

# Cosmopolitan constitutionalism: The case of the European Convention

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**Abstract:** Owing to the vagaries of the ‘constitutionalization’ of the European Union, legal scholarship has disregarded the momentous constitutional transformation brought about by the European Convention System. This is regrettable, not least because the Convention has reconfigured national constitutional authority in a cosmopolitan context. The emerging cosmopolitan constitutionalism is based upon three ideas: first, the exercise of state authority must also be legitimate from the perspective of those who are not citizens; second, a constitution must embrace fundamental rights and the representation of insiders in order to facilitate the representation of all, including outsiders; third, the authority of the constitution doesn’t just depend on endorsement by an independent people but also on recognition by other peoples who pursue the same type of political project. At the same time, any cosmopolitan constitutional system needs to leave space for particularity. It is therefore not accidental that the idea of a ‘margin of appreciation’ is of pivotal significance.

**Keywords:** constitutionalism; cosmopolitanism; European Convention; Liberalism; margin of appreciation

## I. Introduction

Owing to the vagaries of the ‘constitutionalization’ of the European Union, legal scholarship has disregarded the momentous constitutional transformation brought about by the European Convention System. This is regrettable, not least because the Convention has reconfigured national constitutional authority in a cosmopolitan context. The emerging cosmopolitan constitutionalism is based upon three ideas: first, the exercise of state authority must also be legitimate from the perspective of those who are not citizens; second, a constitution must embrace fundamental rights and the representation of insiders in order to facilitate the representation of all, including outsiders; third, the authority of the constitution doesn’t just depend on endorsement by an independent people but also on recognition

by other peoples who pursue the same type of political project. At the same time, any cosmopolitan constitutional system needs to leave space for particularity. It is therefore not accidental that the idea of a ‘margin of appreciation’ is of pivotal significance.

## II. The other European project

This article claims that European constitutionalists have stubbornly underappreciated the European Convention System. Spellbound by the ‘constitutionalization’<sup>1</sup> of the European Union and fixated upon the indeterminate nature of the beast, scholars have neglected the significance of the historically first track of European integration that has over many years come to interact somewhat uneasily with Union law.<sup>2</sup> While this neglect is understandable in light of the convention’s lack of primacy and direct effect,<sup>3</sup> it is nonetheless regrettable in light of the radical reorientation of the constitutional project that it portends.

The Convention System has put core ideas of modern constitutionalism into question and replaced them with an alternative vision of constitutional authority.<sup>4</sup> It has done so by elevating fundamental rights protection to a

<sup>1</sup> See Martin Loughlin, ‘What is Constitutionalisation?’ in *The Twilight of Constitutionalism*, edited by P Dobner and M Loughlin (Oxford University Press, Oxford, 2008) 47–69.

<sup>2</sup> See *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland*, ECHR Application No 45036/98 (30 June 2005). Available at <<http://hudoc.echr.coe.int/eng?i=001-69564>>. For a commentary, see Frank Schorkopf, ‘The European Court of Human Rights’ Judgment in the Case of *Bosphorus Hava Yollari Turizm v Ireland*’ (2005) 6 *German Law Journal* 1255.

<sup>3</sup> On a formal level, the convention lacks the authority of supranational law. Hence the convention cannot be invoked in order to play a legal trump card against national (constitutional) law. Substantively, the Convention is not infrequently applied in a highly deferential manner, particularly in cases that affect core areas of sovereignty, such as safety or combating system opposition. See Mark W Janis, Richard S Kay and Anthony W Bradley, *European Human Rights Law: Text and Materials* (3rd ed, Oxford University Press, Oxford, 2008) 702–17.

<sup>4</sup> There is, however, a very conventional and straightforward way of viewing the Convention System in a constitutional context. The Convention was introduced to stabilize democracies in post-war Europe. Not by accident, it was the states in which the first experiment with democracy after the Great War had foundered that favored the Convention the most, while more mature and more firmly entrenched democracies were not convinced it was needed, and were concerned about the loss of sovereignty. The core idea underlying the link between protecting fundamental rights and stabilizing democracy is perplexingly simple. Democracies are on the brink of turning into authoritarian regimes once majorities become tyrannical. Using fundamental rights violations as scoring devices, however, it is relatively easy to identify such majorities. In particular, when democratically elected majorities aim to foreclose the channels of political change, they are most likely to do so by locking members of the opposition up and tinkering with the rights of mass media. But these are not the only salient issues. Religious intolerance is also a quite reliable indicator of majority tyranny. See Andrew Moravcik, ‘The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe’ (2000) 54 *International Organization* 217.

level that is of common concern for the participating states and by submitting their conduct to the (now) mandatory jurisdiction of the European Court of Human Rights (ECtHR). This has altered the nature of the constitution of these states. National constitutions have been transformed into a cosmopolitan constitution. The European Convention System demonstrates that the cosmopolitan project can be realized in a decentralized form and without a world state.

In this article, I focus on the demise of three core ideas of modern constitutionalism. The first is that a constitution is addressed first and foremost to its citizens and speaks to the members of a particular bounded polity. After all, traditionally conceived, a constitutional system is the equivalent of a social compact and supposed to advance the interests of those who are a party to it.<sup>5</sup> By contrast, owing to its focus on human rights, the Convention System puts everyone – including foreigners – at the center of constitutional law. The second idea is that a constitution is an instrument to give effect to the collective self-determination of a people and to render it stable over time. The Convention System dispenses with this idea and dissociates the legitimate exercise of public authority from the expression of a common, let alone general, will. It will be seen, however, that it nevertheless has to concede great significance to shared moral understandings. According to the third idea, the people are the masters of their constitutional law and no other nation has to meddle with their choices. The Convention System strips constitutional authority of such isolationist pretensions. In the concluding sections of this article, I point out how these transformations are relevant to the authority of law in general.

### III. Foreigners first

Cosmopolitanism is the belief that we are at home in the world. The globe is our fatherland. Since antiquity, this belief has been stated by drawing a contrast with membership of the polity to which one happens to belong.<sup>6</sup> Therefore, cosmopolitanism essentially involves a disavowal of one's political particularity. Cosmopolitans claim, for example, that they are neither Danish nor Dutch, but rather citizens of the world.<sup>7</sup>

Remarkably, the world is – at least politically speaking – not a self-governing unit. Once one leaves the ambit of one's home country, one

<sup>5</sup> See, for example, Thomas Paine, *Rights of Man* (ed E. Foner, Penguin, Harmondsworth, 1969) 185.

<sup>6</sup> The case in point is the cynic philosopher Diogenes.

