

## Article

# Taking Global Constitutionalism Seriously: A Framework for Discourse

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### ABSTRACT

*Globalization leads to many issues, for example the rise of global constitutionalism. How do we perceive the rise of global constitutionalism? What is the best way for us to understand the proper role that the global constitutionalism can play in the globalizing world? The main purpose of this paper is to argue that scholars should take the rise of global constitutionalism more seriously, and propose a “framework for discourse” for ameliorating the effect of grasping the global constitutionalism. This “framework for discourse” is based on a macroscopic and structural-functional approach. Structurally analyzing, on one hand, this paper asserts that scholars should treat the rise of global constitutionalism as an umbrella paradigm of the overall architecture of constitutionalism, so that it may unite different discourses about global constitutional order. On the other hand, relying on a functional observation, this paper claims that because efforts for taking global constitutionalism as an instant project-in-practice are premature, scholars might*

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*perceive global constitutionalism as a mindset for mapping a Global Republic of Constitutionalism (GROC). Under the influence of this mindset, some critical concerns with mapping a Global Republic of Constitutionalism must be taken into account, including those concerns in respect to the Republic's foundation, configuration, and limitation.*

**Keywords:** *Globalization, Global Constitutionalism, Framework for Discourse, Umbrella Paradigm, Mindset, Global Republic of Constitutionalism*

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## I. INTRODUCTION

Like it or not, it is evident that the world is rapidly being globalized with increasing interdependence.<sup>1</sup> Under this circumstance, the world has become far more fluid and messy.<sup>2</sup> A number of global developments have taken place to accommodate for this unprecedented situation, and undoubtedly, the constitutional globalization is surely one of the most significant developments.<sup>3</sup> Amongst various intellectual responses to the trend of constitutional globalization, global constitutionalism is remarkably prominent.<sup>4</sup> As such, to some extent, global constitutionalism seems to be an emerging paradigm in the constellation of constitutionalist.

The thing that the emerging paradigm of global constitutionalism does not assume a dominant role in the system of constitutionalism reveals another fact. That is, the old paradigm of national constitutionalism, which has been embedded in the regime of Westphalian sovereignty, is still robust. This Westphalian regime, which consists of three elements- the sovereign equality, mutual non-interference, and state consent,<sup>5</sup> has lasted for almost 300 years, beginning from the Treaty of Westphalia of 1648 to the formation of the United Nations in 1945.<sup>6</sup> Since the end of the Cold War in 1990, however, the traditional statehood, or the notion of state sovereignty, has been eroded by the global spread of international organizations. Because nation-states have to cede a certain amount of sovereign power to international organizations, their national constitutions no longer hold the monopoly of public power within their national territories. Simply put, the classical paradigm of national constitutionalism has been robust but erosive.

Juxtaposing these two scenarios, it is evident that the emerging paradigm of global constitutionalism coexists with the old paradigm of national constitutionalism. As such, the overall architecture of constitutionalism is expanding its magnitude. How do we perceive the rise of global constitutionalism? What is the best way for us to understand the

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1. Maximilian Feldman, *The Domestic Implementation of International Regulations*, 88 N.Y.U. L. REV. 401, 404 (2013); Nicolas Carrillo-Santarelli, *Enhanced Multi-Level Protection of Human Dignity in a Globalized Context through Humanitarian Global Legal Goods*, 13 GERMAN L.J. 829, 872 (2012); Rex D. Glensy, *The Use of International Law in U.S. Constitutional Adjudication*, 25 EMORY INT'L L. REV. 197, 212 (2011).

2. Harold Hongju Koh, *Remarks: Twenty-First-Century International Lawmaking*, 101 GEO. L.J. 725, 745 (2013).

3. Gary Jeffrey Jacobsohn, *Constitutional Values and Principles*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 777, 789 (Michael Rosenfeld & András Sajó eds., 2012).

4. Christian Volk, *Why Global Constitutionalism Does Not Live up to Its Promises*, 4 GOETTINGEN J. INT'L L. 551, 553 (2012).

5. Tom Ginsburg, *Eastphalia as the Perfection of Westphalia*, 17 IND. J. GLOBAL LEGAL STUD. 27, 29 (2010).

6. Dieter Grimm, *Types of Constitutions*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW, *supra* note 3, at 98, 130.

proper role that the global constitutionalism can play in the globalizing world? The main purpose of this paper is to argue that scholars should take the rise of global constitutionalism more seriously, and propose a “framework for discourse” for ameliorating the effect of grasping the global constitutionalism. What this framework adopts is a macroscopic and structural-functional approach. Structurally analyzing, on the one hand, this paper asserts that scholars should treat the rise of global constitutionalism as an umbrella paradigm of the overall architecture of constitutionalism, so that it may unite different discourses about global constitutional order. On the other hand, based on a functional observation, this paper claims that because taking global constitutionalism as an instant project-in-practice is premature, it is better for scholars to perceive global constitutionalism as a mindset for mapping a Global Republic of Constitutionalism (GROC).

This paper is divided into five sections. After a brief introduction in Part I, Part II epitomizes four models of current discourses of global constitutionalism to demonstrate the rise of global constitutionalism, and then describes the general background of the “framework for discourse.” Part III argues that we should take the rise of global constitutionalism more seriously, and regard it as an umbrella paradigm for the evolving architecture of constitutionalism. Part IV explicates the reasons why scholars should treat global constitutionalism as a mindset for mapping the Global Republic of Constitutionalism, and addresses some critical concerns about establishing Global Republic, including those concerns with respect to the Republic’s foundation, configuration, and demarcation. Finally, the paper concludes with making some further suggestions for “We the Global Scholars” to advance the global constitutionalism discourses.

## II. FOUR MODELS OF EXISTING GLOBAL CONSTITUTIONALISM: AN OVERVIEW

As a novel concept, there are many variations on global constitutionalism. Authors have tried to categorize them under various typologies. For instance, the editors of the *Global Constitutionalism*, which was first published in 2012, classify those contributions into three schools: functionalist, normative, and pluralist.<sup>7</sup> Indeed, the categorization is concise. However, they overvalue the methodology or research approach that scholars adopt. As a result, readers find it hard to grasp the core concept of each school. Another kind of typology has been proposed by Christine Schwöbel. She divides the perspectives of global constitutionalism into four

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7. Antje Wiener, Anthony F. Lang Jr., James Tully, Miguel Poiars Maduro & Mattias Kumm, *Global Constitutionalism: Human Rights, Democracy, and the Rule of Law*, 1 GLOBAL CONSTITUTIONALISM 1, 6-10 (2012).

dimensions: social, institutional, normative, and analogical.<sup>8</sup> Each dimension represents a subtype of global constitutionalism. Schwöbel's classification is broad indeed; however, it incorporates some irrelevant, at least not central, issues into the constellation of global constitutionalism, such as social constitutionalism and analogical constitutionalism.

By generally browsing the contributions concerning the issues of global constitutional order, this paper tentatively categorizes the literature into four ideal-type models: text-based, jurisdiction-based, norm-based, and rights-based.

#### A. *Text-Based Model of Global Constitutionalism*

The text-based model of global constitutionalism involves those contributions focusing on the constitutional text. In other words, authors who adopt the text-based model hold the view that the global widespread development of constitutional text can be regarded as global constitutionalism. This model encompasses two subtypes: the first one includes researches concerning with *the global spread of written constitution* and *the global trend of constitutional structure*; the second one refers to *the global debate over the existence of a world constitution*.

Visionaries that support the first subtype have addressed the global prevalence of the written constitution. Alec Stone Sweet and Jud Mathews, for example, depict that out of 194 state constitutions, 190 have written constitutions except Bhutan, Israel, New Zealand, and the United Kingdom.<sup>9</sup> On the other hand, according to David S. Law and Mila Versteeg, the global convergence of constitutional structure from 1946 to 2006 has been manifested by three trends: a tendency to guarantee an increasing number of rights, the spread of judicial review, and the existence of generic constitutional rights.<sup>10</sup> Law and Versteeg have also found that, from 1946 to 2006, the global development of ideology embedded in state constitutions appears to have been converging upon one of the two competing constitutional paradigms, namely libertarian constitution or statist constitution, but these two paradigms themselves are not converging upon each other.<sup>11</sup>

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8. Christine E. J. Schwöbel, *Organic Global Constitutionalism*, 23 LEIDEN J. INT'L L. 529, 530 (2010); Christine E. J. Schwöbel, *The Appeal of the Project of Global Constitutionalism to Public International Lawyers*, 13 GERMAN L.J. 1, 4 (2012).

9. Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSN'L L. 72, 85, 132 (2008) (Sweet and Mathews emphasize that by 1990s, the basic formula of the new constitutionalism contains three elements, that is, a written constitution, a charter of rights, and a review mechanism to protect rights).

10. David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CAL. L. REV. 1163, 1194-1200 (2011).

11. *Id.* at 1246.

The second subtype of the text-based model focuses on debating over the necessity of crafting a global written constitution. Opponents of this subtype mainly consist of those who are legal pluralists or constitutional pluralists who unequivocally reject any plan for a world government or a global constitution. Conversely, there are more and more commentators who recognize the necessity of a world government along with a global constitution. Some proponents have dedicated themselves to reforming the United Nation Charter since 1960s, such as Greville Clark and Louis Sohn's world federalist model,<sup>12</sup> Saul H. Mendlovitz's global constitutional government,<sup>13</sup> Pierre-Marie Dupuy's prediction for a promising world constitution based on the reforms of the U.N. Charter,<sup>14</sup> and especially Bardo Fassbender's persistent advocacy of considering the U.N. Charter as the global constitution.<sup>15</sup> But some other proponents such as Michael W. Doyle,<sup>16</sup> who argues for a global constitution, deny the constitutional status of the U.N. Charter by highlighting that the U.N. Charter is just a treaty in essence. Based on the rejection of recognizing the U.N. Charter as a global constitution, Fredrick J. Lee suggests that the world needs some form of world government<sup>17</sup> in order to overcome the global difficulties of collective action. Under this scenario, crafting a global constitution will become an inevitable task.

#### B. *Jurisdiction-Based Model of Global Constitutionalism*

Scholars who adopt the jurisdiction-based model of global constitutionalism lay emphasis on the global spread of judicial power, especially the power of constitutional interpretation. In a nutshell, they

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12. Samuel S. Kim, *In Search of Global Constitutionalism*, in THE CONSTITUTIONAL FOUNDATIONS OF WORLD PEACE 55, 56 (Richard A. Falk, Robert C. Johansen & Samuel S. Kim eds., 1993).

