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THINKING BEYOND DEMOCRACY FOR A FUTURE COSMOPOLITAN LEGAL ORDER

by

THOMAS DALTON BRIGGS

Under the Direction of S.M. Love, PhD

ABSTRACT

Recent decades have seen sustained theoretical interest in how a cosmopolitan legal order could be created in a manner consistent with the liberal human rights ideals and democratic principles it is supposed to realize. I argue that this “democratic cosmopolitan” account of the genesis of cosmopolitan law faces at least two dilemmas. Both concern the role that “learning processes” play in its explanation of how a genuine cosmopolitan *legal* order can emerge from a global transformation in the meaning of sovereignty and citizenship. The first dilemma is the theory’s reliance on underdeveloped sociological claims about the nature of democratic political processes, while the second concerns its one-sided analysis of how global trade and interdependence might produce a kind of “cosmopolitan learning.” In light of these issues, I propose that cosmopolitan theorists think beyond democracy as an ideal that should strictly guide the *creation* of a cosmopolitan legal order.

INDEX WORDS: Cosmopolitanism, Democracy, State, Law, International law, Kant

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December 2020 **DEDICATION**

For my parents and sister, who show me more tolerance and generosity than I deserve.

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1 REALIZING COSMOPOLITAN RIGHT

Recent history has renewed the great “cosmopolitan debate,” with some key historical events giving ammunition to both sides. On one hand, beginning with the end of the Cold War and the fall of the USSR, many saw an opportunity appear—an opportunity to build certain global institutions that might bring international politics under the yoke of law—the likes of which had not been seen since the end of the second World War, however brief *that* opportunity turned out to be. And yet the United States’ response to the 9/11 terrorist attacks quickly cast a shadow over these nascent cosmopolitan aspirations, calling into question the liberal internationalism that, to many, was beginning to serve as a mere veil for the power politics of the Western, United States-led order.

A key element of this back-and-forth between cosmopolitanism and its critics concerns the cosmopolitan legal project, that is, the question of how a universal, international system of law founded upon human rights principles could be established in a way consistent with the democratic principles of self-determination to which cosmopolitanism is also committed. It is this debate that is the present concern of this thesis. The authors discussed herein, for the most part, offer a particular account of this genesis of cosmopolitan law that I will call “democratic cosmopolitanism.” And it is this general theory that I will critique. To do so effectively, I think, requires that we start with the cosmopolitanism of Immanuel Kant, the 18th-century philosopher whose work inaugurates the tradition from which contemporary cosmopolitans draw.

Two years after publishing *Perpetual Peace* (1795), Kant declares the “ultimate goal of the whole right of nations”—perpetual peace itself—to be “indeed an unachievable idea.”¹ Despite practical reason demanding both individuals *and* states to leave the state of nature and the condition of war therein, the best we can aspire to is but a mere “continual approximation” of the political principles of peace. To understand the democratic cosmopolitans’ project we will examine two

¹ Kant 1797: §61.

questions they ask of Kant's cosmopolitanism. The first question concerns why Kant abandoned the original project of establishing a genuine cosmopolitan *legal* order, i.e., a law based on principles of peace and human rights capable of binding nation-states; the second, how his account fails and what conceptual revisions are necessary for its present revival.

1.1 Kant's Cosmopolitanism and its Failure

Kant's account of the origin of law is in some important ways a familiar one. The state of nature (i.e. war) among pre-civil individuals is one they ought to leave, because the uncertainty and danger therein make realizing right impossible. Leaving this condition requires a legal order founded on an innate right to freedom all possess in virtue of their being human.² It is not wrong to coerce others into this legal order if they refuse to join because without it right is impossible—that is, any coercion required to bring people out of a state of nature is not (necessarily) unjust because the state of nature itself is a condition of injustice.³ The solution to war among states and the international state of nature, we might think, would be an analogous creation of a *world* state that lifts individuals *and* states out from under the global threat of war. Kant rejects this world state solution on practical and theoretical grounds. Practically, "the size of such a state of nations would make protecting each member impossible,"⁴ with tyranny inevitably arising from the bloated body of a global Leviathan. Theoretically, however, there is another issue: despite how both the pre-civil and the international states of nature threaten human right generally with the possibility of war, coercion is not a rightful solution for the international problem. Unlike individuals in the pre-civil state of nature, states "already have a rightful constitution internally" and have thus "outgrown" the efforts of others to impose their own idea of right upon them.⁵ Even though practical reason still demands states leave

² Kant 1797: 6:237.

³ See Kant 1797: 6:312 and 6:350

⁴ Kant 1797: 6:350.

⁵ See Kant 1795: 8:355 and Kant 1797: 6:344.

their lawless condition, history, for Kant, makes clear their general refusal to do so. In light of this fact Kant replaces the original positive vision of a coercive world republic with "the negative surrogate of a league," wherein states *voluntarily* covenant to avoid war and establish peace through mutual cooperation.⁶

Kant was thus sensitive to two common objections to legal cosmopolitanism: concerns for the inability of institutions of such size and scope to be democratically legitimate,⁷ and the worry that the project is merely one people's vision of right coercively imposed on others. It turns out, though, that the democratic cosmopolitans' answer to the second question—why Kant's account fails and what can be done to revive it—will also be the basis for their response to the above objections. But we must see, first, why they find Kant's voluntary league inadequate, and second, how they diagnose Kant's *statist notion of popular sovereignty* to be the source of his account's failures. The foundation of the democratic cosmopolitan account of a genuine *legal order* of cosmopolitan right will be its reimagining of this statist understanding of popular sovereignty.

The importance of the cosmopolitan juridical project should be emphasized, because the actual realization and institutionalization of cosmopolitan right is not merely an optimistic addendum to the general moral vision. Rather, it is perhaps cosmopolitanism's most pressing theoretical task, for the general lack of law capable of binding states themselves remains a constant threat to human right even when it is realized (merely provisionally, however) in individual states.⁸ The distinction here can be thought along the lines of that between classical international law and constitutionally bound domestic law. Classical international law for the most part merely governed the relations between states, but only to the extent that both sovereign contracting parties allowed it to. In such a system, as Habermas notes, war itself was conceptually incapable of itself being a crime, as the *jus*

⁶ Kant 1795: 8:357.

⁷ See Dahl 2010 and Rawls 1999. For a contrasting view on this issue, see Nili 2015.

