



SHOULD INTERNATIONAL LAW BE
PART OF OUR LAW?

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INTRODUCTION

As globalization runs its course, the domestic world is becoming full of international law. One of the mechanisms by which international law penetrates domestic law is largely unproblematic: our own political actors—Congress and the President through statutes, or the Senate and President through treaties—can incorporate international law into the domestic legal order. But international law now may enter into the domestic sphere in more controversial ways. First, some Supreme Court Justices have suggested that the Court should use international law as a source for construing the U.S. Constitution, and the Court itself has begun to use this interpretative strategy to a limited degree.¹ Such constructions could lead to the invalidation of domestic laws. Second,

1. See Ruth Bader Ginsburg, Assoc. Justice, U.S. Supreme Court, "A Decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication, Keynote Address at the Ninety-Ninth Annual Meeting of the American Society of International Law (Apr. 1, 2005), in 99 AM. SOC'Y. INT'L. L. PROC. 351, 357-59 (2005).

advocates of customary international law argue for its direct incorporation into domestic law in order to constrain federal and state governments.² Finally, others suggest that important domestic statutes be construed in light of customary international law, even if such interpretations prevent the President and his subordinates from exercising otherwise lawful discretionary authority.³

We use the term “raw international law” to denote this latter kind of international law, which has not been endorsed by the domestic political process. Raw international law is distinguished from “domesticated international law,” which our political branches have expressly made part of our law through the legislative process; as when the President and Senate enact treaties or when Congress by statute decides to incorporate norms of customary international law into American law.

The penetration of raw international law into the domestic sphere has led to extensive debate over the desirability of this development.⁴ But the existing literature has largely neglected a major disadvantage of international law relative to domestic law: the lack of democratic control over its content. We call this the “democracy deficit” of international law.⁵ This Article is the first to comprehensively analyze the democracy deficit. Finding that a serious democracy deficit exists, it also shows that the processes that generate international law do not make up for the deficit through other procedural virtues.⁶

2. Customary international law is “a general and consistent practice of states followed by them from a sense of legal obligation.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (1987). Scholars have many different theories of the extent to which customary international law is part of our law. See *infra* Part I.B.2 for discussions of these variations.

3. We discuss these arguments *infra* Part I.B.3.

4. Articles and books by leading academics who defend the presence of international law in U.S. law include ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004) (suggesting that interlocking networks of judges, regulators, and NGOs help create norms that transcend national boundaries); Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43, 52-57 (2004) (arguing that the presence of what he calls transnational law is now a permanent part of American jurisprudence). There are fewer works by academics who deplore this trend, but the most notable are ROBERT BORK, *COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES* (2003) (arguing that penetration of international law into the American legal system is an attempt by liberal elites to control the political regime), and JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005) (arguing that customary international law has far less beneficial effect than advocates claim).

5. The term “democracy deficit” first came into widespread use as a result of debates over the seemingly undemocratic nature of the European Union. See, e.g., Robert Rohrschneider, *The Democracy Deficit and Mass Support for an EU-Wide Government*, 46 AM. J. POL. SCI. 463 (2002) (assessing the impact of the democracy deficit on public support for the European Union).

6. Others have noted the democracy deficit of international law. See Philip Alston, *Promoting the Accountability of Members of the New UN Human Rights Council*, 15 J. TRANSNAT’L L. & POL’Y 49, 51-57 (2005). But this Article is the first to comprehensively describe the democracy deficit and show its relevance to the use of international law across the range of doctrines in which international law may have force in American jurisprudence.

Our reason for focusing on the democracy deficit is straightforward: as we discuss at greater length below, democracy is the political process most likely to generate beneficial norms.⁷ Even if democratic control is only one of several normative standards by which to judge the desirability of international law,⁸ it remains central to any analysis of its consequences. Holding constant other considerations, if international law has a comparative democracy deficit, this deficit substantially reduces its attractiveness relative to domestic law. If international law suffers from a democracy deficit relative to domestic law, and there is no other compelling process justification to compensate for this defect, the burden of proof shifts to those who would like to use international law to displace domestic law and constrain domestic political actors.

We then review a broad range of doctrinal arguments defending the incorporation of raw international law into domestic jurisprudence. We conclude that the low quality of the political processes generating international law provides a strong argument against allowing raw international law to become part of domestic law in any respect. Not only does the democracy deficit undermine the utility of raw international law for Americans,⁹ it also undermines it for foreigners. American law, by contrast, is not only likely to be beneficial for Americans because of its democratic origin, but in many areas is also likely to benefit foreigners. Because of the position of the United States as the dominant economic and military power in the international system, it has strong incentives to provide international public goods that benefit foreigners as well as Americans. In some situations, it even has incentives to provide “private goods” for foreigners as well.

The aftermath of the Supreme Court’s decision in *Hamdan v. Rumsfeld*¹⁰ is likely to make the question of the status of raw international law in domestic jurisprudence even more salient. In *Hamdan*, the Court relied on international law to hold that the President lacked the authority to establish military commissions to try prisoners held at Guantanamo Bay for war crimes. But it invoked international law only because it held that Article 21 of the Uniform

It is also the first to consider the implications of the democracy deficit for the world as a whole, as well as for Americans. One of the authors of this Article briefly advanced some analysis of the democracy deficit of international law in a centennial essay devoted to the use of foreign and international law in constitutional interpretation. See John O. McGinnis, *Foreign to the Constitution*, 100 NW. U. L. REV. 303, 313-18 (2006). These arguments, however, were contained in a few pages and did not approach the comprehensive treatment offered here.

7. We discuss the reasons for this view *infra* Part II.A.

8. We consider *infra* Part II.G another important standard—efficiency—by which norms are judged and show that international norms are not created by a process that is likely to satisfy that standard either.

9. At least on some theories of political legitimacy, the U.S. political regime is required to consider only the welfare of its own citizens. Most famously, Thomas Hobbes argued that a regime’s proper interest is in the welfare of its own citizens, not foreigners. See generally THOMAS HOBBS, *LEVIATHAN* (A.P. Martinich ed., Broadview Press 2005) (1660).

10. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

Code of Military Justice—a statute enacted by Congress—conditioned the use of the tribunal on compliance with international law.¹¹ Thus, the Court relied on domesticated international law, not raw international law, in reaching its decision.

But confining reliance on international law to that which is endorsed by the political branches is unlikely to resolve the issues relating to the War on Terror set to arise in the wake of *Hamdan* outside the context of military commissions. Examples of areas in which scholars have accused the Bush Administration of violating international law include the rendition of suspects,¹² the legality of preemptive war,¹³ and the treatment of detainees.¹⁴ Moreover, the relevance of international law is not limited to the War on Terror. Emerging international law norms on a wide range of issues, such as hate speech,¹⁵ the death penalty,¹⁶ and labor unions,¹⁷ may conflict with domestic legal norms. Applying raw international law to create domestic rules of decision would have ever farther-reaching consequences as the scope of international law grows.

In concluding that raw international law should not displace domestic law because of its substantial democracy deficit, we provide a new justification for “dualism”—the proposition that international law and domestic law control only their respective legal spheres.¹⁸ Because American law derives from a political process and geopolitical position that is likely to benefit both Americans and foreigners more than raw international law, we also show that

11. *Id.* at 2794 (“[C]ompliance with the law of war is the condition upon which the authority set forth in Article 21 is granted.”).

12. See David Weissbrodt & Amy Bergquist, *Extraordinary Rendition: A Human Rights Analysis*, 19 HARV. HUM. RTS. J. 123, 153 (2006) (arguing that extraordinary renditions are a “flagrant” violation of customary international law).

13. See Srividhya Ragavan & Michael S. Mireles, Jr., *The Status of Detainees from the Iraq and Afghanistan Conflicts*, 2005 UTAH L. REV. 619, 626 (arguing that the Bush Administration’s invasion of Iraq may have violated customary international law).

14. See Joshua A. Decker, *Is the United States Bound by the Customary International Law of Torture?: A Proposal for ATS Litigation on the War on Terror*, 6 CHI. J. INT’L L. 803, 828 (2006).

15. See, e.g., Kevin Boyle, *Hate Speech—The United States Versus the Rest of the World?*, 53 ME. L. REV. 487, 496 (2001) (arguing that the U.S. “failure to prohibit advocacy of national racial or religious hatred is in violation of . . . customary international law”).

16. See Harold Hongju Koh, *Paying “Decent Respect” to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085, 1086 (2002) (“[T]he United States’ administration of the death penalty and international human rights law are on a collision course . . .”).

17. See Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1, 16-17 (1982) (declaring that article 23 of the Universal Declaration of Human Rights, which includes the right to organize, has become a “basic component of international customary law, binding on all states”).

18. See, e.g., George Slyz, *International Law in National Courts*, 28 N.Y.U. J. INT’L L. & POL. 65, 67 (1996) (“[D]ualism regards international law and the internal law of states as wholly separate legal systems.”).

strict dualism is particularly suitable for the legal regime of a modern democratic superpower.¹⁹

To argue in favor of strict dualism, however, does not commit us to any particular distribution of power among the branches of the U.S. government. Our conclusions are distinct from those of Bush Administration supporters who claim that the President should have nearly unlimited power to interpret or ignore international law as he sees fit.²⁰ To the extent that international law is incorporated into domestic law through treaty ratification or enactment in a congressional statute, we see no reason to give the President unlimited authority to set it aside, or even very substantial interpretative deference. Treaty ratification by the Senate or incorporation of international law by statute cures the democracy deficit that we find in raw international law. And nothing in our approach prevents the political branches from incorporating international law into our law through treaty or statute.

In Part I, we review the principal reasons for the rise of raw international law. First, international law may be a solution to the growing coordination problems caused by global spillover effects. Second, with the demise of totalitarianism, the belief that all people everywhere have rights has given rise to a notion of universalism, and international law seems the natural mechanism to implement universal rules. Third, raw international law may be part of a worldwide trend by which elites seek to develop legal mechanisms to restrain democracy. These powerful impetuses for raw international law are likely to endure, making the status of such law a central legal question for the rest of this century.

We then describe the different doctrinal categories in which raw international law may find expression. First, raw international law may be used as a source of authority to aid in the construction of the U.S. Constitution. Second, it may cross into the domestic sphere as customary international law binding on states, the President, and even on Congress. Third, customary international law may be used as a canon of construction for statutes. Even as an interpretative principle, international law may exercise substantial power within domestic law by limiting the President's otherwise lawful discretion and requiring Congress to provide clear statements to avoid its strictures. In all these areas, doctrinal disputes have eluded textual or historical resolution, making a fresh pragmatic approach all the more useful.²¹

19. We are not arguing here that other nations should necessarily adopt U.S. laws, only that the United States's adoption of these laws has beneficial effects, including a potential "demonstration effect" of their benefits.

20. *See, e.g.*, JOHN YOO, *THE POWERS OF WAR AND PEACE* 182-214 (2005) (arguing that the President is the final interpreter of international treaty obligations).

21. Some scholars have argued that the practice of using raw international law to supplement and supplant American jurisprudence goes back to the Framing. *See, e.g.*, Steven Fogelson, Note, *The Nuremberg Legacy: An Unfulfilled Promise*, 63 S. CAL. L. REV. 833, 878-81 (1990). Others disagree. *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith,

Part II presents a comprehensive analysis of the democracy deficit of raw international law. The deficit is inherent in the political processes that “make” international legal rules. Since the Treaty of Westphalia, international law has been constructed from the actions of nation-states, many of which are far from democratic.

Second, according to most theories of international law generation, nation-states do not explicitly agree on many principles that are deemed customary international law. Instead, these rules are inferred from state actions by publicists—such as international law professors—and international courts. Both of these groups are highly unrepresentative and not subject to democratic control, thereby exacerbating the democracy deficit.

Third, customary international law suffers from the problem of the “dead hand.” Because of the requirement that international law be made by consensus, our generation finds it difficult to change past international law to meet new conditions, which further reduces the law’s quality. Fourth, because international law is more opaque to citizens than domestic law, we argue that it has comparatively high agency costs, reducing its quality and permitting insiders to manipulate it to their advantage. In the long run, international law with global application may also undermine democratic control of government by diminishing the scope of “exit rights,” which enable citizens to “vote with their feet” by emigrating from nations with harmful or oppressive policies.²² Part II ends by focusing on other potential process justifications for international law, including custom and the common law. We show that the processes generating raw international law lack the advantages of the common law or custom that might in the domestic context compensate for a democracy deficit.

Part III discusses how the process defects in the generation of international law militate against its use in interpreting the Constitution, construing statutes, or adopting customary international law as a domestic rule of decision. In particular, we discuss in detail the way in which the low quality of the processes for generating international law counts against using it to displace the decisions of political branches, including Congress, the President, and state legislatures.

Part IV addresses the argument that incorporation of international law into the domestic sphere is necessary to serve the interests of the people of the

Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 HARV. L. REV. 815, 820, 857 (1997) (arguing that the Framers’ endorsement of international law as “general common law” is not the equivalent of granting international law the status of federal common law that can displace the actions of state governments).

22. On the role of exit rights in ensuring democratic accountability, see Ilya Somin, *Political Ignorance and the Counter-majoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1344-50 (2004). Cf. ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* (1970) (laying out the general theory of exit and voice as alternative mechanisms of imposing accountability on government).

world as a whole, even if it does not serve the parochial interests of Americans. Even if valid, this claim still does not justify its use in the many cases where U.S. domestic law does not create significant externalities. Defenders of raw international law have claimed that it should displace domestic law even in many situations where there are no real spillover effects. By reaching into areas without substantial negative externalities, international law may actually harm the people of the world by undermining the benefits of international diversity and migration.

But even in situations where externalities are possible, international law may do more harm than good if it is worse than the U.S. law it displaces. U.S. domestic law may in fact be better for the citizens of the world even in spite of externalities. Because of its dominant position in the world economy, the United States has strong incentives to provide both public and private goods for foreign citizens and thus is likely to generate legal norms that facilitate such goods. At the very least, it has better incentives to do so than do the political elites who create raw international law. Foreigners as well as Americans are likely to be better off if we do not allow raw international law to override our domestic legal rules.

I. THE RISE AND COMPOSITION OF RAW INTERNATIONAL LAW

Here, we briefly discuss the reasons for the rise of raw international law in domestic law as well as some of the primary doctrinal components of raw international law. The salience and depth of these reasons show that this movement is likely to be enduring. Similarly, the breadth of the movement to incorporate raw international law into domestic jurisprudence over different doctrinal areas shows its salience to the contemporary development of law.

A. Reasons for the Rise of Raw International Law

The reasons for the increasing use and increasing advocacy of the use of raw international law are complex. But three are worth discussing here. First, globalization is creating a smaller world. More actions of individuals in one nation are likely to affect the welfare of individuals in other nations. International law offers the possibility of creating coordination mechanisms. Second, the idea of universal norms has a more powerful hold than ever on the human imagination, as Western liberalism diffuses globally and all the peoples of the world are continuously visible through the mass media. Finally, the rise of international law may have roots in the domestic struggle for power. It is one means, among many others, by which elites push back against democratization.

1. *Global spillover effects*

The first reason for the growth of international law within the federal system is similar to one of the arguments used to justify the growth of federal power from the Founding through the New Deal. Just as it was thought by some that the federal government needed to project more authority as the activities of individual states affected other states, so it can be argued that an international regime is needed to project greater authority into our domestic system as the activities of our nation affect other nations. The optimal scope of a legal regime depends on the extent of the spillovers it is meant to regulate.²³ In theory, local government should address only local matters,²⁴ state governments should address only matters that affect the state's residents, and the federal government should address issues that affect multiple states. By this reasoning, international law should address international matters, which an economist would describe as activities within nations that impose substantial costs or benefits outside those nations' borders.²⁵

Thus, international law may be called upon to regulate those modern-day activities that have transnational effects, which a purely national regime would not have an incentive to take account.²⁶ Transboundary pollution is a classic example. If human economic activity now creates effects like global warming, economic activity in one nation acutely affects the welfare of citizens in another, and some mechanism is needed to take those effects into account.²⁷

However, spillover effects among nation-states may not serve as a complete explanation for the rise of raw international law because many areas in which advocates are most insistent about using raw international law have few concrete externalities. This is true most notably of international human rights law.²⁸ For instance, the use of international law to attack the application

23. See Henry N. Butler & Jonathan R. Macey, *Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority*, 14 YALE L. & POL'Y REV. 23, 24 (1996) (describing the matching principle as one in which the size of a government's jurisdiction is proportioned to the extent of the spillovers it is designed to regulate); Mancur Olson, Jr., *The Principle of "Fiscal Equivalence,"* 59 AM. ECON. REV. 479 (1969) (same); Gordon Tullock, *Federalism: Problems of Scale*, 6 PUB. CHOICE 19 (1969) (same).

24. See Butler & Macey, *supra* note 23, at 26.

25. See Eric A. Posner & Alan O. Sykes, *Optimal War and Jus Ad Bellum*, 93 GEO. L.J. 993, 1013 (2005) ("The conventional justification for public international law is the existence of important international externalities when decisions are made unilaterally.").

26. See Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignities*, 35 VA. J. INT'L L. 121, 121-22, 174-75 (1994) (arguing that pervasive international effects have given rise to the need for an international regime).

27. See Howard F. Chang, *An Economic Analysis of Trade Measures to Protect the Global Environment*, 83 GEO. L.J. 2131, 2146 (1995) (noting that no single nation has optimal incentives to address global warming).

28. See, e.g., Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217, 217 (2000) ("[I]nternational human

of the death penalty in the United States addresses an issue that has few international spillover effects. The United States imposes the death penalty on crimes committed within its jurisdiction. Accordingly, the U.S. policy on the death penalty has no direct effect on citizens in other nations, except in the rare cases where a foreigner who commits a crime on U.S. soil is sentenced to death as a result.²⁹

In addition, the externality model may not serve as a complete explanation for the rise of raw international law because the expanding scope of international regulation itself imposes political transaction costs. For instance, decisionmaking costs increase as the size of the polity is expanded.³⁰ So too does the danger that the larger jurisdiction will entrench harmful policies over a wider area. Finally, special interests have greater ability to impose costs on others in a larger polity where exit is more difficult.³¹ Only an international law sensitive to these costs as well as to the benefits of reducing negative externalities can be justified on economic grounds.

2. *Universalism*

The rise of universalism may also help explain the rise of raw international law.³² If human rights are universal, all humans wherever situated on the globe deserve the benefit of them. Much of Western liberalism carries this universalist element. Rights are assumed to be self-evident truths and these truths by their very nature can know no national boundaries.³³ This philosophical impetus to use international law as a vehicle for imposing universal values has no doubt gained strength from the rise of global media.

rights institutions are not designed primarily to regulate policy externalities arising from societal interactions across borders, but to hold governments accountable for purely internal activities.”).

29. To be sure, one can conceive of less tangible transnational effects. For instance, it might be argued that the existence of the death penalty in the United States harms the sensibilities of those in foreign nations or creates an atmosphere in which the death penalty is more likely to be imposed elsewhere. Such “weak” externalities, however, fail to offer a sufficiently strong justification for expanding the scope of international regulation. See John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 583-88 (2000).

30. See Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 731 (1991) (“[B]ecause the costs of collective decisionmaking (including the costs of collecting and disseminating information) often increase with group size, there will often be a tradeoff between minimizing decisionmaking costs and ensuring that all affected interests are represented.”).

31. See *supra* note 22 and accompanying text.

32. Jürgen Habermas, *Kant’s Idea of Perpetual Peace, with the Benefit of Two Hundred Years’ Hindsight*, in PERPETUAL PEACE: ESSAYS ON KANT’S COSMOPOLITAN IDEAL 113 (James Bohman & Matthias Lutz-Bachmann eds., 1997) (rooting international law in Kantian universalism).

33. See Costas Douzinas, *The End(s) of Human Rights*, 26 MELB. U. L. REV. 445, 451 (2002) (“International human rights are the most common form of universal morality . . .”).

More than ever, we are confronted with events in faraway places on a daily basis. The common humanity of foreigners is much more visible to us than before.³⁴

This explanation may have particular resonance in the area of human rights and thus help explain why resort to international law is popular, even in an area where the economic rationale for expanding the scope of international regulation is not plausible. Nevertheless, the universalist explanation for the rise of international law may not be a complete explanation either. Some of those enthusiastic about the expansion of international law are also concerned about imposing Western values and desire to protect cultural diversity.³⁵ Yet most universal human rights standards derive from the Western political tradition,³⁶ and practices inconsistent with those standards are crucial elements of many non-Western cultures. Moreover, the expansion of international law has gone well beyond human rights issues. Thus, even the universalist turn in international law, particularly human rights law, may not offer a complete explanation of the rise of international law.

