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Postnational democracies without postnational states? Some skeptical reflections

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Abstract

Prominent critical theorists (including Jürgen Habermas) have embraced a radical democratic version of the popular notion of ‘global governance without government,’ according to which postnational democratization can be achieved without establishing robust forms of postnational statehood. The sources of the argument in Hauke Brunkhorst’s recent theorizing are critically interrogated. Brunkhorst’s interpretation of the European Union as an emerging case of postnational democracy, his critique of traditional ideas of state sovereignty, and Kelsenian notions about the primacy of global law are criticized. Robust democracy ‘beyond the nation-state’ will necessarily require the establishment of democratic postnational statehood.

Keywords: *global governance; global democracy; state building; monopoly on violence; cosmopolitanism; critical theory*

A specter is haunting critical theory debates about global governance: the specter of democracy ‘beyond the nation-state’ *without* statehood. Unfortunately, like many specters, it remains more the product of fantasy than systematic normative or empirical analysis. Like most political fantasies competing for our attention today, this one is by no means harmless: the project of postnational democracy without postnational states distracts those of us who hope to advance democratization ‘beyond the nation-state’ from many of the difficult political choices we face. However appealing it may at first seem, critical theorists and allied defenders of robust democracy should remain skeptical.

GLOBAL GOVERNANCE WITHOUT GLOBAL GOVERNMENT?

As always, Jürgen Habermas has offered one of the strongest defenses of the argument. In recent writings on globalization, Habermas has defended a tripartite

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model of global governance, where decision making at the national level would be supplemented by new forms of what he dubs *supranational* (e.g. global or worldwide) and *transnational* (regional or continental) authority.¹ At the supranational level, Habermas seeks a single world organization, for all essential purposes a reformed United Nations (UN), equipped more effectively than at the present with the capacity to protect basic human rights and consistently prevent war. An empowered and refurbished UN need not take the form of a global federal republic or superstate, however. At the transnational level, economic, energy, environmental, and financial policies, or what Habermas dubs ‘global domestic politics,’ would be negotiated mainly by those global political actors (e.g. regional organizations like the European Union (EU), or great powers like the USA or China), he alone considers muscular enough to implement policies across large territories and thus help tame globalizing capitalism. Only major global players of this type, he believes, are adequately equipped to realize far-reaching experiments in cross-border regulation beyond the negative (and primarily neo-liberal) economic integration now advanced by existing multilateral organizations like the WTO or IMF. Although, some of the relevant actors might possess the characteristics of a state, others apparently would not. Nor would effective coordination between and among regional blocs and/or the great powers require subservience to a world state. Finally, at the *national* level, states would hold onto some core elements of sovereignty as classically conceived, though the right to wage war and the protection of basic human rights would now be primarily located at the supranational level. Both transnational and supranational governance would stay in decisive respects dependent on the nation-state: ‘States remain the most important actors and the final arbiters on the global stage.’² Nation-states can apparently preserve some classical attributes of sovereignty *despite* the fact that constitutive elements of decision making would be transferred to postnational institutions.

Defending a dramatic augmentation of decision-making authority at the postnational levels, Habermas resists the intuition that doing so demands the institutionalization of state or state-like structures there. In short, we can achieve dramatically improved global security, the systematic protection of human rights, and even ambitious forms of politically progressive transnational social policy *without* having to build postnational states: the ‘democratic constitutionalization of international politics’ can thrive *without* traditional statist modes of political organization, and hence we can reasonably hope to achieve:

a politically constituted global society that reserves institutions and procedures of global governance for (nationally based) states at both the supra- and transnational levels. Within this framework, members of the community of states are indeed obliged to act in concert, but they are not relegated to mere parts of an overarching hierarchical super-state.³

Those who believe that democratization beyond the nation-state ultimately requires the achievement of a global federal republic or some type of world state, Habermas counters, remain imprisoned in anachronistic early modern conceptions of state

sovereignty. Outdated conceptual baggage, and especially the historically contingent but now obsolescent view that democratic constitutionalization relies intimately on state sovereignty, prevents many analysts from recognizing the possibility of achieving multi-layered global *governance* without global *government*.

The crucial conceptual move here is a sharp delineation of ‘state’ from ‘constitution’:

A ‘state’ is a complex of hierarchically organized capacities available for the exercise of political power or the implementation of political programs; a ‘constitution,’ by contrast, defines a horizontal association of citizens by laying down the fundamental rights that free and equal founders mutually grant each other.⁴

As Habermas openly notes, this conceptual distinction, and indeed much of the theoretical inspiration behind his overall account of global governance, derives directly from the recent work of Hauke Brunkhorst, one of contemporary Germany’s foremost critical theorists, and arguably the most impressive present-day theoretician of a radical democratic version of ‘global governance without government.’ For nearly a decade now, Brunkhorst has been arguing forcefully that far-reaching democratization is possible beyond the nation-state, and that its proper conceptualization necessitates breaking with anachronistic ideas of state sovereignty. For all practical purposes, many of the key functions of the classical sovereign state are *already* operative at both the regional and global levels: ‘*World-stateness without a world state* already exists,’ Brunkhorst declares in a recent essay, in which he recalls the vast array of efficacious institutional and legal mechanisms which presently operate ‘beyond the nation-state,’ none of which can conceivably be described as possessing a monopoly on legitimate violence or other attributes of state sovereignty as conventionally conceived.⁵ The EU, he has similarly pointed out on many occasions, constitutes a poststatist polity in which complex legal and regulatory tasks are regularly and effectively undertaken: Europe represents a paradigmatic case, and indeed decisive evolutionary breakthrough, underscoring the normative and institutional advantages of building complex modes of non-statist postnational decision making.

Of course, Brunkhorst is hardly the first scholar to describe the EU, as well as institutions like the WTO or even *Lex Mercatoria* in such terms.⁶ What sets Brunkhorst apart is his embrace of two additional theses. First, he offers a normatively demanding view of democracy, according to which self-government requires not only free-wheeling deliberation and a robust civil society, but also the institutional realization of strict egalitarian organizational norms in which those impacted by decisions can participate in their determination in free and equal ways. To his credit, he has admirably opposed the tendency among some deliberative democrats to reduce democratic politics to little more than the free-flow of political argumentation; as he has astutely acknowledged, this standpoint risks obscuring the centrality of strict institutional and legal devices alone capable of ensuring that popular preferences can be strictly translated into binding decisions.⁷ Democratic self-government requires much more than the deliberatively based *influence* on

binding decisions, but instead a legally guaranteed free and equal opportunity to *participate* fully and equally in their making. Although the EU, for example, can already be described as having undergone a far-reaching process of constitutionalization, and even though it contains important democratic potentials, its constitutional structure still lacks what he describes as ‘revolutionary democratic integration,’ according to which Europeans might make a substantially reformed EU their own by means of a ‘*constituting*’ re-foundation of the Union as a democratic community . . . in fact derived from the will-formation of the citizenry.’⁸ Insisting that binding EU decisions need to be traceable, ‘back along an unbroken and relatively short legitimating claim to the wills of the citizenry,’ he sympathizes with those who voted against the recently proposed constitutional treaty, worrying that it did too little to shatter the ‘collective Bonapartism’ which plagues the present-day EU.⁹ Unlike many more pragmatically minded defenders of the EU status quo, he insists that postnational democracy not be permitted to regress below the level of existing national democracies, emphatically pointing out that democracy only obtains in the context of ‘an egalitarian system of organizational norms . . . that excludes no one.’¹⁰

Second, Brunkhorst believes that the democratization of decision making beyond the nation-state can be achieved by significant reforms to existing regional and global structures of decision making *without* requiring the construction of sovereign states at the regional or global level. To be sure, existing postnational institutions are badly in need of reforms, and some of them need to be substantially strengthened; however, it would be a mistake to model reform on misconceived ideas of a world state or global federal republic. Like Habermas, Brunkhorst believes that not simply global governance, but global *democratic* governance, can be achieved without *global democratic government*. From this perspective, the main task at hand is figuring out the emerging system of global governance that can be reformed in accordance with a demanding vision of democracy, while respecting its integrity as a (non-statist) system of decision making. Although, state-building and democratic constitutionalism have been closely linked in modern history, there is no reason to assume a necessary connection between them. Because of a widespread tendency to obscure the simple but decisive difference between state and (democratic) constitution, Brunkhorst believes, many defenders of postnational democratization wrongly presuppose that it must take on familiar elements of modern statehood. But why presuppose that democratic constitutionalism in the context of globalization necessarily has to reproduce the contingent and arguably irreproducible history of modern state building? For both Brunkhorst and Habermas, the point is not simply that postnational state or state-like capacities can be implemented in a piecemeal fashion, and that statehood should not be seen as an all-or-nothing affair. Instead, postnational democracies can thrive without statehood at the postnational level, and thus demands for postnational state construction (e.g. in the form of a world republic) are intellectually anachronistic and indeed counterproductive.