⁸ See Habermas 2008 and 2010; Held 1997 and 2010; and Benhabib 2007, 2012, and 2014.

ad bellum was an absolute right constitutive of a state's sovereign legal status.⁹ Post-WW2 developments in international law appeared to overturn this paradigm, at least partially, as war itself became criminalized and international politics began to see a meaningful process of legalization.¹⁰ Yet the foreign and domestic policy of the United States in its present War on Terror legal paradigm is a stark reminder for the cosmopolitans that more is clearly needed to constrain international power politics. Hence the inadequacy of the voluntary league and its mere "continual approximation" of the true cosmopolitan task. Habermas captures the problem when he says that "Kant must still solve the *conceptual problem* of how this order could be thought of from the viewpoint of law."¹¹ Because Kant is unable to rely on coercion as a mechanism for realizing and enforcing cosmopolitan right, he must instead substitute each state's *moral self-binding* to the voluntary league for the *legal* binding that lies outside his conceptual grasp.¹² A voluntary league is thus incapable of realizing cosmopolitan right because each state is only provisionally bound by its own moral ideas; that the central question of how states themselves can be brought together under law is answered with a facsimile of legal order is more than just a practical concern, but a problem with Kant's idea of cosmopolitanism itself.¹³

Kant's inability to think (popular) sovereignty beyond the form it was beginning to take on in his historical context—the form of the nation-state—is, according to the democratic cosmopolitans, the source of his account's failure. It is, first, why the initial disanalogy between the pre-civil and international states of nature proves an insurmountable obstacle to a straightforward juridification of cosmopolitan right. And while he recognized that practical reason demands states bind themselves to higher law, he nevertheless failed to imagine an international order outside the

⁹ Habermas 2006: 119.

¹⁰ See Habermas 1997 and Finnemore 2004.

¹¹ Habermas 1997: 116.

¹² Habermas 1997: 118.

¹³ Habermas 1997: 118.

horizon of the nation-state, instead settling on the voluntary league as the highest order to which we can aspire. Moreover, global-historical transformations that Kant couldn't have predicted cast further doubt on the possibility of realizing popular sovereignty and human right in the form of the nation-state. Three global forces unleashed in the process of industrialization and globalization are responsible: capitalism's international markets and the unrestrained movement of capital it demands; ecological crises accelerated and magnified by industrialization; and finally, transnational migrations of immigrants and refugees made more frequent and intense by the previous two forces.¹⁴ These forces challenge the ideal of state sovereignty by dissolving the very distinction between a state's internal and external affairs—its domestic and foreign policy—constitutive of the meaning of sovereignty. State sovereignty and the self-determination of a people were "internally linked," as Habermas puts it,¹⁵ for what it meant for a people to determine themselves was not just internal self-legislating, but also the defense and defining of the community against those outside it. The distinction, then, is what *makes it possible to conceive of "internal self-legislating" in the first place.*¹⁶ Thus the modern concepts of sovereignty and self-determination emerged already-wedded to notions of *territory* and *identity* that gave meaning to these concepts by providing their determinate form and content. The modern forces of globalization and global crises, however, defy territorial constraints and thus render the internal/external and foreign/domestic distinctions untenable from the point of view of self-determination within a state. I'll return to this point in a moment. But first let's provisionally consider how: multinational corporations and the global market exist and operate outside any constraints a single state could possibly muster; ecological crises are issues that by their nature require collective, global solutions; and, finally, international migrations challenge the

¹⁴ While this "death of the state" thesis actually remains quite a disputed one today, for the purposes of this paper I will not dispute the claims of the democratic cosmopolitans here. I believe there are deeper flaws in their accounts, hence my uninterest in challenging them on this point.

¹⁵ Habermas 2010: 270.

¹⁶ See Walzer 2015.

traditional meaning of citizenship as well as the practical and ethical justifications for borders in liberal societies wherein the idea of human right serves as a foundational legal concept.¹⁷

As individual states become increasingly beholden to these forces, so too does popular sovereignty become increasingly threatened so long as the state remains the form through which it must be realized.¹⁸ In addition, the mode in which this sovereignty has historically been expressed—in an aggressive outward projection of "hard power" (e.g. military force)—is itself being replaced by "soft power," the use of such means as persuasion and the control of information as the diplomatic *modus operandi* of Western states. This shift thus "robs the subjects Kant had counted on in his association of free states of the very basis for their independence."¹⁹ The primary obstacle to realizing Kant's vision of cosmopolitan law—statist sovereignty—ends up being that which also fails to adequately realize the (popular) sovereignty that gave the statist form its normative force in Kant's theory.²⁰

1.2 New Ideas of Sovereignty and Citizenship in Cosmopolitan Democracy

So Kant's vision of a cosmopolitan legal order failed because he couldn't see beyond the statist horizon of sovereignty that dominated his historical context. And it is also precisely within this horizon where sovereignty has been undermined, as contemporary global forces thwart traditional attempts at sovereign self-assertion. Hence the detrimental elements of the statist conception—its particularist (territorial/geographic, ethnic, religious) constitutive elements—are, in

¹⁷ See Benhabib 2004 and 2007.

¹⁸ See Held 1997, 2005, and 2010; Brown 2010; Benhabib 2004 and 2007; and Habermas 1997, 2008, and 2010.

¹⁹ Habermas 1997: 123.

²⁰ It is important to note now, though, that recognizing the inadequacy of state sovereignty does not commit the democratic cosmopolitans to a wholesale denial of the state form's moral or (temporary) practical significance. Habermas (2008), for example, makes clear that states will almost certainly need to play a role (for historically contingent reasons) at the outset of any foreseeable cosmopolitan juridical order, insofar as they contribute to its democratic legitimation. But it is also important to recognize that the new role for states in these accounts nevertheless fundamentally alters states' central normative function, indeed presupposing the transformation of sovereignty I discuss in the next section.

the democratic cosmopolitan accounts, replaced with a liberal-procedural vision of generally accepted principles and procedures for governance that form the new locus of a people's sovereign will or self-determination. I find important at least two dimensions along which the theories reimagine the concept: (a) topological revisions and (b) procedural-representative ones. The former concern the topology of the statist sovereignty concept—the internal/external, domestic/foreign distinctions constitutive of the concept—and thus directly pertain to how contemporary global forces dissolve such distinctions. The latter revise the processes through which sovereign representation is expressed, fitting it within sovereignty's reimagined "vertical" topology.

1.2.1 *Topological Revisions*

What does it mean to say that those ecological-economic-demographic forces undermine statist sovereignty due to the concept's *topology*? As we saw, the internal/external distinction is central to the meaning of statist sovereignty. This is why Finnemore calls foreign intervention a "liminal concept" for the idea of sovereignty, as it "sets the outer limits of its meaning" and thus provides its determinate content.²¹ The basic topology of statist sovereignty is this division between the internal and external because it is through this distinction that the sense of "self-determination" is formed—a people (the internal) expressing its will against those forces pressing in from without (the external). The problem, then, is that ecological collapse, the dynamics of global capitalism, and mass displacements of peoples dissolve this distinction.