<sup>7</sup> See, for example, Martha Nussbaum, 'Education for Citizenship in an Era of Global Connection' (2002) 21 *Studies in Philosophy and Education* 289.

immediately realizes that wherever else one might move to in this world, one is destined to be a foreigner there – at least for a number of years. The world is not a polity: it is composed of a plurality of bounded communities that all draw a line between insiders and outsiders. Hence, if one is at home in the world and does not feel at home in one's place, then one had better conceive of oneself as an outsider.

Cosmopolitans thus have to be at home with occupying the status of a foreigner. Therein lies a remarkable challenge for constitutional theory. A cosmopolitan constitutional theory requires to reconsider the foundations of political authority from the perspective of those who are, at least temporarily, outsiders and hence in a disenfranchised state, or do not participate in a social compact. More to the point, it involves conceiving of legitimate authority from the perspective of those who are in no position to claim authorship of the laws that are applied to them.

#### IV. Representation and rights

From the perspective of modern constitutional philosophy, it is undoubtedly unusual to conceive of political authority from such an angle, but it is not totally uncommon either. It is not uncommon if it is taken into account that liberal political philosophy recognizes two ways of respecting the interests of the governed: political participation and rights. Of these two ways, rights are of key significance for the cosmopolitan outlook.

One core idea underlying representative government is that those affected by governmental action are also the most capable sentinels of their interests.<sup>8</sup> Those bearing the brunt of state policies are likely to make themselves heard or even felt, and their concerns will be given due consideration if the political process is equitable and fair. Evidently, the fairness condition is not met if majorities behave tyrannically. They move ahead without taking seriously the concerns of the minority of persons affected.<sup>9</sup> Consequently, these persons find themselves in a position that is tantamount to experiencing the effects of disenfranchisement. It is as if nobody spoke for them, for those among them who do speak are simply ignored. The majority remains unresponsive.

It is, however, possible to resort to an alternative to political voice in order to render legitimate governmental action from the perspective of those who find themselves either *de jure* or *de facto* in such a disenfranchised state.

<sup>8</sup> See John Stuart Mill, *Considerations on Representative Government* (Prometheus Books, Buffalo, 1992) 66; LT Hobhouse, *Liberalism* (Oxford University Press, Oxford, 1964) 124.

<sup>9</sup> See Alexis de Tocqueville, *Democracy in America* (trans HC Mansfield and D Winthrop, University of Chicago Press, Chicago, 2000) 239–42.

Their interests can be represented by other means than by having delegates participate in negotiations and deliberations of government policies. The chief means thereto is investing them with rights that they can invoke against governmental action. Since rights do not, unless they are political rights proper, facilitate the active participation in processes of collective decision-making, but merely draw limits with regard to what politics may do, they confer a specific veto power on those who have them, subject to the proviso that the interference complained of is disproportional and excessive. The veto is actually closer to an objection, for it gives a voice to persons in a considerably circumscribed way. The participation in the political process that they facilitate is issue-specific and negative; at the same time, it can be highly effective.<sup>10</sup>

## V. Rule of law and negative liberty

The significance of that type of ‘playing a role’, which is neither active nor entirely passive, can be appraised more fully from within the liberal outlook to which it is historically aligned. If enjoying individual freedom is essential for the legitimacy of government, the most elementary form of freedom, which has been tirelessly invoked by liberal political philosophy (but also in defence of the rule of law<sup>11</sup> and modern ‘republicanism’)<sup>12</sup> consists of not being in the position of a slave.<sup>13</sup> Masters have the power to treat their slaves at whim; slaves, on the other hand, cannot demand to have their obligations laid down clearly in advance of their actions. They can be kicked around randomly from one moment to the next. They do not enjoy the autonomy that accrues from being able to anticipate, and to rely on, the reactions of those giving them orders. They have no room to control their own lives, for they lack immunity from unauthorized or undetermined interference. The conduct of their masters is not required to observe any prior constraints, no matter what these might be. The relation between them and their inferiors is indeed not based on the rule of law.

<sup>10</sup> Evidently, a tradeoff is made between the opportunity of leaving one’s mark and of asserting oneself by drawing a line.

<sup>11</sup> See Lon L Fuller, *The Morality of Law* (rev ed, Yale University Press, New Haven, CT, 1969) 162–67; Nigel Simmonds, *Law as a Moral Idea* (Oxford University Press, Oxford, 2007) 101, 141.

<sup>12</sup> See, for example, Philip Pettit, *On the People’s Terms: A Republican Theory and Model of Democracy* (Oxford University Press, Oxford, 2012) 50, 58.

<sup>13</sup> See, notably, John Locke, *Two Treatises of Government* (ed P Laslett, Cambridge University Press, Cambridge, 1960), Second Treatise, §§ 22–23, pp 283–84.

By contrast, the most elementary form of freedom is facilitated by the rule of law.<sup>14</sup> It promises freedom from unlawful interference.<sup>15</sup> Evidently, this liberal perspective on government allows for the articulation of normative conditions of political legitimacy that do *not* have to include the common authorship of laws.<sup>16</sup> This explains why the conception of freedom that underpins this conception of legitimacy is essentially private. Instead of manifesting itself in the participation in collective or joint action, freedom concerns the rational pursuit of individual aims.<sup>17</sup> Since the pursuit of such aims is reasonably possible only if one avails of certain goods, such as health and safety, removing acts that interfere with such goods from the ambit of governmental action is apt to enhance the private liberty of individuals. With the focus resting on liberty enjoyed in virtue of effective immunity from state interference, it is possible to add to freedom from ‘domination’ by others the respect for certain goods that are necessary to leading a life (Rawls’ ‘primary goods’).<sup>18</sup> Briefly, observing the rule of law and respect for fundamental rights comprise the liberal gold standard of legitimate constitutional authority.

## VI. Two spheres of rational action

It is possible, then, to carve out conditions of legitimacy that apply to citizens and foreigners alike, namely the conditions that *anyone* needs to enjoy for the sake of taking control of their own private life. These universal conditions confer specific veto powers that originate from the private sphere and limit the exercise of public authority. The idea that citizens are to be the authors of their laws does not even enter the picture here. By contrast, the idea is that the private and the public spheres are both spheres of *rational action* that depend on one another,<sup>19</sup> but are also likely to give rise to conflict.

<sup>14</sup> See, building upon the work of Lon Fuller, Nigel Simmonds, *Law as a Moral Idea* (Oxford University Press, Oxford, 2007).

<sup>15</sup> For a classical statement, see Georg Jellinek, *System der subjektiven öffentlichen Rechte* (2nd ed, Mohr Siebeck, Tübingen, 1919) 103.

<sup>16</sup> On the common authorship of laws as a condition of freedom, see Jean-Jacques Rousseau, ‘On the Social Contract’ in *The Major Political Writings* (trans. JT Scott, Chicago University Press, Chicago, 2012) 174.

