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Globalization and the Public Realm

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Abstract

Globalization can undermine as well as enable public discourse at the national, international, and supranational levels. A challenge for political theory is to imagine how a global public realm might be constituted. Because the public realm has flourished in states whose citizens are related under the rule of law, one might ask whether this model of civil association can be extended to a broader and potentially universal context. Given the contingent obstacles to a global state, realizing civil association globally implies a universal confederation of rule-of-law states. If the public realm means free deliberation on the laws of a civil association, the 'global public realm' would include deliberation at all three levels.

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Many papers could be written about globalization and the public realm, depending on how those terms are defined. In this paper, I want to discuss whether the model of civil association developed in the context of the modern territorial state can be extended beyond that context. How should we understand the idea of a universal civil association? We can imagine a single world state whose citizens are related in a way that preserves their liberty and basic human rights by subjecting its government to the rule of law. But though we can imagine it, a global civil association seems improbable. A more realistic alternative would be, as Kant argued and Rawls affirms, a universal confederation of rule-of-law states that is itself governed according to the rule of law. How should we understand the idea of a public realm in this context?

For Jürgen Habermas the 'public realm' or 'public sphere' (*Öffentlichkeit*) is a space in which citizens freely express their opinions on matters beyond their own private affairs (Habermas 1974). One might also define it more narrowly but more precisely as a space for public discussion of the laws in a civil association. And one might define the 'global public realm' as a space for discussion of the laws in a potentially universal civil association, whether unitary or confederal. Such discussion would engage all three levels of Kant's theory of right: national, international, and cosmopolitical (Kant 1991). It would consider the laws of particular countries (the degree to which their laws respect human rights, for example) as well as the laws governing relations between states (international relations) and between residents of different states (transnational relations). In doing so it would consider the desirability of adopting or amending particular laws in an actual or potential universal legal order constituted internationally, globally, or in a hybrid manner. Globalization—understood not as economic liberalization or cultural Americanization but as the experienced compression of time and space for people around the world who are

increasingly engaged in instantaneous and deterritorialized exchanges with one another—facilitates that discussion by focusing attention on the rules governing their transactions and calling attention to the need for common standards that respect their differences. But globalization can also undermine the public realm by empowering enemies of civil association at all three levels.

If the public realm presupposes civil association, we need to look more closely at the idea of civil association and its relationship to the rule of law. The public realm can be discussed in other terms, but the most widely-used vocabularies—of democracy, human rights, civil society, and so forth—are equivocal with respect to the character and aims of law and therefore not always suitable tools for analysis. In this paper I discuss the global public realm in terms of civil association, relating my discussion to parallel discussions in other terms.

Civil association

The expression 'public realm' identifies a space for political deliberation within a legal order. The modern territorial state is the paradigm case of such an order. The idea of a public realm, following Kant, Arendt, and Habermas, is the idea of a legally protected space for free discussion among citizens focused at least in part on the laws under which they must live. Within this space, citizens deliberate the terms of their association. The public realm is fully realized only in an association of citizens defined by the rule of law, where that expression identifies a kind of association that presupposes the freedom of its members and respects their rights. Such an association is 'civil' rather than religious or economic, and its members are 'citizens', not believers or stakeholders. The idea of civil association has been, since Hobbes, one model of the modern state. That model can be contrasted with an alternative idea of the state as an enterprise for promoting sectarian

piety, economic prosperity, or some other organizing purpose, and one whose laws are understood to be instruments for promoting that purpose. The public realm is attenuated in an enterprise state. Any actual state is an ambiguous mixture of civil and enterprise association because those ideas define abstract possibilities realized to different degrees in different states or in the same state at different times. A state at war, for example, is to some extent a purposive enterprise, even when the enterprise is to defend a civil order. And declaring a state of emergency moves a political community along the civil-enterprise continuum regardless of its previous location on that continuum. In becoming less civil and more entrepreneurial it mobilizes people to meet the threat, often against their will, and becomes less tolerant of public discourse, which in extreme cases it may try to suppress altogether.

