An Integrative Theory of Global Public Law:

Cosmopolitan, pluralist, Public Reason oriented

Mattias Kumm

(This is a very rough incomplete first draft. Do not cite or circulate without permission. For internal use only.)

I. The Legitimatory Trinity

The focus of this paper are the central conceptual and normative ideas that are in play in the interpretation and contestation of the contemporary practice of what I call gobal public law. Global public law as I use the term here refers both to the significant number of constitutionally guided and constrained public law practices in liberal democracies across the world[1] and to public law beyond the state, in particular the Law of the European Union law and international law. It is a central characteristic of the world of contemporary global public law that human rights, democracy and the rule of law have become the largely uncontested criteria by which law´s claim to legitimate authority is assessed. Indeed the formula of "human rights, democracy and the rule of law" appears so frequently in relationship to legitimate law and is being invoked so ritualistically, that it functions much like the formula "the father, the son and the holy ghost" in relationship to the Godhead in mainstream Christian theology: As a fundmantal dogma, and yet also as a puzzle whose complex depths await further elucidation in the practice of life lived engaging it in good faith. I will therefore refer to the formula as *global public law´s legitimatory Trinity* and seek to engage it in good faith in order to address a number of puzzles that concern the structure of global public law.

The deep dogmatic anchoring of the legitimatory Trinity in global public law is manifest in three ways. First, there is apparently no constitution enacted after 1990 that does not explicitly commit itself to human rights, democracy and the rule of law *(hereinafter: the Legitimatory Trinity or LT)* . Second, and perhaps more surprisingly, it has become commonplace for international law, too, to present itself as being based on and instantiating a commitment to the Legitimatory Trinity. Whether the focus is on the Treaties that serve as the Constitutional Charter of the European Union[2] or the texts of UN bodies[3], including UN Security Council Resolutions[4]: Human rights, democracy and the rule of law must presumeably now, along with the principle of sovereign equality, be counted among the foundational commitments even of law beyond the state. Third, these textual commitments are not only of political significance, but often provide legally enforceable criteria for what is to be enforced as valid law. If a legal norm or the procedure used to generate it can be shown to be incompatible with human rights, democracy or the rule of law, it is likely that a court will have the jurisdiction to declare it null and void or to set it aside and refuse to enforce it in its jurisdiction on those grounds. In the world of global public law legality is today generally tied to an idea of legitimate authority that is spelled out in terms of respect for and realization of a commitment to the legitimatory Trinity. The language of political morality associated with the French and American Revolutions and the modern tradition of constitutionalism, has become the *lingua franca* for justifying and contesting claims to legitimate authority within the world of global public law.

But if the deep dogmatic anchoring of the legitimatory Trinity is not in dispute, what is highly contested is how it should be understood. What is the meaning of this dogma in the context of actual global public law practice?[5] More specifically how can the legitimatory Trinity illuminate some basic puzzles of global public law practice, that raise legitimacy questions. In the following I will address three questions of pressing concern, over which there is conceptually interesting and persisten disagreement. First, how does international law relate to national law? Under what circumstances, if at all, should international law be judicially

enforced domestically even in light of countervailing national legislation or constitutional provisions? How should conflicts between different legal orders be addressed? Second, does international law, as it has evoloved in recent decades, suffer from a structural democratic legitimacy deficit? If so, what exactly does it consist in? What kind of interpretation, progressive development or political reform would make it more legitimate? The third concern issue concerns what some might describe as the peculiar structure of human rights practice. How can one make sense of its scope and structure, the role of courts and the overlapping jurisdiction between national and international courts?

To address the first set of questions, the first part will focus on the problem of legal conflict: What happens when competing claims of legal authority are made and the question is, which one should be respected? How should we think about resolving these issues? (II) As an illustrative example the much discussed and contentious issue of the legal conflict between UN Law, EU Law and the constitutional law of Member States will be the subject of close analysis and discussion The purpose of using this example is not so much to learn how to resolve conflicts that occur in this particular context, but to analyze more closely competing conceptions of public law and conceptions of legitimate authority that underlie arguments put forward by different actors in these debates. More specifically I will distinguish three conceptions of public law, tied to different conceptions of legitimate authority, that underlie these debates: Democratic Statism, Legalist Monism and Cosmopolitanism. All of these conceptions have in common that they are conceptually distinctive interpretations of the dogma of the legitimatory Trinity[6]: they all provide conceptual frameworks that interpret the idea of the commitment to human rights, democracy and the rule of law as it relates to the legal construction of legitimate authority. But these conceptual frameworks provide very different accounts of the world of global public law and put forward very different claims about what grounds the legitimate authority of law. Not surprisingly they lead to very different conclusions with regard to the question which laws should take precedence and which law should be set aside. I will argue that only *cosmopolitanism* is able to effectively address and take into

account the relevant moral and pragmatic concerns in the appropriate way and that both Democratic Statism and Legalist Monism are onesided and misguided.

With the basic idea of a cosmopolitan conception of public law introduced, the second part focuses on the legitmacy of international law practices, that have expanded in scope and have in part severed the traditionally close ties to state consent. These can take the form of governance practices engaged in by Treaty based regimes or the development of the law through an interpretation of customary law, that can no longer serve as a proxy for states implicit consent. As will becom clear, global public law interpreted within the framework of cosmopolitanism provides an original perspective on what conventionally is perceived as the structural legitimacy problems that plague international law not closely tied to state consent. The core concern is not that international public authorities are not subject to electoral accountability. Significantly more serious is the capture of the international jurisgenerative process by states, in particular the state's executive branches. The current legal structure, in which powerful states can too easily sabotage effective collective action, tends to impose unreasonable burdens on the development of processes and norms that ensure wider participation and help to effectively realize global public goods. These are the problems that debates about legitimacy should be focused on. Questions of democratic legitimacy of transnational governance practices, on the other hand, are widely overstated. Once freed from statist assumptions of what makes democracy legitimate, these concerns translate into the important, but relatively mundane demand to ensure that appropriate forms of transparency, participation and representativeness and accountability become an integral part of governance practice.

The final part focuses on some structural features of human and constitutional rights practice, such as the pervasiveness of the proportionality requirement and the increasing mutual engagement of international and national human rights practice. This practice structurally connects rights discourse with the idea of justifiability in terms of public reason. It also establishes strong links between

national constitutional rights practice and international human rights practice, which are conceived of as part of a joint, mutually engaging, cooperative enterprise. Together these interlocking and mutually reinforcing elements describe a coherent paradigm of a public reason oriented cosmopolitan pluralism. As will become clear, the cosmopolitan paradigm not only provides a description and assessment of national and international constitutionalism within a common conceptual framework; its defining feature is its insistence that questions of legal authority and legitimacy have to be discussed in a way that takes into account the structural connections between national and international law. Global Public Law, to the extent that it is concerned with the establishment and maintenance of legitimate public authority, has to be conceived within a cosmopolitan, not a national, frame.

II. Legal conflict and competing claims to legitimate authority: Cosmopolitanism as a unified framework for the reconstruction of legal pluralism

There is deep disagreement about how the law of the European Union fits into the world of public law.[7] Is EU Law an integral part of international law? Or does EU law establish an independent constitutional system? Is national law an integral part of that European system or does it remain an independent constitutional system? Disagreements about these questions are not just of interest to legal theorists. They give rise to high stakes legal controversy, when EU Law conflicts with either international or national constitutional law. Which law should be set aside? These conflicts provide a useful prism through which to study different claims about the structure of the world of public law. Such a prism helps sharpen the sense for what is at stake, when conceiving of the legal world in one way or another.

Conflicts between EU Law and other laws arise in two types of cases.

The first type concerns conflicts between the EU Law and the wider international legal order. Such a conflict has been the focus of the ECJ's recent *Kadi*[8] decision. The question was whether the implementation by the EU of a UN Security Council Resolution could be made conditional on conformity with European fundamental rights standards, or whether the obligations derived from the UN Charter have primacy over all other international law, including EU Law. The ECJ, overruling a previous decision by the ECFI[9], held that it was appropriate to subject the EU Regulation implementing Security Council resolution to European fundamental rights standards, effectively precluding the enforcement of a UN Security Council Resolution. That decision has triggered strong reactions, both affirming and critical.[10] Is European Union law hierarchically subordinated to UN Law, as Art. 103 UN Charta might suggest? If not, does that mean that the constitutional law of the EU, whatever that happens to be, determines if and under what conditions UN Law is to be applied by the EU? Is there a third way to resolve this issue that does not involve establishing categorical primacy of one over the other?

The second issue concerns potential conflicts between European law and Member States law, in particular Member State's constitutional law. After the ECJ in *Costa v. Enel*[11] declared EU Law to have primacy over all national law, including national constitutional law, most national courts have *not* accepted outright the position of the ECJ. Instead many insisted that there are national constitutional red lines, guarded by national constitutional courts, which EU must not cross in order for it to be implemented nationally. Nearly 50 years after Costa and an immeasurable amount of ink spilled describing and analyzing the decisions by the ECJ and national constitutional courts[12], much remains in flux and the basic questions remain alive: Should national courts accept that national constitutional law is subordinated to EU Law, as the ECJ claims? If not, does that mean that national constitutional law as interpreted by national constitutional courts establishes the conditions under which EU Law is enforced nationally? Is there a third way of answering that questions, that does not insist on the primacy of one over the other? If there are lines to draw in the sand and those lines are not

simply derived from specific provisions of national constitutions, how should national courts go about drawing them?

Both issues raise the question how European Law fits into the world of public law. The purpose of this chapter is not to report on the rich literature addressing each of these issues or, more ambitious, try to resolve them. It is to get a deeper understanding of them, how they are related to one another and why they seem so difficult to resolve. The deep, interminable and seemingly incommensurable disagreement that exists with regard to these questions, I will argue, is the result of a basic disagreement over how to conceive of the world of public law and the foundations of legitimate public authority. Debates about how the EU is appropriately described as a legal and political subject and how it fits into the legal world are deeply tied up with different conceptions of the world of public law. More specifically there are *three competing models* of public law underlying these conflicts, generating three very different accounts of how European law fits into the world of public law. I will distinguish between *Democratic Statism*, *Legalist Monism* and *Cosmopolitan Pluralism*, with each model of public law playing an important role in the justification of judicial decisions in European legal practice and each connected to a different conception of public authority.

In the following I will describe and analyze each of these models as they play out in practice and spell out their implications for the question how European Law fits into the world of public law. Ultimately I will argue that a Constitutionalist Model of public law not only best incorporates and operationalizes the competing normative concerns in play. It also provides an account of public law that can reconstruct and justify the mutually engaged, deferential and principled legal pluralism that is arguably the hallmark feature of contemporary European constitutional practice.

1. The old world of public law: Democratic Statism and the deep divide

a) Statism in three historical versions: conceptual, realist and democratic

The core feature of statist accounts of the world of law is a deep divide: there is national or state law on the one hand and there is international or interstate law on the other. State law is the paradigmatic case of law. International law is the impoverished stepchild of state law. The former is in some sense derived from the latter and yet it seems lacking in some basic way. Historically three different accounts of that that divide were offered, distinguishable by their account of what exactly international law lacked.

During much of the 19th century legal theorists spent a great deal of time grappling with the *conceptual question* whether international law properly so called could exist, or whether it was really just a kind of positive morality, given the absence of an international sovereign. If law was the command of a sovereign [13] or sovereignty was a predicate that precluded being subject to legal obligations[14], how could international law exist as law properly so called?

Even though conceptual arguments lost their sway in the 20th century, after WWII so called 'realism'[15] provided what was believed to be an *empirically grounded* account of why the structure of the international system made the establishment of the rule of law beyond the state a utopian exercise. In an international system where states simply followed their national interests, international law could not function as an independent guide or constraint for state action.

But by the end of the Cold War, with the spread of failed states on the one hand the rise of relatively effective Treaty regimes and practices of global governance on the other, that argument too, fell out of favour. The terms of the debate shifted again. General scepticism was in retreat as a rich literature burgeoned that tried to explain the widespread phenomenon of compliance with international law.[16] As liberal constitutional democracies were increasingly constrained perhaps not by a Weberian iron cage but at least a strong web of transnational legal norms, *statism took a democratic turn*: now the deep divide between national law and international law was justified with reference to democratic constitutional theory. State law ultimately derives its authority from "We the People" imagined as having acted as a *pouvoir constituant* to establish a

national constitution as a supreme legal framework for democratic self-government.[17] International law, on the other hand, derives its authority from the consent of states. Of course states may decide to establish all kinds of international institutions to address specific issues. They can also establish courts and tribunals and even establish Treaties that create rights and obligations for individuals. But no matter how important these Treaties might be to address basic collective action or coordination problems, no matter the internal complexity of the institutions they set up: none of this takes away from the fact that these international institutions are ultimately based on Treaties requiring the ratification by states following national constitutional requirements. Member States remain the Masters of international Treaties, for so long they are not replaced by genuine constitutions attributable to a constitutive act of "We the People".

There are two important consequences connected to a construction of the legal world informed by democratic statism. First, democratic statism insists that national constitutional law, as the supreme law of the land, determines if and under what conditions international law is to be enforced domestically. The authority of international law, from the perspective of national law, remains a matter to be determined by national constitutional law. Of course a violation of international law may trigger the responsibility of the violating state on the international level, but as a matter of domestic law such a consequence might well be legally irrelevant. The legal world thus has a dualist structure. Second, given that state law is connected to the idea of "We the People" governing themselves democratically and the institutional and social infrastructure for collective self-government is absent beyond the state, international law is inherently infected by a democratic deficit. That deficit is less when there is a close and concrete link between a specific international legal obligation and state consent. But even then there is a residual problem, because many international obligations can't be unilaterally revoked by the state as a matter of international law, even when the majority of citizens using a democratic procedures wants to do so. Problems of democratic legitimacy become even more serious, when Treaties authorize international institutions to make important social and political choices. Even if ultimately problem-solving or cooperation-enhancing benefits associated with

international law may legitimate international law, there remains an aura of a legitimacy deficit that hangs over international law.

2. Democratic Statism and the ECJ's claim to primacy over domestic constitutional law

When the ECJ made the claim in *Costa v. Enel* that EU law has primacy over national law, even national constitutional law, the court implicitly rejected Democratic Statism and embraced an alternative account of public law. That will be described below. Here the focus is on how to make sense of such a claim from the point of view of Democratic Statism, a framework adopted by some Member States' highest courts, perhaps most prominently the German Federal Constitutional Court in its *Maastricht*[18] and *Lisbon*[19] decision. Within the framework of Democratic Statism a claim to primacy is plausible only if the European Union has in fact become a federal state with a constitution properly so called. The central question becomes: Is the EU an international organization, ultimately based on Treaties deriving their authority from the ratification of Member States according to their national constitutional requirements? Or has the EU become a federal state, based on an act by "We the People" acting as a *pouvoir constituant*? If it is the former EU law can not, at least as a matter of domestic law, claim primacy over national constitutional law. If it is the latter, Member States have lost their ultimate authority as their national constitutional order has been hierarchically integrated into the legal order of the new federal superstate.

Note that within the democratic statist model there is no third alternative. The EU qualifies either as a state or as an international institution. Calling the EU an institution *sui generis*, as has become customary in EU Law circles to avoid asking that question, just clouds the issue. The EU may be *sui generis* in all kinds of ways, but it will be either a *sui generis* state or a *sui generis* international institution, *tertium non datur*. The question is whether it is one or the other.

a) The test for establishing statehood: Why the EU is no state

So how do you know whether it is one or the other? Courts and scholars using a Democratic Statist framework generally focus on some combination of three factors.[20] The first is *institutional* and focuses on the structure of the EU Treaties. Here the general focus tends to be whether Member States can still plausibly be described as the "Masters of the Treaty" or whether EU institutions have emancipated themselves from the control of Member States to a sufficient degree. The focus is on a variety of factors that include but are not limited to the amendment procedure (is the unanimity required to amend the Treaties or is a qualified majority enough?), the ordinary legislative procedure (is the Council in charge or does Parliament dominate the legislative process and even if it does, is it constituted in a way that reflects the idea of equality of citizens) , competencies (how far does EU law authorize legislation in core traditional areas of sovereignty, such as taxes, defense, social security and criminal law?). The second factor is *procedural*. Were the Treaties the result of an ordinary Treaty ratification procedure or was there a constitutional convention or some other mechanisms which allowed for the kind of high level participation and deliberation associated with actions appropriately attributable to "We the People"? Third, there are *sociological* factors: Do EU citizens have the kind of cohesion, do they share the kind of bond characteristic of "the people"? Do they have what it takes to be a "*Demos*"? To determine whether that is the case some authors focus on shared history, culture, religion, language etc.. Others focus on the structure of the public sphere and the institutions of civil society relating to media, political parties, interest group organizations etc. Here these differences can't be addressed and it must suffice to point to the structure of the argument.

