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Cosmopolitanism in Constitutional Law

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COSMOPOLITANISM IN CONSTITUTIONAL LAW

Vlad Perju[†]

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INTRODUCTION

Cosmopolitanism has a bad name in law. Its tenets are routinely dismissed as naïve, sloppy, or even disingenuous. Cosmopolitans are seen as committed to a world government in stark oblivion of a political reality that continues to revolve around state sovereignty.¹ The “dream”²

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¹ See, e.g., José E. Alvarez, *State Sovereignty is Not Withering Away: A Few Lessons for the Future*, in *REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW* 26, 27–37 (Antonio

of uniting the world assumes that individuals have obligations toward one another across and irrespective of borders simply by virtue of belonging to the human race. But these are at most *moral* obligations, and it takes a sloppy jurist to derive legal duty from moral obligation. Furthermore, lofty goals of world unity deflate when given institutional form, hence the noted tendency of cosmopolitans to gloss over issues of enforcement. So basic is the skill of separating law from morality and so strikingly utopian are the cosmopolitan tenets that, critics conclude, persistence must be cover for something else: “scratch a cosmopolitan and you’ll find an imperialist just below the surface.”³

This harsh indictment has more or less obliterated cosmopolitanism from contemporary legal discourse. With few exceptions, drawn, unsurprisingly, from the ranks of international lawyers or from among scholars of the European Union,⁴ the label “cosmopolitan” has become anathema. Even the case for cosmopolitanism reinforces the indictment. In order to be “useful in the real world,” one scholar argues, cosmopolitanism must be de-radicalized; it must be “understood to engage actual political duties, not to demonstrate their evanescence and unimportance.”⁵ Cosmopolitanism will not get a seat at the table with the grown-ups unless it accommodates “plausibility constraints.”⁶

But domestication is the wrong cure, just as radicalism is the wrong diagnosis. Kant’s cosmopolitanism, which remains the most complex and influential account, rejects the above assumptions in no uncertain terms. In the words of one commentator, “[a] core issue for political

Cassese ed., 2012) (arguing for the resilience of state sovereignty despite accounts of its disappearance or disintegration).

² See David Kennedy, *One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream*, 31 N.Y.U. REV. L. & SOC. CHANGE 641 (2007).

³ GARRETT WALLACE BROWN, *GROUNDING COSMOPOLITANISM: FROM KANT TO THE IDEA OF A COSMOPOLITAN CONSTITUTION* 126–27 (2009) (internal quotation marks omitted) (mentioning this view without endorsing it). One version of the same argument is present in Carl Schmitt’s formula “Humanity, Bestiality.” As Schmitt writes, “[t]he concept of humanity is an especially useful ideological instrument.” CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 54 (George Schwab trans., 2007). For a discussion of Schmitt’s critique of Kant’s conception in *Perpetual Peace*, see Jürgen Habermas, *Kant’s Idea of Perpetual Peace, with the Benefit of Two Hundred Years’ Hindsight*, in *PERPETUAL PEACE: ESSAYS ON KANT’S COSMOPOLITAN IDEAL* 132, 135–36 (James Bohman & Matthias Lutz-Bachmann eds., 1997).

⁴ See, e.g., THOMAS FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1998); Matthias 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* 258, 258–326 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009); Alexander Somek, *On Cosmopolitan Self-Determination*, 1 *GLOBAL CONSTITUTIONALISM* 405 (2012). Beyond the legal context, see DAVID HELD, *DEMOCRACY AND THE GLOBAL ORDER: FROM THE MODERN STATE TO COSMOPOLITAN GOVERNANCE* (1995).

⁵ Noah Feldman, *Cosmopolitan Law?*, 116 *YALE L.J.* 1022, 1032 (2007).

⁶ Jack Goldsmith, *Liberal Democracy and Cosmopolitan Duty*, 55 *STAN. L. REV.* 1667, 1673–75 (2003).

cosmopolitanism concerns the role and importance of states”⁷—*states*, in the plural. Kant defends at great length the existence of a plurality of states, as opposed to a unitary world government.⁸ Furthermore, his argument refers to specifically legal duties, as opposed to moral or political obligations. Kant is adamant that his concern is “not with philanthropy, but with right.”⁹ Far from being sidelined, issues of enforcement are central to this account.¹⁰ Finally, the intellectual history of cosmopolitanism is too complex to dismiss its driving ideal as nothing more than an expression of imperialism. While it remains a danger that cosmopolitanism will be used to claim universal relevance for viewpoints “infected by the particularity of the speaker, the world of his or her experience, culture and profession, knowledge and ignorance,”¹¹ it is no less true that the reaction to the horrors of European colonialism is a part of the very origins of cosmopolitanism.¹²

⁷ PAULINE KLEINGELD, *KANT AND COSMOPOLITANISM: THE PHILOSOPHICAL IDEAL OF WORLD CITIZENSHIP* 6 (2012). As I discuss in greater detail below, Kant’s reasons for rejecting a world state are partly—though not exclusively—practical in nature. Hans Kelsen’s own concerns, though similar to Kant’s, are edifying. See HANS KELSEN, *PEACE THROUGH LAW* 5 (1944) (“There can be no doubt that the ideal solution of the problem of world organization as the problem of world peace is the establishment of a World Federal State composed of all or as many nations as possible. The realization of this idea, however, is confronted with serious and, at least at present, insurmountable difficulties.”). For our present purpose, it is important to keep in mind that even when unification remains a distant ideal, the separateness of states as a practical matter is severable from the goal of unification. See, e.g., KWAME ANTHONY APPIAH, *COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS* (2006); ROBERT FINE, *COSMOPOLITANISM* (2007); Bruce Ackerman, *Rooted Cosmopolitanism*, 104 *ETHICS* 516 (1994).

⁸ Brian Barry and Charles Beitz have argued that “it may be that the best way to realize the ideals of moral cosmopolitanism lies in organizing humanity in a society of states that retain their separate statehood while subjecting themselves to the requirements of international covenants and some universal principles.” BROWN, *supra* note 3, at 109 (internal quotation marks omitted); see also Brian Barry, *Statism and Nationalism: A Cosmopolitan Critique*, in *GLOBAL JUSTICE: NOMOS XLI* 12, 39 (Ian Shapiro & Lea Brilmayer eds., 1999) (“[C]osmopolitan morality does not commit its adherents to any particular institutional arrangement, including a world state . . .”).

⁹ IMMANUEL KANT, *Perpetual Peace: A Philosophical Sketch*, in *KANT: POLITICAL WRITINGS* 93, 105 (Hans Reiss, ed., H.B. Nisbet trans., 1991) (emphasis omitted).

¹⁰ Compare BROWN, *supra* note 3, at 14 (“[A]ny form of Kantian cosmopolitanism certainly has an institutional component.”), with Barry, *supra* note 8, at 35 (“Cosmopolitanism is a moral outlook, not an institutional prescription.”); see also SAMUEL SCHEFFLER, *Conceptions of Cosmopolitanism*, in *BOUNDARIES AND ALLEGIANCES* 111, 129 (2003) (arguing that “moderate cosmopolitanism about justice[—which the author advocates—]will be a compelling position only if it proves possible to devise human institutions, practices, and ways of life that take seriously the equal worth of persons without undermining people’s capacity to sustain their special loyalties and attachments”).

¹¹ Martti Koskeniemi, *The Subjective Dangers of Projects of World Community*, in *REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW*, *supra* note 1, at 3, 10.

¹² Pauline Kleingeld, *Kant’s Cosmopolitan Law: World Citizenship for a Global Order*, 2 *KANTIAN REVIEW* 72, 75–76 (1998) (arguing that in third definitive article in *Perpetual Peace*, which gives a stranger the right not to be treated with hostility when he arrives on someone else’s territory, Kant was “primarily concerned with limiting the rights of colonialist aggressors”); see also 2 ALAN RYAN, *ON POLITICS: A HISTORY OF POLITICAL THOUGHT: FROM HERODOTUS TO THE PRESENT* 859–60 (2012) (describing Kant as a “principled anti-imperialist”

Unmarred by some unshakable original sin, cosmopolitanism stands in no obvious need of an apology.

Yet the goal of this Article is not to rehabilitate cosmopolitanism for its own sake—it is to put it to work. Contemporary law has been much impoverished by the absence of the rich cosmopolitan tradition. The partial exception remains international law, where Kant's *Perpetual Peace*, published in 1795, remains a text of reference.¹³ The emphasis on individuals as “human beings, rather than as citizens of states”¹⁴ resonates with recent developments in supranational human rights structures.¹⁵ For instance, Alec Stone Sweet's recent study of European legal integration draws specifically on Kant to define a cosmopolitan legal order as “a transnational legal system in which all public officials bear the obligation to fulfill the fundamental rights of every person within their jurisdiction, without respect to nationality or citizenship.”¹⁶

and discussing his views about human progress). While Kant might have been a “child of his time,” as Habermas called him, his views did not fit the charges leveled against him. See Jürgen Habermas, *Does the Constitutionalization of International Law Still Have a Chance?*, in *THE DIVIDED WEST* 113, 147 (Ciaran Cronin ed. & trans., 2004). It is noteworthy to mention in this context that one can be a critic of Kant without being a critic of cosmopolitanism. For example, James Tully criticized Kant in the name of cosmopolitanism for endorsing views that Tully labeled “cultural imperialism.” See James Tully, *The Kantian Idea of Europe: Critical and Cosmopolitan Perspectives*, in *THE IDEA OF EUROPE: FROM ANTIQUITY TO THE EUROPEAN UNION* 331, 358 (Anthony Pagden ed., 2002). Tully also disputes the application of the adjective cosmopolitan to Kant's political philosophy. It is true that Kant refers to “cosmopolitan right,” and not to cosmopolitanism as such. See *supra* note 9. Other authors refer to a cosmopolitan constitutional or legal order. While the distinction could be significant, especially in the field of Kantian exegesis, the use of cosmopolitanism has been adopted widely. See, e.g., Martha C. Nussbaum, *Kant and Stoic Cosmopolitanism*, 5 *J. POL. PHIL.* 1 (1997).

¹³ Robert Delahunty & John Yoo, *Kant, Habermas and Democratic Peace*, 10 *CHI. J. INT'L L.* 437, 445 (2010) (describing *Perpetual Peace* as “probably [Kant's] most widely read and influential work on international law and relations”). Not long after its entry into force, Carl Friedrich pointed out the Kantian origins of the U.N. Charter. See CARL JOACHIM FRIEDRICH, *INEVITABLE PEACE* 33 (1948) (arguing that the U.N. Charter “in many respects fulfills those conditions which Immanuel Kant had formulated as essential for the establishment of a world-wide organization”); see also ERIC A. POSNER, *THE PERILS OF GLOBAL LEGALISM*, at xi (2009) (noting—and discussing critically—a movement in the United States “toward the view that the real justification for international law is cosmopolitan”).

¹⁴ Kleingeld, *supra* note 12, at 72.

¹⁵ *Id.* (concluding that Kant's *Perpetual Peace* “illuminates recent changes in the status of individuals under international law”). On cosmopolitanism more generally, see Feldman, *supra* note 5, at 1025 (“By treating the individual as primary, and his or her political associations as secondary, cosmopolitanism can clear the way to imagining not only moral and ethical but also legal duties justifiably arising outside the bounds of state or other political power.”); see also SEYLA BENHABIB, *ANOTHER COSMOPOLITANISM* 16 (Robert Post ed., 2008) (arguing that cosmopolitan norms “whatever the conditions of their legal origination, accrue to individuals as moral and legal persons in a worldwide civil society. . . . they endow individuals rather than states and their agents with certain rights and claims” (emphasis omitted)). Cosmopolitanism is sometimes the object of criticism. Jack Goldsmith has discussed critically cosmopolitan duties incumbent upon the United States to enter into treaties and to engage in costly humanitarian interventions that do not enhance the net U.S. welfare. Goldsmith, *supra* note 6, at 1669.

¹⁶ Alec Stone Sweet, *A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe*, 1 *GLOBAL CONSTITUTIONALISM* 53, 53 (2012). While Stone Sweet looks

However, there are fields other than public international law or European Union law that stand to gain equally, if not more, from a cosmopolitan outlook.¹⁷ My focus in this Article is on constitutional law. In stark contrast with the commonplace view of cosmopolitanism as concerned exclusively with the supranational level, cosmopolitanism in its Kantian version places great emphasis on domestic constitutionalism—the “republican constitution.”¹⁸ One scholar has gone so far as to claim that, “domestic justice is the cornerstone of Kant’s overall cosmopolitan vision.”¹⁹ The deep continuity between *ius civitatis* (domestic political right), *ius gentium* (international political right), *ius cosmopoliticum* (cosmopolitan right), and specifically the supranational implications of the constitutional structure of states,²⁰ is Kant’s “conceptual innovation”²¹ and “a plan of great political courage.”²²

exclusively at the European supranational system, he points out that the Kantian model can be applied to global constitutionalism more generally. *Id.* at 83. However, there are important differences between the European and the global contexts, especially because of the very different institutional settings.

¹⁷ This is more a statement about international law than about cosmopolitanism. As Mark Mazower recently argued, international law has become a “mere shadow of what they hoped it might become, which was a complete alternative mode of conducting relations between states.” MARK MAZOWER, *GOVERNING THE WORLD: THE RISE AND FALL OF AN IDEA, 1815 TO THE PRESENT* 66 (2012).

¹⁸ See KANT, *supra* note 9, at 99 (stating as the first article of perpetual peace that “[t]he [c]ivil [c]onstitution of [e]very [s]tate shall be [r]epublican”).

¹⁹ BROWN, *supra* note 3, at 45. The author goes on to argue that “the state’s legal apparatus and republican government, as understood as a form of popular sovereignty, is given considerable priority in providing the foundations for a continued movement toward cosmopolitan justice.” *Id.* at 99; see also JOHN RAWLS, *THE LAW OF PEOPLES* 8 (1999) (“The crucial fact of peace among democracies rests on the internal structure of democratic societies . . .” (emphasis omitted)). It is precisely because of the centrality of domestic constitutionalism, or republican constitutions, that the recent attempts to incorporate China within the framework of a Kantian-inspired project faced great challenges. See Manik Suri, *Conceptualizing China Within the Kantian Peace*, 54 *HARV. INT’L L.J.* 219 (2013).

²⁰ See KANT, *supra* note 9, at 137 (arguing that “if even only one of these three possible forms of rightful state lacks a principle which limits external freedom by means of laws, the structure of all the rest must inevitably be undermined, and finally collapse”). Kant also wrote that, “the problem of establishing a perfect civil constitution is subordinate to the problem of a law governed external relationship with other states, and cannot be solved unless the latter is also solved.” BROWN, *supra* note 3, at 45 (internal quotation marks omitted) (citing Kant).

²¹ BENHABIB, *supra* note 15, at 21 (“The conceptual innovation of Kant’s doctrine of cosmopolitanism is that Kant recognized three interrelated but distinct levels of ‘right,’ in the juridical senses of the term. First is domestic law, the sphere of posited relations of right, which Kant claims should be in accordance with a republican constitution; second is the sphere of rightful relations among nations . . . resulting from treaty obligations among states; third is cosmopolitan right, which concerns relations among civil persons to each other as well as to organized political entities in a global civil society.” (footnote omitted)). On the deep continuity between national and international law, from a neo-Kantian perspective, see LARS VINX, HANS KELSEN’S PURE THEORY OF LAW: LEGALITY AND LEGITIMACY 176 (2007); see also Kumm, *supra* note 4. For a similar argument, as far as the continuity between national and international law is concerned, although from different jurisprudential standpoint, see Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 *HARV. L. REV.*

This is, I argue, the kind of conceptual innovation needed to make sense of transformations in the global constitutional landscape over the past few decades. These transformations, which have been referred to as “inevitable globalization,”²³ or the “new universe,”²⁴ in constitutional law, are brought about in large measure by cross-jurisdictional exchanges among constitutional systems around the world.²⁵ As Sujit Choudhry has argued, “[t]he migration of constitutional ideas across legal systems is rapidly emerging as one of the central features of contemporary constitutional practice.”²⁶ These synchronous developments have impacted domestic constitutionalism and have shaped the understanding of political power, the relation between states and individuals, and the judicial role. Locked in “methodological nationalism,”²⁷ constitutional theory has lacked the intellectual framework to theorize these developments. Of this missing framework,

1791 (2009) (arguing that both international and constitutional law are best understood as part of public law which, by contrast to ordinary domestic law, are meant as solutions to the same problem of constituting and constraining the state).

²² OTFRIED HÖFFE, *KANT’S COSMOPOLITAN THEORY OF LAW AND PEACE* 151 (Alexandra Newton trans., 2006) (Kant’s “connection between the republic as a political innovation at the time and a truly global perspective, give[s] rise to a plan of great political courage. If humanity would recognize it by establishing a legal order according to moral principles not only within states, but also between them, then it would, as a whole, attain the status of kingliness.”).

²³ Mark Tushnet, *The Inevitable Globalization of Constitutional Law*, 49 VA. J. INT’L L. 985 (2009).

²⁴ VICKI JACKSON, *CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA* (4th ed. 2009). Some of the issues brought up by globalization are old but taking a new cast. One particularly relevant example is the extraterritoriality of constitutional norms. See generally KAL RAUSTIALA, *DOES THE CONSTITUTION FOLLOW THE FLAG?: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW* (2009); see also, Letter from Laurence H. Tribe to Justice Stephen G. Breyer (Apr. 29, 2005), reproduced in Lawrence H. Tribe, *The Treatise Power*, 8 GREEN BAG 2D 291, 292, available at <http://www.scotusblog.com/movabletype/archives/Tribe-Treatise-Green%20Bag%202005%20low%20res.pdf> (mentioning dispute regarding “the proper role and likely impact of treaty, international and foreign law” among the reasons for the suspension of the third edition of the author’s much-celebrated *American Constitutional Law Treatise*).

²⁵ There are also other mechanisms through which constitutional law is being transformed. For instance, a recent study has thoroughly documented the subtle and indirect ways in which international human rights treaties lead the constitutional convergence. See Zachary Elkins, Tom Ginsburg & Beth Simmons, *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 54 HARV. INT’L L.J. 61 (2013).

²⁶ Sujit Choudhry, *Migration as a New Metaphor in Comparative Constitutional Law*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 1, 13 (Sujit Choudhry ed., 2006). I discuss this phenomenon at greater length in Vlad Perju, *Constitutional Transplants, Borrowing and Migration*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 1304, 1304–27 (Michel Rosenfeld & András Sajó eds., 2012). For a more recent discussion in the context of global intellectual history, see Samuel Moyn, *On the Nonglobalization of Ideas*, in *GLOBAL INTELLECTUAL HISTORY* 187–204 (Samuel Moyn & Andrew Sartori eds., 2013).

