

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

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## I. INTRODUCTION: LEGITIMACY PRIVATIZED

Globalization has reinvigorated the interest in the long-standing movement for international rule of law,<sup>1</sup> and global governance has become the central concept around which various projects for legal reform are organized.<sup>2</sup> Regardless of distinctive understandings of global governance, it evokes

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1. See David Kennedy, *The Mystery of Global Governance, in RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE* (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009) (asserting that the UN Charter, the WTO, and human rights regimes have each been interpreted as part of a world constitution); see also Martti Koskenniemi, *The Fate of Public International Law: Between Techniques and Politics*, 70 *MOD. L. REV.* 1, 1–3 (2007) (asserting a link between the end of the Cold War in 1989 and increasing interest in concepts of international law present in the writings of Kant and Hegel).

2. ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 4 (2004) (“Understood as a form of global governance, government networks . . . can perform many of the functions of a world government—legislation, administration, and adjudication—without the form.”); see also Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 *YALE L.J.* 1490, 1490 (2006) (“[S]upranational governance, . . . [i.e.,] developing a baseline set of administrative law tools and practices will strengthen whatever supranational policymaking is undertaken.”); Graf-Peter Callies & Moritz Renner, *Between Law and Social Norms: The Evolution of Global Governance* 22 *RATIO JURIS* 260, 261 (2009) (“[L]egal theory has largely failed to grasp the intricate relationship between law and social norms in the context of global governance regimes that might even necessitate a reconsideration of the concept of law itself.”) (citation omitted).

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 face a fundamental challenge as to the legitimacy of the proposed transnational legal orders.<sup>4</sup> To address the concerns surrounding legitimacy, the idea of publicness has long been tapped into as a solution to the question of political legitimacy.<sup>5</sup> Yet the idea of publicness utilized to bolster the legitimacy of the legal taming of global governance and to address the legal character of global administrative law is unique. The invocation of the idea of publicness in global administrative law suggests what I call a post-public legitimacy, posing fundamental theoretical challenges to the attempts to ground global governance on the rule of law.

Proponents of global governance are aware of the elusiveness of the idea of a global political community.<sup>6</sup> As a result,

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3. See Claus Offe, *Governance: An Empty Signifier?*, 16 CONSTITUTIONS 550, 553 (2009) (“*Governance* . . . may apply to all kinds of political or social units, such as corporations . . . , municipalities, interest organizations, individuals, states, subsections or the entirety of the international system. *Governance* especially takes place where (due to the absence of a state-analogous “world government”) state-organized hierarchies are insufficient, namely in the sphere of *global governance*.”).

4. See NICO KRISCH, *BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW* 13 (2010) (“International law, in particular, can no longer rest on its old basis when consent elements have been increasingly diluted through delegation to international institutions, decision-making in informal networks and enforcement through review mechanisms and formalized sanctions procedures.”); J.H.H. Weiler, *The Geology of International Law – Governance, Democracy and Legitimacy*, 64 HEIDELBERG J. INT’L L. (ZaōRV) 547, 560 (2004) (“The international system form of governance with government and without demos means there is no purchase, no handle whereby we can graft democracy as we understand it from Statal settings on to the international arena.”).

5. See, e.g., JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* 7 (Thomas Burger trans., 1989) (describing the “publicness . . . of representation” of the English monarch during feudal times as a “status attribute” that enabled the monarch to embody the country).

6. See KRISCH, *supra* note 4, at 53–54 (citing an advocate for global governance who suggests that “the structure of the global sphere resist[s] constitutionalization, perhaps because . . . the multiplicity of unconnected centres of governance simply does not represent a suitable object for it”); Armin von Bogdandy, *Constitutionalism in International Law: Comment on a Proposal from Germany*, 47 HARV. INT’L L.J. 223, 235 (2006) (acknowledging that there are large differences between national and international communities, including the lack of an international democratic polity); cf. Ulrich K. Preuss,

some proponents of global governance turn to administrative law as the main tool to lay legal grounds for global governance.<sup>7</sup> Instead of pinning their hopes on a comprehensive constitution-like charter to govern the operation of global administration,<sup>8</sup> aspirants for global governance cast their eyes on two aspects of the contribution administrative law has made to modern governance. First, they emphasize enhancing the transparency and accountability of diffuse transnational regulatory regimes. Second, they focus on improving the reasonableness and procedural fairness of the decisions made under transnational regulatory frameworks. Both points are aimed at bolstering the legitimacy of global administration by enhancing the quality of policy results and bridging the gap between transnational decisionmaking mechanisms and interested parties.<sup>9</sup> Correspondingly, traditional tools of administrative law such as the requirements of reason-giving<sup>10</sup> and due process,

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*Equality of States—Its Meaning in a Constitutionalized Global Order*, 9 CHI. J. INT'L L. 17, 44 (2008) (explaining the tension between international constitutionalization and the independence of states). *But see* DAVID HELD, DEMOCRACY AND THE GLOBAL ORDER: FROM THE MODERN STATE TO COSMOPOLITAN GOVERNANCE (1995).

7. *See, e.g.*, Esty, *supra* note 2, at 1490 (asserting that the tools of administrative law should be used at the international level); Sabino Cassese, *Administrative Law Without the State? The Challenge of Global Regulation*, 37 N.Y.U. J. INT'L L. & POL. 663, 668 (2005) (explaining that a distinctive feature of administrative law is that once administrative judges decide a dispute, the States should implement those decisions).

8. *See* Cassese, *supra* note 7, at 688 (explaining that the democratic deficit implicit in the lack of a global constitution may be compensated for by the proliferation of a global civil society); Nico Krisch, *Global Administrative Law and the Constitutional Ambition*, in *THE TWILIGHT OF CONSTITUTIONALISM* 245, 245 (Petra Dobner & Martin Loughlin eds., 2010) (explaining that constitutionalism and administrative law are competing projects when it comes to the question of global governance); KRISCH, *supra* note 4, at 57 ("Postnational constitutionalism thus has radical implications for the transformation of institutions and society beyond the nation-state; it has a distinctively utopian flavour.").

9. *See* Esty, *supra* note 2, at 1561 ("Legitimacy, however, can also be grounded in an institution's delivery of good results, its capacity to carry out rulemaking in ways that provide clarity and stability, its systemic strength and structure of checks and balances, its ability to promote political dialogue, and its commitment to procedural rigor."); *see also* Cassese, *supra* note 7, at 688 (explaining that greater openness, participation, and transparency may make up for a democratic deficit in global governance).

10. The requirement of reason-giving has been considered central to the idea of good administration in American and European administrative law.

including the rights to timely notice, meaningful hearing, and effective judicial review, are employed to contribute to the legitimacy of global regulatory regimes.<sup>11</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>12</sup>

In the meantime, other advocates for global governance are driven by the global migration of constitutional ideas.<sup>13</sup> They have been inspired by the post-Cold War experiences of constitutional democracies and the ideas that have developed around constitutionalism. As a result, they ambitiously envision a constitutional version of global governance.<sup>14</sup> They do not contest the importance of administrative law in the build-

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Regardless of its diverse meanings, the underlying theme of reason-giving is to facilitate judicial review of administrative decisions by requiring administrative agencies to give reasons in regard to their decisions. See Jerry L. Mashaw, *Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance*, 76 GEO. WASH. L. REV. 99 (2007) (discussing reason-giving in U.S. and E.U. law).

11. See Esty, *supra* note 2 (discussing procedural legitimacy and identifying administrative law tools that could help legitimize international policymaking); Benedict Kingsbury, *The Concept of "Law" in Global Administrative Law*, 20 EUR. J. INT'L L. 23, 34–50 (2009) [hereinafter Kingsbury, *Concept of "Law"*] (exploring the requirement of publicness in global administrative law); Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 37–41 (2005) [hereinafter Kingsbury et al., *Emergence of Global Administrative Law*] (discussing various procedural requirements reflected in global administrative law); see also Armin von Bogdandy, *General Principles of International Public Authority: Sketching a Research Field*, 9 GERMAN L.J. 1909, 1928–38 (2008) (presenting general principles for the exercise of international authority in the E.U.).

12. See Jeffrey L. Dunoff & Joel P. Trachtman, *A Functional Approach to International Constitutionalization*, in *RULING THE WORLD?*, *supra* note 1, at 3, 33–35 (separating legal proposals for global governance into three schools of thought: international constitutionalization, legal pluralism, and global administrative law).

13. See, e.g., Matthias Kumm, *Democratic Constitutionalism Encounters International Law: Terms of Engagement*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 256 (Sujit Choudhry ed., 2006); Mayo Moran, *Inimical to Constitutional Values: Complex Migrations of Constitutional Rights*, in *MIGRATION OF CONSTITUTIONAL IDEAS*, *supra*, at 233; David Schneiderman, *Constitution or Model Treaty? Struggling over the Interpretive Authority of NAFTA*, in *MIGRATION OF CONSTITUTIONAL IDEAS*, *supra*, at 294; Neil Walker, *The Migration of Constitutional Ideas and the Migration of the Constitutional Idea: The Case of the E.U.*, in *MIGRATION OF CONSTITUTIONAL IDEAS*, *supra*, at 316.

