Ruling the World?

Constitutionalism, International Law, and Global Governance

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10. The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State

MATTIAS KUMM

I. Introduction

1. Constitutionalism beyond the State? The Skeptic's Challenge

The language of constitutionalism has become widespread among international lawyers. International law as a whole[1] or specific international regimes[2] are described using constitutional language. Yet from the perspective of many national constitutional lawyers – not only, but particularly, in the United States – the application of constitutional language to international law is viewed with skepticism. A constitution, in the modern tradition, is generally understood as the supreme law of a sovereign state. The constitution is a written document, imagined as constituting and authorized by "We the People," enforced, if need be, by the coercive power of the state. International law, on the other hand, is conventionally imagined as the law among states, founded on the consent of states, and addressing questions of foreign affairs. Within this dualist paradigm, any talk of constitutionalism beyond the state is deeply

[1] *See* in this volume Andreas Paulus, *The International Legal System as a Constitution*, Chapter 3. For a brief history of constitutional language in international law, *see* Bardo Fassbender, *"We the Peoples of the United Nations": Constituent Power and Constitutional Form in International Law*, *in* The Paradox of Constitutionalism 270–73 (Martin Loughlin & Neil Walker eds., 2007).

[2] The focus of discussion has been on the United Nations, the European Union, the World Trade Organization, and the international human rights regime. *See* Jeffrey Dunoff & Joel Trachtman, *A Functional Approach to International Constitutionalization*, Chapter 1, and their contributions to Part II of this volume.

Besides Jeffrey Dunoff and Joel Trachtman and the participants of the workshop on "Ruling the World" in October 2007 in Philadelphia I thank the conveners and participants of the workshop at the Wissenschaftskolleg in May 2008 in Berlin on "The Twilight of Constitutionalism?" and in particular Dieter Grimm, Martin Loughlin and Alexander Somek for their critical comments and questions as well as Jack Goldsmith and Daryl Levinson and the participants of the Harvard Public Law workshop in February 2009.

implausible. Whoever uses the language of constitutionalism in relation to public international law is suspected of effectively advocating some version of a constitutional world state. Given the central role that sovereign states play and are likely to continue to play in the international system, such ideas, whatever their merit from a purely moral point of view might be,[3] are easily dismissed as hopelessly out of touch with reality and certainly of little value for the analysis and assessment of international law as it exists today.

Of course most international lawyers embracing the language of constitutionalism do not see themselves as committed to a grand institution-building project that will lead to the establishment of a federal world state.[4] The way that international lawyers use constitutional language to describe facets of international law is, at least on the surface, more modest. Their project is conventional: to describe and analyze international law or some part of it as a coherent legal order. Constitutional language is helpful for this purpose, because there are structural features of international law that bear some resemblance to features associated with domestic constitutional law. In part these are formal: there are elements of a hierarchy of norms in international law. They range from *jus cogens* norms to article 103 of the UN Charter, establishing the priority of the UN Charter over other norms of international law. In part they are functional: there are multilateral treaties that serve as regime-specific constitutional charters for institutionally complex transnational governance practices. And in part they are substantive:[5] human rights obligations have long pierced the veil of sovereignty that kept the relationship between the state and its citizens from the purview of international law. The individual has long emerged as a subject of rights and obligations under international law. There are international human rights courts established by treaties that authorize individuals to vindicate their rights before international courts. International law even criminalizes certain types of particularly serious human rights violations. These are features more characteristic of modern constitutional systems than of the traditional paradigm of international law as the law among states.

To the extent that constitutional language is used to describe international law in these contexts, it appears to be used in a different way from in the

[3] From a moral point of view, too, the idea of a federal world state is controversial. Immanuel Kant famously associated such a state with despotism, whereas others embrace it.

[4] In fact, no contributor in this volume conceives of constitutionalism in international law in this way.

[5] *See, e.g.*, Erika de Wet, *The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order*, 19 Leiden J. Int'l L. 611 (2006).

domestic context. Domestic constitutionalism and international constitutionalism appear, on the surface, to be homonyms. There is constitutionalism with a "big *C*" (constitutionalism properly so called, or domestic constitutionalism) and there is constitutionalism with a "small *c*." Constitutionalism properly so called is linked to the establishment of ultimate legal authority in the form of a written constitution, in the service of "We the People" people governing itself democratically and supported by the coercive powers of the state. Constitutionalism with regard to international law is constitutionalism with a small *c*: the project to describe international law or parts of it as a coherent legal system that exhibits some structural features of domestic constitutional law, but that is not connected to the establishment of an ultimate authority, not connected to the coercive powers of state institutions and not connected to the self-governing practices of a people.

Even when those distinctions are clear and confusion is avoided, there are serious problems with the use of constitutional vocabulary beyond the state. If legal practices are described in constitutional terms, the aura of legitimacy and authority associated with big-*C* constitutionalism tends to be bestowed on international practices. This tends to cover up a number of problems that are said to plague international law. The idea of constitutional order suggests coherence, when in fact there is a deeply pluralist and fragmentized international legal practice.[6] It suggests effectiveness, when in fact compliance issues are a central problem to at least some of the areas of international law most associated with the use of constitutional language.[7] And it suggests legitimacy in exactly those areas of international law not firmly grounded in state consent, where legitimacy concerns are most serious.[8] Small-*c* constitutionalism appears as little more than legitimating rhetoric for a discipline of international law that is in crisis, after having partially unmoored itself from the firm and reliable anchor of state consent. Constitutional language has the double function of assuaging disciplinary anxieties about international law and helping co-opt national constitutional actors, national courts in particular, to lend their support to a cosmopolitan project of transnational integration whose legitimacy and efficacy are questionable. It stands in a fraught

[6] *See Report of the Study Group of the International Law Commission: Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.682, Apr. 13, 2006.

[7] *See* Jack Goldsmith & Eric Posner, The Limits of International Law (2005), for a recent attempt to establish what kind of international law matters and what kind does not. Literature on compliance has recently mushroomed.

[8] *See* Jeremy Rabkin, The Case for Sovereignty (2004).

relationship with the idea of constitutional self-government.[9] It should therefore be abandoned.

That is the core of the skeptic's challenge.

The following can be read as a thought experiment. What if the real puzzles, pathologies and peculiarities are connected to the way national constitutional lawyers imagine constitutional law, rather than the way international lawyers imagine international constitutionalism? What might domestic constitutionalism be, if it was imagined not within the conventional statist paradigm, but within a cosmopolitan paradigm? What if the idea of sovereignty as ultimate authority, a conception of constitutional law tied to the coercive institutions of the state and a conception of legitimacy and democracy reductively tied to the self-governing practices of "We the People", is deeply flawed and implausible? What might it mean to reconstruct the legal and political world without reference to the conventional conceptualizations, idealizations and assumptions connected to the paradigm of statehood and sovereignty? What might it mean and what would one be able to see if one analyzed the relationship between international and national law using a cosmopolitan paradigm? How would one describe and analyze the structural changes that international law has experienced after WWII and the Cold War? How might one make sense of the structure of human rights and constitutional rights practice across liberal democracies, with the principle of proportionality playing such a central role, and the increasingly intimate relationship between national and international rights practice, both of which are not easily reconciliable with a conventional account of constitutional law?

The following is an attempt to articulate as clearly as possible an argument that, if plausible, would propose as significant a revolution in legal thinking, as the emergence of modern constitutionalism in the 18th century, perhaps even as significant as the emergence of the statist paradigm associated with the Westphalian settlement in the 17th century. To even attempt something of that sort in an essay rather than a book length work rich in historical detail, legal analysis and theoretically informed reflection might suggest an unfortunate if not uncommon combination of megalomania and lack of sophistication. But the thought experiment, which here takes the form of an

[9] For an overview of the issues, *see* Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 Eur. J. Int'l L. 907 (2004). In Europe, where national constitutional practice has opened itself to transnational law to a significant extent, and the density of transnational legal practice is high, revisionist sensibilities are articulated in more defeatist, nostalgic tones. There is talk of the "twilight" of constitutional law and the demise of the modern constitutional tradition.

argument for radically reimagining the legal world in order to assess whether that improves our understanding of it, is not only successful, if it proves to be correct. There might be a great deal to learn even from its failure. For that reason, at least, I hope that the reflexive disbelief of the more sophisticated of the skeptics will be suspended to allow for serious engagement.

To further encourage the suspension of disbelief a clarifying disclaimer is in order: As transformative as the project to be undertaken might appear to be on the conceptual level, its claims are focused on how best to understand the law as it is, not to make an argument about what the law should be. Cosmopolitan constitutionalism, as it is presented here, is a jurisprudential account claiming to describe the deep structure of public law as it is. It tries to make sense of a series of basic structural features of international and domestic constitutional law practices in liberal constitutional democracies that remain a peculiarity within the statist paradigm of constitutionalism, but can easily be accounted for within the cosmopolitan paradigm. More specifically the cosmopolitan paradigm provides a unifying framework for the analysis of four phenomena: the increasingly complex structure of doctrines that concern the management of the interface between national and international law (conventionally described as the constitutional law of foreign affairs), the proliferation of internally complex governance structures within international law (focused on, for example, by the Global Administrative Law project) and the functional reconceptualization of sovereignty, as well as basic structural features of contemporary human rights practice, including the global spread of proportionality analysis and the increasing interaction between national and transnational human rights adjudication. The central claim is that a cosmopolitan paradigm is better able than a statist paradigm to make sense of contemporary public law practice, to provide a plausible reconstructive account that both fits that practice and shows it in its best light.[10] The adoption of a cosmopolitan cognitive frame for imagining public law is not conceptually connected to *any* political project relating to institutional architecture and certainly does not entail a commitment to a world state. On the contrary, those who insist on the desirability of establishing a world state tend to be caught up in statist thinking in the same way as

[10] The basic jurisprudential assumptions informing this project are unspectacular: 1. Law, conceived from the internal point of view of a participant in the practice of making legal claims, has a normative structure; 2. the identification of legal norms is at least in part a matter of conventions; 3. the identification and interpretation of the relevant conventions to some extent requires engagement with moral arguments, that is arguments about what is efficient, fair, legitimate or just. All three assumptions are shared among others by Ronald Dworkin, who has specifically coined the 'best fit' formula.The first two are shared also by modern positivists such as H. L. A. Hart, Joseph Raz, Jules Coleman or Leslie Green.

traditional statists. They too endorse big *C* constitutionalism. They just want big '*C*' constitutionalism on the global scale.

