Kant, Habermas and Democratic Peace

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Philosophers of great stature rarely write about international law or international relations. When they do, their writing, though often illuminating, tends to be brief, episodic and marginal to the rest of their work. We owe a fine essay on the balance of power to David Hume;1 two short but fascinating essays on peace to Jean-Jacques Rousseau;2 and an essay on treaties and another on intervention to John Stuart Mill.3 But no one could claim that these essentially minor works are central to the thought of those philosophers. One notable, recent exception to this generalization is John Rawls Law of Peoples (2001). Two other major exceptions should be mentioned. The first of these is the towering eighteenth-century Enlightenment thinker Immanuel Kant. The other is the contemporary German thinker Jürgen Habermas, much of whose highly influential work is devoted to international affairs. In this Article, we shall be examining the ideas of Kant and Habermas, especially as reflected in Habermas’ long essay, The Kantian Project and the Divided West, published in an English translation in The Divided West.4 The relationship between Kant and Habermas, both in that essay and throughout Habermas’ work, is an extremely close one, and few later thinkers have done as much as Habermas to demonstrate the continuing importance and relevance of Kant’s political thought for the contemporary world.

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+ Professor of Law, University of California Berkeley School of Law; Visiting Scholar, American Enterprise Institute. The authors thank Janet Galeria for excellent research assistance.
1 David Hume, Of the Balance of Power in Essays Moral, Political, Literary (Liberty Fund 1987) (arguing that the concept of a “balance of power” is not modern but is rooted in the practices of the ancient world).
4 Jürgen Habermas, The Divided West 113 (Polity Press 2006) (Ciaran Cronin, trans).
Briefly stated, our argument is this: two characteristically Kantian theses need to be distinguished. The first thesis we call the idea of “world federalism,” in other words the creation of some form of global governance structures as a solution to the problem of war. The second thesis is what has come to be called the “democratic peace.” The first idea envisages the creation of a “cosmopolitan constitution,” or a set of legal and political arrangements on a global scale that would entrench peace between and within states, partly through extending world citizenship and human rights protections to all human beings. A “cosmopolitan constitution,” in both Kant’s and Habermas’ view, does not necessarily require the emergence of a unitary world state or global empire. Both thinkers argue that a cosmopolitan constitution could instead be realized through some form of legalized and institutionalized associations among states that are sturdier and more binding than traditional defensive alliances and trade pacts, but that do not involve the complete submergence of those states in a larger political union. For Kant, the then-new federal system of the US provided one model, on a local scale, for a cosmopolitan constitution; for Habermas, the EU may do the same.

Kant also discovered what later expositors have come to call the “democratic peace thesis.” That thesis has two sides, one empirical and the other theoretical. As explained by the political scientist Michael Doyle (whose seminal 1983 work *Kant, Liberal Legacies, and Foreign Affairs* provoked extensive discussion of the democratic peace thesis), the empirical claim is that “[e]ven though liberal states have become involved in numerous wars with nonliberal states, constitutionally secure liberal states have yet to engage in war with one another.” The theoretical claim is, in brief, that “democracies have unique ‘contracting advantages,’ which allow them to build stable, peaceful relations, based on multiple self-enforcing bargains.” Although not without its critics, the empirical side of the democratic peace thesis appears to be well established. On the theoretical side, the thesis draws strength from its close links to the “rationalist” theory of war, which has so far proven to be perhaps the most plausible general account of the origins of major war. The democratic peace

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6 *Id* at 10.


8 See, for example, Joanne Gowa, *Ballots and Bullets: The Elusive Democratic Peace* (Princeton 1999) (arguing that “democratic peace” is not a result of common polities, but rather a product of the shifting-interest patterns after the Cold War).

9 For the classic statement of that theory, see James D. Fearon, *Rationalist Explanations for War*, 49 *Int'l Org* 379 (1995). Fearon’s work has recently been deepened and extended by R. Harrison Wagner, *War and the State: The Theory of International Politics* (Michigan 2007) (discussing ideas about the relationship between organized violence and political order at the global level through the lens
thesis does not hold that democracies do not fight wars with non-democracies; on the contrary, there is abundant evidence not only that they do fight such wars, but also that their democratic constitutions give them certain advantages in such contests.\textsuperscript{10} Nor does the democratic peace thesis hold that new and immature democracies do not fight each other. However, there is also substantial evidence that, at least after the Second World War, democracies have been far less likely to initiate aggressive war than non-democracies.\textsuperscript{11} Supporters of the democratic peace thesis often believe that the surest and best method of securing global peace, protecting human rights and reducing the incidence of mass atrocities is to promote democracy successfully throughout the world.\textsuperscript{12} Consistent with that belief, democracy-promotion has been a fundamental American policy objective for many decades, in both Republican and Democratic administrations.\textsuperscript{13} The US undoubtedly has been encouraged in that effort by its remarkable successes after the Second World War in transforming Germany, Italy and Japan into stable, peaceful, democratic allies and trading partners.\textsuperscript{14} Democracy-promotion was undoubtedly a significant motive for several recent American military interventions abroad, including those in Panama (1989), Haiti (1994) and Iraq (2003).


\textsuperscript{12} For example, Daniel Goldhagen has recently argued that non-democratic régimes today “have a built-in propensity—a real one, and not just a hypothetical one—to adopt eliminationist policies, including their lethal variant.” Daniel Jonah Goldhagen, \textit{Worse Than War: Genocide, Eliminationism and the Ongoing Assault on Humanity} 280 (Public Affairs 2009); see also id at 592–97.


\textsuperscript{14} This is not to say that democracy usually can or should be imposed by military intervention. The economist Christopher Coyne has studied US attempts since 1898 to impose democracy after military intervention. See Christopher J. Coyne, \textit{After War: The Political Economy of Exporting Democracy} (Stanford 2007). Coyne found a success rate of only 28 percent after five years and of only 36 percent after twenty years. Id at 15–16. Moreover, the most significant successes of coerced democratization were the post-Second World War cases of Nazi Germany and Austria, Fascist Italy and Imperial Japan—where traces of pre-War liberalism had not been wholly effaced, and where the American military victories had been absolute. In general, Coyne found that “political, economic, and social change that is imposed at the point of a gun is more likely to be met with resistance and is less likely to ‘stick’ once occupiers exit the country.” Id at 28.
Our core claim, then, is this: Habermas conceives the “Kantian project” to be one of securing global peace and upholding basic human rights through strengthening and expanding supranational and transnational institutions. In substance, he is offering a kind of Kantian world federalism as the way forward for the global community of states. We consider that approach fundamentally mistaken. In our view, democracy-promotion is clearly the better path. It recognizes the necessity and desirability of a plurality of independent nation states. It is more protective of both the freedom of individuals and the cultural identities of peoples. It is far more likely to yield a durable global peace. And it can form the basis of a foreign policy that serves the national security interests of the US and its leading allies.

In Section I, we begin by outlining Immanuel Kant’s views on war and peace. In Section II, we set forth and criticize Habermas’ version of the “Kantian project.” In Section III, we explain the democratic peace thesis more fully and argue that democracy-promotion will not only tend to promote global peace and respect for human rights, but will serve the national security interests of the world’s leading democratic powers by doing so.

I. KANT ON WAR AND PEACE

In order to understand Habermas’ position, we will need at least a rudimentary grasp of the thinking of Immanuel Kant on war and peace. So let us start with a reprise of Kant’s ideas on that subject.

A. Kant on War and Its Remedies

Kant assumes that war—even the “limited” kind of war characteristic of eighteenth-century Europe before the French Revolution—is a very great evil. In his fascinating reflections on the Book of Genesis, originally published in 1786 as *Conjectures on the Beginning of Human History*, he wrote:

[T]he greatest evils which oppress civilized nations are the result of war—not so much of actual wars in the past or present as of the unremitting,

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indeed ever-increasing preparation for war in the future. All the resources of the state, and all the fruits of its culture which might be used to enhance that culture even further, are devoted to this purpose. Freedom suffers greatly in numerous areas, and the state’s maternal care for its individual members is replaced by demands of implacable harshness (even if this harshness is justified by fear of external threats).16

Kant’s account could hardly be improved upon as a description of his native Prussia, which throughout his lifetime was effectively “an army with a State . . . rather than a State with an army.”17

What remedy exists for this condition?18 Kant considered, but emphatically ruled out, the possibility of a world state—a single, planetary government to which all of humanity would be subject. For Kant (as for other eighteenth-century thinkers such as the historian Edward Gibbon), even if a world state brought enduring peace, it would also spell the end of freedom.19 Kant compared such a world state to the Empire of China, which for him was a paradigm of political despotism: “[w]e need only look at China, whose position may expose it to occasional unforeseen incursions but not to attack by a powerful enemy, and we shall find that, for this very reason, it has been stripped

16 Immanuel Kant, Conjectures on the Beginning of Human History, in Hans Reiss, ed, Kant: Political Writings at 221, 231–232 (Cambridge 2d ed 1991) (H.B. Nisbet, trans). See also Immanuel Kant, On the Common Saying: ‘This May be True in Theory, but it does not Apply in Practice,’ in Reiss, ed, Kant: Political Writings 61, 91–2. (“Nowhere does human nature appear less admirable than in the relationships which exist between peoples. No state is for a moment secure from the others in its independence and its possessions. The will to subjugate the others or to grow at their expense is always present, and the production of armaments for defense, which often makes peace more oppressive and more destructive of internal welfare than war itself, can never be relaxed.”).

17 Geoffrey Best, War and Society in Revolutionary Europe 1770-1870 at 37 (St Martin’s 1982). Kant was right to emphasize the crippling financial burdens that eighteenth-century warfare imposed. The Hapsburg Empire’s war with Turkey had “nearly bankrupted” it; France “was bankrupted by its semi-victory over Britain” in the American Revolutionary War; and Britain had expended the colossal sum “at least £ 110 million” in fighting that war. Id at 29–30. Kant had seen the effects of the Seven Years’ War at first hand: his native city of Königsberg was occupied by Russian forces from 1756 to 1763. See Elizabeth York, Leagues of Nations: Ancient, Medieval, and Modern 264 (Swarthmore 1919).