13. Richard A. Falk, Robert C. Johansen & Samuel S. Kim, *Global Constitutionalism and World Order*, in THE CONSTITUTIONAL FOUNDATIONS OF WORLD PEACE, *id.* at 3, 4.

14. See Pierre-Marie Dupuy, *The Constitutional Dimension of the Charter of the United Nations Revisited*, 1 MAX PLANCK Y.B.U.N.L. 1 (1997).

15. Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUM. J. TRANSN'L L. 529 (1998); Bardo Fassbender, *The Meaning of International Constitutional Law*, in TRANSNATIONAL CONSTITUTIONALISM-INTERNATIONAL AND EUROPEAN MODELS 303, 308 (Nicholas Tsagourias ed., 2007); Bardo Fassbender, *Rediscovering a Forgotten Constitution: Notes on the Place of the UN Charter in the International Legal Order*, in RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE 133 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009); BARDO FASSBENDER, THE UNITED NATIONS CHARTER AS THE CONSTITUTION OF THE INTERNATIONAL COMMUNITY 77-115 (2009); See Thomas Kleinlein, *Alfred Verdross as a Founding Father of International Constitutionalism?*, 4 GOETTINGEN J. INT'L L. 385, 406 (2012) (Thomas Kleinlein admits that in the present debate, Fassbender stands out among defenders of a constitutionalist approach to the U.N. Charter).

16. Michael W. Doyle, *The UN Charter-A Global Constitution?*, in RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE, *id.* at 113, 113.

17. Fredrick J. Lee, *Global Institutional Choice*, 85 N.Y.U. L. REV. 328, 329, 357 (2010).

regard global constitutionalism as the global spread of judicial power. Contributions pertaining to this mode can be further divided into three subtypes: (1) *the global prevalence of the judicial review institution*; (2) *the global spread of judicial dialogue*; and (3) *the global diffusion of judicial interpretive method*.

Firstly, some constitutional scholars are interested in the global prevalence of the judicial review institutions. Based on empirical studies, other contributors provide their observations. Tom Ginsburg shapes the prevailing process as three waves: the founding period (1803-1945), the second wave (1945-1989), and the third wave (1989- ).<sup>18</sup> Miguel Schor characterizes the process as two main phases: federalism-driven period (1787-1945) and the human rights-driven period (1945- ).<sup>19</sup> Ruthann Robson provides an empirical estimation: out of 193 states, 164 have some form of judicial review.<sup>20</sup> Law & Versteeg show that in 1946, only 35 percent of nations established either de jure or de facto judicial review, but by 2006, 87 percent had the institution of judicial review.<sup>21</sup> From the theoretical perspective, on the other hand, Tom Ginsburg provides his viewpoint that the proliferation of judicial review institution in emerging democracies would be theorized as the insurance model of judicial review.<sup>22</sup> Ran Hirsch renders another theoretical explication, which he calls “interest-based hegemonic preservation thesis”,<sup>23</sup> stating that the prevalence of judicial review results from a strategic tripartite pact among hegemonic political elites, economic elites, and the constitutional court.<sup>24</sup> Political elites bolster the establishment of judicial review because they believe the Court will protect their interests.

Secondly, some commentators hold the view that global constitutionalism can be illustrated by the global development of judicial dialogue. For example: Claire L’Heureux-Dube, the former Justice of the Supreme Court of Canada, argues that thanks to the globalization of the judicial world or legal community, mutual influence between courts has

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18. TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES-CONSTITUTIONAL COURTS IN ASIAN CASES 90-105 (2003) [hereinafter GINSBURG, JUDICIAL REVIEW]; Tom Ginsburg, *The Global Spread of Constitutional Court*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 81, 82-88 (Keith E. Whittington, R. Daniel Kelemen & Gregory A. Caldeira eds., 2010) [hereinafter Ginsburg, *Global Spread*].

19. Miguel Schor, *Mapping Comparative Judicial Review*, 7 WASH. U. GLOBAL STUD. L. REV. 257, 261-65 (2008).

20. Ruthann Robson, *Judicial Review and Sexual Freedom*, 30 U. HAW. L. REV. 1, 4-5 (2007).

21. Law & Versteeg, *supra* note 10, at 1199.

22. GINSBURG, JUDICIAL REVIEW, *supra* note 18, at 25 (contending that judicial review in emerging democracies can be used to serve as a form of insurance to prospective electoral losers in constitutional bargain).

23. RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 214 (2004).

24. Schor, *supra* note 19, at 267.



changed from reception to dialogue.<sup>25</sup> And empirically, as Luis Roberto Barroso describes, constitutional courts around the world have engaged in a growing constitutional dialogue via mutual citation and academic interchange.<sup>26</sup> Some other scholars support the trend of global judicial dialogue, such as Michael Kirby,<sup>27</sup> Mellisa A. Waters,<sup>28</sup> Nicholas M. Mclean,<sup>29</sup> and Jeremy Waldron.<sup>30</sup>

However, some opponents refute the trend of global judicial dialogue, or even object to any borrowing from foreign constitutional experience.<sup>31</sup> David S. Law and Wen-Chen Chang, for example, argue against the existence of judicial dialogue by exemplifying the case between Canadian Supreme Court and the South African Constitutional Court. According to Law and Chang, the Justices of the South African Constitutional Court cited Canadian Supreme Court decisions on a collective total of 850 occasions from 1995 to 2009, but Justices of Canadian Supreme Court, over the same period of time, cited decisions of the South African Constitutional Court only three times.<sup>32</sup> A similar scenario occurred in Taiwan's Constitutional Court during the period from 1949 to 2008.<sup>33</sup> For Law and Chang, this lopsided interchange might be more accurately described as a monologue (one-way transmission) than a dialogue (mutual communication).

Finally, Academic contributions with regard to the third subtype of the jurisdiction-based model usually consider global constitutionalism as the global diffusion of judicial interpretive methods, especially when they focus on the worldwide development of the principle of proportionality or proportionality analysis (PA). PA is an argumentation framework initiated for dealing with intra-constitutional tensions.<sup>34</sup> There might even be an origin in Anglo-American legal tradition.<sup>35</sup> Most commentators are convinced that it

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25. Claire L'Heureux-Dube, *The Importance of Dialogue: Globalization and International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 17 (1998).

26. Luis Roberto Barroso, *Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse*, 35 BOSTON C. INT'L & COMP. L. REV. 331, 343 (2012).

27. Michael Kirby, *Transnational Judicial Dialogue, Internationalisation of Law and Australian Judges*, 9 MELB. J. INT'L L. 171 (2008).

28. Mellisa A. Waters, *The Future of Transnational Judicial Dialogue*, 104 AM. SOC'Y INT'L PROC. 465 (2010).

29. Nicholas M. Mclean, *Intersystemic Statutory Interpretation in Transnational Litigation*, 122 YALE L.J. 303-13 (2012).

30. JEREMY WALDRON, "PARTLY LAWS COMMON TO ALL MANKIND": FOREIGN LAW IN AMERICAN COURTS 109-41 (2012).

31. E.g., Antonin Scalia, the Justice of the U.S. Supreme Court, is considered to be the most vocal opponent of borrowing foreign constitutional law. See Moshe Cohen-Eliya & Gila Stopler, *Probability Thresholds as Deontological Constraints in Global Constitutionalism*, 49 COLUM. J. TRANSN'L L. 75, 113 (2010).

32. David S. Law & Wen-Chen Chang, *The Limits of Global Judicial Dialogue*, 86 WASH. L. REV. 523, 532-33 (2011).

33. *Id.* at 557.

34. Sweet & Mathews, *supra* note 9, at 90.

35. Bonafede's analysis reveals that in Anglo-American tradition, some legal concepts and cases

was founded in German jurisprudential context. As such, PA has been regarded as one contribution of the German experience to global constitutionalism.<sup>36</sup> As being consolidated in German tradition through the process of constitutionalization in 1960s,<sup>37</sup> PA has been widely adopted not simply by national constitutional courts around the world in the past decades, such as those countries in the European continent, Commonwealth system, post-Communist constellation, East Asian democracies, and even in the United States, but also by the judges sitting on powerful international courts, including the European Court of Justice (ECJ), the European Court of Human Rights (ECtHR), and the Appellate Body of the World Trade Organization.<sup>38</sup> According to Sweet and Mathews, PA is both a global constitutional standard and a fundamental element of global constitutionalism to date.<sup>39</sup> Thanks to this critical status, more scholars have concentrated their energy on the relevant issues<sup>40</sup> of the principle of proportionality. The following description by Vlad Perju may explain the

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would implicate the principle proportionality, such as the Christian just war, Caroline doctrine (resulting from the Caroline incident in 1837-1841) and so forth. See Michel C. Bonafede, *Here, There, and Everywhere: Assessing the Proportionality Doctrine and U.S. Uses of Force in Response to Terrorism after the September 11 Attacks*, 88 CORNELL L. REV. 155, 163-64, 166 (2002); Eric Engle also depicts that the Magna Charta is the legal source of the principle of proportionality in British and U.S. common law. See Eric Engle, *The History of the General Principle of Proportionality: An Overview*, 10 DARTMOUTH L.J. 1, 7 (2012).

36. Sweet & Mathews, *supra* note 9, at 98.

37. The German Federal Constitutional Court (GFCC) established the principle of proportionality via some constitutional rulings. In 1958, the GFCC finished the three tests of the principle of proportionality—suitability, necessity (or the least-restrictive means, LRM), and balancing in the strict sense (or proportionality in the narrow sense)—by handing out the leading case of *Apothekenurteil*. In 1968, the GFCC declared the principle of proportionality to be “transcendent standard for all state action, and thus binding all public authorities. Undergoing these processes, the principle of proportionality was consolidated in German constitutionalism”. See Sweet & Mathews, *supra* note 9, at 108, 110.

38. Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797, 799 (2011); Sweet & Mathews, *supra* note 9, at 75.

