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## **On Cosmopolitan Self-determination\***

In order to arrive at an adequate understanding of the changing Westphalian world, it is necessary to distinguish political self-determination from its cosmopolitan counterpart. While political self-determination has its place in a familiar and common space, cosmopolitan self-determination stands for unbounded collective self-determination among strangers. Two forms can be distinguished. In its mixed form, it is tied in with political self-determination, adopting the latter as a medium for realizing common autonomy among those who are foreign to one another. Virtual representation is essential to understanding how cosmopolitans are connected to bounded political spaces. In its pure form, by contrast, cosmopolitan self-determination detaches itself from political judgment and finds its major role in authorizing risk management and crisis intervention. It lends expression to the impoverishment suffered by collective freedom in an administered world. Any calibration of the relationship between political and cosmopolitan self-determination must examine the general social conditions enabling an autonomous life.

### Movement of a Discipline

From Martin Heidegger come the portentous words that the actual movement of an intellectual discipline is manifest in the more or less radical, and initially obscure, revision of its basic concepts.<sup>1</sup> The basic concepts are the terms under which a discipline constitutes a domain from which phenomena come into perspective. For the most part, these concepts remain latent. They make things intelligible without calling attention to themselves. However, what they render perceptible also acts upon them in turn. With a change of the context, their meaning changes, too. As Heidegger points out, such feedback initially remains implicit. Once a discipline becomes aware of such change, however, it recognizes the movement to which it has made itself vulnerable owing to its intentional involvement with phenomena. As a discipline, it can prove

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\* I would like to thank the two anonymous reviewers for *Global Constitutionalism* for their helpful comments.

<sup>1</sup> See Martin Heidegger, *Being and Time* (trans. J. Stambaugh, Albany: New York University Press, 1996) at 9.

itself when change does not erase its relevance and when, as Heidegger noted, it turns out to be capable of sustaining itself in spite of such a transformation.

Not least owing to its philosophical dimension, the discipline of public law is remarkably resilient. One of the greatest challenges that it is confronted with today is the gradual transformation of the Westphalian world order.<sup>2</sup> The basic phenomenon is widely known. The sovereign state, formerly the anchor of the political world, finds itself pushed out of its central position in the course of increasing international integration and interdependence. In this process, some notions that have made up the core of our political vocabulary become questionable. The “nation” belongs to those terms just as much as the “people” or the exercise of “sovereign rights”.

If Heidegger is correct, the discipline of legal studies will be able to cope with change only if it reflects on its basic concepts. Improvisation with makeshift vocabulary, as epitomized in the governance discourse, will not reach far enough.<sup>3</sup> Only with recourse to basic concepts is it possible to sustain the dynamic element that accounts for the vitality of a discipline. Recalibration has to engage tradition, even if the result may not amount to more than intermittent stopgaps marking change, such as “post-democracy”<sup>4</sup> or by now almost obsolete “post-modernity”.<sup>5</sup>

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<sup>2</sup> See Ann-Marie Slaughter, *The New World Order* (Princeton: Princeton University Press, 2001).

<sup>3</sup> See, for example, the remarkably set collected in G. de Búrca & J. Scott (eds.), *Law and New Governance in the EU and the US* (Oxford: Hart Publishing, 2006).

<sup>4</sup> See Colin Crouch, *Post-Democracy* (Cambridge: Polity Press, 2004).

<sup>5</sup> See Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge* (trans. G. Bennington & B. Massumi, Minneapolis: University of Minnesota Press, 1984).

### Critical reconciliation

In what follows, I would like to propose a conceptual amendment that I consider relevant to the study of our modified Westphalian world. The concept is “cosmopolitan self-determination”. It is apt, though not sufficient, to capture an alteration in our self-understanding that is manifest in the widespread acceptance of transnational institutions. I submit that their authority is best apprehended when we consider them to be endorsed on the basis of cosmopolitan self-determination.

Remarkably, as a form of collective self-determination, cosmopolitan self-determination emerges at a historical moment when the ideals of political modernity—freedom, equality and solidarity—appear to be strangely exhausted. The rise of the modern legal system had originally been part of a broader process of emancipation from subordination and tutelage and associated with the assertion of self-reliance and equality of status.<sup>6</sup> It is with regard to the promise of emancipation that one nowadays encounters widespread apathy and disillusionment. I surmise that the salience of cosmopolitan self-determination is concomitant to this deflation of emancipatory aspirations.

The ideal of equality, for example, is no longer linked to a vision of society where its members would cease to encounter one another as inhabitants of different worlds; rather, equality has been toned down into a requirement of equal treatment that is to be met by various distributions of goods and opportunities. Anti-discrimination policies are taken to be the most suitable tools for guaranteeing equality. The grand ideal of equality becomes, thus, a social precaution against group disadvantage. Whoever wishes to benefit from it has to make a credible case of belonging to a group whose members have regularly been rejected or unduly burdened. It no longer crosses the mind of social reformers that the estab-

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<sup>6</sup> See Immanuel Kant, ‘One the common saying: That may be correct in theory, but is of no use in practice’ In his *Practical Philosophy* (ed. M. J. Gregor, Cambridge: Cambridge University Press, 1996) 273-310.

lishment of a society of equals presupposes the social and economic conditions under which people are no longer perceived on the basis of their respective social rank. On the contrary, a social world where equal treatment obligations are complied with is fully compatible with the proliferation of rankings and distinctions. What is more, in such a world the losers cease to live among successful people. They live somewhere else. They master the art of killing time with electronic gadgets and ingest pharmaceuticals in order to anesthetize their misfortune.

