

Cosmopolitan Democracy and the Rule of Law

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Abstract. The ongoing process of globalization calls out for novel forms of transnational liberal-democratic decision-making. In this spirit, David Held and a group of interlocutors (especially Daniele Archibugi) propose an ambitious model of “cosmopolitan democracy.” Although the proponents of cosmopolitan democracy are right to insist that transnational liberal democracy must avoid the dangers of an excessively centralized world-state, their own efforts to do so ultimately fail. The weaknesses of their ideas about the notion of the “rule of law” generate unforeseen theoretical difficulties for their account. Any transnational network of liberal-democratic governance worth defending will need to do a better job preserving a substantial quotient of traditional rule of law virtues.

What are the likely consequences of globalization for democratic theory and practice? In a series of path-breaking publications that have garnered a remarkable amount of scholarly attention in a brief span of time, the political theorist David Held and a group of interlocutors (most important, Daniele Archibugi and Anthony McGrew) have tackled this question by means of an audacious model of “cosmopolitan democracy,” according to which the democratization of transnational politics now belongs at the top of the agenda (Archibugi 1992, 1995, 1998, 2000; Archibugi and Held 1995; Archibugi, Held and Koehler 1998; Held 1991, 1992, 1995a, 1995b, 1998, 2000; McGrew 1997, 1998; McGrew and Held 1993). Working in cooperation with an interdisciplinary group of scholars, Held and his intellectual compatriots argue that the ongoing transnationalization of key forms of human activity calls out for the development of no less transnational modes of liberal democratic decision-making.¹ A host of recent social trends (the globalization of the

¹ Their research was conducted, at least for a period of time, under the auspices of the European Commission-funded Network of European Scholars on the Political Theory of Transnational Democracy: Citizens, Minorities, and People in Europe. The project was interdisciplinary in scope, and a number of other scholars (including David Beetham, Mary Kaldor, Martin Koehler, Andrew Linklater, and Richard Falk) have played important roles in contributing to the theory

economy, for example, as well as the growing significance of cross-border environmental problems) not only demonstrates that the existing nation-state is ill-prepared to deal with the regulatory imperatives of our times, but also raises fundamental questions about the traditional attempt to weld liberal democracy onto the framework of the modern nation-state. Modern liberal-democratic theory typically presupposed the existence of substantial symmetry and congruence between citizen-voters and decision-makers at the national level, and the key categories of consent, constituency, participation, and representation were accordingly conceived within the parameters of the nation-state (Held 1999, 81). As national borders become ever more porous, however, a series of difficult and thus far unanswered questions force themselves onto the agenda of democratic theory: "What is the proper constituency, and proper jurisdiction, for developing and implementing policy issues with respect to ... the use of nuclear energy, the harvesting of rain forests, the use of non-renewable resources, the instability of global financial markets, and the reduction of the risks of nuclear warfare" (Held 1998, 22) in light of their profound cross-border consequences? Held's and his interlocutors' answer to this question is that we need to update the liberal-democratic vision by undertaking a series of dramatic institutional reforms. Stated in the simplest terms: those policy arenas whose transnational scope overwhelms existing nationally-based liberal democratic institutions require a dramatic strengthening of nascent forms of transnational liberal-democratic authority (under the auspices of the UN, but also regional organizations such as the EU or NAFTA) along with the establishment of new forms of transnational decision-making (for example, cross-border popular referenda).

The resulting model of "cosmopolitan democracy" has generated significant interest among political theorists, and a number of useful recent publications have already been devoted to critically analyzing Held's proposals from a host of different theoretical perspectives (Archibugi, Held and Koehler 1998; Coates 2000; Dahl 2000; Dryzek 1999; Goerg and Hirsch 1998; Hirst and Thompson 1996; Holden 2000; Schmitter 1999; Shapiro and Hacker-Cordon 2000; Thompson 1999; Zolo 1997, 2000; Zuern 1998, 248–9). Here I cannot hope to offer an adequate critical summary of that increasingly multisided debate, in which communitarian-inspired attempts to deflate cosmopolitan democracy's universalistic Kantian features play an especially prominent role (Bellamy and Castiglione 1998; Kymlicka 2000; Thompson 1998; Wendt 2000). For now, let me just state that I find the communitarian response unconvincing (Scheuerman 2001a). Nonetheless, it is striking that little critical attention has been paid to cosmopolitan democracy's purported fidelity to classical conceptions of the "rule of law." Held repeatedly suggests that

of cosmopolitan democracy, whose fundamental core has been sketched out most clearly by Archibugi and Held in a number of essays, books, and jointly-edited volumes. I should also note that the theory of cosmopolitan democracy has influenced some of Habermas' recent reflections on globalization: Habermas 1998, 159–63.

