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KANT'S CONCEPT OF INTERNATIONAL LAW*

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Modern theorists often use Immanuel Kant's work to defend the normative primacy of human rights and the necessity of institutionally autonomous forms of global governance. However, properly understood, his law of nations describes a loose and noncoercive confederation of republican states. In this way, Kant steers a course between earlier natural lawyers such as Grotius, who defended just-war theory, and visions of a global unitary or federal state. This substantively mundane claim should not obscure a more profound contribution to the science of international law. Kant demonstrates that his concept of law forms part of a logical framework by which to ascertain the necessary institutional characteristics of the international legal order. Specifically, his view is that the international legal order can only take a noncoercive confederated form as its subjects become republican states and that in these circumstances law can exist without a global state. Put another way, Kant argues that if we get state-building right, the law of nations follows.

> When in 1795 Kant formulated the articles of a federation of peoples for the mutual guarantee of independence of peace, he regarded it as essential that the member States should possess a democratic constitution. . . . However, the federation of Kant was not a federal State; it was a confederation, presupposing the continued existence of sovereign States.[1]

Kant's law of nations is often considered to be the forerunner of or inspiration behind, all sorts of recent claims about the normative structure and institutional form of the international legal order. Modern Kantians use his work to justify proposals for cosmopolitan and suprastate forms of

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1. Hersch Lauterpacht, *Sovereignty and Federation in International Law*, *in* INTERNATIONAL LAW: COLLECTED PAPERS: 3. THE LAW OF PEACE 19, 25 (E. Lauterpacht ed., 1977) (1945).

international governance,[2] for humanitarian intervention by powerful liberal states,[3] or for the defense of global moral standards such as human rights.[4] Modern interpreters of Kant himself, who have paid closer attention to Kant's texts on legal philosophy, have pondered whether his claims are at all like those ascribed to him by modern Kantians. Some wonder whether he in fact argues that there is a necessary connection between positive law and the moral law.[5] Perhaps he would not have supported universal human rights and humanitarian intervention on moral grounds. Others question whether his work can be used to defend suprastate and cosmopolitan forms of international governance that resemble a global state.[6] Instead, it is often suggested that he actually advocates some sort of federal international system often referred to as a "state of peoples" or "state of states."

It is our argument that by reading his law of nations in line with his general legal theory set out in the *Doctrine of Right* (which Kant tells us we must do), it can be shown that his views on the law of nations cannot be obviously used to support any of the institutional proposals by these Kantians and interpreters of Kant; indeed, these proposals distort the nature of his contribution to legal philosophy. It is clear that Kant rejects a global republic or a global monarchy, but we argue that Kant also rejects a federal international system along the lines of a "state of peoples." Instead our argument is that Kant understands the ideal institutional form of the international legal order to be a weak, noncoercive confederation of republican sovereign states, with minimal or no suprastate forms of institutional governance, in which states have plenary jurisdiction. He thinks that properly constituted states through their collective actions could perform the administrative functions of the international legal order. Put another way, he wants to show how it is possible to conceive of the international legal order as a genuine system of law without the institutional baggage associated with unitary, federal, or other forms of sovereign state. Thus those Kantians who advocate a

2. JÜRGEN HABERMAS, THE DIVIDED WEST (C. Cronin ed. & trans., 2006); and Tom Carson, *Perpetual Peace: What Kant Should Have Said*, 14 SOC. THEORY & PRAC. 173–214 (1988).

3. FERNANDO TESÓN, A PHILOSOPHY OF INTERNATIONAL LAW (1998).

4. Daniele Archibugi, *Immanuel Kant, Cosmopolitan Law and Peace*, 1 EUR. J. INT'L REL. 429–456 (1995).

5. Waldron, Pogge, and Wood are skeptical as to whether there is a necessary connection between law and morality for Kant. *See* Jeremy Waldron, *Kant's Legal Positivism*, 109 HARV. L. REV. 1535–1566 (1996); Thomas Pogge, *Is Kant's* Rechtslehre *a "Comprehensive Liberalism*?," *in* KANT'S METAPHYSICS OF MORALS 133–158 (Mark Timmons ed., 2002); and Allen Wood, *The Final Form of Kant's Practical Philosophy*, *in* KANT'S METAPHYSICS OF MORALS 1–21 (Mark Timmons ed., 2002). Höffe, Perreau-Saussine, and Ripstein all consider that morality and law are necessarily connected for Kant. *See* OTFRIED HÖFFE, KANT'S COSMOPOLITAN THEORY OF LAW AND PEACE (A Newton trans., 2006); A. Perreau-Saussine, *Immanuel Kant on International Law*, *in* THE PHILOSOPHY OF INTERNATIONAL LAW 53–75 (John Tasioulas & Samantha Beson eds., 2010); ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY (2009), at 355–388.

6. *See* Pauline Kleingeld, *Approaching Perpetual Peace: Kant's Defence of a League of States and His Ideal of a World Federation*, 12 EUR. J. PHIL. 304–325 (2004); and B. Sharon Byrd & Joachim Hruschka, *From the State of Nature to the Juridical State of States*, 27 LAW & PHIL. 599–641 (2008).

world state, a state of peoples, a state of states, or anything that resembles the institutional form of a global state are incorrect if they consider their position to be that of Kant.[7] And those interpreters who defend any of these institutional configurations as representative of Kant's own view are mistaken.

It is our aim, then, to set out what Kant's concept of international law is rather than provide a direct normative justification for his claims, plausible though they might be.[8] For those who hope for a defense, we make two points. The first is that any plausible defense of Kant's position must be in part a defense of the correct interpretation of his position. Without the latter, the former rests on sand. However, the latter remains highly controversial amongst Kant scholars. Second, if our interpretation is correct, we consider that it presents Kant as both problematizing the relationship between law and state institutions and offering a distinctive and interesting solution at the global level. Modern Kantians, we consider, typically fail to acknowledge the gap between "law" and "state" that underpins Kant's conception. Beyond that, we let his arguments stand for themselves.

We regard Kant as making three key moves in his law of nations: (1) international law is a system of law *like any other*; (2) international law is institutionalized through a noncoercive *confederation* of states that is best described as an interstate system; and, (3) Kant's calls for the confederation to comprise republican states is *necessary* to support his claim that international law is indeed a form of law. The result is a "special type of league" (*einen Bund von besonderer Art*). This forms the cornerstone of his concept of international law. With these moves Kant attempts to steer a middle way between earlier claims by theorists such as Grotius—who regarded *jus gentium* as based upon the unilateral interpretation by states of natural moral principles—and those whom he regarded as advocating a world state, such as St. Pierre and probably Wolff.[9] Much current thinking on Kant's legal

7. This said, it should be noted that John Rawls does argue for a confederation, and thus it is his work that most closely resembles Kant's in this respect. *See* JOHN RAWLS, THE LAW OF PEOPLES (2001), at 42–43. However, *see* Section IV *infra*, where we discuss the differences between the positions taken by Rawls and by Kant.

8. For a defense of some of Kant's claims, *see* PATRICK CAPPS, HUMAN DIGNITY AND THE FOUNDATIONS OF INTERNATIONAL LAW (2009).

9. Kant mentions St. Pierre and Rousseau (*see* IMMANUEL KANT, 8 GESAMMELTE SCHRIFTEN 24 (Royal Prussian Academy of Science ed.); and *see* KANT, *Idea for a Universal History with a Cosmopolitan Intent* [*Idee zu einer allgemeinen Geschichte in weltbürgerlicher Absicht*], *in* PERPETUAL PEACE AND OTHER ESSAYS (Ted Humphrey trans., 1983), at 35) but does not mention Wolff in his discussion of the law of nations. However, CHRISTIAN WOLFF's JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM (Joseph Drake trans., 1934) (1749) was an important argument in support of some sort of universal state in Germany at the time. Wolff argues specifically for a *civitas maxima*, which is translated by Drake to mean, problematically, a "supreme state" (for more on this interpretative difficulty, *see* Nicholas Onuf, *Civitas Maxima: Wolff, Vattel, and Republicanism*, 88 AM. J. INT'L L. 280–303 (1994)). Whatever the correct translation, Wolff clearly sees the *civitas maxima* as an institution with coercive powers (WOLFF, JUS GENTIUM §13), that issues positive law (*id.*, §§11, 25), is institutionally based upon democratic principles (*id.*, §19), and is administered (somewhat confusingly) by a fictional ruler (*id.*, §21). Although we

philosophy supposes that these three moves are mutually incompatible and therefore that one or more of them must be revised either as an interpretation of Kant or in his modern appropriation. We argue that such revision is unnecessary.

In what follows these moves are developed through various ideas caught by the concept of legal autonomy. In Kant's practical philosophy, the idea of autonomy can be said to emerge in two distinct senses. These are *moral* and *legal* autonomy. In the first sense, Kant contrasts autonomy with heteronomy in his moral philosophy. He argues that each individual human agent is capable of practical reason, which means that they are able to conceive of various ends or interests—described as "objects of volition"[10]—and to select the means by which these can be achieved.[11] Ultimately, our selection of an "object of volition" has a complex causal history that may be of a biological, psychological, or ideological provenance. If so, it has a cause that is external to the agent's rational will: a cause arises from the agent's self-conception of his or her "needs,"[12] "joys,"[13] or "happiness."[14]

Such behavior can be said to have the characteristic of heteronomy. Autonomy describes our "capacity for self-determination independently of, and even contrary to, these needs."[15] This does not mean that agents act independently of their needs or happiness but rather that they are self-consciously able to constrain their pursuit of such interests by acting on reasons that arise from morality.[16] Thus moral autonomy refers to the capacity of agents to act in accordance with moral reason, which, for Kant, is structured by the categorical imperative. This is expressed as a series of

have no way of knowing whether Kant was arguing against Wolff when the former rejected a *civitas gentium* in *Perpetual Peace*, it seems likely. One scant piece of evidence in support of this claim is from 1847, when Kaltenborn suggests that Wolff's *civitas maxima* was understood to represent a version of the global state. This suggests that Wolff was understood, at least at this time, as defending a universal state. *See* CARL VON KALTENBORN, KRITIK DES VÖLKERRECHTS (1847), at 70.