2. Clarifying the Stakes: A Clash of Constitutional Paradigms

The skeptic's challenge, I will argue, fails. In fact, its failure is complete and deep. It fails for reasons that go right to the heart of the understanding of national constitutionalism. Many of the conventional assumptions underlying domestic constitutional practice, particularly as it relates to international law, are misguided. It is not the discipline of international law that has misleadingly appropriated the vocabulary of constitutionalism; it is the discipline of national constitutional law that has, at least to the extent that it makes use of the cognitive frame informing the skeptic's challenge, inappropriately narrowed, morally misconstrued, and falsely aggrandized national constitutionalism by analytically connecting it to a statist paradigm of law. The skeptic's challenge points to an important point: big-*C* constitutionalism is incompatible with a meaningful conception of constitutionalism on the international level. But it does not follow that the language of constitutionalism should be restricted to the domain of the national. Instead something is wrong with the conception of big-*C* constitutionalism: I will argue that it is necessary to rethink the basic conceptual framework that is used to describe and interpret national constitutional practice in order to make sense of the idea of constitutionalism beyond the state. There is no deep divide between big-*C* constitutionalism and small-*c* constitutionalism beyond the state. There is only constitutionalism in different institutional contexts. Constitutionalism does not require the framework of a state to be meaningful. The meaning of the institutional framework of the state is to be determined by principles of constitutionalism. Constitutionalism, then, needs to take a Copernican turn. The statist paradigm of constitutionalism needs to be replaced by a cosmopolitan paradigm of constitutionalism. Within the cosmopolitan paradigm, both national constitutional practice and international law can be meaningfully analyzed and assessed within the same conceptual framework, notwithstanding their different institutional structure. Conceived in this way, constitutionalism becomes a universally applicable conceptual framework for the analyses and assessment of the institutions, procedures, and decisions of public authorities.[11] To put it another way: *Cosmopolitan constitutionalism*

[11] For a conceptual approach that has a similar structure, *see* Miguel P. Maduro, *From Constitutions to Constitutionalism: A Constitutional Approach for Global Governance*, *in* Global Governance and the Quest for Justice – Volume 1: International and Regional Organisations (Douglas Lewis ed., 2006).

establishes an integrative basic conceptual framework for a general theory of public law that integrates national and international law.

The debate about constitutionalism in international law is not appropriately understood exclusively as a debate internal to the discipline of public international law. It is also a debate that concerns national constitutional law and its conception of legitimate constitutional authority.[12] The debates about constitutionalism in international law are complemented by highly contentious debates within national constitutional law about how domestic institutions should relate to the structural changes of international law, given national constitutional commitments. Just as the language of constitutionalism is contested on the international level, the constitutional law of foreign affairs has become a highly contested field of law in many liberal democracies.[13] When international lawyers discuss the development of governance structures on the transnational level, domestic constitutional lawyers discuss the nature of domestic constitutional commitments that guide and restrict domestic institutions as they engage these practices. Questions that arise include the following: Does the constitution authorize the transfer of public authority to transnational institutions? If so, under what conditions? Does enforcement of international legal obligations require specific endorsement by national political institutions or should they be legally enforceable by domestic courts, even in the face of political resistance? What does it mean and who gets to decide whether international obligations are self-executing? Should national judges, when interpreting national constitutional rights provisions, refer to international human rights? If so, what weight, if any, should be attached to them? What is at stake in these debates is not only the resolution of this or that doctrinal issue or the appropriateness of this or that interpretative strategy. There are patterns of arguments that repeat themselves across doctrinal areas and methodological debates that point to a deeper conflict. On the one hand there are doctrines, interpretative strategies, and arguments supporting an open constitution that encourage the progressive development of international legal authority and reflect a cosmopolitan paradigm of constitutionalism. On the other hand there are revisionists who are seeking to ensure that national political institutions remain in effective control over

[12] *See* Samantha Besson, *Whose Constitution(s)? International Law, Constitutionalism, and Democracy*, Chapter 13 in this volume.

[13] Whereas in Europe integration has created significant dynamism in the field, generally leading up to a greater opening of constitutional legal orders to transnational law (for an overview, see The European Courts & National Courts (Anne-Marie Slaughter, Alec Stone Sweet & Joseph Weiler eds., 1998)), in the United States, revisionists have pushed in the opposite direction. Among those leading the revisionist charge are Professors Curtis Bradley, Jack Goldsmith, and John Yoo.

the generation and enforcement of an international law that is and should remain firmly grounded in state consent. What is at stake here is the clash between two competing constitutional paradigms, which influence both the understanding of national constitutional law as it relates to foreign affairs and the understanding of international law more generally.

The skeptic's challenge is articulated within a statist paradigm of constitutionalism: the constitution establishes the supreme legal norms of the national legal system. It constitutes the legal system of the sovereign nation-state. That rank is justified with reference to "We the People," the demos as the *pouvoir constituant*, and the foundation of constitutional authority. The statist paradigm establishes an analytical link among the constitution as a legal document, democracy as a foundational value, and the sovereign state as an institution. The conception of legitimate constitutional authority it establishes insists on the importance of a chain of legitimation that traces the legitimate authority of any law, including international law, to the national constitution and the democratic practices it establishes. The more attenuated that link, the greater is the concern about its legitimacy. Given those presuppositions, there can be no legitimate global legal order that does not tie effective control of the generation and application of international law firmly tied back to the states' consent. Within the statist paradigm of constitutionalism, the skeptic's challenge succeeds. There is certainly no space for big-*C* constitutionalism beyond the state. And it is unclear what small-*c* constitutionalism achieves, beyond providing a legitimating rhetoric that covers up a democratic deficit. But the statist paradigm of constitutionalism is contested. At the heart of many contemporary debates, internationally and nationally, lies a struggle between the statist paradigm of constitutionalism and those that seek to transcend it.

In order to transcend the statist paradigm, it is not sufficient to embrace the language of *post* and *beyond* (sovereignty, the state, the nation) that has become so prominent in international scholarship. Nor is it sufficient to attach the label "constitution" to any treaty that establishes some elements of public authority and some degree of hierarchical ordering, or to use the language of governance to describe certain transnational practices of an administrative character. Such language is symptomatic of a crisis. Its virtues lie in the fact that it brings into focus some features of transnational practice that conventional statist descriptions of international law tend to neglect or downplay. But because of its lack of a theoretical grounding and its disconnection from domestic constitutional practice, it is too easy to dismiss or ignore as unpersuasive idealistic rhetoric, not rooted in how we normally think of law. It does not provide an alternative to the statist paradigm for making intelligible the

legal and political world. A serious alternative to the statist paradigm would have to provide what the statist paradigm provides: the conceptual tools for the description and analysis of the basic structure of the legal world as a whole, connected to the basic structure of an account of legal and political authority. Furthermore, such an alternative paradigm would be successful only if it were able to make better sense of legal and political practice as it currently exists than does the statist paradigm of constitutionalism. Is there such an alternative? If so, what are its basic features and implications? And what makes it more attractive than the statist paradigm?

The core purpose of this chapter is threefold. First, it analyzes the central role that cognitive frames or paradigms play in constitutional law. Second, it presents a cosmopolitan paradigm of constitutionalism as a competitor to the statist paradigm and traces its implications for the construction of the relationship between national and international law. As will become apparent, many of the more persistent disagreements and major debates in constitutional and international law can be traced back to differences in the choice of cognitive frame. Third, it argues that the cosmopolitan paradigm better fits existing practice and should replace the statist paradigm, where it still has a strong hold. A Copernican turn in constitutionalism is not only possible but also necessary. The cosmopolitan paradigm can make better sense of many of the core structural features of contemporary legal and political practice than can the statist paradigm. It also provides a morally more convincing account of constitutionalism than the statist paradigm and allows for an empirically more grounded account of public law. The statist paradigm has become a central stumbling block for the intelligent and context-sensitive assessment of international law and the constitutional law of foreign affairs.

3. The Idea of a Constitutional Paradigm and Its Connection to Constitutional Practice

A constitutional paradigm provides a cognitive frame that makes intelligible the legal and political world. It establishes a basic conceptual framework for the construction of public authority. Conceptual frameworks are the basic building blocks for theories of public law. In national constitutional law the cognitive frame guides and structures debates about the appropriate interpretative methodologies and the substantive principles underlying various areas of constitutional law. In international law, where there is no constitutional text, the cognitive frame is central for helping to identity, to structure, and to interpret the relevant legal materials. This chapter focuses on the implication of the choice of cognitive frame for constructing the relationship between national and international law. But the choice of cognitive frame has more general implications.

A constitutional paradigm provides a cognitive frame for the construction of public authority. In jurisprudential terms, it provides a thin account for the grounds of what positivists describe as the rule of recognition,[14] or *Grundnorm*.[15] It provides an answer to the question of why we should, for example, look to the constitution to provide us with guidance when assessing, say, whether an act of the legislature should be enforced. "It's the supreme law of the land and the legislature is bound by it," a lawyer might say. But how do we know that? Of course it is not sufficient to say that the constitution says so. The fact that a document says that it is the supreme law of the land does not make it so. What the constitution says is only relevant once we already know that this is where we should look to for guidance. If you and I draw up a document and establish solemnly in article 1 that "this document and everything its authors in their infinite wisdom formally declare to be good and just is the supreme law of the land," that does not make it the supreme law of the land. Furthermore, many constitutions have no explicit supremacy clause, yet they are recognized as the supreme law of the land. A supremacy clause, then, is neither necessary nor sufficient to establish a constitution as the supreme law of the land. We might, of course, say that the constitution is in fact recognized as a supreme law of the land, and as lawyers, that is all we need to know. The Why? question often has a legally sufficient answer when we can point to established conventions. But in some contexts that presumption might be challenged. That was the case, for example in Europe, when national highest courts of European Union Member States one day found themselves confronted with the claim by the European Court of Justice, that European law is not only self-executing but requires national courts to ignore national constitutional provisions precluding the enforcement of EU Law. But even if the supremacy of the national constitution is settled, we might still want to know what reasons there are to accept the constitution as the supreme law of the land, because those reasons might be relevant when it comes to *the interpretation* of the constitution. Questions of interpretative methodology as well as questions concerning the guiding principles that underlie the different areas of constitutional law – rights provisions, federalism provisions or the provisions governing the constitutional law of foreign affairs – call for answers that ultimately make reference to the moral grounds for legitimate constitutional authority. Here constitutional paradigms provide the resources to guide and structure debates in constitutional practice.