²⁷ GUNTHER TEUBNER, *CONSTITUTIONAL FRAGMENTS: SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION* 10 (2012). There are, of course, notable exceptions. See, e.g., Mattias Kumm, *Democratic Constitutionalism Encounters International Law: Terms of Engagement*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS*, supra note 26, at 256; Grainne de Búrca & Oliver Gerstenberg, *The Denationalization of Constitutional Law*, 47 HARV. INT’L L.J. 243 (2006).

Robert Post prophesied at the turn of the millennium:

All forms of American constitutional law scholarship . . . have been firmly anchored within the secure frame of a national legal system grounded in a democratic state. . . . [T]he single greatest challenge to these disciplines will come from circumstances that negate the generic and implicit presupposition of this scholarship, which is the frame of a national legal system within a democratic state.²⁸

I do not mean to suggest that Kant's conception of cosmopolitanism, *tel quel*,²⁹ is the much-needed framework. That conception needs to be "reformulated" using "the superior and undeserved knowledge of later generations" to resolve its "conceptual difficulties."³⁰ Kant did not quite anticipate the type of developments currently underway in constitutional law.³¹ He theorized "republican constitutions"—or constitutional democracies, in today's parlance— independently of one another, and while he recognized the deep normative continuity within public right, he nevertheless kept its different dimensions separate. Downplaying cross-jurisdictional interdependence and, generally, a degree of inattention to how domestic jurisdictions interact outside shared institutional frameworks, are blind spots of *Perpetual Peace*. The question, however, is if Kant's philosophical account has the resources to help us make sense of these phenomena. The answer to that question is affirmative. His account of a multilayered public law, which includes municipal, international, and cosmopolitan levels, is particularly relevant. Furthermore, and depending on one's interpretation, Kant's account of cosmopolitan hospitality sets the normative grounds for all trans-jurisdictional

²⁸ Robert Post, *The Challenge of Globalization to American Public Law Scholarship*, 2 THEORETICAL INQUIRIES L. 323, 327 (2001). Post has also argued that, "[a] fundamental challenge for our time is the construction of a jurisprudential theory able to reconcile the universality of human rights with the partiality of positive law." Robert Post, *Introduction to SEYLA BENHABIB, ANOTHER COSMOPOLITANISM*, *supra* note 15, at 1, 3.

²⁹ As the reader has already noticed, that framework is different from the framework of cosmopolitan right. In Kant's account, "cosmopolitan right" has a very clearly delimited meaning. *See infra* Part III.C. On the other hand, I refer to the framework of cosmopolitanism as the entirety of the account of public right that Kant articulated in *Perpetual Peace*.

³⁰ Habermas, *supra* note 3, at 114. Many of the elements that Habermas discusses in this chapter—such as the international structure or the interpretation of international peace—fall beyond the interest of this Article, which is what I call the missing step of the direct interaction between republican constitutions, and its impact on the domestic constitutionalism of each.

³¹ KATRIN FLIKSCHUH, *KANT AND MODERN POLITICAL PHILOSOPHY* 187 (2000) (arguing that "Kant's conception of cosmopolitan Right requires some extension under current conditions of globalization" (emphasis omitted)); *see also* BROWN, *supra* note 3, at 39 ("Although Kant never used the term globalization specifically, he did believe that the world was becoming increasingly interconnected and that the forces of nature were organized in such a way that it would eventually produce a cosmopolitan condition." (emphasis omitted)).

interactions, including among constitutional systems.³² Other elements of Kant's philosophical account—such as the choice for an international federation of very limited powers—might even require or presuppose the kind of rich interplay between republican constitutions. His “brilliant anticipation of a global public sphere,”³³ to use Habermas's formulation, makes it particularly helpful for understanding the global transformation of constitutional law.

The timing of the turn to Kant should be unsurprising. After a long period in which Kant's political philosophy was considered far less advanced than his moral philosophy, there has been an “astonishing revival”³⁴ of interest in his political philosophy over the past two decades. The revival has left traces in legal thought, especially in contract, tort, and criminal law as well as in general jurisprudence.³⁵ But its radiating effect has not yet reached constitutional law, for reasons not obvious given that “Kant's influence has been greatest in shaping the doctrine of the *Rechtsstaat*, the state governed according to the rule of law.”³⁶ Perhaps more surprisingly, his influence remains similarly limited in the nascent fields of comparative constitutional law and global constitutionalism. Three recent, field-formative encyclopedias of comparative constitutional law make virtually no mention of cosmopolitanism or Kant in their comprehensive surveys of these fields.³⁷

It might seem facetious to be surprised at this absence. After all, isn't the reason for this absence obvious—*constitutional* law? How can

³² Compare Jeremy Waldron, *Cosmopolitan Norms*, in ANOTHER COSMOPOLITANISM, *supra* note 15, at 83, with SEYLA BENHABIB, *Hospitality, Sovereignty and Democratic Iterations*, in ANOTHER COSMOPOLITANISM, *supra* note 15, at 147.

³³ Habermas, *supra* note 3, at 124; see also James Bohman, *The Public Spheres of the World Citizen*, in PERPETUAL PEACE: ESSAYS ON KANT'S COSMOPOLITAN IDEAL, *supra* note 3, at 179–200.

³⁴ FLIKSCHUH, *supra* note 31, at 182. Flikschuh traces the revival to widely influential works by John Rawls and Jürgen Habermas. See RAWLS, *supra* note 19; Habermas, *supra* note 12.

³⁵ Its influence is felt in other fields, such as contract, tort, or criminal law, but its influence has not until now penetrated the field of constitutional law. See, e.g., George Fletcher, *Why Kant*, 87 COLUM. L. REV. 421 (1987); Ernest J. Weinrib, *Poverty and Property in Kant's System of Rights*, 78 NOTRE DAME L. REV. 795 (2002). For a more general jurisprudential discussion, see ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY* (2009); Jeremy Waldron, *Kant's Legal Positivism*, 109 HARV. L. REV. 1535 (1996). Noah Feldman's important article, *Cosmopolitan Law?*, focuses on both more ancient and more recent works on cosmopolitanism and does not discuss Kant's work. See Feldman, *supra* note 5, at 1022. The analysis, however, is relevant to a study of Kant, given Kant's reliance on Stoic cosmopolitanism. See Martha Nussbaum, *Kant and Cosmopolitanism*, in PERPETUAL PEACE: ESSAYS ON KANT'S COSMOPOLITAN IDEAL, *supra* note 3, at 25–57.

³⁶ Hans Reiss, *Introduction* to IMMANUEL KANT, KANT: POLITICAL WRITINGS, *supra* note 9, at 1, 11.

³⁷ COMPARATIVE CONSTITUTIONAL LAW (Tom Ginsburg & Rosalind Dixon eds., 2011); ROUTLEDGE HANDBOOK OF CONSTITUTIONAL LAW (Mark Tushnet, Thomas Fleiner & Cheryl Saunders eds., 2013); THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW, *supra* note 26.

the cosmopolitan ideal find a home in constitutional law, premised as it is on the particularity of different jurisdictions? How does cosmopolitanism fit with a democracy's commitment to self-government?³⁸ Is not "cosmopolitan action by a liberal democracy . . . bounded by constituent preferences,"³⁹ as Jack Goldsmith put it, rather than the other way around? Whatever sway cosmopolitanism might have over international human rights or, generally, "suprapositive law,"⁴⁰ isn't constitutional law necessarily bound up to the particular political community?

I discuss these challenges in the last part of this Article where I group them into the challenge of democracy, the challenge of history and the challenge of politics. Part I introduces Kant's account of republican constitutions, with a particular focus on its structural institutional and normative features. Part II discusses the global transformation of constitutional law. It explores how the Kantian theoretical framework can help us understand these developments as well as what these developments add to Kant's own framework. What is the relation between the theory and the practice of republican constitutional orders? Why do constitutional democracies interact with one another and how, if at all, does their interaction shape each system's capacity for responsiveness to the demands of their subjects? What does it mean to say that constitutional systems are converging, and, assuming that they are, can the framework of cosmopolitanism help us understand what they are converging toward? Does the idea of perpetual peace offer a compelling answer? After discussing these questions in the domestic context, I turn in Part III to the international level and specifically to Kant's rejection of a world state in favor of an international federation. I then discuss in Part IV whether cosmopolitan hospitality, which Kant discusses as the third definitive article in *Perpetual Peace*, is a convincing framework for theorizing cross-constitutional interactions.

Throughout the analysis, I offer a view of cosmopolitanism from-the-ground-up. Domestic jurisdictions have a preferential standpoint. My account is different from other cosmopolitan conceptions that proceed from the top-down by theorizing the constitutionalization of

³⁸ Goldsmith, *supra* note 6, at 1669 ("Constitutional and collective action hurdles, and other difficulties, constrain cosmopolitan action Cosmopolitan argument must be bounded by institutional and moral constraints that arise in the domestic-democratic sphere. We cannot even have a coherent ideal of liberal democracies' cosmopolitan duties unless we understand these realistic limits on what liberal democracies can do.").

³⁹ *Id.* at 1686.

⁴⁰ Gerard L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863 (2003).

international law and institutions,⁴¹ with arguments about the creation of a world parliament, strengthening the world court and reforming the United Nations.⁴² Such top-down conceptions have a difficult time accounting for the existence of a plurality of municipal systems as well as for the theoretical building blocks—state, sovereignty, solidarity—that underpin that reality. These difficulties are particularly stringent in the case of specifically constitutional accounts that take the existence of jurisdictional boundaries as a given. However, my approach also differs from more traditional constitutionalist accounts, which show a fleeting interest in other constitutional systems but remain firmly grounded in one given constitutional order. In fact, many of the most important transformations take place within public law, in the legal spaces that open up between and within republican constitutions. In the following pages I argue for a bottom-up cosmopolitan framework, which accounts for the supranational constitutional phenomena without subsuming municipal constitutional orders or otherwise compromising their integrity.

I. *IUS CIVITATIS*: REPUBLICAN CONSTITUTIONS

Kant divides the path to *Perpetual Peace* into three “definitive articles,” from which states may not derogate, and a set of six preliminary articles.⁴³ The three definitive articles are: “The Civil Constitutions of Every State shall be Republican” (the first definitive article); “The Right of Nations shall be based on a Federation of Free States” (the second definitive article); and, finally, “Cosmopolitan Right shall be limited to Conditions of Universal Hospitality” (the third definitive article).⁴⁴ These definitive articles roughly correspond to the domestic, the international, and the cosmopolitan right (or cosmopolitanism *strict sensu*) dimensions. This Section takes up the

⁴¹ See, e.g., Habermas, *supra* note 12; Kumm, *supra* note 4. For context to these works, and specifically to the argument that justice at the supranational level depends on the existence of global institutions, see Liam Murphy, *Institutions and the Demands of Justice*, 27 PHIL. & PUB. AFF. 251 (1999); Thomas Nagel, *The Problem of Global Justice*, 33 PHIL. & PUB. AFF. 113 (2005).

⁴² See Habermas, *supra* note 3, at 134–36.

⁴³ The preliminary articles, which I discuss in this Article only when relevant to the analysis of the definitive articles, require that no secret reservations be made that would allow for a future war, that no independent state be acquired by another state, that standing armies be abolished, that no national debt be contracted in connection with the affairs of the state, that no state forcibly interfere in the constitution or government of another state, and that no state engage in acts of hostility that would endanger mutual confidence at the time of peace. See KANT, *supra* note 9, at 93–96.

⁴⁴ BROWN, *supra* note 3, at 95 (arguing that the three definitive articles conform to contractarian criteria). Brown goes on to point out that the three “definitive articles correspond to the categorical imperative and represents an attempt to create a rightful condition of universal law without the need for an overarching world government.” *Id.* at 95.

observation that perpetual peace among states requires, first of all, a set of institutional principles and institutional structures that are internal to each of these states. Kant refers to that structure as the republican constitution.⁴⁵ The structure is of central importance since a “republican constitution is the only one which does complete justice to the rights of man.”⁴⁶

The starting point for understanding the first definitive principle is a distinction between republican and democratic constitutions. The salient feature of a democracy is the fact that the people, as holders of the seat of sovereignty, exercise their rights as sovereigns directly. By contrast, republicanism, in which Kant saw the alternative to tyranny, is the form of government in which the legislative and the executive are separated.⁴⁷ At first glance, Kant seems to have in mind the familiar principle of the separation of powers.⁴⁸ But however important the separation of powers may be, can it truly be counted as the only obstacle in a state’s path to tyranny?

A closer reading shows that his emphasis on separating the executive from the legislative has more to do with the importance of representative government—the only “mode of government is to accord with the concept of right”⁴⁹—rather than with the separation of powers as such.⁵⁰ A state in which the executive is different from the legislative, and citizens are self-governing, is one in which the authority to exercise the sovereign power is in the hands of another institution (the

⁴⁵ KLEINGELD, *supra* note 7, at 48 (“Kant’s republican notion of the state may well explain his change of view regarding the way peace should be pursued.”). The prominence of the internal structure of the state is somewhat lost when the emphasis becomes exclusively on international law. Hans Kelsen writes that “the problem of a durable peace can be sought only within the framework of international law—that is to say, by an organization which, in the degree of its centralization, does not exceed that of the usual type of international communities.” KELSEN, *supra* note 7, at 12.

⁴⁶ KANT, *supra* note 9, at 112 (emphasis omitted); *see also* BROWN, *supra* note 3, at 95. For Kant, “republicanism” does not mean a polity centered on an idea of a good life, such as one finds in later theories of republicanism. *See, e.g.*, NORBERTO BOBBIO & MAURIZIO VIROLI, *THE IDEA OF THE REPUBLIC* (Allan Cameron trans., 2003).

⁴⁷ In *The Metaphysics of Morals*, Kant discussed how the three separated powers—the ruling power in the person of the legislator, the executive power, and the judicial power—are the parts of the universally united will. KANT, *supra* note 9, at 138–43.

⁴⁸ In this sense too, Kant was the philosopher of the French Revolution. Article 16 of the French Declaration of the Rights of Man and the Citizen (1789) stipulates that “Any society in which the guarantee of the rights is not secured, or the separation of powers not settled has no constitution.” *Déclaration Universelle des Droits de L’Homme et du Citoyen* [Declaration of the Rights of Man and the Citizen] art. 16 (1789) (Fr.). The principle of the separation of powers requires interpretation. *But see* RICHARD TUCK, *THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT* 211 (1999) (describing Kant’s approach as “far from being like a Montesquieuan or Madisonian separation of powers”).

⁴⁹ KANT, *supra* note 9, at 102.

⁵⁰ *See also* Jeremy Waldron, *Separation of Powers in Thought and Practice?*, 54 B.C. L. REV. 433 (2013).

executive) that, in republican systems, exercises power as a representative of the sovereign legislator. For this reason, Kant thought democracy to be necessarily despotic because the will of the sovereign (the people) can govern without the need to be represented by powers separated into executive and legislative.⁵¹ For contemporary societies, by contrast, the phrase constitutional democracy might be fraught with tensions,⁵² but it is neither a tautology nor a pleonasm. Unlike for Kant, who could not simply assume representation of the sovereign in the process of implementing its will, the scale of contemporary democracies prevents direct democracy, that is, democracy unmediated by institutions of representation, from being a viable option. In modern politics, constitutionalist features of republicanism have become internalized and are now assumed when referring to constitutionalism *tout court*. As Otfried Höffe concludes, “Kant links unqualified or eternal peace to the principle of modern politics, namely, a democracy committed to human rights and to the division of power, at his time referred to as a republic.”⁵³

I will take up later the important question whether Kant’s identification of the features of republican constitutions is sufficiently general and loose to avoid the risk of constitutional uniformity. For now, let us note that each republican constitution instills a set of principles: freedom for all members of society (as human beings); formal equality for everyone (as citizens); and dependence of everyone upon a single common legislation (as subjects). Civil constitutions create the external conditions for freedom by making coercion the subject of laws rather than of the arbitrary will of another human being.⁵⁴ As Kant had argued in the *Metaphysics of Morals*, the sum total of the conditions for the reconciliation between the wills of different persons in accordance with the universal law of freedom is defined as the concept of right.⁵⁵

On this basis Kant distinguishes “patriotic” from a “paternal” government. In the former regime:

Each regards himself as authorised to protect the rights of the commonwealth by laws of the general will, but not to submit it to his personal use at his own absolute pleasure. This right of freedom

⁵¹ KANT, *supra* note 9, at 101; *see also* TUCK, *supra* note 48, at 211 (on the nature of representation in Kant).

⁵² *See* Nimer Sultany, *The State of Progressive Constitutional Theory: The Paradox of Constitutional Democracy and the Project of Political Justification*, 47 HARV. C.R.-C.L. L. REV. 372, 374 (2012).

⁵³ HÖFFE, *supra* note 22, at 15.

⁵⁴ KANT, *supra* note 9, at 99 (“My external and rightful freedom should be defined as a warrant to obey no external law except those to which I have been able to give my own consent.” (emphasis omitted)).

⁵⁵ KANT, *supra* note 9, at 133.

belongs to each member of the commonwealth as a human being, in so far as each is a being capable of possessing rights.⁵⁶

This is the conception of freedom on which contemporary constitutional democracies are grounded. Closely related to this conception, although not as widely shared, is Kant's conception of formal equality.⁵⁷ Human beings are equals as subjects of the state since they are equal subjects before the law.⁵⁸ However, Kant points out that this formal equality is "perfectly consistent with the utmost inequality of the mass in the degree of its possessions."⁵⁹

Self-government follows from the idea of freedom defined as the absence of any restraints that are not self-imposed. As Kant put it, "my external and rightful freedom should be defined as a warrant to obey no external laws except those to which I have been able to give my own consent."⁶⁰ This is the familiar idea, embedded in the normative presuppositions of all constitutional democracies, of the citizen as "co-legislator"—"[f]or only towards oneself can one never act unjustly."⁶¹ Self-government explains why only a republican constitution leads to perpetual peace. Only under a system of self-government would the citizens be consulted on the decision to go to war, and, Kant believes, they would vote against "calling down on themselves all the miseries of war."⁶²

Kant's description of the salient features of republican constitutions matches the features of constitutional democracies. As

⁵⁶ KANT, *supra* note 9, at 74. As Arthur Ripstein puts it, "republican governments do not act for private purposes." RIPSTEIN, *supra* note 35, at 229.

⁵⁷ However, Kant points out that this formal equality is "perfectly consistent with the utmost inequality of the mass in the degree of its possessions." KANT, *supra* note 9, at 75. For a discussion of Kant's conception of redistribution and equality of opportunity, see RIPSTEIN, *supra* note 35, at 267–99.

⁵⁸ Hence the conclusion that:

[E]very member of the commonwealth must be entitled to reach any degree of rank which a subject can earn through his talent, his industry and his good fortune. And his fellow-subjects may not stand in his way by *hereditary* prerogatives or privileges of rank and thereby hold him and his descendants back indefinitely. . . . Since birth is not an act on the part of the one who is born, it cannot create any inequality in his legal position

KANT, *supra* note 9, at 75–76. For this reason, Kant has been called "the philosopher of the French Revolution." See Reiss, *supra* note 36, at 3.