39. Sweet & Mathews, *supra* note 9, at 80, 161.

40. See, e.g., Mads Andenas & Stefan Zleptnig, *Proportionality and Balancing in WTO Law: A Comparative Perspective*, 20 C.A.M.B. REV. INT’L AFF. 71, 71-77 (2007); Mads Andenas & Stefan Zleptnig, *Proportionality: WTO Law: In Comparative Perspective*, 42 TEXAS INT’L L.J. 371 (2007); Barbara J. Flagg, *In Defense of Race Proportionality*, 69 OHIO ST. L.J. 1285 (2008); Tor-Inge Harbo, *The Function of the Proportionality Principle in EU Law*, 16 EUR. L.J. 158 (2010); William W. Berry III, *Separating Retribution from Proportionality: A Response to Stinneford*, 97 VA. L. REV. BRIEF 61 (2011); William W. Berry III, *Practicing Proportionality*, 64 FLA. L. REV. 687 (2012); Bernhard Schlink, *Proportionality in Constitutional Law: Why Everywhere but Here?*, 22 DUKE J. COMP. & INT’L L. 291 (2012); Evan J. Criddle, *Proportionality in Counterinsurgency: A Relational Theory*, 87 NOTRE DAME L. REV. 1073 (2012); Nancy Gertner, *On Competence, Legitimacy, and Proportionality*, 160 U. PA. L. REV. 1585 (2012); Youngjae Lee, *Why Proportionality Matters*, 160 U. PA. L. REV. 1835 (2012); Richard A. Bierschbach, *Proportionality and Parole*, 160 U. PA. L. REV. 1745 (2012); Gregory S. Schneider, *Sentencing Proportionality in the States*, 54 ARIZ. L. REV. 241 (2012); Rebecca Shepard, *Does the Punishment Fit the Crime?: Applying Eighth Amendment Proportionality Analysis to Georgia’s Sex Offender Registration Statute and Employment Restriction for Juvenile Offenders*, 28 GA. ST. U. L. REV. 529 (2012); Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094 (2015).

global diffusion of the principle of proportionality:

Nevertheless, ours is the ‘era of proportionality.’ From countries in Eastern Europe to South Africa and from Canada to Brazil to Europe’s supranational courts, judges have adopted proportionality as their method of choice in constitutional cases and beyond. This global spread of proportionality has been extensively documented.<sup>41</sup>

### C. *Norm-Based Model of Global Constitutionalism*

The norm-based model of global constitutionalism contains viewpoints that presume the fundamental international norms as global constitutional norms. In response to the absence of a single global constitution, reality has revealed that there is a pressing need of the global legal order for global governance. Scholars who adopt the norm-based model, on the one hand, accept a broad definition of the global constitution, identifying those international norms that serve as constitutional functions with global constitution(s).<sup>42</sup> On the other hand, they seek to highlight some individual international norms, proclaiming that these individual norms would be constituted to provide a framework for instituting a global constitutional order, because they possess constitutional character. And, at the final step, those who adopt the norm-based mode of global constitutionalism will generalize these individual norms by calling them “the world law,” “fundamental norms,” or “*jus cogens* norms.” From this perspective, the norm-based model of global constitutionalism encompasses two subtypes: 1. *visions that take the global administrative law as global constitutional norm*; and 2. *visions that regard the international norm as global constitutional norm*.

Visions pertaining to the first subtype claim that the global administrative law can serve as a global constitutional norm. The basic viewpoint the scholars of global administrative law hold is that the global governance, which is characterized as a new type of global administration<sup>43</sup>

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41. Vlad F. Perju, *Proportionality and Freedom-An Essay on Method in Constitutional Law*, 1 GLOBAL CONSTITUTIONALISM 334, 335 (2012).

42. For example, Andreas Follesdal defines the global constitution as “the fundamental international norms and structures that serve constitutional functions.” See Andreas Follesdal, *When Common Interests Are Not Common: Why the Global Basic Structure Should Be Democratic*, 16 IND. J. GLOBAL LEGAL STUD. 585, 585-86 (2009).

43. Scholars have rendered five types of global administration, including: (1) administration by formal international organizations; (2) transnational networks and coordination; (3) distributed administration conducted by national regulators under treaty, network, or other cooperative regime; (4) administration by hybrid intergovernmental-private arrangements; and (5) administration by private institutions with regulatory functions. See Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW AND CONTEMP. PROBS. 15, 20-23 (2005).

and different from the traditional international administrative law based on the Westphalian regime, must rely on the global administrative law.<sup>44</sup> Because national governments alone cannot address and tackle those global critical issues, including terrorism, trade liberalization, economic integration, infectious diseases, and global environmental issues such as climate change.<sup>45</sup> Global administrative law is a necessary instrument to help global-scale policymakers cope with these issues in the global administrative space. Accordingly, the main principles of the global administrative law, such as legitimacy, transparency, accountability, procedural fairness, procedural participation, reasoning in policy-making, and the principle of proportionality, might be taken as global constitutional norms in the absence of a single global constitution. In practice, scholars of this subtype demonstrate that the global administrative law has been widely applied by a number of supranational organizations,<sup>46</sup> such as World Trade Organization (WTO), Organization for Economic Cooperation and Development (OECD), World Bank (WB), World Health Organization (WHO), United Nations Environment Program (UNEP), and so forth.

This subtype of visions, however, is susceptible to criticism that global administrative law as a global constitutional norm lacks democratic legitimacy;<sup>47</sup> because global governance has a hard time deriving its legitimacy from a higher law or from the processes of representative democracy.

The second subtype of the norm-based model of global constitutionalism holds a main viewpoint that the international norms in operation can be regarded as global constitutional norms. This subtype consists of two prominent perspectives. On the one hand, some commentators argue that in the international legal order, certain regulations can be considered as global constitutional norms because they possess constitutional principles. Thus their legal hierarchy is superior to others. For example, the International Law Commission (ILC) has recognized the

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44. See Ming-Sung Kuo, *Taming Governance with Legality? Critical Reflections upon Global Administrative Law as Small-c Global Constitutionalism*, 44 N.Y.U. J. INT'L L. & POL. 55, 63, 66, 69, 71, 73, 74-75 (2011); *Id.* at 37-40; Pascale Hélène Dubois & Aileen Elizabeth Nowlan, *Global Administrative Law and the Legitimacy of Sanctions Regimes in International Law*, 36 YALE J. INT'L L. ONLINE 15, 16 (2010), [https://disciplinas.stoa.usp.br/pluginfile.php/1276986/mod\\_resource/content/0/2.%20Global%20Administrative%20Law%20and%20the%20Legitimacy%20of%20Sanctions.pdf](https://disciplinas.stoa.usp.br/pluginfile.php/1276986/mod_resource/content/0/2.%20Global%20Administrative%20Law%20and%20the%20Legitimacy%20of%20Sanctions.pdf).

45. Daniel C. Esty, *Good Governance at Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490, 1493 (2006).

46. *Id.* at 1542-57; Dubois & Nowlan, *supra* note 44, at 24-25.

47. Kuo, *supra* note 44, at 81-83. Notably, although Ming-Sung Kuo addresses the problem of lacking legitimacy in global administration, he claims that it will be overcome by enhancing rationality and acceptance; Ming-Sung Kuo, *Between Fragmentation and Unity: The Uneasy Relationship between Global Administrative Law and Global Constitutionalism*, 10 SAN DIEGO INT'L L.J. 439, 448 (2009).

hierarchy in international law and emphasized that “nevertheless, some rules of international law are more important than other rules and for this reason enjoy a superior position or special status in the international legal system”.<sup>48</sup> ILC has enumerated three sorts of international legal rules as embracing the hierarchy:<sup>49</sup> *jus cogens*,<sup>50</sup> obligations *erga omnes*,<sup>51</sup> and Article 103 of the United Nations Charter.<sup>52</sup> On the other hand, some researchers assert that the rules of some international organizations can be viewed as global constitutional norms, because these rules have possessed constitutional character while regulating various international affairs in different arenas. Scholars such as John O. McGinnis & Mark L. Movsesian,<sup>53</sup> Sungoon Cho,<sup>54</sup> Garrett Wallace Brown,<sup>55</sup> and so forth, concentrate their energy on cases involving the World Trade Organization. This subtype of visions, however, has been challenged by skeptics. Daryl J. Levinson, for example, has argued that the growth in power of global governance institutions like United Nations, European Union, World Trade Organization, and the World Bank have raised some problems concerning “democratic deficit” and “accountability gaps”.<sup>56</sup> Taken together, issues of the norm-based model of global constitutionalism need to be further clarified.

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48. Int’l Law Comm’n, Rep. on the Fifty-Eighth Session, 6, U.N Doc. A/61/10, at 419 (2006).

49. *Id.* at 418.

50. ILC described *jus cogens* as “a rule of international law may be superior to other rules on account of the importance of its content as well as the universal acceptance of its superiority,” and noted that “the most frequently cited examples of *jus cogens* norms are the prohibition of aggression, slavery and the slave trade, genocide, racial discrimination apartheid and torture, as well as basic rules of international humanitarian law applicable in armed conflict, and the right to self-determination”. *See id.* at 419 (at normative level, some commentators might argue that states are bound by customary international law norms of *jus cogens*). *See* Seyla Benhabib, *The New Sovereignism and Transnational Law: Legal Utopianism, Democratic Skepticism and Statist Realism*, 5 GLOBAL CONSTITUTIONALISM 109, 114 (2016).

51. ILC described obligations *erga omnes* as “some obligations enjoy a special status owing to the universal scope of their applicability . . . that is obligations of a State towards the international community as a whole. These rules concern all States and all States can be held to have a legal interest in the protection of the rights involved. Every State may invoke the responsibility of the State violating such obligations”. *See* Int’l Law Comm’n, *supra* note 48, 420-21.

52. ILC claimed that a rule of international law may also be superior to other rules by virtue of a treaty provision, and ascertained some “recognized hierarchical relations by virtue of a treaty provision”. ILC illustrated the case of Article 103 of the United Nations Charter, because the Article provides that “In the event of a conflict between the obligations of the Members of the United Nations under the . . . Charter and their obligations under any other international agreement, their obligations under the . . . Charter shall prevail”. *See id.* at 420.

53. John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 511 (2000).

54. Sungoon Cho, *Global Constitutional Lawmaking*, 31 U. PA. J. INT’L L. 621, 622, 678 (2010).

55. Garrett Wallace Brown, *The Constitutionalization of What?*, 1 GLOBAL CONSTITUTIONALISM 201, 213 (2012).

56. Daryl J. Levinson, *Rights and Votes*, 121 YALE L.J. 1286, 1313 (2012).

#### D. *Rights-Based Model of Global Constitutionalism*

The rights-based model of global constitutionalism encompasses two subtypes: the first includes *visions that conceive of the global constitutionalization of human dignity as global constitutionalism*; the second subtype consists of *viewpoints that treat the global constitutionalization of fundamental human rights as global constitutionalism*.

