

The Cosmopolitan State

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Editor's Note: The following essay is drawn from the Casad Comparative Law Lecture presented in September 2012 by Professor Patrick Glenn. The Casad Lecture, held regularly at the University of Kansas School of Law School as a component of the school's multifaceted International and Comparative Law Program, is named after Robert C. Casad and Sarah Casad in recognition of the special contributions that both have made to the Law School over many years, particularly in the area of comparative law. Bob Casad's service on the KU Law faculty, starting in 1959, reflected his deep dedication to both academic scholarship and classroom teaching, so that generations of students and practitioners have benefited from his contributions to civil procedure, particularly from a comparative perspective.

Professor Casad became a college freshman at age sixteen, and by the age of twenty-one he had earned his undergraduate degree and a master's degree from the University of Kansas. He then went on to earn a juris doctor degree from the University of Michigan and an advanced law degree from Harvard. Before Professor and Mrs. Casad moved to Lawrence in 1959, they lived for a short time in Winona, Minnesota where Professor Casad practiced law at the practice of Streater and Murphy.

During their long association with KU, Professor and Mrs. Casad worked and lived overseas several times, including forays to Spain, Vienna, London, Japan, Costa Rica, Guatemala, Munich, Augsberg, Frankfort, and many other places. In connection with some of those visits abroad, Professor Casad became fluent in Spanish and has undertaken extensive research and writing in that language—a sign of a

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true legal comparativist. Among Professor Casad's most well-known scholarly works in English are *Res Judicata in a Nutshell* (1976) and *Jurisdiction in Civil Actions* (1998). Professor Casad took emeritus status at the Law School in 1997 and has remained active in scholarship and faculty matters ever since.

In keeping with common practice followed by the *Kansas Law Review* in publishing lectures of this sort, and consistent with the character of this Casad Comparative Law Lecture in particular, the following is structured more in the form of an essay than a traditional law journal article.

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I. INTRODUCTION

It is a great pleasure to be here at the University of Kansas School of Law and an honor to give the Casad Comparative Law Lecture. Bob Casad and I have toiled for many years together in the fields of civil procedure, private international law, and comparative law, and it is a particular pleasure to see Bob and Sarah Casad here this evening with members of their family.

My topic is “The Cosmopolitan State,” and I think for most this topic is both novel and obscure. So let me begin by saying what the topic does *not* mean, and what I will not be arguing. I will not be arguing that states should declare themselves to be cosmopolitan, multicultural, consociational, or any other such expression meant to capture and even accentuate the diversity of law and legal structures within a state. More particularly, and perhaps most emphatically, I will not be arguing that states should declare themselves to be legally pluralist through adoption of different personal laws (or *statuts personnels*) which coexist with the law of the state. Many states of the world have done so in abandoning the idea of a uniform private law, as is the case with India, Israel, Singapore, Malaysia, Indonesia, South Africa, and many more.¹ Each of these states has adopted such a multiplicity of laws for its own particular reasons, and I do not think these reasons can be generalized. Each of these states does, however, represent a general principle that it is for each state to articulate its own sources of law and, as Philip Allott has observed, each state is characterized by its “utter particularity” in choice

¹ For an extensive list, see H. PATRICK GLENN, THE COSMOPOLITAN STATE (forthcoming 2013) (ch.8, text accompanying note 11) (on file with author).

of sources of law and legal institutions.² If these choices must be respected, and each state makes different choices, how then can it be appropriate to speak in general terms of the cosmopolitan state?

The argument for the cosmopolitan state that I wish to make is general in that it transcends, or attempts to transcend, the particular state decisions that are made about legal sources and legal institutions. The very general and broad argument is that *all* states are cosmopolitan in character, often in spite of themselves and of the choices they may have made. Most people do not presently think that this is the case—for reasons that I will explore more fully later—but this is principally because the western theory of states has been formulated in terms of necessary equality and uniformity within states. It is the notion of a “nation-state” that has largely prevailed. To overcome the notion of national uniformity, I therefore have to look in a very detailed way at how different states and their law are actually cosmopolitan in character. In other words, I am advancing a very *broad and general* proposition that needs to be supported in a *detailed* way with respect to the utter particularity of each state and how each state is cosmopolitan. So please bear with me as I explore four propositions.