19 Compare Edward Gibbon, The Decline and Fall of the Roman Empire, Ch 3 ¶35 (Fred de Fau and Co 1906) (“The division of Europe into a number of independent states, connected, however, with each other, by the general resemblance of religion, language, and manners, is productive of the most beneficial consequences to the liberty of mankind.”).
of every vestige of freedom.” That form of world state, therefore, is not the solution to the problem of war.

Equally, Kant rejected the common eighteenth-century idea that “a so-called European balance of power” could bring permanent, universal peace. That notion, he said, was “a pure illusion.” Kant was right. Recent studies suggest that the predatory balance of power system that prevailed in Europe for most of the eighteenth century was far more violent and war-prone than the “concert” system that superseded it after the defeat of Napoleon and the great settlement of 1815. As one scholar of the period has written, “[b]alance-of-power politics—the politics of confrontation—generated intolerable international tensions, produced increasingly serious armed conflicts, and inspired progressively extravagant plans of aggression. It neither maintained peace nor preserved the independence of sovereign states; by the time of the

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20 Kant, *Conjectures on the Beginning of Human History* at 232 (cited in note 16). For a brief discussion of eighteenth-century European misconceptions of China (of which Kant’s was typical), see John Darwin, *After Tamerlan: The Rise and Fall of Global Empires 1400-2000* 131–32 (Bloomsburg 2008).

21 See Kant, *On the Common Saying* at 92 (cited in note 16). Beginning as early as the fifteenth century, European statesmen and diplomats had begun to think in terms of a “balance of power” by means of which peace was to be maintained and one state was to be prevented from dominating others. By 1612, the renowned international lawyer Alberto Gentili was arguing in his *De Jure Belli Libri Tres* that the European states were justified in resisting the claims of the Spain on the one side and the Ottoman Empire on the other to universal dominion. Reflection on and theorization of the balance of power were brought to new heights in the eighteenth century, and the policy of maintaining the balance “appeared to many observers as something with moral justification of its own, almost independent of any practical value it might have.” See M.S. Anderson, *The Rise of Modern Diplomacy 1450-1919* 165 (Longman 1993); consider, id at 150–66 (tracing evolution of the doctrine). For example, Emmerich de Vattel, one of the eighteenth century’s leading authorities on international law, viewed the balance of power, not only as protecting both liberty and stability, but also as causing Europe as a whole to become a kind of republic of its own. See Nicholas G. Onuf, *The Republican Legacy in International Thought* 102–03 (Cambridge 1998). Even in its heyday in the eighteenth century, however, the balance of power had severe critics. See Sheehan, *Balance of Power* at 103 (cited in note 15) (quoting views of British parliamentarian William Wyndham); see also Robert J. Delahunty, *Herbert Butterfield, Christianity, and International Law*, 86 U Detroit Mercy L Rev 615, 645–46 (2009) (discussing eighteenth-century balance of power theory).

French Revolution, the international system had broken down altogether.”²³ Leading European statesmen who had witnessed the transformation, including Friedrich Gentz and Friedrich Arcillon, also recognized the fundamental difference between the pre-Revolutionary balance of power system and the Concert of Europe that supplanted it after 1815.²⁴ As the historian Paul Schroeder pungently expressed, after the Napoleonic wars “European statesmen had learned that eighteenth-century poker led to Russian roulette and decided to play contract bridge instead.”²⁵

What then was Kant’s solution to the problem of war? His initial answer depended on drawing an analogy between individual human beings and households in the pre-political “state of nature” and organized states in the condition of international anarchy.²⁶ In his 1793 essay On the Common Saying: ‘This May be True in Theory, but it does not Apply in Practice,’ he argued that just as the widespread private violence and pervasive insecurity that are endemic to the state of nature force individuals into an organized political and legal system—“a civil constitution”—so the pressures of interstate war and competition must ineluctably lead states to form a “cosmopolitan constitution.”²⁷

But what is a “cosmopolitan constitution?” Kant noted that “such a state of universal peace” under a cosmopolitan constitution “is in turn even more

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²⁴ See Carsten Holbrand, The Concert of Europe: A Study in German and British International Theory 1815-1914 17–18 (Longman 1970) (quoting views of leading publicist Friedrich Gentz in 1818 on the significant differences between the pre-Revolutionary balance of power and the post-war Congress system); id at 36–37 (discussing the view of Friedrich Ancillon, writer, royal tutor and later Foreign Minister of Prussia, on the merits of Congress system as opposed to pre-Revolutionary balance of power). From its origin in Clause Six of the Quadruple Alliance of the November 20, 1815, it was understood and expected that the Congress system would mark an unprecedented departure in European diplomatic practice. See Quadruple Alliance of November 20, 1815 in Sir Charles Webster, 2 The Foreign Policy of Castlereagh 1815-1822 55–57 (G. Bell and Sons 1963); Henry Kissinger, A World Restored 215 (Houghton Mifflin 1957). Scholars disagree over exactly how and why the “Congress” system differed from the earlier balance of power. For the argument that the master concept of the Congress system was the “Great Power principle,” see Andreas Osiander, The States System of Europe 1640-1990: Peacemaking and the Conditions of International Stability 232–47 (Oxford 1994). In any event, the Concert’s mechanisms were operating, albeit feebly, as late as 1912-13. See Richard Langhorne, The Collapse of the Concert of Europe: International Politics 1890-1914 at 4 (1981).

²⁵ Paul W. Schroeder, Austria, Great Britain and the Crimean War: The Destruction of the European Concert 404 (Cornell 1972); consider id at 401–07 (describing principles that underlay the Concert system).


²⁷ Kant, On the Common Saying at 90 (cited in note 16).
dangerous [than interstate warfare] to freedom, for it may lead to the most fearful despotism (as has indeed occurred more than once with states which have grown too large).”

Instead, “distress must force men to form a state which is not a cosmopolitan commonwealth under a single ruler, but a lawful federation under a commonly accepted international right.” In the end, he maintained, the problem of war could not be solved except through “a state of international right, based upon enforceable public laws to which each state must submit (by analogy with a state of civil or political right among individual men) . . . . [W]e should proceed in our disputes in such a way that a universal federal state may be inaugurated.”

Kant returned to the problem of war in his 1797 work, *The Metaphysics of Morals*. There, as before, he argued that “the state of nature among nations (as among individual human beings) is a state which one ought to abandon in order to enter a state governed by law.” International law in its current form can establish peace between nations, but it does so only on a provisional basis because it does not end the condition of international anarchy. The moral imperative to create a permanent peace could only be satisfied, Kant argued, by “a universal union of states (analogous to the union through which a nation becomes a state).” A cosmopolitan constitution creating such a union, unlike the prevailing public international law, would have a peremptory validity, rather than being merely provisional. The peace that it would establish would be a true and lasting peace, not an ephemeral one. But at this point, Kant surfaced a conflict that had been latent in his thought. This union of states seemingly could not take the form of a single supra-state that dissolved the identities of its member states. Kant based that conclusion not on the threat to freedom that a supra-state would pose, but rather on the consideration that as the territory of a supra-state grows ever larger, “it will eventually become impossible to govern it and thence to protect each of its members,” leading back again to the state of war.

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28 Id.
29 Id.
30 Id at 92.
31 *Kant: Political Writings* 131, 171 (cited in note 16).
32 Id at 171.
Instead, Kant suggested that a union of several states meant to preserve peace might take the form of “a permanent congress of states,” like the assembly of European powers that had met periodically at The Hague from the late seventeenth century through the early eighteenth century. Although the work of this assembly resulted in several major treaties, including the Treaty of the Triple Alliance (1688), the Concert of the Hague (1710) and the Treaty of Peace between Spain, Savoy and Austria (1717), and although the governments concerned came to think of “all Europe as a single federated state, which they accepted as an arbiter in all their public disputes,” the Hague system proved to be short-lived. In the War of the Austrian Succession (1740-48) and the Seven Years’ War (1754-63), Europe returned to its violent ways. As Kant’s contemporary Jean-Jacques Rousseau put it, it was once again sadly true that “the state peculiar to the Powers of Europe is simply a state of war.” The solution to the problem of war thus required avoiding both too highly centralized and consolidated a union of states and a system so loose that it amounted to little more than an alliance that could be dissolved at any time at the behest of any of its members. Kant suggestively (but without giving detail) proposed that the proper model would be “an association which, like that of the American states, is based on a political constitution and is therefore indissoluble. For this is the only means of realizing the idea of public international right as it ought to be instituted, thereby enabling the nations to settle their disputes in a civilized manner by legal proceedings, not... by acts of war.”

B. Kant’s “Perpetual Peace”

Kant’s Perpetual Peace: A Philosophical Sketch is probably his most widely read and influential work on international law and relations. It was originally published in 1795, between the 1793 essay On the Common Saying, and The Metaphysic of Morals in 1797. In Perpetual Peace, Kant sketched out a solution to the problem of war that marks a real advance over his other formulations—a solution that proposes neither a unitary world-state like the Chinese or Roman Empires, nor a loose alliance like the Hague Congresses, nor even a global government modeled on American federalism. Here, in place of the “positive idea of a world republic,” Kant offered the “negative substitute of an enduring

35 Id. For the early eighteenth-century conception of Europe as a kind of unitary system with identifiable interests of its own, distinct from those of particular European states, see Osianer, The States System of Europe 110–17 (cited in note 24).
36 Jean-Jacques Rousseau, Extrait du projet perpetuelle de M. l’Abbé de Saint-Pierre, quoted in Jonathan Haslam, No Virtue Like Necessity: Realist Thought in International Relations since Machiavelli 82 (Yale 2002).
37 Kant, The Metaphysics of Morals at 171 (cited in note 34).
and gradually expanding federation likely to prevent war.”\textsuperscript{38} While this “negative substitute” falls short of the ideal of a “world republic” or unitary, federal global government, it provides the basis for a feasible program of action that can, over time, foster the conditions for a lasting global peace.