14. See KRISCH, *supra* note 4, at 31–32.

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>15</sup> Beyond traditional functions associated with administrative law, they contend that global administrative law paves the way for constitutionalizing 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>16</sup>

It remains to be seen whether global governance will continue on one of two paths: either become a collection of transnational regulatory regimes that jointly manage global administration or move towards a constitutionalized framework for resolving transboundary issues.<sup>17</sup> Notably, global administrative law functions to spell out the fundamental norms underpinning the relationship between global governance and its interested parties, which corresponds to the role of domestic administrative law in constitutional democracies. Compared with the relationship between administrative law and the constitution in the domestic context, however, the alignment of global governance with legality poses some theoretical challenges to global administrative law to be explored in this Article.

By looking into the way that global administrative law takes on constitutional character, I will argue that global administrative law has emerged as a small-c constitutional law of global governance but at same time conceived of legitimacy in a distinctive way, suggesting the notion of what I call post-pub-

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15. See Matthias Kumm, *The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State*, in RULING THE WORLD?, *supra* note 1, at 312 (explaining that cosmopolitan constitutionalism provides an overarching conceptual framework for ideas of constitutionalism that have been articulated in research on global governance, global administrative law, international public authority, etc.).

16. See Dunoff & Trachtman, *supra* note 12, at 32 (discussing the possibility that “the systematization of coordination may develop a kind of new constitutional synthesis”).

17. Continuing on the former path, global governance will simply signify the aggregation of transnational regulatory practices without normative implications. In contrast, taking on the latter path, more institutional and legal issues need to be addressed in regard to global governance, which underlies this Article’s concern.

lic legitimacy.<sup>18</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.<sup>19</sup> In contrast, the constitutional character of global administrative law is constructed free of a Large-C global Constitution.<sup>20</sup> Unmoored from a Large-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 argued to rest on the normative idea of publicness that bridges democracy and the rule of law rather than on an author-based Large-C Constitution.<sup>21</sup>

A close inspection of the idea of publicness in global administrative law scholarship shows that it suggests a post-public legitimacy in which the regulatory publics, where the supposed publicness of global administrative law originates, comprise informed but privileged players in global administrative space. The composition of the regulatory publics leads to a fragmented notion of publicness and further to the privatization of legitimacy. Stripped of a global public and embedded in

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18. See Ming-Sung Kuo, *The Concept of 'Law' in Global Administrative Law: A Reply to Benedict Kingsbury*, 20 EUR. J. INT'L L. 997, 1004 (2009) (discussing "post-public" conception of legitimacy).

19. See WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 1–28 (2010) (explaining that the constitutional process should be seen to include statutes, treaties and agency rules and deliberative processes); see also WILLIAM F. HARRIS II, *THE INTERPRETABLE CONSTITUTION* 104–13 (1993) (discussing the need for constitutional interpretation to encompass both the text of the Constitution and the political structures or polity created by it).

20. Large-C global constitutionalism suggests a unified document or a set of documents, an equivalent to a national constitution, which underpins global constitutionalism. Small-c global constitutionalism refers instead to the version of global constitutionalism that focuses on the development of constitutional values independently of a global constitution. For a discussion on the relationship between Large-C constitutionalism and small-c constitutionalism, see Michael J. Perry, *What Is "the Constitution"?* (and Other Fundamental Questions), in *CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS* 99, 99–100 (Larry Alexander ed., 1998).

21. See Kingsbury et al., *Emergence of Global Administrative Law*, *supra* note 11, at 42–51 (discussing internal administrative accountability, protection of rights, and promotion of democracy as three possible normative conceptions of the role of global administrative law).

diffuse global regulatory regimes targeted 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 centered on particular regulatory regimes, pointing to a post-public legitimacy. My argument proceeds as follows: Section II explores how global administrative law is conceived of in global governance and takes on constitutional character. Section III examines the issues embedded in the discourse on global administrative law as a small-c global constitutionalism. Section IV provides a summary of the main arguments and concludes that the strategy of resting the legitimacy of global administrative law as small-c global constitutionalism on the notion of publicness turns out to be the privatization of legitimacy, implying a post-public concept of legitimacy.

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

The buzzword “globalization” characterizes 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 globalization,”<sup>22</sup> “the globalization of law,”<sup>23</sup> or anything with an epithet evoking globalization such as the “global rule of law”<sup>24</sup> and “globalized judiciary”<sup>25</sup> are widespread in legal scholarship. In this Section, I first discuss how administrative law has been brought into the fold of globalization scholarship. Pointing out that new types of administration require corresponding new visions of administrative law, I argue that the evolution from international administrative law to global adminis-

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

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

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

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

trative law has been driven by the pragmatism and problem-solving mentality in addressing regulatory issues arising from the post-Westphalian world order. Next, I proceed to explore the way that constitutionalism has been projected beyond state boundaries. Paralleling the constitutional spillover effect of domestic administrative law, global administrative law undergoes the processes of constitutionalization. This Section thus concludes with the suggestion that attempts to tame global governance with administrative law tends to take on a constitutional character, indicating an emerging small-c global constitutionalism.

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

In this part, I first show how the changes in transnational administrative space bring about the transition from international administrative law to global administrative law. After revealing the relationship between the configuration of administration and administrative law, I discuss the new developments in global administrative law in terms of the post-Hobessian pragmatism in a post-Westphalian world order.

1. *Globalizing Administrative Space: Distinction Between International Administrative Law and Global Administrative Law*

While administrative law is conventionally discussed in the domestic context, it has been noted that it also exists in international settings.<sup>26</sup> 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>27</sup> In contrast to the old “inter-

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26. See Kingsbury et al., *Emergence of Global Administrative Law*, *supra* note 11, at 19–20 (discussing “[t]he idea of analysing transnational governance as administration subject to distinctive administrative law principles”). See also Esty, *supra* note 2, at 1493–95 (arguing for application of administrative law principles to “remedy the democratic deficit and legitimacy concerns at the transnational level”).

27. Kingsbury et al., *Emergence of Global Administrative Law*, *supra* note 11, at 23–24; see also Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 *EUR. J.*

national administrative law,”<sup>28</sup> the identity of global administrative law is constructed against the backdrop of emerging global governance that is underpinned by reason and rationality, transcending the boundaries of nation-states. In other words, global administrative law is to global governance as international administrative law is to “international administration.”<sup>29</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>30</sup> In contrast, global governance, or global administration to which global administrative law is seen to respond, is more complex and multifarious.

According to Kingsbury, Krisch, and Stewart, global administration can be divided further 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>31</sup> they identify three other types of global administration: “transnational networks and coordination arrangements,” “hybrid intergovernmental-private administration,” and “private bodies.”<sup>32</sup> To address the issues

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INT’L L. 1, 2–3 (2006) (describing expansion of administrative and regulatory functions into global context).

28. The features of international administrative law will be discussed later.

29. See Kingsbury et al., *Emergence of Global Administrative Law*, *supra* note 11, at 18–19 (discussing global administrative law by analogy to international administrative law).

30. *Id.* at 19–20.

31. 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.” *Id.* at 21. Also, they note that the pre-1945 “broad notions of ‘international administration’” included not only “international institutions” but also “domestic administrative actors when taking actions with transboundary significance.” *Id.* at 19–21. Taken together, what Kingsbury, Krisch, and Stewart call “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.” *Id.*

32. 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 [sic] structure and the dominance of informal cooperation among state reg-

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>33</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>34</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 theorizing global administrative law is required.

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

33. *See id.* at 37–41 (outlining principles and requirements of global administrative law); Esty, *supra* note 2, at 1524–37 (identifying administrative law tools that can counter agency problems with global governance institutions and activities).

34. Kingsbury et al., *Emergence of Global Administrative Law*, *supra* note 11, at 53–54.

New types of administration require corresponding new visions of administrative law; likewise, the transition from international administrative law to global administrative law results from the changes in transnational administration. With the emergence of informal types of administration such as transnational networks and coordination arrangements, hybrid administration, and private bodies, administrative law must necessarily become more informal and flexible.<sup>35</sup> Notably, 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 reconceptualized as being subsumed under the rubric of global governance, calling for global administrative law in the place of traditional international administrative law.

International administrative law differs from the emerging global administrative law in an important way. International administrative law was secondary to domestic administrative law. Kingsbury, Krisch, and Stewart trace the origin of global governance back to the mid-nineteenth century and regard the pre-1945 paradigm of international administrative law as the predecessor of global administrative law.<sup>36</sup> But international administration, which was at the center of traditional international administrative law, did not go beyond the Westphalian system of nation-states. On the one hand, international administrative law focused on areas such as postal services, navigation, and telecommunication, which gave rise to “international unions,”<sup>37</sup> and indeed derived from the interna-

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35. See *id.* (identifying a variety of approaches and strategies in global administrative law, depending in part on existing institutions and “shifting patterns of international ordering”); Esty, *supra* note 2, at 1536 (arguing that flexibility mechanisms in global administrative law may be necessary “to accommodate intense national political pressures”). See also Cassese, *supra* note 23, at 977 (questioning whether procedural formalities based on U.S. administrative law are appropriate for international organizations, “whose frameworks are defined by informality and negotiation”).

