Habermas on Nationalism and Cosmopolitanism*

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Abstract. After drawing a distinction between a cosmopolitan attitude and institutional cosmopolitanism, this paper reconstructs Habermas’s account of the relationship between morality and law in order to argue that this account can be the basis of a cosmopolitan attitude which, although insufficient, on its own, to ground cosmopolitan institutions, can, nonetheless, motivate interest in institutional cosmopolitanism. The paper then examines Habermas’s proposal for institutionalizing a system of cosmopolitan governance. It distinguishes and explores the reach and limitations of three arguments in favor of institutional cosmopolitanism not always adequately differentiated in Habermas’s work: (a) an argument from the weakness of the nation state, (b) an argument from the democratic deficit of nationalism, and (c) an argument from the state’s incapacity to guarantee human rights.

Although it is (still) premature to talk about the demise of the nation state, there is no question that the conditions that led to the entrenchment of the nation state beginning with the Treaty of Westphalia in 1648 have changed considerably (see, e.g., Lyons 1995 and Zacher 1992). Changes in the military, in technology, in international trade, in cultural diffusion, and in internal and external politics, in addition to increased migration and renewed pressure for the recognition of particular identities within existing nation states, give an idea of the magnitude of the difficulties associated with theorizing about international political organization. In this respect, it might represent a significant advantage to reflect upon questions of nationalism from the standpoint of a broad social and political theory that already encompasses the factors listed. Jürgen Habermas’s recent writings on nationalism and cosmopolitanism reflect such an advantage. They are part and parcel of an

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ambitious theory of democratic society, and can therefore deal in a systematic way with a greater variety of concerns than the occasionally illuminating but often opportunistic thoughts on nationalism so popular today. Although, as I will argue, Habermas’s defense of cosmopolitanism still requires some work, it at least has three desirable characteristics: First, it does not rest on a repudiation of the achievements and merits of the nation-state; second, it is sensitive to difference; and, most importantly, it emphasizes the importance of democratic rights even at the cosmopolitan level.

The focus of this paper will be on the normative arguments in defense of cosmopolitan political organization either adduced by Habermas or that can be constructed on the basis of his work, rather than on the concrete details of his institutional proposal. In section 1, I argue that Habermas’s account of the relationship between morality and law afforded him an opportunity to make a case in favor of a cosmopolitan attitude that he surprisingly missed. In section 2, I provide a brief sketch of the institutional dimension of Habermas’s cosmopolitanism, and in section 3, I distinguish and engage three normative arguments in favor of cosmopolitanism.

1. A Preliminary Consideration: On the Relationship between Morality and Law

Before examining in detail Habermas’s recent arguments concerning cosmopolitanism, I would like to suggest that an argument in favor of a cosmopolitan attitude, if not of cosmopolitan institutions, can be constructed on the basis of his earlier work. A cosmopolitan attitude consists of an obligation to assess the morality of one’s acts at least in part in light of the acceptability of their consequences by everyone affected by them, regardless of borders, territorial or otherwise. While this constructed argument has no institutional implications of its own, it is nevertheless helpful in providing a motivation for cosmopolitan organization. Cosmopolitan institutions can then be justified as the best means of institutionalizing moral requirements, thus unburdening individuals of moral obligations that might be difficult for them to observe on their own.

The core of the argument in favor of a cosmopolitan attitude lies in Habermas’s analysis of the relationship between a universalistic conception of morality and the notion of legal validity. Habermas offers two different accounts of this relationship, one in works prior to Between Facts and Norms (Habermas 1996) and the second in that book and in his latest essays. In essence, both accounts support the same general point: Given a post-traditional world in which metaphysical or religious justifications of morality and law are no longer sufficient, one can still make use of the notion of justification in a universalistic sense by articulating the notion of validity in terms of discursive acceptability. The crucial insight behind this position is that in a culture such as ours, the only forms of rationally acceptable justification for
binding norms is, precisely, the ability to stand up to critical scrutiny and prove acceptable to those who have to live by them, in a discursive situation in which all are treated as free and equal participants.

In works that precede *Between Facts and Norms*, Habermas provides an account of the validity of norms in general without distinguishing between moral and legal norms. According to this account, norms are valid if and only if they satisfy a moral principle of universalization. This principle (U) states that every valid norm of action has to fulfill the condition that all affected can accept the consequences and the side effects its general observance can be anticipated to have for the satisfaction of everyone’s interests (and these consequences and interests are preferred to those of known alternative possibilities for regulation). (Habermas 1990, 65)

The failure to distinguish between moral and legal norms in addition to the requirement that all norms satisfy a moral principle of universalization suggests that in his earlier work Habermas subordinated legal legitimacy to the universalistic principle of morality (U). Although this imposes on the law demands that will be seen to be inappropriate, given that there is no territorial closure to a universalistic moral principle, it should be plain that the subordination of legal legitimacy to such a principle of morality leads to the conclusion that the legitimacy of laws depends upon their consequences for all those who are substantially affected by them, not only within national borders, but wherever those affected reside. This position, then, could constitute the basis of a radically cosmopolitan argument; since Habermas argues not only for a universalistic principle of morality, but for the thesis that universalizability can only be tested through real dialogues and not through Kantian thought experiments, then one would have the premises of an argument in favor of deliberative forums, and possibly of political representation within electoral districts whose membership should not be defined in terms of a territorial criterion, but of being affected by a given norm, regardless of traditional political—national or international—boundaries.