Civil association is association on the basis of a common law. Its unity rests not on shared values and beliefs but on its members acknowledging a common authority. When citizens can't agree on substantive matters, they agree to disagree and to accept the outcomes of authoritative procedures for settling disputes. In the civil model, law is not the outcome of a bargain that rewards interests in proportion to their power but an expression of the common good of the community. It is a product of the rational will of citizens who understand that coexistence and respect for moral rights requires deference to common laws that are something other than a vector of convergent interests. (Philosophers have theorized this will as the will of a virtuous and omniscient lawgiver or ideal observer, or of citizens themselves in a social contract or original position.) Citizens may be contingently united by shared beliefs, values, and interests, but legal authority does not presuppose such unity. On the contrary, it can exist in the absence of unity: recognizing the authority of a common law may be the only basis for unity possible in the absence of substantive agreement. Civil law presupposes difference but also makes it possible. The

argument that the *authority* of government to rule depends on citizens having shared goals because law would otherwise lack perceived *legitimacy*—that people would otherwise not be motivated to behave as the law prescribes—confuses the legal authority to govern with beliefs about whether that authority is being properly used or is properly grounded in morality, utility, or popular consent. It confuses the idea of civil association with one of the contingent conditions for realizing that idea, which is that people should be motivated to acknowledge and obey the law. A government that lacks legitimacy in this sociological sense may fail to generate emotional loyalty. It may fail to govern effectively—that is, to exercise its constitutional authority—but its ability to govern is not the ground of its authority, nor does governing ineffectively deprive it of authority.

It is not social differences but the view that such differences are intolerable that destroys a legal order. The point of legal authority, on the civil model, is to enable people with different beliefs and values to live together. They may think that their laws are unfair, ineffective, or bad in some other way, but they must recognize those laws as law. A legal order is held together by institutions for enacting laws, for settling disputes over how laws should be interpreted in particular cases, and for making sure that people perform their legal obligations. Law may become the tool of particular interests, but to the extent that it does, it is contrary to civil association. This is true even when the interests it serves are those of a majority. Civil association is not democracy. It is a constraint on democratic as well as authoritarian power, and laws protecting civil freedom can be enacted according to undemocratic procedures. The essence of civil association is that it respects the rights of citizens to pursue their own purposes. The right to participate in making decisions is not itself a criterion of civil association, which is compatible with a variety of constitutions. One of the unresolved questions of political theory (and therefore of a theory of global

order) is the conceptual relationship between democracy as a constitutional form and civil association or the rule of law as a mode of relationship.

Globalization

How does globalization affect civil association and the public realm? Does it support or undermine civil association? Probably both. In so far as globalization requires financial transparency and accountability or gives citizens access to information about public policies, it supports civil association. In so far as it subordinates individuals to managerial control, it undermines the civil mode. I've suggested that the public realm implies public discussion of the desirability of civil laws. This means that the public realm is not only contingently dependent on the existence of a civil association if it is to flourish but is also conceptually related to the idea of civil association. In an enterprise association, where laws are policy instruments, deliberating about law means deliberating about policy. Only in a civil association can citizens debate the desirability of the laws apart from the policies to which those laws might be seen as instrumental. The public realm can therefore be said to presuppose the rule of law, understood as a noninstrumental legal framework within which citizens pursue goals they choose for themselves. To ask how globalization affects the public realm is therefore to ask whether globalization supports or undermines civil association, either contingently or conceptually.

Such inquiries need to be distinguished from arguments about the desirability or otherwise of globalization. Much of the globalization literature adopts a prescriptive stance. That stance can be progressivist: globalization is good because it is creating a new global order that is more prosperous, more democratic, or better in some other way than the international order it is replacing, and should for such reasons be encouraged. Or the stance can be reactionary: globalization is bad because it increases economic inequality or

undermines democracy and should therefore be resisted. But prescription always rests on assumptions about how the world works and how information should be categorized, so the first questions that need to be asked are causal and conceptual, not practical and prescriptive, though the answers to these questions may have practical implications. What is the effect of globalization on public realms within or between states, or globally? How are the ideas of public realm and civil association related in a global context? What conclusions emerge when we adopt the descriptive stance of an observer or theorist of globalization and its consequences?