“cosmopolitan democratic law” builds on the best of the western legal tradition, even going so far as to dub his updated version of liberal democracy a cosmopolitan “democratic *Rechtsstaat*” (Held 1995a, 221–38; 2000, 106–7). As I hope to show here, this claim not only obscures the extent to which Held and his colleagues in fact *break* with traditional conceptions of the “rule of law,” but the weaknesses of their legal argumentation also point to the existence of immanent flaws within their overall vision of transnational democracy. Both Archibugi and Held insist that one of cosmopolitan democracy’s main appeals is that it circumvents the ills of unacceptable models of a hyper-centralized “planetary Leviathan” or world-state likely to prove incapable of doing justice to cultural, religious, and ethical diversity (Archibugi 1995, 132–5; 1998, 215).² They proudly assert that their model of “cosmopolitan democratic law” not only can succeed in effectively restraining the exercise of political power on the global level, but that it would continue to provide significant room for decision-making at the local and national levels. Presumably there is no legitimate reason to fear cosmopolitan democracy as a potential cover for a new and potentially onerous form of imperialism, and opponents of centralized world-government would do well to join forces with those committed to realizing transnational democracy in accordance with their ideas.³

Unfortunately, the legal ills of cosmopolitan democracy undermine precisely those features that initially make it so attractive. These flaws suggest that we would do well to pursue more modest—but nonetheless important—experiments in buttressing democracy at the global level. I first provide an exegesis of the conceptual foundations of the idea of a cosmopolitan democratic *Rechtsstaat* (I), before turning to examine its conceptual weaknesses (II).

I

Cosmopolitan democracy is predicated on the plausible notion that a growing range of policy concerns explodes the confines of both the traditional nation-state and Westphalian system of international relations in which the nation-state has long been embedded. In light of a host of phenomena providing evidence of a “rapid growth of complex interconnections and

²Most participants in the ongoing debate on transnational democracy share similar reservations about world government. A perceptive critical discussion of this idea is offered by Narr and Schubert 1994, 233–47. See also Kelsen’s criticisms of it: Kelsen 1944, 12.

³In a similar vein, Ingeborg Maus (1998) endorses neo-Kantian models of international relations, but she worries that contemporary Kantian models of global governance suffer from substantial conceptual and political confusion. Like Maus, I am worried that core features of the idea of the “rule of law” are obscured by Held. In some contrast to Maus (1992), I am less interested in making sure that we identify the “right” interpretation of Kant’s legacy for contemporary political and legal theory. But I am very much indebted to a characteristically enlightening conversation with her in Frankfurt where she planted some doubts in my mind about cosmopolitan democracy’s rule-of-law credentials. This essay represents an attempt to follow up on those doubts.

interrelations between states and societies" along with the growing "intersection of national and international forces and processes," existing nation states increasingly seem poorly equipped to tackle the most pressing political concerns of our times *either* unilaterally *or* by means of traditional forms of interstate cooperation (Held 1998, 12).⁴ National legislation too often is of limited effectiveness in the face of transnational problems; regulations passed by impressive second-tier powers (France, Germany, or Italy), or even a world power like the U.S.A., are unlikely to immunize them against ozone depletion, for example, or the problematic side-effects of global trade. The heightened significance as well as the lasting character of many transnational policy tasks render traditional forms of treaty making inadequate; the temporary and *ad hoc* character of most treaties meshes poorly with the regulatory undertakings at hand. From a normative perspective, the profound impact on domestic politics of global financial markets or the environmental crisis makes it difficult to accept the traditional view that *inter*-national matters can be left in the hands of small groups of (typically non-elected) foreign policy elites: If we are to take liberal-democratic notions of legitimacy seriously, we need to conceive of new ways to democratize decision-making concerning issues no longer narrowly "international" in the traditional sense of the term. In a similar vein, it is unclear how Realist "reason of state"-oriented views of interstate politics offer satisfactory conceptual resources for tackling the imperatives of transnational policy making, especially in light of the fact that Realism's dogmatic insistence on the primacy of the "national interest" makes less and less sense conceptually in a world in which the border between "national" and "transnational" interests becomes blurred (Held 1998, 22; Archibugi 1998, 205–6). Realist theories of international politics miss the boat in part because they reify precisely that institutional constellation, the modern nation-state, presently exhibiting signs of decay.

Cosmopolitan democracy's exponents propose that "[d]eliberative and decision-making centers beyond national territories are [to be] appropriately situated when those significantly affected by a public matter constitute a cross-border or transnational grouping, when 'lower' [local or national] levels of decision-making cannot manage and discharge satisfactorily transnational ... policy questions, or when the principle of democratic legitimacy can only be properly redeemed in a transnational context" (Held 1998, 22–3). Since many issues continue to affect constituencies primarily local or national in character, this recommendation should by no means entail the hypercentralization of decision-making. Thus, Archibugi and Held repeatedly describe themselves as advocates of a multi-tiered political system in which

⁴In this account, globalization is a multidimensional (economic, environmental, cultural, legal and political) phenomenon (Held, McGrew, Goldblatt and Perraton 1999). Its most obvious manifestations are probably economic (the growth of multinational firms, global currency markets, free trade) and environmental (ozone depletion, global warming).