<sup>17</sup> See Benjamin Constant, ‘On the Liberty of the Ancients Compared With That of the Moderns’ *Political Writings*, edited by B Fontana (Cambridge University Press, Cambridge, 1988) 307–28.

<sup>18</sup> See John Rawls, *Political Liberalism* (Columbia University Press, New York, 1991) 187–90.

<sup>19</sup> No state revenue without commerce, no commerce without the administration of justice.

This point deserves special emphasis. Conceiving of legitimacy from the perspective of *private* liberty puts rational agency in the place that could also be occupied by the collective authorship of laws. Government is imagined, and supposed, to be a body of institutions in charge of rationally pursuing goals that cannot be achieved via the horizontal coordination of conduct owing to factors such as market failure and coordination problems. The pursuit of such ‘public interest’ invariably interferes with private liberty, but it may do so only to the extent that interferences are instrumentally warranted. The rationality of state action is the universalistic *equivalent* of the collective authorship of laws *qua* legitimating factor.

This equivalent emerges from detaching authorship from particular communities. Rational agency is faceless and anonymous; it stands for what anyone would have to do regardless of who they may be. From that perspective, any author is as good as any other. It does not matter whether or not governmental authority is the mouthpiece of a foreign will – for example, a colonial motherland – as long as and inasmuch as this will rationally pursue sound public policy. The relationship between government and its subjects is based upon mutually yielding to instrumentally justified demands, while the goal pursued is, in the case of government, the public interest and individual happiness in the case of subjects. The mutual recognition of these goals is what makes yielding possible.

## VI. Anonymous authority

Since the relation to government is rooted in recognizing the doings of a rational agent, the nature of government is rendered as *inherently administrative*. It is viewed as concerned with problem-solving, more precisely the pursuit of public interests at the lowest cost for private individuals. States may have to be particularistic because common traditions are psychologically indispensable in order to sustain peaceful arrangements between the public agent and private individuals, but the value of governmental action is in principle independent of being derivative of political authority or being rooted in a sense of belonging to a community. Its claim to respect does not stem from dealing fairly with a plurality of perspectives in the face of ineradicable reasonable disagreement;<sup>20</sup> what matters is that governmental action is rational and perhaps even necessary whenever it puts an obstacle into the path of private liberty. Indeed, as is evident in Hobbes’ third law of

<sup>20</sup> See, for that matter, Jeremy Waldron, *Law and Disagreement* (Oxford University Press, Oxford, 1999).

nature,<sup>21</sup> the social contract upon which the authority of government is deemed to rest regards the observation and performance of covenants merely as means to pursue individual long-term objectives. More locally bounded communities – places where people are united by mutual sympathies – only play a facilitative role.

This is not to say that liberal political philosophy necessarily has cosmopolitan implications. The relation is the other way around. Putting the status of an ‘unencumbered self’<sup>22</sup> that does not belong to any community at the forefront and attributing to it equal footing vis-à-vis citizens is invariably tied up with a liberal outlook.<sup>23</sup> It is remarkably apolitical. The agenda is predominated by the protection of the fundamental rights. Democratic political participation is secondary at best – or, as some publicists in public international law tend to phrase it, one form of ‘good governance’ among potential others.<sup>24</sup>

A system of fundamental rights protection that delinks, at least among a group of states, the protection of human interests from political representation is the nucleus of the cosmopolitan constitutional system. Remarkably, it can even be achieved on the basis of some coordinated effort among nations. What matters is how nation states conceive of, and design, their own constitutions.

## VII. Horizontal constitutional authority

Once the vertical link between constitutional authority and a particular people becomes relativized, it should not come as a surprise that the well-spring of constitutional authority can no longer be located exclusively in the will of the people, at least not without anything further involved. On the contrary, a *ius gentium* component enters the foundational level of the

<sup>21</sup> See Thomas Hobbes, *Leviathan* (ed CB Macpherson, Penguin, Harmondsworth, 1951) 201.

<sup>22</sup> See Michael J. Sandel, *Liberalism and the Limits of Justice* (Cambridge University Press, Cambridge, 1982).

<sup>23</sup> The enjoyment of rights in the face of rationally defensible governmental action is a genuine condition of legitimacy. It pays no heed to whether someone is a foreigner. It posits a general reason to find the government acceptable, not just reason that arises on a personal level from striking the balance between putting oneself into a position of disenfranchisement, on the one hand, and enjoying the material or spiritual benefits of international mobility on the other.

<sup>24</sup> See Mattias Kumm, ‘The Cosmopolitan Turn in Constitutionalism: On the Relationship Between Constitutionalism in and Beyond the State’ in *Ruling the World? Constitutionalism, International Law, and Global Governance*, edited by JL Dunoff and JP Trachtman (Cambridge University Press, Cambridge, 2009) 258, 290.



system.<sup>25</sup> This can be understood, puzzlingly enough, by taking a look at the constitutional theory of the French Revolution.

We owe to Abbé Sieyès the idea that the sovereign entity from which the constitution originates is the nation. The nation exercises the constituent power – which, even though not subject to positive law, is not without constraints. It is bound to observe natural law.<sup>26</sup> The implication of this idea is twofold. First, in deciding how to take heed of natural law, the nation is free to construe its meaning and to infer by its own lights what it requires. At the same time, however, natural law must not remain entirely toothless. The danger is very real. Nations do not obey orders; they are sovereign. But there is something that they can do in order to check whether or not they are on the right track. They can explore whether their construction of natural law is sound by looking around and observing what those do whom they consider to be their equal – that is, other nations that are also engaged in a liberal constitutional enterprise. From this, it follows that it is at least advisable and prudent, if not necessary in order to avail of critical standards, for the constitutional protection of fundamental rights to take into account how members of a peer group of states treat comparable issues. This is, arguably, the only check that is available to a nation. I shall return to this most important point and to its implications below.

At this point, it becomes clear that the horizontalization of constitutional authority is essential to a cosmopolitan constitutional system. In a sense, such a system grants sovereignty to polities only at a discount. The people are taken to be the authors of their constitution, but the people have to stay abreast of what other free peoples do. Furthermore, the recognition as members in good standing in a cosmopolitan enterprise must matter to them. The system thus involves what may be called cosmopolitan *amour propre*.<sup>27</sup>

### VIII. Mitigating elitism

The existence of such an other-regarding attitude is puzzling to American constitutional theorists. Jed Rubenfeld<sup>28</sup> once reported with utmost bewilderment that constitutions were prepared in Europe for fledgling

<sup>25</sup> See Jeremy Waldron, 'Foreign Law and the Modern Ius Gentium' (2005) 119 *Harvard Law Review* 129.

<sup>26</sup> See Emmanuel Joseph Sieyès, *Political Writings* (trans. M. Sonenscher, Hackett, Indianapolis, IN, 2013) 136.