However attractive, this vision suffers from a number of flaws. I start with Brunkhorst’s crucial reflections on the EU, before turning to his theoretical critique of the concept of state sovereignty and then his Kelsenian views about the ‘legal

revolution' which allegedly has resulted in the supremacy of global over national law. To date, Brunkhorst has formulated the most impressive defense of the project of global democratization without global statehood. Nonetheless, it generates at least as many new and unanswered questions as it answers old ones.

THE EUROPEAN UNION (EU) AS PARADIGMATIC CASE

The experience of the EU has clearly inspired Brunkhorst to develop a model of global democratization without global statehood. At times barely containing his enthusiasm, he repeatedly declares that the EU represents a novel and in decisive respects path breaking institutional experiment with poststatist politics. The EU, he announces, already possesses a coherent constitutional structure, though still in an insufficiently democratic form, and it exercises 'the classic characteristics of sovereignty, albeit without a state.'¹¹ European law functions at least as reliably as national law; the EU is already more deeply integrated in some ways than even the US.¹² In a recent essay, he goes so far as to prophesize that the future belongs to regional non-statist structures like the EU: the alleged failures of great powers like the US, Russia, and China to master recent political, economic, and military challenges shows that the EU model of a poststatist polity represents the 'only evolutionary alternative' in the face of globalization's manifold demands.¹³

To what then does the EU owe its evolutionary superiority? Developing an argument that has obviously influenced Habermas, Brunkhorst points to the existence of a new and creative version of the division of powers, in which most rule-making activity now occurs at the European level, while the enforcement and implementation of legislative and judicial decisions stays in the hands of nation-states.¹⁴ National courts implement European law, and nation-states maintain a monopoly over the legitimate use of force. However, that monopoly has now been effectively decoupled from the actual processes of rule-making. In addition, Brunkhorst points out, the tasks of so-called 'positive' economic integration remain at the national level as well: social policy is still fundamentally the prerogative of national governments. Indeed, 'there seems to be no need for any European monopoly of power, because the new division of powers does work.'¹⁵

If the EU has no need to aspire to traditional modes of statehood (in the form of a federal EU, for example), *what* kind of political form might it then embody? For Brunkhorst, the EU anticipates the possibility of a historically novel democratic *confederation*, a highly decentralized polity lacking a shared monopoly over violence. To be sure, this model has important historical predecessors, including the US under the Articles of Confederation (1776–1788), the German *Bund* (1815–1866), and Switzerland, but unlike them, it is not simply a *confederation of states* but also a *confederation of citizens*.¹⁶ In contrast to its historical predecessors, in short, we can conceive of the EU as an emerging *democratic* confederation committed to a demanding procedural ideal of *popular* sovereignty. Although no friend of democracy, Carl Schmitt, Brunkhorst adds, was nonetheless right to observe that the political

unity of a confederation of this type need not rely on substantialist conceptions of the nation, but instead on a ‘family resemblance of political principles’ like democracy and human rights.¹⁷ Brunkhorst also endorses Schmitt’s insight that a confederation need not embody the traditional attributes of state sovereignty. Even Schmitt, it seems, was at least implicitly willing to concede the possibility of an effective poststatist confederation along the lines, Brunkhorst apparently believes, now being constructed in Europe.

Many others, as noted, have similarly highlighted the EU’s credentials as a novel postsovereign political order. But most of them lack Brunkhorst’s robust radical democratic credentials. Unfortunately, this version of the ‘postsovereignty thesis’ sits somewhat uneasily alongside Brunkhorst’s many worries about the EU’s numerous democratic deficits: the EU, we are told, represents *both* the ‘only evolutionary alternative’ to existing statist political forms *and* a deeply undemocratic and indeed ‘Bonapartist’ system. Given Brunkhorst’s observations about the EU’s failure to achieve democratic or revolutionary integration, how can we be so sure that its novel instantiation of the division of powers seems ‘to work’ in any but a necessarily limited functional sense? Why indeed rely on the highly ambivalent story of the EU to posit the historically novel prospect of a robustly democratic poststatist polity, in light of the EU’s own familiar pathologies? On Brunkhorst’s own account, the EU can hardly be credited with constructing anything approaching a democratic polity beyond the nation-state. A hard-headed empiricist might legitimately wonder whether Brunkhorst’s attempt to build on the EU experience to justify the possibility of a historically unprecedented marriage of radical democracy with postsovereignty makes sense. At the very least, a somewhat more cautious assessment of its prospects would seem no less defensible.

Illuminating in this context is Brunkhorst’s admission that EU regulation thus far has chiefly been preoccupied with matters of (limited) negative economic integration. It remains, in many respects, a paradigmatic case of primarily neo-liberal supranational governance; as Brunkhorst concedes, the EU has yet to develop ambitious varieties of cross-border social policy or far-reaching ‘positive’ economic regulation.¹⁸ But this also means that it has perhaps yet to face what Hans J. Morgenthau once aptly described as the supreme task of any effective government, namely the proven ability ‘to change the distribution of power in society without jeopardizing the orderly and peaceful processes upon which the welfare of society depends.’¹⁹ Possession of the monopoly on legitimate violence, of course, has oftentimes played a decisive role in allowing political communities to pass this test because ‘without the chance to resort to force,’ it is difficult for ‘governments to implement policies in cases where powerful political groups or individual citizens put up resistance to particular rules and regulations.’²⁰ To be sure, a familiar mistake among Hobbesian and other excessively statist theories is to occlude the paramount role typically played by non-state mechanisms in resolving or at least mediating most political conflict; by the same token, we should avoid throwing the baby out with the bathwater and downplay the familiar fact that the state’s monopoly on legitimate violence has repeatedly helped guarantee both the fairness of democratic procedures

and the effective enforcement of the policies generated by them. In the language of contemporary social science: wherever we face collective action problems we typically need ‘some kind of authoritative regime that can organize common solutions to common problems and spread out the costs fairly,’ and then make sure that common solutions are rigorously enforced.²¹ In social policy, as perhaps in few other political arenas, polities are likely to face resistance from ‘powerful political groups and individuals,’ as the oftentimes bloody history of the rise of the welfare state dramatically documents: crucial to US state development, for example, was the willingness of the New Deal regime of Franklin Delano Roosevelt to place the sizable muscle of the federal state on the side of striking workers amid the social upheavals of the 1930s. As an historical matter, explosive political battles about social and economic policy have played a significant but sometimes overlooked role in the history of modern state making, with the augmentation not only of the central state’s taxing powers, but also its capacity to redistribute economic resources, however modestly, working to augment both its effectiveness and legitimacy. Indeed, it remains difficult to see how controversial social and economic policies could ever be systematically advanced without some possibility of recourse to a common system of effective enforcement. If far-reaching redistributive measures are to be regularized and ultimately legitimized in the EU, and not simply undertaken as temporary ad hoc measures pushed through by political elites who remain insufficiently accountable, there are probably good reasons for suspecting that the EU will need to develop shared enforcement mechanisms which inevitably will require core attributes of statehood.

