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## Taming governance with legality? Critical reflections upon global administrative law as small-c global constitutionalism

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# TranState Working Papers

TAMING GOVERNANCE WITH LEGALITY?  
CRITICAL REFLECTIONS UPON  
GLOBAL ADMINISTRATIVE LAW AS  
SMALL-C GLOBAL CONSTITUTIONALISM

MING-SUNG KUO

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*Ming-Sung Kuo*

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***Taming Governance with Legality?***  
***Critical Reflections upon Global Administrative Law***  
***as Small-c Global Constitutionalism***

**ABSTRACT**

The project of global administrative law has stood out from various efforts to tame global governance with the rule of law. By enhancing transparency and accountability, global administrative law is expected to improve the policy output of global administration, giving legitimacy to global governance. In this way, global administrative law evolves into a small-c global constitutionalism. In this paper, I trace the trajectory of global administrative law as small-c global constitutionalism and how the concept of legitimacy is recast in relation to global governance. I first point out that originally embedded in the practice of global governance, global administrative law effectively functions as the small-c constitutional law of global governance, echoing the trends toward constitutionalization. As it takes on constitutional character, however, global administrative law faces the challenges of legality and legitimacy. Turning away from state consent, global administrative law turns to the idea of publicness as solution to its double challenges. My inspection of the notion of publicness in global administrative law shows that the strategy of resting the legitimacy of global administrative law as small-c global constitutionalism on the idea of publicness turns out to be the privatization of legitimacy, suggesting a post-public concept of legitimacy.

## CONTENTS

INTRODUCTION .....	1
ALIGNING GLOBAL GOVERNANCE WITH LEGALITY:	
THE INEVITABILITY OF CONSTITUTION TALKS .....	4
Making Sense of Global Administrative Law:	
The Bootstrapping of Global Governance .....	5
From Functional Administration to Constitutionalisation:	
The Constitutional Spillover of Global Administrative Law .....	10
Towards a Small-c Global Constitutionalism .....	14
AN ANATOMY OF SMALL-C GLOBAL CONSTITUTIONALISM:	
THE STATE AND CHALLENGES OF GLOBAL ADMINISTRATIVE LAW .....	16
Rationalisation and Legitimation Untied .....	17
Technocratic Constitutionalism without the People .....	21
In the Name of Publicness: An Emerging Post-Public Legitimacy? .....	26
CONCLUSION .....	31
REFERENCES .....	33
BIOGRAPHICAL NOTE .....	38

# ***Taming Governance with Legality?***

## ***Critical Reflections upon Global Administrative Law as Small-c Global Constitutionalism***<sup>\*</sup>

### **INTRODUCTION**

Globalisation reinvigorates interest in the long-standing movement for international rule of law.<sup>1</sup> Global governance becomes the central concept around which various projects for legal reform are organised.<sup>2</sup> Regardless of distinctive understandings of global governance, it is evocative of some sort of political ordering that transcends nation-states.<sup>3</sup> For this reason, the efforts to consolidate global governance with a legal framework are faced with a fundamental challenge as to the legitimacy of the proposed transnational legal orders.<sup>4</sup>

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<sup>1</sup> See David Kennedy, 'The Mystery of Global Governance' in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009). See also Martti Koskenniemi, 'The Fate of Public International Law: Between Techniques and Politics' (2007) 70 *MLR* 1, 1-3.

<sup>2</sup> Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2004). See also Daniel C Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative Law' (2006) 115 *Yale LJ* 1490; Graf-Peter Calliess and Moritz Renner, 'Between Law and Social Norms: The Evolution of Global Governance' (2009) 22 *Ratio Juris* 260.

<sup>3</sup> See Claus Offe, 'Governance: An "Empty Signifier"?' (2009) 16 *Constellations* 550, 550-54.

<sup>4</sup> See JHH Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy' (2004) 64 *Heidelberg J Int'l L (ZaöRV)* 547, 560-62; Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Post-national Law* (OUP 2010).



Aware of the elusiveness of the idea of a global political community,<sup>5</sup> some proponents of global governance turn to administrative law as the main tool to lay legal grounds for global governance.<sup>6</sup> Instead of pinning their hopes on a comprehensive constitution-like charter to govern the operation of global administration,<sup>7</sup> aspirants for global governance cast their eyes on two aspects. First, they put emphasis on the enhancement of the transparency and accountability of diffuse transnational regulatory regimes. Second, they focus attention on the improvement of the reasonableness and procedural fairness of decisions made under transnational regulatory frameworks. Both are aimed at bolstering the legitimacy of global administration by enhancing the quality of policy results and bridging the gap between transnational decision-making mechanisms and interested parties.<sup>8</sup> Correspondingly, traditional tools of administrative law such as the requirements of reason-giving and due process, including the rights to be noticed and hearing and effective judicial review, are employed to contribute to the legitimacy of global regulatory regimes.<sup>9</sup> Global administrative law is regarded as essential to the growth of global governance, setting itself apart from other proposals to rest global governance on a legal basis.<sup>10</sup>

In the meantime, other advocates for global governance are driven by the global migration of constitutional ideas. Inspired by the ideas associated with constitutionalism and encouraged by the experiences of constitutional democracies, especially in the post-

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<sup>5</sup> See Krisch (n 4) 54-61. See also Armin von Bogdandy, 'Constitutionalism in International Law: Comment on a Proposal from Germany' (2006) 47 Harv Int'l LJ 223, 233-236. Cf Ulrich K Preuss, 'Equality of States—Its Meaning in a Constitutionalized Global Order' (2008) 9 Chicago J Int'l L 17, 41-45. But see David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Stanford University Press 1995).

<sup>6</sup> See eg Esty (n 2); Sabino Cassese, 'Administrative Law without the State? The Challenge of Global Regulation' (2005) 37 NYU J Int'l L & Pol 663.

<sup>7</sup> See Cassese (n 6) 687-89; Nico Krisch, 'Global Administrative Law and the Constitutional Ambition' in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism* (OUP 2010) 245. See also Krisch (n 4) 57-104.

<sup>8</sup> See Esty (n 2) 1561; Cassese (n 6) 687-89.

<sup>9</sup> See Esty (n 2); Benedict Kingsbury and others, 'The Emergence of Global Administrative Law' (2005) 68 LCP 15, 37-41; Benedict Kingsbury, 'The Concept of "Law" in Global Administrative Law' (2009) 20 EJIL 23, 34-50. See also Armin von Bogdandy, 'General Principles of International Public Authority: Sketching a Research Field' (2008) 9 German LJ 1909, 1928-38.

<sup>10</sup> See Jeffrey L Dunoff and Joel P Trachtman, 'A Functional Approach to International Constitutionalization' in Dunoff and Trachtman (n 1) (separating legal proposals for global governance into three schools of thought: international constitutionalisation, legal pluralism, and global administrative law).

Cold War era, they ambitiously envision a constitutional version of global governance.<sup>11</sup> They do not contest the importance of administrative law in the build-up of global governance. Rather, they regard the emergence of global administrative law as laying the groundwork for placing global administration within a constitutional framework.<sup>12</sup> Beyond administrative law, they contend that global administrative law paves the way for constitutionalising the component regulatory regimes of global administration in the future. Seen in this light, global governance is expected to evolve from a cluster of transnational regulator regimes into a global legal order with constitutional values.<sup>13</sup>

It remains to be seen whether global governance will continue as a descriptor of various transnational regulatory regimes that jointly manage global administration or move towards a constitutionalised framework under which transboundary issues are to be resolved. Notably, corresponding to the role of domestic administrative law in constitutional democracies, global administrative law functions to spell out the fundamental norms underpinning the relationship between global governance and its interested parties. Compared with the relationship between administrative law and the constitution in the domestic context, however, the alignment of global governance with legality as noted above poses some theoretical challenges to global administrative law.

By looking into the way that global administrative law takes on constitutional character, I aim to argue that global administrative law has emerged as a small-c constitutional law of global governance but in the meantime conceived of legitimacy in a distinctive way, suggesting the notion of what I call post-public legitimacy.<sup>14</sup> In the domestic context, the small-c constitution comprises not only constitutional principles and doctrines proclaimed in the case law of the judiciary but also the so-called super statutes, including administrative procedure legislation and election laws, to name just a pair.<sup>15</sup> In contrast, the constitutional character of global administrative law is constructed free of a Capital-C global Constitution. Unmoored from a Capital-C Constitution, global administrative law is faced with the question of legitimacy as it takes on constitutional character. In response, the legitimacy of global administrative law is ar-

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<sup>11</sup> See Krisch (n 4) 31-32.

<sup>12</sup> See Matthias Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State' in Dunoff and Trachtman (n 1) 312.

<sup>13</sup> See also Dunoff and Trachtman (n 10) 33-34.