In summary, as long as morality is understood in universalistic terms, and provided that legitimacy is subordinated to morality, this introduces a universalistic requirement into law-making. Whether this requirement is best satisfied by supranational institutions would take further elaboration, but, at a minimum, the argument suggests a moral obligation which legislators in particular bear, an obligation that requires them to assess the impact of their law making in terms that go beyond considerations of national expediency. This is what I call a cosmopolitan attitude.¹

¹I tried to put this argument to use in the context of discussions about drug policy in De Greiff 1999.
In *Between Facts and Norms* and succeeding works, Habermas changes in significant respects his account of the relation between morality and law, and he does it in a way that seems to threaten the defense of a cosmopolitan attitude just sketched, for the new argument is specifically intended to overcome the subordination of legality to morality. I will argue that despite the changes, a defense of a cosmopolitan attitude can still be constructed, but that this requires helping Habermas out of a confusion.

As part of a more comprehensive discourse theory of democracy, Habermas introduces in his later works a higher degree of differentiation between morality and law and a modified account of their relationship. Instead of arguing that *all* norms are valid if they satisfy a universalistic moral principle, he now argues that moral and legal norms satisfy different principles of validity. The principle of moral validity remains the same, namely (U), but now a separate principle of democratic legitimacy is introduced:

only those judicial statutes may claim legitimacy that meet with the agreement of all citizens in a discursive law-making process that is itself legally constituted. (Habermas 1996, 110, 135)

So, what is the relationship between the principles of moral validity and of legal legitimacy? Given that the core discourse-theoretic position that validity ought to be understood in terms of rational acceptability remains unchanged, Habermas now argues that both (U) and the principle of legal legitimacy are specifications of a general principle of validity according to which

[j]ust those action norms are valid to which all those possibly affected could agree as participants in rational discourses. (Ibid., 107)

This general principle merely explicates the impartial standpoint from which questions of the validity of norms should be assessed, without discriminating yet between moral and legal norms of action. It can, though, be specified for both, yielding the two different principles of moral validity and democratic legitimacy. The principle of moral validity (U), then, is supposed to specify what the notion of impartiality which is at the core of validity entails when the norms at issue are moral norms. Similarly, the principle of democratic legitimacy specifies what discursive, impartial validity amounts to when the norms in question are legal norms.

The key idea behind linking legitimacy and morality as nothing more than specifications of the very same principle of validity (understood in terms of rational acceptability) is that both legitimacy and morality—as all other forms of validity—hinge on what is rationally acceptable for all. On the other hand, the motivation for distinguishing between them is twofold: In the first place, it is only once the two principles have been distinguished that their relation can be properly spelled out. The earlier conflation of legitimacy and morality had led to the subordination of the former to the latter, and this
subordination, Habermas now argues, obscures the relationship between legitimacy and democracy. If it were held that coincidence with morality is a sufficient condition for the legitimacy of laws, as natural law theorists used to maintain, there would be no legitimating role left for democratic procedures to play. To think that legitimacy derives directly from morality leads to a paternalistic foisting of rights to citizens, whereas according to Habermas’s more thorough recent constructivism, citizens ought to be able to see themselves as authors of the rules they live by (see Habermas 1996, 120–1, 127–8, and secs. 3.1.4, 3.3).

An additional argument adduced by Habermas for reconsidering the subordination of law to morality is that such relation rests on an insufficient differentiation between these two spheres. Shortly before the publication of Between Facts and Norms, Habermas spelled out his rendition of the old distinction between pragmatic, ethical, and moral reasons. He distinguishes between ethics and morality by arguing that ethics answers the question What ought I/we to do?, on the basis of considerations of personal or collective identity. By contrast, morality interprets the same question as one that should be answered on the basis of considerations of justice or rights (see Habermas 1993; 1996, 15–52, 95–9). Following Kant, Habermas holds that what makes moral norms distinctive is that they raise a universal validity claim, and so differ both from pragmatic discourses, the validity of whose conclusions—Kant’s “imperatives of skill”—is contingent on the commonality of particular ends, as well as from ethical discourses, whose claims—“counsels of prudence”—are valid only for members of a community which already shares a tradition and its strong evaluations (Kant 1968, 415–16).

Part of Habermas’s point in introducing the distinction between pragmatic, ethical, and moral reasons in the context of the discussion of legal legitimacy was to address the charge that discourse ethics could not provide an adequate account of legitimacy, for it ignored the importance of ethical, and especially of pragmatic, reasons in the justification of laws (see, e.g., Tuori 1989). In Between Facts and Norms Habermas has now opened up room for such teleological dimension of valid law: He now specifically argues that in the justification of laws, pragmatic and ethical considerations rightly play a role.

What happens to the cosmopolitan consequences of the account of the relationship between morality and law once the account of legitimacy is expanded in this manner? Oddly, Habermas talks as if legitimacy became a purely internal, national issue. This may converge with traditional legal theory, but it conflicts with his own position on the relationship between morality and law, and, incidentally, leads him to miss a possible justificatory ground for his later interest in cosmopolitanism. Habermas now holds that the scope of the legitimating constituencies, what he calls the “reference system,” the group of people whose consent has to be secured in the legitimation of a norm, is a function of the type of norm in question. Specifically, he argues that only moral norms refer to a group whose scope encompasses humanity
in general, whereas the reference system of legal norms is a particular legal community:

With moral questions, humanity, or a presupposed republic of world citizens constitutes the reference system for justifying regulations that lie in the equal interest of all. In principle, the decisive reasons must be acceptable to each and everyone. With ethical-political questions, the form of life of the political community that is “in each case our own” constitutes the reference system for justifying decisions that are supposed to express an authentic, collective self-understanding. In principle the decisive reasons must be acceptable to all members sharing “our” traditions and strong evaluations. (Habermas 1996, 108)