II. PROPOSITION NUMBER ONE: THERE ARE NO NATION-STATES

My first proposition is that there never has been and there never will be a “nation-state,” in spite of the appeal of that term. It is true that states today are known as “nation-states,” in both public and academic discourse. The expression also has a nice ring, more pleasing, I would say, than the word “state.” The single word “state” is too abstract, too bureaucratic, and too suggestive of Hobbes’s Leviathan for popular adoption. It is worse if the word is capitalized, as “State.”³ In the United States, the word is avoided as much as possible in favor of “the administration,” and it was even read out of much academic debate a few years ago. It has since been brought “back in.”⁴ The term is unavoidable

² PHILIP ALLOTT, THE HEALTH OF NATIONS: SOCIETY AND LAW BEYOND THE STATE 117–18 (2002) (“It is of the nature of a nation to be uniquely itself . . .”); see also THE WORLD BANK, WORLD DEVELOPMENT REPORT 1997: THE STATE IN A CHANGING WORLD 1 (1997) (“[D]ifferences in size, ethnic makeup, culture and political systems make every state unique.”).

³ SHLOMO AVINERI, HEGEL’S THEORY OF THE MODERN STATE, at ix (1972) (noting that capitalized, “Leviathan and Behemoth are already casting their enormous and oppressive shadows,” though selective capitalization is “as arbitrary and intellectually scandalous as any other willful misrepresentation”).

⁴ Peter B. Evans et al., *Preface* to BRINGING THE STATE BACK IN, at vii (Peter B. Evans et al. eds., 1985).

at the international level, and it is “states” that are failing, failed, or fragile, not simple governments.⁵

By contrast, the term “nation-state” does have a nice, even warm feeling to it. In using the term, we convey the message that “this is our state, the state of *our* nation,” or that it is the state that belongs somehow to a particular group of people. It seems, then, that the appeal of the expression “nation-state”—short, punchy, and congenial as it is—has contributed enormously to the success of the concept. The expression “cosmopolitan state,” by contrast, is probably too long for general adoption. If there are no nation-states, however, the time has come to search for different language. It is time to face the reality of the situation.

The reality is that what began as an essentially romantic idea⁶ in eighteenth century France—the idea that “*la nation*” should have its own legal and political structures—is an idea that has failed. We have been trying to make it succeed for over two centuries now, but it has not succeeded. It is simply not the case that there has ever been a nation-state, and we may now therefore draw the conclusion that there never will be.

Of course, I am envisaging a “nation” according to its classic definition, which is that it is a homogeneous people united by language, religion, and even ethnicity. That is how “*la nation*” has been historically conceived.⁷ Thus, to have a “nation-state” which is in fact true to this bringing together—this confluence of the institutions of both a *state* and a *people*—you have to find a nation that satisfies the requirement of homogeneity, and it must coincide with a given state structure.⁸ Where can you find a nation-state?

I have looked, even at great length, for a nation-state. There are many examples given, though usually without supporting documentation. Finland, for example, is often given as an example of a nation-state, because the Finnish language is unique, being related, and only vaguely, to Hungarian. As a result, only the Finns speak Finnish. Yet Finland, like my jurisdiction of Quebec, is a bilingual jurisdiction.⁹ Finland has

5 See, e.g., SETH D. KAPLAN, FIXING FRAGILE STATES 5–6 (2008).

6 The idea arose in reaction to the abstract and universalizing language of the enlightenment.

7 For challenge to the existence of nations, however, see PATRICK J. GEARY, THE MYTH OF NATIONS 1 (2002) (discussing the myth of distant historical formation of stable European ethnicities).

8 ERNEST GELLNER, NATIONS AND NATIONALISM 1 (1983) (“[T]he political and the national unit should be congruent.”).

9 French is the “official language” of Quebec, but the Canadian Constitution guarantees the

always had a Swedish minority, and hence Swedish has been made an official language. There are two linguistic “nations.”

Astonishingly enough, Germany is often cited as a nation-state on the ground that Germany has historically looked to ethnicity as a definition of nationality. That is an oversimplification, but it is the case that Germany has historically adhered more to a *jus sanguinis* principle than a *jus soli* principle in defining nationality. Citing Germany as a nation-state, however, runs counter to both contemporary and historical reality. The contemporary state of Germany has a very large foreign-born population, dating back to the 1950s when a massive influx of people developed as a means of providing workers for the German economy. Even more generally, Germany has historically been populated with minorities scattered around the German borders, including a very large population of Danes in the north—that is, persons who are Danish by everything that they identify themselves by. So Germany—despite being often cited as a nation-state because of the *jus sanguinis* principle—is in fact a cosmopolitan state and is becoming much more cosmopolitan today than it ever has been in the past.

Asian states that have resisted immigration are often cited as examples of nation-states. This is notably the case for Japan. Yet Japan has its Koreans, its Chinese, and its Ainu of the island of Hokkaido.¹⁰ Its population would be largely *both* Buddhist and Shinto, but ten percent of the population is Christian or other. So, it is impossible to sustain the proposition that the Japanese islands have been populated by a single people united in language, ethnicity, and religion. It never has been the case, and it never will be the case. South Korea is twenty-six percent Christian. North Korea has a “small Chinese community”; its population is both Buddhist and Confucian and includes “some Christian and Syncretic Chondogyo.”¹¹

In short, several prominent states often cited as nation-states—Finland, Germany, Japan, and North Korea—all fail the test because they have never been able to overcome the inherent diversity of population in

use of English in legislation, and English is widely used—too widely used for many.