To provide some illustrations, it might be helpful to go right to the two paradigms that are the protagonists of this chapter. According to the statist

[14] H. L. A. Hart, The Concept of Law (1960).
[15] Hans Kelsen, Reine Rechtslehre (2d ed. 1960).

paradigm, the authority of the constitution rests on its authorization by "We the People." The constitution is seen as the legal framework through which a political community governs itself as a sovereign nation. For the cosmopolitan paradigm, the authority of the constitution rests on its authorization by the formal, jurisdictional, procedural, and substantive principles of cosmopolitan constitutionalism. The cosmopolitan paradigm also requires that the national constitution be justified to those it seeks to govern. But there are two core differences. First, that justification has to meet a complex standard of public reason,[16] established by the principles of cosmopolitan constitutionalism, not by the will of a demos. Second, this complex standard of public reason requires taking into account legitimate concerns of outsiders. The legitimate authority of a constitution depends at least in part how it relates to the wider international community of which it is an integral part. Much will be said about these principles, their connection to public reason, and their operation in concrete contexts later. The point here is that within the cosmopolitan paradigm, a complex standard of public reason, which includes reference to jurisdictional and procedural principles, replaces the equally complex idea of a collective will or democracy as the basic point of reference for the construction of legal authority.

The choice of paradigm for the construction of public authority has implications for the structure of debates concerning both interpretative methodologies and interpretative outcomes.

According to the statist paradigm, the constitution is required to be interpreted so as to best reflect the will of "We the People." After all, if that is the source of the constitution's authority, it should also guide its interpretation. Debates about interpretative methodologies are debates about how to understand that requirement. Even though there is considerable space for disagreement about when "We the People" act in a constitutionally relevant way,[17] and what is to count as the people's will,[18] characteristically different versions of originalism play a central role in debates that are framed within

[16] Public reason here refers to reasons that are appropriate for the justification of law in liberal democracies. This conception of public reason shares many of the features described by John Rawls. *See* John Rawls, Political Liberalism (1993). But it is developed here in a way that includes reference to jurisdictional and procedural concerns.

[17] Bruce Ackerman famously argued in the U.S. context that "We the People" as the nation's *pouvoir constituant* have acted not only at the time of the founding but at least on two other constitutional revolutions in conjunction with the Civil War and the New Deal. *See* Bruce Ackerman, "We the People": Foundations (1993).

[18] *Compare* Robert Bork, The Tempting of America (1990) (focusing on original intent) *with* Antonin Scalia, A Matter of Interpretation (1997) (focusing on the original understanding).

this paradigm. The open engagement with public reason, on the other hand, reflected in open-ended tests like proportionality, tends to be looked upon skeptically,[19] and cabined if not marginalized.[20] Within the cosmopolitan paradigm, on the other hand, constitutions are interpreted to best reflect the principles of cosmopolitan constitutionalism. Here, too, there is some space for disagreement on interpretative methodologies, but characteristically public-reason-oriented, purposive interpretations and the proportionality requirement play a central role and are openly endorsed. Questions regarding the judicial role are more often framed as problems with specific understandings of the proportionality test and the role of courts adjudicating them.

Besides debates about interpretative methodology, debates about the desirability of interpretative outcomes are also assessed within different frameworks. Within the statist paradigm, the assessment of those outcomes is ultimately focused on the degree to which they enable and reflect the more perfect realization of democracy: "We the People" governing themselves. The central problem of rights-protecting judicial review, for example, is its democratic legitimacy. If and to the extent it is legitimate, it must be so because it helps to more fully realize democracy. Perhaps democracy is more perfectly realized because rights judicially recognized are representation reinforcing.[21] Perhaps the right conception of constitutional democracy is itself internally committed to the protection of certain substantive rights.[22] Perhaps the constitutionalized rights reflect a particular historical commitment of the self-governing community.[23] Whatever the case may be, the statist paradigm makes democracy the standard for assessing institutional arrangements and outcomes. It is not possible to argue that a particular solution may or may not be compatible with democracy but that it has other virtues that take precedence under the circumstances. Whatever virtues those might be, they have to be shown to be an integral part of an attractive conception of democracy.

Within the cosmopolitan paradigm, on the other hand, outcomes are more openly assessed in terms of their public reasonableness. Concerns about

[19] *See* T. Alexander Alenikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L.J. 943 (1987).

[20] The only way that the use of open-ended moral principles as standards for the adjudication of rights claims can be justified within this paradigm is to insist that that was what the framers originally understood to be authorizing courts to do. For such an attempt, *see* Ronald Dworkin, *Originalism and Fidelity*, *in* Justice in Robes 117–39 (2006).

[21] *See* J. H. Ely, Democracy and Distrust (1981).

[22] *See* Ronald Dworkin, Freedom's Law (2000).

[23] *See* Jed Rubenfeld, Freedom and Time (2001); Lawrence Lessig, *Fidelity in Translation*, 71 Tex. L. Rev. 1165 (1993).

democratic legitimacy tend to be debated in terms of the appropriate degree of deference that should be accorded to legislative decisions, when assessing the substantive justification of a decision within the proportionality framework. Of course, political decision making connected to electoral accountability should play a central role given the fact of reasonable disagreement on questions of rights and public policy. But not all disagreements are reasonable. The real issue is not the legitimacy of judicial review. The real issue is the legitimacy of a decision by public authorities that imposes burdens on individuals when that decision is not susceptible to a plausible justification within a framework of public reason.

Note how these differences in construction do not map onto different views of the role of the judiciary as an institution in a simple way. Within both paradigms it is possible to make the case for or against an active judiciary, depending on how the comparative merits of the judiciary over the legislative branches are assessed.[24] The real differences lie in the structure of the arguments that need to be made to justify one position or another and the different structure of the doctrines that result. At the same time there is a comparative collectivist bias underlying the statist paradigm that assesses institutional arrangements and outcomes in terms of democracy. Conversely, there is a comparative individualist bias underlying the cosmopolitan paradigm that assesses institutional arrangements and outcomes in terms of public reason.

The purpose of these examples was merely to illustrate how constitutional paradigms structure debates about basic constitutional questions. The relationship between constitutional paradigms and constitutional practice needs to be further clarified in three respects. First, paradigms should not be confused with constitutional theories. Constitutional theories are elaborations of constitutional paradigms. They tend to be thicker, in that they provide a richer and more fully developed account of the relevant values, their relationship to one another, and their institutional and doctrinal implications. Constitutional paradigms are cognitive frames that merely provide a general conceptual structure within which basic constitutional issues are contested and resolved. A constitutional practitioner may not think of him- or herself as having much of a constitutional theory. But even the most pragmatic judges will have their reasoning be informed by one or another constitutional paradigm that provides them with a general sense of what they are doing.

[24] Jeremy Waldron's wholesale skepticism about judicial review, for example, is articulated within a cosmopolitan rights-based paradigm. *See, e.g.*, Jeremy Waldron, Law and Disagreement (1999); Jeremy Waldron, *The Core Case against Judicial Review*, 115 Yale L.J. 1346 (2006); Jeremy Waldron, *A Right-Based Critique of Constitutional Rights*, 13 Oxford J. Legal Stud. 18 (1993).

Second, constitutional paradigms as cognitive frames help structure debates. They do not determine specific outcomes. But even though they do not determine outcomes, the choice of structure focuses debates in a certain way and gives certain types of arguments greater force while weakening others. The choice of cognitive frames tends to effect the pattern of outcomes. Third, in constitutional debate these frames are rarely made the subject of explicit analysis and assessment. They often remain part of the legal unconscious. But without being made explicit, cognitive frames can never be the conscious subject of an informed choice. When disagreements based on competing cognitive frames remain unanalyzed, they often give an impression of being based on incommensurable premises. Such disagreements tend to become shrill once it becomes clear that they will remain unresolved by further argument and that it is not even clear why the other side is emphasizing the arguments they are emphasizing while being seemingly impervious to the arguments of the other side. When the stakes in these debates are high in political and legal terms, the sociologically dominant side finds it easy to brand the other side as ideological. More generally, disagreement on constitutional paradigms tends to foster camp mentalities: you're either with us or against us. Making explicit what is too often implicit in constitutional debates about the relationship between national and international law, this chapter is also an effort to provide a deeper understanding of the nature of the disagreement in order for that disagreement to be engaged more intelligently.

In the following, the core structure of the cosmopolitan paradigm of constitutionalism will be analyzed, and its link to legal practice, particularly as it relates to international law, described and contrasted with the statist paradigm (Section II). That description seeks to make explicit the basic features of an understanding of constitutionalism that has implicitly shaped many of the doctrinal developments and scholarly writings on constitutionalism in international law as well as national constitutional law of foreign affairs. It seeks to provide the bare-bones structure and theoretical grounding for the proliferation of the language of constitutionalism on the international level. But it also seeks to provide a theoretical ground for the opening up of national constitutional orders to international law that characterizes many constitutions and constitutional interpretations after World War II, not just in Europe. The cosmopolitan paradigm repositions national constitutional practice as an integral part of a global practice of law and reconceives public international law in light of constitutional principles. National constitutional law and public international law are reconceived as reflecting a common commitment to basic constitutional principles. Instead of "We the People," statehood, and sovereignty as the foundations of a practice of constitutional

law that imagines itself as focused on the interpretation of one text, diverse legal materials are identified, structured, and interpreted in light of principles that lie at the heart of the modern tradition of constitutionalism. Ultimate authority is vested not in "We the People" either nationally or globally, but in the principles of constitutionalism that inform legal and political practice nationally and internationally. A third section will discuss some counterarguments to the cosmopolitan paradigm, also to provide a better understanding of its core legal, moral, and empirical assumptions.