10. KANT, 4 GESAMMELTE SCHRIFTEN, *supra* note 9, at 440; and *see* KANT, THE MORAL LAW [GRUNDLEGUNG ZUR METAPHYSIK DER SITTEN] (H.J. Paton trans., 1972) (1785), at 101. Along with Paton's translation of MORAL LAW, we use the following translations: IMMANUEL KANT, THE METAPHYSICS OF MORALS [DIE METAPHYSIK DER SITTEN] (Mary Gregor trans., 1996) (1797); KANT, *On the Proverb: That May Be True in Theory, but It Is of no Practical Use* [*Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis*], *in* PERPETUAL PEACE AND OTHER ESSAYS (Ted Humphrey trans., 1983) (1793); KANT, *Idea for a Universal History with a Cosmopolitan Intent* [*Idee zu einer allgemeinen Geschichte in weltbürgerlicher Absicht*], *in* PERPETUAL PEACE AND OTHER ESSAYS (Ted Humphrey trans., 1983) (1784); and KANT, *Perpetual Peace* [*Zum ewigen Frieden*], *in* PERPETUAL PEACE AND OTHER ESSAYS (Ted Humphrey trans., 1983) (1795).

11. *See* HENRY ALLISON, KANT'S THEORY OF FREEDOM (1990), at 103.

12. KANT, 4 GESAMMELTE SCHRIFTEN, *supra* note 9, at 439; and *see* KANT, MORAL LAW (Paton trans.), *supra* note 10, at 100.

13. KANT, 6 GESAMMELTE SCHRIFTEN, *supra* note 9, at 215–216; and *see* KANT, METAPHYSICS (Gregor trans.), *supra* note 10, at 9.

14. KANT, 5 GESAMMELTE SCHRIFTEN, *supra* note 9, at 34; and *see* KANT, CRITIQUE OF PRACTICAL REASON [KRITIK DER PRAKTISCHEN VERNUNFT] (M. Gregor trans., 1997) (1788), at 31.

15. *See* ALLISON, *supra* note 11, at 97.

16. *See, e.g.*, KANT, 6 GESAMMELTE SCHRIFTEN, *supra* note 9, at 221; and *see* KANT, METAPHYSICS (Gregor trans.), *supra* note 10, at 23.

practical maxims and duties about the boundaries of morally permissible action.

There is an extensive literature on the relationship between moral autonomy and law,[17] but as mentioned above, this is not the subject of this article. Instead our concern is with legal autonomy. The starting point for Kant's vision of this form of autonomy is the following sentence in the *Doctrine of Right*:

> Every state contains three authorities within it, that is, the general united will consists of three persons (*trias politica*): the sovereign authority (sovereignty) in the person of the legislator; the executive authority in the person of the ruler (in conformity to law); and the judicial authority (to award to each what is his in accordance with the law) in the person of the judge (*potestas legislatoria, rectoria et iudiciaria*).[18]

At first blush, legal autonomy is a relatively straightforward idea to understand. It refers to the idea that law establishes the omnilateral or "general united will" of a community. This will is understood as an "all-sided will"[19] or, as elucidated in Hastie's translation, as the judgment of "all the Wills of a Community together."[20] This means that it is autonomous from the individuated subjective wills of those who comprise a community. It is a different form of willing. The omnilateral will settles what each member of a community is legally entitled to by establishing common standards for the community. As a consequence, the establishment of the omnilateral will reduces the potential for coordination problems, thus saving individuals from the "violence"[21] associated with a unilateral system of willing found in the state of nature.[22]

17. *See, e.g.*, Waldron, *supra* note 5; Pogge, *supra* note 5; and Wood, *supra* note 5.

18. KANT, 6 GESAMMELTE SCHRIFTEN, *supra* note 9, at 313; and *see* KANT, METAPHYSICS (Gregor trans.), *supra* note 10, at 90–91.

19. *Id.* 259 (our translation).

20. IMMANUEL KANT, THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS A SCIENCE OF RIGHT (William Hastie trans., 1887), at 84.

21. KANT, 6 GESAMMELTE SCHRIFTEN, *supra* note 9, at 312; and *see* KANT, METAPHYSICS (Gregor trans.), *supra* note 10, at 89.

22. Kant's argument that law has autonomy because it expresses the omnilateral will of a community is one that is familiar to legal theory and can be said to reflect the autonomy thesis. Postema, who has considered the contours and plausibility of this thesis in detail, writes that for the autonomy thesis, law's "proximate aim and defining task is to supply a framework of practical reasoning designed to unify public political judgment and coordinate social interaction." *See* Gerald Postema, *Law's Autonomy and Public Practical Reason*, *in* THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM (Robert George ed., 1996), at 80. It achieves this aim by establishing a set of public and general norms that are isolated from the "conflicting interests, principles, and values that stand as obstacles to social cooperation." *Id.* This description of the fundamental purposive orientation and structural nature of law is entirely consistent with Kant's view of law understood as an omnilateral will. Waldron explains Kant's reasoning in a similar way. He writes that for an individual to reject the rational necessity of subjecting ourselves to law is, for Kant, "tantamount to turning his back on the idea of our sharing a view about right or justice and implementing it in the name of the community." *See* Waldron, *supra* note 5, at 1564.

Kant's argument is that although the idea of law is conceivable merely as omnilateral will, it is not possible for law to be realized without some institutional expression. Law has implicit within it the idea of institutions that are able to exercise public functions in a way that is distinct from the way in which members of the community governed by them can. In the quotation set out above on Kant's description of state institutions, he distinguishes the idea of an omnilateral ("collective") will from the institutions (legislature, executive, and judiciary) that form the sovereign state and can be said to administer it. The principal institutions of the state are, as legal institutions, independent of the human beings out of whom they are constituted. So the legislature—whether individual or composite—is in its capacity as such the determinator of the omnilateral will and not simply a human being or a collection of human beings. It is a distinctive institution that has the role of articulating the substantive norms that comprise the omnilateral will. The judiciary brings the norms of the omnilateral will to bear on individual cases. The executive enforces this will against individuals who might otherwise not be disposed to comply with the requirements of the omnilateral will.

Within this description of Kant's concept of legal autonomy is an ambiguity. In a stronger sense, legal autonomy is achieved through the establishment of the distinctive legislative, executive, and adjudicative institutions associated with the sovereign state. Thus, for Kant, law implies the state or, more accurately, the *Rechtsstaat* and a republican form of governance. However, in a weaker sense, Kant seems to realize that the idea of law is not necessarily expressed in the traditional institutional form of the *Rechtsstaat*. An institutional arrangement is necessary that allows for the creation, interpretation, and, where necessary, enforcement of law, but this need not take a statelike form.

If Kant considers that international law must adopt the strong version of legal autonomy, this implies state institutions at the international level that are different from the states that are governed. This might include distinctive institutions such as a cosmopolitan legislature, a suprastate enforcement agency, or a world court with compulsory jurisdiction.

In his work, Kant actually considers a range of possibilities that reflect this strong form of legal autonomy. None of this is articulated in great detail and may not have the same meaning in the same way in and between his various works on legal philosophy. The first is a state of peoples (*Völkerstaat*). This is an international legal order that, it is generally assumed by Kant's commentators, resembles a federated model like that found in the (then) newly formed United States of America. As such, this federation would have a permanent constitution[23] alongside some statelike federal structures at the international level. It would also have some sort of executive institution,

23. KANT, 6 GESAMMELTE SCHRIFTEN, *supra* note 9, at 351; and *see* KANT, METAPHYSICS (Gregor trans.), *supra* note 10, at 120.

distinct from states, that could enforce the law. Federal institutions would also be legally competent directly to regulate individuals within states. It should be noted that at times Kant elides the idea of a state of peoples with a second possibility, namely, a world republic (*Weltrepublik*). This is where states are governed by a unitary government, which has a "single head,"[24] negating international relations.[25] The third possibility is a universal monarchy (*Universalmonarchie*).[26] According to Sharon Byrd and Joachim Hruschka, this is understood to mean a single world state where there is "only *one* source, only *one* origin of state power."[27] Presumably this is distinguished from the cosmopolitan commonwealth by the absence of representative government. A world republic and a universal monarchy both reflect a globalized version of a unitary sovereign state but are different forms of it.

The weaker institutional form by which legal autonomy can be achieved is also discussed by Kant. He describes a league of states or a universal association of states. This is what has come to be known as a confederation. In a confederation there are no centralized governmental institutions and no executive power to enforce international law against those states that violate it. States are free to join or leave this association. They have plenary jurisdiction, and the activities of individuals within states cannot be directly regulated by the confederation. The omnilateral will is given institutional expression through the collective willing of states, and states collectively undertake the administrative functions of international legal order. This proposes a system of law without a global state.

We believe that the central question Kant faces in his international legal theory is whether the institutional expression of the omnilateral will at the global level need take the form of the sovereign state. Put another way, does Kant regard the normal set of state institutions referred to in his discussion of public right in the *Doctrine of Right* as a necessary implication for all forms of law and specifically of international law? It has been suggested by commentators such as Pauline Kleingeld,[28] Otfried Höffe,[29] and Byrd and Hruschka[30] that Kant's writings on political and legal philosophy are best understood as defending a coincidence between legal autonomy and the state. Each of these interpreters argues that when Kant rejects the global state, he is actually rejecting a form of global monarchy or global republic (because they are both illegitimate and ineffective) and that he will accept the state of peoples instead. The confederation, then, is only a "negative surrogate" or a mere approximation to the state of peoples.