From the observer standpoint, two arguments about the contingent consequences of globalization for civil association can be distinguished. The first is that globalization undermines state sovereignty by destroying the conditions for effective state power and recognized authority. Political decisions are today often made not by parliaments but by unaccountable experts under conditions of technical complexity, speed, and emergency that increase managerial control by enabling managers to ever more closely monitor and control their 'human resources' and by eroding the authority and effectiveness of public law as a constraint on management (Scheuerman 2004; Whitman 2005; Koskenniemi 2007b; Ramraj 2008). The state ceases to be an arena of civic participation or political decision as public business is handed over to corporations and other private organizations. Autonomy, which civil association assumes for public officials as well as for citizens, disappears with the emergence of 'systems' that take on a life of their own and escape human control. The physician or professor becomes an algorithmic node in an industrial process run by computerized 'enterprise systems', the citizen a consumer, the politician a performer in a play scripted by political consultants. The consequent erosion of civil association provokes cynicism and apathy on the part of citizens, and the public realm contracts because few can be bothered to occupy the confined space that does exist for

democratic deliberation. If the civil order of the state vanishes, civil association will have to be reconstituted in some other way if it is to continue as a mode of human relationship and to support a public realm.

A second observer standpoint argument is that globalization is undermining the 'Westphalian' international order based on a society of independent states. If states are ceasing to be important, so is international society along with the public international law, based on treaties and state practice, that constitutes and regulates that society. No states, no international law. This argument reverses the familiar realist claim that state power makes international law ineffective and illusory. Here, the *weakness* of the state has that effect. New modes and orders are replacing an international order based on sovereignty, intergovernmental diplomacy, and classical international law. According to one version of the argument, we are witnessing the emergence of a 'new world order' constituted by intergovernmental functional associations as inter-state diplomacy is disaggregated into networks of officials concerned with different international or transnational policy areas. Where governments once interacted diplomatically through their foreign offices, now administrative, judicial, and legislative officials in one country transact state business with their counterparts in other countries (Slaughter 2004). According to another version of the argument, political decisions are increasingly being made within networks that include nongovernmental as well as intergovernmental organizations. Non-state actors including banks, corporations, trade unions, religious organizations, philanthropic foundations, and professional associations interact with governments and intergovernmental agencies to determine policy. The result is not supranational government but a decentralized process of 'governance' in which policies are deliberated and decisions made by various combinations of public and private actors (Rosenau & Czempiel 1992; Kuper 2004).

Global governance

The theorists who advance these descriptive models use them to prescribe as well as to explain policy. Although many are pessimistic about the prospects for global governance, others argue that intergovernmental functional networks or public-private arrangements can solve global problems more effectively and justly than intergovernmental cooperation through traditional diplomacy or the activities of organizations like the United Nations. The optimists also argue that such mechanisms encourage global democracy, civil society, and an enlarged global public realm. Several objections to this rosy view come readily to mind.

First, the networks through which governance decisions are made can amplify particular interests, such as those of corporate managers or investors, putting them above the common good. In doing so, these networks narrow the public realm by weakening the rule of law. There are networks of terrorists and drug dealers as well as of human rights lawyers and climate scientists. And if, as some argue, networks are 'deterritiorialized', with the result that people in Internet contact across the globe can be 'closer' than people living on the same street who do not know one another, this increases the challenges facing those charged with regulating them. Networks can democratize policy making by exploiting new communication technologies to broaden participation in public debate, but they can also undermine democracy by moving decision making out of representative institutions into the domain of technical experts (Woods 2002: 34; Florini 2005). It is naïve to emphasize the utility of networks as governance mechanisms while ignoring their dark side (Kennedy 2004). Given the equivocal character of transnational governance networks, advocates for global governance overstate the extent to which such networks can establish civil association at the global level.

Second, the idea of governance as a complex decision-making process wider than government by formally constituted governing authorities erases the distinction between the state and 'civil society', where the latter stands for social interactions constituted by the market or by social movements and voluntary associations. The expression 'civil society' is unfortunate because it obscures the distinction between that understanding and civil association as a nonvoluntary relationship of citizens under a common body of law, which is what it meant before Ferguson, Hegel, and others redefined it as the sphere of voluntary transactions and relationships. Today, 'civil society organizations' are treated by governance theorists as the civil conscience and as agents of progress in solving problems that governments can't solve. As with networks, however, one must be careful not to claim too much for civil society, which is shaped by organizations with their own interests and agendas, including those that are sectarian, extremist, and criminal—so-called 'bad civil society' (Chambers & Kopstein 2006: 373). Beyond that, and more importantly, the idea of governance confuses government with activities outside government that need to be governed. What are the rules by which the private or mixed public-private governance of networks will proceed? How will rights be preserved and unjust coercion limited? Good governance requires a public realm in which policies are debated, but how can there be rational public debate if that realm is reserved for experts or corrupted by corporate media ownership, advertising, propaganda, censorship, attacks on journalists, and other threats to free communication? How can there be a public discourse focused on the desirability of laws if the distinction between private and public decisions is blurred and finally eradicated? The idea of 'governance' obscures elementary distinctions between proper and improper governance and between public government and private usurpation of governing powers.