3. International law as an expression of juristocracy

A final explanation for the rise of raw international law may be its attractiveness to groups that are dissatisfied with the outcomes of the domestic political process. Political scientist Ran Hirschl has suggested that political and social elites have reacted to the rise of democracy in the modern world by constructing more powerful and wide-ranging roles for the judiciary, over which they retain substantial influence.³⁷ Whatever the merits of Hirschl's theory as an explanation for the rise of domestic judicial review, we believe that it has important applications to raw international law.

As discussed below in Part II, international law can be popular with groups seeking political change because its content is not strongly constrained by the domestic legal process. It allows domestic political "losers" to regain some of the ground they have lost.³⁸

34. See Andras Sajó, *Socioeconomic Rights and the International Economic Order*, 35 N.Y.U. J. INT'L L. & POL. 221, 254 (2002) (noting that visible suffering creates universal claims).

35. See Michael J. Glennon, *Self-Determination and Cultural Diversity*, FLETCHER F. WORLD AFF., Summer-Fall 2003, at 75 (discussing the tension between universalism, international law, and claims of cultural diversity).

36. See *generally* UNIVERSAL HUMAN RIGHTS? (Robert G. Patman ed., 2000) (criticizing the human rights community for emphasizing Western values at the expense of alternatives).

37. See RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004).

38. See Donald J. Kochan, *The Political Economy of the Production of Customary International Law: The Role of Non-governmental Organizations in U.S. Courts*, 22 BERKELEY J. INT'L L. 240, 265-72 (2004).

B. *The Components of Raw International Law*

We focus on the three most important doctrinal categories by which raw international law can become part of our law. First, raw international law can be used as a rule of construction for interpreting the Constitution. Second, customary international law can generate norms that bind actors in the domestic world. What actors it should bind and to what degree are, as we shall see, matters of heated disagreement. Finally, international law can be invoked as a rule of statutory construction.

We show that in each of these doctrinal areas, the quality of the processes for generating raw international law—and therefore its relative democracy deficit—is central to determining the appropriate scope of the doctrines at issue. We also suggest that doctrine in these areas is not well settled by precedent, historical practice, or the consensus of scholars, and thus would benefit from a reconceptualization that puts the quality of international law front and center in the analysis.

1. *The use of raw international law in constitutional interpretation*

The Supreme Court has recently used international materials as part of its decisions to invalidate domestic laws.³⁹ In *Roper v. Simmons*, the Court cited the Convention on the Rights of the Child as evidence of international consensus on the execution of juveniles.⁴⁰ However, the United States never ratified the Convention.⁴¹ In addition, the Court cited the International Covenant on Civil and Political Rights,⁴² even though the United States has entered a formal reservation against the Covenant's death penalty provision.⁴³ Thus, the Court relied on international law material that the political branches expressly refused to incorporate into domestic law.

To be sure, this use of international law is modest and equivocal. The Court cited the Convention as “confirmation” of a decision it based on domestic materials. Moreover, its reference to the Convention may have been less to establish a norm of international law than simply to show a consensus of other nations' practices. But some Supreme Court Justices have expressed enthusiasm for broader uses of international law in their extrajudicial

39. *Roper v. Simmons*, 543 U.S. 551 (2005) (holding unconstitutional the execution of offenders for crimes committed while under the age of eighteen); *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding unconstitutional the execution of mentally retarded criminals).

40. 543 U.S. at 576.

41. See Office of United Nations High Comm'r for Human Rights, Convention on the Rights of the Child, 20 November 1989 (Mar. 13, 2007), <http://www.ohchr.org/english/countries/ratification/11.htm>.

42. *Roper*, 543 U.S. at 576.

43. *Id.* at 622 (Scalia, J., dissenting).

speeches.⁴⁴ For example, in a recent speech to the American Society of International Law, Justice Ruth Bader Ginsburg suggested that we refer to international law as one of the “common denominators of basic fairness between the governors and the governed.”⁴⁵ Many academics are even more enthusiastic and explicit about using international law to ensure that judicial interpretations of the U.S. Constitution reflect the values of the wider world community. Dean Harold Koh of Yale Law School has heralded the death of “nationalist jurisprudence,” and has suggested that the time is near when “transnational legal process” will regularly provide precedents to move our own law closer to that embraced by other nations.⁴⁶

Nevertheless the practice of using contemporary international law in constitutional interpretation is hotly contested both within and outside the Court.⁴⁷ Under a pragmatic theory of constitutional interpretation that takes account of the consequences of constitutional decisions,⁴⁸ our inquiry into the quality of the processes that generate international law is of substantial relevance to evaluating the use of international law as an aid to constitutional construction.⁴⁹ If international law’s quality is likely to be higher than that of domestic law, then perhaps international law should indeed be a factor in interpreting the Constitution to invalidate domestic law. But if the opposite is true, we should be far more reluctant to use international law to displace our own law.

44. See Stephen Breyer, Assoc. Justice, U.S. Supreme Court, Keynote Address at the Ninety-Seventh Annual Meeting of the American Society of International Law (Apr. 4, 2003), in 97 AM. SOC’Y INT’L L. PROC. 265, 265 (2003) (“[F]oreign experience is often important to our work.”); Sandra Day O’Connor, Assoc. Justice, U.S. Supreme Court, Keynote Address at the Ninety-Sixth Annual Meeting of the American Society of International Law (Mar. 16, 2002), in 96 AM. SOC’Y INT’L L. PROC. 348, 350 (2002) (“[C]onclusions reached by . . . the international community should at times constitute persuasive authority in American courts.”).

45. Ginsburg, *supra* note 1, at 354 (quoting Judge Wald).

46. Koh, *supra* note 4, at 52-57.

47. Compare, e.g., Joan L. Larsen, *Importing Constitutional Norms from a “Wider Civilization”*: Lawrence and the Rehnquist Court’s Use of Foreign and International Law in Domestic Constitutional Interpretation, 65 OHIO ST. L.J. 1283 (2004) (arguing against using international law to construe the Constitution), with Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT’L L. 1 (2006) (favoring the use of international law to construe the Constitution).

48. Of course, if one is an originalist, modern international law materials are irrelevant because they do not bear on what a reasonable person would have understood the Constitution to mean at the time it was framed. See, e.g., Antonin Scalia, Assoc. Justice, U.S. Supreme Court, Foreign Legal Authority in the Federal Courts, Keynote Address at the Ninety-Eighth Annual Meeting of the American Society of International Law (Apr. 2, 2004), in 98 AM. SOC’Y. INT’L L. PROC. 305, 307 (2004) (claiming that “modern foreign legal materials can never be relevant to an interpretation of . . . the U.S. Constitution”).

49. For important recent works defending pragmatic consequentialist constitutional interpretation, see STEPHEN G. BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005), and RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (2003).

2. Customary international law as our law

The notion that international law can have direct effect without action by the political branches is best captured in the slogan “international law is part of our law,” taken from the Supreme Court’s famous decision in *The Paquete Habana*.⁵⁰ Unfortunately, however, scholars disagree about the exact sense in which international law is part of our law. The lack of consensus is not surprising because the legal status of raw international law in the domestic legal system does not rest on the text of the Constitution. To the contrary, the only kind of international law that Article VI makes the “supreme Law of the Land” is a treaty.⁵¹ Moreover, international law has changed greatly since the Founding in its breadth and scope.⁵²

Here we briefly summarize the range of views on the status of raw international law in our domestic system and suggest that consideration of the quality of the processes for generating international law may help us resolve the unsettled question of the extent to which customary international law really is part of our law. We move from the most expansive to the least expansive views of the effect of customary international law in our domestic jurisprudence.

The most expansive theory justifying the incorporation of international law into domestic law holds that customary international law—at least in so far as it embodies fundamental norms such as those governing war crimes or torture—cannot be violated by the United States, even with the express authorization of Congress and the President acting in unison.⁵³

The more prevalent opinion of scholars, however, is that Congress has the power to override any norm of customary international law by enacting statutes.⁵⁴ Under this view, customary international law is a default rule that can be overridden by congressional action. Within this camp, some advocates of international law believe that newly developed norms of international law nevertheless supersede prior inconsistent federal statutes until Congress overrules them.⁵⁵ By this rationale, whenever a new norm of international law arises, that norm can be enforced by U.S. courts unless and until Congress chooses to override it.⁵⁶

50. 175 U.S. 677, 700 (1900).

51. U.S. CONST. art. VI.

52. See *infra* note 68.

53. See Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1075 (1985).

54. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115(1)(a) (1987) (stating that an act of Congress will supersede prior international law if Congress intends that it do so).

55. See, e.g., Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1566 (1984).

56. See *id.* (“An old act of Congress need not stand in the way of U.S. participation in the development of customary law and courts need not wait to give effect to that development until Congress repeals the older statute.”). One variation on this position is that

While there is widespread agreement that Congress can override customary international law, there are a variety of views on the question of whether the President is bound by it. One position holds that customary international law binds the President unless he is exercising constitutionally enumerated powers.⁵⁷ Another holds that the President has no independent constitutional authority to violate customary international law and is thus always bound, unless authorized by Congress.⁵⁸ A distinct minority of scholars believe that the President has no obligation to follow customary international law whatsoever.⁵⁹

The dominant view also holds that customary international law, as determined by federal courts, can displace state law.⁶⁰ Irrespective of Congress's or the President's authority over international law, it is argued that international law remains federal common law and thereby takes precedence over conflicting state law.⁶¹ Recently, some scholars have denied that customary international law has the status of federal law.⁶² Under this view, neither the political branches nor the states are bound to follow it.⁶³

The quality of raw international law is obviously relevant to the extent to which Congress, the President, or state governments should be bound by customary international law. Our own domestic actors are bound by domestic

due to the nature of customary international law, it is constantly being refreshed, meaning it will always be last in time and will thus supersede even newly enacted inconsistent federal statutes. Whether a new norm of international law can overrule a prior inconsistent federal statute has not yet been judicially clarified. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115 reporter's note 4 (1987).

57. *See* Louis Henkin, *The President and International Law*, 80 AM. J. INT'L L. 930, 936 (1986) ("Acting under his constitutional powers [as the sole organ in foreign affairs or as commander in chief], the President can make limited law in the United States, which would supersede a treaty or principle of international law."); Frederic L. Kirgis, Jr., *Federal Statutes, Executive Orders and "Self-Executing Custom,"* 81 AM. J. INT'L L. 371, 375 (1987).

58. *See* Michael J. Glennon, *Raising The Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 NW. U. L. REV. 321, 325 (1985); Lobel, *supra* note 53, at 1114-30; Jordan J. Paust, *The President Is Bound by International Law*, 81 AM. J. INT'L L. 377, 378 (1987).

59. *See* Bradley & Goldsmith, *supra* note 21, at 844-46 (noting that if customary international law is not federal common law, there is no basis for enforcing it against the President); Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205, 1207 (1988).

60. *See, e.g.,* Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1834-35 (1998).

61. *Id.* at 1841 (discussing the status of international law as federal common law).

62. *See* Bradley & Goldsmith, *supra* note 21, at 817.

63. Within the revisionist camp, however, there are variations in the role that the federal judiciary plays. According to the traditional revisionist position, the federal judiciary can only interpret laws set forth by domestic sources such as the Constitution, treaties, acts of Congress, or state laws. *See* Michael D. Ramsey, *International Law as Non-preemptive Federal Law*, 42 VA. J. INT'L L. 555, 584 (2002) (suggesting that one side (the revisionists) believes "that federal courts cannot apply international law at all unless it is affirmatively incorporated into state or federal law by Congress, the treaty-makers, or the states").

law. Displacing that authority should require a process that is likely to generate superior legal rules. Yet scholars have failed to focus on the issue of the relative quality of international and domestic law. Instead they focus on historical arguments such as the status of international law at the time of the Framing or the *Paquete Habana* case itself.⁶⁴

We do not believe either of those types of inquiries is likely to resolve the issue. At the time of the Framing, most of those who understood customary law as part of our law viewed customary law as a species of natural law.⁶⁵ For instance, in *United States v. La Jeune Eugenie*, Justice Story stated that “every doctrine[] that may be fairly deduced by correct reasoning from the rights and duties of nations, and the nature of moral obligation, may theoretically be said to exist in the law of nations.”⁶⁶ Assuming that natural law exists, it follows that it should trump other law.⁶⁷ But if we are generally positivist in our approach to legal interpretation, natural law arguments cannot be used to resolve the relative status of international and domestic law.⁶⁸

Nor does *The Paquete Habana*⁶⁹—a case from early in the transition towards positivism in American legal interpretation—resolve this question. *The Paquete Habana* concerned the legality of the seizure of a fishing boat taken off Cuba during a period when the United States had instituted a blockade against Cuba. President McKinley stated in his blockade order that the United States would maintain it “in pursuance of the laws of the United States, and the law of nations applicable to such cases.”⁷⁰ The owners of the *Paquete Habana* later sued in federal court, arguing that international law forbade the seizure.

Justice Horace Gray held for the owners.⁷¹ He declared that “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”⁷² On the other hand, international law would govern only when

64. The literature debating history and practice is vast. The two most important recent pieces are Bradley & Goldsmith, *supra* note 21, and Koh, *supra* note 60.

65. See Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 HASTINGS L.J. 805, 819 (1990).

66. 26 F. Cas. 832, 846 (C.C.D. Mass. 1822) (No. 15,551).

67. See, e.g., Lobel, *supra* note 53, at 1090-92 (asserting that several of the Framers understood natural law to be superior to any sovereign power).

68. Moreover, it is clear that the scope of what was then called the “law of nations” was far more circumscribed than the scope of modern customary international law, consisting of the duty one nation owed to another. The law of nations did not concern a nation’s duty to its own citizens. See *La Jeune Eugenie*, 26 F. Cas. at 847. The expansion of customary international law to include such subjects as human rights obviously creates a far greater scope for conflict with domestic democratic authority.

69. 175 U.S. 677 (1900).

70. Proclamation No. 6, 30 Stat. 1769 (1898).

71. *The Paquete Habana*, 175 U.S. at 714.

72. *Id.* at 700.

there is no “controlling executive or legislative act or judicial decision.”⁷³ Thus, Justice Gray incorporated the law of nations into our domestic law, but only insofar as Congress through statutes, the executive through executive acts, and the courts through their own decisions had not displaced that law.

Justice Gray’s resolution, however Solomonic, cannot settle the status of customary law by virtue of either its holding or its analytic coherence. Doctrinally, his entire discussion appears to be mere dicta. Those who want to give a greater status to customary international law in the United States by denying the executive (and often Congress as well) the power to override international law have noted that the Court did not find as a matter of fact any such controlling executive act.⁷⁴ Less noted is the fact that international law may have had application not by its own force, but by virtue of President McKinley’s blockade order endorsing its application.⁷⁵ *The Paquete Habana* thus may not even have involved a question of what we are calling raw international law, but of international law that had been domesticated by one of the political branches.

Beyond its uncertain precedential status, the opinion has an analytic void at its core, at least from a positivist standpoint.⁷⁶ If law is made by sovereign command and the Constitution establishes the political branches as sovereign, why does international law that is not fabricated according to the Constitution’s established political processes have any governing authority? It is no answer to say that the rule is only governing provisionally,⁷⁷ because the Constitution establishes a system in which the federal government must act affirmatively to impose legal regulation on its citizens or displace state law. In the absence of federal law, state law governs. Conversely, if international law is a positive

73. *Id.*

74. *See, e.g.,* Francesco Forrest Martin, *Our Constitution as Federal Treaty: A New Theory of United States Constitutional Construction Based on an Originalist Understanding for Addressing a New World*, 31 HASTINGS CONST. L.Q. 269, 308 & n.145 (2004) (dismissing the “controlling authority” language of *The Paquete Habana* as dicta). One scholar has argued that the dicta have been wholly misconstrued as permission for the executive to disregard international law. *See, e.g.,* David Golove, *Military Tribunals, International Law, and the Constitution: A Franckian-Madisonian Approach*, 35 N.Y.U. J. INT’L L. & POL. 363, 391-92 (2003) (arguing that the reference to the absence of “controlling executive authority” meant the Court would apply international law even if the President had not issued an order making international law applicable).

75. Proclamation No. 6, 30 Stat. 1769 (1898).

76. Professor William Dodge also views *The Paquete Habana* in the context of the movement from natural to positive law, but is generally more sympathetic to its analysis. *See* William S. Dodge, *The Story of The Paquete Habana: Customary International Law as Part of Our Law* (Nov. 14, 2005) (unpublished manuscript), available at <http://ssrn.com/abstract=847847>.

77. *See, e.g.,* Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371, 384 (1997) (“Our system follows a practice of presumptive enforceability of customary international law, subject to congressional override.”).

federal rule of decision that should govern within its appropriate sphere, why should a decision of the executive or even Congress be able to trump it?⁷⁸

Particularly given the doctrinal instability in this area, the quality of the process for generating international law is directly relevant to how far customary international law should be incorporated into our law. If international law is generally superior to domestic law, perhaps the President and even Congress should not have the authority to override it. If international law's quality is almost as good as our own domestic law, perhaps it should be given a provisional status subject to overruling by the democratic branches. But if its quality is much lower than that of domestic law, even that provisional status is unjustified.

3. *Construing statutes to conform with international law*

A final and important mechanism for integrating international law into domestic law is the claim that statutes should be interpreted to be consistent with international law whenever possible.⁷⁹ Advocates of this mode of interpretation argue that it gains support from certain venerable precedents—most famously the *Charming Betsy* case.⁸⁰ In the *Charming Betsy*, the Marshall Court upheld a claim by a Danish citizen that a voyage on his ship did not violate the Nonintercourse Act, because applying that act to him would violate neutrality principles of international law.⁸¹ If this canon of construction were applied to statutes on which government actors rely, the President would be constrained from his claim to act under a statute in violation of international law, unless Congress clearly expressed its intent that he be able to do so.⁸²

78. The recent decision in *Sosa v. Alvarez-Machain* also fails to clarify the status that customary international law has by virtue of its own force. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). In *Sosa*, the Court interpreted the Alien Tort Statute, 28 U.S.C. § 1350, as a congressional sanction permitting aliens to bring tort claims grounded in customary international law. *Id.* at 724. But *Sosa* does not involve a question of raw international law because Congress mandated the application of law through its jurisdictional grant. *Id.* at 712. It is true that *Sosa* offers a relatively narrow conception of what international law can be applied under the Alien Torts Claim Act. The *Sosa* Court holds that customary international law for the purposes of the Alien Torts Claim Act must have the certainty and specificity of the kind of international tort claims recognized in 1789. *Id.* at 725. But that conceptualization is also largely a matter of trying to do justice to Congress's purposes in 1789 and does not necessarily have more general implications for the status of custom outside the context of the Alien Tort Statute.

79. See Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law, and the Charming Betsy Canon*, 46 B.C. L. REV. 293, 331-33 (2005).

80. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

81. *Id.*

82. We recognize that *Charming Betsy* can be applied as a canon of construction to limit the actions of individuals other than the President and members of the executive branch. But we focus on the canon in this particular context because our primary concern in this Article is with the ability of international law to displace the decisions of the political branches.

The canon may thus give international law a presence in domestic law with wide-ranging consequences. For instance, the post-9/11 Authorization for Use of Military Force resolution is a broad delegation that permits the President to exercise all necessary force against the perpetrators of the 9/11 terrorist attacks.⁸³ But under the *Charming Betsy* canon, the President's authority to implement the AUMF would be cabined by international law.

Like the status of customary law itself, the canon and its strength are a matter of controversy that is difficult to resolve by purely doctrinal or historical arguments. Some believe that the canon should be shaped around the preemptory language of the *Charming Betsy*, where the court noted that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."⁸⁴ In contrast, the language of the *Restatement (Third) of Foreign Relations Law* is weaker, stating that an interpretation that does not violate international law should be applied "[w]here fairly possible."⁸⁵ Still others believe that the canon should not be applied to statutes relating to governmental actors, because the purpose of the canon is to assure that only the political branches are able to make the decision to violate international law.⁸⁶

The disagreement on the strength and existence of the canon again suggests the importance of evaluating the quality of the processes that generate international law. As discussed below, the canon makes substantial sense as a guide to construction, if we can be confident that international law is a source of superior or at least beneficial norms, but much less sense if we cannot.