36. Kingsbury et al., *Emergence of Global Administrative Law*, *supra* note 11, at 19–20 & n.11; see also Weiler, *supra* note 4, at 553 (describing transactional international law as predecessor to international governance).

37. Kingsbury et al., *Emergence of Global Administrative Law*, *supra* note 11, at 19.

tional union-creating treaties that were concluded under the Westphalian system.<sup>38</sup> On the other hand, international administrative law only extended indirectly to domestic administrators with minor effects.<sup>39</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>40</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>41</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 center stage as the main players with other actors from the private realm and international civil service. Domestic administrators, both in international administration that involves intergovernmental organizations established by treaties or executive agreements and in distributed administration or other types of global administration, and other actors are equal players in an extended sphere of global administration.<sup>42</sup> This new “global administrative space” transcends nation-states, suggesting the post-Westphalian and post-Hobbesian characteristics of global administrative law.<sup>43</sup>

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38. See Weiler, *supra* note 4, at 555 (noting that the prototypes of international organization were based on traditional treaty-making between sovereign states).

39. See Kingsbury et al., *Emergence of Global Administrative Law*, *supra* note 11, at 19 (suggesting that the scope of international administration was limited and functioned under the treat framework).

40. *Id.*

41. *Id.*

42. See *id.* at 20–27 (describing types of global administration).

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

2. *New Developments in Global Administrative Law: The Post-Hobbesian Shift to Pragmatism in a Post-Westphalian System*

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 counter-terrorism and other national security concerns 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>44</sup> Nation-states in the traditional form, which occupy the center of the Westphalian world system, no longer hold a monopoly on transboundary regulatory issues. Instead, nation-states are disaggregating.<sup>45</sup> Moreover, the relationship among the players in the global administrative space is post-Hobbesian in that national self-interest plays a lesser role in global administration. The problem-solving attitude of pragmatism takes the place of political realism in addressing transboundary regulatory issues.<sup>46</sup> Certainly, transnational cooperation in tackling transboundary issues is not novel, 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 in the construction of administrative space and legal function. First, given the transboundary or global nature of contemporary regulatory issues, administrative space—which was previously centered on the nation-state—has been reconceptualized. While traditional nation-state-centered administrative space covers the area of the politico-juridical authority

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44. See Cassese, *supra* note 23, at 973–77 (providing examples of transboundary issues that implicate global governance); see also Cassese, *supra* note 7, at 663–70 (describing global tuna fishing regulation).

45. See generally SLAUGHTER, *supra* note 2; Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, 24 MICH. J. INT'L L. 1041 (2003).

46. See Kingsbury et al., *Emergence of Global Administrative Law*, *supra* note 11, at 54–57 (describing “the relative informality of [global administration], its multi-level character, and the strength of private actors in it” as limits on the application of domestic administrative law in a transborder context).

of the nation-state, this new administrative space is conceptualized in accordance with the nature of the subject matter at issue. In other words, in traditional administrative law, administrative space, the object of administrative law, is defined by the source of its delegated authority.<sup>47</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 the scope of international administrative law extends only to the subject matters that nation-states consent to delegate to international institutions or other treaty-based regulatory mechanisms.<sup>48</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>49</sup> The scope of global administrative space is not embedded in the source of legitimate power but is functionally determined instead. On this view, nation-states are regarded as components of global administration in the way that subnational administrative districts are considered parts of national administration. While a national constitution serves as the reference point for the relationship between subnational administrative districts and national administration, there is no legal norm defining the relationship between the envisaged global administration and nation-states. Rather, 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 administra-

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47. See generally Jack M. Beermann, *The Reach of Administrative Law in the United States*, in *THE PROVINCE OF ADMINISTRATIVE LAW* 171 (Michael Taggart ed., 1997).

48. This is reflected in what Joseph Weiler calls the transactional model of international governance. Weiler, *supra* note 4, at 553–56.

49. See Andreas Fisher-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 *MICH. J. INT'L L.* 999, 1020–21 (2004) (proposing “a shift from territoriality to ‘functional regime affiliation’”); cf. MARTIN LOUGHLIN, *THE IDEA OF PUBLIC LAW* 97 (2003) (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”).

tive law tools from national experiences, with an eye to making the decisions of global administrative players more acceptable to those under regulation.<sup>50</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>51</sup> Even though there may be common procedural mechanisms and substantive values from the comparative perspective of administrative law, they materialized with reference to individual constitutional norms and legal traditions.<sup>52</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 rationality in the decision-making process. Also, by providing for reviewing mechanisms to eliminate not only arbitrary or capricious decisions but also irrational policies, reason and rationality are expected to duly function in global administration.<sup>53</sup> Global administrative law—as a discipline and as a practice—by combining its function-driven nature and the configuration of the global administrative space transcending existing politico-judicial spaces defined by national constitutions is part of the bootstrapping of global governance.<sup>54</sup> Global administrative law helps a

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50. See Esty, *supra* note 2, at 1524–37 (identifying administrative law tools that could advance good supranational governance).

51. For example, the enactment of the 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 ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES* 13–37 (6th ed. 2006).

52. See Beermann, *supra* note 47 (describing norms of procedural and substantive fairness that administrative law incorporates). See generally *COMPARATIVE ADMINISTRATIVE LAW* (Susan Rose-Ackerman & Peter L Lindseth eds., 2010).

53. See Esty, *supra* note 2, at 1529–30 (listing essential characteristics of good global policymaking); Kingsbury, *Emergence of Global Administrative Law*, *supra* note 11, at 37–41 (demonstrating how the procedural safeguards of domestic administrative law have become a part of global administrative law).

54. In line with Jon Elster's use of "bootstrapping," which involves a clean break with a pre-constitutional past in constitutional politics, I adopt the

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.

B. *From Functional Administration to Constitutionalization: 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>55</sup> Yet these administrative practices not only make global governance possible but also underpin the normative contents of global administrative law, constituting the constitutional spillover effect of global administrative law. As the normative contents of global administrative law materialize in transnational administrative practices, the processes of juridification driven by global lawmaking in relation to global governance further transform the character of global administrative law, adding constitutional significance to global administrative law.

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term here to refer to the disconnection of theorizing a global administrative space and a corresponding global administrative law from the existing norm-laden politico-juridical space centering on nation-states. See Jon Elster, *Constitutional Bootstrapping in Philadelphia and Paris*, in *CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY: THEORETICAL PERSPECTIVES* 57, 57 (Michel Rosenfeld ed., 1994).

55. See also Karl-Heinz Ladeur, *The Emergence of Global Administrative Law and the Evolution of General Administrative Law* (Osgoode Hall Law School CLPE Research Paper No. 16/2011, 2010), available at [www.papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1792062](http://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=1792062) (discussing historical and theoretical aspects of administrative law). For the idea of “internal administrative law” or “internal law of administration,” see Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Federal Administrative Law in the Republican Era, 1801–1829*, 116 *YALE L.J.* 1636, 1686, 1737–40 (2007).

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>56</sup> In traditional international law, state consent is the legal basis for the authority of international legal regimes<sup>57</sup> and national constitutions provide the framework within which controversies regarding state consent are resolved.<sup>58</sup> In contrast to the 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>59</sup>

Specifically, the global process of juridification is set apart from the development of “juridification” in terms of municipal law by the way that the law is conceived. In contrast to the court-centered concept of domestic juridification,<sup>60</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 institutionalized through myriad self-regulatory networks, developing into a networked global legal regime. Moreover, the global legal regime generalizes and stabilizes normative expectations in each sector of subject matter and thus enhances

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56. Jean L. Cohen, *Whose Sovereignty? Empire Versus International Law*, 18 ETHICS & INT’L AFF. 1, 2 (2004).

57. See Martti Koskenniemi, *Introduction* to SOURCES OF INTERNATIONAL LAW xi, xi–xii (Martti Koskenniemi ed., 2000) (describing the realist stance that formal sources of international law are valuable only as indicia of state consent).

58. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 287 (6th ed. 2003) (illustrating that customary international law obligations, as well as treaty obligations, depend on state consent).

59. See Kuo, *supra* note 18, at 997–98 (describing how global administrative law “unsettles” the idea of an international law based solely on state consent).