new forms of transnational liberal-democratic authority, concerned exclusively with those issues possessing genuinely transnational effects, would *complement* existing forms of liberal democratic decision-making. They also seem assured that this proposal amounts to more than yet another doomed "liberal idealist" pipedream inconsistent with the fundamental laws of international politics. Though critical of its widely-acknowledged democratic deficits, they not only see the EU as an important stepping stone to more ambitious models of global governance, but they also interpret it as a present-day approximation of their own quest to develop transnational political authority "midway between the confederal and federalist models" of transnational governance (Archibugi 1998, 215). Like the EU, experiments in cosmopolitan democracy require closer ties among its units than those typically characteristic of loosely-connected confederations of sovereign states (for example, NATO) since globalization increases the need for permanent forms of democratically-legitimized transnational cooperation. Yet cosmopolitan democracy would avoid the relatively high degree of centralized power exhibited by existing federal systems (the U.S.A., for example, or Federal Republic of Germany) since "it is undesirable to go beyond a given threshold of centralization on a scale as vast as a global one" (ibid., 216). The EU example is also illuminating since it suggests the possibility of complex political institutions able to realize novel forms of sovereignty inconsistent with the traditional "hierarchical relationship between central institutions and individual states" (ibid.). In this account, there is no principled reason to underscore potential tensions between regional and global forms of political authority: Regional liberal-democratic political blocs not only represent useful experiments in transnational democracy, but regional decision-making would also continue to play a decisive role in a more universal global network of liberal-democratic decision-making when interests affected are genuinely regional in scope and thus require a regionalized solution.⁵

What then is the role of *law* in this model? Archibugi and Held advocate a system of *cosmopolitan* "democratic public law" in some contrast to existing *inter-national* law in part because they envision a more ambitious form of jurisprudence than implied by the traditional notion of a "law between states." Since the Nuremberg Trials, international rights protections have tended to demote the role of the nation-state while anticipating, albeit incompletely, the possibility of transnational citizenship built on an unmediated relationship between individuals and global institutions. A key task of cosmopolitan democratic law is to further this cause. New forms of regional and global liberal-democratic decision-making would rest directly on an emerging transnational "community of fate," and an unmediated legal relationship between individuals and transnational decision-making bodies would come to operate in a manner thus far only hinted at within existing

⁵Other observers are less sanguine about the relationship between regional and global law (Cassese 1986).

forms of international law. Transnational courts would ultimately gain jurisdiction over many key conflicts pitting individuals against existing nation-states. In order to help ground this transformation of *inter*-national law into *trans*-national law, Archibugi and Held appeal to Kant's famous notion that "universal hospitality" represents a universal right transcending the claims of particular nations and states and legitimately extending to all members of the human community.⁶ But they radicalize Kant's claim by provocatively suggesting that "in a highly interconnected world" universal hospitality entails a more far-reaching set of rights than Kant originally had in mind. Given the process of globalization, universal hospitality today allegedly implies nothing less than the "mutual acknowledgement of, and respect for, the equal and legitimate rights of others to pursue their own projects and life-plans" (Held 1995a, 228; also Archibugi 1992, 310–17). Reinterpreted in accordance with present-day social and economic imperatives, Kant's cosmopolitan right to hospitality points the way to an audacious model of transnational law committed to realizing an extensive set of basic rights.⁷

More fundamentally, cosmopolitan democracy builds directly on the liberal-democratic tradition insofar as it aspires to realize both the principles of self-determination and limited government. It promises protection from arbitrary power as well as meaningful possibilities for self-determination, individual self-development, and economic opportunity, and its commitment to upholding "cosmopolitan democratic public law" is essential to its liberal-democratic credentials (Held 1995a, 150). Only by exercising political power in accordance with a legal "structure that is both constraining and enabling" can transnational liberal democracy, like its nationally-based cousin, realize both self-determination and a commitment to the ideal of the rule of law (*ibid.*, 147).

Held has gone furthest in offering a detailed account of the model of law at the base of this vision. In his view, cosmopolitan democratic law ultimately rests on liberal democracy's underlying "principle of autonomy," whose chief characteristics are already embedded in the liberal-democratic practices and traditions of the West (*ibid.*, 148). The principle of autonomy represents the "constitutive basis of democratic public law" and thus serves as an indispensable basis for political legitimacy in any liberal-democratic political community (*ibid.*, 153, 163). Influenced by Rawls' conception of political liberalism, Held considers it possible to pursue his Kantian intuitions

⁶Kant (1970, 105–6) was already able to observe that "[t]he peoples of the earth have thus entered in varying degrees into a universal community, and it has developed to the point where a violation of rights in *one* part of the world is felt *everywhere*. The idea of a cosmopolitan right is therefore not fantastic and overstrained; it is a necessary complement to the unwritten code of political and international right, transforming it into a universal code of humanity."

⁷On Kant's relevance for contemporary models of global governance, see the important essays collected in Lutz-Bachmann and Bohman 1997 as well as Maus's comparatively heretical—and provocative—statements (Maus 1998).

without committing himself to controversial philosophical justifications, and he expressly distances himself from Habermas' attempt to ground a similar model of democratic politics in a demanding "theory of communicative action" (ibid., 166). In this view, the liberal-democratic vision of autonomy requires a commitment to diverse clusters of rights that alone make it possible for "people to participate on free and equal terms in the regulation of their own associations" (ibid., 191). Making T. H. Marshall's famous account of the evolutionary dynamic of (legal, political, and social) rights look relatively cautious (Marshall 1950), Held argues that a legitimate interpretation of cosmopolitan democratic public law centers around a bold set of seven types of (health, social, cultural, civic, economic, pacific, and political) rights. These include traditional liberal-democratic rights such as due process, equal treatment before the law, freedom of thought and expression, freedom of religion, adequate and equal possibilities for political deliberation, and universal political participation, as well as social-democratic, environmental, and even feminist rights to physical and emotional well-being, universal childcare, a guaranteed minimum income, sustainable environment, control over one's own fertility, universal education, lawful foreign policy, political accountability, as well as a mixed economy consisting of diverse forms of consumption and production (Held 1995a, 190–201).