24. KANT, 8 GESAMMELTE SCHRIFTEN, *supra* note 9, at 311; and *see* KANT, *On the Proverb, in* PERPETUAL PEACE (Humphrey trans.), *supra* note 10, at 89.

25. KANT, 8 GESAMMELTE SCHRIFTEN, *supra* note 9, at 354; and *see* KANT, *Perpetual Peace, in* PERPETUAL PEACE (Humphrey trans.), *supra* note 10, at 115.

26. *Id.* at 367; 125 (Humphrey trans.).

27. Byrd & Hruschka, *supra* note 6, at 628.

28. Kleingeld, *supra* note 6, at 304.

29. HÖFFE, *supra* note 5.

30. Byrd & Hruschka, *supra* note 6.

If this is his view, the international legal order implies a global state of a particular type: the federated state of peoples. This is hard to square with Kant's explicit rejection of a federal state of peoples (in his rejection of the American federal system) along with a world republic and a universal monarchy. Our argument is that his vision of international legal order is as a system of law that is administered through a noncoercive confederation of republican states, and this reflects a weaker institutional form by which legal autonomy can still be exhibited. This is not, for Kant, some transitory institutional form on the way to the state of peoples. Put another way—and this is his significant move for legal theory—he cuts the normal connection between law and the state.

Our argument in support of these claims about Kant's concept of international law progresses in three parts. The first part outlines the general structure of Kant's legal theory. In the second part, we show how his law of nations can be said to be a system of regulation that exhibits legal autonomy. In the third part, we explain how Kant provides a coherent justification of how the law of nations can be established without any form of global state, whether monarchical, republican, or (most plausibly for Kant's interpreters) federal.

I. KANT'S PHILOSOPHY OF LAW

Near the beginning of the *Doctrine of Right*, Kant states that "Towards the end of the book I have worked less thoroughly over certain sections than might be expected in comparison with earlier ones, partly because it seems to me that they can be easily inferred from the earlier ones."[31] Therefore it is only by considering his fundamental arguments about the nature of law that the later parts of this work on state law and the law of nations can be properly understood. It is for this reason that we need to set out in brief his general legal theory.

The justification for Kant's concept of law draws inspiration from the social-contractarian tradition, in particular from Hobbes and Rousseau. It should therefore come as no surprise that Kant's legal philosophy is in part an argument that explains why each human agent must rationally submit to the rule of law. For this argument, his specific and technical understandings of "violence" and "coercion" are of central importance. A key passage that introduces these terms runs as follows:

> It is not experience from which we learn of human beings' maxim of violence and of their malevolent tendency to attack one another before external legislation endowed with powers appears. It is therefore not some fact that makes coercion through public law necessary. On the contrary, however well

31. KANT, 6 GESAMMELTE SCHRIFTEN, *supra* note 9, at 209; and *see* KANT, METAPHYSICS (Gregor trans.), *supra* note 10, at 6.

> disposed and law-abiding men might be, it still lies *a priori* in the rational idea of such a condition (one that is not-rightful) that before a public lawful condition is established individual human beings, peoples, and states can never be secure against violence from another, since each has its own right to do *what seems right and good to it* and not to be dependent upon another's opinion about this.[32]

These three sentences reveal much about Kant's legal philosophy. The first and second sentences are a rejection of Hobbes's basis for justifying law; for Kant, we need not submit to law because of the experience of human beings' tendency to be violent to one another in the absence of legal constraint.[33] Instead, a prelegal state of nature is a priori not rightful, as even well-meaning people (who are presumably not violent in the intuitive sense of the word) must submit to law. In the third sentence we discover why: in the absence of legal constraint, each individual does "*what seems right and good to it*," and it is for this reason he describes this state as a situation of "violence." So "violence" does not seem obviously to tally with Hobbes's description of the state of nature or with our intuitive idea of violence.[34]

This idea of "violence" can be made explicit by considering Kant's definition of "coercion." He writes that in a community in a state of nature, individuals "cannot help but mutually influence one another."[35] In this sense, any action has the potential to constrain the ability of another to act on his or her practical judgments, and this is what Kant means by "coercion." He stipulates that "every limitation of freedom by the will of another is called coercion."[36] Coercive acts are "violent" when they infringe upon the rights of others to act on those judgments that they consider morally justified. This explains, then, his claim that each of us "can never be secure against violence from another, since each has its own right to do *what seems right and good to it* and not to be dependent upon another's opinion about

32. *Id.* at 312; 89–90 (Gregor trans.).

33. KANT, 8 GESAMMELTE SCHRIFTEN, *supra* note 9, at 289–290; and *see* KANT, *On the Proverb*, *in* PERPETUAL PEACE (Humphrey trans.), *supra* note 10, at 71–73.

34. It should be noted that Kant often employs language reminiscent of Hobbes's views of the state of nature. For instance, he describes the state of nature as being characterized as "barbarous freedom" (KANT, 8 GESAMMELTE SCHRIFTEN, *supra* note 9, at 26; and *see* KANT, *Universal History*, *in* PERPETUAL PEACE (Humphrey trans.), *supra* note 10, at 35) and "a mad freedom" (*Id.* at 354; and *see* KANT, *Perpetual Peace*, *in* PERPETUAL PEACE (Humphrey trans.), *supra* note 10, at 115). Elsewhere he directly supports Hobbes's approach (*see* KANT, 6 GESAMMELTE SCHRIFTEN, *supra* note 9, at 95–97; and *see* IMMANUEL KANT, RELIGION WITHIN THE BOUNDARIES OF MERE REASON [DIE RELIGION INNERHALB DER GRENZEN DER BLOSSEN VERNUNFT] (Allen Wood & George di Giovanni trans., 1998) (1793), at 106–109) and often describes a prelegal situation using language reminiscent of Hobbes (*See, e.g.*, KANT, 8 GESAMMELTE SCHRIFTEN, *supra* note 9, at 307–308; and *see* KANT, *On the Proverb*, *in* PERPETUAL PEACE (Humphrey trans.), *supra* note 10, at 85). Despite this, it seems to us that the technical definition of violence is at the center of his legal theory and is the only way to make sense of many of his central claims.

35. *Id.* at 289; 71–72 (Humphrey trans.); and *see* KANT, *On the Proverb*, *in* PERPETUAL PEACE (Humphrey trans.), *supra* note 10, at 71.

36. *Id.* at 290; 72 (Humphrey trans.).

this."[37] More specifically, though, he seems to accept that any individual must, by willing an end, also necessarily accept that there are obligations on others not to act in "violent" ways toward him or her.[38] By virtue of the categorical imperative, the same individual must accept a reciprocal obligation not to act in ways that are "violent" toward others.

These points are put together in Kant's discussion of property ownership in the state of nature. Property ownership is predicated upon the "ability or capacity to use external objects of choice,"[39] and this includes the behavior of those with whom individuals have contracted. Once owned, it is a matter of the will of the person claiming to have a right to the property as to how it should be used.[40] Attempts to prevent this usage must be construed as examples of "violence" by the person claiming the right to the property. Kant writes:

> When I declare (by word or deed), I will that something external is to be mine, I thereby declare that everyone else is under an obligation to refrain from using that object of my choice, an obligation no one would have were it not for this act of mine to establish a right. This claim involves, however, acknowledging that I in turn am under an obligation to every other to refrain from using what is externally his; for the obligation here arises from a universal rule having to do with external rightful relations.[41]

Thus, in the state of nature, there is "a continual violation of the rights of all others."[42] As violation of rights (i.e., violence) is "continual," it can be said to be systemic: it is an endemic and structural feature of the state of nature qua social system.[43] For this reason, in the state of nature, any claim to own something or any right to act would always be an unsubstantiated assertion: "By my unilateral choice I cannot bind another to refrain from using a thing, an obligation he would not otherwise have."[44] An individual's right to an external object or the ability to act on his or her purposes in general can be secured only through a system of omnilateral governance or law. This means that each member of a community must "unite . . . with all others (with which it cannot avoid interacting), [and] subject itself to a public lawful external coercion."[45]

37. KANT, 6 GESAMMELTE SCHRIFTEN, *supra* note 9, at 312; and *see* KANT, METAPHYSICS (Gregor trans.), *supra* note 10, at 90.

38. *Id.* at 255; 44 (Gregor trans.).

39. *Id.* at 268 and 273–274; 55 and 58–60 (Gregor trans.).

40. *Id.* at 268; 55 (Gregor trans.).

41. *Id.* at 255–256; 44–45 (Gregor trans.).

42. KANT, 6 GESAMMELTE SCHRIFTEN, *supra* note 9, at 97n; and *see* KANT, RELIGION, *supra* note 34, at 108.

43. *See* KANT, 6 GESAMMELTE SCHRIFTEN, *supra* note 9, at 307–308; and *see* KANT, METAPHYSICS (Gregor, trans.), *supra* note 10, at 85–86, where this same point is made: in a state of nature, agents "*in general* . . . do wrong in the highest degree" (emphasis added).

44. *Id.* at 261; 49 (Gregor trans.).

45. *Id.* at 312; 89–90 (Gregor trans.).

It is not that, on balance, living in a lawful condition governed by an omnilateral will is in the self-interest of each member of a community which drives Kant's argument.[46] Instead, he argues that each is under a moral *obligation*—a duty—to leave the state of nature because it is by necessity not rightful, and it is not rightful independent of any subjective judgment made by legal subjects about the moral validity of the content of legal norms or the benefits of living under a system of law. This is clear when Kant writes that it is by a "*categorical imperative*" that governance by law is "obligatory for us to strive after"[47] and must be the product of our recognition that our actions violate the rights of others. This moral obligation comes from the immorality of the systemic violence that characterizes the state of nature. In the state of nature, each of us can infringe our moral obligations to others simply by claiming property or even by acting in ways that affect others.