The contemporary topological weaknesses of statist sovereignty can be thought of practically and theoretically. The dissolution of the internal/external distinction manifests along ecological, economic, and demographic fault-lines, although these are all ideal types and mutually involved. Ecological crises, to start, can only be managed effectively by great or near-great powers, and even so, no great power acting alone could avoid the crises spawned by the steady march of

²¹ See Finnemore 2003. By "determinate content" I mean here, e.g., what policies the international system permits a state to pursue, i.e., the zone (of actions) of a state's legitimate sovereign authority.

climate change. Because all states are (to varying degrees) both responsible for and subject to ecological crises, the political space these crises open transcends the internal/external, domestic/foreign distinctions. Something similar can be said about the political-economic dynamics of global capitalism. Multinational corporations are a good example of the concrete forces blurring these distinctions, as they are both internal and external to the nations in which they operate, often capable of exerting more influence over domestic and international policy than most states could. It makes sense, then, that the economic crisis appears as a kind of phantasm, simultaneously reaching into the most basic economic life of a state while also looming above and beyond it, external to it, a new kind of "foreign threat." FDR's declaration of "war against this depression" in his 1933 inaugural address—²²a declaration of war and marshaling of the state apparatus against a *domestic economic crisis*—is an archetypal example of how the blurring between the internal and external manifests in practical state policy.²³

In response to this blurring of the distinction constitutive of statist sovereignty, cosmopolitan democracy reimagines sovereignty with a *vertical topology*. This "vertical division" of sovereignty takes the basic idea of federalism from the United States as a loose model for a future cosmopolitan supranational government. Individuals would exist in a network of overlapping institutions, the highest global level responsible for managing issues like those ecological, economic, and demographic ones mentioned above, with global peacekeeping an essential additional function. The basic federalist idea, moreover, seems at first to avoid looking like a world state by dispersing governmental authority across different vertical "levels," be they local, provincial, regional, global. "What I am proposing," writes Thomas Pogge, "is not the idea of a centralized world state... [r]ather, the proposal is that governmental authority—or sovereignty—be widely dispersed in the vertical

²² See Franklin D. Roosevelt 1933.

²³ Scheuerman (2004, p. 175) discusses how the distinction between a country's foreign and domestic economic policy has become blurred over this period of the internationalization of the liberal legal-economic model.

dimension."²⁴ Institutions representing large global regions (similar to the European Union) would, first, be created where they didn't already exist and, moreover, their decisions "recognized, in principle, as legitimate independent sources of law."²⁵ With this disassociation of sovereignty from fundamentally particularist forms, the new political space opened by global issues need not necessarily undercut popular sovereignty; international organizations would exist possessing the proper size, scope, and authority to deal with the ecological, economic, and demographic issues that defy spatio-territorial constraints. While there are unsurprisingly a great number of differences in the specific institutional arrangements the democratic cosmopolitan theorists imagine, nevertheless there is a generic "three level" global system that encompasses the general project: (1) a highest-level supranational organization that at the minimum maintains security between nations; (2) transnational organizations coordinating ecological, economic, and demographic policy; and (3) the remnants of those democratically legitimate states and/or nations at the "lowest" level (of the major three) that conducts local policy consonant with that set out by the larger cosmopolitan institutions.²⁶

For now I want to put aside myriad questions concerning the practical functioning of this "verticalized sovereignty" concept and the cosmopolitan institutions that would embody it, questions about, e.g., the managing of the peacekeeping force, the degree to which higher levels control the lowers' policies, who arbitrates disputes between the levels, etc. Regardless of such questions, the new verticalized sovereignty at least in theory avoids several problems caused by its old statist topology. First, institutions capable of addressing issues that cut across current borders would ensure the popular sovereignty of those peoples that could not fully grapple with said issues themselves. No longer beholden to the often mercurial wills of other nations, the world's peoples could now appeal to a genuine *legal* authority to coordinate response to acute ecological or economic

²⁴ Pogge 2010: 120.

²⁵ Held 1997: 247.

²⁶ See Habermas 2008 (esp. pp. 451-3) and Held 2010.

crises. And, perhaps most important, the problem of nations going to war with each other would now become a *legal* one, as the prevention of war becomes a central institutional task of the highest level of cosmopolitan government.

1.2.2 *Representative Revisions*

Yet eventually we must ask: how will popular sovereignty be expressed in its new vertical form? That is, what account of sovereign *representation* do these accounts offer whereby the transnational institutions come to be seen as legitimate sources of law? The second dimension of the democratic cosmopolitan revisions—their account of representation—attempts to answer this question.

We should note first that the problem of representation isn't uncomplicated within the familiar statist form of sovereignty. Again, the aforementioned three ideal-type global issues present problems practical and theoretical. Mass displacements of peoples are, in particular, a novel challenge to the traditional liberal idea of citizenship.²⁷ First, fundamental principles of Western liberal law attribute sets of basic rights to *all* individuals merely in virtue of their being human, their humanity. Such rights open up a new kind of political space—however limited—to non-citizens living alongside or within a nationally organized community. Originally, Kant imagined that the world *public* created by such co-habitation (which is yet another blurring of the internal/external distinction) would naturally drive humanity toward the creation of a world *republic*.²⁸ The quintessential cosmopolitan right for Kant is unsurprisingly the "right to hospitality,"²⁹ the right to travel and engage in the socio-economic life of another state. But Kant didn't resolve the tension between a state's obligation to hospitality and its right to control its domestic borders, i.e., its internal

²⁷ Seyla Benhabib has provided perhaps the most impressive sustained discussion of this problem from the democratic cosmopolitan theoretical perspective. See Benhabib 2004, 2007, and 2014.

²⁸ See Kant 1795.

²⁹ See Kant 1797.

policy, a tension we see today between international human rights laws and treaties and increasingly contentious national immigration policies. In all fairness, though, Kant couldn't have foreseen or imagined anything like the ongoing Syrian refugee crisis: not the magnitude of people displaced, nor the capabilities and contentious ethico-legal obligations of the advanced industrial states responding to it, and certainly not the dynamics of the isolationist–cosmopolitan divisions we see today both within and among states. Like the blurring of the distinction between domestic and foreign economic policy, boundaries between the legal and socio-economic meanings of citizenship and non-citizenship shift in ways that throw politics into confusion. Cultural and legal schisms have arisen around a host of related issues, like the basic rights refugees and economic migrants should have; the number of migrants a state should tolerate/accommodate; and, ultimately, the question of whether certain groups even "belong" at all in their (new? or temporary?) state.

"Transnational migrations," says Benhabib, thus "bring to the fore the constitutive dilemma at the heart of liberal democracies: between sovereign self-determination claims on the one hand and adherence to universal human rights principles on the other."³⁰ National identity has accordingly become a fault-line for deep political-philosophical fractures. Political conflict about national identity and immigration are nothing new, of course, at least in American history.³¹ But the intensity and scope of these conflicts have reached a fever pitch in recent years, not least because of the increased visibility mass media has given to such demographic and cultural disruptions. Mass human displacements affect every element of a national identity, whether religious, ethnic, cultural, etc., turning what were once fundamental political credences into centers of political conflict. In this new political space cosmopolitan theorists have called great attention to the *contingency* of the "national essences" often underlying notions of national identity.³² "There is only a historically

³⁰ Benhabib 2004: 2.

³¹ Eric Kaufmann's *Whiteshift* (2018) details this history at length.