Held is well aware of how unrealistic some of these rights are likely to appear in the existing political climate, and he concedes that it may be impractical to expect them all to be fully realized at the present time (Held 1995a, 210). But this generates no real intellectual anxiety on his part: A substantial concretization of them is presently attainable, and thus they can legitimately function as a yardstick according to which political action should be evaluated (ibid., 206–16). Although basic rights "must be defined broadly" in order to assure their abstract and general character "to guide and resolve disputes among ... interests in particular conflict situations," they lay "down an *agenda* for democratic politics, but necessarily leave ... open the exact interpretation of each of the items on the agenda" (ibid., 200–1). The justiciable charter of rights proposed here constitutes the basis for a "rule of law" to the extent that it remains legitimate to expect "[r]ules, laws, policies and decisions" to be made within their confines (ibid., 205). Held clearly believes that they can successfully set "the form and limits of public power" in such a way as to make his vision deserving of the noble title of "democratic *Rechtsstaat*" (ibid., 216). His proposed charter of rights thus offers "an agenda for change and direction for policy to which 'offending' institutions, laws and policies could, in principle, adapt if they are to claim justifiably the mantle of democracy" (ibid., 205). To the extent that rights *enable* the exercise of political power by determining how it is to be properly channeled, while simultaneously *limiting* the exercise of power by focusing on its proper form and scope, this model allegedly offers an effective structure for a "democratic legal order—[a] democratic *Rechtsstaat*" in which

political power is “circumscribed by, and accounted for in relation to, democratic public law” (Held 2000, 106).

In the final analysis, this model of a transnational rule of law consists of the following core components. When faced with issues impacting on genuinely transnational groupings, supranational legislative devices should strive to act in accordance with a detailed—but by no means fully realizable—charter of rights, and these rights thus should “be enshrined within the constitutions of parliaments and assemblies” (Held 1995a, 272). In order to achieve this goal, transnational decision-making authorities would be empowered to pass “framework” legislation whose basic outlines would correspond to the aims of cosmopolitan democratic law, but whose application and implementation should be left in the hands of lower (national or local) levels of governance; on this point as well, Held has been inspired by the EU and its relatively limited reliance on traditional forms of uniform general legislation, and he seems to accept the view that transnational legislation will need to take a relatively flexible form so as to deal effectively with the challenge of pluralism at the global level (*ibid.*, 255, 274–5).⁸ Transnational courts play a pivotal role in this conception as well. Although cosmopolitan democratic law “empowers” legislators to pursue an ambitious policy agenda, the authority of courts will be extended “so that groups and individuals have an effective means of suing political authorities for the enactment and enforcement of key rights” (*ibid.*, 200, 272). A system of judicial review would need to be established in order to make sure that legislators exhibit proper fidelity to the rights constitutive of cosmopolitan democratic law. In order to bring about this goal, Archibugi and Held propose that we build on Hans Kelsen’s famous proposal to extend the compulsory jurisdiction of international courts. Kelsen’s courageous defense of a robust system of international justice has long been neglected, but Archibugi and Held believe that globalization provides Kelsen’s hopes with a fresh impetus (Held 1995a, 272; Archibugi 1995, 146–8; Kelsen 1944, 3–67).

II

Archibugi and Held conveniently fail to mention a striking difference between their championship of compulsory jurisdiction and Kelsen’s. To be sure, Kelsen hoped that international courts would undergo invigoration, and he proposed that individuals (for example, war criminals) could be held more or less directly punishable on the basis of international legal norms. Kelsen was no enemy of either an ambitious welfare state or social democracy (Kelsen 1955). Whereas cosmopolitan democracy institutionalizes mandatory jurisdiction for a vast range of political, social, economic, and environmental rights, however, Kelsen’s defense of compulsory jurisdiction

⁸ In a similar vein, see Zuern 1998, 345.

for international courts focused on the *fundamental issue of war and peace*, and a careful reading of his discussion of this issue suggests that he endorsed a more modest—yet indisputably innovative—model of compulsory jurisdiction for global courts.⁹ Indeed, Archibugi's and Held's enormously ambitious proposals arguably leave them vulnerable to Kelsen's wise admonishment that the reformer of international law would do well not to compromise "great ideals" while simultaneously accommodating "his postulates to what is politically possible." Progress in international law is only achievable if we avoid directing our suggestions "toward a goal which, if at all, can be reached only in a distant future; this is unreal and therefore politically less than nothing" (Kelsen 1944, viii). Archibugi and Held certainly offer "great ideals," but their recommendations for the international state system should at least raise the question of whether Kelsen's insistence on the virtues of a "slow and steady perfection of the international legal order" undertaken in a sober and "realistic" tone has been sufficiently heeded (*ibid.*, ix). To the extent that cosmopolitan democracy means dismantling core components of the international state system, it points the way to revolutionary changes in contemporary political life.