In \textit{Perpetual Peace}, Kant repudiated the analogy on which he relied elsewhere between individual men in the state of nature and individual nations in the state of international anarchy. Thus, he wrote:

\begin{quote}
[While natural right allows us to say of men living in a lawless condition that they ought to abandon it, the right of nations does not allow us to say the same of states. For as states, they already have a lawful internal constitution, and thus have outgrown the coercive right of others to subject them to a wider legal constitution in accordance with their conception of right.\textsuperscript{39}]
\end{quote}

Yet, as he did elsewhere, he also insisted here on the necessity of a general agreement between nations that would establish a permanent (rather than a merely provisional) peace: “reason, as the highest legislative moral power, absolutely condemns war as a test of rights and sets up peace as an immediate duty. But peace can neither be inaugurated nor secured without a general agreement between the nations.”\textsuperscript{40} Here that agreement is to establish “a particular kind of league, which we might call a pacific federation (\textit{foedus pacificum}).”\textsuperscript{41} Significantly, though, this “league” or “federation” is to be neither a loose-jointed treaty alliance, nor a world state, nor a federal union along the lines of the US.

This federation does not aim to acquire any power like that of a state, but merely to preserve and secure the freedom of each state in itself, along with that of the other confederated states, although this does not mean that they need to submit to public laws and to a coercive power which enforces them, as men do in a state of nature.\textsuperscript{42}

The sovereignty of the member states of such a league is thus preserved and no supra-state necessarily emerges from their union.\textsuperscript{43} Yet the bonds that link the

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\textsuperscript{38} Kant, \textit{Perpetual Peace: A Philosophical Sketch} in Reiss, ed, \textit{Kant: Political Writings} at 105 (cited in note 16).
\textsuperscript{39} Id at 104.
\textsuperscript{40} Id.
\textsuperscript{41} Id (italics added).
\textsuperscript{42} Kant, \textit{Perpetual Peace: A Philosophical Sketch} in Reiss, ed, \textit{Kant: Political Writings} at 104 (cited in note 16).

\textsuperscript{43} Although Kant himself does not distinguish the various legal forms that a “league” might assume, accounts of the “constitutional” structure of the EU bring different possibilities to light. At least three accounts of the EU have been given. Some analysts think that the EU is (or should remain) an intergovernmental organization; others think that it is evolving into a federal union. Still others think that it represents some form of hybrid that is neither an intergovernmental organization nor
\end{footnotesize}
member states together are far stronger and more cohesive than those that unite the members of a defensive alliance, and the outcome of their association is not merely a provisional end to any hostilities between them, but the makings of a durable peace.

How is that possible? Kant’s insight is to see that the internal or “civil” constitutions of the member states of such a federation can make a decisive difference. Kant has argued that states with “republican” civil constitutions have an innate predisposition to peace. So “if by good fortune one powerful and enlightened nation can form a republic,” that nation can provide “a focal point for federal association among other states.” Other states, not feeling threatened by that powerful but peaceable republican state, will be drawn to establish friendly relations with it. Peaceful relations will tend to promote prosperity, as the states involved shed the burdens of preparing for, waging, and recovering from wars with each other. Furthermore, peaceful relations between states will open the door to commerce and trade among them, creating interdependencies

44 Kant, Perpetual Peace at 104 (cited in note 16). Kant may have had France in mind as that “powerful and enlightened” republic. See Wagner, War and the State 100 (cited in note 9).

45 As W.B. Gallie argues: “[T]he real strength—if not the ‘teeth’—of [Kant’s] proposed federation lies in its capacity to maintain and extend peace among a number of like-minded powers. In this way it will demonstrate . . . that marked non-aggression pays—in a quite material sense—in a world where war is becoming ever more costly and more destructive.” W.B. Gallie, Philosophers of Peace and War: Kant, Clausewitz, Marx, Engels and Tolstoy 25 (Cambridge 1978).
that Kant believes will also deter them from going to war with one another. And the success of their alliance will in turn draw still other states into association with them. A crucial step in this argument is, obviously, the claim that “republics” will be naturally disposed to peace. In defending that claim, Kant maintained that a republican form of government would introduce political and legal controls not found in monarchies or other non-republican constitutions that would greatly reduce the likelihood of (aggressive) war. If, as is inevitably the case under this [republican] constitution, the consent of citizens is required to decide whether or not war is to be declared, it is very natural that they will have a great hesitation in embarking on so dangerous an enterprise. For this would mean calling down on themselves all the miseries of war . . . .


47 What Kant meant by a “republic” might seem uncertain, given that the term was often used to refer to constitutions of very different kinds. See *The Federalist No 39* (Madison), in *The Federalist Papers* 240 (Mentor 1983) (“What, then, are the distinctive characters of the republican form? Were an answer to this question to be sought, not by recurring to principles, but in the application of the term by political writers, to the constitution of different States, no satisfactory one would ever be found.”). However, Kant helpfully identified three principles on which “republican” constitutions are founded: “firstly, the principle of freedom for all members of a society (as men); secondly, the principle of dependence of everyone upon a single common legislation (as subjects); and thirdly, the principle of legal equality for everyone (as citizens). It is the only constitution which can be derived from the idea of an original contract . . . .” Kant, *Perpetual Peace* at 99–100 (cited in note 16). Furthermore, Kant went to some pains to state that “republics” must be distinguished from (classical) democracies, which involved direct popular rule by the citizen body and which accordingly did not manifest a separation of powers. Id at 100–01. Later interpreters have reasonably understood Kant to be referring to “a political society that has solved the problem of combining moral autonomy, individualism, and social order.” Doyle, *Kant, Liberal Legacies, and Foreign Affairs* at 21 (cited in note 5). In substance, this is to say that Kant may be taken to be speaking of liberal-capitalist constitutional democracies. See also Wolfgang Kersting, *Politics, Freedom, and Order*, in Paul Guyer, ed, *Cambridge Companion to Kant* 342, 361 (Cambridge 1992) (equating republicanism with “a political order characterized by parliamentary democracy, popular representation and the division of power”).

48 Kant, *Perpetual Peace* at 100 (cited in note 16). In an extremely influential work originally published in 1962, Habermas called attention to the rise of “public opinion” as a force for peace. See Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (MIT 1989) (Thomas Burger, trans). According to Habermas, the eighteenth century witnessed the emergence of a “bourgeois public sphere” in which matters of public policy were rationally and publicly debated. The bourgeois public sphere was adamantly opposed to secrecy in government affairs, not least in the form of kabinett diplomatie (cabinet diplomacy) of the kind defended and practiced by, among others, Prussia’s King Frederick II. The greater transparency
Citizens of republics, Kant argued, would be most reluctant to assume the burden of fighting themselves, paying for the costs of war out of their own resources, facing the risks of devastation to their property, and saddling themselves with onerous war debts. By contrast, in constitutional systems in which the subject is not a citizen, the rulers can force the burdens of warfare onto the subject while capturing its gains for themselves. Indeed, as Kenneth Waltz has noted, Kant argues that the inner dynamics of war, including the competition among different groups of economically predatory rulers, will itself enable subjects to wrest liberty from those rulers, and thus serve to bring about “republican” government.

C. Kant’s Central Insights

Kant’s central insights were to link a state’s (liberal-democratic) civil constitution to the type of policies it will espouse with respect to war and peace, and then to explain how associations of like-minded free states will tend to form zones of peace. These insights have rightly been acclaimed as “a revolutionary step forward in political philosophy.” To be sure, Kant does not quite advocate the “democratic peace thesis,” if only because he does not insist that the members of his “pacific federations” must all be republics. Nonetheless, he

demanded by the bourgeois public sphere strengthened democratic political controls over states’ war-making. See James Van Horn Melton, The Rise of the Public in Enlightenment Europe 8 (Cambridge 2001).

49 Kant was not the only eighteenth-century thinker to discern a link between the republican form of government and a tendency towards peace. For example, Montesquieu had said that “[t]he spirit of monarchy is war and enlargement of dominion; peace and moderation are the spirit of a republic.” See Charles Louis de Secondat, Baron de Montesquieu, 1 The Complete Works of M. de Montesquieu, Book 9 Ch 2, ¶ 895 (T. Evans 1777). See also Thomas Paine, The Rights of Man ¶ 362 (J.S. Jordan 1791). Consider Michael Howard, War and the Liberal Conscience 23–30 (Rutgers 1986).

50 See Kenneth Waltz, Kant, Liberalism, and War in Waltz, Realism and International Politics 10–11 (cited in note 46). Thus in Conjectures on the Beginning of Human History, Kant shrewdly points out that “the risk of war is the only thing which keeps despotism in check, because a state must now have wealth before it can be powerful, and there can be no wealth-producing activity without freedom.” See Kant, Conjectures on the Beginning of Human History at 231 (cited in note 16). See also the remarks in Immanuel Kant, Idea for a Universal History with a Cosmopolitan Purpose in Reiss, ed, Kant, Political Writings 41, at 51 (cited in note 16). Waltz’s insight has been taken further in the penetrating account by Wagner, War and the State at 118–20, 202–06 (cited in note 9).

51 Gallie, Philosophers of Peace and War, at 13 (cited in note 45). Gallie explains: [Kant] had made the first significant step . . . to construct a framework of ideas within which the generally acknowledged rights and duties of states vis-à-vis their own citizens can be shown to require, logically, its acknowledgement of certain equally important rights and duties towards each other (and each other’s citizens) if their traditionally recognized tasks are ever to be effectively discharged.

Id at 13–14. Gallie brings out the conceptual side of Kant’s insight. But there is also an empirical side—the democratic peace thesis—which we wish to underscore here.
supplies the core of the democratic peace idea. By his reasoning, a league of republics would be more likely to promote peace among its members than a league that included non-republics (because the latter would retain their propensity for war, even if to a lesser degree). Moreover, careful students of Kant (including Habermas\textsuperscript{52}) read him to be contemplating a “liberal pacific union” or a “pacific union of liberal republics”\textsuperscript{53}—in other words, a league whose members are all (or predominantly) “republican.” Thus, even though later writers provide much deeper and fuller accounts than Kant’s as to why the political and constitutional structures of mature liberal democracies tend to produce peace among them,\textsuperscript{54} Kant can properly be credited with anticipating the democratic peace thesis.\textsuperscript{55}

Kant apparently considered the idea of promoting peace through a league of republics as less satisfying from the moral point of view than the idea of a federal world state or republic. That is why he characterized the former as a “negative substitute” for the latter.\textsuperscript{56} He wrote:

\textsuperscript{52} See Jürgen Habermas, \textit{The Kantian Project and the Divided West}, in Habermas, \textit{The Divided West} at 125 (cited in note 4) (“[A]ssociated with the project of a league of nations is the idea of an ever-expanding federation of republics engaging in commerce which renounce wars of aggression.”).