<sup>14</sup> See Ming-Sung Kuo, 'The Concept of "Law" in Global Administrative Law: A Reply to Benedict Kingsbury' (2009) 20 EJIL 997.

<sup>15</sup> See William N Eskridge, Jr. and John Ferejohn, *A Republic of Statutes: The New American Constitution* (Yale University Press 2010) 1-28. See also William F. Harris II, *The Interpretable Constitution* (Johns Hopkins University Press 1993) 104-13.

gued to rest on the normative idea of publicness that bridges democracy and the rule of law rather than on an author-based Capital-C Constitution.<sup>16</sup>

A close inspection on the idea of publicness portrayed in global administrative law scholarship, I argue, shows that it suggests a post-public legitimacy. Stripped of a global public and embedded in the diffusion of global regulatory regimes targeting at particular interested parties, global administrative law lacks a general notion of publicness. Rather, the idea of publicness central to global administrative law as the small-c constitution of global governance is fragmented and centred on particular regulatory regimes, pointing to a post-public legitimacy. My argument proceeds as follows: Part II explores how global administrative law is conceived in global governance and takes on constitutional character. Part III examines the issues embedded in the discourse on global administrative law as a small-c global constitutionalism. Part IV provides a summary of the main arguments.

## **ALIGNING GLOBAL GOVERNANCE WITH LEGALITY: THE INEVITABILITY OF CONSTITUTION TALKS**

The buzzword ‘globalisation’ characterises myriads of developments that started prior to, or in the wake of, the collapse of the Berlin Wall, and has since become virtually irresistible to academic disciplines. Law is no exception. ‘Legal globalisation’,<sup>17</sup> ‘the globalisation of law’,<sup>18</sup> or anything with an epithet evoking globalisation such as the ‘global rule of law’<sup>19</sup> and ‘globalised judiciary’<sup>20</sup> are widespread in legal scholarship. In this Part, I first discuss how administrative law has been brought into the fold of globalisation scholarship. Next, I proceed to explore the way that constitutionalism has been projected beyond state boundaries. This Part concludes with the suggestion that attempts to tame global governance with administrative law tends to take on constitutional character, indicating an emerging small-c global constitutionalism.

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<sup>16</sup> See Kingsbury (n 9).

<sup>17</sup> See eg David Levi-Faur, ‘The Political Economy of Legal Globalization: Juridification, Adversarial Legalism and Responsive Regulation. A Comment’ (2005) 59 *International Organization* 451.

<sup>18</sup> See eg Martin Shapiro, ‘The Globalization of Law’ (1993) 1 *Ind J Global Legal Stud* 37 (1993); Sabino Cassese, ‘The Globalization of Law’ (2005) 37 *NYU J Int’l L & Pol* 973. See also Duncan Kennedy, ‘Two Globalizations of Law and Legal Thought: 1850–1968’ (2003) 36 *Suffolk UL Rev* 631.

<sup>19</sup> See eg Ruti Teitel, ‘The Alien Tort and the Global Rule of Law’ (2005) 57 *International Social Science Journal* 551.

<sup>20</sup> See eg Ken I. Kersch, ‘The “Globalized Judiciary” and the Rule of Law’ (2004) 13 *Good Society* 17.

## **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.<sup>21</sup> 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’.<sup>22</sup> 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 transboundary regulations.<sup>23</sup> 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 argue that global administration sets the emerging global administrative law apart from traditional international administrative law.<sup>24</sup> They further divide global administration into five types. In addition to international administration and what they call ‘distributed administration’, both of which were formerly the objects of international administrative law,<sup>25</sup> they identify three other types of global administration: ‘transnational networks and coordination arrangements’, ‘hybrid intergovernmental-private administration’, and ‘private bodies’.<sup>26</sup> To address the

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<sup>21</sup> See Kingsbury and others (n 9) 19–20. See also Esty (n 2) 1493–95.

<sup>22</sup> See Kingsbury and others (n 9) 18–19.

<sup>23</sup> See *ibid* 18–20.

<sup>24</sup> See *ibid* 20–23. See also Nico Krisch and Benedict Kingsbury, ‘Introduction: Global Governance and Global Administrative Law in the International Legal Order’ (2006) 17 *EJIL* 1, 2–3.

<sup>25</sup> 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 and others (n 9) 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 *ibid* 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’. *Ibid*.

<sup>26</sup> 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’. *Ibid* 21. An example of this type of global ad-

issues arising from global governance, traditional administrative law tools such as procedural fairness, the transparency requirement, and accountability control are deployed in the global setting, giving rise to ‘global administrative law’.<sup>27</sup>

As Kingsbury, Krisch, and Stewart note, informality and pluralism, among other things, distinguish global administrative law from traditional administrative law, both domestic and international.<sup>28</sup> 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 theorising global administrative law is required.

New types of administration require corresponding new visions of administrative law. 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 seems to be necessary.<sup>29</sup> Notably, this emerging administrative law that corresponds to global administration does not replace but instead coexists with traditional administrative law, including international administrative law and domestic administrative law. Nevertheless, these new types of administration, together with conventional international administration, are reconceptualised as being subsumed under the rubric of global governance, calling for global administrative law in the place of traditional international administrative law.

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ministration 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. Ibid. ‘Hybrid intergovernmental-private administration’ refers to bodies, which combine private and governmental actors, in charge of various transboundary regulatory matters. Ibid 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. Ibid. As regards ‘private bodies’ in global administration, Kingsbury, Krisch, and Stewart discuss the private International Standardization Organization (ISO) among other examples. Ibid 22–23. The over 13,000 standards that the ISO has adopted to harmonise 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. Ibid.

<sup>27</sup> See *ibid* 37–41; Esty (2) 1524–37.

<sup>28</sup> See Kingsbury and others (n 9) 53–54.

<sup>29</sup> See *ibid*; Esty (n 2) 1537–42. See also Cassese (n 18) 976–77.

Tracing the origin of global governance back to the mid-nineteenth century, Kingsbury, Krisch, and Stewart regard the pre-1945 paradigm of international administrative law as its predecessor.<sup>30</sup> Still, international administrative law differs from the emerging global administrative law in an important way. International administration, which was at the centre of traditional international administrative law, did not go beyond the Westphalian system of nation-states. International administrative law was secondary to domestic administrative law. On the one hand, international administrative law focused on areas such as postal services, navigation, and telecommunication, which gave rise to ‘international unions’,<sup>31</sup> and indeed derived from the international union-creating treaties that were concluded under the Westphalian system.<sup>32</sup> On the other hand, international administrative law only extended indirectly to domestic administrators with minor effects.<sup>33</sup> 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.<sup>34</sup> To address the regulatory issues left out by unratified secondary rules, domestic administrators were included in the notion of international administration. By way of the cooperation of domestic administrators with international institutions, the regulatory objectives of international unions could be fulfilled.<sup>35</sup> In terms of the development of international administrative law, domestic administrators played the central role in the success of international administration.

In contrast, the position of domestic administrators in global governance is not distinctive from that of other regulatory players. Rather, these administrators share the centre stage as main players with other actors from the private realm and international civil service. Domestic administrators, both in international administration that involves intergovernmental organisations 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.<sup>36</sup> This new ‘global ad-

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<sup>30</sup> See Kingsbury and others (n 9) 19–20 & n11. See also Weiler (n 4) 553.

<sup>31</sup> See Kingsbury and others (n 9) 19.

<sup>32</sup> See Weiler (n 4) 555.

<sup>33</sup> See Kingsbury and others (n 9) 19.

<sup>34</sup> See *ibid.*

<sup>35</sup> See *ibid.*

<sup>36</sup> See *ibid.* 20–27.

ministrative space' transcends nation-states, suggesting the post-Westphalian and post-Hobbesian characteristics of global administrative law.<sup>37</sup>

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.<sup>38</sup> Nation-states in the traditional form, which occupy the centre of the Westphalian world system, no longer hold a monopoly on transboundary regulatory issues. Instead, nation-states are disaggregating.<sup>39</sup> Moreover, the relationship among the players in the global administrative space is post-Hobbesian in that national self-interest plays a minor role in global administration. The problem-solving attitude of pragmatism takes the place of realism in addressing transboundary regulatory issues.<sup>40</sup> 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 was previously centred on the nation-state, has been reconceptualised. While traditional nation-state-centred administrative space covers the area of the politico-juridical authority of the nation-state, this new administrative space is conceptualised 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.<sup>41</sup> 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

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<sup>37</sup> See generally Mathias Albert and Tanja Kopp-Malek, 'The Pragmatism of Global and European Governance: Emerging Forms of the Political "Beyond Westphalia"' (2002) 31 *Millennium – Journal of International Studies* 453.

