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**The Future of Democratic Sovereignty and Transnational Law.
On Legal Utopianism and Democratic Skepticism**

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**The Future of Democratic Sovereignty and Transnational Law.
On Legal Utopianism and Democratic Skepticism***

By Seyla Benhabib**

Abstract

This essay examines the rise of legal cosmopolitanism in the period since the UDHR of 1948 as it gives rise to two very distinct sets of literature and preoccupations. I contrast the mainly negative conclusions drawn by conventional political theory about the possibility of reconciling democratic sovereignty with a transnational legal order to the utopianism of contemporary legal scholarship that projects varieties of global constitutionalism with or without the state. I argue that transnational human rights norms strengthen rather than weaken democratic sovereignty, and name processes through which rights-norms are contextualized in polities ‘democratic iterations.’ The challenge is to think beyond the binarism of the cosmopolitan versus the civic republican; democratic versus the international and transnational; democratic sovereignty versus human rights law.

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I. The Resurgence of Cosmopolitanism

The last two decades have seen a revival of interest in cosmopolitanism across a wide variety of fields, ranging from law to cultural studies, from philosophy to international politics, and even to city planning and urban studies.¹ How do we account for this? Undoubtedly, the most important reasons for this shift in our sensibilities and cognitions are the epoch-making transformations referred to as ‘globalization’ and the end of the ‘Westphalian-Keynesian-Fordist’ paradigm by many;² as the spread of neo-liberal capitalism by some, and as the rise of multiculturalism and the displacement of the West by the ‘rest’ by still others. Cosmopolitanism has become a place-holder for thinking beyond the confusing present towards a possible and viable future.

Legal developments are at the forefront of these transformations. It is now widely accepted that since the Universal Declaration of Human Rights in 1948, we have entered a phase in the evolution of global civil society which is characterized by a transition from *international* to *cosmopolitan* norms of

¹ Seyla Benhabib, *Dignity in Adversity. Human Rights in Troubled Times* (Cambridge, UK and Cambridge, MA: Polity Press, 2011), pp. 1-20; Cf. Pheng Cheah and Bruce Robbins, eds. *Cosmopolitics: Thinking and Feeling Beyond the Nation* (Minneapolis: University of Minnesota Press, 1998); Pheng Cheah, *Inhuman Conditions. On Cosmopolitanism and Human Rights* (Cambridge, MA: Harvard University Press, 2006); for philosophy cf. the debate started by the volume, *For Love of Country? Debating the Limits of Patriotism*, ed. by Joshua Cohen and Martha Nussbaum (Boston: Beacon Press, 1996) and Nussbaum’s well-known essay in this volume, “Patriotism and Cosmopolitanism,” pp. 3-17; but see Nussbaum’s later retractions, in: 137 *Daedalus* 3 (Summer 2008). Cf. Anthony Appiah, *Cosmopolitanism. Ethics in a World of Strangers* (New York: W.W. Norton and Company, 2006); Thomas Pogge, “Cosmopolitanism and Sovereignty,” 103 *Ethics* 1 (October 1992): 48-75; Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Cambridge, UK: Polity, 2002); Stan van Hooft, *Cosmopolitanism. A Philosophy for Global Ethics* (Montreal and Kingston: McGill-Queen’s University Press, 2009). For the pioneering work in political theory and international relations, see Daniel Archibugi, David Held and Martin Kohler, *Re-Imagining Political Community. Studies in Cosmopolitan Democracy* (Stanford: Stanford University Press, 1998); David Held, *Democracy and the Global Order* (Stanford: Stanford University Press, 1994); Daniel Archibugi, *The Global Commonwealth of Citizens. Toward Cosmopolitan Democracy* (Princeton: Princeton University Press, 2008); for urban studies, Leonie Sandercock, *Cosmopolis II. Mongrel, Cities in the 21st Century* (London: Continuum, 2003).

² For a recent lucid statement of the end of the ‘Westphalian-Keynesian-Fordist’ paradigm, see Nancy Fraser, *Scales of Justice. Reimagining Political Space in a Globalizing World* (New York: Columbia University Press, 2009), pp. 1 -30.

justice. While norms of international law emerge either through what is recognized as customary international law or through treaty obligations to which states and their representatives are signatories, cosmopolitan norms accrue to individuals considered as moral and legal persons in a world-wide civil society. By ‘cosmopolitanism’ I have in mind both a moral and a legal proposition: morally, the cosmopolitan tradition is committed to viewing each individual as equally entitled to moral respect and concern; legally, cosmopolitanism considers each individual as a legal person entitled to the protection of their human rights in virtue of their moral personality and not on account of their citizenship or other membership status. Even if cosmopolitan norms also originate through treaty-like obligations, such as the UN Charter, the UDHR and various other human rights covenants, their peculiarity is that they bind signatory states and their representatives to treat their citizens and residents in accordance with certain norms, even when states later wish, as is often the case, to engage in actions which contradict these terms and violate the obligations generated by these treaties themselves. This is the uniqueness of the many human rights covenants concluded since WWII: through them sovereign states undertake the ‘self-limitation’ of their own prerogatives.

The best known of the human rights agreements which have been signed by a majority of the world’s states since the 1948 Universal Declaration on Human Rights (UDHR) are as follows:³ the United Nations Convention on the Prevention and Punishment of the Crime of Genocide, adopted by Resolution 260 (III) A of the UN General Assembly on December 9 1948 (Chapter II); the 1951 Convention on Refugees (which entered into force in 1954);⁴ the International Covenant on Civil and Political Rights (ICCPR; signed in 1966 and entered into

³Universal Declaration on Human Rights, G.A. res. 217A (III) (Dec. 10, 1948) [hereinafter, “UDHR”].

⁴ Convention relating to the Status of Refugees, G.A. res. 429 (V) (entered into force April 22, 1954) [hereinafter, “1951 Convention.”]

force in 1976, with 167 countries out of 195 being party to it as of 2013)⁵; the International Covenant on Economic, Social and Cultural Rights (ICESCR; entered into force the same year and with 160 member parties as of 2013),⁶ the Convention to Eliminate of All Forms of Discrimination Against Women (CEDAW; signed in 1979 and entered into force in 1981, with 99 signatories and 187 state parties as of 2013);⁷ the International Convention on the Elimination of All Forms of Racial Discrimination (entry into force on January 4th, 1969, with 86 signatories and 176 parties as of 2013);⁸ the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (entry into force June 26, 1987, with 78 signatories and 153 state parties as of 2013).⁹ These are some of the best known among many other treaties and conventions.¹⁰

In her illuminating book, *Humanity's Law*, Ruti G. Teitel has analyzed parallel developments in the domains of laws of war and peace and international criminal justice. She writes: “The normative foundations of the international legal

⁵ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976.) [hereinafer, “ICCPR”].

⁶ International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter, “ICESCR”].

⁷ The Convention to Eliminate All Forms of Discrimination Against Women, United Nations, General Assembly Resolution 34/180, Dec. 18, 1979 (entered into force, Sept. 3, 1981) [hereinafter, “CEDAW”].

⁸ International Convention on the Elimination of all Forms of Racial Discrimination, General Assembly Resolution 2106 (XX), Dec. 21, 1965.

⁹ Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Resolution 39/46, Dec. 10, 1984.

¹⁰ These provisions are, of course, augmented by many others. *See, e.g.*, Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, G.A. res. 40/144, annex, 40 U.N. GAOR Supp. (No. 53) at 252, U.N. Doc. A/40/53 (1985) (providing such “aliens” with rights to leave, liberty of movement within a country, as well as to have their spouses and minor children to be admitted to join and stay with them, and to protect them from expulsion by requiring opportunities for hearings and for decision-making not predicated on discrimination based on “race, colour, religion, culture, descent or national or ethnic origin”); Convention on the Reduction of Statelessness, 989 U.N.T.S. 175, (Dec. 13, 1975) (requiring that nations grant nationality rights, under certain conditions, to “persons born in its territory who would otherwise be stateless”); Migration for Employment (Revised) (ILO No. 97), 120 U.N.T.S. 70, (Jan. 22, 1952) (providing that members of the ILO make work policy and migration policies known and treat fairly “migrants for employment”); Declaration on Territorial Asylum, G.A. res. 2312 (XXII), 22 U.N. GAOR Supp. (No. 16) at 81, U.N. Doc. A/6716 (1967).

order have shifted from an emphasis on state security – that is, security as defined by border, statehood, territory, and so on – to a focus on human security: the security of persons and peoples. In an unstable and insecure world, the law of humanity – a framework that spans the law of war, international human rights law, and international criminal justice – reshapes the discourse of international relations.”¹¹ Just as legal cosmopolitans emphasize the *shift* from state sovereignty to the universal legal status of personhood as being decisive for the post-1948 world order, Teitel also maintains that the interstate system “is challenged by the claims of new subjects such as persons and peoples, organized along affiliative ties (such as race, religion and ethnicity)¹² that extend beyond the state and even beyond nationality. These claims range from demands for secession and sovereignty to assertion of novel rights, to claims for protection, assistance, and accountability for past wrongs, both individual- and group-based. We also see the interstate system facilitating both the civil and criminal accountability of non-state actors, while making a strong statement about the universal reach of the rule of law, and the universalizable content of the core of humanity norms.”¹³

II. The Skeptical Objection

The skeptic will ask: but what does all this really mean? What possible significance can these multilateral human rights covenants and developments in ‘humanity’s law’ have, if states continuously and brazenly violate them, manipulate them to serve their own ends, etc.? Are they not mere words at worst

¹¹ Ruti G. Teitel, *Humanity’s Law* (Oxford: Oxford University Press, 2011), p. 4. See also Rafael Domingo’s statement: “The human person, and not the state, should constitute the cornerstone of global law... a global law must find its normative foundation in the person, that is, the individual in space and time who ultimately is responsible for and is the reason for being of all jurisprudence and positive law.” In: *The New Global Law* (Cambridge: Cambridge University Press, 2010), p. xvi.

¹² The emergence of subnational as well as transnational affiliative ties is one of the interesting features of the cosmopolitan moment. Such multiple affiliations at times augment and at times clash with ideals of world-citizenship. Legal norms cannot prescribe identity formations; they may enable them. The decentering of the affiliative primacy of the nation is made possible by the transnational as well as local dialogues enabled by these treaties. See my critique of Dahl in section IV below.

¹³ Teitel, p. 7.

or aspirational ideals at best that have little traction in influencing and limiting state conduct? Do these developments create a novel, enforceable and justiciable legal world order? Doesn't the process of formulating RUD's – reservations, understandings and declarations – take the bite out of the human rights treaties in particular and make them merely convenient smoke-screens for states to hide behind?

Some of these concerns are most vividly illustrated by the political gyrations and inconsistencies of numerous U.S. politicians and Administrations in their attempts to defang the regime of international law which the U.S. had historically actively promoted – both with the League of Nations and the United Nations. Senator Bricker's proposal to amend "the Constitution to make all treaties non-self-executing," if adopted, as Martin S. Flaherty notes in a recent article, "would have blocked the threat of courts enforcing human rights instruments directly."¹⁴ Yet despite some political changes under the Carter Administration leading to the elevation of the status of human rights law in U.S. Courts, the influence of the Bricker amendment, although never adopted by the Senate, remained. Consequently, the United States never ratified the Covenant on Economic, Social and Cultural Rights, and it attached non-self-executing declarations to the International Covenant on Civil and Political Rights, the Convention on the Elimination of all Forms of Racial Discrimination, and the Convention against Torture. The United States under the Clinton Administration signed, and then under the G.W. Bush Administration exited from, the Treaty of Rome that founded the International Criminal Court.¹⁵

While skeptical doubts about state behavior and an international state-system that remains beset by violence, civil wars and proxy wars cannot be set

¹⁴ Martin S. Flaherty, "Global Power in an Age of Rights: Historical Commentary, 1946-2000," in: *International Law in the U.S. Supreme Court. Continuity and Change*, ed. by David L. Sloss, Michael D. Ramsey, and William S. Dodge (Cambridge and New York: Cambridge University Press, 2011), pp. 416-443; here p. 421.

¹⁵Eyal Benvenisti gives a more detailed account of the complexities concerning treaty ratification processes within the USA, which he characterizes as "extreme deference to the executive." In: "Exit and Voice in the Age of Globalization," 98 *Michigan Law Review* 167 (1999-2000), pp. 167-213; here p. 189.

aside, like Teitel, I remain convinced that something has changed profoundly in the grammar and syntax of the language of international law, sovereignty and human rights.¹⁶ Just as repeated use may imperceptibly change grammar and syntax in a language - consider for example, the frequent use of contractions such as “he’s” for “he is” in English - legal practice, institutionalization and adjudication may change legal doctrine. In an earlier work, I described such processes of transformation in the international domain through the use of another metaphor: we are like travelers navigating a new terrain with the help of old maps; while the terrain has radically changed our maps have not. Thus, we stumble upon streams we did not know existed, and we have to climb hills we had never dreamt of.¹⁷

Responding to the skeptic, I will argue that transnational human rights norms strengthen rather than weaken democratic sovereignty. Distinguishing between a ‘concept’ and a ‘conception’ of human rights, I will claim that self-government in a free public sphere and free civil society is essential to the concretization of the necessarily abstract norms of human rights. *My thesis is that without the right to self-government, which is exercised through proper legal and political channels, we cannot justify the range of variation in the content of basic human rights as being legitimate.* I name such processes ‘democratic iterations.’

