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How Does European Union Law Fit into the World of Public Law? *Costa, Kadi,* and Three Conceptions of Public Law

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When European Union Law Conflicts with other Laws

There is deep disagreement about how the law of the European Union (hereinafter: EU Law) fits into the world of public law.[1] Is EU Law an integral part of international law? Or does EU Law establish an independent constitutional system? Is national law an integral part of that European system or does it remain an independent constitutional system? Disagreements about these questions are not just of interest to legal theorists. They give rise to high stakes legal controversy, when EU Law conflicts with either international or national constitutional law and courts are required to determine which of the conflicting laws should be set aside. Furthermore these conflicts provide a useful prism through which to study different claims about the structure of the world of public law. Such a prism helps sharpen the sense for what is at stake, when conceiving of the legal world in one way or another.

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

The first type concerns conflicts between the EU Law and the wider international legal order. Such a conflict has been the focus of the European Court of Justice's (ECJ's) recent *Kadi*[2] decision. The question was whether the implementation by the EU of a UN Security Council Resolution could be made conditional on conformity with European fundamental rights

standards, or whether the obligations derived from the UN Charter have primacy over all other international law, including EU Law. The ECJ, overruling a previous decision by the European Court of First Instance (ECFI),[3] held that it was appropriate to subject the EU Regulation implementing Security Council resolution to European fundamental rights standards, effectively precluding the enforcement of a UN Security Council Resolution. That decision has triggered strong reactions, both affirming and critical.[4] Is EU Law hierarchically subordinated to UN Law, as Art. 103 UN Charta might suggest? If not, does that mean that the constitutional law of the EU, whatever that happens to be, determines if and under what conditions UN Law is to be applied by the EU? Is there a third way to resolve this issue that does not involve establishing categorical primacy of one over the other?

The second issue concerns potential conflicts between EU Law and member states' law, in particular member states' constitutional law. After the ECJ in *Costa v. Enel*[5] declared EU Law to have primacy over all national law, including national constitutional law, most national courts have *not* accepted outright the position of the ECJ. Instead many insisted that there are national constitutional red lines, guarded by national constitutional courts, which the EU must not cross in order for it to be implemented nationally. Nearly fifty years after *Costa* and an immeasurable amount of ink spilled describing and analysing the decisions by the ECJ and national constitutional courts,[6] much remains in flux and the basic questions remain alive: should national courts accept that national constitutional law is subordinated to EU Law, as the ECJ claims? If not, does that mean that national constitutional law as interpreted by national constitutional courts establishes the conditions under which EU Law is enforced nationally? Is there a third way of answering those questions, that does not insist on the primacy of one over the other? If there are lines to draw in the sand and those lines are not simply derived from specific provisions of national constitutions, how should national courts go about drawing them?

Both issues raise the question how European Law fits into the world of public law. The purpose of this chapter is not to report on the rich literature addressing each of these issues or, more ambitious, try to resolve them. It is to get a deeper understanding of them, how they are related to one another and why they seem so difficult to resolve. The deep, interminable, and seemingly incommensurable disagreement that exists with regard to these questions, I will argue, is the result of a basic disagreement over how to conceive of the world of public law and the foundations of legitimate public authority. Debates about how the EU is appropriately described as

a legal and political subject and how it fits into the legal world are deeply tied up with different conceptions of the world of public law. More specifically there are *three competing models* of public law underlying these conflicts, generating three very different accounts of how European Law fits into the world of public law. I will distinguish between *Democratic Statism*, *Legalist Monism*, and *Constitutionalism*, with each model of public law playing an important role in the justification of judicial decisions in European legal practice and each connected to a different conception of public authority.

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

The Old World of Public Law: Democratic Statism and the Deep Divide

Statism in Three Historical Versions: Conceptual, Realist, and Democratic

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

During much of the nineteenth century legal theorists spent a great deal of time grappling with the *conceptual question* whether international law properly so called could exist, or whether it was really just a kind of positive morality, given the absence of an international sovereign. If law was the command of a sovereign (Austin 1832) or sovereignty was a predicate that precluded being subject to legal obligations (Lasson 1871),[7] how could international law exist as law properly so called?

Even though conceptual arguments lost their sway in the twentieth century, after the Second World War so called 'realism'[8] provided what

was believed to be an *empirically grounded* account of why the structure of the international system made the establishment of the rule of law beyond the state a utopian exercise. In an international system where states simply followed their national interests, international law could not function as an independent guide or constraint for state action.

But by the end of the Cold War, with the spread of failed states on the one hand and the rise of relatively effective Treaty regimes and practices of global governance on the other, that argument too, fell out of favour. The terms of the debate shifted again. General scepticism was in retreat as a rich literature burgeoned that tried to explain the widespread phenomenon of compliance with international law.[9] As liberal constitutional democracies were increasingly constrained perhaps not by a Weberian iron cage but at least a strong web of transnational legal norms, *Statism took a democratic turn*: now the deep divide between national law and international law was justified with reference to democratic constitutional theory. State law ultimately derives its authority from 'We the People' imagined as having acted as a *pouvoir constituant* to establish a national constitution as a supreme legal framework for democratic self-government (Sieyès 1982). International law, on the other hand, derives its authority from the consent of states. Of course states may decide to establish all kinds of international institutions to address specific issues. They can also establish courts and tribunals and even establish Treaties that create rights and obligations for individuals. But no matter how important these Treaties might be to address basic collective action or coordination problems, no matter the internal complexity of the institutions they set up: none of this takes away from the fact that these international institutions are ultimately based on Treaties requiring the ratification by states following national constitutional requirements. Member states remain the masters of international Treaties, for so long they are not replaced by genuine constitutions attributable to a constitutive act of 'We the People'.

There are two important consequences connected to a construction of the legal world informed by Democratic Statism. First, Democratic Statism insists that national constitutional law, as the supreme law of the land, determines if and under what conditions international law is to be enforced domestically. The authority of international law, from the perspective of national law, remains a matter to be determined by national constitutional law. Of course a violation of international law may trigger the responsibility of the violating state on the international level, but as a matter of domestic law such a consequence might well be legally irrelevant. The legal world thus has a dualist structure. Second, given that state law is connected to the

idea of 'We the People' governing themselves democratically and the institutional and social infrastructure for collective self-government is absent beyond the state, international law is thought to be inherently infected by a democratic deficit. That deficit is less when there is a close and concrete link between a specific international legal obligation and state consent. But even then there is a residual problem, because many international obligations can't be unilaterally revoked by the state as a matter of international law, even when the majority of citizens using democratic procedures wants to do so. Problems of democratic legitimacy become even more serious, when Treaties authorize international institutions to make important social and political choices. Even if ultimately problem-solving or cooperation-enhancing benefits associated with international law may legitimate international law, there remains an aura of a legitimacy deficit that hangs over international law.