With regard to freedom, we are ready to relinquish the common political control of our world so long as we are promised more choices from a broader variety of products and services. We trade in our public liberty for the satisfaction of consumer demand. It would appear, therefore, as though we conceived of ourselves primarily as subjects of private law. But even the aura of private autonomy is clouded in a world in which one hardly finds any sole proprietors left to serve as exemplars of what it means to *master* one's fate or *lead* one's life. Following the universal demotion of the entrepreneur to the manager of a personal career, the idea of self-reliance has worn off. Our competitive life takes place in the shadow of large scale organizations that expect a great deal of bowing and ducking from us. It is fraught with responsibility for the smart management of the one human resource, whom we coincidentally call our self. Freedom of choice, formerly a cynical weapon against hierarchies and rigid fashions, is understood to be a condition for daily demonstrations of agility and adaptability. Its operation is surrounded by nagging doubts as to whether one is capable of reaching rational decisions without advice. By virtue of our longing for recognition, the gauge of a successful career is the opinion of others. As a result, freedom no longer liberates. It has lost its connection with a process of emancipation. It is a synonym for the leeway in which is nested the responsibility to cope respectably with the burden of having to make a success of one's life. Everything would be easier if we were allowed to remain imma-

ture. Alas, the prime directive of perfectionist capitalism forbids this. It demands the universal unleashing of productive talents under competitive conditions. Freedom stands in an instrumental relation vis-à-vis the realization of this directive.

The following exposition of cosmopolitan self-determination is aware of these deflated aspirations and has recourse to the vocabulary of political modernity at a moment at which it is surrounded by an air of obsolescence. Once more — maybe for the last time — its remaining critical potential is to be unearthed. For that reason, the meaning of self-determination is so broadly conceived that it extends to freedom even in such a cooled and jaded state. The concept of cosmopolitan self-determination is supposed to accommodate the historical situation from which it originates. In capturing experiences of foreignness and estrangement, it perceives us as inhabitants of a world in which we are foreigners and strangers to one another. It may even be able to reconcile us with such a world. Owing to the continuity that is established with political modernity, the concept also preserves its critical edge and allows for the naming of the criteria that cosmopolitan self-determination has to live up to.

### Two Misinterpretations

With that I come to the matter at hand. Cosmopolitan self-determination is a subtype of collective self-determination, which is about individuals insofar as they actively allow themselves be determined passively by others. Collective self-determination is about accepting the authority of something larger than oneself and of which one may or may even not be an immediate component (e.g., the democratic majority). For example, whoever is politically self-determining resolves to will something by yielding to the democratic majority, regardless of whether one happens to be on its side.

For the purpose of our discussion, it is important to throw into relief the difference between cosmopolitan self-determination and

its political counterpart. Recognizing a difference is not supposed to deny extensional overlap. On the contrary, it makes sense to consider ourselves to be political beings as well as the subjects of cosmopolitan self-determination. Any restriction to purely one dimension would seem to be questionable.

The concept of cosmopolitan self-determination may, upon first impression, evoke associations with models of global democracy. Accordingly, one might imagine cosmopolitan self-determined subjects to be citizens of a global democracy. A democracy of this type would not entrench, but rather transcend, national boundaries.

Alas, the view that a cosmopolitan democracy emerges from the aggregation or communicative engagement of particular communities is sadly misguided. Indeed, it involves either of two complementary mistakes.

The first mistake consists in assimilating cosmopolitan self-determination to its political counterpart.<sup>7</sup> A transnational community is imagined to be merely a more encompassing political space, in which people encounter and experience each other as belonging together. The only differences vis-à-vis the paradigmatically political space of a republic would be, first, that in the cosmopolitan context people view each other as foreigners and, second, that any spontaneous feeling of sympathy is replaced with the more profound moral insight into our common responsibility for sentient beings on this globe.<sup>8</sup> Thus understood, a cosmopolitan democracy is comprised of members of peoples who entertain communicative exchanges across national borders. It is merely more diverse, pluralistic, and possibly sectorally much more fragmented

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<sup>7</sup> See, in particular, David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Stanford: Stanford University Press, 1995) at 237. See also his *Cosmopolitanism. Ideals and Realities* (London: Polity Press, 2010).

<sup>8</sup> See, for example, Peter Singer, *One World: The Ethics of Globalization* (New Haven: Yale University Press, 2002).

than national political bodies, not least owing to the absence of irrational factors that give rise to common sympathies. Nevertheless, the point of self-determination is, borrowing a term from Habermas, world domestic affairs (*Weltinnenpolitik*).<sup>9</sup> In this respect cosmopolitan self-determination comes out as a broader and lighter form of political self-determination.

The second mistake is encountered wherever transnational concepts of democracy either avoid or leave open the limits of democratic units and shift the emphasis from majorities to deliberative processes.<sup>10</sup> This is no coincidence. When boundaries are no longer relevant, it does not matter that there is a group of people comprising a constituency. With the demise of boundaries, votes can no longer be decisive either. Whether someone ought to have standing in a deliberative process becomes a question of its *substantive* accuracy rather than of respecting the *presence* of people within a limited and shared space. The fact that someone might be affected by a potential decision is a sound substantive criterion for allowing participation, for potentially affected people are usually able to give first-hand accounts of how proposed measures would impact on them. As soon as participation only matters insofar as input contributes to the cognitive and moral objectivity of problem solving, the basis of self-determination shifts from belonging to a political space toward assuring the quality of debate and regulatory choices. The overall quality is likely to be better served if vulgar and populist voices are completely shut out. The idea of democratic legitimacy becomes therefore systematically vulnerable to elitism. Ultimately biased in favor of deliberation, it turns out to be internally contradictory.

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<sup>9</sup> See Jürgen Habermas, *The Divided West* (trans. C. Cronin, Cambridge: Polity, 2006) at 134.

<sup>10</sup> See generally, John S. Drysek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (Oxford: Oxford University Press, 2000); more specifically, see Steven Wheatley, *The Democratic Legitimacy of International Law* (Oxford: Hart Publishing, 2010).

## Sic et Non

One encounters, thus, two complimentary mistakes. In the first case, the concept of cosmopolitan self-determination is assimilated to its political counterpart to such an extent that it turns out to be a special application, or at least a borderline case, of the latter. With its patent lack of social homogeneity, a cosmopolitan democracy would be nothing short of a national democracy marked by a high degree of pluralism and diversity. In the second case, it remains an open question who actually gets to decide. Deliberative democracy is expected to be susceptible to the “non-coercive force of better arguments” (Habermas). If this expectation were met to the highest possible degree, all decision-making would actually become superfluous. Not by accident, proponents of deliberative democracy consider consensus to be the ideal case of democratic decision-making. That is, the ideal case is not the acceptance of majorities despite opposition and recalcitrance by the minority. It turns out, therefore, that champions of deliberative concepts are guilty of confusing democracy with liberalism. Consensus is convergence among isolated individuals. When majoritarian decision-making drops out of the picture, what is at issue is not *collective* but rather *individual* self-determination.