⁵⁹ KANT, *supra* note 9, at 75.

⁶⁰ *Id.* at 99 (emphasis omitted).

⁶¹ *Id.* at 77; see also Reiss, *supra* note 36, at 30 ("The fundamental element of any republican constitution . . . is respect for law. The subjects as well as the ruler and the sovereign must possess this respect. In the last resort, the subject can be expected to respect those laws in the giving of which he has participated as fellow-legislator.").

⁶² KANT, *supra* note 9, at 100. To be sure, this account is not beyond objection. One of the devastating effects of nationalism in the nineteenth century turned out to be the propensity of states, including those based on republican constitutional orders, to wage wars. For a critique along these lines, see Habermas, *supra* note 3, at 120. For a discussion, see *infra* Part III.A.

Brian Barry has argued, “within a state, cosmopolitanism of (Kantian) form is commonly called liberalism by political philosophers.”⁶³ It is worth pointing out that attachment to a republican constitution explains Kant’s view of patriotism as a cosmopolitan duty.⁶⁴ In societies ruled on the basis of republican constitutions—that is, in constitutional democracies⁶⁵—citizens have duties different from those of the subjects in a non-republican state. Since only a republican state has the structure of institutions and procedures that make collective self-government—and freedom—possible, such a state requires an attitude of civic commitment on the part of the citizenry.⁶⁶

Thus far we have considered the republican constitutional orders in isolation. But once they come into existence,⁶⁷ these orders become part of a world of political communities that are similarly structured and normatively oriented. Under external conditions that enable communication and exchanges among systems—from the existence of technology to the education of elites—the constitutional republics establish relations that do not depend upon pre-existing institutional frameworks and are, until proven differently, voluntary in nature.⁶⁸ How do these orders relate to one another? How does their interaction alter their internal constitutional processes? While constitutional challenges and problems will not be identical, given the contingencies of their particular historical situations, neither are they likely to be unrecognizably different. From a constitutional standpoint, all legal systems will have to interpret their common (republican) principles, structure institutions and (re)calibrate them to the realities of political and social life. These constitutional issues are internal to each

⁶³ Barry, *supra* note 8, at 36.

⁶⁴ KLEINGELD, *supra* note 7, at 6. Brian Barry refers to the same time of patriotism as “civic nationalism.” Barry, *supra* note 8, at 54. John Rawls refers to it as “proper patriotism.” RAWLS, *supra* note 19.

⁶⁵ BROWN, *supra* note 3, at 96 (“Kant’s discussions of republicanism come considerably close to contemporary understandings of liberal democracy and representative government. As has been suggested by many scholars, Kant’s conception of republicanism is closely synonymous with current understandings of representative democracies, and it is from this resemblance that their interchange has been deemed warranted.”).

⁶⁶ KLEINGELD, *supra* note 7, at 30–31; *see also* SCHEFFLER, *supra* note 10, at 129 (arguing that “moderate cosmopolitanism about justice,” which the author advocates, “will be a compelling position only if it proves possible to devise human institutions, practices, and ways of life that take seriously the equal worth of persons without undermining people’s capacity to sustain their special loyalties and attachments”); Arthur Applbaum, *Legitimacy without a Duty to Obey*, 38 PHIL. & PUB. AFF. 215 (2010); Frank Michelman, *Law’s Republic*, 97 YALE L.J. 1493 (1988).

⁶⁷ In *infra* Part II.B., I take up the theoretical and practical question of their existence.

⁶⁸ Regarding the voluntariness, I do not mean to suggest that these relations somehow escape the logic of soft power altogether. But I do mean to suggest that these relations are not coercive, or they do not amount to a kind of “forcibl[e] interfere[nce] in the constitution and government of another state” of the kind that Kant bans in one of the preliminary articles in *Perpetual Peace*. *See* KANT, *supra* note 9, at 96 (internal quotation marks omitted).

jurisdiction but, unless these jurisdictions are hermetically sealed, the issues are similar in a non-trivial way. The constitutional interaction can be normatively relevant by setting in motion, or contributing to, reflection within domestic constitutionalism, including on issues such as interpretation of the principles of freedom, equality, and self-government within each of the municipal jurisdictions. How, then, does Kant's account theorize the interaction and gauge its impact on the several constitutional orders?

The simple answer is that Kant did not anticipate this phenomenon. By this I do not mean that he did not anticipate the exact historical moment or forms that this phenomenon would take, which of course would have been beyond anyone's powers. Rather, his account does not theorize the normative implications of an interchange between republican constitutional orders. As we will see, these acts of laterally-conducted normative integration are neither circumstantial nor shallow. Since their effect can be transformative, the question where they fit within the structure of public law is important. Kant, however, approaches the internal structural and substantive elements of a republican constitution within an exclusively domestic framework, assuming that republican states are to remain isolated, presumably until they enter an international federation. While their stability depends on what Kant calls a "cosmopolitan system of general political security,"⁶⁹ the substance and development of domestic constitutionalism remain confined to that jurisdiction. From this perspective, the constitutional account in *Perpetual Peace* is somewhat static. Yet, at the same time, *Perpetual Peace* offers a structure for theorizing the interplay of constitutional orders. As Jeremy Waldron has argued, cosmopolitan hospitality in the third definitive article is best understood as a principle, rather than a rule, and as such it can carry its normative weight, in this case the value of interaction of cultures, beyond its original context.⁷⁰ Relatedly, Kant theorized a global public sphere, and his insistence on publicity as well as on removing any restrictions on communication are enabling factors in the establishment of an international civil society.⁷¹ Such a global "public use of one's reason in all matters"⁷² creates the conditions of impartiality and objectivity that are necessary in order to juridify these spaces.⁷³ As we will see, Kant's theory of cosmopolitan

⁶⁹ KANT, *supra* note 9, at 49. In the same text, Kant argues that "[t]he problem of establishing a perfect civil constitution is subordinate to the problem of a law-governed external relationship with other states, and cannot be solved unless the latter is also solved." *Id.* at 47 (emphasis omitted).

⁷⁰ See Waldron, *supra* note 32, at 88.

⁷¹ See, e.g., Bohman, *supra* note 33, at 179–200; see also Habermas, *supra* note 3, at 123–26.

⁷² KANT, *supra* note 9, at 55 (emphasis omitted).

⁷³ On the criterion of impartiality and the plurality of standpoints, see HANNAH ARENDT, LECTURES ON KANT'S POLITICAL PHILOSOPHY 42–46 (Ronald Beiner ed., 1989). I discuss this at

right, in its broader interpretation,⁷⁴ is linked to the global public sphere. Finally, there is the issue of the learning processes in republican orders. Before putting these pieces together, we need to turn first to a brief analysis of the global transformation of constitutional law.

II. THE GLOBAL TRANSFORMATION OF CONSTITUTIONAL LAW

I have mentioned above the interaction among republican constitutional orders. But what exactly does that interaction entail and how does it come about? What domestic effect—institutional, reputational, and normative—does the circulation of constitutional ideas across borders have? What factors drive republican constitutions to interact with one another? Should cross-constitutional interactions be understood as a dimension of public right that Kant theorizes (*ius civitas*, *ius gentium*, or *ius cosmopolitanicum*) or, rather, are they best understood as another, as-yet-unexplored form of public right?

A. *Integration of Constitutional Spaces*

American constitutional scholarship has vigorously debated the legitimacy of using foreign law for the purpose of constitutional interpretation.⁷⁵ Whatever one's views on the legitimacy of that practice, it is worth noting that its very existence, outside of the framework of international institutions, is the signal of a rapprochement of constitutional systems. Its timing is largely a matter of historical contingency. The story has been told often and it includes standard references to the American idea of the constitution as law, the mechanics of judicial review in Europe after the First World War, the constitutional moments of the aftermath of the Second World War, including the enactment of new constitutions, the gradual spread of constitutionalism in the following decades, and the constitutional

some length in Vlad Perju, *Proportionality and Freedom: An Essay on Method in Constitutional Law*, 1 GLOBAL CONSTITUTIONALISM 334 (2012); see also Bohman, *supra* note 33, at 185–86.

⁷⁴ Kleingeld, *supra* note 12, at 75 (arguing that cosmopolitan law as concerned with “with interaction across borders. . . covers any kind of communication, interaction, trade, or business. It applies to travel, migration, intellectual exchange, as well as to commercial endeavors” (citation omitted)).

⁷⁵ The paradigmatic example is the debate about the use of foreign law for the purpose of constitutional interpretation. For a comprehensive description of this phenomenon, see APPLICATION OF FOREIGN LAW (Carlos Esplagues, Jose Luis Iglesias & Guillermo Palao eds., 2011). For analysis, see JEREMY WALDRON, “PARTLY LAWS COMMON TO ALL MANKIND”: FOREIGN LAW IN AMERICAN COURTS (2012); Vlad Perju, *The Puzzling Parameters of the Foreign Law Debate*, 2007 UTAH L. REV. 167 (2007); Eric Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131 (2006); Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931 (2008).

effervescence following the fall of communism in Eastern Europe and of apartheid in South Africa at the end of the century. For our purposes, it suffices to point out that written constitutions now structure and discipline the exercise of political power across legal systems. Bills of rights adorn these constitutional charters, and independent courts around the world have been entrusted with their enforcement.⁷⁶ “[T]he most successful legal transplant in the second half of the twentieth century”⁷⁷ is not an element of contract or property law, as jurists of comparative law would have predicted,⁷⁸ but rather it is a method of constitutional interpretation.⁷⁹ The ensuing constitutional migrations have not only changed the world’s constitutional landscape but have also profoundly altered the approach to domestic constitutionalism. To some extent, actors in these systems—judges, lawyers, claimants—end up inhabiting shared constitutional spaces.

A helpful account of these integrated spaces, or lifeworlds,⁸⁰ comes from Lorraine Weinrib. In her reconstruction of the specifically “sophisticated judicial paradigm,” these developments are said to have “produced a particular conception of constitutional ordering, to stabilize democracy and safeguard equal citizenship and respect for inherent human dignity as supreme or higher law.”⁸¹ This is the globalization of the “rights-based [constitutional] conception.”⁸² The constitutional paradigm rests on principled ways to dovetail competing imperatives that have produced tensions in legal thought. This post-war judicial paradigm provides “a safe haven from both popular sovereignty, history and tradition, on the one hand, and judicial subjectivity, on the

⁷⁶ Even in France, where opposition to the “*government des juges*” meant that citizens could not ask the Constitutional Council, that jurisdiction’s constitutional court, to strike down legislation as unconstitutional, reforms have recently been introduced that change this state of affairs. For an earlier account of constitutional development in France, see ALEC SWEET, *THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE* (1992).

⁷⁷ Mattias Kumm, *Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice*, 2 INT’L J. CONST. LAW 574, 595 (2003).

⁷⁸ See generally ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (1974); Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974).

⁷⁹ Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT’L L. 72, 74, 160 (2008) (arguing that proportionality has become “a foundational element of global constitutionalism”). For proportionality more generally, see AHARON BARAK, *PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS* 211–40 (Doron Kalir trans., 2012); Perju, *supra* note 73, at 334–67.

⁸⁰ For the concept of “lifeworld,” also used in the plural as “lifeworlds,” see JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: LIFEWORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASONING* (Thomas McCarthy trans., 3d ed. 1985).

⁸¹ Loraine E. Weinrib, *The Postwar Paradigm and American Exceptionalism, in THE MIGRATION OF CONSTITUTIONAL IDEAS*, *supra* note 26, at 84, 86.

⁸² *Id.* at 85.

other.”⁸³ The objective order of constitutional values, which has been theorized in German constitutional jurisprudence,⁸⁴ underpins the legal principles at the foundations of liberal democracy and gives legal expression to the rights of individuals. While centered on the judiciary, this account is comprehensive, since it incorporates a new understanding of the state and political power, as well as a conception of rights, institutions—including prominently, courts—practices such as judicial review, methods, and, generally, a new approach to the relation between individuals and the state, and to political power.

According to Weinrib, the rights-based conception is the outcome of several jurisprudential choices. Flexible principles, rather than all-or-nothing legal rules, “inform” judges’ analysis and the scope of rights-claims, but “do not function as concrete rules that mechanically dictate uniform results.” The method of proportionality is used to assess the legality of government action and it does so by integrating contextual analysis within legal doctrine in a structured, and principled, manner. “Calculations of social utility do not enter into the analysis.”⁸⁵ Courts are the “special guardians of foundational constitutional principles, including the rule of law, the separation of powers, the democratic function, and the specific rights that the constitution guarantees,” but, despite this broad mandate, they do not “encroach upon political prerogatives, but restrain[] . . . [their] elected bodies to their electoral mandate,” whose limits are set in the constitution.⁸⁶ In contrast to an adversarial model, in which rights are “trump cards” against state power, in this collaborative approach, the state and the right-holder are understood as working together. As Dieter Grimm, a former Justice of the German Constitutional Court puts it, “[t]he function of constitutional guarantees of rights is not to make limitations as difficult as possible but to require special justifications for limitations that make them compatible with the general principles of individual autonomy and dignity.”⁸⁷ In this system, where the three separated powers “operate co-operatively,”⁸⁸ commentators point to a high degree of centralization of regulatory authority in national governments and even federal systems.⁸⁹ To sum up the ethos of this constitutional order, the “state’s primary aspiration is to create stable institutions that work co-

⁸³ *Id.* at 88.

⁸⁴ DONALD P. KOMMERS & RUSSELL A. MILLER, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 57–58 (3d ed. 2012).

⁸⁵ Weinrib, *supra* note 26, at 91, 97.

⁸⁶ *Id.* at 92.

⁸⁷ See Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. TORONTO L.J. 384, 391 (2007).

⁸⁸ Weinrib, *supra* note 26, at 92.

⁸⁹ Tushnet adds “a reasonably high degree of centralization of regulatory authority in national governments” and even federal systems. Tushnet, *supra* note 23, at 985–86.

operatively to advance the widest application of the various constitutional principles.”⁹⁰

This “rights-based (constitutional) conception” is a helpful normative reconstruction of a set of complex constitutional practices. However, one should be neither too celebratory nor overly gloomy about the transformations it depicts. Capturing not quite a “Victorian moment,”⁹¹ the new model cannot avoid persistent tensions in contemporary constitutional thought. From the objective order of constitutional values to the non-instrumental nature of its method of rights interpretation, and from the nonconflictual relation between the state and individuals to the spirit of cooperation among the separated powers, deep theoretical disagreements persist about the demands of constitutional legitimacy and the tools of constitutional law.⁹² Pluralism and deep disagreement remain salient features of the constitutional republics, as Kant and his followers understood and anticipated,⁹³ and constitutional law remains a territory in which the larger conflict of visions in society unfolds.

Unless such disagreements are acknowledged, it will be impossible to grasp both the important challenges to cross-constitutional interactions and the difficulty of theorizing these phenomena. Taking domestic constitutionalism as the point of reference, critics have challenged the legitimacy of integrating constitutional spaces. Unlike in other areas of law, such as antitrust,⁹⁴ where borrowing and transplantation represent a major mechanism of legal development,⁹⁵ constitutional law is presumably self-referential since it codifies a political community’s charter of self-government.⁹⁶ The debate about the impermissible use of foreign law at the interpretative stage—albeit not with respect to constitutional design, for “[n]o one begins writing a constitution from scratch,”⁹⁷—reflects a standard legitimacy challenge.⁹⁸

⁹⁰ Weinrib, *supra* note 26, at 98.

⁹¹ I use this phrase in the sense discussed in Martti Koskeniemi, *Lauterpacht: The Victorian Tradition in International Law*, 2 EUR. J. INT’L L. 215 (1997).

⁹² For more, see *infra* Part IV.C.

⁹³ See Waldron, *supra* note 35; see also JOHN RAWLS, *POLITICAL LIBERALISM* (1996).

⁹⁴ See, e.g., EINER ELHAUGE & DAMIEN GERADIN, *GLOBAL ANTITRUST LAW AND ECONOMICS* (2d ed. 2011); Eleanor Fox, *Antitrust Without Borders: From Roots to Codes to Networks*, in *COOPERATION, COMITY, AND COMPETITION POLICY* 265 (Andrew T. Guzman ed., 2011).

⁹⁵ WATSON, *supra* note 78; see also Perju, *supra* note 26, at 1304.

⁹⁶ Sometimes, constitutions permit the use of “exogenous” materials such as foreign law. See, e.g., S. AFR. CONST., 1996, ch. 1, § 1(c), ch. 2, § 39(1)(c) (“When interpreting the Bill of Rights, a court, tribunal or forum . . . may consider foreign law.”).

⁹⁷ Wiktor Osiatynski, *Paradoxes of Constitutional Borrowing*, 1 INT’L J. CONST. L. 244, 244 (2003). One can go even further back and identify the global migration of the American Declaration of Independence of 1776. For a study, see DAVID ARMITAGE, *THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY* (2007).

⁹⁸ See *supra* note 45 and accompanying text.

The rights model also requires empirical qualifications. First, its thick description includes features that not all constitutional republics share. American constitutional law arguably takes exception with some of the features described above, such as a constitution-mandated collaborative approach to the separation of powers or the use of proportionality in assessing the constitutionality of government action. These “exceptionalist” features do not make the American constitution un-republican.⁹⁹ Second, there is a sliding scale between democratic and non-democratic regimes. While the rights-based conception model does not claim universal reach, the growing number of authoritarian legal systems in the world shows its descriptive limits.¹⁰⁰ Interestingly, this authoritarian turn is not limited to isolated jurisdictions without a democratic pedigree. Even among an association of democracies like the European Union, authoritarian constitutional developments in countries such as Hungary and Romania have unfolded with little resistance.¹⁰¹ Finally, this model glosses over constitutional dissimilarities among the democratic systems. Dissimilarities are the most manifest with respect to the form of government—presidential, parliamentary, or mixed—but they extend to the system of constitutional review, the mechanism for judicial appointments, and the relation between domestic and international law.

This last point deserves special emphasis. There are countless similarities and dissimilarities among constitutional systems. How is one to choose what to emphasize and then defend one’s general conclusions? In the theory of comparative law, which has a long history of thinking through this challenge,¹⁰² Rudolf Schlesinger introduced a helpful distinction between “integrative” and “contractive” comparisons. Contractive comparisons are periods that emphasize differences between legal systems, and they alternate with periods of integrative comparison, when the focus is on similarities.¹⁰³ Schlesinger’s observation was based on his study of private law—contracts, property, torts—which for him, as for most twentieth century comparative lawyers, formed the exclusive domain of proper comparative analysis. Yet this pendulum between contraction and

⁹⁹ See generally MICHAEL IGNATIEFF, *AMERICAN CONSTITUTIONALISM AND HUMAN RIGHTS* (2009).