60. See Lars Trägårdh & Michael X. Delli Carpini, *The Juridification of Politics in the United States and Europe: Historical Roots, Contemporary Debates and Future Prospects*, in AFTER NATIONAL DEMOCRACY: RIGHTS, LAW AND POWER IN AMERICA AND THE NEW EUROPE 41, 72–73 (Lars Trägårdh ed., 2004) (discussing courts as a link between state and civil society, bypassing elected officials).

global governance.<sup>61</sup> Taken together, the networked norm-making regime results from the norms that autonomously materialize in the processes in which governance becomes globalized.<sup>62</sup>

Moreover, this new model of norm-making is regarded as constituting the “ultimate rule of recognition” on a global scale, according to which the distinction between law and *non-law* is made.<sup>63</sup> 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>64</sup> Rather, it has to be determined in light of the global rule of

61. Compare Bernhard Zangl, *Is There an Emerging International Rule of Law?*, in TRANSFORMATIONS OF THE STATE? 73 (Stephan Leibfreid & Michael Zürn eds., 2005) (noting the wide acceptance of dispute settlement procedures in four issue areas in international law—international trade, security, labour, and environmental law—as indicative of an emerging (quasi)international rule of law complementing modern states’ domestic rule of law), with Daniele Archibugi & Iris Marion Young, *Envisioning a Global Rule of Law*, in TERRORISM AND INTERNATIONAL JUSTICE 158, 158, 160–61 (James P. Sterba ed., 2003) (arguing that an international criminal justice centered strategy in the place of “war on terror” in response to global terrorism would contribute to a global rule of law that goes beyond the existing focus on international trade, investment, and environmental protection). This networked global legal regime results either from intergovernmental networks of regulatory cooperation or from *lex mercatoria* (merchant law) and its variations. See generally GLOBAL LAW WITHOUT A STATE (Gunther Teubner ed., 1997). See also Gunther Teubner, *Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory?*, in TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM 3, 21–23 (Christian Joerges et al. eds., 2004) (discussing *lex electronica* and *lex mercatoria*); Andreas Fischer-Lescano, *Themis Sapiens: Comments on Inger-Johanne Sand*, in TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM, *supra*, at 67, 72–73; Michelle Everson, *Law and Non-Law in the Constitutionalisation of Europe: Comments on Eriksen and Fossum*, in TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM, *supra*, at 147, 155; Alec Stone Sweet, *The New Lex Mercatoria and Transnational Governance*, 13 J. EUR. PUB. POL’Y 627 (2006).

62. Norms autonomously materialize in the sense that they are embedded in the governance practices with no identifiable external source of norm-making.

63. See H.L.A. HART, THE CONCEPT OF LAW 100–23 (Penelope A. Bulloch & Joseph Raz eds., 2d ed. 1994).

64. See Cohen, *supra* note 56, at 7 (positing a shift away from state sovereignty as a basis of international law); Teubner, *supra* note 61, at 8 (“General legislative bodies will become less important with the development of globalization. Global law is produced in self-organized processes of ‘structural coupling’ of law with ongoing globalized processes of a highly specialized and technical nature.”).

recognition in that municipal legal systems are reconceptualized as components of the globalized legal system, suggesting the emergence of a “constitutional” order for the world.<sup>65</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 constitutionalized global legal order.

Taken together, administrative/regulatory practice driven by a problem-solving mentality to make global administration functional serves as the “ultimate rule of recognition” on a global scale, and it adds constitutional significance to global administrative law.<sup>66</sup> Layered with normative implications, however, global administrative law spills further into global constitutionalism.<sup>67</sup> As pointed out above, global administrative law echoes its domestic counterpart, comprising the normative values of due process, transparency, and accountability

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65. See *Introduction* to TOWARDS WORLD CONSTITUTIONALISM: ISSUES IN THE LEGAL ORDERING OF THE WORLD COMMUNITY xiii, xv (Ronald St. John MacDonald & Douglas M. Johnston eds., 2005) (arguing that “the interventionist role of the UN Security Council, ‘validated’ by the world constitutionalism model [of international law], represents a direct challenge to the state autonomy model”); Constance Jean Schwindt, *Interpreting the United Nations Charter: From Treaty to World Constitution*, 6 U.C. DAVIS J. INT’L L. & POL’Y 193 (2000) (arguing that “characterizing the [UN] Charter as a World Constitution may . . . more accurately reflect international law”); see also Seyla Benhabib, *Another Cosmopolitanism*, in ANOTHER COSMOPOLITANISM 13, 71 (Robert Post ed., 2006) (asserting that international constitutional checks and balances apply to domestic legislative action); cf. Christian Walter, *Constitutionalizing (Inter)national Governance—Possibilities for and Limits to the Development of an International Constitutional Law*, 44 GER. Y.B. INT’L L. 170 (2001) (proposing a segmented, as opposed to comprehensive, version of international constitutional law). This “conceptual shift” is related to the globalist epistemological shift to an external sociological perspective of the law. See Cohen, *supra* note 56, at 7.

66. As Joseph Raz emphasizes, the rule of recognition in H.L.A. Hart’s legal theory exists as “a practice of the legal officials” and stands apart from constitutions. See Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS, *supra* note 20, at 152, 160–62. Nevertheless, the sociological view of global constitutionalization brings the practice-embedded world constitutional order closer to the Hartian rule of recognition. For an exemplary discussion on the relationship between the constitution and Hart’s concept of the rule of recognition, see generally THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION (Matthew D. Adler & Kenneth Einar Himma eds., 2009).

67. See Cassese, *supra* note 7, at 687–89; Cassese, *supra* note 23, at 985–86 (arguing that global law is developing in a way that facilitates adoption of constitutional principles).

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>68</sup> Nevertheless, global administrative law has been equated with “all the rules and procedures that help ensure the accountability of global administration.”<sup>69</sup> Corresponding to the growing trend towards the self-constitutionalization of the emerging legal regimes beyond the nation-state,<sup>70</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>71</sup> Accordingly, the trend to extend constitutional ordering beyond the state needs to be analyzed 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 fully implementing constitutionalism is the underlying cause of the contemporary expansion of constitutionalism, driving

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68. Krisch & Kingsbury, *supra* note 27, at 10; *see also* Nico Krisch, *The Pluralism of Global Administrative Law*, 17 EUR. J. INT’L L. 247 (2006) (“[The] pluralist structure [of global governance], based on pragmatic accommodation rather than clear decisions, strongly contrasts with the ideals of coherence and unity in modern constitutionalism . . . [and] is likely to endure and . . . is also normatively preferable . . .”).

69. Kingsbury et al., *supra* note 11, at 28; *see also* Neil Walker, *Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders*, 6 INT’L J. CONST. L. 373, 381 (2008) (noting the expansive character of “the Global Administrative Law project”).

70. *See* Petra Dobner & Martin Loughlin, Introduction to THE TWILIGHT OF CONSTITUTIONALISM?, *supra* note 8, at xi (noting “processes of constitutionalism at the transnational level”).

71. *See* Miguel Poirares Maduro, *From Constitutions to Constitutionalism: A Constitutional Approach for Global Governance*, in GLOBAL GOVERNANCE AND THE QUEST FOR JUSTICE: INTERNATIONAL AND REGIONAL ORGANIZATIONS 227, 238–41 (Douglas Lewis ed., 2006) (arguing that national constitutionalism provides a useful framework for analyzing global constitutionalism).

the constitutionalization of politics.<sup>72</sup> Moreover, the inclination to turn to the court for the full implementation of constitutionalism 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>73</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>74</sup> The state or, rather, the polity cannot be disassociated from the idea of justice but is rather considered the means to achieve justice. Correspondingly, the constitution that underlies the state and its equivalent is to be read and interpreted through theories of justice.<sup>75</sup> As the multiplication of the functions of fundamental rights and the expansion of the catalogue of constitutional rights suggest, the full implementation of constitutionalism is carried out by reading theories of justice into the constitution.<sup>76</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>77</sup> To sum up, the development of global administrative law extends beyond the pragmatism of

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72. See Matthias Kumm, *Who Is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law*, 7 GER. L.J. 341, 342–43 (2006) (discussing constitutionalization of politics).

73. See PAUL W. KAHN, PUTTING LIBERALISM IN ITS PLACE 268–79 (2005) (identifying constitutionalism as the cause of the modern nation-state).

74. *Id.* at 270.

75. See *id.* at 258, 268–72 (“We appeal to justice to criticize law, to work toward the reform of law and, at times, to decide among possible interpretations of law.”); DAVID ROBERTSON, THE JUDGE AS POLITICAL THEORIST: CONTEMPORARY CONSTITUTIONAL REVIEW 1 (2010) (describing role of constitutional courts as promoting constitutional values); Sujit Choudhry, *Globalization in Search of Justification Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819, 825 (1999) (arguing the existence of “transcendent legal principles” guaranteed by constitutions with priority over positive legal rules and doctrine).

76. See Ming-Sung Kuo, *Reconciling Constitutionalism with Power: Towards a Constitutional Nomos of Political Ordering*, 23 RATIO JURIS 390, 392–93 (2010) (describing the constitutional state as “the means to complete the pursuit of justice”); ROBERTSON, *supra* note 75, at 27–28 (collecting examples of courts considering moral values and social implications when deciding constitutional cases).

77. See Kumm, *supra* note 15, at 302–03, 312 (suggesting that global administrative law works alongside global constitutionalism toward a cosmopolitan public law).

functional administration to global constitutionalism with the increase of its constitutional spillover effects.

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

In the preceding section, I explained how global administrative law is related to the discussion on global constitutionalism, despite the disavowal of some global administrative law scholars. In this part, I take a closer look at the implications of global administrative law for the way that global constitutionalism is conceived. 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 merges with the question of whether political community is a precondition for a constitution, hampering the effort to reform global governance on the basis of the rule of law.<sup>78</sup> Nevertheless, in light of our experiences with national constitutional ordering in which constitutionalism builds on a Large-C Constitution and small-c constitutionalism,<sup>79</sup> a global constitutionalism without a global Large-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>80</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 challenges 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>81</sup> Most of the constitutional issues find solu-

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78. See KRISCH, *supra* note 4, at 59 (explaining that the greatest challenge to the globalization of constitutionalism is the diversity of the global polity).

