitutional contract in a federation, see Schmitt, 2008, pp. 113-24, 385-6; see also Böckenförde, 2017, pp. 159-61. I shall come back to the limitations of this analogy in Section 3.

<sup>8</sup> The constitution usually includes a large-C Constitution among other forms of constitutional norms. It is noteworthy that a single Constitution is not a precondition for speaking about modern constitutionalism. For example, lacking a codified Constitution, Israel has several Basic Laws, which are distinct from and higher than ordinary parliamentary legislation in its constitutional order (see Sapir, 2009).

<sup>9</sup> Assuming the fragmentation of global governance, Cohen’s global constitutional project is distinctively pluralist relative to other strong federalists in the debate over global constitutionalism (compare Cohen, 2012, pp.288-91, with Fassbender, 2009, p. 236; cf. Habermas, 2006, p. 102).

<sup>10</sup> The ESM Treaty came into effect on September 27, 2012.

<sup>11</sup> A new clause was added to the TFEU as Article 136 (3): “The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality.” It was passed under Article 48 (6) of the TEU. The European Council adopted the treaty amendment on March 25, 2011, but the new Article 136 (3) did not come into force until April 2013 when the Czech Republic gave its consent.

<sup>12</sup> The Czech government did not sign the TSCG for other reasons.

<sup>13</sup> It is stipulated in Article 16 of the TSCG (see also Fromage and de Witte, 2017).

<sup>14</sup> Notably, the ESM Treaty provides indirectly for IMF involvement in its Preamble (12): “In accordance with IMF practice, in exceptional cases an adequate and proportionate form of private sector involvement shall be considered” (see also Kuo, 2014b, p. 85).

<sup>15</sup> Waldron (2016) is ambivalent about how each stage is exactly defined and delineated from others (pp. 63-4).

<sup>16</sup> For example, while the GFCC’s ESM decision could be an instance of interactive adjudication (see Joerges, 2014a, pp. 43-5; Joerges, 2016, pp. 330-1), its decision on the ECB’s Outright Monetary Transactions (OMT) is strongly criticized (cf. Joerges, 2014b, pp. 781-2).

<sup>17</sup> Concerns about the judicialization of political decision-making lie at the heart of Judge Gertrude Lübbe-Wolff’s dissenting opinion in the GFCC’s OMT decision (see Schiek, 2014, pp. 340-1).

?

## REFERENCES

- Agamben, G. (2005). *State of Exception* (translated by K. Attell). Chicago, IL: University of Chicago Press.
- Avbelj, M. and J. Komárek (Eds.). (2012). *Constitutional Pluralism in the European Union and Beyond*. Oxford: Hart.
- Baraggia, A. (2015). Conditionality measures within the Euro area crisis: A challenge to democratic principle. *Cambridge Journal of International and Comparative Law*, 4, 268-88.
- Barents, R. (2012). The fallacy of European multilevel constitutionalism. In Avbelj and Komárek, 2012, pp. 153-83.
- Bermeo, N. (2016). On democratic backsliding. *Journal of Democracy*, 27 (1), 5-19.
- Besson, S. (2009). Whose constitution(s)? International law, constitutionalism, and democracy. In Dunoff and