¹⁰ Timothy Webster, *Insular Minorities: International Law’s Challenge to Japan’s Ethnic Homogeneity*, 36 N.C. J. INT’L. L. & COM. REG. 557, 579–91 (2011) (discussing Japan’s governmental efforts at assimilation and ensuing litigation); see also *id.* at 565 (describing Japan as at the center of a “multiethnic empire” during 1895–1945).

¹¹ For this and other information on populations, see generally the CIA WORLD FACTBOOK, CENTRAL INTELLIGENCE AGENCY, available at <https://www.cia.gov/library/publications/the-world-factbook/> (last visited Mar. 5, 2013) (providing relevant information regarding “Ethnic groups,” “Populations,” and “Religions” for each state).

their territories. These are all, however, relatively large states, and social diversity may be directly related to the size of a state's population and territory. A nation-state appears intuitively more probable in smaller jurisdictions. The smallest state in the world appears to be the island of Tuvalu in the South Pacific. It is juridically equivalent to the United States of America and is accordingly represented at the United Nations. It is a state, although it has a population of only some 10,000 people. Tuvalu, however, is a more interesting place than it initially appears to be. It is ethnically, religiously, and linguistically diverse, with a population largely Polynesian but partly Micronesian, belonging to the Church of Tuvalu (Congregational) but also other religions, and speaking both the official languages of Tuvalu and English and the unofficial languages of Samoan and Kiribati. Human diversity appears manifest in even the smallest of the world's states.

I think, therefore, that we cannot succeed in our search for a nation-state. There are diversities and minorities in all populations, and it does not matter for our purposes how *small* the minority is. One person is sufficient to give rise to the problem of state treatment of minority populations. The great debate in Europe presently is the treatment of the Roma, the so-called Gypsy people. The Roma people of France—whose numbers constitute less than one percent of the overall French population, but who are highly mobile—are creating significant difficulties for the French state in its relations with the European Union. Successive French governments have undertaken removal from France of members of the Roma population, and the French action is challenged by the European Union.¹² Under the circumstances, this may or may not constitute a form of ethnic cleansing, but ethnic cleansing has been widespread in the world. It is the dark side of the nation-state.

I therefore draw the conclusion that there are no nation-states. There never have been; there never will be. All states are therefore cosmopolitan. The most *successful* states, moreover, are the states that have been most successful in dealing with their own internal diversity. One such state is the United States of America. I have this on no less an authority than Justice Scalia of the United States Supreme Court, who

12 See generally COMM'R FOR HUMAN RIGHTS, COUNCIL OF EUROPE, HUMAN RIGHTS OF ROMA AND TRAVELLERS IN EUROPE (2012), available at http://www.coe.int/t/commissioner/source/prems/prems79611_GBR_CouvHumanRightsOfRoma_WEB.pdf (discussing proposed solutions to widespread discrimination of Roma and Travellers in Europe); JEAN-PIERRE LIÉGEOIS, THE COUNCIL OF EUROPE AND ROMA: 40 YEARS OF ACTION (2012) (discussing the history of the Council of Europe's interaction with the Roma people); *Roma*, FRA, <http://fra.europa.eu/en/theme/roma> (last visited Mar. 3, 2013) (providing background information, press releases, and news updates regarding FRA, an organization dedicated to human rights for the Roma people).

said in *Employment Division v. Smith* that the United States is a “cosmopolitan nation.”¹³ Of course, he meant “state,” not “nation.” There is no nation here, in the sense of a homogeneous population. The United States is a successful cosmopolitan state because its legal and political project has succeeded—most of the time on most questions—in having the people here think in terms of what has been called “constitutional patriotism,” most frequently associated with the German philosopher Jürgen Habermas. Civic identity thus largely prevails over other identities. There is collaboration in working with diverse peoples. So the states that have been seen as the most successful republican and united enterprises are in a sense paradoxically the states that have been most successful in dealing with their inherently cosmopolitan character.