The cosmopolitan consequences of the earlier account of the relationship between morality and law, seem, indeed, to be under threat. It is worth spending some time considering the reasons that led Habermas to settle the scope of the reference systems for morality and law in the way he did. The first reason has to do with the positivity of law, the fact that legal norms are enacted, and this means that they always emanate from a particular community. Habermas puts the point as follows: “Unlike moral rules, legal rules do not norm (normen) possible interactions between communicatively competent subjects in general but the interaction contexts of a concrete society. This follows simply from the concept of the positivity of law, that is, from the facticity of making and enforcing law. Legal norms stem from the decisions of a historical legislature; they refer to a geographically delimited legal territory and to a socially delimitable collectivity of legal consociates, and consequently to particular jurisdictional boundaries” (ibid., 124).

The second reason for determining the scope of the legitimating community of law in less than cosmopolitan terms has to do with the importance of ethical and pragmatic reasons in the process of legitimating laws. The point here is that the irruption of these reasons introduces a contextualist element in processes of legitimation, for, after all, pragmatic and ethical reasons owe whatever force they have to the contingent fact of sharing some particular ends or evaluations.

Are these reasons convincing? To allow the positivity of the law to determine the scope of the relevant legitimating community seems to betray a degree of “state-centricity” that is incompatible with other strains of Habermas’s position. Moreover, this move is question begging, for part of the issue that needs to be decided is, precisely, who should be included as a participant in discourses in which the legitimacy of laws is at issue. The fact that historically these discourses have been territorially bounded leaves open both the normative question of whether these discourses ought to be more cosmopolitan, as well as the practical question of whether they can be organized effectively in such a fashion.

Thus, the whole weight of the argument for narrowing the scope of legitimating discourses rests on the second reason, the fact that legal discourses involve ethical and pragmatic considerations which are contextual
in nature. Were this factor sufficient to determine the extent of the consideration we owe others, then particular jurisdictions would be absolutely free to adopt whatever laws they wanted, regardless of the consequences of those laws beyond their own borders. But then it would not be clear what Habermas means by insisting that “a legal order can be legitimate only if it does not contradict basic moral principles” (ibid., 106). Indeed, the necessary coherence of legitimate laws with the requirements of morality is a point that Habermas reiterates repeatedly, and that figures in the very definition of legitimacy (see Habermas 1996, 152, 154, 156).

If the validity of law were simply contingent on the law achieving certain goals and on embodying a shared community identity, Habermas’s legal theory would collapse into a form of communitarian positivism. While with the positivists Habermas wants to distinguish between morality and law, against positivism, he insists that legitimacy imposes moral constraints on the law. Legitimate laws, therefore, can express a community’s sense of identity, and reflect its evaluative and practical priorities as well, so far as the laws’ compatibility with the universalistic requirements of morality has been established.

Since it is apparent that Habermas articulated his account of the legitimacy of law in a traditional state-centric manner, perhaps he would like to argue that the satisfaction of the principle of morality associated with legal legitimacy is exhausted once it is guaranteed that the law in question is in the equal interest of all, where the “all” refers merely to all the members of a particular legal community. This does lead to the settling of the relevant legitimating constituencies in the way Habermas suggests, and explains the meaning of the assertion that “whereas moral norms are directed to every person, legal norms address only the members of the legal community” (ibid., 156; see also 112). However, whereas the restriction of universality to the members of a particular legal community might make perfect sense in a world of isolated nation states, or in those cases in which laws have no substantial spill-over effects across national borders, the world is no longer so fragmented, and the number of laws that do generate significant spill-over effects is increasing. Moreover, Habermas himself sometimes argues about the requirements that morality imposes on the law in a way that is incompatible with his talk about the territorial closure of the legitimating constituency:

By their very structure laws are defined by the question of which norms citizens want to adopt for regulating their common life. To be sure, discourses aimed at achieving self-understanding are also an important component of politics. In such discourses the participants want to get a clear understanding of themselves as members of a specific nation, as members of a local community, as inhabitants of a region, and so on; they want to determine which traditions they will continue; they strive to determine how they will treat one another and how they will treat minorities and marginal groups; in short, participants in such discourses (or in identity politics)
hope to become clear about the kind of society in which they want to live. But [...] these questions are subordinate to moral questions [...]. The question that has priority in legislative politics is how a matter can be regulated in the equal interest of all. The making of norms is primarily a justice issue, subject to principles that state what is equally good for all. Unlike ethical questions, questions of justice are not related at the outset to a specific collective and its form of life. The law of a concrete legal community must, if it is to be legitimate, at least be compatible with moral standards that claim universal validity beyond the legal community. (Ibid., 282)

There are then two possible readings of the argument. On the stronger reading, exemplified by the quotation above, there is a universalistic moral constraint inherent to the notion of legitimacy itself. Even this stylized argument would entail serious changes in our understanding of sovereignty. A universalistic requirement would make countless present laws illegitimate not because they fail procedural prerequisites, or because they are unfair to some citizens within a particular legislative community, but because of the ill-effects these laws might have on citizens of other countries. Legislative sovereignty, as it was classically understood, would be severely curtailed. Legislators would be free to frame laws on the basis of pragmatic and ethical reasons as long as these laws do not conflict with moral norms—and these moral norms, as explained before, are derived not just from the community served by them, but from the community affected by the proposed legislation, regardless of conventional borders, national or otherwise.