Democratic Statism and the ECJ's Claim to Primacy Over Domestic Constitutional Law

When the ECJ made the claim in *Costa v. Enel* that EU Law has primacy over national law, even national constitutional law, the court implicitly rejected Democratic Statism and embraced an alternative account of public law. That will be described below. Here the focus is on how to make sense of such a claim from the point of view of Democratic Statism, a framework adopted by some member states' highest courts, perhaps most prominently the German Federal Constitutional Court in its *Maastricht*[10] and *Lisbon*[11] decisions. Within the framework of Democratic Statism a claim to primacy is plausible only if the European Union has in fact become a federal state with a constitution properly so called. The central question becomes: is the EU an international organization, ultimately based on Treaties deriving their authority from the ratification of member states according to their national constitutional requirements? Or has the EU become a federal state, based on an act by 'We the People' acting as a *pouvoir constituant*? If it is the former EU Law cannot, at least as a matter of domestic law, claim primacy over national constitutional law. If it is the latter, member states have lost their ultimate authority as their national constitutional order has been hierarchically integrated into the legal order of the new federal superstate.

Note that within the Democratic Statist model there is no third alternative. The EU qualifies either as a state or as an international institution. Calling the EU an institution *sui generis*, as has become customary in EU Law circles to avoid asking that question, just clouds the issue. The EU may

be *sui generis* in all kinds of ways, but it will be either a *sui generis* state or a *sui generis* international institution, *tertium non datur*. The question is whether it is one or the other.

(a) The test for establishing statehood: Why the EU is no state. So how do you know whether it is one or the other? Courts and scholars using a Democratic Statist framework generally focus on some combination of three factors (Kumm 2005). The first is *institutional* and focuses on the structure of the EU Treaties. Here the general focus tends to be whether member states can still plausibly be described as the 'Masters of the Treaty' or whether EU institutions have emancipated themselves from the control of member states to a sufficient degree. The focus is on a variety of factors that include but are not limited to the amendment procedure (is the unanimity required to amend the Treaties or is a qualified majority enough?), the ordinary legislative procedure (is the Council in charge or does Parliament dominate the legislative process and, even if it does, is it constituted in a way that reflects the idea of equality of citizens), competencies (how far does EU Law authorize legislation in core traditional areas of sovereignty, such as taxes, defence, social security, and criminal law?) The second factor is *procedural*. Were the Treaties the result of an ordinary Treaty ratification procedure or was there a constitutional convention or some other mechanisms which allowed for the kind of high level participation and deliberation associated with actions appropriately attributable to 'We the People'? Third, there are *sociological* factors: do EU citizens have the kind of cohesion, do they share the kind of bond characteristic of 'the people'? Do they have what it takes to be a 'demos'? To determine whether that is the case some authors focus on shared history, culture, religion, language, etc. Others focus on the structure of the public sphere and the institutions of civil society relating to media, political parties, interest group organizations etc. Here these differences can't be addressed and it must suffice to point to the structure of the argument.

Even though on application of one or another of these factors might give rise to debate, there is not a single court or author I am aware of that has embraced the Democratic Statist framework and then concluded that, on application, the EU qualifies as a state. Among Democratic Statists there seems to be a consensus that the EU is based on Treaties, not a constitution properly so called and that it qualifies not as a state, but as an international institution. Democratic Statists thus conclude that the primacy claim made by the ECJ is mistaken, at least if it is understood as a claim that national courts should apply EU Law even in the face of opposing national constitutional norms. Since there is no European Constitution plausibly grounded

in an act of a European *pouvoir constituant* and ensuring the democratic self-government of a European People, European Law cannot plausibly be conceived as the supreme law of the land. Recognizing the position of the ECJ would undermine commitments to democratic self-government central to Democratic Statism. Instead EU Law ultimately derives its authority from member states who have ratified the Treaties according to their national constitutional requirements. The status of EU Law as a matter of domestic law depends ultimately on what the national constitution determines. EU Law trumps national law only to the extent prescribed by the national constitution. National constitutional law remains the supreme law of the land.

(b) Consequences for the domestic application of EU Law. Where does that leave the application of EU Law by national courts? Those who adopt a Democratic Statist framework insist that such a commitment is distinct from national constitutional parochialism. It does not necessarily entail a commitment to national constitutional doctrines that are inimical to the application of EU Law and the functional imperatives of European integration. States might well adopt an 'open constitution', allowing for far reaching openness to and engagement with the international legal order. Fears invoked by those advocating European Law's primacy in the name of ensuring the effective and uniform enforcement are overblown. It is a mistake to believe that only the recognition that EU Law is the supreme law of the land ensures the effective and uniform functioning of EU Law. National constitutions may well contain norms that specifically authorize the enforcement of EU Law in most cases. There is no problem inherent to the idea of constitutional self-government as it is conceived by democratic statists. The real question is merely *how to conceive of the self that governs itself constitutionally*[12] and how that identity translates into national constitutional conflict norms. The core point is this: following the disasters of the First and Second World Wars, the national selves that govern themselves constitutionally have committed themselves to constitutionally tolerate the European laws enacted collectively by member states and their peoples. On this authors ranging from conservatives such as Paul Kirchhof (1999), Judge Rapporteur of the *Maastricht* judgement[13] to liberal constitutionalists, such as Dieter Grimm (1995) or Joseph Weiler (2003), notwithstanding important differences among them, would agree. The idea of constitutional tolerance lies at the heart of what makes European integration possible and describes its normative core (Weiler 2003). Most national constitutions have been amended in the process of European integration. All of them are interpreted by national courts to require the enforcement of

EU Law, even when it conflicts with national statutory law. Constitutional tolerance of EU Law—the openness of national legal orders to EU Law—is hardwired into national constitutional law as it is interpreted by member states' highest courts. But tolerance remains very much a feature of the *national* constitution and those who interpret it. Conceptually, Democratic Statism and its connection between the supremacy of the constitution and the idea of constitutional self-government remain untouched. Focusing on the Schmittian question—who has the final say?—misses the point. It obscures the remarkable fact that in Europe the everyday enforcement of European law is guaranteed by national constitutional provisions and their interpretation by national courts. The true innovation in European integration is not the establishment of a new ultimate constitutional authority on the European level. And it is not the abdication of national constitutional authority. Europe's genius and the key to understanding its *sui generis* character lies in the reinterpretation of national constitutional traditions to reflect a commitment to constitutional tolerance. National constitutional authority, structured and exercised to reflect a commitment to constitutional tolerance, lies at the heart of the European integration process. The challenge is to amend and interpret national constitutions in such a way that it reflects appropriate respect for national democratic commitments, while enabling appropriate engagement with European Law. European integration is inherently beset by a tension between genuine democratic self-government that takes place on the national level, and functional considerations that justify some delegation of powers to the European Union and some degree of opening up of the national legal orders to EU Law. That tension has to be carefully calibrated and reflected in the constitutional doctrines that national courts as ultimate guardians of constitutional legality enforce. EU Law, no doubt in many ways *sui generis*, ultimately remains Treaty based international law and not constitutional law properly so called.