II. THE DEMOCRACY DEFICIT OF RAW INTERNATIONAL LAW

In this section, we discuss the democracy deficit of international law. For reasons that we explain in this Part, raw international law is characterized by both low accountability of lawmakers to democratic electorates and low transparency. The latter makes it difficult for the public even to know what is going on. In this, it contrasts with the key domestic institutions, including both legislative rulemaking and judicial decisionmaking. We argue that the relationship between transparency, electoral accountability, and different

83. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). This authorization permits the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." *Id.* § 2(a).

84. *Charming Betsy*, 6 U.S. at 118.

85. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 114 (1987).

86. Professor Curtis Bradley has argued that the canon is rooted in the separation of powers and should not apply to a decision by the President to violate international law. See Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 484 (1997).

modes of domestic and international lawmaking is similar to that displayed in Table 1:

Table 1. Democratic Control of Law

		Electoral Accountability of Lawmakers	
		Low	High
Transparency	High	Domestic Judicial Review	Domestic Legislation
	Low	Raw International Law	Ratified International Law

Domestic legislation is enacted by elected officials and is relatively visible to the public through press coverage, thus scoring fairly well on both transparency and accountability. Ratified international law also must be enacted by elected officials, thus leading to high electoral accountability. But it is less transparent than domestic legislation because citizens generally know less about the institutions through which international law is made than the institutions through which domestic law is enacted and find it more difficult to keep track of international than domestic norms.⁸⁷ Domestic judicial review is undertaken by actors with little or no electoral accountability, but is arguably more transparent than raw international law; judicial confirmations and decisions are often a focus of public attention.⁸⁸ Finally, raw international law—the main focus of our inquiry—is both nontransparent and created by political actors with little or no electoral accountability. It thus suffers from a greater democracy deficit than any of the other three major sources of legal norms.

Even if international law does not suffer from a democracy deficit, it might be argued that its domestic application should be rejected on the ground that it includes preferences of those outside our polity. But there are countervailing arguments in favor of international law as well. The existence of these arguments show that a focus on the democracy deficit is a central theoretical question for international law. The case for the primacy of international law would be much stronger were it subject to democratic control.

There are several considerations that weigh in favor of international law, in the absence of a democracy deficit. First, larger representative republics may make better laws, as James Madison argued, because no one faction is likely to

87. See *infra* Part II.E.

88. See, e.g., STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* (1994) (noting growing public and press attention focused on Supreme Court confirmations).

get control of them.⁸⁹ Second, lawmaking by a larger international jurisdiction can be better for U.S. citizens if the activities within nations of the world have substantial effects on one another.⁹⁰ For instance, it may be best for all nations, including the United States, to refrain from overfishing a common body of water. In the long run, this will produce more fish for all of them. But because of collective action problems, the United States would not unilaterally limit its fishing: in the absence of an international norm that limits fishing, the fish would disappear anyway in the long run because of overfishing by other states. International law could in theory provide a norm for coordinating among nations that may make everyone better off.⁹¹

Moreover, if international law were fashioned democratically, it would represent the judgments of more people about facts and values. Many have argued that democracy has an epistemic advantage over other systems of norm creation.⁹² Insofar as the advantages of democratically enacted law capture truths about facts and values rather than simply aggregated preferences, norms that have more universal support would seem to be superior to those that received more parochial democratic validation.⁹³

However, we will show that the underlying problem with these potential arguments for the use of raw international law is that the process for generating international law is generally undemocratic and has no other offsetting guarantee of quality. Thus, the democracy deficit is a central flaw in a variety of defenses of the beneficence of international law.

89. See THE FEDERALIST NO. 10, at 77-84 (James Madison) (Clinton Rossiter ed., 1961). On the other hand, a larger jurisdiction with more decisionmakers also has potential costs. For instance, if a larger, internationalized jurisdiction reaches the wrong decision, it will adversely affect more people. Even more importantly, as we discuss below, a bad international rule will prevent people from “exiting”—escaping the bad effects of the rule. See Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1608 (2005) (arguing that the costs of exiting from larger jurisdictions are higher than exiting from smaller jurisdictions); see also *infra* Part II.F (discussing the importance of exit rights).

90. See Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT’L. L. 529, 529 (1993) (arguing that spillover effects are now so acute that a universal international law is necessary).

91. See *infra* Part IV.B.1 for an in-depth discussion of this rationale for international law.

92. On the epistemic nature of democracy, see David Estlund, *Beyond Fairness and Deliberation: The Epistemic Dimension of Democratic Authority*, in DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS 173 (James Boehman & William Rehg eds., 1997); see also Frank I. Michelman, *Why Voting?*, 34 LOY. L.A. L. REV. 985, 996 (2001) (discussing the epistemic argument as one of three justifications for democracy).

93. Cf. Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131 (2006) (considering the argument that the Constitution should be interpreted in light of the law of other states on the epistemic grounds that these multiple perspectives are likely to help achieve a correct answer).

A. Why the Democracy Deficit Matters

A focus on democracy is not just an analytical curiosity. For three interrelated reasons, it is a crucial element of any normative analysis of the value of international legal norms.

First, many political theorists argue that democratic control of government policy has intrinsic value.⁹⁴ If the governed do not have any meaningful control over their rulers, it is far from clear that the latter have any inherent right to wield the power they possess.

Second, even if democratic control has little or no inherent value, it still has considerable instrumental benefits. On average, democratic governments outperform authoritarian and totalitarian ones in providing economic growth, security, and other public goods.⁹⁵ As a general rule, citizens are likely to be better off under a government subject to democratic checks than under one where they are largely absent.

Finally, democratic accountability also plays a crucial role in preventing major public policy disasters, since elected leaders know that a highly visible catastrophic failure is likely to lead to punishment at the polls. For example, it is striking that no democratic nation, no matter how poor, has ever had a mass famine within its borders,⁹⁶ whereas such events are common in authoritarian and totalitarian states.⁹⁷ More generally, democracy serves as a check on self-dealing by political elites and helps ensure, at least to some extent, that leaders enact policies that serve the interests of their people.

Democracy also has numerous shortcomings. For example, widespread political ignorance often prevents voters from monitoring government effectively.⁹⁸ The disproportionate power of organized interest groups allows them to “capture” the democratic process and use it for their own benefit, at the expense of the general public.⁹⁹ For these and other reasons, democratic

94. *See, e.g.*, BENJAMIN BARBER, *STRONG DEMOCRACY* (1984); CAROLE PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* (1970).

95. For a recent summary of the evidence, see MORTON H. HALPERIN ET AL., *THE DEMOCRACY ADVANTAGE: HOW DEMOCRACIES PROMOTE PROSPERITY AND PEACE* 25-64, 93-134 (2005).

96. AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 178 (1999) (famously noting that “there has never been a famine in a functioning multiparty democracy”).

97. Indeed, many totalitarian states and other dictatorships actually organize famines in order to eliminate disfavored parts of the population. *See, e.g.*, JASPER BECKER, *HUNGRY GHOSTS: CHINA’S SECRET FAMINE* (1996) (documenting massive government-created famine in China in the late 1950s and early 1960s); ROBERT CONQUEST, *THE HARVEST OF SORROW* (1986) (documenting a government-organized mass famine in the Soviet Union in the 1930s that killed as many as fourteen million people); STEPHANE COURTOIS ET AL., *THE BLACK BOOK OF COMMUNISM* 598-602, 692-93 (Jonathan Murphy & Mark Kramer trans., 1999) (documenting government-created famines in Ethiopia and Cambodia).

98. *See* Somin, *supra* note 22; Ilya Somin, *Voter Ignorance and the Democratic Ideal*, 12 *CRITICAL REV.* 413, 415-33 (1998) [hereinafter Somin, *Voter Ignorance*].

99. For a helpful presentation of the arguments on this point, see WILLIAM C.

government will often be inferior to market or civil society institutions.¹⁰⁰ However, in this Article we compare two types of governmental lawmaking—that which produces international law and that which produces U.S. domestic law. We are not addressing the relative merits of government on the one hand and free markets or civil society on the other. In this context, the key comparison is between democratic government and an international legal system that is subject to little or no democratic control. Thus, the evidence that democratic government systematically outperforms nondemocratic government is of great relevance.

It might be argued that our domestic legal system also incorporates nondemocratic elements such as judicial review. But international law cannot easily be defended by this analogy. Judicial review enforces principles that are democratically enacted by the supermajoritarian process by which the Constitution and its amendments were agreed to.¹⁰¹ Moreover, as we discuss in more detail below, international law is far less transparent than domestic judicial review.

A similar point applies to claims that allowing international law to override domestic law does not undercut democracy because of the influence of bureaucrats. While bureaucrats can and do sometimes exercise considerable power independent of the democratic process,¹⁰² they are also significantly constrained by that process. In the United States and most other democracies, bureaucratic agencies are typically headed by officials appointed by elected officeholders such as the President. Moreover, elected legislatures control the agencies' funding and establish regulations that delineate the scope of their authority. The combined impact of democratic influence over appointment, funding, and regulatory authority does not by any means eliminate all the undemocratic elements of bureaucracy. But it does effect a reduction by comparison with international law, which has few, if any, similar democratic checks.¹⁰³

MITCHELL & RANDY T. SIMMONS, *BEYOND POLITICS: MARKETS, WELFARE, AND THE FAILURE OF BUREAUCRACY* 102-45 (1994). For a good recent survey of the literature on interest group power and its impact, see DENNIS C. MUELLER, *PUBLIC CHOICE III* 347-53, 481-89, 497-500 (2003).

100. See, e.g., DAVID SCHMIDTZ, *THE LIMITS OF GOVERNMENT: AN ESSAY ON THE PUBLIC GOODS ARGUMENT* (1991) (arguing that the private sector will often perform better than democratic government in providing many public goods); Somin, *Voter Ignorance*, *supra* note 98, at 444-47 (arguing that political ignorance justifies reducing the role of government in society).

101. See John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 *TEX. L. REV.* 703, 780-91 (2002).

102. See, e.g., WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971) (arguing that bureaucrats can exercise significant independent authority because of their access to information and their lobbying power).

103. For citations to the extensive literature demonstrating the power of democratic checks on the power of bureaucrats, see MUELLER, *supra* note 99, at 386-99.

If we are right to argue that raw international has a relative democracy deficit compared to U.S. domestic law, this conclusion undermines claims that the United States should simply evaluate international law norms on a case-by-case basis, following only those that have beneficial consequences. The key question is: who does the evaluating? If it is the ordinary domestic lawmaking process, then this approach is fully in accord with our position: that the United States should only allow international law to override domestic law if the former has been ratified by the domestic political process. If, on the other hand, the mere existence of a norm of raw international law is taken as justification for the claim that it is likely to have beneficial consequences, then the democracy deficit provides good reason to reject this conclusion. To the extent that international law suffers from a comparative democracy deficit, allowing it to override domestic law will, on average, result in beneficial norms being replaced by relatively more harmful ones.¹⁰⁴

This point holds true even if most rules of raw international law actually produce beneficial results. For example, let us assume that raw international law promotes “good” results 70% of the time, but because of its relatively smaller democracy deficit, domestic law does so 75% of the time. Even in this stylized situation, domestic law is likely to produce better results than raw international law when the two conflict. Assuming that there are only two alternative legal rules, one “good” and the other “bad,” in this scenario domestic law is likely to pick the good option and international law the bad one in about 56% of the cases where the two diverge.¹⁰⁵

It is important to remember that our argument is comparative. International norms are less likely to be of sound quality than those created by an established democracy such as the United States. This will be true both in cases where U.S.

104. This point also cuts against Mattias Kumm’s recent argument that “[c]itizens should regard themselves as constrained by international law and set up domestic political and legal institutions so as to ensure compliance with international law, to the extent that international law does not violate jurisdictional, procedural and outcome related principles to such an extent, that the presumption in favour of international law’s authority is rebutted.” Mattias Kumm, *Constitutional Democracy Encounters International Law: Terms of Engagement* 6 (N.Y. Univ. Pub. Law & Legal Theory Working Paper No. 47, 2006) (emphasis omitted), available at <http://lsr.nellco.org/nyu/plltwp/papers/47>. To the extent that democratic accountability is one of the “procedural and outcome related principles” that Kumm sees as constraining international law, there need not be a conflict between his position and ours. If that is the case, then both theories would require the domestic law of democratic nations to trump raw international law whenever the two conflict, as the former is subject to greater democratic control than the latter. If, on the other hand, Kumm does not include democracy as one of the required constraints on the domain of raw international law, then his theory would, if accepted, lead to supersession of domestic law by substantively inferior international law.

105. Assuming that the domestic and international law norms are developed independently of each other, in this scenario the two norms will both converge on the “good” option 52.5% of the time; domestic law will pick the good option and international law the bad one 22.5% of the time, and the reverse will occur in 17.5% of cases; both will converge on the “bad” alternative in 7.5% of iterations. $22.5\% / 40\% = 56.25\%$.

law and international law directly conflict and in those situations where international law seeks to regulate an issue that American law has left to executive discretion or to the private sector. A domestic decision to leave an issue to official discretion or to private initiative is just as likely to be superior to a competing international law norm as a domestic decision to impose a legal rule by statute.

On the other hand, international law norms may well be superior to those created by dictatorships or transitional democracies. Such countries may well be better off following international law norms instead of those produced by their own governments.¹⁰⁶ At the same time, it is doubtful that repressive dictators will allow international law norms to override their own laws in any situations where doing so might endanger the dictator's grip on power.

B. The Nature of Customary International Law

Before we can evaluate the quality of the processes that generate modern customary international law, we must understand their nature. This is not an easy task because there is disagreement not only over the specific content of customary international law but also over the methodology by which that content is determined.

An effective way to understand the nature of this debate is to assess its poles, even if some scholars take the middle ground. Positivists or classicists in customary international law occupy one extreme.¹⁰⁷ They believe that customary international law must be rooted in the widespread consensus of the actual practices of nation-states.¹⁰⁸ In their view, only if nation-states generally engage in a practice and do so from a sense of legal obligation will that practice be deemed a rule of customary international law.¹⁰⁹ The sense of legal obligation is called "opinio juris," and it too is measured objectively under the positivist conception. Under the classical view, the question for opinio juris is not whether the practice is morally right and should be observed out of a sense of legal obligation but whether it actually is undertaken from a sense of legal obligation.¹¹⁰

106. See Tom Ginsburg, *Locking in Democracy: Constitutions, Commitment, and International Law*, 38 N.Y.U. J. INT'L L. & POL. 707 (2006) (discussing the tendency of transitional democracies to entrench international legal norms).

107. See, e.g., Arthur M. Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT'L L. 1, 32 (1988) (arguing for a more rigorous examination of evidence of state practice and opinio juris).

108. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (1987) (requiring widespread acceptance of a rule for it be customary law).

109. *Id.* § 202(2) ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.").

110. *Id.* § 202 cmt. c.

Although the metric for classical customary international law is objective, its objectivity does not mean that determining the content of custom is straightforward.¹¹¹ State practices are multifarious and often obscure. Because cataloguing them requires specialized expertise, customary international law has long looked to the authority of experts in customary international law—also called publicists—to make such assessments.¹¹²

The classical methodology for determining the rules of customary international law greatly restricts its range. Partly for that reason, the classical approach is not the consensus view of contemporary scholars.¹¹³ Human rights norms would generally fail to qualify as custom in the classical conception because they rarely represent an actual consensus of the practices of states. Many nations today as a matter of fact violate human rights norms.¹¹⁴

Under a more modern concept of international custom, many scholars embrace a methodology that permits substantial human rights norms to be encompassed within customary international law. They relax the classical standards in several ways that accomplish this. Instead of requiring that nation-states actually engage in a practice, they substitute statements by nation-states that give the norms verbal endorsement.¹¹⁵ These include resolutions of the General Assembly of the United Nations¹¹⁶ and multilateral treaties.¹¹⁷

111. See David J. Bederman, *Constructivism, Positivism, and Empiricism in International Law*, 89 GEO. L.J. 469, 486 (2001) (“[C]ustomary international law has always been quite elusive. When is there sufficient state practice? And when is there sufficient *opinio juris*?” (quoting ANTHONY CLARK AREND, *LEGAL RULES AND INTERNATIONAL SOCIETY* 67 (1999))).

112. See Statute of the International Court of Justice art. 38(1)(d), June 26, 1945, 59 Stat. 1055, 1060 (allowing the “teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law”); J. Patrick Kelley, *The Twilight of Customary International Law*, 40 VA. J. INT’L L. 449, 475 (2000) (“A knowledge of CIL [customary international law] requires detailed study of I.C.J. decisions and those of its League of Nations predecessor, the Permanent Court of International Justice, a willingness to examine old and venerable treatises, and familiarity with difficult to obtain materials, such as international arbitral findings and individual state practices. This has become the work of a highly specialized group of experts, not the residue of customary norms understood and accepted by members of a society.”).

113. See Kelley, *supra* note 112, at 476 (“Judges and writers only rarely engage in a detailed inquiry into state practice.”).

114. See Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT’L L. 757, 776 (2001).

115. See Patrick McLain, *Settling the Score with Saddam: Resolution 1441 and Parallel Justifications for the Use of Force Against Iraq*, 13 DUKE J. COMP. & INT’L L. 233, 239 (2003).

116. CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 4-5 (2000).

117. Anthony D’Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1135 & n.98 (1982).

The extent to which such declarations should substitute for the harder evidence required by the classical regime depends on the content of the norm to be created.¹¹⁸ Norms that are “deeply held” and “widely shared” are those that may permissibly enter the canon of international law under a relaxed regime.¹¹⁹ As described by Oscar Schachter, the usual requirement that state practice be general and consistent need not be shown if a deeply held and widely shared norm has significant *opinio juris* behind it.¹²⁰ Under the modern conception, *opinio juris* becomes a normative concept, focusing not on whether nations in fact act out of a sense of legal obligation, but whether they should do so.¹²¹

This formulation of customary international law is implicit in the opinion of the International Court of Justice (ICJ) in *Nicaragua v. United States*.¹²² In finding a rule of non-intervention in customary international law, the court in *Nicaragua* looked only to *opinio juris* for its justification.¹²³ An examination of state practice, traditionally the bedrock of customary international law, was all but absent. As Professor Frederick Kirgis explains, this practice is sound insofar as customary international law is formed on a sliding scale.¹²⁴ A lack of either state practice or *opinio juris* is compensated for by a correspondingly strong showing of the other.¹²⁵ Precisely how much substitution is permitted is a function of the activity in question and the reasonableness of the rule asserted.¹²⁶ A focus on the reasonableness of the rule necessarily gives greater discretionary power to publicists and international law judges, who must assess that reasonableness. While publicists play an important role in both the classical and modern conceptions of custom, they have more open-ended discretion under the modern conception.

In the next two Subparts, we show that under either the classical or modern conception, customary international law suffers from a democracy deficit and is therefore likely to produce lower quality norms than a democratic domestic political process.

118. Oscar Schachter, *Recent Trends in International Law Making*, 12 AUST'L Y.B. INT'L L. 1, 10-11 (1992).

119. *Id.* at 11.

120. *Id.*

121. *Id.*

122. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27).

123. Frederic L. Kirgis, Jr., *Custom on a Sliding Scale*, 81 AM. J. INT'L L. 146, 147 (1987).

124. *Id.* at 149.

125. *Id.*

126. *Id.*

C. *The Democracy Deficit of the Modern Conception of Customary International Law*

1. *The role of publicists*

As discussed above, publicists play a very large role in the modern conception of customary international law. That role undermines democratic accountability because publicists are not subject to any electoral checks.

Under any conception of customary international law, some set of individuals must infer the existence of a rule from the welter of states' practices and determine, in addition, whether those practices are adopted out of a sense of obligation. But under the modern conception, publicists must also evaluate the reasonableness of the rule to determine what quantum of practice is required to support it.¹²⁷ This subjective role exacerbates the agency cost problem inherent in conferring power on an unelected group of experts. Defenders of the modern concept of international law are quite unapologetic about this method of creation. Professor Louis Sohn, for example, writes that nation-states do not make customary international law. Instead, it is made by "the people that care; the professors, the writers of textbooks and casebooks, and the authors of articles in leading international law journals."¹²⁸

As this statement suggests, the problem with lodging discretion in publicists is that it has high agency costs. The "people who care" are self-appointed and cannot be considered the faithful agents of anyone but themselves. They certainly are not likely to be agents of their fellow citizens, because they are not accountable to them and do not represent popular views about what counts as "reasonable."