It will be seen that underlying this disregard of decision-making is a tacit shift in perspective from respect for the *will* of others to the optimization of *rationality*. The latter does not have to be mediated through some collective choice.<sup>11</sup> It is possible to reconstruct this shift by paying heed to the rise of cosmopolitan self-determination.

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<sup>11</sup> This is not to deny that there may be good reasons to trust the wisdom of majorities. See Adrian Vermeule, *Law and the Limits of Reason* (Oxford: Oxford University Press, 2008).

## Cosmopolitan Detachment

The misguided interpretations outlined above spring from a certain understanding of cosmopolitanism. It is considered to be a positive relationship. Cosmopolitans live in the *cosmopolis*. This is the name of the world that belongs to all human beings equally. A consequence of such a status attribution is the admission that much needs to be done institutionally in order to bring humanity into a position where it can collectively organize and control the collectively occupied space.

Such an understanding of cosmopolitanism as a positive relationship disregards its original *negative* accent. Whoever claims, as Diogenes did, to be a citizen of the world detaches himself from his own political community, as well as from any other. Taking a cosmopolitan point of view, we open ourselves up to the world as a whole by detaching ourselves from every *closed* social world. The world belongs to us at the price of detachment from the real places where humans live. As cosmopolitans, we are foreigners in a world with borders. In other words, we are visitors in *this* world inasmuch as we are citizens of *the* world. Taking the cosmopolitan point of view means to conceive of oneself as a foreigner wherever one may happen to reside, even at the place called “home”.

Despite casting us as visitors on foreign soil, the cosmopolitan perspective does not affirm heteronomy. It does not counsel sacrificing public liberty for the sake of private gains. Rather, the concept of cosmopolitan self-determination is supposed to explain under which conditions beings, to whom the world belongs jointly and who are, paradoxically, nonetheless only visitors on foreign territory, can be collectively self-determined. The explanation can take either of two paths. While the first highlights equality in the relations of citizens and foreigners, the second examines the authority of administrative expertise. Both explanations can be developed in contradistinction to political self-determination.

## Political Self-Determination

Political self-determination is situated in a shared space. Its boundaries constitute visibility. Within a zone of mutual visibility one encounters real people. Dealing with them could only be avoided by removing either them or oneself from the territory. In the long run, at any rate, it is impossible to do what can be done in relation to people who live somewhere else, namely to proceed as though they did not exist. If one tried one would be reminded, possibly quite vocally, of their existence.

In a political space, the well-being of real people is not merely addressed through the filter of aggregated data. Decisions cannot be made solely by appealing to models, projections or extrapolations. The truncation of human life to datasets and risk calculations may at any time be called into question from the perspective of actual experience. Scientifically advised policy makers may be confronted with demands made by “uneducated” masses.

This is coherent with the horizon of political self-determination. The space of political self-determination overlaps with the sphere where people possibly lead their whole lives. This explains the relevance of distributive justice, for if anything forms the ultimate point of reference of social justice then it is the real opportunity to choose a *life project* and to pursue it within a fair system of social cooperation. Addressing matters of justice, however, requires viewing one’s own life as an element of a larger whole and being heeded of unreasonable demands that one ought not to make on others.

The participants in political self-determination conceive of themselves as inhabitants of a *common* space. This presumed unity is an outflow of political modernity. It is a reflex of subjection to the same sovereign. The common space is, first and foremost, a territory.<sup>12</sup> The experience of sharing subordination to public pow-

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<sup>12</sup> See Ulrich K. Preuss, ‘Disconnecting Constitutions from Statehood: Is Global Constitutionalism a Viable Concept’ In P. Dobner & M. Loughlin

er in one territory is the basis for perceiving, in spite of all heterogeneity, a *common* form of life. Sovereignty is a synthesizing force. Even after appropriation by its subjects, it bonds heterogeneous elements together and thus prepares the ground for political self-determination to take place against the horizon of a common form of life.

People are politically self-determined if they let the will of others count as their own because they perceive themselves as elements of a form of life. Ultimately, political self-determination is mediated by loyalty. This is its principle. The medium for its realization is political judgment, as it has been reconstructed by Arendt and Vollrath on the basis of Kantian motives.<sup>13</sup> Political judgement is manifest in the “expanded way of thinking” (*erweiterte Denkungsart*) with which one takes the position of others in order to find out what may be reasonably expected for them to accept. This form of judgment is reflective in that it attempts to arrive at generalizations departing from the particulars, without being able, necessarily, to spell out what it is that facilitates agreement. Not by accident, therefore, political self-determination is often encountered in the form of settlements or compromises. From a teleological perspective, its exercise is geared towards realizing what people are capable of when acting together.

### Paradigms of Political Bondage

Historically, political self-determination can be encountered in two types of political subjectivity. They are useful in order to identify cases where one no longer is politically self-determined.

The bourgeois subject wants to enjoy private autonomy and to decide political matters by her own lights. Nothing is more repug-

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(eds.), *The Twilight of Constitutionalism?* (Oxford: Oxford University Press, 2010) 23-46.

<sup>13</sup> See Hannah Arendt, *Lectures on Kant's Political Philosophy* (ed. R. Beiner, Chicago: University of Chicago Press, 1989); Ernst Vollrath, *Die Rekonstruktion der politischen Urteilskraft* (Stuttgart: Klett Cotta, 1977).

nant to this type of subject than tutelage by know-it-all bureaucrats. Such a subject would consider herself not free if the pursuit of her well-being were tied to the apron strings of public administration.

The subject of modern mass democracy, by contrast, is capable of being mobilized. She also conceives of herself as mature, however her power of judgment is oriented towards supporting one or another comprehensive political program. In fact, the subject of modern mass democracy is concerned with a comprehensive social vision, but owing to her predominant interest in the common place she can accept settlement and compromise. Electoral campaigns, however, are supposed to involve contests over comprehensive social visions. For this reason, a subject of modern mass democracy would consider herself politically disempowered if nothing were left for her to decide, maybe because election results no longer have any impact or because available party platforms lack any bite.