<sup>27</sup> Alexander Somek, 'From Republican Self-Love to Cosmopolitan *Amour Propre*: Europe's New Constitutional Experience', in *The Double-Facing Constitution*, edited by J Bomhoff, D Dyzenhaus and T Poole (Cambridge University Press, Cambridge, 2019) 153–74.

<sup>28</sup> See Jed Rubenfeld, 'Unilateralism and Constitutionalism' (2004) 79 *New York University Law Review* 1971.

democracies by committees established under the auspices of the Council of Europe. The experts working on these committees were in tacit agreement that involving the folks on the ground would be detrimental to the success of such a project. Rubinfeld was irritated – I think rightly – by the ostensible paternalism of this attitude. Nevertheless, the state-centered American understanding of sovereignty ignores that sovereign power is answerable to those whom it affects, and that part of the answer amounts to exploring whether the peer group is not dissatisfied with what ‘we’ do.

Admittedly, on this basis one does not advance any further than to endorsing some form of authoritarian liberalism, possibly complicit with the authority of an international judicial elite, which had been suspected of assuming the role of Platonic guardianship by authors (and judges) such as Learned Hand<sup>29</sup> and Antonin Scalia.<sup>30</sup> Cosmopolitan constitutionalism must therefore appear to be almost all too thoroughly liberal, owing to its allegiance with that stratum of society that believes itself ‘in the know’, given that it has proven to be successful in life (or luckily inherited the fruits of success from ancestors). Indeed, from Constant<sup>31</sup> to Mill<sup>32</sup> and beyond, liberalism has embraced condescension towards the feeble-minded – particularly towards the passion-driven and myopic many that are disposed to employ political power to redistribute the well-earned wealth of the few.

This is, however, a major deficiency. The cosmopolitan constitutional project is not buttressed by common sympathies that, according to Mill, undergird public opinion and an effective system of representation.<sup>33</sup> At the same time, it is difficult to imagine the government of a free people without a system of fair representation. Democratic participation is essential to the moral quality of laws. Only if those affected by them have at least a voice in the process leading up to their adoption can laws promise to be defensible from a moral perspective.

But how is representation even conceivable if the people do not vote? Is there a way of imagining representation that does not involve voting?

## IX. Virtual representation

The world inhabited by cosmopolitans, which is undeniably our contemporary world, is composed of polities, each of which draws a distinction

<sup>29</sup> See Learned Hand, *The Bill of Rights* (Harvard University Press, Cambridge MA, 1958) 73.

<sup>30</sup> See Antonin Scalia, ‘Commentary’ (1996) 40 *St Louis University Law Journal* 1119, 1122.

<sup>31</sup> See (n 17) 204.

<sup>32</sup> See (n 8) 180–82.

<sup>33</sup> See (n 8) 308, 310.

between insiders and outsiders. Cosmopolitanism is concerned with outsiders *as such* and not interested in turning them into insiders. Otherwise, the cosmopolitan outlook would fall by the wayside. Aside from entrusting the task to an enlightened technocratic elite,<sup>34</sup> the representation of outsiders can only be somehow derivative of a representation of insiders. This is not an altogether unfamiliar idea, even though it was treated with much suspicion or even disdain in the history of political ideas, namely the idea of *virtual representation*.

Edmund Burke introduced this concept in order to address remonstrations of those who did not elect representatives by pointing out that people of their kind – folks from the same social stratum and group with whom they shared interests and sympathies – would elect representatives in other districts.<sup>35</sup> The disenfranchised would be virtually represented by voters who were similarly situated. As is well known, this concept infuriated the torchbearers of the American Revolution.<sup>36</sup> It became – albeit to a limited extent – intellectually rehabilitated in John Hart Ely’s magisterial study *Democracy and Distrust*, in which he explained how protection against discrimination exercises a representation-reinforcing effect.<sup>37</sup> The idea is straightforward. Victims of discrimination have their interests ignored. They are deemed as either unworthy or powerless. Protection against discrimination restores the representation of their interest to the extent that governmental action recognizes the interests of others. Equality provides them with a derivative right to those interests.

Beyond the representative effect of equal treatment, the idea of virtual representation is generally adequate in the context of a cosmopolitan constitutional system. It explains how the inclusion of the disenfranchised into the polity also embraces exclusion. Virtually represented outsiders have to put up with the fact that their types of interests may not be as forceful in the political process of a foreign country as they might be at home, owing to the

<sup>34</sup> See Giandomenico Majone, ‘Europe’s “Democracy Deficit”: A Question of Standards’ (1998) 4 *European Law Journal* 5.

<sup>35</sup> See Melissa Williams, ‘Burkean “Descriptions” and Political Representation: A Reappraisal’ (1996) 29 *Canadian Journal of Political Science* 23. Burke states, ‘Virtual representation is that in which there is a communion of interests and a sympathy in feelings and desires between those who act in the name of any description of people and the people in whose name they act, though the trustees are not actually chosen by them.’ This is from a letter by Burke of 1792 to Sir Hercules Langrishe, quoted in Melissa S Williams, *Voice, Trust, and Memory: Marginalized Groups and the Failings of Liberal Representation* (Princeton University Press, Princeton, NJ, 1998) 35.

<sup>36</sup> See Gordon S Wood, *The Idea of America: Reflections on the Birth of the United States* (Penguin, New York, 2011) 181–82.

<sup>37</sup> See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, Cambridge, MA, 1980) 85, 98, 100, 153.

different compositions of the relevant citizen bodies. Their interests can be articulated only to the extent that insiders lend them their own voice.

Despite this difference in political impact, virtual representation requires that foreigners and citizens be treated equally. A cosmopolitan constitutional system must embrace non-discrimination on the ground of nationality as one of its core principles. The Convention System embraces it too, even though it is of far greater significance in the Union.

When the idea of virtual representation is given a more radical twist, it can be seen that the cosmopolitan outlook accommodates the sense with which some, if not many, people live in their own polity as though it were just another foreign country. Widespread alienation from one's fellow citizens, detachment from the domestic political process and voting abstention fuel the sense that one's polity is not really what it appears to be. According to the model of representation inherent in a cosmopolitan constitution, one's fellow citizens still would mediate representation even if one conceived of them as *substitute foreigners*.