Visions pertaining to the first subtype try to demonstrate the widespread inclination to the global constitutionalization of human dignity by exemplifying three trends of global constitutional development: the first case is the global prevalence that national constitutions around the world would adopt the conception of human dignity into their texts; the second case is that the global spread of international legal rules would adopt the conception of human dignity; and the third case is the global development that both national courts and international judges would incorporate the notion of human dignity into the legal system via various judicial practices. Perspectives from researchers like Joern Eckert,<sup>57</sup> Neomi Rao,<sup>58</sup> Rex D. Glensy,<sup>59</sup> Leslie Meltzer Henry,<sup>60</sup> and Luis Roberto Barroso<sup>61</sup> have illustrated this trend.

Critics, however, raise questions about the suitability of human dignity as a legal concept. The negative reasons they hold consist of the following:<sup>62</sup> 1. when the term “human dignity” is not written in the text of a national constitution, it cannot be used in legal reasoning; 2. human dignity should not be applied in states that have no legal tradition of the very concept; 3. the conception of human dignity is vague and lacks substantive meaning. Notably, Ruth Macklin concludes that dignity is “a useless concept” because “appeals to dignity are either vague restatements of other, more precise, notions or mere slogans.”<sup>63</sup>

The second subtype of the rights-based model of global constitutionalism focuses on the global constitutionalization of fundamental human rights. According to Stephen Gardbaum,<sup>64</sup> this trend can be made

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57. See Joern Eckert, *Legal Roots of Human Dignity in German Law*, in *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCLOSURE* 41 (David Kretzmer & Eckart Klein eds., 2002).

58. See Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183 (2011); Neomi Rao, *American Dignity and Healthcare Reform*, 35 HARV. J. LAW & PUB. POL'Y 171 (2012).

59. See Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65, 65-142 (2011).

60. See Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169 (2011).

61. See Barroso, *supra* note 26, at 331-93.

62. *Id.* at 351.

63. Ruth Macklin, *Dignity Is a Useless Concept*, 327 BRITISH MED. J. 1419, 1419 (2003).

64. Stephen Gardbaum, *Human Rights and International Constitutionalism*, in *RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE*, *supra* note 15, at

evident by two processes of constitutionalization of fundamental human rights: national (internal) and international. By means of these two processes, two leading systems for protecting the fundamental rights of individuals- domestic bill of rights and international human rights law- will serve as the same function.<sup>65</sup> With respect to the national constitutionalization of fundamental human rights, according to the empirical study of David S. Law and Mila Versteeg,<sup>66</sup> three global trends are prominent: the proliferation of domestic constitutional rights, the spread of judicial review (which is usually used to protect human rights in nation-states), and the number of generic constitutional rights, which are increasing over time. As to the international constitutionalization of fundamental human rights, two trends are prominent: on the one hand, the concept of human rights protection has been increasingly written in a series of international documents like the Charter of the United Nations (UN Charter, 1945), the Universal Declaration of Human Rights (UDHR, 1948, with 146 state parties as of 2015), the International Convention on the Elimination of All Forms of Racial Discrimination (CRED, 1969, with 177 state parties as of 2015), the International Covenant on Civil and Political Rights (ICCPR, 1976, with 168 state parties as of 2015), the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1976, with 164 state parties as of 2015), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1981, with 189 state parties as of 2015), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1987, with 158 state parties as of 2015), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW, 2003), and the Convention on the Rights of Persons with Disabilities (CRPD, 2008).<sup>67</sup> On the other hand, most of aforementioned documents of international human rights further present the concept of providing an individual complaint mechanism within an international human rights treaty.<sup>68</sup> Overall, the global constitutionalization of fundamental human rights has been becoming more prevalent.

However, the situation is always unsatisfactory. Skeptics challenge the substantive effect of the global constitutionalization of fundamental human rights on individuals. Michael J. McDermott, for example, has contended that although international treaties recognize a right to food, few countries

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233, 237-38.

65. *Id.* at 233.

66. Law & Versteeg, *supra* note 10, at 1194-1202.

67. Alexander R. Harrington, *Don't Mind the Gap: The Rise of Individual Complaint Mechanisms within International Human Rights*, 22 DUKE J. COMP. & INT'L L. 153, 154-73 (2012); Benhabib, *supra* note 50.

68. Harrington, *id.* at 154; Benhabib, *supra* note 50.

have established a domestic enforcement mechanism. Consequently, McDermott has concluded that without national legal enforcement mechanisms, an international right to food fails to serve as an effective tool for combating hunger.<sup>69</sup> In this respect, the rights-based model of global constitutionalism does not live up to its promises in the real world.

The preceding overviews on four models of global constitutionalism suggest that global constitutionalism is not only essentially contested in its conceptual aspect,<sup>70</sup> but also intractable in ascertaining its substantive content. Admittedly, the rise of global constitutionalism is, at its core, both an emerging global social fact and an academic research trend, and the latter results from the former. As for a global social fact, global constitutionalism embraces a descriptive implication that the current regime of global governance essentially involves a number of norms, rules, values and laws. The problems with the hierarchy of norms inevitably arise when the consequences of regulation application result in issues of incompatibility. In other words, global governance raises the concern of constitutional order in the long run, and thus it might as well be described in constitutional terms. As an academic research trend, the rise of global constitutionalism has manifested a reality that different issues of global constitutionalism have attracted the attention of intellectuals, especially social scientists. Even though academic scholars around the world from various fields have devoted themselves to addressing many aspects of global constitutionalism, the current discourses are more divergent than convergent. Simply put, worldwide scholars should take the global constitutionalism more seriously.

Facing this twofold scenario, what are the appropriate responses scholars should make regarding the rise of global constitutionalism? Although the preceding overviews of four models we classified provide a valuable understanding on recent development of global constitutionalism, the existing models have uncovered two aspects of limitations: one is methodological, the other is comprehensive. On the methodological respect, the method that these arguments have adopted could generally be concluded as a microscopic approach, and thus the argumentative style they have showed is narrow and not broad enough; on the comprehensive aspect, although academic scholars around the world from various fields have addressed many aspects of global constitutionalism, their discourses are more divergent than convergent. Under these circumstances, even social

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69. Michael J. McDermott, *Constitutionalizing an Enforceable Right to Food: A New Tool for Combating Hunger*, 35 BOS. C. INT'L & COMP. L. REV. 543, 544-45 (2012).

70. Lars Vellechner, *Constitutionalism as a Cipher: On the Convergence of Constitutionalist and Pluralist Approaches to the Globalization of Law*, 4 GOETTINGEN J. INT'L L. 599, 600, 602 (2012); Jessica C. Lawrence, *Contesting Constitutionalism: Constitutional Discourse at the WTO*, 2 GLOBAL CONSTITUTIONALISM 63, 67 (2013).



scientists, not to mention the ordinary people, could not easily grapple with the whole picture of global constitutionalism.

In order to ameliorate the efficiency of grasping global constitutionalism, this paper would like to provide an alternative, which relies on a macroscopic and structural-functional approach. Based on this approach, this paper proposes a “framework for discourse.” On the one hand, it is contended that with this framework, scholars should consider global constitutionalism as an umbrella paradigm in the entire architecture of the existing constitutionalism system. This is the structural aspect of global constitutionalism. On the other hand, it is claimed that scholars should treat global constitutionalism functionally served as a mindset for mapping a global republic of constitutionalism because efforts for taking global constitutionalism as an instant-practical project are still premature, but endeavors for taming globalization with constitutionalism are more likely to generate a brand new regime like a Republic of Constitutionalism. This is the functional aspect of global constitutionalism. The next part will discuss the structural aspect, and then explore the functional aspect in Part IV.

### III. THE RISE OF GLOBAL CONSTITUTIONALISM AS AN UMBRELLA PARADIGM

Observing through the lens of structure, the rise of global constitutionalism represents the signal of an emerging paradigm entering into the evolving constitutional system. If we consider global constitutionalism as an umbrella paradigm of the whole scheme of constitutionalism system, the role it plays or will play could be better understood.

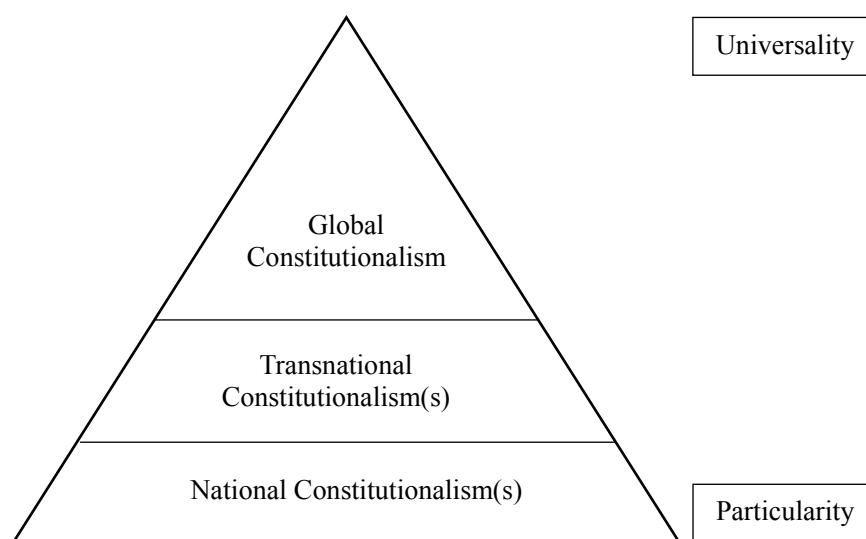
#### A. *The Evolving Architecture of Constitutionalism Paradigm*

Indeed, the rise of global constitutionalism is an epochal event in the eyes of constitutional scholars. As the global constitutionalism joins the family, there are at least three types of constitutionalism operating in the evolving architecture of the constitutional system. Basically, if we view each type of constitutionalism as a paradigm, three paradigms would coexist in the globalizing world.

