



Global Governance

CONSTITUENT POWER AND THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS

THE CONSTITUTION OF SUPRANATIONALISM

John G. Oates



Constituent Power and the Legitimacy of International Organizations

This book develops a constitutional theory of international organization to explain the legitimation of supranational organizations.

Supranational organizations play a key role in contemporary global governance, but recent events like Brexit and the threat by South Africa to withdraw from the International Criminal Court suggest that their legitimacy continues to generate contentious debates in many countries. Rethinking international organization as a constitutional problem, Oates argues that it is the representation of the constituent power of a constitutional order, that is, the collective subject in whose name authority is wielded, which explains the legitimation of supranational authority. Comparing the cases of the European Union, the World Trade Organization, and the International Criminal Court, Oates shows that the constitution of supranationalism is far from a functional response to the pressures of interdependence but a value-laden struggle to define the proper subject of global governance.

The book will be of interest to students and scholars of international organization and those working in the broader fields of global governance and general International Relations theory. It should also be of interest to international legal scholars, particularly those focused on questions related to global constitutionalism.

John G. Oates is an Assistant Professor in the Department of Politics and International Relations at Florida International University. He received his PhD in Political Science from The Ohio State University, and has published articles in *Review of International Studies*, *Journal of International Relations and Development*, and *Journal of International Political Theory*. His research examines the dynamics of authority and legitimacy in global governance, with a particular focus on the origins of supranational institutions. He also has interests in normative international theory, social theory, and international law.

Global Governance

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Constituent Power and the Legitimacy of International Organizations

The Constitution of Supranationalism

John G. Oates

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Dedicated to the memory of my father, Thomas R. Oates



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1 Introduction

From contracts to constitutions

In the late summer of 2015, as the migrant crisis in the Mediterranean deepened, the European Council, a legislative body of the European Union (EU), adopted a measure intended to ease the burden borne by Italy and Greece in managing the growing population of asylum seekers coming to Europe. The measure mandated all member states to assist in the resettlement of 120,000 migrants over the next 2 years, using a quota system to determine the number of migrants each member would be expected to accept. Such a drastic measure was necessary, the EU argued, to demonstrate solidarity towards Italy and Greece and the thousands of refugees crossing the EU's borders. As Jean-Claude Juncker, the EU Commissioner, noted in September 2015, "If ever European solidarity needed to manifest itself, it is on the question of the refugee crisis. It is time to show collective courage and deliver this European response now."¹ With 28 member states, it is perhaps unsurprising that such an ambitious policy measure was met with varying degrees of support, ambivalence, and outright repudiation by EU member states. What *is* surprising, however, is that despite the formal objections of four member states – the Czech Republic, Hungary, Romania, and Slovakia – the measure was nevertheless adopted and became formally binding for all EU members. Few international organizations today enjoy the authority to mandate policy choices for member states without their consent, particularly on matters that so directly implicate their domestic jurisdiction, and the ability of the European Union to wield this supranational authority over its member states marks it out as one of the more powerful international organizations in world politics.

The appeal to European solidarity notwithstanding, the European Council's decision was not accepted with equanimity by the dissenting states, and they refused to fulfill their specified resettlement quota. These states objected to the perceived intrusion of EU authority into matters integral to state sovereignty, an argument that rested primarily on principled objections to the EU's supranational authority rather than a concern with the material costs of resettlement. As the Hungarian foreign minister, Peter Szijjarto, argued after the unsuccessful challenge of the Council's authority before the European Court of Justice: "Politics has raped European law and raped European values. This decision practically openly legitimizes the power of the EU above the member states of EU. This is

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unacceptable in all terms.”² The dissenting member states are now subject to infringement procedures initiated by the Commission and may face punitive fines for their noncompliance with the Council’s decision.

The political tensions associated with the EU’s migrant crisis help to illuminate two important questions related to the practice of supranationalism in world politics. Cases in which international organizations exercise authority over the domestic jurisdiction of member states without first securing their consent are not limited to postwar Europe. This type of supranational authority is an increasingly common attribute of international organizations, evident in major global institutions like the International Criminal Court (ICC), the dispute resolution mechanism of the World Trade Organization (WTO), and to a more limited extent the United Nations Security Council (UNSC). These developments signal a dramatic shift not only in the distribution of public authority in the international system but also in the rationalities and ideas that inform the practice of international organization. How did this move to supranational authority become possible in the postwar international system? How do governments legitimate the creation of international institutions with the authority to bind them to policy choices without their consent?