Even though on application of one or another of these factors might give rise to debate, there is not a single court or author I am aware of that has embraced the democratic statist framework and then concluded that, on application, the EU qualifies as a state. Among democratic statists there seems to be a consensus that the EU is based on Treaties, not a constitution properly so

called and that it qualifies not as a state, but as an international institution. Democratic Statists thus conclude that the primacy claim made by the ECJ is mistaken, at least if it is understood as a claim that national courts should apply EU Law even in the face of opposing national constitutional norms. Since there is no European Constitution plausibly grounded in an act of a European '*pouvoir constituant*' and ensuring the democratic self-government of a European People, European law can not plausibly be conceived as the supreme law of the land. Recognizing the position of the ECJ would undermine commitments to democratic self-government central to democratic statism. Instead EU Law ultimately derives its authority from Member States who have ratified the Treaties according to their national constitutional requirements. The status of EU Law as a matter of domestic law depends ultimately on what the national constitution determines. EU Law trumps national law only to the extent prescribed by the national constitution. National constitutional law remains the supreme law of the land.

b) Consequences for the domestic application of EU Law

Where does that leave the application of EU Law by national courts? Those who adopt a Democratic Statist framework insist that such a commitment is distinct from national constitutional parochialism. It does not necessarily entail a commitment to national constitutional doctrines that are inimical to the application of EU Law and the functional imperatives of European integration. States might well adopt an 'open constitution', allowing for far reaching openness to and engagement with the international legal order. Fears invoked by those advocating European Law's primacy in the name of ensuring the effective and uniform enforcement are overblown. It is a mistake to believe that only the recognition that EU Law is the supreme law of the land ensures the effective and uniform functioning of EU Law. National constitutions may well contain norms that specifically authorize the enforcement of EU Law in most cases. There is no problem inherent to the idea of constitutional self-government as it is conceived by democratic statists. The real question is merely *how to conceive of the self that*

governs itself constitutionally[21] and how that identity translates into national constitutional conflict norms. The core point is this: Following the disasters of WWI and WWII, the national selves that govern themselves constitutionally have committed themselves to constitutionally tolerate the European laws enacted collectively by Member States and their peoples. On this authors ranging from conservatives such as Paul Kirchhof[22], Judge Rapporteur of the Maastricht judgment[23] to liberal constitutionalists, such as Dieter Grimm[24] or Joseph Weiler[25], notwithstanding important differences among them, would agree. The idea of constitutional tolerance lies at the heart of what makes European integration possible and describes its normative core.[26] Most national constitutions have been amended in the process of European integration. All of them are interpreted by national courts to require the enforcement of EU Law, even when it conflicts with national statutory law. Constitutional tolerance of EU Law – the openness of national legal orders to EU Law –is hardwired into national constitutional law as it is interpreted by Member States highest courts. But tolerance remains very much a feature of the *national* constitution and those who interpret it. Conceptually, Democratic Statism and its connection between the supremacy of the constitution and the idea of constitutional self-government remain untouched. Focusing on the Schmittian question – who has the final say? – misses the point. It obscures the remarkable fact that in Europe the everyday enforcement of European law is guaranteed by national constitutional provisions and their interpretation by national courts. The true innovation in European integration is the not the establishment of a new ultimate constitutional authority on the European level. And it is not the abdication of national constitutional authority. Europe's genius and the key to understanding its *sui generis* character lies in is the reinterpretation of national constitutional traditions to reflect a commitment to constitutional tolerance. National constitutional authority, structured and exercised to reflect a commitment to constitutional tolerance, lies at the heart of the European integration process. The challenge is to amend and interpret national constitutions in such a way that it reflects appropriate respect for national democratic commitments, while enabling appropriate engagement with European law. European integration is inherently beset by a tension between

genuine democratic self-government that takes place on the national level, and functional considerations that justify some delegation of powers to the European Union and some degree of opening up of the national legal orders to EU Law. That tension has to be carefully calibrated and reflected in the constitutional doctrines that national courts as ultimate guardians of constitutional legality enforce. EU Law, no doubt in many ways *sui generis*, ultimately remains Treaty based international law and not constitutional law properly so called.

3. Democratic Statism and the relationship between UN Law and European Law

Democratic Statists would have an easy time addressing the issue whether the ECJ had the authority to effectively review the UN Security Council Resolution of European on fundamental rights grounds. The EU is, like the UN, a Treaty based organization. It came about by states negotiating, signing and ratifying a Treaty according to their national constitutional requirements. Given that both Treaties derive their authority from the same source and are both equally international law, the relationship between the two can't be resolved with reference to source based conflict rules. Instead the issue is one of conflicting Treaty provisions. Conflicts between Treaties are resolved first of all with reference to stipulations made by the Treaties themselves about their status in case of conflict.[27] Luckily in this case both Treaties contain concurring propositions that indicate what should be done in case of conflict. Both the UN Treaties and the EU Treaties require or permit that EU primary Law is not applied to prevent the effective implementation to UN Law. On the one hand Art. 103 UN Charter in conjunction with Art. 25 UN Charter clearly stipulates that in case of a conflict between the obligations of the Members of the United Nations under the Charter and their obligations under any other international agreement the Charter shall prevail. On the other EU side Art. 307 ECT specifically provides that nothing in the Treaty is to be considered as incompatible with previously assumed international obligations by Member States.[28] Since UN obligations were assumed

before Member States joined the EU, the EU Treaties should not preclude the application of UN Law. Other provisions specifically accommodate or create a space for cooperation with the UN.[29] Nothing suggests that the Treaties should have primacy over the UN. Clearly, therefore, the ultimate conclusion reached by the ECFI that UN Law is not to be effectively subjected to EU Law fundamental rights review is correct and the position of the ECJ is wrong.

The position of the ECJ in *Kadi* does become more plausible, however, if one starts off with the assumption *that the EU is a state* and that EU primary law is like the constitution of a state the supreme law of the land. Is that how the ECJ justifies its claim that it can effectively subject UN Law to EU fundamental rights review? At the crucial juncture of the decision the court is remarkably obscure in its reasoning and apodictic in its formulation: The EU is committed to the rule of law and can't avoid reviewing acts it undertakes on the basis of its own constitutional charter, that establishes an autonomous legal system.[30] Obligations imposed by international agreements cannot change the allocation of powers under that constitutional charter and cannot have the effect have the effect of prejudicing constitutional principles, that form part of the foundations of the Community.[31] Ultimately the ECJ is only pronouncing itself on an EU measure, not a UN measure and it is doing so applying EU fundamental principles.

One obvious criticism to this type of rhetoric is that it is statist in the worst sense: It is not even democratic statist. It may sound like some of the more recalcitrant Member States courts asserting the supremacy of their national constitutions, when confronted with the ECJ's claim that EU law takes primacy over national law, including national constitutional law. The only difference is that the rhetoric of "the EU as an autonomous legal order" substitutes the invocation of state sovereignty. But notice how this kind of argument resembles a pre-democratic conceptual statism: A conceptual claim – this time not 'statehood' or sovereignty', but the idea of an 'autonomous legal order' - substitutes for an argument relating to "We the People" and democracy. The idea of an autonomous legal order is not enriched by arguments about what it is about an order that has

certain features that justifies according primacy to it. Read in this way the ECJ's Kadi decision is even worse than national constitutional decisions that make claim to supreme authority. If you take the more articulate cases of national recalcitrance, perhaps best exemplified by the German Constitutional Court in its *Maastricht*[32] and more recent *Lisbon* decision[33], these decision at least provide a theoretical basis for their recalcitrant approach: they provide for a democratic statist constitutional theory. Democratic statism may be ultimately unconvincing, but it is made explicit and allows for serious engagement and criticism.[34]

Of course it is not surprising that the ECJ does not draw on Democratic Statism to justify the EU's primacy over UN Law. Arguments about democracy and the role of a '*pouvoir constituant*' would not resonate when applied to the EU. As discussed above, the perceived absence of a '*demos*' and the perception that the EU is based on Treaties rather than an act of a European 'pouvoir constituant' has made it plausible for many national courts to insist on limiting the extent to which the primacy claim of the ECJ is enforced over specific national constitutional commitments. Not surprisingly the ECJ in *Costa* did not rely on democracy based arguments to justify the primacy of EU Law over Member States' law either. So if the ECJ did not embrace democratic statism to justify its claim to primacy in *Costa v. Enel* what did it rely on? And how might that justification fit with the Court's position with regard to UN Law in *Kadi*?

2. The modernist challenge: Legalist Monism

Democratic Statism has, over time, been challenged by another model of the world of public law: Legalist Monism.[35] Legalist Monism is the position that underlies the ECJ's jurisprudence in *Costa v. Enel*, justifying the primacy of EU Law over all national law, including national constitutional law. The ECJ justified the primacy of EU Law not by coming up with a competing interpretation of the criteria established by Democratic Statism as they concern the EU. Instead the ECJ insisted on using a very different conceptual framework to justify that EU law trumps national law. The following will briefly analyze the justification of

that position in *Costa v. Enel* (1) and then assess what the implication of such an account of the world of public law would be for assessing the relationship between EU and UN Law (2). As will become apparent, there is a tension between *Costa* and *Kadi*. The Legal Monist position in Costa should have led the ECJ to confirm the ECFI's decision that it should not review acts implementing UN Law on European fundamental rights grounds.

a) The primacy of EU Law

As every student of EU Law knows, since the 1960s the ECJ has consistently held that in case of a conflict between European and national law Member States courts are under an obligation to set aside all national law, even national constitutional law.[36] For all practical purposes European law as interpreted by the ECJ is claimed to be the supreme law of the land.

The ECJ has supported that claim with the proposition that the EC Treaties established a new legal order and later referred to the Treaties as Europe's 'constitutional charter'.[37] To substantiate this claim the ECJ employed three arguments.

First, the Court makes a conceptual argument. If the Treaty is to establish legal obligation properly so called, it can't be permissible for a Member State to unilaterally set it aside unless authorized to do so by EU Law. Such unilateral unauthorized action would undermine the status of EU Law as law properly so called binding on all Member States. This argument is of Kelsenian heritage. According to Kelsen the world of law has to be conceived in monist terms. Taking a legal point of view is incompatible with the claim that from the point of view of one legal order (say, the European legal order) x is the case, but from the point of view of another legal order (the legal order of Member States) y is the case. There can be no coexistence of different legal systems constituted by different ultimate legal rules. The world of law is unified not as an empirically contingent matter, but as a conceptual matter.[38]

This is not the place to provide a comprehensive discussion and critique of the argument. Here it must suffice to point out that the argument is not at all obvious. It is not clear why it would undermine the status of EU Law as law that there is another legal system that incorporates EU Law on its own terms. It is unclear why it should be *conceptually impossible*, as opposed to, say, undesirable on pragmatic grounds, to imagine the legal world in pluralist terms. What is *conceptually* wrong with acknowledging the possibility of the existence of different legal orders, each of which recognize the authority of the law of the other on its own terms? There does not *have to be* only one legal point of view, even though it *might* be desirable that there be only one on other normative grounds. Member States may or may not be doing the right thing if they insist on determining the status of EU Law in light of their own national constitutional requirements. But they are not thereby undermining the status of EU Law as law properly so called.

The second argument put forward by the ECJ is, at first sight, no less mysterious. The Court lists a number of features a number of features of the Treaties that distinguish it from ordinary Treaties of international law: Within the considerable competencies defined in the Treaty EC institutions can enact legislation directly binding citizens in Member State. Furthermore since the enactment of the Single European Act most decisions concerning the Common Market and, increasingly in other domains as well, are made following a non-consensual procedure that allows valid legislation to be passed by qualified majority vote and the participation of a European Parliament, even in the face of resistance of powerful member States. European law, then, has emancipated itself in its day to day workings from its international law foundations and the idea of state consent. It has established its own autonomous legal order.

It is not easy to make sense of this argument. It might be understood in one of two ways. First it could be understood as a weak claim that the EU is sufficiently different from ordinary Treaties that it should not be assessed within

the conventional statist paradigm, which constructs international law in contractualist terms based on state consent. But for that argument to be persuasive it would have been necessary to point out how exactly the highlighted features and the relative autonomy of EU Law are relevant to the claim of primacy. The Treaties of Rome might be different from most run of the mill Treaties, but they are still Treaties and not a genuine constitution of a new state. At least that would be the claim made by a democratic statist. What exactly is wrong with that claim? The ECJ does not say.

But the listing of ways in which the EU is different from other Treaties might just have the function to open the door to the third argument, that lies at the heart of the case for primacy. It turns out that the particular features of the EU and the autonomy of the legal order matter for *functional* reasons. A Treaty regime that has these features and has been designed to fulfill ambitious purposes – including the establishment of a common market - can only function in a coherent way, if the laws it establishes have primacy over national law. Without primacy, the effective and uniform enforcement of Europe's laws would be endangered. The purpose of the European Union to fulfill its various objectives, including the establishment of a common market, could not be achieved, if Member States did not accept the primacy of EU Law. An aggressively purposive interpretation of the Treaties leads the ECJ to conclude that for all practical purposes EU law has to be accepted as the supreme law of the land in order to fulfill its purpose. This is a contestable empirical claim about the consequences of not accepting the unconditional primacy of EU Law connected to a normatively contestable functional account of the basis of public authority.

The claim to primacy is further strengthened by two more general functional arguments, not explicitly made in Costa, but standard fare in the literature supporting that decision. First, there is the idea that legally constraining the relationship between Member States is an effective remedy against the great evils that have haunted the continent throughout much of the 19th and first half of the 20th century: Clashes of interest between nation states have a dangerous

propensity to degenerate into bloody wars. Within the framework of a coherent legal order the definition, articulation and negotiation of national interests occurs in such a manner as to make such a development highly unlikely. Second, legal integration can be seen as a mechanism which tends to immunize nationally organized peoples from the kind of passionate political eruptions that have led to totalitarian or authoritarian governments and/or discrimination of minorities that have characterized European history in the 19th and 20th century. This could not be achieved to the same degree, so the argument goes, if the final decision concerning what is to be applied as law in a Member State rests on a decision ultimately made by Member States themselves.

Clearly these arguments have to be read as a critique of Democratic Statism and the embrace of a different model of public law. Those who claim that the Treaties as the constitution of the European Union are the supreme law of the land in Europe in fact claim that Democratic Statism, which connects the idea of an ultimate legal authority with a strong conception of democratic self-government, is mistaken and needs to be modified. Democratic Statism is unable to incorporate into its account of supremacy the importance of expanding the idea of effective legal authority beyond the boundaries of the nation state. There may not be a European People and a European democracy in a meaningful sense, but the value of constitutional self-government is not absolute. The idea of Europe as a legal community – a Rechtsgemeinschaft[39] - integrated by European institutions and European law in the service of prosperity and peace trumps the limitations this imposes on constitutional self-government.

b) EU Law and International Law: Kadi

Whatever the merits of these arguments might be, what are the implications of such a position for deciding whether the ECJ should subject ban EU Regulation implementing a UN Security Council obligation to EU fundamental rights law? It turns out that the arguments for the primacy of EU Law in *Costa* should also push the ECJ towards recognizing the primacy of UN Law over EU Law. First, if the

conceptual argument is plausible in the context of the relationship between EU Law and the law of Member States, there is no reason why it should not also be determinative in the relation between UN Law and EU Law. If the fact that Member States subject EU Law to national constitutional standards subverts the very idea that EU Law is law properly so called, does not the fact that the ECJ effectively subjects UN Resolutions to review based on EU standards undermine the very idea that UN Law is law properly so called? Second, there are many features of the UN that distinguish it from an ordinary Treaty. The UN Charter establishes complex institutions with their own competencies, it allows the UN Security Council to create new legal obligations following a non-consensual procedure. Is the UN Charter not also a constitutional charter of an autonomous legal order? Of course there are differences between the UN and the EU: The ECJ has compulsory jurisdiction over issues of EU Law, for example, whereas the ICJ does not have compulsory jurisdiction over issues arising under the UN Charter. There is no comparable doctrine of direct effect with regard to UN Law. But not all differences suggest that the EU is more of an 'autonomous legal order' than the UN. Some differences point in the opposing direction. Take the name: The UN is called a Charter, not a Treaty. Think of the explicit claim to primacy in Art. 103 UN Charter, a claim still not explicitly made by the EU Treaties even after the latest rounds of reform.[40] At any rate, whatever differences may exist between the UN and the EU, it remains unclear why these differences should be decisive for the purpose of establishing that the EU is an autonomous legal order that makes a claim to primacy, whereas the UN is not. Third, the functional reasons supporting primacy of EU Law over Member States law also support the claim to primacy of UN Law of EU Law. If the UN is to effectively succeed in 'maintaining peace and security' and if the UN Security Council is to effectively take up its 'primary responsibility for the maintenance of international peace and security', does that not require that other actors accept the primacy of UN Security Council Resolutions? Would anything else not undermine the effective and uniform enforcement of UN Law? The judgment of the ECFI, with its emphasis on functional arguments, to a large extent reflects the Legal Monist positions embraced by the ECJ in *Costa*. But the position of the ECJ does not. Is

the only way to make sense of the ECJ's *Kadi* decision to understand it as the ECJ having taken a statist turn, albeit a statist turn without the resources of democratic constitutional theory to back it up?