¹⁰⁰ Rosalind Dixon & Eric Posner, *The Limits of Constitutional Convergence*, 11 *CHI. J. INT’L L.* 399, 415 (2011).

¹⁰¹ See Andras Jakab & Pal Sonnevend, *Continuity with Deficiencies: The New Basic Law of Hungary*, 9 *EUR. CONST. L. REV.* 102 (2013).

¹⁰² See generally Gerhard Dannemann, *Comparative Law: Study of Similarities or Differences?*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 383–420 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

¹⁰³ Rudolf B. Schlesinger, *The Past and Future of Comparative Law*, 43 *AM. J. COMP. L.* 477 (1995).

integration captures a trait—perhaps also a danger—common to all comparative analysis. From this perspective, we live at a time of integrative comparisons. This might be true, but merely pointing to this feature of our age is by itself insufficient. The need remains for a sound criterion to sort out the relevant from the visible, a criterion that must be justified through whatever new insight the comparative analysis delivers.¹⁰⁴ For instance, why are similarities with respect to one given set of principles of institutional structure or substantive commitments more relevant than alternative sets? Answering these questions requires an elaborate theoretical framework that is sufficiently stable to handle the constitutional materials and sufficiently flexible to be responsive to them. Without such a framework, the most one can hope for is a string of disjointed integrative comparisons that only partly document the transformation of constitutional law and do not elucidate it.

The promise of cosmopolitanism in its Kantian version is to offer a sound and appealing theoretical framework for understanding the complex interplay between the legal systems of constitutional republics. Is the goal of perpetual peace a principle of ordering the similarities and dissimilarities of constitutional systems as they become visible within the framework created by their interactions? Before turning to these matters, we must first have a better view of how the integration of constitutional spaces comes into existence.

B. *The Limitations of Constitutional Causality*

What forces push constitutional democracies to become part of an integrated constitutional web? Why do republican constitutions interact with one another? These “why?” questions have been a prime means for elucidating the integration of constitutional spaces.¹⁰⁵

Scholarly accounts of constitutional causality span a wide spectrum. According to one way of mapping of this debate,¹⁰⁶ at one end are exogenous accounts that see constitutional change as epiphenomenal and a reflection of deeper forces—economic, sociological, political. Sometimes these accounts are referred to as bottom-up, to the extent they emphasize the importance of market-centered processes of cross-jurisdictional competition. David Law, for

¹⁰⁴ Or, as Kant put it, “not all activities are called practice.” IMMANUEL KANT, *On The Common Saying: ‘This May Be True in Theory, But It Does Not Apply in Practice’*, in KANT: POLITICAL WRITINGS, *supra* note 9, at 61 (emphasis omitted).

¹⁰⁵ David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CALIF. L. REV. 1163, 1172 (2011) (“To understand why the content of written constitutions might exhibit convergence, it is necessary to focus instead upon the range of incentives that countries face to adopt similar constitutional provisions.”).

¹⁰⁶ See Dixon & Posner, *supra* note 100, at 415.

example, has argued that because capital is free to move around, attracting it—and thus securing the basis for economic development—requires that constitutional systems offer investors property rights protected by an independent judiciary.¹⁰⁷ The cause of constitutional convergence, for instance in the globalization of property rights, is thus competition among states for investment capital.¹⁰⁸ However ingenious, this explanation is only partly convincing. In addition to situations where competition leads to divergence, rather than convergence,¹⁰⁹ scholars have pointed out elite preferences, namely situations where political elites forego constitutional convergence when against their interests, as well as differences in the meaning of regulatory takings across systems.¹¹⁰ The very dynamic between market interests and constitution-making has been challenged by pointing out that the market itself is the creation of legal rules.¹¹¹ Other causal accounts emphasize the role of elites operating within professional networks whose trading in ideas explains cross-constitutional migration.¹¹² Capturing the political and economic dimension of this phenomenon, Ran Hirschl writes that, “the current global trend toward judicial empowerment through constitutionalization is part of a broader process whereby self-interested political and economic elites, while they profess support for democracy and sustained development, attempt to insulate policy-making from the vagaries of democratic politics.”¹¹³

In addition to competition for capital, learning and coercion have been identified as endogenous causal accounts of constitutional convergence.¹¹⁴ The former sees convergence as the byproduct of a process of accumulation of knowledge by relevant legal actors, whereas coercion is related to the pressures exerted by an outside force—a different constitutional system or even supranational institution—

¹⁰⁷ David S. Law, *Globalization and the Future of Constitutional Rights*, 102 NW. U. L. REV. 1277, 1282 (2008).

¹⁰⁸ See, e.g., Richard Epstein, *All Quiet on the Eastern Front*, 58 U. CHI. L. REV. 555, 558–60 (1991).

¹⁰⁹ Dixon & Posner, *supra* note 100, at 420 (identifying situations when competition leads to divergence rather than convergence).

¹¹⁰ See Tushnet, *supra* note 23, at 995–98.

¹¹¹ *Id.* at 995.

¹¹² ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004); see also Vlad Perju, *Comparative Constitutionalism and the Making of A New World Order*, 12 CONSTELLATIONS 464 (2005).

¹¹³ RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 217 (2004); see also Lee Epstein & Jack Knight, *Constitutional Borrowing and Nonborrowing*, 1 INT'L J. CONST. L. 196, 200 (2003) (“[A]nalyze borrowing—institutional choices, really—as a bargaining process among relevant political actors, with their decisions reflecting their relative influence, preferences, and beliefs at the moment when the new institution is introduced, along with (and critically so) their level of uncertainty about future political circumstances.”). *But see* David Erdos, *Aversive Constitutionalism in the Westminster World: The Genesis of the New Zealand Bill of Rights Act (1990)*, 5 INT'L J. CONST. L. 343 (2003).

¹¹⁴ Dixon & Posner, *supra* note 100, at 399.

regarding the adoption of a particular constitutional rule or institution. Both of these accounts add important insights to the globalization of constitutional law but are ultimately wanting. Learning is insufficient because, however beneficial greater knowledge might be, having such knowledge is an insufficient ground to establish legal authority. The pedigree of a source of knowledge is an essential component to the lawness of a norm. That is why justifications of the use of foreign law as opportunities for learning cannot answer the challenge that, however useful foreign law might be to judges, foreign law is an illegitimate source when it is invested with any kind of authority. Pragmatic answers that point out “the quality of a given foreign solution”¹¹⁵ do not meet this legitimacy challenge.

With regard to coercion, there are indeed situations, such as European Union conditionality agreements, where the adoption of a certain constitutional standard is the result of external pressure.¹¹⁶ But the emphasis on coercion fails to account for voluntary exchanges, which have been a salient feature in the interplay between constitutional actors from different legal orders. Consider again the interaction between constitutional judges. Only the absence of coercion can explain why in the “market” for constitutional citations, the most reputable courts are those of South Africa, India, Israel, or Canada, despite the obvious incapacity of these courts and their states to exercise coercion across borders. To be sure, even within such networks there are reputational effects. Some instances of constitutional borrowing can be “legitimacy-generating.”¹¹⁷ But such effects surely do not qualify as coercive.¹¹⁸

To sum up, these causal accounts, from competition to coercion, learning or the self-interest of elites, are illuminating—and are even indispensable—but they also remain inescapably partial. They typically proceed first by identifying features of the globalization of constitutional law and then seek to explain the entire phenomenon by focusing exclusively on that feature. By disregarding the greater complexity of the constitutional phenomenon, they cannot explain the persistence of constitutional dissonance or evaluate its relevance. More importantly, these accounts cannot meet the normative challenge of illegitimacy because they lack a normative interface between domestic and

¹¹⁵ Jorg Fedtke, *Legal Transplants*, in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 434 (Jan M. Smits ed., 2006) (“The decision to draw on ideas found in other legal systems is . . . often justified by the quality of a given foreign solution.”).

¹¹⁶ WOJCIECH SADURSKI, CONSTITUTIONALISM AND THE ENLARGEMENT OF EUROPE, at xxiv–xxv (2012).

¹¹⁷ Jonathan Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMP. L. 839, 842 (2003).

¹¹⁸ For an argument along these lines, see Vlad Perju, *Cosmopolitanism and the Making of A New World Order*, 12 CONSTELLATIONS 465, 475–81 (2005).

transnational constitutionalism—that is, an account of the point of transnational “engagement.”¹¹⁹

I have presented elsewhere the prolegomena to an account of that normative interface, specifically of the mechanism through which other political communities’ experiments in self-government shape the understanding of constitutionalism of another polity.¹²⁰ I argued there that constitutional systems are combinations of (historical) contingency and (normative) commitment or principle. Each system establishes doctrines that cast light on different dimensions of constitutional principles and rights, such as the principles of freedom, equality, and self-government that form the identity of republican constitutions. However, constitutional claims brought before courts within any one of these systems may rely on aspects of a given rule, principle or value that are shunned, for various reasons, within the claimant’s own system.¹²¹ Because constitutional doctrine ossifies, the capacity of the constitutional system to remain responsive to the claims of its citizens risks being diminished.¹²² Republican constitutions therefore have built-in corrective mechanisms, such as judicial review, the publication of separate opinions, proportionality analysis, the relaxation of standing requirements, as well as other mechanisms described in Weinrib’s account, to limit the distortive effects between the constitutional system and its (self-governing) citizen claimants. Openness to the experiences in self-government of other republican constitutional systems is a corrective mechanism designed to enhance a constitutional order’s responsibility to the demands of its citizens. I discuss below whether such openness is best understood as the cosmopolitan hospitality Kant refers to in the third definitive article (“Cosmopolitan Right shall be limited to Conditions of Universal Hospitality”).¹²³ It suffices to point out that, from this perspective on the constitutional system, the impulse for cross-constitutional interaction is at least partly rooted in the constitutional legitimacy of systems that must remain responsive to the demands of their self-governing citizens.

The conclusion for our current purposes is twofold. First, the interplay between different constitutional systems can have a profound shaping effect on the understanding of the meaning and requirements of constitutionalism within the various republics. Second, normative

¹¹⁹ I mean engagement in the encompassing sense used in JACKSON, *supra* note 24.

¹²⁰ Vlad Perju, *Cosmopolitanism and Constitutional Self-Government*, 8 INT’L J. CONST. L. 326 (2010).

¹²¹ See, e.g., the reliance on European legal materials for an aspect of constitutional liberty in *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) that, at the time the claim was brought, was not recognized by American law.

¹²² On the idea of institutional responsiveness, and its connection to Kant’s *Perpetual Peace*, see Bohman, *supra* note 33, at 191–92.

¹²³ See KANT, *supra* note 9, at 105.

principles—such as the duty of responsiveness that public institutions owe to their citizens—are not irrelevant, and might in fact be central for understanding the interaction among republican constitutions. Only when the focus of causal accounts on the self-interest of these systems' main political or institutional actors is supplemented with, or integrated within, larger normative frameworks, can these constitutional phenomena be understood in their complexity.

C. *Locating the Sites of Constitutional Convergence*

Once we approach these issues from “a different angle”¹²⁴, and consider republican constitutional orders in relation to one another, “why” questions must be supplemented by “what” questions.¹²⁵ What do republican municipal orders share in common? Kant mentions some of their salient features, such as the separation of powers, and the principle of representation, as well as substantive normative principles. Do the practices of contemporary constitutional democracies support this account? How do we know that a constitutional order is republican? That is, at what level—textual, doctrinal, structural, cultural, ideological, or some other level—should one even look to answer this question? What is the proper level of generality for locating the sites of constitutional convergence? Assuming some degree of convergence among the constitutional republics, what exactly is the object of convergence?

A reliable starting point is the existence of written text. As one scholar put it, “[r]eading across any large set of constitutional texts, it is striking how similar their language is; reading the history of any nation’s constitution making, it is striking how much self-conscious borrowing goes on.”¹²⁶ Indeed, at the start of the twenty-first century, virtually all states had codified in written form their rules and principles for structuring political power. The stature and overall societal traction of constitutions varies across jurisdictions, as do their specific structure¹²⁷ or methods of future amendment.¹²⁸ Apart from these details, republican constitutions have, for the most part, written constitutions.

¹²⁴ IMMANUEL KANT, *Idea for a Universal History with a Cosmopolitan Purpose*, in KANT: POLITICAL WRITINGS, *supra* note 9, at 41, 53.

¹²⁵ In this section, I build on previous work in Perju, *supra* note 26.

¹²⁶ Robert E. Goodin, *Designing Constitutions: The Political Constitution of a Mixed Commonwealth*, in CONSTITUTIONALISM IN TRANSFORMATION: EUROPEAN AND THEORETICAL PERSPECTIVES 223, 230 (Richard Bellamy & Dario Castiglione eds., 1996).

¹²⁷ See Liav Orgad, *The Preamble in Constitutional Interpretation*, 8 INT’L J. CONST. LAW 714 (2011).

¹²⁸ Rosalind Dixon & Richard Holden, *Constitutional Amendment Rules: The Denominator Problem*, in COMPARATIVE CONSTITUTIONAL DESIGN 195 (Tom Ginsburg ed., 2011).

But locating the text as the site of constitutional convergence can mean different things. It can refer to the idea of the written constitution or, more frequently, to the text itself. One version of the latter approach is to perform textual analysis by comparing the wording of constitutions, checking it against the date when the constitution came into force, and then charting constitutional trends.¹²⁹ Versteeg and Law have used this method and have found constitutional divergence across various axes. The reality, however, calls for greater nuance. Consider the axis between constitutional structure and fundamental rights. There are obvious differences between systems with regard to constitutional structure. Constitutional regimes might share a principle of separation of powers, but the exact structuring of the powers differs among presidential, parliamentary, and mixed regimes. Fundamental rights seem similar. Sharing an insight similar to that of Otto Kahn-Freund, who had argued that convergence is easier in private law because public law is too central to the interest of politicians who would have an interest in not giving up their control,¹³⁰ Mark Tushnet has argued that, “convergence with respect to fundamental rights will occur more quickly than convergence with respect to constitutional structures, largely because constitutional structures more strongly condition the way politics is conducted on the national level and so produce stronger counterpressures, through those . . . involved in domestic politics.”¹³¹ Indeed, the provisions of the bills of rights in constitutional democracies are strikingly similar. Yet, there remain significant structural differences among different constitutional regimes. To speak of convergence at this structural level, one would have to go beyond the level of particular institutional structure and focus instead on the deeper principles. For instance, one would need to look beyond the details of the legislative structure—unicameral or bicameral—and focus instead on the deeper principle of representation. There might be similarities at that deeper level with respect to structure, just as there are differences in the interpretation of fundamental rights.

A focus on the written text should not obviate the importance of the larger context. Consider the distinction between convergence and liberalization.¹³² The latter implies the opening of constitutions toward the inclusion of rights provisions, whereas convergence requires that the same rights be added and that an entire constitutional mindset follow. To be sure, some rights are especially important. As we have seen, inclusion of the right to property in constitutions, for example, has been

¹²⁹ *Id.*

¹³⁰ Kahn-Freund, *supra* note 78, at 2–4.

¹³¹ Tushnet, *supra* note 23, at 1002.

¹³² Dixon & Posner, *supra* note 100, at 405 (distinguishing between liberalization and convergence).

connected to competition to attract economic investors.¹³³ At the same time, judgment about the sameness—of rights or non-rights provisions—must be closely scrutinized for signs of what has been called “nominalism.”¹³⁴ This is the trap that similar-sounding concepts share an identical meaning. The pervasiveness of the English language in the comparative constitutional materials can heighten—sometimes artificially—the perception of congruence. But behind the same words—“right to privacy,”¹³⁵ for example—there might be an entirely different constitutional mindset. Yet even when rights are the outcome of constitutional borrowing, their meanings change in the course of borrowing.¹³⁶ One cause of nominalism is what has been called “modularity.”¹³⁷ This is an intra-textual or structural approach to interpretation that traces difference in meaning to the overall structural, doctrinal, or institutional architecture. Provisions are related to other provisions, doctrines or larger institutional structures, and so their meaning and role can only be understood as part of those complex relations.¹³⁸

Nominalism and modularity expose the difficulty of drawing conclusions about constitutional integration at a purely textual level. Integration, or convergence, is a judgment about constitutional meaning, and the text, without additional interpretation, is an insufficient basis for reaching such a conclusion. It is possible to rest the analysis of constitutional convergence at the purely textual, or formal, level. But this comes with a heavy price. A purely textual analysis remains perfunctory.¹³⁹ This kind of analysis lumps together constitutions from some of the most authoritarian states—

¹³³ Law, *supra* note 107, at 1308–11.

¹³⁴ See Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 794 (1997); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999).

¹³⁵ See James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1157 (2004).

¹³⁶ This is the reason why some have argued that legal transplants are impossible. See Pierre Legrand, *The Same and the Different*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 240 (Pierre Legrand & Roderick Munday eds., 2003); Pierre Legrand, *On the Singularity of Law*, 47 HARV. INT'L L.J. 517, 519–20 (2006).

¹³⁷ See Mark Tushnet, *Interpreting Constitutions Comparatively: Some Cautionary Notes, with Reference to Affirmative Action*, 36 CONN. L. REV. 649 (2004); Mark Tushnet, *Returning with Interest: Observations on Some Putative Benefits of Studying Comparative Constitutional Law*, 1 U. PA. J. CONST. L. 325 (1998).

¹³⁸ Tushnet gives as an example how legislative standing in the United States is related to provisions authorizing judicial review and generally to the overall structure of the separation of powers. Tushnet, *Returning with Interest*, *supra* note 137, at 330–31; see also Mark Tushnet, *Some Reflections on Method in Comparative Constitutional Law*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS*, *supra* note 26, at 67.

¹³⁹ Apart perhaps from insights into the very idea of the written constitution, by contrast to constitutional custom, see John Gardner, *Can There Be a Written Constitution?*, in 1 OXFORD STUDIES IN PHILOSOPHY OF LAW 162 (Leslie Green & Brian Leiter eds., 2011).

“constitutions without constitutionalism”¹⁴⁰—with liberal democracies.¹⁴¹ Yet, even in the case of property rights, their appeal does not derive from the mere wording of the constitution but, rather, from their effective enforcement throughout the legal system. The emphasis on meaning gives greater promise to a study of constitutional integration.¹⁴²

But once the search turns to meaning, that is, the study of constitutional integration starts with text but it should not end there, its object becomes considerably more complex. In particular, what makes a constitutional order republican becomes more nebulous. Where else to look, beyond text?