The ongoing controversy over the European Council’s decision and the Eastern European member states’ continued objection to the EU’s authority on this issue raises another equally important set of questions concerning the relationship between supranationalism and state sovereignty. Supranational authority is far from a settled practice in world politics, and it continues to generate intense debate and controversy in many governments and publics around the world, not just in the context of the EU where the recent migrant crisis and Brexit have thrown these debates into sharp relief, but also in the South African threat to withdraw from the ICC and the Trump Administration’s continuing efforts to undermine the WTO dispute settlement mechanism.³ How is the claim to supranational authority, divorced as it is from the nation-state, reconciled with the long-standing traditions of popular sovereignty and democratic self-determination that underlie the legitimacy of national governments? And why does this attempted reconciliation sometimes fail, leading to a repudiation of supranational authority? These questions are not merely of academic interest; they have significant implications for the legitimacy and effectiveness of global governance institutions and the quality of national democratic governance.

The principal goal of this study is to understand how powerful, supranational organizations are constituted as legitimate authorities in a world of sovereign states. Rather than beginning, as many explanations of international cooperation do, from the presumption that the agreements establishing international institutions are best understood as contractual agreements among governments, I argue that we gain greater analytic leverage on explaining the foundations of supranational authority if we theorize international institutions as constitutional orders. A constitutional approach focuses on the politics surrounding the effort to legitimate the distribution of public authority among

member states and international institutions, rather than the politics related to choosing policy outcomes or the legitimation of specific moments in which an institution wields authority. It further assumes that the problems confronting the constitution of institutional authority are not reducible to the cooperation problems that impede efficient policy coordination but encompass deeper problems related to the legitimacy of formal, institutionalized power. Rather than highlighting the importance of interest-based intergovernmental bargaining, a constitutional approach draws our attention to the dynamics of representing the constituent power, that is, the collective subject in whose name authority is exercised, which underlies the authority relations of an institutional order.⁴ How this constituent power is represented during moments of institutional foundation, I argue, fundamentally shapes the legitimation of different constitutional authority relations within an international institutional order. The origins of supranational authority, therefore, lie not in objective, structural conditions of interdependence or in the strategic calculations of decision-makers but in ideas about the proper public identity of global governance arrangements and the politics of legitimacy through which these ideas are translated into an institutional reality.

The constitutional theory of supranational authority developed in this book contributes to our understanding of world politics in two ways. First, it advances our understanding of the conditions under which supranational forms of governance emerge in world politics. Though less common than other forms of governance, such as transnational governance networks,⁵ international hierarchies,⁶ or private regulatory frameworks,⁷ supranational institutions, such as the EU, the WTO, and the ICC, remain some of the most significant sites for international governance in the world. Unlike the other forms of governance mentioned above, moreover, supranational institutions rest upon public international authority and thus represent perhaps the most promising avenue for realizing more accountable and legitimate forms of global governance. While none of these institutions has escaped the focus of IR scholars, the study of these powerful international institutions is often treated in isolation from other, similarly powerful international institutions. As a result, it is difficult to identify, much less explain, common patterns and processes in international authority that we might observe across these cases. This book provides the first cross-case comparative analysis of the constitutional legitimacy of supranational institutions. In so doing, it develops the concept of supranationalism as a generic institutional form, one not limited to the unique experience of postwar Europe, and provides a theory to explain the dynamics of constitutional legitimacy that endow this institutional form with authority. I examine three distinct supranational institutions (the EU, the WTO, and the ICC) and show that while each case exhibits its own particularities, they also all exhibit a common set of principles related to international authority that enable us to identify them as supranational and a similar set of processes that help to explain the genesis of those principles.

This study also makes an important contribution to our theoretical understanding of international organization by developing two related claims. The first

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is an ontological claim about the nature of international institutions. Most approaches to international organization conceptualize institutions as functional instruments of statecraft and thus assume that their creation is akin to adopting a new method of accounting to collect and organize information, or establishing a new bureaucratic procedure to oversee policy implementation. I argue that international governance institutions are institutionalized associations that endow relations among governments with a durable character that exists above and distinct from their individual interests. Their creation is thus more akin to the founding of a new constitutional order than the invention of a new policy instrument or strategy. This alternative perspective suggests that governments confront a series of questions when creating new institutions that are constitutional in nature, such as the degree of autonomy that an institution will enjoy from the individual member states, and the relationship of the obligations that will follow from membership to the domestic laws of the member states. These questions concern the public identity of the institution rather than its functionality, and they share similarities with the constitutional issues that we observe in domestic political orders, such as the question of how individual interests will be related to the collective will of the people in a democracy or the question of the proper boundaries between individual freedom and state power in a liberal state. In showing that some variant of these constitutional questions are also present when governments create international institutions, I hope to demonstrate that institutions are more than simply contractual agreements; they also represent forms of political unity and should be understood as a species of constitutional order, albeit ones that exhibit their own properties given the unique context of international relations.