\textsuperscript{53} Doyle, \textit{Kant, Liberal Legacies, and Foreign Affairs} at 21–22 (cited in note 5). See also David Cortwright, \textit{Peace: A History of Movements and Ideas} 242 (Cambridge 2008) (“Kant envisioned the proposed federation as ‘a pacific union’ of liberal republics.”).

\textsuperscript{54} See, for example, Lipson, \textit{Reliable Partners} at 11–15, 77–138 (cited in note 7).

\textsuperscript{55} See Cortwright, \textit{Peace} at 241 (cited in note 53) (applauding Kant’s prescience “in foretelling what contemporary analysts call the democratic peace”).

\textsuperscript{56} The distinguished Kantian interpreter F.H. Hinsley understood Kant differently. Discussing Kant’s “negative substitute” of a league of republican states, Hinsley said that “[f]ar from reaching this conclusion in any spirit of regret or despair at the conduct of states, far from merely accepting the continuing independence of states as inescapable, Kant insisted on it as morally right.” F.H. Hinsley, \textit{Power and the Pursuit of Peace: Theory and Practice in the History of Relations Between States} 63 (Cambridge 1963). We disagree. Kant plainly affirms that individual states have the duty to surmount the condition of international anarchy and to bring war to a definitive end by forming a cosmopolitan constitution, which he envisages would establish a federated union of states. See, for example, Kant, \textit{On the Common Saying} at 92; see also Kant, \textit{Idea for a Universal History} at 41, 47–8 (cited in note 16); accord Carl Joachim Friedrich, \textit{Inevitable Peace} 45–6 (Harvard 1948). As discussed in the text above, that union would bear some resemblance, on a planetary scale, to the federal system of the US; it would not be a global empire along the lines of a planetary Roman or Chinese Empire. Kant thinks that this duty is as incumbent upon states as the corresponding duty to leave the state of nature and enter into a civil constitution is incumbent upon individual men. The difference between men and states is not, in his view, the nature of the moral duty that binds them: in both cases, it is the duty to suppress violence and war, and to submit disputes to legal adjudication. The difference rather is that while individual men may and should coerce other men into a civil constitution, states cannot generally mobilize the force to compel other states to associate with them in a cosmopolitan constitution that established a (federal) world-state. As we see it, then, Kant is yielding to what he sees as hard, practical necessity in advocating the “negative substitute.”
There is only one rational way in which states coexisting with other states can emerge from the lawless condition of pure warfare. Just like individual men [in the state of nature], they must renounce their savage and lawless freedom, adapt themselves to public coercive laws, and thus form an international state (civitas gentium), which would necessarily continue to grow until it embraced all the peoples of the earth. But since this is not the will of nations, according to their present conception of international right . . ., the positive idea of a world republic cannot be realized. If all is not to be lost, this can at best find a negative substitute in the shape of an enduring and gradually expanding federation likely to prevent war.

We agree with Habermas' interpretation of passages such as this. As Habermas argues, a “constitution” for the international community was, from Kant’s usual perspective:

- conceivable only in the form of a republic of republics, that is, as a “republicanism of all states” or as a “world republic.” In this way, the constitution of the nation-state realized through [transformations such as the American and French Revolutions] becomes the model for the transition . . . to cosmopolitan law.
- The “negative substitute” of a loose league of democratic states must therefore seem conceptually and normatively defective, even if it provides the best feasible alternative to a world republic.

This is the point at which we part company with Kant. We think it would be misguided to attempt to promote the goals of global peace and respect for human rights through a program of invigorating international or supranational organizations leading, ideally, to the eventual emergence of an “international state” or “world republic.” We believe that a sounder and more fruitful way of achieving those goals is through the promotion of democratic government in particular states—Kant’s “negative substitute.” The former approach would entail the eventual elimination of nation states, or at least their incorporation into an indissoluble federal union on a planetary scale—a union whose “public coercive laws” would bind its members and be enforceable against them. The latter approach would seek to democratize, rather than federalize, the world’s various states. States would retain their political independence and territorial integrity. Their military and political association, if any, would take the form of a league, in which membership was voluntary and from which withdrawal was permissible.

Nonetheless, the exegetical issue is not easy to resolve. See Pangle and Ahrens, Justice Among Nations at 200 (cited in note 26) (arguing that the precise shape of Kant’s “league” of nations has strong ambiguities). For a recent survey of the different interpretations and an attempt to reach a solution, see Pauline Kleingeld, *Kant’s Theory of Peace,* in Paul Guyer, ed, The Cambridge Companion to Kant and Modern Philosophy at 477, 483–88 (Cambridge 2006).

57 Kant, *Perpetual Peace* at 105 (cited in note 16).
58 Habermas, *The Divided West* at 123 (cited in note 4).
II. HABERMAS’ VERSION OF THE KANTIAN PROJECT

Habermas’ version of the “Kantian project” seeks, like that of Kant himself, to transform or “constitutionalize” classic, state-centered public international law. The “constitutionalization” of international law, Habermas argues, would construct an international legal order that “renders war as a legitimate means of resolving conflicts, indeed war as such, impossible, because there cannot be ‘external’ conflicts within a globally inclusive commonwealth. What had hitherto been military conflicts would assume the character of police actions and operations of criminal justice.”

In other words, under a “constitutionalized” international system, states would no longer be able to exercise the “right” to go to war—the “core component” of classic public international law. The question then, of course, becomes how such a “constitutionalized” international order is to be achieved.

Even more firmly than Kant, Habermas rejects the possibility of bringing about the “legal pacification of world society by repressive means, that is, through a despotic monopoly of power.” Neither Kant nor Habermas, therefore, claims that perpetual peace can only be achieved through creating a world-state, even of a federal kind. In place of that proposal, Habermas invokes Kant’s “core innovation” which was to envision “the transformation of international law as a law of states into cosmopolitan law as a law of individuals.” Instead of being merely the citizens of their own states, individuals would be viewed as members of a “cosmopolitan commonwealth,” and their “civil rights” would “penetrate international relations too.” This transformation, Habermas suggests, would mean more than merely codifying certain basic legal rights that anyone, whether a citizen or not, might claim against any state. It would entail a fundamental change, not only in the relations between states and rights-bearing individuals, but also between states and other states. World citizenship would necessitate some form of world legal order—an order that subordinated the legal systems of particular states to a globalized legal system. To realize the idea of world citizenship, therefore, states would have to sacrifice not only their internal, but also their external, sovereignty to “a higher authority”:

59 Id at 123.
60 Id at 133.
61 Habermas, The Divided West at 124 (cited in note 4). See also id at 134 (“The democratic federal state writ large—the global state of nations or world republic—is the wrong model.”).
62 Id at 124.
63 Id.
The price paid by sovereign states uniting to form a “large state body” for promoting their citizens to world citizens is that they must submit to a higher authority. In acquiring the status of members of a republic of republics, they renounce the option of substituting politics for law in their dealings with other member states. The imposition of the format of a state on international relations would mean that law completely permeates and transforms political power, even in external relations among states. The difference between external and internal sovereignty would thereby disappear, not only on account of the global scale of the inclusive state of nations, but also for normative reasons.64

If the preferred outcome of the “constitutionalization” of international law is not the emergence of a world state of which all individuals are citizens, however, then what is its outcome? What, precisely, is the nature of the “higher authority” that Habermas has in view? Habermas opposes “the thoroughly individualistic legal order of a federal world republic,” for example, the idea of “a politically constituted global society that reserves institutions and procedures of global governance for states at both the supra- and transnational levels.” Instead, he argues that the “constitutionalization” of international law requires the construction of “a supranational power above competing states that would equip the international community with the executive and sanctioning powers required to implement and enforce its rules and decisions.” To repeat, this “supranational power” is not itself any form of a “republican state.” Rather, the transformation of classic international law into a global constitution must be envisaged as a process that begins with “a ‘weakly’ constituted community of

64 Id at 123. In a lengthy newspaper article entitled Bestiality and Humanity, published in Die Zeit on April 29, 1999, Habermas explained more lucidly than he was to do in The Divided West the conceptual nexus between the rights of individuals as cosmopolitan citizens and entrenchment of peace between states. He wrote:

“[l]egal pacifism wants not just to restrict the latent state of war between sovereign states by means of international law, but also to replace it with a cosmopolitan order based on law. . . . Direct membership in an association of world citizens would protect any state citizen against the arbitrary actions of their [sic] own governments . . . . The most important consequence of an international law that even bypasses the sovereignty of states is, as can be seen already in the case of Pinochet, the personal liability of leaders and officials for the crimes committed during their state and war service.”

Jürgen Habermas, Bestiality and Humanity: A War on the Border Between Law and Morality, Die Zeit 1, 1–2 (April 29, 1999) (Franz Solms-Laubach, trans). In other words, it is the threat of personal criminal liability for aggression or other war crimes that will deter political and military leaders from committing those crimes, thus tending to bring about peace. Whether this “deterrent” would be effective is, of course, open to doubt; but Habermas’ program of “legal pacifism” depends upon it.

65 Habermas, The Divided West at 135 (cited in note 4).

66 Id at 132.

67 Id at 133.
states (by comparison with the republican state),” and then goes on to “supplement” that community “at the supranational level by legislative and adjudicative bodies and by sanctioning powers.”  

So augmented, the resulting community will be enabled to “tak[e] political initiatives and execut[e] joint decisions.” The “constitutionalizing” process thus moves “from the non-hierarchical associations of collective actors [states] to the supra- and transnational organizations of a cosmopolitan order.”