³² See Appiah 2018.

contingent connection between the principles underpinning citizenship and the national community," says Held, and hence the principles of citizenship warrant "re-articulation" and "re-entrench[ment]."³³ What the legitimate cosmopolitan government(s) must now represent are not *particular* peoples—defined by their territory, ethnicity, religion, etc.—but humanity as such, embodied in certain universally valid principles and procedures recognized as such by those particular peoples the institutions represent. I do not mean that the institutions imagined by the cosmopolitan theorists will not take such particularist identities seriously; indeed, the idea of regional transnational institutions requires informed distinctions between regions and peoples that take into account their histories, cultures, and material circumstances. But the important theoretical move is that the particularist identifications will no longer be foundational to the concept of citizenship or political authority generally. Unlike past conceptions of popular representation and its state conduits, cosmopolitan governance does away with the contingent, “mythological” unities constitutive of the territorially/ethnically/nationally bounded absolute right of states that conflicts with cosmopolitanism's universalistic liberal principles.³⁴

The statist topology of sovereignty (the internal/external distinction) required a correspondingly exclusive idea of citizenship in order for self-determination (popular sovereignty) to have determinate meaning; without an Other clearly distinguishable from a state's citizens, the collective subject of self-determination is thrown into ambiguity. Cosmopolitanism's vertical sovereignty, if it is to abandon the particularist foundations of the concept, must then be built on correspondingly non-exclusive, i.e., universal, criteria for political membership. Because cosmopolitanism demands not only "world citizens" but a world wherein all *are* citizens,³⁵ the

³³ Held 2010: 307.

³⁴ See Held 2005, especially p. 167, for a particularly clear and forceful statement of this view.

³⁵ Hannah Arendt (1973) popularized this notion of “the right to have rights” as the central moral-juridical problem concerning stateless peoples. This right to have rights amounts to a right to citizenship, for as Arendt (and many others) experienced, human rights remain unrealizable outside a kind of juridical context currently only found

foundations of cosmopolitan citizenship must be "general rules and principles which can be entrenched and drawn upon in diverse settings."³⁶ The rules and principles are, of course, principles of human rights and the cosmopolitan *lex suprema*, the permanent suspension of states' *jus ad bellum*, their right to go to war. Being a cosmopolitan citizen means existing in a legal order wherein all humanity enjoys basic rights and participates in governance across a potentially wide array of institutions and communities; the cosmopolitan citizen would, in this way, take on *multiple* citizenships corresponding to those issues and communities affecting them.³⁷

The alternative model of citizenship is self-defeating, so the cosmopolitan theorists say, because the distinctions upon which it must rest have been and continue to be rendered obsolete. Only a universal citizenship is capable of representing the peoples of a world wherein deteriorating ecology, unpredictable technologies and economies, and mass human displacement have made isolation a practical impossibility. Cosmopolitanism thus "constitutes the political basis and political philosophy of living in a global age."³⁸ Indeed, the world has become so interconnected and issues so far-reaching, they argue, that cosmopolitan democracy is the *only* form of government capable of realizing (liberal) democracy and popular sovereignty.³⁹

1.3 "Learning Processes" as a Key Explanatory Mechanism in Cosmopolitan Theory

Now we arrive at a decisive point in the democratic cosmopolitan account. Having supplied (a) the topological structure of its concept of sovereignty, as well as (b) the principles underlying a cosmopolitan citizenship, it must now give an account of (c) how such an order—a genuine *legal*

within states. For an essay on Arendt's notion of the "right to have rights," see Benhabib's "The right to have rights": Hannah Arendt on the contradictions of the nation-state," in Benhabib 2004.

³⁶ Held 2010: 306.

³⁷ See Held 2005 and 2010; Habermas 2008; and Pogge 1992.

³⁸ Held 2005: 167.

³⁹ See, among others, Habermas 2006, 2008, and 2010; Held 1997, 2005, and 2010; and Benhabib 2004, 2007, and 2014.

order—would be and become democratically legitimate, i.e, how the peoples within it would see it as realizing their right to self-determination. For if the cosmopolitan juridical order failed in this last regard, then the accounts I have discussed here would not have moved beyond Kant's original problem of articulating a universal law that did not violate the plurality of existing polities and their right to self-determination. This last question is, moreover, twofold: first is the question of what self-determination is *in theory for the cosmopolitan citizen*; second, how the world's peoples would transition from their predominant statist understanding of citizenship toward the cosmopolitan one.

If the cosmopolitan theorists are correct in their diagnosing statist sovereignty and citizenship as terminally ill-suited for the present global situation; and, importantly, if we *recognize* this point; then where else can we turn to but cosmopolitanism's universalistic principles to realize our right to self-determination if no particularist foundations are up to the task? "The issue," writes Habermas, "is whether we must finally bid farewell to the very idea of constitutional democracy or whether the normative core of the vanishing world of democratic nation-states can be recovered within the post-national constellation."⁴⁰ Hence cosmopolitan citizens would, accordingly, "take their orientations from universalistic standards" of human right and world peace, standards institutionally embodied in and realized by a future cosmopolitan world organization.⁴¹ This "constitutional patriotism"⁴² would thus replace those old particularist identities that merely contingently underlie our ideas of sovereignty and citizenship. But "constitutional patriotism" could not *fully* replace those ideas because, first, in doing so it would dissolve the pluralism that is both the starting point of cosmopolitan theory as well as the condition a cosmopolitan legal order must respect if it is to be democratically legitimate. Second, the general architecture of a cosmopolitan legal order as proposed calls for regional and sub-regional institutions (including juridically

⁴⁰ Habermas 2010: 274.

⁴¹ Habermas 2008: 447.

⁴² See Habermas 1996, esp. p. 499.

subordinated nation-states) to supplement the overarching supranational one; and so a modified form of *national citizenship* still remains in the cosmopolitan account, chiefly to make use of the processes of democratic legitimation some existing states embody.⁴³

The development of the cosmopolitan legal order encounters here yet another obstacle, the product of the theory's inability to fully banish a particularist form of citizenship (however juridically subordinated) from its proposed legal architecture. The practical dimension of the problem concerns how present world opinion is to move away from a particularist/statist idea of sovereignty and citizenship toward a suitably cosmopolitan one. Crucially, brute coercion is not an available option, as it wasn't for Kant, due to the normative core of the theory as it has been imagined.⁴⁴ The cosmopolitan theorists are quite clear on this point.⁴⁵ The creation of a cosmopolitan legal order must occur consensually, and so some kind of permissibly (non-)coercive mechanism for its realization must be identified. More will be said about this problem shortly. But first I will introduce its theoretical counterpart, which Habermas calls a "major gap" in the cosmopolitan legal account. His comments are worth quoting at length:

[This gap] primarily concerns the legitimate expectations and demands of citizens in their contrasting roles as *cosmopolitan* and *national* citizens. *Cosmopolitan* citizens take their orientation from universalistic standards which the peace and human rights policies of the United Nations must satisfy no less than a global domestic politics negotiated among global players. *National* citizens, by contrast, measure the conduct of their governments and chief negotiators in these international arenas in the first instance not by *global* standards of justice but above all by the effective observance of *national* or *regional* interests. But if this conflict were fought out in the heads of the same citizens, the notions of legitimacy that evolved within the cosmopolitan framework of the international community would inevitably clash with the legitimate expectations and demands derived from the frame of reference of the respective nation-states.⁴⁶

⁴³ See Habermas 2008 and Held 2005.

⁴⁴ Below (2.2.1) I discuss the meaning of coercion and its role in accounts of cosmopolitan law in greater detail.

⁴⁵ Held 1997: 245.

⁴⁶ Habermas 2008: 449.