- Trachtman (2009a), pp. 381-408.
- Böckenförde, E.-W. (1991). *State, Society and Liberty: Studies in Political Theory and Constitutional Law* (translated by J. A. Underwood). New York, NY: Berg.
- Böckenförde, E.-W. (2017). *Constitutional and Political Theory: Selected Writings* (Edited by M. Künkler and T. Stein and translated by T. Dunlop). Oxford: Oxford University Press.
- Cassese, S. (2005). Administrative law without the state? The challenge of global regulation. *New York University Journal of International Law and Politics*, 34, 663-94.
- Chalmers, D. (2013). European restatements of sovereignty. In R. Rawlings, P. Leyland and A. Young (Eds.), *Sovereignty and the Law: Domestic, European and International Perspectives* (pp. 186-212). Oxford: Oxford University Press.
- Cohen, J. L. (2012). *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism*. Cambridge: Cambridge University Press.
- Cottier, T. and M. Hertig (2003). The prospects of 21<sup>st</sup> century constitutionalism. *Max Planck Yearbook of United Nations Law*, 7, 261-328.
- Curtin, D. (2014). Challenging executive dominance in European democracy. *Modern Law Review*, 77, 1-32.
- Davies, G. (2015). Democracy and legitimacy in the shadow of purposive competence. *European Law Journal*, 21, 2-22.
- de Búrca, G. and J. H. H. Weiler (Eds.). (2011). *The Worlds of European Constitutionalism*. Cambridge: Cambridge University Press.
- de Wet, E. (2006). The international legal order. *International and Comparative Law Quarterly*, 55, 51-76.
- de Witte, B. (2011). The European Union as an international legal experiment. In de Búrca and Weiler, 2011, pp. 19-56.
- Dimopoulos, A. (2015). Taming the conclusion of *inter se* agreements between EU member states: The role of the duty of loyalty. *Yearbook of European Law*, 34, 286-318.
- Dunoff, J. L., and J. P. Trachtman (Eds.). (2009a). *Ruling the World? Constitutionalism, International Law, and Global Governance*. Cambridge: Cambridge University Press.
- Dunoff, J. L. and J. P. Trachtman (2009b). A functional approach to international constitutionalization. In Dunoff and Trachtman (2009a), pp. 3-35.
- Fassbender, B. (1998). The United Nations Charter as constitution of the international community. *Columbia Journal of Transnational Law*, 36, 529-619.
- Fassbender, B. (2009). Rediscovering a forgotten constitution: notes on the place of the UN Charter in the international legal order. In Dunoff and Trachtman (2009a), pp. 133-47.
- Fromage, D. and B. de Witte (2017). The Treaty on Stability, Coordination and Governance: Should it be incorporated in EU law? *Verfassungsblog*, 2017/11/06, <https://verfassungsblog.de/the-treaty-on-stability-coordination-and-governance-should-it-be-incorporated-in-eu-law/>.
- Fu, H. and X. Zhai. (2018). What makes the Chinese constitution socialist? *International Journal of Constitutional Law*, 16, 655-63.
- Genschel, P. and M. Jachtenfuchs (2013). Conclusion: The European integration of core state powers. patterns and causes. In P. Genschel and M. Jachtenfuchs (Eds.), *Beyond the Regulatory Polity? The European Integration of Core State Powers* (pp. 249-68). Oxford: Oxford University Press.
- Glenn, H. P. (2013). *The Cosmopolitan State*. Oxford: Oxford University Press.
- Gordon, S. (1999). *Controlling the State: Constitutionalism from Ancient Athens to Today*. Cambridge, MA: Harvard University Press.
- Grimm, D. (2016). *Constitutionalism: Past, Present, and Future*. Oxford: Oxford University Press.
- Habermas, J. (2006). *The Divided West* (Edited and translated by C. Cronin). Cambridge: Polity.
- Hale, T., D. Held and K. Young (2013). *Gridlock: Why Global Cooperation Is Failing When We Need It Most*. Cambridge: Polity.
- Heath, J. B. (2016). Global emergency power in the age of Ebola. *Harvard International Law Journal*, 57, 1-47.
- Hirschl, R. (2018). Opting out of “global constitutionalism”. *Law and Ethics of Human Rights*, 12, 1-36.
- Isiksel, T. (2016). *Europe’s Functional Constitution A Theory of Constitutionalism Beyond the State*. Oxford: Oxford University Press.
- Joerges, C. and C. Glinski (Eds.). (2014). *The European Crisis and the Transformation of Transnational Governance: Authoritarian Managerialism versus Democratic Governance*. Oxford: Hart.
- Joerges, C. (2014a). Three transformations of Europe and the search for a way out of its crisis. In Joerges and Glinski (2014), pp. 25-46.
- Joerges, C. (2014b). “Brother, can you paradigm?” *International Journal of Constitutional Law*, 12, 769-85.