III. PROPOSITION NUMBER TWO: COSMOPOLITANISM DOES NOT IMPLY UNIVERSALISM

My second proposition is that it is possible to be cosmopolitan without being universalist. I say this because in the world today there is a very rich and very impressive literature of so-called cosmopolitan theory. In the United Kingdom, for example, David Held is prominent in that literature.¹⁴ In the United States, it is Thomas Pogge of Columbia University and Martha Nussbaum of the University of Chicago who are prominent.¹⁵ These are philosophers and political theorists who are advancing with great subtlety and great distinction the idea that we should think about the world in terms of cosmopolitanism. What that means for them is the sentiment best expressed by Diogenes in Greece: “I am a citizen of the world.” It is a beautiful, classic, ringing statement—although, as I will shortly explain, the reason Diogenes said it is a subject of some intriguing debate. Cosmopolitan theoreticians say today that we should regard each individual as a citizen of the world. They urge that each citizen should be treated on an equal basis with every other citizen of the world. Essentially, therefore, we should,

13 494 U.S. 872, 888 (1990) (“[W]e are a cosmopolitan nation made up of people of almost every conceivable religious preference . . .” (quoting *Braunfeld v. Brown*, 366 U.S. 591, 606 (1961) (internal quotation marks omitted)).

14 See, e.g., David Held, *Principles of Cosmopolitan Order*, in THE POLITICAL PHILOSOPHY OF COSMOPOLITANISM 10 (Gillian Brock & Harry Brighouse eds., 2005).

15 See, e.g., Martha C. Nussbaum, *Patriotism and Cosmopolitanism*, in FOR LOVE OF COUNTRY? 3 (Joshua Cohen ed., 2002); Thomas W. Pogge, *An Egalitarian Law of Peoples*, 23 PHIL. & PUB. AFF. 195 (1994).

according to Thomas Pogge, be engaging in revenue distribution throughout the world and we have to find some way of doing this.¹⁶

Hence, the cosmopolitanism being circulated today has enormous implications for our present notions of national law and states as sources of law. We should bear in mind, however, that there is a real debate about what Diogenes meant in saying that he was “a citizen of the world.” Diogenes was a Cynic, and in his day Cynics were those kinds of people who didn’t believe in anything and rejected all kinds of authority. So, when the citizens of the city of Diogenes came to Diogenes and said to him, “these are the responsibilities of the citizens of this city,” Diogenes is reported to have said in reply, “I am a citizen of the world.” The implication, of course, is that Diogenes did *not* have a duty to fulfill the responsibilities of a citizen of the city because his citizenship lay *outside* the city.

This is a quite different meaning than the one cosmopolitan theoreticians usually give to Diogenes’s statement. Interestingly, there are some French dictionary definitions of the eighteenth century that apparently construed Diogenes’s statement in the less flattering way and accordingly defined a “cosmopolitan” as a bad citizen, on the ground that such a person shirked local obligation in the name of larger forms of obligation.¹⁷ My argument, however, is that one can be cosmopolitan without being universalist in character and without being a bad citizen. For this I rely on what I take to be the usual meaning of “cosmopolitan,” which the Oxford English Dictionary defines as “[h]aving the characteristics which arise from, or are suited to, a range over many different countries.”¹⁸ This ordinary language understanding of cosmopolitanism has been defended with great subtlety by Stephen Toulmin, who in the mid-twentieth century argued that “cosmopolitan” means what the word indicates—it is a combination of “cosmos,” hence “cosmo,” and “polis,” or polity—so that “cosmopolitan” means it is possible to have a harmonious bringing together of the cosmos and a particular polity.¹⁹ This understanding of the world implies a notion of harmonious coexistence rather than of obligatory universality.

16 See Pogge, *supra* note 15, at 199–202 (proposing a Global Resource Tax on consumption, with proceeds “to be used toward the emancipation of the present and future global poor”).

17 DICTIONNAIRE DE L’ACADEMIE FRANCOISE (4th ed. 1762) (defining “cosmopolite”). By the fifth edition in 1798, however, the wind had turned and the cosmopolitan had become someone who “sees the universe as their country.” DICTIONNAIRE DE L’ACADEMIE FRANCOISE (5th ed. 1798) (defining “cosmopolite”).

18 3 THE OXFORD ENGLISH DICTIONARY 985 (2d ed. 1989).

19 E.g., STEPHEN TOULMIN, COSMOPOLIS 67–68 (1990).

Given this ordinary language understanding of cosmopolitanism, the cosmopolitan state is not a state of domination that purports to impose its law on the rest of the world. It is not a world state or a hegemonic state. Instead, the cosmopolitan state is a state that has dealt more or less successfully with the inevitable internal and external diversity within which all states must function. There is no cosmopolitan universal law, but there are cosmopolitan *attitudes* and cosmopolitan *methods*. There are also cosmopolitan *officials* who know, in light of the utter particularity of each state, how to reconcile in a particular state claims for exception to and application of the law and normativity of the majority. In short, the cosmopolitan state has to address the challenge of balance.