## X. Reviewing the cosmopolitan turn

It is time to return to the constitutionalist ideas mentioned above and to explain how they are overcome in a cosmopolitan context. First, the constitution is no longer taken to speak on behalf of the members of the polity. Therefore, the people can no longer claim that it is 'theirs'; or it is 'theirs' only subject to the proviso that it has to include respect for outsiders, too. The national sense of cohesion ('common sympathies'), serves, where it exists, merely as a vehicle for the realization of universal values; however, it is of no foundational significance. Second, the constitution is no longer considered to provide the medium of political self-determination. The legitimacy of law depends on the rational pursuit of sound public interests. The constitution regulates the interaction of two spheres of rational action. Rationality and proportionality tests are used in order to draw out legal constraints. Their application is in principle dissociated from expressing a popular will.<sup>38</sup> Third, the people are no longer the exclusive masters of their constitutional law. Via the rulings of an international tribunal and the application of its case law, representatives from peer nations are given some voice in each particular constitutional system.<sup>39</sup>

<sup>38</sup> This is a point to which we shall return in the course of discussing the margin of appreciation. It will be seen that the categorical statement in the text cannot be sustained.

<sup>39</sup> This is considered to be a problem from the perspective of political constitutionalism. See Richard Bellamy, 'The Democratic Legitimacy of International Human Rights Conventions:

Interestingly, the peer review system is also ready to concede to the politics various spaces in which the international supervision of national fundamental rights protection becomes narrowly circumscribed. This readiness has given rise to possibly the most famous idea to have originated from the Convention System: the so-called margin of appreciation.

## XI. Three understandings of the margin of appreciation

It should be borne in mind regarding the jurisprudence of the court that the notion can signify at least<sup>40</sup> three different phenomena.<sup>41</sup>

First, the ECtHR may find that a state has observed the margin for the reason that the interference with fundamental rights at issue is proportionate.<sup>42</sup> Thus understood, staying within the margin merely means that state action is unobjectionable in the eyes of the reviewing or ‘supervising’ court. This is, arguably, a *false* understanding of the margin, for it assimilates an altogether distinct and original idea to satisfying the proportionality principle.

Second, in what might be called the *weak* understanding of the margin, states are taken to possess relatively wide discretion to strike ‘a fair balance’ between the public interest pursued and the right restricted.<sup>43</sup> This means, practically speaking, that the scrutiny employed by the Court is low and that state action is submitted to some plausibility or rationality test.<sup>44</sup> The conditions under which the margin, thus understood, is taken to exist vary in the jurisprudence of the Court and are subject to fragmentary and

Political Constitutionalism and the European Convention on Human Rights’ (2015) 25 *European Journal of International Law* 1019 at 1020, 1035.

<sup>40</sup> The case law is so confusing that any attempt at a reconstruction must be prefaced with a disclaimer that alternative reconstructions cannot be dismissed as wrong and are possibly equally plausible. For that move, see Andreas Follesdal, ‘Exporting the margin of appreciation: Lessons for the Inter-American Court of Human Rights’ (2017) 15 *I • CON* 359 at 362.

<sup>41</sup> On the following, see Alexander Somek, *The Cosmopolitan Constitution* (Oxford University Press, Oxford, 2014) 186–87. For a very helpful guide to understanding the margin, see George Letsas, *A Theory of Interpretation of the European Convention of Human Rights* (Oxford University Press, Oxford, 2008). For a solid and thorough overview of the jurisprudence, see Dominic McGoldrick, ‘A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee’ (2016) 65 *International and Comparative Law Quarterly* 21.

<sup>42</sup> This appears to be the focus of the analysis in Yuval Shany, ‘Toward a General Margin of Appreciation Doctrine in International Law’ (2005) 16 *European Journal of International Law* 907.

<sup>43</sup> See Dominic McGoldrick, ‘Religious Rights and the Margin of Appreciation’ in *Human Rights Between Law and Politics: The Margin of Appreciation in Post-National Contexts*, edited by P Agha (Hart, Oxford, 2017) 156.

<sup>44</sup> See (n 43) 155.

conflicting expositions.<sup>45</sup> Two factors, however, stand out. The first concerns the interest affected within the scope of protection afforded by a particular fundamental right.<sup>46</sup> For example, an interest not to suffer criminal punishment is more eligible to receive judicial solicitude than the interest to have a same-sex partnership recognized as a ‘marriage’<sup>47</sup> or to adopt a child as a single homosexual person.<sup>48</sup> A similar distinction is made with regard to political speech and artistic speech, in the case of which the margin is deemed to be wider.<sup>49</sup> The second factor is manifested in an ‘emerging’ consensus among European countries.<sup>50</sup> This means that convergence among national legislatures may lead to a gradual narrowing of the margin of appreciation. The effect of consensus is to expand the scope of the right and to restrict the scope of limitations.<sup>51</sup> The same-sex marriage cases are again relevant here, not least because the developments (in Western Europe)<sup>52</sup> have given rise to a situation in which states are under a positive obligation to provide for some form of civic union.<sup>53</sup> At the same time, while there is no more margin left regarding whether or not to provide such a union, what states will provide and the details of the relevant arrangements still remain within a wide national margin of appreciation.

It is open to debate how the interest criterion and the consensus criterion are linked together. Conceivably, the Court could claim that the margin must be narrow where ‘a particularly important facet of an individual’s existence or identity is at stake’.<sup>54</sup> It is, of course, difficult to predict the circumstances under which the Court will find this to be the case. These

<sup>45</sup> For a useful summary, see (n 42) 927. See also (n 41) 24–28.

<sup>46</sup> See Nicholas Bamforth, ‘Social Sensitivity, Consensus and the Margin of Appreciation’ in *Human Rights Between Law and Politics: The Margin of Appreciation in Post-National Contexts*, edited by P Agha (Hart, Oxford, 2017) 132.

<sup>47</sup> Compare *Dudgeon v UK* (1982) 4 EHRR 149 with *Schalk and Kopf v Austria* (2011) 53 EHRR 20. Note that the latter case even the wording of Article 12 seems to exclude a more searching inquiry, since the language seems to suggest that a marriage is between a man and a woman. See (n 46) 136.

<sup>48</sup> See *Fretté v France* (2004) 38 EHRR 21.

<sup>49</sup> See *Muller v Switzerland* (1991) 13 EHRR 212.

<sup>50</sup> On the following, see (n 46) 135–39. The Court may at times also refer to international trends. See (n 43) 153.

<sup>51</sup> See (n 43) 153. It is also the question what one takes to be ‘consensus’. There is very little doubt that incremental convergence of legal reform counts as such. But what about inaction on certain issues, such as a dearth of sumptuary laws? Would that be indicative that there is a solid consensus that they would be violative of Article 8?

<sup>52</sup> Or, for that matter, across the range of the members of the Council of Europe. See (n 41) 30. Bamforth (n 46) 139 observes very aptly that in LGBT cases the Court does not take into account the fact that more liberal attitudes have not yet gained a foothold in Eastern Europe.

<sup>53</sup> See *Oliari v Italy* (2015) 40 BHRC 549.