#### Mixed and Pure Cosmopolitan Self-Determination

Cosmopolitan self-determination has no locale. It is collective self-determination among foreigners who may never have any encounters with one another. From the perspective of its subjects, it is carried out either laterally or from above, that is, either *in relation to* communities or *in abstraction from* them. In this respect, one can distinguish between a “horizontal” and a “vertical” variant, even though such a characterization is not terribly felicitous because of its connotation to the effects of fundamental rights. For reasons to be explained below, one can refer to the lateral variant as “mixed” and to the top-down variant as “pure”.

The lateral (or mixed) version uses political self-determination as its medium and submits it to certain conditions. So long as political self-determination fulfills these conditions, it can also pass muster as cosmopolitan self-determination.

The vertical (or pure) version severs all links to places and recognizes borders only inasmuch as they serve as administrative dis-

tricts, whose establishment or existence satisfies regulatory needs. This variant of collective self-determination appeals to us in our capacity as rational private individuals. We live with the awareness that, in order to live a life, we need to live with others without, therefore, having to *share* a place. The position of loyalty as the principle mediating political self-determination is taken over, in this case, by the desire to have regulatory and management burdens lifted from oneself.<sup>14</sup>

The lateral version of cosmopolitan self-determination is transformed into the vertical form if the link to political self-determination is understood to be a question of prudent delegation of authority.

### Laterally: On the Way

Making sense of the collective autonomy of beings that do not belong to any particular collective must *prima facie* appear to be tantamount to squaring the circle. How can someone be collectively self-determined without belonging to a collective?

The air of paradox disappears when it is kept in mind that one belongs, as a cosmopolitan subject, to *any* political community as well as to *none*. If one projects this contradictory synchronous relationship on a diachronic axis, one thereby locates the cosmopolitan subject—or rather, us in our capacity as subjects of this type—in a world with boundaries where these boundaries are always already transcended. Wherever one may be, one has just arrived, or may already be on the way to some place else.

Whoever is always on the move belongs anywhere and nowhere. This conflicting mode of affiliation can be given a modal expression by saying that, as cosmopolitans, we belong *potentially* or *virtually* to all communities. It does not matter where one is so

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<sup>14</sup> One the concept of *Entlastung*, see Arnold Gehlen, *Der Mensch: Seine Natur und seine Stellung in der Welt* (12<sup>th</sup> ed., Wiebelsheim: Aula Verlag, 1978) at 71 (English translation as *Man, his Nature and Place in this World*, trans. C. McMillan & K. Pillemer, New York: Columbia University Press, 1988).

long as that place allows for an existence that is defined by *virtual* membership.

### The Significance of Human Rights

An explication of cosmopolitan self-determination cannot rest content with characterizing the subject that is being determined. It is important to notice what it is that we as cosmopolitans allow ourselves to be determined by. The bounded communities, to whose political determinations we yield, have to be *good enough* in order to render such yielding reasonable. The conditions of reasonableness articulate the principle of lateral cosmopolitan self-determination.

When it is normatively irrelevant to which community one belongs, communities have to be interchangeable. Every community must be as good as any other. From that concept it follows that every relevant community, in order to fulfill this requirement, needs to respect universal standards of legitimacy. As soon as communities meet these standards it does not matter, from a cosmopolitan perspective, whether one lives in this or that community.

The formulation of these conditions of habitability is essential to identifying communities that are relevant from a cosmopolitan perspective. Otherwise, the corresponding set would be either empty or infinite. Since these conditions can only be universal and hence standards with which each and every community *has* to comply, it makes sense to spell them out in the form of human rights (which themselves can be thought of as modes of participating in basic goods). From this follows the notion that so long as a political community respects human rights, a cosmopolitan subject can identify, as a *foreigner*, with that community. It is inhabitable by humans.

### The Difference to Political Self-Determination

In order to be considered co-authored by cosmopolitan subjectivity, acts of political self-determination need to respect human rights. So long as human rights are protected, any practice of political self-determination is as good as any another for subjects who belong anywhere and nowhere. Subjects of this type are indifferent to the traditions or composition of the respective political bodies.

Conformity with human rights — more precisely, respect for the superlegality of human rights<sup>15</sup> — is, however, merely *one* necessary condition under which cosmopolitan subjects allow themselves to be determined by others. It represents the passive moment of determination, hence, *what* one has good reason to let count as one's own will. In the case of political self-determination, this is the will of the majority. In the case of cosmopolitan self-determination, it is the choices of entire political communities, provided that they conform to human rights. The reason for yielding is different in each case. With regard to political self-determination, *loyalty* towards a common form of life is essential. Lateral cosmopolitan self-determination, by contrast, endorses a world that respects the existence of particular communities. Such an endorsement recognizes that our common humanity needs to be articulated through particulars, for being spelled out through particularity is part of its universal character. Humanity is universally particularistic.

### The Burke-Ely two step

Up to his point, the analysis has focused on the lack of affiliation of cosmopolitan subjectivity with one particular political community. All communities are equal. Cosmopolitan identification, however, is possible only if the communities themselves respect such an attitude of detachment.

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<sup>15</sup> See Carl Schmitt, *Legality and Legitimacy* (trans. J. Seitzer, Durham: Duke University Press, 2004) at 53.

It is possible to consider oneself respected with an attitude of detachment so long as one is not discriminated against on the basis of this attitude. In other words, one can consider oneself, as an outsider, to be given recognition by political processes if these do not discriminate on the grounds of nationality (or statelessness, for that matter). This ban on discrimination is a *constitutive* condition for lateral cosmopolitan self-determination.

In order to understand this condition, one must simply do what I will call the Burke-Ely two step. Behind the name is concealed a double reference, on one side to Edmund Burke's notion of virtual representation,<sup>16</sup> and on the other to John Hart Ely's application of Burke's conception to the jurisprudence dealing with protection from discrimination.<sup>17</sup>

One is virtually represented if, without electing representatives, the types of interest that one has are represented in the political process.<sup>18</sup> As long as "the economy", "the sciences", and "the family" are given a voice, every business person, scientist, or parent (and every child) are virtually represented. This concept is most adequate for the representation of orders of society (estates). Neither exchanges between representatives and the represented nor accountability matter. The sameness of status and role — the "identity" — is what mediates representation. The representatives, as *pars valentior*, unify the interests of the relevant order.