On the weaker reading, legitimacy really imposes no extraterritorial concerns. Whatever obligation we have to countenance the effects of our laws on those beyond our national border is a moral rather than a legal obligation. But this would also be sufficient to generate the basis for a cosmopolitan attitude. Although laws that might be unacceptable to those beyond a particular jurisdiction might still be legitimate, they would fail a moral requirement which legislators stand under the obligation to satisfy, an obligation which requires assessing the validity of norms with an eye to their acceptability to all who are affected by them.

In my view, the stronger reading of the argument is not only the correct one, but would also be useful for justifying a cosmopolitan attitude. Habermas, however, writing in response to critics of the implications of his earlier views on morality and law, emphasizes in Between Facts and Norms the contextualist rather than the universalistic import of this relationship. Hence an opportunity to motivate the later institutional form of cosmopolitanism was not taken up.

It is important, however, to be clear about the nature of the missed opportunity. It is not that a justification for cosmopolitan institutions can be constructed on the basis of moral premises alone. This will require an explicitly political argument, as we will see in section 3, part (c) below. Nevertheless, an opportunity to motivate concern for cosmopolitanism has been wasted. I am trying to retrieve it.
Now it is time to move from a defense of a cosmopolitan attitude to institutional cosmopolitanism. In the next section I will sketch Habermas’s institutional proposal, and in section 3 examine the merits of its backing.

2. The Institutional Proposal

Very briefly, the following is what Habermas provisionally defends: (1) the establishment of supranational institutions with executive, legislative, and judicial powers, and (2) the creation of appropriate representative democratic procedures at the supranational level. Concerning Europe, for example, he defends “[n]ew political institutions such as a European Parliament with the usual powers, a government formed out of the Commission, a Second Chamber replacing the Council, and a European Court of Justice with expanded competencies” (Habermas 1998c, 156). In short, Habermas advocates “a transition of the European Community to a democratically constituted, federal state” (ibid.). More broadly, Habermas follows those who defend transforming existing international institutions, using them, nonetheless, as the basis for the formation of a supranational democratic regime. He is thus sympathetic towards the strengthening of the executive functions of the United Nations, giving this body the authority to act in defense of human rights even if such decisions violate the present understanding of state sovereignty and its associated principle of non-intervention (see Habermas 1998b, sec. iv; 1998d, sec. iv). Additionally, since effectiveness in the real world is not only a matter of authorization but of power, Habermas supports the institutionalization of the judicial power of the UN. This includes support for a permanent International Criminal Tribunal with competence to initiate prosecutions and to hear both cases between individuals and cases between an individual and a state. It also includes advocating the formation of a neutral armed force capable of enforcing UN resolutions for those cases in which “preventive and non-violent” interventions fail to work. These proposals would give flesh to the notion of humanitarian intervention. The general idea is to form an international legal order that at the very least would bind individual governments to respect the basic rights of their citizens, if necessary through the threat or the implementation of sanctions (Habermas 1998b, 129–32; 1998d, 179ff.).

Habermas, though, is aware that, given how past and present inequalities of power have affected existing international institutions, augmenting the executive and judicial role of those institutions is risky from the standpoint of justice. The main risk, of course, is that relaxing the principles of sovereignty and non-intervention can easily lead to unfair uses of international force. Even ostensibly defensible UN interventions have teetered on the brink of illegitimacy, for the objector has plenty of instances to offer as warrant for a

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2 I expressed some of my reservations about international courts under the present inequalities of the system of states in De Greiff 1998.
charge of selectivity (Habermas 1998d, 180). In order to meet this problem, at least procedurally, Habermas also argues in favor of the democratization of international institutions. In particular, regarding the UN, he supports adding a second chamber to the General Assembly turning it into a World Parliament whose members would be elected by popular vote. The aim of this addition is to overcome this body’s character as a “mere assembly of government delegations” becoming instead a “parliament [in which] peoples would be represented as the totality of world citizens not by their governments but by elected representatives” (ibid., 187). Regarding the Security Council, Habermas backs motions to extend membership to other powerful countries (Japan and Germany) and to regional groups (e.g., the European Union). Similarly, and also with the idea of democratizing the executive power of the Security Council, Habermas defends replacing the veto power of the permanent members of the Council with a suitable form of majority rule (ibid.).

3. The Backing

Depending on one’s preferences, Habermas’s cosmopolitan proposal constitutes either a wish list, or a catalogue of follies. Here, my aim will be to engage Habermas’s defense of the proposal sketched above. I distinguish three arguments which Habermas does not separate clearly, and which I differentiate here for analytical purposes. They are meant to be mutually supporting, rather than independent trains of thought.

a. The Argument from the Weakness of the Nation State

Clarifying the first line of defense of this proposal will allow me to highlight at the same time one of the virtues of Habermas’s defense of cosmopolitanism, namely, that it rests not on a simplistic repudiation of the nation state or of nationalism, but rather, on an analysis of their accomplishments and their limitations. Briefly, according to Habermas, functionally speaking, the nation state arises in order to remedy a dual legitimation and integration crisis that appears with the demise of the old European feudal order and which deepens with the acceleration of processes of modernization. After the wars of religion and the emergence of creedal pluralism, authority needed to be legitimated in secular terms. The processes of modernization left in their wake isolated individuals and dislocated communities (see Polanyi 1944). The achievement of the nation-state consists precisely in addressing both problems at once. By becoming states and incorporating democratic, constitutional procedures, communities gain a measure of legitimacy for their authoritative political institutions. Furthermore, it is precisely the adoption (in most cases deliberate) of the idea of a nation which creates the bonds of mutual solidarity among former strangers, that motivates the extension of
democratic citizenship, addressing thereby the problem of disintegration (see Habermas 1998a, 1998b).³