<sup>54</sup> See (n 41) 24. See also (n 43) 156: ‘Where a particularly important facet of an individual’s existence or identity is at stake, the MoA allowed to the state will normally be restricted.’

would have to be the cases, however, in which a ‘consensus’ is called for on the basis of rational insight alone. Alternatively, the consensus may be indicative of what the reason is about. Perhaps that there is something deeply and possibly troublingly factual about what we understand by reason in the context practice.<sup>55</sup>

Third, a most intriguing and, indeed, *strong* exposition of the margin is the one to be found in the case that introduced the idea, the *Handyside* case.<sup>56</sup> The Court pointed out that the states have leeway to decide whether they find a certain measure necessary in order to protect important rights or interests of others. Not only conflicts over freedom of speech, but also cases concerning religious freedom demonstrate that states are indeed given much leeway to determine what they consider necessary – where no less restrictive means are available – to protect interests.<sup>57</sup>

## XII. Risk and culture<sup>58</sup>

Regrettably, this has by no means become the predominant reading of the margin of appreciation, even though it actually points to a significant factor concerning the *de facto* authority of national constitutional law. Constitutions are designed to address certain risks, in particular by allaying fears that power might be abused by those governing the governed.<sup>59</sup> No less a figure than Mill expressed quite clearly what a constitution is expected to accomplish from this perspective:<sup>60</sup> ‘All trust in constitutions is grounded on the assurance they may afford, not that the depositaries of power will not, but that they cannot misemploy it.’

Constitutions are devices of political risk regulation.<sup>61</sup> The whole edifice of separation of powers is constructed in order to tame the primary suspect of a constitutional system, such as a president or a potentially tyrannical

<sup>55</sup> On the idea that mutual social recognition determines the norms of reason, see Robert Brandom, *Tales of the Mighty Dead: Historical Essays in the Metaphysics of Intentionality* (Harvard University Press, Cambridge, MA, 2002) 220.

<sup>56</sup> See *Handyside v UK* (1976) 1 EHRR 737 and my interpretation in (n 41) at 188–91.

<sup>57</sup> For an analysis, see (n 43) 155, 160; McGoldrick attributes this wide margin to the existence of a wide diversity of regulating the relation between the state and religious communities.

<sup>58</sup> The heading cites the title of the famous book by Mary Douglas and Adam B Wildavsky, *Risk and Culture: An Essay on the Selection of Technical and Environmental Dangers* (University of California Press, Berkeley, CA, 1982).

<sup>59</sup> For a systematic elaboration of this idea, see Adrian Vermeule, *The Constitution of Risk* (Cambridge University Press, Cambridge, 2013).

<sup>60</sup> See (n 8) 170.

<sup>61</sup> For a similar take on constitutional law, see András Sajó, *Constitutional Sentiments* (Yale University Press, New Haven, CT, 2011) 116.

legislature, which is nonetheless indispensable in order to provide for the effectiveness and the widespread support of the system of government.<sup>62</sup> Constitutional risk regulation extends also to the risks that originate from the exercise of fundamental freedoms, such as freedom of speech, the unrestricted enjoyment of which could potentially lead to sexual depravity among the young and the feckless.<sup>63</sup> Powers to proscribe the publication and dissemination of certain materials are supposed to assuage concerns about the adverse effects of freedom of expression.

The assessment of the magnitude of the risk depends crucially, however, on how a potentially risky action is morally evaluated.<sup>64</sup> If what could materialize is totally abhorred, even the slightest chance of its occurrence is considered to be unbearable, regardless of whether it is likely or not: it simply must not happen. For example, disarming the population through a ban on the use of hand-guns sounds an alarm bell for those who want to be socially in the position to claim that they are able to protect their family. Availing of certain protections confers a status of safety or immunity that rests on deeply held moral beliefs concerning the reasons why one is entitled to that status. In cases where the Court senses that legislation has touched base with the ‘vital forces of society’<sup>65</sup> – for example, in matters concerning sexual morality or offences to the religious feeling of the larger population – the Court is inclined to concede a wider margin of appreciation.<sup>66</sup> Sustaining a people’s attachment to their way of life requires respecting their evaluations. These evaluations are reflected in what they consider to be intolerably hazardous.

Arguably, no particular community would be possible if majorities could not assert their like-mindedness on certain issues.<sup>67</sup> If particularity is indeed indispensable (a point to which we shall return below), then cosmopolitan constitutional systems must make room – reserve a margin of appreciation – for the ‘vital forces’ of national societies. Into the resoluteness of these forces

<sup>62</sup> See Alexander Somek (cited n 40) 70–71, 79.

<sup>63</sup> See *Handyside* (n 56).

<sup>64</sup> See, for example, Dan M Kahan, ‘The Gun Control Debate: A Culture-theory Manifesto’ (2003) 60 *Washington and Lee Law Review* 3.

<sup>65</sup> This is the phrase used in the *Handyside* case. Such contact with moral sentiment is not conflated with the idea that the Court must grant a wider margin for the epistemic reason that national or local authorities are closer to the realities of the country. See (n 43) 148. In these cases, the ruling amounts to a *renvoi*.

<sup>66</sup> These cases are to be distinguished from those other cases in which the court concedes margin owing to the fact that the national authorities are simply better positioned with regard to assessing the facts and circumstances of the case. See *Sunday Times v UK* (1980) 2 EHRR 245 para 59.

<sup>67</sup> For a similar observation, see (n 39) 1030–31.



feeds the like-mindedness of those sharing certain fears about the adverse consequences of unbridled liberty.

### XIII. Proto-federalism and the cosmopolitan alternative

Ostensibly, this strong understanding of the margin is irreconcilable with the consent component of its weak alternative. If consent and not the *inherent* particularity of communities mattered, then the Convention System would avail itself of a tacit federal component.<sup>68</sup> It would treat participating states as members of a federal system and regard the existence of (sufficient) consensus as the equivalent of federal legislation that pre-empts states from holding on to their old ways. The strong understanding, by contrast, honors the particularity of states, for it recognizes that this particularity can only be sustained if states retain the power to determine the weight of the grounds for permissible restrictions, such as morals, the rights of others, or health and safety. This would actually rule out overriding states on the ground of the convergent practice of their peers.

The question must arise, therefore, of whether understanding of the margin of appreciation is consistent with a cosmopolitan constitution. It cannot be answered on empirical grounds. Not only would it be futile to search in the jurisprudence of the Court for a pattern that would demonstrate consistent adherence to one or the other conception; the question is actually *inherently normative*. It is essentially about what a cosmopolitan constitution ought to be. Arriving at an answer therefore requires exploring its philosophical roots. Arguably, Immanuel Kant's ideas concerning a federation of republics are a good place to start.