An omnilateral system of willing is systemically nonviolent in the sense that it determines or concretizes the relationships between the disputing agents over ownership rights of external objects or the actions of others.[48] Thus it establishes authoritatively for the community the appropriate way in which its members should relate to each other. Various rights are conclusively determined by this will, and this, by necessity, affects the entitlements of others.[49] The authorization of a community member to act or use something is an authorization that "can be thought as contained in a synthetic general will and as in accordance with that will."[50] One's action, if successful, is no longer justified on the basis of a unilateral will but rather is authorized by the will of the community expressed through the omnilateral will.

Such collective willing can be both specific and general. In specific cases of disagreement, courts can make authoritative judgments in response to a particular coordination problem.[51] The problem with a judgment of a court is that it does not allow members of a community in general to be able to predict how others will act, and it is purely reactive to disagreements that emerge. For this reason, court judgments, cannot *preempt* disagreement and instead can only be reactive to the particular dispute. Enacted legal norms, however, are a form of general collective willing that establish zones in which each member of a community can have freedom to act. This is how it is possible to preempt disagreement and establish the conditions by which coordination and cooperation can occur. Legal autonomy refers to expression of the omnilateral will of a community in both general (legislative) and particular (judicial) forms. But this has to be done by something or

46. This is Pogge's view. *See* Pogge, *supra* note 5, at 146–147.

47. KANT, 6 GESAMMELTE SCHRIFTEN, *supra* note 9, at 318; and *see* KANT, METAPHYSICS, *supra* note 10, at 95.

48. *Id.* at 297; 78 (Gregor trans.). By "concretized" we mean that what is legally the case in a coordination problem is *fixed* or *settled* by the omnilateral will.

49. *See* RIPSTEIN, *supra* note 5, at 167–173.

50. KANT, 6 GESAMMELTE SCHRIFTEN, *supra* note 9, at 269; and *see* KANT, METAPHYSICS, *supra* note 10, at 95.

51. *Id.* at 297; 78 (Gregor trans.).

someone, and thus necessarily entails the institutionalization of the omnilateral will.

For Kant, an omnilateral will must be institutionalized, and this is normally through the well-known features of the sovereign state. Kant argues that "A state (*civitas*) is a union of a multitude of human beings under laws of right."[52] The state consists of three "persons" who correspond to the familiar executive, legislative, and judicial institutions that form the sovereign state, or *Rechtsstaat*. Thus law is institutionalized by the state, and the state exercises power to uphold the omnilateral will. For Arthur Ripstein, Kant's claim is that each part of the state is required to implement the omnilateral will fully.[53] However, as we explain in the next section, Kant's argument is that there must necessarily be institutions that can perform the legislative and judicial functions, but these need not take the form of those institutions associated with the *Rechtsstaat*. Furthermore, he does not regard the existence of an executive function as being necessary to institutionalize the law of nations as the expression of the omnilateral will of a community of states. For both of these reasons, the link between legal autonomy and the state can be cut.

II. KANT'S "LAW OF NATIONS"

Kant's concept of international law exhibits legal autonomy but rejects any form of federated or unitary global state. This section is concerned with demonstrating the first part of this claim. One way in which Kant supports this is by inference. In a note in *Perpetual Peace* he writes, "All men who can mutually influence one another must accept some civil constitution."[54] Therefore the fact of international relations implies law to govern them. Furthermore, the strategy by which Kant defends his concept of law is set out clearly in his discussion of the law of nations. He writes:

> nations . . . [and] peoples can be regarded as single individuals who injure one another through their close proximity while living in the state of nature (i.e., independently of external laws). For the sake of its own security, each nation can and should demand that the others enter into a contract resembling the civil one and guaranteeing the rights of each.[55]

52. *Id.* at 313; 90 (Gregor trans.).

53. *See* RIPSTEIN, *supra* note 5, at 173–174 and 225–230. Ripstein's view is that Kant does not offer a complete argument for the law of nations. Instead Kant focuses only on the need to establish an omnilateral will to establish conclusively the entitlements and rights of states. This is, accordingly, an oversight by Kant. Our response is that Kant thinks that international legislature and executive are unnecessary. After setting out Kant's oversight, Ripstein seems to make an argument that supports our view. On Kant's theory of the state, *see also* WOLFGANG KERSTING, WOHLGEORDNETE FREIHEIT (1984).

54. KANT, 8 GESAMMELTE SCHRIFTEN, *supra* note 9, at 348n; and *see* KANT, *Perpetual Peace*, *in* PERPETUAL PEACE (Humphrey trans.), *supra* note 10, at 111–112.

55. *Id.* at 354; 115 (Humphrey trans.).

It should be noted when analyzing the extract that Kant tends to use different terminology in relation to international relations. The state of nature in international relations is often rendered the state of war. This is uncontroversial and need not be dwelt upon. "Violence" is often referred to as "injury" in his international theory, and the latter concept does the same work in his international legal theory as the former does in his general legal theory. Some further explanation is needed here.

While it is the case that "injury" sometimes reflects a more Hobbesian view than "violence," Kant's main point should not be mistaken. In the quotation above, he argues that it is states' "close proximity" to each other that generates injury. This appears broader than Hobbes's characterization of international relations, where the rulers of states adopt a diffident (i.e., mutually distrusting and wary) psychological disposition toward each other.[56] This broader idea is expressed in Kant's characterization of "injury" in the state of war. He writes, "if even only one of these [nations] had only physical influence on another, they would be a state of nature, and consequently they would be bound together in a state of war."[57] In the previous section, "violence" is shown to be caused by each member of a community limiting the capacity of others to act on their purposes because of their close proximity to each other. This would appear from the foregoing quote to be the same as Kant's characterization of "injury" in international relations. Therefore the state of war is not a Hobbesian state of nature, where each state is diffident and potentially hostile. Rather, "injury" is an a priori characterization of the implications of state action in international relations.

The state of war in international relations appears to describe a number of states in which each can have a physical influence on the others by acting on and achieving its unilateral will. In this sense, successful state action can be said to alter or *restructure* the relations between states by altering the possibility that other states can achieve their purposes. We might, then, presume that as a system, international relations are structured by the relative power of states to achieve their respective purposes. This reading explains what Kant means when he writes "wars are . . . so many attempts . . . to bring about new relations among nations."[58] This interpretation also clarifies Kant's claim that:

> The elements of the right of nations are these: (1) states, considered in external relation to one another, are (like lawless savages) by nature in a non-rightful condition. (2) This non-rightful condition is a *condition* of war (of the

56. *See* THOMAS HOBBES, LEVIATHAN (Richard Tuck ed., 1987) (1651), at 90. *See also* ROSS HARRISON, HOBBES, LOCKE AND CONFUSION'S MASTERPIECE (2003), at 92–100.

57. KANT, 8 GESAMMELTE SCHRIFTEN, *supra* note 9, at 348n; and *see* KANT, *Perpetual Peace*, *in* PERPETUAL PEACE (Humphrey trans.), *supra* note 10, at 112.

58. KANT, 8 GESAMMELTE SCHRIFTEN, *supra* note 9, at 24–25; and *see* KANT, *Universal History*, *in* PERPETUAL PEACE (Humphrey trans.), *supra* note 10, at 34–35.

> right of the stronger), even if it is not a condition of actual war and actual attacks being constantly made (hostilities).[59]

The immorality of the state of war is demonstrated in the following way. Kant argues that there are certain moral obligations on states that govern when and how states can use force against one other in the state of nature, and here he effectively puts forward a just-war theory.[60] These moral obligations are expressed as a series of maxims whereby states can go to war only with the consent of those they govern; can go to war only when they have been wronged by another state; cannot use spies, assassins, or "poisoners," and so on.[61] Most important, however, is that all states must leave the possibility of peace open, because to do otherwise would "reveal . . . a maxim by which, if it were made a universal rule, any condition of peace among nations would be impossible and, instead, a state of nature would be perpetuated."[62]

This final moral obligation that states are under seems to imply that to deny peace through law when using force constitutes a contradiction in the "will" of a state. In turn, this idea of a contradiction in the "will" is one way in which Kant thinks about the application of the categorical imperative.[63] But how does such a contradiction arise? One answer Kant gives is that such a maxim would, if universalized, imply a denial that any state could achieve its purposes or that it could conclusively acquire things that are useful to the community it governs. The global distribution of goods would be provisional and a matter of luck and power. If correct, this matches the claim in his general legal theory that the immorality of the state of nature is a result of the inability of any members of it conclusively to possess those things they claim a right to or purposes they seek to achieve. As a system of willing, it is, then, one in which no state can have a conclusive right to achieve its purposes or to hold property. Everything is contingent and rooted on a balance of power in international relations. This is why Kant writes:

> Since a state of nature among nations, like a state of nature among individual human beings, is a condition that one ought to leave in order to enter a lawful condition, before this happens any rights of nations, and anything external

59. KANT, 6 GESAMMELTE SCHRIFTEN, *supra* note 9, at 344; and *see* KANT, METAPHYSICS (Gregor trans.), *supra* note 10, at 114.

60. *Id.* at 346; 116 (Gregor trans.).

61. KANT, 8 GESAMMELTE SCHRIFTEN, *supra* note 9, at 346; and *see* KANT, *Perpetual Peace*, *in* PERPETUAL PEACE, *supra* note 10, at 109–110.

62. KANT, 6 GESAMMELTE SCHRIFTEN, *supra* note 9, at 349; and *see* KANT, METAPHYSICS (Gregor trans.), *supra* note 10, at 119.

63. *See, e.g.*, KANT, 4 GESAMMELTE SCHRIFTEN, *supra* note 9, at 446–447; and *see* KANT, MORAL LAW (Paton trans.), *supra* note 10, at 107–108.