<sup>38</sup> See Cassese (n 18) 973–77. See also Cassese (n 6) 663–670.

<sup>39</sup> See generally Slaughter (n 2); Anne-Marie Slaughter, 'Global Government Networks, Global Information Agencies, and Disaggregated Democracy' (2003) 24 *Mich J Int'l L* 1041.

<sup>40</sup> See Kingsbury and others (n 9) 54–57.

<sup>41</sup> See generally Jack M Beermann, 'The Reach of Administrative Law in the United States' in Michael Taggart (ed), *The Province of Administrative Law* (Hart 1997).

nation-states consent to delegate to international institutions or other treaty-based regulatory mechanisms.<sup>42</sup>

In contrast, in global administrative law, the targeted administrative space is determined by how and where global regulatory issues will be best tackled.<sup>43</sup> The scope of global administrative space is not embedded in the source of legitimate power but is functionally determined instead. Nation-states function in regard to global administration as subnational administrative districts do 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 law tools from national experiences, with an eye to making the decisions of global administrative players more acceptable to those under regulation.<sup>44</sup> 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.<sup>45</sup> Even though there may be common procedural mechanisms and substantive values in terms of comparative administrative law, they materialised with reference to individual constitutional norms and legal traditions.<sup>46</sup>

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

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<sup>42</sup> This is reflected in what Joseph Weiler calls the transactional model of international governance. See Weiler (n 4) 553-56.

<sup>43</sup> See Andreas Fisher-Lescano and Gunther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Mich J Int'l L* 999, 1021. Cf Martin Loughlin, *The Idea of Public Law* (OUP 2003) 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').

<sup>44</sup> See Esty (n 2) 1524-37.

<sup>45</sup> 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 Stephen G Breyer and others, *Administrative Law and Regulatory Policy: Problems, Text, and Cases* (6th edn, Aspen 2006) 13-37.

<sup>46</sup> See generally Susan Rose-Ackerman and Peter L Lindseth (eds), *Comparative Administrative Law* (Edward Elgar 2010). See also Beermann (n 41).



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.<sup>47</sup> Global administrative law, as a discipline and as a practice, by combining its function-driven nature and the configuration of global administrative space transcending existing politico-juridical spaces defined by national constitutions, is part of the bootstrapping of global governance.<sup>48</sup> Global administrative law helps a function-driven, pragmatic global administration to fulfil 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.

### **From Functional Administration to Constitutionalisation: The Constitutional Spillover of Global Administrative Law**

As pointed out in the preceding section, global administrative law is tied to global governance. 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 to better tackle global issues with legality and consistency, look like an ‘internal administrative law’ or ‘internal law of administration’ within the global administrative space.<sup>49</sup> Yet, these administrative practices not only makes global governance possible but also underpins the normative contents of global administrative law.

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<sup>47</sup> See Esty (n 2) 1529–30; Kingsbury and others (n 9) 37–41.

<sup>48</sup> 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 theorising a global administrative space and a corresponding global administrative law from the existing norm-laden politico-juridical space centring on nation-states. See Jon Elster, ‘Constitutional Bootstrapping in Philadelphia and Paris’, in Michel Rosenfeld (ed), *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (Duke University Press 1994) 57.

<sup>49</sup> See also Karl-Heinz Ladeur, ‘The Emergence of Global Administrative Law and the Evolution of General Administrative Law’ [2010] *ExpressO* <[http://works.bepress.com/karlheinz\\_ladeur/1](http://works.bepress.com/karlheinz_ladeur/1)> accessed 15 March 2011. 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’ (2007) 116 *Yale LJ* 1636, 1686, 1737–40.

At the core of the phenomenon of global lawmaking in relation to global governance is what Jean Cohen calls ‘the juridification of the new world order’.<sup>50</sup> In traditional international law, state consent is the legal basis for the authority of international legal regimes<sup>51</sup> and national constitutions provide the framework within which controversies regarding state consent are resolved.<sup>52</sup> In contrast to this Westphalian world composed of national jurisdictions, the world order envisaged 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.<sup>53</sup>

Specifically, 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-centred concept of domestic juridification,<sup>54</sup> 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 institutionalised through myriad self-regulatory networks, developing into a networked global legal regime. Moreover, the global legal regime generalises and stabilises normative expectations in each sector of subject matter and thus enhances global governance.<sup>55</sup> Taken together, the

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<sup>50</sup> Jean L Cohen, ‘Whose Sovereignty? Empire Versus International Law’ (2004) 18 *Ethics and International Affairs* 1, 2.

<sup>51</sup> See Martti Koskenniemi, ‘Introduction’ in Martti Koskenniemi (ed), *Sources of International Law* (Ashgate 2000).

<sup>52</sup> See Ian Brownlie, *Principles of Public International Law* 287 (6th ed, OUP 2003).

<sup>53</sup> See Kuo (n 12) 997-98.

<sup>54</sup> See also Lars Trägårdh and Michael X Delli Carpini, ‘The Juridification of Politics in the United States and Europe: Historical Roots, Contemporary Debates and Future Prospects’ in Lars Trägårdh (ed), *After National Democracy: Rights, Law and Power in America and the New Europe* (Hart 2004) 41.

<sup>55</sup> Compare Bernhard Zangl, ‘Is There an Emerging International Rule of Law?’ in Stephan Leibfreid and Michael Zürn (eds), *Transformations of the State?* (CUP 2005) 73 (noting the wide acceptance of dispute settlement procedures in four issue areas in international law—international trade, security, labour, and environmental law—as indicative of an emerging (quasi)international rule of law complementing modern states’ domestic rule of law), with Daniele Archibugi and Iris Marion Young, ‘Envisioning a Global Rule of Law’ in James P. Sterba (ed), *Terrorism and International Justice* (OUP 2003) 158 (arguing that an international criminal justice centred 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 Gunther Teubner, ‘Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory?’ in Christian Joerges and others (eds), *Transnational Governance and Constitutionalism* (Hart 2004) 3, 21–23 (*lex elec-*

networked norm-making regime amounts to the function of norms autonomously materialising in the processes of globalising governance.

Moreover, this new model of norm-making is regarded as constituting the ‘ultimate rule of recognition’ on a global scale,<sup>56</sup> according to which the distinction between law and *non-law* is made. On this view, the question of what is law and *non-law* in the traditional municipal legal system can no longer be decided solely by reference to national constitutions.<sup>57</sup> Rather, it has to be determined in light of the global rule of recognition in that municipal legal systems are reconceptualised as components of the globalised legal system, suggesting the emergence of a ‘constitutional’ order for the world.<sup>58</sup> In this way, global administrative law not only plays the pivotal role in the juridification of global governance but also paves the way for a constitutionalised global legal order.

Taken as a whole, a practice that is driven by a problem-solving mentality to make global administration functional in the eyes of global administrative law takes on constitutional character as it functions as the ‘ultimate rule of recognition’ on a global scale. Layered with normative implications, however, global administrative law further lays

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*tronica* and *lex mercatoria*); Andreas Fischer-Lescano, ‘Themis Sapiens: Comments on Inger-Johanne Sand’ in Christian Joerges and others (n 55) 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 Christian Joerges and others (n 55) 147, 155 (*lex mercatoria* and *lex digitalis*); Alec Stone Sweet, ‘The New *Lex Mercatoria* and Transnational Governance’ (2006) 13 *Journal of European Public Policy* 627.

<sup>56</sup> As Joseph Raz emphasises, the rule of recognition in HLA 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 Larry Alexander (ed), *Constitutionalism: Philosophical Foundations* (CUP 1998) 152, 160–62. Nevertheless, the sociological view of global constitutionalisation 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 Neil Walker (ed), *Sovereignty in Transition* (Hart 2003) 33, 42 (identifying Rousseau’s notion of ‘general will’ and popular sovereignty as ‘the ultimate rule of recognition’ in the normative system of democracies).

<sup>57</sup> See Cohen (n 50) 7. See also Teubner (n 55) 8.

<sup>58</sup> See Constance Jean Schwindt, ‘Interpreting the United Nations Charter: From Treaty to World Constitution’ (2000) 6 *UC Davis J Int’l L & Pol’y* 193; Ronald St. John MacDonald & Douglas M. Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Brill 2005). See also Seyla Benhabib, *Another Cosmopolitanism* (Robert Post ed, OUP 2006) 29, 71–72. Cf Christian Walter, ‘Constitutionalizing (Inter)national Governance—Possibilities for and Limits to the Development of an International Constitutional Law’ (2001) 44 *German Yearbook of International Law* 170 (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 (n 50) 7.

the foundations for global constitutionalism.<sup>59</sup> As pointed out above, global administrative law echoes its domestic counterpart, comprising the normative values of due process, transparency, and accountability at the core of constitutionalism. Some of the main proponents of global administrative law have 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’.<sup>60</sup> Nevertheless, global administrative law has been equated with ‘all the rules and procedures that help ensure the accountability of global administration’.<sup>61</sup> Corresponding to the growing trend towards the self-constitutionalisation of the emerging legal regimes beyond the nation-state,<sup>62</sup> the normative values underpinning global administrative law are recast in constitutional terms.