79. See Perry, *supra* note 20 (discussing the relationship between Large-C constitutionalism and small-c constitutionalism).

80. See Lawrence Sager, *The Domain of Constitutional Justice*, in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS, *supra* note 20, at 235, 235 (arguing that the domain of constitutional justice helps to interpret the Constitution).

81. See Bruce Ackerman, *2006 Oliver Wendell Holmes Lectures: The Living Constitution*, 120 HARV. L. REV. 1737, 1756 (2007) (proposing a new kind of

tion 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, scholars and practitioners not only need to understand the Constitution itself but also have to take account of constitutional law developed in the processes of constitutional interpretation and construction.<sup>82</sup> Notably, judicial interpretations of the Constitution and the case law concerning the Constitution are not the only 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>83</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>84</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 Large-C Constitution in accounting for the state of the national constitutional order.<sup>85</sup>

It is noteworthy that in the domestic context the small-c constitution does not supplant but instead supplements the Large-C Constitution. It is true that principles and doctrines

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constitutional interpretation, which takes into account both the text of the constitution and the entirety of American history).

82. For the distinction between interpretation and construction in understanding the constitution, see KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 5–14 (1999).

83. See Ackerman, *supra* note 81, at 1742 (“landmark statute”); William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 *DUKE L.J.* 1215, 1216–17 (2001) (“super statute”); see also Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 *Nw. U.L. REV.* 63, 67 (2009) (treating the Voting Rights Act, a landmark statute, as a unique part of constitutional history).

84. See ESKRIDGE & FEREJOHN, *supra* note 19, at 395–99 (providing examples of when the executive branch played such a role); ELIZABETH FISHER, *RISK: REGULATION AND ADMINISTRATIVE CONSTITUTIONALISM* (2010) (discussing the idea of the legal disputes over public health and environmental risk regulation as disputes over administrative constitutionalism).

85. See ESKRIDGE & FEREJOHN, *supra* note 19, at 9–19 (explaining that statutes fill in the gaps of the Constitution and ultimately change the Constitutional structure).

of case law and super statutes as well as executive decisions flesh out the institutional and normative framework established in the Large-C Constitution. Without the small-c constitution, the polity conceived in the Large-C Constitution is skeletal. Nevertheless, principles and doctrines of the small-c constitution are understood and further interpreted in light of the Large-C Constitution. They are not freestanding principles, however important they may be to the operation of the constitutional order. The Large-C Constitution and the small-c constitutional law are tied in a dialectical relationship, illuminating each other and jointly underpinning the national constitutional order.<sup>86</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 at bolstering the values of due process, transparency, and accountability, which are central to the relationship between modern administration and citizens in a constitutional order.<sup>87</sup> Administrative law is to constitutional government what global administrative law is to constitutionalized global governance.<sup>88</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

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86. See HARRIS, *supra* note 19, at 104–13 (treating American constitutional interpretation as an effort to read the small-c constitution and the Large-C Constitution together).

87. See MARTIN M. SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 27 (paperback ed. 1986) (noting the role of administrative law in constructing the relationship between citizens and the state).

88. 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. ed. 2006) (citing 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*, 57 *MOD. L. REV.* 191, 201–05 (1994) (explaining that constitutional law influenced German administrative law, which subsequently influenced European administrative law).

Large-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.

### III. 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 constitutionalization. In this Section, I aim to examine the characteristics of global administrative law as a small-c global constitutionalism without the global Large-C Constitution. My focus is on the fundamental issues surrounding global administrative law as small-c global constitutionalism, the question of legitimacy in particular, and the corresponding solutions that have been proposed.

As our national constitutional experiences suggest that a legitimate constitutional ordering builds on a Large-C Constitution and small-c constitutional law, the small-c global constitutionalism based on global administrative law yet without a Large-C global constitutional norm raises new issues as to the legitimacy of global governance. The challenges surrounding the questions of legitimacy are analyzed in the first two parts of this Section. I first discuss why this view of global constitutionalism suggests a new idea of legitimacy based on rationality. I argue that this new conception of legitimacy does not provide a solution to the legitimacy challenges facing global administrative law as small-c global constitutionalism but instead results in 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.

After identifying the challenges posed toward the legitimacy of global administrative law as small-c global constitutionalism, in the final part of this Section, I shift my focus to the idea of publicness, which has been proposed as a solution

to the fundamental, dual challenges of legitimacy and legality, facing global administrative law. I conclude my discussion by arguing that the idea of publicness invoked as the redress to the challenges facing global administrative law and global governance suggests a new concept of law based on a post-public concept of legitimacy.

### A. *Rationalization and Legitimation Untied*

Regardless of taking on constitutional character, global administrative law cannot avoid the issue of legitimacy.<sup>89</sup> Notably, global governance does not derive its legitimacy from a higher law in the way domestic administration refers to national constitutions. Nor does it base its legitimacy on the paradigm of representative democracy on which the principal-agent model of accountability centers.<sup>90</sup> Legitimacy does not take the center stage in the discussion on global governance anymore but is instead addressed in a more nuanced way. The concept of legitimacy is understood through the lens of rationality in global administrative law and thus echoes the appeal of deliberative democracy.<sup>91</sup> In this way, however, global administrative law does not address the rationality and legitimacy of global governance as equally as it claims. Rather, the question of the legitimacy of global administrative law as small-c global constitutionalism remains unresolved.

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

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89. See Kingsbury et al., *supra* note 11, at 48 (stating that, partly due to legitimacy concerns, nearly all public institutions of global governance face pressure to increase the openness of their decision-making processes).

90. See Joshua Cohen & Charles F. Sabel, *Global Democracy?*, 37 N.Y.U. J. INT'L L. & POL'Y 763, 772–84 (2005) (demonstrating that no centralized authority exists in global administrative law).

91. See Peter L. Lindseth, "Weak" Constitutionalism? Reflections on Comitology and Transnational Governance in the European Union, 21 OXFORD J. LEGAL STUD. 145, 150–51 (2001) (citing increased transparency and participation rights as two of the most popular methods for increasing legitimacy); see also Martin Shapiro, "Deliberative," "Independent" Technocracy v. Democratic Politics: Will the Globe Echo the E.U.?, 68 LAW & CONTEMP. PROBS. 341, 350–51 (2005) (dismissing deliberation as an unachievable ideal).

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. As a result, reasoned analysis becomes the common language in the policymaking network of global governance.<sup>92</sup>

Seen in this light, a different conception of legitimacy seems to take shape in global administrative law. What characterizes 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>93</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 polic[ies]” in transnational regulation,<sup>94</sup> the entire network can be seen as consisting of “epistemic communities,” including officials and civilians with “rival expertise.”<sup>95</sup>

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92. See Lindseth, *supra* note 91, at 148–51 (exploring how “rational deliberation” characterizes the EU Committee system); see also Cohen & Sabel, *supra* note 90, at 764–65, 778–82 (explaining that transnational movements advance the focus on rationality and reason as well as describing how “deliberative polyarchy” depends on “mutual reason giving”).

93. Joshua Cohen and Charles Sabel term this practice “deliberative polyarchy.” Cohen & Sabel, *supra* note 90, at 779–84.

94. See Lindseth, *supra* note 91, at 148 (noting that participants in “[t]he process of ‘transnational’ deliberative interaction” concerning the making of public policies “must now justify their positions as ‘sound policy’”).

95. For the issues concerning the rule by “epistemic communities,” see Martin Shapiro, *Administrative Law Unbounded: Reflections on Government and Governance*, 8 IND. J. GLOBAL LEGAL STUD. 369, 373–74 (2001); but see Karl-Heinz Ladeur, *Towards a Legal Theory of Supranationality—The Viability of the Network Concept*, 3 EUR. L.J. 33, 50–51 (1997) (welcoming the increasing institutionalization of “epistemic community” through the “comitology” process

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 non-experts,<sup>96</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>97</sup> On this view, the ideal of deliberative democracy seems to find its institutional embodiment in global governance.<sup>98</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>99</sup>

As described above, the small-c global constitutionalism underpinned by global administrative law appears to address both the rationality and legitimacy of global governance. It is true that democratic legitimacy built on representative democracy is not the only working model of legitimacy. Rather, legitimacy can be a product of different mechanisms such as proce-

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in the EU). For the issue of “rival expertise” resulting from the expert-centered model of administration, see Shapiro, *supra* note 91, at 343–49.

96. See Shapiro, *supra* note 91, at 343 (arguing that regulators cannot regulate technical subject matter properly without high levels of expertise); cf. J.H.H. WEILER, *THE CONSTITUTION OF EUROPE: “DO THE NEW CLOTHES HAVE AN EMPEROR?” AND OTHER ESSAYS ON EUROPEAN INTEGRATION* 349 (1999) (identifying “a general sense of political alienation” with the EU comitology).

97. See Christian Joerges, ‘Good Governance’ Through Comitology?, in E.U. COMMITTEES: SOCIAL REGULATION, LAW AND POLITICS 311, 312–16 (Christian Joerges & Ellen Vos eds., 1999) (outlining theory of “deliberative supranationalism”).