This problem of a “split consciousness” in the minds of future cosmopolitan citizens, we should note, appears (to Habermas) even *after* ideas of a cosmopolitan sovereignty and citizenship have “evolved” in the international community, and would thus also appear within this initial stage of “evolution” as well. So this split consciousness problem is not wholly separable from the above practical problem. The solution to *both* problems that the cosmopolitan theorists mobilize is built upon a notion of cosmopolitan *learning processes*, an explanatory mechanism that acts as a theoretical fulcrum for the rest of the cosmopolitan legal project. Now we must see how this notion appears in the different accounts I’ve referenced so far.

Habermas directly appeals to “learning processes” to explain the “constitutionalization of international law,” his term for the world transition to cosmopolitan law. “From the perspective of a politically constituted world society,” he writes, “both governments and populations would have to adopt new orientations and in this sense ‘learn.’”⁴⁷ Although he recognizes that states today are far from living up to the “historical learning processes” that emerged as the post-WWII order took shape, nascent cosmopolitan institutions like the United Nations (UN) and the European Union (EU) evidence the continuing possible development of this cosmopolitan *Geist*. We can think of the different kinds of learning this transformation requires in terms of the two different subjects of cosmopolitan law: states (governments) and individuals (peoples). States (and future regional governments) will have to adapt their range of legitimate action to those policies in line with the cosmopolitan commitments to peace and human rights. The structure of the EU, with its vertical division of law- and policy-making, illustrates how states can take on new roles wherein they become “fallible agent[s] of the world [European] community.”⁴⁸ Under the threat of sanction from the EU, individual European states have, to a significant extent, organized their domestic law around cosmopolitan principles while nevertheless still retaining their monopoly on violence. We should

⁴⁷ Habermas 2008: 453.

⁴⁸ Habermas 2008: 453.

note that the origins of this nascent European cosmopolitanism were far from “consensual” or democratic, given the essential role the Second World War and the ensuing conflict between the first two superpowers played in this story.

Nevertheless, these institutions have proved enduring, all things considered. But as recent years especially have taught us, an additional learning process must take place if such cosmopolitan transformations are to continue their development toward genuine cosmopolitan law. We have seen how the particularist notions of citizenship and sovereignty can be mobilized against the cosmopolitan project even when they oppose consensus among governmental elites, which is what occurred in Britain’s dramatically prolonged exit from the EU. So peoples must also undergo learning processes cultural, social, and political before a condition of cosmopolitan law can be said to exist in an enduring way. Cosmopolitan theorists see these particularist (nationalist, religious, ethnic) attitudes as “obstinate frame[s] of mind,”⁴⁹ historically contingent relics of a normatively obsolete international order. How a continued application of current nascent cosmopolitan practices might lead to further development—rather than stagnation or reversal—remains unclear, especially if states maintain their monopoly on legitimate force before their “obstinate” populations “learn.” The cosmopolitan theorists adapt two ideas from Kant to explain how such a transformation might take place.

The first idea concerns how cosmopolitan law might develop among those states wherein its core principles have already “taken root.” According to Kant, free trade and laws of hospitality guaranteeing the right to travel and interact with foreigners will create a broader community of interests and a spirit of camaraderie among those involved.⁵⁰ The thought is that, if different peoples nevertheless all live in the same “global public,” then a common morality—i.e., a cosmopolitan one—will develop among them. So long as the conditions such a global public

⁴⁹ Habermas 2008: 453. See also Held 2005 and 2010.

⁵⁰ See Kant 1795.

requires are maintained over some period, then we can expect to see a gradual transformation in the relations between these states and peoples toward cosmopolitan law. Jeremy Waldron offers a similar idea in his account of the “cosmopolitan thicket” of interlocking laws, treaties, and norms currently at work in international politics.⁵¹ Although this thicket is of course far from resembling a genuine cosmopolitan legal order, its very existence goes to show that, with the correct nourishing and care, further development along the cosmopolitan trajectory is possible. Free trade and the opinions of a global public can thus act as a “healthy soil” in which other principles and laws can eventually take root. Given the proper environment, the world’s peoples can thus come to learn a cosmopolitan morality.

These conditions, however, are only those *necessary* for a cosmopolitan transformation to take place *where a nascent cosmopolitanism already exists*. While we already see a version of this order in Europe and North America, the question remains as to how non-citizens and other peoples will come to be incorporated within it. Seyla Benhabib attempts to answer this crucial question with her idea of “democratic iterations.” Benhabib takes the developments in European democracy over the last three-quarters of a century to suggest that there is something inherent in democratic political processes themselves that mediates between local moralities and cosmopolitan norms, “between universal norms and the will of democratic majorities.”⁵² Taking up Kant’s idea that states with certain republican constitutions have a natural affinity to cooperate, she claims that repeated modifications of law through democratic processes produces a “jurisgenerative politics” that gradually incorporates and encompasses non-citizens and outsiders. In the process, a cosmopolitan idea of citizenship is supposed to emerge. Examples of such jurisgenerative politics, Benhabib points out, can be found in how the EU and its member states have gradually increased the rights of non-citizens and, moreover, have led efforts to extend such measures in the international arena

⁵¹ Waldron 2006.

⁵² Benhabib 2006: 49.

generally.

1.4 Taking Stock

I'll now summarize all the moving parts I've discussed so far. The democratic cosmopolitan theorists have given us an account of how genuine cosmopolitan *law* could rightfully emerge from our present situation. These accounts try to overcome the failures and obstacles that Kant's account faced by reimagining the concepts of sovereignty and citizenship. Kant could only offer a facsimile legal cosmopolitanism because his statist understanding of these concepts prevented him from imagining a realistic alternative to states as the highest existing legal authorities. The cosmopolitans overcame this first obstacle by providing a universalistic model of sovereignty and citizenship, so that in theory the plurality of peoples could be respected while united in a single cosmopolitan legal order. But here they confront a new problem arising, first, from the fact that our present pluralist condition is one in which the "historically obstinate" understandings of sovereignty and citizenship still predominate; and second, from their inability to utilize *coercion* as a mechanism for creating a cosmopolitan legal order, for bridging this gap between these current understandings and the cosmopolitan ones awaiting their realization.

To bridge this gap the theorists all introduce "learning processes" as the mechanism that explains how a non-coercive (i.e., consensual and democratically legitimate) cosmopolitan transformation could occur in our present condition. The move from cosmopolitan theory to cosmopolitan law, they say, can take place through some combination of the following. First, a continued application of those existing nascent cosmopolitan laws and institutions can produce the conditions required for peoples to "learn" cosmopolitan principles—nourishing a "cosmopolitan thicket" of international norms and laws—and engender this learning among those involved populations. The post-WWII liberal order built on free trade, commerce, and the resultant global

public is the exemplary historical instance of such learning processes for the cosmopolitans. But for a genuine cosmopolitan *law* to emerge there must also be an account of how this order would expand to include non-citizens and other peoples. Here the learning processes are found in a particular idea of democratic politics acting as a bridge between local moralities and universal cosmopolitan principles. Through “democratic iterations” different peoples can be gradually united in a cosmopolitan legal order, as such iterations present an opportunity for them to “learn” cosmopolitan principles through their domestic enacting of them alongside others. Learning processes, then, are the cosmopolitans’ answer to the paradoxes Kant confronted when he tried to think how plurality might be respected when united under a universal law.