Third, theorists of global governance fail to grasp the importance of law for civil association, and the kind of law that civil association requires. The problem is not only that global governance, by itself, is no guarantee of democracy, transparency, rationality, or justice. A theory of global governance is inherently incoherent as a theory of the public realm. The public realm is a space for deliberation within a state or other legally defined political community. It enables discussion of what should and should not be law in such a community. Law implies the possibility of coercion because it prescribes obligations and provides ways for securing compliance. Public deliberation is therefore about prescriptions that are properly enforceable as law within a community. Some advocates for deliberative democracy overlook the point that democracy is a way of making legally binding decisions. Like other forms of government, democracy depends on laws that specify who may participate in making law (by voting or holding office, for example) and on whom law can be enforced. And it implies the existence of procedures allowing those who are affected by public decisions to participate in making them. As often theorized, however, deliberation is detached from making decisions (Bohman 1997; Dryzek 2006). Perhaps because everything is seen as political, it seems unnecessary to distinguish between political and other kinds of deliberation. But democracy without law yields 'discourse' in a vacuum—a conversation between undefined interlocutors unrelated to the business of enacting the laws of a legally defined community.

Finally, theorists of global governance confuse the rule of law with mixed public-private regulatory regimes, which they understand less as imposing constraints on policy making than as a way of implementing policy. If laws are little more than policy tools, the distinction between law and policy disappears. A consequentialist weighing of goods and outcomes replaces the categorical distinction between good and right, between desired ends and proper or justifiable means. Moral and legal propriety are demoted to the level of

desirability and justice to utility. Form and substance merge when procedure becomes the servant of substantive policy goals. Furthermore, when a legal system is fragmented into functionally differentiated regulatory regimes, each managed to serve particular interests, it loses its coherence as a legal order—a development revealingly identified in the globalization literature as the emergence of 'private' forms of authority (Albert 2007: 176). Civil association is corrupted as the boundaries between public and private are obscured. The consequence of deformalization and fragmentation is not better governance but the disappearance of legal order, domestically or internationally, and therefore of civil association and the public realm it supports (Koskenniemi 2007a, 2007c). One result of the disintegration of international law, as a practice of states and an idea in the minds of international lawyers, is the growth of imperial power at the expense of international law and institutions. Westphalian order yields to American hegemony, not the global rule of law (Cohen 2006).

Civil association beyond the state

If civil association means the rule of law, theorists of governance, democracy, and civil society in a global context need to connect those ideas to the idea of law. The debate over how decisions should be made above the state level is in part a debate about law. The European Union, as a hybrid of national and international institutions, inevitably invites legal and, especially, constitutional inquiry. But in the larger arena of international law, constitutional inquiry has withered along with hopes for the United Nations after the early postwar years, to be replaced by political realism, which dismisses international law as ineffective, or by inquiries into the effectiveness of international law. American theorists of international law in particular are today preoccupied by what they call the compliance problem: how to motivate states to obey international law, either by structuring costs and

benefits so that incentives for compliance outweigh disincentives or, alternatively, how to endow international law with perceived legitimacy by grounding it on shared values and beliefs. These are understandable preoccupations for theorists in an imperial state, but they suggest a certain lack of perspective. The topic of compliance is worth investigating, but to make it the program for international legal theory is to replace traditional jurisprudential concerns with the concerns of rational-choice economics or behavioral psychology. The study of how to secure compliance through law belongs not to jurisprudence but to a tradition of instrumental reflection concerned with acquiring and exercising power. That inquiry should not be confused with inquiry into the constitution of a legal order or the purposes it should serve. There is, in short, still a need for inquiry into the character and constitution of civil association above the level of the state and into the question of what laws are desirable at that level.