Significantly, Habermas believes that the key elements of such a cosmopolitan order, though insufficiently developed, are already in place. These are “the three most imposing examples of international organizations”—the UN, the EU, and the WTO. The task immediately ahead for the “Kantian project,” therefore, is to fortify these international organizations by expanding their legal powers. While at present the three organizations “give the impression of a suit of clothes a couple of sizes too big waiting to be filled out,” the community of states must provide them with “a stronger body of organizational law—in other words . . . stronger transnational and supranational mandates for governance.”

Let us now examine more closely why Habermas considers the UN to be already a key component of an emerging cosmopolitan world order and what future role he would assign to that organization as his Kantian project unfolds. Habermas points out, correctly, that the UN has already acquired (or assumed) the legal authority to intervene in the internal affairs of criminal governments and failing states. “In these two policy domains, the member states grant the UN Security Council the competence to protect the rights of citizens against their own governments if necessary. Hence, it would be consistent to describe the world organization as already a community of ‘states and citizens.’” As for the future, a “suitably reformed world organization could perform the vital but clearly circumscribed functions of securing peace and promoting human rights at the supranational level in an effective and non-selective fashion without having to assume the state-like character of a world republic.” Although Habermas does not identify here what these suitable reforms to the UN would be, he asserts in his essay *Bestiality and Humanity* that “a necessary precondition” for a “world civil society” would be “a well-functioning Security Council, the

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68 Id.
69 Habermas, *The Divided West* at 133 (cited in note 4).
70 Id.
71 Id at 133–34.
72 Id at 134.
73 Habermas, *The Divided West* at 135 (cited in note 4).
74 Id at 136.
binding judgments of an international court of criminal justice and the complementing of the General Assembly of government representatives with a ‘second level chamber’ composed of representatives of world citizens.”

We think that Habermas has fundamentally misunderstood the nature of the UN, and has therefore designed a role for it in the protection of global security and the promotion of human rights that it lacks any real capacity to perform. The UN is simply nothing like a Kantian league of liberal-democratic states and could not possibly serve the cause of global peace in the way that Kant envisaged that such a league would do. Thus, instead of carrying Kant’s project forward, Habermas ends up betraying it.

Although it has been suggested that the UN “in many respects fulfills those conditions which Immanuel Kant had formulated as essential to the establishment of a world-wide organization,” it is immediately obvious that the UN has never borne any resemblance to a Kantian league of free republics and, barring an almost inconceivable transformation, will never mature into one. Admission to membership in the UN has been consistently based on the principle of universality or non-discrimination by régime type. In contrast, the essence of a truly Kantian league is that its members be at least predominantly “republican” or liberal-democratic. In this respect, at least, the UN has been true to its origins in practice.

The original nucleus of the UN was, of course, the wartime alliance of four Great Powers (the US, the UK, the Soviet Union and, by courtesy, China) that had defeated the Axis. These powers invited the states that had signed the Declaration of the UN to attend the UN Conference on International Organization in San Francisco. Original membership in the proposed organization was offered as a matter of right to all states that were participating at least formally in the struggle against the Axis. Neutrals and enemies would be able to seek admission later. At the San Francisco Conference, “most of the delegates . . . were thinking in terms of membership ultimately to be universal. Some, indeed, would have made membership of all nations automatic or required . . .” The coalition of Great Powers which transformed its wartime alliance into a permanent international organization included both the world’s

75 Habermas, Bestiality and Humanity, Die Zeit at 4 (cited in note 64).
76 Friedrich, Inevitable Peace at 33 (cited in note 56).
77 See Hans Kelsen, Membership in the United Nations, 46 Colum L Rev 391, 395 (1946) (noting that the Charter “does not require a democratic form of government as a condition of being or becoming a member of the Organization”).
78 See UN Charter Art 3 (1945); see also Clyde Eagleton, The United Nations: Aims and Structure, 55 Yale L.J 974, 975–76 (1946).
79 Id at 983.
leading liberal-democratic, capitalist states and the world’s leading Communist state, the Soviet Union under Josef Stalin. With the exception of the Fascist states, their allies and some suspect quasi-neutrals, the organization was open to states regardless of régime type.80

Article 4 of the UN Charter sets forth the conditions for admission to (non-original) membership of the organization. Article 4(1) states that “[m]embership in the United Nations is open to all other peaceloving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.”81 The Article imposes no requirement on the political system or constitutional character of future member states, other than that they be “peaceloving”—a condition aimed at Axis enemies. In an advisory opinion of 1948, the International Court of Justice ruled that the qualifications for admission set forth in Article 4(1) were exhaustive, and that additional political considerations could not be superimposed above them.82 However, conflict between the Western and Eastern blocs in the early Cold War period led to disputes over the admission of new members, as the Soviet Union and its allies initially found themselves badly outnumbered in the General Assembly.83 Furthermore, Spain, then under the rule of Generalissimo Franco, presented a special and problematic case in view of its pre-war association with Nazi Germany and Fascist Italy.84 But in 1955, the organization admitted sixteen new members, including Spain (which was still governed by the Franco régime), and

80 By contrast, although membership in the League of Nations was legally open to states without regard to their constitutional character, ideological conflict prevented the Soviet Union from becoming a League member until 1934. See Paul Kennedy, The Parliament of Man: The Past, Present, and Future of the United Nations 13 (Random House 2006); F.P. Walters, 2 A History of the League of Nations 579-85 (Oxford 1952). Indeed, Woodrow Wilson had originally argued (in very Kantian terms) that any future league should consist solely of democratic states. See President Woodrow Wilson, We Must Accept War, Address to Congress (April 2, 1917); see also Edward H. Buehrig, Woodrow Wilson and the Balance of Power 138–39 (Indiana 1955) (describing the similar views of Wilson’s Secretary of State Lansing).
81 UN Charter Art 4 (1945).
82 Conditions of Admission of a State to Membership in the United Nations (Advisory Opinion), 1948 ICJ 57, 62. The Court did however read Article 4 to permit “the taking into account of any factor which it is possible reasonably and in good faith to connect with the conditions laid down” in the Article. Id at 63.
84 Spain had not been invited to the San Francisco Conference, which adopted a resolution designed to keep Spain out of the UN. A General Assembly Resolution of February 1946 reaffirmed that position. See Evan Luard, 1 A History of the United Nations: The Years of Western Domination 1945–1955 361–64 (St. Martin’s 1982); Louis B. Sohn, The Expulsion or Forced Withdrawal From an International Organization, 77 Harv L Rev 1381, 1401–02 (1964).
thus established the principle of non-discrimination in membership.\footnote{Consider Leo Gross, \textit{Progress Towards Universality of Membership in the United Nations}, 50 Am J Intl L. 791 (1956).} The UN’s membership has included states having such very different types of civil constitutions as liberal-democratic republicanism (the US), communism (the Soviet Union, the People’s Republic of China), constitutional monarchy (the UK, Norway), tribally based monarchy (Saudi Arabia), Papal rule (the Vatican), Islamist theocracy with democratic elements (Iran), dictatorships and military juntas of both the left and right, and more. Indeed, it could reasonably be argued that the principle of sovereign equality embodied in Article 2(1) logically entails that admission to membership be open to all states, regardless of their political form.

It is precisely because UN membership is universal and non-discriminatory in this sense, however, that the organization cannot function as anything like a Kantian republican league. Its foundational premises, buttressed by decades of practice, preclude that possibility. And it is precisely because the UN has this character that several major political leaders (for example, Senator John McCain\footnote{John McCain, \textit{America Must Be a Good Role Model}, The Financial Times (Mar 18, 2008) (“We need to strengthen our transatlantic alliance as the core of a new global compact—a League of Democracies—that can harness the great power of the more than 100 democratic nations around the world to advance our values and defend our shared interests.”).}) and legal scholars (for example, Philip Bobbitt\footnote{Philip Bobbitt, \textit{Terror and Consent: The Wars for the Twenty-First Century} (Knopf 2008) (arguing that democracies should unite to counter global terrorism).}) have argued that the US should take the lead in forming a global league of democracies, obviously contemplating that association as an alternative to the UN. Indeed, the creation of NATO—a true Kantian league of democracies\footnote{See Geir Lundestad, \textit{The United States and Western Europe Since 1945: From “Empire” by Invitation to Transatlantic Drift} 65–66 (Oxford 2003) (characterizing NATO as a “security community” in which there is a real assurance that community members will not fight each other).}—attests that only four years after the UN had come into being, it was evident that the organization could not protect the peace. The entire history of the UN has been characterized by recurring and intractable conflicts that have arisen (largely) out of the different constitutional forms of its member states and that have produced chronic impasses over vital questions of international security. Thus, the very universality of the UN all but ensures that attempts to promote international peace and security through its agency will be stymied. No likely “reform” of the UN will change that fact.

To be concrete: the Security Council includes two permanent, veto-wielding members—China and Russia—both of which are undemocratic (or at
least, in Russia’s case, not a mature democracy and both of which have extremely poor human rights records. It would be absurd to expect these two states to emerge as paladins of human rights. Further, both of those states have regularly shielded “outlaw” states that pose serious threats to global or regional peace (such as North Korea, Iran, Serbia and Sudan) from effective UN sanctions. It is overwhelmingly likely that they will do so in the future. To be sure, the Security Council can help to manage and mitigate Great Power disagreement. Furthermore, Security Council authorization for the use of force can legitimize an outside intervention—and legitimacy is desired even by powerful states. But the Council cannot be expected to take the lead in promoting peace and human rights. We can hardly blink at the UN’s poor performance over more than six decades in both those areas.

Habermas’ signal failure to acknowledge that the Charter system is often an obstacle to human rights enforcement was evident in Bestiality and Humanity, his 1999 essay in Die Zeit on the War in Kosovo. There Habermas half-heartedly defended NATO’s intervention in the (then) Serbian province of Kosovo—an armed intervention that succeeded in halting what he called the “murderous ethno-nationalism” being practiced by the Milosević government. Habermas agreed that Milosević’s “victims [do not] have to be left at the mercy of their

89 For a recent, highly pessimistic account of Russia’s chances of becoming a democracy, see Steven Rosefielde and Stefan Hedlund, Russia Since 1980: Wrestling with Westernization (Cambridge 2008) (arguing that scholars have overestimated Russian prospects for liberalization and democratization). Nonetheless, Russia’s political leaders at least profess that “the modern state is above all a democratic state.” President Dmitry Medvedev, Speech at the International Conference on the Modern State and Global Security (Sept. 15, 2009), online at http://www.yaroslavl-2009.ru/eng/about/part174 (visited Nov 21, 2009).