A decentralized system of enforcement, as we know from international law, suffers from relatively substantial doses of irregularity and inconsistency. At the very least, it too often founders in the face of opposition from powerful social groups or, as in the context of confederations and federal states, recalcitrant member-states: at such junctures, the threat of force can become essential to the enforcement of the common will.²² Unless Brunkhorst can identify *a priori* reasons for presupposing that European political life is somehow necessarily destined to be less conflict-ridden and potentially explosive than what much of modern history suggests as the norm, it would seem premature to presuppose that an effective European-wide polity can do without recourse to common police and military power. The EU will never be plagued by violent secessionist movements, regions, or social groups who refuse to make minimal financial contributions to the common good, or—as in the US—localized racist movements which systematically violate the rights of racial, religious, or ethnic minorities? And thus the EU will never need to act quickly and expeditiously to squelch locally based political tyranny or injustice by police or military force? On the contrary, given the deeply pluralistic and heterogeneous characteristic of the emerging European polity, in some contradistinction to what we find even in large continentally based nation-states, a real European democracy will inevitably rely on a shared system of effective enforcement that requires a substantial augmentation of state capacities.

Quite legitimately, one might note that the dream of a European federal state remains 'utopian' today, in part precisely because the idea of a European police or military force able to enforce EU laws against individual member-states repels so many. Yet, this arguably remains a positive and thus constructive utopia, in contrast to the politically naïve and negative utopia of a European community that somehow has miraculously freed itself from the prospect of intense political conflict or potential political violence requiring resolution—as in the past—by a democratically legitimate, *as well as* effectively, equipped, system of *common enforcement*.

Of course, Brunkhorst tends to argue that essential to the EU's novel division of powers is the fact that social policy can remain fundamentally in national hands. In other words, he sometimes appears to believe that a Europeanized social policy is neither desirable nor realizable. Yet, how realistic is this assessment in light of the dynamics of contemporary globalizing capitalism, which indeed poses significant challenges to the possibility of effective social and economic regulation, especially for small and economically peripheral states, many of which now make up the EU? Precisely such worries, by the way, inspired Habermas' initial reflections on the possibility of achieving far-reaching global governance 'beyond the nation-state.' Habermas, in some contrast, has occasionally argued for a Europeanized system of social regulation and, indeed, for a global system of 'transnational' negotiation which the EU would be firmly equipped to challenge hegemonic neo-liberal policies as advanced by the US and others.²³

Brunkhorst's claim that the EU *already* exercises the essential functions of sovereignty without possessing the classical attributes of statehood also seems odd in light of another familiar weakness of the EU, namely its widely noted lacuna in the sphere of foreign and military policy. Like many others both in Europe and abroad, Brunkhorst celebrated the massive peace demonstrations of 2003 opposing the US-led invasion of Iraq, seeing in them the harbinger 'of a social movement that could mobilize the power used to enforce a new, citizen-based European constitution.'²⁴ In his view, the February 15th demonstrations served as concrete evidence for the possibility of a mobilized European public able to shape decisively the course of political affairs. In hindsight, however, the impact of the protests on the subsequent course of events was ultimately minimal: the US of course, not only blustered on with its invasion and subsequent occupation of a sovereign country, but also successfully played off European governments against each other in order to ensure the complicity of many of them in its illegal invasion and war crimes. Of course, one can only speculate about the likely course of events if the EU had been in possession of a more effective common foreign and military policy. Nonetheless, it remains striking that what undoubtedly was one of the most impressive shows of European-wide popular protest in history resulted in no common European policies able to stem US aggression, while in the US itself, a war that was only half-heartedly supported by a plurality of the population for a limited period of time, nonetheless was launched and quickly impacted the lives of millions of people worldwide—most importantly, of course, the 94,000 innocent Iraqi civilians sacrificed and countless others displaced by it.²⁵ Part of this difference, of course, stems from the

(purportedly obsolescent) state-like character of the US in contrast to what Brunkhorst takes to be the (supposedly more advanced) non-statist model of the EU.

Like Habermas, Brunkhorst envisions the EU as potentially operating as a force able to check or ‘counterbalance’ the hegemonic aspirations of the US, and thus as a potential impediment to US imperialism, as well as the dogmatic brand of neo-liberalism aggressively advanced by Washington. If the EU is to take on this role, however, it will necessarily have to garner some traditional attributes of statehood which it presently lacks. As Glyn Morgan has persuasively suggested, a coherent European defense policy along the lines sought by Brunkhorst and Habermas will demand of the EU not only that it shed its postsovereign form, but that it also develop a capacity for independent military action. Doing so will likely require the EU to develop a more centralized security apparatus. Without some decisive elements of state sovereignty, Glyn argues, the Europeans will inevitably remain excessively dependent on American power, an uncomfortable fact which those who tout the possibility of fusing democracy with postsovereignty tend to ignore.²⁶ As long as Europe’s one-sided relationship of dependency on the US remains unchecked, Europeans will simply not enjoy as much public and private freedom as those on the other side of the Atlantic: residents in Germany or Italy in some policy contexts will not have the same chance to shape world affairs as those of Iowa or Indiana. Europeans can sign petitions and demonstrate until they turn blue in the face, but without a common system of state-like institutional devices by which those energies can be forcefully funneled, the US, and perhaps China and Russia will continue, *pace* Brunkhorst’s claims, to shape disproportionately the planet’s future. As Alexander Wendt has also observed in his provocative neo-Hegelian defense of the idea of a world state, the key problem with global governance arguments like those defended by Brunkhorst and Habermas is their weakness in the face of ‘unauthorized violence by rogue Great Powers.’²⁷ Unless the Europeans can thwart such violence, their political and private autonomy will remain impaired.

Indeed, some empirical evidence suggests that the Europeans are already moving toward a more robust form of statehood. Despite Brunkhorst’s assertion that the monopoly over legitimate violence remains located at the level of the nation-state, under the auspices of NATO military policies have long undergone a process of supranationalization (a familiar fact, by the way, which his analysis curiously neglects), and even in the more down-to-earth arenas of policing, EU states ‘no longer have total sovereignty over decision making and implementation of policies in matters of internal security.’²⁸ Especially in the last decade or so, anxieties about transnational criminal networks, drug trafficking, terrorism, and immigration have resulted in dramatic augmentations of shared and increasingly complex forms of policing and security policies operating ‘beyond the nation-state’ (e.g. the European search warrant), with one scholarly commentator describing the movement toward supranationalized policing in Europe as ‘one of the strongest expanding fields of activity’ within the EU.²⁹ To be sure, Brunkhorst occasionally alludes to these trends, but he tends to neglect what may be most striking about them: political elites are responding, albeit oftentimes opportunistically and irresponsibly, to widespread

popular anxiety about globalizing crime, terrorism, and illegal immigration, all of which indeed arguably cry out for novel forms of postnational action. As elites try to deal with popular anxiety, they find themselves, like so many of their historical predecessors, enhancing the *state-like* capacities of those institutions which alone seem capable of providing a modicum of security and protection to the individual. In our globalizing age, those institutions are now increasingly located at the postnational level: not surprisingly, we are witnessing a normatively ambivalent and in many respects troubling, but nonetheless irrepressible, augmentation of the state-like capacities of postnational institutions.

To pretend that this is not happening, or to suggest that we can have all the benefits of modern statehood without constructing state or state-like institutions well beyond those endorsed by Brunkhorst, obscures not only the tough questions we face, but also the real dangers as well. Taming the Leviathan at the level of the nation-state has proven difficult enough. Can we do so at the level of the EU?

BEYOND STATE SOVEREIGNTY?

Brunkhorst's speculations about the idiosyncrasies of the EU undergird another pillar in his theoretical system: a far-reaching critique of the idea of *state sovereignty*, which he employs to claim that defenders of a European federal state or other postnational states have succumbed to obsolescent and anachronistic political thinking. As noted earlier, Habermas has also taken up this feature of Brunkhorst's agenda, similarly describing advocates of global federalism or a world state as committed to outdated ideas about sovereignty.