3. Second Modernity: Cosmopolitanism in a Pluralist key

There seems to be an irresolvable tension between *Kadi* and *Costa*, just as there is seems to be an irresolvable tension between *Costa* and most of the decisions of national constitutional courts, that insist on drawing constitutional red lines in the sand. But there is a way to reread *Kadi*, *Costa* and national constitutional court decisions that suggests all three in fact embrace a very similar conception of public law. But that conception is neither Democratic Statist, nor is it Legal Monist. Instead it is what I call Cosmopolitan Pluralism. Cosmopolitan Pluralism refers to a position according to which a set of universal principles central to liberal democratic constitutionalism undergird the authority of public law and determine which norms take precedence over others in particular circumstances. Contrary to Democratic Statism it is not the case that the idea of 'democracy' and 'national self-government' connected to statehood and sovereignty provides the decisive principle to help determine where ultimate authority lies. But nor is it the case the idea of legality and the functional reasons in support of it are sufficient to justify a Monist account of the legal world. Instead constitutionalism provides the following framework for the analysis of constitutional conflicts:

First, Legalist Monism is right that the idea of legality – respect for the rule of law – and the functional and procedural considerations that support extending it to the level beyond the state plausibly provide for a presumption of some weight: that the law of the more expansive community should be respected by public authorities, regional or national law to the contrary notwithstanding. There is a presumption that UN Law trumps EU Law and that EU Law trumps Member States Law ultimately grounded in functional considerations. Given the collective action and coordination problems that these regimes are trying to solve

that States individually are unable to address effectively, the resolution provided for by the regimes ought to carry with them a presumption of authoritativeness. But in liberal democracies, legitimate authority is not tied to formal and functional considerations alone. It is also tied to procedural and substantive requirements that are reflected in constitutional commitments to democracy and the protection of rights. That does not mean that the authority of UN Law, from the perspective of EU Law, should be determined exclusively by EU primary law or that the authority of EU Law should be determined exclusively by Member States constitutions. Both legal monism and the dualist conception of the legal world provided by the statist version of national constitutionalism ultimately provide one-sided and thus unpersuasive accounts of the principle of legality. What it suggests instead is that the presumption in favor of applying the law of the more expansive community can be rebutted if in a specific context, when the law of the more expansive community violates countervailing principles in a sufficiently serious way. I have provided a more developed account of these principles elsewhere (Kumm 2009). Here it must suffice to name them and then later briefly illustrate how they operate: besides the principle of legality, which establishes a presumptive duty to enforce international law, the normatively complementary but potentially countervailing principles are the jurisdictional principles of subsidiarity, the procedural principle of due process, and the substantive principle of respect for human rights and reasonableness.

The basic building blocks of a conception of legality that is tied to a framework of constitutionalism are now in place: the law of the more expansive community should presumptively be applied even against conflicting national law, unless there is a sufficiently serious violation of countervailing constitutional principles relating to jurisdiction, procedure, or substance.

To illustrate the idea of Constitutionalism as a distinct model of the world of public law I will first provide an alternative account of the approach taken by some Member States' courts in their engagement with the ECJ's primacy claim (1), then revisit Costa (2) and finally provide another reading of Kadi (3). The point is to illustrate both how central elements of these decisions can be

understood as reflecting a commitment to Constitutionalism, rather than Statism or Legalist Monism. Neither of the latter two can describe very well the contemporary place of European law in the world of public law. The constitutionalist model of the world of public law, on the other hand, is descriptively more powerful.

a) Constitutionalism and the German Constitutional Court's response to Costa

One important consequence of conceiving of legal authority as a function of the realization of a set of principles is that whether or not EU Law should be recognized as having primacy over national constitutional law is a question that allows for qualified answers. It admits to more answers than just yes or no. Even if the European Union Law does not, without some qualification, establish the supreme law of the land, it could still effectively reconstitute legal and political authority in Europe. The authority of EU Law is possibly a question of degree. It may depend on the degree to which constitutional principles are realized by EU institutions. It admits to the possibility that neither EU Law nor national constitutional law effectively establishes the supreme law of the land. In this way constitutionalism can help shed light on a fascinating aspect of national court's reception of EU Law. For the most part national courts have not accepted that EU Law is the supreme law of the land. But nor have they simply assumed that national constitutional law is the supreme law of the land. There is something deeply misleading in claiming that, to the extent that national courts have not accepted EU Law as the supreme law of the land, they are merely interpreting their national constitutions to establish what the status of EU Law should be as a matter of domestic law. National courts have generally adopted an intermediate position. They generally accept neither EU Law nor the national constitution as the supreme law of the land. Instead they look to both EU law and the national constitution and try to make sense of what the best understanding of the competing principles in play requires them to do. [41] Theirs is a cosmopolitan conception of public law. To flesh out what this means practically and provide an

example, a brief and somewhat schematic analysis of the German Federal Constitutional Court's approach to the authority of EU Law will follow. The jurisprudence of the Court may be widely known by European Union lawyers, but its reconstruction in terms of a commitment to constitutionalism may prove illuminating, even if it can only be brief and schematic.

The German constitution, until the early nineties[42], contained no specific provisions addressing European integration, though the Preamble mentions Germany's commitment to strive for peace in a united Europe. The constitution did authorize Germany to enter into Treaties establishing international institutions.[43] And it contained general provisions giving international Treaties the same status as domestic statutes.[44] Yet the ECJ had claimed that EU Law was to be regarded as the supreme law of the land requiring Member States court's to set aside any national law, even national constitutional law, if it was in conflict. How was the court to respond? Was the ECJ's claim really plausible that Member States had established a new supreme law of the land by signing and ratifying a set of Treaties the core objective of which was to establish a common market? On the other hand, was it plausible to claim that the EU Treaties, which established institutions that had been endowed with significant legislative authority, and played a significant role to secure peace and prosperity in war ravaged Europe, should be treated like any other Treaty? Was it really adequate to apply the general rule applicable to Treaties according to which an ordinary statute enacted after the Treaty was ratified would trump it? If the court simply accepted the basic ideas underlying Democratic and its idea of constitutional self-government, that is probably the conclusion the court would have reached. If, on the other hand, the court accepted EU Law as legitimate constitutional authority on legalist grounds, it would follow the ECJ. But the court chose neither of these options. It embraced an intermediate solution. That intermediate solution illustrates the connection between a constitutionalism and the complex set of doctrines that national courts have in fact developed for assessing the ECJ's claims concerning the supremacy of EU Law.

First the FCC accepted without much ado that EU Law trumps ordinary statutes, even statutes enacted later in time, because of the importance of securing an effective and uniformly enforced European legal order.[45] The principle of ensuring the effective and uniform enforcement of EU Law – expanding the rule of law beyond the nation state - was a central reason for the court to recognize the authority of EU Law over national statutes. This meant that in Germany EU Treaties were effectively granted a more elevated status than ordinary Treaties, to which a 'last in time' conflict rule generally applies.

Yet, contrary to the position of the ECJ, the court recognized that that principle was insufficient to justify the supremacy of EU Law over all national law. The principle of legality matters, but it is not all that matters. The *second* issue before the Court in the was whether it should subject EU Law to national constitutional rights scrutiny. Could a resident in Germany rely on German constitutional rights against EU Law? Could the protection of national residents against rights violations guaranteed in the national constitution be sacrificed on the altar of European integration? Like other questions concerning the relationship between EU Law and national law, the German constitution provided no specific guidance on that question. In *Solange I*[46] the FCC balanced the need to secure the fundamental rights of residents against the needs of effective and uniform enforcement of EU Law and established a flexible approach: For so long as the EU did not provide for a protection of fundamental rights that is the equivalent to the protection provided on the national level, the court would subject EU Law to national constitutional scrutiny. At a later point[47] the court determined that the ECJ had significantly developed its review of EU legislation and held that the standard applied by the ECJ was essentially equivalent to the protection provided by the FCC's interpretation of the German Constitution. For so long as that remained the case, the FCC would not exercise its jurisdiction to review EU law on national constitutional grounds. Because the ECJ though its own jurisprudence, provided the structural guarantees that fundamental rights violations by EU institutions would generally be prevented, it conditionally accepted the authority of EU law. To put it another way: Structural deficits in the

protection of fundamental rights on the European level were the reason for the FCC to originally insist that it should not accept the authority of EU Law, insofar as constitutional rights claims were in play. When those specific concerns were effectively addressed by the ECJ, the authority of EU Law extended also over national constitutional rights guarantees and the FCC as their interpreter. The authority of EU Law, then, was in part a function of the substantive and procedural fundamental rights protections available to citizens as a matter of EU Law against acts of the European Union.

But this is not yet the whole story. There are two residual lines of resistance drawn by national courts to the wholesale acceptance of the authority of EU Law. The drawing of these lines is justified by reference to the principle of democracy and the absence of meaningful democratic politics and a meaningful European identity on the European level.

In its Maastricht decision[48] and later in its Lisbon decision[49] the FCC determined that it had jurisdiction to review whether or not legislative acts by the European Union were enacted *ultra vires* or not. If such legislation were enacted *ultra vires*, it would not be applicable in Germany. As a matter of EU Law it is up to the ECJ, of course, to determine as the ultimate arbiter of EU Law whether or not acts of the European Union are within the competencies established by Treaties.[50] But the ECJ had adopted an extremely expansive approach to the interpretation of the EU's competencies, raising the charge that it allowed for Treaty amendments under the auspices of Treaty interpretation. Under these circumstances the FCC believed it appropriate for it to play a subsidiary role as the enforcer of limitations on EU competencies of last resort. In the decision arguments from democracy played a central role. Democracy in Europe remains underdeveloped, with electoral politics playing a marginal role. The national domain remained the primary locus of democratic politics. Under those circumstances ensuring that EU institutions would remain within in the competencies established in the Treaties is of paramount importance. Whatever EU institutions decide, can no longer be decided by directly electorally accountable national actors.

This points to a final line of resistance, not as yet explicitly endorsed by the FCC, but visible in the jurisprudence of other courts. When a national constitution contains a specific rule containing a concrete national commitment – say a commitment to free secondary education[51], or a restriction to national citizens of the right to vote in municipal elections[52], a categorical prohibition of extradition of citizens to another country[53] – these commitments will not generally be set aside by national courts. Instead national courts will insist that the constitution is amended to ensure compliance with EC Law. This line of cases, too, reflects an understanding that the realm of the national remains the primary locus of democratic politics. For so long as that remains the case, a commitment to democracy is interpreted by some Member States courts to preclude setting aside national constitutional commitments as they are reflected in these concrete and specific rules. It is then up to the constitutional legislature to initiate the necessary constitutional amendments.

This highly stylized and schematic account illustrates the operation of a conception of legitimate constitutional authority, that puts the principles of constitutionalism front and center.[54] The principle of legality and its extension beyond the nation state has an important role to play to support the authority of EU Law, but concerns relating to democracy and human rights may provide countervailing reasons for limiting the authority of EU Law in certain circumstances. Furthermore the republican principles that govern the relationship between national and EU Law do not themselves derive their authority from either the national constitution or EU Law. The relative authority of EU and national constitutions is a question to be determined by striking the appropriate balance between competing principles of constitutionalism in a concrete context.

b) Constitutionalist elements in Costa and beyond

As was argued above, *Costa v. Enel* more than any other decision reflects a commitment to Legal Monism, not Cosmopolitan Constitutionalism. But there

are elements in *Costa* that make better sense when interpreted in a constitutionalist, rather than Legal Monist prism (1). Furthermore EU Law has evolved in a way that suggests that the courts continued insistence on primacy may today not only be justifiable in constitutionalist terms, but also be generally compatible with the position taken by Member States' courts (2).

(1) Costa and Constitutionalism: Making sense of the idea of an autonomous legal order

So how does constitutionalism make sense of the claim that the authority of EU Law is not simply derived from the fact that Member States have signed and ratified it following their respective constitutional requirements? What, if anything, justified the claim that EU Law establishes an autonomous legal order and what follows from it?

Whether a Treaty qualifies as a constitution of an autonomous legal order or merely as an ordinary Treaty under international law depends on how its claim to legal authority is best understood. If its claim to legal authority is best understood to rest exclusively on the fact that Member States have signed and ratified it, then it is an ordinary Treaty of international law. The decisive feature of constitutional Treaties establishing an autonomous legal order in some sense is that its claim to authority is in part directly grounded in constitutional principles.[55] Its claim to authority is not grounded exclusively in the fact that Member States have signed and ratified it, even if it would not have come into existence of Member States had not signed and ratified it. The idea of a Constitutional Treaty, then, is contrary to claims by Democratic Statists, not a contradiction in terms. Nor does it matter that the Treaties of the European Union have gradually evolved in a piecemeal fashion, rather than having being created in a legal revolutionary moment, a kind of constitutional 'big bang' or a 'creatio ex nihilo'. Whether or not something that takes the form of a Treaty is in fact merely a Treaty of international law or a form of transnational constitutional law that has greater authority is a question of interpretation.

The European Union explicitly claims to be founded on constitutional principles. Art. 6 EUT [56]states that the "Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles which are common to the Member States." The EU, in its self-presentation, is neither founded on the will of a European "We the People", nor is it founded on the "will of Member States". It is founded on the constitutional principles that are a common heritage of the European constitutional tradition as it has emerged in the second half of the 20th century. And, as the ECJ has found more than forty years ago and is now recognized in the Constitutional Treaty[57], EU Law makes a claim to primacy. Whether and to what that claim to authority deserves to be recognized by Member States courts is not an easy question and gives rise the kind of concerns that were described above. But an answer to that question will not make use of unhelpful dichotomies between Treaties and constitutions or the "will of Member States" or "We the People".

(2) Costa today

When the ECJ made the claim that EU law has primacy over all national law, including national constitutional law, it was making a claim that national courts were right not to accept in an unqualified way. At the time EU Law did not provide for adequate constitutional rights protection, it did not provide for an adequate democratic legislative procedure and there was no indication that the court took seriously the limits of competencies in the Treaty. These concerns became more serious as the decision-making moved from unanimity to qualified majority vote in more and more areas since the mid-eighties. To a significant extent the response of Member States' courts can be understood as a general acceptance of the ECJ's claim to primacy, but with the proviso that EU Law did not violate fundamental rights, remained within its competencies and did not encroach on fundamental constitutional commitments that defined the democratic identity of the Member State. To the extent that Member States' responses fit this description, they generally comply with constitutionalist requirements. What is

remarkable, however, is that all of these concerns are now addressed to a large extent, even if not always effectively, by EU Law itself. The story about the evolution of the EU's fundamental rights guarantees is well known and has finally led to the entry into force of the European Charter of Fundamental Rights in Dec. 2009. The concerns relating to competencies has arguably led the ECJ to pay greater attention to delimitation of competencies, even though here there are still good grounds for scepticism.[58] Furthermore the Treaty of Lisbon contains interesting procedural innovations involving national Parliaments that might make some contribution to help establish a culture of subsidiarity in Europe. Finally the structural problems relating to democracy have not really been addressed so far by EU actors even though the legal framework established by the Treaty of Lisbon might allow for the evolution of greater electoral accountability of the Commission in the future thereby making the elections of the European parliament more meaningful.[59] But more importantly EU law now specifically requires that Member States constitutional identity be respected.[60] A plausible interpretation of that provision suggests that it might not violate EU Law if a Member State refused to apply EU law in a situation where a fundamental national constitutional commitment is in play.[61] If that is correct, it is not implausible that a claim to primacy made by EU Law that shares these features may no longer be implausible from a constitutionalist point of view. The justification for the primacy of EU Law at the time *Costa* was decided might not have been plausible. And the limited acceptance by Member States might in most instances have been justified. But to a significant extent EU Law has absorbed the concerns that fostered legitimate resistance by Member States, just as Member States had, over time, opened up their legal orders to accept the application of EU over national law in most instances. Shared constitutional principles seem to have provided the focal point of complementary evolutions of both EU Law and national constitutional law. The tensions created by a conflict between Legalist Monism and Democratic Statism have to a large extent been replaced by a common commitment to Constitutionalism. That still leaves open the possibility of conflict on application, but it ensures a common framework within which concrete disagreements are addressed.