### XIV. Kantian ideas

Kant regards states as obligated to cooperate peacefully within a federal system.<sup>69</sup> Such a system, however, lacks powers to legislate and enforce obligations. Kant's federation is not supposed to command a world police force.<sup>70</sup> Compared with the natural duty that Kant ascribes to human beings

<sup>68</sup> See Alexander Somek (cited n 41) 70–71, 79.

<sup>69</sup> See Immanuel Kant, 'Zum ewigen Frieden: Ein philosophischer Entwurf' in *Werkausgabe in zwölf Bänden* (ed W Weischedel, 2nd ed, Suhrkamp, Frankfurt, 1978) vol 11, 224–25 (B63–64).

<sup>70</sup> For a useful summary of Kant's relevant ideas, see Christoph Horn, *Nichtideale Normativität: Ein neuer Blick auf Kants politische Philosophie* (Suhrkamp, Berlin, 2014) 281, 284, 286, 304.

to overcome the state of nature and to subject themselves to the sovereign authority of states,<sup>71</sup> the obligation on the part of states to cooperate peacefully on the international level is far less stringent.<sup>72</sup> In fact, such cooperation appears to be an entirely voluntary affair. This asymmetry between the domestic and the international legal order is rather puzzling, not least because Kant's political philosophy is committed to establishing and sustaining peaceful international relations.

As Jakob Gaigg argues in a sophisticated interpretation of Kant's legal and political philosophy,<sup>73</sup> the asymmetry in the relation between domestic legal orders and a federation of republics can be reconstructed by focusing on the problem that any legal order has to solve. The relevant asymmetry affects the sovereignty of domestic coercive systems, namely the legally unconstrained power to say what the law is and to make this stick.

According to Kant, in the state of nature the law that is to be applied to individual situations is subject to various, and variously conflicting, elaborations. By their very nature, the general precepts of natural law (e.g. *honeste vivere, alterum non laedere, suum cuique tribuere*) are highly indeterminate and require further elaboration. Reading Kant, for a moment, with Lockean eyes,<sup>74</sup> this means that individual citizens implicitly legislate when they, for example, protect their property against interference or takings by others. As a result of this decentralized form of private law-making, the law is subject to conflicting determinations. The resulting indeterminacy, however, is contrary to the idea that the law ought to be a universal public standard. Consequently, the state of nature needs to be overcome, not only because it is likely to give rise to an endless cycle of hostilities, but for the even more urgent reason that it is a state in which nobody can authoritatively claim to know what the law is. From this it follows that any community that has succeeded in establishing a government invested with power to determine the law represents a human achievement that must command respect.

<sup>71</sup> See Immanuel Kant, 'Die Metaphysik der Sitten' in *Werkausgabe in zwölf Bänden* (ed W Weischedel, 2nd ed, Suhrkamp, Frankfurt, 1978) vol. 8, 430–31 (B194).

<sup>72</sup> Actually, it is fully congenial with how political constitutionalism conceives of the obligations that may legitimately arise under a system of international human rights protection. The review by an international court is supposed to be 'weak', and this means that it is subject to being overridden by national political bodies. Likewise, the states are supposed to remain free to leave such a system whenever they want. See (n 39) 1034–35.

<sup>73</sup> See Jakob Gaigg (unpublished manuscript, on file with the author).

<sup>74</sup> See John Locke, *Two Treatises on Government* (ed P Laslett, Cambridge University Press, Cambridge, 1988), Second Treaties, §§ 12–13, 275–76.

## XV. Necessary particularity

Gaigg argues convincingly that the authoritative determination of what the law is by the state *obliterates* a great deal of private law making – or rather of ideas people may harbor about what general precepts of natural law require in a specific context. From this it follows that systems of public authority are *necessarily particular*. They can never exhaust a reservoir of alternative possibilities that could become parts of a system of law that delimits the range of freedom of choice. Particularity is thus a *necessary* feature of legal systems.

Such necessary particularity apparently conflicts with the claim of legal norms to universal validity. Hence, it would seem to be necessary to transgress the particularism of legal orders in favor of the law of a global world republic. The catch inherent in such a solution, though, is that such a global legal order would be universal *in form only*, but not in substance, for it would also involve the destruction of alternative normative possibilities of giving flesh to the bones of natural law. Any universal law is necessarily beset with a contradiction between form and substance; hence the critical dimension of universal natural law – its transcendence of particular constructions – can be sustained only if whatever *formally* claims to be universal law allows itself to be *substantively* challenged by other particular systems of law.

Viewing formally universal law as substantively particular can be integrated into its claim to universal validity. From a substantive perspective, the international understanding of fundamental rights is no less particular than that of particular states. It can, however, sustain its claim to universality by establishing the conditions under which its own particular determination of law may prevail over other such determinations. The universal can make a difference with regard to its very own particularity by rising above it and regulating its scope vis-à-vis other particulars. The particular that is supposed to constrain others can legitimately claim priority over them by setting the minimum standard that is to be common to all. The preference of the Convention System for its own standard is defensible if it expresses a threshold below which no signatory state must fall.<sup>75</sup> This is the particularity that all other particulars can accept, for it is never alien to them, but instead essential to what they are.

<sup>75</sup> See JHH Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (Cambridge University Press, Cambridge, 1999) 104–06.

## XVI. Conditional deference

The brief excursion into philosophical territory should help us to arrive at an answer to the question of which of the two competing interpretations of the margin of appreciation – the weak proto-federalist or the strong cosmopolitan – is to be preferred. It should emerge clearly that the reading that emphasizes particularity is more defensible because it respects the determinative power of states. It also recognizes that any relatively more universal system of law is bound to remain particular.

Against this backdrop it should also not come as a surprise that the ECtHR has developed a manner of applying the margin that allows states to retain their wide margin if they make – either on the legislative or the judicial level or even on the level of civil society<sup>76</sup> – an effort to assess actively the proportionality of a restriction. The Court will then merely review their review.<sup>77</sup> This can be regarded as an integral element of the strong reading. The idea is that if assessments of the proportionality of interferences are invariably tainted with particular evaluations of the relative importance or weight of fundamental freedoms, then this particular perspective has to be brought to bear on the issue with the requisite empirical, analytical and procedural diligence. If states fail to engage in a diligent analysis, the international tribunal may rightly step in order to arrive at its own thorough assessment of the merits. The deference that is inherent in the margin of appreciation is conditional upon states making an effort to address the constitutionality of the interference by their own lights. Diligence comes first, substance second.

## XVII. Reasonable disagreement and political authority

The question remains of whether, with the rejection of the weak reading – which actually concerns only the consensus component<sup>78</sup> – any reference to convergent practice must drop out of the picture too. Exploring this question requires taking another quick detour into more philosophical terrain.