Democratic Statism and the Relationship between UN Law and European Law

Democratic Statists would have an easy time addressing the issue whether the ECJ had the authority to effectively review the UN Security Council Resolution of European on fundamental rights grounds. The EU is, like the UN, a Treaty based organization. It came about by states negotiating, signing and ratifying a Treaty according to their national constitutional requirements. Given that both Treaties derive their authority from the same

source and are both equally international law, the relationship between the two cannot be resolved with reference to source-based conflict rules. Instead the issue is one of conflicting Treaty provisions. Conflicts between Treaties are resolved first of all with reference to stipulations made by the Treaties themselves about their status in case of conflict.[14] Luckily in this case both Treaties contain concurring propositions that indicate what should be done in case of conflict. Both the UN Treaties and the EU Treaties require or permit that EU primary Law is not applied to prevent the effective implementation of UN Law. On the one hand Art. 103 UN Charter in conjunction with Art. 25 UN Charter clearly stipulates that in case of a conflict between the obligations of the members of the United Nations under the Charter and their obligations under any other international agreement the Charter shall prevail. On the other EU side Art. 307 ECT specifically provides that nothing in the Treaty is to be considered as incompatible with previously assumed international obligations by member states.[15] Since UN obligations were assumed before member states joined the EU, the EU Treaties should not preclude the application of UN Law. Other provisions specifically accommodate or create a space for cooperation with the UN. Nothing suggests that the Treaties should have primacy over the UN. Clearly, therefore, the ultimate conclusion reached by the ECFI that UN Law is not to be effectively subjected to EU Law fundamental rights review is correct and the position of the ECJ is wrong.

The position of the ECJ in *Kadi* does become more plausible, however, if one starts off with the assumption *that the EU is a state* and that EU primary law is like the constitution of a state the supreme law of the land. Is that how the ECJ justifies its claim that it can effectively subject UN Law to EU fundamental rights review? At the crucial juncture of the decision the court is remarkably obscure in its reasoning and apodictic in its formulation: the EU is committed to the rule of law and can't avoid reviewing acts it undertakes on the basis of its own constitutional charter, that establishes an autonomous legal system.[16] Obligations imposed by international agreements cannot change the allocation of powers under that constitutional charter and cannot have the effect of prejudicing constitutional principles, that form part of the foundations of the Community.[17] Ultimately the ECJ is only pronouncing itself on an EU measure, not a UN measure and it is doing so by applying EU fundamental principles.

One obvious criticism of this type of rhetoric is that it is statist in the worst sense: it is not even democratic statist. It may sound like some of the more recalcitrant member states courts asserting the supremacy of their national constitutions, when confronted with the ECJ's claim that EU Law

takes primacy over national law, including national constitutional law. The only difference is that the rhetoric of 'the EU as an autonomous legal order' substitutes the invocation of state sovereignty. But notice how this kind of argument resembles a pre-democratic conceptual statism: a conceptual claim—this time not 'statehood' or sovereignty', but the idea of an 'autonomous legal order'—substitutes for an argument relating to 'We the People' and democracy. The idea of an autonomous legal order is not enriched by arguments about what it is about an order that has certain features that justifies according primacy to it. Read in this way the ECJ's *Kadi* decision is even worse than national constitutional decisions that make claim to supreme authority. If you take the more articulate cases of national recalcitrance, perhaps best exemplified by the German Constitutional Court in its *Maastricht*[18] and more recent *Lisbon* decision,[19] these decisions at least provide a theoretical basis for their recalcitrant approach: they provide for a Democratic Statist constitutional theory. Democratic Statism may be ultimately unconvincing, but it is made explicit and allows for serious engagement and criticism (Kumm 2005: 262).

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

The Modernist Challenge: Legalist Monism

Democratic Statism has, over time, been challenged by another model of the world of public law: Legalist Monism (Kelsen 1945, Verdross 1923, Lauterpacht 1950). Legalist Monism is the position that underlies the ECJ's jurisprudence in *Costa v. Enel*, justifying the primacy of EU Law over all national law, including national constitutional law. The ECJ justified the primacy of EU Law not by coming up with a competing interpretation of

the criteria established by Democratic Statism as they concern the EU. Instead the ECJ insisted on using a very different conceptual framework to justify that EU Law trumps national law. The following will briefly analyse the justification of that position in *Costa v. Enel* (1) and then assess what the implication of such an account of the world of public law would be for assessing the relationship between EU and UN Law (2). As will become apparent, there is a tension between *Costa* and *Kadi*. The Legal Monist position in Costa should have led the ECJ to confirm the ECFI's decision that it should not review acts implementing UN Law on European fundamental rights grounds.

The Primacy of EU Law

As every student of EU Law knows, since the 1960s the ECJ has consistently held that in case of a conflict between European and national law member states courts are under an obligation to set aside all national law, even national constitutional law.[20] For all practical purposes European law as interpreted by the ECJ is claimed to be the supreme law of the land.

The ECJ has supported that claim with the proposition that the EC Treaties established a new legal order and later referred to the Treaties as Europe's 'constitutional charter'.[21] To substantiate this claim the ECJ employed three arguments.