(3) A Cosmopolitan reading of Kadi

But is Kadi compatible with an account that emphasizes the spread of constitutionalism? On the surface the ECJ may seem to have adopted a relatively conventional dualist, statist approach. It insisted on the primacy of EU constitutional principles and explicitly rejected applying these principles deferentially, even though the EU Regulation implemented a UN Security Council Resolution. But on close examination it becomes apparent that important elements of that decision reflect constitutionalist analysis: First, the court specifically acknowledges the function of the UN Security Council as the body with the primary responsibility to make determinations regarding the maintenance of international peace and security.[62] Second, the court examines the argument whether it should grant deference to the UN decisions and rejects such an approach only because at the time the complaint was filed there were no meaningful review procedures on the UN level and even those that had been established since then[63] still provide no judicial protection.[64] Only after an assessment of the UN review procedures does the court follow that full review is the appropriate standard. This suggests that, echoing the ECHR's approach in Bosphorus[65], more adequate procedures on the UN level might have justified more deferential review. This is further supported by the ECJ's conclusion that under the circumstances the plaintiffs right to be heard and the right to effective judicial review were *patently* not respected. This language suggests that even under a more deferential form of judicial review the court would have had to come to the same conclusion. This section of the opinion suggests that the court was fully attuned to constitutionalist sensibilities. It just turns out that the procedures used by the Sanctions Committee were so manifestly inappropriate given what was at stake for the black-listed individuals, that any jurisdictional considerations in favor of deference were trumped by these procedural deficiencies, thus undermining the case not just for abstaining from judicial review altogether, but also for engaging in a more deferential form of review. Third, the court shows itself attuned to the functional division of labor between

the UN Security Council and itself when discussing judicial remedies: The court does not determine that the sanctions must be lifted immediately, but instead permits them to be maintained fro three months, allowing the Council to find a way to bring about a review procedure that meets fundamental rights requirements. Finally, during all of this the court is careful to emphasize that nothing it does violates the UN resolution, given that international law leaves it to states to determine by which procedures obligations are enforced. Notwithstanding serious problems that remain, it seems that forceful judicial intervention has had a salutary effect, with serious reform proposals discussed and in part enacted at the UN level.[66] An ECJ committed to constitutionalism takes international law seriously. But taking international law seriously does not require unqualified deference to a seriously flawed global security regime. On the contrary, the threat of subjecting these decisions to meaningful review might help bring about reforms on the UN level. Only once these efforts bear more significant fruit will the ECJ have reasons not to insist on meaningful independent review of individual cases in the future.

Even if the above suggests that it is a mistake to read Kadi merely as a case of entrepreneurial but jurisprudentially dubious state-building by the ECJ[67], there are still plausible grounds to criticize Kadi on constitutionalist grounds: Why did the court not emphasize the universal nature of the human rights it was applying? Why did the court not follow the AG's lead and was more explicit about the conditional nature of its lack of deference? And was it justifiable for the court to preclude Member States from finding their own ways to address the tensions between compliance with UN Sanctions and the relevant human rights concerns? But notwithstanding scope for legitimate criticism, constitutionalist sensibilities were not lacking in Kadi.

4. Conclusion

There are three claims that are at the heart of the argument presented here. First, questions concerning the relationship between UN law and EU Law and questions concerning the relationship between EU Law and Member States Law are connected. Both concern not only the status of EU Law in the world of law, but also raise issues about the structure of the world of public law generally and how to address competing claims of legal authority. Second, much of the disagreement about the structure of the world of public law and the relationship between UN Law, EU Law and national constitutional law can be traced back to competing conceptions of public law. I have called these Democratic Statism, Legalist Monism and Constitutionalism respectively. Third, there are good grounds to believe that Constitutionalism is not only the most plausible account of the world of public law in normative terms, but that a great deal of constitutional practice can be reconstructed as reflecting constitutionalist commitments. Of course practice is complex and varied. Not everything fits and much of what was presented here was necessarily schematic and underdeveloped. *But it makes explicit the structure of Constitutionalism as a distinct cosmopolitan framework for the construction of coherently principled, yet pluralist world of public law.* Helping to make explicit how the principles of constitutionalism work allows legal actors to more conscientiously embrace them as a focal point of an overlapping consensus that spans national, European and international law.

So what are the core characteristics of a world of public law described in cosmopolitan terms? First, unlike the world imagined within the framework of Democratic Statism, the world of public law is imagined as constituted and held together by a shared commitment to universal moral principles. There is no fundamental distinction between state law and international law. State law and law beyond the state have more in common than statists suggest. These principles are constitutive not only of national law and politics, but of law and politics *tout court*. In that sense constitutionalism is reconceived in a *cosmopolitan* and not statist framework. Second, nor is the legal world of imagined as a monist whole structured by clear hierarchies. Instead this kind of cosmopolitanism helps give an

account of the deeply pluralist and fragmentized nature of the world of public law.

There are two ways in which cosmopolitanism and pluralism are connected. First, cosmopolitanism explains how there can be a plurality of legal regimes that make claims to authority which go beyond their origin in the consent of states. These regimes may be based on a Treaty, but these Treaties are, just like domestic constitutions in traditional constitutional theory, genuinely constitutive: with them a new legal authority comes into the world. Instead of deriving their authority from the legal acts that made them possible, their claims to authority derive at least in part directly from the principles they embody and help realize. Second, these principles provide the mediating norms for a deeply pluralist structure of public law. In practice regime pluralism sometimes leads to the enactment of rules that conflict with one another. When they do there is no guarantee that conflicts between them will be resolved in the same way by each regime. So there is a distinct possibility of contradictory claims that are part of the legal world without law having the resource to resolve them conclusively. But notwithstanding the possibility of irresolvable legal conflict, *this kind of pluralism* is not deep and hard, but shallow and soft. It is shallow and not deep because of constitutionalist principles are the shared *foundation* of public law practices. And it is not hard but soft, because constitutionalist principles serve as a *common framework* to mediate potential disputes and give rise to principled practices of engagement and deference that reduce the occasions and limit the stakes of conflict. The world of global public law, constructed through the prism of the best understanding of European legal practices, is both cosmopolitan and pluralist. To put it another way: It is the world of cosmopolitan pluralism.

III. The Structure of International Law: Making sense of legitimacy challenges

There are a variety of ways in which the legitimacy of international law tends to be challenged. One concerns the claim that an increasingly expanding international law is inappropriately encroaching on state sovereignty (1.), the other is that the combination of the increasingly attenuated role of state consent and the absence of electoral procedures on the global level there is a democratic deficit (2.). Both of these claims are largely misguided and the result of misleading statist conceptual framing. Once analyzed within a cosmopolitan framework the principle of subsidiarity does provide some jurisdictional restrictions on what international law may legitimately cover and it does provide for procedural standards of legitimacy, but these need not be electoral (3.).

1. Jurisdictional Legitimacy: From Sovereignty to Subsidiarity

The principle of subsidiarity helps structure and guide meaningful debates about the appropriate sphere of state autonomy or sovereignty, defined as the sphere in which a state does not owe any kind of obligations to the international community and can govern itself as it deems fit. Turned around, it is also a principle that helps define the appropriate scope of international law and thus guides and limits the interpretation and progressive development of international law. The principle of subsidiarity helps give constructive meaning to debates on sovereignty that permeate international law. On the one hand, claims to sovereignty tend to be made by state actors against the interpretation or progressive development of international law whenever an important national interest is at stake. On the other hand, there is the formalist legal rejoinder that, as a matter of international law, the limits of sovereignty are defined by international law, whatever it happens to be. The principle of subsidiarity can help transform competing and incommensurable claims about sovereignty into a constructive debate about the appropriate delimitation of the sphere of the national and the international in specific legal and political debates.

Sovereignty is invoked as an argument in international law in a variety of ways. When the UN Security Council decides, for example, whether government behavior violates human rights in such a way as to legitimate sanctions under

chapter 7 of the UN Charter, those who do not favor such intervention often invoke sovereignty as an argument. This can be understood as an argument that concerns the interpretation of the competencies of the UN Security Council and the meaning of "threat to the peace" and "restoration of international peace and security" in article 39 of the UN Charter more specifically. Here sovereignty is invoked as an argument that is supposed to carry some weight in the context of interpreting international law, thus restricting its reach. Sovereignty is also invoked as an argument against assuming certain types of potentially intrusive international obligations. More specifically it is often invoked as a reason not to enter into a particular international legal commitment, for example, to sign and ratify a multilateral treaty that establishes am international institution and provides it with some degree of potentially intrusive decision-making authority.[68] Here the argument from sovereignty is invoked as a political argument. It may be of legal relevance, however, when made in the context of domestic constitutional debates about the proper constitutional limits for the 'delegation' of authority to international institutions. Often national constitutions do not contain any provisions that either explicitly authorize or explicitly prohibit or impose constraints on the delegation of authority to international institutions. But in those cases sovereignty serves as an argument to read implicit restrictions into vague national constitutional provisions.[69] Connected to the idea of sovereignty is the idea of "matters essentially within the domestic jurisdiction of a state" (art. 2(7) of the UN Charter). In both cases the invocation of sovereignty is tantamount to making the claim that that the issue discussed is an issue that properly concerns only the state and that requires no international regulation, intervention, or even justification to the international community. To put it another way, the international community does not have jurisdiction to address the issue because the issue pertains to the exclusive jurisdiction of the state. In that sense sovereignty refers to the domain over which a national community may govern itself without regard to the international community.

The idea of sovereignty does not, however, in and of itself provide any indication whatsoever of how large that domain should be or even how to meaningfully structure debates about the boundaries of sovereignty. In practice,

the invocation of sovereignty is typically little more than a way of expressing a political will in legal language. When a representative of a state says that something is within that state's sovereign right, he or she means to say that the state's behavior pertains to a domain that is of no legitimate concern for the international community without having provided any kind of reason why that should be so. The idea of sovereignty adds nothing. The idea of sovereignty becomes meaningful only in the context of a particular theoretical paradigm that provides an account of how the debates about the boundaries of sovereignty should be structured. Without it, the invocation of sovereignty might seem like an empty rhetorical gesture.

The reason why sovereignty is not merely an empty rhetorical gesture in political life but one that is widely understood and widely resonant is that the language of sovereignty has traditionally been connected to the statist paradigm that does give it a specific meaning. Within the statist paradigm, any discussions relating to jurisdiction are biased in favor of the central level of the state. Besides the claim to establish an ultimate legal authority, the universal, all-encompassing claim to jurisdiction is a defining feature of sovereignty. Constructively, the national or state level is the level where all decision making is originally located. Of course a state might enter into treaties, even multilateral treaties that establish international institutions and delegate some authority to them. But if international law is to impose any obligations on states, it will presumptively have to trace those firmly back to the states' consent.[70] Presumptively, the state has jurisdiction. International law has jurisdiction only if and to the extent that a restriction of that sovereignty can be traced back to the state's consent.

Today the language of subsidiarity has to some extent replaced the language of sovereignty. In the law of the European Union, the language of subsidiarity has completely replaced the language of sovereignty. The principle of subsidiarity found its way into contemporary debates through its introduction to European constitutional law in the Treaty of Maastricht. In Europe it was used to guide the drafting of the European Constitutional Treaty, whose operational provisions are mostly identical to the Treaty of Lisbon. It is a principle that guides

the exercise of the European Union's power under the treaty. And it guides the interpretation of the European Union's laws. As such, it is a structural principle that applies to all levels of institutional analysis, ranging from the big-picture assessment of institutional structure and grant of jurisdiction to the microanalysis of specific decision-making processes and the substance of specific decisions. The principle is also one of the principles that governs the relationship of the European Union with the larger international community.[71] Furthermore, some national constitutions have specifically adopted the principle of subsidiarity as a constitutional principle that determines whether and to what extent the transfer of public authority to international institutions is desirable.[72]

But even to the extent that the language of sovereignty remains alive, the concept of sovereignty is today sufficiently unsettled to open up the possibility to redescribe it in terms of a commitment to subsidiarity. [73] Sovereignty should be, and to some extent already has been, reinterpreted within a cosmopolitan paradigm, which has given it a different meaning. On the one hand, the idea has gained ground that a state can claim sovereignty only under the condition that it fulfills its responsibilities toward citizens. According to a high-level UN report, that means at the very least

> that states are under an obligation to protect citizens from large scale violence. . . . When a state fails to protect its civilians, the international community then has a further responsibility to act, though humanitarian operations, monitoring missions and diplomatic pressure – and with force if necessary, though only as a last resort.[74]

But the idea of *conditioning sovereignty on a state's ability to effectively fulfill functions* might also be extended to its role within the international system more generally. In effect this would mean *that the scope of sovereignty should be determined by the principle of subsidiarity*. What exactly would that mean?

At its core, the principle of subsidiarity requires any infringements of the autonomy of the relatively local level by the relatively centralized level to be justified by good reasons.[75] The infringement of a state's autonomy can take the relatively weak form of an international duty to justify state actions or have them

monitored and subject to assessment in an international forum or the stronger form of being subject to restrictive substantive rules of international law. The principle of subsidiarity requires any international intervention to be justified as a concern appropriately addressed by actors, institutions, or norms beyond the state. There has to be a reason that justifies the international community's involvement; a reason against leaving the decision to be addressed conclusively by national institutions. Any norm of international law requires justification of a special kind. It is not enough for it to be justified on substantive grounds by, say, plausibly claiming that it embodies good policy. Instead, the justification has to make clear what exactly would be lost if the assessment of the relevant policy concerns was left to the lower level. With exceptions relating to the protection of minimal standards of human rights, only reasons connected to collective action problems – relating to externalities or strategic standard setting giving rise to race-to-the-bottom concerns, for example – or reasons relating to nontrivial coordination benefits are good reasons to ratchet up the level on which decisions are made. And even when there are such reasons, they have to be of sufficient weight to override any disadvantages connected to the preemption of more decentralized rule making. On application, subsidiarity analysis thus requires a two-step test. First, reasons relating to the existence of a collective action problem have to be identified. Second, the weight of these reasons has to be assessed in light of countervailing concerns relating to state autonomy in the specific circumstances. This requires the applications of a proportionality test or a cost-benefit analysis that is focused on the advantages and disadvantages of ratcheting up the level of decision making. This means that on application, this principle, much like the others, requires saturation by arguments that are context sensitive and most likely subject to normative and empirical challenges. Its usefulness does not lie in providing a definitive answer in any specific context. But it structures inquiries in a way that is likely to be sensitive to the relevant empirical and normative concerns. The principle of subsidiarity provides a structure for legal and political debates about the limits of sovereignty.

There are good reasons for the principle of subsidiarity to govern the allocation and exercise of decision-making authority wherever there are different

levels of public authorities. These reasons are related to sensibility toward locally variant preferences, possibilities for meaningful participation and accountability, and the protection and enhancement of local identities, which suggest that the principle of subsidiarity ought to be a general principle guiding institutional design also in federally structured entities. In this way, it could also be put to fruitful use in the reconstruction of federalism rules and doctrines. But the principle has particular weight with regard to the management of the national-international divide. In well-established constitutional democracies, instruments for holding accountable national actors are generally highly developed. There is a well-developed public sphere allowing for meaningful collective deliberations grounded in comparatively strong national identities. All of that is absent on the international level. That absence, in conjunction with the danger of smaller states being dominated by the major powers in the international arena,[76] strengthens the prima facie case for state autonomy and raises the bar for the justification of international requirements being imposed in states.