Mirroring these imperceptible but cumulative transformations of the last three decades, the status of international law and of transnational¹⁸ legal

¹⁶ R. Teitel, pp. 7.

¹⁷ S. Benhabib, *The Rights of Others. Aliens, Residents and Citizens*. The John Seeley Lectures (Cambridge, UK: Cambridge University Press, 2004), p. 6.

¹⁸ I am using the term ‘transnational law’ in the sense described by Harold Koh as international law that moves through public and private institutions and engages not only states but non-governmental organizations as well as commercial corporations. See H. Koh, “Transnational Legal Process,” in: 75 *Nebraska Law Review*, pp. 181-208, and Harold Koh, “Transnational Public Law Litigation,” in: 100 *Yale Law Journal*, pp. 2347-2402. Cf. also Oren Perez: “This expanding network of transnational ‘legalities’ is not based on a coherent set of normative or institutional hierarchies. Rather, it represents a highly pluralistic mixture of legal regimes, with variable organizational and thematic structures: from state-oriented systems – such as the dispute settlement of the WTO, or the adjudicative system of the Law of the Sea Convention – to hybrid or private regimes.” By ‘hybrid regimes,’ Perez also means “the cooperation between public and private bodies.” In: Oren Perez, (2003) “Normative Creativity and Global Legal Pluralism:

agreements and treaties with respect to the sovereignty claims of liberal democracies has become a highly contentious theoretical and political issue. Deep divergences have emerged among democracies normally considered allies. While Europe, under the impact of the cumulative jurisprudence of the European Court of Justice, the European Court of Human Rights, and strong constitutional courts such as the *Bundesverfassungsgericht*, has moved towards a cosmopolitan order of strong rights-protection and increasing harmonization of domestic laws with the UDHR and other international treaties,¹⁹ a strong isolationist current has become visible in the U.S. Supreme Court.

At least two different controversies have dominated recent discussions. First, what is the status of foreign law, including the law of other nations and international treaties in constitutional and statutory adjudication? As we know, great variations across countries exist in this regard: while international law becomes part of the valid constitutional order in many countries of the world such as The Netherlands and South Africa (referred to as *constitutional monism*), other constitutions are *dualist* with respect to treaty-based international law, and require various forms of treaty-ratification before these can become part of the law of the land.

A second controversy concerns whether recent developments in legal doctrine and practice can be seen as leading toward ‘global constitutionalism,’ with or without the state.²⁰ *Global constitutionalists* point to increasing

Reflections on the Democratic Critique of Transnational Law,” *Indiana Journal of Global Legal Studies*: vol. 10, Issue. 2, Article 2, pp. 25-64; here p. 25.

¹⁹ Alec Stone Sweet, “A Cosmopolitan legal order: Constitutional Pluralism and Rights Adjudication in Europe,” 1 *Global Constitutionalism* 1 (2012), pp. 53-90.

²⁰ Among the literature discussing ‘world constitutionalization,’ See Bardo Fassbender, “The United Nations Charter as Constitution of the International Community,” *Columbia Journal of Transnational Law* 3 (1998); B. Fassbender, “‘We the Peoples of the United Nations’: Constituent Power and Constitutional Form,” in: *The Paradox of Constitutionalism*, M. Loughlin and N. Walker, eds. (2007); Arnim von Bogdandy, “Constitutionalism in International Law: Comment on a Proposal from Germany,” 47 *Harvard International Law Journal* (2006), pp. 223-242; Brun-Otto Bryde, “Konstitutionalisierung des Vöelkerrechts und Internationalisierung des Verfassungsbegriffs,” in: *Der Staat* 1 (2003), pp. 61-75; Hauke Brunkhorst, “Globalizing Democracy without a State: Weak Public, Strong Public, Global Constitutionalism,” 31 *Millenium: Journal of International Studies* 3 (2002), pp. 675-690.

cooperation among constitutional court justices across the globe, their learning from one another and increasingly, their citing one another in considering similar cases, not as precedent but as significant evidence. Even some scholars, such as Jeremy Waldron, who find the concept of ‘global constitutionalism’ exaggerated, nonetheless argue that there is increasing convergence around a ‘law for all nations.’²¹

Others who defend *constitutionalization without the state*, such as Gunther Teubner, single out the spread of norms of *lex mercatoria*, and many other “lex’s,” such as *lex sportiva*, to argue that processes of norm-hierarchization, coordination and cooperation beyond the purview of states have evolved into a self-regulating system.²² Why shouldn’t a system that exhibits so many features of constitutionalism also be honored with that title?

My own questions are related to, but distinct, from both sets of issues. I am interested in legal cosmopolitanism, as it bears on the moral individual as a legal person in the international community, and I wish to examine the alleged conflict between one class of international legal norms in particular, namely those pertaining to human rights, broadly understood, and democratic sovereignty.²³ The next two sections contrast the epistemic temporality of

For historical antecedents cf. Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer reinen Rechtslehre* (Vienna: Scientia Allen, [1928], 1960); Alfred Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Vienna, 1926). There are parallel discussions concerning constitutionalization in the EU; in the WTO and the IMF etc. See Alec Stone Sweet, “Constitutionalism, Legal Pluralism, and International Regimes” 16 *Indiana Journal of Global Legal Studies* 2 (2009), pp. 621 ff.

²¹ Jeremy Waldron, *Partly Laws Common to all Mankind: Foreign Law in American Courts*, Storrs Lectures, Yale University (New Haven: Yale University Press, 2012); Cf. also Jeremy Waldron, “The Supreme Court, 2004 Term-Comment: Foreign Law and the Modern Jus Gentium,” 119 *Harvard Law Review* 129 (2005).

²² For the first position see Gunther Teubner, “Global Bukovina,” in *Global Law Without a State*, G. Teubner, ed. (Aldershot and Brookfield, Vermont: Dartmouth Publishing Com., 1997), pp. 3-28; Gunther Teubner, “Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory,” in: *Transnational Governance and Constitutionalism*, Christian Joerges, I. J. Sand and G. Teubner, eds. (Oxford: Hart Publishers, 2004), pp. 3-29.

²³ Jean Cohen gives a useful overview of the debate among global constitutionalists and legal pluralists, claiming that both positions represent either a mistaken monism or a dualism; instead she pleads for “constitutional pluralism.” See Jean L. Cohen, “Constitutionalism Beyond the State: Myth or Necessity? (A Pluralist Approach),” 2 *Humanity* 1 (Spring 2011), pp. 127-158. Cohen identifies ‘cosmopolitanism’ as a *monist* position (Ibid., note 14, p. 151). But my theory of

contemporary political science with that of legal scholarship (III) by focusing on a well-known essay by Robert Dahl- “Can International Organizations be Democratic?” (IV) I compare Dahl’s negative answer with three theses: the thesis that state sovereignty has been radically transformed; the thesis that multilateral international organizations can enhance democracies; and the thesis that becoming signatories to human rights treaties has empowering effects on states – whether democratic or not.

While none of these theses amounts to the defense of a global constitutional subject, I engage briefly with Michel Rosenfeld’s work and maintain that the formation of global cosmopolitan *subjectivities* is more important than positing a non-existent global subject. (V)

The final sections of the paper turn to a philosophical elucidation of the relationship between transnational human rights norms and democratic sovereignty by engaging in normative political theory. (VI-IX)

III. A note on Disciplinary Temporality

Permit me an observation on what I would like to call ‘disciplinary temporality.’ Disciplines have their privileged object domains; this is what legitimizes their boundaries. But as the boundaries of the post-Westphalian state system become blurrier as a consequence of contemporary developments, disciplinary boundaries get blurred as well. Some disciplines lose their privileged object domain, while others imperceptibly gain new ones. Although I cannot fully document this claim here, I would argue that at the end of the Cold War and with the transition out of communism of east-central European countries in the mid- to late-1980’s, sociology was overtaken by political science. Sociology, since Durkheim, Weber, Simmel and many others, had been a ‘moral science’ that dealt

‘jurisgenerativity’ and ‘democratic iterations’ is designed precisely to counteract such monism. See S. Benhabib, *Dignity in Adversity. Human Rights in Troubled Times*, pp. 1-20; 117-138. The charge the cosmopolitanism is a ‘monism,’ rests on an inadequate differentiation in some versions of cosmopolitan theory (such as Martha Nussbaum’s) between the *logic* of cosmopolitan norms as normative *principles* and their instantiation in constitutional and statutory contexts as *justiciable norms*. See Seyla Benhabib, “Reason-Giving and Rights-Bearing: Constructing the Subject of Rights,” *Constellations. An International Journal of Critical and Democratic Theory*, vol. 20, No. 1 (March 2013), pp. 38-51.

with the integration, legitimation, distribution and socialization problems of a national civil society, bounded by a centralized nation-state. This national civil society and not world-society (Niklas Luhmann), was the privileged object domain of classical sociology.²⁴ The end of the Cold War confronted sociological theory with renewed normative questions such as nation-formation, minority and multicultural rights, decentralizing the state, pluralist constitution-making, federalism, and consociationalism. The system of states was changing, and along with it, the privileged object of sociology was disappearing. In this context, political science – questions of the *who* (who constitutes the demos), the *what* (what are the main conflicts about – redistribution or recognition), and the *how* of the polity (how can these conflicts be resolved – by secession, multicultural arrangements, federalism, etc.) – once more gained ascendancy.²⁵

Surveying the legal writing of the last two decades on constitutionalization with or without the state, global constitutionalism, legal pluralism, constitutional pluralism, juridification or constitutionalization in the world-society etc., I have the impression that law and legal scholarship today, much as they helped to consolidate the gains of the interstate Westphalian peace

²⁴ Generalizations of this kind are always in danger of simplifying, but at times they are useful precisely because in their simplicity they may capture certain truths. In recent years, Ulrich Beck has made the strongest case for going beyond the nation-state centered framework of classical sociology. See among his many works: Ulrich Beck, *Risk Society. Towards a New Modernity*, trans by Mark Ritter (London: Sage Publications, 1992); *Cosmopolitan Vision* (Cambridge, UK: Polity Press, 2006). Social scientists and historians such as Fernand Braudel, Charles Tilly, Immanuel Maurice Wallerstein and Michael Mann were among the first to break away from nation-state centered boundaries and focus on power and state-formation in a world society. Cf. Fernand Braudel and Sian Reynold. *The Perspective of the World. Civilization and Capitalism. 15th-18th Century*, 3 vols. (Berkeley: University of California Press, 1992); Immanuel Maurice Wallerstein, ed. *The Modern World System in the Long Duree* (Fernand Braudel Center Series) [Colorado: Paradigm Publishers, 2004]; Charles Tilly, *Coercion, Capital and European States: AD 990-1992* (Cambridge, MA and Oxford, UK: Basil Blackwell, 1990); C. Tilly, *Social Movements. 1768-2008* (Basil Blackwell, 2004); Michael Mann, *The Sources of Social Power: Volume 1. A History of Power from the Beginning to AD 1760* (Cambridge, UK: Cambridge University Press, 1986); *The Sources of Social Power: Volume 2. The Rise of Classes and Nation-States 1760-1914* (Cambridge, UK: Cambridge University Press, 1993).

²⁵ For a trenchant statement, see Claus Offe, “‘Homogeneity’ and Constitutional Democracy: Coping with Identity Conflicts Through Group Rights,” *6 Journal of Political Philosophy* 2 (1998), pp. 113-141.

of 1648 by providing the philosophical and jurisprudential bases of liberal bourgeois revolutions in the 18th century, are anticipating a world that is yet to be born, “*une vérité à faire*.”²⁶ Legal scholarship has become a constitutive element of a new world that is yet to come, but which we, as contemporaries, can only grasp with the help of various metaphors.

By contrast, political science has lost its privileged object domain – the state and inter-state relations. This observation pertains both to Realists who take the unitary state as the principal actor for all reflection and investigation, and to Liberal Internationalists who have a more pluralist vision of the state and who analyze state behavior differently. Whether we think that states behave as self-interested principals, or as agents and principals that are susceptible to normative and value considerations and are not guided by strategic self-interest alone, the unit we are looking at remains the same: the state and its institutions. Whereas the new legal scholarship has ‘disaggregated’ this unit, political science – with few exceptions – has not yet taken note of these transformations.

IV. Robert Dahl on Democracy and Skepticism Toward International Institutions

Consider the highly influential article by Robert A. Dahl, “Can international organizations be democratic? A skeptic’s View,”²⁷ and his crisp answer, “an international organization is not and probably cannot be democratic.”²⁸ Dahl argues that the most important aspects of democracy are that it is a “system of popular control over governmental policies and decisions,” and that is “a system of fundamental rights.”²⁹ Viewed thus, democracy consists “of rule by the people, or rather the demos, with a government of the state that is responsive and accountable to the demos, a sovereign authority that decides

²⁶ J. Cohen (2011), p. 128.

²⁷ In: Ian Shapiro and Casiano Hacker-Cordon, eds., *Democracy’s Edges* (Cambridge, UK: Cambridge University Press, 1999), pp. 19-36.