98. See Lindseth, *supra* note 91, at 150–51 (noting how deliberative democracy is suited for “a complex system of transnational governance”); Shapiro, *supra* note 91, at 350–51 (describing deliberation as a “building block” of global administrative law); cf. Cohen & Sabel, *supra* note 90, at 779–84 (discussing “deliberative polyarchy”). For criticism, see WEILER, *supra* note 96, at 283–85.

99. See Cohen & Sabel, *supra* note 90, at 773–84 (concluding that for legitimate accountability, an agent need only be able to explain how his decisions advance a goal regardless of a principal’s involvement, and going on to find that the “deliberative polyarchy” in global administrative law satisfies this accountability requirement).

dural fairness, systematic consistency in policy decisions, and rational results, to name just three.<sup>100</sup> It is also true that these multiple models of legitimacy are not mutually exclusive but instead jointly enhance the legitimacy of administration. Multiple models of legitimation notwithstanding, it is democratic legitimacy under the principal-agent paradigm that lies at the center of polemics concerning legitimacy. The other models of legitimacy are designed to address the challenges from democratic legitimacy. As Joshua Cohen and Charles Sabel note, even the nascent models of accountability that are considered to enhance the legitimacy of global governance still center on the concept of democratic accountability based on the principal-agent model.<sup>101</sup>

This principal-agent relationship-centered concept of accountability and democratic legitimacy is characteristic of traditional domestic administrative law. The United States provides an example of this phenomenon. While the accountability model has long departed from the transmission-belt type in the development of the U.S. administrative law, the Supreme Court has never formally abandoned the nondelegation doctrine.<sup>102</sup> Instead, it has managed to reinterpret the jurisprudence of nondelegation to allow more models of accountability to evolve to enhance the legitimacy of administrative agencies. This jurisprudence testifies to the role of the principal-agent model in the conception of accountability and legitimacy.<sup>103</sup> Another example of the centrality of the princi-

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100. See Esty, *supra* note 2, at 1518–20, 1521–23 (pointing to structures such as balance of powers and administrative procedural rules as legitimacy-ensuring devices even absent electoral representation).

101. Cohen & Sabel, *supra* note 90, at 773–79.

102. See generally Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297 (2003) (detailing different stances on the nondelegation doctrine and criticizing any idea that the Constitutional question has been fully resolved); see also Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975) (noting the limited application of the nondelegation doctrine to only two cases, both in 1935, but also noting intense advocacy by some academics for its revival).

103. See Alexander & Prakash, *supra* note 102 (commenting on the ultimate question of nondelegation as to whether a legislative grant of power to an executive agency creates any analog to a principal-agent relationship). For a theoretical discussion on the grip of the principal-agent model in the conception of accountability and legitimacy, see Cohen & Sabel, *supra* note 90, at 774–76.

pal-agent model to administrative law is the *Chevron* doctrine.<sup>104</sup> Considered one of the most influential decisions in modern U.S. administrative law,<sup>105</sup> *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>106</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 limits of that delegation.”<sup>107</sup> If administrative agencies act without Congressional delegation or beyond the defined limits of delegation by Congress, they will lose the legitimacy in their 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-global constitutionalism through policy rationality and enhanced accountability. To take the policy decisions resulting from deliberation among distinct groups of experts 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

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104. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (creating a doctrinal test for analyzing the legitimacy of agency decisions in light of Congressional intent).

105. See, e.g., Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 188 (2000) (noting the *Chevron* decision as “foundational, even a quasi-constitutional text”); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 823–24 (2006) (pointing out that *Chevron* is “the most cited case in modern public law” and “one of the most important rulings in the past quarter century in American public law”).

106. *Chevron*, 467 U.S. at 843. It should be noted that even under such circumstances, it does not mean that the agency has carte blanche in interpreting statutes. Instead, agency interpretations must be reasonable.

107. *Id.* at 865. For how the Supreme Court subsequently reinterpreted *Chevron* and limited its scope of application by an implicit invocation of the nondelegation doctrine, see Sunstein, *supra* note 105, at 244–47.

public. For a multilayered, reason-centered global administration to self-legitimate its own decisions, however, requires more than accessibility and transparency of its policy deliberations to the citizenry. Here comes the second part of the presumption behind the assumption of self-legitimizing the small-c global constitutionalism through policy rationality and enhanced accountability: a correspondence between the global administration and public concerns is also needed. A multilayered global regulatory regime self-legitimizes its decisions only inasmuch as the “heavily-committed true believers” sitting on the myriad “epistemic committees” involved in global administration can be considered trustees of the general citizenry.<sup>108</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 characterized by a heavily-committed true belief in the rational and reasonable solution of public issues regardless of who makes the decision.<sup>109</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 those presumptions comes close to an attempt to “rationalize” the status quo of global governance, which is oriented toward rational and reasonable policy choices.<sup>110</sup> In sum, the incor-

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108. See Shapiro, *supra* note 95, at 373–74 (questioning the model of governance based on “networks consist[ing] of professionals, specialists, and heavily-committed true believers”). According to Cohen and Sabel, a trustee-based model of accountability turns out to generate unaccountability. See Cohen & Sabel, *supra* note 90, at 776–77.

109. See von Bogdandy, *supra* note 6, at 238 (“practical reason”); Cassese, *supra* note 7, at 691 (suggesting scientific rationality); see also Gráinne de Búrca & Oliver Gerstenberg, *The Denationalization of Constitutional Law*, 47 HARV. INT’L L.J. 243, 247, 254 (2006) (“reason of the thing”).

110. See Shapiro, *supra* note 91, at 346–51 (discussing the drawbacks of technocratic decision-making and critiquing justifications of it); Susan Marks, *Naming Global Administrative Law*, 37 N.Y.U. J. INT’L L. & POL. 995, 997–98 (2005) (questioning the ideology of progress in theorizing the role of global administrative law in global governance); see also B.S. Chimni, *Co-*

poration 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 rationalization of global governance from the issue of its legitimation. As a result, the issue of legitimacy keeps haunting global administrative law.

### B. *Technocratic Constitutionalism Without the People*

In traditional legal thinking centering on a domestic legal system, a constitution is distinguished from the residual body of ordinary legal acts. Related to this conceptual duality is an evaluative duality: first, the legitimacy of ordinary legal acts is translated into the question of constitutionality; second, the legitimacy of constitution itself refers to the conceptual rubric of the constituent power, despite its multiple formations.<sup>111</sup> A constitution's position as "the ultimate rule of recognition" for domestic and international law rests on its origin in the people's lawgiving, constituent power.<sup>112</sup>

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*Option and Resistance: Two Faces of Global Administrative Law*, 37 N.Y.U. J. INT'L L. & POL. 799 (2005) (arguing that global administrative law currently is being shaped by a transnational capitalist class that seeks to legitimize unequal laws and institutions, and that it thus has little potential as a tool of resistance and change). Global administrative law may arguably function as a mechanism of contestation rather than cooption, opening a new front for fighting for justice, see Kingsbury et al., *supra* note 11, at 52–57; Krisch, *supra* note 68, at 263–74. Still, the possibility of contesting the result from the expert-minded, rationality-oriented policy-making mechanism presumes the persona of contestants, who are equally rational and acquire rival expertise.

111. Frank I. Michelman, *Constitutional Legitimation for Political Acts*, 66 MOD. L. REV. 1, 9 (2003); see also Ming-Sung Kuo, *Cutting the Gordian Knot of Legitimacy Theory? An Anatomy of Frank Michelman's Presentist Critique of Constitutional Authorship*, 7 INT'L J. CONST. L. 683, 687 (2009). For different interpretations of constituent power, see THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM (Martin Loughlin & Neil Walker eds., 2007).

112. Ulrich K. Preuss, *The Exercise of Constituent Power in Central and Eastern Europe*, in THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM, *supra* note 111, at 211, 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 a particular constitutional system. For the meaning of ultimate rule of recognition, see *supra* note 66.

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 only rest on state consent. Rather, its legitimacy arises out of a dynamic process in which players in various fields resolve a myriad of issues among themselves in response to functional demands and the norm of efficiency.<sup>113</sup> These commonly accepted solutions can take various forms, including precedents, decisions, and standardized regulations.<sup>114</sup> What is important is that these effective solutions-turned-norms are added with constitutional significance,<sup>115</sup> supplanting national constitu-

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113. See Cohen, *supra* note 56, at 3, 8, 13–15 (noting, but disagreeing with, arguments that the global political order comprises not states but rather sub-state and non-state actors and transnational networks); see also Karl-Heinz Ladeur, *Globalization and the Conversion of Democracy to Polycentric Networks: Can Democracy Survive the End of the Nation State?*, in PUBLIC GOVERNANCE IN THE AGE OF GLOBALIZATION 89, 104 (Karl-Heinz Ladeur ed., 2003) (noting the “breakdown of the traditional pre-individual hierarchical order” and its replacement with a “heterarchical model of the mutual overlapping of differing functional systems”).