The notion is of no import, of course, for political communities, where the representatives are answerable to the represented. But it lends itself to perceiving a relationship of representation where, as in the case of national political processes and foreigners, no political accountability exists. It is absent for the very good rea-

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<sup>16</sup> See Edmund Burke, Speech to the Electors of Bristol (1774), <http://press-pubs.uchicago.edu/founders/documents/v1ch13s7.html>.

<sup>17</sup> See John Hart Ely, *Democracy and Distrust. A Theory of Judicial Review* (Cambridge, Mass.: Harvard University Press, 1982).

<sup>18</sup> See Melissa S. Williams, 'Burkean "Descriptions" and Political Representation: A Reappraisal' (1996) 29 *Canadian Journal of Political Science* 23-45.

son that foreigners have to respect democratic processes other than their own. They cannot expect to have the same voice abroad, with the same weight, as they have at home. Harboring such an expectation would be imperialistic. They can be confident, rather, that so long as human rights remain protected the type of interests that they have will be capable of representation, even if under the conditions predominant in other countries. The voice, which would be theirs, might be stronger, weaker, or barely audible. Such differences in strength are in the nature of a world that is composed of a plurality of political communities.

Ely has supplemented these considerations with the insight that virtual representation fails in cases of discrimination. Conversely, it can be re-established through protection from discrimination. This is the secret of the Burke-Ely two step. Foreigners are rightfully *only* virtually represented. Virtual representation is successful if the national political process does not discriminate on the basis of nationality. Cosmopolitan subjects are collectively self-determining vis-à-vis any political process that conforms to human rights and does not discriminate on the grounds of nationality.

By virtue of the Burke-Ely two step, it is possible to perceive equality not just as a condition, but as a medium of self-determination. This is the case because of its internal relationship to virtual representation, which is the principle of cosmopolitan self-determination.

### Superlegality and Juristocracy

What we arrive at, thus, is what collective freedom means for a politically blunted modernity. Cosmopolitan subjects are collectively autonomous when they are subject to laws that conform with human rights and avoid discrimination on the ground of nationality. This is the kind of collective freedom that people enjoy insofar as they do not belong to any political body.

It may be objected that the virtual representation argument is implausible. One cannot argue that for a person one democracy is

as good as any other if someone who enjoys the support of the majority at home finds his views marginalized in a neighboring country. Rather, for that person one democracy is better (or worse) than the other.

This objection ignores that cosmopolitan self-determination presupposes detachment from any political community. One is virtually represented everywhere where the articulation of one's point of view is at least *conceivable*. Cosmopolitan self-determination reconciles us with varied legal systems. The ability to have views articulated is backed up by human rights, whose protection is key to cosmopolitan self-determination.

With the observance of human rights standards comes an important shift in emphasis, which has already been noted by Schmitt.<sup>19</sup> Cosmopolitan self-determination would be inconceivable without superlegality. Spelling out its terms is invariably the business of courts, for they articulate the essence of human rights vis-à-vis legislatures. Not by accident does the *practice* of cosmopolitan self-determination focus on “interesting” cases, such as the decision of the European Court of Justice *Kadi*.<sup>20</sup> Moral energies, which would otherwise be invested in the political process, end up being concentrated on the study of court decisions. The cosmopolitan world is a world dominated by courts and their jurisprudential commentators.<sup>21</sup>

### From the Mixed to the Pure Form

The aptness of the concept of cosmopolitan self-determination with regard to new realities becomes even more significant when turning to its vertical form.

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<sup>19</sup> See Schmitt, note 15.

<sup>20</sup> See Cases Rs. C-402/05 P und C-415/05 P, Yassin Abdullah Kadi and Al Bara-kaat International Foundation v Council of the European Union and Commission of the European Communities [2005] ECR II-3649.

<sup>21</sup> See Ran Hirschl, *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism* (Cambridge, Mass.: Harvard University Press, 2004).

Already the lateral variant involves seeing one's own political community as merely one among others. The detachment from domestic political self-determination does not, however, result in a total disconnect. The latter remains of primary relevance, for it is tied to a form of life to which one's individual life is believed to belong. Due to this strong biographical relevance, it represents the normal case of collective self-determination. In order to be a suitable medium of cosmopolitan self-determination, it has to respect certain limits.

We understand ourselves *both* as political *and* as cosmopolitan beings. Lateral cosmopolitan self-determination is not an instantiation of pure cosmopolitanism. It is best characterized as a mix or combination of both political and cosmopolitan self-determination.

The attitude of detachment, however, does not leave the meaning of political self-determination unaffected. It becomes janus-faced. With regard to its origin, political self-determination is an outgrowth of people sharing a common world. At the same time, it also serves as the medium for the realization of cosmopolitan autonomy. From that perspective, it is an expedient for effecting virtual representation. It no longer avails of a substance, but rather appears as merely *one* mode of realizing a social world that is hospitable to cosmopolitan subjects. More precisely, from the perspective of realizing human rights and non-discrimination, it becomes entirely accidental. All that matters is that it is capable of generating laws that pass cosmopolitan muster. Consequently, potential functional equivalents of decision-making come into view. Cosmopolitan self-determination realizes that it can sever its moorings in political self-determination and align itself with other modes of rational choice and "good governance", in particular when the *rationality* of policies becomes the utmost concern. The situation is thereby profoundly altered.

## From Volition to Knowledge

This change of situation can be clarified in the following way. Lateral (mixed) cosmopolitan self-determination accepts as its own the output of political self-determination out of respect for a world in which people try to get along with one another in the place where they live. Yielding to political self-determination is not based on recognizing the greater rationality or ingenuity of others. It reflects respect for their will. Lateral cosmopolitan self-determination retains a political element, for political self-determination is also based on letting the will of others—in this case, the will of the majority—count as one's own. This is done out of loyalty to a way of life. Similarly, lateral cosmopolitan self-determination respects political choices because it accepts a world in which political communities adopt collectively binding decisions.

But once the medium of cosmopolitan self-determination is no longer understood to be an expression of volition but is rather viewed as an expression of *knowledge*, political self-determination changes its meaning. Volition itself comes to be viewed as applied knowledge. Political decisions appear to be possible *responses to problems*, the instrumental and practical rationality of which can be analyzed and challenged. By their very nature, responses to problems remain adjustable even after they have been adopted, for they are situation-sensitive.