- Joerges, C. (2016). Integration through law and the crisis of law in Europe's emergency. In D. Chalmers, M. Jachtenfuchs and C. Joerges (Eds.), *The End of the Eurocrats' Dream: Adjusting to European Democracy* (pp. 299-338). Cambridge: Cambridge University Press.
- Joerges, C. and M. Weimer (2013). A crisis of executive managerialism in the European Union—No alternative? In G. de Búrca, C. Kilpatrick and J. Scott (Eds.), *Critical Legal Perspectives on Global Governance: Liber Amicorum David M Trubek* (pp. 295-322) Oxford: Hart.
- Kahn, P. W. (2000). War powers and the millennium.' *Loyola of Los Angeles Law Review*, 34, 11-60.
- Kahn, P. W. and K. Brennan-Marquez (2014). *Statutes and democratic self-authorship. William and Mary Law Review*, 56, 115-79.
- Kennedy, D. (2009). The mystery of global governance. In Dunoff and Trachtman, 2009a, pp. 37-68.
- Kilpatrick, C. (2015). On the rule of law and economic emergency: The degradation of basic legal values in Europe's bailouts. *Oxford Journal of Legal Studies*, 35, 325-53.
- Kingsbury, B., N. Krisch and R.B. Stewart (2005). The emergence of global administrative law. *Law and Contemporary Problems*, 68, 15-62.
- Koskenniemi, M. (2007). The fate of public international law: Between technique and politics. *Modern Law Review*, 70, 1-30.
- Krasner, S.D. (1982). Structural causes and regime consequences: Regimes as intervening variables. *International Organization*, 36 (2), 185-205. 186
- Kreuder-Sonnen, C. and B. Zangl (2015). Which post-Westphalian? International organizations between constitutionalism and authoritarianism. *European Journal of International Relations*, 21, 568-94.
- Krisch, N. (2010). *Beyond Constitutionalism: The Pluralist structure of Postnational Law*. Oxford: Oxford University Press.
- Krisch, N. (2016). *Pouvoir constituant and pouvoir irritant in the postnational order. International Journal of Constitutional Law*, 14: 657-79.
- Kumm, M. (2009). The cosmopolitan turn in constitutionalism: On the relationship between constitutionalism in and beyond the state. In Dunoff and Trachtman (2009a): pp. 258-325.
- Kuo, M.-S. (2010). Reconciling constitutionalism with power: Towards a constitutional nomos of political ordering. *Ratio Juris*, 23, 390-410.
- Kuo, M.-S. (2014a). Federation is not only about function: Where a neo-federalist plan for global constitutionalism falls short. *Melbourne Journal of International Law*, 15, 271-89.
- Kuo, M.-S. (2014b). The moment of Schmittian truth: Vonceiving of the state of exception in the wake of the financial crisis. In Joerges and Glinski, 2014, pp. 83-97.
- Kuyper, J. (2015). Transformative pathways to world government: A historical institutionalist critique. *Cambridge Review of International Affairs*, 28, 657-79.
- Law, D. S. (2011). The evolution and ideology of global constitutionalism. *California Law Review*, 99, 1163-1257.
- Levinson, S. and B. H. Sparrow (2005). Introduction. In S. Levinson and B. H. Sparrow (Eds.), *The Louisiana Purchase and American Expansion, 1803-1898* (pp. 1-18). Lanham, MD: Rowman and Littlefield.
- Lindseth, P.L. (2010). *Power and Legitimacy: Reconciling Europe and the Nation-State*. Oxford: Oxford University Press.
- Lindseth, P. L. (2016). The perils of 'as if' European constitutionalism. *European Law Journal*, 22, 696-718.
- Loughlin, M. and N. Walker. (2007). Introduction. In M. Loughlin and N. Walker (Eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (pp.1-8). Oxford: Oxford University Press.
- Loughlin, M. (2010a). *Foundations of Public Law*. Oxford: Oxford University Press.
- Loughlin, M. (2010b). What is constitutionalisation?' In P. Dobner and M. Loughlin (Eds.), *The Twilight of Constitutionalism?* (pp. 47-69). Oxford: Oxford University Press.
- Manent, P. (2017). Populist demagogy and the fanaticism of the center. *American Affairs*, 1 (2), available at <https://americanaffairsjournal.org/2017/05/populist-demagogy-and-the-fanaticism-of-the-center/>
- Mayer, F. C. and M. Wendel (2012). Multilevel constitutionalism and constitutional pluralism: *Querelle allemande or querelle d'allemand*. In Aybelj and Komárek, 2012, pp. 127-51.
- McIlwain, C. H. (1947) *Constitutionalism: Ancient and Modern* (rev. ed.). Ithaca, NY: Cornell University Press.
- Möllers, C. (2013). *The Three Branches: A Comparative Model of Separation of Powers*. Oxford: Oxford University Press.
- Müller, J.-W. (2010). Three constitutionalist responses to globalization. In J. K. Tulis and S. Macedo (Eds.), *The Limits of Constitutional Democracy* (pp. 239-55). Princeton, NJ: Princeton University Press.