Nonetheless, we cannot escape being concerned with the perceived legitimacy of supranational law and with long-running debates on that issue, especially among theorists of European order. For many of those theorists, the lesson of the European Union is that civil association is unlikely to flourish beyond the nation-state because it is the cultural 'nation' that holds the legal 'state' together. According to this view, the main obstacle to supranational civil association is that a thin formal order cannot achieve legitimacy unless it is rooted in a thick national culture. A nation-state is not an abstraction but a community with its own language and history. The wished-for new European identity is a pallid thing compared to the German, French, or other identities it is supposed to supplant. So critics wonder whether a European, not to mention a global, civil association could generate the emotional loyalty of those associated largely by the minimal obligations of a common law. They argue that the 'democratic deficit' created by globalization works against the

postnational patriotism that advocates for the European Union had counted on to support it (Habermas 1998).

In evaluating such arguments one should remember that the states of Europe are not exactly ‘nations’. Most have been multinational at some point in their histories, and national identity has often followed rather than preceded the creation of a new state. The history of European states is a history of efforts to create solidarity among peoples who have chosen or been forced to associate with one another within a legal order. If European states have been able to achieve social solidarity and national identity in the past, it is at least conceivable that an enlarged European state could do the same (Habermas 2002: 231). So could a world state, though the obstacles are correspondingly larger, especially if the cynic is right that there is no solidarity without enemies (Schmitt 1996). Continuing globalization might nevertheless eventually create propitious conditions for civil association in Europe and elsewhere.

Attention to the contingent conditions of civil association cannot, then, be avoided in thinking about its character and constitution. Kant, for example, advanced the idea of a confederation of republics as a second-best solution to the problem of justice at the global level because of contingent obstacles to a single world republic. For him, a confederation of republics related to one another on the basis of a common law but maintaining their independence is a solution dictated by circumstances, not moral principle. The debate over global civil association has scarcely moved beyond the theoretical framework that Kant articulates, and that insures its current relevance. What constitutional shape should civil association take beyond the state? Should that constitution be regional or global? Should it be an international, confederal, or unitary constitution? Corresponding to each possible constitution is a possible public realm.

The first possibility is a single, global, civil association, and a correlative global public realm. One can imagine such an association even if its achievement is improbable. In more familiar language, one can imagine a world state constituted by laws that respect the freedom of people everywhere to participate in public discourse and deliberation. The project of cosmopolitan democracy advanced by David Held (1995, 2004), Iris Young (2000), and others is to show the practical and moral necessity of global civil association. Transnational problems that cannot be managed adequately at the national level must be handled by institutions at a higher level, and those institutions must be responsive to all who are affected by their decisions. And if there are problems that are truly global in the sense that they affect everyone, only global institutions can properly represent everyone's views and interests. Much of the literature in this vein is concerned with strengthening and democratizing the United Nations and other supranational institutions. Such concerns put this literature in the utopian tradition of world government, whose ideal is a global constitutional order or 'cosmopolis'. We can call this the cosmopolitan model.

The second possibility is an association of states that is analogically civil in the sense that its 'citizens'—states—are related to one another on the basis of law and in a manner that respects their freedom and rights as states. Since they remain independent, the law in terms of which states are related is public international law. This association is a version of the familiar society of states defined by classical international law. It supports an international public realm, not a global one: a sphere of deliberation for representatives of states engaged in diplomatic exchanges with one another in various forums (Cohen 2004; Sellers 2006). But the states that compose this international civil association are not necessarily civil associations. Call this the international model. It is the model of a society of states based on the rule of international law, and it allows states that are not themselves rule-of-law states to participate. It should not be confused with an association of civil

associations that falls short of being itself a civil association because its members, which though they are themselves civil associations, are joined in a purposive enterprise for defense, economic development, or some other substantive purpose. Alliances or free trade zones are examples of international enterprise association.