²⁸ *Ibid.*, p. 19.

²⁹ *Ibid.*, p. 20.

important political matters either directly in popular assemblies or indirectly through representatives...”³⁰

Having established these non-controversial features of democracies, Dahl then states his main argument: “In democratic countries where democratic institutions and practices have long been and well established and where, as best we can tell, a fairly strong democratic political culture exists, it is notoriously difficult for citizens to exercise effective control over many key decisions on foreign affairs. What grounds have we for thinking then, that citizens in different countries engaged in international systems can ever attain the degree of influence and control over decisions they now exercise within their own countries?”³¹ Dahl’s skeptical answer emphasizes (i) epistemic limits, (ii) cultural diversity, and (iii) procedural factors, as deterrents to citizens being able to exercise such control.

Ad. i. Since international matters are infinitely complex, they are beyond the judgment of the average citizen and are often handled by experts. But, we may ask, is it more difficult to understand why the spread of AIDS in Africa needs to be stopped than to decipher the US Federal tax code? Isn’t the epistemic argument of complexity a matter of degree rather than of kind?

Ad. ii. For Dahl, when a democratic unit is enlarged to include new territory and people, “the demos is likely to become more heterogeneous.”³² Diversity increases the possible cleavages over socio-economic and political interests, as well as over cultural, national and religious identity, and this, in turn, makes it more difficult for citizens to understand the situation, needs, conditions, and aims of “distant others.”³³ However, in complex modern societies whose population is getting rapidly reconfigured under conditions of global economic migrations, cultural and scientific exchanges and world-wide travel, isn’t the demos quite “non-homogeneous” already? Doesn’t Dahl’s conception of the citizens’ perceptions of their own interests and identities seriously

³⁰ Ibid.

³¹ Ibid., p. 23.

³² Ibid., p. 26.

³³ Ibid.

underestimate the deep diasporic attachments and multiple identities that citizens may feel with subnational as well as transnational groups? Again, is this a matter of degree or of kind?

Ad. iii. The proper criterion for government decisions is the public good. But Dahl sees both substantive and procedural hurdles to realize this in international organizations. Substantive hurdles concern the divergence of interests and identities. Procedurally, the public good is as contested in international matters as in domestic ones, yet the weight of elite consensus on international matters means that the views and interests of the majority of citizens would not be represented. But don't similar trends exist in domestic politics as well, and furthermore, why couldn't procedural reform and institutional tinkering lead to better representation of interests and a more affective articulation of the good of all those affected in international institutions as well?

In sum: Dahl's answer that international organizations cannot be democratic, is based upon the model of a conventionally state-centered and homogeneous demos with very clear lines demarcating the inside from the outside, domestic from foreign politics.³⁴ His examples drawing from the European Union experience are no longer historically accurate, since they largely pertain to the mid-nineteen-nineties when debates around the Maastricht Treaty dominated. Let me also add that the European Union, strictly speaking, is not just an international organization as Dahl argues, but a "constitutional post-national polity."

³⁴ All democracies presuppose a principle of membership according to which some are entitled to political voice while others are excluded. The decision as to who is entitled to have political voice and who is not can only be reached, however, if some who are already members decide who is to be excluded and who is not. This means that there can be no non-circular manner of determining democratic membership. Robert Dahl had already observed that the problem of how to legitimately make up the people had been neglected by all major democratic theorists. See Robert Dahl, *Democracy and its Critics* (New Haven: Yale University Press, 1989), pp. 119-131; Robert Dahl, *After the Revolution* (New Haven: Yale University Press, 1970), pp. 59-63. For an attempt to ameliorate Dahl's paradox, see S. Benhabib, "Democratic Exclusions and Democratic Iterations: Dilemmas of Just Membership and Prospects of Cosmopolitan Federalism," in: *Dignity in Adversity*, pp. 138-166.

Dahl concedes that sometimes citizens can get sufficiently galvanized such that foreign affairs are seen along more of a continuum with domestic ones and this can cause their passions to enflame. He also observes that “international organizations can help to expand human rights and the rule of law.”³⁵ But in the final analysis, such institutions will remain “bureaucratic bargaining systems,” even if we need to develop democratic criteria to judge them.

Dahl’s nation-state centric understanding of international organizations and institutions is not adequate to account for the radical interdependence of states throughout the ecological, immunological, financial, banking, and many other global systems and networks in our days. Whereas historically, states could more or less hope to influence their external environment through their own actions and policy measures, today the scope and effectiveness of state action and capacity have been greatly reduced.³⁶ States are one among many actors in transnational networks that they cannot control. The sovereign-debt crisis of the last years is one of the most vivid illustrations of states’ dependence upon international organizations, networks, and processes, showing the degree to which Dahl’s boundary categories have become superceded. Nevertheless, Dahl poses a fundamental challenge to which there are no easy answers: in the post-Westphalian world, where state sovereignty has been greatly diminished, what are the new political configurations that are to house democracies? As I will argue below, I too proceed from a strong normative model of ‘democratic authorship,’ which makes democratic procedures and institutions fundamental for legitimacy. How is this to be envisioned in a post-Westphalian context?

There are three positions within contemporary social science that provide us with a different assessment of the relationship of democracies to international institutions. I will name these “the transformation of sovereignty thesis” (TOS);

³⁵ R. Dahl (1999), p. 32.

³⁶ It is important to stress “the more or less” clause here because no state, in any century, could control factors affecting it, but the tremendous intensification of transborder transfers in news, germs, money, fashion, and much else with the facilitation of new electronic and travel technologies is a novum in human history. From 1990 to 2000 the number of transnational NGO’s has quadrupled; from 1980 to 2000 “the number of international governmental organizations (“IGO’s”) and emanations has more than doubled, as has the number of treaties deposited in the United Nations.” Daniel W. Drezner, “On the Balance Between International Law and Democratic Sovereignty,” vol. 2, No. 2, *Chicago Journal of International Law* (Fall 2001), pp. 321-336; here p. 322.

the thesis that “democracies need international institutions” (DNII); and the thesis that “international institutions strengthen human rights (IIHR).”

Saskia Sassen, one of the most prominent defenders of the TOS thesis,³⁷ notes that the national and the transnational are not binaries; they interpenetrate; the national tries to structure the transnational and the transnational is both enframed by and simultaneously pushes up against the limits of the national. Relations with other *demoi* are no longer intermittent and episodic but continuous and structural. “State sovereignty,” writes Sassen, “is usually understood as the State’s monopoly of authority over a particular territory, demarcated by reasonably established geographic borders. Today, it is becoming evident that even as national territories remain bound by traditional geographic borderlines, globalization is causing novel types of ‘borderings’ to multiply...”³⁸ Among those most significant novel ‘borderings’ are the ‘denationalization’ of what was once national. “[The] State,” adds Sassen, “plays an active role in this denationalizing, but this only becomes evident when we disaggregate ‘the’ State and examine the work of particular parts of the State: particular agencies, particular court decisions, particular executive conditions. It also means that this denationalizing can coexist with traditional borders and with the ongoing role of the State in new global regimes.”³⁹

Whereas Sassen questions the sociological adequacy of the model of state sovereignty that underlines Dahl’s concept of democracy, in an influential article titled, “Democracy Enhancing Multilateralism,” Robert O. Koehane, Stephen

³⁷ Saskia Sassen, “Bordering Capabilities versus Borders: Implications for National Borders,” 30 *Michigan Journal of International Law* (2008-2009), pp. 567-597. See also S. Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (New Jersey and Oxford: Princeton University Press, 2006).

³⁸ Saskia Sassen, “Bordering Capabilities versus Borders: Implications for National Borders,” 30 *Michigan Journal of International Law* (2008-2009), p. 567. See also S. See also Wendy Brown, *Walled States, Waning Sovereignty* (New York: Zone Books, 2010), and my essay “Twilight of Sovereignty or the Emergence of Cosmopolitan Norms,” in: *Dignity in Adversity*, pp.94-117; cf. J.G. Ruggie, “Territoriality and Beyond: Problematizing Modernity in International Relations,” 47 *International Organization* 1 (1993), pp. 139-74. From a more jurisprudential point of view cf. Abram Chayes and Antonia Handler Chayes, *The New Sovereignty. Compliance with International Regulatory Agreements* (Cambridge, MA: Harvard University Press, 1995).

³⁹ S. Sassen (2008-9), 569.

Macedo and Andrew Moravcsik, argue “that participants in multilateral institutions – defined broadly to include international organizations, regimes and networks governed by formal international agreements, can enhance the quality of domestic democracy.”⁴⁰ Defenders of the DNII thesis see this “democracy-enhancement” as occurring in three domains: they argue that membership in international organizations restricts the power of special interest groups within states in matters concerning the environment and global trade, for example. Such membership can enhance the protection of minority rights either through treaty membership or by belonging to regional human rights regimes such as the European Convention on Human Rights and Fundamental Freedoms, the African Charter of Human Rights and Duties, etc. Finally, they see such membership as enhancing the quality of democratic deliberation by “fostering collective deliberation in non-majoritarian institutions,” such as “courts, bureaucratic agencies, national executives and the military.”⁴¹ One of the most prominent examples of deliberation-enhancing, non-majoritarian institution is the Intergovernmental Panel on Climate Change, formed under UN auspices in 1988. Throughout, the authors’ strategy is to take issue with conceptions of direct deliberative democracy by arguing that just as constitutional democracy means that peoples accept certain limits on their unbridled sovereignty so as to govern themselves democratically over the long-term (and not just on the basis of periodic majoritarian elections), so too, multilateral institutions and regimes can be seen as creating institutional and normative limitations on democratic majorities such as to enable better cooperation on a global scale. In sections VI VII, and VII I will defend a more robust conception of deliberative democracy than the advocates of DNII, but on the whole I am in agreement with the strategy of their argument concerning the interaction of democracies and multilateral institutions.

Beth Simmons’s recent work supports the third thesis (IIHR), namely, that international institutions strengthen observance of, and respect for, human rights in non-democracies as well as democracies. Simmons has provided

⁴⁰ In: *International Organization* 63 (Winter 2009), pp. 1-31; here p.1.

⁴¹ *Ibid.*, 18-9.

empirical case studies to analyze the impact of states' ratifications of various human rights treaties on domestic adherence to human rights norms. She observes that "the more interesting cases ... are those in which governments ratify an international human rights agreement, yet make no move to implement or comply with it. Why should a ratified treaty make a difference in such cases?"⁴² One reason may be that since treaties constitute law in some jurisdictions, they could strengthen civil rights litigation. Yet it is more challenging when ratified treaties enable citizens' mobilization. Simmons focuses on "non-democratic" states to argue that "ratification injects a new model of rights into domestic discourse, potentially altering expectations of domestic groups and encouraging them to imagine themselves as entitled to forms of official respect."⁴³ Furthermore, "Treaties create additional political resources for pro-rights coalitions under these circumstances. They resonate well with an embryonic rule of law culture and gather support from groups that not only believe in the specific rights at stake, but also believe they must take a stand on rule-governed political behavior in general."⁴⁴ Simmons presents an analysis of the impact of the ICCPR on civil liberties and religious freedoms across several countries. "These results suggest," she writes, "a modest but important conclusion: international treaty commitments quite likely have made a positive contribution to civil rights practices in many countries around the world."⁴⁵

In view of these perspectives, new questions suggest themselves: rather than being confined to the nation-centric demos, democracy itself may no longer be possible *except* as a project of *state interdependence and global cooperation*.

⁴² See Beth Simmons, "Civil Rights in International Law: Compliance with Aspects of the "International Bill of Rights," *Indiana Journal of Global Legal Studies*, vol. 16, No. 2 (Summer 2009), pp. 437-481, here p. 443.

⁴³ *Ibid.*, p. 445.

⁴⁴ *Ibid.*, p. 447.

⁴⁵ *Ibid.*, p. 480. For further research on the significance of treaty ratification for human rights' observance and activism, see Margaret E. Kick and Kathryn Sikkink, *Activists Beyond Borders* (Ithaca: Cornell University Press, 1998); Thomas Risse, Steven Rapp, and Kathryn Sikkink, *The Power of Human Rights: International Norms and Domestic Change* (Cambridge, UK: Cambridge University Press, 1999); Beth Simmons *Mobilizing for Human Rights. International Law in Domestic Politics*, (Cambridge, UK: Cambridge University Press, 2009).