The gestalt shift from volition to rational problem-solving points to the principle underlying pure cosmopolitan self-determination. A purely cosmopolitan subject allows himself to be determined by others on the basis of his trust that decisions by authorities are rational enough to be willed by anyone. Deference and the confidence that other cosmopolitan individuals will also defer to credible administrative authority provides the basis for acceptance, and not the fact that something has been chosen by a political community.

When the respect for concrete others is no longer at stake, volition is transmuted into a deficient form of knowing. What is want-

ed by someone commands respect insofar as it appears to be based on plausible insight or deals with a matter over which reasonable people can reasonably disagree. Volition is demoted to the level of residual imperfect knowledge.

Consequently, democratic and administrative processes enter into cognitive rivalry. Political processes take on a new appearance. They are seen as if they were procedures in which information is processed, relevant factors are examined, different viewpoints are given a voice, and pro and con arguments are exchanged as rationally as possible in order to arrive at optimal results. Against this background, it is not implausible to regard administrative-regulatory processes as more attractive than democratic fora, insofar as they promise to be capable of guaranteeing smart choices that do not succumb to provincial small-mindedness or various forms of bias.

### Pure Cosmopolitan Self-Determination

Lateral cosmopolitan self-determination is right for beings who understand themselves both as citizens of their polity and as universally detached citizens of the world. Political self-determination is their primary concern owing to their biographical roots in a particular community. Accepting the relevance of political choices for others is a dictate of cosmopolitan reciprocity.

As soon as cosmopolitan self-determination severs its link with its political counterpart, perhaps because life is no longer experienced as going on at a certain place and within a certain form of life, the intelligence of problem-solving becomes the determining factor of collective self-determination. One encounters therewith cosmopolitan self-determination “from above”, or in its pure form. It calls for the kind of intelligence that is capable of managing risks and intervening in crises. Viewed from above, and in abstraction from political units, the social world appears to be composed of a decentralized network of relationships that demand periodic intervention. Political authority is relevant merely insofar as it is capa-

ble of exercising management functions. In principle, however, pure cosmopolitan self-determination (“from above”) perceives itself as positioned in the global context of administration without sovereignty.<sup>22</sup>

A purely cosmopolitan subject that is collectively determined no longer experiences life as something that is going on in community with others. Rather, it lives like others in contingent exchanges with those others and demands like others regulations that address risks and interventions that cope with crises. It must rely on administrative services in order to see peace, order, security, and efficiency guaranteed. The knowledge that goes into such services reflects technological, economic, and sociological expertise. It is independent from discursive exchanges in local communities, for it is based upon generic social science, which is generated in global multi-level systems and applied to individual cases. It employs aggregated data.

Cosmopolitan self-determination from above, as a form of collective self-determination, is manifest in the tacitly coordinated simultaneous yielding to knowledge-based administrative capability. Yielding, which is mediated by public authorities, is based on the dual understanding that, first, there is demand for regulation and that, second, it is smarter to rely on the expertise of specialists than on one’s own judgment.<sup>23</sup> The principle of self-determination is no longer loyalty to a political community, but rather the expectation to have lifted from oneself the burdens of appraising risks and organizing collective action, particularly in transnational contexts where collectivities do not exist. Nevertheless, even in its pure

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<sup>22</sup> See my ‘Administration without Sovereignty’ In M. Loughlin & P. Dobner (eds.), *The Twilight of Constitutional Law?* (Oxford: Oxford University Press 2010) 267-278.

<sup>23</sup> On the service conception of authority, see Joseph Raz, ‘The Obligation to Obey: Revision and Tradition’ In his *Ethics in the Public Domain: Essays in the Morality of Politics and Law* (2d ed., Oxford: Oxford University Press, 1995) 341-354.

form, cosmopolitan self-determination has in common with its lateral form to set out the protection of human rights as a condition for yielding. Administrative rationality that lifts various burdens from us and the protection of basic rights define the core of pure cosmopolitan self-determination.

As soon as volition disappears from view, people no longer entertain a legal relationship with one another. They find themselves entangled in an array of precautionary measures, safety tactics, advice- and self-help strategies, or even training programs. The conditions governing trust in the apparatuses guiding human life are articulated in the form of imperatives of rationality. These are less rigid than law, for they must remain adjustable to fluctuating situations in order to fulfill their intended purpose. One does not owe them the respect that is due to acts of volition, for they are basically articulations of knowledge, which belongs to everyone and no one. Volition and choice, which are manifest in regulations, are merely invariable means for the implementation of knowledge. Quite understandably, therefore, “volition” needs to adapt to changing knowledge and becomes co-extensive with it.

### The Relevance of these Concepts

Obviously, I do not want to recommend, let alone praise, pure cosmopolitan self-determination. I surmise that its mixed or lateral counterpart is more likely to engage our self-understandings. Nonetheless, I would like to discuss, briefly, the usefulness of the conceptual proposal I have submitted here. It permits us to cast recent developments in a new light.

The disenchantment of the national state goes along with an increasing emphasis, among political philosophers, on human rights. Democracy recedes into the background. This shift of emphasis appears to reflect, quite evidently, a change in the practice of self-determination. What we have lacked, so far, is a theory that would be able to account for this change.

Constitutional democracies, particularly in Europe, have come to conceive of themselves as members of a peer group that is committed to the protection of human rights. While this is epitomized, in Europe, by the convention system, this development is globally manifest in the increasing “internationalization” of fundamental rights adjudication.<sup>24</sup> Courts and constitutional courts increasingly engage with decisions made by their neighbours. This practice alters the authority of the constitution, for what stems from national history is, at least with regard to a certain part of constitutional law, submitted to a lateral test of plausibility. The authority of the constitution is no longer *only* derivative of political self-determination. With regard to constitutional practice this means that adjudication needs to make explicit in which respect one’s own tradition is different even when it is understood, at the same time, that it is unnecessary to justify its existence to others.