2 SOME DILEMMAS FOR LEGAL COSMOPOLITANISM

The democratic cosmopolitans believe those obstacles to establishing cosmopolitan law are only “complex coordination problems” which do not present a “real dilemma” for the future of legal cosmopolitanism.⁵³ I disagree. Though the obstacles may very well be kinds of coordination problems, they are certainly not *only* that. The problem Rousseau brings to our attention in his story of the stag hunt, for example, isn’t merely that of *coordinating* the hunting party—rather, it is the *structural problem of how we can even imagine cooperation among self-interested individuals in the absence of a force to correct any errant, self-interested behavior.*⁵⁴ But we must remember that cosmopolitans have foreclosed the coordinating force available to Rousseau as a potential solution to this problem: the creation of a sovereign. Indeed, the entire exercise in developing accounts of “learning processes” is not an attempt to solve the analogous “coordination problem” among self-interested states in the

⁵³ Brown 2010b: 260.

⁵⁴ See Rousseau 2011.

international arena, but instead an attempt to *dissolve* the assumptions underlying it; namely, the assumptions of statist sovereignty and particularist citizenships that constituted the cosmopolitan dilemma as Kant confronted it. In this way learning processes are the mechanism through which the international community is to be transformed in a way that bypasses the traditional understanding of international anarchy.⁵⁵

2.1 The Peculiar Nature of Cosmopolitan “Learning Processes”

I think there are a couple problems with how the cosmopolitans use learning processes to explain the genesis of cosmopolitan law. It’s important, though, to point out that “learning” can be quite an ambiguous concept. All learning is a kind of process, but we have to specify the kind of learning we’re talking about here. Learning the rules to a board game is different than learning how to live a certain kind of way with others. Several people from quite different cultures (I think it’s safe to assume) could probably figure out the rules to a board game they’re all trying to play, so long as there isn’t a significant language barrier. They share a practical goal (we assume each is intent on playing the board game, or is compelled to) and they have the means to carry it out, namely their sociability and their cognition. So long as nothing actively interferes with the process, it seems reasonable to say that the group will play the game by undergoing a collective “learning process.” The sociological and conceptual structures this requires are all accounted for, and so appealing to learning processes to explain how they will eventually come to play the game together seems cogent.

Is this, then, the sense in which the cosmopolitans use “learning processes” in their theories? There are important similarities. They provide a compelling case for why the predominant meanings of sovereignty and citizenship have been rendered inadequate in today’s world. At the very least the

⁵⁵ This kind of transformation is discussed at length by constructivist scholars of international relations. See Alexander Wendt (1992), “Anarchy is what States Make of it,” and Helen Milner (1991), “The Assumption of Anarchy in International Relations Theory: A Critique.”

concepts need revising, and it's plausible that the cosmopolitans are right to claim that *any* particularist foundations for these concepts will prove to be fatal flaws. Moreover, the global issues responsible for this shift are, in a way, “universal” problems confronting all the world's peoples, much like how every player must confront the same challenges in a board game. So if the world is to “play” this “game” without sacrificing *in toto* a liberal-democratic understanding of popular sovereignty and citizenship,⁵⁶ then it must “learn” the new cosmopolitan rules to the game, i.e., the cosmopolitan ideas of sovereignty and citizenship. At least this is what the cosmopolitans seem to say.

If someone is playing a game wrong, we are likely to correct them; and because they presumably want to play it correctly, they will likely just thank us for pointing out their error. Or perhaps they firmly believe they understood the rules correctly, and so the rulebook or some online forums might have to be consulted. At worst someone intentionally plays incorrectly (cheats) and we have to find someone else to play with. The first major problem with the cosmopolitans' idea of learning processes is that they don't function like the ones in this hypothetical game. First, there is a necessary indeterminacy in the “rules” that peoples must learn—i.e., how to live together in the context of certain global issues—because we can only imagine such learning as democratic if what is learned is the result of consensual interaction and cooperation, as it is in Benhabib's idea of “democratic iterations.” If we can specify the exact rules that need to be learned beforehand—before we come together to play the game—then deliberation and compromise with peoples in a “historically obstinate frame of mind” can only lead to an undemocratic paternalism, on the one hand, or a distortion and erring from the cosmopolitan principles around which the world must be organized, on the other. Even if we assume that such peoples would learn in the minimum sense of coming to see that *some kind of institutionalization* of cosmopolitan principles must occur, the other

⁵⁶ See Habermas 2008.

kind of “learning”—figuring out what such arrangements would look like in particular circumstances—must still take place. And we ought not assume that agreement would appear here, as different peoples with their own interests would almost certainly have different (and thus potentially incompatible) ideas about what sorts of cosmopolitan institutional arrangements they would be willing to tolerate. The subject matter of this *learning-how* to live with one another lacks the kind of objectivity found in, say, the rules to a board game, an objectivity that enables “learning processes” to function as a real explanatory mechanism there.

The cosmopolitans recognize, to a degree, the need for this kind of objectivity when they emphasize that realizing the new cosmopolitan paradigm depends on its core principles of democracy and human rights being “available” and “clear” for all to see.⁵⁷ Putting aside the myriad meta-ethical questions this raises—like, for example, whether such principles can even be “objective” in this way, what that would even mean, etc.—such comments nevertheless still evince an essential ambiguity in the cosmopolitan account. On the one hand, cosmopolitan principles and the cosmopolitan legal project purportedly enjoy a kind of “objective ethical necessity” that could come to be consensually “seen” or “learned” by the world’s peoples if the structures such learning requires—e.g., a global public, rights of hospitality, open commerce and free trade, interconnected democratic political processes, etc.—are cultivated and maintained. But on the other hand, what exactly is to be learned is left ambiguous in order to preserve the possibility that such learning will proceed consensually, for the meaning of “consensual” and what it will look like will inevitably vary from people to people.

I’m not saying that this kind of learning is impossible, or that we have no reason to expect it ever to happen. In some way and for some indeterminate time it did in fact happen, as the cosmopolitans point out, among the states that founded, entrenched, and expanded the post-WWII

⁵⁷ Held 2010: 307.

liberal order across the last half-century. The problem, though, is that in order for this learning to serve as a foundation for a genuine *legal* order, there must be some corrective force that operates when someone playing the game “forgets” what they’ve learned, or still continues (for whatever reason) to play improperly. Cosmopolitanism, however, cannot appeal to the traditional corrective force—a sovereign—because the genesis of this force—the force of genuine cosmopolitan law—is *what “learning processes” are supposed to explain!* Instead, the cosmopolitans must find a corrective force lurking within the very democratic learning processes themselves, but so far they’ve only offered an underdeveloped sociology⁵⁸ to support such a claim. Kant appealed to a natural teleology operating in republican states to explain why, over time, we can expect the cosmopolitan spirit to develop among them. An even stranger natural teleology, though, is required to explain how this development would come to incorporate those states and peoples *outside* these orders, not to mention why those outside would enter willingly.