##### 1. *Triple Levels of Paradigm System*

In the evolving architecture of constitutionalism(s), figure 1 indicates that three types of constitutionalism exist: national constitutionalism, transnational constitutionalism, and global constitutionalism. National

constitutionalism, which is also well known as the traditional constitutionalism, has been embedded in the Westphalian regime since 1648. Based on the nation-centered logic and statehood, national constitutionalism is calculated to attain three main goals within the given state territory:<sup>71</sup> limiting governmental powers, adhering to the rule of law, and protecting human rights.



**Figure : The Evolving Architecture of Constitutionalism(s)**

As transnational interactions have prevailed, constitutionalism started moving beyond traditional nation-state borders and developed into different types of “constitutionalism beyond the state”,<sup>72</sup> either regional or transnational constitutionalism.<sup>73</sup> The most frequently cited model is the European Union constitutionalism, which involves issues of transnational governance among some Member States. According to Peter L. Lindseth,<sup>74</sup>

71. Michel Rosenfeld, *Modern Constitutionalism as Interplay between Identity and Diversity*, in CONSTITUTIONALISM, IDENTITY, AND LEGITIMACY: THEORETICAL PERSPECTIVES 3, 3 (Michel Rosenfeld ed., 1994) [hereinafter Rosenfeld, *Modern Constitutionalism*]; Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307, 1307 (2001) [hereinafter Rosenfeld, *Rule of Law*].

72. Peter L. Lindseth, *Constitutionalism beyond the State? The Administrative Character of European Governance Revisited*, 33 CARDOZO L. REV. 1875, 1876, 1887 (2012).

73. Jiunn-Rong Yeh & Wen-Chen Chang, *The Emergence of East Asian Constitutionalism: Features in Comparison*, 59 AM. J. COMP. L. 805, 806 (2011) [hereinafter Yeh & Chang, *East Asian Constitutionalism*]; Jiunn-Rong Yeh & Wen-Chen Chang, *The Emergence of Transnational Constitutionalism: Its Features, Challenges and Solutions*, 27 PENN ST. INT'L L. REV. 89, 89, 91 (2008) [hereinafter Yeh & Chang, *Transnational Constitutionalism*]; Wiener, Lang, Tully, Maduro & Kumm, *supra* note 7, at 5.

74. Lindseth, *supra* note 72, at 1876.

the process of European integration over the years has undoubtedly generated profound constitutional implications for its member states and national citizens. Proponents have presented some other potential examples like the East Asian constitutionalism,<sup>75</sup> but skeptics have challenged the possibilities on the basis that Asian countries must encounter some intractable difficulties such as legal integration, sovereign transcendence, and factors of international environment.<sup>76</sup> Nevertheless, transnational constitutionalism, which is best exemplified by the EU model, has been considered as an ideal-type in the constitutionalism system.

Thanks to a number of contemporary global developments, especially the globalization—the umbrella term used to grasp the enormous increase in the flow of people, capital, goods, services, and ideas across national borders,<sup>77</sup> or the various processes of economic, social, cultural, and political integration across national borders<sup>78</sup>—and the fragmentation of international law,<sup>79</sup> the issues of global governance have become more complex and interdependent, and thus needed to be managed by a series of global regulations. As has been stated in the last part, the global governance inevitably raises the concerns of constitutional order in the long run, and it might as well be described in constitutional terms. Accordingly, to address and deal with the problems of global governance in constitutional terms, global constitutionalism becomes a newcomer to the family of constitutionalism.

## 2. *Paradigms Coexist: Old and New*

A paradigm may possess multiple meanings. Thomas S. Kuhn, in his seminal book *The Structure of Scientific Revolutions*, has addressed some of them. According to Kuhn, a paradigm might be referred to as: (a) some accepted examples, illustrations, or exemplars in the scientific research;<sup>80</sup> (b) an accepted judicial decision in the common law;<sup>81</sup> (c) the entire constellation of beliefs, values, techniques, and so on shared by the members of a given community;<sup>82</sup> and (d) a disciplinary matrix.<sup>83</sup> Usually, scholars

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75. Yeh & Chang, *East Asian Constitutionalism*, *supra* note 73, at 839.

76. Tom Ginsburg, *Eastphalia and Asian Regionalism*, 44 U.C. DAVIS L. REV. 859, 877 (2011).

77. Jeffrey L. Dunoff & Joel P. Trachtman, *A Functional Approach to International Constitutionalization*, in RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE, *supra* note 15, at 3, 5.

78. JULIAN KU & JOHN YOO, TAMING GLOBALIZATION: INTERNATIONAL LAW, THE U.S. CONSTITUTION, AND THE NEW WORLD ORDER 21 (2012).

79. Dunoff & Trachtman, *supra* note 77, at 5-9; John Linarelli, *Concept and Contract in the Future of International Law*, 67 RUTGERS U. L. REV. 61, 75 (2015).

80. THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 10, 43, 187 (3d ed. 1996).

81. *Id.* at 23.

82. *Id.* at 175.

adopt the preferable definition as a tool in their works. Jürgen Habermas has exemplified a clear case by explicitly adopting one of Kuhn's definitions, and thus claiming that "a paradigm is discerned primarily in paramount judicial decisions . . .".<sup>84</sup>

By envisaging this triple-level constitutionalism architecture, if we adopt a broad definition of the paradigm, we may treat each type of constitutionalism as a paradigm because each of them has been accepted as an example, illustration, exemplar, or a cognitive frame for perceiving the legal and political world<sup>85</sup> in social science research on certain subjects. But none of them enjoy an exclusive position in practice. Notably, although the actual relationship among them requires further clarification, a significant feature is obvious: they coexist with one another.<sup>86</sup> Simply put, in the real world, even though the overall architecture of evolving constitutional system is expanding its magnitude, national constitutionalism is robust but undermined by the emerging transnational constitutionalism and global constitutionalism. Relatively, both transnational constitutionalism and global constitutionalism are becoming vibrant but not dominant within the whole system.

#### B. *Justifying Global Constitutionalism as an Umbrella Paradigm*

Based on a structurally analytical point of view, the proper status of global constitutionalism as a paradigm in the overall scheme of constitutionalism is better seen as an umbrella paradigm. Because the overall scheme needs an umbrella paradigm to consolidate the unity of paradigms, global constitutionalism is capable of playing this role.

##### 1. *Global Constitutionalism as an Umbrella Paradigm Is Necessary*

Admittedly, although paradigms may coexist, they will interact and even compete with each other. However, Tom Ginsburg has emphasized that "globalization is producing deep integration among nations that will be accompanied by quasi-constitutional global governance".<sup>87</sup> The intractable

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83. *Id.* at 182.

84. Jürgen Habermas, *Paradigms of Law*, 17 CARDOZO L. REV. 771, 771 (1996).

85. Mattias Kumm refers to a constitutional paradigm as providing a cognitive frame that makes intelligible the legal and political world. See Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State*, in RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE, *supra* note 15, at 258, 266.

86. Although Kuhn has claimed that the outcome of paradigm competition ordinarily reduces the number of competing schools to one, he never rejects the possibility that paradigms will coexist. See KUHN, *supra* note 80, at 178.

87. Ginsburg, *supra* note 5, at 44.

problems resulting from globalization are hard to be dealt with at the national or transnational level under the context of national constitutionalism or transnational constitutionalism. Consequently, policy-makers all over the world will inevitably seek for possible solutions at the global level. This is the case of global governance. And, as has been noted above, global governance raises the concerns of constitutional order in the long run, and thus it might as well be addressed in constitutional terms. That is the case of global constitutionalism. Taken altogether, a number of critical global issues should eventually be resolved by global resolution mechanisms that have been embedded in the paradigm of global constitutionalism.

By this token, the driving force of globalization will spontaneously push global constitutionalism to assume the position as the umbrella paradigm, and thus the coherence of paradigm will possibly be maintained. Therefore, just like how the concept of globalization can be considered as the umbrella term for grasping the enormous increase in the flow of people, capital, goods, services, and ideas across national borders,<sup>88</sup> global constitutionalism can be regarded as an umbrella paradigm for capturing and addressing the intractable problems resulting from globalization.

## 2. *Justifying the Proper Standing of Global Constitutionalism*

However, even though global constitutionalism is essential to be treated as the role of the umbrella paradigm in order to maintain the coherence of paradigm scheme, it is neither omnipotent nor omniscient. Because it is well known and undeniably that not all problems are so insurmountable; most issues can be dealt with and overcome at the national or transnational level. Under this scenario, paradigms of national- and transnational constitutionalism have been functioning in the real world. Simply put, the diversity of paradigm is a *fait accompli*.

Taking into account that both paradigm coherence and diversity are indispensable and valuable in the evolving architecture of constitutionalism, one may reasonably assert that the structural equilibrium will be the appropriate status within the overall scheme of constitutionalism(s), which this paper will tentatively call “unity in diversity.” Substantively, the concept of “unity in diversity”<sup>89</sup> can be analogized by a Chinese academic phrase “*li yi fen shu*” (理一分殊), meaning: Coherence is one and its manifestations are many.<sup>90</sup> Employing this analogy, this paper plausibly claims that the role of global constitutionalism as an umbrella paradigm can be properly viewed

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88. KU & YOO, *supra* note 78.

89. Michel Rosenfeld, *Constitutional Identity*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW, *supra* note 3, at 756, 774.

90. STEPHEN C. ANGLE, CONTEMPORARY CONFUCIAN POLITICAL PHILOSOPHY 177 (2012).

as “coherence,” and both paradigms of national and transnational constitutionalism can be regarded as its “manifestations.” Accordingly, both the increasing significance in the evolving system of constitutionalism and the overarching position for addressing and grasping the issues and concerns of the globalizing world have given further support to empower global constitutionalism with a standing to act as an umbrella paradigm.

Consequently, if the aforementioned argument is justified, taking the rise of global constitutionalism as an umbrella paradigm will then help us capture the structural role that global constitutionalism actually plays, and should play, in the overall framework of constitutionalism.

#### IV. A MINDSET FOR MAPPING A GLOBAL REPUBLIC OF CONSTITUTIONALISM

In this section, the article proposes that scholars should treat global constitutionalism functionally served as a mindset for mapping a Global Republic of Constitutionalism while focusing on two main issues: Firstly, the reasons why scholars should treat global constitutionalism as a mindset for mapping a global republic of constitutionalism; and secondly, the basic concerns for mapping a Global Republic of Constitutionalism that will arise from this mindset.