This relativization of the authority of the constitution is amazingly co-extensive with a relativization of belonging. As is widely known, such an alteration of membership is not merely manifest in the case of European Union citizenship, but can be generally observed – in the US as well as Europe – with regard to shifting attitudes towards rights of residence. The right of residence is no longer seen as dependent on incrementally acquired legal titles or state affiliation, but rather, as is paradigmatically spelled out in European Union law, on the degree of integration into a society.<sup>25</sup> The degree of integration increasingly takes over the function of a criterion for social belonging and begins to eclipse traditional citizenship. This development is concomitant with the rise of a strong *prima facie* presumption in favor of free entry into a community

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<sup>24</sup> For an attempt to come up with an account of these developments, see Vicki C. Jackson, *Constitutional Engagement in a Transnational Era* (Oxford: Oxford University Press, 2010).

<sup>25</sup> See Case C-209/03 *The Queen (on the application of Dany Bidar) v London Borough of Ealing and Secretary of State for Education and Skills*, [2005] ECR I-2119.

depending on market demand. Double loyalty is therefore no longer an exception. The difference between citizenship and non-citizenship becomes blurred.

The fact that polities are in one way or another intermingled with one another also holds true for the multi-level system. Where jurisdictions overlap, the primacy of human rights is preserved in instances of conditional deference, of which the German Federal Constitutional Court has developed the paradigmatic example with regard to the European Court of Justice.<sup>26</sup> The European Court of Human Rights has followed suit in *Bosphoros*.<sup>27</sup> Such relations of conditional deference allow for a measure of pluralism, which is based on the mutual trust of participants in the effectiveness of such intermingled systems.<sup>28</sup>

The revocable trust in the ability of partners to sustain the rule of law and the concession of their relevance to critical self-assessments deposes an autistic understanding of sovereignty from its position as the first principle of public law. From the cosmopolitan point of view, nation states are also treated from the inside as merely one community among others. This explains our interest in comparisons and in multi-level systems, which help us to guard against decisional errors. The Member State protects European citizens against the failures of the European Union, and the European Court of Human Rights in turn protects them against the Member States.

From the experience of mutual interpenetration and the prospect that conflicts among various levels do not admit of a legal resolution arises the interest in the constitution beyond the nation

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<sup>26</sup> See Siehe BVerfGE 73, 339 (Solange II).

<sup>27</sup> See Case 84/95 *Bosphoros v. Ireland*, App. No. 45036/98 (2006) 42 EHRR I.

<sup>28</sup> See my 'Monism: A Tale of the Undead' In M. Avbelj & J. Komárek (eds.), *Constitutional Pluralism in the European Union and Beyond* (Oxford: Hart Publishing, 2012) 343-379

state. As an integral element of all national constitutions, it is an implication of our political-cosmopolitan double nature.

### Three misleading interpretations

In the meanwhile, the discourse on the “constitutionalization” of structures of authority beyond the nation state has become a well-spring of rather misleading interpretations. I should like to mention only three.

The first consists in blindly taking for granted the European Court of Justice’s neo-liberal transformation of rights to be free from discrimination into rights to substantive economic due process.<sup>29</sup> The neo-liberal rendering of transnational constitutionalism remains dubious. It pairs pure cosmopolitanism with a radical economic philosophy that undermines the political self-determination of states.<sup>30</sup> It places states in the awkward position of having to defend their laws against any relatively more business-friendly alternative.

The second misleading interpretation of the constitution beyond the nation state has left its mark on that current of European public international law doctrine which intends to perceive a constitutionalization of public international law.<sup>31</sup> When kept in per-

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<sup>29</sup> This interpretation even tries to base itself implicitly on the doctrine of virtual representation. See Miguel Poiars Maduro, *We The Court: The European Court of Justice and the European Economic Constitution* (Oxford: Hart Publishing, 1998). In far less elaborate form it is to be found in the jurisprudence of the Court. See my ‘Idealization, De-Politicization and Economic Due Process: System Transition in the European Union’ in B. Iancu (ed.), *The Law/Politics Distinction in Contemporary Public Law Adjudication* (Utrecht: eleven, 2009) 137-167.

<sup>30</sup> I cannot elaborate this point here. See Fritz W. Scharpf, ‘The Double Asymmetry of European Integration, Or: Why the EU Cannot Be a Social Market Economy’ (2009) 09/12 *MPIfG Working Paper*.

<sup>31</sup> For a very useful introduction, see Anne Peters, ‘Rechtsordnungen und Konstitutionalisierung: Zur Neubestimmung der Verhältnisse’ (2010) 56 *Zeitschrift für öffentliches Recht* 3-63.

spective, public international law is plainly constitutionally deficient. Some of its secondary rules, such as the rule for the creation of customary law, are notoriously unclear or may not even be secondary rules at all. From the perspective of classical constitutionalism, which is chiefly concerned with the clarification of legal sources, public international law has *no* constitution – and that even more strikingly than in the sense in which Great Britain does not have a constitution, since at the very least this nation recognizes the principle of parliamentary sovereignty. In the context of constitutionalization discourse, the constitutional deficiency of public international law is cajoled into an exhilarated state of euphemistic compensation. The respective rhetorical effervescence is manifest in the invocation of values, the substantive weight of which is translated into the formal obligations of *erga omnes* and *ius cogens*. It is to be feared that such a solicitous change of condition merely disguises, and does not help to overcome, the weakness of the international community. Powerlessness is merely cloaked behind a veil of idealization.<sup>32</sup>

The third misleading account is akin to the second. It does not concern, however, the euphemistic compensation of missing constitutional discipline, but rather the neglect of a constitution's function of facilitating political power. When this function is discounted, what remains of a constitution is a "value system" and the protection of fundamental rights. This truncated understanding is typically German.<sup>33</sup> Such a simultaneous narrowing and broadening of the constitution has its roots in the estimable attempt to cope with a historically horrible failure of democracy. Remarkably,

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<sup>32</sup> Or this is what I have argued before. See my 'From the rule of law to the constitutionalist makeover: Changing European conceptions of public international law' (2011) 18 *Constellations* 556-577.

<sup>33</sup> See Thilo Rensmann, 'The Constitution as a Normative Order of Values: The Influence of International Human Rights Law on the Evolution of Modern Constitutionalism' In *Common Values in International Law* (ed. P.-M. Dupuy et al., Kehl: N. P. Engel, 2006) 259-278.

the concentration of the constitution to an order of values that it is for the constitutional court to divine is remarkably compatible with the mindset of the common law. The respective convergence in the reverence for courts is explicable in the terms of pure cosmopolitan self-determination, which merely recognizes administrative apparatuses and controlling courts, but no political processes.