2. The Connection between Subsidiarity and Democracy

Discussions of the democratic deficit are often informed by a statist paradigm of legitimacy, which tends to inappropriately focus legitimacy concerns on electoral accountability. Because meaningful electoral accountability can take place only on the national level, this casts a general cloud of suspicion over all international law that does not take the form of treaties that establish in relatively concrete and specific terms what the rights and obligations of the parties are, thus ensuring democratic input at the time of treaty ratification. Modern customary law or the kind of activities involving international institutions that are part and parcel of global governance all fall under a cloud of suspicion. There is a plausible core underlying these sensibilities, to be sure: basic political decisions properly made by the state should presumptively be made by institutions that can be held accountable in an electoral process. Furthermore, decisions appropriately made on the domestic level should not be made on the international level, exactly because those processes are linked to citizens' participation and concerns in a more attenuated way. It is clearly not always an indication of human progress to have a

problem resolved by international institutions rather than democratically resolved in the more open national processes. But questions of procedural legitimacy – or input legitimacy – have to be tied to jurisdictional questions to be plausible. Dogmatic insistence on democratic accountability is misguided, to the extent that it is conceived in terms of meaningful electoral accountability. Many cases falling under the rubric of global governance concern the production of global public goods and make possible the participation of a wider range of actors. They lead to enhanced representation of the relevant wider community in the legal process, thus improving input legitimacy. The alternative of leaving decisions with significant externalities to states raises serious legitimacy issues, even when the national process is democratic. Instead of focusing exclusively on the legitimating virtues of the electoral process on the national level that are absent on the international level, the central questions are whether, to what extent, and following which procedure the international community ought to have an effective say in decisions of public policy with significant externalities made by states. That effective say might take the form of imposing requirements on the state to justify its actions in a way that takes into account outside interests. It might involve the articulation of certain global minimum standards. Or it might involve a thicker set of regulations that preempt national regulations.

This way of framing the issue leads to a change of focus. Rather than exclusively focusing on the legitimacy of activities by international actors, the *inactivity* of international actors and the underdevelopment of institutional capacities on the international level come into view as serious legitimacy concerns. Law can raise legitimacy concerns not only because of the restrictions it imposes but also because of what it fails to restrict. International law's permissive rules, its authorization of harmful state behavior without effectively imposing duties to compensate, deserves to become a central concern for those concerned with law's legitimacy.[77] Given a background rule that sovereign states can do as they please unless a rule of international law proscribes a particular behavior, the focus should turn on the procedural rules that enable the international community to intervene and secure the provision of global public goods. Are the rules governing the jurisgenerative process on the international level – in more

traditional parlance, the sources of law[78] – structured in a way that allows the international community to adequately address common concerns? Which interpretation of, say, the requirements of customary international law best serves this purpose? Is the international community best served by an understanding of state practice that includes or excludes declaration made by states or international bodies? What degree of support, what duration of time, and what level of consistency are required for customary international law to best serve its purpose? Should this depend on context? And how should the general principles of law be conceived of?

Furthermore, if treaty making remains at the heart of the international rule-making process and states remain the central institutions charged with the enforcement of treaties, then national constitutional rules regarding the negotiation, ratification, and enforcement of treaties have an important constitutional function in the international system. States do not just establish an institutional framework through which a national community governs itself. States also serve as legislators and enforcers of international law. They are an integral part of an international system through which the international community governs itself. Because of this double function,[79] national constitutional rules raise serious legitimacy concerns when they impose unreasonable burdens on the development of an effective and legitimate international legal order. Treaties under the U.S. Constitution, for example, require the ratification by two-thirds of the Senate. This makes it unusually difficult for the state to effectively commit itself internationally, even though its actions, more than that of any other nation, affects others. That may have been defensible in an age when the need for international engagement and international interdependencies were comparably low. But under modern circumstances there might be good constitutional grounds to interpret extensively the power of the president to enter into international law treaties by concluding executive-congressional agreements, for which simple majorities suffice.[80] This type of concern deserves to be central to the assessment of constitutional rules and their interpretation by national courts.

The principle of subsidiarity, then, is not a one-way street. If there are good reasons for deciding an issue on the international level, because the concerns that need to be addressed are best addressed by a larger community in order to solve collective action problems and secure the provision of global public goods, then arguments from subsidiarity can support international intervention. Subsidiarity related concerns may, in certain contexts, strengthen either the legal case for interpreting the competencies of an international institution expansively or the political case for engaging in ambitious projects of international capacity building. And even though the principle generally requires contextually rich analysis, there are simple cases. The principle can highlight obvious structural deficiencies of national legislative processes with regard to some areas of regulation.

Imagine that in the year 2015, a UN Security Council resolution enacted under chapter 7 of the UN Charter imposes ceilings and established targets for the reduction of carbon dioxide emissions aimed at reducing global warming. Assume that the case for the existence of global warming and the link between global warming and carbon dioxide emissions has been conclusively established. Assume further that the necessary qualified majority in the Security Council was convinced that global warming presented a serious threat to international peace and security and was not appropriately addressed by the outdated Kyoto Protocol or alternative treaties that were negotiated and opned for signature following the Kopenhagen conference in late 2009, without getting the necessary number of ratifications to make them effective. Finally, assume that formal cooperation mechanisms between the General Assembly and the Security Council have been established, securing a reasonably inclusive deliberative process, and that a robust consensus has developed such that permanent members of the newly enlarged and more representative UN Security Council were estopped from vetoing a UN resolution if four-fifths of the members approved a measure.[81]

Now imagine that a large and powerful constitutional democracy, such as the India, has domestic legislation in force that does not comply with the standards established by this resolution. The domestic legislation establishes

national emission limits and structures the market for emissions trading, but it goes about setting far less ambitious targets and allowing for more emissions than do the international rules promulgated by the Security Council. Domestic political actors invoke justifications linked to lifestyle issues and business interests.[82] National cost-benefit analysis, they argue, has suggested that beyond the existing limits, it is better for the nation to adapt to climate change rather than incur further costs preventing it. After due deliberations on the national level, a close but stable majority decides to disregard the internationally binding Security Council resolutions and invoke the greater legitimacy of the national political process. Yet assume that the same kind of cost-benefit analysis undertaken on the global scale has yielded a clear preference for aggressive measures to slow down and prevent global warming along the lines suggested by the Security Council resolution.

In such a case, the structural deficit of the national process is obvious. National processes, if well designed, tend to appropriately reflect values and interests of national constituents. As a general matter, they do not reflect values and interests of outsiders. Because in the case of carbon dioxide emissions there are externalities related to global warming, national legislative processes are hopelessly inadequate to deal with the problem. To illustrate the point: the United States produces nearly 25 percent of the world's carbon dioxide emissions, potentially harmfully affecting the well-being of people worldwide. Congress and the Environmental Protection Agency currently make decisions with regard to the adequate levels of emissions. Such a process clearly falls short of even basic procedural fairness, given that only a small minority of global stakeholders is adequately represented in such a process.[83] It may well turn out to be the case that cost-benefit analysis conducted with the national community as the point of reference suggests that it would be preferable to adapt to the consequences of global warming rather than incur the costs of trying to prevent or reduce it. In other jurisdictions, the analysis could be very different.[84] More important, cost-benefit analysis conducted with the global community as the point of reference could well yield results that would suggest aggressive reductions as an appropriate political response. The jurisdictional point here is that the relevant

community that serves as the appropriate point of reference for evaluating processes or outcomes is clearly the global community. When there are externalities of this kind, the legitimacy problem would not lie in the Security Council issuing regulations. Legitimacy concerns in these kinds of cases are more appropriately focused on the absence of effective transnational decision-making procedures and the structurally deficient default alternative of domestic decision making.

The principle of subsidiarity, then, is Janus-faced. It not only serves to protect state autonomy against undue central intervention but also provides a framework of analysis that helps to bring into focus the structural underdevelopment of international law and institutions in some policy areas. In these areas, arguments from subsidiarity help strengthen the authority of international institutions engaging in aggressive interpretation of existing legal materials to enable the progressive development of international law in the service of international capacity building.[85]

What should also be clear is the link between jurisdictional and procedural principles of legitimacy: the jurisdictional principle of subsidiarity determines whether and to what extent an issue is a legitimate concern of the larger community or whether an issue is best determined autonomously by the state (or subnational local authorities within the state). If it is an issue in which the international community has a dominant interest, and in which national institutions effectively prevent the international community from addressing the issue, national decisions suffer from a legitimacy problem, no matter how democratic the procedure used to address it might be from a national point of view. Without the commitment to an international legal system that is able to effectively identify and address concerns of the international community, national constitutionalism suffers from a structural legitimacy deficit. National constitutionalism is legitimate only if and to the extent that it conceives of itself within a cosmopolitan paradigm.

This means that there is a statist or nationalist bias in identifying legitimacy of legal practices with democratic legitimacy. To focus debates on

democratic legitimacy is misleading in two ways. First, democratic legitimacy is very plausibly a necessary condition for the legitimacy of domestic constitutional practice, but it is not sufficient. A further necessary criterion for the legitimacy of domestic constitutions is the commitment to an international legal system that is able to effectively identify and address concerns of the international community. Call this criteria cosmopolitan legitimacy. Constitutional rules that make the ratification of treaties prohibitively difficult, that generally preclude ratification of treaties that transfer regulatory authority to international institutions, or that preclude the effective enforcement of international law by the central government might raise serious legitimacy concerns. Second, given the structure of the international community and the nature of the decisions made on the international level, it is unreasonable to insist on democratic legitimacy of international institutions, at least if democratic legitimacy refers to meaningful electoral accountability on the international level. What is appropriate is to insist on compliance with the principle of subsidiarity, complemented by compliance with principles of good governance. This requires further elaboration

(3) **Procedural Standards of Good Governance**

Even when international law plausibly meets jurisdictional tests, it could still be challenged in terms of procedural legitimacy. The procedural quality of the jurisgenerative process clearly matters. Electoral accountability may not be the right test to apply, but that does not mean that there are no standards of procedural adequacy. Instead, the relevant questions are whether procedures are sufficiently transparent and allow for the fullest possible participation and representation of those affected under the circumstances.[86] Some aspects of procedural legitimacy concern the basic structure of the institutional environment in which decisions are made and may raise serious concerns. The role and structure of the UN Security Council, for example, points to significant procedural legitimacy concerns: Given the increasing role of the UN Security Council, should it be required to cooperate more closely with the General Assembly, thereby ensuring a higher degree of inclusiveness? Is it legitimate for there to be some states that are permanent members and others that are not? If so, which criteria should be applied to

determine who they should be? Is it acceptable that permanent membership comes with a veto right? Should the requirement of blocking decisions not be set higher? Here there is a great deal of space for reform. But besides procedural questions that concern the basic structure of the institution, many procedural questions concern more mundane questions that nonetheless are of considerable practical significance. When, for example, the UN Security Council establishes a Sanctions Committee that manages a blacklist that contains the names of persons against whom severe economic sanctions are to be applied, how should the procedure for listing and delisting be structured to ensure adequate due process? For these types of questions concerning the day-to-day decision making of international institutions, mechanisms and ideas derived from domestic administrative law may, to some extent, be helpful to give concrete shape to ideas of due process on the transnational level.[87] Furthermore, principles and mechanisms described by the EU Commission's 2001 white paper could also provide a useful source for giving substance to the idea of transnational procedural adequacy.[88] This is an area that has spawned an important research program focused on the development of global administrative law.[89]

The complex idea of procedural legitimacy that underlies the cosmopolitan paradigm thus has three core features. It replaces or reinterprets the jurisdictional idea of sovereignty using the principle of subsidiarity. It insists on connecting democracy concerns to jurisdictional concerns when assessing questions of procedural legitimacy. And it establishes standards of good governance when electoral accountability cannot reasonably be demanded.

III. A Cosmopolitan Conception of Human and Constitutional Rights

International human rights are generally the rights guaranteed by international treaties. Constitutional rights are the rights guaranteed by the national constitution. The cosmopolitan conception of human rights can give a plausible account of some core characteristic shared by both and their relationship to one another. As the preambles of many national constitutions and many human rights instruments indicate, the positive law of human and constitutional rights

domestically and internationally sees its foundation in a universal moral requirement that public authorities treat those who are subject to their authority as free and equal persons endowed with human dignity. This helps explain three prominent features of contemporary human and constitutional rights practice: (1) the open-ended structure of reasoning about rights that connects rights discourse to public reason, (2) the engagement and mutual interaction between national courts and political institutions, and (3) the internal connections and mutual references between national constitutional and international human rights practice. Here nothing more than a very abbreviated rough sketch of each of these points can be given.

C 1. Rights and Public Reason

First, there is a close connection between the idea of rights and the idea of public reason. It is true that some human and constitutional rights are simply relatively clear and specific rules that define minimum standards that public authorities are required to respect. These are rules that reflect settled agreements on the concrete content of rights guarantees and can be found in constitutional texts, international human rights instruments, or settled judicial doctrine. Their application and interpretation requires nothing more than run-of-the-mill legal techniques. But a great deal of modern human and constitutional rights practice has a different, less legalistic structure. At the heart of much of human and constitutional rights adjudication is an assessment of the justification of acts of public authorities in terms of public reason. This is reflected doctrinally by the prevalence of proportionality tests[90] and related multitier tests[91], which tend to be used to give meaning to highly abstract rights provisions invoking freedom of speech, privacy, freedom of religion, and the like in concrete contexts. These tests tend to provide little more than checklists for the individually necessary and collectively sufficient conditions that need to be fulfilled in order for an act to be justifiable in terms that are appropriate in a liberal democracy.[92] In this way, human and constitutional rights practices give expression to and operationalize the idea that the exercise of legal authority, to the extent it infringes on important individual interests, is limited to what can be demonstratively justified in terms of public

reason. In a system that allows for individual judicial review – most liberal democracies and some regional human rights treaties – individuals are empowered to contest acts by public authorities and have them reviewed by a court to provide an impartial assessment of whether the acts plausibly meet the standards of public reason.

Within the statist paradigm, on the other hand, constitutional rights are rights whose authority is traced back to the will of the national constitutional legislator. To the extent that rights provisions have an open-ended structure, courts are under pressure to interpret them in line with national traditions or emerging accepted standards. Critical debates about democratic legitimacy of judicial review are endemic, as are methodological debates and insecurities about constitutional interpretation. These features are characteristic of a conception of law that is tied to the will of a people, governing itself within the framework of a constitutional state. If the foundation of law is a formally articulated will, then the judge's engagement with public reason is an anomaly, narrowly circumscribed by the original meaning of the act of constitutional legislation and further put in question by the legislative will of current majorities. The cosmopolitan conception, on the other hand, takes as basic a commitment to rights-based public reason and interprets acts by the democratic legislator as an attempt to spell out what that abstract commitment to rights amounts to under the circumstances addressed by the legislative act. The will of the legislator – even the constitutional legislator[93] – is interpreted within a framework of rights-based public reason; rights are not interpreted within the framework of an authoritative will.

C 2. Rights, Courts, and Legislatures

Given the open structure of rights provisions, the contested nature of many rights claims and the relative indeterminacy of public reason, such a conception of rights seems to put a great deal of faith in the powers of the judiciary. But even though the old chestnut of the legitimacy of judicial review cannot be addressed here,[94] the problem is at least mitigated by the second feature of the cosmopolitan conception of rights. Rights practice is a highly cooperative endeavor in which courts and other politically accountable institutions are partners in joint enterprise

and different institutions assume different roles. Courts, as veto players, are junior partners in a joint deliberative enterprise.[95] Judicial review within such a paradigm has been aptly characterized as a kind of quality-control process in which decisions already made by other institutions are subjected to a further test of public reason.[96] The definition and concretization of rights is not an activity that courts hold a monopoly on, even when courts claim to have the final say. Courts, legislators, and administrative agencies are conceived of as partners in a joint enterprise to give meaning to the abstract rights guarantees in concrete contexts. Perhaps the most obvious illustration of this is the fact that national-level courts generally accord the democratic legislator or administrative agencies some degree of discretion, particularly when it comes to assessing competing policy considerations within the proportionality framework. A court sees its task not to provide what it might consider the best, most efficient, or most just solution to an issue, but to merely to ensure that public authorities have not transgressed the boundaries of the reasonable.