##### A. *Accounting for Taking Global Constitutionalism as a Mindset*

Some authors<sup>91</sup> have been enlightened by Martti Koskenniemi on his concept of the nexus between constitutionalism and mindset when he has asserted that “instead of an institutional architecture or a set of legal rules, constitutionalism is best seen as a mindset, a tradition, and a sensibility about how to act in a political world”.<sup>92</sup> Koskenniemi is partially right to consider constitutionalism as a mindset because the conceptual essence of constitutionalism includes an element of high-level abstraction. However, Koskenniemi is partially wrong to consider constitutionalism as a mere mindset and disdains its overarching role in an institutional architecture, for constitutionalism can be launched into a process of institutionalization, and as a result, plenty of institutions can be derived from this process. Current

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91. See, e.g., Anne Peters & Klaus Armingeon, *Introduction: Global Constitutionalism from an Interdisciplinary Perspective*, 16 *IND. J. GLOBAL LEGAL STUD.* 385, 388 (2009); Karolina Milewicz, *Emerging Patterns of Global Constitutionalism: Toward a Conceptual Framework*, 16 *IND. J. GLOBAL LEGAL STUD.* 413, 420 (2009); Geir Ulfstein, *The Relationship between Constitutionalism and Pluralism*, 4 *GOETTINGEN J. INT'L L.* 575, 579 (2012); Viellechner, *supra* note 70, at 603; Volk, *supra* note 4, at 556; Rafael Domingo, *The New Global Human Community*, 12 *CHI. J. INT'L L.* 563, 567 (2012).

92. Martti Koskenniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization*, 8 *THEORETICAL INQUIRIES L.* 9, 9 (2007).

institutions around the world that derive from the institutionalization process of national constitutionalism, such as judicial review etc., have demonstrated this fact. Simply put, in reality, constitutionalism has at least two main dimensions: ideal and institutional.

1. *Global Constitutionalism as an Instant Project Is Premature*

Like constitutionalism, global constitutionalism has two basic aspects. As has been illustrated above (in Part II), global constitutionalism is still situated in the phase of initial conceptual construction (and reconstruction) or conceptualization (and re-conceptualization), and thus any endeavors for taking global constitutionalism as an instant project-in-practice are still premature. This is not to say that endeavors for contestation over global constitutionalism from the perspectives of institutional establishment are useless. Rather, this paper claims that any considerations, either at the ideal or institutional level, for capturing global constitutionalism will contribute to the achievement of an overall success in the future. What this paper intends to emphasize is that, at the pre-institutionalization stage, global constitutionalism is best viewed as a mindset because it provides an overarching idea with a wider space for further understanding of the grand landscape of humanity.

2. *Mapping a New Global Republic Needs a Mindset as Basis*

As most people have recognized, we live in a globalizing world. Globalization, with its merits and demerits, has led to a tremendous impact on all people in every respect. Accordingly, taming globalization becomes an inevitable task for “we the global people,” especially for policy-makers all over the world. On the other hand, Richard Albert reminds us that constitutionalism is ubiquitous. It compels and constrains all the dimensions of our everyday lives.<sup>93</sup> Furthermore, a concluding remark made by David Law and Mila Versteeg demonstrates that “success breeds imitation, and constitutionalism is no exception.” They have proved that the global adoption of constitutionalism has become a common phenomenon in the world.<sup>94</sup> If we combine this inescapable task with the reality of ubiquitous constitutionalism, taming globalization with constitutionalism then seems to be a plausibly promising strategy.

But ongoing efforts for taming globalization via constitutionalism are more likely to result in a brand new regime like a Republic of

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93. Richard Albert, *The Cult of Constitutionalism*, 39 FLA. ST. U.L. REV. 373, 374 (2012).

94. See Law & Versteeg, *supra* note 10, at 1166-71, 1173.

Constitutionalism. Because once the taming mechanism starts to work, the interaction among three different levels of constitutionalism (*i.e.*, national, transnational, and global) will be enhanced, and the hierarchy of norms embedded in this taming mechanism must be established in the long run. When this pivotal mechanism has been set up at the global scale, the embryonic form of a global republic will be on its way to come into being. This paper tentatively calls this emerging global republic a Global Republic of Constitutionalism (GROC).

As the well-known proverb goes, Rome was not built in a day. The emerging Global Republic of Constitutionalism must be constructed by thoughtful authors through deliberative processes. Notably, it requires a firm and refined rationale. Therefore, global constitutionalism as a mindset, based on the promising prospect that it will be continuously refined by pundits around the world, would be appropriate to functionally serve as an ideal underpinning for the brand new global republic. At least, global constitutionalism as a mindset may be regarded as a matrix<sup>95</sup> for contemplating and addressing the critical concerns of mapping a Global Republic of Constitutionalism.

#### B. *Concerns in Mapping a Global Republic of Constitutionalism*

At the pre-institutionalization period, there are some fundamental concerns that should be taken into consideration when thinking of mapping a future global republic in light of the global constitutionalism as a mindset. In this paper, I would like to sketch a nascent outline about these concerns by drawing on Jack M. Balkin's constitutional concept of "framework originalism". According to Balkin, framework originalism "views the Constitution as an initial framework for governance that sets politics in motion and must be filled out over time through constitutional construction".<sup>96</sup> In other words, the central idea of framework originalism is that the Constitution is best viewed as a basic plan for governance. Relying on this notion, this paper asserts that the framework of the Global Republic of Constitutionalism must be perceived as a basic plan for global governance.

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95. Jeffrey L. Dunoff and Joel P. Trachtman rendered a preliminary constitutional matrix at transnational level and international level. To some extent, they regard the constitutionalism as a matrix. See Dunoff & Trachtman, *supra* note 77, at 26-29.

96. Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 550 (2009); JACK M. BALKIN, *LIVING ORIGINALISM* 21 (2011); Jack M. Balkin, *Nine Perspectives on Living Originalism*, 2012 U. ILL. L. REV. 815, 816 (2012).



### 1. *Concerns for the Global Republican Foundation*

At the outset of speculating a global republic and intending to map a blueprint of the Global Republic of Constitutionalism, we should deliberately think about certain issues of the Republican foundation. In this regard, this paper suggests that three foundations must be taken into account.

#### (a) Systematic Foundation: A Global Human Community

Firstly, the Global Republic demands a systematic foundation. From the perspective of sociological thinking, it requires a global human community or a global constitutional community to be a structural underpinning. Admittedly, both the nature and the membership of this community are essentially contested. Rafael Domingo, for example, characterizes the new global human community as “a political community of persons, not of nation-state; is universal in nature; consists of compulsory membership; and is incomplete and complementary”.<sup>97</sup> Rex D. Glensy describes that a global community consists of institutions (e.g. courts) and structured humankind.<sup>98</sup> Adopting a more inclusive stance, however, Anne Peters asserts that the membership of the global constitutional community encompasses individuals, states, international organizations (IOs), non-governmental organizations (NGOs), and business actors.<sup>99</sup> Several authors analogize the global community with Niklas Luhmann’s concept of “world society”,<sup>100</sup> or with Immanuel Kant’s “world republic”.<sup>101</sup> Whatever we may conceive, this paper contends that in the process of debating over the membership and characteristics of this global community, the basic concept of “We the Global People” should be embedded in the core of the evolving community.

#### (b) Normative Foundation: A Global Constitutional Order

Secondly, the Global Republic of Constitutionalism has to be bolstered by a normative foundation. This is a jurisprudential foundation, which is

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97. Domingo, *supra* note 91, at 587; Domingo claims that the global community has to be clarified and organized, but that does not mean it does not exist. See RAFAEL DOMINGO, *THE NEW GLOBAL LAW* 104 (2010).

98. Glensy, *supra* note 1, at 213.

99. Anne Peters, *Membership in the Global Constitutional Community*, in *THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW* 153, 157-258 (Jan Klabbers, Anne Peters & Geir Ulfstein eds., 2011).

100. According to Clemens Mattheis, Luhmann’s world society is rested on inclusiveness and a singular concept: the transformation of all political, legal, economic and cultural differences into internal differences of the one and only one world society. See Clemens Mattheis, *The System Theory of Niklas Luhmann and the Constitutionalization of the World Society*, 4 *GOETTINGEN J. INT’L L.* 625, 638 (2012).

101. Phillip-Alexander Hirsch contends that Kant’s ultimate goal of international law is neither a State of States nor the peace federation, but the cosmopolitan republic or a single homogenous world State. See Phillip-Alexander Hirsch, *Legalization of International Politics: On the (Im)Possibility of a Constitutionalization of International Law from a Kantian Point of View*, 4 *GOETTINGEN J. INT’L L.* 479, 480, 484-90 (2012).

proper to be characterized as a global constitutional order. Certainly, it would be a formidable task to constitute this order, either in form or in substance. Relying on the mindset of global constitutionalism, this paper contends that a global constitutional order must contain at least three essential concerns.

The first concern is to address or identify a minimal global value system. This value system must be recognized by the majority of the global community through the circularly discursive process, and thus it is based on a minimal global consensus. Therefore, this system may include some naïve values such as global survival (global sustainable existence), world peace,<sup>102</sup> global justice, global fundamental human rights, and so forth.

The second concern with building a global constitutional order is to establish a mechanism for the hierarchy of global norms. As Pasquale Pasquino highlights, any constitutional system can be presented as a hierarchy of norms,<sup>103</sup> and the global constitutional order is no exception. Thus, the hierarchy of norms has to be positioned as the pivotal place in that order. In this respect, the current dilemma that the international constitutional order has encountered like the *Kadi* case<sup>104</sup> should be overcome in the future. Only when the mechanism for the hierarchy of global norms has been formulated, can the stabilized global constitutional order be possible.

The third concern with the establishment of a global constitutional order is the issue regarding constitutionalization. It is another essentially contested concept in the studies of global constitutionalism.<sup>105</sup> Global

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102. World peace has been valued by most writers. For example, Anne Peters views the world peace as “the primary objective and principle of the international constitutional order”. See Anne Peters, *Dual Democracy*, in THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW, *supra* note 99, at 263, 280.

103. Pasquale Pasquino, *Classifying Constitutions: Preliminary Conceptual Analysis*, 34 CARDOZO L. REV. 999, 1017 (2013).