90 For instance, the Security Council provided a “unique forum” that facilitated certain forms of diplomatic engagement between the US and the Soviet Union during the Cuban missile crisis of 1962. See Abram Chayes, The Cuban Missile Crisis: International Crises and the Role of Law 84–85 (Oxford 1974). Even then, however, traditional bilateral dealings between the Powers concerned seems to have been far more important in resolving the crisis.


92 See Goldhagen, Worse Than War at 592 (cited in note 12) (“We should do away with the United Nations . . . because it is illegitimate, and ineffectual, and corrupt, and does far too little to coordinate the world’s countries to alleviate misery, including to fight against exterminationist and eliminationist politics.”).

93 On several occasions, the present authors have documented the poor record of the UN in upholding international security and have argued that the Charter system suffers from incurable defects at the level of both legal norm and institutional design. We need not repeat those arguments here. See, for example, Robert J. Delahunty and John C. Yoo, Great Power Security, 10 U Chi J Int'l L. 35, 42–46 (2009); Robert J. Delahunty and John C. Yoo, Peace Through Law? The Failure of a Noble Experiment, 106 Mich L. Rev 923 (2008).

94 Habermas, Bestiality and Humanity Die Zeit at 2 (cited in note 64).
persecutors,” at least if “there is no other way out.”\textsuperscript{95} But he was greatly troubled that NATO was acting without a Security Council mandate, and instead had to rely on moral and humanitarian considerations to justify its actions. “Moral norms, which appeal to our better judgment, should not be enforced like established laws.”\textsuperscript{96} Characteristically, the burden of suspicion, for Habermas, fell entirely on the Western alliance, and especially on the US, rather than on the UN. For him, the US was merely displaying “a new hybrid of humanitarian selflessness and the logic of imperialist power politics.”\textsuperscript{97} Utterly missing in Habermas’ discussion was any suggestion that the Security Council had defaulted on its obligation to protect the Kosovar Albanians from mass atrocities, that its unwillingness to authorize NATO’s intervention underscored the Council’s indifference to gross human rights violations, and that the Council, far more than the Western alliance, was being driven by old-fashioned “power politics.”

Finally, even if Habermas were right in thinking that a “suitably reformed” UN could have an important role to play in a fully institutionalized cosmopolitan constitution, he is plainly mistaken in claiming that the functions he would have the organization perform are “clearly circumscribed.”\textsuperscript{98} If a reformed UN were empowered to perform those functions—which he identifies as “securing peace and promoting human rights at the supranational level in an effective and non-selective fashion”—\textsuperscript{99} and somehow proved capable of doing so, then it would make far deeper inroads into the sovereignty of its member states than it does presently. Indeed, there would be little to distinguish it from the world republic that Habermas professes to reject. Consider, for example, that Habermas’ notion that “under an effective UN peace and security régime, even global players would be forbidden to resort to war.”\textsuperscript{100} Not only does that seem to mean that the UN would be able to face down any combination of recalcitrant Great Powers, but it also suggests that states could no longer engage in legitimate self-defense. We find it extraordinarily hard to imagine how such a situation could arise except under a unitary and encompassing world government. Or consider what would follow if an international organization had the authority and power to implement human rights across the globe. Surely that organization would have vast power in relation to its member states—so much so that only vestiges of internal sovereignty would remain to them. Habermas’ cosmopolitan program would require a sweeping transfer of authority from the national level to the

\begin{footnotes}
\item[95] Id at 6.  
\item[96] Id at 6.  
\item[97] Id (quoting Ulrich Beck).  
\item[98] Habermas, \textit{The Divided West} at 136 (cited in note 4).  
\item[99] Id.  
\item[100] Id.  
\end{footnotes}
supranational level, comparable in scope and comprehensiveness to the changes in American federalism brought about by the Fourteenth Amendment. In short, the only way to realize Habermas’ vision would be through world government.

III. PERPETUAL PEACE AND DEMOCRACY-PROMOTION

Democracy promotion in particular states presents a way forward that does not rely on the utopian vision of a world republic or federation founded on a cosmopolitan international constitution. As we have argued here and elsewhere, the notion of a supranational global government exercising sovereign powers simply does not describe a reality where neither the UN nor international courts have any enforcement mechanisms of their own. If current international institutions were to somehow develop into a supranational government, as we suggested in Section II, they would rest upon anti-democratic foundations that would make impossible republican government. A government strong enough to exercise sovereign authority throughout the world would have to receive the consent of democracies and autocracies. The latter would only allow such a world government if it could not threaten their régimes.

Our argument is not based on the notion, which remains controversial among political philosophers and legal scholars, that a universal set of human rights exists and that this package includes the right to democratic government. We disagree, therefore, with the views of President George W. Bush, insofar as he argued that the primary objective of the US in promoting democracy should be to uphold the individual right of self-determination. One

101 See, for example, Garrett Epps, The Antebellum Political Background of the Fourteenth Amendment, 67 L. & Contemp Probs 175 (2004) (“[T]he changes the Fourteenth Amendment wrought in our system were far reaching and profound . . . for the relationship between states and the federal government.”).

102 Thus, the German Federal Constitutional Court found in The Lisbon Case that if the degree of political integration in the EU were eventually to “reach[] a level corresponding to the federal level in a federal state,” then a “structural democratic deficit” would arise in that supra-state that would be “unacceptable” under Germany’s Basic Law. The Lisbon Case, at ¶ 264 (cited in note 43). “With the present status of integration, the European Union does, even upon the entry into force of the Treaty of Lisbon, not yet attain a shape that corresponds to level of legitimization of a democracy constituted as a state.” Id at ¶ 276. On the question of a “democratic deficit” in the EU’s institutions, see Mattias Kumm, Why Europeans Will Not Embrace Constitutional Patriotism, 6 Intl J Const L 117 (2008).

103 In the optimism of the immediate post-Cold War period, a right in international law to democratic government seemed to some observers to be emerging. See Thomas M. Franck, The Emerging Right to Democratic Governance, 86 Am J Intl L 46 (1992). It is open to debate whether that trend in the law has persisted.
may well argue instead that foreign policy should aim to increase overall human welfare rather than individual human rights or that global security and stability must come first before economic development and human rights can improve. Furthermore, “democracy” might eventually emerge in, for example, the Islamic world in a form that is different from its historical forms in the West. Instead, we identify democracy as a point of agreement between Kantians and those who view international politics through a more instrumental lens. Because of the democratic peace thesis, and explanations for its empirical findings, nations such as the US and its allies may pursue a policy that is in their security interests, but which has the benefit of drawing the world closer toward the league of republics as sketched by Kant. Such an outcome would operate like the invisible hand of the market, in that democracies pursuing their own self-interest in an anarchic international system will produce gains for global welfare. Welfare will increase through the maintenance of a peaceful, stable international system that will allow for economic development and trade, and individuals within the states will enjoy a certain level of freedom and maintain their cultural identities. If the world becomes Kantian, it will be by the pursuit of national self-interest, an irony that might well have pleased Kant.

But before we reach any conclusion on whether American foreign policy ought to promote democracy—even to the point of using force to achieve régime change—we need to understand the roots of the democratic peace. If the peace is only a statistical regularity explained by factors other than domestic political systems, then spreading democracy will not advance American national security and could well be counter-productive. Defining democracy in a narrow way in order to fit the data might make the lessons for real world security more tenuous and even impractical. We need to understand the causal mechanism that makes democracies less warlike with each other before we can link the national security policy of individual states to Kant’s larger goal of a league of democratic republics.

The “empirical regularity” of the democratic peace thesis is critical to our argument. Rigorous statistical analysis shows that democracies do not wage war with other democracies. There are several other important observations linked

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to this fundamental finding. Democracies commonly fight wars with non-democracies. Democracies win a disproportionate share of the conflicts with non-democracies. Democracies settle disputes through peaceful dispute settlement processes more often than others. Democracies are more likely to initiate wars against non-democracies than vice-versa. Democracies fight shorter wars with lower costs when they begin the wars. Transitional democracies are more likely to fight, and larger democracies are less likely to go to war than smaller ones. Critics have questioned whether the findings are statistically robust, or have argued that omitted variables such as the stability of the Cold War are the true explanations. Yet it appears that the democratic peace is as close to a statistical law as anything will be in international politics.

Dispute continues, however, over the explanation for the democratic peace. Some of the explanations bear directly on the relevance of the arguments of Kant and Habermas. One school of thought argues that democracies share certain norms for resolving conflicts domestically that they also bring to international politics. Since democracies internally settle their disputes peacefully, they will only use force in self-defense or, at times, to stop human rights violators in other countries. The leading scholar behind this argument, Michael Doyle, drew his argument explicitly from Kant in his well-known article, *Kant, Liberal Legacies, and Foreign Affairs*.