But it is precisely this integrative, solidaristic achievement of the nation which is presently under threat, and whose preservation, Habermas argues, will be possible only at a higher level of political organization, namely, supranationally. He appeals here not only to familiar considerations concerning the weaknesses of nation states in the face of global ecological problems, inequality, organized crime and the denationalization of the economy, considerations which one might call pragmatic. Instead, he gives a normative twist to these well-known apprehensions by calling to mind the following scenario: What is noteworthy about processes of economic denationalization is not merely the increased magnitude of economic activity across national borders, but the rapid mobility of capital and the consequent competition for it among different states, which can lead to a race among countries to dismantle their welfare systems in the search for competitive advantages. This international “race for the bottom” might accelerate the formation of underclasses even in developed countries, with three possible important consequences: first, an increased appeal to repressive policies in a vain attempt to contain the existence of a large underclass; second, the decay of the infrastructure of increasingly large areas, especially of the urban centers, and third, as the combined outcome of these two consequences, the collapse of the bonds of social solidarity and of political legitimacy, bonds which were, precisely, the two great achievements of the democratic nation state (see Habermas 1998a, sec. v).

The general position being defended, then, is that only expanded coordination can stem the tide of social disintegration and allow us to meet global environmental and social problems. There is of course an important pragmatic component to this position, but it is not just an argument based on expediency, for more is being said than that our present standard of living will decline unless we shift focus towards cosmopolitan institutions; the important claim is that the weakness of the nation state undermines the social and economic conditions of solidarity, and that the normative bases of law and legal-political institutions will be undermined as well, because processes of legitimation become less representative and hence less democratic. Democracy, then, has to be saved by institutionalizing it at the cosmopolitan level as well.

But there is in this argument a leap between the diagnosis of the present and the cosmopolitan prescription. Even if we agreed not only with the descriptive part of the case, but also, with its predictive part—that is, with the account of the formation of the underclass, the rise of repression, the decay of infrastructure, and finally, the erosion of solidarity and legitimacy—that this argument does not univocally support the formation of transnational

³Habermas is by no means alone in thinking about the achievement of the nation in terms of forging bonds of solidarity. Some of the recent defenders of nationalism focus on this aspect of life within nations. See, e.g., Miller 1987–88, Weiler 1997, Tamir 1993.
political structures. It might be that Hobbesian realists take the same point of departure in order to argue for the strengthening rather than the weakening of the structures of national sovereignty (see, e.g., Enzensberger 1994; Brown, Lynn-Jones and Miller 1995). This sobering critique maintains that given that developed democratic countries cannot solve all the world’s problems, the least—and perhaps the most?—they can do is to make sure that their own conditions of legitimacy are preserved, even if the price to be paid is the implementation of exclusionary policies.

One need not be a realist of the kind just mentioned in order to have qualms about this first line of defense of cosmopolitan structures. After all, it is still an open question whether supranational arrangements would be more or less effective than nation states at adopting policies that would foster solidarity and legitimacy. Here the evidence is ambiguous: While it can be argued that economic transfers within the European Union, and, even more so, measures to prevent a race to the bottom, have effectively helped sustain the conditions of social solidarity and legitimacy within and across European countries, the weight of competitive economic imperatives in the recent trend towards globalization warrants some doubts.

b. The Argument from the Democratic Deficit of Nationalism

There is one further problem that needs to be addressed at this point. According to Habermas’s own analysis, the nation state was instrumental in giving rise to bonds of solidarity, which in turn were essential for the establishment of democracy. As he puts it, the “invention of the people’s nation (Völksnation) had a catalyzing effect on the democratization of state power. A democratic basis for the legitimation of domination would not have developed without national self-awareness, because it was the nation that first created solidarity between persons who until then had been strangers to each other” (Habermas 1997, 171). But if this is so, it must then be asked whether democracy can survive independently of the nation. Examining this issue will allow me to broach one of the many ways in which Habermas is sensitive to questions of difference—the second great virtue of his position—and at the same time, raise questions that remain outstanding.

Despite the historical importance of the convergence of democracy and nationalism in the creation of the modern nation state, Habermas insists that the link between them is merely contingent. Indeed, he argues that there is a tension between nationalism and democracy, that the tension is coming to a head, and that this is another reason to start thinking about forms of political organization that would allow us to preserve democracy beyond the framework of the nation state. The inherent tension stems from the fact that the idea of the nation is usually understood in terms of ascriptive criteria like ethnicity, or a common language, or a shared culture, whereas democracy is founded on the ideal of voluntary association and universal human rights.
Habermas wants to argue that democracy can shed its dependence on nationalism now, and that it is urgent to do so, for the twentieth century has manifested grotesquely the dangers of clinging to this relationship. This implies that he disputes the communitarian claim that the effective operation of a constitutional democracy has as a necessary condition a culturally or ethnically homogeneous population. In framing this argument Habermas makes use of a pair of related distinctions that is becoming important in discussions not just about nationalism, but more generally about political justification in multicultural contexts. He distinguishes between a civic and an ethnic sense of the nation, and between a political and a majority culture. The idea, of course, is to restrict the object of politics so as to make political agreement more feasible. A functioning democracy does not require agreement over cultural practices in general, but rather, a still demanding but more modest agreement about abstract constitutional principles and more concrete legal-political practices. Nationalism, according to this view, may have played an instrumental role in extending the notion of citizenship rights to previously disenfranchised groups, transforming thereby the Adelsnation, the nation of the nobility, into the Volksnation, the nation of the people (Habermas 1998a, 110). But in this transformation it is the civic and not the ethnic sense of the nation that is crucial, according to Habermas. The content of the rights that were extended remained firmly tied to abstract principles such as equality and democracy. We now find ourselves, he claims, in a situation in which solidarity need not be mediated by identification with a concrete and particularistic majority culture, but one which expresses a shared legal-political culture: “[I]n complex societies the citizenry as a whole can no longer be held together by a substantive consensus on values but only by a consensus on the procedures for the legitimate enactment of laws and legitimate exercise of power” (Habermas 1998e, 225). In other words, modern democracies are integrated not by old fashioned patriotism, but by what Habermas and others call “constitutional patriotism,” a reflexive and abstract form of identity which is manifested in the “readiness to identify with the political order and the principles of the Basic Law” (Habermas 1989, 257). One might call this a form of civic patriotism, which does not eliminate but merely subordinates regional, inherited loyalties.