My main aim here is to criticize neither cosmopolitan democracy's utopian overtones nor its misleading reliance on Kelsen. I mention these differences vis-à-vis Kelsen only in order to raise initial doubts about cosmopolitan democracy's legal credentials. As I hope to demonstrate, cosmopolitan democracy's legal weaknesses go well beyond a minor misappropriation of the leading light of twentieth-century liberal international law.

The notion of the "rule of law" has been widely contested in the history of legal thought (Bobbio 1987, 138–56; Neumann 1986). Within the modern liberal tradition, however, it generally has taken the form of requiring that state action rest on legal norms that are (1) general in character, (2) relatively clear, (3) public, (4) prospective, and (5) stable. In this standard liberal view, only norms of this type assure a minimum of certainty and determinacy within legal decision-making, help guarantee the accountability of power-holders, promote the principle of fair notice, and contribute to achieving equality before the law. As Franz L. Neumann pointed out many years ago, this model often coexists with a particular interpretation of the liberal commitment to basic rights. Liberalism rests on the notion of a "presumption in favor of the rights of the individual against the coercive power of the state" (Neumann 1996, 198). The rule of law in part provides a minimal but indispensable standard for helping to determine the legitimate scope of state intervention in the sphere of individual rights. Although liberalism conceives of rights as essential for assuring liberty, rights nonetheless always require legal regulation or restraint, though they never can be obliterated by legal means; even ardent defenders of free speech, for example, must accept

⁹See Kelsen's famous discussion in Kelsen 1944, 71–123.

the necessity of regulating free speech, even if it only entails establishing minimal basic rules for registering demonstrations or publishing newspapers. By necessity, rights are interpreted, institutionalized, and contested by a panoply of state bodies and agents, and the task of making sure that the interpretation and regulation of individual rights can be rendered normatively acceptable, traditionally has been linked to the notion of the rule of law. In this view, "individual rights may be interfered with by the state only if the state can prove its claim by reference to an indeterminate number of future cases; this excludes retroactive legislation and demands a separation of legislative from judicial functions" (Neumann 1996, 200). Fidelity to the rule of law virtues noted above is essential if we are to make sure that the interpretation and regulation of basic rights (for example, free speech) takes a relatively predictable and consistent form. In contrast, if state bodies are permitted to regulate basic rights in accordance with inconsistent, ambiguous, open-ended, or retroactive norms, excessive discretionary authority is likely to accrue to state authorities, and the sphere of individual liberty will suffer significant damage. From this traditional perspective, the rule of law performs many admirable functions, but one of its more worthwhile purposes is to work alongside the liberal defense of basic rights in order to preserve meaningful possibilities for individual liberty.

Of course, even those of us sympathetic to this conventional interpretation of the rule of law typically are forced to acknowledge its limitations; Neumann himself conceded that it was unrealistic to expect every aspect of the legal order to take the form of general, clear, public, prospective, and stable norms (Neumann 1996, 203–4). In addition, traditional liberal jurisprudence raises a host of difficult institutional questions, and the multiplicity of ways in which liberal democracy has sought to institutionalize the idea of the rule of law suggests that these questions are likely to remain controversial. Nonetheless, we would do well not to throw away the baby along with the bathwater, as too many critics of liberal jurisprudence tend to do. Despite the familiar dangers of overstating the merits of this traditional view, it provides a fruitful starting point for critically interrogating Archibugi's and Held's vision of cosmopolitan democratic law.

Notwithstanding constant appeals to the notion of the *Rechtsstaat*, Archibugi and Held seem unfamiliar with the traditional notion of the rule of law. At the very least, the only features of cosmopolitan democratic law clearly overlapping with it are their demand for rights to due process and equal treatment before the law (Held 1995a, 193). The account of the rule of law briefly summarized above is richer than theirs, however, to the extent that it better highlights key functions (for example, assuring fair notice and the accountability of power-holders) and more cogently underscores the importance of effectively harnessing the exercise of state authority by demanding that legal norms and standards take a clear, general, prospective, and stable form. From the perspective of traditional liberal jurisprudence, the potential

danger with Archibugi's and Held's conceptual lacuna on this matter is that it may leave cosmopolitan democracy ill-equipped to ward off problematic forms of discretionary state authority. If Archibugi and Held are as worried by the specter of a "planetary Leviathan" as they repeatedly claim, one might expect them to pay closer attention to the liberal legal model's emphasis on the dangers of discretionary and even arbitrary state authority. Unfortunately, they occasionally associate traditional concerns of this type with economic "libertarianism" and the ideas of Friedrich Hayek (Held 1995a, 241–4). A principled commitment to traditional rule of law virtues by no means necessitates loyalty to free-market capitalism, however (Raz 1979, 210–29; Scheuerman 1994). In a similar vein, it is also troubling that cosmopolitan democracy's exponents have little to say about how transnational "framework" legislation would be fleshed out at local and national levels. At one juncture, Held declares that local and national bodies would be outfitted with the authority to "implement" global laws, and that the EU "embodies a range of relevant distinctions among legal instruments and types of implementation which are helpful to reflect on in this context" (Held 1995a, 275). Although there is no question either that the legal problem of "translating" transnational directives to the national or local arena is exceedingly complex, or that a great deal can be learned from the EU about this matter, Held's appeal to the EU experience only begs the question at hand. Even those enthusiastic about the emerging EU legal system would likely consider it presumptuous to suggest that EU law in its present incarnation represents a fully satisfactory embodiment of traditional rule of law virtues.