However, that form of Kantian explanation does not work because it is not at all clear that democracies direct their peaceful norms outwards as well as inwards. As noted, democracies have often fought non-democracies, and many of these wars have not been conflicts of self-defense—in fact, democracies appear to initiate wars against non-democracies more often than the other way round. This appears to be the case even when the opponent is not an autocracy, but instead is a colony. Nineteenth-century imperialism in Asia and Africa was not an experiment in exporting democracy. Another claim based on norms is that the leaders of democracies are more likely to trust and respect each other to such an extent that they will avoid the use of threats and force and

108 Id at 791.
109 See, for example, Henry S. Farber and Joanne Gowa, *Common Interests or Common Polities?: Reinterpreting the Democratic Peace*, 59 J Pol 393 (1997) (arguing that the Cold War influenced most of the stability between democratic states, rather than similar government structures).
110 Doyle, *Kant, Liberal Legacies, and Foreign Affairs* at 25 (cited in note 5).
111 Id at 26.
instead rely on negotiation and peaceful dispute settlement. Again, it is not clear
whether the empirical evidence supports this mechanism. Democracies have
used covert action and force against other democracies—witness the US’
interventions against Iran in 1953 and Chile in 1973—even when they have been
great powers. Crises between the US, Britain and France have been resolved
without war, but not because they were unwilling to approach the brink of
war.114

Institutional accounts for the democratic peace begin to draw us closer to a
confluence of national self-interest and international public good, though several
of them contain their own faults. However, they still depend, in part, on a
Kantian approach because they assume that democracies will contain certain
constitutional or political structures that will make them more peaceful by
nature. Bueno de Mesquita and Siverson, for example, argue that democratic
régimes make their leaders more accountable to groups in society that will
oppose war more often than not.115 Elected leaders will not undertake costly,
unpopular, or dangerous wars because they will be ousted if they lose. Different
variations of this approach maintain that other features of democratic
government will make offensive war difficult. The importance of public opinion
places constraints on democratic leaders, because the public does not want to
suffer the costs of war116 while at the same time, interest groups that benefit
from peace and trade will also oppose war.117 Autocrats are responsible, at best,
to a much narrower electorate. Separate institutional features of democracies,
which depend on their constitutional structure, also may explain the democratic
peace. Democracies make decisions in a slower, more transparent manner
because of public discussion in legislatures and multiple checks on authority.
This makes democracies slower to mobilize and less likely to launch successful
surprise attacks.118

These explanations, however, suffer from the same problem that besets the
argument that democracies apply the same norms to their external affairs as to
their internal ones. Institutional features of democracies should be present
regardless of the régime type of their opponent. These arguments tend to claim
that democracies are inherently more peaceful than non-democracies, and hence

115 Bueno de Mesquita, 93 Am Poli Sci Rev at 793–94 (cited in note 107); see also Bruce Bueno de Mesquita
and Randolph M. Siverson, War and the Survival of Political Leaders: A Comparative Political Analysis of
117 Doyle, Kant, Liberal Legacies, and Foreign Affairs at 26 (cited in note 5).
118 Mesquita, 93 Am Poli Sci Rev at 802–03 (cited in note 107); Kenneth A. Schultz, Domestic
when two democracies face off against each other, these characteristics will interact to lower the chances of war virtually to zero. But the empirical evidence does not appear to support the claim that democracies are more pacifistic; they have no difficulty waging war against autocracies, and appear to do so more often than autocracies start wars against democracies.

A more promising direction is suggested by asking how the democratic peace thesis fits into theories of why interstate wars occur in the first place. Here, we make use of the political science literature on crisis bargaining. Because war is so destructive, a point emphasized by Kant, rational nations with complete information should prefer a negotiated settlement to war. Imagine, for example, that the US and China have a dispute over the control of Taiwan. China issues a threat to the US that it is willing to use force unless the US removes its protections from Taiwan and allows its absorption by the mainland. The US must decide whether to accede to China's demand or to resist with force. Both the US and China have an expected value for going to war, which is a function of the probability that each will win a war and the value of controlling Taiwan minus the expected cost of fighting the conflict. If the US knows that the expected value of controlling Taiwan is lower for China than the likely cost of any US-China conflict, the US will not back down because it knows that a rational China would not wage war. Likewise, if the US knows that the expected value of controlling Taiwan's independence is higher to China than the likely cost of war, it will give up its protection or reach some other negotiated settlement. In both cases, both the US and China avoid the deadweight loss of warfare, the only change being whether Taiwan remains within the sphere of American protection or becomes part of China.

Several assumptions underlay this model. There must be a real probability that either the US or China will win, and that both nations can estimate this probability. Neither China nor the US is risk-seeking, in the sense that they would gamble to win a low-probability victory. Additionally, Taiwan or the asset in dispute can be bargained over and divided, rather than transferred as a whole, though side payments, linked deals, or different spheres of influence.

This noncooperative bargaining model identifies two factors that can produce war, even when both sides to the dispute are acting rationally. First,

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incomplete information can cause nations to estimate important variables incorrectly. For example, China may not know the US’ expected value of going to war. China may have an understanding of the value of Taiwan’s independence to the US, but the probability that the US would prevail in a conflict will depend on several factors—its military and political capabilities, its diplomatic support, the nature of Taiwan’s armed forces—that could well be private information known to the US. China might not know, for example, how many submarines the US has deployed near Taiwan and how much damage it could inflict on any invasion fleet. Conversely, the US may also have little information on the true capability of Chinese armed forces in Taiwan, its abilities to control the sea and air, and how much political support will exist for the invasion.

Democracies may do a better job of overcoming this information deficit than autocracies by providing ways to send more costly signals to each other.\textsuperscript{122} Nations can reveal private information to each other so as to reduce the chances of conflict. A few problems stand in the way. A nation might feed misleading information in the hopes of exaggerating its probability of winning (that is, engage in strategic bluffing), or there may be so much publicly available information in a democracy that it is too difficult to filter out the noise.\textsuperscript{123} To reveal private information credibly, nations can send a costly signal. A democratic leader who issues a threat—say if President Obama were to declare that the US would defend Taiwan with armed force—sends that signal more credibly because he will incur domestic political costs if he does not follow through. Elements of constitutional design can provide a method for making signals even more credible. An executive branch that works for legislative enactment of a war authorization bill can send a more credible signal than simply opinion polls or speeches by opposition politicians supporting the President.

There is a significant challenge for this theory, however. Just as critics have argued that the norms-based and political constraints approaches do not seem to hold in wars between democracies and non-democracies, the informational theory we raise should also lead to reductions in wars between democracies and opponents regardless of régime type. In the two American wars against Iraq in 1991 and 2003, the President went to Congress and received authorizations to use force.\textsuperscript{124} The 1991 bill was particularly costly because it barely passed the Senate, fifty-two to forty-seven, when Congress was under the control of the opposition party. Yet, it does not seem that these signals convinced Saddam Hussein to come back to the negotiating table to resolve his outstanding


\textsuperscript{123} Rosato, \textit{The Flawed Logic of Democratic Peace Theory} at 599 (cited in note 113).

\textsuperscript{124} See John Yoo, \textit{The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11} 12, 155 (Chicago 2005).
disputes with the US. Autocrats may have difficulty filtering through all of the information produced by the political system of a democratic opponent, and may instead only pick and choose the information that supports their preconceived views.\footnote{Rosato, \textit{The Flawed Logic of Democratic Peace Theory} at 599 (cited in note 113).}

Democracies might prove able to cut through the noise, but primarily only with other democracies. Democratic leaders might be better able to filter through the information produced by an opposing democracy because they operate in similar political systems. They can distinguish between general data involving military capabilities, opinion pieces by journalists and commentators, and specific signals revealing private information sent by responsible government officials.\footnote{See Branislav Slantchev et al, \textit{Probabilistic Causality, Selection Bias, and the Logic of the Democratic Peace}, 99 Am Poli Sci Rev 459, 460 (2005).} This explanation is different from the norms theory. It is not that democratic leaders extend their norms of behavior to other nations, but that their democratic culture and upbringing allow them to understand the signals that emerge from other democracies in a way that autocracies cannot. These messages, once understood, can help avoid war by revealing private information about the expected value of war.

Commitment problems pose a second obstacle to nations seeking a bargain to resolve a dispute. Even if nations have full information about their opponent’s probability of prevailing in conflict, they still may be unable to reach a bargain to head off war. Full information allows each party to identify the acceptable range of outcomes for the other, and hence reach a resolution and a distribution of the surplus. Instead, the problem is that neither party has confidence that the other will perform its obligations without a supra-governmental enforcement mechanism.\footnote{See, for example, Robert Powell, \textit{War as a Commitment Problem}, 60 Intl Org 1 (2006); Robert Powell, \textit{The Inefficient Use of Power: Costly Conflict with Complete Information}, 98 Am Poli Sci Rev 231 (2004).} This is especially the case if the division of the asset in dispute will give one side an advantage in resources in any future conflict. Suppose, for example, that the US and China could settle the Taiwan question by agreeing to a division of the island. Division would give China a distinct military advantage in any future conflict by providing it with additional resources and by lessening the tactical advantage of American naval and air forces. The US cannot rely on China to take advantage of a relative shift in resources in the future and wage war to take over the rest of the island. The lack of an enforcement mechanism prevents the two nations from reaching a negotiated settlement, even though they might have complete information about the other side’s expected value from conflict.
Democracies might be able to overcome this problem by using their domestic constitutions to make credible commitments. The constitution could divide authority over the international agreement, in which the participation of other branches would be required to begin or end cooperation. The participation of more than one branch in the making of the agreement would signal a greater level of commitment by the political system. Requirement of approval by more than one branch in termination reveals commitment by showing that higher costs would accrue to end the agreement. If the US, for example, were to undertake an international arms control agreement, Congress would have to participate by authorizing the destruction of American weapons systems. Likewise, the other nation would have more confidence that the US would not breach the agreement because Congress would have to authorize any construction of new weapons systems that might go beyond agreed upon levels.

As with signaling, democracies might be better able to understand whether the domestic constitutions of other democratic nations may be able to produce meaningful commitment. An autocrat, for example, may be unable to navigate the alien constitutional design of a democratic opponent, or may simply be unwilling to believe that the other branches of government could really block the democracy’s executive policy. Democratic leaders, by contrast, may better understand another country’s constitutional requirement of legislative appropriations for military expansion or parliamentary approval for treaty formation or termination.