First, the Court makes a conceptual argument. If the Treaty is to establish legal obligation properly so-called, it cannot be permissible for a member state to unilaterally set it aside unless authorized to do so by EU Law. Such unilateral unauthorized action would undermine the status of EU Law as law properly so-called binding on all member states. This argument is of Kelsenian heritage. According to Kelsen the world of law has to be conceived in monist terms. Taking a legal point of view is incompatible with the claim that from the point of view of one legal order (say, the European legal order) x is the case, but from the point of view of another legal order (the legal order of member states) y is the case. There can be no coexistence of different legal systems constituted by different ultimate legal rules. The world of law is unified not as an empirically contingent matter, but as a conceptual matter.[22]

This is not the place to provide a comprehensive discussion and critique of the argument. Here it must suffice to point out that the argument is not at all obvious. It is not clear why it would undermine the status of EU Law as law that there is another legal system that incorporates EU Law on its own terms. It is unclear why it should be conceptually *impossible*, as

opposed to, say, undesirable on pragmatic grounds, to imagine the legal world in pluralist terms. What is *conceptually* wrong with acknowledging the possibility of the existence of different legal orders, each of which recognizes the authority of the law of the other on its own terms? There does not *have to be* only one legal point of view, even though it *might* be desirable that there be only one on other normative grounds. Member states may or may not be doing the right thing if they insist on determining the status of EU Law in light of their own national constitutional requirements. But they are not thereby undermining the status of EU Law as law properly so-called.

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

It is not easy to make sense of this argument. It might be understood in one of two ways. First it could be understood as a weak claim that the EU is sufficiently different from ordinary Treaties that it should not be assessed within the conventional statist paradigm, which constructs international law in contractualist terms based on state consent. But for that argument to be persuasive it would have been necessary to point out how exactly the highlighted features and the relative autonomy of EU Law are relevant to the claim of primacy. The Treaties of Rome might be different from most run of the mill Treaties, but they are still Treaties and not a genuine constitution of a new state. At least that would be the claim made by a Democratic Statist. What exactly is wrong with that claim? The ECJ does not say.

But the listing of ways in which the EU is different from other Treaties might just have the function of opening the door to the third argument that lies at the heart of the case for primacy. It turns out that the particular features of the EU and the autonomy of the legal order matter for *functional* reasons. A Treaty regime that has these features and has been designed to

fulfil ambitious purposes—including the establishment of a common market—can only function in a coherent way, if the laws it establishes have primacy over national law. Without primacy, the effective and uniform enforcement of Europe's laws would be endangered. The purpose of the European Union to fulfil its various objectives, including the establishment of a common market, could not be achieved, if member states did not accept the primacy of EU Law. An aggressively purposive interpretation of the Treaties leads the ECJ to conclude that for all practical purposes EU Law has to be accepted as the supreme law of the land in order to fulfil its purpose. This is a contestable empirical claim about the consequences of not accepting the unconditional primacy of EU Law connected to a normatively contestable functional account of the basis of public authority.

The claim to primacy is further strengthened by two more general functional arguments, not explicitly made in *Costa*, but standard fare in the literature supporting that decision. First, there is the idea that legally constraining the relationship between member states is an effective remedy against the great evils that have haunted the continent throughout much of the nineteenth and first half of the twentieth century: clashes of interest between nation-states have a dangerous propensity to degenerate into bloody wars. Within the framework of a coherent legal order the definition, articulation and negotiation of national interests occurs in such a manner as to make such a development highly unlikely. Second, legal integration can be seen as a mechanism which tends to immunize nationally organized peoples from the kind of passionate political eruptions that have led to totalitarian or authoritarian governments and/or discrimination of minorities that have characterized European history in the nineteenth and twentieth centuries. This could not be achieved to the same degree, so the argument goes, if the final decision concerning what is to be applied as law in a member state rests on a decision ultimately made by member states themselves.

Clearly these arguments have to be read as a critique of Democratic Statism and the embrace of a different model of public law. Those who claim that the Treaties as the constitution of the European Union are the supreme law of the land in Europe in fact claim that Democratic Statism, which connects the idea of an ultimate legal authority with a strong conception of democratic self-government, is mistaken and needs to be modified. Democratic Statism is unable to incorporate into its account of supremacy the importance of expanding the idea of effective legal authority beyond the boundaries of the nation state. There may not be a European people and a European democracy in a meaningful sense, but the value of

constitutional self-government is not absolute. The idea of Europe as a legal community—a *Rechtsgemeinschaft* (Hallstein 1969)—integrated by European institutions and European law in the service of prosperity and peace trumps the limitations this imposes on constitutional self-government.

EU Law and International Law: Kadi

Whatever the merits of these arguments might be, what are the implications of such a position for deciding whether the ECJ should subject EU Regulation implementing a UN Security Council obligation to EU fundamental rights law? It turns out that the arguments for the primacy of EU Law in *Costa* should also push the ECJ towards recognizing the primacy of UN Law over EU Law. First, if the conceptual argument is plausible in the context of the relationship between EU Law and the law of member states, there is no reason why it should not also be determinative in the relation between UN Law and EU Law. If the fact that member states subject EU Law to national constitutional standards subverts the very idea that EU Law is law properly so-called, does not the fact that the ECJ effectively subjects UN Resolutions to review based on EU standards undermine the very idea that UN Law is law properly so-called? Second, there are many features of the UN that distinguish it from an ordinary Treaty. The UN Charter establishes complex institutions with their own competencies, it allows the UN Security Council to create new legal obligations following a non-consensual procedure. Is the UN Charter not also a constitutional charter of an autonomous legal order? Of course there are differences between the UN and the EU: the ECJ has compulsory jurisdiction over issues of EU Law, for example, whereas the ICJ does not have compulsory jurisdiction over issues arising under the UN Charter. There is no comparable doctrine of direct effect with regard to UN Law. But not all differences suggest that the EU is more of an 'autonomous legal order' than the UN. Some differences point in the opposing direction. Take the name: the UN is called a Charter, not a Treaty. Think of the explicit claim to primacy in Art. 103 UN Charter, a claim still not explicitly made by the EU Treaties even after the latest rounds of reform.[23] At any rate, whatever differences may exist between the UN and the EU, it remains unclear why these differences should be decisive for the purpose of establishing that the EU is an autonomous legal order that makes a claim to primacy, whereas the UN is not. Third, the functional reasons supporting primacy of EU Law over member states' law also support the claim to primacy of UN Law over EU Law. If the UN is to effectively

succeed in 'maintaining peace and security' and if the UN Security Council is to effectively take up its 'primary responsibility for the maintenance of international peace and security', does that not require that other actors accept the primacy of UN Security Council Resolutions? Would anything else not undermine the effective and uniform enforcement of UN Law? The judgment of the ECFI, with its emphasis on functional arguments, to a large extent reflects the Legal Monist positions embraced by the ECJ in *Costa*. But the position of the ECJ does not. Is the only way to make sense of the ECJ's *Kadi* decision to understand it as the ECJ having taken a statist turn, albeit a statist turn without the resources of democratic constitutional theory to back it up?