Much of what Brunkhorst and Habermas say in this context is sound. To be sure, we need to break with ideas, like those pervasive in German political thought from Hegel to Hermann Heller, according to which the sovereign state should be pictured as a more-or-less impermeable, supra-legal entity, a concrete substantial subject that somehow stands beyond and outside the communicative practices of democratic politics. As we have known at least since Harold Laski, too much of the conceptual paraphernalia of modern sovereignty derives from early modern Absolutism;³⁰ Brunkhorst is right to remind us of these old but neglected lessons. Under contemporary conditions, and arguably throughout much of modern history, so-called state sovereignty has been relativized by the interpenetration of national and international (and now postnational) law, at present especially manifest in the EU, but characterizing many other contemporary and earlier contexts as well. The idea of an impermeable and homogeneous sovereign nation-state, Brunkhorst persuasively notes, has *always* been a myth, existing at most only for rare moments in limited regions of the globe. *Pace* traditionalist models of state sovereignty in which the idea has been linked to a 'clear-cut distinction between autonomous legal self-determination and heteronomous determination by another's alien will,' Brunkhorst recalls that even the borders between competing political units have to be accepted and recognized by both sides.³¹ This not only contradicts the commonplace

association of sovereignty with strict inviolability or exclusivity, but also provides support for his alternative view that the outdated notion of state sovereignty should be replaced with that of *popular sovereignty*, according to which sovereignty is best reinterpreted as meaning that ‘those who are affected by binding legal decisions have to be included as free and equal members in the procedures of producing these decisions.’³² It is the *people* who should be seen as outfitted with sovereignty, not their *states*, as state borders indeed decreasingly determine the range or even scope of those decisions which affect us. In short, historically and theoretically obsolete attempts to link sovereignty to the state as a concrete empirical subject need to be jettisoned for a normative model of democracy, in which strict procedures guarantee that those impacted by binding decisions freely and equally participate in their making.

Although much seems sensible about this argument, it moves too fast. First, even if Brunkhorst is right to reinterpret the concept of sovereignty in terms of a robust model of democracy, we still face the question of what form—if any—state institutions should play in helping to realize popular sovereignty. Tellingly, one of the main inspirations behind Brunkhorst’s own vision of popular sovereignty, the Frankfurt political theorist Ingeborg Maus, maintains at least some elements of the traditional discourse of state sovereignty, in part because she continues to see an integral link between democratic politics and the notion that in international affairs states should be treated as legally equal and independent entities.³³ Even if we seek fundamentally to disconnect the idea of sovereignty from the state, and surrender the outdated conceptual framework which rightly alarms Brunkhorst, popular sovereignty may require, as Rainer Schmalz-Bruns has suggested in an excellent critical response to Habermas’ version of the argument, some familiar forms of state institutions. Relying on Thomas Nagel, Schmalz-Bruns argues persuasively that we need to see state or at least what for all effective purposes are state-like organizations as themselves *essential* to democracy and self-government. In other words, Habermas’ (and Brunkhorst’s) attempt to disconnect modern statehood from modern normative political and legal aspirations is overstated. Democratic equality and liberty are best guaranteed by fair and reasonable procedures which can realistically be expected to have a determinative influence or impact on action. Influence of this type can only be achieved by forms of institutionalization with which we rightly associate significant elements of statehood.³⁴ Democratic deliberation and participation only make sense if we can reasonably expect that our voices will result in some course of action which is effectual and binding on others: we need state institutions outfitted with administrative power and far-reaching coercive instruments, and thus at least something approaching what traditionally has been described as a monopoly on violence, to preserve equal participatory rights in the face of potential violations, for example, and enforce democratically achieved decisions even against powerful actors who may have a vested interest in resisting them. In his own ambitious democratic model, Brunkhorst underscores democracy’s necessary dependence on strictly egalitarian decision-making procedures: as at the level of existing nation-states, preservation of those procedures at the postnational level will require an effective system of shared enforcement. Can we be so sure that

even basic democratic rights can be ensured without state or at least state-like institutional devices necessarily playing a protective role? Acknowledging this admittedly conventional theoretical point hardly requires fidelity to Absolutist conceptions of sovereignty, visions of the state as supra-legal and undemocratic, or a secret passion for Carl Schmitt. It is not those who worry about the readiness to discard traditional elements of statehood who should be criticized for adhering to historically anachronistic forms of state organization, but instead Brunkhorst and Habermas who risk downplaying the indispensability of state forms to the normative kernel of democratic politics.³⁵

Brunkhorst is right, for example, to assert that a ‘clear-cut distinction between autonomous legal self-determination and heteronomous determination by another’s alien will therefore no longer implies the distinction between statehood and its absence,’ certainly not in the conventional sense that sovereign states can be seen as coterminous with autonomous self-determination. For residents of small and weak states, this has long been self-evident; now even ‘global players’ like the US must recognize that their fate is shaped decisively by factors beyond their immediate control. The fact that even powerful nation-states are now embedded in complex networks of supranational lawmaking and adjudication only reinforces this point. Yet, such trends still raise the question of how public and private autonomy is best guaranteed under the conditions of a globalizing capitalist political economy. As I hinted at in the first section of this paper, Europeans are unlikely to enjoy the same degree of autonomy as others elsewhere as long as they refuse to establish a shared monopoly on violence, today—as in previous moments of modern history—a central source of effective power. As long as the US and other great powers can use their disproportionate state and military capacities to outmuscle the Europeans, their policy options will be disproportionately circumscribed. Of course, such ‘hard’ forms of power only represent one source of influence, as even classical Realists typically acknowledged. Yet, if an effective balance of power is to obtain between the EU and its rivals, it seems naïve to believe that the Europeans can neglect the cultivation of such conventional forms of ‘hard’ power. At least one of the main justifications for moving toward European statehood, however politically unrealistic this may presently seem, is thus eminently democratic in character: if Europeans are going to enjoy influence and ultimately liberty proportionate to that of the Americans, and not instead be forced to bend their will to the latest occupant of the White House, they need to develop much more ambitious state-like capacities at the level of the EU. Even if they are to preserve influence even over what may appear to be purely ‘internal’ European matters, in our globalizing age this requires that they possess significant power resources to check the Americans, Chinese, and Russians. So rather than simply discard traditional notions of sovereignty, as Brunkhorst and Habermas argue, we might instead hold onto its rational kernel: if political communities are to preserve their autonomy in a political universe which remains a *pluriversum*, achieving a effective monopoly on coercive power remains indispensable.

The argument moves too rapidly in another respect as well: Brunkhorst never fully engages a rich scholarly literature which suggests persuasively that the discourse of sovereignty ‘involves normative principles and symbols meanings worth preserving.’³⁶ Jean L. Cohen, for example, has argued that we can cleanse the discourse of sovereignty of its problematic Absolutist connotations by reconceptualizing it as a *relational* concept which captures the ‘mutual containment of law and politics’: ‘sovereignty evokes both the public power that enacts law and the public law that restraints power.’³⁷ *Pace* traditionalistic usages, we need not crudely juxtapose sovereignty to law or democratic politics, envision it as located in a single actor or institution, link it to hyper-centralized models of decision making, or ignore its intersubjective character: as a claim to ultimate *authority* within a political community it requires recognition both domestically and internationally. Even if classical theorists mistakenly associated it with an idea of *exclusivity* according to which states were to tolerate no external interference in their internal affairs, we should hold onto a more nuanced understanding of the ways in which sovereignty remains tightly coupled to a legitimate claim for political autonomy. The discourse of external sovereignty, for example, should thus be reinterpreted as entailing the ‘non-subordination and non-domination’ of political communities by others, and hence as a useful conceptual device for thinking about political autonomy in the context of a pluralistic political universe. When properly interpreted, this feature of sovereignty discourse serves as a powerful check on imperialistic and hegemonic political pretensions, as well as a valuable way to begin thinking creatively about the unavoidable ‘multiplicity of autonomous political communities and their interrelationship.’³⁸ The mere fact that polities now oftentimes find themselves subject to competing jurisdictional claims does not *per se* constitute an attack on their sovereignty since not all such claims can be legitimately interpreted as generating subordination and domination. By the same token, a revised interpretation of the idea of sovereignty allows us to see why political communities have a right to resist attempts to undermine their non-subordination and non-domination at the hands of external powers as well as resist undemocratic forms of postnational regulation.