> that is mine or yours which states can acquire or retain by war, are merely *provisional*.[64]

States must leave the state of war and establish a system of law to govern their relations for this reason. Hence, Kant argues, states must "stand under common external constraints"[65] that are "independent, universally valid laws that restrict the freedom of everyone."[66] In this way, Kant provides a moral justification for states to be governed by an omnilateral will that matches the argument in his general legal theory.

So far, the argument for the law of nations matches that of the state legal order, and both have legal autonomy. The only difference is that the natural human agent is replaced by the state as an artificial agent.[67] However, it is this difference that allows the international legal order to take a quite different institutional form from a state legal order.

III. THE INSTITUTIONAL STRUCTURE OF THE INTERNATIONAL LEGAL ORDER

In this final section we set out what we consider to be the most plausible interpretation of the institutional implications of Kant's concept of international law. However, as a preliminary comment, it is important to recall that Kant attempts to steer a middle course between Grotius's natural-law theory on the one hand and the global state on the other. Thus he attempts to show how it is possible to have law (i.e., the institutional expression of the omnilateral will) without the state. For Grotius, *jus gentium* consists of a set of moral principles derived from *jus naturae* that govern the conduct of states. This cannot be a system of law for Kant because it is not system of collective or omnilateral willing. The problem with Grotius's formulation, therefore, is that "nations do not stand under any common external constraints."[68] The "external constraints" are the essential feature of governance by law and what distinguishes law from morality. Grotius is an "irritating comforter" because he is prepared to dress the unilateral acts and aggressive behavior of various states with the clothing of law. For Kant, writers like Grotius are only ever cited in support of a war, and states never use such doctrines to justify refraining from war.[69]

64. KANT, 6 GESAMMELTE SCHRIFTEN, *supra* note 9, at 350; and *see* KANT, METAPHYSICS (Gregor trans.), *supra* note 10, at 119. *See* also BERND LUDWIG, KANTS RECHTSLEHRE (1988), at 177.

65. KANT, 8 GESAMMELTE SCHRIFTEN, *supra* note 9, at 355; and *see* KANT, *Perpetual Peace, in* PERPETUAL PEACE (Humphrey trans.), *supra* note 10, at 116.

66. *Id.* at 356–357; 117 (Humphrey trans.).

67. For a detailed analysis, *see* Katrin Flikschuh, *Kant's Sovereignty Dilemma: A Contemporary Analysis*, 18 J. POL. PHIL. 469–493 (2010).

68. KANT, 8 GESAMMELTE SCHRIFTEN, *supra* note 9, at 355; and *see* KANT, *Perpetual Peace, in* PERPETUAL PEACE (Humphrey trans.), *supra* note 10, at 116.

69. *Id.* at 355; 116 (Humphrey trans.). On this, *see* Perreau-Saussine, *supra* note 5.

However, Kant's vision of the law of nations must also preclude any form of global state. This is because (i) laws "invariably lose their impact with the expansion of their domain of governance";[70] and (ii) a global state will be "a soulless despotism" that "finally degenerates into anarchy" "after it has uprooted the soul of good."[71] Beyond these pragmatic arguments, he also claims that the existence of a global state denies the premise of international relations.[72] Kant needs a way of institutionalizing a system of law which does not reflect a global version of the sovereign state. What is his solution?

One answer, which is advanced by Habermas, is that Kant's view is not entirely clear.[73] Between and within his texts on international law, Kant's argument varies. It is natural that his views should have developed over this period, as his works on this subject span the period from 1784 to 1797. But while Kant accepts that his position is not wholly worked out, Habermas's claim is too strong.[74]

This said, and on the whole, his modern interpreters who have followed Kant to this point suggest that he prefers a state of peoples that is a form of federal global legal order. They continue that when he rejects a world state, it is the unitary world state described by the world republic or universal monarchy that he is rejecting.[75] Therefore he adopts a view of international law that is statelike, but he rejects a global *unitary* state. When he appears to accept an institutional form in the weak sense, such as a *Völkerbund*, or confederation, he does so as the lesser evil in the hope of better times to come.[76] It is true that there is a developmental aspect to Kant's writing; his "Preliminary Articles for Perpetual Peace Amongst Nations"[77] is an obvious example of this.[78] But the interpretation that holds that the confederation is but one stage on the way toward federal global government is difficult to support without ignoring some key distinctions that Kant makes. The confederation, which is a "special type of league,"[79] is the *end* of Kant's project.

It is our view that the correct interpretation of Kant's position is that legal autonomy need not be accompanied by statelike institutions. It does not

70. KANT, 8 GESAMMELTE SCHRIFTEN, *supra* note 9, at 367; and *see* KANT, *Perpetual Peace*, *in* PERPETUAL PEACE (Humphrey trans.), *supra* note 10, at 124–125.

71. *Id.*

72. *Id.* at 354; 125 (Humphrey trans.).

73. *See* HABERMAS, *supra* note 2.

74. *See* Section I, *supra*, and KANT, 6 GESAMMELTE SCHRIFTEN, *supra* note 9, at 209; and *see* KANT, METAPHYSICS (Gregor trans.), *supra* note 10, at 6.

75. Logically, Kant may not be able to rule out the perpetual possibility of the united will of all human beings on the globe replacing all current legal orders. However, Kant's arguments against this form of global law are not merely practical and are rooted in the categorical moral obligations that must be accepted by republican states. *See* LUDWIG, *supra* note 64, at 176). *See infra*, Section III.A, where we argue that Kant prefers a confederal form of international law.

76. *See* Kleingeld, *supra* note 6; and Byrd & Hruschka, *supra* note 6.

77. KANT, 8 GESAMMELTE SCHRIFTEN, *supra* note 9, at 343–348; and *see* KANT, *Perpetual Peace*, *in* PERPETUAL PEACE (Humphrey trans.), *supra* note 10, at 107–111.

78. *See* Perreau-Saussine, *supra* note 5.

79. KANT, 8 GESAMMELTE SCHRIFTEN, *supra* note 9, at 356 (our translation).

entail a "state-of-peoples," a *Völkerstaat*, a federal world order, or versions of a unitary global sovereign state. Instead, for Kant, the necessary institutional implications of legal autonomy are fulfilled by the formation of a noncoercive confederation of republican states. It is crucial, however, that this confederation have the character of law if and only if the legal persons whose unilateral will needs transcending in the international sphere are internally constituted as republican states. Unlike human nature, which is flawed, the nature of states is, for Kant, reformable, and it is this point that holds the key to the viability of a confederation and obviates the need for a state of peoples at the international level.

International law is thus the expression of the omnilateral and collective will of republican states qua administrative organs of the international legal order. By distinguishing between the institutional forms the international legal order and the state can take on the one hand, and the idea of international law as an expression of the omnilateral will on the other, Kant is able to conceptualize international law on the basis of the noncoercive confederation.

The argument in this section progresses in three steps: (i) that international legal order is best understood as a confederation of states rather than a federation; (ii) that Kant's claim that the confederation must comprise republican states is a necessary condition; (iii) that the confederation is an early form of what has become known as an interstate system, that is, one in which states collectively undertake major administrative roles in the international legal order.

A. Confederation Rather Than Federation

In *The Doctrine of Right*, Kant argues in favor of a "universal association of states," which he elsewhere calls a league, congress, or federation. Crucially, though, this is not like the federation upon which the government of the United States of America is founded, and it is for this reason that those who argue that Kant argues for a federal state of peoples are mistaken. Instead, this association is noncoercive and does not have a centralized executive coercive power. Kant writes:

> Only in a universal association of states (analogous to that by which a people becomes a state) can rights come to hold conclusively and a true condition of peace come about. . . . Such an association of several states to preserve peace can be called a permanent congress of states, which each neighbouring state is at liberty to join. . . . The congress is here understood only as a voluntary coalition of different states which can be dissolved at any time, not a federation (like that of the American states) which is based on a constitution and can therefore not be dissolved.—Only by such a congress can the idea of a public right of nations be realised, one to be established for deciding their disputes

> in a civil way, as if by a lawsuit, rather than in a barbaric way (the way of savages), namely by war.[80]

Although we have no way of knowing how Kant understood the federal system of the fledgling United States, it might be useful to consider Kant's comments in the light of those made in support of a coercive and permanent federation of states set out in the *Federalist Papers*. Although geographically a substantial leap, this, at least, provides an exposition and critique of arguments for and against various forms of international governance at the time Kant was writing. The prefederal Confederation of American States had two principal defects for Hamilton, Madison, and Jay. The first was that it legislated for "STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of whom they consist."[81] Therefore states under the confederation have plenary jurisdiction, and the confederation can regulate only states. Second, the Federalists bemoaned the lack of a "superintending power under the direction of a common council."[82] The superintending power is an executive power that can coerce states, has a standing army, can raise taxes, and so on. For the authors of the *Federalist Papers*, a federation would have the competence directly to regulate the affairs of individuals within states as well as executive powers such as those decribed in this paragraph. Without both of these features a confederacy (or league) would be a "simple alliance offensive and defensive; and would place us in a situation to be alternate friends and enemies of each other, as our jealousies and rivalships, nourished by the intrigues of foreign nations, should prescribe to us."[83]

Kant explicitly rejects the federal system of governance found in the United States, as stated above. But he also explicitly accepts both of the features of a confederacy that the authors of the *Federalist Papers* reject. He writes "A league of nations in accordance with the idea of an original social contract is necessary, not in order to meddle in one another's internal dissentions but to protect against attacks from without."[84] So Kant rejects the idea that the law of nations should interfere with the plenary jurisdiction of states or directly regulate the affairs or protect the rights of individuals. He also accepts the centrality of self-defense to the league. More importantly, he refuses to accept the idea that the international legal order should have

80. KANT, 6 GESAMMELTE SCHRIFTEN, *supra* note 9, at 350–351; and *see* KANT, METAPHYSICS (Gregor trans.), *supra* note 10, at 119–120.