It is noteworthy that our experiences with constitutionalism are formed in the legacies of state constitutionalism, which further frame our imagination with respect to the new global constitutional ordering.<sup>63</sup> Accordingly, the trend to extend constitutional ordering beyond the state needs to be analysed in the light of our inherited constitutional experiences. Among the legacies of state constitutionalism, citizens’ inclination to turn to the guardian of the constitution, mostly the (constitutional) courts, to hold the government to account for implementing constitutionalism in its fullness is the underlying cause of the contemporary expansion of constitutionalism, driving the constitutionalisation of politics.<sup>64</sup> Moreover, the inclination to turn to the court to implement constitutionalism in its fullness by interpreting the constitution in the light of the idea of justice is rooted in a modernist state of mind, in which the centrality of constitution to the rule of law idea is conceived.<sup>65</sup> On this view, the state power ordained by the constitution is conceived of as part of ‘a project of theory, as well as of practice’.<sup>66</sup> The state, or, rather,

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<sup>59</sup> See Cassese (n 6) 687–89. See also Cassese (n 18) 985–86.

<sup>60</sup> See Krisch and Kingsbury (n 24) 10. See also Nico Krisch, ‘The Pluralism of Global Administrative Law’ (2006) 17 EJIL 247.

<sup>61</sup> See Kingsbury and others (n 9) 28. See also Neil Walker, ‘Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders’ (2008) 6 ICON 373, 381 (noting the expansive character of ‘the Global Administrative Law project’).

<sup>62</sup> See Petra Dobner and Martin Loughlin, ‘Introduction’ in Dobner and Loughlin (n 7) xi, xi.

<sup>63</sup> See Miguel Poiars Maduro, ‘From Constitutions to Constitutionalism: A Constitutional Approach for Global Governance’ in Douglas Lewis (ed), *Global Governance and the Quest for Justice, Volume I: International and Regional Organizations* (Hart 2006) 227, 238–41.

<sup>64</sup> See Mattias Kumm, ‘Who Is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law’ (2006) 7 German LJ 341.

<sup>65</sup> See Paul W Kahn, *Putting Liberalism in Its Place* (Princeton University Press 2004) 265–79.

<sup>66</sup> See *ibid.*

the polity, cannot be disassociated from the idea of justice but is rather considered the means to complete the pursuit of justice. Correspondingly, the constitution that underlies the state and its equivalent is to be read and interpreted through theories of justice.<sup>67</sup> As the multiplication of the functions of fundamental rights and the expansion of the catalogue of constitutional rights suggest, constitutionalism in its fullness is implemented by reading theories of justice into the constitution.<sup>68</sup> For this reason, constitutionalism tends to be tied to the idea of justice, standing as the ideal model of a sophisticated legal system. As global administrative law operates to perfect its normative values, it also takes on constitutional character.<sup>69</sup> To sum up, the development of global administrative law extends beyond the pragmatism of functional administration to global constitutionalism with the increase of its constitutional spillover effects.

### **Towards a Small-c Global Constitutionalism**

In the preceding section, I have aimed to explain how global administrative law is related to the discussion on global constitutionalism, despite the disavowal of some global administrative law scholars. It is true that talks of global constitutionalism tend to stir up the debate on the legitimacy of global governance itself. Moreover, in terms of the elusive global political community, focusing attention on the issue of legitimacy is liable to be dragged into the question whether political community is the precondition for constitution, hampering the effort to reform global governance on the basis of the rule of law.<sup>70</sup> Nevertheless, in light of our constitutional experiences with national constitutional ordering, a global constitutionalism without a global Capital-C Constitution seems to be taking shape without contradicting the project of grounding global governance on global administrative law.

It has long been argued that the state of a national constitutional order can only be grasped by taking account of both the Constitution and the practices, conventions, and other instruments that underpin the operation of the constitutional order.<sup>71</sup> While the principles and values stipulated in the Constitution lay the foundations of a national constitutional order, they fall short of fully addressing the variegated issues and chal-

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<sup>67</sup> See *ibid* 258, 268-72. See also Sujit Choudhry, 'Globalization in Search of Justification Toward a Theory of Comparative Constitutional Interpretation' (1999) 74 *Ind LJ* 819, 844; David Robertson, *The Judge as Political Theorist: Contemporary Constitutional Review* (Princeton University Press 2010).

<sup>68</sup> See Ming-Sung Kuo, 'Reconciling Constitutionalism with Power: Towards a Constitutional Nomos of Political Ordering' (2010) 23 *Ratio Juris* 390, 392-93. See also Robertson (n 67) 27-28.

<sup>69</sup> See Kumm (n 12) 302-03, 312.

<sup>70</sup> See Krisch (n 4) 59.

<sup>71</sup> See Lawrence Sager, 'The Domain of Constitutional Justice' in Larry Alexander (n 56) 235, 235-36.

lenges arising amid the routines of constitutional operation. Rather, the Constitution only provides the general reference framework within which constitutional issues are debated and addressed.<sup>72</sup> Most of the constitutional issues find solution in the constitutional decisions and interpretations by the judiciary or other constitutional dispute-settlement mechanisms. Thus, to account for the state of a national constitutional order not only needs to understand the Constitution itself but also has to take account of constitutional law developed in the processes of constitutional interpretation and construction.<sup>73</sup> Notably, judicial interpretations of the Constitution and the case law concerning the Constitution are not the constitutional components of constitutional law. Some legislation governing the operation of the political system, which is termed ‘super statute’ or ‘landmark statute’, is also a part of constitutional law.<sup>74</sup> Alongside the legislature and the judiciary, the executive power may also play a role in substantiating the constitutional order by its decisions through administrative rule-making and political decisions.<sup>75</sup> Taken together, the interpretations made by the judicial decisions, legislative statutes, and executive conventions concerning the Constitution jointly constitute a small-c constitutional law, which complements the capital-C Constitution in accounting for the state of the national constitutional order.<sup>76</sup>

It is noteworthy that in the domestic context the small-c constitution does not supplant but instead supplements the Capital-C Constitution. It is true that principles and doctrines of case law and super statutes as well as executive decisions flesh out the institutional and normative framework established in the Capital-C Constitution. Without the small-c constitution, the polity conceived in the Capital-C Constitution is skeletal. Nevertheless, principles and doctrines of the small-c constitution are understood and further interpreted in light of the Capital-C Constitution. They are not freestanding principles, however important they may be to the operation of the constitutional order. The Capital-C Constitution and the small-c constitutional law are tied in a dialectical rela-

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<sup>72</sup> See Bruce Ackerman, ‘2006 Oliver Wendell Holmes Lectures: The Living Constitution’ (2007) 120 Harv L Rev 1737, 1756.

<sup>73</sup> For the distinction between interpretation and construction in understanding the constitution, see Keith E Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (University Press of Kansas 1999) 5-14.

<sup>74</sup> See Ackerman (n 72) 1742 (‘landmark statute’); William N. Eskridge, Jr and John Ferejohn, ‘Super-Statutes’ (2001) 50 Duke LJ 1215 (2001) (‘super statute’). See also Bruce Ackerman and Jennifer Nou, ‘Canonizing the Civil Rights Revolution: The People and the Poll Tax’ (2009) 103 Nw U L Rev 63.

<sup>75</sup> See Eskridge and Ferejohn (n 15) 395-99. See also Elizabeth Fisher, *Risk: Regulation and Administrative Constitutionalism* (paperback edn, Hart 2010).

<sup>76</sup> See Eskridge and Ferejohn (n 15) 9-19.

tionship, illuminating each other and jointly underpinning the national constitutional order.<sup>77</sup>

As indicated above, global administrative law functionally provides the fundamental normative principles underpinning the operation of global governance. Specifically, the fundamental principles at the core of global administrative law are aimed to bolster the values of due process, transparency, and accountability, which are central to the relationship between modern administration and citizens in a constitutional order.<sup>78</sup> Administrative law is to constitutional government what global administrative law is to constitutionalised global governance.<sup>79</sup> Thus, as global administrative law takes on constitutional character with its underlying normative principles gaining currency, it stands as the small-c constitution of global governance. Notably, global administrative law functions as a small-c global constitutionalism but is not tied to a global Capital-C Constitution, generating more questions than answers. I proceed to discuss the issues resulting from global administrative law as a small-c global constitutionalism in the next section.