Archibugi and Held undertake a conceptual move relatively familiar from recent jurisprudence: The notion of the rule of law is basically reinterpreted as a rights-centered model of jurisprudence in which courts are likely to gain substantial authority to determine a host of controversial matters.¹⁰ At times echoing Ronald Dworkin's famous critique of a positivist "rule-book" conception of law and concomitant espousal of a rights-based jurisprudence in which courts are outfitted with generous interpretative authority, Archibugi and Held similarly redefine the *Rechtsstaat* in terms of a set of basic rights purportedly able both to "empower" legal actors and effectively "circumscribe" them (Dworkin 1977, 1985).¹¹ But here as well, courts ultimately are destined to take on weighty discretionary authority. As we saw above, the "rule of law" here basically means that legislators and courts are supposed to act in accordance with an ambitious set of basic rights. Given the fact that these rights "must be defined broadly," one wonders how they, in fact, might succeed in effectively binding or circumscribing state authority. On the surface, they would seem to provide tremendous leeway for both legislators and judicial actors, especially in light of the fact that Archibugi and Held

¹⁰ For a provocative critical discussion of this trend, see Maus 1992, 308–36.

¹¹ Interestingly, Dworkin is only mentioned in passing here, for example, by Held 1995a, 202–17.

seem uninterested in how a traditional model of the rule of law might contribute to the task of guaranteeing a modicum of consistency and calculability in the interpretation of basic rights. So how then would cosmopolitan democracy make sure that transnational authorities exercise authority in accordance with this charter of rights in a satisfactorily “circumscribed” way? In the final analysis, their answer seems to be that this determination should be placed in the hands of transnational courts: “[T]he ... influence of judicial ‘review boards,’ the courts, and designated complaints and appeal procedures has to be extended so that groups and individuals have an effective means of suing political authorities for the enactment or enforcement of key rights” (Held 1995a; see also 205, 270–2; cf. Archibugi 1995, 143–8). Although cosmopolitan democratic public law would probably grant impressive legislative power to a variety of transnational political actors, transnational judges would ultimately possess the impressive authority to determine how the rights constitutive of “democratic public law” are ultimately to be concretized and interpreted.

By commenting that we would do well to consider proposals to democratize the judiciary,¹² Held indirectly concedes that this vision risks placing substantial open-ended authority to interpret cosmopolitan democratic law in the hands of judicial personnel: Notwithstanding cosmopolitan democracy’s alleged break with traditional concepts of sovereignty, it is such judicial experts who seem most likely to exercise far-reaching “sovereign” prerogative power. Discretionary rule by judicial personnel, however, is *not* the same thing as the rule of law.¹³ Neither Held nor Archibugi seems to grasp the ways in which their view potentially conflicts with conventional ideas about the *Rechtsstaat*, nor the fact that their account of cosmopolitan democratic law threatens to generate precisely the sort of unharnessed state authority which so worried classical theorists of the liberal rule of law. In their model, that authority will now be exercised on a global scale, and thus ultimately backed up by the prospect of transnationally-organized military force (Held 1995a, 279). In a Dworkinian mode, one might praise this demotion of classical rule of law virtues by conceding that the architects of cosmopolitan democracy may be right to downplay the significance of clear, general rules

¹²Held 1995a, 206 speculates that judicial bodies might consist of people “statistically representative of key social categories” rather than existing judicial personnel. This proposal also raises fundamental questions for the ideal of the rule of law, to the extent that distinct modes of legal reasoning typically generated by a specialized legal training and culture have long been associated with it. One might argue that this proposal minimizes some of the dangers of “judicial imperialism” that I hope to highlight here. However, discretionary rule exercised by members of statistically representative social groups may deserve to be described as democratic, but it cannot be considered consistent with the notion of the rule of law.