Second Modernity: Constitutionalism, Cosmopolitan, and Pluralist

There seems to be an irresolvable tension between *Kadi* and *Costa*, just as there is seems to be an irresolvable tension between *Costa* and most of the decisions of national constitutional courts that insist on drawing constitutional red lines in the sand. But there is a way to reread *Kadi*, *Costa*, and national constitutional court decisions that suggests all three in fact embrace a very similar conception of public law. But that conception is neither Democratic Statist, nor is it Legal Monist. Instead it is what I call Constitutionalist (Kumm 2009). Constitutionalism refers to a position according to which a set of universal principles central to liberal democratic constitutionalism undergird the authority of public law and determine which norms take precedence over others in particular circumstances. Contrary to Democratic Statism it is not the case that the idea of 'democracy' and 'national self-government' connected to statehood and sovereignty provides the decisive principle to help determine where ultimate authority lies. But nor is it the case the idea of legality and the functional reasons in support of it are sufficient to justify a Monist account of the legal world. Instead constitutionalism provides the following framework for the analysis of constitutional conflicts:

First, Legalist Monism is right that the idea of legality—respect for the rule of law—and the functional and procedural considerations that support extending it to the level beyond the state plausibly provide for a presumption of some weight: that the law of the more expansive community should be respected by public authorities, regional or national law to the contrary notwithstanding. There is a presumption that UN Law trumps EU Law and

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

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

To illustrate the idea of Constitutionalism as a distinct model of the world of public law I will first provide an alternative account of the approach taken by some member states' courts in their engagement with the ECJ's primacy claim (1), then revisit *Costa* (2), and finally provide another reading of *Kadi* (3). The point is to illustrate both how central elements of these decisions can be understood as reflecting a commitment to Constitutionalism, rather than Statism or Legalist Monism. Neither of the latter two can describe very well the contemporary place of European law in the world of

public law. The constitutionalist model of the world of public law, on the other hand, is descriptively more powerful.

Constitutionalism and the German Constitutional Court's Response to Costa

One important consequence of conceiving of legal authority as a function of the realization of a set of principles is that whether or not EU Law should be recognized as having primacy over national constitutional law is a question that allows for qualified answers. It admits to more answers than just yes or no. Even if the European Union Law does not, without some qualification, establish the supreme law of the land, it could still effectively reconstitute legal and political authority in Europe. The authority of EU Law is possibly a question of degree. It may depend on the degree to which constitutional principles are realized by EU institutions. It admits to the possibility that neither EU Law nor national constitutional law effectively establishes the supreme law of the land. In this way constitutionalism can help shed light on a fascinating aspect of national courts' reception of EU Law. For the most part national courts have not accepted that EU Law is the supreme law of the land. But nor have they simply assumed that national constitutional law is the supreme law of the land. There is something deeply misleading in claiming that, to the extent that national courts have not accepted EU Law as the supreme law of the land, they are merely interpreting their national constitutions to establish what the status of EU Law should be as a matter of domestic law. National courts have generally adopted an intermediate position. They generally accept neither EU Law nor the national constitution as the supreme law of the land. Instead they look to both EU Law and the national constitution and try to make sense of what the best understanding of the competing principles in play requires them to do.[24] Theirs is a constitutionalist conception of public law. To flesh out what this means practically and provide an example, a brief and somewhat schematic analysis of the German Federal Constitutional Court's (FCC's) approach to the authority of EU Law will follow. The jurisprudence of the Court may be widely known by European Union lawyers, but its reconstruction in terms of a commitment to constitutionalism may prove illuminating, even if it can only be brief and schematic.

The German constitution, until the early 1990s,[25] contained no specific provisions addressing European integration, though the Preamble mentions Germany's commitment to strive for peace in a united Europe. The constitution did authorize Germany to enter into Treaties establishing

international institutions.[26] And it contained general provisions giving international Treaties the same status as domestic statutes.[27] Yet the ECJ had claimed that EU Law was to be regarded as the supreme law of the land requiring member states courts to set aside any national law, even national constitutional law, if it was in conflict. How was the court to respond? Was the ECJ's claim really plausible that member states had established a new supreme law of the land by signing and ratifying a set of Treaties the core objective of which was to establish a common market? On the other hand, was it plausible to claim that the EU Treaties, which established institutions that had been endowed with significant legislative authority (Kumm 2005) and played a significant role to secure peace and prosperity in war ravaged Europe, should be treated like any other Treaty? Was it really adequate to apply the general rule applicable to Treaties according to which an ordinary statute enacted after the Treaty was ratified would trump it? If the court simply accepted the basic ideas underlying Democratic Statism and its idea of constitutional self-government, that is probably the conclusion the court would have reached. If, on the other hand, the court accepted EU Law as legitimate constitutional authority on legalist grounds, it would follow the ECJ. But the court chose neither of these options. It embraced an intermediate solution. That intermediate solution illustrates the connection between a constitutionalism and the complex set of doctrines that national courts have in fact developed for assessing the ECJ's claims concerning the supremacy of EU Law.

First the FCC accepted without much ado that EU Law trumps ordinary statutes, even statutes enacted later in time, because of the importance of securing an effective and uniformly enforced European legal order.[28] The principle of ensuring the effective and uniform enforcement of EU Law—expanding the rule of law beyond the nation-state—was a central reason for the court to recognize the authority of EU Law over national statutes. This meant that in Germany EU Treaties were effectively granted a more elevated status than ordinary Treaties, to which a 'last in time' conflict rule generally applies.

Yet, contrary to the position of the ECJ, the court recognized that that principle was insufficient to justify the supremacy of EU Law over all national law. The principle of legality matters, but it is not all that matters. The *second* issue before the Court was whether it should subject EU Law to national constitutional rights scrutiny. Could a resident in Germany rely on German constitutional rights against EU Law? Could the protection of national residents against rights violations guaranteed in the national constitution be sacrificed on the altar of European integration? Like

other questions concerning the relationship between EU Law and national law, the German constitution provided no specific guidance on that question. In *Solange I*[29] the FCC balanced the need to secure the fundamental rights of residents against the needs of effective and uniform enforcement of EU Law and established a flexible approach: for so long as the EU did not provide for a protection of fundamental rights that is the equivalent to the protection provided on the national level, the court would subject EU Law to national constitutional scrutiny. At a later point[30] the court determined that the ECJ had significantly developed its review of EU legislation and held that the standard applied by the ECJ was essentially equivalent to the protection provided by the FCC's interpretation of the German Constitution. For so long as that remained the case, the FCC would not exercise its jurisdiction to review EU Law on national constitutional grounds. Because the ECJ though its own jurisprudence provided the structural guarantees that fundamental rights violations by EU institutions would generally be prevented, it conditionally accepted the authority of EU Law. To put it another way: structural deficits in the protection of fundamental rights on the European level were the reason for the FCC to originally insist that it should not accept the authority of EU Law, insofar as constitutional rights claims were in play. When those specific concerns were effectively addressed by the ECJ, the authority of EU Law extended also over national constitutional rights guarantees and the FCC as their interpreter. The authority of EU Law, then, was in part a function of the substantive and procedural fundamental rights protections available to citizens as a matter of EU Law against acts of the European Union.