The past couple decades have cast more doubt on cosmopolitan learning processes taking place in the way cosmopolitans think they will. Indeed, faced with precisely the kind of questions for which Benhabib develops her idea of “democratic iterations”—questions concerning the meaning of citizenship, of incorporating those outside a polity within it, etc.—Great Britain and the United States, as just two examples, have chosen to turn their backs on the kind of cosmopolitan principles and institutions they purportedly learned over the past half-century. “There is no guarantee that ‘learning’ is irreversible,” writes Raymond Geuss, pithily capturing the central issue; “nor can any distinct sense be attributed to the claim that learning in the long term is natural, that is, will take place *unless* prevented.”⁵⁹ What’s needed to prevent such a backslide, I repeat, is a coercive force—a kind of law—that lies out of reach precisely when the idea of a learning process must be invoked in the cosmopolitan accounts. Paraphrasing Kenneth Waltz, if the end we seek is a

⁵⁸ Brown 2010b: 264.

⁵⁹ Geuss 2008: 5.

cosmopolitan legal order, and if the basis for such an order is a network of “learning processes” emanating from a certain kind of democratic politics, “then some active agency must be substituted for the spontaneously functioning evolutionary forces whenever those forces seem to bog down.”⁶⁰ The cosmopolitans don’t give us compelling reasons to think that peoples, when confronted with global issues like mass migrations, ecological collapse, and economic crises will choose to enact or continue to practice cosmopolitan politics, a politics that is often held responsible, rightly or wrongly, for these issues even appearing in the first place.

2.1.1 A comment on consent, coercion, and cosmopolitan learning

Until now I’ve left open a crucial ambiguity: what counts as illegitimate coercion in these cosmopolitan learning processes? That is, what exactly are the boundaries between consent and coercion, so that we can distinguish between a cosmopolitan “slightly visible hand” that justifiably pushes the learning processes along and one that pushes too hard? This question is an important one because the answer to it will determine what, if any, “corrective forces” might in fact be available to the cosmopolitans, so that they might fill the central explanatory gap in their notion of learning processes I pointed out above. The traditional corrective force—the coercive, violent force of law—is from the outset out of bounds. What would most closely approach this corrective force in today’s international politics—the armed intervention—is also quite clearly out of bounds, as not respecting the consent constraints on the establishment of cosmopolitan law.⁶¹ The force of arms is not a legitimate way to correct errant learning processes, at least according to the cosmopolitan accounts as they now stand. This much should be clear. The threat of sanctions as found in the European Union appear to be legitimate, but we must remember that the EU, although imperfect(ly cosmopolitan), is nevertheless an already existing supranational organization. So the sanctions it

⁶⁰ Waltz 2001: 109.

⁶¹ Barring extreme cases, of course, like genocide; but these are cases wherein armed intervention serves to protect another people from a violence preceding the intervention, so at least in theory such cases are justified.

metes out have, in a way, already been deemed legitimate by the member states to whom such sanctions might apply. But again, we are not just asking about coercion within an existing cosmopolitan organization; we are trying to discover what this might look like in a legitimate process of its creation. How are the learning processes leading to the cosmopolitan transformation to be legitimately “corrected” when they go awry?

The different parts of the cosmopolitan account come together here to render this boundary essentially ambiguous, or so I will now argue. To see why we must return to the beginning, but just for a moment. Recall how, for Kant, the cosmopolitan dilemma arose from the disanalogous pre-civil and international states of nature, the two different conditions of war. In the pre-civil case, coercing others into a legal order is justifiable because without this kind of order a condition of right is impossible. But when it comes to other states and peoples, the external, international state of war, such coercion becomes unjustifiable because some condition of right already exists *internally*, within different states. And it was precisely this internal/external, i.e. statist, distinction which prevented Kant from transcending the plurality of states and giving an account of the genesis of cosmopolitan law. So long as we remain within the statist horizon, then, the boundaries between coercion and consent in this context are relatively stable. Coercion amounts to violating another state’s sovereignty—e.g. deploying armed force against their territory—whereas consensual interstate policy amounts to making use of the limited socio-economic agreements of a hypothetical voluntary league to change another’s behavior. Because states have the prerogative to enter and exit from such voluntary agreements—as well as the voluntary league itself—then any state or group of states also has the prerogative to make such agreements conditional on others behaving in a certain way.

Here we see another consequence of the dissolution of the internal/external distinction, now in the blurring of the boundaries between consensual and coercive foreign policies. The

cosmopolitans suspended the original dilemma Kant confronted by transcending the statist distinctions constitutive of it. But by doing so, I argue that it has become practically impossible to find a meaningful distinction between consensual and coercive “learning.” Sure, some actions obviously fall on one side or the other. Sending an army to forcibly change another state’s laws and attitudes to comport with cosmopolitan principles is quite clearly illegitimate coercion. And asking said state in a global forum, mobilizing the social forces present there, is obviously permissible. (And thus also consensual, if such appeals “correct” any errant “learning.” In the next section I discuss whether such appeals and this global forum might be the kind of corrective force the cosmopolitan account of learning processes needs.)

But what about economic sanctions? Remember that, according to the cosmopolitans, the dynamics of global capitalism have overturned the ease with which Kant could see trade agreements between states as uncontroversially “voluntary” ones. We need only glance at the controversies arising from implementations of the “Washington Consensus” to see but one prominent historical example of this transformation. Habermas notes, though, how smaller states are much more likely to “learn,” i.e. “reorient” themselves to cosmopolitan principles, because they are much more beholden to the global economic forces than are larger states.⁶² But in this instance, “learning processes” only become more concrete explanatory mechanisms *in virtue of the distinction between consensual and coercive learning becoming less so*. As I briefly mentioned above, we can see a corresponding shift in the nature of economic policy generally over the last hundred years that bears out this point. Two related trends are worth considering. The first is the increasing indistinction between domestic and foreign economic policy, an indistinction that has resulted in policy measures once reserved for external (and thus wartime) threats “collapsing inward” on domestic legal orders.⁶³ From the point

⁶² Habermas 2008: 453.

⁶³ See Scheuerman 2004, especially p. 175. See also Scheuerman 2000 and Agamben 2005 for further discussion of this trend.

of view of the state, however, these changes appear rather necessary; in an increasingly globalized economy, the economic crisis and the military crisis take on a similar appearance. If armed intervention to correct errant learning isn't allowed (excepting extreme cases), then why should economic sanctions representing similar kinds of damage, instability, and suffering be viewed differently? Sure the scope of the damage may vary, but mass unemployment, civil unrest, etc., present similar threats to the safety and welfare of a nation as might armed intervention. Moreover, armed conflict and economic instability often accompany one another, a fact which casts even more doubt on drawing a meaningful normative distinction between these two policies.

The cosmopolitan theorists, at the very least, need to articulate better what they mean to capture when they distinguish between consensual learning and illegitimate coercion. As of now it's not at all clear what can ground such a distinction from the point of view of democratic cosmopolitanism and its core normative commitments. Clarifying what policies are permitted by the theory will be necessary if they are to supplement their central explanatory mechanism (learning processes) with the corrective forces it requires to function as such; that is, if they are to explain how peoples and their governments are to overcome their current understandings of sovereignty and citizenship and adopt cosmopolitan principles. Now we will examine whether the cosmopolitan account of those first kind of learning processes—the learning that can be cultivated among already-existing-yet-nascent cosmopolitan governments and peoples—is on as firm a footing as it needs to be.