Another candidate for convergence is the method of interpreting the constitutional text. Proportionality is a structured—and, its defenders argue, a principled¹⁴³—method of interpretation, and it is a mechanism for asserting whether governmental action has impermissibly interfered with a constitutional right. The method divides the constitutional analysis into a series of distinct steps, which the constitutional interpreter must follow in order to determine the constitutional validity of the challenged method. As Alec Stone Sweet and Jud Mathews wrote, “[b]y the end of the 1990s, virtually every effective system of constitutional justice in the world, with the partial exception of the United States, had embraced the main tenets of [proportionality analysis]. . . . [It has become] a foundational element of global constitutionalism.”¹⁴⁴

Yet the problem with any judicial method of interpreting constitutional text, including proportionality, is its instability as the object of constitutional convergence. At one level, proportionality is exclusively a judicial method, although studies show that legislators go through a method of reasoning similar to the one they know courts will use in determining the constitutionality of the legislative measures.¹⁴⁵ More to the point, convergence on a methodological approach is partial, for that method by necessity rests on an entire background

¹⁴⁰ H.W.O. Okoth-Ogendo, *Constitutions without Constitutionalism: Reflections on an African Political Paradox*, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 65 (Douglas Greenberg et al. eds., 1993).

¹⁴¹ It is true that scholars have suggested that “the globalization of constitutional law might occur even in somewhat authoritarian nations.” Tushnet, *supra* note 23, at 997.

¹⁴² This richer understanding of convergence, which includes the constitutional text but goes beyond it to incorporate processes of constitutional meaning and creation, is standard in the literature. See Elkins, Ginsburg & Simmons, *supra* note 25, at 62 (defining convergence of rights as the “increasing similarity in legal texts and broader discourses about rights among different countries”).

¹⁴³ See BARAK, *supra* note 79, at 7; see also MOSHE COHEN-ELIYA AND DR. IDDO PORAT, PROPORTIONALITY AND CONSTITUTIONAL CULTURE (2013).

¹⁴⁴ Sweet & Mathews, *supra* note 79, at 74, 160.

¹⁴⁵ *Id.* at 111 (discussing these developments in the German constitutional context).

constitutional architecture (the judicial role, the structure of the courts system, rules about precedent). If shared, that background architecture would itself be the object of convergence. Finally, the level of methodology is unstable also because of its direct connection to judgments about constitutional legitimacy. In societies where deep pluralism is part of the circumstances of constitutional justice, and where constitutional law performs essential stability functions, agreement on a certain method signifies acceptance of an approach to constitutional legitimation. Therefore, agreement on method stands for agreement on a larger model or framework for legitimizing the exercise of coercion. Proportionality, however, has been vigorously challenged as legitimizing a type of cost-benefit analysis that stands in contrast to the deontological nature of rights.

Perhaps the object of convergence must be sought at a more general level of abstraction, such as the ideology of republican constitutions. At one level, it seems clear that the spread of constitutionalism has brought with it the ideological overtones of liberal democracies. Many have argued that the emphasis on rights and the rule of law marks an ideology of liberalism. As Mark Tushnet put it, it is necessary to give ideology a distinct role such as “rule of law considerations for the judges in transnational networks and substantive commitments to human rights for the highly skilled.”¹⁴⁶ However, the difficulty with identifying constitutional ideology as the site of convergence is that scholars have found evidence of polarization, specifically at the ideological level. A survey of world constitutions has shown ideological clustering has happened in two directions: one libertarian and the other social-democratic.¹⁴⁷ There are different interpretations of the importance of ideological polarizations. Law and Versteeg argue that:

Domestic constitutionalism is, in part, both a locus and a manifestation of geopolitical conflict and rivalry. The growing interdependence and increasingly permeable borders that define globalization only serve to heighten the impact of such conflict on the viability of national constitutional norms. A less utopian vision of the future of global constitutionalism might thus predict the division of the world into rival camps that champion incompatible conceptions of constitutionalism.¹⁴⁸

By contrast, Tushnet has argued that, “the globalization of domestic constitutional law will lead to convergence not towards classical liberalism, but to some sort of social democratic liberalism.”¹⁴⁹

¹⁴⁶ Tushnet, *supra* note 23, at 994.

¹⁴⁷ Law & Versteeg, *supra* note 105.

¹⁴⁸ *Id.* at 1173 (footnote omitted).

¹⁴⁹ Tushnet, *supra* note 23, at 999.

Wherever the truth may lie, evidence of ideological polarization cautions against using ideology as the site of convergence.

A more promising answer is the constitutional, or, better yet, constitutionalist mindset. According to Martti Koskenniemi, who theorized this “Copernican turn in legal theory,”¹⁵⁰ the constitutionalist mindset captures the attitude and spirit in which law regulates the conduct of politics and power. The argument here is that the existence of constitutional provisions instilling substantive principles of freedom, self-government, and equality, or structural imperatives such as the separation of powers, is necessary but insufficient. These principles need to be interpreted and applied in the complex realities of constitutional democracies. The constitutionalist mindset speaks to the state of mind of public officials in republican constitutions when engaged in that process of interpretation. By contrast to architectural approaches, which presuppose the existence of more or less rigid structures, the mindset assumes the existence of flexibility and the necessity of choice. It speaks of an attitude of the decision-maker when choices must be made in interpreting the conflict between powers or the application of a constitutional principle. Such a mindset is indispensable because “[m]ere constitutional architectonics”—i.e., text, structure, doctrine, or even method—“provide[] a poor guarantee for freedom.”¹⁵¹ Koskenniemi contrasts the constitutional mindset with legalism, which assumes that the application of rules is a matter of pure logical deduction and decisionism, which denies that the freedom of the decision-maker can ever be constrained by rules.¹⁵² Relying on Kant’s idea of constitutionalism, Koskenniemi places the essence of the rule of law in the “the judgment of the law-applier.”¹⁵³ Since rules do not regulate the conditions of their own application, mere existence of a specific structure leaves open the questions of interpretation and application. To be sure, interpretation depends on existing legal rules and constitutional structures. It also presupposes that these structures are moderately efficient because, if they were not, the officials would not share in the constitutionalist mindset.

¹⁵⁰ Martti Koskenniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization*, in 8 THEORETICAL INQUIRIES IN LAW 9, 31 (2007).

¹⁵¹ *Id.*

¹⁵² *Id.* at 12 (“[T]he rule of law in this Kantian image relates to the way the law-applier (administrator, public official, lawyer) approaches the task of judging within the narrow space between fixed textual understandings (positivism) on the one hand, and predetermined functional objectives (naturalism) on the other, without endorsing the proposition that the decisions emerge from a ‘legal nothing’ (decisionism).”).

¹⁵³ *Id.* at 11. The emphasis on application should not detract from the legislative stage. Koskenniemi is clear: “Law’s virtue does not lie only in law-application. It resides equally in legislation as the expression of a community’s self-determining will.” *Id.* at 25.

The constitutionalist mindset is the result of disaggregating the various elements of the Kantian account of the features of republican constitutions, which are then re-assembled into a whole larger than the sum of its parts. The latter is the constitutionalist mindset shared at least by officials in a republican constitutional order and incorporates the text and context that enable rule by law, rather than by fiat. Surveying the text and doctrine of constitutional systems around the world, both formally and substantively, it is possible to find a certain overlap in the commitment to using the constitution to codify the self-government of free communities of equals. The constitutional principles of freedom, equality, and self-government take different institutional forms across the world, as one would expect they would, and they have different, sometimes conflicting, interpretations. But they all share a set of principles that put the exercise of political power to the discipline of law.

Is this a descriptive argument, that the object of constitutional convergence in the world today is the constitutionalist mindset of public officials and constitutional subjects? Or is it a normative argument, that laterally-conducted integration of constitutional republics requires sharing in such a mindset? Kantians typically answer “both” to such questions. Such an answer is understandable from the perspective of a normative reconstruction of a constitutional practice. Indeed, asking the “what” question, by contrast to having an exclusive focus on causality, invites that dual perspective.

In conclusion, let us note that part of this constitutionalist mindset is an understanding of how and why the constitutional life of other republics is relevant to the experiment in self-government of one’s own political community. This is an attitude of openness—or cosmopolitan hospitality, to use Kantian jargon—to other constitutional systems that can be classified as republics. Yet, an emphasis on openness—or on the idea of the mindset itself—is too frail and underdetermined a ground. The idea of the mindset itself needs to be integrated within a broader goal that can give it direction and specify it further.

III. COSMOPOLITANISM AS A CONSTITUTIONAL FRAMEWORK

A. *The Goal of Perpetual Peace*

Kant’s emphasis on republican constitutions reflects the view that this type of constitution “is the only constitution which can lead to a perpetual peace.”¹⁵⁴ Peace is a principle of ordering in the sense

¹⁵⁴ KANT, *supra* note 9, at 100. Kant goes on to argue that, “the republican constitution is the only one which does complete justice to the rights of man.” *Id.* at 112 (emphasis omitted).

discussed above. As Otfried Höffe has pointed out, Kant is the only philosopher and “to date the only great thinker to have elevated the concept of peace to the status of a foundational concept of philosophy.”¹⁵⁵ Unlike other political thinkers, including Hobbes,¹⁵⁶ Kant understood that securing domestic peace is incomplete without protecting it through a global system that makes war impossible.¹⁵⁷ However, peace can be understood in at least one of two ways. It means, first, non-aggression. Second, it refers to the condition in which social order makes freedom possible: the “universal rule of law.”¹⁵⁸

As far as non-aggression is concerned, perpetual peace is more than the state of affairs that marks the end of hostilities in a particular situation. Calling such a state of affairs peaceful is “pure illusion,”¹⁵⁹ since that peace is only the circumstantial outcome of how political interests happen to align at a particular point in time. The real question—Kant’s question—concerns the conditions that end the possibility of war altogether.¹⁶⁰

This connection between republican constitutions and cosmopolitan peace—or, put differently, the idea of “domestic justice as a precondition for establishing a global civil condition of public right”¹⁶¹—has received a great deal of scholarly attention, to which I return below. It suffices for now to point out that, as historical testing shows,¹⁶² a defensible connection between the two demonstrates that

¹⁵⁵ HÖFFE, *supra* note 22, at xv. This internal-external connection has been made by Kantian scholars who noticed that Kant’s view of international peace evolved from early on under the influence of the French revolution and specifically in a republican direction. As Kleingeld writes, “Kant’s republican notion of the state may well explain his change of view regarding the way peace should be pursued.” KLEINGELD, *supra* note 7, at 48.

¹⁵⁶ TUCK, *supra* note 48, at 214–15 (“Like Rousseau, Kant saw very clearly that the Hobbesian theory entailed no end to the state of war”); *see also* Reiss, *supra* note 36, at 10 (discussing the similar problem for Kant and Hobbes: “the basic political problem is the same for both: to turn a state of war into a state of order and peace”).

¹⁵⁷ KLEINGELD, *supra* note 7, at 164 (“[E]nlightenment is possible only when the just state is not threatened by outside forces. Warfare between states tends to stifle development within states.”).

¹⁵⁸ CARL JOACHIM FRIEDRICH, *INEVITABLE PEACE* 29 (1948) (defining the “universal rule of law” as “a scheme of organization which would guarantee universal and eternal peace”).

¹⁵⁹ KANT, *supra* note 104, at 92.

¹⁶⁰ On what Kant means by “war,” *see* IMMANUEL KANT, *The Metaphysics of Morals*, in *THE CAMBRIDGE EDITION OF THE WORKS OF IMMANUEL KANT: PRACTICAL PHILOSOPHY* 482 (1996) (“1) [S]tates, considered in external relation to one another, are (like lawless savages) by nature in a nonrightful condition. 2) This nonrightful condition is a condition of war (of the rights of the stronger), even if it is not a condition of actual war and actual attacks being constantly made (hostilities). Although no state is wronged by another in this condition (insofar as neither wants anything better), this condition is in itself still wrong in the highest degree, and states neighboring upon one other are under obligation to leave it.”).

¹⁶¹ BROWN, *supra* note 3, at 96.

¹⁶² The classic work remains MICHAEL W. DOYLE, *Kant, Liberal Legacies and Foreign Affairs*, in *LIBERAL PEACE* 13–60 (2012). At a regional level, the project of European integration after the Second World War deserves mention. Peace has been a leitmotif of Europe’s evolution from

while democracies are indeed more hesitant to go to war with each other, that inclination gives way when they are confronted with non-democracies.¹⁶³

By itself, non-aggression is too narrow a normative framework for the transformation of constitutional law. Nor is non-aggression a particularly convincing goal without having worked out the foreign policy dimensions of the principles of domestic constitutionalism. Nevertheless, non-aggression should not be entirely dismissed in its relevance as a byproduct, as well as enabling condition, of the other dimension of perpetual peace, namely as a universal rule of law. The external (non-aggression) and internal (rule of law) dimensions are related as a matter of both political morality¹⁶⁴ and law.¹⁶⁵ As I have argued, the structure of Kant's three definitive articles, and specifically the connection between domestic and global justice, is rooted, through law, in a deeper philosophical continuity of the different levels of normative order: domestic, international, and cosmopolitan.¹⁶⁶

The grounds for the deep continuity between the domestic and supranational levels are revealed once peace is understood as a "fundamental theme not only of Kant's political thought but of his entire philosophy."¹⁶⁷ Peace is the *sine qua non* condition for having a civil—republican—constitution, which constitutes the only framework

the Schuman Declaration (1950) to the Treaty of Lisbon (2009). See generally ANDREW WILLIAMS, *THE ETHOS OF EUROPE: VALUES, LAW AND JUSTICE IN THE EU* 22–69 (2010).

¹⁶³ HÖFFE, *supra* note 22, at 177–87 (questioning the claim that republics are inherently peaceful). Höffe argues that democracies might be more hesitant to go to war, or inclined not to go to war with each other, or inclined to be peaceful generally—but they cannot be said to be fundamentally opposed to war. *Id.* at 186. He then details the conditions under which Kant's claim about the fundamental peaceable nature of republics holds true: "[s]elf-interest [which is all Kant relies on] in no way speaks against all wars if one (1) trusts more in weapons than in troops; (2) places only voluntary, not conscripted troops into service; (3) wages war only against weaker opponents," and (4) stands to gain economically from the war. *Id.*

¹⁶⁴ BROWN, *supra* note 3, at 46 ("Kant believed that domestic justice could not flourish without the state also being secured in its external relations through a legal condition of international right."); KLEINGELD, *supra* note 7, at 66 ("Even a small increase in stability will already allow for more internal development within states. From his first writings on history onwards, Kant repeatedly expresses his view that less war means more development within states—development of the political institutions, education, and enlightenment in general." (footnote omitted)).

¹⁶⁵ HÖFFE, *supra* note 22, at 150 ("The peace Kant discusses is, as a mere protection of life and freedom, a legal task.").

¹⁶⁶ Consider, for instance, how the principle of publicity applies to all levels. Seyla Benhabib points to the principle of publicity: "Kant's transcendental condition of publicity mediates between morals and politics by assuring that no legislator can pass a law that would be incompatible with its being made public to people who fall under its jurisdiction. . . . The transcendental principle of publicity applies at the cosmopolitan level no less than at the level of bounded communities." BENHABIB, *supra* note 15, at 150–51 (footnote omitted); see also BROWN, *supra* note 3, at 96 ("Kant altered the Hobbesian paradigm by focusing on domestic justice as a precondition for establishing a global civil condition of public right."). On publicity, see KANT, *supra* note 9, at 125.

¹⁶⁷ HÖFFE, *supra* note 22, at 136.

in which freedom is possible. “[A] civil constitution determined by laws is complete only when it exists not only among individual human beings, but also among states.”¹⁶⁸ This is the security, non-aggression level. In that sense, perpetual peace means a cosmopolitan system of general political security.

Yet non-aggression has domestic roots. Kant explains the propensity for peace of constitutional democracies by reference to the self-interest of these citizens who would not chose to put themselves through the miseries of war. To be sure, within a Kantian framework, self-interest is not a matter of raw preference but it is itself the product of reflection. Self-interest is important given Kant’s enduring belief that institutional structures have an impact in shaping the lives of the individuals who live under them.¹⁶⁹ It is, in fact, this very effect that underlies the continuity of attitudes with regard to the rule of law between the domestic and the transnational levels: “The respect for law which prevails in a republican state makes it incumbent upon its citizens and its government to establish a similar system of law in international affairs.”¹⁷⁰ What, then, explains Kant’s emphasis on self-interest? The only plausible explanation seems to be his concern with protecting his account from charges of utopianism.¹⁷¹ However much he believed in the possibility of moral enlightenment, the availability of a platform for the expression of self-interest within constitutional democracies provided sufficient basis for the connection between republican constitutions and the goal of securing perpetual peace.

Cosmopolitanism, then, is not an end in itself. Its role is to secure the conditions that make perpetual peace possible. At the same time, cosmopolitanism should not be understood in an instrumental way. The cosmopolitan condition makes peace possible, just as peace creates the conditions that make freedom, equality, and self-government possible. Peace is social order, the universal rule of law, which itself is a necessary

¹⁶⁸ *Id.* at 169.

¹⁶⁹ See KANT, *supra* note 9, at 113 (“[W]e cannot expect [people’s] moral attitudes to produce a good political constitution; on the contrary, it is only through the latter that the people can be expected to attain a good level of moral culture.”); see also KLEINGELD, *supra* note 7, at 179 (“Kant remains committed to the view that legal institutions (at the national and international levels) play a crucial role in the development of cosmopolitan moral attitudes.”).

¹⁷⁰ Reiss, *supra* note 36, at 35; see KLEINGELD, *supra* note 7, at 33 (“A just republic and its citizens will naturally conduct themselves in a way that is peaceful and just toward non-citizens internally and toward other states and non-citizens in their external relations. In other words, whenever cosmopolitans work on behalf of freedom and justice within their own countries, they do so in a way that is compatible with promoting justice elsewhere, too.”).

¹⁷¹ Concerns about feasibility are central to accounts of world peace. See RAWLS, *supra* note 19, at 82–83, 119, 124 (contrasting a cosmopolitan vision to that of a Society of Peoples and defending his account from charges of utopianism); see also KELSEN, *supra* note 7. For a discussion, in the Kantian context, see Jeremy Waldron, *Kant’s Theory of the State*, in IMMANUEL KANT, TOWARD PERPETUAL PEACE AND OTHER WRITINGS ON POLITICS, PEACE, AND HISTORY 179–200 (Pauline Kleingeld, ed., David L. Colclasure trans., 2006).

solution to what Kant calls the “unsocial sociability of [persons].”¹⁷² The existence of the state, and thus the very possibility of freedom, depends on it. It is in this sense that peace is built on a process of civilization and education that enable “a universal cosmopolitan existence.”¹⁷³ Therefore, an instrumental understanding of peace would be incongruous with this entire approach. “[C]osmopolitan law goes beyond mutual security and is also meant as the legal foundation for continued interconnection and development that may eventually bring human beings closer to understanding each other as mutual citizens.”¹⁷⁴

We have here part of the answer to the question, how can the interaction of constitutional republics contribute to the goal of perpetual peace? From a Kantian perspective, the *prima facie* case is two-fold. First, it relies on an understanding of peace that means more than non-aggression—at least among constitutional democracies—and refers to the institutional conditions that make freedom possible. The constitutionalist mindset of officials charged with interpreting and applying the rules epitomizes these conditions. Secondly, the interaction sets in motion broader societal learning processes and makes available forms of reasoning that allow self-governing citizens to recognize dimensions of their selves across jurisdictional boundaries. Underpinning this model, but optional for the model’s overall cogency, is Kant’s Enlightenment view of the “progressive improvement [of the human race] in relation to the moral end of its existence.”¹⁷⁵ Because people find in others dimensions of their own freedom, and, through them, get to understand themselves more fully, they discover a shared identity that integrates and transcends—without rejecting—their institutional affiliation to their own state. But what about this form of

¹⁷² KANT, *The Idea of a Universal History*, in KANT: POLITICAL WRITINGS, *supra* note 9, at 44 (“The means which nature employs to bring about the development of innate capacities is that of antagonism within society, in so far as this antagonism becomes in the long run the cause of a law-governed social order. By antagonism, I mean in this context the unsocial sociability of men, that is, their tendency to come together in society, coupled, however, with a continual resistance which constantly threatens to break this society up.” (emphasis omitted)).