II. The Structure of Cosmopolitan Constitutionalism

The following consists of three parts. Each part addresses prominent features of contemporary public law practice that are difficult to make sense of within the statist paradigm of law. The first addresses the relationship between national and international law and the unconventional doctrinal structures that courts use to engage legal practices outside their jurisdiction. This part spells out the implications of the cosmopolitan paradigm of constitutionalism for the idea of constitutional legality and the construction of legal authority. Here the formal, jurisdictional, procedural, and substantive principles of the cosmopolitan paradigm of constitutionalism are introduced and their implications for the construction of legal authority described. The principles give rise to a structure of legal authority that is described as constitutional pluralism: it is not monist and allows for the possibility of conflict not ultimately resolved by the law, but it insists that common constitutional principles provide a framework that allows for the constructive engagement of different sites of authority with one another.

The second part focuses on some central features of international law: The increasing divorce of international law from state consent, either in the form of relatively autonomous governance practices, the increasing divorce of customary international law from time honored custom that might plausibly serve as a proxy for implict consent and the ever expanding domain of international law. This part addresses the legitimacy issues such practices raise, and will provide a discussion of the jurisdictional principle of subsidiarity and the general procedural principle of due process, which, in the domestic context, takes the form of a commitment to democracy and on the international level translates into a complex requirement of good governance. The cosmopolitan paradigm 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 appropriately wide participation and help guide and constrain state action in order to and effectively realize global public goods. And it has led to an international law that authorizes states to harm others without effective legal remedies being provided. 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, representativeness, and accountability become an integral part of governance practice.

The third 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 constitutionalism. 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. Constitutionalism, 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.

1. The Construction of Legal Authority: Cosmopolitan Constitutionalism as a Framework for Legal Pluralism

Cosmopolitan constitutionalism carves out a distinct position beyond monism and dualism to describe the relationship between national and international law: constitutional pluralism.[25] Constitutional statists are right

[25] The idea of constitutional pluralism has played a central role for understanding the relationship between national and EU law. *See* Neil Walker, *The Idea of Constitutional Pluralism*, 65 Mod. L. Rev. 317 (2002); Miguel Poiares Maduro, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, *in* Sovereignty in Transition 501–37 (Neil Walker ed., 2003);

that it is a mistake to imagine the world of law as a hierarchically integrated whole, as monism does. But it is also a mistake to imagine national and international law as strictly separate legal systems that follow their own ultimate legal rules with only contingent secondary connections between them, as dualism does. Instead, common principles underlying both national and international law provide a coherent framework for addressing conflicting claims of authority in specific contexts. These principles will sometimes favor the application of international rules over national – even national constitutional – rules. At other times they will support the primacy of national rules.

So what are the principles governing the construction of legal authority? To begin with, there is the principle of legality. The principle of legality, in its thinnest interpretation,[26] establishes that wherever public authority is exercised, it should respect the law. If there is a law that governs an activity, public authorities are under an obligation to abide by it. If there are competing and contradictory laws or interpretations governing that activity, the legal system established by the constitution provides the resources to determine which law ought to govern an actor's behavior. The question is: What does respect for the law mean in a situation where national law conflicts with international law? What if, for example, a UN resolution imposes legal obligations on member states to impose severe economic sanctions on blacklisted individuals, when compliance with such an obligation would require a state to disregard national constitutional guarantees?[27] What does legality require of public authorities in these types of situations?

a. Beyond Monism and Dualism: Constitutionalism as a Principled Framework for Legal Pluralism

Within the framework of the statist paradigm, this is not a difficult question. The national constitution, reflecting a commitment of "We the People" governing themselves, is the supreme law of the land. The only kind of legality

Mattias Kumm, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty*, 11 Eur. L.J. 262 (2005). For a critical discussion, *see* Julio Baquero Cruz, *The Legacy of the Maastricht-Urteil and the Pluralist Movement*, 14 Eur. L.J. 389 (2008).

[26] There are considerably more demanding conceptions of legality or the rule of law. That is not surprising. As Joseph Raz points out: "When a political ideal captures the imagination of large numbers of people its name becomes a slogan used by supporters of ideals which bear little or no relation to the one originally designated." Joseph Raz, The Authority of Law 210 (1979).

[27] This question is currently at a heart of a number of cases before the ECJ. *See* Yusuf and Al Barakaat C-415/05 P and Kadi C-402/05 P.

that ultimately matters is national constitutional legality. The idea of legality is interpreted within a statist paradigm of constitutionalism and leads to a classical dualist account of the legal world: if the national constitution is the supreme law of the land, international law matters only if and to the extent the national constitution so determines. All public authority that becomes effective on the state's territory must ultimately be justified in terms prescribed by the national constitution. All legality properly so called is ultimately legality as defined by national constitutional standards. When faced with a choice to violate either international law or national constitutional law, public authorities are required to respect the national constitution and violate international law. Of course national constitutions often grant international law a certain status in domestic law. National constitutional conflict rules typically focus on the sources of international law. Characteristic for the statist paradigm is a constitutional rule that determines that treaties have the same status as domestic legislation,[28] particularly when national legislative institutions were involved in the ratification process. Furthermore, rules of customary law might also be assigned a status under the constitution.[29] But within the statist paradigm the lack of specific and clear state consent as a necessary requirement for the emergence of a rule of customary international law means that it is difficult to justify a status for customary international law in domestic law that would make it immune from override by national political decisions. At any rate, whatever the status that international law has as part of domestic legal practice is circumscribed by the national constitution, which serves as the ultimate point of reference for determining international law's authority in domestic practice. Legality as constitutional legality does not depend on requirements of international law. On the contrary, whether compliance with international law is legal depends on the requirements of the national constitution, whatever the constitutional legislator has determined them to be. Violations of international law compatible with the national constitution are not violations of the principle of legality, because what legality properly so called requires is constitutional legality. This is the classical dualist understanding of the relationship between national and international law: independent systems of national law and international law. A violation of international law may trigger the responsibility of the state as a matter of international law, but national constitutional legality provides its own distinct

[28] For a comparative overview concerning the rules governing treaties, *see* The Effect of Treaties on Domestic Law (Francis Jacobs & Shelley Roberts eds., 1987).

[29] For an overview, *see* Luzius Wildhaber & Stephan Breitenmoser, *The Relationship between Customary International Law and Municipal Law in Western European Countries*, 48 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 163 (1988).

criteria for legality, the specifics of which depend on the requirements established by the national constitution.

But notwithstanding deeply engrained habits of thought linked to the statist paradigm, why should one think of legality in this somewhat schizophrenic way, sharply separating international from domestic legality? If legality reflects an important commitment, what sense is there in limiting it to whatever constraints domestic law imposes on the enforcement of international law? Why should the idea of legality not generally require that the law be taken seriously, whether it is domestic or international law? Why discriminate against international law in this way? Is there no alternative conception of legality that is more attractive? After all, like all law, international law in part seeks to effectively address collective action problems and achieve coordination benefits, thus ensuring the provision of global public goods for the global community. Those functions are more effectively fulfilled if the requirement of legality is not, from the perspective of national public authorities, restricted to national constitutional legality.

An argument along those lines is at the heart of a competing conception of legality that has been at the center of jurisprudential debates about the relationship between national and international law in the twentieth century: international legal monism.[30] According to it international law and domestic law form one hierarchically integrated whole, with international law as the supreme law. Public authorities are never faced with an option to break one law or another, just as a state judge within a federal legal system is not required to break state law in order to comply with federal law. Instead the legal system provides for a clear conflict rule – the primacy of international law – that helps public authorities determine what their legal obligations really are. International law recognizes states and authorizes them to govern themselves through national constitutions, but only within the limits of international law. National constitutional law can never legally be used to set aside provisions of international law. Of course the constitution remains supreme national law. It trumps ordinary legislation, administrative regulations, municipal ordinances, and so on. But it is not the supreme law governing public authorities and individuals; international law is. The national supremacy claim is linked only to the limited authority delegated by international law to the national community to govern itself through national law. The idea of legality is tied to a monist construction of the legal authority.

[30] The classic literature on the monist side includes the Vienna school, with Hans Kelsen, General Theory of Law and State 363–80 (1945); Alfred Verdross, Die Einheit des rechtlichen Weltbildes auf Grundlage der Vőlkerrechtscerfassung (1923); and Hersch Lauterpacht, International Law and Human Rights (1950).

International legal monism is a conception of legality that has the advantage of not artificially dividing up the world into two fundamentally separate legal systems, the national and the international. It appropriately extends the idea of legality beyond the realm of the state. But the idea of legality is insufficient to carry the heavy burden of justifying a categorical rule that international law should always trump domestic law when the two are in conflict. The idea of legality – respect for the rule of law – and the functional considerations that support extending it to the international level plausibly provide for a presumption of some weight: that international law should be respected by public authorities, national law to the contrary notwithstanding. But in liberal democracies, legitimate authority is not tied to the idea of legality 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 international law, from the perspective of national law, should be determined exclusively by national constitutions, as suggested by dualists. 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 international law can be rebutted if in a specific context, when international law violates countervailing principles in a sufficiently serious way. More will be said about these principles later. Here it must suffice to name them: besides the principle of legality, which establishes a presumptive duty to enforce international law, the potentially countervailing principles are the jurisdictional principles of subsidiarity, the 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 cosmopolitan constitutionalism are now in place: international law 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.