## **AN ANATOMY OF SMALL-C GLOBAL CONSTITUTIONALISM: THE STATE AND CHALLENGES OF GLOBAL ADMINISTRATIVE LAW**

I have argued that global administrative law originates in response to the calls for conceiving global governance in the rule of law but develops further into a small-c global constitutionalism as its underlying normative principles gain currency amid the global trends toward constitutionalisation. In this Part, I aim to examine the characteristics of global administrative law as a small-c global constitutionalism without the global Capital-C Constitution. I first discuss why this view of global constitutionalism suggests the separation of rationality and legitimacy concerning global governance. I then proceed to explore the way that global administrative law as a small-c global constitutionalism expresses a technocratic constitutionalism, pointing to the fundamental challenge of legitimacy facing global administrative law and global governance. I conclude this Part with discussing how the idea of publicness is invoked as the redress to the challenges

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<sup>77</sup> See Harris (n 15) 104-13.

<sup>78</sup> See Martin M Shapiro, *Courts: A Comparative and Political Analysis* (paperback edn, University of Chicago Press 1986) 27.

<sup>79</sup> Fritz Werner, a former President of Germany's Supreme Administrative Court, once famously referred to administrative law as 'concretised constitutional law', expressing the close relationship between constitutional law and administrative law in German legal history. See Jürgen Schwarze, *European Administrative Law* 85-86 (rev edn, Sweet & Maxwell 2006) 1462 (quoting and translating Fritz Werner, 'Verwaltungsrecht als konkretisiertes Verfassungsrecht' [1959] DVBI 527). See also Georg Nolte, 'General Principles of German and European Administrative Law – A Comparison in Historical Perspective' (1994) 57 MLR 191, 198-205 (1994).

facing global administrative law and global governance, suggesting a new concept of law based on a post-public concept of legitimacy.

### **Rationalisation and Legitimation Untied**

Regardless of taking on constitutional character, global administrative law cannot avoid the issue of legitimacy.<sup>80</sup> Rather, the concept of legitimacy is understood differently in global administrative law. 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. Thus, under the small-c global constitutionalism underpinned by global administrative law, 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.<sup>81</sup>

Seen in this light, 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 centres.<sup>82</sup> Legitimacy does not take the centre stage in the discussion on global governance anymore but is instead addressed in a more nuanced way. What characterises global administrative law as small-c global constitutionalism is that policy choices result from multiple dialogues among administrative actors in the five types of global administration in response to the needs of the emerging global society.<sup>83</sup> 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

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<sup>80</sup> See Kingsbury (n 9).

<sup>81</sup> See Peter L Lindseth, “‘Weak’ Constitutionalism? Reflections on Comitology and Transnational Governance in the European Union” (2001) 21 OJLS 145, 148–51. See also Joshua Cohen and Charles F Sabel, ‘Global Democracy?’ (2005) 37 NYUJ Int’l L & Pol 763, 764–65, 778–82.

<sup>82</sup> Cohen and Sabel (n 81) 772–84.

<sup>83</sup> Joshua Cohen and Charles Sabel term this practice ‘deliberative polyarchy’. See *ibid* 779–84.



police[ies]’ in transnational regulation,<sup>84</sup> the entire network can be seen as consisting of ‘epistemic communities’, including officials and civilians with ‘rival expertise’.<sup>85</sup>

On the other hand, through the lens of global administrative law as small-c global constitutionalism, 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,<sup>86</sup> 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.<sup>87</sup> On this view, the ideal of deliberative democracy seems to find its institutional embodiment in global governance.<sup>88</sup> 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.<sup>89</sup>

As described above, the small-c global constitutionalism underpinned by global administrative law appears to address both 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.<sup>90</sup> It is also true that these multiple models of legitimacy are not mutually exclusive, but instead jointly enhance the legitimacy of admini-

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<sup>84</sup> See Lindseth (n 81) 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”’).

<sup>85</sup> For the issues concerning the rule by ‘epistemic communities’, see Martin Shapiro, ‘Administrative Law Unbounded: Reflections on Government and Governance’ (2001) 8 *Ind J Global Legal Stud* 369, 373–74. But see Karl-Heinz Ladeur, ‘Towards a Legal Theory of Supranationality – The Viability of the Network Concept’ (1997) 3 *ELJ* 33, 50–51 (welcoming the increasing institutionalisation of ‘epistemic community’ through the ‘comitology’ process in the EU). For the issue of ‘rival expertise’ resulting from the expert-centred model of administration, see Martin Shapiro, “‘Deliberative,’ ‘Independent’ Technocracy v. Democratic Politics: Will the Globe Echo the E.U.?’ (2005) 68 *LCP* 341, 343–49.

<sup>86</sup> See Shapiro (2005) (n 85) 343. Cf JHH Weiler, ‘The Constitution of Europe: “Do the New Clothes Have an Emperor?” and Other Essays on European Integration’ (CUP 1999) 349 (identifying ‘a general sense of political alienation’ with the EU comitology).

<sup>87</sup> See Christian Joerges, “‘Good Governance’ Through Comitology?” in Christian Joerges and Ellen Vos (eds), *E.U. Committees: Social Regulation, Law and Politics* (Hart 1999) 311, 312–16.

<sup>88</sup> See Lindseth (n 81) 150–51. See also Shapiro (2005) (n 85) 350–51. Cf Cohen and Sabel (n 81) 779–84 (‘deliberative polyarchy’). For criticism, see Weiler (n 86) 283–85.

<sup>89</sup> See Cohen and Sabel (n 81) 773–84.

<sup>90</sup> See Esty (n 2) 1518–20, 1521–23.

stration. Multiple models of legitimation notwithstanding, it is democratic legitimacy under the principal-agent paradigm that lies at the centre 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 centre on the concept of democratic accountability based on the principal-agent model.<sup>91</sup>

This principal-agent relationship-centred 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 the U.S. administrative law, the Supreme Court has never formally abandoned the nondelegation doctrine.<sup>92</sup> 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.<sup>93</sup> Another example of the centrality of the principal-agent model to administrative law is the *Chevron* doctrine.<sup>94</sup> Considered one of the most influential decisions in modern U.S. administrative law,<sup>95</sup> the Supreme 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.<sup>96</sup> While this judicial deference is based on the expertise of administrative agencies and their accountability to the people by way of the President, the Supreme 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 lim-

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<sup>91</sup> See Cohen and Sabel (n 81) 773–79.

<sup>92</sup> See generally Larry Alexander and Saikrishna Prakash, ‘Reports of the Nondelegation Doctrine’s Death Are Greatly Exaggerated’ (2003) 70 U Chi L Rev 1297. See also Richard B Stewart, ‘The Reformation of American Administrative Law’ (1975) 88 Harv L Rev 1669.

<sup>93</sup> See Alexander and Prakash (n 92). For a theoretical discussion on the grip of the principal-agent model in the conception of accountability and legitimacy, see Cohen and Sabel (n 81) 774–76.

<sup>94</sup> *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 US 837 (1984).

<sup>95</sup> See eg Cass R Sunstein, ‘*Chevron* Step Zero’ (2000) 92 Va L Rev. 187, 188 (noting the *Chevron* decision as a ‘foundational, even a quasi-constitutional text’); Thomas J Miles and Cass R Sunstein, ‘Do Judges Make Regulatory Policy? An Empirical Investigation of *Chevron*’ (2006) 73 U Chi L Rev 823, 823–24 (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’).

<sup>96</sup> *Chevron*, 467 US 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.

its of that delegation'.<sup>97</sup> 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, however, a twofold presumption stands behind the assumption of self-legitimizing the small-c global constitutionalism 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-centred global administration to self-legitimize 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 insofar as the 'heavily-committed true believers' sitting on the myriad epistemic committees involved in global administration can be considered trustees of the general citizenry.<sup>98</sup> 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 characterised by a heavily-committed true belief in the rational and reasonable solution of public issues regardless of who makes the decision.<sup>99</sup>

Taken together, global administrative law does not address the rationality and legitimacy of global governance as equally as it claims. As discussed above, the legitimacy of the small-c global constitutionalism, which global administrative law aims to satisfy by enhancing the accountability of global administration, is premised on the aforementioned twofold presumption. However, a conception of legitimacy based on presumption comes close to an attempt to 'rationalise' the status quo of global governance,

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<sup>97</sup> Ibid 865. See also David J Barron and Elena Kagan, '*Chevron's* Nondelegation Doctrine' [2001] S Ct Rev 201. For how the Supreme Court subsequently reinterpreted *Chevron* and limited its scope of application by an implicit invocation of the nondelegation doctrine, see Sunstein (n 95) 244–47.

<sup>98</sup> See Shapiro (2001) (n 85) 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 and Sabel (n 81) 776–77.