¹⁷³ KANT, *supra* note 9, at 51.

¹⁷⁴ BROWN, *supra* note 3, at 47. As Habermas explains,

The abolition of war is a command of reason. . . . From Kant’s republican perspective, there is . . . a conceptual connection between the role of law in promoting peace and the role of a legal condition that citizens can accept as legitimate in promoting freedom. The cosmopolitan extension of a condition of civil liberties first secured within the constitutional state is not only pursued because it gives rise to perpetual peace, but also for its own sake, as a command of reason. Hence, “establishing universal and lasting peace constitutes not merely a part . . . but rather the final end of the doctrine of right.”

Habermas, *supra* note 12, at 121 (third alteration in original).

¹⁷⁵ KANT, *supra* note 9, at 88. See generally Alan Wood, *Kant’s Philosophy of History*, in TOWARD PERPETUAL PEACE AND OTHER WRITINGS ON POLITICS, PEACE, AND HISTORY, *supra* note 171, at 243.

reasoning would not be available through interactions at the federative, international level, and therefore at the cross-constitutional level? Without such an answer, it is unclear why the cross-constitutional level would not at most replicate interactions at the international level.

In reality, the cross-constitutional level adds a great deal more than what the international system can provide. As we will see in the next Section, Kant conceived of the international federation as a minimal institutional framework. Such an international federation must be supplemented by the rich interactions among constitutional systems in order to gain the legitimacy and play the role that Kant expects from them. Because the international structure is minimal, and its point is mainly to secure perpetual non-aggression, the background stability of enabling conditions for individual freedom require interchange across a wide range of constitutional topics. The socialization of both individual right-holders with one another, and state officials, must take place within a medium more wide-ranging than the minimal international federation.

B. Ius Gentium: *The International Federation*

If reason demands that war be abolished, one way to make war impossible is to dissolve the conventional actors that can wage war: states. Once integrated within a world republic, war between states becomes impossible, and all conflict is merely a domestic challenge to order within the new republic.¹⁷⁶ Since Kant famously, and controversially, argued that citizens of a state—regardless of size—do not have a right to civil disobedience,¹⁷⁷ the option in favor of a world republic seems to have irresistible appeal. There is also another way to get to this same conclusion. It starts from the moral arbitrariness of borders and factors in the imperative that law should follow the demands of morality. A united world, one without borders but which is nevertheless organized in a political structure, is a world republic. This world republic, an international state, can take either unitary or federative form, the latter with the caveat about the role of its boundaries.

Kant rejects both of these paths and, with them, the argument for a world republic.¹⁷⁸ Much to the puzzlement of his commentators, the

¹⁷⁶ For this interpretation, see Habermas, *supra* note 12, at 123.

¹⁷⁷ See, e.g., CHRISTINE M. KORSGAARD, CREATING THE KINGDOM OF ENDS 148–49 (1996).

¹⁷⁸ This point is all the more significant given that Kant had earlier advocated an international state. *Perpetual Peace* presents a new argument from Kant. Previously, in *Universal History*, he had argued for a strong federal authority, rather than a voluntary, non-coercive federation of states. See KANT, *supra* note 9, at 127 (“[P]ermanent and free association . . . without some kind of lawful condition which actively links together the various

second definitive article states: “The Right of Nations shall be based on a Federation of Free States.” Perpetual peace does not require the unification of the world into one political formation.¹⁷⁹ A plurality of jurisdictions, joined in a non-coercive league of states each with its own sovereign constitutional jurisdiction formed on a “republican constitution,” is the projected means toward the goal of securing a perpetual peace.¹⁸⁰ The identity of each jurisdiction, through its constitutional system, remains protected.¹⁸¹

Why prefer a plurality of states to a unified political formation? Is the world state ruled out at this particular stage in history, or is such supranational unification undesirable under any historical circumstances? Is any significant power exercised at the supranational level, and, if so, aren’t global institutions necessary to secure the rule of law, rather than fiat, at the supranational level? Put differently, does an international federation have the powers to guarantee perpetual peace or do those powers have to be supplemented and, if so, how?

Kant’s explanations for opting for a federation are somewhat sketchy. In what follows, I suggest that his emphasis on the republican constitutions, understood along the lines discussed in the previous Sections, explains in large measure the rejection of a world state and choice for a federation. The emphasis on the relation between the domestic and the supranational levels, and on the relation between the three definitive articles, shows that the key to accepting a plurality of jurisdictions is the conception of the internal organization of the state.¹⁸² I also suggest that the relations that constitutional republics establish with one another is at least compatible, and, at least in the first stages of development, must perhaps even be presupposed by the rather

physical or moral persons . . . the only possible form of right is a private one.” (emphasis omitted)).

¹⁷⁹ KANT, *supra* note 9, at 102. For a comprehensive discussion of the federation versus unitary state, see FLIKSCHUH, *supra* note 31, at 187.

¹⁸⁰ On the issue of sovereignty, see HÖFFE, *supra* note 22, at 195 (“The federation of peoples is made up of sovereign partners that maintain their sovereignty entirely.”). *But see* BENHABIB, *supra* note 15, at 29 (“State sovereignty is no longer the ultimate arbiter of the fate of citizens or residents. The exercise of state sovereignty even within domestic borders is increasingly subject to internationally recognized norms that prohibit genocide, ethnocide, mass expulsions, enslavement, rape, and forced labor.”); *see also* BROWN, *supra* note 3, at 111 (“[S]overeignty is conditional within the Kantian federation. It is conditioned on the normative principles of popular sovereignty, conditions of public right, equal justice, external freedom and universal law.”).

¹⁸¹ These questions are important because there is an ambiguity in comparative constitutional law. The reference to “comparative” clearly assumes the existence of a plurality of jurisdictions. Yet, it is often unclear what the point of that plurality is. One answer to the ambiguity is to refer to global constitutionalism, rather than comparative constitutionalism.

¹⁸² KANT, *supra* note 9, at 123 (arguing that states “should have an internal constitution organised in accordance with pure principles of right, and also that it unite with other neighbouring or even distant states to arrive at a lawful settlement of their differences by forming something analogous to a universal state”).

minimalistic approach to the international federation. I do not make the strong claim that such interactions are necessary to Kant's account of *Perpetual Peace*, though I do not find that strong claim necessarily implausible.

Kant's heavy reliance on republicanism in the domestic context renders the imperative of a world state less stringent. Scholars such as Pauline Kleingeld, have argued that, "Kant's republican notion of the state may well explain his change of view regarding the way peace should be pursued,"¹⁸³ and specifically that it should be pursued through a federation rather than an international state. But Kleingeld seems to have in mind specifically the idea of self-determination, since she writes that Kant's "republicanism rules out the coercive establishment of a world state, on the one hand, and supports the feasibility of a strong international federation, on the other."¹⁸⁴ Now, it is certainly correct to point out Kant's concern with self-determination.¹⁸⁵ As Kleingeld argues, making the federation coercive would allow stronger states to exert pressure on the weaker states.¹⁸⁶ But there is more to the emphasis on the republican constitution. If each state offers the guarantees of a republican constitution, that is, if each state secures the conditions for freedom within its own jurisdiction, the need for a world state is accordingly mitigated. States will enter a voluntary federation that will secure the peace, so that the federation will "extend[] gradually to encompass all states and thus lead[] to perpetual peace."¹⁸⁷ The one dimension that remains uncovered is the trans-border transactions such as the movement of persons, of communication, etc. The third definitive article on cosmopolitan right, and specifically the duty of hospitality, is meant to cover exactly this situation. The essence of this interpretation is the focus on the republican constitution.

¹⁸³ KLEINGELD, *supra* note 7, at 48.

¹⁸⁴ *Id.* at 49.

¹⁸⁵ HÖFFE, *supra* note 22, at 194 ("A world organization that arrogated to itself more responsibilities than that of securing international peace would violate the state right to (political and cultural) self-determination."). Höffe also argues that "a homogenous world state would violate state rights. An international state, by contrast, would not dissolve the peoples of the primary states, but rather only contest their exclusive right to a state form. It would develop as a secondary state or state of states." *Id.* at 197.

¹⁸⁶ KANT, *supra* note 9, at 117 ("[A] state which is self-governing and free from all external laws will not let itself become dependent on the judgment of other states in seeking to uphold its rights against them."). Kleingeld places emphasis on the voluntary nature of states joining the federation of states. The citizens of republics cannot be forced into joining an international federation. KLEINGELD, *supra* note 7, at 53–55. As Kleingeld explains Kant's position, "the people should be put in a position to determine themselves the shape of their political institutions. Kant has good reason then, given his broader republican commitments, not to sanction the coercive formation of a state of states as a matter of right, and therefore to advocate a league instead." *Id.* at 57 (emphasis omitted).

¹⁸⁷ KANT, *supra* note 9, at 104.

Kant's chosen path toward achieving peace is a voluntary, non-coercive federation of states. This federation is a political formation. He distinguishes a pacific federation from a peace treaty. Whereas a treaty would put an end to one war, the federation would end all wars by ending the "general warlike condition."¹⁸⁸ The federation is limited in scope and set up entirely for the purpose of securing peace: it "does not aim to acquire any power like that of a state, but merely to preserve and secure the freedom of each state in itself."¹⁸⁹ States belonging to the federation—whose vocation is to expand over time to encompass all states—derive their security "automatically," "from a united power and the law-governed decisions of a united will," rather than by virtue of "[their] own power or [their] own legal judgment."¹⁹⁰ In this sense, it can be said that the federation juridifies the international sphere.

But Kant remains sketchy on the details of the federation. For instance, the federation does not have a separation of power like that which the first definitive article calls for at the domestic level. Given its focus on collective security, commentators have referred to it as "an ultraminimal world state . . . with respect to its governing structure."¹⁹¹

Is this solution sufficiently stable? Can a federation of such limited powers deliver on its goal of securing perpetual peace? One concern is that such a limited federation will prove too weak or unstable to withstand political pressure at times of deep crisis. One possibility is that the powers of the federation will expand over time. The expansion can happen through a version of spillover effects, or with the consent of the member states, or—more likely—through a combination of both. The evolution of the European Union, which is probably the political organization that comes closest to Kant's idea, shows how this process could unfold—either unanimously among the members of the federation or using the system of enhanced cooperation.¹⁹²

But because such expansion cannot be assumed, the sources of the stability of the international federation must be sought elsewhere. One such place is domestic constitutionalism itself: More specifically the constitutionalist mindset within republican constitutional orders. In Kant's account, these constitutions set in motion learning processes whose object is not only the relation between individuals and the state within the confines of the state, but also the outward manifestations of the state. This places a very significant burden on domestic constitutions. However, the learning processes are likely to be more

¹⁸⁸ *Id.* at 104.

¹⁸⁹ *Id.* (emphasis omitted).

¹⁹⁰ *Id.* at 47–48.

¹⁹¹ HÖFFE, *supra* note 22, at 193.

¹⁹² See, e.g., Pavlos Eleftheriadis, *The European Constitution and Cosmopolitan Ideals*, 7 COLUM J. EUR. L. 21 (2001).

effective when they rely less on the actors' imagination and more on direct cross-jurisdictional exchanges. The interplay between constitutional republics within the integrated constitutional spaces I discussed above supplements the purely domestic level. It places the republican constitutions within a sounding board for their doctrinal choices and an environment in which to work out, in the presence of others but consistent with each jurisdiction's self-determination, the implications of their normative choices. As we have seen, the range of those interactions is very significant. It goes far beyond issues of security to which exchanges in the international federation are confined. These direct, non-hierarchical features make the international federation far more stable than it would otherwise be.

But why does reason call for a plurality of states joined in a federation rather than for an international state? Kant's insistence on the federation is intriguing, especially since he was not oblivious of the world republic argument.¹⁹³ He sees the creation of a world republic as the solution for "emerg[ing] from the lawless condition of pure warfare."¹⁹⁴ An "international state" would eventually grow to encompass all the peoples of the world—peoples, not states. In that sense, the state's vocation is similar to that of a republic, which is also to encompass all the states.

The choice of a plurality of jurisdictions is not (necessarily) arbitrary. Seyla Benhabib points to Kant's "extremely important move" of carefully distinguishing between a "world government" and a "world federation."¹⁹⁵ She writes that, "[a] 'world government' would only result in a 'universal monarchy,' . . . and would be a 'soulless despotism,' whereas a federative union . . . would still permit the exercise of citizenship within bounded communities."¹⁹⁶ Similarly, Otfried Höffe points out "the right of nations to retain their idiosyncrasies in the same way that individuals may retain them in individual states. The 'fusion' of peoples into a single, homogeneous people of the state is prohibited."¹⁹⁷ But Höffe builds his argument, and criticism of Kant, on the fact that state sovereignty is not limited, and Kant develops a second-best strategy to avoid a pure state of war when states hold fast to their sovereignty—" [t]his strategy is to enter contractual agreements without a state character, that is, to establish a federation of peoples instead of an international state. . . . [But it] is a mere cease-fire."¹⁹⁸ Thus, Höffe

¹⁹³ Indeed, Kant himself had previously advocated a world republic. See KANT, *supra* note 9, at 122.

¹⁹⁴ *Id.* at 105.

¹⁹⁵ BENHABIB, *supra* note 15, at 24.

¹⁹⁶ *Id.*

¹⁹⁷ HÖFFE, *supra* note 22, at 196.

¹⁹⁸ *Id.* at 200.

concludes, “Kant’s moderate political cosmopolitanism is more precisely both a complementary and subsidiary cosmopolitanism.”¹⁹⁹

Yet there is an interesting ambiguity in Kant’s equivocation between a federation of states and an international state. At one level, Kant appears concerned with the conditions for the practical realization of perpetual peace. He mentions that the idea of federalism as a path to peace is “practicable and has objective reality,” and he further notes that the international state “is not the will of the nations, according to their present conception of international right . . . [so] the positive idea of a world republic cannot be realised.”²⁰⁰

His concern can be easily interpreted as an answer to critics who, even during his time, were mocking the utopian dimension of the cosmopolitan project. But such a concern with the conditions for practical realization has been aptly called “unKantian.”²⁰¹ Kant’s emphasis throughout his moral philosophy is on the requirements of reason, rather than the conditions for the realization of those requirements. A sudden change of register signals Kant’s uncharacteristic concession.

Kant’s argument about a plurality of states is consistent as a preliminary stage at which cosmopolitanism becomes instilled in the constitutional law of the different republics. Yet this federative structure is only an intermediate stage that, from the perspective of Kant’s philosophy of history, opens the way to at least the possibility of a world stage.²⁰² The league is a step towards the “initiat[ion of] the departure from the international state of nature.”²⁰³

At the same time, and this is the equivocation I mentioned, there are elements in Kant to argue that the federative solution is “negative,” intermediary in nature, and does not rule out a possible—perhaps even necessary—next stage. The federation is the only conclusion possible given his starting assumption, namely the plurality of states. Since the object of inquiry is the “right of nations in relation to one another,”²⁰⁴ a federation of states whose aim is to end the general warfare condition is the only outcome. Because the positive solution of an international state is not available, and “[i]f all is not to be lost, this can at best find a negative substitute in the shape of an enduring and gradually expanding federation likely to prevent war.”²⁰⁵

¹⁹⁹ *Id.* at 201 (citation omitted).

²⁰⁰ KANT, *supra* note 9, at 104–05 (emphasis omitted).

²⁰¹ KLEINGELD, *supra* note 7, at 43 (citing Habermas, *supra* note 3).

²⁰² *Id.* at 44 (“[L]eague [of states is] a first step on the road toward the stronger ideal of a state-like international federation of states.”).

²⁰³ *Id.* at 51.

²⁰⁴ KANT, *supra* note 9, at 102.

²⁰⁵ *Id.* at 105 (emphasis omitted); see also KLEINGELD, *supra* note 7, at 179 (“Kant remains committed to the view that legal institutions (at the national and international levels) play a

Practical considerations of implementation of the political project are not the only ones weighing against an international state. Like all states, the international state could fall prey to “the most fearful despotism”²⁰⁶ on a scale proportionate to its size. One can imagine, for example, a democratic state where people do not exercise their sovereign power through their representatives. While Kant never fleshes out this argument, he deems the consequences of the despotic international state so debilitating that, however small the risk might be, a federation under a commonly accepted international right becomes more appealing. The reason is that war is preferable to anarchy. War is also preferable to a unified, universal monarchy created by force when a strong state overtakes all others. In such a monarchy “the laws progressively lose their impact as the government increases its range, and a soulless despotism, after crushing the germs of goodness, will finally lapse into anarchy.”²⁰⁷

Kant remains aware of the shortcomings of this (negative) solution—and that, indeed, of any solution short of an international state. War can always flare back in a federation,²⁰⁸ although that is more difficult than if the international sphere had been left entirely unjuridified.²⁰⁹ But to the extent the federation is successful, that is, to the extent it secures peace, a federation is one step toward the creation of the conditions—such as the state’s internalization of international right, moral learning, education—that will prepare the ground for further integration. Theorizing the direct interplay between constitutional systems, and integrating it in the framework of *Perpetual Peace*, is one answer to how the international federation can be successful at setting the conditions for peace without turning into a world government.

C. Ius Cosmopolitanus: *Cosmopolitan Hospitality*

Short of a world state, which does away with the distinction between internal and external (there would be no foreigners if the world were unified in an international state), the coexistence of multiple states

crucial role in the development of cosmopolitan moral attitudes” and “[o]nce their internal development and enlightenment have progressed far enough, republican peoples will join a world federation voluntarily.”).

²⁰⁶ KANT, *supra* note 9, at 90.

²⁰⁷ *Id.* at 113–14.

²⁰⁸ *Id.* at 105 (The federation “may check the current of man’s inclination to defy the law and antagonise his fellows, although there will always be a risk of it bursting forth anew.”).