Conceptualizing international institutions as constitutional orders suggests a second claim, namely, that we can fruitfully understand international organization as a form of constitutional politics. Constitutional politics are distinct from the everyday politics of positional bargaining not only because they address basic, foundational questions of political organization but also because they are driven by philosophical or normative considerations rather than an interest in distributional gain.⁸ Constitutional politics, in short, are defined by struggles over basic value commitments, and I argue that the politics of international constitutional design can be understood as a struggle to define the public identity of governance institutions, on the one hand, and the purpose of state power, on the other. These struggles occur both between governments as they seek to define the collective subject whose interests an institution will serve, and within governments as they seek to reconcile the obligations associated with membership in a new institution with traditions of state sovereignty. At the center of both of these struggles is a set of competing ideologies of global governance that define the purpose of international cooperation and state power in fundamentally different ways. Existing approaches to international organization overlook these ideological struggles and overlook, as a result, key conditions of possibility for the emergence of international authority.

The argument

Scholars use the concept of supranationalism in a variety of ways: to describe a particular bargaining process,⁹ a process through which national loyalties are transferred to higher level institutions,¹⁰ or a particular institutional outcome.¹¹ Even when understood as an outcome, however, there is little agreement as to what features differentiate supranational institutions from intergovernmental arrangements. I seek to redress this confusion by developing the concept of supranationalism as a generic institutional form, arguing that it is defined by two properties: (1) the ability to wield regulatory, legislative, or judicial authority without first securing member-state consent, (2) over matters that are typically within the exclusive jurisdiction of states. These two properties – what we can call (1) nonconsensual authority and (2) jurisdictional primacy – set supranational institutions apart from traditional intergovernmental institutions, and their emergence represents more than simply a change in the strategies that governments use to realize policy coordination; it represents a significant transformation in the distribution of public authority in the international system, constituting a new locus of authority above (rather than between) sovereign states.

The emergence of powerful international organizations has been the focus of a growing body of International Relations (IR) scholarship.¹² The dominant approaches to explaining supranationalism in Europe and beyond offer functional explanations to account for the origin and design of international institutions,¹³ yet this focus on functional efficiency elides the range of principled ideas and arguments that often structure public debates on the legitimacy of supranational organizations. Proposals to establish supranational organizations frequently confront an already crowded field of proposals for different forms of policy coordination, not all of which involve delegating authority. Emphasizing the functional benefits of delegation as an explanation for institutional choice neglects the historical context out of which proposals for supranationalism emerge and the political dynamics through which these competing ideas become settled into a foundational rationality for an authoritative IO. Constructivist scholars have shown more interest in the politics of legitimacy, but they typically focus on cases in which appeals to expertise or morality legitimate specific moments in which an institution exercises its authority.¹⁴ Less attention is paid in this scholarship to the underlying constitutional structures that make these more immediate practices of international authority possible. What is missing is a framework that can account for how the constitutional structures of authoritative international organizations are legitimated.

This book develops such a framework by examining the processes of public legitimation that accompany the founding of supranational organizations. Public legitimation concerns the rhetorical justification that decision-makers give their audiences for the choices they make,¹⁵ and in the context of founding international organizations, a context heavily influenced by traditions of international law and diplomacy, two audiences are particularly important: the actors, often (though not exclusively) representatives of national governments, that participate

in the diplomatic conference where the constitutional form of an international institution is negotiated, and the domestic publics and national legislatures to whom governments seek to legitimate their membership in a proposed IO. Because different claims, rhetorical tropes, and discourses resonate with each of these audiences, they constitute distinct political domains for the politics of legitimacy. In the international domain – where government representatives seek to legitimate their preferred constitutional choices to each other – arguments about the nature of the international community and the public identity of international institutions define the landscape of upon which public legitimation occurs. In the domestic domain, by contrast, this discursive terrain is marked by arguments about the nature of sovereignty and the purpose of state power.