The group from which publicists are most likely to be drawn is in fact highly unrepresentative. As noted above, in the modern world publicists are essentially international law professors. As law students come to know, law professors have many virtues, but similarity to their fellow citizens on most dimensions is not among them. Elite international law professors in the United States are very unrepresentative of popular opinion, leaning Democratic rather than Republican by a ratio of over five to one.¹²⁹ A group with such unrepresentative values is unlikely to generate representative norms. The unrepresentative nature of publicists might be unimportant if they were tightly constrained by external controls, such as elections. In reality, however, international law professors and other publicists are rarely if ever subject to democratic accountability of any kind.

127. *Id.*

128. See Louis B. Sohn, *Sources of International Law*, 25 GA. J. INT'L & COMP. L. 399, 399 (1996).

129. See John O. McGinnis et al., *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 GEO. L.J. 1167, 1182-83 (2005) (discussing political campaign contributions of international law professors).

The other group most likely to be responsible for shaping the content of customary law is international law judges. They are no more likely to be representative of the people of the world than professors. Moreover, international law judges are not subject to meaningful democratic accountability. Appointments are nominally made by the United Nations.¹³⁰ But, in actuality, their appointments reflect the influence of national governments and regional blocs.¹³¹ Many of the nations that traditionally are allowed to name judges are dictatorships, such as China.¹³² And the International Court of Justice currently contains justices from other nondemocratic nations. At present, of the fifteen justices on the ICJ, five represent authoritarian states, and two come from nations whose democratic credentials are highly questionable.¹³³ Many of the nations within the regional groupings that are responsible for the nomination of other justices are also authoritarian. Accordingly, some justices of the Court either will be appointed by authoritarian governments outright or will reflect their influence.

Even for a democratic government, like the United States, the nomination process for an ICJ justice is nothing like the deliberative process that leads to the appointment of a Supreme Court Justice. First, the President is not directly responsible for nominations. That role is reserved for a so-called “national group” at the Permanent Court of Arbitration at The Hague.¹³⁴ While members of these groups are appointed by national governments, they operate with more insulation from political control.¹³⁵ Second, these choices lack public deliberation and are made behind closed doors. There is nothing resembling the Senate confirmation process for federal judges, which allows public scrutiny. As a result of this lack of transparency and the relative obscurity of the

130. To be seated on the ICJ, justices must be approved by a majority of both the General Assembly and Security Council. See INT’L COURT OF JUSTICE, THE INTERNATIONAL COURT OF JUSTICE 23 (5th ed. 2004), available at <http://www.icj-cij.org/icjwww/igeneralinformation/ibleubook.pdf>.

131. See Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 HARV. INT’L L.J. 271, 278-79 (2003) (presenting a picture of the U.N. International Court of Justice election process that is highly politicized and where influential nations exert outside influence and smaller nations use whatever clout they have to get their candidates elected); Fred L. Morrison, *The Future of International Adjudication*, 75 MINN. L. REV. 827, 841-42 (1991) (describing the large role geography plays in the selection of justices).

132. A Chinese justice has sat on the International Court of Justice since 1985.

133. See Int’l Court of Justice, Composition and Organization of the Court, <http://www.icj-cij.org/icjwww/igeneralinformation/igncompos.html> (listing current composition of ICJ). The five authoritarian states represented on the Court as of March 2007 are China, Jordan, Madagascar, Morocco, and Sierra Leone. The two tenuous democracies are Russia and Venezuela.

134. Statute of the International Court of Justice art. 4(1), June 26, 1945, 59 Stat. 1055, 1055; *id.* art. 5(2).

135. See Mark L. Movsesian, *Judging International Judgments: Understanding Sanchez-Llamas* 26 VA. J. INT’L L. (forthcoming 2007) (on file with authors) (discussing the selection process for ICJ justices).

position, American citizens are unlikely to be able to even name the U.S. nominee to the ICJ at the time of his nomination.¹³⁶ From our understanding, the nominations process in other democratic nations is no more likely to draw attention to their ICJ nominees than our process.

In addition, international courts, like the ICJ, can create more power for themselves by expanding the scope of international law.¹³⁷ They thus have an institutional stake in a wider scope for custom. This institutional bias makes them unlikely to be an unbiased umpire of the appropriate reach of international law. Thus, the discretion that international jurists exercise is unlikely to produce legal rules representative of the citizens of nations that appoint them—both because of the process that leads to their appointment and their institutional bias.

2. *The undemocratic sources of modern customary law*

The democracy deficit of modern customary international law is not limited to the unrepresentative nature of those charged with making crucial discretionary judgments. The sources that publicists and others rely upon to “make” international law are themselves forged undemocratically. First, the agreements from which many of these norms are drawn were created through negotiations with nondemocratic governments. Second, even the democratic nations that sign these agreements often do not apply them of their own force to displace their own laws.¹³⁸ Thus, the norms are what economists call “cheap talk.”¹³⁹ By contrast, domestic law has stronger democratic credentials.

We first consider the democracy deficit of the use of provisions from multilateral treaties as evidence of custom. In particular, multilateral treaties exacerbate the influence of nondemocratic nations. As treaties represent bargains between national governments, we cannot be sure that democratic nations would have agreed to all of the provisions if nondemocratic

136. Thomas Buergenthal’s nomination to replace the retired Stephen M. Schwebel as an ICJ justice merited almost no mention in the U.S. press. Even momentous events, such as the United States’ withdrawal from compulsory ICJ jurisdiction, do not receive much media attention. See Michael J. Glennon, *Protecting the Court’s Institutional Interests: Why Not the Marbury Approach*, 81 AM. J. INT’L L. 121, 124-25 (1987).

137. John O. McGinnis, *The Appropriate Hierarchy of Global Multilateralism and Customary International Law: The Example of the WTO*, 44 VA. J. INT’L L. 229, 243 & n.42 (2003).

138. Most nations are dualist with respect to international law and their signing a treaty does not automatically make it binding as a matter of domestic law. See *infra* note 144 and accompanying text.

139. As economists explain, “cheap talk” is the opposite of costly signaling. See Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1445-46 (2003). There is much less reason to believe that ratifying a treaty represents the real preferences of the domestic polity if the members of the polity are not willing to have the rules enforced against themselves.

governments had not been present at the bargaining table. Thus, unlike the case where customary international law is based on state practices considered individually, customary law based on multilateral treaties may well contain norms that would have been rejected by the democratic process if considered in their own right.

Many multilateral human rights treaties were in fact negotiated at a time when totalitarian states were a powerful force in the international community and had veto power over the treaties' content.¹⁴⁰ Obviously, the rulers of these states were not constrained by any kind of electoral accountability. For instance, the terms of multilateral treaties that had to be negotiated with the Soviet bloc and other communist nations do not have any special merit by virtue of the process that brought them into being. Some crucial provisions were the product of compromise with those now-discredited regimes.¹⁴¹ Even today, 103 of the world's 193 nations are either "Not Free" or only "Partly Free," according to Freedom House's annual survey of political freedom around the world.¹⁴²

To be clear, the terms of a multilateral treaty are not necessarily harmful because totalitarian nations had a significant place at the negotiating table. It is just that we cannot be confident that the terms are desirable as a result of the process that generated them. And reliance on international law *by virtue of its being international law* is the issue here.

Even if treaties were the outcome of a more democratic consensus, it remains questionable whether the treaties actually represent a considered judgment that the norms they embody should be reflected in a nation's law. Many, if not most, legal systems are dualist with respect to international law.¹⁴³ In dualist systems, international legal obligations are separate from domestic legal obligations and do not displace contrary domestic law without action by the government to incorporate international law into domestic legislation.¹⁴⁴ Thus, even democratic ratification by dualist nations does not show that their

140. The Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 10, 1948), the International Covenant on Civil and Political Rights, Dec. 16, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171, and the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. EXEC. DOC. D, 95-2 (1978), 993 U.N.T.S. 3, all date from the Cold War period.

141. See Stephanie Farrior, *Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, 14 BERKELEY J. INT'L L. 1, 21-23 (1996) (discussing the influence of the Soviet Union on provisions regarding hate speech in the International Covenant on Civil and Political Rights).

142. Press Release, Freedom House, Freedom in the World 2007: Year Marked by Global "Freedom Stagnation," Setbacks for Democracy in Asia, available at <http://www.freedomhouse.org/template.cfm?page=70&release=457>.

143. See PETER MALANCZUK, *AKHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 63 (7th ed. 1997).

144. See John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310, 314-15 (1992).

citizens wish to have international law enforced by the judiciary without intermediate steps by their own elected representatives.¹⁴⁵

Nations could have many reasons for refusing to implement the international rules of treaties without first subjecting them to domestic legislative processes. They could regard international law, particularly human rights law, as aspirational.¹⁴⁶ Or they might believe that the international rules are too vague or open ended to be given automatic effect.¹⁴⁷ Whatever the reason, the failure of other nations to permit raw international law to override domestic law undermines claims that such incorporation by the United States is required in order to honor an international consensus. When nations do not agree to have international law trump their own law, international law is, in economic terms, “cheap talk,”¹⁴⁸ and is a less plausible source of norms to displace those by which a democratic nation actually agrees to be bound.¹⁴⁹

Thus, norms created by multilateral agreements are unlikely to be as beneficial as those created by democratic domestic political processes. The democracy deficit of multilateral agreements is clearest when authoritarian and totalitarian nations participate in their formation. But even at other times the dualist nature of most nations’ legal systems detracts from the clarity of the commitment to the norms embodied in the treaty. A nation’s decision to ratify these norms does not necessarily mean that they intend to apply them to their own citizens.¹⁵⁰

145. The question of how far nations may actually act to comply with international obligations simply because they are international obligations is a vast subject which we cannot address here. Our view, like that of many other modern theorists, is that states do not have a strong tendency to comply with international law for the sake of international law compliance, or even to maintain their reputation among other nation states. See GOLDSMITH & POSNER, *supra* note 4; Jack Goldsmith & Eric A. Posner, *The New International Law Scholarship*, 34 GA. J. INT’L & COMP. L. 463, 466-72 (2006). But we certainly acknowledge that the influence of a nation’s sense of obligation to comply is an empirical question. Nations could conceivably at some time in the future develop a stronger sense of obligation to international law, making their international commitments a signal of commitment more akin to domestic legislation. Just as the case for making international law a force in our system would increase if it were created by a global demos, it could also be increased if it were a product of largely democratic states which had a non-instrumental sense of obligation to international law.

146. See Donald J. Kochan, *No Longer Little Known but Now a Door Ajar: An Overview of the Evolving and Dangerous Role of the Alien Tort Statute in Human Rights and International Law Jurisprudence*, 8 CHAP. L. REV. 103, 131 (2005) (noting that customary international law is often aspirational and not legally enforceable).

147. See Matthew D. Thurlow, Note, *Protecting Cultural Property in Iraq: How American Military Policy Comports with International Law*, 8 YALE HUM. RTS. & DEV. L.J. 153, 183 (2005) (presenting the possibility that nations prefer vague language in order to create conflicting standards).

148. See *supra* note 139.

149. *Id.*

150. See, e.g., Arthur M. Weisburd, *The Effect of Treaties and Other Formal International Acts on the Customary Law of Human Rights*, 25 GA. J. INT’L & COMP. L. 99, 134-36 (1996) (arguing that human rights treaties generally lack true enforcement

These problems are even more acute with other sources of international law, such as U.N. General Assembly resolutions or the decisions of U.N. agencies.¹⁵¹ Such resolutions do not even purport to have binding force, which raises serious questions about their sincerity.¹⁵² Moreover, nations' failure to agree to give the resolutions direct effect renders it likely that their principles will be vague and aspirational rather than clear rules suitable for implementation.¹⁵³ Like multilateral agreements, such resolutions are also the product of negotiations in which nondemocratic governments play a substantial role.

Thus, modern custom has a double democracy deficit. The materials on which it is based lack serious democratic bona fides. And the power to interpret these documents is lodged in an undemocratic and unrepresentative elite.¹⁵⁴

D. The Democracy Deficit of Classical Customary International Law

The democracy deficit of classical customary law is more subtle. First, the role of publicists continues to create an agency problem by lodging discretionary decisions in a guild that is unrepresentative of the general population and not subject to any kind of electoral accountability.¹⁵⁵ To be sure, classical custom depends on more objective judgments, such as determinations about the number of nations that actually engage in a practice and do so from a sense of obligation.¹⁵⁶ But even these determinations require discretionary judgment. The practices of nation-states are not written down in some canonical text. They must be inferred from a study of historical events and then categorized.¹⁵⁷ Whether nations are engaging in a given practice out

mechanisms, raising doubts that states intend for them to have a legal character).

151. For a theory of international law that would give such multilateral forums the authority to construct customary international law, see Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 543-44 (1993).

152. Davis R. Robinson, *Expropriation in the Restatement (Revised)*, 78 AM. J. INT'L L. 176, 176-77 (1984) (noting that resolutions of the U.N. General Assembly are nonbinding).

153. See Roberts, *supra* note 114, at 769-70 (observing that modern custom is often aspirational rather than realistic).

154. Thus, these facts show why the requirement that international law command a consensus of nations, including at least some currently democratic nations, is not a persuasive response to the democracy deficit. As to modern international law, it is simply not true that it necessarily reflects the views of the citizens of democratic nations, because the content of international law is influenced by the discretion of courts and publicists and has never met the test of domestic enactment through democratic processes.

155. For a discussion of the power and unrepresentative nature of publicists, see *supra* text accompanying notes 127-29.

156. See Roberts, *supra* note 114, at 757-60 (describing the process of norm creation under the traditional approach).

157. See, e.g., INT'L COMM. OF RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) (compiling and categorizing state practices as part of an ICRC study).

of a sense of obligation is also not self-evident.¹⁵⁸ *Opinio juris* thus also requires interpretation. It would be surprising if publicists were able to keep their normative views completely separate from these purportedly objective determinations.

As noted above, this is not simply a theoretical issue. The two groups most responsible for determining the content of international law—law professors and international jurists—are likely to have biases that will prompt them to both expand international law and shape its content to their liking. Even in the absence of biases, discovering the content of customary international law is far harder than discovering the content of statutes or treaties because these latter instruments are committed to writing.¹⁵⁹ This epistemic difficulty weakens the quality of international law even if democratic nations substantially contribute to the practices that constitute it because their practices are less closely connected to norms than in the domestic context.¹⁶⁰

Moreover, the materials from which practices are inferred, while more circumscribed than those relied on in modern customary international law, still may reflect a democracy deficit. First, the aforementioned problem of cheap talk remains: the acceptance of an international obligation does not necessarily suggest that it binds the nation domestically. Second, the classic conception of custom does not require that a government decision to follow a practice be in keeping with the will of its people.¹⁶¹ Customary international law does not inquire into the internal governance of a nation from which a practice emerges.

To be sure, many nations now are democratic and thus the requirement of widespread consensus suggests that at least some democratic nations will sign on to new principles of customary international law. But nothing in customary international law requires that even the practices of democratic nations reflect the results of decisions of elected officials.¹⁶² Many democratic nations insulate their policies on certain issues from popular control. For instance, majority public opinion in several European nations would like to apply the death penalty in certain circumstances, but political elites prevent these sentiments from becoming law and assure continued prohibition.¹⁶³

158. Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT'L L. 348, 367 (1987) (“To be sure, it is difficult to demonstrate such *opinio juris* . . .”).

159. See McGinnis, *supra* note 137, at 239-42 (discussing the greater epistemic difficulty in ascertaining the content of treaties and customary international law).

160. By emphasizing the substantial indeterminacy in translating these materials into norms, we are not endorsing claims that all law is radically indeterminate. We are focusing on relative indeterminacy, comparing law that is written down with the practices that constitute international law.

161. See Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 727-31 (1986) (arguing that the process of norm creation in customary international law has almost no exposure to the democratic process in the United States).

162. See *id.*

163. See Ivan Briscoe, *U.S. Death Penalty: Victims Seize the High Ground*, UNESCO COURIER, Oct. 2000, at 42 (explaining that in European nations such as Britain and France

But even if we could rely on international publicists to make objective judgments, and even if the judgments were based on practices that emerged from the electoral processes of some democratic nations, classical customary international law faces another kind of democracy deficit: the problem of the dead hand. Because classical international law requires widespread consensus among states, once formulated it is difficult to change.¹⁶⁴ Even if all states participating in the formulation of international law were democratic, and even if we did not have an unrepresentative class of publicists and international jurists distilling its norms, it would still often fail to represent contemporary sentiment, as opposed to past democratic sentiment. The consensus requirement of international law locks old norms in place even if they are clearly suboptimal.¹⁶⁵

The problem is exacerbated in an age of rapid technological change, like our own. Customary international law arose at time when change in technology was relatively slow. Thus, rules once in place were unlikely to become anachronistic. Scientific discovery and technological invention now proceeds much faster and, according to some, at an ever-accelerating rate.¹⁶⁶ As a result, the nature of the world's social problems changes ever faster.

In this context, the dead hand problem is particularly acute. To take but one example, customary international law is perhaps best interpreted to preclude preemptive attacks, at least without the agreement of the Security Council.¹⁶⁷ Nevertheless, the possibility of weapons of mass destruction (WMD) may render that rule anachronistic. We are not here trying to determine whether a

“clear majorities supported the [death] penalty, though political leaders resolved to push through with abolition all the same”), available at http://www.unesco.org/courier/2000_10/uk/ethique.htm; see also Jeffrey L. Kirchmeier, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States*, 73 U. COLO. L. REV. 1, 87 (2002) (suggesting that international pressure—not popular support—led to the abolition of the death penalty in France when “French presidential candidate François Mitterrand declared his opposition to the death penalty, despite opinion polls showing popular support”).

164. G. J. H. VAN HOOF, *RETHINKING THE SOURCES OF INTERNATIONAL LAW* 114 (1983).

165. This can be a general problem with norms that rely on entrenched customs. See Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1711-12 (1996). Thus, under the classical conception of custom, it is not a persuasive answer to argue that the supermajoritarian consensus provides sufficient evidence that the norms are good. While supermajority rules for the creation of legal norms can be beneficial in certain circumstances (for instance, if they correct for process defects in a majoritarian system that make it too easy to enact norms), they can have substantial net costs in other circumstances. One of the most important costs is the lost benefits that can be gained from a new norm that is blocked by the supermajority rules. See John O. McGinnis & Michael B. Rappaport, *Three Views of the Capitol*, 85 TEX. L. REV. (forthcoming 2007).

166. See RAY KURZWEIL, *THE SINGULARITY IS NEAR: WHEN HUMANS TRANSCEND BIOLOGY* 10-20 (2005) (arguing that technology is advancing at an accelerating rate).

167. See Thomas Graham, Jr., *National Self-Defense, International Law, and Weapons of Mass Destruction*, 4 CHI. J. INT'L L. 1, 3 (2003) (“The United Nations Charter on its face rules out preemptive attack.”).

rule permitting or prohibiting preemption is wise. Our point is that democratic processes in our nation would evaluate sound policy on preemptive attacks with reference to current circumstances. It would not be confined by a consensus crystallized long ago at a time when terrorists and rogue states did not have easy access to weapons of mass destruction.¹⁶⁸

E. Citizens' Comparative Ignorance of International Law

Another aspect of the democracy deficit is that citizens are rationally ignorant about international law and the institutions responsible for its creation to an even greater degree than domestic politics and domestic institutions. This problem affects both classical and modern customary international law. Public ignorance exacerbates the democracy deficit because citizens cannot monitor or control the individuals and institutions responsible for international law fabrication if they are unaware of their existence or operations. It is the key factor reducing the relative transparency of international law, thereby enabling political elites and interest groups to establish international norms that run counter to the interests of ordinary citizens. This point has common sense support: the doings of international agencies in Geneva are more opaque to Americans than events in Washington.¹⁶⁹ Here, we offer empirical evidence to demonstrate its validity and provide it with theoretical grounding.

Decades of social science research show that most citizens have very low levels of political knowledge.¹⁷⁰ This result is not accidental and is not

168. It is true that modern customary international law, unlike the classical version, tends to temper the dead hand problem by divorcing customary law from the requirement of consensus. The difficulty with this approach is that it in many ways exacerbates the democracy deficit. Rather than being confined by the practices of nation-states, at least some of which are democratic, this new view of custom floats free in the minds of those responsible for supplying the normative considerations—publicists and international jurists. As discussed above, such actors are likely to be unrepresentative of the world's citizens and their normative visions quite unlikely to be chosen democratically.

169. See Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 *NW. J. INT'L L. & BUS.* 681, 699-702 (1997) (explaining that citizens face higher costs monitoring international than domestic rules).