It should be apparent why this is a useful concept in this context. In the first place, this form of social integration is meant to accommodate the inevitable pluralism of contemporary societies. It is meant to express an abstract agreement about basic norms rather than cultural convergence on substantive matters of the good or productive life. In the second place, to the extent that different constitutional traditions embody the same set of rights, it is plausible to think, according to Habermas, that the same sort of constitutional patriotism could accommodate a new, supranational form of integration. If for example, the Basques, the Catalans, the Danish, the Greeks, and so on, all think that attachment to constitutional, democratic principles
lies at the core of their political identity, it is easier to envisage their coming together in some form of political organization than if each persists in subordinating their political ideals to their specific cultural identities (see Habermas 1996, chap. 3, sec. 3; 1998a, 117–19).

The foregoing seems to me to merely express a hope, however. Whereas it is clear how nationalism played an integrative role in the emerging democracies of the eighteenth and nineteenth centuries, or, more apropos here, whereas it is clear why the notion of rights had to be complemented by nationalism, it is not so obvious that constitutional patriotism, on its own, can integrate supranational entities. It is possible to cull from Habermas’s work two responses to this doubt: The first is an account of the role of legal institutions in the formation of the modern identity of citizens. This account reminds us that modern political consciousness is not simply a result of membership in prepolitical ancestral communities based on kinship. Rather, national identity is at least in part a function of politics, of the active enjoyment of the status of citizen within a political community. Legal structures help to constitute identity. So, for instance, the identity of the French is bound up not merely with a shared cultural identity, but with the shared legal-political institutions that are part of the legacy of the Revolution. Legal-political institutions have what Habermas calls a catalytic or inducing effect on the formation of identities (see, e.g., Habermas 1998c).

This might be helpful initially, but I do not think that it addresses the objection fully. Nationalism, as Habermas himself argues, was useful for it was a means of determining membership of a particular political community. Nationalism, that is, attempts to provide an answer to the question that Robert Dahl posed so clearly: “To say that all people […] are entitled to the democratic process begs a prior question. When does a collection of persons constitute an entity—‘a people’—entitled to govern itself democratically?” (Dahl 1989, 183). The idea of the nation provides an answer to the question of the scope of particular legal institutions, a question that constitutional principles themselves do not answer. Something prior to constitutional principles determines who falls under their authority. Constitutional patriotism, like the very idea of republican government, begs this question.

Let me illustrate the point. Habermas has plausibly defended the idea that emerging European institutions will have the mentioned catalytic effect, that is to say, that they will help precipitate the formation of a European identity (different from, but not eliminating, rather overlaying, the identity of French, German, Danish, and so on). But of course, constitutional patriotism does not, on its own, integrate the citizens of the European Union. After all, this is still a European Union. Something else helps determine membership and solidifies integration, and this is a shared history, shared traditions (and, the Turks would add with chagrin, a shared religion). The account of the impact of legal-political structures cannot, by itself, do this. In other contexts it would be even less unreasonable to doubt that constitutional patriotism is a
sufficiently strong integrative force for supranational integration. The experiences of many nation states do not provide strong grounds for optimism: Legal institutionalization has failed to lead many post-colonial countries—even some highly culturally and ethnically homogeneous ones—to the requisite degree of integration, in some cases after decades or centuries of constitutionalization. The history of Latin American countries, for instance, provides plenty of examples of the many ways in which constitutionalization may fail to lead to political integration, let alone to its supranational version.

Habermas’s second response to the doubt about whether there is a sufficiently strong functional replacement for the integrative force of nationalism, one that would lead to supranational integration, is the argument according to which the growing awareness of the globalization of present dangers (environmental disasters, the proliferation of arms, organized crime, etc.) “has long since united the world into an involuntary community of shared risks” (Habermas 1998d, 186; 1998b, 150). But there is a significant difficulty with this last suggestion. Although it might very well be true that these risks are shared, since they do not impact equally on different countries, and, especially, since different countries have greatly different possibilities of responding to them, it is plausible that the threats, rather than leading to increased cooperation will lead to increased protectionism and friction. Even in the environmental arena, the evidence supporting increased cooperation is less than unambiguous (see, e.g., Shue 1997). Regarding international crime, a restricted problem about which one would expect unproblematic cooperation, the difficulties in establishing international tribunals or indeed a European police task force (let alone a world-wide force), the constant acrimony surrounding judicial evidence-sharing, and the general inequities in the treatment of criminals and in the distribution of the burdens of fighting them, raise questions about whether an awareness of common risks is a sufficiently strong integrative force to lead to cosmopolitan institutions.