Note how these sets of principles do not simply replace national constitutional provisions that establish rules regarding the engagement with international law. Clearly the fact that the national constitutional legislator has established constitutional rules that limit the application of international law will itself be a legally relevant fact that weighs against the application of international law, because of its connection to ideas of procedural legitimacy. But this does not mean that national constitutional rules are conclusive. True, national courts will rarely, if ever, be required to say that national constitutional rules are trumped by the presumption of international law's

legality established by the cosmopolitan paradigm. But this is not because the constitution effectively establishes the supreme law of the land when it comes to the determination of the status of international law. There are three reasons why the possibility of a direct conflict between the requirements of the cosmopolitan paradigm and national constitutional rules relating to international law remains a theoretical possibility only. First, the cosmopolitan paradigm does not itself provide hard-and-fast conflict rules, but just background principles, in light of which the terms of engagement between national and international law should be specified. Often enough, national constitutional rules can be reconstructed as plausible interpretations of the requirements of the cosmopolitan paradigm. If they can be reconstructed in this way, it strengthens their authority. Second, national constitutional rules relating to international law are often highly indeterminate and incomplete. The U.S. Constitution, for example, establishes that treaties are part of the supreme law of the land, but it does not say whether they trump congressional legislation or whether they are superior to it or whether the constitution trumps treaties or whether they have the same rank.[31] Furthermore the constitution says nothing about when the treaty is to be enforced by domestic courts without further political endorsement. Does that mean that treaties should be judicially enforced like domestic law without further endorsement by the political branches? If treaties are to be enforced only if they are self-executing, when are they self-executing, and who gets to make that determination?[32] The constitutional text is silent on all these questions. Finally, the constitutional text also says nothing about the status of customary international law generally, though it does acknowledge its existence as law. Clearly, within such a textual framework, constitutional practice is strongly

[31] The U.S. Constitution states in art. VI (2): "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." That is today translated into the following conflict rule: "An act of Congress supersedes an earlier rule of international law or a provision of an international agreement as law of the United States if the purpose of the act to supersede the earlier rule or provision is clear or if the act and the earlier rule or provision cannot be fairly reconciled." *See* Restatement (Third) of Foreign Relations Law of the United States § 115(1)(a) (1987).

[32] Restatement (Third) of Foreign Relations Law of the United States § 111(4) (1987) states the governing rules as follows: "An international agreement of the United States is non-self-executing (a) if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation, (b) if the Senate in giving consent to a treaty, or Congress by resolution, requires implementing legislation, or (c) if implementing legislation is constitutionally required." These complex rules, which are not very stable in practice, are the result of relatively freestanding constructive exercises by courts and scholars over time.

guided by background principles of interpretation, which are drawn either from the statist or from the cosmopolitan paradigms, each of which tend to lead to a very different structure of doctrines. Third, even if there are clear and specific restrictive constitutional rules, their scope of application can be reduced by not applying them in certain types of cases, such as where the reasons supporting international legality are particularly strong. In Europe there were several states that simply did not apply the general constitutional rule that treaties have only the same status as domestic legislation to laws of the European Union, even though those laws were generated by institutions established by treaties.[33] The functional reasons supporting greater weight in favor of the effective and uniform enforcement of EU law led courts to devise doctrines that effectively give greater deference to EU Law. Seen as a whole, constitutional practice that relates to engagement with international law often bears only an attenuated connection to constitutional provisions, perhaps in part exactly because it is understood that the national constitutional legislator's authority in this area is limited by prerogatives of the international legal system.

This results in a conception of legality that is not monist in that it allows for legal pluralism: potential for legally irresolvable conflict between national and international law remains. But it is not simply dualist either: the relationship between national and international law is reconceived in light of a common set of principles that play a central role in determining the relative authority of each in case of conflict, thus ensuring legal coherence.[34] The following section provides an example that illustrates how such a conception of legality can operate not only to mitigate potential conflicts between national and international law but also to ensure coherence within the increasingly fragmentized practice of international law.[35]

b. Constitutional Pluralism in Context: The European Court of Human Rights, the European Union, and the United Nations

International institutions, from the European Union to the United Nations, have an increasingly important role to play in global governance. States have

[33] For an overview of the reception of EU law in member states and the doctrinal dynamics that were an integral part of this process, see The European Courts and National Courts (Anne-Marie Slaughter, Alec Stone Sweet & J. H. H. Weiler eds., 1998).

[34] The existence of a common unifying conceptual framework of norms makes it possible to describe cosmopolitan constitutionalism as monist, even if the institutional practices it justifies might have a pluralist structure. I thank Alexander Somek for clarifying this point.

[35] For a more elaborate discussion of the framework, see Mattias Kumm, *Democratic Constitutionalism Encounters Constitutional Law: Terms of Engagement*, *in* The Migration of Constitutional Ideas 256–93 (Sujit Choudhry ed., 2006).

delegated authority to these institutions in order to more effectively address the specific tasks within their jurisdictions.[36] The institutions make decisions that directly effect people's lives. Increasingly, this gives rise to situations in which the constitutional or human rights of individuals are in play. When these decisions are enforced domestically, should national courts apply to them the same constitutional rights standards they apply to acts by national public authorities?

Here there are two opposing intuitions in play. The first focuses on the nature of the legal authority under which international institutions operate. International institutions are generally based on treaties concluded between states. These treaties are accorded a particular status in domestic law. If these treaties establish institutions that have the jurisdiction to make decisions in a certain area, these decisions derive their authority from the treaty and should thus have at most the same status as the treaty as a matter of domestic law. Because in most jurisdictions treaties have a status below constitutional law, any decisions enforced domestically must thus be subject to constitutional standards.

The opposing intuition is grounded in functional sensibilities. Constitutions function to organize and constrain domestic public authorities. They do not serve to constrain and guide international institutions. Furthermore, international institutions typically function to address certain coordination problems that could not be effectively addressed on the domestic level by individual states. Having states subject decisions by international institutions to domestic constitutional standards undermines the effectiveness of international institutions and is incompatible with their function. So both the function of the domestic constitution and the function of international institutions suggest that domestic constitutional rights should not be applied to decisions by international institutions at all.

In its *Bosphorus* decision,[37] the European Court of Human Rights (ECHR) had to address just this kind of question, and it did so by developing a doctrinal framework that can serve as an example of the application of the framework presented here. To simplify somewhat, the applicant, Bosphorus, was an airline charter company incorporated in Turkey that had leased two 737-300 aircraft from Yugoslav Airlines. One of these Bosphorus-operated planes was impounded by the Irish government while on the ground in Dublin airport.

[36] Delegating State Powers: The Effect of Treaty Regimes on Democracy and Sovereignty (Thomas M. Franck ed., 2000).

[37] Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland, App. No. 45036/98 Eur. Ct. H.R. 30 (2005).

By impounding the aircraft, the Irish government implemented EC Regulation 990/93, which in turn implemented UN Security Council Resolution 820 (1993). UN Security Council Resolution 820 was one of several resolutions establishing sanctions against the Federal Republic of Yugoslavia in the early 1990s, designed to address the armed conflict and human rights violations taking place there. It provided that states should impound, inter alia, all aircraft in their territories in which a majority or controlling interest is held by a person or undertaking in or operating from the Federal Republic of Yugoslavia. As an innocent third party that operated and controlled the aircraft, Bosphorus claimed that its right to peaceful enjoyment of its possessions under article 1 of Protocol No. 1 to the convention had been violated.[38]

The ECHR is, of course, not a domestic constitutional court, but itself it is a court established by a treaty under international law. But with regard to the issue it was facing, it was similarly situated to domestic constitutional courts. Just as the UN Security Council or the European Union – the two international institutions whose decisions led to the impounding of the aircraft – are not public authorities directly subject to national constitutional control, they are not directly subject to the jurisdiction of the ECHR either. Just as only national public authorities are generally addressees of domestic constitutions, the ECHR is addressed to public authorities of signatory states.

The ECHR began by taking a formal approach: at issue were not the acts of the European Union or the United Nations, but the acts of the Irish government impounding the aircraft. These acts unquestionably amounted to an infringement of the applicant's protected interests under the convention. The question is whether the government's action was justified. Under the applicable limitations clause, the government's actions were justified if they struck a fair balance between the demands of the general interest in the circumstances and the interests of the company.[39] Government's actions have to fulfill the proportionality requirement. It is at this point that the court addresses the fact that the Irish government was merely complying with its international obligations when it was impounding the aircraft. The ECHR

[38] Art. 1 of Protocol No. 1 to the Convention reads:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, be in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

[39] *See Bosphorus* para. 149.

held that compliance with international law clearly constituted a legitimate interest. The ECHR recognized "the growing importance of international co-operation and of the consequent need to secure the proper functioning of international organizations."[40] But that did not automatically mean that a state could rely on international law to completely relieve itself from the human rights obligations it had assumed under the convention. Instead, the ECHR "reconciled" the competing principles – ensuring the effectiveness of international institutions and the idea of international legality on the one hand and outcome-related concerns (the effective protection of human rights under the convention) on the other – by establishing a doctrinal framework that strikes a balance between the competing concerns.

First, the ECHR held that state action taken in compliance with international legal obligations is generally justified "as long as the relevant organization is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides."[41] If an international institution provides such equivalent protection, this establishes a general presumption that a state has not departed from the requirements of the convention when it merely implements legal obligations arising from membership of such an international institution. If no equivalent human rights protection is provided by that international institution, the ECHR will subject the state action to the same standard as it would if it were acting on its own grounds, rather than just comply with international law. When a general presumption applies, this presumption can be rebutted in the circumstances of the particular case, when the protection of convention rights was manifestly deficient.[42]

Under the circumstances, the ECHR first established that the international legal basis on which the Irish government effectively relied was the EC regulation that implemented the UN Security Council resolution and not the UN Security Council resolution itself, which had no independent status as a matter of domestic Irish law. It then engaged in a close analysis of the substantive and procedural arrangements of the European Community as they relate to the protection of human rights. Given, in particular, the role of the European Court of Justice (ECJ) as the enforcer of last resort of human rights

[40] *Id* at para 150.