Despite these important differences, the politics of legitimacy in both of these domains is fundamentally shaped by the representation of the collective subject in whose name political authority is exercised, what is known as the “constituent power.” Ideas about the proper constituent power of an international institution shape the effort by decision-makers to collectively legitimate constitutional design choices to other governments. Supranational authority, in which an IO enjoys the recognized right to wield independent authority over policy matters that implicate the domestic jurisdiction of member states, becomes possible only when the constituent power of international organization is constructed as a *postnational* rather than an intergovernmental constituent power. This postnational constituent power can take many forms, from the future collective subject of Europe, to private, transnational actors such as multinational corporations, to a global subject such as the idea of the international community, but it always entails the representation of a collective subject that is distinct from sovereign states. Postnational constituent powers locate the ultimate authority of international institutions not in the common interests of governments but in a subject whose interests and welfare prefigure, supersede, or challenge state interests, and legitimating the proposed powers of an international organization in these terms helps to constitute the “logic of delegation” that underlies the constitution of supranational authority.

In the domestic domain of legitimation where governments must justify their institutional design choices to their national publics and legislatures, the legitimation of supranational authority turns on whether actors are able to link ideas about the purpose of international governance to preexisting ideas about state sovereignty, in particular, ideas about the constituent power of the state. I distinguish between two broad discursive traditions of legitimating state power that represent sovereignty in different ways. *National sovereignty* represents the purpose of state power as giving expression to a pregiven national identity, a tradition often associated with the power and authority of majoritarian institutions like parliaments. The tradition of *administrative sovereignty*, in contrast, locates the purpose of state power in the administration of society and is often associated with the power and authority of the executive offices of government. Securing domestic approval for a proposed supranational arrangement becomes more difficult when state sovereignty is represented as national sovereignty because it raises questions about the integrity of national democratic self-determination in

the face of supranational authority. Ideas of administrative sovereignty, in contrast, are less difficult to reconcile with governance beyond the nation-state. The legitimation of supranational authority is thus made possible by two distinct discourses of constituent power that intersect during moments of institutional creation. Representations of sovereignty can facilitate or obstruct the founding of supranational organizations depending on the discursive tradition of sovereignty that defines the purpose of governance in an issue area, a factor that is often deeply path dependent and shaped by prior practices of legitimation within national governments on issues unrelated to international governance.

The constitution of supranational authority is thus fundamentally shaped by legitimation practices that represent the constituent power of international organization on the one hand and state sovereignty on the other. This argument has significant implications for how we conceptualize and explain international organization, suggesting that the creation of new institutions is far more than a functional response to preexisting structural conditions but a dynamic and somewhat contingent process of assigning value to expressions of collective power. It further suggests that supranationalism owes its provenance in the postwar period, not only to the growing demand for transnational policy coordination or to rising levels of complex interdependence but to two ideological developments in the modern international system, one rooted in ideas about the postnational constituent power of international institutions, and another rooted in changing ideas about the purpose of the modern nation-state. Recognizing and explaining these dynamics becomes possible when we appreciate the constitutional dimensions of international organization, yet existing approaches, most of which adopt a contractual model of international organization, have largely neglected these dimensions.

The contractual model and its limits

The dominant approach to explaining the design and authority of international institutions adopts a broadly contractual perspective on international cooperation. Keohane's influential rational choice approach to international cooperation explicitly draws an analogy between international regimes and contracts, noting that both "are designed not to implement centralized enforcement of agreements" but to "provide information and generate patterns of transaction costs."¹⁶ This early contractual approach was focused primarily on the "weak and fragile" quasi-agreements and conventions that made policy coordination more likely through the provision of information and issue linkages,¹⁷ but recent rational choice approaches have explored the design of more robust and legalized institutional arrangements, many of which are assumed to wield some form of international authority.¹⁸ In keeping with the earlier contractual model developed by Keohane, these approaches assume that decisions about the scope of international authority and the discretion that institutions enjoy in wielding this authority are determined by the functional benefits that these arrangements produce for policy coordination. Delegation may, for example, be undertaken in order to facilitate regulation

of a highly technical international problem when governments confront high levels of uncertainty about the world. Alternatively, delegation may be an effort to enhance the credibility of member-state commitments to a policy change when short- and long-term interests conflict.¹⁹ In both cases, the design of institutions is driven by the need to solve the cooperation problems that impede effective or efficient policy coordination.