170. See, e.g., Somin, *supra* note 22 (summarizing evidence and research on the subject). For the most thorough political science analysis of voter ignorance, see MICHAEL X. DELLI CARPINI & SCOTT KEETER, *WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS* (1996) (documenting widespread voter ignorance and explaining the importance of political knowledge to the democratic process). See also Somin, *Voter Ignorance*, *supra* note 98 (assessing dangers of voter ignorance and critically analyzing literature on the subject). For other studies showing low levels of political knowledge, see, for example, ERIC R. A. N. SMITH, *THE UNCHANGING AMERICAN VOTER* (1989); Stephen Earl Bennett, "Know-Nothings" *Revisited: The Meaning of Political Ignorance Today*, 69 *SOC. SCI. Q.* 476 (1988) [hereinafter Bennett, "Know Nothings" *Revisited*]; Stephen Earl Bennett, "Know-Nothings" *Revisited Again*, 18 *POL. BEHAV.* 219 (1996); Stephen Earl Bennett, *Trends in Americans' Political Information, 1967-87*, 17 *AM. POL. Q.* 422 (1989) [hereinafter Bennett, *Trends*]; Michael X. Delli Carpini & Scott Keeter, *Stability and Change in the U.S. Public's Knowledge of Politics*, 55 *PUB. OPINION Q.* 583 (1991).

primarily caused by stupidity or by low availability of information. Most voters are “rationally ignorant” about politics.¹⁷¹ Because of the low significance of any single vote,¹⁷² there is a vanishingly small payoff to acquiring political knowledge in order to vote in an informed way. Even if a voter makes a tremendous effort to become highly informed, there is almost no chance that his or her well-informed vote will actually swing the electoral outcome in favor of the “better” candidate or party.¹⁷³ The acquisition of political information is a classic collective action problem, a situation in which a good (here, an informed electorate) is undersupplied because any one individual’s possible contribution to its production is insignificant. And those who do not contribute will still get to enjoy the benefits of the good if it is successfully provided through the efforts of others.¹⁷⁴ This prediction is confirmed by studies showing that there has been little or no increase in voter knowledge during the post-World War II era, despite massive increases in education levels and in the availability of political information.¹⁷⁵

Most citizens are thus often ignorant of basic political information, such as the very existence of important legislation, the differences between liberal and conservative ideology, and the responsibilities of different branches of government. It would not be surprising, therefore, if they also tend to be ignorant about international law and the institutions that form it.

But more importantly for present purposes, political ignorance is likely to be a more severe problem with respect to international law than in traditional domestic lawmaking. This is so for two reasons. First, to the extent that comparisons are possible, citizens seem to have a lower absolute level of knowledge about international legal institutions than about domestic ones. Second, it is more difficult for citizens to make up for their ignorance by using “information shortcuts” in the domain of international law than in the domestic arena. This relative ignorance has serious consequences. It exacerbates the potential for interest group influence and manipulation by elites that we have already noted is inherent in the structure of raw international law.¹⁷⁶ If citizens

171. The idea of rational ignorance was first introduced in ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 238-76 (1957).

172. See William H. Riker & Peter C. Ordeshook, *A Theory of the Calculus of Voting*, 62 *AM. POL. SCI. REV.* 25 (1968) (demonstrating that the chance of any one vote determining the outcome of a presidential election is roughly one in one hundred million).

173. *Id.*

174. For a general discussion of collective action theory, see the classic work by MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (rev. ed. 1971). See generally RUSSELL HARDIN, *COLLECTIVE ACTION* (1982) (extending Olson’s argument with various applications to political participation).

175. For studies showing little or no increase in political knowledge over time, see works cited *supra* note 170. See also NORMAN H. NIE ET AL., *EDUCATION AND DEMOCRATIC CITIZENSHIP IN AMERICA* 111-66 (1996) (presenting extensive evidence showing that increases in formal education in the post-World War II era have failed to lead to commensurate increases in political knowledge).

176. See *infra* Parts II.A-E.

do not know about the process of international law making, their ability to influence its development is greatly reduced.

1. *Public knowledge of international legal institutions*

Unfortunately, the available data on public knowledge of international law and legal institutions is limited. The paucity of survey questions on these issues is in itself revealing since pollsters are often reluctant to ask about issues that are so obscure that only a small fraction of respondents are likely to know about them.

The middle column of Table 2 summarizes the available data on American public knowledge of international legal institutions. It is noteworthy that over 70% of survey respondents claim to have heard of the United Nations, the most prominent international lawmaking body. On the other hand, only 48% can name as many as three of the five permanent members of the Security Council,¹⁷⁷ by far the most powerful legal authority within the U.N. system, and only 1% in a 1997 survey knew the name of Kofi Annan, the U.N. Secretary General.¹⁷⁸ As of 2005, just 43% knew that President George W. Bush opposes the Kyoto Protocol on global warming, despite the intense controversy over his decision to withdraw the U.S. signature on the agreement. Only 35% claim to be aware of the International Criminal Court (ICC), despite the extensive public controversy over the U.S. decision not to join this institution. Although 58% claim to know about the World Bank, 57% admit ignorance of its companion institution, the International Monetary Fund (IMF).¹⁷⁹

177. GERMAN MARSHALL FUND & COMPAGNIA DI SAN PAOLO, TRANSATLANTIC TRENDS 2003: TOPLINE DATA 50 (2003).

178. It is likely that public knowledge of Annan would be somewhat greater if the question were repeated today, in the aftermath of Annan's prominent role in recent world events such as the debate over the Iraq War and the "Oil for Food" scandal. However, the 1997 survey, taken in the immediate aftermath of press coverage of Annan's selection as Secretary General, gives a rough indication of the Secretary General's "name recognition" during a period of "normal" politics—as opposed to a time of crisis.

179. All four questions that ask respondents whether or not they have "heard" of a particular institution probably overestimate public knowledge by a substantial degree. Many survey respondents are reluctant to admit ignorance and are likely to say that they have heard of a given person or institution even if in reality they were unaware of it prior to being asked the question. For a classic survey result showing that many respondents will express opinions even about completely fictitious legislation invented by researchers, see Stanley Payne's famous finding that 70% of respondents expressed opinions regarding the nonexistent "Metallic Metals Act." STANLEY L. PAYNE, THE ART OF ASKING QUESTIONS 18 (1951).

Table 2. Public Knowledge of Domestic and International Legal Institutions

Domestic Institution		Comparable International Institution	Difference	
Claim to Have Heard of U.S. Congress ¹	96%	Claim to Have Heard of United Nations ²	73%	23%
Claim to Have Heard of Federal Reserve Board Chairman ³	77%	Claim to Have Heard of World Bank ²	58%	19%
Know "Great Majority" of Scientists Believe Global Warming Exists ⁴	52%	Know President Bush Opposes Kyoto Treaty on Global Warming ⁴	43%	9%
Claim to Have Heard of Federal Reserve Board Chairman ³	77%	Claim to Have Heard of IMF ²	43%	34%
Know U.S. Supreme Court Determines Constitutionality of Laws ⁵	58%	Claim to Have Heard of International Criminal Court ²	35%	23%
Know Name of U.S. Vice President ⁶	61%	Know Name of U.N. Secretary General (1997) ⁷	1%	60%

1. Survey by Democracy Corps/Greenberg Quinlan Rosner Research (Apr. 20-24, 2006) (available at iPOLL Databank, Roper Center for Public Opinion Research, University of Connecticut, <http://www.ropercenter.uconn.edu/ipoll.html>). This survey asked respondents not whether they had heard of Congress per se, but to rate their feelings about "the Republican Congress." Ninety-six of respondents registered some opinion about the Republican Congress. One would expect that even more respondents would claim to have heard of Congress without the potentially confusing party moniker.

2. Survey by Gallup International (June 29-July 3, 2005) (available at iPOLL Databank, Roper Center for Public Opinion Research, University of Connecticut, <http://www.ropercenter.uconn.edu/ipoll.html>).

3. Survey by CNN/USA Today/Gallup Organization (Mar. 14-15, 2003) (available at iPOLL Databank, Roper Center for Public Opinion Research, University of Connecticut, <http://www.ropercenter.uconn.edu/ipoll.html>). This survey also asked respondents to register an opinion about the subject. A total of 77% of respondents expressed some opinion about Federal Reserve Board Chairman Alan Greenspan.

4. Survey by PIPA/Knowledge Networks (June 22-26, 2005), in PIPA/KNOWLEDGE NETWORKS POLL: AMERICANS ON CLIMATE CHANGE 2005, at 2-3 (2005), available at http://www.pipa.org/OnlineReports/ClimateChange/ClimateChange05_Jul05/ClimateChange05_Jul05_quaire.pdf. Thirty-nine percent believe scientists are "divided."

5. DELLI CARPINI & KEETER, *supra* note 170, at 70 (citing 1992 data).

6. Survey by Pew Research Center/Princeton Survey Research Associates (Apr. 19-May 12, 2002) (available at iPOLL Databank, Roper Center for Public Opinion Research, University of Connecticut, <http://www.ropercenter.uconn.edu/ipoll.html>).

7. Survey by CNN/USA Today/Gallup Organization (Nov. 21-23, 1997) (available at iPOLL Databank, Roper Center for Public Opinion Research, University of Connecticut, <http://www.ropercenter.uconn.edu/ipoll.html>).

2. Comparisons with knowledge of domestic institutions

It is difficult to make direct comparisons to public knowledge of domestic legal institutions because of the differences in structure between domestic and international lawmaking bodies. For example, there is no clear domestic equivalent to the International Criminal Court or the World Bank. Nonetheless, the available evidence suggests that public knowledge of domestic institutions is significantly greater than that of international ones.

Table 2 above summarizes some admittedly inexact comparisons between American citizens' knowledge of domestic and international legal institutions. In each case, the comparisons are imperfect, so it would be a mistake to interpret the difference between the two as an exact measure of the gap between American citizens' knowledge of domestic and international law. The important point is the general tendency towards far greater knowledge of domestic institutions.

Thus, even in the case of the United Nations, which 73% of Americans claim to have heard of—making it by far the best-known international legal institution—an even larger number (96%) claim knowledge of the U.S. Congress. Although Congress is not an exact equivalent of the United Nations, having greater legislative power, the two are roughly similar in being the primary lawmaking bodies of the domestic and international systems, respectively. Similarly, public knowledge of the Federal Reserve Bank and U.S. Supreme Court greatly outstrips knowledge of their very rough international equivalents—the IMF and World Bank, and the International Criminal Court. Although the ICC is not the only major international court and one could argue whether it is more important than the International Court of Justice, it has been at the center of a major controversy in recent years and there is no reason to believe that public knowledge of the ICJ would be any greater.

Only 43% of the public know that President Bush opposes the Kyoto Protocol on global warming, the most prominent and controversial international agreement on the subject, as compared to 52% who realize that the “great majority” of scientists agree that global warming “exists and could do significant damage” and a further 39% who state that scientists are “divided” on the subject.¹⁸⁰

Finally, the Secretary General of the United Nations is the most prominent executive official of the most prominent international legal institution. It would perhaps be unfair to compare his name recognition to that of the President of

180. The latter statement is not necessarily inaccurate if one assumes that “a great majority” requires near-universal consensus. A number of prominent scientists, albeit a minority, continue to be skeptical about global warming and its predicted effects. See RICHARD A. POSNER, *CATASTROPHE: RISK AND RESPONSE* 52-56 (2004) (discussing scientific critics of global warming theories).

the United States, easily the most widely recognized domestic politician.¹⁸¹ But even the Vice President, a less powerful and more obscure executive branch leader, enjoys far greater public recognition than U.N. Secretary General Kofi Annan.¹⁸²

3. *International institutions and information shortcuts*

Not only do citizens have less knowledge about international legal institutions than domestic ones, they also probably have less ability to offset their ignorance through the use of “information shortcuts.” Scholars who claim that political ignorance is unimportant have long argued that its effects can be alleviated through the use of information shortcuts that enable voters to assess candidates and parties without relying on extensive knowledge.¹⁸³ The two most common and potentially most effective information shortcuts are party affiliation and “retrospective voting.” Here we show that neither is of much use with respect to international law and that other shortcuts are likely unavailing as well.

a. Party affiliation

Voters who know little or nothing about a given officeholder or candidate can often learn valuable information about her if they know her party affiliation.¹⁸⁴ On average, Republicans hold policy positions different from those of Democrats; knowing that Senator X or Governor Y is a Republican

181. On the rare occasions when the public is asked to identify the president, some 99% can do so. See DELLI CARPINI & KEETER, *supra* note 170, at 91.

182. In several cases, there are differences in question wording between the domestic and international survey questions. All of them, however, tend towards relative underestimation of knowledge of domestic institutions. For example, to get a correct response on the Supreme Court question, respondents had to be able to identify the Court as the institution that determines the constitutionality of laws, while respondents on the ICC question merely had to claim to have heard of it. Respondents to the question about the U.S. Congress were asked about the “Republican Congress,” which may be more confusing (and thus more likely to lead to an admission of ignorance) than asking about the “United Nations,” without any partisan or ideological modifier.

183. For extensive citations to the literature, see Somin, *Voter Ignorance*, *supra* note 98, at 419-33; Somin, *supra* note 22, at 1320-23; Ilya Somin, *When Ignorance Isn't Bliss: How Political Ignorance Threatens Democracy* (Cato Inst. Policy Analysis No. 525, 2004) [hereinafter Somin, *When Ignorance Isn't Bliss*], available at <http://www.cato.org/pubs/pas/pa525.pdf>. Elsewhere, one of us has argued in great detail that such information shortcuts are often inadequate to the task of alleviating the harmful impact of political ignorance—especially ignorance of very basic information about politics and public policy. See Somin, *Voter Ignorance*, *supra* note 98, at 419-31.

184. See, e.g., JOHN H. ALDRICH, *WHY PARTIES?* (1995) (discussing informational benefits of parties). See also the discussion of this shortcut in Somin, *Voter Ignorance*, *supra* note 98, at 421-24.

can provide useful information about her issue positions even if we know nothing else about her.

Unfortunately, most of the individuals, including publicists and international jurists, and institutions that generate raw international law have no public party affiliation. In most cases, they lack even indirect affiliations with a political party. Thus, citizens cannot use the party affiliation information shortcut to assess their positions. Nor is there any comparably clear group affiliation shortcut that can be used in place of party membership.¹⁸⁵

b. Retrospective voting

Retrospective voting is potentially the easiest information shortcut for voters to use. If incumbent officeholders seem to be performing poorly, voters can take note of this fact and vote them out.¹⁸⁶ However, in order to use this shortcut effectively, voters must know how well the incumbents are doing, and also which issues are decided by which officeholders.¹⁸⁷

Both of these tasks are harder for citizens to perform with respect to international law than domestic law. Assessing incumbent performance is unusually difficult in the international law field because of the complex and nontransparent nature of most international lawmaking and the difficulty of tracing its effects. Moreover, the lack of regular elections for many of the key players—particularly publicists and judges—in the international legal system reduces the incentive for citizens to pay attention to incumbents' performance.

Assessing responsibility for international legal policy is also unusually difficult. International customary law is not made by a single highly visible legislature, such as the U.S. Congress, but by a diffuse group of publicists, national governments, and international agency bureaucrats. Few if any nonspecialists can determine which of these entities is responsible for which international legal developments. By contrast, many if not all domestic legal

185. It is possible that citizens could instead rely on international bureaucrats' and publicists' affiliations with their home countries. For example, officials representing Arab nations are likely to be hostile to Israel, and officials representing European Union states are likely to support agricultural protectionism. However, using such shortcuts is far more difficult than relying on party affiliation in the domestic context as it requires considerable knowledge of the ideologies and foreign policy priorities of numerous foreign countries. But most American citizens have only minimal knowledge of foreign political systems. *See, e.g.,* DELLI CARPINI & KEETER *supra* note 170, at 91 (presenting data indicating that large majorities of Americans cannot identify the leaders of major foreign nations such as France, Germany, Italy, and Japan, though 80% did know the name of the prime minister of Great Britain). It is therefore unlikely that they can use national origin as an effective replacement shortcut for party affiliation.

186. For more detailed discussion, see Somin, *Voter Ignorance*, *supra* note 98, and Somin, *When Ignorance Isn't Bliss*, *supra* note 183.

187. Somin, *supra* note 22, at 1315-16.

changes can be traced to Congress or the Presidency, both of which are highly visible institutions.

c. Other shortcuts

Other information shortcuts include reliance on knowledgeable “opinion leaders,”¹⁸⁸ extrapolation from personal experience,¹⁸⁹ and a specialized focus on a few specific issues of particular interest to the citizen in question.¹⁹⁰ These shortcuts, too, are less likely to be effective in the field of international customary law than domestic law.

Far fewer citizens are likely to have personal experience relevant to international law than to domestic law. For example, many citizens have personal experience with domestic litigation, but very few have ever litigated before international courts. Similarly, it is likely that fewer people have a special interest in international customary law than in various issues covered by domestic law. Domestic legal issues such as affirmative action, abortion, and criminal justice often engage the general public, while customary international law is rarely if ever debated by ordinary citizens. Finally, although there is no definitive research on the subject, it is reasonable to conjecture that fewer citizens have access to knowledgeable opinion leaders in the field of international law than to those with special knowledge of domestic lawmaking.

It is theoretically possible that public knowledge of international law will increase over time, especially if international law comes to have greater impact on domestic public policy. However, the finding that recent surveys still show a large gap between domestic and international political knowledge, despite the upsurge of public debate over international law in recent years, suggests that knowledge of international law may not rise to the same level as knowledge of domestic law for a long time to come. The fact that information shortcuts are relatively less effective in the international law field suggests that the gap may never be closed at all.

F. *Customary International Law’s Potential Threat to Exit Rights*

1. *International exit rights and democratic accountability*

A serious potential drawback of universally applicable raw international law is the danger that it will undermine exit rights. While this threat is unlikely to become a serious danger in the near future, it will become more significant if

188. For discussion of this point, see, for example, Ilya Somin, Book Note, *Resolving the Democratic Dilemma?*, 16 YALE J. ON REG. 401 (1999).

189. For citations to the literature, see Somin, *Voter Ignorance*, *supra* note 98.

190. *Id.*

raw international law is incorporated into American law as fully as some advocates contend it should be.

One of the advantages of decentralized federalism is the ability of citizens to “vote with their feet” and exit a jurisdiction whose policies harm their interests by moving to one that is more attractive.¹⁹¹ Even very poor and severely oppressed groups, such as blacks in the Jim Crow-era South, have been able to take advantage of exit rights under federalism to improve their lot.¹⁹²

In addition to providing a means for migrants to improve their personal circumstances, exit rights also function as an additional mechanism for imposing democratic control over government policy. Jurisdictions that adopt harmful policies oppressing or impoverishing their people risk losing valuable labor, capital, and tax revenue to areas with more attractive policies. As a result, regional governments have incentives to change their policies to conform more closely with the interests of their people. In some respects, such government accountability through “exit” is actually more effective than traditional accountability through voting and other forms of “voice.”¹⁹³ In this way, exit rights increase the democratic accountability of governments to their citizens. They also help increase the transparency of government policy, because citizens often have stronger incentives to acquire information for use in making migration decisions than to acquire political knowledge relevant to voting decisions. The latter are subject to a serious collective action problem that creates “rational ignorance,”¹⁹⁴ while the former are not.¹⁹⁵

International mobility through emigration is often far more difficult than movement from one region to another within a single nation. Nonetheless, international migration often achieves some of the same benefits as does interregional migration. Indeed, the vast majority of the population of the United States consists either of immigrants or descendants of immigrants who came here fleeing the oppression or poverty that they experienced under other

191. For detailed discussion, see John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 106-12 (2004); Somin, *supra* note 22; Ilya Somin, *Closing the Pandora's Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 GEO. L.J. 461, 464-65 (2002).

192. See WILLIAM COHEN, *AT FREEDOM'S EDGE: BLACK MOBILITY AND THE SOUTHERN WHITE QUEST FOR RACIAL CONTROL, 1861-1915* (1991); FLORETTE HENRI, *BLACK MIGRATION: MOVEMENT NORTH, 1900-1920* (1975); David E. Bernstein, *The Law and Economics of Post-Civil War Restrictions on Interstate Migration by African-Americans*, 76 TEX. L. REV. 781, 782-85 (1998).

193. For the distinction between exit and voice, see HIRSCHMAN, *supra* note 22. For arguments that exit is often a superior means for imposing democratic control on government, see Somin, *supra* note 22, at 1344-50.

194. See *supra* Part II.E.

195. See Somin, *supra* note 22, at 1344-47.

governments.¹⁹⁶ The desire to avoid this “brain drain” may cause at least some foreign governments to treat their people better in order to reduce the outflow of people to the United States and other attractive destinations.