Second, international organizations themselves need to be increasingly subject to multilateral criteria of democratic accountability and transparency, as Dahl also agrees. In fact, some of the literature on constitutionalization and human rights now focuses on subjecting WTO, IMF and various public administrative law regimes to observing human rights norms.⁴⁶

V. From Democratic Skepticism to Global Legal Utopianism. Michel Rosenfeld on the Constitutional Subject

Michel Rosenfeld's recent and eloquent appeal for global citizenship, in his important new book, *The Identity of the Constitutional Subject. Selfhood, Citizenship, Culture and Community*,⁴⁷ well illustrates the contrast between the democratic *political realism* of a Robert Dahl and the *legal utopianism* of law scholars. Rosenfeld writes: "For all its promise, global citizenship may not be ultimately desirable if it proved dependent on global government. Arguably, however, global citizenship could be sustained by global *governance* without global *government*. Furthermore, if international human rights were regarded as providing partial citizenship rights on all human beings, then we already have in place elements of global governance that are linked to certain attributes of global citizenship."⁴⁸ These observations precede Rosenfeld's provocatively titled final chapter, "Can the Constitutional Subject Go Global?"⁴⁹ With these concluding considerations, Rosenfeld engages the intense contemporary debate on global

⁴⁶ See Nico Krisch, "Global Administrative Law and the Constitutional Ambition," in: *The Twilight of Constitutionalism*, ed. Petra Dobner and Martin Loughlin (Oxford: Oxford University Press, 2010), pp. 245-267; Ann Peters, "Membership in the Global Constitutional Community," sections on International Organizations and Business Actors, in: Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford and New York: Oxford University Press, 2009), pp. 153-263

⁴⁷ Michel Rosenfeld, *The Identity of the Constitutional Subject. Selfhood, Citizenship, Culture, and Community* (London and New York: Routledge, 2010). All references in the text are to this edition. Cf. my review: "On Michel Rosenfeld's *The Identity of the Constitutional Subject*," 33 *Cardozo Law Review* 5 (Spring 2012), pp. 101-119.

⁴⁸ M. Rosenfeld (2010), p. 246, emphasis in the original text.

⁴⁹ *Ibid.*, p. 243 ff.

constitutionalism.⁵⁰ Rosenfeld is well aware of the difficulties of proposing that a *global subject* may even be imagined as a *utopian* possibility. He suggests, nevertheless, in analogy with Jürgen Habermas’s proposal for “constitutional patriotism” situated in a “layered and segmented plural transnational order,” that one could conceive of a “human rights patriotism,” coupled with “constitutional necessity.”⁵¹

Is human rights patriotism compatible with constitutional necessity? Rosenfeld understands constitutional necessity as being embedded in a *legally pluralist* order, comprising different regional, functional and segmented legal regimes.⁵² But it seems to me too easy a solution to think that such legal pluralism can accommodate human rights patriotism. The mediations envisaged by Rosenfeld between the segmented plurality of current legal regimes and global constitutional human rights, such that “the universal and the particular together yield the singular,” strike me as being too smooth and not as riven by the kind of dialectical tensions that Rosenfeld had earlier analyzed the relationship between the national and the constitutional subject to be.⁵³ Nor should it be surprising why this would be so. The *global constitutional subject* is neither an individual, nor a collectivity, nor a plurality. At the present it is not a *subject* at all. Current world society presents more and less advanced degrees of constitutional integration, as is the case of the European Union; an imperfect transnational organization as the world’s sole public authority, that is, the United Nations; regional human rights courts, such as the Inter-American Court of Human Rights and others; transnational institutions of global governance, such as the IMF and the World Bank; an International Court of Justice, as well as partial self-governing regimes of legal regulation such as the *lex mercatoria*. The geography

⁵⁰ In addition to the literature discussed in note 20 above, cf. Petra Dobner and Martin Loughlin, eds. *The Twilight of Constitutionalism*; J. L. Dunoff and J. P. Trachtman, eds.; *Ruling the World? Constitutionalism, International law and Global Governance* (Cambridge, UK: Cambridge University Press, 2009); J. Weiler, “Prologue – Constitutionalism – Global and Pluralist,” in Grainne de Burca and J. Weiler, eds. *The Worlds of European Constitutionalism* (Cambridge, UK: Cambridge University Press, 2011).

⁵¹ *Ibid.*, p. 261.

⁵² *Ibid.*, p. 267.

⁵³ *Ibid.*, p. 243.

of the current world-society exhibits a degree of plurality of principle and organization⁵⁴ such that all references to a ‘global constitutional subject’ must be understood as metaphors only.

I want to emphasize the formation of *global subjectivities* as opposed to the search for a global constitutional *subject*. For me, the crucial issue is the *formation of the ethics of cosmopolitan citizenship* rather than the identity of the global constitutional subject. Is there really a difference between the two? I believe that there is. Let me elucidate this by focusing on the relationship of *human rights* and *constitutional rights*. Rosenfeld equates the two rather quickly, thus minimizing the difficulties of forming global subjectivities. This will also permit me to return to the question whether legal cosmopolitanism is a form of constitutional monism and what degree of pluralism can be thought to be compatible with legal cosmopolitanism, when it comes to the interpretation of human rights in different polities. I want to integrate here legal scholars’ contributions to this debate with certain normative considerations on human rights and democratic theory. I want to follow the DNII and IIHR theses presented above, by elucidating a more philosophical approach to the interdependence of democracy and human rights. Human rights constitute the core of legal cosmopolitanism; without clarifying the relationship of human rights treaties and international practices to the institutions and practices of states, much talk about legal cosmopolitanism hangs in thin air.⁵⁵

⁵⁴ Such a pluralist, institutional model of transnational institutions is offered by Eyal Benvenisti, who, while agreeing with the difficulties of democracies to effectively control transnational institutions, nevertheless claims that “transnational institutions would be capable of responding to a greater number of collective action problems in ways that not only promote efficiency, but democracy and social justice as well.” In: Eyal Benvenisti, “Exit and Voice in the Age of Globalization,” 98 *Michigan Law Review* 167 (1999-2000), pp. 167-213; here p. 202. Benvenisti sees transnational institutions as functioning “in tandem with parallel domestic processes.” (203) I agree with the general argument of this article, but I cannot do justice to its complexities here. Benvenisti’s position is also interesting in that it focuses on transnational economic issues.

⁵⁵ In recent years, the historiography of human rights has commanded the attention of many historians as well and it is as if each historian has his or her heroes and heroines in telling the tale of the Universal Declaration of Human Rights in particular. For Mary Ann Glendon, this is Eleanor Roosevelt [*A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001)]; for Samantha Powers it was Ralph Lemkin [*A Problem from Hell: America and the Age of Genocide* (New York: Basic Books, 2002)]; for

Christopher McCrudden observes that in considering the meaning and significance of national judges' citation of judgments from other jurisdictions in cases with a significant human (or constitutional) rights aspect, three questions suggest themselves: "empirical questions (how far does it happen, and where?), jurisprudential questions (can we identify criteria that help explain why it does or does not happen), and normative questions (is it legitimate?).⁵⁶ McCrudden believes that the first two are "the most pressing, and probably the most difficult to resolve."⁵⁷ Alas, in the following sections of this essay, I can only hope to contribute to a clarification of the third -- normative -- problem by focusing on human rights and the democratic right to self-governance.

Jay Winter it is the French jurist Renee Cassin [*Dreams of Peace and Freedom: Utopian Movements in the Twentieth Century* (New Haven: Yale University Press, 2006)]; for Marx Mazower, it is the South African Prime Minister Smuts, whose efforts ironically resulted in the condemnation of his own South Africa for its treatment of 'colored peoples' [*No Enchanted Palace: the End of Empire and the Ideological Origins of the United Nations*. Lawrence Stone Lectures. (New Jersey: Princeton University Press, 2009)]. Johannes Morsink's extremely instructive and more philosophical reconstruction of the debates resulting in the Universal Declaration has the Canadian Humphreys as its hero. [*The Universal Declaration of Human Rights. Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 1999)]. As opposed to these works, Samuel Moyn's much-discussed narrative is less reverent and explicitly anti-teleological and anti-hagiographic [*The Last Utopia. Human Rights in History* (Cambridge: Cambridge University Press, 2010)]. Joining Marc Bloch in criticizing the "idol of origins" (we can also think here of Walter Benjamin), he refuses to see history as the tracing of antecedents and argues that when it comes to human rights, they are something new that transformed old currents beyond recognition (42). The "true key to the broken history of human rights, then, is the move from the politics of the state to the morality of the globe which now defines contemporary aspirations." (42) This passage succinctly states Moyn's historiographic method. As opposed to Lynn Hunt's earlier work [cf. Lynn Hunt, *Inventing Human Rights. A History* (New York: Norton, 2007)] that drew a parallel between the rise of humanitarian concerns and human rights along a continuous line across modernity, Moyn emphasizes ruptures, discontinuity, and unexpected breaks. Where Moyn goes wrong is in his simplistic juxtaposition of human rights and self-determination, and in misconstruing the interaction between the ethical and political dimensions of human rights. See sections VII and IX below.

⁵⁶ Christopher McCrudden, "A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights," 20 *Oxford Journal of Legal Studies* 4 (2000), pp. 499-532; here p. 499. McCrudden distinguishes sharply between "the use of *foreign* human rights law" and "*international* human rights law" and "foreign human rights law that purports to be interpretative of international human rights law..." (510)

⁵⁷ *Ibid.*, p. 532.

VI. Human Rights and Constitutional Rights

There is wide-ranging disagreement among contemporary philosophers about the philosophical justification as well as the content of human rights. Some argue that human rights constitute the “core of a universal thin morality,” (Michael Walzer), while others claim that they form “reasonable conditions of a world-political consensus,” (Martha Nussbaum). Still others narrow the concept of human rights “to a minimum standard of well-ordered political institutions for all peoples”(John Rawls) ⁵⁸. As is well-known, John Rawls cautioned that a distinction needed to be made between the list of human rights included in the Law of Peoples, and defensible from the standpoint of a global public reason, and the Universal Declaration of Human Rights of 1948. These different justifications of human rights inevitably lead to a certain variation in content and to “cherry-picking” among various lists of rights. Thus, Allen Buchanan in a recent article has noted that there is a “justification deficit” in human rights discourse, characterized by the “disturbing fact that, while the global culture and institutionalization of human rights” has gained considerable traction, “the nature of the justification for claims about the existence of human rights remains obscure.”⁵⁹

Admittedly, the philosophical discussion of human rights and the conversation among lawyers, jurists, and legal scholars do not run in tandem, but the philosophical debate does raise a legitimate question about the relationship of human rights norms and constitutional rights. In this essay, I do not provide my preferred strategy of philosophical justification for human rights, which proceeds

⁵⁸ Michael Walzer, *Thick and Thin: Moral Argument at Home and Abroad*, (Notre Dame, IN: University of Notre Dame Press, 1994); Martha C. Nussbaum, “Capabilities and Human Rights,” in: *Fordham Law Review* (1997-98), vol. 66, No. 273, pp. 273-300; John Rawls, “The Law of Peoples,” [1993], in: J. Rawls, *Collected Papers*, ed. by Samuel Freeman (Cambridge, MA: Harvard University Press, 1999), pp. 529-564; here p. 552. There are interesting differences in formulation between this early article and Rawls’s later book *The Law of Peoples*. See J. Rawls, *The Law of Peoples with “The Idea of Public Reason Revisited,”* (Cambridge, Mass.: Harvard University Press, 1999).

⁵⁹ Allen Buchanan, “The Egalitarianism of Human Rights,” 120 *Ethics* (July 2010), pp. 669-710; here, p. 679.

from the value and norm of communicative freedom. I have done so elsewhere.⁶⁰ Briefly, in my view, human rights constitute a narrower group of claims than general moral rights; human rights bear on human dignity and equality; they are protective of the *human status* as such. I agree with James Griffin that human rights do not exhaust the *entirety* of our conceptions of justice, let alone of morality.⁶¹ Human rights have their proper place in discourses of political legitimation. Such discourses presuppose moral principles, in the sense that the justification of human rights always leads back to some moral principle and some view of human agency. Human rights are most central to a public vocabulary of political justice; they designate a special and narrow class of moral rights.⁶²

Human rights covenants and declarations articulate general principles which need contextualization and specification in the form of legal norms. How is this legal content to be shaped? Basic human rights are rights that require justiciable form, i.e. rights that require embodiment and instantiation in a

⁶⁰ See S. Benhabib, "Another Universalism. On the Unity and Diversity of Human Rights," in: *Dignity in Adversity*, pp. 57-77; S. Benhabib, "Reason-Giving and Rights-Bearing: Constructing the Subject of Rights," *Constellations: An International Journal of Critical and Democratic Theory*, pp. 38-51.

⁶¹ James Griffin, "Human Rights: Questions of Aim and Approach," in: 120 *Ethics* (July 2010), pp. 741-760; here p. 745.