Finally, imagine a civil association of civil associations. This is the confederation of rule-of-law states imagined by Kant, partly achieved in the European Union, and advocated as 'democratic regionalism' or a 'society of peoples' (Habermas 2002; Rawls 1999). Call this the civil confederal model. 'Confederal' is a better term than 'regional' for such an association, provided we remember that we are speaking of a civil confederation of states that are themselves civil associations, because a confederation could in theory emerge among geographically separated states, like those of the British Commonwealth. Civil association at this level is a complex idea embracing (1) a civil relationship between states as the analogous 'citizens' of an inter-state association—in other words, one defined by international laws that are more than merely instrumental and meet the criteria of the rule of law—and (2) legal orders within each state that meet the requirements of civil association or the rule of law. Such an association—a civil confederation of civil states—could become universal, as Kant, Rawls, and others have imagined, were every state to become a civil association and to join the confederation. But as long as member states retained their independence, even a universal confederation would fall short of being a world state or 'cosmopolis' because its legal order would be a dualistic system of national and international law, not a unitary system of cosmopolitan law.

From a cosmopolitan standpoint, it would seem that the public realm supported by a universal confederation could be little more than an aggregate of separate national public discourses together with an international diplomatic discourse, and that it would therefore not be a truly global public realm. The confederal model can extend civil association

beyond national borders, but it cannot realize the idea of a truly global civil association. For cosmopolitans, a world state is needed because global civil association can be based only on a system of global law. The confederal model provides not global law but, at best, only a combination of national and international law—in other words, a combination of civil association within and between states. Civil association at the level of the state supports public realms within each member state, and the treaty-based civil association in which these states are confederally united supports an international public realm. But without a global civil association, there can be no global public realm.

I think this reasoning is mistaken. The jurisdiction of public discourse is more inclusive than that of law. It is not entirely constrained by the discursive equivalent of the nonintervention principle. Citizens can have opinions about and even try to influence the laws of other states. And they can argue about the laws of a confederation to which their own state belongs, even if those laws are international rather than supranational. And to the degree that a confederal treaty provides a basis for the emergence of transnational or supranational law, space for public deliberation focused on that emerging law is created. The idea of a civil confederation of civil associations therefore creates the possibility that a confederal public realm might expand beyond inter-governmental diplomacy to include a transnational dialogue of citizens with multiple loyalties. The Kantian idea of a republican confederation of republics allows for the emergence of institutions supporting an inclusive public realm, and the discussions that go in that realm can in turn strengthen confederal institutions and reshape the identities of states and their citizens to support a supranational and potentially global civil order (Bohman 1997; Calhoun 2002: 302). This idea is the idea of European union, European identity, and a European public realm writ large, and it invites a debate similar to that which has been going on for a long time in the European context (Bellamy 2006). But far from challenging the idea of a global public

realm, that debate is evidence of its vigor. I think this answers the objection that a global Kantian federation cannot substitute for a global state because it does not create a global public realm.

Global constitutionalism

It is sometimes said that in *Perpetual Peace* Kant explicitly rejects the idea of a global legal order by insisting that 'cosmopolitan right shall be limited to conditions of universal hospitality' (Kant 1991: 105). But this reads too much into the quoted sentence. Kant means by it that although people have a right to travel freely throughout the world, they do not necessarily have the right to settle where they wish. A state is not obligated to permit foreigners to enter its territory as immigrants, and therefore in effect to provide them with substantive benefits. Kant is worried about the problem of colonial settlement, which in the guise of commerce or beneficence is really a coercive intrusion on the rights of non-European peoples. If such peoples were obligated to allow foreigners to settle, Europeans would have a right to move in and, given their superior resources, they would eventually displace or conquer their hosts. But because every human being has a moral right to live *somewhere*, a state cannot refuse to receive foreigners if doing so would result in their deaths (Kant 1991: 106). There is, in other words, a right of refuge and a correlative duty of asylum. Kant's objections to a global legal order lie elsewhere, in the practical difficulties of establishing and maintaining a world republic and, more importantly, in the morally legitimate existence of separate states and the risk that states already enjoying republican constitutions would incur by submitting to a less fully republican confederal constitution (Laberge 1998: 93).