If raw international law is made universally applicable to all states, including the United States, there is a danger that it can be used to undermine the power of exit rights to improve the lives of emigrants. Certainly, international elites representing oppressive governments or those that favor flawed economic policies have incentives to use raw international law to force other countries to enact similar legal rules. If they succeed, the ability of their citizens to use emigration to escape poverty or oppression will be correspondingly reduced.

As yet, raw international law has had relatively little impact on the exercise of exit rights through international migration. But that may reflect the fact that until recently, international law has had little applicability to domestic legal arrangements. If U.S. courts and policymakers adopt a policy of presumptive adherence to raw international law, the growth of modern international law will offer many more opportunities for foreign political elites to use international legal rules to reduce the attractiveness of migration to the United States.

There is an interesting irony here: relatively open immigration, opposed by many American conservatives, buttresses the case for the American refusal to accept raw international law, a cause to which most conservatives are sympathetic. Yet, ironically or not, the importance of international exit rights is an important consideration weighing against the presumptive acceptance of raw international law.

2. The case of restrictions on “hate speech”

While this problem is largely a prospective one, in at least one area there is already a nascent movement to use international law in ways that could undermine important exit rights: the effort to criminalize “hate speech.”

Some advocates of American adherence to raw international law argue that customary international law requires the United States to punish so-called “hate speech.”¹⁹⁷ This norm has a variety of antecedents, most importantly the International Covenant on Civil and Political Rights (ICCPR). The ICCPR forbids “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”¹⁹⁸

196. For a comprehensive account, see, for example, ROGER V. DANIELS, *COMING TO AMERICA* (1991).

197. See, e.g., Boyle, *supra* note 15, at 496 (arguing that the U.S. “failure to prohibit advocacy of national racial or religious hatred is in violation of both the Covenant [on Civil and Political Rights] and customary international law”); Fariior, *supra* note 141, at 4-12, 93-98 (discussing international law forbidding “hate speech” and arguing that the United States is in violation of international legal norms).

198. International Covenant on Civil and Political Rights art. 20(2), Dec. 16, 1966, S.

Defenders of the hate speech ban argue that it can be applied very broadly. For example, Louise Arbour, the United Nations High Commissioner for Human Rights, claimed that Denmark's willingness to permit publication of the cartoons of the prophet Mohammed that angered many Muslims in late 2005 and early 2006 may violate international laws against "hate speech." She initiated a U.N. investigation of the matter.¹⁹⁹ Given that several of the cartoons involved criticism of Muslim support for suicide bombing,²⁰⁰ censorship of them would surely inhibit public debate about the relationship between terrorism and radical Islamism. Arbour, a former justice of the Canadian Supreme Court, has also argued that international law bans "xenophobic arguments in political discourse," which must be suppressed by "effective national laws and policies," possibly including "criminal sanctions."²⁰¹

Oriana Fallaci, a controversial Italian journalist who harshly criticized Islam for allegedly promoting terrorism and undermining civil liberties in Europe, was put on trial for "hate speech" under Italy's domestic hate speech law.²⁰² If convicted, she would have faced up to two years in prison.²⁰³ Prosecutions such as this one could gravely inhibit public discussion of issues related to Islam, terrorism, and civil rights. Other recent hate speech prosecutions include that of a Swedish pastor who attacked homosexuality in a sermon, French actress Brigitte Bardot for criticizing Muslim ritual slaughter, and British historian David Irving for denying the Holocaust. In a case similar to Fallaci's, two Australian clergymen were convicted for claiming that Islam is a violent religion.²⁰⁴

EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976). The United States ratified the ICCPR in 1992, but with reservations rejecting the imposition of restrictions on freedom of speech that violate the First Amendment. U.S. Reservations, Understandings, and Declarations to the International Covenant on Civil and Political Rights, no. I(1), 138 CONG. REC. 8068 (1992). Yet these reservations would not block application of a customary international law ban of hate speech under expansive modern theories of customary international law. *See supra* Part II.C. Modern customary international law does not require unanimity to create rules of international law. Indeed, the Supreme Court noted the consensus against juvenile executions represented by the Rights of the Child Convention as confirmation that the Constitution should be construed to prohibit the execution of juveniles, despite the fact the United States had taken a reservation about that provision of the Convention. *See supra* notes 42-44 and accompanying text.

199. Paul Belien, *UN to Investigate Racism of Danish Cartoonists*, BRUSSELS J., Dec. 7, 2005, available at <http://www.brusselsjournal.com/node/546>.

200. The cartoons are available at <http://ala-mierda.blogspot.com/2005/12/los-12-chistes-que-la-onu-y-la.html>.

201. Louise Arbour, U.N. High Commissioner for Human Rights, Remarks at International Day for the Elimination of Racial Discrimination Panel Discussion (Mar. 21, 2005).

202. *See* Margaret Talbot, *The Agitator: Oriana Fallaci Directs Her Fury Toward Islam*, NEW YORKER, June 5, 2006, at 58. Fallaci died in 2006.

203. *Id.*

204. These incidents are discussed in John Leo, *Free Speech Retreats in the West*,

Currently, writers and speakers threatened by hate speech laws in their own countries can at least publish their work abroad. For example, Fallaci's books have been published in the United States and in European countries with less restrictive hate speech rules.²⁰⁵ In extreme cases, they could even seek refuge in the United States and thereby continue to speak and write on controversial issues. In the wake of the Italian prosecution, Fallaci herself spent most of her time in the United States in order to avoid criminal and civil lawsuits triggered by the publication of her books in Europe.²⁰⁶ But if all or most nations adhere to the highly restrictive international hate speech rules advocated by Arbour and others, free speech will no longer be protected by exit rights. The ICCPR and related treaties²⁰⁷ could be used to censor debate over racial, religious, and political issues all over the world.

G. Alternative Process Justifications for International Law

We have shown that on one salient axis of quality—democratic control—international law is much weaker than domestic law. Thus, if raw international law is to be permitted a role in our domestic system it must be defended on the ground that there is some other process connected to its creation that ensures its quality.²⁰⁸ Unfortunately, other processes that might promote quality also seem inapplicable to customary international law.

1. Customary international law as efficient custom

The first potential justification of raw international law is custom. Under certain conditions, customary law is likely to produce norms that increase

CHATTANOOGA TIMES FREE PRESS, Mar. 12, 2006, at F5.

205. See, e.g., ORIANA FALLACI, *THE FORCE OF REASON* (2006) (U.S. edition of the book that led to the Italian prosecution).

206. Mark Steyn, *Celebrate Tolerance, or You're Dead: Oriana Fallaci Appeals to Europe to Save Itself*, *MACLEAN'S*, May 1, 2006, at 62.

207. The International Convention on the Elimination of All Forms of Racial Discrimination also bans hate speech and is considered to be broader than the Civil and Political Rights Covenant. This Convention prohibits "all dissemination of ideas based on racial superiority or hatred [and] incitement to racial discrimination." International Convention on the Elimination of All Forms of Racial Discrimination art. 4, Dec. 21, 1965, S. EXEC. DOC. C, 95-2 (1978), 660 U.N.T.S. 195.

208. Some have argued that whatever the democracy deficit of international law, its norms can be justified because they protect the rights of minorities which may be neglected in democracy. See Anupam Chander, *Globalization and Distrust*, 114 *YALE L.J.* 1193 (2005). But there is no reason to believe that the process for generating international law will be systematically better at protecting minorities. Nondemocratic governments and international legal elites do not have particular solicitude for minorities and they play a key role in the production of international law. It may be countered that some minority rights are a part of emerging norms of international law. But it is not at all clear that these rights are more important than other policies, such as restrictions on the use of force that frustrate humanitarian interventions, and therefore are damaging to oppressed minorities.

efficiency. Customary norms under this theory evolve to create surpluses as interacting individuals or entities choose those norms that will provide them with the greatest possible increases in wealth.²⁰⁹ Accordingly, some have argued by analogy that customary international law is efficient.²¹⁰

The first shortcoming of this argument lies again in the democracy deficit. Even if customs generated among states prove to be efficient, it only follows that they are efficient for state leaders, not for their subjects. Authoritarian and totalitarian states do not represent the preferences of their people. Thus, interactions among these states do not necessarily lead to rules that are efficient from the standpoint of the population as a whole.²¹¹

Moreover, customary international law is not even likely to generate efficient norms from the perspective of states themselves. Efficient norms are most likely to arise when the members of the groups generating the norms are small in number and homogeneous in character. They also work better when they interact often in a reciprocal manner (i.e., they take turns playing the different relevant roles in the practices that customary norms seek to regulate).²¹² But as Eugene Kontorovich has shown, these conditions are rarely satisfied in the case of international custom.²¹³ There are now almost 200 nation-states.²¹⁴ Far from homogenous, nations have different interests defined by geographic position, level of development, and religious identification.²¹⁵ Many never interact in substantial ways. And nations tend not to interact in reciprocal ways, often because they are so heterogeneous.²¹⁶ Many nations, for instance, are not in a position to engage in war with more powerful states. Professor Kontorovich rightly concludes that the usual indicia for efficient international custom are absent here.²¹⁷

209. See Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1660 (1996).

210. See Anthony D'Amato, *Modifying U.S. Acceptance of the Compulsory Jurisdiction of the World Court*, 79 AM. J. INT'L 385, 402 (1985) ("The rules of international law . . . grew out of [state] interactions over centuries of practice . . . Thus the rules, almost by definition, are the most efficient possible rules for avoiding international friction and for accommodating the collective self-interest of all states.").

211. See McGinnis, *supra* note 137, at 242-45.

212. See Eugene Kontorovich, *Inefficient Customs in International Law*, 48 WM. & MARY L. REV. 859, 889-94 (2006).

213. *Id.*

214. See Press Release, United Nations, United Nations Member States, U.N. Doc. ORG/1360/Rev.1 (Oct. 10, 2004).

215. Kontorovich, *supra* note 212, at 900-01.

216. *Id.* at 901.

217. *Id.* at 902.

2. *Customary international law as efficient common law*

The efficiency of customary international law also cannot be demonstrated by analogizing it to the presumed efficiency of the common law.²¹⁸ Again, we have the problem that states, not people, are the actors in the international regime. Thus, even a common law process that is efficient for nation-states will not necessarily be efficient for citizens. Moreover, the process by which the common law tends toward efficient rules is not likely to be replicated by customary international law.

The common law is thought to move towards efficiency for one of two reasons. First, efficient rules are selected as the byproduct of the litigation strategies that litigants choose.²¹⁹ But international law is tested in the crucible of litigation too rarely to make that theory of common law efficiency plausible in the international context.

Second, judges may have incentives to choose the most efficient rules on their own.²²⁰ But any such mechanism seems lacking in international law. One powerful incentive promoting efficiency is competition. Competing court systems may try to get the efficient rule that maximizes surplus among parties because that will increase their business in the long run.²²¹ But international courts do not compete with other courts. Different types of international disputes are generally assigned to specialized courts. For instance, trade disputes are assigned to the appellate body of the WTO²²² whereas disputes over war and peace are assigned to the ICJ.²²³ Nor is there substantial competition between national and international courts. Generally, states are the only parties in international courts and individuals or non-state entities are parties in national courts. The evidence on the ICJ shows that what often motivates justices are the narrow parochial interests of their states and

218. For this analogy, see, for example, Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 HASTINGS L.J. 185, 268-69 (1993).

219. See, e.g., George Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65, 67 (1977) (“Once promulgated, inefficient rules are more likely than efficient rules to be reexamined by courts because they will come up in litigation more often. This conclusion follows directly from the fact that inefficient rules impose higher costs than efficient rules on the parties subject to them . . .”).

220. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 569-71 (5th ed. 1998) (arguing that judges choose efficient rules).

221. Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 910-11 (1992) (describing competition among courts).

222. See Understanding on Rules and Procedures Governing the Settlements of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 112, 126 (1994).

223. The International Court of Justice is the principal judicial organ of the United Nations, U.N. Charter art. 92, and, as such, adjudicates issues about the appropriate use of force under the U.N. Charter.

governments rather than broader concerns about efficiency for the governments of the world, let alone their citizens.²²⁴

III. THE DOCTRINAL IMPACT OF THE DEFECTS OF INTERNATIONAL LAW

If raw international law emerges from a process that is likely to produce results inferior to those of domestic law, this has implications for the many doctrinal categories by which raw international law may be incorporated into our law. In general, the low quality of the processes for generating raw international law provides a strong reason not to allow it to override domestic law.

In this Part, we will consider how the comparatively low quality of the processes generating raw international law should affect several doctrinal areas. First, we show that this low quality provides powerful reasons not to use it as a factor in interpreting the Constitution to overturn domestic statutes. Second, we show that this low quality militates against using it to displace the actions of domestic political actors, including Congress, the President, and state governments. Finally, we suggest that this comparatively low quality casts doubt on the deployment of a canon of construction that would interpret U.S. statutes to conform to international law.

Some of the negative consequences of allowing raw international law to override domestic law might be alleviated by the fact that the United States often has great influence over the content of the former. To the extent that, because of U.S. influence, American domestic law and raw international law arrive at identical rules, there will be no cost to allowing the latter to override the former. However, since U.S. control over the content of raw international law is far from total, there will still be instances in which it establishes rules different from those of U.S. law. In those cases, the democracy deficit suggests that following U.S. law will, on average, lead to better results.

A. *International Law as a Constitutional Constraint on Domestic Legislation*

First, the low quality of the processes for generating international law militates against its use in construing the Constitution. The pragmatic argument in favor of using international law is that its content gives us reason to doubt that U.S. legal rules are necessarily good ones in cases where they conflict with international norms. But the presumptively low quality of raw international law undermines the premise of this argument.²²⁵

224. See Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1 (2005) (discussing how judges follow the interests of the disputing nations).

225. For a more exhaustive discussion of this point, see McGinnis, *supra* note 6, at 312-39.

Second, the low quality of raw international law casts doubt on the general proposition that international law should be part of our law. Federal laws, whether they regulate citizens and states, or constrain the power that our own executive actors would otherwise enjoy, go through an arduous process of bicameralism and presentment that offers some guarantee of democratic control.²²⁶ By contrast, international law has a severe democracy deficit. The more sweeping the claim of authority for international law, the more pronounced the democracy deficit and the more dubious the assertion that customary international law should override domestic law. We will analyze the claims of authority in order of their boldness.

As noted above, the most extreme view is that international law is an equal and wholly independent fount of domestic jurisdiction and its norms cannot be changed by domestic political actors, thus giving international law a quasi-constitutional status.²²⁷ This understanding of the relation of international law to domestic law would exalt lower quality norms with a severe democracy deficit over democratically enacted law. International law would have a status equal to our Constitution because a constitutional amendment would have to be passed to negate its status. Yet far from having the democratic control that arises from the supermajoritarian consensus required of constitutional amendments,²²⁸ international law has weaker democratic credentials than even ordinary domestic legislation.

B. *International Law as a Default Rule*

A less sweeping argument in support of raw international law is the claim that it should be accepted as part of our law until Congress affirmatively overrules it. Some have argued that this approach is modest because it only makes international law a default rule.²²⁹ But even this more modest conception is still too strong given the presumptively low relative quality of raw international law. Making international law a default rule actually gives it the *same* force as a congressional statute, despite the large differences in quality between the two kinds of enactments. Congressional statutes are themselves law only until Congress decides to repeal them. Congress always has the ability to create a norm at variance with its own earlier statutes because

226. See McGinnis & Rappaport, *supra* note 101, at 769-75 (discussing the way bicameralism and presentment generate high quality laws).

227. See, e.g., Lobel, *supra* note 53, at 1075; see also Peter J. Spiro, *Treaties, International Law, and Constitutional Rights*, 55 STAN. L. REV. 1999 (2003) (arguing that international law should in many instances override the U.S. Constitution).

228. See John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. (forthcoming 2007) (discussing the quality that supermajoritarian rules give to constitutional provisions).

229. See Chander, *supra* note 208, at 1207.

one Congress cannot bind another.²³⁰ Thus, Congress's ability to supersede international law by a subsequent statute would not distinguish the force of international law from that of ordinary legislation.

We can quantify the very substantial power that this conception would give to raw international law. International law would be controlling whenever the forces opposing the norms of raw international law cannot meet the requirements for tricameral passage of legislation, meaning the three-tiered approval process involving the House, Senate, and presentment to the President.²³¹ Thus, U.S. policy would be set by international law whenever the House, Senate, and the President (or two-thirds of the members of the House and the Senate over a presidential veto) do not agree to pass legislation in the area. Given that our system of tricameralism typically requires more than a majoritarian consensus,²³² a majority of citizens through their elected representatives could not, as a general rule, set policy in conflict with international law. Our regime should not give such powerful force to international norms with such a large democracy deficit and no other redeeming indicia of quality.

C. International Law as a Constraint on Presidential Power

As discussed above, yet another, somewhat more modest claim for integrating raw international law into our domestic law focuses on its ability to bind the President.²³³

1. Constraining presidential power flowing from congressional authorization

Analytically, it is important to break down the claim that international law constrains the President into two parts, depending on whether international law would bind the President when acting under statutory authority delegated from Congress or under his own inherent authority. A constraint on the President's actions under statutory authority involves an international law constraint on Congress as well as the President. If the President is acting under congressional authorization, using international law to curb his power also effectively overrides Congress. The case against this position is exactly the same as that

230. The position that a legislature cannot bind a subsequent legislature dates back to Blackstone. See 1 WILLIAM BLACKSTONE, COMMENTARIES *90.

231. See U.S. CONST. art. 1, § 7.

232. See JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 233-49 (1962) (illustrating how bicameralism requires a greater than majoritarian consensus).

233. See *supra* notes 57-59 and accompanying text; see also Paust, *supra* note 58, at 378.

against allowing raw international law to override congressional enactments more generally.

A more widely accepted argument for using international law to constrain the President's exercise of power under statutes relies on the proposition that statutes should be interpreted whenever possible to be consistent with international law.²³⁴ Supporters of this view argue that it gains support from the *Charming Betsy* case, as discussed in Part II.²³⁵ Our objection to this canon flows from our previous discussion: there is no reason to sustain a canon whose effect is to interpret U.S. law in light of norms that have no claim to emerging from a process that provides guarantees of good quality. A canon can be justified either as a heuristic that helps discover Congress's true intent or, more pragmatically, attempts to interpret statutes to reach better results than they otherwise would.²³⁶ As applied to the President, the *Charming Betsy* canon cannot easily be understood as an attempt to reflect Congress's true intent. Given the low quality of international law, we would need strong evidence, which has never to our knowledge been furnished, that Congress would affirmatively embrace this canon.²³⁷

Pragmatically, the canon will likely create worse results than domestic law for two reasons. First, it will, other things being equal, displace other modes of interpretation that have better indicia of quality, such as reading the statute in light of legislative history or in light of other statutes on similar subjects. Second, the President's decision to engage in the action at variance with raw international law itself carries a degree of democratic legitimacy. The President is elected by the entire nation and thus there is at least some presumption that he represents the majority's preferences. While on any individual issue that presumption may not be strong, given the range of issues on which a presidential election turns, it still has stronger democratic credentials than any norm of raw international law. Indeed, foreign policy issues play a greater role in presidential elections than in those for other offices,²³⁸ and thus the President acts in foreign affairs with an even greater presumption of democratic bona fides than in domestic affairs.

234. See Wuerth, *supra* note 79, at 331-33.

235. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

236. See Lawrence C. Marshall, "Let Congress Do It": *The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 228 (1989) (offering both an intent- and results-based rationale for canons of construction).

237. It is true that a rule of statutory construction can also be conceptualized as an information-forcing default rule. See Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2145-47 (2002). But if customary international law derives from a low-quality process, the benefits of informing Congress of its content do not justify the costs of forcing congressional reconsideration.

238. See Paul E. Peterson, *The President's Dominance in Foreign Policy Making*, 109 POL. SCI. Q. 215, 220-21 (1994) (noting that foreign policy issues play a greater role in presidential elections than in congressional ones).