104. The *Kadi* case is a significant example relating to the hierarchy of norms in international legal system. It involves a challenge to U.N. Security Council resolutions that require states to freeze the assets of named individuals and entities suspected of supporting terrorism. However, in despite of U.N. Charter’s self-proclaimed and widely accepted priority over the European Convention of Human Rights (ECHR) in international law system, the European Court of Justice (ECJ) invalidated the resolutions made by U.N. Security Council, and held that *Kadi*’s rights under the Convention blocked implementation of the resolutions. See Levinson, *supra* note 56, at 1313-14; for further comments on the *Kadi* case, See Gráinne de Búrca, *The European Court of Justice and the International Legal Order after Kadi*, 51 HARV. INT’L L.J. 1 (2010); Peter Hilpold, *EU Law and UN Law in Conflict: The Kadi Case*, 13 MAX PLANCK Y.B. U.N. L. 141 (2009); Albert Posch, *The Kadi Case: Rethinking the Relationship between EU Law and International Law?*, 15 COLUM. J. EUR. L. ONLINE 1, 1-5 (2009); Matej Avbelj & David Roth-Isigkeit, *The UN, the EU, and the Kadi Case: A New Appeal for Genuine Institutional Cooperation*, 17 GERMAN L.J. 153 (2016).

105. Though several scholars have worked on defining the concept of constitutionalization, few consensus have been made. See Dunoff & Trachtman, *supra* note 77, at 5-26; Milewicz, *supra* note 91, at 420-26; Anne Peters, *The Merits of Global Constitutionalism*, 16 IND. J. GLOBAL LEGAL STUD. 397, 397-400 (2009); Samantha Besson, *Whose Constitution(s)? International Law, Constitutionalism, and Democracy*, in RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE, *supra* note 15, at 381, 384; Martin Loughlin, *What Is Constitutionalization?* in THE

constitutionalization is, at its core, an ongoing process that is dynamic. On the one hand, the constitutionalization is the concrete process of developing the global constitutional order,<sup>106</sup> in which the consensually minimal global values and many others, such as the construction of global public powers, the establishment of a global rule of law, and the protective system of global fundamental human rights, will be legitimately incorporated into an integral constitutional system.<sup>107</sup> On the other hand, global constitutionalization will be transformed into a dynamic process for shaping a global constitutional paradigm.

(c) Cognitive Foundation: A Global Constitutional Identity

The third foundation of the Global Republic of constitutionalism is a global constitutional identity. It is a psychological foundation. In order to make the Global Republic of constitutionalism work, people who live in this Republic have to conceive of themselves as subjects of the Republic, and share a belief that they are obliged to commit themselves to abiding by the global constitutional norms. Among commentators, Michel Rosenfeld has enumerated seven models of constitutional identity: the German, the French, the American, the British, the Spanish, the European Transnational, and the Post-Colonial in the dual system of nation-state and transnational constitutionalism. What Rosenfeld has demonstrated is that multi-level identity in the real world is both possible and feasible. By this token, a global model of constitutional identity will be a potentially reasonable expectation. Owing to the positive effects that the notion of identity may connote community, unity, and harmony,<sup>108</sup> the global constitutional identity is not only conducive to Republic-building engineering, but also a necessary, albeit insufficient, condition for underpinning a sound and robust Global Republic of Constitutionalism.

2. *Concerns for the Global Republican Configuration*

In the wake of grappling with Republic foundations, concerns for the Republican configuration must be put on the agenda. Inspired by global constitutionalism as a mindset, the configuration of the Global Republic of Constitutionalism comprises at least three dimensions if it is put on the agenda of institutionalization: formal, procedural, and substantive.

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TWILIGHT OF CONSTITUTIONALISM? 47, 59-68 (Petra Dobner & Martin Loughlin eds., 2010); Brown, *supra* note 55, at 205-06.

106. Milewicz, *supra* note 91, at 420.

107. All constitutional orders must be legitimated; the global constitutional order is no exception. See Jan Klabbers, *Setting the Scene*, in THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW, *supra* note 99, at 1, 43.

108. Michel Rosenfeld, *The Constitutional Subject, Its Other, and the Perplexing Quest for an Identity of Its Own: A Reply to My Critics*, 33 CARDOZO L. REV. 1937, 1967 (2012).

(a) Formal Dimension: Constructing Global Public Powers

To analyze the issue functionally, the Global Republic of Constitutionalism demands some global public powers, so that the Republic is capable of promoting global public interests from the positive perspective and keeping the global governance in order from the negative perspective. However, global public powers without any restrictions will have gone too far. Evidence provided by the axiom of constitutionalism shows that all public powers have to be legitimized, limited, and controlled.<sup>109</sup> The public powers at the global level must be appropriately regulated, so that the legitimacy of global governance can be ensured. In actuality, because the case for regulating public powers at the global scale is extremely complex, it will be a formidable task for future engineering masters.

(b) Procedural Dimension: Establishing Global Rule of Law

The rule of law is not only the fundamental postulate of constitutionalism,<sup>110</sup> but also one of the most important political ideals of our time.<sup>111</sup> And thus, all constitutional democracies reject any sort of the rule of men or women.<sup>112</sup> Even if there are some competing definitions made by authors on the basis of the fact that the rule of law is also an essentially contested concept,<sup>113</sup> legal pundits and others have concentrated their energy on all aspects of the rule of law, and have made some contributions.

Among others, two frameworks proposed by Aharon Barak and Adriaan Bender are prominent. According to Aharon Barak, the former president of the Supreme Court of Israel, the rule of law consists of three basic aspects:<sup>114</sup> (i) the formal aspect- at the minimal level, the rule of law means rule by law; (ii) the jurisprudential aspect- the rule of law contains certain minimum requirements, without which a legal system cannot exist, such as the law is general; legal rules must be publicized, clear, intelligible, stable, not retroactive, and coherent; and (iii) the substantive aspect- the rule of law guarantees fundamental values of morality, justice, and human rights, with a proper balance between these and the other needs of the society. The other framework proposed by Adriaan Bender encompasses three categories:<sup>115</sup> (i) procedural elements- rule by law; state actions are subject to law, formal legality, and democracy; (ii) substantive elements- law and its interpretations

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109. Markus Kotzur, *Overcoming Dichotomies: A Functional Approach to the Constitutional Paradigm in Public International Law*, 4 GOETTINGEN J. INT'L L. 585, 587 (2012).

110. Larry Catá Backer, *Party, People, Government, and State: On Constitutional Values and the Legitimacy of the Chinese State-Party Rule of Law System*, 30 BOS. U. INT'L L.J. 331, 345 (2012).

111. Jeremy Waldron, *The Concept of the Rule of Law*, 43 GA. L. REV. 1, 3 (2008).

112. AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 52 (2006).

113. See Richard H. Fallon Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 7 (1997).

114. BARAK, *supra* note 112, at 53-56.

115. Adriaan Bedner, *An Elementary Approach to the Rule of Law*, 2 HAGUE J. ON RULE L. 48, 56-72 (2010).

are subject to the principles of justice, human rights protection, and group rights protection; and (iii) controlling mechanisms- an independent judiciary, and some guardian institutions of the rule of law. Notably, judicial review, as it is adopted around the world, has been viewed as the significant guardian institution of the rule of law.<sup>116</sup>

Relying on these recognitions of the rule of law, those who manage to establish the Global Republic of Constitutionalism must take into account that the Global Republic requires a procedural dimension and both the organizational formation and the operation of the Republic must accord with the rule of law.

(c) Substantive Dimension: Offering a Global Bill of Rights

As previous depiction has uncovered, national constitutionalism is born to attain three fundamental goals: limiting governmental powers, adhering to the rule of law, and protecting human rights.<sup>117</sup> Reversely speaking, protecting human rights can be seen as one of the three pillars of national constitutionalism. Hence, it appears that if we take global constitutionalism as a mindset, human rights protection must lie at the heart of the Global Republic. Jeremy Waldron reminds us that “we are bound into a global community, especially on questions of fundamental rights”.<sup>118</sup> The task of building the Global Republic of Constitutionalism may begin by proposing a Global Bill of Rights, or at least taking the proposal of a Global Bill of Rights as an indispensable engineering of the overall agenda.

What is the critical concern about the character of the Global Bill of Rights? This paper asserts that the Global Bill of Rights can be plausibly embedded in the concept of human dignity. As noted in Part II, the concept of human dignity has been incorporated into the nation-state constitutions all over the world and has spread to the transnational level. The Global Republic should follow this trend and try to accelerate the transition from an international human rights regime,<sup>119</sup> which is based on international human rights treaties, to a regime of Global Bill of Rights. Because human dignity has been viewed with respect as a fundamental concept for the international legal order of human rights,<sup>120</sup> the concept is likely to be employed as an effective basis to create a mode of the Global Bill of Rights.

Although the concept of human dignity might be regarded as the

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116. For example, Dieter Grimm, a former German Constitutional Court Justice, highlights that the rule of law is on shaky ground with judicial review. See Dieter Grimm, *Levels of the Rules of Law on the Possibility of Exporting a Western Achievement*, 1 EUROPEAN-ASIAN J.L. & GOVERNANCE 5, 10 (2011).

117. Rosenfeld, *Rule of Law*, *supra* note 71.

118. WALDRON, *supra* note 30, at 141.

119. Yvonne M. Dutton, *Commitment to International Human Rights Treaties: The Role of Enforcement Mechanisms*, 34 U. PA. J. INT'L L. 1, 3, 10 (2012).

120. Matthias Mahlmann, *Human Dignity and Autonomy in Modern Constitutional Orders*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW, *supra* note 3, at 370, 371.

supreme value in some national constitutional systems, like that in German Basic Law,<sup>121</sup> it is necessary for global scholars and policy-makers to further refine the concept in all respects, especially in constitutional terms. By so doing, the concept of human dignity will be promoted and globally recognized as possessing an overarching and converging status for proposing a Global Bill of Rights. In this regard, this paper opines that Dworkin's elaboration on the concept of human dignity might be viewed as the baseline. According to Ronald Dworkin, the concept of human dignity encompasses three basic principles:<sup>122</sup>

First, the principle of intrinsic value— (i) each human life has a special kind of objective value. It has value as potentiality. Once a human life has begun, it matters how it goes; (ii) it is good when that life succeeds and its potential is realized and bad when it fails and its potential is wasted; (iii) the success or failure of any human life is important in itself, something we all have reason to want or to deplore. Second, the principle of self-respect— each person must take his own life seriously and he must accept that it is a matter of importance that his life be a successful performance rather than a wasted opportunity. Third, the principle of *bona fide* self-responsibility<sup>123</sup>—each person has a special, personal responsibility for identifying what counts as success in his own life. He has a personal responsibility to create that life through a coherent narrative or style that he himself endorses.