It might be argued that the Kantian model is too conservative because we now have, as a consequence of globalization, something Kant could imagine but not observe:

an emergent global constitution. Is it true, as some international legal theorists now claim, that a global constitution already exists? To answer the question we need a definition of 'global constitution'. One might look for such a definition in the constitutional discourse of the European Union. Had it been adopted, the proposed European Constitution, though itself a treaty, would have established genuine supranational institutions by locating the Union's authority in a document whose interpretation was in the hands of a constitutional court, the European Court of Justice. The failure of a sufficient number of member states to ratify the treaty not only reaffirms the international rather than supranational character of the European Union but also reinforces the familiar distinction between a state founded on a document whose terms are interpreted by a constitutional court and a confederation founded on treaties that leave important matters in the hands of independent member states. There are, however, other ways to understand European constitutionalism. It can be argued that the treaties that constitute the European Union *are* its constitution, and this constitution is already to some degree supranational. In particular, a body of European law has emerged that is supranational as well as transnational because it forms a hierarchical system. It allows some judicial intervention by the European Court of Justice and other European courts, which can decide disputes between litigants at different levels, uphold human rights, and enforce constitutional safeguards for minorities. One can therefore speak of a European 'constitutional politics' even in the absence of a formal constitution (O'Sullivan 2004: 183).

Similar arguments have been used to support the claim that a global constitution can be identified in the United Nations Charter and in the complex system of transnational rules and institutions that in the past half century has emerged beside but has not replaced classical international law (Fassbender 1998; Teubner 1997). In contrast to theorists of global governance, who explicitly challenge the distinction between law and non-law,

theorists of global constitutionalism do distinguish between law and politics. They are concerned with issues of legal authority and obligation and with how law is made and interpreted in novel ways in this emergent global legal system. They distinguish the rules and principles of this system from 'soft law', private regulations, policies resulting from a mixed private-public decision process, and other non- or quasi-legal practices examined in the global governance literature. The idea of a constitution relied on by theorists of global constitutionalism does not allow private organizations to assume legal powers. It does, however, support national courts in exercising new legal powers by applying foreign, transnational, international, and supranational law. It also invites the creation of tribunals to handle cases arising in under special legal regimes such as human rights law, the law of the sea, and international criminal law. The result is a complex, polycentric, universal legal system that is in some ways the functional equivalent of constitutional law and institutions within a state. From a constitutionalist perspective, human rights are the cosmopolitan equivalent of civil liberties within this global legal system. National and regional courts draw upon and in turn strengthen the global system by interpreting and applying its rules and principles (Cohen 2004: 10). To critics who object that they exaggerate the cosmopolitan aspects of public international law, global constitutionalists respond that their reading of that law, though an 'academic artifact', is a permissible one that points the way towards a supranational legal order (Peters 2005: 39).

The constitutional debate, like many others in international law, raises issues that will be resolved only by experience. Whether, for example, the proliferation of specialized tribunals will contribute to fragmentation or, eventually, to a stronger global legal order, cannot be settled by theoretical inquiry. But theory can tell us that a constitution implies unity, for a constitutional order is a single reasonably coherent system of law. That system need not rest on a written constitution but it must amount to more than the parallel

existence of distinct functional regimes. It must unite these regimes into a self-consistent whole, which implies procedures for reconciling their different rules. As Koskenniemi, Cohen, and other critics maintain, the current fragmentation of international and transnational law precludes a unified global constitutional framework. A constitution also implies hierarchy: constitutional law is higher law. International lawyers sometimes argue that hierarchy in international law is achieved in the concept of *jus cogens*, which refers to rules of law that override other rules when apparent incompatibilities arise. So, for example, a treaty among several states to permit forced labor would be overridden by international human rights law, which because of its fundamental character forbids it. There is much to be said for the idea of *jus cogens* from the standpoint of the rule of law, which implies moral constraints on positive law, whether that law is enacted, agreed to by treaty, or generated in a process of customary law formation (Nardin 2008). But *jus cogens* can only serve to unify a legal system if the courts that interpret its rules as they apply in particular situations produce a consistent body of case law. Merely postulating a normative hierarchy does not establish the actual existence of that hierarchy in the absence of evidence of consistent judicial practice—evidence that some, at least, would argue is so far lacking.

But although we must view with skepticism the claim that a global constitution already exists, there is no conceptual obstacle to the existence of such a constitution. If supranational law has emerged within the European Union, it could emerge within a more inclusive confederation. In the meantime, however, it would be foolish to mistake evidence of progress towards a global civil association for proof that its establishment is inevitable. We must reject the teleology implicit in global utopianism. History is about the past, not the future, and it consists not in a process determined by the laws of history but only in events contingently related to one other in ways that might have been other than

they are. We can, however, look for evidence of a global public realm as events occur—provided we know what we are looking for.

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