IV. PROPOSITION NUMBER THREE: WE NEED NOT WORRY ABOUT THE COSMOPOLITAN STATE

Having explored my first two propositions—(a) that there never has been and there never will be a nation state, because all states are in fact cosmopolitan, and (b) that it is possible to be cosmopolitan without being universal—I turn to a third proposition that I believe is more comforting than the first two. My third proposition is this: we needn't worry about recognizing the cosmopolitan state. It is true that there is a great deal of angst in the world and a lot of antagonistic discussion about globalization, foreign influence, empires, hegemonic behavior, terrorism, and all of the things that occupy us in present circumstances. Of course there is reason to worry about acts of violence. But I think that some of the violence in the contemporary world can be related, although I have no proof of this, to three hundred years of teaching that the ideal legal and political structure is a nation-state. We have been teaching populations this for three hundred years, so people are naturally going to accept it as true and object, sometimes violently, to human diversity within their state.

We can't fault people for accepting orthodox instruction—that is, for accepting the view that the true states are nation-states. Likewise, we can't fault people for trying to ensure that their state achieves the status of a nation-state. If their state is obviously *not* a nation-state, they feel they are correct in sustaining measures that would correct that situation. So, you have a kind of reaction in today's world—which features very high population mobility—as a result of which local populations express resistance or antagonism towards recently arrived populations. This phenomenon is everywhere. It is to be expected because this teaching has been out there since the time of the French romantics.

What we should worry about is the violence that happens in association with the antagonism of local populations toward recently arrived populations. One way, over time, to reduce the violence would be to abandon the notion of the nation-state. A message has to be developed about the necessity of living with human diversity, because it is impossible to do otherwise.

The notion of the inherently cosmopolitan nature of states may therefore offset in some measure the dark side of the nation-state, and we should not worry about it. At the same time, we should not worry about the general phenomenon that the state is losing its place in the face of what we call “globalization.” I’ve been very impressed recently reading a book by Hilary Lawson, entitled *Closure: A Story of Everything*.²⁰ It could perhaps be just as aptly titled “Closure: The Answer to Everything.” I found it a very theoretical and abstract read, but decided it was relevant to present circumstance and to thinking about the cosmopolitan state. Lawson says two things. The first is that the only way we can understand the world is to effect some kind of closure.²¹ If you want to do anything, if you want to think about anything, you must narrow the focus. You’ve got to decide that this is your problem, this is your unit of political construction, this is your legal problem, or whatever it might be. You cannot function without a form of closure that allows you to think about the object of the closure. Once you’ve effected a closure around a problem, concept, or thing, then it becomes possible to study it.

This is an interesting proposition. The more important and second part of Lawson’s project, however, is to say that closures can never be definitive.²² Closures can never be definitive because when effecting closure, you necessarily effect a closure around something that is part of a much larger field of what Lawson calls “texture.” You are faced constantly with a reality of undistinguished texture. To understand anything about that reality, you must effect a kind of closure. But the closure effect is surrounded in an ongoing way by the texture that lies beyond the closure you have effected. That texture, beyond your closure, is an ongoing incitation to new and different forms of closure. So, no closure can be definitive.²³ Closures are thus never definitive because

20 HILLARY L. LAWSON, CLOSURE: A STORY OF EVERYTHING (2001).

21 *Id.* at 4.

22 *Id.* at 20 (“[T]here is always more to the world, there are always further distinctions which could be made, further aspects that could be perceived.”).

23 Of course, you could theoretically have a definitive closure if you could have closure of *everything*, but that would not improve the situation because everything would be on the inside as

they can never be rendered immune from the attraction of texture not included in the initial closure.

Lawson would therefore have given the answer to everything that concerns us about the cosmopolitan state. The modern state is a form of closure. Consider what has happened in Europe over the course of several centuries. Throughout much of European legal history, there were recognizably cosmopolitan states with ecclesiastical law, commercial law, and, in some measure, Roman law running across what are now state borders. There were many horizontal webs of pan-European law. Indeed, some of those webs of law ran across the Atlantic as well, as explained by Mary Sarah Bilder in a recent book entitled *The Transatlantic Constitution*, which describes the exchange of information over the Atlantic between colonizing countries of Europe and North American forms of government.²⁴ These horizontal webs of law, this texture of normativity that ran across what we now know as national boundaries, suffered greatly in the process of the territorial and national closures of the seventeenth through twentieth centuries.

This process of political and legal closure had its precedents, of course. Before the contemporary state there were other forms of closure. We have had, in earlier times, closure around *tribes* as the major form of legal and political organization. Tribes have now lost much of their significance because the closure of the tribe has given way for many people to other, more tempting forms of closure. But tribes are still with us, as shown by the fact that North American state law recognizes the law of aboriginal peoples. We argue about how much it does so, but it is the case that the United States of America, Mexico, and Canada all in some measure recognize the unwritten law of the chthonic populations that were here before the Europeans.²⁵

Another example from the past: in feudal times we had closure around the *manor*. The manor was the basic form of organization of feudal societies. I don't know how many manors are still operating effectively today, but the manor has lost a great deal, if not all, of its significance. It yielded to ongoing attraction of the texture that surrounded it. It gave way to city-states, so called because they were the

opposed to the outside.