⁶² In recent debates, two quite distinct ways of considering human rights have emerged: the so-called "traditional" conception of Alan Gewirth and James Griffin, to be distinguished from the so-called "political" or "functional" (Joseph Raz and Charles Beitz) conception of rights, inspired by John Rawls's work in *The Law of Peoples*. Whereas traditional human rights theories such as Alan Gewirth's and James Griffin's, build human rights around a conception of human agency, the approach to human rights initiated by John Rawls's project of developing "public reason," presupposes that the late modern political world, characterized by an inevitable value pluralism and by burdens of judgment, does not need to presuppose any such philosophical accounts. See Alan Gewirth, *Human Rights. Essays on Justification and Applications* (Chicago: University of Chicago Press, 1982) and A. Gewirth, *The Community of Rights* (Chicago: University of Chicago Press, 1996); James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2009); J. Rawls, *The Law of Peoples with "The Idea of Public Reason Revisited,"* (Cambridge, Mass.: Harvard University Press, 1999); Charles Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009), p. 13; Joseph Raz, "Human Rights Without Foundations," in: *The Philosophy of International Law*, ed. by Samantha Besson and John Tasioulas (Oxford: Oxford University Press, 2010), pp. 321-339. Pablo Gilabert names the "traditional" conception the "humanistic" view," in: "Humanist and Political Perspectives on Human Rights," *Political Theory* vol. 39, No. 4 (May 2011), pp. 439-467. I discuss these differences in Benhabib, "Reason-Giving and Rights-Bearing. Constructing the Subject of Rights," pp. 38 ff.

specific legal framework. Human rights straddle that line between morality and legality; they enable us to judge the legitimacy of law.⁶³

It is important to consider Habermas's caveat about not making an all-too-hasty transition from human rights considered as moral principles to constitutional rights: "Hence we must not understand basic rights or *Grundrechte*, which take the shape of constitutional norms, as mere imitations of moral rights, and we must not take political autonomy to be a mere copy of moral autonomy. Rather, norms of action *branch out* into moral and legal rules."⁶⁴ Since even basic constitutional norms such as respect for the dignity of the person and equality need to be promulgated in accordance with a specific jurisdiction and in a specific time and place, they differ from moral norms which are valid for human beings at all times and places. Moral principles, such as respect for human dignity and equality, do not *dictate* a specific constitutional content, but all constitutional basic norms entail certain moral principles of respect for persons, their equality and dignity.⁶⁵

In negotiating the relationship between general human rights norms, as formulated in various human rights declaration, and their concretization in the multiple legal documents of various countries, we may invoke the distinction between a *concept* and a *conception*.⁶⁶ We need to differentiate between *moral concepts* such as fairness, equality and liberty – let us say – and *conceptions* of

⁶³ See the classical essay by Ronald Dworkin, "Taking Rights Seriously" (1970), in: *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1978), pp. 184ff.

⁶⁴ Jürgen Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*, translated by William Rehg (Cambridge, UK: Polity Press, 1996), p. 107.

⁶⁵ Robert Alexy argues that constitutional rights are principles: "...the decisive point in distinguishing rules from principles is that principles are norms which require that something be realized to the greatest extent possible given their legal and factual possibilities. Principles are optimization requirements, characterized by the fact that they can be satisfied to varying degrees...[B]y contrast rules are norms that are always either fulfilled or not." Robert Alexy, *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 2002), pp. 47-48 and Matthias Kumm, "Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice," *I.CON*, vol. 2, No. 3 (2004), pp. 574-596.

⁶⁶ In *A Theory of Justice*, Rawls invokes H.L. A. Hart's discussion in *The Concept of Law* to introduce this distinction. See John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), here p. 5 and H.L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1975 [1961]), pp. 155-159. My usage of these terms is more kindred to Dworkin's as cited in note 67 below. Many thanks to the late Ed Baker for clarifying some of the intertextual issues involved here.

fairness, equality and liberty which would be attained as a result of introducing additional moral and political principles to supplement the original conception.⁶⁷ Should justice be defined as “fairness” (Rawls) or as “from each according to his abilities to each according to his needs” (Marx)? To be able to argue for one or the other, we would need to introduce some further claims about scarcity, human needs and wants, the structure of the basic subject of justice and the like to supplement our original concept of justice.

Applied to the question of how we move from general normative principles of human rights, as enshrined in the various covenants, to specific formulations of them as enacted in various legal documents, this would suggest the following: We can view these documents as formulating core *concepts* of human rights which would form part of any *conception* of valid constitutional rights. How then is the legitimate range of rights to be determined across liberal democracies, or how can we transition from general *concepts* of rights to specific *conceptions* of them? Even as fundamental a principle as “the moral equality of persons” assumes a justiciable meaning as a human right once it is posited and interpreted by a democratic law-giver. And here a range of legitimate variations can always be the case. For example, while equality before the law is a fundamental principle for all societies observing the rule of law, in many societies such as Canada, Israel and India, this is considered quite compatible with special immunities and entitlements which accrue to individuals in virtue of their belonging to different cultural, linguistic and religious groups. For societies such as the United States and France, with their more universalistic understandings of citizenship, these multicultural arrangements would be completely unacceptable.⁶⁸ At the same time, in France and Germany, the norm of gender equality has led political parties to adopt various versions of the principle of “parité” – namely that women ought to hold public offices on a fifty-fifty basis with men, and that for electoral office, their names ought to be placed on party

⁶⁷ R. Dworkin, “Constitutional Cases,” in: *Taking Rights Seriously*, pp. 131-149; here pp. 134 ff.

⁶⁸ Seyla Benhabib, *The Claims of Culture. Equality and Diversity in the Global Era* (Princeton, N.J : Princeton University Press, 2002), pp. 154-168.

tickets on an equal footing with male candidates. By contrast, within the United States, gender equality is protected by Title IX which applies only to major public institutions which receive federal funding.⁶⁹ Political parties are excluded from this.

James Nickel is one of the few authors who have noted the multiplicity of levels at which the rights vocabulary can function and who have tried to explain the translation of the language of moral principle to that of justiciable rights claims. Nickel writes: “The rights vocabulary can be used at any of these levels. For example, one might talk at the grand level of the right to equal respect, at the middle levels of the constitutional right to due process, and at the application levels of a statutory right to have thirty days to prepare for a hearing. But the vocabulary of human rights is used most typically at the middle level – it is used by nations or international organizations to outline in broad but still fairly definite terms what grander principles of morality and justice require in one country or era.”⁷⁰

There is, in other words, a *legitimate range of variation* even in the interpretation and implementation of such a basic right as that of “equality before the law.”⁷¹ But the legitimacy of this range of variation and interpretation is crucially dependent upon the principle of self-government. *My thesis is that without the right to self-government, which is exercised through proper legal and political channels, we cannot justify the range of variation in the content of basic human rights as being legitimate.* Unless a people can exercise self-government through some form of democratic channels, the translation of human rights norms into justiciable legal claims in a polity cannot be actualized.

⁶⁹ Title IX, Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (1972).

⁷⁰ James W. Nickel, *Making Sense of Human Rights. Philosophical Reflections on the Universal Declaration of Human Rights* (Berkeley: University of California Press, 1987), p. 44.

⁷¹ There is an epistemic parallel between what I am calling “range of variation” and jurisprudential principles such as “margin of appreciation” and “proportionality,” used frequently by courts in their interpretation and application of human rights norms. I intend to explore these “epistemic parallelisms” in a future work. In this essay, I am concerned to develop a conceptual model for thinking of the relationship between international human rights norms and democratic legitimacy.

So, the right to self-government is the condition for the possibility of the realization of a democratic schedule of rights.⁷² Just as without the actualization of human rights themselves, self-government cannot be meaningfully exercised, so too, without the right to self-government, human rights cannot be contextualized as justiciable entitlements. They are coeval. That is, the *liberal* defense of human rights as placing limits on the publicly justifiable exercise of power needs to be complemented by the *civic-republican* vision of rights as constituents of a people's exercise of public autonomy. Without the basic rights of the person, republican sovereignty would be blind; and without the exercise of collective autonomy, rights of the person would be empty.⁷³ Cosmopolitan citizenship is formed through such democratic iterations within and across *demoi*.

⁷² This strong thesis will provoke the objection that surely it is possible that a non-democratic regime, say a monarchy or some other form of benevolent authoritarianism, may be a form of "constitutional theocracy" to use Ran Hirschl's term, [Ran Hirschl, *Constitutional Theocracy* (Cambridge, MA: Harvard University Press, 2010)] would respect human rights without accepting a human right to self-government. John Rawls' distinction between liberal democracies and decent-hierarchical regimes in *The Law of Peoples* [1999, pp. 79-80] was based on this insight. I am willing to bite the bullet here and argue that such a limitation of human rights to minimal protections of the person, the rule of law, and guarantees of civic peace and property are *fundamentally incomplete*. Human rights cannot be separated from the right to self-government, because when they are, they no longer are "rights" but "privileges" granted to one by some higher authority. The people can claim rights to be its own only when it can recognize itself, through the proper institutional channels, to be their author as well. Certainly, stability, some respect for the rule of law and property relations, civic peace among competing ethnic and religious groups, that many "decent-hierarchical" regimes may achieve, are politically valuable and not to be dismissed. But they cannot satisfy a prime condition of political modernity that legitimacy originates with respect for the capacity of persons to be the sources of reasonable consent. See S. Benhabib, "Is There a Human Right to Democracy? Beyond Interventionism and Indifference," in: *Philosophical Dimensions of Human Rights. Some Contemporary Views*, ed. by Claudio Corradetti (New York: Springer, 2011), pp. 190-213.

⁷³ I owe this formulation to Habermas's thesis of the cooriginality of public and private autonomy. See J. Habermas, *Between Facts and Norms*, pp. 84-104. The final sentence refers, of course, to Kant's famous formula that "Thoughts without concepts are empty, intuitions without concepts are blind." Immanuel Kant, *Critique of Pure Reason*, unabridged edn., trans. by Norman Kemp Smith (New York: St Martin's Press, 1965), p. 93. Although I am indebted to Habermas's general discussions of the relationship between public and private autonomy and his analysis of the discursive legitimation of law, I do not follow his "discourse-theoretic deduction of basic rights." See my review of Habermas's *Between Facts and Norms* in: *9 American Political Science Review* 3 (1997), pp. 725-26.

The model of democratic legitimacy presented above may also be named ‘the model of democratic authorship.’ The democratic people are said to be the ‘authors’ as well as the addressees of human rights and constitutional rights. Yet this model of democratic authorship proceeds from a strongly idealized concept of a unitary people that is considered the single seat of sovereignty. But doesn’t this fiction belong to the early history of democratic revolutions and can it be defend conceptually or sociologically in complex, decentered societies? It may be that we need to conceptualize democratic authorship in less unitary and hierarchical terms, and instead approach democratic authorship through a different model of sovereignty and the public sphere. Stated succinctly, the model of democratic authorship suggested above presupposes a centered form of Westphalian authority with a clearly demarcated demos. But wasn’t my objection to Robert Dahl’s critique of international institutions precisely that he proceeded from a model of Westphalian sovereignty that was no longer viable? The post-Westphalian transformation of state sovereignty and models of democratic legitimacy of transnational human rights norms again appear to diverge. Should one opt for one of the two horns of the dilemma then? That is, should one accept the sociological force of the post-Westphalian diagnosis and admit that democratic authorship and popular sovereignty remain captive to a historically defunct model of territorially bounded sovereignty and forfeit them; or should one insist that these normative criteria of legitimacy remain necessary even in view of new global arrangements but that they cannot be easily housed in new institutions .⁷⁴

⁷⁴ “We argued above,” write Goodhart and Taninchev, “that popular sovereignty represents the reconciliation of sovereignty ... with the democratic principles of freedom and equality...Freedom and equality do not require popular sovereignty; they require that if there is sovereignty it must be popular ...The challenge, then, is to decouple democratic freedom and equality from the notion of popular control, to develop new democratic criteria more appropriate for making sense of and evaluating global governance arrangements.” Michael Goodhart and Stacy Bondanella Taninchev, “The New Sovereignist Challenge for Global Governance: Democracy without Sovereignty,” *International Studies Quarterly* (2011) 55, pp. 1047-1068; here p. 1060. My central argument in this essay is that the ‘decoupling’ of democratic authorship from freedom and rights makes no sense conceptually and is hardly possible institutionally. Rather, we need to recognize the *multiplicity* of national, international and transnational political arrangements and their messy

VII. Democratic Legitimacy and International Norms

A normative model of democratic authorship is particularly inappropriate, it seems, in the context of international norms whose legitimacy cannot be traced back to the united will of a sovereign people. Such norms have their origin either in declarations and covenants formulated by expert bodies in international organizations such as the United Nations and other treaty-producing organizations or they originate through customary international law as upheld by national and international courts and shared practice.

Oren Perez states the problem as follows:

The broadening acceptance of the democratic ideal in contemporary (global) society means that the legitimacy of transnational regimes is judged, increasingly, by the nature of processes that led to the regime's creation, and by the public accountability of those who implement them. This tendency reflects a widely shared expectation that the people affected by a certain normative structure should be involved in its design and implementation. Legitimacy is seen as a measure of consent and control.⁷⁵

Perez concludes that “none of the possible pathways that lead from democracy – in its directly deliberative interpretation – to legitimacy are convincing. The fragility of the legitimacy/democracy connection points, then, to the need for an alternative understanding of legitimacy, for another standpoint from which to observe current calls for the democratization of transnational law.”⁷⁶

Perez considers three models for legitimizing transnational law and since his argument is rich both in empirical case studies and in its attention to the normative link between legitimacy and democracy, it is worthwhile to consider

interlinkages through various iterations, all the while subjecting such arrangements to democratic accountability and scrutiny.

⁷⁵ Oren Perez, “Normative Creativity and Global Legal Pluralism: Reflections on the Democratic Critique of Transnational Law,” p. 29.

⁷⁶ *Ibid.*, p. 30.

these claims in greater detail. This will enable me to develop the legitimacy implications of my concept of ‘democratic iterations.’