114. Cf. Fisher-Lescano & Teubner, *supra* note 49, at 1039–40 (suggesting that “default deference” through “mutual observation” among participants in the global governing network plays a similar role to “stare decisis”). For the constitutionalization of the private standard-setting process, see Harm Schepel, *Constituting Private Governance Regimes: Standards Bodies in American Law*, in TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM, *supra* note 61, at 161, 164–67, 187 (noting that courts have recognized the value of private standard setting, overlooking traditional distinctions between public and private law, and have been willing to promote the “procedural integrity” of such standards bodies); Errol Meidinger, *Law and Constitutionalism in the Mirror of Non-Governmental Standards: Comments on Harm Schepel*, in TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM, *supra* note 61, at 188, 196–97 (arguing that when we recognize the constitutionality of non-governmental standards, we are operating under an implicit theory of constitutionalism that may alter the boundaries of transnational publics).

115. See Cohen, *supra* note 56, at 8 (noting arguments that the global legal system is “constitutionalized”); see also Fischer-Lescano & Teubner, *supra* note 49, at 1014–17 (stating that reflexive norm building becomes constitutional norm building once it begins to parallel the form of a political constitution); Gunther Teubner, “Global Bukovina”: *Legal Pluralism in the World Society*, in GLOBAL LAW WITHOUT A STATE, *supra* note 61, at 3, 7–9 (discussing the characteristics of legal pluralism in global legal system and suggesting the self-constitutionalization of each legal regime); cf. Karl-Heinz Ladeur, *Post-Modern Constitutional Theory: A Prospect for the Self-Organizing Society*, 60 MOD. L. REV. 617, 625–26 (1997) (suggesting that a post-modern constitution be

tions as the “ultimate rule of recognition” in deciding what is law and non-law.<sup>116</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 constitutionalization, blurring the distinction between constitution-making and ordinary law-making.<sup>117</sup>

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 globalization.<sup>118</sup> The global legal regime’s self-legitimation does not take place at the exceptional time of a “constitutional moment.”<sup>119</sup> Rather,

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based on the “pre-constituted” condition of today’s “experimenting society”); *but see* Walter, *supra* note 65, at 195 (arguing that constitutionalization of international law is limited to the “various sectoral regimes, but fails to reach the international community as a whole”).

116. *See supra* note 66 and accompanying text.

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

118. *See* Ladeur, *supra* note 113, 93–97 (discussing institutional forms of globalization); *see also* Ladeur, *supra* note 95, at 46, 50 (stating that the metaphor of the “network” describes the cooperative decision-making process whereby the actors within the EU produce rules and new ways to define the problems to which the rules respond).

119. *See* BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991) (defining “constitutional moments” as moments of creative constitutional change made possible by the convergence of historical forces; key examples in the U.S. context include the Founding, Reconstruction, and New Deal); Dieter Grimm, *Integration by Constitution*, 3 INT’L J. CONST. L. 193, 200–01 (2005) (defining integration as a collective identification with a constitution, and observing that “constitutional moments” might not be the only events that enable constitutions to have integrative power); Joseph H.H. Weiler, *On the*

as the development of global administrative law into small-c global constitutionalism suggests, global constitutionalization is embedded in the routine operation of the institutions involved in global juridification.<sup>120</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 constitutionalization of the global legal regime.<sup>121</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 “deformalized” into the pragmatic calculation of concrete solutions to particular issues.<sup>122</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

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*Power of the Word: Europe's Constitutional Iconography*, in *THE EU CONSTITUTION: THE BEST WAY FORWARD?* 3, 13 (Deirdre Curtin et al. eds., 2006) (discussing the hybrid nature of a European Treaty-Constitution).

120. See Ming-Sung Kuo, *The End of Constitutionalism As We Know It? Boundaries and the State of Global Constitutional (Dis)Ordering*, 1 *TRANSNAT'L LEGAL THEORY* 329, 358–64 (2010) (arguing that in the era of globalization, the consensus that legitimates global constitutionalism emerges incrementally and in an iterative process rather than springing from a single, defined “moment” of constitutional change).

121. See Ladeur, *supra* note 113, at 93–99 (noting the role of the network of public and private actors in contributing to the evolution of global law through a system learning process); Teubner, *supra* note 61, at 15–27 (describing the range of actors whose decision-making contributes to the constitutionalization process).

122. See Cohen, *supra* note 56, at 18–19 (discussing the displacement of “hard” law with “soft” rulings in “decentered ‘imperial sovereignty’”); Martti Koskeniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization*, 8 *THEORETICAL INQUIRIES L.* 9, 20–21 (2007) (commenting on the “deformalization” of formal rules to adapt to changing circumstances); Teubner, *supra* note 61, at 24–27 (discussing the relationship of non-legal rulemaking to the formal legal system). For the relationship between Schmittian autonomy of the political and the concept of constituent power, see generally Ernst-Wolfgang Böckenförde, *The Concept of the Political: A Key to Understanding Carl Schmitt's Constitutional Theory*, 10 *CAN. J. L. & JURISPRUDENCE* 5 (1997).

are the core of global constitutionalism.<sup>123</sup> Even so, global constitutionalism is not merely a sort of cosmopolitan morality. Rather, it envisages a political order, which results from the juridification of global governance.<sup>124</sup> On this view, the world not only becomes interdependent and globalized but is also effectively ordered in accordance with a set of shared norms. In the face of an elusive 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>125</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 constitutionalized.<sup>126</sup> They are the model world citizens who realize how

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123. See, e.g., Alec Stone Sweet & Jud Matthews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 73 (1998) (explaining the adoption of proportionality analysis—a principle used by many major democracies in constitutional rights determination—as a centrepiece of global constitutionalism).

124. See Preuss, *supra* note 6, at 41–49 (discussing the power relationships of states to one another within intergovernmental organizations, present and future). For views on the nature of the relationship between the juridification/legalization of international relations and the rise of global constitutionalism, see Dieter Grimm, *The Constitution in the Process of Denationalization*, 12 CONSTELLATIONS 447, 458–59 (2005); Dieter Grimm, *The Achievement of Constitutionalism and Its Prospects in a Changed World*, in THE TWILIGHT OF CONSTITUTIONALISM, *supra* note 8, at 3, 19; Martin Loughlin, *What is Constitutionalisation?*, in THE TWILIGHT OF CONSTITUTIONALISM, *supra* note 8, at 47, 61.

125. 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*. Von Bogdandy, *supra* note 6, at 233. 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.” *Id.* at 237. For a consideration of the potential nature and results of the existence of such a global *demos*, see Cohen & Sabel, *supra* note 90, at 796–97.

126. Cf. Gunther Teubner, *Global Private Regimes: Neo-Spontaneous Law and Dual Constitution of Autonomous Sectors?*, in PUBLIC GOVERNANCE IN THE AGE OF GLOBALIZATION, *supra* note 113, at 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”).

making polices 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 legitimizing the small-c global constitutionalism underpinned by global administrative law, while “sectoralism” seems to dominate the discourse on the juridification of and the corresponding constitutionalization of global governance.<sup>127</sup>

While the values cherished in global administrative law are widely accepted, how they are implemented and translated into diverse administrative fields is not beyond contestation. “Who governs and how,” the central issue concerning the legitimacy and organization of power, not only looms in the creation of values but also in their articulation and implementation.<sup>128</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>129</sup> In contrast, the small-

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127. Compare Harold J. Berman, *The Western Legal Tradition in a Millennial Perspective: Past and Future*, 60 LA. L. REV. 739, 763 (2000) (indicating that in order to form “world legal tradition,” legal cultures and traditions will need to commit to integration and to examine their belief systems in order for the “forces of world integration . . . to overcome the forces of disintegration”), with JOHN P. MCCORMICK, WEBER, HABERMAS, AND TRANSFORMATIONS OF THE EUROPEAN STATE: CONSTITUTIONAL, SOCIAL AND SUPRANATIONAL DEMOCRACY 231–86 (2007) (theorizing how the new constitutional democratic model of Europe that goes beyond the nation-state tradition can build up in distinct social and functional “sectors”); see also Cassese, *supra* note 7, at 679–80 (explaining that the global legal order adapts to sectoral functions rather than following a uniform model).

128. Compare Cassese, *supra* note 7, at 692–94 (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, *supra* note 95, at 377 (“[W]ho governs and how remain the central and pressing questions . . . in the [global] age of governance. The answers, however, are likely to be more complex.”); see also Krisch & Kingsbury, *supra* note 27, at 10 (noting the contest of constituencies in global governance); Krisch, *supra* note 68, at 274–77 (on the difficulties posed by pluralism in global administrative law).

129. See generally ANDREW ARATO, CIVIL SOCIETY, CONSTITUTION, AND LEGITIMACY (2000) (assessing the creation and legitimation of constitutional regimes in Eastern Europe after the dissolution of the Soviet Union). To the extent that judicial landmark decisions stand as the lode star for government

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 constitutionalization, 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>130</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 constitutionalization. The technocratic nature of global administrative law as small-c global constitutionalism aggravates the issue of legitimacy in global governance.