24 MARY SARAH BILDER, THE TRANSATLANTIC CONSTITUTION (2004); see also H. PATRICK GLENN, ON COMMON LAWS (2005) (explaining the notion of common law as an instrument in this process).

25 For the underlying, cosmopolitan character of the ongoing relations between European settlers and those who preceded the Europeans, see H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 61–98 (4th ed. 2010).

product of a form of political and legal organization meant to be in large measure self-sufficient. The city-states and the manors then gave way to kingdoms. There were even so-called absolutist kingdoms, such as that of Louis XIV, the Sun King. But those kingdoms couldn't resist other forms of closure that emerged from the texture surrounding them.²⁶ So we saw the emergence of the contemporary state as a territorially bounded exclusive source of law for what is meant (or imagined) to be a uniform population within it.

We are finding today that the contemporary state is losing its grip. States are tempted by texture beyond themselves. Here is an illustration: states today recognize judgments emerging from arbitration, whereas in the nineteenth and early twentieth centuries, arbitration was seen as contrary to state public policy.²⁷ States now, however, see arbitration as an ally in the process of dispute settlement, so the state's exclusivity in dispute resolution has been abandoned in favor of adoption of the texture of private resolution of disputes, particularly in the form of resolution of commercial disputes.

In short, the contemporary state today is declining in influence. Don't worry. Something will take its place. We don't know what that will be. It is even possible that there is nothing novel left to take its place. It is unlikely we will have a world government. Kant was very skeptical about world government. His idea of a cosmopolitan law was simply a right to travel from one place to another.²⁸ It certainly did not involve world government or world law. There may not be anything beyond the state, and it may be that we have to live with what we have. All previous forms of closure are still with us, in some measure. There is

26 For the challenge, moreover, to the reality of absolutist government in France and elsewhere, see 2 J. ELLUL, *HISTOIRE DES INSTITUTIONS* 339 (1956) (noting ongoing "feudal structures"); A. LLOYD MOOTE, *THE REVOLT OF THE JUDGES* 36–63 (1971) (noting the recalcitrance of royal officials, and the Fronde, making a "mockery" of absolute monarchy). For an overview of recent historical writing to this effect, see Michael P. Breen, *Law, Society and the State in Early Modern France*, 83 J. MOD. HIST. 346, 353 (2011) (noting a "wave of revisionist studies," and Bourbons "cooperating and colluding" rather than commanding).

27 For national prohibitions, see Karl-Heinz Böckstiegel, *Commercial Arbitration—Practice and Prospects*, in *THE PEACEFUL SETTLEMENT OF INTERNATIONAL DISPUTES IN EUROPE: FUTURE PROSPECTS* 269, 273 (Daniel Bardouillet ed., Hague Academy of International Law 1991) (noting that the French Court of Cassation refused to recognize arbitration clauses for future disputes in 1843); *see also* Detlev F. Vagts, *Dispute-Resolution Mechanisms in International Business*, 203 RECUEIL DES COURS 9, 62–63 (1987) (discussing international hostility towards arbitration that has subsided over time).

28 IMMANUEL KANT, *PERPETUAL PEACE* 137–42 (M. Campbell Smith trans., 1903) (1795) ("This right to hospitality, however—that is to say, the privilege of strangers arriving on foreign soil—does not amount to more than what is implied in a permission to make an attempt at intercourse with the original inhabitants.").

no progressive evolution, but simply different opinions and different instantiations of them. So the state may be as good as it gets, and the most successful states are the most cosmopolitan in dealing with the human diversity that they inevitably confront. This leads me to the comforting news of my fourth proposition.

V. PROPOSITION NUMBER FOUR: STATES ARE BECOMING MORE EVIDENTLY COSMOPOLITAN

Let me therefore advance my fourth and final proposition, which is that against a background of what we call “globalization,” over which no one has control, states are becoming more and more evidently cosmopolitan in character. They are adjusting to the texture which surrounds them. The cosmopolitan state will thus become recognized as a successor to the nation-state, even though the nation-state has never existed. Generally, I think this is a salutary development because it means we should stop teaching people that there are means to ensure ethnic, linguistic, and religious uniformity. There are no such means, despite the many attempts to find them.

How are states becoming more and more evidently cosmopolitan? Let me advance three ways: through cosmopolitan citizens, cosmopolitan sources of law, and cosmopolitan logic or thought.