Unsurprisingly perhaps, Brunkhorst’s discussion of the historical prototypes for his model of Europe as a ‘confederation of states and peoples’ seems idiosyncratic as well. He tends, as noted above, to see the US under the Articles of Confederation (1776–1787), the German *Bund* (1815–1866), and Switzerland as forerunners. Yet, it seems worth recalling that the Articles of Confederation was plagued by both internal disunity and external incompetence: legitimate fears of civil war and foreign invasion helped generate the Federalist movement, spearheaded by young men who had witnessed at first hand on the battlefield the exorbitant human costs of ineffective government, and ultimately the more centralized federal republic established under the US Constitution. Similarly, the German *Bund* was ultimately replaced by Bismarck’s Prussia and its highly effective—albeit authoritarian—mobilization of power resources. So at least two of Brunkhorst’s examples might be taken as confirmation of my anxieties that a highly decentralized poststatist polity is unlikely to secure a modicum of legal security or political autonomy. Despite its

widely discussed peculiarities, Switzerland seems an odd addition to the list—*unless* one implicitly and mistakenly presupposes, as Brunkhorst perhaps does, that state sovereignty requires the extreme centralization of decision making and enforcement capacities in a single institution or set of hands.³⁹ Yet, this interpretation of sovereignty has long been discredited: federal regimes deserve to be described as ‘states’ even in a rather old-fashioned sense of that term, as long as they possess relatively clear mechanisms for mobilizing (economic, political, and military) power resources to serve common goals. The state’s monopoly on legitimate violence is obviously consistent with a significant variety of state types: not only simple classical nation-states, but also relatively loose federal systems (e.g. Canada) can be aptly described as possessing it. Even more oddly, Brunkhorst has recently added the antebellum (e.g. pre Civil War) US to his list, and in a recent essay in *Constellations* went so far as to suggest that the *contemporary* US may not be all that different from the EU in light of the fact that some interpretations of the American polity—along the lines advanced by the reactionary Supreme Court Justice Clarence Thomas—emphasize its deeply decentralized contours: ‘the USA today, the European Union, or Switzerland . . . should not be equated with states.’⁴⁰ But again, this only makes sense if one implicitly presupposes as a standard a (mythical) ideal of hypercentralized sovereignty, along the lines criticized elsewhere by Brunkhorst, in which federal structures like those found in the US or Switzerland are somehow incongruent with it. Nor is it accurate to claim that in US federalism sovereignty ‘remains *durably suspended between the federation and the member-states*.’⁴¹ Despite the wisdom of Clarence Thomas, most US citizens recognize that at the latest since the Civil War, the federal state has possessed preeminence in foreign, military, and many other decisive matters. And even before the Civil War, as Native Americans and the Mexicans quickly learned, the US federal state, despite its many weaknesses, was able to mobilize substantial military muscle against alleged ‘internal’ and ‘external’ foes. Can the same claim plausibly be made about the present-day EU?

THE KELSENIAN WORLD LEGAL REVOLUTION

The final pillar in Brunkhorst’s defense of (radical democratic) ‘global governance without government’ is his forthright endorsement of the Kelsenian thesis that the last century witnessed a ‘legal revolution’ in which the traditional dualism between nationally based state and international law was overcome, and states have become subsidiary units of an overarching and ever more integrated global legal system to which they have become subordinate. To be sure, Kelsen’s legal cosmopolitanism may have been ahead of its times when originally formulated. Yet Brunkhorst considers Kelsen to have been a prophetic thinker who accurately predicted the subsequent course of legal and political development: Kelsen was right to pummel traditionalistic models of state sovereignty, and especially the anachronistic view that states can operate in ‘law-free’ (*rechtsfreie*) zones; he was also correct to recognize that nationally based legal orders not only were merging with international law, but also

rapidly becoming part of a novel global legal order; his frontal assault on the innumerable dualisms that still plague political and legal thinking (e.g. state vs. law, national vs. international, or even general legislation vs. particularized administrative application) remains path breaking. In this interpretation, ‘we should read Kelsen’s theory no longer primarily as a scientific theory of pure legal doctrine but as a practical oriented theory (and anticipation) of the global legal revolution of the twentieth century.’⁴² Kelsen perceptively identified the prospect of a global legal order in which ‘an enlarging or contracting circle of legal and political communication . . . has no beginning and no end *outside* positive law *and* democratic will formation.’⁴³ Kelsen, in short, serves Brunkhorst as a convenient ally in the quest to advance a democratic vision of legal cosmopolitanism allegedly able to dispense with obsolete ideas of state sovereignty and thereby problematic claims about the necessity of postnational state structures.

Here, as in Brunkhorst’s analysis of the EU, a critical and indeed radical critique of power relations at the global level coexists somewhat uneasily with a relatively optimistic diagnosis of recent legal developments. Since the Nuremberg Trials, Kelsen’s legal revolution and especially his rejection of the view that states are sovereign in the sense of possessing legal independence has gained a substantial footing in legal practice. Yet, that revolution remains unfinished because existing global legal and constitutional systems remain insufficiently democratic. In fact, global law too often mirrors ‘the hegemonic power structure and the new relations of domination in the world society,’⁴⁴ as countless critical analyses of institutions like the WTO and IMF readily attest. To his credit, Brunkhorst remains very much attuned to the inequalities and forms of exclusion generated by global capitalism and the ‘world society’ shaped by it. Yet, he simultaneously wants to preserve Kelsen’s insight that we can and indeed already *are* establishing an ambitious mode of poststatist legal cosmopolitanism. This leads Brunkhorst to resist attempts to explain many of the familiar pathologies of global law as resulting from practices legal and political scholars traditionally link to state sovereignty. In this assessment, one of Kelsen’s great achievements was to have effectively dismembered the idea that state sovereignty conflicts with international law, and that international law too often remains subordinate to nation-states and their legal orders. The dualistic structure of such arguments, Brunkhorst asserts, is anachronistic and misleading, and Kelsen was right to discard them.

Unfortunately, this move leads to counterintuitive and sometimes implausible assertions. For example, especially the US in recent years has made a mockery of international law, when it invaded Iraq and then proceeded to normalize torture and set up secret offshore detentions camps in flagrant violation of longstanding international legal norms. Such acts—and the history of international politics is littered with similar violations by both great and second-tier states—might readily be taken as corroboration for the old-fashioned view that state sovereignty still can conflict with international law, and thus that we are by no means unambiguously on the bright path to legal cosmopolitanism described by Brunkhorst. So how then does he interpret such acts? In his view, they by no means pose a fundamental challenge to

Kelsen's diagnosis because they remain *illegal* but by no means *extra-legal* actions, meaning that they still operate under the auspices of our emerging global legal system, and not somehow *outside* it. Of course, the great powers manipulate international law in ways that lesser powers cannot, yet, even they remain deeply enmeshed in international law. Pressing reasons continue to suggest that even hegemonic powers like the US will find themselves forced to respect international law: it exercises a powerful normative pull which even the White House will not prove able to resist. So even if the US condones torture, practices indefinite detention, and violates international law to attack sovereign states, it acts illegally but not externally to the legal code.⁴⁵ In the systems theory language sometimes employed by Brunkhorst, US action remains enmeshed in the 'legal/illegality' code.

The immediate flaw with the argument is that it downplays the fact that when great powers act in this fashion, they typically make a mockery of even *minimal* rule of law standards. So the Bush Administration indeed claims to be acting 'legally' while endorsing torture and indefinite detention, but its actions in these arenas are composed of stunning examples of arbitrary state power incongruent with the basic legal virtues of generality, consistency, and publicity. One might indeed go a step further with Jeremy Waldron and argue that horrific practices like torture are simply inconsistent with the most fundamental normative ideals of any decent legal order, and thus cannot be coherently rendered part of any legal order deserving to be described as such.⁴⁶ So, at the very least, Brunkhorst's argument rests on an extremely loose and arguably indefensible conception of law: if Abu Ghraib and Guantanamo Bay are still somehow consistent with US fidelity to the law or legal code, it frankly becomes hard to envision *what* state actions might *possibly* contravene it. But then the distinction between 'illegality' and 'extra-legality' on which the overall argument depends begins to seem rather tenuous, particularly in light of the substantial analytic weight it presumably is expected to carry.