81. JAMES MADISON, ALEXANDER HAMILTON & JOHN JAY, THE FEDERALIST PAPERS (Isaac Kramnick ed., 1987) (1788), at 147.

82. *Id.* at149.

83. *Id.* at 148–149. For commentary, *see* Tara Helfman, *The Law of Nations in the Federalist Papers*, 23 J. LEGAL HIST. 107–128 (2002).

84. KANT, 6 GESAMMELTE SCHRIFTEN, *supra* note 9, at 344–345; and *see* KANT, METAPHYSICS (Gregor trans.), *supra* note 10, at 115.

an executive (and coercive) power like that possessed by states. He writes that "this league does not seek any power of the sort possessed by nations."[85]

For both of these reasons, Kant seems to argue in favor of a confederacy—that is, a legal agreement that establishes a form of organization with certain functions between a group of states, does not have centralized coercive powers, and leaves states with plenary jurisdiction. Furthermore, the function of this organization is to settle disputes between states and to organize mutual self-defense. However, in order for this confederation to be a system of law, Kant holds that it must consist of republican states.

B. Republicanism Is a Necessary Form for States to Take in the Confederation

In the *Federalist Papers*, Hamilton sets out the following justification for a confederation:

> There was a time when we were told that breaches by the States of the regulations of the federal authority were not to be expected; that a sense of common interest would preside over the conduct of the respective members, and would beget a full compliance with all the constitutional requisitions of the Union.[86]

He then asks the question: "Why has government been instituted at all? Because the passions of men will not conform to the dictates of reason and justice without constraint. Has it been found that bodies of men act with more rectitude or greater disinterestedness than individuals?"[87] In response to the final question, Hamilton thinks they do not. Kant, however, argues that if states can be constituted properly, the sort of skeptical position taken by Hamilton need not be implied. Kant's view is that it is a necessary condition of the law of nations that the members of a noncoercive confederation consist of republican states. It is not that the confederation is somehow second-best. Rather, this is the only way in which the state of war can be resolved by law without destroying the sovereignty of states.

To explain, in the section of *Perpetual Peace* in which he defends the claim that "The civil constitution of every nation should be republican,"[88] Kant distinguishes two ways in which republican governance can be justified. He writes: "in addition to the purity of its origin, a purity whose source is the pure concept of right, the republican constitution also provides for this desirable result, namely, perpetual peace."[89] So, first, as a matter of pure

85. KANT, 8 GESAMMELTE SCHRIFTEN, *supra* note 9, at 356; and *see* KANT, *Perpetual Peace*, *in* PERPETUAL PEACE (Humphrey trans.), *supra* note 10, at 117.

86. MADISON ET AL., *supra* note 81, at 149.

87. *Id.*

88. KANT, 8 GESAMMELTE SCHRIFTEN, *supra* note 9, at 349–351; and *see* KANT, *Perpetual Peace*, *in* PERPETUAL PEACE (Humphrey trans), *supra* note 10, at 111–113.

89. *Id.* 351; 113 (Humphrey trans.).

practical reason, states should be republican, and second, it is advantageous for states to be republican because empirically such states tend to be more peaceful.

Most commentators focus on the second reason and employ it as support for a democratic-peace thesis,[90] but we regard it as important to dwell on the first justification. According to the first justification, Kant is clear that there are two moral obligations placed on the rulers of states, regardless of how they come to power. Internally, they are morally required to alter the constitution of the state so that it accords with republicanism. Externally, rulers are under a moral obligation to leave the state of nature in international relations and enter a state of governance by law.[91]

Regarding the external obligation, as a matter of fact, rulers tend to reject the idea that they should be subject to international law and find honor or pride in their ability to stand free of external constraints and to dominate others. However, Kant claims that officials in republican states are collectively mature enough to accept the external moral obligation and bring their state into a civil condition with others in international relations. Guaranteed freedoms of officials and others to be publicly critical of the state through a free press is one way in which Kant considers this maturity can be exhibited.[92] This is what Kant means when he writes: "For as nations they already have an internal, legal constitution and therefore have outgrown the compulsion to subject themselves to another legal constitution that is subject to someone else's concept of right."[93] To clarify, the first part of this sentence describes states that adopt a republican form of governance. The second part of the sentence indicates that states no longer need to be compelled to subject themselves to a concept of right; it does not need to be imposed upon them by another.

This interpretation is reinforced when we consider the sentence that directly follows that just quoted, which reads: "Nonetheless, from the throne of its moral legislative power, reason absolutely condemns war as a means of determining the right and makes seeking the state of peace a matter of unmitigated duty. But without a contract among nations peace can be neither

90. Probably the most significant contribution on this point is Michael Doyle, *Kant, Liberal Legacies, and Foreign Affairs*, 12 PHIL. & PUB. AFF. 205–235 (1983); also Michael Doyle, *Kant, Liberal Legacies, and Foreign Affairs, Part 2*, 12 PHIL. & PUB. AFF. 323–353 (1983).

91. This view is supported by Paul Guyer when he writes that within a republican state, "rulers cannot be motivated solely by self-interest and coercion, but must be motivated by respect for morality." *See* Paul Guyer, *The Crooked Timber of Mankind*, *in* KANT'S IDEA FOR A UNIVERSAL HISTORY WITH A COSMOPOLITAN AIM (Amelie Oksenberg Rorty & James Schmidt eds., 2009), 129–149 at 133. *See also* Ripstein, *supra* note 5, at 229; Flikschuh, *supra* note 67; and Perreau-Saussine, *supra* note 5.

92. *See* Perreau-Saussine, *supra* note 5.

93. KANT, 8 GESAMMELTE SCHRIFTEN, *supra* note 9, at 355–356; and *see* KANT, *Perpetual Peace*, *in* PERPETUAL PEACE (Humphrey trans.), *supra* note 10, at 116. This sentence is interpreted quite differently by Kleingeld. However, as we show, the text surrounding the sentence seem to correspond to our reading. *See* Kleingeld, *supra* note 6, at 307–310.

inaugurated nor guaranteed."[94] To be clear, Kant is not commenting on the empirical tendencies associated with republican states. Rather he is reflecting on the state being structured in such a way that it is responsive to the internal and external moral obligations that bear down upon it. Externally, therefore, states must accept peace through law. In this respect, states are in the same position vis-à-vis the international legal order as are executive bodies vis-à-vis the legislature within republican states. By Kant's definition, such executive bodies are governed by law but not by force.[95] The same must be true of properly constituted states as a whole.

By contrast, the relationship between republican and nonrepublican states cannot be governed by law. Less mature states (or better, *Unrechtsstaaten*), it must be surmised, cannot be part of the law of nations. Therefore the argument by scholars such as Fernando Tesón that Kant adopts a *legal* doctrine that would allow the republican states (or some equivalent) to intervene for humanitarian reasons in the affairs of nonrepublican states cannot be sustained.[96] While it may be possible to show that there are various moral reasons for intervention, the grounds for intervention cannot be legal.

This argument explains why a confederation of republican states is noncoercive. Republican states accept that they have a categorical duty to accept the governance of law and need not be forced to comply by an executive power that characterizes federal legal orders.[97] Kant, to be clear, is claiming that the confederation is noncoercive in a specific way. Of course, if a state acts on its legally vindicated right, it affects the capacity of other states to achieve their purposes, and such states are coerced in one sense of that word. However, in such circumstances, states are beholden, as a matter of practical reason, to acquiesce in the constraint of their freedom.

Furthermore, such a confederation must be coercive in the sense that it engages in self-defense. So when Kant regards the confederation as noncoercive, it must mean that (i) states cannot be forced to join or leave the confederation, and (ii) there is no centralized executive power that enforces laws *within* the confederation.[98] Kant's claim that the confederation must be repudiable at any time fits with his view of the noncoercive nature of the confederation. While republican states will accept governance by law, other states that are members of the confederation may not if their system of governance changes. If this occurs, it amounts to a return to the state of nature, and republican states must be prepared to defend their interests.

94. KANT, 8 GESAMMELTE SCHRIFTEN, *supra* note 9, at 356; and *see* KANT, *Perpetual Peace*, *in* PERPETUAL PEACE (Humphrey trans.), *supra* note 10, at 116–117.

95. KANT, 6 GESAMMELTE SCHRIFTEN, *supra* note 9, at 313; and *see* KANT, METAPHYSICS (Gregor trans.), *supra* note 10, at 90–91.

96. *See* TESÓN, *supra* note 3.

97. This view is reflected strongly in RAWLS, LAW OF PEOPLES: that for ideal theory, there is no need for strong, coercive forms of global governance. *See* RAWLS, *supra* note 7, at 36.

98. KANT, 8 GESAMMELTE SCHRIFTEN, *supra* note 9, at 356; and *see* KANT, *Perpetual Peace*, *in* PERPETUAL PEACE (Humphrey trans.), *supra* note 10, at 116–117.

Furthermore, it seems that the confederation should be regularly renewed to draw attention to the fact of both the freedom and ongoing moral obligation to remain within it.[99]

C. The Confederation as an Interstate System of International Law

Kant's general view is that all forms of law exhibit legal autonomy, which implies the establishment of legal institutions able to create, interpret, and enforce the omnilateral will. However, his argument is that states must take a republican form, which allows the international legal order to take a confederated form. International law, then, is noncoercive, and the need for institutions that are able to enforce international legal norms is obviated. However, Kant does offer some evidence of how the confederation is able to create and interpret international legal norms without the need for institutions that have legal autonomy in the strong sense.