The first model is named by Perez “indirect democratic supervision”; the second, “NGOs-led democratization,” and the third, “directly deliberative democracy.” (ibid, p. 28) The *indirect democratic supervision* model assumes that the legitimacy of international law and transnational organizations derive from state consent. Whether interpreted formalistically as a single, monovocal instance of treaty-ratification⁷⁷ or more democratically as a process that reflects the voices and interests of the plurality of actors within a state, Perez argues that the “delegated authority” model cannot account for the “increasingly autonomous nature of these global networks, and the fact that they rely on bases of support located outside the state system.” (Ibid., p. 38) His primary examples are the increasing legal autonomy of the WTO system and the work of the Intergovernmental Panel on Climate Change. *Lex mercatoria* and *private international law* also escape state control and render the idea of state consent meaningless.⁷⁸

Clearly the model of indirect democratic supervision via state consent is empirically inadequate to account for the multiplicity of transnational regimes. What about attempts at NGO-led democratization and directly deliberative democracy? Advocates of the first argue that NGO’s should have a greater say in the production of transnational norm as participants, observers, etc. Yet this seems to beg the question of the legitimacy of NGO’s themselves. As Dahl has also pointed out, they are not always governed democratically; they are not truly transnational and have often a western and northern provenance, and most importantly, who would decide *which* NGO should be able to participate and which one not?

⁷⁷ Judith Resnik, “Comparative (in)equalities: CEDAW, the jurisdiction of gender, and the heterogeneity of transnational law production,” I.CON (2011), vol. 10, No 2, pp. 531-550.

⁷⁸ Perez discusses the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. While such legal conventions are dependent on states for their enforcement, they develop mechanisms to “shelter them from state-sponsored intervention.” Ibid., p. 41. Saskia Sassen (see section IV above) refers to changes initiated by such conventions as the ‘denationalization of the national.’

The third model is the “directly-deliberative polyarchy,” proposed by Joshua Cohen and Chuck Sabel, and indebted to Habermas’s discourse theory. The democratic process is viewed here as a “collective decision-making that proceeds through direct participation by and reason-giving between and among free and equal citizens.”⁷⁹ From the standpoint of this model arenas for collective decision-making and deliberation can be multiple and can arise whenever controversial norms and decisions are subject to critique and evaluation. Perez’s objection to this model is twofold: first, he considers the Internet as an institutional design that would be the correlative of such a conception (Ibid., p. 48), and second, he claims that this consensual model rests on a flawed transcendental argument. (Ibid., p. 52) He finds the first lacking, and the second, unacceptable.

I have argued in my previous work that the claim that the deliberative democratic models rest on a transcendental argument about consent is both widely spread and quite false; I will not consider it here.⁸⁰ Nevertheless, Perez’s discussion is instructive in that it conflates *normative principles of legitimacy* with *issues of institutional design*. Of the three models discussed above, only the directly deliberative polyarchy model articulates a normative principle, namely that “only those norms and normative institutional arrangements can be considered legitimate if all those actually or foreseeably affected by their consequences have a yes or no say in their articulation.”⁸¹ This is a counterfactual claim, meaning that it does not *describe* or *prescribe* a process of norm-generation and origination. Rather, it states that *all stakeholders* (not just citizens, as Cohen and Sabel mistakenly assume) have a moral claim to raise objections and to demand participation in such processes of norm-generation once they consider themselves to be affected by their consequences. Until and unless these objections are satisfied, legitimacy cannot be reestablished.

⁷⁹ Ibid., at 377.

⁸⁰ See Benhabib, *Situating the Self. Gender, Community and Postmodernism in Contemporary Ethics* (Routledge and Polity: New York and London, 1992).

⁸¹ There are important debates among scholars who subscribe to some version of the “all affected principle” as to whether this should be formulated rather as “an all subjected” principle (Nancy Fraser). I have considered these issues in some detail in: “Postscript on the Principle of ‘Affected Interests’,” *Dignity in Adversity. Human Rights in Troubled Times*, pp. 156-165.

We can see now that the link between democracy and legitimacy which Perez tries to sever is actually fundamental: democratic institutions and procedures are modes of assuring that the voice and interests of those that will be affected by the norm promulgated by a specific public instance will have representation in the process of their articulation. Democracies institutionalize legitimacy through the function of legality.

Perez is undoubtedly correct that there is *no “one size fits all”* model empirically to account for the enormous complexity and variety of the world’s transnational regimes and organizations. Pace, Michel Rosenfeld there is not and cannot be a global constitutional subject! But this does not mean that global citizens may not subject these transnational regimes to democratic critique and demand that they enhance their legitimacy. What specific institutional arrangements will result from such legitimation struggles and which specific institutional design will seem most appropriate for different transnational regimes cannot be answered a priori. Nevertheless, if we do not distinguish criteria of legitimacy from matters of institutional design, we risk sacrificing democracy for complexity.

Thinking along similar lines as the model of directly-deliberative polyarchy, I now want to elaborate *democratic iterations*.

VIII. Democratic Iterations

By *democratic iterations* I mean complex processes of public argument, deliberation and exchange through which universalist rights claims are contested and contextualized, invoked and revoked, posited and positioned throughout legal and political institutions as well as in the associations of civil society. In the process of repeating a term or a concept, we never simply produce a replica of the first intended usage or its original meaning: rather, every repetition is a form of variation. Every iteration transforms meaning, adds to it, enriches it in ever so-subtle ways. The iteration and interpretation of norms and of every aspect of the

universe of value, however, is never merely an act of repetition.⁸² Every act of iteration involves making sense of an authoritative original in a new and different context through interpretation. The antecedent thereby is repositied and resignified via subsequent usages and references. Meaning is enhanced and transformed; conversely, when the creative appropriation of that authoritative original ceases or stops making sense, then the original loses its authority upon us as well.

Democratic citizens and stake-holders must reinterpret and reappropriate human rights principles such as to give them shape as constitutional rights, and, if and when necessary, *suffuse* constitutional rights with *new* content. Nor is it to be precluded that such constitutional iterations may themselves provide feedback loops in rendering more precise the intent and language of international human rights declarations and treaties. Such processes of democratic iteration and negotiation do not yield a global constitutional subject. At their best, they produce a messy awareness of the difficulties as well as attractions of the ethics of world-citizenship. It is only by suffusing the universalist promise of human rights with concrete moral and political struggles in concrete contexts that visions of cosmopolitan citizenship and global subjectivities can develop.⁸³

Democratic iterations occur throughout transnational civil society and global public spheres in diverse sites. In constitutional democracies, the courts are the primary authoritative sites of norm iteration through judicial interpretation. But the interaction between domestic and binding transnational norms can take place in courts, as well as through the contributions of other organizations such as NGO's and INGO's like Amnesty International and Human Rights Watch that can produce expert reports as well as mobilizing public opinion around specific issues of norm interpretation and norm implementation.

⁸² Cf. Jacques Derrida, "Signature Event Context." In: *Limited, Inc.* (Evanston, Ill.: Northwestern University Press, 1988).

⁸³ I have discussed in more detail the role of global social movements in claiming rights across borders and generating cosmopolitan citizenship in: S Benhabib, "Claiming Rights Across Borders: International Human Rights and Democratic Sovereignty," *Dignity in Adversity. Human Rights in Troubled Times*, p. 117-138; originally published in: No. 103 *American Political Science Review* 4 (November 2009), pp. 691-704.

A third site of iteration emerges through the interaction of judicial and transnational sources of norm-interpretation with the political opinion-formation of ordinary citizens and residents. In formulating the concept of democratic iterations, it is this latter process that I had most in mind, though the other two processes were not excluded. Robert Post captures this tension between the legal and political very well:

Politics and law are thus two distinct ways of managing the inevitable social facts of agreement and disagreement. As social practices, politics and law are both independent and interdependent. They are independent in the sense that they are incompatible. To submit a political controversy to legal resolution is to remove it from the political domain; to submit a legal controversy to political resolution is to undermine the law. Yet they are interdependent in the sense that law requires politics to produce the shared norms that law enforces, whereas politics requires law to stabilize and entrench the shared values the politics strives to achieve.⁸⁴

But if “the boundary between law and politics is essentially contested, then judicial judgments engage but do not pre-empt politics.”⁸⁵ It is this “engagement” between the juridical and the political which democratic iterations aim at conceptualizing.

If democratic iterations are necessary in order for us to judge the legitimacy of a range of variation in the interpretation of a right claim, how can we assess whether democratic iterations have taken place rather than demagogic processes of manipulation or authoritarian indoctrination? Do not democratic iterations themselves presuppose some standards of rights to be properly evaluated? Furthermore, aren't democratic iterations conceding too much to, or may be even idealizing, democratic processes that are inevitably messy, often ill-

⁸⁴ Robert Post, “Theorizing Disagreement: Re-conceiving the Relationship Between Law and Politics,” 98 *California Law Review* 4 (2010), pp. 1319-1350. See also the concept of ‘democratic constitutionalism,’ developed by Robert Post and Reva B. Siegel, “Roe Rage: Democratic Constitutionalism and Backlash,” *Harvard Civil Rights and Civil Liberties Review* 42 (2007), pp. 373-434.

⁸⁵ Post, “Theorizing Disagreement,” p. 1347.

informed, and more significantly, which may result in the trampling of the rights of unwanted others and minorities?

My model seems to conflate liberal protections of rights with a majoritarian democratic conversation. As we know, this relationship is one of the most significant and fraught throughout the history of modern political thought. I am very much aware of this and yet insist on the necessary interaction between the liberal-discourse of rights-protection and the democratic processes of opinion-and-will-formation. Democratic iterations are not merely populist politics but have some formal discourse conditions built into them that would exclude the most egregious rights-violations.

Democratic legitimacy reaches back to principles of *normative justification*. Democratic iterations do not alter the conditions of validity of moral discourses of justification that are established independently of them. Very briefly, such discourses stipulate several formal-procedural criteria: all those whose interests are affected by the adoption of a specific norm have the right to participate in discourses through which such norms are to be adopted. First then is a condition of *equal participation* of all affected. Second is the right of all discourse participants to an *equal say* in such conversations. Third is the right of all participants to challenge *the rules of agenda setting*, and fourth is the right of participants to engage in *meta-discourses* about the procedures for framing discourses. As is well-known, this discourse model of justification, much like John Rawls's model of the two principles of justice, is a counterfactual one. It leads us to judge as *legitimate* or *illegitimate*, in a preliminary and formal sense, processes of opinion- and will-formation through which rights claims are contested and contextualized, expanded and debated, in actual institutions of civil and political society. Such criteria minimally distinguish a *de facto consensus* from a *rationaly motivated one*. Such criteria, as I have discussed above, are not guidelines for building institutions, any more than Rawls's second principle of justice – the difference principle – tells us how to organize the economy! They are counterfactual criteria which can lead participants to challenge the legitimacy of a decision reached and a norm that is advocated. They provide moral agents with a “veto power,” if you wish.

Some will note that there may be some kind of circularity here: I am talking about the *right of participants* to equal say, agenda-setting, etc., and you will say, but “weren’t such norms supposed to result from a practical discourse in the first place”? The answer to this objection is twofold: since Aristotle, we know that in reasoning about matters of ethics and politics, we are “always already situated” in *medias res* – we never begin the conversation without some presupposition, and in this case, without some shared understanding of what equality of participation in the conversation, challenging the agenda, and the like, may mean. Discourses are reflexive processes through which much of what we always already take for granted is challenged, questioned, “bracketed,” if you wish, until these presuppositions are reestablished at the end of the conversation. a conversation which itself is always open to a future challenge.

This hermeneutic model of iteration is a *recursive one*, based on the same principles of non-foundationalism recently articulated by Neil Walker. There is an *empirical* and a *normative incompleteness* to the interpretation of the rules that frame the discourses themselves⁸⁶, which then need to be repositied and rearticulated through the conversation. This *recursive model of justification*, based on the force of iterations, is related to many discussions in contemporary non-foundationalist epistemology as well.⁸⁷

⁸⁶ Neil Walker, “Constitutionalism and the Incompleteness of Democracy: An Iterative Relationship,” 39 *Rechtsphilosophie & Rechtstheorie* 3 (2010), pp. 206-233; N. Walker, “Constitutionalism and the Incompleteness of Democracy. A Reply to Four Critics,” *Ibid.*, pp. 276-288; N. Walker, “Constitutionalism and the Incompleteness of Democracy: State and Global,” Paper presented at the NYU Faculty Colloquium and on file with the author. Walker is discussing democracy in these articles and not rules of discourse per se, but rules of discourse are the most abstract norms that undergird democratic practices, and the principle of “incompleteness” holds for both. While not accepting the prospect “of postnational constitutionalism without democracy,” Walker shows the inadequacy of the sovereign nation-centric model discussed above by elucidating how constitutionalism and democracy define and ‘complete’ each other. (“Constitutionalism and the Incompleteness Democracy: An Iterative Relationship,” pp. 228 ff.)

⁸⁷ Cf. the following statement by Robert Brandom: “Saying ‘we’ in this sense is placing ourselves and each other in the space of reasons, by giving and asking for reasons for our attitudes and performances...Our attitudes and acts exhibit an intelligible content, a content that can be grasped or understood, by being caught up in a web of reasons, by being inferentially articulated.” Robert B. Brandom, *Making it Explicit. Reasoning, Representing and Discursive Commitment* (Cambridge, MA: Harvard University Press, 1994), p. 5ff.