c. The Argument from Lack of Guarantees

Given the ambivalent results of the first two lines of defense, a strong position in favor of cosmopolitan structures cannot rest solely upon these foundations. Habermas offers another familiar defense of cosmopolitanism, this one more straightforwardly normative in character. Part of the argument is presented as a response to Kant’s essay of 1795 on Perpetual Peace (Kant 1983b) in which Kant trims the transnational sails that he had unfurled eleven years earlier in his Idea for a Universal History with a Cosmopolitan Intent (Kant 1983c). In Perpetual Peace, as is well known, Kant argues that perhaps his earlier support for a world government might lead to a form of oppression, and defends instead a federation of sovereign states. Indeed, Kant introduces a distinction between a “universal state” (Völkerstaat) “based upon public laws backed by force and submitted to by every nation,” (Kant 1983a, 89) and a “federation of
nations” (Völkerbund) a more modest structure whose aim is not to constitute a legal order to increase welfare and justice, but rather to abolish war (Kant 1983b, 115–20). Kant was trying, as so many people have since then, to reconcile national sovereignty with the goal of maintaining peace in the long run.

Habermas, by contrast, gives up on this aspiration. For him, Kant’s dual aspiration is ridden with tension. The concern to leave intact the sovereignty of the members of the federation will predictably conflict in hard cases with the need to oblige unruly members to subordinate their own raison d’etat so that peace may be perpetuated (see Habermas 1998d, 166–71). Since Kant’s federation is eminently dissolvable—so as to respect the sovereignty of its individual members—there is nothing that obligates unruly members to preserve peace. Kant’s “voluntary association” does not give rise to any actionable rights, and hence, its permanence and effectiveness remains unexplained. For Habermas, the promotion of peace requires that states be under the obligation to act in harmony with the principles of the federation, and this entails a right of intervention in defense of this obligation on the part of other member states.

The core of Habermas’s third defense of cosmopolitanism, then, lies in the worry that the nation state is not a reliable guarantor of human rights. Habermas acknowledges that international law took a great leap forward after the Nuremberg trials established the principle that individuals are proper subjects of international law, and therefore that they can be held accountable for deeds committed within the borders of their own nation and under the authority of their own state. And yet, the present international system remains a hybrid that resembles Kant’s federation in its desire to give a role both to individual rights and to the rights of nation states implied by the notion of national sovereignty. The present UN-based system is an association not of peoples but of nation states. As such, the organization defends the principles of mutual respect, non-intervention, and consent as the basis of obligation to comply with international law.4

Leaving aside practical difficulties with Habermas’s proposal—no small concession—I want to concentrate on the normative aspects of this third defense. Supporters of the nation might object to Habermas’s proposal by pointing out that it is not obviously clear that a commitment to a universalistic conception of rights, on its own, requires a commitment to cosmopolitan structures. At least conceptually, they will argue, moral universalism is in principle compatible with a world organized into a system of states. Liberal political theory has traditionally asserted this position. The demands of universalism could be met “distributively”: Assuming that the different nation-states in the world system respected individual rights, each state would articulate and exercise its power in accordance with a legal system that embodies the same fundamental rights and obligations found in all the

4See Laberge 1998, for an interesting comparison between Kant’s federation, the UN, and NATO.
other legal systems. So, if the objection holds, a further set of steps would be needed to go from this abstract argument about individual rights to a conclusion in favor of cosmopolitan political organization.

Charles Beitz has spelled out a distinction between moral and institutional cosmopolitanism which a critic might use as the basis of an objection to this line of defense: *Institutional* cosmopolitanism “holds that the world’s political structure should be reshaped so that states and other political units are brought under the authority of supranational agencies of some kind.” *Moral* cosmopolitanism “concerns itself, not with institutions themselves, but with the basis on which institutions, practices, or courses of action should be justified or criticized. Its crux is the idea that each person is equally a subject of moral concern, or alternatively, that in the justification of choices one must take the prospects of everyone affected equally into account” (Beitz 1994, 124). Armed with this distinction, Beitz writes:

The doctrine of universal human rights is cosmopolitan in its foundations without being cosmopolitan in its institutional requirements. That is, the most natural foundation of human rights doctrine lies in the related cosmopolitan ideas that conceptions of individual well-being are not fundamentally relative to culture or geographical location and that, in the assignment of responsibility for satisfying basic individual needs, national (or cultural or ethnic) boundaries do not necessarily play a limiting role. At the same time, however, human rights doctrine does not prescribe any particular institutions (or set of institutions) for the world as a whole. Instead, it specifies minimum conditions that any institutions should satisfy. Accordingly, human rights doctrine does not rule out the possibility—indeed it trades on the hope—that its institutional requirements can be satisfied within a political structure containing nation-states more or less as we know them today. (Beitz 1994, 127)

But this objection misses its target. Understanding why it does is an important part of understanding the distinctiveness of Habermas’s approach to cosmopolitanism. I consider it a great advantage that Habermas, unlike other commentators, has developed his views on cosmopolitanism as part of a wide-ranging theory of democracy and rights. Of course, one could say that in this way his views about this concrete issue are freighted with the difficulties that may afflict the theory as a whole. But if the theory is a strong one, the problem is ameliorated, and the end result is that the link between cosmopolitanism and democracy is explicitly established. This interest in democracy I take to be the most salient feature of Habermas’s take on cosmopolitanism.