Of course, a great deal of existing global law consists of exceedingly soft, vague, and even unwritten norms, as Brunkhorst notes, which is one reason why even Kelsen's most sympathetic critics repeatedly argued that they remain susceptible to 'shifting conditions of power relations and power politics' to a vastly greater extent than domestic or municipal law.⁴⁷ A central source of the familiar weaknesses of international and now global law, of course, is that its application and enforcement at the international level remains—despite the achievements of the UN and many other valuable developments—highly decentralized, which necessarily conflicts with the quest for legal regularity and generality. Indeed, in some contradistinction to his most recent disciple, Kelsen at least seemed to acknowledge the significance of this point, forthrightly describing the weaknesses of what he described as a our 'primitive' system of international law, and openly suggesting that only the centralization of executive power at the global level might, for example, permit far-reaching disarmament.⁴⁸ So at least at some junctures Kelsen seemed to temper his own utopian legalistic aspirations with a hard-headed recognition of the fact that the legal revolution he hoped to bring about remained, to a great extent, a normative and political *aspiration* which ultimately might require the institutionalization of

impressive state-like capacities at the global level.⁴⁹ Kelsen, in fact, arguably lacked Brunkhorst's fundamental hostility to ideals of global federalism or a world state, though he certainly considered—and was right to do so—its realization exceedingly unrealistic in the foreseeable future. Yet, he remained more willing to concede its potential advantages.

Revealingly, in his discussion of US torture and detention policies, Brunkhorst directly reproduces Kelsen's own unsatisfactory response to those who argued that the harsh facts of interstate warfare conflict with his liberal progressivist account of legal development. In opposition to those who saw recourse to war as an extra-legal abrogation of law and thereby—Kelsen claimed—misleadingly conceived of force and law as fundamentally inconsistent, he famously argued, we should treat all such acts either as (legally based) *delicts* or *sanctions*, and thus as attempts to violate or sanction the law. Even unilateral military reprisals, in this view, should be interpreted as fundamentally *legal* acts, albeit ones potentially *illegal* in character. As Kelsen reminded his readers, when states go to war even under suspect circumstances they typically appeal to legal norms to justify their actions.⁵⁰

Yet, this argument, like Brunkhorst's recent attempt to update it, obscures the deeply dubious character of many such legal appeals, as well as the fact that their fundamental source remains the unpleasant political facts of interstate rivalry and power competition. The intellectual danger here, as Kelsen's student John Herz many decades ago pointedly noted, is that what for all effective purposes are indeed best described as 'extra-legal' practices misleadingly get dressed up in legalistic garb.⁵¹ This position misconstrues the fact that as long as enforcement among states remains fundamentally decentralized:

it is not the exceptional, but the normal case that there is no general agreement in treating acts of force as either a delict or sanction. It is not the case that there is normally agreement in international society as to which side in an international armed conflict represents the law-breaker and which the law-enforcer. There is commonly disagreement on this matter, or there is agreement that the conflict should be regarded as a political one in which each side is asserting its interest.⁵²

Like Kelsen, Brunkhorst is right to underscore many of the recent advances in international and now postnational law. Yet he ultimately downplays the *structurally rooted* differences separating domestic from international and global law. To be sure, global law now arguably covers every imaginable political situation: ours is indeed a deeply globalized legal order. Yet, as the Bush Administration has unfortunately reminded us, the extent to which norms are applied and interpreted uniformly, or even applied at all, still depends to a substantial degree on the 'sovereign' will of individual states. Recognizing that point hardly requires, by the way, subscribing to the thesis that states thereby possess a non-legal or extra-legal core, or a closet affinity for Carl Schmitt. However, it does entail acknowledging that especially—though not exclusively—the great powers continue to possess substantial discretionary authority when applying, interpreting, and enforcing international norms. Admittedly, even at the national level, general norms must be particularized, and the process by which

this takes place often leaves much to be desired. But the deep structural differences that continue to distinguish domestic from global political and legal conditions means that typically we can expect their uniform application at the domestic level, whereas its achievement remains a vastly less certain matter ‘beyond the nation-state.’

Many of Kelsen’s criticisms of traditional ideas about the dualism of ‘national’ vs. ‘international’ law remain persuasive. Certainly, the reactionary versions of this thesis articulated by Schmitt and other authoritarian German theorists offer no constructive guidance as we seek to reform the global order. But here again, we should perhaps hesitate before throwing the baby out with the bathwater and simply discarding *any* version of this dualism, just as we might legitimately seek to reformulate traditional ideas about state sovereignty. Although, I cannot sufficiently defend this thesis here, there may be some sound normative reasons for doing so.⁵³

CONCLUSION

To date, Hauke Brunkhorst has developed the theoretically most sophisticated interpretation among critical theorists of the position that we can and should aspire to achieve democracy beyond the level of the nation-state without having to construct postnational states. If some of my criticisms seem pedantic, it is only because the obvious virtues of Brunkhorst’s theoretical achievement—which Habermas quickly and astutely recognized—require those of us similarly sympathetic to global democratization to scrutinize his ideas and proposals carefully.

So should we then instead try to construct postnational states or even a democratic world state? If so, does not my implicit programmatic alternative to the ideas of Brunkhorst and Habermas seem unrealistic and indeed probably utopian?

These are legitimate questions. Let me just conclude by noting that there clearly are many sensible reforms *short* of regionalized or globalized statehood which both nation-states and regional organizations like the EU might undertake in order to deepen self-government. As Phillip Schmitter has proposed, for example, nation-state might sensibly accord each other seats in their legislatures to representatives of other states with which they are intensely involved (for example, within free trade zones like The North America Free Trade Agreement (NAFTA))⁵⁴; Brunkhorst’s own call for cross-border referenda in the EU and elsewhere has much to be said in its defense. So my point is *not* that strengthening democracy between and among nation-states is altogether impossible without the establishment of postnational states.

Brunkhorst and Habermas have not simply advanced the relatively uncontroversial thesis that existing states might cooperate in novel ways in order to deepen democracy between and among them, however. Instead, they advance a significantly stronger thesis: they argue that what we might describe as the *robust* or *full-fledged* democratization of our emerging system of global governance is possible *without* the simultaneous achievement of postnational state institutions. It is this claim which

deserves a skeptical reception. If we seek *substantially* augmented decision making at the regional or global levels, as we understandably might, let us not deceive ourselves into thinking that ‘global governance without (democratic) government’ will ultimately do the job. Far-reaching democratization beyond the nation-state, in which egalitarian procedures of decision making are effectively protected and the results of the political process systematically enforced, will ultimately require the realization of state institutions.

To be sure, the realization of a global federal republic, or even a federal Europe, seems politically unrealistic today.⁵⁵ By the same token, this is hardly the first time that we are forced to recognize that what remains normatively and politically desirable necessarily represents a long term political project. Better to look the many difficulties posed by that project directly in the eye than pretend that we can have meaningful democracy ‘beyond the nation-state’ without the institutional prerequisites that remain indispensable to it. Ours indeed is a ‘time of transition,’ as Habermas has aptly entitled one of his recent books. Rather than conceal the unattractive attributes of our transitional era, in which nation-states are in decline, but new state forms have yet to emerge, by dressing up ugly facts in misleading talk of global governance, we would do well to think hard about the awesome political and institutional challenges at hand.