[41] *Id.* at para. 155. *Bosphorus* further develops the ECHR's case law in this respect. *See* Case 13258/87, M. & Co. v. Federal Republic of Germany (1990) 64 DR 138, and Case 21090/92, Heinz v. Contracting States also Parties to the European Patent Convention, (1994) 76A DR 125.

[42] *See Bosphorus* para. 156.

in the European Community, the ECHR concluded that the European Community was an international institution to which the presumption applied. Because this presumption had not been rebutted in the present case, it held that the Irish government had not violated the convention by impounding the aircraft.

This approach may be generally satisfactory with regard to legislative measures taken by the European Community and reflects sensibilities toward constitutionalist principles. But in an important sense it dodges the issue. In this case the European Community itself had merely mechanically legislated to implement a UN Security Council resolution. And it is very doubtful that the ECHR would have held that UN Security Council decisions deserve the same kind of presumption of compliance with human rights norms as do EC decisions. It is all very well to say that European citizens are adequately protected against acts of the European Community generally. But this just raises the issue of what adequate protection amounts to when the substantive decision has been made not by EC institutions but by the UN Security Council. How should the ECJ go about assessing, for example, whether EC Regulation 990/93, which implemented the UN Security Council resolution, violated the rights of Bosphorus as guaranteed by the European Community? Should the ECJ, examining the EC regulation under the European Community's standards of human rights, accord special deference to the regulation because it implemented UN Security Council obligations?

There is no need to make an educated guess about what the ECJ would do. The ECJ had already addressed the issue. Bosphorus had already litigated the issue in the Irish courts before turning to the ECHR. The Irish Supreme Court made a preliminary reference to the ECJ under article 234 of the EC treaty, to clarify whether or not EC law in fact required the impounding of the aircraft or whether such an interpretation of the regulation was in violation of the human rights guaranteed by the European legal order. In assessing whether the regulation was sufficiently respectful of Bosphorus's rights to property and its right to freely pursue a commercial activity, the ECJ ultimately applied a proportionality test.[43] The general purposes pursued by the European Community must be proportional under the circumstances to the infringements of Bosphorus's interests.

How, then, is it relevant that the EC regulation implemented a UN Security Council resolution? Within the proportionality test, the ECJ emphasized that the EC regulation contributed to the implementation at the European

[43] Case C-84/95, Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Minister for Transport, Energy and Communications and Others [1997] ECR I-2953, paras. 21–26.

Community level of the UN Security Council sanctions against the Federal Republic of Yugoslavia. But, unlike the ECHR, the ECJ did not go on to develop deference rules establishing presumptions of any kind. Instead, the fact that the EU regulation implemented a Security Council decision was taken as a factor that gave further weight to the substantive purposes of the regulation to be taken into account. The principle of international legality was a factor in the overall equation. The purpose to implement a decision by an international institution added further weight to the substantive purpose pursued by the regulation to persuade the Yugoslav government to change its behavior and help bring about peace and security in the region. But a generous reading of the decision also suggests that, beyond formal and substantive considerations, jurisdictional considerations were added to the mix: the ECJ emphasized the fact that the concerns addressed by the Security Council pertained to international peace and security and to putting an end to the state of war. The particular concerns addressed by the UN Security Council went right to the heart of war and peace, an issue appropriately committed to the jurisdiction of an international institution such as the United Nations. Jurisdictional concerns, then, give further weight to the fact that the United Nations had issued a binding decision on the matter. Under these circumstances the principle of international legality has particular weight. The ECJ concluded: "as compared with an objective of general interest so fundamental *for the international community* . . . the impounding of the aircraft in question, which is owned by an undertaking based in . . . the Federal Republic of Yugoslavia, cannot be regarded as inappropriate or disproportionate."[44]

Within the framework used by the ECJ, both the principle of international legality and jurisdictional considerations were factors that the ECJ relied on in determining whether, all things considered, the EU measures as applied to Bosphorus in the particular case were proportionate. Outcome-related concerns did not disappear from the picture. Indeed, within proportionality analysis substantive concerns – striking a reasonable balance between competing concerns – framed the whole inquiry and remained the focal point of the analysis. But what counts as an outcome to be accepted as reasonable from the perspective of a regional institution such as the European Union is rightly influenced to some extent by what the international community, addressing concerns of internal peace and security through the United Nations, deems appropriate. Though it may not have made a difference in this particular case, sanctions by the European Union enacted under the auspices of the UN Security Council may be held by the ECJ to be proportionate, even when the

[44] *Id.* at para. 26 (emphasis added).

same sanctions imposed by the European Union unilaterally may be held to be disproportionate and thus in violation of rights.

The approaches by the ECHR and the ECJ both reflect engagement with the kind of moral concerns already highlighted here. The ECHR's more categorical approach is preferable with regard to institutions such as the European Union that have relatively advanced human rights protection mechanisms. With regard to such an institution, a presumption of compliance with human rights seems appropriate, preventing unnecessary duplication of functions and inefficiencies. On the other hand, even when such a presumption does not apply, there are still concerns relating to the principle of international legality in play. Here the kind of approach taken by the ECJ in Bosphorus seems to be the right one.

But the case of UN Security Council resolutions may help bring to light a further complication. It is unlikely that UN Security Council resolutions would be held by the ECHR as deserving a presumption of compatibility. Procedurally, UN Security Council decisions involve only representatives of relatively few and, under current rules, relatively arbitrarily selected, states.[45] Their collective decision making is frequently, to put it euphemistically, less than transparent.

Council resolutions enacted to combat terrorism in recent years in particular illustrate the severity of the problem.[46] These resolutions typically establish the duty of a state to impose severe sanctions on individuals or institutions believed to be associated with terrorism: assets are frozen and ordinary business transactions are made impossible because an individual or an entity appears on a list. The content of the list is determined in closed proceedings by the Sanctions Committee established under the resolution. Until very recently, this internal procedure did not even require a state that wanted an entity or individual to be on the list to provide reasons.[47] If a state puts forward a name forward to be listed, it would be listed, unless there were specific objections by another state. There is no meaningful participatory process underlying UN Security Council resolutions, and there is no process within the Sanctions Committee that comes even close to providing the kind

[45] The UN Security Council composition, particularly with regard to the permanent members, reflects post–World War II standing in the international community. Current reform proposals are focused on creating a more representative body including a stronger South American, Asian, and African presence.

[46] *See* Kim Lane Scheppele, *The Migration of Anti-Constitutional Ideas: The Post 9/11 Globalization of Public Law and the International State of Emergency*, *in* The Migration of Constitutional Ideas 347 (Sujit Choudhry ed., 2006)

[47] A weak reason giving requirement has been established by S.C. Res. 1617, U.N. Doc. S/RES/1617 (July 29, 2005).

of administrative and legal procedural safeguards that are rightly insisted upon on the domestic level for taking measures of this kind.

These deficiencies are not remedied by more meaningful assessments during the implementation stage in Europe. The implementation of the Council Resolution by the European Community does not involve any procedure or any substantive assessments of whether those listed are listed for a good reason.[48] Implementation is schematic. The fact that a name appears on the list as determined by the UN Security Council is regarded a sufficient reason to enact and regularly update implementation legislation. As the Sanctions Committee of the UN Security Council decides to amend the list of persons to whom the sanction are to apply, the European Union amends the implementation regulation, which is the legal basis for legal enforcement in member states, accordingly.[49] The EU member states have frozen the assets of about 450 people and organizations featured on this list.

Furthermore, there is no administrative-type review process and no alternative legal review procedures that provide individuals with minimal, let alone adequate, protection against mistakes or abuse by individual states that are represented in the Sanctions Committee. The only "remedy" originally available to individuals and groups who found their assets frozen was to make diplomatic representations to their government, which could then make diplomatic representations to the Security Council Sanctions Committee to bring about delisting, if the represented member states unanimously concur.

This was the context that provided the backdrop to the ECJ's recent ruling in Kadi,[50] which involved a challenge to the EU Regulation implementing the UN Security Council decision. The decision is complex and multifacetted and can't be described in great detail here. Here it must suffice to point out some of its core structural features. The Kadi decision overturned the decision by the European Court of First Instance (ECFI).[51] Unlike either

[48] *See* Commission Regulation 881/2002 (EC).

[49] *See, e.g.*, Commission Regulation 1378/2005 (EC), amending for the fifty-second time the original implementation Regulation 881/2002 (EC). In order to satisfy the reason giving requirement under art. 253 of the ECT, the Commission stated only: "On 17 August 2005, the Sanctions Committee of the United Nations Security Council decided to amend the list of persons, groups and entities to whom the freezing of funds and economic resources should apply. Annex I should therefore be amended accordingly."

[50] See Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission.

[51] *See* Case T-306/01, Yusuf and Al-Barakaat Int'l Found. v. Council and Comm'n, 2005 E.C.R. II-03649. *See also* Case T-315/01.

the ECJ or the ECHR in Bosphorus, the ECFI adopted a straightforward monist approach.[52] It began stating the trite truth that UN Security Council resolutions were binding under international law, trumping all other international obligations. But it then went on to derive from this starting point that "infringements either of fundamental rights as protected by the Community legal order . . . cannot affect the validity of a Security Council measure or its effect in the territory of the Community."[53] The only standards it could hold these decisions to were principles of *jus cogens*, which the European Court of First Instance held were not violated in this case.[54] The ECJ, in overruling the ECFI, adopted what on the surface looks like a conventional dualist approach. It insisted on the primacy of EU constitutional principles and explicitly rejected applying those principles deferentially, even though the EU Regulation implemented the UN Security Council Resolution. But on closer examination it becomes apparent that a great deal in that decision reflects cosmopolitain 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.[55] Second, the court examines the argument

[52] One reason for the reluctance of the European Court of First Instance to adopt anything other than a monist position was no doubt the introduction of art. I-3 s(4) of the Constitutional Treaty, which establishes that "the strict observance and the development of international law, including respect for the principles of the United Nations Charter" as an EU objective. The constitutional convention that drafted the Constitutional Treaty was deliberating these clauses in the context of what was widely regarded as the blatant disregard of the United States for international law and the United Nations specifically in the context of the Iraq War, which generated mass demonstrations in capitals across Europe, including London, Rome and Madrid. The Constitutional Treaty is unlikely to be ratified in the present form, following its rejection in French and Dutch referenda, but its provisions may still exert a moral pull that informs the interpretation of the current law of the European Union. A commitment to international legality, in particular in the security area, may well have become a central part of a European identity.