It is important to understand how this mechanism for the democratic peace is at odds with Kant’s. Kant argued that democracies would be less likely to make war because, as republics, they depended on popular consent for their foreign policies. The people, in contrast to hereditary rulers, would be wary of conflict because of the high costs in lives and fortunes, the destruction resulting from and the rebuilding necessitated by the conflict, and the national debts incurred. This, however, does not explain the higher rate of wars between democracies and autocracies, especially the fact that democracies tend to launch wars against non-democracies rather than vice versa.\footnote{See Zaov Maoz and Nasrin Abdolali, \textit{Regime Types and International Conflict, 1816-1976}, 33 J Conflict Resolution 3, 17–26 (1989).}

Our explanation relies on two different mechanisms, both rooted in the theory that war arises because of a bargaining failure between two nations in a dispute. The first is that democracies may have the ability, because of their republican constitutions, to send costly signals that provide reliable information to their opponents about their capabilities and willingness to fight. The second is that democracies may be able to make more credible commitments by requiring the consent of more than one branch of government before terminating an
international agreement. These mechanisms may function more effectively in
democracy-democracy dyads than democracy-autocracy dyads because
democratic leaders may be better able to interpret the signals sent, and
commitments made, by another democracy. A democracy may not make its
leaders more pacifistic than autocrats, but it may allow them to better
understand the abilities of democratic opponents, including their ability to
disable themselves from going to war.

If these arguments accurately explain the mechanisms behind the
democratic peace, then there may be firmer grounds for making democracy
promotion part of the national security strategies of the US and its Western
allies. We are not arguing that democracy promotion will automatically produce
a more peaceful world. If the democratic peace holds true, as well as its corollary
that democracies wage wars with autocracies at a regular pace, then whether the
world becomes more peaceful with the spread of democracy will depend, in part,
on the number of non-democracies in the world. If there are relatively few
democracies and many autocracies, war might well increase because the former
wage war against the latter more regularly. Nor does our argument here depend
on the claim, to which we are sympathetic, that the spread of democracy will
increase global welfare by spreading freedom and creating the conditions for
successful economic growth.

Instead, the democratic peace suggests that so long as the US remains a
democracy, it can successfully reduce threats to its security by promoting régime
change in its enemies. The great example remains, of course, the post-Second
World War experience with Germany, Japan and Italy. These nations formed the
Axis threat during the war, but the US and its allies transformed them into
democracies during the postwar period and they have remained trusted allies
ever since. At the time, the US had a selfish motive for its transformation of the
three nations. The start of the Cold War made it imperative that the US secure
allies in Europe and East Asia to help contain Soviet (and later, Chinese)
communism. The US not only promoted democracy on Germany and Italy, but
it recognized West German sovereignty and rearmament as part of the North
Atlantic Treaty Alliance—which also had the effect of containing Germany
too. When North Korea invaded the South, Japan became the forward base of
operations for the US military effort. The US promoted democracy in
Germany, Italy and Japan, not because it was interested in the Kantian ideal of
creating a league of republics, but because it needed stable, friendly nations in
Europe and East Asia.

(Princeton 1999).

Kant’s league of republics thus becomes a welcome by-product of the pursuit of security by democratic nations. The US and its allies have an interest in promoting democracies because this type of régime is less likely to pose a national security threat to them in the future. They follow this policy for self-interested reasons, not because they seek to add to global welfare generally. As democracies spread, however, they will create a space of peace in their own relations that will approximate Kant’s league. That result, not necessarily intended by the spreaders of democracy, will enhance global welfare.

Our account of the mechanisms behind the democratic peace has two implications worth mentioning here. First, contrary to the account of Habermas, international institutions may well hinder rather than help this process. Habermas’ mistaken extension of Kant grounds the spread of a Kantian peace on the strengthening of international institutions such as the UN, which he hopes will follow the growth pattern of the EU. Earlier, we argued that the UN and other international institutions, as currently constructed, could not advance the idea of a Kantian peace because of the powerful positions held by autocratic (or at least questionably democratic) states in their governing structures. Non-democracies hold two of the five permanent seats on the UN Security Council and are well-represented on other international bodies such as the International Court of Justice. Indeed, the democratic peace has gone on for long periods without any meaningful international organizations at all (1814-1919, for example), and we are unaware of any empirical studies that show that the existence of the League of Nations or the UN has done anything to affect the democratic peace.

International organizations may not just represent barren ground for a democratic peace. They may even affirmatively retard progress toward Kant’s goal. One reason is the UN Charter’s strict regulation of the use of force. Article 2(4) of the Charter prohibits nations “from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” Article 51 conditions the complete ban on the use of force against another state in cases of self-defense: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.” Thus, the Charter creates a system in which nations cannot use force except in self-defense or as authorized by the Security Council. As one of us has observed earlier, these provisions seek to drive the amount of force in international politics to zero, and attempt to

131 UN Charter Art 2(4).
132 UN Charter Art 51.
create a monopoly on violence in the supranational government of the Security Council, much as the domestic legal system does with national governments.\textsuperscript{133}

The problem with this system is that the Charter’s formal rules exclude uses of force that would contribute to the spread of democracy and, hence, the growth of a zone of peace among republics. To be sure, a coalition of nations has supported a broader “responsibility to protect” doctrine to create a legal basis for humanitarian intervention.\textsuperscript{134} That principle would allow intervention in cases where a government is committing systematic human rights abuses. In 2006, the Security Council even endorsed the responsibility to protect in a resolution.\textsuperscript{135} Nonetheless, the member nations of the UN have not amended Articles 2(4) or 51 to recognize this new responsibility, which is therefore in tension with the guarantee of territorial sovereignty at the heart of the Charter. Perhaps more importantly, it is unclear that the UN can live up to its new responsibility. The Security Council Resolution itself acknowledges that the responsibility to protect will be enforced by collective action as authorized through the regular channel of the Security Council. In any event, the responsibility to protect does not address itself to whether a régime is democratic or not, and would allow autocratic governments to rule so long as humanitarian abuses ended.

An international system that took account of the working mechanisms behind the democratic peace should expand the grounds for legitimate intervention. It should also recognize greater flexibility for régime change during the occupation of another country in the course of intervention. As currently conceived, the international law of occupation does not permit an occupying country to change the governmental form or the laws of the occupied nation. Article 42 of the Hague Regulations of 1907, which formed one of the earliest treaties on the laws of war, declares that an occupying power “shall take all measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”\textsuperscript{136} As further articulated in Article 64 of the Fourth Geneva Convention of 1949, this principle allows an occupying power to alter domestic laws—which would extend to governmental forms, we assume—when necessary.

\textsuperscript{134} Resolution 1674, UN Security Council, 5430th mtg ¶4 (April 28, 2006), UN Doc S/RES/1674.
\textsuperscript{135} Id.
\textsuperscript{136} Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Annex, Art 43, 36 Stat 2277, 2306, TS No 539.
to maintain public order or protect the occupying power’s own security.\textsuperscript{137} Unless change in the governmental form meets these conditions, generally an intervening power cannot engage in the régime change of a defeated nation to favor democracy. The US and its allies, however, were able to change the governing structure of Iraq because the régime of Saddam Hussein, as then constituted, posed an ongoing threat to the safety of the occupying forces, and UN Security Council resolutions encouraged the US and Britain to promote “representative government” there.\textsuperscript{138} But Iraq represents the exception, rather than the rule. If a Kantian peace is to be spread by democracies acting in their own interests, international law should give them more freedom to plant the seeds of republican government in nations that they occupy.

Our theory of the democratic peace carries a second implication, one involving the types of régimes that the US and its allies should prefer. While predicting the consequences of constitutional design is not easy,\textsuperscript{139} a democratic nation may favor in the constitutions of other nations certain provisions that would improve their ability to send costly signals and to make reliable commitments. In the area of signals, a constitution could create multiple channels to make foreign policy and national security decisions. Nations could choose the more costly method when it wishes to send meaningful signals as part of bargaining in an international dispute. To take an example from the US, the President has waged war without congressional authorization sometimes (for example, Korea), and with authorization at other times (for example, Iraq). It is politically costly for the President to seek legislative authorization for war, though the amount of those costs is a matter of degree depending, in part, on whether Congress is controlled by the opposition party. If the President wishes to send a meaningful signal about the willingness and capability of the US to go to war, he can choose to go through Congress. If there is nothing to be gained from such a signal, the President can still act on his own.\textsuperscript{140}

With commitments, a constitution could disperse decision-making authority over certain forms of international agreements between different branches. A treaty requiring independently elected executive and legislative branches to concur would represent greater commitment than, for example, a

\textsuperscript{137} Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 6 UST 3516, TIAS 365 Article 64 (1949). For the leading discussion of this issue, see Eyal Benvenisti, \textit{The International Law of Occupation} 13 (Princeton 1993).


\textsuperscript{140} See Nzelibe & Yoo, \textit{Rational War and Constitutional Design} (cited in note 122).
treaty signed by a parliamentary government in which the majority party in the legislature also controls the executive branch. A constitution that places implementation of an international agreement in different branches may well make it more difficult for a nation to withdraw from its international commitments. The non-self-execution doctrine in American law, for example, allows the President and Senate to make the treaty, but requires Congress to implement provisions that require appropriations or changes in domestic law. Once these spending decisions or regulations are enacted, the executive branch cannot terminate them along with a treaty since they rest on Congress’s independent legislative authorities.\footnote{For discussion of this point, see John Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 Colum L. Rev 2218 (1999).} Congressional-executive agreements bear this same characteristic. Since Congress enacts them as legislation, the President cannot terminate them unilaterally.\footnote{See John Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 Mich L. Rev 757 (2001).}

These examples are only meant to be suggestive, rather than definitive. We only wish to highlight that the mechanisms of the democratic peace bear important implications for constitutional design. The important point is that if democracies do not wage war with each other because of their ability to send signals or make commitments, then certain features of their constitutions and political systems will perform those functions better than others. Nations that spread democracy in order to enhance their security will have an interest in promoting those constitutional features as well.

**IV. Conclusion**

There are two basic ways in which the Kantian project may be carried forward. One way is Habermas’: that of starting from existing international or regional organizations such as the UN or the EU, and working for their evolution into some form of globalized government. The other way is to work forward from Kant’s powerful insights into the possibility of a democratic peace. Habermas’ version of the project may well be truer to Kant’s original thought, but it seems likely to result in a world that risks being neither peaceful nor free. The root problem in Habermas’ highly institutionalized approach is that the global governmental structures he envisages will lack real democratic legitimization. The approach we advocate instead has the advantage, among others, of “cutting with the grain.” In promoting democratic government in particular states, the world’s leading democratic powers will be serving their own security needs and, as a welcome by-product, producing the circumstances in
which respect for human rights and friendly relations between states are likely to spread.