2. *Constraining the President's inherent authority*

A narrower argument for using international law to constrain presidential power focuses on his inherent authority—power that he wields even without congressional authorization.²³⁹ Inherent authority includes power that Congress may not override, such as the Commander-in-Chief power, and authority that the President can exercise only in the absence of a congressional directive. In the language of Justice Robert Jackson's famous concurrence in *Youngstown*, the first is category one authority and the second is category two authority, described by him as the "zone of twilight."²⁴⁰

The President's electoral mandate is again a powerful argument for permitting him to take action within his inherent authority even when it conflicts with international law. To be sure, the presumption of quality attached to the President's action is weaker than the presumption that should attach to Congress's action. Congress is a multimember institution whose deliberative decisions have stronger democratic credentials than the President's precisely because it reflects a wider range of constituencies and interests. But the question here is not whether Congress should be able to constrain the President, but whether raw international law should be able to do so.²⁴¹

It might be thought that in some areas, the President's incentives are such that they will lead him to take harmful actions despite his endorsement at the polls. It has been argued, for example, that the President's desire for political gain is likely to distort his judgment and cause him to undertake foreign military adventures that are not in the nation's interest.²⁴² It also could be argued that some actions are so momentous that they require the kind of consensus and deliberation that only the legislature can deliver.²⁴³ Declaring war is an example of an area in which that contention is plausible.

But the conclusion that the presidency exhibits systematic institutional failings or that a more substantial consensus should be sought than the President can provide amounts to an argument that he should not have inherent power in that issue area. It does not prove that he should be constrained by raw

239. We do not address arguments that the scope of executive power is actually constituted by international law. *See Golove, supra* note 74 (suggesting that the extent of the President's war powers depend on the scope of international law). These arguments are historical in nature and are beyond the reach of this Article. Given our view of the quality of international law, we obviously do not believe that it would be a pragmatically sound interpretation of the Constitution.

240. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952).

241. This point once again differentiates our argument from that of YOO, *supra* note 20.

242. *See William Michael Treanor, Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 740-56 (1997).

243. *See JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 4 (1993) (emphasizing the need for deliberation and reasoning from multiple perspectives that only legislatures can provide).

international law. International law is not of sufficient presumptive quality that a divergence between the President's actions and its dictates can provide a signal that the President's action is ill-advised. Conversely, the compatibility of the President's action with international law does not provide a strong signal that his action is sound. International law is simply orthogonal to the appropriate constraints on presidential power. These lie in limiting the President's inherent authority to areas where a plenary power (in the case of category one authority) or the power of initiative in the absence of congressional action (in the case of category two authority) is warranted.

Another difficulty with relying on international law to trigger the need for Congress to authorize presidential action is that it undermines legislative accountability. International law, as we have noted, is often unclear.²⁴⁴ Arguing about whether the President has violated international law allows Congress to deflect its own responsibility for reining in the President by suggesting that the President's behavior should be policed by international law. In reality, Congress has its own ample authority to constrain the president, including its power to regulate the armed forces,²⁴⁵ and its authority to limit executive spending on wars and other foreign policy initiatives.²⁴⁶

3. *Constraining subordinate executive branch officials*

In theory, raw international law could be used to constrain the President's subordinates without restricting the President's own actions. This approach can gain some support from *The Paquete Habana*, which suggests that international law is part of our law, absent controlling executive authority.²⁴⁷ Under this view, the President would be required personally to authorize all departures from international law. Actions by subordinates in violation of international law would be illegal.

Even this more limited and provisional incorporation of raw international law within our law would be a mistake. The President's subordinates may act within their authorities without presidential approval but only subject to presidential supervision. There are sound reasons for this general practice. Given that the President appoints executive branch officials and can dismiss them, officials are assumed to reflect the President's outlook and he would presumptively approve of their actions.²⁴⁸ Moreover, the President has many

244. See *supra* notes 155-57 and accompanying text.

245. See U.S. CONST. art. I, § 8, cl. 14 (giving Congress the power to "make rules for the Government and Regulation of the land and naval forces").

246. See ELY, *supra* note 243, at 28-29 (noting strong textual and consensus support for congressional cut-offs of spending).

247. See *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law . . ."). As we have discussed, even this language can be dismissed as dicta given that the President in that case had himself authorized the application of international law.

248. See Robert V. Percival, *Checks Without Balance: Executive Office Oversight of*

responsibilities. Allowing his subordinates to act without his express authorization allows him to determine the issues on which he will focus. Permitting only the President to override international law would reverse the traditional rule allowing the President broad discretion to organize and supervise executive branch officials.²⁴⁹

International law does not appear to have the presumptive quality to warrant such a reversal. The President, democratically elected, chooses to empower his subordinates. It should be his decision to subject them to international law. A subordinate's decision that is inconsistent with international law does not necessarily suggest that this decision is wrong because the quality of international law is not likely to be higher than those decisions. Moreover, the scope of international law is unclear because of its uncertain method of derivation.²⁵⁰ Thus, the President would need to invest substantial time authorizing decisions of subordinates simply because they might be held to violate raw international law.

D. International Law as a Constraint on State Law

The final and most limited way to incorporate international law into the domestic sphere would be to confine its domestic effect to displacing state rather than federal legislation. There is substantial support among scholars for this position, often understood as treating international law as a form of federal common law and thereby making it superior to state law.²⁵¹ Courts, in fact, have on occasion followed raw international law when it conflicts with state law.²⁵² Our discussion of the quality of the processes that generate raw international law also suggests that this doctrine is unwarranted. Given the democracy deficit of international law, it seems inferior in quality to state as well as federal law because state law generally represents more democratic decisions, however local.

It may be countered that state law may enjoy less of a presumption of quality for the nation as a whole than does federal law. It represents only the

the Environmental Protection Agency, 54 LAW & CONTEMP. PROBS., Autumn 1991, at 127, 161 ("The president's appointment and removal powers guarantee that his views will carry considerable weight with his appointees . . .").

249. This practice reflects the need to preserve energy in the executive, which is one of the rationales for presidential control. See Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 38 (1995) (viewing "energy" as a necessary ingredient of executive power). A President who cannot make the determinations of what to delegate and what to decide himself will not be an energetic executive.

250. See *supra* Parts II.B-D.

251. See, e.g., Henkin, *supra* note 55, at 1561; see also notes 60-63 and accompanying text.

252. See, e.g., *Republic of Argentina v. City of New York*, 25 N.Y.2d 252 (1969) (prohibiting New York City from taxing diplomatic property because of its conflict with customary international law).

preferences of citizens of the particular state. Moreover, by regulating matters of foreign policy, state decisions can impose costs on the nation as a whole.

But these are arguments for restricting state laws to matters that affect state citizens, not for giving force to raw international law.²⁵³ The incompatibility of international law with state law does not give us any indication that the state judgment is faulty. Nor does it even suggest that it occurs in an area where federal interests predominate. As we have noted, international law now concerns itself with limitations on the punishment of crimes and other issues that are quintessentially state matters in the American federal system.²⁵⁴

Other doctrinal developments make it particularly unnecessary to use international law to police the states rather than rely on federal actors acting within their areas of responsibility. The Supreme Court has recently interpreted the Constitution to grant greater latitude to federal actors to overrule states when international matters affecting the welfare of the nation as a whole are implicated. For instance, in *American Insurance Ass'n v. Garamendi*, the Court held that the President can override state law when state laws are in tension with an area of foreign policy over which the Constitution provides for presidential control.²⁵⁵ It would seem a small step from *Garamendi* to include within the scope of these imperatives the power to enforce compliance with international law when he believes that such compliance is necessary to enforce federal interests.²⁵⁶ Under those circumstances, the state decisions would not be overruled unless a democratically elected federal actor—either the President or Congress—took action.²⁵⁷

253. See McGinnis & Somin, *supra* note 191, at 124-25 (arguing that federal judicial power should be used to restrict the extraterritorial application of state law).

254. See *supra* notes 60, 68.

255. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) (holding that the President could override California state law and require insurance companies to provide information to victims of the Holocaust in light of an international agreement the President had made on the subject).

256. *Id.* at 414 (discussing the President's "vast share of responsibility for the conduct of foreign relations" (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952))). Determining when breaches of international law affect foreign relations would seem to be within the President's purview as would ensuring that states comply. See also Julian G. Ku, *Structural Conflicts in the Interpretation of Customary International Law*, 45 SANTA CLARA L. REV. 857, 863 (2005) (explaining that *Garamendi's* "broad recognition of the president's power to preempt state law by setting a national policy could easily be understood to include the power to declare adherence to international law").

257. At least one of the current authors has reservations about *Garamendi* as a matter of constitutional law. The Supreme Court should make it clear that the federal government has authority to displace state law only with respect to issues that fall within the enumerated powers of Congress or the President. Cf. Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867 (2005) (arguing that Congress can only legislate to implement those treaties whose content falls within the scope of Congress's enumerated powers under Article I of the Constitution). With respect to the former, perhaps a congressional statute should be required in addition to (or instead of) presidential action. If Congress fails to act, then the area is left within state authority. But we do not address

Thus, insofar as it is thought that states should be forced to comply with international law to protect federal interests, this proposition can be accommodated within the current law of foreign relations. Making the President the trigger for requiring state compliance provides a democratic screen on the quality of the international law at issue. Moreover, it assures that a politically responsible actor is accountable for overriding state law.²⁵⁸ While we do not necessarily endorse the view that the President has the power to override state government policies any time he believes it necessary to do so to protect federal foreign policy interests, it is a superior alternative to requiring states to be bound by raw international law.

While we believe it would be a mistake to allow international law to preempt governmental actors within the sphere of the authority that the Constitution or statutory law gives them, we are not opposed to international commitments undertaken by the political branches. The President, with the Senate's ratification, can enter into treaties, and Congress can adopt norms of customary international law if they believe that such actions would solve coordination problems among nations.²⁵⁹ The democratic provenance of such commitments will provide some evidence that the solutions international law provides are actually good ones or at least no worse than those of domestic law. The solution to the democracy deficit of international law within our system is contained in the separation of powers itself: the political branches should not be constrained by international law, but instead should be free to incorporate its norms as they fit with their appropriate constitutional sphere.

disputes about the correctness of *Garamendi* here. The existence of *Garamendi*'s broad presidential preemption authority makes it even clearer that international law itself is not necessary to police state interference in foreign affairs.

258. Some scholars have argued for yet another kind of treatment of international law, which we will not discuss in full here. They argue that international law should not be understood as federal common law, but general law. See Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT'L L. 365, 467-74 (2002); A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L L. 1, 48-56 (1995). These authors would apply conflicts rules to determine when international law should be applied. Young, *supra*, at 470-74. These arguments are subtle, but other commentators still believe that in some circumstances, this view would give international law preemptive force. See Ramsey, *supra* note 63, at 578. For the reasons discussed above, we would disagree with such a conception. If by general law, one meant only that courts empowered to make common law could consider international law in their policy calculus, we would not categorically object. But we doubt that it should be given much, if any, weight unless courts had independent reasons to believe that the norm embodied in international law was of high quality.

259. In the context of treaties, customary international law may well be relevant to their interpretation if the parties contracted against a body of international law definitions of terms. See McGinnis, *supra* note 137, at 257 (discussing the appropriate role of customary international law in interpreting treaties).

IV. AMERICAN LAW AS BETTER THAN INTERNATIONAL LAW
FOR THE REST OF THE WORLD

It might be argued that our previous discussion misses the point of using raw international law. Even if it were worse than American law for Americans, we should also be concerned about the welfare of citizens of the world. Raw international law may have substantial defects, but perhaps no current alternative better takes into account the concerns of the citizens of the whole world.

Any defense of raw international law on this basis makes sense only if international law is generally better for foreigners than American law. This Part suggests that such an assumption is unwarranted. On average, U.S. law is likely to be better than international law even for foreigners. This conclusion is easiest to defend in situations where U.S. law has no spillover effects onto other nations. But there are two major categories of situations where U.S. law does have potential spillover effects: the provision of international public goods and cases where U.S. actions might either create private goods for foreign citizens or inflict private harms. While U.S. law may be flawed, raw international law is, overall, likely to be even worse in all three situations.

A. Situations in Which U.S. Law Has No Direct Spillovers

Many U.S. laws have no direct effects on other nations. For instance, our capital punishment laws generally apply only to our own citizens and those foreign nationals who subject themselves to our jurisdiction.²⁶⁰ So do many other laws providing or denying what some international law advocates view as human rights. In such cases, it might seem obvious that international law could thus play no role in limiting the autonomy of the United States to choose what law it applies to its own citizens.

But such an assumption would be wrong. International norms that have emerged from international human rights agreements address numerous matters that have no direct spillovers. The International Convention on the Rights of the Child,²⁶¹ the International Covenant on Economic, Social, and Cultural Rights,²⁶² and the International Covenant on Civil and Political Rights²⁶³ are but a few of the examples. As we have discussed above, these conventions do

260. For a discussion of European efforts to use raw international law to prevent American domestic application of the death penalty, see Nora V. Demleitner, *The Death Penalty in the United States: Following the European Lead?*, 81 OR. L. REV. 131 (2002).

261. See, e.g., Convention on the Rights of the Child arts. 26-30, Nov. 20, 1989, 1577 U.N.T.S. 3 (mandating that children receive various governmental welfare and education benefits).

262. See International Covenant on Economic, Social, and Cultural Rights arts. 6-7, *opened for signature* Dec. 16, 1966, S. EXEC. DOC. D, 95-2 (1978), 993 U.N.T.S. 3 (mandating state recognition of a "right to work" and rights to welfare benefits).

263. See *supra* discussion of the ICCPR at notes 198-207 and accompanying text.

not emerge from a process that offers any evidence of quality sufficient to trump U.S. laws. Here we focus on the potential harm to foreigners if the United States follows such raw international law rather than its own laws.

There are several advantages to granting the United States autonomy to pursue its distinctive norms in matters that have no direct spillovers. First, it offers at least some foreigners an alternative to international norms. While we do not have completely open borders, we do permit substantial immigration.²⁶⁴ One advantage of having distinctive norms is that the United States can attract others who would like to live under them, thus improving their lives. Indeed, this is one of the most important reasons why the United States has been a favored destination of immigrants and refugees for some 200 years.²⁶⁵ From 1941 to 2000 alone, the United States admitted 27.6 million legal immigrants and 3.5 million refugees²⁶⁶ as well as millions of illegal immigrants, temporary workers, and foreign students. Many of these immigrants and refugees came to the United States in large part because of economic opportunities and political and religious freedoms created by American policies that differed greatly from those of their home countries.²⁶⁷ Once again, the U.S. policy of permitting large-scale immigration, opposed by many conservatives, strengthens the case against allowing international law to supersede U.S. law, a position most anti-immigration conservatives tend to support.

The second benefit to foreigners of distinctive U.S. legal norms is information. The costs and benefits of our norms will be visible for all to see.²⁶⁸ Particularly in an era of increased empirical social science testing, over time we will be able to analyze and identify the effects of differences in norms between the United States and other nations.²⁶⁹ Such diversity benefits foreigners as foreign nations can decide to adopt our good norms and avoid our bad ones.

The only noteworthy counterargument is the claim that U.S. norms will have more harmful effects than those of raw international law, yet other will nations still copy them. But both parts of this proposition seem doubtful. First, U.S. law emerges from a democratic process that creates a likelihood that it will cause less harm than rules that emerge from the nondemocratic processes

264. See discussion of the benefits of exit rights in Part II.F *infra*.

265. See generally DANIELS, *supra* note 196.

266. ROGER DANIELS, *GUARDING THE GOLDEN DOOR: AMERICAN IMMIGRATION POLICY AND IMMIGRANTS SINCE 1882*, at 191, 235 (2004).

267. See generally *id.* chs. 8-10 (discussing varied motivations of post-World War II immigrant groups).

268. For a discussion of how the flow of information among nations may improve policy, see Wolfgang Kerber & Oliver Budzinski, *Competition of Competition Laws: Mission Impossible?*, in *COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY* 31 (Richard A. Epstein & Michael S. Greve eds., 2004).

269. On the increasing opportunities for empirical testing of policies that differ from jurisdiction to jurisdiction, see John O. McGinnis, *Age of the Empirical*, *POL'Y REV.*, June-July 2006, at 47.

that create international law. Second, other democratic nations can use their own political processes to screen out American norms that might cause harm if copied.

Of course, many nations remain authoritarian.²⁷⁰ But our norms are not likely to have much influence on their choice of norms. Authoritarian states are likely to select norms that serve the interests of those in power, regardless of the norms we adopt. It is true that sometimes they might cite our norms as cover for their decisions. But the crucial word here is “cover.” They would have adopted the same rules, anyway. The cover may bamboozle some and thus be counted a cost. But this would seem marginal compared to the harm of allowing raw international law to trump domestic law.

Finally, we emphasize that U.S. domestic law is likely to be superior to raw international law even if there is a tendency for foreign governments to copy harmful American legal norms. In such a scenario, foreign states may indeed copy harmful U.S. domestic law. But they are at least equally likely to copy harmful international law norms that penetrate into the U.S. domestic legal system. If foreigners have a tendency to copy U.S. law, that tendency should be just as great in cases where the United States follows international law in preference to domestic law as when it chooses not to. For the reasons we outline in Parts II and III, the rules of raw international law are likely to be, on average, less beneficial than those of American law. Thus, if foreigners, for whatever reason, tend to copy American legal rules even in situations where those norms are dysfunctional, the harm caused by this perverse form of imitation is likely to be even greater if the United States allows raw international law to override domestic law than if it does not. Given the relatively low quality of raw international law, a U.S. legal system that allows it to override domestic law will be a worse model for imitative foreigners than one that does not.

B. *Norms with Spillover Effects*

The more difficult case is that of policies with spillover effects. For example, the United States may adopt a rule about military force and that military force may affect foreign citizens if, for example, the US chooses to invade their country. If one is concerned about global welfare, we may legitimately worry that the United States may at times adopt norms that favor its own citizens at the expense of the rest of the world. But international law will be better for foreigners only if, on average, it is likely to have more positive effects on them than U.S. law.

These benefits of international law are open to doubt because of the defects we have noted in the international law development process. In contrast, U.S. law is, on average, likely to have better consequences for foreign citizens.

270. See *supra* note 142 and accompanying text.

1. *Providing international public goods*

One situation where U.S. law may at first glance appear inferior to raw international law is the provision of global public goods, such as providing security against threats that would lead to global instability and depression and dealing with some types of global environmental problems.²⁷¹ In this section we show that U.S. law is likely to be superior at providing such goods.

Public goods are nonrivalrous and nonexcludable.²⁷² Once a “nonrivalrous” good is produced, consumption by one person or state does not prevent simultaneous consumption by others. The “nonexcludability” condition means that it is impossible to exclude those individuals or nations who failed to contribute to the production of the good from benefiting from it.²⁷³ A classic example is the reduction of air pollution in a city.²⁷⁴ The consumption of clean air by one citizen does not preclude other city residents from also benefiting from it. And, once the air has been cleaned up, even those citizens who did not bear any of the costs of pollution-reduction efforts can still benefit from the improvement in air quality.

Left to themselves, individual nations, including the United States, could choose to “free ride” on the production of global public goods, thereby making it likely that they will be underproduced. In theory, customary international law could be used to solve this problem by requiring each state, especially large and powerful ones such as the United States, to contribute to the production of public goods.

a. International legal norms as public goods

It is important to understand that “public goods” are not limited to benefits produced by monetary expenditures. The creation and enforcement of beneficial norms of international law can also be a public good, so long as “consumption” of the norm’s benefits is nonrivalrous and nations that fail to contribute to the norm’s enforcement still benefit from it. Similarly, free riding

271. For a broad survey of international public goods problems, see generally TODD SANDLER, *GLOBAL COLLECTIVE ACTION* (2004).

272. For a helpful short explanation of these two conditions, see MUELLER, *supra* note 99, at 10-11; see also RICHARD A. MUSGRAVE, *THE THEORY OF PUBLIC FINANCE: A STUDY IN PUBLIC ECONOMY* 9-12 (1959). For a good general discussion of public goods, see JAMES M. BUCHANAN, *THE DEMAND AND SUPPLY OF PUBLIC GOODS* (1968). The theory of public goods traces back to early work by Paul Samuelson. See Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 *REV. ECON. & STAT.* 387 (1954).

273. For an analysis emphasizing the importance of excludability to the provision of international public goods, see Peter Drahos, *The Regulation of Public Goods*, 7 *J. INT’L ECON. L.* 321, 322-28 (2004).