In the next section, I will consider normative proposals for conceptualizing the epistemic and political dialogue around rights concepts, as they take place both within and across democracies. These three models, like *democratic iterations*, develop modalities of thinking beyond the binarism of the cosmopolitan versus the civic republican; democratic versus the international and transnational; democratic sovereignty versus human rights law.

IX. Human Rights and the Legitimacy of the International Order

The arguments presented above are greatly supported by a recent article of Allen Buchanan's.⁸⁸ Although Buchanan does not use the concept of 'democratic iterations' or the 'discourse theory of legitimacy,' many of his formulations are consistent with both and expand them in helpful ways. Buchanan begins with the observation that "The more seriously the international legal system takes the protection of human rights and the more teeth the commitment has, the more problematic the lack of a credible public justification for human rights norms becomes."⁸⁹ Buchanan then spells out what such a public justification process might entail: the process of specifying and justifying human-rights norms should be understood as "a matter of ongoing mutual adjustment between our *provisional core conception of human rights*, our standards for the epistemic performance of the institutions that articulate human rights-norms, and our judgments about the existence and content of particular human rights."⁹⁰ Buchanan's innovative move is the argument that the justification of human rights can only be addressed if, in addition the philosophical articulation of a *concept* of human rights also formulated in the light of major human rights documents and treaties, we focus on "the epistemic virtues of institutions through which the norms are specified, contested and revised over time."⁹¹

⁸⁸ Allen Buchanan, "Human Rights and the Legitimacy of the International Order," *Legal Theory*, 14 (2008), pp. 39-70.

⁸⁹ *Ibid.*, p. 41.

⁹⁰ *Ibid.*, p. 66, emphasis in the original text.

⁹¹ *Ibid.*, p. 39.

Buchanan's concept of 'epistemic virtue' is enormously helpful to unpack my concept of 'democratic iterations.' Given that human-rights norms are necessarily abstract, they need contextualization and specification. But to avoid the parochialism and a free-for-all pluralism that may result from such contextualization, we need institutional processes of a certain *epistemic quality*. First and foremost, the *legal* translation of human-rights norms cannot be mere mechanical applications of moral norms – a point also emphasized by Habermas (see above section VI) – but they should constitute “modes of public practical reasoning that contribute to our understanding of moral rights [I would add as well as legal ones SB] and to their justification.”⁹² Epistemic virtue in these matters then entails “modes of public practical reasoning” that are publicly accessible and justifiable.

What might such public practical reasoning involve? Beyond the transmission and utilization of correct factual information that may bear on such processes of reasoning, “institutions that contribute to the articulation of human-rights norms ought to provide venues for deliberation in which the authority of good reasons is recognized, in which credible efforts are made to reduce the risk that strategic bargaining or raw power will displace rational deliberation, in which principled contestation of alternative views is encouraged, in which no points of view are excluded on the basis of prejudicial attitudes toward those who voice them, and in which conclusions about human rights are consonant with the foundational idea that these are moral rights that all human beings (now) have, independently of whether they are legally recognized by any legal system.”⁹³

⁹² Ibid., p. 48.

⁹³ Ibid., p. 62. Note that Allen Buchanan's criteria of the epistemic virtue of institutions are, like those of the discourse-theoretic approach I defend, also formal-procedural ones. One needs to emphasize though that such criteria provide *necessary* but not *sufficient* conditions of the exercise of practical reason. Criteria as well as procedures require interpretation; and here critical judgment has a role to play. Practical reason involves both 'determinative' and 'reflective' judgment in the Kantian sense. For my early analysis of these issues, see “Judgment and the Moral Foundations of Politics in Hannah Arendt's Thought,” in: S. Benhabib, *The Reluctant Modernism of Hannah Arendt* (CA: Sage Publications, 1996; expanded edition : New Jersey: Rowman and Littlefield, 2003), pp. 173-193. For some recent work on the problem of judgment, see Alessandro Ferrara, *The Force of the Example* (New York: Cambridge University Press, 2008)

Such epistemic virtues are the virtues of a democratic public sphere and of deliberative sites in the judiciary, civil society, and political representative institutions that interact with the democratic public sphere. Since the contextualization of human rights norms entails processes of public practical reason, and since states cannot simply hide behind the shield of sovereignty, what we are looking at is a *transnational conversation of practical reasons* that toggleback and forth between the moral and the legal concept of human rights and their supporting arguments. I don't think that this transnational conversation amounts to global constitutionalism, but global constitutionalism can only emerge, if at all, in and through such iterations, conversations, and contestations.

Anne-Marie Slaughter has called such dialogues among courts "transjudicial communication."⁹⁴ The courts around the world recognize that a global set of human rights issues are to be adjudicated upon in "colloquy with one another." "Such recognition," she writes, "flows from the ideology of universal human rights ...The premise of universalism, however, does not anoint any one tribunal with universal authority to interpret and apply these rights. Collective judicial deliberation, through awareness, acknowledgment, and use of decisions rendered by fellow human rights tribunals, frames a universal process of judicial deliberation and decision."⁹⁵

Anne-Marie Slaughter has been an enthusiastic and most able advocate of "the new world order" of global constitutionalism and judicial internationalism. Even if we may not share in her political optimism about these processes, she is undoubtedly correct in calling our attention to the emergent world of transjudicial communication. What I am trying to suggest is that such processes of transjudicial communication can be seen as forms of practical reasoning as

and Albenaz Azmanova, *The Scandal of Reason. A Critical Theory of Political Judgment* (New York: Columbia University Press, 2012).

⁹⁴ Anne-Marie Slaughter, "A Typology of Transjudicial Communication," 29 *University of Richmond Law Review* (1994-5), p. 123.

⁹⁵ *Ibid.*, p. 121-2.

well, insofar as they involve, as Buchanan also notes, practices of reason-giving, deliberation and reasoned argumentation.

What about the skeptic's point that this typology of transjudicial communication flies in the face of states' practice of placing RUD's - reservations, understandings and declarations – on human rights treaties such as to blunt their import and shield their own practices of non-compliance? As Judith Resnik has observed, treaty ratification processes now no longer center upon “a singular formal moment of ratification through a monovocal nation-state.”⁹⁶ Increasingly, cities, states, counties, municipalities are themselves incorporating major human rights treaties into their own charters. The city of San Francisco as well as San Paolo (Brazil) have adopted CEDAW; Portland, Oregon has incorporated the UDHR.⁹⁷ These processes of *legal seepage* at sites below the centralized judicial authority of the state testify to ‘disaggregation’ processes of the national that Saskia Sassen is also concerned with. However, one cannot naively assume that all local iterations will enhance democratic processes and values; they will and do not. Nevertheless, such affiliations multiply the sites at which transjudicial conversations can occur, and show how even in the face of national recalcitrance and resistance to some human rights organs such as CEDAW, for example, a human rights discourse across national and local boundaries can take place.

Judith Resnik's innovative contribution is to suggest that RUD's themselves can be viewed in analogy to doctrines such as “margin of appreciation” or types of legal pluralism permitted by a variety of federalist arrangements (*vide* India's Muslim Family Law). Yet whereas the local and regional incorporation of rights treaties suggest their expansion across borders, these other processes suggest the limitation and blunting of their normative reach. Resnik argues that “...wholesale criticism of the practice undervalues CEDAW's contribution to a political economy in which a formal commitment to women's equality is seen to confer capital. What is intriguing about CEDAW is

⁹⁶ Judith Resnik, “Comparative (in)equalities: CEDAW, the jurisdiction of gender, and the heterogeneity of transnational law production,” *I.CON* (2011), pp. 531-550.

⁹⁷ *Ibid.*, p. 546.

the decision by many inegalitarian political orders to state – albeit with RUD’s – that their versions of legal structures fit within a women’s rights template ... [M]oreover, RUD’s are not necessarily static; they can provide a means of beginning conversations about treaty obligations.”⁹⁸ Resnik cites how Bangladesh in 1997 withdrew reservations to CEDAW which were earlier based on “the conflict between Sharia law” and the Convention; Jordan withdrew a similar objection to a woman’s right to independent residence and domicile other than that of her husband in 2009. Sex-based differences in the military had led countries such as Australia, Austria, Germany, New Zealand, Switzerland and Thailand to place reservations on CEDAW, many of which have since then withdrawn their caveats.

Resnik is not oblivious either to the limiting effect of RUD’s nor to the potentially opportunistic uses made of the doctrine of “margin of appreciation” by European Courts. Yet she sees “these models of mediated participation,” as offering a “cosmo-political” vision to “capture the idea of polities joining in commitments that both acknowledge their independent identities while imposing reciprocal obligations.”⁹⁹

X. Conclusion

As this final discussion indicates, whether we emphasize the epistemic virtues of practical reason at work in the deliberative institutions of a democratic society (Buchanan), the transjudicial conversations of judges (Anne-Marie Slaughter), or law’s affiliations through de-centering the nation-state paradigm and the “heterogeneity of transnational law production” (Resnik), transnational treaties, practices and institutions can enhance rather than diminish democratic deliberation and rights discourse.

While not sharing the skepticism of realist state-theorists, I am also unable to share in the enthusiasm of global constitutionalists. It is within and across *bounded* polities (which may or may not be nation-states -- they can be multiethnic or multicultural democracies, binational federations, or

⁹⁸ Ibid., p. 549.

⁹⁹ Ibid., p. 19.

constitutional post-national polities such as the EU) -- that democratic iterations can occur. Empires have frontiers; democracies have boundaries. These boundaries are porous, permeable and active sites of transnational conversations and interactions. It is this radical fact of interdependence and transnational affiliation that contemporary legal cosmopolitanism seeks to elucidate.

XI. Appendix: Alien Tort Statute and A Note on American Exceptionalism

In 1985 Louis Henkin lamented that “An abiding isolationism (or unilateralism) ... continues to appeal to many Americans, even some who readily judge others and are eager to intervene on behalf of democracy and human rights in other countries. There is a reluctance to accept, and have our courts apply, standards perceived to have been created by others, even if they were borrowed from us and reflect our own values.”¹⁰⁰ Much of the writing on international human rights’ scholars considers this as yet another instance of “American exceptionalism,” at best, or the brazen disregard of a “rogue superpower” for international law, at worst.

One of the most forceful critiques of the U.S. with regard to the law of nations was formulated early on by Carl Schmitt. As he put it quite bitinglly: “Once the priority of the Monroe doctrine – the traditional principle of Western Hemisphere isolation, with its wide-ranging interpretations – was asserted in Geneva, the League abandoned any serious attempt to solve the most important problem, namely the relation between Europe and the Western Hemisphere. Of course, the practical interpretation of the ambiguous Monroe Doctrine – its application in concrete cases, its determination of war and peace, its consequences for the question of inter-allied debts and the problem of reparations – was left solely to the United States ...Whereas the Monroe doctrine forbade any League influence in American affairs, the League’s role in European

¹⁰⁰ L. Henkin, “The US and International Human Rights,” in *Justice for a Generation*, papers presented in London, England, 15-19 July 1985 at the plenary sessions of a meeting between the American Bar Association, the Senate of the Inns of Court, and the Law Society of England and Wales, p. 377, as cited by McCrudden, “A Common Law of Human Rights,” p. 520.

affairs ... was codetermined by these American states.”¹⁰¹ And in a turn of phrase that could have flown from Jacques Derrida’s pen, Schmitt concludes: “The United States was, thus, formally and decisively *not present* in Geneva. But they were, as in all other matters, and hardly ineffectively and very intensely, *present* as well. There thus resulted an odd combination of *official absence* and *effective presence*, which defined the relationship of America to the Geneva Convention and to Europe...”¹⁰²

The matter of the citation of foreign law, whether the law of other nations or international human rights law and treaties, has in the meantime become an American political *scandalon*. It now serves as a litmus test in the appointment of Supreme Court Justices, who are asked whether or not they will interpret the U.S. Constitution in the light of ‘foreign doctrine or influence.’ A group of scholars, intellectuals and policymakers “who view the emerging international legal order and system of global governance with consternation,”¹⁰³ have now coalesced as the “new sovereigntists.”

Historical scholarship suggests that this was not always so. Between 1789 and 1860 the Court never applied an American states’ law in the face of a conflicting treaty obligation. The “Charming Betsy”¹⁰⁴ presumption prevailed: “An act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.” (6US. 64, 118 (1804)) For the Founding Fathers, international customary law and treaties with other nations unquestionably constituted the law of the land. In fact, one of the oddest statutes of US Law -The Alien Tort Claims Act- named by Judge Friendly “a legal

¹⁰¹ Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*. Fourth edition. (Duncker and Humblot: Berlin, 1997), p. 224; *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, trans. G.L. Ulmen (New York: Telos, 2003), pp. 254-255. I have consulted but not always used the English translation.

¹⁰² Ibid., p. 224-5. I used my own translation here since the English has been somewhat abbreviated. My emphasis.

¹⁰³ M. Goodhart and Stacy Bondanella Tanichev, “The New Sovereigntist Challenge for Global Governance: Democracy without Sovereignty,” 55 *International Quarterly Studies* 4 (2011) p. 1047.

¹⁰⁴ I thank Joseph Weiler for drawing my attention to this charmingly named Article.