### 3. *Concerns for the Global Republican Demarcation*

On the ground that the Global Republic of Constitutionalism will be neither omnipotent nor omniscient, some concerns with the demarcation of the Global Republic must be kept in mind. Resulting from taking global constitutionalism as a mindset, there are at least two demarcations that have to be taken into consideration while contemplating a map for the Global Republic. In this paper, they are called the “twin principles of the Global Republic”: the principle of universality and the principle of subsidiarity. The former is a substantive limit; the latter is a procedural restraint.

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121. Cohen-Eliya & Stopler, *supra* note 31, at 86-87.

122. RONALD DWORIN, IS DEMOCRACY POSSIBLE HERE? PRINCIPLES FOR A NEW POLITICAL DEBATE 9-10 (2006) [hereinafter DWORIN, POLITICAL DEBATE]; RONALD DWORIN, JUSTICE FOR HEDGEHOGS 203-04 (2011) [hereinafter DWORIN, JUSTICE].

123. The original term that Ronald Dworkin employs in his *Justice for Hedgehogs* is “the principle of authenticity”. For a comprehensive purpose, this paper modifies it as a new term. See DWORIN, JUSTICE, *id.* at 204.

(a) Substantive Demarcation: Principle of Universality

First, the Global Republic of Constitutionalism is subject to the principle of universality. Broadly speaking, the Global Republic of Constitutionalism needs to be characterized as a global human community with “unity in diversity” in nature. As Markus Kotzur has contended, universality might be seen as “humankind-based”,<sup>124</sup> so that the Global Republic, which is driven by global governance and bolstered by a robust global constitutional order, must deal with global existential issues that are only universally critical, like issues regarding climate change, environmentally sustainable activities, threats to global public health and security, as well as global fundamental human rights arising from human dignity.

Under the principle of universality, the policy-makers of the Global Republic must act as a hedgehog rather than a fox. As Dworkin reminds us that the fox knows many things, but the hedgehog knows one big thing.<sup>125</sup> The global existential issues with universally critical nature are big things. As such, the principle of universality will substantively demarcate the boundaries of the Global Republic in the context of excising power, and thus the Global Republic will not transform into an overarching coercive authority—a global hegemony<sup>126</sup> that is likely to undermine the autonomy of nation-states.

(b) Procedural Demarcation: Principle of Subsidiarity

Second, in order to avoid leading towards global imperialism, the Global Republic of Constitutionalism is also obliged to comply with the other principle: the principle of subsidiarity. Subsidiarity, according to Fredrick J. Lee and Machiko Kanetake,<sup>127</sup> requires a higher public power to make local issues governed by local regulations, maintain national sovereignty, and promote governing efficiency. But if local action is incapable of overcoming the collective action problems, the higher public power would possess a legitimate stance to intervene. As a result, the principle of subsidiarity could be functionally employed as an organizing mechanism for the Global Republic that both legitimizes and limits<sup>128</sup> the global public powers. In this regard, subsidiarity represents a useful starting point for allocating powers in global governance,<sup>129</sup> and thus it helps

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124. Kotzur, *supra* note 109, at 591.

125. DWORKIN, JUSTICE, *supra* note 122, at 1.

126. David Singh Grewal, *The Domestic Analogy Revisited: Hobbes on International Order*, 125 YALE L.J. 618, 620 (2016).

127. Lee, *supra* note 17, at 330; Machiko Kanetake, *Subsidiarity in the Maintenance of International Peace and Security*, 79 L. & CONTEMP. PROBS. 165, 165-66 (2016).

128. Lee, *supra* note 17, at 346.

129. Markus Jachtenfuchs & Nico Krisch, *Subsidiarity in Global Governance*, 79 L. & CONTEMP. PROBS. 1, 2 (2016).

reconcile the potential tensions between global entities and national states.

However, skeptics have contended that considerations of subsidiarity may provide strong arguments against the centralized global government.<sup>130</sup> This viewpoint is premised on the assumption that global constitutionalism will be considered as an instant project-in-practice. The paper is not based on this assumption. That is why we assert that scholars should treat global constitutionalism as a mindset, especially in the pre-institutionalizing phase. Most prominently, it is well known that the principle of subsidiarity is, at its core, closely linked to the concept of collective action problems. Under this principle, the exercise of global public powers must depend on the presence of global collective action problems that will hinder resolving the global existential issues. Ultimately, the principle of subsidiarity will constitute a procedural limitation to the Global Republic.

Overall speaking, even if the elaborate blueprint of the Global Republic is not easy to draw while global governance is expanding fast in different directions<sup>131</sup> and various arenas, we are still capable of understanding its main sketch based on the twin principles of universality and subsidiarity. Most notably, these twin principles would provide us with a conceptual scheme for establishing the resolution mechanism of reconciling conflicts or tensions between global universality and national autonomy at the stage of institutionalization.

## V. CONCLUSION

Globalization generates many things; the rise of global constitutionalism is one of them. How do we perceive the rise of global constitutionalism? What is the best way for us to conceive of the proper role that global constitutionalism can play in the globalizing world? As this paper has explored, the rise of global constitutionalism has dual implications: it is a global social fact on one hand; and it represents the trend if an academic research on the other hand. As a global social fact, global constitutionalism should be addressed and grasped in constitutional terms. As the trend of an academic research, the four models of existing literature that this paper has explored uncover that the discourses of global constitutionalism are rather divergent than convergent. In order to ameliorate the efficiency of grappling with global constitutionalism, this article argues that scholars should take the rise of global constitutionalism more seriously, and renders a “framework for discourse” in light of a macroscopic and structural-functional approach.

The “framework for discourse” encompasses two main arguments. The

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130. Andreas Follesdal, *The Principle of Subsidiarity as a Constitutional Principle in International Law*, 2 GLOBAL CONSTITUTIONALISM 37, 61 (2013).

131. Jachtenfuchs & Krisch, *supra* note 129, at 1.



first one involves the structural aspect of global constitutionalism. This article argues and suggests that scholars should treat the rise of global constitutionalism as an umbrella paradigm of the overall architecture of constitutionalism, and thus it may unite different discourses about global constitutional order. The second one involves the functional aspect of global constitutionalism. This paper has contended that the efforts for taking global constitutionalism as an instant project-in-practice are premature and claimed that scholars might perceive global constitutionalism as a mindset for mapping a Global Republic of Constitutionalism. Furthermore, based on the overarching concept of taking global constitutionalism as a mindset, this paper considers that there are some critical concerns with the mapping of a Global Republic of Constitutionalism that should be taken into account, including critical concerns with regard to the Global Republican foundation, configuration, and demarcation.

Additionally, the proposal we have proposed here is not a cure for all. This article, however, believes that “we the global scholars” may embody the suggestions for advancing global constitutionalism discourses through two paths: on the ground that global constitutionalism involves complex knowledge with regard to several disciplinary expertise, especially for sciences of politics and law;<sup>132</sup> scholars have to adopt a way of interdisciplinary cooperation. The editors of the journal of *Global Constitutionalism* have addressed this aspect, and believe that interdisciplinary cooperation is the only way to fully capture the issues of global constitutionalism.<sup>133</sup> This cooperation may start from legal scholars and political scientists on. The other way will be through a dialogically discursive contestation.<sup>134</sup> In this way, scholars who come from different disciplines should treat global constitutionalism as an activity of dialogue,<sup>135</sup> discourse,<sup>136</sup> and academic contest.<sup>137</sup> In other words, with its profound

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132. This view has been embraced by several scholars. For example, the editors of the journal of *Global Constitutionalism* emphasized that constitutionalism as an idea sits precisely at the intersection between law and politics. See Wiener, Lang, Tully, Maduro & Kumm, *supra* note 7, at 2; Volk, *supra* note 4, at 555 (Christian Volk stated that global constitutionalism is a legal-political project).

133. Anthony F. Lang Jr., Mattias Kumm, Antje Wiener, James Tully & Miguel Poiares Maduro, *Interdisciplinarity: Challenges and Opportunities*, 2 GLOBAL CONSTITUTIONALISM 1, 1 (2013).

134. Lawrence, *supra* note 70, at 66.

135. Peer Zumbansen, *Comparative, Global and Transnational Constitutionalism: The Emergence of a Transnational Legal-Pluralist Order*, 1 GLOBAL CONSTITUTIONALISM 16, 20 (2012).

136. Clifford Ando, *The Origins and Import of Republican Constitutionalism*, 34 CARDOZO L. REV. 917, 935 (2013); Lawrence, *supra* note 70, at 84.

137. This claim is affirmed by the editors of the journal of *Global Constitutionalism*, they firmly argue that “global constitutionalism is a scholarly arena of critical reflection on the contested field of global law and governance.” See James Tully, Jeffrey L. Dunoff, Anthony F. Lang Jr., Mattias Kumm & Antje Wiener, *Introducing Global Integral Constitutionalism*, 5 GLOBAL CONSTITUTIONALISM 1, 1 (2016).

complexity in nature, global constitutionalism has become an interdisciplinary enterprise that is open to all. However, capturing the essence of global constitutionalism is undoubtedly a task for “We the Global Scholars”.

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## 認真看待全球憲政主義： 一個對話框架的提出

陳文政、朱雪妮

### 摘 要

全球化衍生諸多事物，全球憲政主義的興起即為其中之一。吾人應該如何看待全球憲政主義的興起呢？何者是理解全球憲政主義在全球化世界中適切角色的最佳方式呢？本文主要目的在於論述：學者們應更認真對待全球憲政主義，並提出一個能增進理解全球憲政主義的對話框架。此一對話框架所採取的是宏觀的結構功能研究途徑，本文一方面從結構上分析，主張論者應將全球憲政主義興起視為整體憲政主義構造的屋頂典範，使其能整合有關全球憲政秩序之種種論述；另一方面，本文基於功能觀察，認為視全球憲政主義為一種立即實踐的計畫乃是過早的思維，因此論者可將全球憲政主義視為一種形繪「全球憲政主義共和國」之心智模型。在此心智模型下，吾人應將形繪「全球憲政主義共和國」的若干圖像納入考量，包括與此共和國有關的基礎、輪廓和界限等。

**關鍵詞：**全球化、全球憲政主義、對話框架、屋頂典範、心智模型、全球憲政主義共和國