3. The Relationship between National and International Rights Practice

This partnership relationship is not just one that is confined to the national institutions that interpret and concretize rights. International and national human and constitutional rights courts also see themselves as engaged in a joint, mutually engaging enterprise.[97] International courts like the ECHR, for example, leave member states considerable margins of appreciation in many contexts. The degree of that margin of appreciation depends at least in part on whether there is a widespread consensus in many of the other states on how a particular rights issue should be resolved.[98] If there is, the court is less likely to defer to a member state then in a situation of widely divergent national practices. More generally, an international court is well positioned institutionally to draw on the experience of other member states and thereby enrich legal analysis. For example, when the British government argued that reasons concerning the operative effectiveness of the armed forces justified preventing gays from serving in the military, the Strasbourg court was able to draw on experiences in a number of other European jurisdictions where armed forces had recently opened themselves up to gays and

experienced very little disruption. This cast doubt on the force of that argument and in effect ratcheted up the burden of proof to a level that the British government was unable to meet.[99]

Similarly, international human rights practice guides and constrains the development of domestic constitutional practice in various ways. Besides having played an important role in the drafting of national constitutions in the past decades, human rights treaties also have played a central role in the context of the interpretation of national constitutional provisions.[100] National courts often refer to international human rights practice as persuasive authority.[101] There is a good reason for this. International human rights treaties establish a common point of reference negotiated by a large number of states across cultures. Given the plurality of actors involved in such a process, there are epistemic advantages to engaging with international human rights when interpreting national constitutional provisions. Such engagement tends to help improve domestic constitutional practice by creating awareness for cognitive limitations connected to national parochialism. At the same time such engagement with international human rights law helps to strengthen international human rights culture generally.

Human rights treaties can be relevant to the domestic interpretation of constitutional rights in a weak way or a strong way. International human rights can be relevant in a weak way by providing a discretionary point of reference for deliberative engagement. This is the way that some recent U.S. Supreme Court decisions have referred to international human rights law. In *Roper v. Simmons*, Justice Kennedy writing for the Court used a reference not to specific international human rights instruments,[102] but to an international consensus more generally, as a confirmation for the proposition that the Eighth Amendment prohibition of cruel and unusual punishment prohibits the execution of juvenile offenders. And in *Grutter v. Bollinger*, the Court made reference to a treaty addressing discrimination issues to provide further support for the claim that the equal protection clause does not preclude certain affirmative action programs.[103] In the United States, engagement with international human rights, to the extent that it takes place at all, is regarded as discretionary. It is something that a federal

court facing a constitutional rights question may or may not find helpful under the circumstances.[104] And even when engagement takes place, the existence of international human rights law governing a question does not change the balance of reasons applicable to the correct resolution of the case. Reference to international human rights merely has the purpose to confirm a judgment or make the Court aware of a possible way of thinking about an issue. In this way, the U.S. Supreme Court, and indeed much of the literature, does not distinguish between the use of foreign court decisions concerning human rights and references to international human rights law. Both have a modest role to play as discretionary points of reference for the purpose of deliberative engagement.

Second, international human rights law can be relevant to constitutional interpretation in a stronger sense. Foremost, instead of leaving it to the discretion of courts, some constitutions require engagement with international human rights law. A well-known example of a constitution explicitly requiring engagement with international human rights law is the South African Constitution. It establishes that the Constitutional Court "shall . . . have regard to public international law applicable to the protection of the rights" guaranteed by the South African Constitution.[105] Whereas engagement with the practice of other constitutional courts is merely discretionary,[106] engagement with international human rights law is compulsory. Next, a clear international resolution of a human rights issue may be treated not only as a consideration relevant to constitutional interpretation but also as a rebuttable presumption that domestic constitutional rights are to be interpreted in a way that does not conflict with international law. The existence of international human rights law on an issue can change the balance of reasons applicable to the right constitutional resolution of a case.

Such an approach has been adopted, for example, by the German Constitutional Court. Unlike the South African Constitution, the German Constitution makes no specific reference to international human rights law as a source to guide constitutional interpretation. Under the German Constitution, treaty law, once endorsed by the legislature in the context of the ratification process, generally has the status of ordinary statutes. Yet in a recent decision

concerning the constitutional rights of a Turkish father of an "illegitimate" child who had been given up for adoption by the mother, the Constitutional Court developed a doctrinal framework that exemplifies how international human rights can be connected to constitutional interpretation in a strong way.[107] In *Görgülü* a lower court had decided the issue in line with the requirements established by the ECHR as interpreter of the European Convention of Human Rights, granting certain visitation rights to the father. The lower court schematically cited the necessity to enforce international law in the form of the ECHR's jurisprudence and held in favor of the father. On appeal, the higher court dismissed the reliance on the ECHR on the grounds that the ECHR as treaty law, ranking below constitutional law, was irrelevant for determining the constitutional rights of citizens. The Constitutional Court held that both approaches were flawed. Instead, it held that "both the failure to consider a decision of the ECHR and the enforcement of such a decision in a schematic way, in violation of prior ranking [constitutional] law, may violate fundamental rights in conjunction with the principle of the rule of law." The Court postulated a constitutional duty to engage: "the Convention provision as interpreted by the ECHR *must be taken in to account* in making a decision; the court must at least *duly consider* it."[108] The Court even held that there was a cause of action available in case this duty to engage was violated: "A complainant may challenge the disregard of this duty of consideration as a violation of the fundamental right whose area of protection is affected in conjunction with the principle of the rule of law."[109] Beyond the duty to engage the European Convention when interpreting the constitution, the Court also had something to say about the nature of that engagement: international law and especially the international human rights law of the European Convention establish a presumption about what the right interpretation of domestic constitutional law requires. "As long as applicable methodological standards leave scope for interpretation and weighing of interests, German courts *must give precedence* to interpretation in accordance with the Convention."[110] This presumption does not apply in cases where the constitution is plausibly interpreted to establish a higher level of protection than that of the ECHR. The

standards established by the ECHR provide a presumptive floor but not a presumptive ceiling.

This is not the place to analyze the relative merits of the weak and strong ways of engaging with international human rights law in the context of domestic constitutional interpretation. Nor is it the place to analyze the differences in the legal, political, and cultural contexts that explain and, to some extent, justify the differences in approach of the U.S. Supreme Court and the German Constitutional Court. Here it must suffice to point out that within the cosmopolitan paradigm some form of cooperation between national and international courts is a natural corollary to a conception of rights that is universal and connected to public reason. Within the statist paradigm, on the other hand, it is not obvious what justifies making reference to transnational human rights practice. If rights are authoritatively connected to the authority of "We the People," engagement with transnational human rights practice is at the very least a peculiar anomaly that requires special justification.[111] The heated debates underlying the reference to international practice in the context of constitutional rights adjudication, even in the weak form that it takes in the United States, is difficult to make sense of in terms of its immediate practical implications. Those appear to be marginal. Looked at in pragmatic terms this debate might seem like a tempest in a teacup. The reason why such a practice could raise not just scholarly but also political passions is that it brings to the fore a clash of constitutional paradigms.

A III. Criticisms and Challenges to Cosmopolitan Pluralism

The cosmopolitan conception of global public law describes the practice of national law and international law within an integrated conceptual framework. This conceptual framework establishes an internal connection between national and international law. That internal connection extends to the construction of legal authority, the standards of procedural legitimacy, and the practice of human and constitutional rights.

Obviously, the preceding sketch of the structure of cosmopolitan pluralism leaves a great many questions unanswered. But it was not its point to develop a full-blown theory of public law or take a position on a concrete doctrinal issue.

The sketch is successful if it threw light on many features of contemporary legal practice that remain peripheral, puzzling, and problematic when assessed within a statist conceptual framework or a monist legalist framework but make perfect sense within the cosmopolitan framework. The following takes up a number of challenges to the cosmopolitan conceptual framework and, in beginning to address them, provides some clarifications that concern the paradigms' theoretical foundations and assumptions.

B 1. Is Cosmopolitanism "Hard Law" or Just an Ideal?

Cosmopolitanism does not just articulate an ideal. The argument presented here is a legal argument: it concerns the basic conceptual framework to be used for the interpretative reconstruction of an existing public law practice. It is not a political program to establish a particular kind of institutional architecture. Like its central competitor the statist paradigm, the cosmopolitan paradigm seeks to provide a conceptual framework that helps organize legal materials and structure legal debates, guiding and constraining them. That does not mean that normative ideals have nothing to do with the choice of conceptual frameworks. The conceptual framework is the one that best fits legal practice. All conceptual paradigms trying to reconstruct legal practice from an internal point of view necessarily have an idealizing element that complements the conventional element.[112] That idealization is an internal feature of the legal practice that they are trying to reconstruct.[113] Sovereignty, states, "We the People" as the constituent power – none of these concepts refer to a natural kind. They are a way of constructing the legal world that is informed by a host of ideas and assumptions about what is accepted, what is attractive, and what works. The idealizing element is shared by the statist and the cosmopolitan paradigm, even if the respective ideas and the conceptual structures that give expression to them are quite different. The question is which ideas and which conceptual structure best fit the legal world we inhabit. The criticism of the cosmopolitan paradigm would thus have to be reformulated: whatever the merit of the idealizing elements that it includes, does it actually fit practice?

Even though a great deal more would have to be said, the illustrations provided suggest that there are many features of the contemporary legal world that a cosmopolitan paradigm can help make better sense of. These range from the particular doctrinal structures that national courts in liberal democracies tend to use to manage the interface between national and international law to the evolution of sources doctrine or the understanding of sovereignty in international law or the basic structural features of human and constitutional rights practice. Many of these features remain contested. They are more widely accepted in some constitutional jurisdictions and more contested in others. But even when they are contested, they are contested at least in part because of the conflict of paradigms that lie at the heart of these disagreements. In that case the articulation of the cosmopolitan paradigm as a contrast to the statist paradigm of constitutionalism helps provide a deeper understanding of these debates by pointing to the source of disagreement.

Furthermore, when making a judgment about fit, that judgment is comparative. The level of fit required for a constitutional paradigm to best fit legal practice depends in part on the level of fit of competing paradigms. The statist paradigm, the chief competitor, however, does not fit constitutional practice very well. It is for that reason that reassertions of the statist paradigm come in the form of revisionist or, more accurately, reactionary approaches. These approaches react to established doctrines that have moved away from what they perceive as the old and better way of thinking about the relationship between national and international law. It is exactly because the statist paradigm does not fit practice that research agendas have been articulated around the idea of constitutionalism in international law, global governance, global administrative law, international public authority, and so on: their point is to focus and assess developments in international law that are difficult to make sense of within the traditional statist paradigm. Many of these efforts are complementary to and provide support for, rather than articulate alternatives to, the cosmopolitan paradigm described here. Their claims are more modest and their focus is more limited. Cosmopolitanism provides a more comprehensive framework and deeper grounding for many of these efforts by providing an account of how various

aspects of legal practice are connected, helping to overcome the fragmentation of international law, and building a bridge between international and national constitutional practice. Without such an overarching framework, these projects face the perpetual risk of either being marginalized (think of the general thrust of the skeptic's challenge), misdirected (think of the debates about democratic legitimacy of global governance), or unduly apologetic (fiddling while Rome burns). An important function of the cosmopolitan paradigm is to provide an overarching conceptual framework on the same basic level and fulfilling the same function as the statist paradigm. The articulation of that alternative paradigm helps sharpen the awareness that, first, there is nothing inevitable about the choice of basic frameworks, and, second, it is necessary to have such a basic framework. The language of *post* and *beyond* in conjunction with the state, the nation, and sovereignty nicely fits postmodern sensibilities and its skepticism of overarching conceptual frameworks and grand narratives. And the virtues of modesty and narrow focus resonate strongly in a professional culture that is both cynical and attuned to serving the powerful and that prizes abstraction only when it comes in the form of economic models. But the powerful cognitive role of basic conceptual frameworks for guiding our sense of what is important and what is not, what is normal and what is not, and what is possible and what is not, only tends to become stronger if it is left unacknowledged and unreflected. This is a terrain that deserves to be a central focus of legal scholarship. It should not be left to deeply engrained habits of thought – the legal unconscious – or entrepreneurial political ideologues. Furthermore, the critical analysis of cognitive frames plays to a lawyer's comparative advantage. It requires analyzing conceptual structures and the moral and empirical presuppositions that make them meaningful, as well as tracing their implications for the structure and content of doctrines across areas of legal practice.

B 2. Is Cosmopolitanism Morally Attractive, Given the Normative Commitments That People Actually Have?

Even if the cosmopolitan paradigm can be understood as a legal paradigm rather than just a moral one, is it really morally attractive? One reason why it might not

be morally attractive is that nations are central to political life. There are many reasons for this.[114] One of the most important ones is that nations enable meaningful political practices of collective self-government. Meaningful democracy is not possible without a certain kind of civic friendship and solidarity that generally do not exist beyond the state. One important advantage of the statist paradigm is that it provides a conceptual framework for the idea that at the heart of modern political life is necessarily the nation. Even to the extent that there is disagreement about the virtues and vices of nationalism, it must surely be of considerable moral significance that a great many people actually think of themselves primarily as national citizens. Of course there are also some who primary think of themselves as tribe or clan members. Where that happens it raises serious problems for state building. But rarefied, and arguably not particularly enviable, is the group who primarily thinks of itself as cosmopolitan. If that is so, is cosmopolitanism not a mere elitist project out of touch with the values citizens hold dear? Is the frequent reference to the international community not deeply problematic? Does a commitment to democracy not entail a commitment to a statist paradigm of constitutionalism, which ultimately connects all legal and political authority to "We the People"? And doesn't statism already misdescribe the paradigm in a biased way? Should it not be referred to as the sovereign democracy paradigm?

This type of criticism is largely based on a category mistake. There is much that could be said about these claims, concerning both the morality of nationalism and the empirical questions relating to commitments and identities that people in liberal democracies actually have. But here I will accept, for argument's sake, both the moral claims relating to the central virtues of nationalism and the empirical claims about the preponderance of strong national identities in democracies as a matter of fact. The core point is this: it is simply a mistake to assume that the thing that most people care most about should be the foundation of legal and political practice. Were it otherwise, how could it be justifiable not to establish theocracies in states If it were otherwise, the case for establishing Christianity and its teaching as the supreme law of the land in the United States would be strong. The reasons against making a commitment to a

sovereign nation the foundation of constitutional practice, as in the statist paradigm, have a similar structure as the reasons against establishing Christian theology as the cognitive frame for U.S. constitutional practice. First, the reasons why constitutional practice is not based on what most people care most about has nothing to do with an elitist critical judgment about what people should or should not hold dear. Just as the establishment clause and a commitment to freedom of religion does not denigrate belief in a Christian God, the cosmopolitan paradigm of constitutionalism does not denigrate patriotic commitments to the nation and national self-government. On the contrary, just as religion can flourish in a country that refuses to establish an official religion and guarantees freedom of religion, so national patriotism and democratic self-government can flourish within a national constitutional framework that is conceived within a cosmopolitan paradigm. Second, the reason why neither Christian theology nor the idea of a sovereign nation should be the cornerstone of constitutional practice is that these tend to lead to pathologies that ultimately undermine both the values people care most about and the integrity of a constitutional practice that takes as basic the idea of free and equals governing themselves. Just as religious fervor, fear, and enthusiasm tends to mix badly with political ambition, so national fervor, fear, and enthusiasm mix badly with the idea of ultimate authority unconditionally grounded in "We the People." Third, excluding Christianity and the sovereign nation as the ultimate orientation and cornerstone of constitutional practice is nevertheless not a value neutral decision. Even though it is a decision that is not directed against Christianity or the idea of a sovereign nation generally, it does preclude certain conceptions of Christianity and of the sovereign nation. Just as theocratic conceptions of Christianity are effectively ruled out as unconstitutional by modern constitutions, certain forms of nationalism are effectively incompatible with a cosmopolitan conception of constitutionalism. Cosmopolitan constitutionalism requires that a commitment to the nation is conceived of as part of a constitutional framework that has due regard for the wider international community built into it. Imperially ambitious or autistically callous conceptions of the national self-government, for example, are incompatible with cosmopolitan constitutionalism.