<sup>99</sup> See von Bogdandy (n 5) 238 ('practical reason'); Cassese (n 6) 691 (suggesting scientific rationality). See also Gráinne de Búrca and Oliver Gerstenberg, 'The Denationalization of Constitutional Law' (2006) 47 Harv Int'l LJ 243, 247, 254 ('reason of the thing').

which is oriented toward rational and reasonable policy choices.<sup>100</sup> In sum, the incorporation of the values that derive from national constitutional experiences and constitute an integral part of global administrative law into a multilevel global constitutional order, albeit with the epithet of small-c, only results in untying the rationalisation of global governance from the issue of its legitimation. As a result, the issue of legitimacy keeps haunting global administrative law.

## **Technocratic Constitutionalism without the People**

In traditional legal thinking centring on a domestic legal system, 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 constitution itself refers to the conceptual rubric of the constituent power, despite its multiple formations.<sup>101</sup> That constitution stands as ‘the ultimate rule of recognition’ for domestic and international law rests on its origin in the people’s lawgiving, constituent power.<sup>102</sup>

In contrast, the emerging small-c global constitutionalism underpinned by global administrative law suggests a new configuration of the legal order. The binding effect of the emerging juridified, transnational, global regime does not rest on state consent. Rather, its legitimacy arises out of a dynamic process in which players in various fields

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<sup>100</sup> See Shapiro (2005) (n 85) 346-51; Susan Marks, ‘Naming Global Administrative Law’ (2005) 37 NYUJ Int’l L & Pol 995, 997-98. See also BS Chimni, ‘Co-Option and Resistance: Two Faces of Global Administrative Law’ (2005) 37 NYUJ Int’l L & Pol 799. Global administrative law may arguably function as a mechanism of contestation rather than cooption, opening a new front for fighting for justice, see Kingsbury and others (n 9) 52–57; Krisch (n 60) 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.

<sup>101</sup> See Frank I Michelman, ‘Constitutional Legitimation for Political Acts’ (2003) 66 MLR 1, 9. See also Ming-Sung Kuo, ‘Cutting the Gordian Knot of Legitimacy Theory? An Anatomy of Frank Michelman’s Presentist Critique of Constitutional Authorship’ (2009) 7 ICON 683, 687. For different interpretations of constituent power, see Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (OUP 2007).

<sup>102</sup> See Ulrich K Preuss, ‘The Exercise of Constituent Power in Central and Eastern Europe’ in Loughlin and Walker (n 101) 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. 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 ultimate rule of recognition, see above n 56.

resolve a myriad of issues among themselves in response to functional demands and the norm of efficiency.<sup>103</sup> These commonly accepted solutions can take various forms, including precedents, decisions, and standardised regulations.<sup>104</sup> What is important is that these effective solutions-turned-norms are added with constitutional significance,<sup>105</sup> supplanting national constitutions as the ‘ultimate rule of recognition’ in deciding what is law and non-law.<sup>106</sup> Unlike the relationship between constitution and ordinary legal acts, the process by which global administrative law evolves as a small-c global constitutionalism with the increasing juridification of global governance is regarded as the origin of global constitutionalisation, blurring the distinction between constitution-making and ordinary lawmaking.<sup>107</sup>

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<sup>103</sup> See Cohen (n 50) 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 Karl-Heinz Ladeur (ed), *Public Governance in the Age of Globalization* (Ashgate 2003) 89, 104.

<sup>104</sup> Cf Fisher-Lescano and Teubner (n 43) 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 constitutionalisation of the private standard-setting process, see Harm Schepel, ‘Constituting Private Governance Regimes: Standards Bodies in American Law’ in Joerges (n 55) 161, 164–67; Errol Meidinger, ‘Law and Constitutionalism in the Mirror of Non-Governmental Standards: Comments on Harm Schepel’ in Joerges (n 55) 188, 196–97.

<sup>105</sup> See Cohen (n 50) 8. See also Fischer-Lescano and Teubner (n 43) 1014–17; Teubner (n 55) 7–9. Cf Karl-Heinz Ladeur, ‘Post-Modern Constitutional Theory: A Prospect for the Self-Organizing Society’ (1997) 60 *MLR* 617, 625–26 (suggesting that a post-modern constitution be based on the ‘pre-constituted’ condition of today’s ‘experimenting society’). But cf Walter (n 58) 191–96 (arguing that constitutionalisation of international law is limited to the ‘various sectoral regimes, but fails to reach the international community as a whole’).

<sup>106</sup> See above n 56.

<sup>107</sup> 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 emphasised, 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, ‘[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*

From this view, the small-c global constitutionalism underpinned by global administrative law 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 globalisation.<sup>108</sup> The global legal regime's self-legitimation does not take place at the exceptional time of a 'constitutional moment'.<sup>109</sup> Rather, as the development of global administrative law into small-c global constitutionalism suggests, global constitutionalisation is embedded in the routine operation of the institutions involved in global juridification.<sup>110</sup> 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 nascent constitutionalisation of the global legal regime.<sup>111</sup> 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 'deformalised' into the pragmatic calculation of concrete solutions to particular issues.<sup>112</sup>

Notably, a global version of constitutionalism may take multiple forms. Not all forms of global constitutionalism can be pinned on the autonomous norm-making processes of administrative law. Rather, substantive values that have been associated with the experiences of constitutional democracies are the core of global constitutionalism.<sup>113</sup> Even so, global constitutionalism is not merely a sort of cosmopolitan morality. Rather, it en-

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*Law and Politics* (Hart 2000) 139 and n 67 (citing JGA Pocock, *The Ancient Constitution and the Feudal Law* (rev edn, CUP 1987)).

<sup>108</sup> See Ladeur (103) 92–97. See also Ladeur (n 85) 43–49.

<sup>109</sup> See generally Bruce Ackerman, *We the People: Foundations* (Belknap 1991). See also Dieter Grimm, 'Integration by Constitution' (2005) 3 *ICON* 193, 200–01; Joseph HH Weiler, 'On the Power of the Word: Europe's Constitutional Iconography' in Deirdre Curtin and others (eds), *The EU Constitution: The Best Way Forward?* (Asser 2006) 3, 13.

<sup>110</sup> See Ming-Sung Kuo, 'The End of Constitutionalism As We Know It? Boundaries and the State of Global Constitutional (Dis)Ordering' (2010) 1 *Transnational Legal Theory* 329, 358–64.

<sup>111</sup> See Ladeur (n 103) 93–99. See also Teubner (n 55) 15–27.

<sup>112</sup> See Cohen (n 50) 18–19; Martti Koskeniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization' (2007) 8 *Theoretical Inquiries in Law* 9, 20–21. See also Teubner (n 55) 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' (1997) 10 *CJLJ* 5.

<sup>113</sup> See eg Alec Stone Sweet and Jud Matthews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Colum J Transnat'l L* 73.

visages a political order, which results from the juridification of global governance.<sup>114</sup> On this view, the world not only becomes interdependent and globalised but is also effectively ordered in accordance with a set of shared norms. In the face of an elusive, although not inexistent, global demos, and because of the lack of a world constituent assembly, alternative sources of legitimacy are needed to make the case that cosmopolitan values are not merely moral aspirations but have already exerted an influence on our behaviour.<sup>115</sup> 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 constitutionalised.<sup>116</sup> They are the model world citizens who realise how making policies in the light of traditional rule-of-law values will contribute to the development of global governance. The way that administrative actors in particular regulatory fields resolve the issues they face effectively and acceptably is viewed as legitimising the small-c global constitutionalism underpinned by global administrative law, while ‘sectoralism’ seems to dominate the discourse on the juridification of and the corresponding constitutionalisation of global governance.<sup>117</sup>

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<sup>114</sup> See Ulrich K Preuss, ‘Equality of States—Its Meaning in a Constitutionalized Global Order’ (2008) 9 *Chicago J Int’l L* 17, 41-49. For the relationship between the juridification/legalisation of international relations and the rise of global constitutionalism, see Dieter Grimm, ‘The Constitution in the Process of Denationalization’ (2005) 12 *Constellations* 447, 458-59; Dieter Grimm, ‘The Achievement of Constitutionalism and Its Prospects in a Changed World’ in Dobner and Loughlin (n 7) 3, 19; Martin Loughlin, ‘What is Constitutionalisation?’ in Dobner and Loughlin (n 7) 47, 61.

<sup>115</sup> 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 (n 5) 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’ (1999) 281 *Recueil des Cours* 10). 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’. *Ibid* 237. See also Cohen and Sabel (n 81) 796–97.

<sup>116</sup> Cf Gunther Teubner, ‘Global Private Regimes: Neo-Spontaneous Law and Dual Constitution of Autonomous Sectors?’ in Ladeur (103) 71, 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’).