²⁰⁹ HÖFFE, *supra* note 22, at 198 (“In internal relations, where the state of nature has been overcome, [states] are free; but in external relations, where the state of nature continues to exist, they are not yet free.”).

poses challenges with regard to trans-border issues.²¹⁰ These are familiar challenges involving asylum, deportation, and immigration more generally.²¹¹ The third definitive article of *Perpetual Peace*, which stipulates a right to hospitality, formally addresses these issues faced by world citizens in an international order of multiple states. According to this norm, cosmopolitan right—by which Kant refers to the rights of citizens of one state in relation to other states—shall be limited to conditions of universal hospitality. This is “the right of a stranger not to be treated with hostility when he arrives on someone else’s territory.”²¹²

At first blush, the right to hospitality is not particularly broad—for instance, the stranger does not have a right to be entertained and could even be turned away, if doing so would not cause him death. Hospitality entitles the right holder only to *attempt*—rather than succeed—to enter relations with those who already inhabit the land to which one travels. However, this narrow interpretation of cosmopolitan right does not fit easily within a systematic account of Kant’s political thought. Commentators have relied on that account to offer broader interpretations. With respect to the object of the right, commentators have argued that hospitality includes “all human rights claims which are cross-border in scope.”²¹³ Moreover, hospitality does not grant permission to states to engage in purely self-serving actions. “The point of international right and cosmopolitan right is to realize right at a global level. . . . [T]he duty of civic patriotism does not require closing borders to strangers in need.”²¹⁴ We find here the same interpretative complexity as in the case of other concepts central to Kant’s thought, such as perpetual peace.

The central insight of the third definitive article is that the right—and corresponding duty—of hospitality is legal in nature. Cosmopolitan right stands alongside both domestic constitutional and international law as an integral part of public right. They are normatively continuous, but separated. This is the cosmopolitan level, where transnational legal

²¹⁰ Kleingeld, *supra* note 12, at 88 n.8 (“[U]niversal state of humankind’ should not be taken to imply that Kant advocates the establishment of a world state that would absorb existing states. It refers to the legal system which unites all humans under common, cosmopolitan law.”).

²¹¹ See, e.g., SEYLA BENHABIB, *THE RIGHTS OF OTHERS: ALIENS, RESIDENTS AND CITIZENS* (2004); LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* (2006); DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* (2007); AYELET SHACHAR, *THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY* (2009).

²¹² KANT, *supra* note 9, at 105.

²¹³ BENHABIB, *supra* note 15, at 31; see also Kleingeld, *supra* note 12, at 75 (“Cosmopolitan law is concerned with interaction across borders. It covers any kind of communication, interaction, trade, or business. It applies to travel, migration, intellectual exchange, as well as to commercial endeavors.” (citation omitted)); Pavlos Eleftheriadis, *Cosmopolitan Law*, 9 EUR. L.J. 241 (2003) (arguing for a broad interpretation of hospitality).

²¹⁴ Kleingeld, *supra* note 12, at 79.

relations have persons, rather than states, as their object. Benhabib writes that, “hospitality is a right that belongs to all human beings insofar as we view them as potential participants in a world republic.”²¹⁵ This conceptual innovation captures an important jurisprudential insight, namely that the *legal* standpoint need not be jurisdiction-bound. As Kant writes, “[t]he idea of a cosmopolitan right is therefore not fantastic and overstrained; it is a necessary complement to the unwritten code of political and international right, transforming it into a universal right of humanity.”²¹⁶ The legal perspective is sufficiently broad to encompass the universal right of humanity. One need not confine oneself to the moral or political standpoint—law is also available.²¹⁷

I have argued thus far that Kant insufficiently theorizes the interaction between republican constitutional states. I have also called his account of republican constitutions “static.” Yet the broad interpretation of cosmopolitan right makes the third definitive article a possible theoretical framework for cross-constitutional interactions. If the right applies to “any kind of communication, interaction, trade, or business. It applies to travel, migration, intellectual exchange, as well as to commercial endeavors.”²¹⁸ The question then arises why the right could not also apply to the complex phenomenon of constitutional exchanges? Such exchanges, as we have seen, are related to the crossing of borders. A few questions must be answered, such as who would be the holders of these rights. But the model I suggest above offers some preliminary solutions. In the case of constitutional interpretation, the right-holders would be domestic claimants with an interest in operationalizing or implementing the insights that originate in the experiences in self-government of other political communities.²¹⁹ This interpretation underscores what Jeremy Waldron called Kant’s “emphatically non-nationalist”²²⁰ view. It makes hospitality a principle central to the constitutionalist mindset as it takes up the interaction between republican constitutions.²²¹ It forces a type of normative

²¹⁵ BENHABIB, *supra* note 15, at 22.

²¹⁶ KANT, *supra* note 9, at 108.

²¹⁷ See BROWN, *supra* note 3, at 46 (“Kant’s political theory is preoccupied with the moral worth and rightful condition of all human beings everywhere.”).

²¹⁸ Kleingeld, *supra* note 12, at 75.

²¹⁹ For the exact context of this normative reconstruction, see *supra* Part III; Perju, *supra* note 120.

²²⁰ Waldron, *supra* note 32, at 92.

²²¹ Moreover, the “law-ness” of cosmopolitan right, which Kant was keen to underscore, would not be compromised in this interpretation. It is possible to interpret integrated constitutional spaces as spaces in which norms at least “aspire” to juridical status. See Waldron, *supra* note 32, at 96. It is noteworthy, however, that Waldron does not use *jus cosmopolitanum*, but *jus gentium*, as the jurisprudential framework of these integrated spaces. See WALDRON, “PARTLY LAWS COMMON TO ALL MANKIND”, *supra* note 75.

openness that ensures that constitutional cultures of republican states will find themselves transformed by the interaction with one another.

However appealing this account may be, Kant's account of cosmopolitan right does not contain the evidence to support it. To start, this account blends different levels of public right. While I have pointed out repeatedly the normative continuity within public right—domestic, international, and cosmopolitan—it is equally important that the three levels be kept separate. A normative reconstruction that sees the interplay among republican constitutions as part of cosmopolitan right would basically blend the two levels of analysis. Perhaps the risk of blending these two levels could be mitigated by requiring that *ius civitatis* incorporate, without residue, the demands of cosmopolitan right. But other risks are harder to address. One such risk is that the trans-border constitutional phenomena are different in nature from cosmopolitan right. The former describe, importantly, bottom-up constitutional interactions whereas the cosmopolitan right is best understood as top-down. The bottom-up approach ought to be preserved because it signifies the primacy of the domestic jurisdictions: each constitutional republic retains its filter and sovereignty over any ensuing constitutional transplant or migration. Removing that filter opens the way to the kind of domestic interferences with self-determination that Kant speaks against elsewhere in *Perpetual Peace*.²²²

Secondly, the above interpretation relies on the broad interpretation of cosmopolitan right that seems at odds with Kant's insistence that the right be confined to actual world citizens who find themselves in a foreign land.²²³ It is true that the right can be plausibly interpreted as expressing a deeper principle relevant to all cross-border interactions. But Kant explicitly gives it a spatial, territorial dimension that is reflected in the right's origins. Specifically, Kant points out that the human race shares in common the possession of the earth's surface. Since "no-one originally has any greater right than anyone else to occupy any particular portion of the earth," man "must necessarily tolerate one another's company."²²⁴ Thence follows Kant's famous

²²² Kant, *supra* note 9, at 96.

²²³ We should not interpret this restrictively. Waldron is correct in stating that "hospitality is [not] about states or political communities at all, whether at the level of a world republic or an individual republic. It is about relations between people and peoples." Waldron, *supra* note 32, at 89. However, in the interpretation suggested above, hospitality is about the openness of the jurisdictions of individual republics toward the experiments in self-government of other individual republics. In this account, political communities and constitutional jurisdictions are relevant though the ultimate beneficiary could be interpreted as the people or peoples.

²²⁴ KANT, *supra* note 9, at 106. As Richard Tuck has argued, Kant did not question the substance (hospitality) of the theories of international lawyers such as Vattel and Puffendorf, whom he had famously called "sorry comforters," but only that they had failed to give hospitality the force of law. See TUCK, *supra* note 48, at 220; see also Martti Koskenniemi,

conclusion: “The peoples of the earth have thus entered in varying degrees into a universal community, and it has developed to the point where a violation of rights in one part of the world is felt everywhere.”²²⁵ Much has been made of Kant’s idea of interdependence, which commentators typically handle separately from the specifics of the conception of cosmopolitan right.²²⁶ Further expanding cosmopolitan hospitality to apply to the interaction between constitutional republics would be helped by de-territorializing the right, so to speak, perhaps by seeking alternative foundations in “[original,] innate human right to freedom”²²⁷ rather than in the common possession of the earth’s surface. Once that work is done, cosmopolitan hospitality might provide an alternative framework for understanding the globalization of constitutional law and theory.

IV. CHALLENGES TO COSMOPOLITANISM IN CONSTITUTIONAL LAW

A. *The Challenge from Democracy*

How does the argument about the interplay between republican constitutions square with the widely shared view that, unlike in other areas of law where the need of coordination allows, and might even require, a global approach, the deep logic of constitutional law in a democracy is self-referential? Just as politicians are committed by virtue of the positions they occupy to furthering the welfare of their electorate, so, Jack Goldsmith writes in a carefully calibrated and far-reaching critique that will be our guide in this Section, “cosmopolitan action by a liberal democracy is bounded by constituent preferences.”²²⁸

This challenge leaves open the possibility that a self-governing democratic citizenry, either elsewhere or in the future, might adopt a cosmopolitan outlook. For instance, one can imagine an educational system that teaches citizens to see themselves as members of “a complete commonwealth or even of cosmopolitan society.”²²⁹ But since Goldsmith’s focus is the United States, after surveying electoral results and public discourse,²³⁰ the author feels bound to conclude:

Miserable Comforters: International Relations as New Natural Law, 15 EUR. J. INT’L REL. 395 (2009).

²²⁵ KANT, *supra* note 9, at 107–08 (emphasis omitted).

²²⁶ *Id.*

²²⁷ See Kleingeld, *supra* note 12, at 78–79 (seeking alternative foundations for the right to hospitality, in the “[original,] innate human right to freedom”).

²²⁸ Goldsmith, *supra* note 6, at 1686.

²²⁹ KANT, *supra* note 9, at 56.

²³⁰ In what follows I defer to Goldsmith’s account of the self-understanding of U.S. citizens with regard to self-interest and altruism. The challenge from democracy is strongest under

This conception of the democratic process does not, in my view, mean that the U.S. government could plausibly engage in more generous acts of cosmopolitan charity. Even political leaders with powerful cosmopolitan sentiments who are unworried about reelection hesitate to engage in costly altruistic acts abroad. . . . [because] they have . . . a moral duty, in virtue of their election, their oath, and their identity, to promote the welfare of the State and its citizens.²³¹

Goldsmith's analysis of cosmopolitanism is presented in the context of international law, and specifically with respect to demands on the United States to engage in cosmopolitan actions such as the ratification of global treaties and the engagement in humanitarian action even "if doing so would lower net U.S. welfare."²³² But the argument is easily amenable to the constitutional domain, since its ultimate foundation is a conception of constitutional democracy. As Goldsmith writes, "the U.S. Constitution—and, with different mechanisms, every liberal democracy—ties foreign policy action to voter preferences."²³³ He continues: "the State does not organize itself for the purpose of engaging in acts of cosmopolitan charity. The dominant purpose of any State is to create a community of mutual benefit for citizens and other members, and more generally to preserve and enhance the welfare of compatriots."²³⁴

The conclusion is not that cosmopolitanism should be abandoned altogether, but that it should be adapted to plausibility constraints inherent in the logic of democracy. "Cosmopolitan argument must be bounded by institutional and moral constraints that arise in the domestic-democratic sphere. We cannot even have a coherent ideal of liberal democracies' cosmopolitan duties unless we understand these realistic limits on what liberal democracies can do."²³⁵ As I mentioned, those limits are not static and they might shift in time in all directions, including toward cosmopolitanism. But until and unless that shift happens, respect for democracy demands resistance to actions contrary to the general welfare of the U.S. electorate. Put differently, such respect demands that cosmopolitan sensibilities not transform into cosmopolitan action.

To understand the extent of this challenge, it helps to focus first on the gamut of "cosmopolitan action," in Goldsmith's sense, in constitutional law. If cosmopolitan sensibilities make a push for

these circumstances.

²³¹ Goldsmith, *supra* note 6, at 1685–86.

²³² *Id.* at 1668.

²³³ *Id.* at 1679.

²³⁴ *Id.* at 1676–77.

²³⁵ *Id.* at 1669.

cosmopolitan action in constitutional law, such actions are likely to be deemed undemocratic if they are not independently anchored in non-cosmopolitan grounds. Consider, for instance, the authority of foreign law in constitutional interpretation. Extrapolating from Goldsmith's conception from the international sphere, the use of foreign law would be illegitimate presumably because the specifically legal authority of such sources would have no possible democratic cover. As the question is rhetorically framed in this context, what is specifically legal in the relevance of foreign law?

From a purely source-based perspective, it might look as if foreign law lacks the kind of second-order authority that is specifically legal. Yet, as Jeremy Waldron has argued, there is a difference between the norms that lack any legal authority, for instance a religious norm or a norm of etiquette, and one that "aspires to juridical status."²³⁶ Unless cosmopolitan norms can fit into such a category,²³⁷ their law-ness and their traction will remain unexplainable. In the domestic-oriented interpretation that I have put forth, this insight is all the more relevant because the right to hospitality—which has traditionally been seen as the hard law aspect of Kant's program in *Perpetual Peace*—plays an important, though somewhat ancillary, role. My claim, however, is that the integrated spaces of constitutional law create a field of constitutional gravity that anchors norms which aspire to judicial status.

On the substance of Goldsmith's challenge, the first difference to note concerns not so much legal legitimacy but, rather, law's societal effect. As we have seen, Goldsmith believes, like Kant, that education can shape people's sensibilities in a cosmopolitan direction. However, until the education process has delivered that type of sensibility, cosmopolitan action that does lower U.S. welfare should be rejected as undemocratic. But for Goldsmith, this is a one-way street. He finds no shaping effect or general influence of the overall legal framework on the outlook of law's subjects. In the case of the United States, which is Goldsmith's main concern, the lack of cosmopolitan sensibilities is also due to a conception of exceptionalism, or nationalism, that percolates through the system's capillaries.

Kant did not merely note this shaping effect of law—he placed it at the center of his philosophical approach.²³⁸ As is well known, Kant's conception of law and his political philosophy follow his general philosophy of history. As we have seen, Kant's Enlightenment approach to history is stage-based. Each stage sets in place the learning processes

²³⁶ Waldron, *supra* note 171, at 96.

²³⁷ *Id.* at 95.

²³⁸ See KANT, *supra* note 9, at 113 ("[W]e cannot expect [people's] moral attitudes to produce a good political constitution; on the contrary, it is only through the latter that the people can be expected to attain a good level of moral culture.").

that create the environment in which progress to the next step is possible.²³⁹ Hence, peace is built on a process of civilization and education that enables “a universal cosmopolitan existence.”²⁴⁰ As one commentator writes, “[o]nce enlightenment has progressed far enough and people have achieved a proper understanding of and respect for universal principles of human rights, republicanism, and international and cosmopolitan right, then the time will be ripe for the transition to a global juridical condition.”²⁴¹

Goldsmith does not share this view of law’s effect. Perhaps such a view of law’s shaping effect is naïve. There is abundant literature on constitutional salience showing the limited effect of the Supreme Court’s constitutional pronouncements on American society generally,²⁴² despite self-congratulatory views to the contrary. But it is unclear if the empirical grounds are the most appropriate for gauging these issues, since testing them is almost impossible. Consider, for example, the issue of temporal horizon. The “civilizing effect”²⁴³ of democracy is no less real for having been observed over a long span of time. Considered within any short period, the effect would have been invisible. The same goes for laws’ shaping effect on citizenry’s cosmopolitan sensibilities. The question remains, on what ground one view—which finds a shaping effect—is justified over another, which does not. The answer lies with the philosophy of history. Kant believed that history moves in a certain direction, and “the goal towards which history is moving is the establishment of a republican civil constitution.”²⁴⁴ Because of that belief, he looked at historical evidence with what contemporary social scientists would refer to as a “confirmation bias.”²⁴⁵ That is undeniable. But just as undeniable is that Goldsmith’s approach also has a confirmation bias. The fault line, at least in this case, then becomes the philosophy of history rather than the empirical evidence of a very complex legal and social reality.

I will show how this plays out with regard to the interpretation of democracy. Although both conceptions are committed to the idea of self-government, their interpretations of democracy are different. At

²³⁹ On common learning processes, see generally JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* (1998).

²⁴⁰ KANT, *supra* note 9, at 51.

²⁴¹ KLEINGELD, *supra* note 7, at 62 (emphasis omitted).

²⁴² See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 1991); Frederick Schauer, *Foreword: The Court’s Agenda—and the Nation’s*, 120 HARV. L. REV. 4 (2006); Frederick Schauer, *The Boundaries of The First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004).

²⁴³ The phrase is questionable in any other interpretation but one: NORBERT ELIAS, *THE CIVILIZING PROCESS* (1969).

²⁴⁴ Reiss, *supra* note 36, at 37.

²⁴⁵ KLEINGELD, *supra* note 7, at 175.

one end is Goldsmith's challenge that cosmopolitanism takes for granted a conception of constitutional democracy that can be called, following Ronald Dworkin, "statistical" democracy. It sees democratic rule as the aggregation of the preferences of the majority. Kant's conception is different, and no less a conception of democracy because of it. The point of the rule of law, according to Kant, is to put preferences to the discipline of reason—indeed, the very possibility of freedom rests on the primacy of reflection. It is only in those circumstances, when preferences do not express unreflective taste or self-interest, that freedom is ever possible.

One way to get to this difference is to understand it as a matter of political culture, shaped by historical experience. Jed Rubenfeld has distinguished American and European approaches to the relation between reason and will within these two political cultures.²⁴⁶ He traced the differences in the conceptions of democracy to the impact and meaning of the Second World War in the two societies.²⁴⁷ It is, of course, important not to caricature these different traditions as homogeneous. As we have seen in Lorraine Weinrib's discussion of constitutional convergence in Part I, the "rights-based model of constitutionalism" has its origins in the United States, specifically in the jurisprudence of the Warren court.²⁴⁸ Yet, despite their complexities and nuances, it remains possible to identify different dominant approaches across constitutional jurisdictions. Kant can be situated at the very foundations of the European Enlightenment that has shaped the European approach. There is some truth to this account. Kant's blindness to the nationalism that ravaged Europe in the twentieth century has been duly noted.²⁴⁹

Misunderstanding this point about freedom makes one prone to misread Kant's general conception. The connection between democracy and eternal peace, in particular the role of peace in making freedom possible, has proven to be a trap for some commentators. In a recent article, Robert Delahunty and John Yoo use Kant's focus on domestic justice to argue against the interpretation of the Kantian project that would require the creation and expansion of supranational and transnational institutions.²⁵⁰ Instead, they argue that democracy-promotion recognizes "the necessity and desirability of a plurality of independent nation states,"²⁵¹ and consequently, that "[i]f the world

²⁴⁶ Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971 (2004).