- Paulus, A. L. (2009). The international legal system as a constitution. In Dunoff and Trachtman, 2009a, pp. 69-112.
- Pernice, I. (1999). Multilevel constitutionalism and the Treaty of Amsterdam: European constitution-making Revisited? *Common Market Law Review*, 36, 703-50.
- Pernice, I. (2009). The Treaty of Lisbon: Multilevel constitutionalism in action. *Columbia Journal of European Law* 15, 349-407.
- Pernice, I. (2015). Multilevel constitutionalism and the crisis of democracy in Europe. *European Constitutional Law Review*, 11, 541-62.
- Peters, A. (2006). Compensatory constitutionalism: The function and potential of fundamental international norms and structures. *Leiden Journal of International Law*, 19, 579-610.
- Petersmann, E. U. (2017). *Multilevel Constitutionalism for Multilevel Governance of Public Goods Methodology Problems in International Law*. Oxford: Hart.
- Posner, E. A. (2009). *The Perils of Global Legalism*. Chicago, IL: University of Chicago Press.
- Preuss, U. K. (1995). *Constitutional Revolution: The Link between Constitutionalism and Progress* (translated by Deborah Lucas Schneider). Atlantic Highlands, NJ: Humanities.
- Preuss, U. K. (1996). The political meaning of constitutionalism. In R. Bellamy (Ed.), *Constitutionalism, Democracy, and Sovereignty: American and European Perspectives* (pp. 11-27). Aldershot: Avebury.
- Rabkin, J. A. (2005). *Law Without Nations? Why Constitutional Government Requires Sovereign States*. Princeton, NJ: Princeton University Press.
- Riekmann, S. P. and D. Wydra (2013). Representation in the European state of emergency: Parliaments against governments? *Journal of European Integration*, 35, 565-82.
- Rosanvallon, P. (2008). *Counter-Democracy: Politics in an Age of Distrust* (translated by Arthur Goldhammer). Cambridge: Cambridge University Press.
- Roughan, N. (2013). *Authorities: Conflicts, Cooperation, and Transnational Legal Theory*. Oxford: Oxford University Press.
- Ruffert, M. (2011). The European debt crisis and European Union law. *Common Market Law Review*, 48, 1777-1806.
- Sapir, G. (2009). Constitutional revolutions: Israel as a case-study. *International Journal of Law in Context*, 5, 355-78.
- Scheppele, K. L. (2017). Autocratic legalism. *Constitutionalism and Politics EUI Blog* (Nov. 16, 2017), <https://blogs.eui.eu/constitutionalism-politics-working-group/populist-constitutionalism-6-kim-lane-scheppele-autocratic-legalism/>.
- Schiek, D. (2014). The German Federal Constitutional Court's ruling on Outright Monetary Transactions (OMT) – another step towards national closure? *German Law Journal*, 15, 329-42.
- Schmitt, C. (2008). *Constitutional Theory* (translated by Jeffrey Seitzer). Durham, NC: Duke University Press.
- Schwöbel, C. E.-J. (2010). Situating the debate on global constitutionalism. *International Journal of Constitutional Law*, 8, 611-35.
- Scicluna, N. (2014). Politicization without democratization: How the Eurozone crisis is transforming EU law and politics. *International Journal of Constitutional Law*, 12, 545-71.
- Scicluna, N. (2017). Can the EU's constitutional framework accommodate democratic politics? *Perspectives on Federalism*, 9, 98-118.
- Somek, A. (2012). Constituent power in national and transnational contexts. *Transnational Legal Theory*, 3, 31-60.
- Somek, A. (2014). *The Cosmopolitan Constitution*. Oxford: Oxford University Press.
- Stone Sweet, A. and J. A. Caporaso (1998). From free trade to supranational polity: The European Court and integration. In W. Sandholtz and A. Stone Sweet (Eds.), *European Integration and Supranational Governance* (pp. 92-133). Oxford: Oxford University Press.
- Teubner, G. (2012). *Constitutional Fragments: Societal Constitutionalism and Globalization* (translated by G. Norbury). Oxford: Oxford University Press.
- Tuori, K. (2015). *European Constitutionalism*. Cambridge: Cambridge University Press.
- Tushnet, M. (2015). Authoritarian constitutionalism. *Cornell Law Review*, 100, 391-461.
- Voßkuhle, A. (2010). Multilevel cooperation of the European constitutional courts: *Der Europäische Verfassungsgerichtsverbund*. *European Constitutional Law Review*, 6, 175-98.
- Waldron, J. (2016). *Political Political Theory: Essays on Institutions*. Cambridge, MA: Harvard University Press.
- Walker, N. (2012). Constitutionalism and pluralism in global context. In Avbelj and Komárek (2012), pp. 17-

- Weiler, J. H. H. (2004). The geology of international law – Governance, democracy and legitimacy. *Heidelberg Journal of International Law (ZaöRV)*, 64, 547-62.
- Weiler, J. H. H. (2012). In the face of crisis: Input legitimacy, output legitimacy and the political messianism of European integration. *Journal of European Integration*, 34, 825-41.
- Weiler, J.H.H. (2011). Prologue: Global and pluralist constitutionalism — some doubts. In de Búrca and Weiler, 2011, pp. 8-18.
- Wendler, F. Parliaments as arenas of representation and public contestation: Insights from the Eurozone crisis. In D. Jancic (Ed.), *National Parliaments after the Lisbon Treaty and the Euro Crisis Resilience or Resignation?* (pp. 177-92). Oxford: Oxford University Press.
- White, J. (2015a). Emergency Europe. *Political Studies*, 63, 300-18.
- White, J. (2015b). Authority after emergency rule. *Modern Law Review*, 78, 585-610.
- Young, M.A. (2012). Introduction: The productive friction between regimes. In M. A. Young (Ed.), *Regime Interaction in International Law: Facing Fragmentation* (pp 1-19). Cambridge: Cambridge University Press.