<sup>117</sup> Compare Harold J Berman, ‘The Western Legal Tradition in a Millennial Perspective: Past and Future’ (2000) 60 *Loyola Law Review* 739, 763 (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* (CUP 2007) 231–86 (theorizing how

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 organisation of power, not only looms in the creation of values but also in their articulation and implementation.<sup>118</sup> 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 centring on electoral representation.<sup>119</sup> In contrast, the small-c global constitutionalism underpinned by global administrative law rests on 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 constitutionalisation, on which the legitimacy of global constitutionalism rests, appears to be heralding a new era for legal thinking by conflating the constituent-constituted distinction,<sup>120</sup> 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 constitutionalisation. The technocratic nature of global admin-

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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 (n 6) 679–80; Teubner (n 116) 68.

<sup>118</sup> Compare Cassese (n 6) 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 (2001) (n 85) 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 (n 24) 10; Krisch (n 60) 274–77.

<sup>119</sup> See generally Andrew Arato, *Civil Society, Constitution, and Legitimacy* (Rowman & Littlefield 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 eg, Miguel Poiares Maduro, *We the Court: The European Court of Justice and the European Economic Constitution – A Critical Reading of Article 30 of the EC Treaty* (Hart 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 and others, ‘Rationales for Precedent’ in D. Neil MacCormick and Robert S. Summers (eds), *Interpreting Precedents: A Comparative Study* (Dartmouth 1997) 481. See also Ackerman (109) 86–94 (arguing for a ‘preservationist’ judiciary in constitutional democracy).

<sup>120</sup> Cf Neil Walker, ‘Post-Constituent Constitutionalism? The Case of the European Union’ in Loughlin and Walker (n 101) 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).



istrative law as small-c global constitutionalism aggravates the issue of legitimacy in global governance.

### **In the Name of Publicness: An Emerging Post-Public Legitimacy?**

Taken as a whole, two features of global administrative law as small-c global constitutionalism deserve special mention. First, global administrative law is conceived of in the practice of global governance. It gains its normative content and importance in the operation of diffuse global or transnational regulatory regimes. Second, echoing the experience that the taming of political power culminates in the constitutionalisation of politics, scholarship on global administrative law undergoes its own process of constitutionalisation, recharacterising global administrative law in constitutional terms. It is in this way that global administrative law functions as the small-c constitution of global governance. Yet, these two features also manifest the double challenges facing global administrative law: legality and legitimacy. On the one hand, due to being embedded in the practice of global governance, how to distinguish law from non-law poses a challenge to global administrative law, calling the legality of global administrative law into question. On the other, as indicated in the first two sections of Part III, added with constitutional significance without the democratic ground of a global constituent power, global administrative law as small-c global constitutionalism gets tangled up with the challenge of legitimacy.<sup>121</sup>

Notably, the issues of legality and legitimacy are not new to international lawyers. For one thing, beyond the peremptory norms codified in treaties and decided by international tribunals, the question as to what constitutes *jus cogens* was never settled.<sup>122</sup> Whether state consent provides the sufficient condition for the legitimacy of international legal system remains a subject of contestation. Nevertheless, state consent provides the common ground for scholars of different persuasions to settle on what is necessary for the legitimacy of international law. Moreover, with the translation of the issue of legality concerning *jus cogens* into one of legal and constitutional interpretation, the implementation of *jus cogens* by nation-states is decided in light of national constitutions, which are considered the ultimate expression of the national will.<sup>123</sup> Accordingly, the final solution to the questions of legality and legitimacy facing traditional international law rests on state consent. However, as global administrative law is regarded as

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<sup>121</sup> See Kuo (n 14) 997.

<sup>122</sup> See Andreas Paulus, 'Jus Cogens in a Time of Hegemony and Fragmentation: An Attempt at Re-appraisal' (2005) 74 *Nordic Journal of International Law* 297, 333.

<sup>123</sup> See Erika de Wet, 'The Prohibition of Torture as an International Norm of *jus cogens* and Its Implications for National and Customary Law' (2004) 15 *EJIL* 97, 102 n 24.

echoing recent developments in international law in which the Hobbesian era of international relations is coming to an end, state consent is not the solution to, but instead the problem of, world order. Grounded by state consent, traditional international law fell prey to state sovereignty.<sup>124</sup> Against this backdrop, global administrative law is conceived as unhinged from state consent.<sup>125</sup> Thus, the double challenges of legality and legitimacy facing global administrative law as small-c global constitutionalism seem to be more intractable.

To address the issues of legality and legitimacy under the post-Westphalian paradigm of international law, the notion of publicness has been invoked as the solution to the double challenges facing global administrative law.<sup>126</sup> Inspired by HLA Hart's social fact conception of law, global administrative law is interpreted as based on the practice of global governance.<sup>127</sup> Moreover, Hart's social fact conception of law is read through Lon Fuller's notion of the 'inner morality of law' in order to answer the double challenges – legality and legitimacy – facing global administrative law. In this way, the rule of recognition at the heart of Hart's legal theory is extended to include the notion of publicness.<sup>128</sup> At the core of publicness are 'the claim made for law that it has been wrought by the whole society, by the public, and the connected claim that law addresses matters of concern to the society as such'.<sup>129</sup> Thus, a law that answers to publicness rests on a more solid normative ground than a pure Hartian conception of law,<sup>130</sup> which is ultimately determined by social facts independent of normative judgment.

To avoid the challenges facing content-based conceptions of law in the absence of agreement on moral values, the substantive notion of publicness is embedded in the practices of law.<sup>131</sup> Notably, the underlying idea of publicness of global administrative law is not situated in the normative judgment external to the fact of legal practices but instead in the operation of the legal system itself. Given that current transnational regulatory regimes are oriented towards values that are clustered around the notion of publicness, the practices in today's global regulatory regimes are construed as indicating the

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<sup>124</sup> See Preuss (n 114) 22-28.

<sup>125</sup> See Krisch and Kingsbury (n 24) 10.

<sup>126</sup> See Kingsbury (n 9); Benedict Kingsbury, 'International Law as Inter-Public Law' in Henry Richardson and Melissa Williams (eds.), *Moral Universalism and Pluralism* (NYU Press 2009) 167, 175-85; Benedict Kingsbury and Lorenzo Casini, 'Global Administrative Law Dimensions of International Organizations Law' (2009) 6 *International Organizations Law Review* 319.

<sup>127</sup> See Kingsbury (n 9) 29-31

<sup>128</sup> See *ibid* 30.

<sup>129</sup> See *ibid* 31.

<sup>130</sup> See *ibid* 31-32.

<sup>131</sup> See *ibid* 30-31.

‘fit’ between Hart’s social fact conception of law and the reality of global administrative law.<sup>132</sup> Publicness is understood as ‘what is intrinsic to public law as generally understood’.<sup>133</sup> On this view, publicness is rooted in, not imposed on, the various ‘publics’ that produce the nascent global administrative law through regulatory practices. Moreover, the attributes, constraints, and normative commitments associated with publicness are ‘immanent in public law’.<sup>134</sup> Adding the normative notion of publicness to the components of the Hartian rule of recognition concerning global administrative law, Hart’s positivism is reconstructed in light of Fuller’s concept of ‘inner morality of law’.<sup>135</sup>

In this way, publicness not only resolves the question of legality concerning global administrative law but also suggests an alternative notion of legitimacy. Through the lens of publicness, variegated practices of decentred transboundary regulatory regimes can be further divided into those that correspond to publicness and those that do not, resolving the issue of what is law in the debate over global administrative law. At the same time, the revisionist social fact conception of law as indicated above lays the normative ground for global administrative law without being dragged into the debate over moral disagreement. Publicness thus provides an alternative baseline concept of legitimacy, answering the legitimacy challenge that results from the separation of global administrative law from state consent.<sup>136</sup>

It remains yet to be further analysed whether in this way publicness fully addresses the challenges that legality and legitimacy pose to global administrative law. In contrast to the sovereign state as the traditional administrative space where national administrative law operates, global administrative space is decentred. Correspondingly, the revisionist social fact conception of global administrative law emerges from the practices in heterogeneous transboundary regulatory regimes. Moreover, although the values and norms clustered around the notion of publicness are widely accepted, how the notion of publicness should be carried out in practice turns on the functioning of regulatory regimes. The public of each regulatory regime is made up of regulators, regulatees, as well as third parties without direct interests.<sup>137</sup> To make the claim for a law that ‘it has been wrought by the whole society, by the public’ and ‘addresses matters of concern to the society as such’,<sup>138</sup> the carrying out of the notion of publicness cannot be dictated by

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<sup>132</sup> For the idea of ‘fit’ in legal interpretation, see Ronald Dworkin, *Law’s Empire* (Harvard University Press 1986) 255-56.