²⁴⁷ *Id.*

²⁴⁸ Weinrib, *supra* note 81, at 84 ("The Constitution of the United States provided the inspiration for the rights-protecting constitutions of liberal democracies throughout the world.")

²⁴⁹ Habermas, *supra* note 12, at 146 (discussing Kant's "blind[ness]" to nationalism).

²⁵⁰ Delahunty & Yoo, *supra* note 13.

²⁵¹ *Id.* at 440.

becomes [more] Kantian, it will be by the pursuit of national self-interest.”²⁵² It is quite difficult to see how the emphasis on national self-interest, without any qualification regarding its dovetailing to other polities as well as broader goals, can make the world more Kantian. For one, in a Kantian framework, the construction of national self-interest by a self-governing political community is part of that community’s process of understanding human interdependence as the foundation of human progress. Furthermore, and this is more than a stylistic difference, there is no celebratory tone in Kant when it comes to the existence of a plurality of states. Rather, that reality is simply a state of affairs—and possibly an unstable one at that—given inescapable features about the world. The authors further identify “democracy as a point of agreement between Kantians and those who view international politics through a more instrumental lens,” and argue that peace would look “like the invisible hand of the market, in that democracies pursuing their own self-interest in an anarchic international system will produce gains for global welfare.”²⁵³ But this ignores the fact that Kant’s argument is based on his philosophy of history, which associates moral progress with learning processes as humanity makes its way from one state of enlightenment to the next. The authors may reject this view of history but they must acknowledge its existence and engage with it, since Kant’s philosophical argument is incomprehensive if detached from it.

My point is that the idea of democracy does not by itself do the work that the critics of cosmopolitanism expect from it. The battle will take place on the territory of different interpretations of democracy. Conversely, it is true that cosmopolitanism will be vulnerable from the perspective of some conceptions of democracy. But the question then becomes one of the cogency of those interpretations, especially in relation to the conception of self-government that informs the cosmopolitan approach.

B. *The Challenge from History*

A second challenge to cosmopolitanism in constitutional law uses the dark history of European colonialism to question the universal vocation of the cosmopolitan ideal. Specifically in the context of Kant’s philosophy, this challenge seeks to expose how its Eurocentrism—Kant claimed that Europe would “probably lead the way”²⁵⁴—shows it to be

²⁵² *Id.* at 461.

²⁵³ *Id.*

²⁵⁴ Koskenniemi, *supra* note 11, at 7–8.

imperialistic in its disregard of the diversity of cultures.²⁵⁵ Under the guise of accommodation and toleration hid colonial ambitions and *insensibilities* that are specifically Western in their historical pedigree. Western in this context means European, although in the second-half of the twentieth century, the universality of law is arguably perverted though a specifically American cast. Projects of constitution-making under the guise of the Washington Consensus, promoted by United States-influenced international institutions such as the International Monetary Fund and the World Bank, are evidence for this charge.²⁵⁶ Thus: “scratch a cosmopolitan and you’ll find an imperialist just below the surface.”²⁵⁷

Consider again the distinction between integrative and contractive comparisons. Whereas the analysis of the right-based constitutionalism exemplified integrative comparisons, the challenge from history tends to extoll the contractive virtues of encounters between different republican constitutions. From this latter perspective, the argument about constitutional convergence is based on a typical disregard of difference. The Kantian scholar is like the traveler who sees of the new places he visits only elements that are already familiar.²⁵⁸ He or she sees nothing new that can challenge his or her deep-seated beliefs, not because the novelty does not exist, but rather because it simply does not register. This account does violence to the richness of different constitutional cultures and leads to a very impoverished model of integrative constitutional analysis.²⁵⁹

The historical pedigree of cosmopolitanism is sufficiently complex to suggest that the historical challenge is very real. As one scholar commented on that legacy, “Kant’s so-called universal conception of justice was not only regional *to* Europe but was also regional *within* Europe.”²⁶⁰ Going now beyond Europe, the argument has been exercised

²⁵⁵ Tully, *supra* note 12, at 331–58.

²⁵⁶ MAZOWER, *supra* note 17, at 66.

²⁵⁷ BROWN, *supra* note 3, at 127.

²⁵⁸ Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT’L L.J. 411 (1985).

²⁵⁹ Günter Frankenberg has termed this the Ikea model of constitutional comparison, in Günter Frankenberg, *Constitutional Transfer: The IKEA Theory Revisited*, 8 INT’L J. CONST. L. 563 (2010).

²⁶⁰ Ian Hunter, *Kant’s Regional Cosmopolitanism*, 12 J. HIST. INT’L L. 165, 178–79 (2010) (“Kant’s cosmopolitan or global spatialisation of justice results from the same metaphysical reciprocity that he establishes between the community of space in a spherical earth, and the community of wills formed among the rational beings seeking to occupy this space. . . . [T]he only truly legitimate form of political authority for Kant is that exercised by a world republic; as it is only the harmonisation of wills of the entire universe of rational beings that makes just possession of the earth possible and that is actualised in the cosmopolitan right of the republican cosmopolis. Cosmopolitan right (or international law) is thus both autonomous of and superior to any right claimed by territorial states.”); *see also* Tully, *supra* note 12.

in the context of Chinese, or generally Asian, cultural and legal values.²⁶¹ Yet, authors do use Kant to try to make sense of the evolution of those legal systems. This argument is also based on rather simplistic assumptions about the homogeneity of cultures. As Amartya Sen has argued, the origins of salient features of democratic life can be traced to the Indian culture in equal measure as to the Greek.²⁶²

This challenge points to real risks. There is a risk that the so-called cosmopolitan is “infected by the particularity of the speaker, the world of his or her experience, culture and profession, knowledge and ignorance.”²⁶³ Furthermore, there is a real risk that one glosses over the relevant dissimilarities and focuses instead on the comfort of the similar. It might even be true that cosmopolitanism, of Kantian or other types, is particularly prone to inflicting such violence on the rich and multidimensional constitutional cultures.

But these are only risks, and are not disproportionate risks. Cosmopolitanism is not among those concepts with a history so dark that it cannot be rescued from it. The mere pointing to the European origins does not make the approach inescapably Eurocentric, just like the concept of the state itself is not Eurocentric, despite its origins.²⁶⁴ Moreover, I pointed out the need for a principle of ordering in the case of integrative comparisons such as Weinrib’s. But a similar principle of ordering is needed in the case of contractive comparisons that focus on the dissimilar, the singular. In principle, one has no more reason to extoll the unique or the different as one has to extoll similarities. There are dangers to erring on both sides.

The challenge from history is not a fatal blow to the cosmopolitan approach, but its warning must be heeded. In law as elsewhere,²⁶⁵ globalization can be a cover under which particular interests present themselves as universal and, as such, claim to be beyond justification or criticism.²⁶⁶ Constitutional law can become a tool that is used to ends that violate Kant’s principle of self-determination. The question is whether there are mechanisms that protect from this danger. The absence of supranational structures ensures that each system retains autonomy over all cross-constitutional interactions. Consider how, in

²⁶¹ For thoughtful discussions, see WM. THEODORE DE BARY, ASIAN VALUES AND HUMAN RIGHTS: A CONFUCIAN COMMUNITARIAN PERSPECTIVE (1998); Amartya Sen, *Human Rights and Asian Values*, THE NEW REPUBLIC (July 14–21, 1997), available at <http://www.mtholyoke.edu/acad/intrel/sen.htm>.

²⁶² AMARTYA SEN, THE ARGUMENTATIVE INDIAN: WRITINGS ON INDIAN HISTORY, CULTURE AND IDENTITY (2005).

²⁶³ Koskenniemi, *supra* note 11, at 10.

²⁶⁴ See Charles S. Maier, *Leviathan 2.0: Inventing Modern Statehood*, in A WORLD CONNECTING 1870–1945, at 29, 32–35 (Emily S. Rosenberg ed., 2012).

²⁶⁵ See generally ZYGMUNT BAUMAN, GLOBALIZATION: THE HUMAN CONSEQUENCES (1998).

²⁶⁶ See Martti Koskenniemi, *Legal Cosmopolitanism: Tom Franck’s Messianic World*, 35 N.Y.U. J. INT’L L. & POL. 471 (2003).

this context, American law has been more of the object of “aversive” than positive comparisons.²⁶⁷ Many courts around the world, including young courts such as Hungary’s or South Africa’s, refer to the decisions of the United States Supreme Court in order to openly criticize their reasoning, dismiss them, and chose alternative paths.²⁶⁸

That said, it should be acknowledged that the challenge from history cannot be answered satisfactorily without an account of how the constitutional law of other systems is processed and handled within any given jurisdiction. This is the traditional domain of comparative law. Only such an account could show the structure of learning processes and how they fit into the Kantian framework.

C. *The Challenge from Politics*

The challenge from politics takes two forms. The first form, which is related to the challenge from history, points out the risk that cosmopolitanism hides the political preferences and options that are involved in any jurisprudential choice behind its claim to neutrality. Recall in this context the account of the rights-centered constitutional paradigm, and in particular how the description glossed over the jurisprudential choices and tensions involved in its articulation. The challenge of politics takes that as an example of the “managerial mindset,”²⁶⁹ understood as the belief that the structuring and exercise of political power is a matter of effective management through neutral techniques, rather than substantive choices. By opening up the microcosm of the state to the globalization phenomenon, traditional distributive concerns will become diluted in a sea of technicalities whose power consequences will become hidden but which remain equally consequential. As one scholar put it, we become “ruled by experts who structure their world to deny themselves the experience of discretion and responsibility and the rest of us the opportunity to challenge their

²⁶⁷ Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case For Studying Cross-Constitutional Influence Through Negative Models*, 1 INT’L J. CONST. L. 296 (2003).

²⁶⁸ It is, therefore, somewhat surprising to read Upendra Baxi’s criticism that “[t]he revival of comparative constitutionalism studies almost always ignores the remarkable achievements of decolonized public-law theory, whether as regards the fifty years of Indian judicial or juridical creativity or the extraordinary developments of the South African constitutional court.” Upendra Baxi, *The Colonialist Heritage*, in COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS 46, 53 (Pierre Legrand & Roderick Munday eds., 2003). In fact, constitutional developments in both India and South Africa have become staples in the emerging canon of comparative constitutional law.

²⁶⁹ Martti Koskeniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization*, 8 THEORETICAL INQUIRIES L. 9, 13 (2006) (distinguishing between a managerial mindset and a Kantian, constitutionalist mindset).

action.”²⁷⁰ The danger of cosmopolitanism, from this perspective, is that of a politically aseptic theoretical framework that is blind to the distributive consequences of a legal act, method, or indeed “paradigm.” Shifting the register from government to governance deepens the disconnect between the state and power and removes, both in practice as well as in discourse, power mechanisms from the state’s oversight. To the extent that legal discourse can orient the legal system to provide some oversight to the exercise of power in society, cosmopolitanism can short-circuit that capacity by enlarging the framework of reference to such an extent that participants find themselves reverting to clean, technical, neutral expertise. Yet, that expertise only hides the inescapable political choices that everyone, experts included, are bound to make.²⁷¹

The challenge from politics points to real risks. To the extent that awareness increases both reflectiveness on the part of decision-makers and transparency of the very process of deciding, any choice, whether it is part of a process of globalization or the object of constitutional convergence, must be justified. However, the challenge is exaggerated if it suggests that such justification is impossible within a cosmopolitan framework. Cosmopolitanism is neither more nor less than one of “the many possible worlds.” It is just like alternative frameworks, including nationalist ones. The insights brought out by the challenge from politics become a trap if built into the challenge itself is a bias for the small and bounded community. Cosmopolitanism does expand the legal space, which comes with the risk of a heightened appeal of fake neutrality. At the same time, however, it also has the advantage of offering a framework in which constitutional self-knowledge and self-understanding can be deepened.

²⁷⁰ Kennedy, *supra* note 2, at 647.

²⁷¹ The challenge from politics relies heavily, at least in this version, on the role of legal professionals. Consider, for example, that cosmopolitanism changes the paradigm from hierarchy to network, from unity to plurality. See, e.g., Alec Stone Sweet, *A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe*, 1 GLOBAL CONSTITUTIONALISM 53 (2012) (arguing for a connection between the cosmopolitan ideal and constitutional pluralism, which is characterized by the coexistence of competing claims for constitutional authority). As David Kennedy writes,

Legal pluralism is not a fact about the world. It is a professional experience: the experience that things don’t add up, that coherence fails, that incommensurability must be acknowledged. . . . I want to celebrate this professional experience first, because at that moment we realize we have *discretion*. We are open to persuasion, and we have lost control, precisely because *we do not know* what the law determines. And second, because at that moment we see our Cosmopolitan Dream of a universal rule of law for what it is—a dream. Seeing this, perhaps we can take another look at *what* we are deciding, *what* world, among the many possible ones, we are creating through our rulership.

Kennedy, *supra* note 2, at 641, 644 (emphasis added).

But this defense of cosmopolitanism might itself seem too abstract and theoretical. Past constitutional and political argument shows a propensity to hide ideological projects behind the fake neutrality of cosmopolitanism. Projects of democratic promotion are perhaps most prominent in this context. Foreign interventions in the name of democracy-promotion and state-building have been justified by the unqualified thesis that constitutional republics are peaceful and democracies do not go to war.²⁷² Some of these accounts rely on the democratic peace literature, although many scholarly accounts in this tradition typically show far greater nuance.²⁷³ In fact, democracy-promotion interventions cannot find a basis in Kant's account because they violate the principle of self-government. *Perpetual Peace* rejects foreign interventions as contrary to the ideal of democratic self-determination. The fact that cosmopolitanism can be misinterpreted and misused, like all-powerful intellectual tools, cannot count as an argument against it.

There is another version of the challenge from politics. Whatever the descriptive accuracy of the case for republican constitutions, this view holds that cosmopolitanism should be resisted because it entrenches a set of institutional structures that become ossified and end up straightjacketing the flow of politics. Consider here the very definition of republican constitutions. In defining them, Kant walks the fine line between being under-inclusive, with the risk of making it difficult to distinguish them from other regimes, and being over-inclusive. The danger in this latter instance is precisely the one singled out in the challenge, namely that the existence of a unique and nonderogable institutional framework will leave voiceless the interests and visions that the framework fails to capture. The two versions of the challenge from politics converge in that the single institutional framework is likely to be presented as the only possible alternative.

The stakes are particularly high, if one recalls that according to Kant, republican constitutions are the only ones that make freedom possible. The very idea of a republican constitution, with its commitment to self-government, freedom, and equality, require constant experimentation with institutional form. Scholars have suggested the inclusion of "destabilization rights" in constitutions, precisely as a way of freeing politics from the entrenchment of particular interests.²⁷⁴ Rather than convergence, this challenge posits that the world needs institutional experimentation and innovation.

²⁷² Delahunty & Yoo, *supra* note 13.

²⁷³ See PIKI ISH-SHALOM, *DEMOCRATIC PEACE: A POLITICAL BIOGRAPHY* (2013).

²⁷⁴ ROBERTO MANGABEIRA UNGER, *FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY* 530 (2004); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 *HARV. L. REV.* 1015 (2004).

Exactly how well Kant handles the challenge is a matter of some controversy. James Tully, for example, finds that in “Kant’s account the constitution of every free and independent nation-state should be the same.”²⁷⁵ At the same time, we have seen that Kant’s emphasis is on some requirements of institutional structure—the separation of powers and representation—as well as normative principles of freedom—equality and self-government. Moreover, as we have seen in Part IV, the determination of constitutional meaning leaves open the avenue for a variety of interpretations of these principles,²⁷⁶ as well as a variety of forms that the separation of powers can take. Yet, from Tully’s perspective, Kant’s insistence that each citizen be treated “as free and equal” assumes an impartiality of liberal democratic pedigree that is biased against the value of cultural difference.²⁷⁷

To be sure, Kant’s account of cosmopolitanism is avowedly liberal. That feature is no liability and, indeed, the challenge from politics cannot succeed simply by mounting a critique from an alternative, communitarian perspective. The real question is whether Kant’s account of the republican constitutions is indeed over-determined and, therefore, runs the risk of stifling experimentation. Debate is possible on this front but the argument concerning stifling is rather weak. Nothing in the idea of cosmopolitanism suggests that it cannot be interpreted in a way that does not require replication of institutional structure. As we have seen, convergence is not uniformity. That applies both with respect to the interpretation of rights as well as to the separation of powers or other elements of institutional structure. Moreover, the lack of a supranational structure signals the continuation of the plurality of different constitutional jurisdictions. That plurality is in fact the guarantee that institutional experimentation remains possible and indeed desirable. This is another important argument, in addition to the argument from despotism, in favor of maintaining the plurality of states and rejecting the world republic.

CONCLUSION

In this Article, I have drawn on the tradition of cosmopolitanism to construct a normative framework for the cross-jurisdictional interactions of legal systems. I referred to these phenomena as elements of laterally-conducted constitutional integration in order to emphasize that interactions of this type occur outside pre-established institutional settings. Where do these interactions fit within Kant’s tripartite system

²⁷⁵ Tully, *supra* note 12, at 347.

²⁷⁶ One exception might be the principle of formal equality.

²⁷⁷ Tully, *supra* note 12, at 347 (relying on Charles Taylor).

of public law: municipal, international, and cosmopolitan? I argued that *Perpetual Peace* does not answer the question, because its author failed to anticipate that once republican constitutional orders come into existence, their normative commitment to (self-)government under law brings them into interaction with one another. Nevertheless, *Perpetual Peace* offers an overall framework for theorizing these phenomena. Specifically, it constructs the levels of public right in a way that makes it possible to place cross-constitutional interactions at the intersection between the different levels, rather than within any one of them. The lesson is that the rights of humanity cannot be incorporated within any one level of public right, and hence are not captive to any one set of institutional arrangements or conceptual structures.

Within this general theoretical structure, I argued that the municipal perspective should be recognized a privileged standpoint. By contrast to other scholarly accounts, which associate a cosmopolitan view to top-down accounts about institutional reform at the international level or universal moral demands, my account has taken domestic constitutionalism as both starting and end points. In this sense, I have defended a bottom-up version of cosmopolitanism. Cosmopolitanism from the ground-up preserves the primacy of the domestic jurisdictions: each republican constitutional order retains the filter of its own discourse and structures as it integrates and internalizes the constitutional experiences of other republican constitutions. The commitment to self-government and human rights requires that the filter of the domestic system be preserved. I have shown how the turn to domestic constitutionalism is not a turn away from the others, and the cosmopolis. To the contrary, deep within domestic constitutionalism, we discover not only our own political community, but the world. Constitutionalism is a welcoming home for the cosmopolitan ideal in law.