The margin of appreciation can be traced back to the very *form of law*. Recall the Kantian situation of private legislation. In the state of nature, each person legislates substantively, even though no one has the formal power to do so. As long as people universalize ('In every situation X there ought to be Y'), they arrive at sound proposals with regard to what should be a general law. Some would award emotional damages in most tort cases. Others would protect personally offensive speech, at least as long as it is not likely to trigger

<sup>76</sup> See (n 43) 162.

<sup>77</sup> See (n 40) 365–67, 369; (n 43) 164–65.

<sup>78</sup> Conceivably, the reference to protecting a core of liberty can be integrated in the strong reading as sketched out above.

an instant violent reaction. There are good arguments for or against these views. Different people weigh the pros and cons differently and end up in situations that contemporary legal philosophy refers to as reasonable disagreements.<sup>79</sup>

In the face of such disagreements, common ground can only be found by submitting to political authority.<sup>80</sup> In it is vested the power to say what the law is and thus to overcome the paralysis inherent in any potentially infinite debate of pros and cons. Once the authority has spoken, what one does is done because the former has said so.

The margin of appreciation does not rest on an authoritative determination. It denotes a mode of exploring a question, and not a determinate result. The European Court of Human Rights claims to yield to the ‘vital forces’ of society or, more generally, ‘the profound moral views of the people of the state’.<sup>81</sup> The margin merely says what the Court must be ready to yield to, but not under what condition it should do so. Conversely, the signatory states are expected to yield to what the Court espouses as the minimal standard. Again, the margin specifies, if at all, what the states will have yield to and leaves the conditions of yielding largely open.

In this respect, the margin repeats within itself the situation from which the law originates. It stands for the absence of political authority at the international level. Not by accident, its meaning has to remain elusive and its bounds must continue to be largely indeterminate.

## XVIII. Foundational indeterminacy

Just as one encounters at the origin of the legal relation of two moral judgments,<sup>82</sup> and the question arises which of these is to be given precedence (‘You should go to church on Sunday’; ‘I hate church’), the margin is about two competing claims to institutional competence (‘vital forces’ versus ‘minimal standard’). Thus, within the margin, nothing less than the law in the relation of signatory states and the international tribunal is at stake. The problem for which the construction of legal relations has supposedly already provided a solution thus recurs. The margin signifies that the problem of law persists within the law.

Legal relations originate from yielding to the judgments or determinations made by others. Paul gets hammered every night. We find this wrong. But we

<sup>79</sup> See (n 20).

<sup>80</sup> This is Waldron’s core idea.

<sup>81</sup> *A, B and C v Ireland* (2011) 53 EHRR para 241.

<sup>82</sup> See Alexander Somek ‘The Cosmopolitan and the Federal Margin of Appreciation’ forthcoming in *The EU Charter on Fundamental Rights in the Member States* (ed. M. Bobek & J. Prassl, Hart Publishing, Oxford, 2020).

cannot and must not change it. He has the right to destroy himself. Of course, our yielding to Paul's choices – ascribing a right to him – is justified only if the universal conditions for giving way to others are reasonable. Respecting Paul's self-destructive behavior can be warranted by the principle that society must not meddle with conduct that concerns only the acting persons themselves.<sup>83</sup> Whether or not this principle obligates us depends either on its moral merit or on its having been issued by political authority. In constitutional democracies, we prefer the second option. We take it for granted that powers to determine or to settle the law ('I am entitled to my booze') have to be based on powers to lay down such powers.

Any political authority established in order to address reasonable disagreements is, however, expected to respect the limits of reasonable disagreements. It must itself not act unreasonably. A line thus needs to be drawn between disagreements that are reasonable and those that are not. Controversies may arise, of course, over where the line has to be drawn with regard to dissents that are considered to be unreasonable and those that are not. Since it cannot be ruled out *a priori* that the disagreements over the limits of reasonable disagreement may themselves be reasonable, it can also not be established *a priori* where the lines have to be drawn. Absorbing reasonable disagreement over reasonable disagreements requires action. It is a historical process. Reasonable disagreements determine their own limits from within, and in the face of, reasonable disagreements.

A disturbingly 'factual' element enters thus into the determination of the reasonable.<sup>84</sup> What we accept as demanded by reason is subject to variation over time and given effect by something that is neither something nor nothing. We are thrown into agreement and possibly also again out of it.<sup>85</sup> Distinguishing the reasonable from the unreasonable is a question of whether the distinction will 'stick'.

This seems to suggest that sovereign states invariably have to have the final say on this issue. And this is why their convergent practice must not be ignored for the purpose of working with the margin of appreciation in the strong sense.

<sup>83</sup> John Stuart Mill, 'On Liberty' in *On Liberty in Focus* (eds J Gray and GW Smith, Routledge, London, 1991) 30.

<sup>84</sup> See GWF Schelling, 'Philosophische Einleitung in die Philosophie der Mythologie' in: *Sämtliche Werke* (ed KFA Schelling, Cotta, Stuttgart) vol III/2, 1856–1861 at 266.

<sup>85</sup> See Stanley Cavell, *Conditions Handsome and Unhandsome. The Constitution of Emersonian Perfectionism* (University of Chicago Press, Chicago, 1990) 94: 'On Wittgenstein's view, the agreement criteria we depend upon lies in our natural reactions. We may laugh and cry at the same things, or not; some experience may throw us out of, or into, agreement here, but the idea of *achieving* agreement in our senses of comedy or tragedy seems our of place.'

## **XIX. Conclusion**

Fundamental rights protection is the chief task of a cosmopolitan constitution. It focuses on what makes a legal order legitimate from the perspective of outsiders. An essential condition is virtual representation effected by the existence of a democratic political process and the application of the equality principle.

At the same time, the cosmopolitan mindset is decidedly liberal. What citizens of the world are ready to accept are claims made by governments concerning the rationality of their action. The political nature of governments – that they make choices in the face of reasonable disagreement – enters this mindset only indirectly in the form of the margin of appreciation. In the determination of its scope, the problem that the law is designed to solve reappears within the law.

From a cosmopolitan perspective, the determination of law within domestic legal systems is an important achievement. An international body must not override it lightly, for the international system of fundamental rights protection is itself only one particular system among others. Hence, in order to stay true to its universal ambition, it must retreat to establishing a minimum standard and to exploring whether the national particular systems observe their limited power to determine the necessity of a restriction on the basis of their own moral understanding of what warrants interference. They can retain this margin, however, only if they make a serious effort to assess the proportionality of restrictions themselves. Otherwise, the international tribunal will engage in this effort itself.

None of the above suggests that the status of an outsider is as good or as desirable as the status of an insider. Indeed, active citizenship is even indispensable for the representation of interests from the cosmopolitan viewpoint. What the model does suggest is how we can make sense of the liberal underpinnings of world citizenship even where there is no world state.

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