<sup>133</sup> See Kingsbury (n 9) 30.

<sup>134</sup> Ibid.

<sup>135</sup> See *ibid* 38-40.

<sup>136</sup> See *ibid* 39-40.

<sup>137</sup> See Kingsbury and Casini (n 126) 353-54.

<sup>138</sup> Kingsbury (n 9) 31.

regulators. Rather, it must result from the values that the members, or rather, interested parties, of a particular regulatory regime, ie, the regulatory public, hold in common. In other words, publicness is associated with the public to which a particular regulatory regime relates.<sup>139</sup> In the absence of a global public, however, the publics are decentred and indefinite, making global administrative law unintelligible. Thus, in the face of the overlaying publics in global administrative space, how to draw the jurisdictional boundaries between regulatory regimes so as to spell out the specifics of the concept of publicness in diverse regulatory practices poses another fundamental challenge to global administrative law.

One proposal to respond to the issue of boundary drawing regarding regulatory publics, the incubators of publicness, in global administrative law is to rest publics with the entities that exercise regulatory powers.<sup>140</sup> From this formalist perspective, the state and non-state entities that exercise public authorities and regulatory powers in global regulatory practices delimit the regulatory publics where global administrative law originates, resolving the difficulty of specifically identifying and delineating individual regulatory publics in this overlaid global administrative space. As a result, the issue of jurisdictional distinction concerning global administrative law is recast as one of legal technicality, which is resolved with the traditional conflicts of laws skills.<sup>141</sup>

On closer inspection, however, what underlies this conception of global administrative law is not the publics where the notion of publicness is substantiated but instead the entities that exercise regulatory powers.<sup>142</sup> As noted above, individual regulatory publics that jointly constitute global administrative space are oriented towards specific fields of subject. These single issue-oriented regulatory publics are closer to private clubs than to real public communities in which the idea of publicness is expected to thrive.<sup>143</sup>

Specifically, the public community in which the idea of publicness underlies the law is jurisgenerative.<sup>144</sup> What is characteristic of a jurisgenerative community is that legal nomos forms through social and historical narratives, which constitute the foundation of a public in which the law originates.<sup>145</sup> In contrast, the architecture of global administra-

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<sup>139</sup> See *ibid* 56.

<sup>140</sup> See *ibid*.

<sup>141</sup> See *ibid*.

<sup>142</sup> See *ibid*.

<sup>143</sup> See Thorsten Benner and others, 'Multisectoral Networks in Global Governance: Towards a Pluralistic System of Accountability' (2004) 39 *Government and Opposition* 191-210.

<sup>144</sup> See Robert Cover, 'The Supreme Court, 1982 Term-Foreword: Nomos and Narrative' (1983) 97 *Harv L Rev* 4, 25-40. See also Ming-Sung Kuo, 'Between Law and Language: When Constitutionalism Goes Plural in a Globalising World' (2010) 73 *MLR* 858, 879-80.

<sup>145</sup> See Cover (n 144).

tive law as portrayed above is constructed around the power-exercising public entities. Yet, considering the following reasons, the power-exercising public entities underpinning global administrative law are the opposite of a jurisgenerative public. First, the creation and organisation of power-exercising entities are subject only to a flimsy form of democratic control through treaty ratification. Second, while the operation of these public entities is seen as moving towards publicness, their regulatory decisions remain on the margins of public contestation. Outside the state arenas, only those with privileged sources of intelligence concerning global administrative law are able to play the role of informed and active citizens in its generation. As a result, leaving the jurisgenerative role of the publics unaddressed and centring the carrying out of publicness on the public entities, this conception of global administrative law is jurispathic.<sup>146</sup> The regulatory publics turn out to be the clubs of people with privileged access, contributing to the technocratic nature of global administrative law as small-c global constitutionalism.

Moreover, to avoid the fragmentation of the international legal system in the Westphalian era, global administrative law as the small-c constitutionalism of global governance is tasked with the management of the relationship between power-exercising entities in global administrative space. The notion of publicness is central to global administrative law in steering the inter-regulatory regime relationship, too. However, given the absence of generally applicable regulatory practices,<sup>147</sup> a global notion of publicness that would guide the steering of the inter-regulatory regime relationship in global governance is elusive. Thus, to manage the relationship between power-exercising entities in global administrative space, global administrative law as small-c global constitutionalism needs to assess the ‘weight’ that should be given to each power-exercising public entity, amounting to a practice of a ‘weighing’ of the norms emerging from different regulatory regimes in global administrative space.<sup>148</sup> However, the practice of weighing at the core of global administrative law as the small-c constitutionalism of global governance is political in nature but lies outside of democratic control. Accordingly, global administrative law is untied from jurisgenerative publics, making an end run around democracy. The notion of publicness is thus not expressive of a public conception of legitimacy but rather collapses into the codes of conduct observed by privileged interested parties in individual regulatory regimes.<sup>149</sup>

To sum up, to the extent that publicness is attributed to the diverse practices in regulatory regimes, the conception of global administrative law underlain thereby reflects a

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<sup>146</sup> See Kuo (n 14) 1002.

<sup>147</sup> See Kingsbury (n 9) 51-52.

<sup>148</sup> See *ibid* 27.

<sup>149</sup> See Kuo (n 14) 1003.

privatised, post-public view of legitimacy.<sup>150</sup> Moreover, in terms of its steering role in the inter-regime relationship in global governance, global administrative law as small-c global constitutionalism is centred on negotiations over the weight of these diverse practices concerning publicness.<sup>151</sup> It turns out that these negotiations depend on those informed but privileged global actors' views toward individual regulatory regimes, pointing to a post-public legitimacy.

## CONCLUSION

Global governance has become the topic gripping the attention from various disciplines. Legal scholarship plays a prominent role in the discussion on global governance in that the idea of rule of law is considered a necessary condition for well-functioning political ordering. Thus, aligning global governance with the rule of law has occupied centre stage in globalisation studies. Among the various efforts to ground global governance in a legal framework is the project of global administrative law. Applying domestic administrative law tools to the myriad transnational regulator regimes in the so-called global administrative space is regarded as an effective response to the needs of global governance, enhancing both the accountability and transparency of global administration. With the increase of transparency and accountability, the policy output of global administration is expected to improve correspondingly, giving legitimacy to global governance. This line of thought, however, indicates that global governance cannot avoid the question of legitimacy even if it seeks to build on global administrative law rather than politically charged global constitutionalism.

To look into how the issue of legitimacy figures in global governance, I have traced the trajectory of global administrative law. Corresponding to the globalisation of administrative space, global administrative law has been conceived to incorporate national and international administrative law. Embedded in the practice of global governance, global administrative law is part of the bootstrapping effort of global governance to reconstruct itself on a legal basis. In this way, global administrative law appears as the paradigm case of the international legal system in the post-Westphalian age. Moreover, echoing the trends toward constitutionalisation, global administrative law effectively functions as the small-c constitutional law of global governance.

As it takes on constitutional character, the challenges gripping global administrative law are rising to the surface. On the one hand, to depart from the Westphalian system of international law, global administrative law is conceived in the practices of global governance. Yet, the practice-embedded feature of global administrative law raises the

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<sup>150</sup> See *ibid* 1002-04.

<sup>151</sup> See *ibid* 1003.

question of legality. It is unclear how to distinguish between law and nonlaw in the practices of global administrative law. On the other hand, as the concept of legitimacy is recast to be liberated from state consent, the small-c global constitutionalism underpinned by global administrative law suggests a technocratic rationality, leaving the question of the legitimation of global governance and the underlying administrative law unaddressed. Viewed in constitutional terms, global administrative law is confronted with the acute challenge of legitimacy.

To address the double challenges of legality and legitimacy facing global administrative law, the notion of publicness has been invoked as the solution. Resting on the inner morality of global administrative law, the notion of publicness is normative but immanent in the operation of various regulatory regimes that jointly constitute global governance. In this way, publicness seems to resolve the issue of legality in global administrative law by providing the criterion under which law and nonlaw can be distinguished. Moreover, the normative nature of publicness also suggests an alternative conception of legitimacy concerning global administrative law.

Nevertheless, a close inspection of the regulatory publics where the supposed publicness of global administrative law originates shows that the regulatory publics comprise informed but privileged players in global administrative space. The strategy of resting the legitimacy of global administrative law as small-c global constitutionalism on this notion of publicness turns out to be the privatisation of legitimacy.<sup>152</sup> Global administrative law suggests a pragmatic path toward taming global governance with legality indeed. The implied post-public concept of legitimacy shows that global administrative law as small-c global constitutionalism may not have rid itself of challenges yet.

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<sup>152</sup> See *ibid* 1003-04.

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