Kant's views on institutional design reflect what international lawyers call an interstate system. An interstate system is an idea developed by Georges Scelle in the 1930s in his theory of *dédoublement fonctionnel*. Cassese describes Scelle's view of the role of the state in international law in the following way:

> As there are no "specifically international rules and agents". . . , national members of the executive as well as state officials *fulfil a "dual" role*: they act as state organs whenever they operate within the national legal system; they act *qua* international agents when they operate within the international legal system. Thus, when the heads of state of the state legislature take part in the formation of a law-making treaty, they act as international law-making bodies; by the same token, any time a domestic court deals with a conflict of law question, it acts *qua* an international judicial body; similarly, any time one or more state officials undertake an enforcement action (resort to force short of war, reprisals, armed intervention, war proper) they act as international enforcement agencies.[100]

Thus, in an interstate system, states collectively perform the institutionalized administrative roles that we associate with any legal order. Such a system is a legal order and has legal autonomy. States acting together form a composite organ that can create, interpret, and enforce international legal norms.[101] Thus, as Waldron points out, "it must be understood that the state

99. KANT, 6 GESAMMELTE SCHRIFTEN, *supra* note 9, at 345; and *see* KANT, METAPHYSICS (Gregor trans.), *supra* note 10, at 115.

100. *See* Antonio Cassese, *Remarks on Scelle's Theory of "Role-Splitting"* (dédoublement fonctionnel*) in International Law*, 1 EUR. J. INT'L LAW 210–231 (1990), at 212–213.

101. On this, *see* HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY (Stanley Paulson & Bonnie Litschewski-Paulson trans., 1934), at 123.

is not just a subject of international law; it is additionally both a source and an official of international law."[102]

We suggest that Kant adopts a view like this. He not only rejects the global republic, the universal monarchy, and the federal state of peoples, but he also sees republican states as playing a key institutional role in the administration of the international legal order. Specifically, in *Theory and Practice*, he suggests that international law is created through "commonly accepted [principles of] *international right*."[103] Moreover, in *Universal History*, Kant describes the confederation as an amphictyonic treaty[104] that is designed to result in commonly agreed positive laws (*gemeinschaftlich verabredete Gesetze*) reflecting a unified will and power on the part of nations (*vereinigte Wille/Macht/Gewalt*).

The volition and agreement of states, then, seem to be integral to the creation of a system of positive international legal norms and suggest that Kant is arguing for some sort of interstate legal system. The omnilateral or collective will of states is thereby given institutional expression by the positive agreements between states. It should also be noted that in *Perpetual Peace*, disputes between states should be settled peacefully, and there is a suggestion that mediation between states by third states is acceptable "just as if they were permanently leagued for this purpose."[105] In these passages Kant hints that the omnilateral will, which is characteristic of any form of law, is institutionalized through an interstate system.

This said, Kant does suggest some distinctive suprastate institutions that more resemble the institutions associated with the sovereign state, but these examples do not undermine our central claim. One clear example is found in his support for an international forum in which states can discuss and resolve their disputes. He refers to the congress of the States-General in The Hague as a good example of the sort of congress he thinks plausible. While the *Stadtholder* of the States-General did have considerable executive power to raise armies, enter into treaties, and levy taxes, we should note that Kant seems to be referring to the *congress* of the States-General rather than the set of more extensive legal institutions of which the congress formed a part.[106]

This interpretation would also fit with the references to Greek amphictyonies scattered throughout his work. Amphictyonic leagues, as far as we

102. Jeremy Waldron, *The Rule of International Law*, 30 HARV. J. LAW & PUB. POL'Y 15–30 (2006), at 23.

103. KANT, 8 GESAMMELTE SCHRIFTEN, *supra* note 9, at 311; and *see* KANT, *On the Proverb*, *in* PERPETUAL PEACE (Humphrey trans.), *supra* note 10, at 88.

104. KANT, 8 GESAMMELTE SCHRIFTEN, *supra* note 9, at 24; and *see* KANT, *Universal History*, *in* PERPETUAL PEACE (Humphrey trans.), *supra* note 10, at 34; and also KANT, 6 GESAMMELTE SCHRIFTEN, *supra* note 9, at 345; and *see* KANT, METAPHYSICS (Gregor trans.), *supra* note 10, at 115.

105. KANT, 8 GESAMMELTE SCHRIFTEN, *supra* note 9, at 368; and *see* KANT, *Perpetual Peace*, *in* PERPETUAL PEACE (Humphrey trans.), *supra* note 10, at 125.

106. KANT, 6 GESAMMELTE SCHRIFTEN, *supra* note 9, at 350; and *see* KANT, METAPHYSICS (Humphrey trans.), *supra* note 10, at 119.

can understand them,[107] established a system of norms that ancient Greek states were committed to comply with in their relations with each other, but such leagues also "administer[ed] a neutral space for competitive interaction, free from the control of any single state, in which states could forge and define their identities, interests and achievements."[108] Although it is unclear how Kant received classical knowledge of amphictyonies,[109] the view in the previous quotation does resonate with his idea of law as a noncoercive confederation with a congress in which matters of common concern are considered. There are two further points supporting our claim.

D. Cosmopolitan Law

The first point is Kant's concept of cosmopolitan law. He argues that added to state law and the law of nations is cosmopolitan law. He insists that the idea of cosmopolitan law is a necessary extension of state law and the law of nations. Any two are vulnerable without the third.[110] Cosmopolitan law concerns the relations between individuals and foreign nations and is thus

107. Bederman suggests that the Greek amphictyonies have often "represented the most sophisticated complex of treaty relations, approaching even a level of real international organisation." He considers, however, that "This is unquestionably an extravagant claim." *See* DAVID BEDERMAN, INTERNATIONAL LAW IN ANTIQUITY (2001), at 170.

108. *See* Jonathan Hall, *International Relations*, *in* 1 THE CAMBRIDGE HISTORY OF GREEK AND ROMAN WARFARE 85–107 (Philip Sabin, Hans van Wees & Michael Whitby eds., 2007), at 100.

109. It seems, however, that the source describing how the Amphictyonic League worked, at least by the fourth century BCE, is likely to be Aeschines, who was actually one of its officials. Without going into the context, he writes:

> I reviewed from the beginning the story of the founding of the shrine, and of the first synod of the Amphictyons that was ever held; and I read their oaths, in which the men of ancient times swore that they would raze no city of the Amphictyonic states, nor shut them off from flowing water either in war or in peace; that if anyone should violate this oath, they would march against such an one and raze his cities; and if any one should violate the shrine of the god or be accessory to such violation, or make any plot against the holy places, they would punish him with hand and foot and voice, and all their power. . . . To prove that they were Amphictyonic cities and thus protected by the oaths, I enumerated twelve tribes which shared the shrine: the Thessalians, Boeotians (not the Thebans only), Dorians, Ionians, Perrhaebi, Magnetes, Dolopians, Locrians, Oetaeans, Phthiotians, Malians, and Phocians. And I showed that each of these tribes has an equal vote, the greatest equal to the least: that the delegate from Dorion and Cytinion has equal authority with the Lacedaemonian delegates, for each tribe casts two votes; again, that of the Ionian delegates those from Eretria and Priene have equal authority with those from Athens and the rest in the same way. . . . Now I showed that the motive of this expedition was righteous and just; but I said that the Amphictyonic Council ought to be convened at the temple, receiving protection and freedom to vote, and that those individuals who were originally responsible for the seizure of the shrine ought to be punished not their cities, but the individuals who had plotted and carried out the deed; and that those cities which surrendered the wrongdoers for trial ought to be held guiltless.

AESCHINES, ON THE EMBASSY (2:115–117).

110. *See* LUDWIG, *supra* note 64, at 177.

expressive of universal citizenship. It is not a superior version of the law of nations; it deals with different subjects and a different subject matter. In his third definitive article in *Perpetual Peace*, he suggests that cosmopolitan law is limited to the conditions of general hospitality, which he glosses in low-key terms as a right of access and toleration.[111] In the *Doctrine of Right*, cosmopolitan law is tied up with the conditions by which commerce between nations is possible.[112] On both accounts, cosmopolitan law is not a thick concept of human rights or the like. Instead, it is directed toward the creation of mutual relations between distant continents, resulting in a type of world community, which in turn can lead to regulation by public law of nations.

This sort of cosmopolitanism does not imply further global institutions. There is no proposal for a cosmopolitan assembly like that suggested by Daniele Archibugi or anything like it.[113] Instead, Kant writes that "the idea of cosmopolitan right is . . . an amendment to the unwritten code of national and international rights, necessary to the public rights of men in general."[114] This suggests that cosmopolitan law arises in an international and national institutional setting rather than being the product of autonomous institutions. Thus Kant envisages that the institutionalization of all three legal orders (state law, law of nations, cosmopolitan law) can be completed largely by getting the internal and external institutional nature of states right and not by multiplying institutions at the international or cosmopolitan levels.

E. A Negative Surrogate?

Kleingeld regards Kant as defending a federal state of peoples but being pragmatically inclined to accept a temporary "negative surrogate" of it. The negative surrogate of the state of peoples is a form of international governance best described as a relatively unstable confederal approximation of the federation of republican states. Her interpretation, she claims, is preferable to those who interpret Kant as being simply contradictory or as rejecting a state of peoples on pragmatic grounds.[115] Likewise, Byrd and Hruschka's reconstruction relies on the confederation as inferior in Kant's view to the global federal state. These three authors thus consider the developmental moment in Kant's thought to be not the gradual global movement toward internal republican constitution which allows for the

111. KANT, 8 GESAMMELTE SCHRIFTEN, *supra* note 9, at 357–360; and *see* KANT, *Perpetual Peace*, *in* PERPETUAL PEACE (Humphrey trans.), *supra* note 10, at 118–119.

112. KANT, 6 GESAMMELTE SCHRIFTEN, *supra* note 9, at 352; and *see* KANT, METAPHYSICS (Gregor trans.), *supra* note 10, at 121.