2.2 A Healthy “Cosmopolitan Thicket” in Unhealthy Soil?

The basis for the first kind of learning that might take place—the cultivation of the “cosmopolitan thicket” through international commerce and the regulative opinions of a global public—is, I argue, not as firm as it needs to be. The idea that increased interdependence will somehow naturally

produce cooperation, or better yet, result in those involved learning new political ideals, must confront the fact that as interdependence increases, so too does the potential for conflict.

Cooperation presupposes the potential for conflict, as Robert Keohane tells us, because what need would there be for the world's peoples to cooperate if they could pursue their interests in natural harmony?⁶⁴ To be sure, this relationship between interdependence, cooperation, and conflict is no iron law; it no more posits an *inevitable* increase in conflict than it does cooperation. But it does give us reason to question the role that interdependence and the learning it purportedly engenders play in the above accounts of the genesis of a cosmopolitan legal order.

I see three *prima facie* plausible directions in which this cosmopolitan "slightly visible hand" could push. Kant and the cosmopolitan theorists see forces at work leading toward a cosmopolitan legal order. Those skeptical of cosmopolitan politics see a much gloomier destination, namely, a world organization *posing* as cosmopolitan but which, in reality, merely serves the interests of the powerful by providing a moral veneer to their imperial policies.⁶⁵ The outcome discussed less often, because less dramatic, is a middlingly (proto-)cosmopolitan world like the one we find ourselves in now, beset by both statist and cosmopolitan politics. The latter will occasionally live up to these principles but, more often, fails to do so on account of weak institutions and, as always, those historically obstinate frames of mind among the peoples and states involved.

It's rather uncertain which outcome we'll see. But even if we don't speculate, we can still assess whether some hypothetical conditions—such as free commerce and a global public sphere—would act as more or less "healthy soil" in which to cultivate our thicket of cosmopolitan law. Free commerce, we should notice, take on two contradictory roles in this story. While *internationally* it is supposed to create a community of common interests, *domestically* it acts as one of those novel global forces undermining popular sovereignty. Perhaps "free trade" functions in an ideal sense in

⁶⁴ See Keohane 2005.

⁶⁵ See Schmitt (2006) and (2007); and Rasch (1999-2000).

the cosmopolitan account; that is, *not* as the unbridled dynamics of an unregulated global capitalism, but of a new kind of economic system altogether. If this is the case, then the cosmopolitans must provide an account of how the current economic system will be reformed so it can play this part in the cosmopolitan transformation.

Finally, what reason do we have to believe that the opinions of a “global public” would serve as a corrective force, regulating the policies of states and attitudes of peoples toward a “cosmopolitan orientation”?⁶⁶ In one sense, this idea is intuitively correct: the larger or more diverse one’s community of discussion, then the chances of being exposed to points of view that can take one out of their narrow or particularist frame of mind seem larger as well. But conditions of discussion domestically remain far from ideal, and it’s hard to see how *widening* the sphere of discussion would do anything to improve the current state of affairs. Raymond Geuss offers an amusing retort to those who find in discussion a *specific* moral force at work:

Discussions, even discussions that take place under reasonably favorable conditions, are not necessary enlightening, clarifying, or conducive to fostering consensus. In fact, they just as often foster polemics, and generate further bitterness, rancor and division. Just think of Brexit. I get along with most people better the less I know about what they really think and feel. Anyone who has had any experience of discussions in the real world knows that they can get nowhere and peter out, they can cause people to become even more confused than they were at the outset and that they can lead to the hardening of opinion and the formation of increasingly rigid and impenetrable fronts between different parties. The longer and more intense the discussion, the worse it can get. This is precisely what motivated Habermas in the theory of communicative action to appeal to the *topos* of an “ideal speech situation” as a means for removing these difficulties. However, it is not at all obvious that anyone who performs a speech act necessarily thereby “presupposes” that his current situation is to be evaluated vis-à-vis what would be decided in an ideal speech situation, nor that in such an ideal situation a consensus would necessarily be reached.⁶⁷

Perhaps we should return to Thucydides to be reminded of the essentially unpredictable courses that democratic processes of discussion can take.⁶⁸ While a wider, global audience may induce a

⁶⁶ See Habermas 2008 and 2010.

⁶⁷ Geuss 2019.

⁶⁸ See Orwin 1984.

spirit of cosmopolitanism among some, it could just as easily spark *ressentiment* and a reaction against cosmopolitanism among the interlocutors instead.

3 THINKING BEYOND DEMOCRACY

Whether statist or cosmopolitan, the idea of (popular) sovereignty appears unclear at best under the shadow of those novel global crises. The democratic cosmopolitans, I think, have presented a compelling critique of statist sovereignty while unfortunately encountering a kind of conceptual impasse when trying to think beyond the concept. In these final sentences I'll first offer some thoughts on the nature of this impasse, and end with what many might consider to be a radical suggestion—that we might have to think “beyond democracy” for establishing a cosmopolitan legal order—but one which we nevertheless ought consider.

To state it shortly, the problem the democratic cosmopolitan account runs into is the following: it tries to rework a central political concept—democracy—for conditions radically different than those in which our understanding of the concept took shape. Modern constitutional democracies emerged wholly wedded to notions of discrete, particular peoples and territories that provided the form and substance for the new liberal-democratic political horizon, regardless of how universalistic the *rhetoric* of democracy appeared to be. (Much of this rhetoric can be attributed to the revolutionary force it provided to nascent democratic movements, movements which were very particularist despite the appearance of their rhetoric.) When democratic cosmopolitanism attempts to rethink the concept of constitutional democracy unbounded from particularist anchors, it is forced to substitute a supposedly *neutral* educational process for the normatively untenable particulars that once provided substance to the democracy concept. The problem, however, is that the apparently democratic or neutral nature of such learning processes is in direct tension with the

universal, substantive telos or product such processes are supposed to produce: namely, a political community capable and willing to arrive at a particular consensus about certain core political principles (of human rights, democracy, peace, etc.)

The problems democratic cosmopolitanism must internally resolve do not weaken its critique of the particularist idea of popular sovereignty, though. Keeping a fraught concept because an alternative remains unproven would not be wise. Hence I propose cosmopolitans move forward with their critique and minimize the weaknesses of their account: that is, I think they ought to concede the democratic deficit of their account and merely assert, in spite of it, the necessity of transnational governance. The goal should be to establish international institutions capable of dealing with and regulating those global issues of climate change, unregulated capitalism, and mass human displacements, and then, once established, worry about how such institutions can be made democratically accountable; not to mention figuring out what “democratic accountability” can even look like or mean on a global scale. But for all the time spent worrying about how cosmopolitan law can be *created* in a democratic way, those global issues—the ultimate threats to popular sovereignty—march on, unrelenting. The ideal of popular sovereignty then might paradoxically require us to think beyond the ideal of democracy, at least for the time being.

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