So, the crucial point at this juncture is that Habermas’s theory of rights is not a moral, but a *political* theory of rights. In other words, the objection misses the target because Habermas is not arguing that moral premises lead directly to institutional consequences. Moral premises, as I argued in section 1 above, can motivate the adoption of a cosmopolitan attitude, but they cannot by themselves ground cosmopolitan institutions. Platonism is dead. In highly differentiated and complex societies, one does well to be suspicious of efforts to derive institutions from moral considerations alone.
One might say that cosmopolitan institutions, rather than being derived from morality, follow from the requirements of politics themselves. Let me explain. According to Habermas, despite the fact that rights can be justified by appealing to moral reasons, that is, to reasons that can be universalized, human rights are not moral but legal in character. As actionable claims, rights are structurally part and parcel of legal orders (Habermas 1998d, 189–93; 1996, sec. 3.3). This account of the nature of rights, of course, does not answer which rights people should have.

This question is answered from a discourse-theoretic perspective as part of a prior, more general political question, namely which rights must persons grant one another if they want to legitimately regulate their life in common by means of positive law (see Habermas 1996, 118, 122, 126, 129). Consistent with the procedural aims and with the discursive character of his project, Habermas argues that in answering this question nothing must be presupposed other than the discourse principle—which ultimately follows from the presuppositions of communication—and the notion of law—which is implied in the formulation of the question itself (ibid., 127–9). Now, it turns out that each of these elements is pregnant with consequences. Of particular relevance in this context is that according to Habermas, the form of law itself presupposes some rights. Laws per se refer to legal subjects, and these in turn are constituted by means of the attribution of certain rights and obligations. In his words, “there is no law without the private autonomy of legal persons in general” (Habermas 2002, 201). This private autonomy is secured by means of rights which include “the right to the greatest possible measure of equal individual liberty,” the rights which secure “the status of a member” in an association under the rule of law, and the rights that guarantee legal protection (Habermas 1996, 122).

However, the legitimacy of law is not exhausted in the mere respect for individual rights to autonomy. Habermas proposes two reasons to explain why this is so. First, limiting rights to autonomy rights involves blocking the self-understanding of citizens as the authors of their own laws. In the absence of political rights, no matter how liberal a regime of autonomy rights might be, citizens would at best enjoy a paternalistically imposed set of rights. Second, without political participation the equality of rights is always under threat. Consequently, in addition to autonomy rights, political rights are necessary as well. On the other hand, political rights, by themselves, are not sufficient for the exercise of popular sovereignty either. The correct way of thinking about the relationship between legal legitimacy and democracy, Habermas maintains, presupposes the realization that citizens participate in the political process as legal subjects, which, again, presupposes the rights to private autonomy. As he summarizes his position,

[start of next paragraph]
of their equally protected private autonomy, they are sufficiently independent; on the other hand, they can realize equality in their enjoyment of private autonomy only if they make appropriate use of their political autonomy as citizens. (Habermas 2002, 202)

The broader aim of Habermas’s theory is to establish that human rights and democracy presuppose one another. Although the theory is originally framed in terms of the sorts of rights that members of the same nation-state ought to grant one another, the hypothetical question that it answers does not predetermine the scope of the political unit for which the answer remains valid. In other words, any community, local, national, regional, or global, whose members want to norm their interactions by means of legitimate positive law, ought to institutionalize the same set of rights. After all, the aim of these rights is to attempt to secure the rational acceptability of decisions taken by means of legitimate law. Since law can be appealed to in order to regulate the mutual interactions of different sorts of subjects in a variety of contexts, this means that the hypothetical procedure of a mutual conferring of rights can be performed at different levels of political organization, beyond the level of particular nation-states, and it would require, all the same, the institutionalization of all the relevant rights, this time across national borders. While the basic human rights that must be conferred in order to establish a legitimate constitutional regime are essentially the same in each case, the political institutions required for their implementation would have to reflect the different scope of the practical matters to be regulated and the different composition of the populations subject to the laws enacted. Thus Habermas’s general theory of human rights points to a global political order in which sovereignty, which in the modern state system resided more or less exclusively in the nation state, would be divided and dispersed among local, national, and regional regimes, with a global regime taking responsibility for the implementation of human rights at the global level. This argument, then, seeks to justify cosmopolitan rights from the standpoint not of a moral theory but of a (normative) political theory of rights that seeks to answer which rights individuals ought to grant one another if they want to regulate their interactions by means of legitimate positive law. An objection based on a distinction between moral and institutional cosmopolitanism leaves the argument untouched. Of course, this line of defense makes the justification of cosmopolitanism contingent on the acceptability of the theory of rights, itself a substantive consideration, but one which I cannot take up here.

Conclusion

Different arguments in favor of cosmopolitanism are offered in, and can be constructed on the basis of, Habermas’s work. None proves with deductive force that cosmopolitan political structures ought to be adopted, but that is no fault in the position. The days of a science of politics understood in this
way are long over. Just as it seems correct to argue that the justification of particular laws involves the full range of reasons, practical, ethical, and moral, it makes sense to think that in the justification of legal orders in general—including a cosmopolitan order—practical, ethical, and moral considerations will play a role. No single kind will be decisive. This makes the justification of cosmopolitanism messy. Habermas’s is certainly complex, and, as I have pointed out, it needs revisions at different junctures. But at least it has the virtues of acknowledging the virtues (as well as the limitations) of the nation state, of being sensitive to difference, and of emphasizing the importance of democratic rights even at the cosmopolitan level.

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