[53] Case T-306/01, para. 225.

[54] There are traces of constitutionalist thinking evident in the Court's innovative understanding of jus cogens. The Court acknowledged that the right to access to the courts, for example, is protected by jus cogens, but that as a rule of jus cogens, its limits must be understood very broadly. In assessing the limitations the Court essentially applies a highly deferential proportionality test attuned to the principles of the constitutionalist model: Given the nature of the Security Council decision and the legitimate objectives pursued, given further the Security Council's commitments to review its decisions at specified intervals, in the circumstance of the case the applicants' interest in having a court hear their case on the merits is not enough to outweigh the essential public interest pursued by the Security Council (see paras. 343–45). Even if the approach taken by the Court to jus cogens is plausible, the results it reached are not.

[55] Kadi, Recital 297.

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[56] still provide no judicial protection.[57] 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, a more adequate procedures on the UN level might have justified a more deferential form of judicial review. This is further supported by the ECJ's conclusion that under the circumstances *the plaintiffs right to be heard and right to effective judicial review were patently not respected*. This language suggests that even under a more deferential form of review, the court would have had to come to the same conclusion. This section of the opinion indicates 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 review altogether, but also for engaging in a more deferential review. Third, the court shows itself attuned to the functional division of labor between the UN Security Council and itself when discussing remedies: The court does not determine that the sanctions must be lifted immediately, but instead permits them to be maintained for three months, allowing the Council to find a way to bring about a review procedure that meets fundamental rights reaquirements. Finally during all of this the court is careful to emphasize that nothing it does violates the UN Resolution, given that international law generally leaves it to the states to determine by which procedures obligations are enforced. Though it is still too early to tell, it seems as the forceful judicial intervention has had a salutary effect, with serious reform proposals being discussed on the UN level. Taking international law seriously does not require unqualified deference to a seriously flawed global security regime.[58] 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 rights review of individual cases in the future.

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

[57] Kadi, Recital 321, 322.

[58] *See* Scheppele, *The Migration of Anti-Constitutional Ideas*, *supra* note 46.

c. The Structure of Legal Authority: The Techniques and Distinctions of Graduated Authority

Cosmopolitan constitutionalism establishes a normative framework for assessing and guiding courts in their attempt to engage international law in a way that does justice both to their respective commitments and to the increasing demands of an international legal system. There are three interesting structural features that characterize any set of doctrines that reflect a commitment to a conception of legality conceived within the framework of cosmopolitan constitutionalism.

First, such courts take a significantly more differentiated approach than traditional conflict rules suggest.[59] Treaties are not treated alike, even if constitutionally entrenched conflict rules suggest that they should be. Instead, doctrines used are sensitive to the specific subject matter of a treaty and the jurisdictional considerations that explain its particular function. Furthermore, the example of the ECHR's engagement with international institutions illustrated how outcome-related considerations are a relevant factor in assessing the authority of its decisions.

Second, the kind of doctrinal structures that come into view suggests a more graduated authority than the statist idea of constitutionally established conflict rules suggests. The doctrinal structures in the example illustrated a shift from rules of conflict to rules of engagement. These rules of engagement characteristically take the forms of a duty to engage, the duty to take into account as a consideration of some weight, or presumptions of some sort. The old idea of using international law as a canon of construction points in the right direction but does not even begin to capture the richness and subtlety of the doctrinal structures in place. The idea of a discourse between courts is, too, a response to this shift. That idea captures the reasoned form that engagement with international law frequently takes. But it too falls short conceptually. It is not sufficiently sensitive to the graduated claims of authority that various doctrinal frameworks have built into them. The really interesting questions concern the structures of graduated authority built into doctrinal frameworks: who needs to look at what and give what kind of consideration to what is being said and done.[60]

[59] *See* W. Michael Riesman, *The Democratization of Contemporary International Law-Making Processes and the Differentiation of Their Application*, *in* Developments of International Law in Treaty-Making 15 (Rüdiger Wolfrum & Volker Röben eds., 2005).

[60] There are two other ways in which the discourse-between-courts paradigm is not helpful. It downplays the significance of the distinction between international law and foreign law. Outside of the area of human rights, the reasons supporting judicial engagement with

Finally, the practice is jurisprudentially more complex than the statist models suggest. The traditional idea that the management of the interface between national and international law occurs by way of constitutionally entrenched conflict rules that are focused on the sources of international law is deeply committed to dualist legal thinking. It suggests that the national constitution is the source of the applicable conflict rules. Furthermore, these constitutional conflict rules are themselves typically organized around the sources of international law: treaties and customary international law are each assigned a particular status in the domestic legal order. Both ideas are seriously challenged by actual practice, which is attuned to cosmopolitan constitutionalism. Principles relating to international legality, jurisdiction, procedures, and outcomes have a much more central role to play in explaining and guiding legal practice. These principles are not alien to liberal constitutional democracy, appropriately conceived. And they are not alien to international law. But their legal force derives not from their canonical statement in a legal document but from their ability to make sense of legal practice and help guide and constrain it in a way that is morally attractive.

2. Complex Procedural Legitimacy: Subsidiarity, Due Process, and Democracy

The cosmopolitan conception of procedural legitimacy includes a jurisdictional and a procedural prong in the narrow sense. First, the jurisdictional prong consists of the principle of subsidiarity. Second, the procedural prong consists of a principle of due process that, on the domestic level, emphasized the role of electoral institutions at the heart of the political process. Both prongs are internally connected: overall procedural legitimacy can be assessed only by also taking into account jurisdictional concerns. Third, questions relating to jurisdiction are central to procedural legitimacy. This means that national legislation enacted in perfect democratic processes on the domestic level can raise serious legitimacy issues, if that legislation creates serious externalities and addresses issues that should be addressed by the international community. And it means that less-than-democratic

foreign law are generally considerably weaker than the reasons supporting engagement with international law. Not surprisingly, in many jurisdictions these differences are reflected in the different doctrinal structures concerning engagement with international law. Furthermore the idea of discourse between courts is too court focused. The spread of constitutional courts and international courts and tribunals clearly is a factor that furthers the tendencies described here. But this shift is not just about courts engaging other courts. It is about courts engaging the various institutions that generate and interpret international law.

international processes might in some cases be superior to domestic democratic processes in terms of overall procedural legitimacy.

a. 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.[61] Here the argument from sovereignty

[61] For an overview of such regimes, *see* Thomas Franck, Delegating State Powers: The Effect of Treaty Regimes on Democracy and Sovereignty (2000).

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.[62] 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

[62] 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.

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.[63] 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.[64] 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.[65]

But even to the extent that the language of sovereignty remains alive, the concept of sovereignty is today sufficiently unsettled to open up the

[63] 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).

[64] 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.

[65] 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."

possibility to redescribe it in terms of a commitment to subsidiarity.[66] 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.[67]

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.[68] 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

[66] 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).

[67] *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).

[68] 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).

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,[69] strengthens the prima facie case for state autonomy and raises the bar for the justification of international requirements being imposed in states.

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

b. Due Process I: 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 imposing duties to compensate, deserves to become a central concern for those concerned with law's legitimacy.[70] 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[71] – 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,[72] 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

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

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

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

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.[73] 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 opened 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.[74]

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

[74] 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.

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.[75] 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.[76] 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

[75] 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).

[76] 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).

could be very different.[77] 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.[78]

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

[77] 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 (last accessed March 10, 2009).

[78] 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).

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.

c. Due Process II: 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.[79] Some aspects of

[79] See Grainne de Burca, *Developing Democracy Beyond the State*, 46 Col. J. Trant'l L. (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

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.[80] Furthermore, principles and mechanisms described by the EU Commission's 2001 white paper could also

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 Leid. J. Int'l L. 579 (2006), or Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analaysis*, 15 Eur. J. Int'l L. 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).

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

provide a useful source for giving substance to the idea of transnational procedural adequacy.[81] This is an area that has spawned an important research program focused on the development of global administrative law.[82]

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.

3. Substance: 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.

a. 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

[81] *See The European Commission's White Paper on European Governance* (2001), *available at* http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0428en01.pdf (last accessed March 10, 2009).

[82] *See* Kingsbury, Stewart & Krish, *The Emergence of Global Administrative Law*, *supra* note 76.

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[83] and related multitier tests,[84] which tend to be used to give meaning to highly abstract rights provisions invoking freedom of speech, privacy, freedom, 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.[85] 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,

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

[84] *See* Richard Fallon, Implementing the Constitution (2000).

[85] 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).

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[86] – is interpreted within a framework of rights-based public reason; rights are not interpreted within the framework of an authoritative will.

b. 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,[87] 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.[88] 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.[89] The definition and concretization of rights are 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

[86] 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.

[87] *See* Kumm, *Institutionalizing Socratic Contestation*, *supra* note 85.

[88] 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).

[89] 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).

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.

c. 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.[90] 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.[91] 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.[92]

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.[93] National courts often refer to international human rights practice as persuasive

[90] *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).

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

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

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

authority.[94] 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,[95] 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.[96] In the United States, engagement with

[94] 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, 502–3 (2000).

[95] 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.

[96] 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.

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.[97] 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.[98] Whereas engagement with the practice of other constitutional courts is merely discretionary,[99] 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

[97] 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).

[98] South African Constitution (1996), art. 35.

[99] The Court "may have regard to comparable foreign case law." *Id.*

"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.[100] 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."[101] 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."[102] 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."[103] 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."[104] 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

[100] Görgülü v. Germany (2004) 2 BvR 1481/04.
[101] *Id.* at para. 47.
[102] *Id.* at para. 62 (emphasis added).
[103] *See id.* at para. 30.
[104] *Id.* at para. 62.

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.[105] 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, are 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.