Lohengrin.” [*IIT v. Vencap, Ltd.*, 519 F.2nd 1001, 1015 (C.A. 2 1975)] derives from this period.

The Alien Tort Statute, enacted as section 9 of the Judiciary Act of 1789, states that “[the] district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations of a treaty of the United States.”¹⁰⁵ Anne-Marie Burley [Slaughter] notes that: “In 1980 the United States Court of Appeals for the Second Circuit breathed new life into these little-used and somewhat mysterious provisions.”¹⁰⁶ The case referred to is *Filartiga v. Pena-Irala*,¹⁰⁷ heard in the United States Court of Appeals for the Second Circuit, in which a Paraguayan family brought suit against a former Paraguayan police chief for the torture and death of one of its members. With reference to the Alien Tort Statute (ATS), Judge Kaufman himself notes that “Construing this rarely-invoked provision, we hold that deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus, whenever an alleged torturer is found and served with process by an alien within our borders, US provides federal jurisdiction.”¹⁰⁸

The *Filartiga* judgment liberally interpreted the terms of the 1789 ATS resolution, which was concerned with an attack in 1784 by Chevalier de Longchamps, an itinerant French nobleman, upon his French countryman, Consul General Marbois in Philadelphia.¹⁰⁹ The Court ruled that “The first crime in the indictment is an infraction of the Law of Nations. This law, in its full extent, is part of the law of this State, and is to be collected from the practice of different Nations, and the authority of writers. ... [The] person of a public minister is sacred and inviolable. Whoever offers any violence to him, not only

¹⁰⁵ Judiciary Act of 1789, ch. 20, sec. 9 (b). 1 Stat 73, 77 (1789); currently 28 U.S.C. § 1350, with some revisions to the original language.

¹⁰⁶ Anne-Marie Burley, “The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor,” *The American Journal of International Law*, vol. 83, No. 3(July 1989), pp. 461-493, here p. 461.
¹⁰⁷ 630 F. 2d 876 (2nd Circ. 1980).

¹⁰⁸ *Ibid.*, p. 878.

¹⁰⁹ *Respublica v. de Longchamps*, 1 U.S. 111 (1784).

affronts the Sovereign he represents, but also hurts the common safety and well being of nations; *he is guilty of a crime against the whole world.*"¹¹⁰

Without a doubt, the Framers of the U.S. Constitution wanted to show that the young Republic was a law-abiding polity, in which foreigners could reside, travel, conduct business safely, and that it would uphold and enforce the law of nations. What exactly the law of nations entailed then and what it entails in the 20th and 21st centuries is the crux of the matter (I leave aside jurisdictional concerns about the authority of state vs. federal courts in this matter). In addition to the protection of ambassadors and emissaries of other states, in addition to the persecution of pirates, in addition to respect for the law of merchants and law maritime, does this act create other tort remedies as well?¹¹¹

Justice Kaufman in *Filartiga* interpreted The Alien Tort Statute in the light of what he considered to be the developing law of nations in the intervening centuries: "Since appellants do not contend that their action arises directly under a treaty of the United States, a threshold question on the jurisdictional issues is whether the conduct alleged violates the law of nations. In light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice), we find that an act of torture committed by one state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations."¹¹² And Justice Kaufman adds: "Thus it is clear that courts must interpret international law not as it was in 1789 but as it has evolved and exists among the nations of the world today."¹¹³ *This statement can be read as signaling the transition from an 18th century understanding of cosmopolitanism to a 20th-century one.* The UN Charter, the UDHR and the Declaration of All Persons from

¹¹⁰ Ibid., p. 116.

¹¹¹ Jeffrey M. Blum and Ralph G. Steinhardt, "Federal Jurisdiction over International Human Rights Claims. ATCA After *Filartiga, v. Pena-Irala*," 22 *Harvard International Law Journal* 53 (1981), pp. 53-112.

¹¹² 630 F. 2d 876, 880 (1980).

¹¹³ Ibid., 881.

Being Subjected to Torture, adopted by the General Assembly Resolution 3452 (No. 34), 91, are generously cited in the decision.

This cosmopolitan moment did not last long. Whereas the Carter Administration supported the *Filartiga* decision by filing an *amicus* brief, subsequent attempts to extend the *Filartiga* precedent to cases other than torture failed. The 2nd Circuit Court of Appeals' ruling that the ATS conferred jurisdiction over the action of Argentina for the bombing of a Liberian tanker during the Falklands/Malvinas War was reversed by the Supreme Court in 1989 in a unanimous decision,¹¹⁴ "leaving no doubts that suits against foreign sovereigns are to be exclusively governed by the Foreign Sovereign Immunities Act."¹¹⁵

The next time the curtain went down on the potential cosmopolitan intentions and iterations of ATS was in the convoluted case of *Jose Francisco Sosa v. Humberto Alvarez-Machain, et al.* decided in June 29, 2004.¹¹⁶ Justice Souter delivered the opinion of the Court, Parts I and II of which were unanimous, with opinions filed by a majority of the other justices concurring in part and concurring in the judgment. Very briefly: in 1985 an agent of the Federal Drug Administration Agency was captured in Mexico and tortured over the course of an investigation in which Alvarez, a Mexican physician, was present. In 1990, a federal grand jury indicted Alvarez for torture and murder of Salazar, the DEA agent. An arrest warrant was issued by the U.S. District Court of California. When the US government's attempts to extradite Alvarez to the US failed, the US hired a group of Mexicans, including Sosa, to abduct Alvarez from his house and bring him to the US. Once in the US, Alvarez moved that his case be dismissed because it was "outrageous government conduct," and violated the US-Mexico extradition treaty. Although the lower courts agreed, the Supreme Court reversed and the case was tried again in 1992 and ended when the District Court granted Alvarez's motion for a judgment of acquittal.

¹¹⁴ *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989).

¹¹⁵ Anne-Marie Burley, "The Alien Tort Statute and the Judiciary Act of 1789," p. 462, fn. 9 to whose historical account I am much indebted.

¹¹⁶ 542 U.S. 692 (2004).

Once in Mexico, Alvarez sued Sosa, a Mexican citizen, and other drug operatives, and invoked the Alien Tort Statute for damages against Sosa, for a violation of the law of nations. The 9th Circuit Court relied upon what it called the “clear and universally recognized norm prohibiting arbitrary arrest and detention,” to support the conclusion that Alvarez’s abduction amounted to a tort in violation of international law. The Supreme Court reversed this decision.¹¹⁷

The Court in its opinion considerably narrowed the scope of ATS, with the claim that “The sparse contemporaneous cases and legal materials referring the ATS tend to confirm both inferences, that some, but few, torts in violation of the law of nations were understood to be within the common law.”¹¹⁸ The Court further concludes that the jurisdiction of ATS was limited to the enforcement of a small number of international norms only --those that a federal court could properly recognize as enforceable within the common law without further statutory authority. And departing from 18th century notions of cosmopolitanism, the court stated that “... we now tend to understand common law not as a discoverable reflection of universal reason but, in a positivistic way, as a product of human choice.”¹¹⁹ His colleagues then engaged Justice Scalia directly: “Whereas Justice Scalia sees these developments as sufficient to close the door to further independent recognition of actionable international norms,

¹¹⁷ I am omitting the Federal Tort Claims At the Agency Level (FTCA) involved in this case for false arrest etc. for the sake of conciseness.

¹¹⁸ 542 U.S. 692, 720 (2004).

¹¹⁹ *Ibid.*, 729. The opinion the Court cites here, *Erie v. Tompkins*, is famous for rejecting a 19th century notion of the English common law as a transcendent and discoverable truth. *Erie v. Tompkins* is seen as a turn to pragmatism and legal realism in legal scholarship. According to Justice Brandeis, speaking for the Court: “The fallacy underlying the rule declared in *Swift v. Tyson* is made clear by Mr. Justice Holmes. The doctrine rests upon the assumption that there is ‘a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute,’ that federal courts have the power to use their judgment as to what the rules of common law are; and that in the federal courts ‘the parties are entitled to an independent judgment on matters of general law’ but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else.” 304 U.S. 64, 79 (1938) Many thanks to my student Blake Emerson for clarifying this point for me.

other considerations persuade us that the judicial power should be exercised on the understanding that *the door is still ajar subject to vigilant doorkeeping*, and thus open to a narrow class of international norms today.”¹²⁰ (My emphasis)

With respect to Alvarez’s claims that his abduction was “arbitrary arrest” according to the UDHR, Article 9 of the ICCPR, etc., the Court retorts that the UDHR does not impose obligations as a matter of international law and that the ICCPR is not self-executing. And with a touch of regret, Justice Souter adds: “Whatever may be said for the broad principle that Alvarez advances, in the present, imperfect world, it expresses an aspiration that exceeds any binding rule having the specificity we require.”¹²¹ Whereas the majority, including Justice Souter, want to keep the “door ajar subject to vigilant doorkeeping ... to a narrow class of international norms,” Justice Scalia wants it shut tight: “The notion that a law of nations, redefined to mean the consensus of states on *any* subject, can be used by a private citizen to control a sovereign’s treatment of *its own citizens* within *its own territory* is a 20th century invention of internationalist law professors and human rights advocates.”¹²²

But the little crack in the door left ajar is being pushed open by yet another case in the courts. In *Kiobel et. al. v. Royal Dutch Petroleum*,¹²³ the Nigerian plaintiffs are seeking monetary damages for a brutal campaign in the 1990’s by three oil companies and the military dictatorship in Nigeria to silence protesters against environmental damage. It is reported that scores were killed, and the plaintiffs themselves claim to have been captured and beaten. The charges include torture, crimes against humanity and executions.

¹²⁰ Ibid.

¹²¹ Ibid., 738.

¹²² Ibid., 749. It is odd that Justice Scalia does not comment on the fact that Alvarez, a Mexican citizen was *abducted* by Mexican nationals *in Mexico* and brought to the US and tried here; and then filed suit *from Mexico* against a Mexican citizen, Sosa, for collaborating with the US, in accordance with US law and his case was upheld by two lower courts. This case simply defies the territorial logic of sovereignty within which Scalia wishes to imprison contemporary law. The ATS begins with the realization that “aliens” live in each other’s territory and that in any civilized nation they have certain claims which accrue to them as persons in the eyes of the law.

¹²³ No. 10-1491.

Whether corporations can be held liable under the Alien Tort Statute is the question. The Second Court of Appeals has held that they cannot, and Royal Dutch Petroleum argues that the Supreme Court must look to the law of nations on the question of corporate liability. But under American law, corporations have been subject to suits for years, and in *Citizens United v. Federal Elections Commission* this Supreme Court declared that corporations had speech rights, just as natural persons, did.¹²⁴ As Lincoln Caplan notes, “If a multinational company commits an offence like torture, the fact that it is a corporation and not an individual is immaterial in the pursuit of justice.”¹²⁵

On April 17, 2013 the US Supreme Court issued its much awaited decision regarding *Kiobel et al. v. Royal Dutch Petroleum* [569 U.S. (2013)]. Writing for the majority, Chief Justice Roberts Jr. argued that “The ATS covers actions by aliens for violations of the law of nations, but that does not imply extraterritorial reach – such violations affecting aliens can occur whether within or outside the United States.” (III) He concluded that, “And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.” (IV) Invoking a traditional understanding of Westphalian territorial sovereignty and sovereign immunity, Justice Roberts and the majority in the Court made it much more difficult to extend the reach of transnational human rights claims into US courts. In his dissenting opinion Justice Breyer tried to forestall the evisceration of the ATS by the Court, by writing that he would not “invoke the presumption against extraterritoriality.” Guided by “principles and practices of foreign relations law,” he argued instead that suits under the law should be allowed when, “the defendant’s conduct substantially and adversely impacts an important American national interest, and that includes a distinct interest in preventing the United

¹²⁴ 558 U.S. 08-205 (2010).

¹²⁵ Lincoln Caplan, “Corporate Abuse Abroad, A Path to Justice Here,” Sunday Observer, *NY Times* (March 4, 2012), A 10. Samuel Estreicher of NYU Law and Meir Feder, Counsel of Record, have filed an *Amici Curiae Brief* for the Respondents (February 3, 2012); Oona Hathaway, Counsel of Record, and Jeffrey A. Meyer, Yale Law School’s Center for Global Legal Challenges have filed as *Amicus Curiae* in support of the Petitioners. (Both on file with the author)

States from becoming a safe harbor (free of civil as well as criminal liability) *for a torturer or other common enemy of mankind.*” (My emphasis)

The strange career of the Alien Tort Statute, a product of 18th century’s cosmopolitan imagination, shared by the Framers of the US Constitution, is not yet over. It is still valid law, and no matter how many restrictions and limitations are placed on its reach (maybe some justifiable, others not), the new world of global interdependence suggests that its transnational iteration across borders in cases involving individuals, corporations and public agents, such as the Drug Enforcement Agency, will continue. The cosmopolitan needs of a new century will keep pushing at the crack in the door until more light streams in. This is why I am skeptical that much talk of ‘global constitutionalism’ makes sense, unless and until the U.S., the world’s oldest democracy and sole superpower (maybe not for long), becomes a robust conversation partner in this transnational dialogue.