More recent work on institutional design has relaxed the strict rationality assumption that informed earlier versions of the contractual model, exploring the role that bounded rationality plays in shaping institutional design²⁰ and examining the role that the diffusion of cognitive factors play in institutional choice and perceptions of legitimacy.²¹ These approaches broaden the contractual model to include the role that social factors play in institutional design, but they do not question the underlying presumption of the contractual model that it is the interest in efficient policy coordination that drives institutional choices and ultimately determines institutional outcomes. The approach I develop in this book shares important affinities with these more recent works, in particular the attention to social context in shaping institutional design, but it departs from them in seeking to develop an alternative, constitutional perspective on questions of delegation, legitimacy, and institutional design.

This alternative perspective helps answer two sets of questions that the contractual model leaves largely unexamined. First, the contractual model presumes that institutional design involves a process in which decision-makers anticipate the effects of different design choices for realizing varying levels of policy coordination, and then choose the design that delivers the most efficient outcome.²² This approach tells us a great deal about institutional design choices, but it neglects the role that commitments to constitutional principles, which may be independent of policy preferences, play in this process. Delegating authority to international organizations implicates more than the distributional interests or policy preferences of the governments involved; it touches on often deep-seated values related to constitutional principles, such as the proper balance between state control over policy choices and the authority of international agents, and these commitments are often irreducible to questions of efficient policy coordination. Before actors can agree upon the specific institutional design features of a supranational institution, for example, they must first agree that enhancing credible commitments to a policy change is more valuable than retaining the traditional prerogatives of sovereign control. The functionalist arguments of the contractual model focus on the more immediate question of how policy preferences are translated into institutional outcomes, and they leave these deeper questions about constitutional principles and their implications for institutional design largely unexamined.

Examining the role that constitutional commitments play in the practice of delegation involves more than simply recovering the principled beliefs of key decision-makers. It calls for an analysis of the political process through which governments construct the constitutional legitimacy of delegation. Proposals to establish a supranational organization nearly always confront a crowded

ideological terrain in which competing ideas about the purpose of international cooperation and the nature of state sovereignty vie for acceptance and legitimacy. Governments may disagree, for example, not simply on matters related to policy choices that implicate their distributional interests,²³ but also on principled ideas about how an international problem should be governed, such as whether a problem should be managed according to intergovernmental principles, in which government consent is required for any collective policy initiative, or whether governments should forgo this prerogative by delegating authority to a supranational organization. Many contractual analyses presume that decision-makers confront a blank slate upon which they write their preferred institutional design choices according to a shared functional rationality, but even a brief look at the negotiating history of international institutions, a history typically fraught with intense ideological struggles over governance principles and the legitimacy of international authority, belies this presumption. By taking the rationality of a particular institutional design choice as the starting point for analysis, existing accounts overlook the process through which a particular institutional rationality emerges out of this ideological terrain to legitimate institutional design choices.

What is needed is an account of the politics of legitimacy that define these moments of institutional choice, an account that shows how competing rationalities of international organization intersect and struggle to gain acceptance among different audiences, and how one (or more) of those rationalities emerges from this terrain to serve as the foundation for an institution's constitutional legitimacy. Such an account is necessary if we are to explain the social conditions of possibility for supranational authority. The contractual model's approach to explaining institutional design thus either begins too late, overlooking the process through which a particular institutional rationality such as delegation, emerges to structure institutional choice in a given context, or ends too early, overlooking the process through which a particular set of ideas about design compete with and are legitimated before larger audiences. While recent scholarship has explored the dynamics of IO legitimacy, much of the focus remains on the legitimacy of different policy choices or popular evaluations of the effectiveness and performance of an IO,²⁴ and the dimension of constitutional legitimacy is given little attention.

None of this is to deny that the contractual model offers valuable insights into the study of supranationalism. Understanding the interests and strategic rationalities of those engaged in designing and founding IOs is central to any effort to explain the origins of supranational arrangements. The contractual model is particularly useful for analyzing how interests and functional concerns shape preferences for policy agendas and initiatives that may be delegated to an IO, yet the focus on policy coordination has left questions related to constitutional legitimacy underexplored. The approach I develop in this book places these constitutional questions at the center of the analysis of delegation, and it sheds light on the different considerations that shape the answers governments give to these questions and the consequences of these answers for the legitimacy of supranational authority. The constitutional model is thus a complement to the