¹³This, of course, is not the same thing as claiming that some measure of judicial discretion and the principle of the rule of law are mutually exclusive. Nor, for that matter, is a simultaneous commitment to constitutionally-enshrined rights and the rule of law. But the relationship between these two features of liberal jurisprudence is more complex than Archibugi and Held seem to grasp.

for liberal-democratic jurisprudence. At the level of global decision-making, classical conceptions of legislation and judicial interpretation undoubtedly face even greater challenges, in light of the complexity of the regulatory tasks at hand, than they do at the level of the nation-state (Teubner 1997; Scheuerman 2001b). Nonetheless, Dworkin at least has devoted substantial energy to describing the proper scope of decision-making for his famous Herculean judge, whereas Archibugi and Held say little about how their hypothetical transnational judges would be effectively "circumscribed" by cosmopolitan democratic law. The fact that they also claim that cosmopolitan democratic law presupposes no particular conception of the good and thus "does not require political and cultural consensus about a wide range of beliefs, values, and norms" seems reasonable given the challenges of pluralism on the global scale (Held 1995b, 115–16).¹⁴ Yet it arguably compounds the weaknesses of their legal analysis by potentially opening the door to a vast diversity of alternative judicial interpretations of the basic framework of cosmopolitan law. If cosmopolitan democratic law is fundamentally neutral in the face of competing interpretations of the good, what is to prevent judges from fleshing out its complex and multi-faceted charter of rights in a rich variety of potentially inconsistent ways? On this point as well, Dworkin's position is arguably superior: Whatever our final assessment of his restatement of natural law-theory, Dworkin strives to provide a detailed gloss on how his conception of rights-based jurisprudence is to be properly embedded in a particular interpretation of liberal political morality (Dworkin 1986).

It is also easy to see why this reinterpretation of the rule of law may initially seem so attractive. Many nation-states have already committed themselves to a set of ambitious international human rights agreements (for example, in the Universal Declaration of Human Rights). From a liberal-democratic perspective, this historical trend is a positive one; my criticisms here are *not* directed against the notion of universal human rights.¹⁵ Nonetheless, a commitment to universal human rights is probably consistent with a rich variety of distinct institutional versions of liberal democracy, both on the global level and elsewhere. Whether the best way either to advance rule of law virtues or pursue transnational democracy is to demand the justiciability of a bold and indisputably controversial charter of rights by transnational courts remains open to debate. We should neither conflate the protection of rights with the rule of law, nor ignore the ambivalent legal and political consequences of a model of transnational government probably destined to place massive discretionary decision-making in judicial hands. Danilo Zolo (2000, 79–80) has accused Held and his interlocutors of

¹⁴This claim also seems questionable in light of the ambitious social-democratic, feminist, and environmental character of the rights they defend.

¹⁵For a useful defense, see Donnelly 1989, 13–16, who provides some helpful remarks on the complex legal status of universal human rights.

advancing a brand of judicial imperialism blind to the matter in which cosmopolitan democracy's model of basic rights masks western biases and exhibits indifference towards non-western legal culture. Although I see no reason for endorsing either Zolo's Realist international relations theory or his dismissive attacks on universalist concepts of human rights, my argument suggests that he nonetheless may have stumbled onto a real failing here: In cosmopolitan democracy, judges would indeed be outfitted with impressive and arguably unprecedented authority concerning a rich variety of highly contestable political matters. The charter of rights making up the core of cosmopolitan democratic law includes issues (for example, ecological and feminist rights) still considered highly controversial even within the wealthy welfare state liberal democracies of Western Europe and North America. Since many of these rights are even more controversial on the global level, one might ask whether it makes much sense to try to advance transnational democracy by outfitting transnational judicial personnel with the authority to rely on an open-ended commitment to them as a starting point for an "agenda for change" (Held 1995a, 205). *Pace* Zolo, the weaknesses of this model hardly represent necessary byproducts of a universalistic brand of Kantianism. Instead, they derive from a questionable interpretation of the notion of the rule of law in which some of the core concerns of traditional liberal jurisprudence have simply been left at the wayside. Recall that Kant envisioned not only a cosmopolitan right of hospitality, but that he also took the rule of law virtues of generality, publicity, and clarity seriously.¹⁶

This criticism also points to real problems for Archibugi's and Held's attempt to distinguish cosmopolitan democracy sufficiently from unacceptable models of a "planetary Leviathan" outfitted with enormous discretionary authority. Their vague statements concerning the precise scope of cosmopolitan law are only likely to fan such anxieties. As we noted earlier, Archibugi and Held tend to argue that issues "affecting" transnational groups would alone make up proper objects of transnational legislative and judicial activity. But this deceptively simple claim cloaks a host of complex normative and institutional questions. As Frederick Whelan (1983, 18–19) has pointed out in an astute critical contribution to democratic theory, "[a]n obvious practical difficulty with the all-affected principle is that it would require a different constituency of voters or participants for every decision" in light of the fact

¹⁶Nearly twenty years ago, the human rights advocate Philip Alston perceptively warned of the dangers of proclaiming ambitious and poorly-defined new rights beyond the basic civil, political, and social and economic rights based in the two International Human Rights Covenants, pointing out that many of the proposed new rights were typically characterized by enormous vagueness (for example, rights "to coexistence with nature," "not to be killed in war," or "to be free to experiment with alternative ways of life"). As Alston 1984, 614 correctly observed, "a proliferation of new rights would be more likely to contribute to a serious devaluation of the human rights currency than to enrich significantly the overall coverage provided by existing rights." If I am not mistaken, Alston's anxieties take on special significance for the defenders of cosmopolitan democracy, since many of the proposed rights at the core of "cosmopolitan democratic law" seem remarkably reminiscent of those criticized by Alston.

that citizens are unlikely to be affected by every decision to the same degree or in the same way. One of the more controversial aspects of many laws and policies is their likely impact on different categories of people; political controversy often is concerned with *determining* which category of people should be affected by a policy. "Thus to say that those who will be affected by a given decision are the ones who should participate in making it is to ... propose what is a logical as well as procedural impossibility" (Whelan 1983, 19).¹⁷ A prior decision would be required in each case to determine who is to be affected and thus entitled to participate on whatever substantive issue is at hand. But how might this decision be made? It would have to be made democratically by those affected, "but now we encounter a regression from which no procedural escape is possible" (*ibid.*).