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NOTES

1. The argument is developed in a number of Habermas’ recent writings, but the clearest defense of it remains Jürgen Habermas, *The Divided West*, trans. Ciaran Cronin (Cambridge, UK: Polity Press, 2006), 113–93. For critical engagements with it, see the essays collected in Peter Niesen and Benjamin Herborst, eds., *Anarchie der kommunikativen Freiheit. Jürgen Habermas und die Theorie der internationalen Politik* [The Anarchy of Communicative Freedom: Jürgen Habermas und International Relations Theory] (Frankfurt: Suhrkamp, 2007); also, Cristina Lafont, ‘Alternative Visions of a New Global Order: What Should Cosmopolitans Hope for?’ *Ethics & Global Politics* 1, no.1–2 (2008): 41–60; and William E. Scheuerman, ‘Global Governance without Global Government? Habermas on Postnational Democracy’, *Political Theory* 36, no. 1 (2008): 133–51.
2. Jürgen Habermas, *The Divided West*, trans. Ciaran Cronin (Cambridge, UK: Polity Press, 2006), 176.
3. *Ibid.*, 135.
4. *Ibid.*, 131.
5. Hauke Brunkhorst, ‘Die Legitimationskrise der Weltgesellschaft. Global Rule of Law, Global Constitutionalism und Welstaatlichkeit’, in *Weltstaat und Weltstaatlichkeit. Beobachtungen*

- globaler politischer Strukturbildung*, ed. Matthias Albert and Rudolf Stichweh (Wiesbaden: Verlag für Sozialwissenschaften, 2007), 101.
6. Glyn Morgan aptly describes this position as the ‘postsovereignty’ thesis. See Morgan, ‘*The Idea of a European Superstate. Public Justification and European Integration*’ (Princeton, NJ: Princeton University Press, 2005), 111–32.
 7. See especially, Hauke Brunkhorst, ‘A Polity without a State? European Constitutionalism between Evolution and Revolution’, in *Developing a Constitution for Europe*, ed. Erik Oddvar Eriksen, John Erik Fossum and Agustin Jose Menendez (London: Routledge, 2004), 96–8. In a similar spirit, see William E. Scheuerman, ‘Critical Theory Beyond Habermas’, *Oxford Handbook of Political Theory*, ed. John Dryzek, Bonnie Honig and Anne Phillips (Oxford: Oxford University Press, 2006), 94–103.
 8. Hauke Brunkhorst, ‘The Legitimation Crisis of the EU’, *Constellations* 13, no. 2 (2006): 177.
 9. *Ibid.*, 173–4.
 10. *Ibid.*, 177.
 11. Hauke Brunkhorst, ‘*Solidarity: From Civic Friendship to a Global Legal Community*’, trans. Jeffrey Flynn (Cambridge, USA: MIT Press, 2005), 131.
 12. Hauke Brunkhorst, ‘Verfassung ohne Staat? Das Schicksal der Demokratie in der europäischen Rechtsgenossenschaft’, *Leviathan* no. 4 (December 2004): 530.
 13. Hauke Brunkhorst, ‘Die Legitimationskrise der Weltgesellschaft. Global Rule of Law, Global Constitutionalism und Welstaatlichkeit’, in *Weltstaat und Welstaatlichkeit. Beobachtungen globaler politischer Strukturbildung*, ed. Matthias Albert and Rudolf Stichweh (Wiesbaden: Verlag für Sozialwissenschaften, 2007), 93. Adam Lupel astutely criticizes Habermas’ tendency to see the EU as a model of sorts for global governance (Adam Lupel, ‘Regionalization and Globalization: Post-nation or Extended Nation?’, *Polity* 36 (2004): 153–74). Brunkhorst’s similar tendency to treat the EU as a paradigmatic case also risks underplaying the idiosyncrasies of European experience.
 14. The argument appears in many of Brunkhorst’s recent writings, but a relatively early statement of it can be found in his ‘Globalizing Democracy without a State: Weak Public, Strong Public, Global Constitutionalism’, *Millennium* 31, no. 2 (2002): 675–90.
 15. Hauke Brunkhorst, ‘A Polity without a State? European Constitutionalism between Evolution and Revolution’, in *Developing a Constitution for Europe*, ed. Erik Oddvar Eriksen, John Erik Fossum and Agustin Jose Menendez (London: Routledge, 2004), 102.
 16. See, most recently, Brunkhorst, ‘State and Constitution—A Reply to Scheuerman’, *Constellations* 15, no. 4 (2008): 493–501; and also Brunkhorst, ‘A Polity without a State’, in *Developing a Constitution for Europe*, ed. Erik Oddvar Eriksen, John Erik Fossum and Agustin Jose Menendez (London: Routledge, 2004), 100–2.
 17. Hauke Brunkhorst, ‘A Polity without a State’, in *Developing a Constitution for Europe*, ed. Erik Oddvar Eriksen, John Erik Fossum and Agustin Jose Menendez (London: Routledge, 2004), 101. Brunkhorst is referring to arguments made by Schmitt in the final chapter of Brunkhorst, ‘*Die Verfassungslehre*’ (Munich: Duncker & Humblot, 1928).
 18. See, for example, Hauke Brunkhorst, ‘Verfassung ohne Staat? Das Schicksal der Demokratie in der europäischen Rechtsgenossenschaft’, *Leviathan* no. 4 (December 2002): 530–43.
 19. Hans J. Morgenthau, ‘*Politics Among Nations: The Struggle for Peace and Peace*’, 2nd ed. (New York: Alfred Knopf, 1954), 415.
 20. Albrecht Funk, ‘The Monopoly of Legitimate Violence and Criminal Policy’, in *International Handbook of Violence Research*, ed. W. Heitmeyer and J. Hagan (Amsterdam: Kluwer, 2003), 1059.
 21. Campbell Craig, ‘The Resurgent Idea of World Government’, *Ethics & International Affairs* 22, no. 2 (2008): 135.
 22. In a revealing contrast to Brunkhorst, in some of his initial writings on globalization, Habermas seemed to suggest that Europeans should aspire for a democratic federal state *precisely* because controversial redistributive social and economic can only gain sufficient

- legitimacy on the basis of a rich common political culture: without such a shared civic identity, Habermas has rightly inferred, it seems difficult to conceive of the possibility that well-to-do Europeans will be willing to go along with policies favoring their less-well-off compatriots. Even in *Divided West* he remains open to the possibility that regional blocs like the EU might evolve into ‘complex federal states on a continental scale’ (p. 141). The federalist strand is relatively strong in Jürgen Habermas, ‘*The Postnational Constellation*’, trans. Max Pensky (Cambridge, MA: MIT Press, 2001), 89–112; and also Jürgen Habermas, ‘*Time of Transitions*’, trans. Ciaran Cronin and Max Pensky (Cambridge, MA: MIT Press, 2006), 73–109.
23. Jürgen Habermas, ‘*The Postnational Constellation*’, trans. Max Pensky (Cambridge, MA: MIT Press, 2001), 89–112, 58–112; and Jürgen Habermas, ‘*Time of Transitions*’, trans. Ciaran Cronin and Max Pensky (Cambridge, MA: MIT Press, 2006), 73–88.
 24. Hauke Brunkhorst, ‘Polity without a State?’, in *Developing a Constitution for Europe*, ed. Erik Oddvar Eriksen, John Erik Fossum and Agustin Jose Menendez (London: Routledge, 2004), 103. In a similar vein, see Jürgen Habermas, *The Divided West*, trans. Ciaran Cronin (Cambridge, UK: Polity Press, 2006), 39–48.
 25. I take this number from Lee Hamilton, former Democratic Congressman from Indiana.
 26. Glyn Morgan, ‘*The Idea of a European Superstate. Public Justification and European Integration*’ (Princeton, NJ: Princeton University Press, 2005), 133–57.
 27. Alexander Wendt, ‘Why a World State is Inevitable,’ *European Journal of International Relations* 9, no. 4 (2003): 506.
 28. John D. Occhipinti, ‘*The Politics of EU Police Cooperation*’ (Boulder, CA: Lynn Rienner, 2003), 2.
 29. Markus Jachtenfuchs, ‘Das Gewaltmonopol: Denationalisierung oder Fortbestand?’ in *Transformation des Staates?* ed. Stephan Leibfried and Michael Zürn (Frankfurt: Suhrkamp, 2006), 85.
 30. Harold Laski, ‘*Studies in the Problem of Sovereignty*’ (New Haven, CT: Yale University Press, 1917).
 31. Hauke Brunkhorst, ‘How Much Democracy Does Global Constitutionalism Need?’ in *Between Cosmopolitan Ideals and State Sovereignty: Studies in Global Justice*, ed. Ronald Tinnevelt and Gert Verschagen (New York: Palgrave, 2006), 188; Hauke Brunkhorst, ‘A Polity without a State? European Constitutionalism between Evolution and Revolution’, in *Developing a Constitution for Europe*, ed. Erik Oddvar Eriksen, John Erik Fossum and Agustin Jose Menendez (London: Routledge, 2004), 99. See also Hauke Brunkhorst, ‘Der Lange Schatten des Staatswillenspositivismus’, *Leviathan* (2003): 362–81; and *Solidarity*, 108, 165–76; Brunkhorst, ‘State and Constitution—A Reply to Scheuerman’, *Constellations* 15, no. 4 (2008): 493–501.
 32. Hauke Brunkhorst, ‘Polity without a State’, in *Developing a Constitution for Europe*, ed. Erik Oddvar Eriksen, John Erik Fossum and Agustin Jose Menendez (London: Routledge, 2004), 99.
 33. See, for example, Ingeborg Maus, ‘Volkssouveränität und das Prinzip der Nichtintervention in der Friedensphilosophie Immanuel Kants,’ in *Einmischung erwünscht? Menschenrechte in einer Welt der Bürgerkriege*, ed. Hauke Brunkhorst (Frankfurt: Fisher, 1998), 88–116.
 34. Rainer Schmalz-Bruns, ‘An den Grenzen der Entstaatlichung. Bemerkungen zu Jürgen Habermas’ Modell einer ‘Weltinnenpolitik ohne Weltregierung’, in Peter Niesen and Benjamin Herborth, eds., *Anarchie der kommunikativen Freiheit. Jürgen Habermas und die Theorie der internationalen Politik* [The Anarchy of Communicative Freedom: Jürgen Habermas and International Relations Theory], (Frankfurt: Suhrkamp, 2007), 269–93.
 35. Schmalz-Bruns, ‘An den Grenzen der Entstaatlichung. Bemerkungen zu Jürgen Habermas’ Modell einer ‘Weltinnenpolitik ohne Weltregierung’, in *Anarchie der kommunikativen Freiheit. Jürgen Habermas und die Theorie der internationalen Politik*, 278. In response to an earlier version of the argument I develop here, Habermas accused me of implicitly advancing a