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

In its *Maastricht* decision[31] and later in its *Lisbon* decision[32] the FCC determined that it had jurisdiction to review whether or not legislative acts by the European Union were enacted *ultra vires* or not. If such legislation were enacted *ultra vires*, it would not be applicable in Germany. As a matter of EU Law it is up to the ECJ, of course, to determine as the ultimate arbiter of EU Law whether or not acts of the European Union are within the competencies established by Treaties.[33] But the ECJ had adopted an extremely expansive approach to the interpretation of the EU's competencies,

raising the charge that it allowed for Treaty amendments under the auspices of Treaty interpretation. Under these circumstances the FCC believed it appropriate for it to play a subsidiary role as the enforcer of limitations on EU competencies of last resort. In the decision arguments from democracy played a central role. Democracy in Europe remains underdeveloped, with electoral politics playing a marginal role. The national domain remained the primary locus of democratic politics. Under those circumstances ensuring that EU institutions would remain within the competencies established in the Treaties is of paramount importance. Whatever EU institutions decide, can no longer be decided by directly electorally accountable national actors.

This points to a final line of resistance, not as yet explicitly endorsed by the FCC, but visible in the jurisprudence of other courts. When a national constitution contains a specific rule containing a concrete national commitment—say a commitment to free secondary education,[34] or a restriction to national citizens of the right to vote in municipal elections,[35] or a categorical prohibition of extradition of citizens to another country[36]—these commitments will not generally be set aside by national courts. Instead national courts will insist that the constitution is amended to ensure compliance with EC Law. This line of cases, too, reflects an understanding that the realm of the national remains the primary locus of democratic politics. For so long as that remains the case, a commitment to democracy is interpreted by some member states courts to preclude setting aside national constitutional commitments as they are reflected in these concrete and specific rules. It is then up to the constitutional legislature to initiate the necessary constitutional amendments.

This highly stylized and schematic account illustrates the operation of a conception of legitimate constitutional authority that puts the principles of constitutionalism front and centre.[37] The principle of legality and its extension beyond the nation-state has an important role to play to support the authority of EU Law, but concerns relating to democracy and human rights may provide countervailing reasons for limiting the authority of EU Law in certain circumstances. Furthermore the republican principles that govern the relationship between national and EU Law do not themselves derive their authority from either the national constitution or EU Law. The relative authority of EU and national constitutions is a question to be determined by striking the appropriate balance between competing principles of constitutionalism in a concrete context.

Constitutionalist Elements in Costa *and Beyond*

As was argued above, *Costa v. Enel* more than any other decision reflects a commitment to Legal Monism, not Cosmopolitan Constitutionalism. But there are elements in *Costa* that make better sense when interpreted in a constitutionalist, rather than Legal Monist prism (*a*). Furthermore EU Law has evolved in a way that suggests that the courts continued insistence on primacy may today not only be justifiable in constitutionalist terms, but also be generally compatible with the position taken by member states' courts (*b*).

(a) Costa *and Constitutionalism: Making sense of the idea of an autonomous legal order.* So how does Constitutionalism make sense of the claim that the authority of EU Law is not simply derived from the fact that member states have signed and ratified it following their respective constitutional requirements? What, if anything, justified the claim that EU Law establishes an autonomous legal order and what follows from it?

Whether a Treaty qualifies as a constitution of an autonomous legal order or merely as an ordinary Treaty under international law depends on how its claim to legal authority is best understood. If its claim to legal authority is best understood to rest exclusively on the fact that member states have signed and ratified it, then it is an ordinary Treaty of international law. The decisive feature of constitutional Treaties establishing an autonomous legal order in some sense is that its claim to authority is in part directly grounded in constitutional principles (Bogdandy 2005). Its claim to authority is not grounded exclusively in the fact that member states have signed and ratified it, even if it would not have come into existence if member states had not signed and ratified it. The idea of a Constitutional Treaty, then, is contrary to claims by Democratic Statists, not a contradiction in terms. Nor does it matter that the Treaties of the European Union have gradually evolved in a piecemeal fashion, rather than having being created in a legal revolutionary moment, a kind of constitutional 'big bang' or a *creatio ex nihilo*. Whether or not something that takes the form of a Treaty is in fact merely a Treaty of international law or a form of transnational constitutional law that has greater authority is a question of interpretation.

The European Union explicitly claims to be founded on constitutional principles. Art. 6 EUT states that the 'Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the member states'. The EU, in its self-presentation, is neither founded on the will of a European 'We the People', nor is it founded on the 'will of member states'. It is

founded on the constitutional principles that are a common heritage of the European constitutional tradition as it has emerged in the second half of the twentieth century. And, as the ECJ has found more than forty years ago and is now recognized in the Lisbon Treaty,[38] EU Law makes a claim to primacy. Whether and to what that claim to authority deserves to be recognized by member states courts is not an easy question and gives rise to the kind of concerns that were described above. But an answer to that question will not make use of unhelpful dichotomies between Treaties and constitutions or the 'will of member states' or 'We the People'.