But its possible to take the argument one step further. Any conception of national constitutionalism that takes as basic the idea of free and equals governing themselves is internally connected to a cosmopolitan paradigm of constitutionalism. It is ultimately not possible to make sense of the idea of constitutional self-government of free and equals within the statist paradigm. Within liberal democracies citizens are encouraged to conceive of themselves as free and as equals and to reflect on the legitimate limits of their individual freedom to do as they please within a framework that takes other persons seriously as free and equal. Furthermore, a universal framework of public reason is central to the determination of the limits of collective self-government as it relates to individual rights within the national community. It is difficult to see what would make plausible not using such a framework to determine the limits of national collective self-government with regard to citizens of other states, who are also conceived as self-governing equals and as fellow members of the international community. The idea of collective self-government that underlies the modern liberal-democratic constitutionalism is internally connected to a universalist frame of reference. The idea of self-governing free and equals cannot be plausibly developed within a statist paradigm without artificially imagining the national community radically separated from and independent of the self-governing practices of others and without giving up on the horizon of a liberated humanity, which is at the heart of the American and French constitutional traditions. Where resistance to a cosmopolitan paradigm of constitutionalism exists, it might well have its source in a commitment to a nationalism that itself is in tension with the idea of free and equals governing themselves within the framework established by the constitution.

B 3. Even If Cosmopolitan Constitutionalism Fits Practice and Is Generally Morally Attractive, Are the Assumptions It Makes about International Law Realistic?

Even if the cosmopolitan paradigm is, in principle, morally attractive, does it not rely on empirical assumptions about the working of the international system that are implausible? The question is somewhat puzzling because it is unclear what

exactly the problem is supposed to be. What has been presented is a conceptual framework that helps reconstruct existing practice, not an institutional proposal for how the world should be governed. To the extent that it is a conceptual framework that succeeds in reconstructing actual legal practice, the assumptions it makes must evidently be compatible with it.[115]

But there is nonetheless a feature of international law, certainly of international law conceived of in constitutionalist terms , that seems to raise concerns. Many of the more powerful states in the world are not liberal democracies – China, Russia, and Iran, for example – and are unlikely to guide their practice by the types of concerns that are central to the cosmopolitan paradigm. And even countries that are liberal democracies tend to generally pursue their national interests, rather than embracing a humanity embracing mindset. Does it not follow that the paradigm is unrealistic?

The short answer is no. The fact that national political actors define and act upon what they conceive to be in their interest and very rarely reflect upon the world in the cosmopolitan framework presented here does not undermine it. It is not at all implausible to claim that liberal democracies, generally have an interest to develop and support and international legal order that exhibits the kind of structure that the cosmopolitan paradigm describes. It projects the basic values underlying liberal democracy onto the global level, while creating a framework for mutually beneficial coordination and cooperation with other states. And given the hegemonic dominance of liberal democracies, even non-liberal democracies that might well have an interest to participate in such a system, rather than staying outside of it or seeking to undermine it. They might not like the liberal democratic baggage that comes with it and might seek to minimize its impact. But they have an interest to reap the coordination and cooperation benfits that such a system provides. Such a system is further be stabilized by the NGO's and various actors of civil society and interest groups that attach themselves to various international institutions and their policies, helping to shape public debates and perceptions that help anchor more deeply a cosmopolitan understanding of politics and of national identity. Furthermore the participation in the various networks and regimes by

public officials[116], journalists and citizens is more generally likely to lead to a strengthening of cosmopolitan sensibilities.

Since the end of the cold war liberal constitutional democracies have been ideologically hegemonic forces, without a serious global competitor. The existence of Islamic fundamentalism, as an ideological force that has captured some states, poses a threat in others and plays a central role in enabling the scourge of terrorism. But it is not currently and is unlikely to develop in the future as a global competitor to cosmopolitan constitutionalism[117], nor is it able to seriously undermine it. More of a challenge to cosmopolitan constitutionalism is a resurgent nationalism of major powers, which have in the past and might continue to use the rhetoric of sovereignty, often in conjunction with democracy, to justify regional or global hegemonic ambitions.[118] But even actors who would not generally be inclined to take the perspective required by cosmopolitan constitutionalism will often have reasons to support an international system committed to it: it might be the best available alternative given actual power relationships and serve as an important instrument of national foreign policy. In many cases concrete results may reflect national interests. Even when they do not, reputational concerns will often push toward compliance, and bureaucratic inertia connected to standard operating procedures might stabilize existing settlements, as might internal interest group pluralism that ensures that some powerful faction will start to throw its weight around to insist on keeping previously made bargains. In some jurisdictions, public or professional cultures of legalism might further support compliance, as might perceptions of legitimacy. Of course, none of this means that international law will always be effectively applied by those bound by it. It is obviously not, and, to the extent it is not, it is a concern that lawyers need to be attentive to. Issues concerning compliance should always be part of the equation when legally analyzing public institutions and the policies they adopt in specific contexts. But nothing in the cosmopolitan paradigm suggests that legal analysis should not take seriously and incorporate these concerns. What it does suggest is that whatever those concerns might be in particular contexts, they do not justify the claim that international law reaches its limits whenever it is not closely tied to the specific consent of each state to be

bound. They certainly do not justify giving up the very idea of an internal account of international law that is necessarily informed by its own ideals. Any plausible conception of public law will have to acknowledge the absence of universal agreement about its foundations as well as its concrete manifestations and will have to recognize some degree of noncompliance.

That leads to a second point. Unwarranted wholesale skepticism about the use of moral categories to describe international law is the flip side of an equally unwarranted wholesale idealization of national constitutional law. International law has traditionally been burdened by the idea of states facing one another in the pose of gladiators waiting to do battle, giving rise to the question how international law can be law properly so called, absent a global sovereign. Constitutional law in liberal democracies, on the other hand, is traditionally conceived of in august terms as "We the People" governing themselves democratically within the framework of a national constitution. Both ideas are part and parcel of the statist paradigm of constitutionalism and the nationalism it provides intellectual cover for. The legal literature on national constitutional law is full of invocations of abstract moral ideals such as self-government, the idea of citizens constituting a community of free and equals, and so on. These and other ideas help make sense of constitutional practice on the national level, guiding and constraining the work of national courts in the elaboration of doctrine. In the domain of political rhetoric, this type of language is also used by politicians on the stump or on festive occasions and when concrete policy priorities are publicly defended to the whole national community. But such language, appropriate and useful as it is for analyzing and assessing public law and public policy from an internal point of view, must not conceal the fact that there is an alternative, no less appropriate way to characterize national political practice in constitutional democracies. Besides the quotidian struggles for power between competing interest groups, there are deep rifts in most societies along lines of class, race, nationality, religion, or other denominators. There is ideological and political struggle over entitlements and distributive claims; there are struggles for recognition of various groups, minorities fighting for greater autonomy in federal systems, asymmetric federal accommodations, minority rights, threats of

independence, and sometimes civil war. Dealing with all that is part of the practice of the democratic constitutional tradition. Examples of what may at times appear to be irreconcilable conflict, deep divisions, ignorance, and mutual misunderstanding are not confined to the realm of the international. Nor are solutions to those problems involving power politics, violence, and disregard for law. When questioning international law it is important not to ignore these features of domestic practice, idealizing constitutional conventions notwithstanding. There is a widespread tendency, directly attributable to the prejudices associated with the statist tradition, to adopt idealizing prose when thinking about domestic constitutional practice while insisting on a hard-nosed realist vocabulary when describing the world of international affairs. A less distorting perspective would recognize and acknowledge the role of legal ideals in the practice of international legal practice, as well as the role of power politics and compliance concerns as central elements of domestic constitutional practice. More generally this suggests that no account of public law in and among liberal democracies is plausible that dogmatically excludes as irrelevant the ideals that inform it and reconstructs it as nothing more but the tools of the powerful. [119] And no conception of law is plausible if it does not recognize and reflect upon the fact that it is also the subject of manipulation, evasion, disregard, or openly hostile contestation by some of those it seeks to bind. Law is both a depository of ideals and an instrument of power and political struggle. Both features of public law practice are an integral part of the conditions of modern constitutionalism.

But there is a third way in which the statist paradigm of global public law distorts legal and political realities. It inappropriately downplays the empirical relationship between successful constitutional self-government on the national level and the international environment, of which any state is a part. There are international legal and political environments that encourage the spread of liberal democracies and there are those that undermine it. The cold war proved to be a bad environment for serious democratic reforms in many states – think of Hungary, Czechoslovakia, Iran, or Nicaragua. In Europe after the cold war, on the other hand, with a perspective on membership in the European Union – a highly integrated regional transnational community governing itself within a treaty-based

framework – has had the effect of encouraging democratic reforms and stabilizing liberal constitutional democracy against internal challenges.[120] In the United States, on the other hand, the very imagination to live in a dangerous world that requires fighting a "global war on terror" whose territorial, temporal, and personal scope is unlimited has not just undermined confidence in international law. It has also undermined confidence in the U.S. Constitution as an instrument that can effectively restrain a committed president and commander in chief. If the success of liberal constitutional democracy on the national level depends at least to some extent on the structure of the international legal system of which it is a part, the converse is also true: the effectiveness and structure of international law depends to some extent on the domestic constitutional structures of states. A world dominated by liberal states will allow for a different international legal system than a world in which there are only great power rivalries, whose conflicts of interests are deepened and made more threatening by their connection to deep ideological conflict.[121]

To summarize: the conceptual structure of the statist paradigm, with its sharp and basic distinction between state law and international law, tends to distort complex legal and political realities. Those structural cognitive distortions operate on three levels. First, on the international level they tend to underestimate the significance of legal ideals for the analysis, assessment, and functioning of international law. Second, on the national level they tend to idealize national constitutional practice. And third, they tend to downplay the significance between the relationship between the domain of the national and the international. The cosmopolitan paradigm avoids these distortions. It insists on the central significance of idealization as an internal feature of legal practice and public policy debate. But it is open for considerations relating to effectiveness and compliance to play a role in the contextual analysis and assessment of specific legal issues or legal regimes. And it will include as relevant in that analysis the complex structure of the relationship between national and international practice. Serious context-focused inquiry is not precluded by unconvincing and overbroad generalizations about either national constitutional law or international law.

IV. Conclusions

There is no deep conceptual difference between national and international public law. There may be differences of degree, but even they are likely to vary across different areas public law seeks to regulate human behavior. There are no special legitimacy problems connected to international law that are not shared by constitutional law. Nor are there compliance problems that are radically distinct from similar problems that tend to be standard fare in domestic practice. These biases are corrected by the cosmopolitan conception of global public law, that ultimately allows for a conceptually more refined, morally more attuned, and empirically more informed account of national and international public law practice.

[1] Check numbers and criteria used for Index.

[2] Cite Art. 6 TEU

[3] Cite Sec. Gen. Reports

[4] Cite Res.

[5] The Legitimatory Trinity may be abstract and highly indeterminate, but a commitment to it does settle something: It excludes other historically influential criteria as ultimate focal points for the resolution of disputes. The ultimate criterion for the correct resolution of legal and political disputes are not, for example, what will enhance the power and glory of the nation, what historical materialism reveals as the right kind of class consciousness, or what according to the right religion will ensure the salvation of our souls.

[6] I will not address theories here that do not accept the legitimatory Trinity as the basis for their efforts. The reson is not that they are *heretic* and therefore unworthy of attention. But taddressing them would be another topic.

[7] See the contributions in J. Weiler, G. de Burca (eds.), *The Worlds Of European Constitutionalism*, CUP 2011.

[8] Joined Cases ECJ C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v. Council*, Decision of Sept. 8 2008.

[9] CFI Cases T- 30601 *Yusuf and Al Barakaat*, T- 315/01 *Kadi*

[10] *Supra* note 1.

[11] Costa v. ENEL (Case 6/64) [1964] ECR 585.

[12] For general overviews of note on the issue see M. Claes, The National Courts' Mandate in the European Constitution (Hart 2006), M. Kumm, The Jurisprudence of Constitutional Confllict: Supremacy before and after the Constitutional Treaty, 11 *European Law Journal* (2005), 262, A. M. Slaughter, A. Stone and J.H.H. Weiler, *The European Courts and National Courts – Doctrine and Jurisprudence* (Oxford, Hart Publishing 1998), Constance Grewe and Helen Ruiz Fabri, *Droits Constitutionnels Européens* (Paris, PUF 1995), Franz Mayer, *Kompetenzüberschreitung und Letztbegründung* (Muenchen, C.H. Beck 2000). For a collection of the leading cases across jurisdictions see A. Oppenheimer (ed.), *The Relationship between European Community Law and National Law: The Cases* (Cambridge, 1994 [Vol.1] & 2003 [Vol.2])

[13] J. Austin, The Province of Jurisprudence Determined (1832)

[14] See for example A. Lasson, *Prinzip und Zukunft des Völkerrechts* (Berlin, Hertz 1871).The argument was actually pleaded and dismissed by the Permanent Court of Justice, the predecessor of the ICJ, see the S.S. Wimbledon Case, 1923 P.C.I.J. (ser A.) No. 1, at 25.

[15] For a classical statement see Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*, Fifth Edition, Revised, (New York: Alfred A. Knopf, 1978, 4-15.

[16] An overview of the debate as it stood in the nineties and further references can be found in H. Koh, 'Why do Nations Obey International Law?', 106 *Yale L. J*. 2634 (1997).

[17] See Emmanuel-Joseph Sieyes, Qu'est-ce que le tiers etat, in: ECRIT POLITIQUES 115, 160 (Roberto Zapperi ed., 1985)

[18] 89 BVerfGE 155 (1993).

[19] BVerfG, 2 BvE 2/08, Judgment of June 30 2009

[20] See M. Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty', 11 *European Law Journal* (2005), 262, 275-278. For an account of a similiarly structured discussion in the US pre-Civil War context see D. Golove, 'New Confederalism: Treaty Delegations, Executive and Judicial Authority', 55 *Stanford Law Review* (2003), 1697.

[21] The idea and its deeper normative significance is developed in Joseph Weiler, *To Be a European Citizen: Eros and Civilization*, in: Weiler, THE CONSTITUTION OF EUROPE, pp. 324. Practical doctrinal implications for thinking about constitutional conflict within this paradigm are developed in Mattias Kumm, *Who is the Final Arbiter of Constitutionality in Europe?*, 36 Common Market Law Review, 356 (1999).

[22] P. Kirchhof, 'The Balance of Powers Between National and European Institutions', 5 *European Law Journal*, 225-242 (1999).

[23] See BVErfGE 89, 189 (1993).

[24] D. Grimm**,** 'Does Europe Need a Constitution?', 1 *European Law Journal* (1995), 282

[25] J. Weiler,CONSTITUTIONALISM BEYOND THE STATE, 7 (CUP 2003).

[26] J. Weiler, *supra* note 15.

[27] For the interpretation of Treaties see Art. 31-33 VCLT. Note that Art. 30 VCLT contains a specific set of conflict rules governing Treaties relating to the same subject matter.

[28] According to Art. 30 (2) VCLT when a Treaty specifies that it is not to be incompatible with an earlier Treaty the provision of the earlier Treaty shall prevail.

[29] check

[30] *Kadi*, Recitals 281 and 282.

[31] *Kadi*, Recitals 282 and 285.

[32] BVerfG 89, 155 (1993).

[33] BVerfG, 2 BvE 2/08, Judgment of June 30 2009.

[34] E.g. M. Kumm, 'The Jurisprudence of Constitutional Conflict: Supremacy Before and after the Constitutional Treaty', *European Law Journal* (2005), 262.

[35] The classic literature on Monism includes H. Kelsen, *General Theory of Law and State* (1945), 363-380; A. Verdross, *Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung* (1923); H. Lauterpacht, *International Law and Human Rights* (1950).

[36] Case 6/44, Costa v. Enel, [1964] ECR 585; Case 43/76, Comet BV v. Produktschap voor Siergewassen, [1976] ECR 2043; Case 106/77, Amministrazione delle Finanze dello Stato v. Simmenthal, [1978] ECR 629.

[37] Case 294/83, Parti Ecologiste 'Les Verts' v. European Parliament, [1986] ECR 1339

[38] According to Kelsen the demand that the world of law be monist does not require a *Grundnorm* according to which transnational law trumps national law. It is also possible to posit a *Grundnorm* according to which there is no law except as established by national law. But the choice of the latter *Grundnorm* would imply a kind of national solipsism, comparable to a Cartesian subject who denies the existence of other such subjects and claims that all other persons are nothing but emanations of his consciousness. Adopting such a position is logically possible. Notwithstanding significant efforts by generations of philosophers, solipsism is a position remarkably difficult to refute conclusively. On the other hand there are just no plausible arguments in its favor, so only the most anxious foundationalists have been troubled by the problem. Others have been happy to assume the reality of other subjects as the more plausible starting point. Similarly lawyers, it might be implied from Kelsen, would do well to posit that there is a European legal order and that the legal orders of Member States are equally subject to it. But of course the whole argument depends on the non-obvious claim that there can only be one legal order and that the idea of legal pluralism is untenable for conceptual reasons. That is an issue not to be deepened here.