First, consider the notion of cosmopolitan citizens. Franklin Roosevelt felt that dual citizenship was a “self-evident absurdity” in the first half of the twentieth century, and national laws reflected that hostility to multiple national loyalties.²⁹ Some states today maintain an exclusivity of citizenship, but the notion is in rapid decline, and the movement towards multiple citizenship appears irreversible. In Europe, everyone is both a national citizen and a European citizen, and all but five states now allow dual national citizenships. Europe is symptomatic of a world-wide phenomenon.³⁰ The movement attracts general approbation as a means of facilitating naturalization and advancing integration. In part, this trend toward recognizing multiple nationalities reflects the theoretical objection of Amartya Sen to the unique

29 PETER J. SPIRO, BEYOND CITIZENSHIP 61 (2008); see also GERARD-RENÉ DE GROOT & HILDEGARD SCHNEIDER, DIE ZUNEHMENDE AKZEPTANZ VON FÄLLEN MEHRFACHER STAATSANGEHÖRIGKEIT IN WESTERN EUROPA 65–66 (2006) (noting the early twentieth century view that one could no more have two citizenships than two mothers).

30 Christian Joppke, *Comparative Citizenship: A Restrictive Turn in Europe?*, 2 L. & ETHICS HUM. RTS. 1, 5 (2008); see also THOMAS FAIST ET AL., DUAL CITIZENSHIP IN AN AGE OF MOBILITY, app. B (2008) (listing more than fifty states now permitting dual citizenship explicitly or recognizing to some extent), <http://www.migrationpolicy.org/transatlantic/docs/faist-final.pdf>.

categorization of people. Sen argues that if you insist on categorizing people in only one way, conflict inevitably follows. Conflict would be “parasitic” on such unique categorization.³¹ More cosmopolitan notions of citizenship would therefore reduce the violence that flows from forcing human beings (who answer back) into large and exclusive categories.

There is not only a growing phenomenon of multiple citizenship in the world, but also an accompanying phenomenon of gradated citizenship. Specialists in the law of citizenship in the United States tell us that there is now a whole range of citizenship status. There are people in the country who are not full citizens but are not aliens, and United States law would be decidedly “ambivalent,” and not uniformly hostile, towards the alien.³² There are different forms of entitlement attaching under state and federal law to different levels of attachment to the country. The word “denizen” is now coming back into use to describe someone who is neither here nor there, straddling the dichotomy between citizen and noncitizen.

The second way in which states are becoming more obviously cosmopolitan is through use of a more cosmopolitan range of sources of law. This has provoked a large and splendid debate in the United States about the practice in the Supreme Court, apparently including some 3,000 law review articles.³³ What’s happening, of course, is that some Justices on the Supreme Court use foreign or international sources, and then there is debate about whether they should be doing it. Some of them keep doing it anyway. What those Justices are doing is reminding the jurisdiction and the rest of the Court that there are different views on the matter in question. Of course, it doesn’t matter whether those Justices are in the majority or minority, because either way the information comes out. There is a reality of such cosmopolitan use of sources in spite of the wonderfully rich debate for and against the practice.

It is not necessary, moreover, for a court to cite foreign sources to be cosmopolitan in its practice. The debate in the United States plays out over citation practices because judges in the United States are free to cite whatever sources they choose. It is possible, however, to consider

31 AMARTYA SEN, IDENTITY AND VIOLENCE, at xii, xv, 10 (2007).

32 See LINDA BOSNIAK, THE CITIZEN AND THE ALIEN 37–38, 49 (2006) (showing an ascending scale of rights for aliens as identity with society increases, and discussing how aliens receive full due process in criminal proceedings yet are possibly denied Medicaid benefits).

33 Roger P. Alford, *Lower Courts and Constitutional Comparativism*, 77 FORDHAM L. REV. 647, 647 (2008).

cosmopolitan sources of law without actually citing them and to be very influenced by them. The French Court of Cassation, for example, never cites authority other than French legislation, and it is sparing in its use of that. It does not cite cases, from anywhere, given the strict form of writing of judgments that has prevailed in France. Despite that, the French Court of Cassation has become an extremely cosmopolitan court. Without citing any non-French materials—and we have this on record—the judges of the court will, before deciding any case that is important in law, engage in extensive research (in the court's large research department) on the law of other European countries and even further afield.³⁴ Without citing foreign sources, the French Court of Cassation is probably a more cosmopolitan court than the United States Supreme Court, which does. You have to look beyond visible practices, if you can, to determine how national institutions engage with the world.

The cosmopolitan character of French judicial practice extends beyond the Court of Cassation. I recently had the privilege of supervising a doctoral thesis of a French student looking at French and Quebec law on how French civil law judges deal with religious law claims.³⁵ Of course France is a country of secular *laïcité*. In France there is only the law of the French state. But French judges get seized with these cases involving religious issues because there's such a large population that sees religious law as normative, whatever their religious belief is. Accordingly, French judges have to deal with the cases. How do they deal with these cases if they cannot apply religious law? They are very cosmopolitan in doing so and deploy a number of judicial techniques. For example, they subsume—that's the language of my doctoral student—religious law claims under civil law rules. So if parties agree to an obligation that is imposed by religious law, it can be treated as a civil law contractual obligation. From the perspective of the French state it is a contract; from the perspective of the parties it is a claim founded ultimately on religious law.