(b) Costa *today.* When the ECJ made the claim that EU Law has primacy over all national law, including national constitutional law, it was making a claim that national courts were right not to accept in an unqualified way. At the time EU Law did not provide for adequate constitutional rights protection, it did not provide for an adequate democratic legislative procedure and there was no indication that the court took seriously the limits of competencies in the Treaty. These concerns became more serious as the decision-making moved from unanimity to qualified majority vote in more and more areas since the mid-1980s. To a significant extent the response of member states' courts can be understood as a general acceptance of the ECJ's claim to primacy, but with the proviso that EU Law did not violate fundamental rights, remained within its competencies, and did not encroach on fundamental constitutional commitments that defined the democratic identity of the member state. To the extent that member states' responses fit this description, they generally comply with constitutionalist requirements. What is remarkable, however, is that all of these concerns are now addressed to a large extent, even if not always effectively, by EU Law itself. The story about the evolution of the EU's fundamental rights guarantees is well known and has finally led to the entry into force of the European Charter of Fundamental Rights in December 2009. The concerns relating to competencies has arguably led the ECJ to pay greater attention to delimitation of competencies, even though here there are still good grounds for scepticism (Kumm 2006). Furthermore the Treaty of Lisbon contains interesting procedural innovations involving national Parliaments that might make some contribution to help establish a culture of subsidiarity in Europe. Finally the structural problems relating to democracy have not really been addressed so far by EU actors even though the legal framework established by the Treaty of Lisbon might allow for the evolution of greater electoral accountability of the Commission in the future thereby making the elections of the European parliament

more meaningful (Kumm 2008). But more importantly EU Law now specifically requires that member states constitutional identity be respected. A plausible interpretation of that provision suggests that it might not violate EU Law if a member state refused to apply EU Law in a situation where a fundamental national constitutional commitment is in play (Ferreres Comella and Kumm 2005). If that is correct, it is not implausible that a claim to primacy made by EU Law that shares these features may no longer be implausible from a constitutionalist point of view. The justification for the primacy of EU Law at the time *Costa* was decided might not have been plausible. And the limited acceptance by member states might in most instances have been justified. But to a significant extent EU Law has absorbed the concerns that fostered legitimate resistance by member states, just as member states had, over time, opened up their legal orders to accept the application of EU over national law in most instances. Shared constitutional principles seem to have provided the focal point of complementary evolutions of both EU Law and national constitutional law. The tensions created by a conflict between Legalist Monism and Democratic Statism have to a large extent been replaced by a common commitment to Constitutionalism. That still leaves open the possibility of conflict on application, but it ensures a common framework within which concrete disagreements are addressed.

A Constitutionalist Reading of Kadi

But is *Kadi* compatible with an account that emphasizes the spread of constitutionalism? On the surface the ECJ may seem to have adopted a relatively conventional dualist statist approach. It insisted on the primacy of EU constitutional principles and explicitly rejected applying these principles deferentially, even though the EU Regulation implemented a UN Security Council Resolution. But on close examination it becomes apparent that important elements of that decision reflect constitutionalist analysis: first, the court specifically acknowledges the function of the UN Security Council as the body with the primary responsibility to make determinations regarding the maintenance of international peace and security.[39] Second, the court examines the argument whether it should grant deference to the UN decisions and rejects such an approach only because at the time the complaint was filed there were no meaningful review procedures on the UN level and even those that had been established since then[40] still provide no judicial protection.[41] 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*,[42] more adequate procedures on the UN level might have justified more deferential review. This is further supported by the ECJ's conclusion that under the circumstances the plaintiffs' right to be heard and the right to effective judicial review were *patently* not respected. This language suggests that even under a more deferential form of judicial review the court would have had to come to the same conclusion. This section of the opinion suggests that the court was fully attuned to constitutionalist sensibilities. It just turns out that the procedures used by the Sanctions Committee were so manifestly inappropriate given what was at stake for the blacklisted individuals, that any jurisdictional considerations in favour of deference were trumped by these procedural deficiencies, thus undermining the case not just for abstaining from judicial review altogether, but also for engaging in a more deferential form of review. Third, the court shows itself attuned to the functional division of labour between the UN Security Council and itself when discussing judicial remedies: the court does not determine that the sanctions must be lifted immediately, but instead permits them to be maintained for three months, allowing the Council to find a way to bring about a review procedure that meets fundamental rights requirements. Finally, during all of this the court is careful to emphasize that nothing it does violates the UN resolution, given that international law leaves it to states to determine by which procedures obligations are enforced. Notwithstanding serious problems that remain, it seems that forceful judicial intervention has had a salutary effect, with serious reform proposals discussed and in part enacted at the UN level.[43] An ECJ committed to constitutionalism takes international law seriously. But taking international law seriously does not require unqualified deference to a seriously flawed global security regime. On the contrary, the threat of subjecting these decisions to meaningful review might help bring about reforms on the UN level. Only once these efforts bear more significant fruit will the ECJ have reasons not to insist on meaningful independent review of individual cases in the future.

Even if the above suggests that it is a mistake to read *Kadi* merely as a case of entrepreneurial but jurisprudentially dubious state-building by the ECJ (Goldsmith and Posner 2008), there are still plausible grounds to criticize *Kadi* on constitutionalist grounds: why did the court not emphasize the universal nature of the human rights it was applying? Why did the court not follow the Advocate General (AG) lead and be more explicit about the conditional nature of its lack of deference? And was it justifiable for the court to preclude member states from finding their own ways to address the tensions between compliance with UN Sanctions and the relevant

human rights concerns? But notwithstanding scope for legitimate criticism, constitutionalist sensibilities were not lacking in *Kadi*.

Conclusion

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

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

There are two ways in which Constitutionalism and pluralism are connected. First, Constitutionalism explains how there can be a plurality of legal regimes that make claims to authority which go beyond their origin in the consent of states. These regimes may be based on a Treaty, but these Treaties are, just like domestic constitutions in traditional constitutional theory, genuinely constitutive: with them a new legal authority comes into the world. Instead of deriving their authority from the legal acts that made them possible, their claims to authority derive at least in part directly from the constitutional principles they embody and help realize. Second, constitutional principles provide the mediating principles for a deeply pluralist structure of public law. In practice regime pluralism sometimes leads to the enactment of rules that conflict with one another. When they do there is no guarantee that conflicts between them will be resolved in the same way by each regime. So there is a distinct possibility of contradictory claims that are part of the legal world without law having the resource to resolve them conclusively. But notwithstanding the possibility of irresolvable legal conflict, *this kind of pluralism* is not deep and hard, but shallow and soft. It is shallow and not deep because of constitutionalist principles are the shared *foundation* of public law practices. And it is not hard but soft, because constitutionalist principles serve as a *common framework* to mediate potential disputes and give rise to principled practices of engagement and deference that reduce the occasions and limit the stakes of conflict. The world of public law, constructed through the prism of the best understanding of European legal practices, is both constitutionalist and pluralist. To put it another way: it is the world of constitutional pluralism.[44]

Notes

1. See the contribution of Weiler and de Búrca 2010.
2. Joined Cases ECJ C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v. Council*, Decision of 8 Sept. 2008.
3. CFI Cases T-30601 *Yusuf and Al Barakaat*, T-315/01 *Kadi*.
4. *Supra* note 1.
5. Costa v. ENEL (Case 6/64) [1964] ECR 585.
6. For general overviews of note on the issue see Claes 2006; Kumm 2005; Slaughter, Stone, and Weiler 1998; Grewe and Ruiz Fabri 1995; Mayer 2000. For a collection of the leading cases across jurisdictions see Oppenheimer 1994 and 2003.
7. The argument was actually pleaded and dismissed by the Permanent Court of Justice, the predecessor of the ICJ, see the S.S. Wimbledon Case, 1923 P.C.I.J. (ser A.) No. 1, at 25.