[39] See W. Hallstein, DER UNVOLLENDETE BUNDESSTAAT: EUR. ERFAHRUNGEN UND ERKENNTNISSE, Düsseldorf - Wien (Econ Verlag 1969)

[40] Of course the failed "Treaty establishing a Constitution" had a qualified supremacy clause. The Lisbon Treaty on the other hand, merely confirms the ECJ's jurisprudence in Declaration 115 attached tp the Treaty. (check).

[41] For a fully developed argument to this effect see Mattias Kumm, *The Jurisprudence of Constitutional Conflict*, 11 European law Journal, 262-307 (2005).

[42] In the context of the ratification of the Maastricht Treaty Art. 23 Basic Law was amended to address questions of European integration.

[43] See Art. 24 Basic Law.

[44] This is the dominant interpretation of Art. 59 II Basic Law.

[45] BVerfGE 22, 293 (1967) and BVerfGE 31, 145 (1971)

[46] BVerfGE 37, 271 (1974).

[47] BVErfGE 73, 339 (1986)

[48] BVerfGE 89, 155 (1993).

[49] BVerfG, 2 BvE 2/08, Judgment of June 30 2009.

[50] See Art. 230 ECT.

[51] Belgian constitutional Court, European Schools, Arbitragehof, Arrest no. 12/94, B.S. 1994, 6137 - 6146

[52] Spanish constitutional Court, Municipal Electoral Rights, 3 Common Law Reports 101, (1994)

[53] Polish constitutional Court, Judgment of 27th April 2005, P 1/05, English Summary available at: www.trybunal.gov.pl

[54] For a more fully developed account see Mattias Kumm, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy Before and After the Constitutional Treaty*, 11 European Law Journal, 262-307 (2005).

[55] Compare also A. Von Bogdandy, 'The Prospect of a European Republic: What European Citizens are Voting on', 42 *Common Market Law Review*, 913-941 (2005).

[56] Check Lisbon Treaty

[57] See Art. 6 CT.

[58] See M. Kumm, Constitutionalizing Subsidiarity in Integrated Markets, 12 *European Law Journal* (2006), 503.

[59] See M. Kumm, 'Why Europeans are not Constitutional Patriots', 6 *ICON* 2008, 117.

[60] See Art. 4 Sect. 2 EUT: "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional…"

[61] See M. Kumm and V. Ferrers Comella, 'The primacy clause of the constitutional treaty and the future of constitutional conflict in the European Union, 3 ICON 2005, 473, 491 & 492.

[62] *Kadi*, Recital 297.

[63] See S.C. Res. 1730, U.N. Doc. S/Res/1730 (Dec. 19, 2006); S.C. 1735, U.N. Doc. S/Res/1735 (Dec. 22 2006); S.C. Res. 1822, U.N. Doc. S/Res/1822 (June 30, 2008).

[64] *Kadi*, Recital 321, 322. See most recently S.C. Res. 1904 (Dec. 17 2009) that provides at least certain minimal guarantees.

[65] *Bosphorus v. Ireland* Eur. Ct. H. R. 30 (2005).

[66] See most recently S.C. Res. 1904 (Dec. 17 2009) that finally provides at least minimal, even if still inadequate, procedural guarantees.

[67] See J. Goldsmith and E. Posner, Does Europe Believe in International Law?, Wall Street Journal, November 25, 2008.

[68] For an overview of such regimes, *see* THOMAS FRANCK, DELEGATING STATE POWERS: THE EFFECT OF TREATY REGIMES ON DEMOCRACY AND SOVEREIGNTY (2000).

[69] In France, for example, the Conseil Constitutionnel has held that transfers of authority that "violate the essential conditions for the exercise of national sovereignty" require constitutional amendment and not just the ordinary majorities usually sufficient for the ratification of treaties. *See* Conseil Constitutionnel, Apr. 9, 1992, Maastricht I. Other constitutions establish more demanding ratification procedures for treaties that authorize international institutions to exercise public authority, requiring supermajorities rather than the ordinary majorities needed for treaty ratification.

[70] For a leading case that exemplifies such an understanding, see the SS *Lotus* case (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

[71] See art. 21 of the Lisbon Treaty, which establishes that the relationship between the European Union and the international community is to be governed by the same basic principles as the principles central to the evolution of the European Union.

[72] Grundgesetz für die Bundesrepublik Deutschland (federal constitution), art. 23, states: "To realize a United Europe, the Federal Republic of Germany cooperates with others to develop a European Union that is committed to . . . the principle of subsidiarity."

[73] John Jackson labeled a similar idea "sovereignty-modern." *See* John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 Am. J. Int'l L. 782 (2003).

[74] *See A More Secure World: Our Shared Responsibility, Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change*, U.N. Doc A/59/565, Executive Summary 4 (Dec. 2004).

[75] For a discussion of how the principle of subsidiarity operates, *see* Mattias Kumm, *Constitutionalizing Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union*, 12 Eur. L.J. 503 (2006).

[76] Benedict Kingsbury, *Sovereignty and Inequality*, 9 Eur. J. Int'l L. 599 (1998).

[77] This point is made by David Kennedy, Of War and Law (2006).

[78] Conventionally the point of reference here is art. 38 of ICJ Statute, itself a provision of a treaty.

[79] Georges Scelle called this "dédoublement fonctionnel," or role splitting. *See* 1 Précis de droit des gens. Principes et systematique (1932).

[80] *See* Bruce Ackerman & David Golove, Is NAFTA Constitutional? (1995) (providing a historical embedded argument that embraces this type of argument).

[81] Assume that current proposals had become law and that it included as new permanent members an African state (Nigeria or South Africa), two additional Asian states (Japan and India or Indonesia), a South American state (Brazil), and an additional European state (Germany), as well as five new non–permanent members.

[82] For an argument of this kind in respect to the U.S. position on the Kyoto Protocol, see Bruce Yandle & Stuart Buck, *Bootleggers, Baptists and the Global Warming Battle*, 26 Harv. Envtl. L. Rev. 177, 179 (2002) (contending that "the Kyoto Protocol would have been a potentially huge drag on the United States' economy" while producing minimal environmental benefits).

[83] Procedural requirements to take into account external effects in cost-benefit analysis have in part been established to mitigate these concerns. *See*, *e.g.*, Benedict Kingsbury, Richard B. Stewart & Nico Krish, *The Emergence of Global Administrative Law*, 68 Law & Contemp. Probs. 15 (2005); Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. Rev. 437 (2003).

[84] For example, the island of Tuvalu, situated in the Pacific Ocean, is in danger of disappearing entirely. On this issue, the governor-general of Tuvalu addressing the UN General Assembly on September 14, 2002, stated the following: "In the event that the situation is not reversed, where does the international community think the Tuvalu people are to hide from the onslaught of sea level rise? Taking us as environmental refugees is not what Tuvalu is after in the long run. We want the islands of Tuvalu and our nation to remain permanently and not be submerged as a result of greed and uncontrolled consumption of industrialized countries." *See* address of Governor General Sir Tomasi Puapua, Sept. 14, 2002, *available at* http://www.un.org /webcast/ga/57/statements/020914tuvaluE.htm.

[85] For the judicial interpretation of customary law in this respect, *see* Eyal Benvenisti, *Customary International Law as a Judicial Tool for Promoting Efficiency*, *in* The Impact of International Law on International Cooperation: Theoretical Perspectives 85 (Eyal Benvenisti & Moshe Hirsch eds., 2004).

[86] See Grainne de Burca, *Developing Democracy Beyond the State*, 46 Columbia Journal of Transnational Law 221 (2008), providing a useful introduction to debates about the legitimacy of transnational governance practices. De Burca's distinction between a '*compensatory*' approach to democracy and a '*democracy-striving'* approach, however, is both overdrawn and misleading. It is overdrawn, to the extent it may not point to more than differences in semantics with regard to some of the authors she cites: Those differences mainly concern the question whether the term democracy should be restricted to describe processes that at a minimum include electoral accountability, whatever else they might require. If you do not believe that it is helpful to use the language of democracy to describe processes that are not anchored in electoral politics, then you'll insist on procedural requirements that compensate for the absence of democracy on the international level. If you embrace a more capacious notion of democracy, you will insist that, on the international level, too, democracy needs to be striven for. It is not clear, whether either approach produces different standards of legitimacy. More importantly both of these approaches, as de Burca describes them, seem to have in common that they do nothing to

undermine the misleading premise that national democracy serves as the appropriate paradigm for legitimacy, a paradigm that international governance practices can at best compensate or strive for. Compared to national democratic law international law is always deemed to be comparatively deficient in some way. Some of those who endorse a 'compensatory approach' seek to reframe the issue: international law, appropriately structured, might help to compensate for the democratic deficit of national decision-making to the extent outsiders are effected in qualified ways. This idea is central to the comensatory approach developed, for example, by Anne Peters, *Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures* ,19 Leiden Journal of International Law 579 (2006), or Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analaysis*, 15 Eur. J. Int'l Law 907 (2004). De Burca does however identify plausible criteria of procedural adequacy for international governance practices. On those see also Joshua Cohen & Charles F. Sabel, *Global Democracy?*, 37 N.Y.U. J. Int'L L. & Pol. 763 (2005).

87 *See, e.g.*, Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?* 68 Law & Contemp. Probs. 63 (2005).

88 *See The European Commission's White Paper on European Governance* (2001), *available at* http://europa.eu.int/comm/governance/white_paper/index_en.htm.

89 *See* Kingsbury, Stewart & Krish, *The Emergence of Global Administrative Law*, *supra* note 70.

90 *See* Robert Alexy, A Theory of Constitutional Rights (2002); David M. Beatty, The Ultimate Rule of Law (2004).

91 *See* Richard Fallon, Implementing the Constitution (2000).

92 For a more developed argument, *see* Mattias Kumm, *Institutionalizing Socratic Contestation, The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review*, 1 Eur. J. Legal Stud. (No. 2) 1 (Dec. 2007).

93 Taken to the extreme, it means that even the enactment of a bill of rights or a charter of fundamental rights has only epistemic, not constitutive, significance. Such an understanding is not alien to at least a part of contemporary rights practice. The preamble to the European Charter of Fundamental Rights specifically establishes that the charter has epistemic significance only: to clarify and make more visible the rights that the European citizens already have and that the European Court of Justice already protects, even without a written charter. Somewhat less radical but leaning in the same direction are national constitutions that entrench highly abstract basic principles relating to human rights, prohibiting their partial or complete abolition.

94 *See* Kumm, *Institutionalizing Socratic Contestation*, *supra* note 78.

95 For an overview of theories that emphasize the dialogic, cooperative nature of the relationship between courts and other political actors, *see* Christine Bateup, *The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue*, 71 Brook. L. Rev. 1109 (2006).

96 For such an understanding of the role of courts as it relates to rights in the U.S. constitutional tradition, *see* Lawrence G. Sager, Justice in Plain Clothes (2004).

97 *See* Gerald Neumann, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 Stan. L. Rev. 1863 (2003). Grainne de Burca & Oliver Gerstenberg, the Denationalization of Constitutional Law, 47 Harvard International Law Journal 243 (2006). *See also* Stephan Gardbaum, *Human Rights and International Constitutionalism* (in this volume).

98 Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. Int'l L. & Pol. 843 (1999).

99 Lustig-Prean & Beckett v. United Kingdom, 29 Eur. Ct. H.R. 548 (1999).

100 For a helpful overview, *see* T. Franck & Arun K. Thiruvengadam, *International Law and Constitution-Making*, 2 Chinese J. Int'l L. 467 (2003).

101 Persuasive authority as understood here refers to any "material . . . regarded as relevant to the decision which has to be made by the judge, but . . . not binding on the judge under the hierarchical rules of the national system determining authoritative sources." Christopher McCrudden, *A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights*, 20 Oxford J. Legal Stud. 499, 502-03 (2000).

102 He could have cited art. 6(5) of the International Covenant on Civil and Political Rights, New York, Dec. 16, 1966, in force Mar. 23, 1976, 999 U.N.T.S. 172, as well as art. 4(5) of the Convention of the Rights of the Child, New York, Nov. 20, 1989, in force Sept. 2, 1990, 1577 U.N.T.S. 3, and art. 37(a) of the American Convention of Human Rights, San José, Costa Rica, Nov. 22, 1969, in force July 18, 1978, 1114 U.N.T.S. 123. These obligations were not binding on the United States as treaty obligations

because the United States had not signed on (Rights of the Child Convention), had signed but not ratified the treaty (in the case of the American Convention), or had signed and ratified the treaty but with reservations concerning the juvenile death penalty (the case of the International Covenant on Civil and Political Rights). Having signed two of these treaties and having failed to meet the persistent objector requirements, the United States was, however, under an obligation to comply with this prohibition as a matter of customary international law.

103 Grutter v. Bollinger, 539 U.S. 306, 345 (2003) (O'Connor, J., concurring) (citing the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women); International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195; Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

104 Even the strongest supporters of transnational deliberative engagement on the court insist on that point. *See* Stephen Breyer, Active Liberty: Interpreting Our Democratic Constitution 180 (2005).

105 South African Constitution (1996), art. 35.

106 The Court "may have regard to comparable foreign case law." *Id.*

107 *Görgülü v. Germany* (2004) 2 BvR 1481/04.

108 *Id.* at para. 62 (emphasis added).

109 *See id.* at para. 30.

110 *Id*. at para. 62.

111 Those justifications might be linked to genealogy ("We the People" sought to continue a tradition of rights protection that first developed in the United Kingdom, so it might be helpful to look at how the rights were understood there), or they might be justified as refuting particular empirical claims (e.g., referring to the European Union as an empirical example that proves that that having states implement federal programs does not necessarily weaken federalism, see J. Breyer in Printz).

112 In this regard, interpretative questions regarding the choice of basic conceptual paradigms are no different from other legal issues. Generally I follow the interpretative approach of Dworkin. *See* Ronald Dworkin, Law's Empire (1986).

113 *See* Joseph Raz, The Authority of Law (1979) (claiming that law necessarily makes a claim to legitimate authority). *See also* Robert Alexy, The Argument from Injustice (2002) (arguing that the law necessarily makes a claim to correctness).

114 *See* Davis Miller, On Nationality (1995).

115 Perhaps the concern is targeted at the idea of the international community, which is frequently invoked as a reference within the cosmopolitan paradigm. Is there actually such a thing? What are the sociological presuppositions that justify using such language? The idea of an international community, as it is used here, makes no sociological presuppositions whatsoever. It refers to a legal concept that is defined in terms of jurisdiction. Just as in domestic constitutional law the people are simply those over whom domestic institutions have jurisdiction and to whom domestic institutional arrangements and decisions are addressed, so the idea of an international community simply refers to the larger community that falls under the jurisdiction of international law and to which it is addressed.

116 Anne-Marie Slaughter, A New World Order (Princeton 2004).

117 The deep political pluralism of the states inhabited by Muslim majorities, often misleadingly referred to as "the Islamic world" is a fact often underestimated. Indonesia, Bangladesh and Turkey, to take some of the largest states, are not Islamic, even though their populations are. And Iranian Shia theocracy is worlds aprt from both Sunni Wahhabi Saudia Arabia or the Taliban.

118 Paradigmatic in this context is the rise of Putinism in Russia, which has given rise to a youth movement that is called "ours" and has an official ideology called "sovereign democracy." On the level of official rhetoric there are significant structural analogies between Russian nationalism under Vladimir Putin and U.S. nationalism under George W. Bush.

119 A 1930 article on constitutionalism in Encyclopedia of Social Sciences begins: "Constitutionalism is the name given to the trust which men repose in the power of words engrossed on parchment to keep a government in order." The author of the article makes clear that such trust ought to be regarded with contempt. *See* Richard S. Kay, *American Constitutionalism, in* Constitutionalism: Philosophical Foundations 16 (Larry Alexander ed., 1998).

120 That did not, of course, prevent the dissolution of and civil war in Yugoslavia.

[121] *See, e.g.*, Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503, 507 (1995). *See also* Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513, 516-24 (1997).