III. Criticisms and Challenges to Cosmopolitan Constitutionalism

The cosmopolitan paradigm describes the practice of national law and international law within a holistic cognitive frame. This cognitive frame 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 constitutionalism leaves a great many questions unanswered. It neither developed a theoretical grounding nor spelled out concrete implications for a wide range of specific issues. But that was not its point. Its point was to describe and analyze the central features of the cosmopolitan constitutional paradigm and the cognitive frame that is central to it by showing what it is that comes into view when such a paradigm is used to engage constitutional practice. 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

[105] 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).

features of contemporary legal practice that remain peripheral, puzzling, and problematic when assessed within a statist paradigm but make perfect sense within the cosmopolitan paradigm. The following takes up a number of challenges to the cosmopolitan paradigm of constitutionalism and, in beginning to address them, provides some clarifications that concern the paradigms' theoretical foundations and assumptions.

1. Is Cosmopolitan Constitutionalism "Hard Law" or Just an Ideal?

Cosmopolitan constitutionalism 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 paradigms. The correct paradigm 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.[106] That idealization is an internal feature of the legal practice that they are trying to reconstruct.[107] 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

[106] 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).

[107] *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).

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. Cosmopolitan constitutionalism 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 constitutional 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.

2. Is It 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.[108] 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

[108] *See* Davis Miller, On Nationality (1995).

building. But rarefied, and arguably not particularly enviable, is the group who primarily thinks of itself as cosmopolitan. If that is so, is cosmopolitan constitutionalism 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 constitutional practice. 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.

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.[109]

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 an 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 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

[109] 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.

interest to reap the coordination and cooperation benfits that such a system provides. Such a system is further be stabilized by the NGOs 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,[110] 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,[111] 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.[112] 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

[110] Anne-Marie Slaughter, A New World Order (Princeton 2004).

[111] 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.

[112] 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.

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.[113] 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 constitutionalism 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

[113] 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).

constitutional democracy against internal challenges.[114] 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 depend 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.[115]

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.

4. What Makes the Cosmopolitan Paradigm Constitutional Properly So Called?

But what exactly is constitutional about the cosmopolitan paradigm of constitutionalism? After all, it is not primarily focused on a constitutional text that

[114] That did not, of course, prevent the dissolution of and civil war in Yugoslavia.

[115] *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).

codifies the rules that make up the supreme law of the land, either nationally or internationally. Why not simply call it a cosmopolitan paradigm of public law, for example, or the modern jus gentium paradigm?

The reasons why the cosmopolitan paradigm is a constitutional paradigm properly so called are twofold.

At the heart of constitutionalism is not a constitutional text but a constitutional cognitive frame. It is true that in the national context constitutional texts play a role that they do not on the international level. But if the argument presented here is plausible, constitutional texts get their meaning to a significant extent through the cognitive frames that are used to engage them. That is true independent of whether the cognitive frame is that of the statist or the cosmopolitan paradigm. At the heart of the modern tradition of constitutionalism is not primarily the idea of a formal constitutional text. It is the adoption of a particular cognitive frame for the construction of legitimate authority.[116] A constitutional text symbolically supports and anchors that cognitive frame in the public imagination, but it is not a necessary feature of constitutionalism. Were it otherwise, the prevalence of constitutional language in countries that do not have a written constitution, such as the United Kingdom, would be puzzling. Even when there is a constitutional text, a great deal of constitutional practice is linked to the text only in a highly attenuated way.[117] What international lawyers have understood intuitively is that at the heart of constitutionalism lies not a constitutional text but a cognitive frame. The cosmopolitan paradigm helps establish a connection and provide a deeper normative foundation to a significant part of the writing

[116] *See* Martti Koskiennemi, *Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization*, 8 Theoretical Inquiries L. 9 (2007).

[117] In many constitutional traditions, the text seems to be of central significance primarily for the establishment of national institutions and the procedures they use to make decisions. It is considerably less significant for questions of federalism, foreign affairs, or human rights. This phenomenon, if corroborated by further research, might be explained in part by the fact that the authority of "We the People" as a collective is arguably greatest when it comes to establishing the institutions through which the people are to govern themselves. When it comes to foreign affairs, legitimate claims of the international community tend to undermine the authority of national texts, in due course putting pressure on national institutions to ignore or reinterpret them. When it comes to federalism, the federal government is often shackled by restrictions that are meaningfully connected not to subsidiarity concerns but to the preservation of power of state governments, who are often veto players in the constitution-giving process. Federal governments often successfully liberate themselves from these constraints in the course of affairs. When it comes to rights, the lists that adorn constitutions are generally of no predictive significance for actual practice. In part that may be because courts, pushed by individual litigants and faced with texts that are often highly indeterminate anyway, have become confident to assess actions of public authorities in terms of public reason.

on constitutionalism in the field of international law. Much of that writing is informed by ideas and sensibilities that the cosmopolitan paradigm and its cognitive frame can help make explicit. There is no big-*C* and small-*c* constitutionalism, only constitutionalism in different contexts.

But if at the heart of the modern constitutional tradition is the adoption of a particular cognitive frame, what makes a cognitive frame a constitutional cognitive frame? What are its defining features? What is it that the statist and cosmopolitan paradigms have in common as constitutional paradigms? For a cognitive frame to be constitutional in the modern sense it has to fulfill four requirements. First, it must provide a conceptual structure that allows for the *holistic* construction of legitimate public authority. Constitutionalism seeks to provide a comprehensive framework for all relevant considerations relating to the establishment and exercise of legitimate authority that falls within its scope. Second, that cognitive frame is of foundational significance. It is not derived not from the ordinary legal construction of a positively enacted legal text. Similarly, it is not subject to ordinary legal change by means of positive enactments. Ultimately, changes in legal and political practice can bring about a change of cognitive frame. The evolution of domestic and international practices that were highlighted in this essay may have undermined the statist paradigm and inspired and paved the way for the adoption of a cosmopolitan cognitive frame. But there can be no positively enacted legal rules that determine how and when such a shift occurs. Constitutional cognitive frames serve as the basic for the construction of legal authority, including sources doctrine. Third, the normative point of this holistic foundational construction of public authority is its reference to the *idea of free and equal persons.* Constitutionalism in the tradition of the American and French revolutions is tied to the idea of free and equals governing themselves individually and collectively through and within a framework of laws. Public authority cannot be derived from a god, the superior quality of a master class destined to rule, or from ancient history. Public authority has to be derived in some way from those who are governed by it. It is imagined as a human construct, the result of human choice and susceptible to reasoned assessment and change. Only a holistic perspective provides a point of view that allows for an informed critical judgment of whether a particular decision, the procedure that was used to enact it, and the background structure of the institutional arrangements meet the requirements of being justifiable in terms that all those subject to them might reasonably accept as free and equals. The difference between the statist and the cosmopolitan paradigms is merely that the statist paradigm narrows the perspective and focuses only on the national level, whereas the cosmopolitan perspective recovers constitutionalism's universal perspective.

Within the cosmopolitan paradigm, legitimate constitutional authority on the national level depends in part on its relationship to the international community, of which it is an integral part. Fourth, a constitutional cognitive frame must be able to integrate and structure in some way debates about three core concerns, all of which are internally connected to the idea of free and equals governing themselves through and by law.[118] First, constitutionalism is about constituting, guiding and constraining the exercise of public authority *through law*. A constitutional cognitive frame must be able to generate an account of legality. Second, it needs to be able to generate an account of legitimate procedures. Formal legality matters at least in part because of the moral significance of the procedures that generated the law in the first place. And third, it must provide some account of the substantive constraints and guiding norms for the exercise of public authority, to be fleshed out in terms of human or constitutional rights. These criteria are fulfilled by the statist and the cosmopolitan paradigms, respectively. Both are constitutional paradigms, properly so called. But if the argument in this chapter is correct, the cosmopolitan paradigm is significantly more attractive.

IV. Conclusions

The skeptic's challenge, then, is based on wrong premises and leads to wrong conclusions. The skeptic's challenge is articulated within a statist paradigm that imposes an unconvincing cognitive frame on the legal and political world. That cognitive frame aggrandizes, narrows, and misconstrues national constitutional law and fails to provide a plausible framework for the analysis of contemporary international law. This leads to a general tendency to idealize national law and to cast a general shadow of suspicion on international law. There is no deep conceptual difference between national and international constitutionalism. 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 paradigm of constitutionalism that provides a cognitive frame that ultimately allows for a conceptually more refined, morally more attuned, and empirically more informed account of national and international public law practice.

[118] Jeremy Waldron, *Can There Be a Democratic Jurisprudence?* (Mar. 2004) (unpublished paper, on file with the author), rightly points out that the analytical distinction among rules of recognition, secondary rules, and primary rules is plausibly connected to an underlying normative commitment connected to liberal democracy.

But there is another virtue of the cosmopolitan paradigm. Constitutional paradigms do not just make intelligible and help interpret the present legal and political world. They also shape how we imagine its future. It is not unlikely that from the perspective of fifty years from now, contemporary juristic preoccupations will be recognized as a manifestation of a complacent, historically bound, yet peculiarly presentist legal consciousness. Images of what global law might be and discussions of the challenges that humanity faces are strangely absent from the reflective horizon of contemporary debates.[119] One advantage of the cosmopolitan paradigm is that it not only helps interpret existing constitutional practice in a way that shows it in its best light. True to its revolutionary constitutional heritage, it also conceptually places legal and political practices within the open horizon of a liberated humanity and thus opens up a perspective on further radical transformations of the global legal order.

[119] For criticism along those lines and some creative reform ideas regarding the future, *see* David Kennedy's contribution in this volume. Kennedy's mistake, however, is to implausibly connect this criticism with a criticism of constitutionalism as a cognitive frame that remains ultimately too apologetic of the status quo and too wedded to the structures that happen to be in place. Constitutional cognitive frames serve a double function. They provide a cognitive frame for guiding an existing legal practice. But they also structure a normative horizon within which the future can be imagined and contested. The cosmopolitan paradigm could be put to good use to assess the proposals that Kennedy introduces for illustrative purposes.