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

As indicated in the preceding two parts of this Section, global administrative law as small-c global constitutionalism is faced with the fundamental challenge of legitimacy, which in conjunction with the question of legality, constitutes the double challenges facing global administrative law. The idea

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agencies and individuals to refer to in making decisions, the judiciary may be seen as another embodiment of "We the People." See, e.g., MIGUEL POIARES MADURO, *WE THE COURT: THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN ECONOMIC CONSTITUTION—A CRITICAL READING OF ARTICLE 30 OF THE EC TREATY* (1998) (arguing that decisions by the ECJ generally represent European majority interests). Still, a distinction needs to be drawn, at least in theory: a judicial interpretation to substantiate the general clause of the constitution and one that substitutes for a statutory or even constitutional provision. See Zenon Bankowski et al., *Rationales for Precedent*, in *INTERPRETING PRECEDENTS: A COMPARATIVE STUDY* 481 (D. Neil MacCormick & Robert S. Summers eds., 1997) (distinguishing between a common-law rationale for respecting precedent and a more "pluralistic approach"); ACKERMAN, *supra* note 119, at 86–94 (discussing a "preservationist" judiciary in constitutional democracy).

130. Cf. Neil Walker, *Post-Constituent Constitutionalism? The Case of the European Union*, in *THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM*, *supra* note 111, at 247, 261 (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).

of publicness is thus invoked not only to address the issues surrounding legitimacy but also to answer the question of legality with respect to global administrative law as small-c global constitutionalism. It remains to be seen whether the double challenges facing global administrative law are thus fully addressed. The invocation of the idea of publicness as the redress to the challenges of legitimacy and legality, however, suggests a post-public concept of legitimacy.

Based on my preceding analysis, two features of global administrative law as small-c global constitutionalism deserve special mention. First, global administrative law 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 constitutionalization of politics, scholarship on global administrative law undergoes its own process of constitutionalization, recharacterizing 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, because of its embeddedness 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 parts of Section 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>131</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>132</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 persua-

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131. See Kuo, *supra* note 18, at 997 (discussing the “twofold challenge” of legality and legitimacy faced by global administrative law).

132. Andreas Paulus, *Jus Cogens in a Time of Hegemony and Fragmentation: An Attempt at a Re-appraisal*, 74 *NORDIC J. INT'L L.* 297, 333 (2005).

sions to settle on concerning 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>133</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 echoes recent developments in international law ending the Hobbesian era of international relations, state consent is not the solution to, but instead the problem of, the world order. Grounded by state consent, traditional international law fell prey to state sovereignty.<sup>134</sup> Against this backdrop, global administrative law is conceived of as unhinged from state consent.<sup>135</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, Benedict Kingsbury, who is a pioneer in the project on global administrative law, has invoked the notion of publicness as the solution to the double challenges facing global administrative law.<sup>136</sup> Inspired by H.L.A. Hart's social fact conception of law, Kingsbury interprets global administrative law as based on the

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133. See Erika de Wet, *The Prohibition of Torture as an International Norm of jus cogens and Its Implications for National and Customary Law*, 15 EUR. J. INT'L L. 97, 102 n.24 (2004) (finding that international enforcement of *jus cogens* violations by national states is still disputed).

134. See Preuss, *supra* note 6, at 22–28 (finding “a tension between the status of membership and independence” of sovereign states vis-à-vis international bodies).

135. See, e.g., Krisch & Kingsbury, *supra* note 27, at 10 (arguing that “too much of [global governance] operates outside the traditional binding forms of law”).

136. See generally Kingsbury, *Concept of “Law,” supra* note 11, at 31–33 (emphasizing publicness as an element of global governance); Benedict Kingsbury, *International Law as Inter-Public Law*, in MORAL UNIVERSALISM AND PLURALISM 167, 175–85 (Henry S. Richardson & Melissa S. Williams eds., 2009) (arguing that publicness is a salient structural element of international law); Benedict Kingsbury & Lorenzo Casini, *Global Administrative Law Dimensions of International Organizations Law*, 6 INT'L ORG. L. REV. 319 (2009) (identifying publicness as a method of legitimizing international organization decision-making).

practice of global governance.<sup>137</sup> Moreover, he reads Hart's social fact conception of law 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, he extends the rule of recognition at the heart of Hart's legal theory to include the notion of publicness.<sup>138</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>139</sup> Thus, a law that answers to publicness rests on a more solid normative ground than a pure Hartian conception of law,<sup>140</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, Kingsbury embeds the substantive notion of publicness in the practices of law.<sup>141</sup> Notably, he does not situate the underlying idea of publicness of global administrative law 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 "fit" between Hart's social fact conception of law and the reality of global administrative law.<sup>142</sup> Publicness is understood as "what is intrinsic to public law as generally understood."<sup>143</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, Kingsbury argues that the attributes, constraints, and normative commitments associated with publicness are "immanent in public law."<sup>144</sup>

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137. See Kingsbury, *Concept of "Law," supra* note 11, at 29–31 (arguing that the decisions made by global governance entities may gain legitimacy by reference to the normative elements of public law).

138. *Id.* at 30.

139. *Id.* at 31.

140. *Id.* at 31–32.

141. *Id.* at 31.

142. For the idea of "fit" in legal interpretation, see RONALD DWORIN, *LAW'S EMPIRE* 255–56 (1986).

143. Kingsbury, *Concept of "Law," supra* note 11, at 30.

144. *Id.*

Adding the normative notion of publicness to the components of the Hartian rule of recognition concerning global administrative law, Kingsbury reconstructs Hart's positivism in light of Fuller's concept of "inner morality of law."<sup>145</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 decentered 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, Kingsbury's 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>146</sup>

It remains yet to be further analyzed 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 decentered. 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, and third parties without direct interests.<sup>147</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>148</sup> the carrying out of the notion of publicness cannot be dictated

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145. *See id.* at 38–40.

146. *See id.* at 39–40 (analogizing the legitimacy of global administrative law to that of U.S. administrative law).

147. *See* Kingsbury & Casini, *supra* note 136, at 353–54 (providing examples of public entities).

148. Kingsbury, *Concept of "Law," supra* note 11, at 31.

by regulators. Rather, it must result from the values that the members, or rather, interested parties, of a particular regulatory regime, i.e., the regulatory public, hold in common. In other words, publicness is associated with the public to which a particular regulatory regime relates.<sup>149</sup> In the absence of a global public, however, the publics are decentered 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>150</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>151</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>152</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 pri-

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149. *See id.* at 56 (“In relation to any particular entity . . . what it means to be a ‘public’ entity would routinely be evaluated by reference to the relevant entity’s legal and political arrangements . . .”).

150. *See id.* (describing different ways in which publics can comprise regulatory entities).

151. *See id.*

152. *Id.* (noting the generation of conflicts of laws arrangements in the public law sphere in global governance).

vate clubs than to real public communities in which the idea of publicness is expected to thrive.<sup>153</sup>

Specifically, the public community in which the idea of publicness underlies the law is jurisgenerative.<sup>154</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>155</sup> In contrast, the architecture of global administrative 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 organization 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 centering the carrying out of publicness on the public entities, this conception of global administrative law is jurispathic.<sup>156</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

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153. See Thorsten Benner et al., *Multisectoral Networks in Global Governance: Towards a Pluralistic System of Accountability*, 39 *GOV'T & OPPOSITION* 191, 195 (2004) (describing the growing power of non-democratic transnational organizations and the sidelining of members of state legislatures in global policymaking).

154. See Robert Cover, *The Supreme Court, 1982 Term-Foreword: Nomos and Narrative*, 97 *HARV. L. REV.* 4, 25–40 (1983) (describing the process by which communities create their ruling principles); see also Ming-Sung Kuo, *Between Law and Language: When Constitutionalism Goes Plural in a Globalising World*, 73 *MOD. L. REV.* 858, 879–80 (2010) (book review) (discussing the jurisgenerative process and its relation to language).

155. See generally Cover, *supra* note 154.

156. Kuo, *supra* note 18, at 1002.

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>157</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>158</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>159</sup>

To sum up, to the extent that publicness is attributed to the diverse practices in regulatory regimes, the conception of global administrative law laid out thereby reflects a privatized, post-public view of legitimacy.<sup>160</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 centered on negotiations over the weight of these diverse practices concerning publicness.<sup>161</sup> It turns out that these negotiations depend on those informed but privileged

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157. Kingsbury, *Concept of “Law,”* *supra* note 11, at 51–52.

158. *See id.* at 27 (insisting that global administrative law theories assess the weight given to different public entities); Kuo, *supra* note 18, at 1003 (integrating Kingsbury’s “weight” requirement into the author’s understanding of global administrative law).

159. Kuo, *supra* note 18, at 1003.

160. *Id.* at 1002–04.

161. *See id.* at 1003 (“[A]t the core of global administrative law as an inter-public law is a ‘weighing’ of the norms emerging from . . . different power-exercising public entities.”).

global actors' views toward individual regulatory regimes, pointing to a post-public legitimacy.

#### IV. CONCLUSION

The field of global governance has caught the attention of 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 center stage in globalization 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 regulatory 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 globalization 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 paradigmatic example of the international legal system in the post-Westphalian age. Moreover, echoing the trends toward constitutionalization, 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 rise to the surface. On the one hand, to depart from the Westphalian system of international law, global administrative law is conceived in the prac-

tices of global governance. Yet, the practice-embedded feature of global administrative law raises the question of legality. It is unclear how to distinguish between law and non-law 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 non-law 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 privatization of legitimacy.<sup>162</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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162. *See id.* at 1003–04 (summarizing Kingsbury’s conception of global administrative law as one that turns on the norms of individual regulatory regimes).