113. Daniele Archibugi, *Models of International Organization in Perpetual Peace Projects*, 18 REV. INT'L STUD. 295–317 (1992).

114. KANT, 8 GESAMMELTE SCHRIFTEN, *supra* note 9, at 360; and *see* KANT, *Perpetual Peace*, *in* PERPETUAL PEACE (Humphrey trans.), *supra* note 10, at 119.

115. Kleingeld, *supra* note 6; and *see, e.g.*, Kevin Dodson, *Kant's Perpetual Peace: Universal Civil Society or a League of States?*, 15 SW. PHIL. STUD. 1–9 (1993).

creation of the three legal orders (state, international, and cosmopolitan), but the move from unstable confederation to stable federation.

This interpretation relies heavily on a passage from *Perpetual Peace* that is at first sight obscure and un-Kantian. The passage runs as follows:

> The concept of the right of nations as a right to go to war is meaningless (for it would then be the right to determine the right not by independent universally valid laws that restrict the freedom of everyone, but by one-sided maxims backed by force). Consequently, the concept of the right of nations must be understood as follows: that it serves justly those men who are disposed to seek one another's destruction and thus to find perpetual peace in the grave that covers all the horrors of violence and its perpetrators. Reason can provide related nations with no other means for emerging from the state of lawlessness, which consists solely of war, than that they give up their savage (lawless) freedom, just as individual persons do, and, by accommodating themselves to the constraints of common law, establish a *nation of peoples* (*civitas gentium*) that (continually growing) will finally include all the people of the earth. But that they do not will to do this because it does not conform to their idea of the right of nations, and consequently they discard in *hypothesis* what is true in *thesis*. So (if everything is not to be lost) in place of the positive idea of a *world republic* they put only the *negative* surrogate of an enduring, ever expanding *federation* that prevents war and curbs the tendency of that hostile inclination to defy law, though there will always be the constant danger of their breaking loose.[116]

Kleingeld, Byrd and Hruschka, and indeed, one of our anonymous reviewers all assume that Kant is writing here in his own voice, arguing for a "*civitas gentium*" (which they interpret as a federal state of peoples, not a unitary global state), and that he thereby rejects the "negative surrogate" of an unstable confederation. This requires them to read his positive reference to a *Friedensbund* (peace league) two paragraphs earlier as really referring to a federal state and his very un-Kantian deference to the actual will of states as the reason he advances a pragmatic compromise.

However, in this passage Kant is simply engaging in a concluding reductio ad absurdum (in the sense of presenting a proof by contradiction) against those who still support the proposition that the law of nations is or contains a right to go to war. The paragraph must not be detached from the overall argument of his second definitive article of *Perpetual Peace*. This begins with a basic conundrum. States could be treated as individuals in a state of nature. This would imply that they should enter a civil constitution to secure their rights. But such a league of peoples cannot be a state of peoples (*Völkerstaat*), since this would amount to the dissolution of states and legal relations between states into a single state.[117]

116. KANT, 8 GESAMMELTE SCHRIFTEN, *supra* note 9, at 356–357; and *see* KANT, *Perpetual Peace*, *in* PERPETUAL PEACE (Humphrey trans.), *supra* note 10, at 117–118.

117. *Id.* at 354; 115 (Humphrey trans.).

Then, after two paragraphs in which he discusses the violence of international relations and the impotence of "sorry comforters" such as Grotius, Pufendorf, and Vattel, he sets out (in a single sentence of 217 words!) three conditions and a conclusion: (1) since the use of war by states to enforce their rights can only end in a single peace treaty and cannot end the state of war in general; and (2) since states cannot be treated simply as individuals obligated to enter a civil constitution; and (3) since escaping war is an immediate rational duty and has to be done by some sort of treaty, there must be a special type of league (*einen Bund von besonderer Art*) called a peace league, which differs from a peace treaty in that it is perpetual.[118] At the end of the next paragraph, Kant calls this "free federalism" the "surrogate" for a civil constitution that reason necessarily connects with the idea of international law.

Kant's final—and problematic—paragraph is the coup de grâce to his argument against the "sorry comforters." There are several small clues, easily lost in translation, that this is so. In the first sentence, he states that the concept of international law as a right to go to war is *actually*, or *in truth* (*eigentlich*), inconceivable.[119] He must mean that it involves one in a logical contradiction. The next sentence, which reads as a contrasting assertion in Mary Gregor's translation, actually continues as part of the same sentence: the concept of the right of nations *would then have to be understood* (*müβte denn darunter verstanden werden*) as justifying the peace of the grave.[120] From such an awful situation, reason can only advise entering into a state of peoples (*Völkerstaat*) under coercive positive law (*Zwangsgesetzen*).[121] However since states are *totally* (*durchaus*) opposed to the idea of a world republic, they can only opt instead for an unstable negative surrogate of a league that keeps the warlike impulse temporarily at bay.[122] The slippage from "state of peoples" to "world republic" reflects the view of Kant and/or states in general that there is no significant difference between a global federal state and a global unitary state.[123]

This paragraph is a reductio ad absurdum of the proposed understanding of the law of nations as the right to go to war because none of the three possible consequences (global graveyard, federal or unitary state, or unstable pragmatic treaties) is logically tenable as a concept of international law. Kant analogizes the state's hypothetical right to go to war with the natural right of humans in a state of nature to make unilateral judgments of right. Either people end up killing each other, or they enter a state, which Kant has already rejected in the opening paragraph of the second definitive article as a possible way of institutionalizing international law, or they opt for

118. *Id.* at 355–356; 116–117 (Humphrey trans.).
119. *Id.* at 356; 177 (Humphrey trans.).
120. *Id.* at 357; 117 (Humphrey trans.).
121. *Id.*
122. *Id.*
123. *Id.*

an unstable compromise, which in the final analysis is still a state of war and no permanent solution.

Of course, if international law is not based on the right to go to war (i.e., make unilateral judgments of right), there are other rational possibilities for international legal order. We point out above that for Kant states are reformable, and this premise opens the way to alternative institutional forms for the global legal order within which they are mutually bound.

The problem presented by this final, problematic paragraph is to work out what Kant thinks the similarities and differences are between the "negative surrogate" and the idea of a confederation set out throughout his work. He refers positively to the confederal peace league as a "surrogate" of the civil constitution in the previous paragraph. What, then, is the "negative surrogate"? There seem to be at least two plausible options. The first option is that he is claiming that even if states accept the law of nations as the right to go to war and reject a federal or unitary world state, they end up agreeing to something that resembles his confederation. Subsequently, there could be "gradual reform,"[124] so that the "negative surrogate" ends up resembling, in reality, an example of the law of nations as a noncoercive free confederation. This would be consistent with his claims about the gradual spread of republicanism as enhancing the possibility of perpetual peace. The second option is that because the negative surrogate is constantly under threat of falling apart, it is actually inadequate as a system of international law and is some distance from the confederation. The negative surrogate is a product of fear, the free confederation a duty of reason. Either way, it is clear to us that this paragraph cannot be used to support the idea that ideally Kant is advocating a world republic or federal state of peoples.

IV. CONCLUSION

A central message of Kant's law of nations is that international law is a form of law like any other in that it exhibits legal autonomy. However, his crucial contribution to the philosophy of international law concerns the institutional role that states—if properly constituted internally and externally—can play in the establishment of the international legal order. This is how the noncoercive confederation of republican states is able to establish an international legal order in a way that does not imply a global state in any of its forms. Thus he is not arguing for a universal monarchy, a world republic, or even a federal state of peoples.

It might be thought that this conclusion is similar to that of John Rawls. Rawls considers that under ideal theory—which describes a community of liberal and decent nonliberal states—there is no need for a global state but rather an institutionally minimal "confederation of peoples" that is bounded

124. KANT, 6 GESAMMELTE SCHRIFTEN, *supra* note 9, at 355; and *see* KANT, METAPHYSICS, *supra* note 10 (Gregor trans.), at 124.

by basic principles of justice.[125] However, even Rawls posits the existence of stronger global executive institutions than Kant does to deal with violations of these basic principles of justice. Rawls's vision of "organizations (such as the United Nations ideally conceived)"[126] to condemn and intervene against unjust domestic institutions is some distance from Kant's understanding of the role and function of his noncoercive confederation. As mentioned above, Kant may accept moral rights to intervene on such grounds, but intervention like that defended by Rawls cannot be a *legal doctrine* for Kant.

Kant's central contribution is that international law can be an autonomous system of law properly institutionalized without implying the institutional forms that we might associate with the federated or unitary global state. It is the way in which the state is constructed that is crucial in establishing this argument, and he shows that there is a logical relationship between the concept of law, the nature of states, and the institutional structure of the international legal order. It is this idea that is perhaps the most important legacy of Kant's legal theory, and not those ideas brought under a Kantian banner which defend humanitarian intervention, a cosmopolitan global state, or respect for fundamental human rights.

Political philosophers often call for stronger international institutions in order to control the behavior of bad states. This is especially true of those who develop Kantian arguments for world government, such as Höffe, Habermas, and Held. Kant's view, on our argument, is that if states accept the categorical moral obligations that require them to treat their own citizens justly, they will respect the rule of law with regard to other states and individuals. Some may find his substantive conclusions a worrying vision of the international legal order given various political ideologies that have dominated recent world politics. Others might wonder how Kant envisaged the relationship between republican and nonrepublican states, which on his account lies outside the domain of international law. We do not comment in detail on these important practical and theoretical concerns. Instead, our claim is that Hersch Lauterpacht's insight into Kant's concept of international law quoted at the head of this article was fundamentally correct. For Kant, if we get state-building right, the law of nations follows.

125. RAWLS, *supra* note 7, at 42.
126. *Id.*