A further cosmopolitan device of French judges is the conversion of religion to fact. The French judge cannot apply religious law but it is a fact that parties before them are litigating a question involving religious law. There is therefore a “*fait religieux*,” a religious fact, and the judges decide the case on the facts before them. For instance, if a person wants

³⁴ Guy Canivet, *The Use of Comparative Law Before the French Private Law Courts*, in COMPARATIVE LAW BEFORE THE COURTS 181, 193 (Guy Canivet ed., 2004) (“[D]eference . . . to the self-sufficiency of national law is now obsolete . . .”).

³⁵ CHRISTELLE LANDHEER-CIESLAK, LA RELIGION DEVANT LES JUGES FRANÇAIS ET QUÉBÉCOIS DE DROIT CIVIL (2007).

to change her French name to a Muslim name because she is converting to the Islamic faith, then she has an interest in the changing of the name, which is a fact that can be appreciated by the French court, and the change of name will be ordered. These are very subtle intellectual devices being used by judges who must respect public secularity but who as judges are required to do justice between the parties. They succeed in doing both.

The third way in which states are becoming more cosmopolitan in their operation is through the development of cosmopolitan logic. How should one think about these problems? Western lawyers and western people have been taught to think in terms of classical logic. There are so-called “laws of thought.”³⁶ There is a so-called “law” of noncontradiction, to the effect that you cannot assert contradictory propositions. To do so is not “thinking like a lawyer.” Perhaps more importantly, there is the “law” of the excluded middle: A or not-A. Between two contradictory propositions, say the classical logicians, there is no middle ground. This is very depressing news for lawyers, faced with the important task of finding some area of middle ground over a vast number of cases.

Why is it logically the case that there is an excluded middle? It flows from the basic assumptions of classical logic. Take me, for example. I am Patrick Glenn. Classical logic treats me as A, a much crisper notion than the real Patrick Glenn. From my perspective, the rest of the world is not Patrick Glenn, or not-A. Thus it becomes logically “Patrick Glenn” or “not-Patrick Glenn” and there is an excluded middle: there is nothing between “Patrick Glenn” and “not-Patrick Glenn.” Why is that logically necessary? Because “not-Patrick Glenn” starts exactly at the (crisp) border of Patrick Glenn and goes on out forever; it is galactic in character. The “not-Patrick Glenn” eats up all possibility of a middle ground. Classical logicians tell us this is how we must think, once there has been formulation of initial, crisp and contradictory propositions, and the teaching of this logic has been very influential in efforts to construct the legal unity thought necessary for a nation-state. Kelsen relied on it explicitly, and codifiers were much influenced by it.³⁷

There are, however, what are being called the “new logics” in the world. I recently discovered, to my initial chagrin but eventual pleasure,

36 For the (relatively recent) development of such “classical” logic, see GLENN, *supra* note 1, ch. 14.

37 HANS KELSEN, PURE THEORY OF LAW 206 (Max Knight trans., 1989) (1960) (discussing “the Principle of the Exclusion of Contradictions”).

a new 700-page volume entitled *The Many Valued and Nonmonotonic Turn in Logic*.³⁸ For the non- logically-trained reader it is impossible to read in a lifetime. Much of it is written in notational form. The essential message of the book, however, is that we needn't take classical logic and the "law" of the excluded middle as we have taken it. That is because a more subtle view of the world does not accept that boundaries are always crisp. Quantum physics is now telling us this, and we already know that normative propositions are always fuzzy in terms of their field of application. All need not be mutually exclusive. There can therefore be a many-valued logic, in which multiple truths can be sustained and a middle ground found between them. This is good news for lawyers, though they may have known it all the time.

To generalize: you can accept contradictions and live with them. You can accept a right to freedom of expression and a right to privacy and everything then depends on where particular cases are situated within the field defined by those contradictory general principles. Logicians are beginning to recognize that the real world is much subtler than a world composed of As and not-As. It really is possible, as legal practice tells us, to find *included* middles.

The more and more populations are diverse and the more and more contradictory propositions are advanced, the more we have to think in terms of cosmopolitan logic. There is now such a logic, and we no longer need be concerned (always) with thinking like lawyers the way lawyers have often been taught to think. It's an age of rethinking thinking, in states that are more and more recognizably cosmopolitan.

Thank you for your attention and once again for the invitation to deliver this Casad Comparative Law Lecture.

38 8 HANDBOOK OF THE HISTORY OF LOGIC, THE MANY VALUED AND NONMONOTONIC TURN IN LOGIC (Dov M. Gabbay & John Woods eds., 2007).