Moreover, it is unclear that we can delineate transnational issues from those properly resolved on the local or national level as easily as cosmopolitan democracy's defenders claim, especially if it is correct to argue that

[g]lobal governance knows no boundaries, geographic, social, cultural, economic, or political. If ... new trading partners are established, if labor and environmental groups in different countries form cross-border coalitions, if cities begin to conduct their own foreign commercial policies ... then the consequences of such developments will ripple across and fan out at provincial, regional, national and international levels as well as across and within local communities. (Rosenau 1998, 31)

If we conceive of globalization as resting on a process of "time and space compression" in which instantaneousness and simultaneity increasingly make up constitutive features of human activity, it inevitably becomes difficult to specify a relatively limited arena for transnational policy (Harvey 1989). As the time span necessary to connect disparate geographical points declines, space is "compressed": In an age of e-mail, instantaneous computerized financial transactions, and high speed forms of production and consumption, "there" seems less distant from "here" than it used to be. Given dramatic changes in the phenomenological horizons of present-day human activity, the scope of cosmopolitan democratic law thus is not only likely to be characterized by ambiguity and flux, but it seems destined ultimately to cover a potentially enormous range of human activities.

In fairness, Held occasionally makes some brief suggestions about how he hopes to limit the scope of transnational legislation. A test of "extensiveness" would determine the range of people potentially affected by a collective problem; a test of "intensity" would assess the degree to which different groupings are affected by a collective problem; an "assessment of comparative efficiency" would focus on the practical pros and cons of grappling with a particular policy task at different levels of governance (Held 1995a, 236;

¹⁷Michael Saward 2000 offers an enlightening discussion of this weakness of cosmopolitan democracy.

Held 1995b, 113–14). But here again, cosmopolitan democracy's proponents simply take their suggestions from the EU and its tension-ridden experience with the difficult task of determining the proper relationship between transnational and national legislation. But they badly obscure the fact that the EU experience with "subsidiarity" raises at least as many difficult questions as it answers.¹⁸ Unless much more is said about how we can properly delineate cosmopolitan democratic law from local and national law, there are legitimate reasons for worrying that cosmopolitan democracy is likely to fail in its noble quest to uphold the traditional liberal notion of a limited law-based government.

III

Notwithstanding its numerous virtues, cosmopolitan democracy suffers from jurisprudential flaws that ultimately undermine its appeal. Does this mean that we should abandon Archibugi's and Held's admirable quest to subject an array of transnational policy arenas to liberal-democratic ideals? Of course not. But my argument does suggest that we will need to develop a concept of transnational democracy better equipped to take the legacy of traditional rule of law-virtues seriously. In light of the prospect of awesome forms of global political authority that make the modern nation-state's power capacities pale in comparison, we abandon the traditional notion of the rule of law at our own risk. Mainstream liberal concerns about the specter of untrammelled state authority arguably take on heightened significance as the prospect of global government becomes real. A transnational democracy worth defending will have to find some way of preserving a substantial quotient of traditional rule of law virtues.

How might we accomplish that task? A proper answer to that question points the way beyond the confines of this essay. But for now, let me just say that a host of more modest—yet nonetheless potentially path-breaking—proposals for deepening liberal democracy on the global level are now being discussed and deserve closer examination.¹⁹ Many of those proposals cohere more clearly with traditional conceptions of the rule of law than the model criticized here. Those of us enamored of Kelsen's thoughtful warnings about the limits of "unreal and politically less than nothing" reform proposals for the international arena can easily identify many *ongoing* political struggles as

¹⁸Held tends to refer in this context to a recent article on subsidiarity within the EU by Karlheinz Neunreither in order to underscore the soundness of the tests of extensiveness, intensity, and comparative efficiency. But Neunreither's article in fact underlines the *inadequacies* of those tests within the EU as devices for generating an adequate conception of subsidiarity, pointing out that they raise difficult questions for those committed to the "uniform enforcement of EC law" (Neunreither 1993, 217).

¹⁹Schmitter 1997, for example, proposes that nation-states accord each other seats in their legislatures to representatives of other nation-states with which they are intensely involved (for example, within free trade zones): See also Schmitter 1999; Saward 2000.

good starting points for preparing the way for major changes in the international system. The demand for an international criminal court should come immediately to mind, as should the possibility of altering the structure of the U.N. Security Council. Reforms of this type may seem dull when compared to the dream of a global liberal democracy committed to realizing an ambitious set of justiciable liberal, democratic, social-democratic, feminist, and ecological rights, but they better build on Kelsen's sound advice to pursue "a slow and steady perfection of the international legal order" (Kelsen 1944, ix).

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