notion of political power as having an ‘impenetrable “substance”’ along the lines perhaps of Schmitt’s ‘concept of the political’ (email to correspondence to the author, February 23, 2008, on file with the author). It is unclear to me, however, why maintaining fidelity to some traditional attributes of modern statehood places anyone in Schmitt’s camp. I am also unconvinced that my position echoes Thomas Hobbes’ (absolutist) model of state sovereignty. On the contrary, in the spirit of Rousseau, Kant, and many others, I instead follow Schmalz-Bruns in seeing at least some elements of modern statehood as essential to a sufficiently robust conception of popular sovereignty.

36. Jean L. Cohen, ‘Whose Sovereignty? Empire Versus International Law’, *Ethics & International Affairs* 18, no. 3 (2004): 14. For some of the recent debates on sovereignty in the context of the European Union, see Neil Walker, ed., *Sovereignty in Transition* (Oxford: Hart Publishing, 2003).
37. Jean L. Cohen, ‘Whose Sovereignty? Empire Versus International Law’, *Ethics & International Affairs* 18, no. 3 (2004): 14–5.
38. *Ibid.*, 16.
39. Here as well, the ‘Realist’ Morgenthau still makes worthwhile reading: as he points out, the Swiss experience was highly idiosyncratic and probably can not be reproduced, and thus represents a poor model for thinking about global governance (Hans J. Morgenthau, *Politics Among Nations: The Struggle for Peace and Peace*, 2nd ed. (New York: Alfred Knopf, 1954), 482–4).
40. Hauke Brunkhorst, ‘State and Constitution – A Reply to Scheuerman’, *Constellations* 15, no. 4 (2008): 495.
41. *Ibid.*, 494–5.
42. Hauke Brunkhorst, ‘Cosmopolitanism and Democratic Freedom’, in *Normative and Sociological Approaches to Legality and Legitimacy*, ed. Chris Thornhill and Samantha Ashenden (forthcoming). See, more generally, for the Kelsenian argument, Hauke Brunkhorst, ‘Die globale Rechtsrevolution’, in *Rechtstheorie in rechtspraktischer Absicht*, ed. Ralph Christensen and Bodo Pieroth (Berlin: Duncker & Humblot, 2007), 9–34; and Hauke Brunkhorst, ‘Kritik am Dualismus des internationalen Recht – Hans Kelsen und die Völkerrechtsrevolution des 20. Jahrhunderts’, in *Internationale Verrechtlichung. Nationale Demokratien im Zeitalter globaler Politik* (Frankfurt: Campus, 2008), 30–63.
43. Hauke Brunkhorst, ‘Cosmopolitanism and Democratic Freedom’, in *Normative and Sociological Approaches to Legality and Legitimacy*, ed. Chris Thornhill and Samantha Ashenden (forthcoming).
44. *Ibid.*, forthcoming.
45. Hauke Brunkhorst, ‘Die Legitimationskrise der Weltgesellschaft’, in *Weltstaat und Weltstaatlichkeit. Beobachtungen globaler politischer Strukturbildung*, ed. Matthias Albert and Rudolf Stichweh (Wiesbaden: Verlag für Sozialwissenschaften, 2007), 80–1; and Brunkhorst, ‘Die globale Rechtsrevolution’ in *Rechtstheorie in rechtspraktischer Absicht*, ed. Ralph Christensen and Bodo Pieroth (Berlin: Duncker & Humblot, 2007), 20.
46. Jeremy Waldron, ‘Torture and the Positive Law: Jurisprudence for the White House’, *Columbia Law Review* 105, no. 6 (2005): 1681–750.
47. John Herz, ‘The Pure Theory of Law Revisited: Hans Kelsen’s Doctrine of International Law in the Nuclear Age’, in *Law, State, and International Legal Order: Essays in Honor of Hans Kelsen*, ed. Salo Engel and Rudolf A. Metall (Knoxville, TN: University of Tennessee Press, 1964), 112.
48. Hans Kelsen, *Law and Peace in International Relations* (Cambridge, MA: Harvard University Press, 1948), 155–6.
49. This is how Herz and many others have said we should best read Kelsen.
50. For useful critical discussions, see John Herz, ‘The Pure Theory of Law Revisited: Hans Kelsen’s Doctrine of International Law in the Nuclear Age’, in *Law, State, and International Legal Order: Essays in Honor of Hans Kelsen*, ed. Salo Engel and Rudolf A. Metall (Knoxville,

- TN: University of Tennessee Press, 1964), 108–12; in a similar vein, Hedley Bull, ‘Hans Kelsen and International Law’, in *Essays on Kelsen*, ed. Richard Tur and William Twining (Oxford: Clarendon, 1986), 326–30.
51. John Herz, ‘*Political Realism and Political Idealism*’ (Chicago, IL: University of Chicago Press, 1951), 99–102.
 52. Bull, ‘Kelsen and International Law’, in *Essays on Kelsen*, ed. Richard Tur and William Twining (Oxford: Clarendon, 1986), 329–30.
 53. In this vein see Jean L. Cohen, ‘Whose Sovereignty? Empire Versus International Law’, *Ethics & International Affairs* 18, no. 3 (2004), 1–24.
 54. Phillip Schmitter, ‘The Future of Democracy: A Matter of Scale?’, *Social Research* 66 (1999): 933–58.
 55. Interestingly, there has recently been a revival of serious theorizing among international relations scholars about the idea of a world state. Much of the debate is motored by a matter that rarely gets mentioned in recent critical theory work on globalization: the horrific possibility of nuclear omnicide. See, for example, Daniel H. Deudney, ‘*Bounding Power: Republican Security Theory From the Polis to the Global Village*’ (Princeton, NJ: Princeton University Press, 2007).