With that this understanding of constitutionalization comes close to what is already prefigured in a transnational context, namely a post-democratic synthesis, the apprehension of which is currently the subject of various discourses. Of particular importance is the global administrative law project. It is concerned with identifying networks of administrative processes in order to subject them to various standards of transparency, rationality, and accountability.<sup>34</sup> The attempts at formulating the post-democratic synthesis between administrative processes and the protection of human rights all point to the core riddle of our time: Have parliaments already become obsolete? If they had, we would have left political modernity behind us.

### Necessary Strangeness

The above observations regarding self-determination have been based on the assumption that any elaboration of its meaning needs to identify the conditions under which something that might at first glance appear to be strange or foreign can be identified as one's own. Certainly, self-determination means that it is the person who determines herself; but the self must also be able to identify something as belonging to herself and to rebuff alien things. The self constitutes its own bounds in interactions with a variety of candidates for identification. This is also true of personal autonomy. Every self-determined will involves identification with an inclina-

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<sup>34</sup> For a programmatic statement, see Benedict Kingsbury, Nico Krisch & Richard B. Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 15-61.

tion. This allows the identifying ego to become a cause for the realization of an end.

On a personal level, our relationship between “us” and our impulses can be a relationship between strangers. The impulses penetrate us, as it were, from the outside, while the inside, from which we encounter them, seems strangely anonymous and empty. Self-determination is a synthetic activity which overcomes *mutual* strangeness (or fixes it, when certain impulses end up being rejected as not belonging to us). It has the power to reconcile us with the uncanny and opaque dimension of our selves.

For the social sphere, this means that, in order to preserve reciprocity in relation to others, we must view ourselves from their perspective and conceive of ourselves as strangers among others. Only under this condition can we identify with them and be collectively self-determined.

There is, however, also an experience of strangeness that is actually closer to estrangement, in the sense of involving the loss of control over one’s own life. It concerns an encounter with strangeness that we find impossible to reconcile with our autonomous existence. It originates from a one-dimensional form of social cooperation that is based on horizontal transactions. This form of cooperation respects individual freedom only inasmuch as all are capable of proving their adaptability and agility. It is indifferent, in particular, to the individual law that people are unto themselves. It restricts autonomy to acts of adaptation to haphazard opportunities. It does not insure human beings against the risk of falling out of society for some factor that impairs their capacity to be participating and productive members.

Hence, some experiences of estrangement and alienation are potentially imprisoning. By contrast, being a subject that stands in a legal relationship is liberating, for in that capacity one lives among others as a stranger and does not, when exercising one’s rights, owe others a more elaborate justification than “What I do is what I have a right to do” or “This is what I think, and I have a

right to say so.” The *foreignness* intrinsic to our cosmopolitan relationship is an instantiation of the *emancipating strangeness* with which we encounter one another as legal subjects.

### The problem of choice

One thus finally arrives at the question which of the discussed forms of self-determination is to be preferred over the other or which, if one were to choose one and the other, is to be given precedence in cases of collision. This question cannot itself be subject to either political or cosmopolitan self-determination, for it precedes this alternative.

Prima facie, the key to an answer can be found, qua matter of social fact, in the biographical mooring of collective self-determination. As long as people understand themselves, at the very least, primarily as members of political communities, they will not relinquish political self-determination in favor of its purely cosmopolitan counterpart. One will likely encounter a preference for pure cosmopolitan self-determination only among people who have adopted as their personal ideal a mobile life that is indifferent towards places where life takes place. With that said, however, nothing is gained for answering the *normative* question of what may provide reasonable guidance when one has to choose one over the other. Since the question concerns forms of self-determination, such guidance can only be obtained from the conditions under which an autonomous life is generally possible. In conclusion, I would like to provide a sketch of an answer.

A life based upon pure cosmopolitan self-determination expects to encounter a great variety of opportunities to pursue personal projects without facing impediments that arise from political boundaries (residence restrictions, for example). It is understood that administrative organizations facilitate and secure private pursuits through precautionary measures, regulations, and various mechanisms of crisis intervention. Ideally, these administrative services do not involve any sizable transfers of wealth.

The stabilization of a world of horizontal transactions may plausibly include guarantees of formal equality of opportunity. This would be an expression of the *organic solidarity* that prevails in a society with a strong division of labor.<sup>35</sup> This type of solidarity recognizes the mutual dependence among persons who share equal legal status. Enjoying freedom in this type of society presupposes, nonetheless, adaptation to market-generated opportunities and agility to pursue them. No common effort is made to expand the range of options beyond the level set by markets.

Under cosmopolitan conditions, it is impossible to realize that type of *distributive solidarity*, which goes beyond a mere guarantee of formal quality of opportunity. There is no closed political space, which is essential to prevent freeloading by outsiders and defection by insiders. Entry barriers to a community and compulsory contributions to risk-management systems are at odds with the voluntarism and volunteerism congenial to pure cosmopolitanism. By contrast, the legally enforced pooling of risk among high-risk and low-risk groups mitigates the omnipresent threat of social exclusion in a market society. It enables everyone, in particular high-risk members, to lead a less anxious and more confident life than they could have if voluntarism and volunteerism had their way.

Moreover, communities where people *live* with one another are capable of realizing *concrete solidarity*. This type of solidarity is built into specific, and historically contingent, arrangements where people experience the lives of others as integral parts of their own lives and consider their own bounded self augmented through supporting others. Every attempt to base mutuality on the calculation of costs and benefits would fail, for it would not capture the intent with which support is extended. The middle class subsidizes ineffective farm operations located in the mountains; farmers, in turn, pay their taxes in order to maintain a high-quality opera house. The assistance is based upon the awareness that it is necessary to

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<sup>35</sup> See Emile Durkheim, *The Division of Labour in Society* (trans. W. D. Halls, New York: Free Press, 1964).

sustain a common world. Only in political communities is it possible to sustain such practices of individual self-transcendence.

Assuming that a plurality of political communities allows for various forms of concrete solidarity, this plurality of communities, taken together, is also generative of more forms of free individual self-realization than a purely cosmopolitan market society. It appears, therefore, that a system of nation states, encircled through the protection of human rights and protection against discrimination, is to be preferred over a purely cosmopolitan alternative.