8. For a classical statement see Morgenthau 1978.
9. An overview of the debate as it stood in the 1990s and further references can be found in Koh 1997. See also Kratochwil 2000 and Finnemore 2000.
10. 89 BVerfGE 155 (1993).
11. BVerfGE, 2 BvE 2/08, Judgment of June 30 2009.
12. The idea and its deeper normative significance is developed in Weiler 1999*c*: 324. Practical doctrinal implications for thinking about constitutional conflict within this paradigm are developed in Kumm 1999.
13. See BVErfGE 89, 189 (1993).
14. For the interpretation of Treaties see Art. 31–3 VCLT. Note that Art. 30 VCLT contains a specific set of conflict rules governing Treaties relating to the same subject matter.
15. According to Art. 30 (2) VCLT when a Treaty specifies that it is not to be incompatible with an earlier Treaty the provision of the earlier Treaty shall prevail.
16. *Kadi*, Recitals 281 and 282.
17. *Kadi*, Recitals 282 and 285.
18. BVerfG 89, 155 (1993).
19. BVerfG, 2 BvE 2/08, Judgment of June 30 2009.
20. Case 6/44, *Costa v. Enel*, [1964] ECR 585; Case 43/76, *Comet BV v. Produktschap voor Siergewassen*, [1976] ECR 2043; Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal*, [1978] ECR 629.
21. Case 294/83, *Parti Ecologiste 'Les Verts' v. European Parliament*, [1986] ECR 1339.
22. According to Kelsen the demand that the world of law be monist does not require a *Grundnorm* according to which transnational law trumps national law. It is also possible to posit a *Grundnorm* according to which there is no law except as established by national law. But the choice of the latter *Grundnorm* would imply a kind of national solipsism, comparable to a Cartesian subject who denies the existence of other such subjects and claims that all other persons are nothing but emanations of his consciousness. Adopting such a position is logically possible. Notwithstanding significant efforts by generations of philosophers, solipsism is a position remarkably difficult to refute conclusively. On the other hand there are just no plausible arguments in its favour, so only the most anxious foundationalists have been troubled by the problem. Others have been happy to assume the reality of other subjects as the more plausible starting point. Similarly lawyers, it might be implied from Kelsen, would do well to posit that there is a European legal order and that the legal orders of member states are equally subject to it. But of course the whole argument depends on the non-obvious claim that there can only be one legal order and that the idea of legal pluralism is untenable for conceptual reasons. That is an issue not to be deepened here.
23. Of course the failed 'Treaty establishing a Constitution' had a qualified supremacy clause. The Lisbon Treaty on the other hand, merely confirms the ECJ's jurisprudence in Declaration 17 attached to the Treaty.

24. For a fully developed argument to this effect see Kumm 2005.
25. In the context of the ratification of the Maastricht Treaty Art. 23 Basic Law was amended to address questions of European integration.
26. See Art. 24 Basic Law.
27. This is the dominant interpretation of Art. 59 II Basic Law.
28. BVerfGE 22, 293 (1967) and BVerfGE 31, 145 (1971).
29. BVerfGE 37, 271 (1974).
30. BVErfGE 73, 339 (1986).
31. BVerfGE 89, 155 (1993).
32. BVerfG, 2 BvE 2/08, Judgement of 30 June 2009.
33. See Art. 230 ECT.
34. Belgian constitutional Court, European Schools, Arbitragehof, Arrest no. 12/94, B.S. 1994, 6137—6146.
35. Spanish constitutional Court, Municipal Electoral Rights, 3 Common Law Reports 101, (1994).
36. Polish constitutional Court, Judgment of 27 April 2005, P 1/05, English Summary available at: www.trybunal.gov.pl
37. For a more fully developed account see Kumm 2005.
38. See Declaration 17.
39. *Kadi*, Recital 297.
40. See S.C. Res. 1730, U.N. Doc. S/Res/1730 (Dec. 19, 2006); S.C. 1735, U.N. Doc. S/Res/1735 (Dec. 22 2006); S.C. Res. 1822, U.N. Doc. S/Res/1822 (June 30, 2008).
41. *Kadi*, Recital 321, 322. See most recently S.C. Res. 1904 (Dec. 17 2009) that provides at least certain minimal guarantees.
42. *Bosphorus v. Ireland* Eur. Ct. H. R. 30 (2005).
43. See most recently S.C. Res. 1904 (Dec. 17 2009) that finally provides at least minimal, even if still inadequate, procedural guarantees.
44. The constitutionalist account of constitutional pluralism is only one among others. For further references and basic positions see the debate between Miguel Maduro, Neil Walker, Julio Baquero Cruz, and Kumm in Avbelj and Komárek 2008.

7

Politics, Power, and a European Law of Suspicion

Michelle Everson

1. Political Theory and Legal Critique

Christian Joerges has bemoaned the failure of European political science 'to take law seriously' (Joerges 1996). This critique also applies to the political theory of integration; not, however, because theory ignores the body of European law that has guided the integration *telos*, but rather because it fails to pay attention to the law as an autonomous phenomenon. This failing is nonetheless not confined to political theory. Instead, viewed from the perspective of a contemporary body of *legal critique*, which is intimately concerned with the origins and impacts of law, European law's all too ready acceptance of its positive role in the construction of the European polity is similarly disturbing. Modern legal critique—whether it draws its vigour from a constructivist perception of law, or whether it crosses a deconstructivist abyss to also doubt law's very 'being'[1]—must perforce interrogate the contribution of legal self-understanding to individual and social disfunction. At a time of crisis (rise of the Right and no-votes) legal critique must ask whether a *praxis* of European law is also implicated within the moral decline of European politics.

To answer this question, legal critique moves far beyond a facile *formal* legal self-perception, which locates the primary function (and source of legitimacy) of law within its ability to *constitute* political community and to defend it against threats stemming from *within* the body politic (*rule of law*), to relocate this imperfect legal translation within the political theory from which it springs, at the same time critically reformulating political theory to take vital critical account of the law as an autonomous phenomenon

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