274. See Todd Sandler, *Global and Regional Public Goods: A Prognosis for Collective Action*, 19 *FISCAL STUD.* 221, 221-23 (1998) (analyzing the reduction of air pollution as a public good).

is not limited to a refusal to make a financial contribution, but might also involve failure to obey norms that promote international public goods.²⁷⁵ “The definition of international norms and their enforcement are public goods whose production requires complex collective action among agents with diverse interests and capabilities.”²⁷⁶

For instance, norms about the use of force to control “rogue states” and major terrorist groups can be public goods. If a rogue state or terrorist group with WMDs threatens a wide range of different countries, the elimination of the threat is a public good for all the nations involved. The good is nonrivalrous because once the threat is eliminated, all the nations that were endangered by it can enjoy their increased security simultaneously. It is also nonexclusive because the benefits of eliminating the threat cannot be limited to those states that aided in its removal.²⁷⁷ This example addresses the removal of a specific rogue state or terrorist group. But the same analysis applies to the creation of general norms about their control and elimination. The establishment and enforcement of a general norm on the elimination of terrorist groups is also a nonexclusive and nonrivalrous public good.²⁷⁸ The fact that one state benefits from the norm does not inhibit others from doing so, making it a nonrivalrous good. Similarly, states that do not aid in the creation or enforcement of the norm can still benefit from it, making it nonexclusive.²⁷⁹

Not all international legal rules are necessarily public goods. For example, a bilateral trade agreement between two nations is not a public good because other states can be excluded from participating and thereby denied a share of its benefits. But it is important to recognize that many important international norms do have a crucial public good component. As discussed above, international norms on the use of force to preempt the use of WMDs and the production of other international public goods are among the subjects of customary international law.

Unfortunately, raw international law is a poor vehicle for the provision of global public goods. By contrast, the United States often has greater incentive

275. For a general analysis of the production of efficient social norms as a collective action problem, see Elinor Ostrom, *Collective Action and the Evolution of Social Norms*, J. ECON. PERSP., Summer 2000, at 137.

276. Eyal Benvenisti & Ariel Porat, *Implementing the Law by Impartial Agents: An Exercise in Tort Law and International Law*, 6 THEORETICAL INQUIRIES L. 1, 21 (2005).

277. For a more detailed application of public goods theory to the control of rogue states, see SANDLER, *supra* note 271, at 144-61.

278. For purposes of simplification, we abstract from the possibility that some governments actually benefit from the activities of certain terrorist groups. In such a situation, elimination of the terrorist groups in question would be a private bad for those states that support the terrorists, but still a public good for states threatened by it (assuming that there is more than one of them).

279. *Cf.* John C. Yoo, *Force Rules: UN Reform and Intervention*, 6 CHI. J. INT'L L. 641, 655-59 (2006) (arguing that military intervention to eliminate rogue states, terrorist groups, and “human rights disasters” is an “international public good” that is likely to be “undersupplied”).

to contribute to such provision than defenders of raw international law are willing to admit.

b. Raw international law and the production of international public goods

Raw international law is unlikely to be effective in producing undersupplied international public goods. Traditional customary international law is the product of a consensus of state practice.²⁸⁰ Therefore, even a relatively small number of “free riding” or indifferent states can prevent the establishment of a public goods-producing legal norm.²⁸¹ If a public good is underproduced as a result of free riding by individual nations, the problem is highly unlikely to be resolved through traditional customary international law, since the free-riding states could continue their errant ways simply by refusing to follow the nascent norm, thereby preventing its establishment.

The fact that the majority of the world’s governments are still either dictatorships or only partly democratic further exacerbates the likelihood that at least some of them will choose to ignore or even frustrate the production of global public goods.²⁸² These governments will often refuse to contribute resources to the production of goods that may benefit their people, but have little or no value to the unaccountable ruling political elite. Norms about the use of force in the context of WMDs and other threats to global security may again be a case in point. Obviously dictators would want to prevent the development of any norms that sanction preemptive strikes against them and that might foster their overthrow, even if such norms were in the interest of the majority of the people of the world.

Modern customary international law is also unlikely to contribute to the production of public goods. Because it can be enacted by a small subset of the world’s states or even by international bureaucrats and publicists, it may avoid the possibility that free riding will block the formation of a public goods-producing international norm. However, the very fact that modern customary international law is produced by a small and undemocratic elite makes it unlikely that its norms will focus on producing global public goods. Since the benefits of the new public good will usually flow overwhelmingly to the general population rather than to the elites who produce modern customary international law, it seems unlikely that the latter will devote themselves to developing norms that increase public goods production.²⁸³ This is especially

280. See *supra* Part II.B-D.

281. Cf. Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1132 (1999) (making a similar point).

282. According to Freedom House’s annual survey of political freedom around the world, 103 of the world’s 193 governments are either “unfree” or only “partly free.” See *supra* note 142 and accompanying text.

283. But cf. Eric A. Posner, *International Law: A Welfarist Approach*, 73 U. CHI. L.

true if the necessary time, resources, and political capital can instead be devoted to the production of norms that provide greater benefits to the elites themselves, with less “leakage” to the general public.

Even if modern customary international law does sometimes contribute to the production of public goods, in cases where there is a strong coincidence between elite and mass interests, such instances must be weighed against the numerous situations where elites can use modern customary international law to generate public bads. For example, European international elites have sought to promote an international law norm against genetically modified crops in order to benefit protectionist lobbies in the European Union—despite the fact that an international norm of free trade in such crops is likely to provide vast benefits to poor consumers in the Third World as well as to many in more advanced nations.²⁸⁴ By so doing, they have actually impeded the production of an international public good, generating the “public bad” of increased protectionism.

The protection of human rights might be seen as an international public good that raw international law could potentially provide. In most cases, however, human rights protection is not an international public good because the violation of human rights in one country does not in and of itself harm the

REV. 487, 512-13, 539 (2006) (claiming that “dictatorships and democracies have roughly the same incentives to choose policies that create public goods”). Posner claims that dictatorial governments seek to “maximize revenue” subject to the constraint that they do not want to endanger their grip on power. For this reason, they will not undersupply public goods, but would instead tax them. *Id.* at 513. Posner’s argument implies that the nondemocratic elites who produce international customary law might be no less motivated to provide public goods than leaders of democratic states such as the United States. However, there are three reasons why the argument is problematic when applied to the field of international law. First, the elites who make international law have little ability to “tax” the citizens of states other than their own and therefore cannot easily appropriate a disproportionate share of any international public goods they help supply. Second (and this undercuts Posner’s point even with respect to domestic law), even if elites can effectively “tax” public goods, they might still be able to benefit even more from directly pursuing private goods that benefit themselves. Finally, the empirical evidence strongly suggests that the argument is wrong. Dictatorial regimes systematically underproduce most public goods as compared to democratic ones. *See generally* HALPERIN ET AL., *supra* note 95, at 25-64, 93-134 (providing extensive data showing that democracies systematically outperform dictatorships in providing public goods such as economic growth, famine prevention, public safety, and the prevention of terrorism).

284. Until 2004, Europe had a moratorium on genetically modified foods. *See EU Displays Split on Biotech Food*, INT’L HERALD TRIB., Mar. 10, 2006, at 12. Even when that ban was lifted, approval for such foods remained controversial and slow. *Id.* Europe based its ban on the precautionary principle, which many have argued is a principle of customary international law. For a discussion of the reliance on customary international law, see McGinnis, *supra* note 137, at 260-62. Europe first advanced this kind of argument in a WTO case about the use of beef hormones. It argued that the precautionary principle permitted it to ban beef hormones even in the absence of scientific evidence that these hormones were dangerous. The WTO appellate body rejected this argument. *See Appellate Body Report, EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R (Jan. 16, 1998).

citizens of others;²⁸⁵ thus, the protection of human rights is generally either a private good for those individuals whose rights are being violated or a national-level public good for the citizens of a particular state whose government is a human rights violator. If human rights protection is not a global public good, it cannot justify the overriding of U.S. law by international law. While the record of U.S. law in protecting human rights abroad is far from perfect, it is likely to be better than that of raw international law in cases where the two conflict—for the same reasons that U.S. law is generally likely to do more to provide private goods for other nations than raw international law.²⁸⁶

Even to the extent that human rights protection is an international public good, there is little reason to believe that customary international law will produce this good better than American law will. After all, dictatorial states that are major human rights violators have some influence over the content of raw international law and substantial influence over its enforcement. For example, the influence of authoritarian and totalitarian governments in the United Nations has largely prevented the U.N. Commission on Human Rights and its successor, the U.N. Human Rights Council, from even criticizing the world's most egregious human rights violators, much less taking effective action against them.²⁸⁷ Even human rights groups strongly committed to international law have criticized what Human Rights Watch calls the “domination” of the Council's deliberations by “states with poor human rights records.”²⁸⁸

It is important to recognize that the argument here is distinct from the traditional argument that customary international law cannot readily provide public goods because it has weak enforcement mechanisms.²⁸⁹ Even if states have strong incentives to obey customary international law despite the lack of centralized enforcement,²⁹⁰ our analysis suggests that this will not result in

285. Even a truly massive human rights violation in one country, such as the 1994 Rwandan genocide, was largely ignored by both foreign governments and U.N. agencies in large part because it had little effect on the interests of non-Rwandans. *See, e.g.*, SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* 329-90 (2002) (showing how the United States, Western European governments, and the United Nations all chose not to intervene to prevent the Rwandan genocide in large part for this reason).

286. *See infra* Part IV.B.2.

287. *See, e.g.*, Human Rights Watch, UN: Rights Council Disappoints Again (Oct. 6, 2006), <http://www.hrw.org/english/docs/2006/10/06/global14354.htm> (“States with poor human rights records dominated the [UN Human Rights] [C]ouncil’s deliberations”); *see also* JEAN-CLAUDE BUHRER, REPORTERS WITHOUT BORDERS, UN COMMISSION ON HUMAN RIGHTS LOSES ALL CREDIBILITY (2003), *available at* http://www.rsf.org/IMG/pdf/Report_UNU_gb.pdf (documenting how UNCHR member states that are themselves human rights violators have blocked condemnation of nearly all those governments that violate human rights the most).

288. *See* Human Rights Watch, *supra* note 287.

289. *See* SANDLER, *supra* note 271, at 87-90 (explaining why efforts at the provision of international public goods will often fail without centralized enforcement); Goldsmith & Posner, *supra* note 281, at 1132 (making a similar point).

290. For a game theoretical argument to this effect, see George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT’L L. 541 (2005).

adequate provision of international public goods because the *substance* of customary international law is unlikely to advance this end. At the very least, as discussed below, it is less likely than U.S. law to do so when the two conflict. This latter proposition is the only one necessary to sustain our argument.

c. American incentives to provide international public goods

In many situations, the United States has strong incentives to contribute to the provision of global public goods or even provide them unilaterally. Since the United States is by far the world's largest economy, producing some 20% of world GDP,²⁹¹ it will often have incentives to provide public goods that further economic growth and prosperity, even if many other nations choose to free ride. Because of the disproportionate benefits the United States is likely to receive, it will often be a "high demander" of such goods, wanting to "consume" more of them than other nations. As economist David Haddock has recently shown, high demanders often have incentives to produce public goods in situations where other beneficiaries choose not to contribute because the high demander knows that it is the only one willing to produce that part of the total that only it wants.²⁹² For example, if the United States would like to consume ten units of a global public good while the rest of the world would be satisfied with eight, the United States will have a strong incentive to produce units one through eight as well as nine and ten, since this is the only way that the last two units will ever be produced at all. By assumption, it will be impossible for the United States to free ride on the production of the last two units by other states, since the latter do not want them in the first place. Empirical evidence suggests that the United States has often acted to provide international public goods since first becoming the strongest power in the world after World War II, which may indicate that the United States is indeed often a "high demander."²⁹³

Even in cases where the United States is not the high demander of a global public good, it may still have incentives to contribute to its production in the absence of pressure from international law. As the "hegemon" of the international system, the United States will often have incentives to take the lead in providing public goods such as free trade, a stable reserve currency, and protection against WMD proliferation because American leaders know that

291. Figure computed from CENTRAL INTELLIGENCE AGENCY, *Rank Order-GDP (Purchasing Power Parity)*, in THE WORLD FACT BOOK, available at <https://www.cia.gov/cia/publications/factbook/rankorder/2001rank.html>. U.S. GDP is \$12.36 trillion, 20.3% of the world total of \$60.71 trillion. *Id.*

292. David Haddock, *Irrelevant Externality Angst* (May 2006) (unpublished manuscript, on file with authors); see also HARDIN, *supra* note 174, at 72-73, 135-36 (making a less detailed version of a similar argument).

293. See, e.g., MICHAEL MANDELBAUM, *THE CASE FOR GOLIATH: HOW AMERICA ACTS AS THE WORLD'S GOVERNMENT IN THE 21ST CENTURY* 7-9, 31-139 (2006) (documenting numerous international public goods provided primarily or exclusively by the United States).

these goods cannot be provided without U.S. participation.²⁹⁴ For instance, the optimal way to counter the worldwide threat of WMDs depends in large part on U.S. law regarding armed conflict, from rules that define the circumstances under which the President can use force to those that define the proper treatment of enemy combatants. Because the United States is an indispensable contributor to the production of most, if not all, global public goods, it will be less likely to neglect the production of appropriate norms in this area (i.e., to free ride) than other states, who can more readily expect that the actions will be taken to produce and enforce those norms even without their participation.²⁹⁵

A global hegemon, however, may not be necessary to produce international public goods, including norms. In many situations, such goods can be produced just as easily by a consortium of several powerful nations, known in economic theory as a “K group.”²⁹⁶ Each member of the K group knows that the public good in question cannot be produced without its participation. Therefore, all have an incentive to contribute and none is likely to free ride, since attempting to do so will only ensure that the good is not produced at all.²⁹⁷ Empirical evidence suggests that the international public goods are more likely to be provided in situations where provision is dependent on one or a small number of key states, and where there is a high level “nation-specific” benefits that accrue to those states.²⁹⁸

In the current international system, with the United States being by far the leading economic and military power, there are few if any global public goods for which the United States is not an essential member of any K group that could potentially produce them.²⁹⁹ Therefore, there is no systematic reason to expect that the United States will shirk on the production of appropriate norms for global order, even in the absence of pressure from international customary law.

294. For arguments that a strong hegemon is needed to provide global public goods for this reason, see CHARLES P. KINDLEBERGER, *THE WORLD IN DEPRESSION, 1929-1939* (1973) (arguing that the lack of a global economic hegemon led to the Great Depression).

295. The argument developed here is very similar to Mancur Olson and Richard Zeckhauser's classic argument that the most powerful member of a military alliance is likely to make disproportionate contributions to the collective self-defense of the alliance members. See Mancur Olson, Jr. & Richard Zeckhauser, *An Economic Theory of Alliances*, 48 *REV. ECON & STAT.* 266 (1966).

296. See Duncan Snidal, *The Limits of Hegemonic Stability Theory*, 39 *INT'L ORG.* 579 (1985) (arguing that a “K group” of powerful nations should be able to produce global public goods no less effectively than a single hegemon).

297. The concept of a K group is similar to but distinct from Mancur Olson's notion of a “privileged group,” in which each member has the resources to produce the public good in question, but it is not necessarily the case that any one member's refusal to contribute will ensure that the good will not be produced. See OLSON, *supra* note 174, at 48-50.

298. See SANDLER, *supra* note 271, at 35.

299. See *id.* (emphasizing the key role of the United States in producing international public goods).

The above analysis assumes that we are dealing with an agreed-upon public good that all nations—or at least all members of a potential K group—would like to consume. In some cases, of course, there will be disagreement over whether or not a given policy change really will produce a public good or not. For example, many European governments claim that implementation of the Kyoto Protocol is necessary to produce the important public good of preventing catastrophic global warming, while the United States, India, and China contend that the costs of adhering to the Protocol outweigh any potential benefits. Disagreements over public goods can arise both because nations often have heterogeneous preferences about ends³⁰⁰ and because there can be disagreements about the efficacy of alternative means to achieving ends all agree to be desirable. The latter may be the explanation for the disagreement about the desirability of the Kyoto Protocol.

When such disagreements occur, the United States may or may not endorse the “correct” set of norms in any given case. If the U.S. assessment of the situation is wrong, then underproduction of a public good may occur. However, there is no systematic reason to believe that the U.S. assessment is more likely to be in error than that arising from raw international law. Given the large benefits that the United States is likely to reap from the production of most genuine global public goods as a result of the relative size of the U.S. economy, the U.S. government has stronger incentives to identify and properly evaluate potential international norms than do leaders of smaller states, officials of international agencies, and international law publicists. Indeed, accurate assessment of international public goods and bads is itself a global public good that the United States has more incentive to contribute to than other nations or international bureaucracies.

2. Providing private goods for citizens of other nations

In addition to having a strong incentive to contribute to the production of international public goods, the United States also often has an interest in providing private goods for foreign citizens. As a result of its role as the biggest player in the world economy, the United States often has both the interest and the means to extend the peace and prosperity of the world.³⁰¹ This part of our argument is the most tentative one, since any nation’s incentive to produce private benefits for foreigners is necessarily smaller than its incentives to produce benefits for its own citizens or international public goods that benefit many nations. By no means are we arguing that the United States will always take foreign private goods into account in the development of its domestic legal

300. Posner, *supra* note 283, at 502-04 (emphasizing the importance of heterogeneous preferences to theories of international law).

301. This is the official policy of the United States. See Bureau of Democracy, Human Rights, & Labor, U.S. Dep’t of State, Democracy, <http://www.state.gov/g/drl/democ/> (discussing the American interest in promoting prosperity and democracy in other nations).

rules. Nonetheless, we suggest several reasons to believe that U.S. law is likely to be superior to raw international law in this field.

First, the United States usually gains when other nations are prosperous. Its exporters can sell goods to them, and its importers can obtain useful products and production inputs.³⁰² As a result, it has an interest in keeping open the avenues of trade that make other nations prosperous and in fostering sound commercial and trade practices around the world.³⁰³ By contrast, it is far from clear that the elites who generate raw international law have as much interest in promoting international trade.³⁰⁴

The United States also has an interest in implanting democratic governments and the rule of law overseas. Democratic government is more likely to be peaceable government. Democracies both generally initiate fewer wars than dictatorships³⁰⁵ and nearly always refrain from attacking each other.³⁰⁶ Moreover, governments that respect the rule of law are more likely to respect the property rights that American citizens will acquire by investing some of the vast wealth of the United States abroad.³⁰⁷ Although the United States does not always promote democracy and the rule of law and will sometimes subordinate this objective to other interests, it surely has a much stronger interest in expanding the domain of democracy than do authoritarian states, international legal elites (many of whom represent nondemocratic

302. From the beginning of the postwar period, the United States was the leader in establishing the GATT and other institutions that helped sustain economic growth throughout the Cold War. See DANIEL C. ESTY, *GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE* 243-48 (1994).

303. It is frequently acknowledged that the United States is the most important actor in the international trade system. See, e.g., Yong K. Kim, *The Beginnings of the Rule of Law in the International Trade System Despite U.S. Constitutional Constraints*, 17 MICH. J. INT'L L. 967, 969 (1996). The United States was largely responsible for creating the more powerful dispute resolution system that is at the heart of the modern WTO. See William R. Sprance, *The World Trade Organization and United States' Sovereignty: The Political and Procedural Realities of the System*, 13 AM. U. INT'L L. REV. 1225, 1264 (1998).

304. For discussion of the left-of-center beliefs of American publicists, see *supra* note 129 and accompanying text.

305. See David A. Lake, *Powerful Pacifists: Democratic States and War*, 86 AM. POL. SCI. REV. 24 (1992).

306. The "democratic peace"—the finding that democracies rarely or never make war on each other—is one of the best-established findings of social science. See, e.g., MICHAEL W. DOYLE, *WAYS OF WAR AND PEACE: REALISM, LIBERALISM, AND SOCIALISM* (1997); JAMES LEE RAY, *DEMOCRACY AND INTERNATIONAL CONFLICT: AN EVALUATION OF THE DEMOCRATIC PEACE PROPOSITION* (1995); BRUCE RUSSETT, *GRASPING THE DEMOCRATIC PEACE* (1993). *But see* JOANNE GOWA, *BALLOTS AND BULLETS: THE ELUSIVE DEMOCRATIC PEACE* (1999) (arguing that the democratic peace theory is flawed). For a strong rebuttal to "realist" objections to the democratic peace, see James Lee Ray, *Does Democracy Cause Peace?*, 1 ANN. REV. POL. SCI. 27 (1998).

307. See Dinah Shelton, *Protecting Human Rights in a Globalized World*, 25 B.C. INT'L & COMP. L. REV. 273, 286 (2002) (stating that the rule of law is a long-term prerequisite to trade and investment).

governments), and international institutions such as the United Nations (where nondemocratic governments have great influence).³⁰⁸

All of these private goods are in part the product of law. International trade depends on the rules the United States adopts to open its borders to goods from other nations. The spreading of democracy and rule of law institutions depends to some degree on American decisions about aid and other foreign policy decisions and the flexibility to carry them out. Better norms in this area mean a greater likelihood of peace and prosperity.

In some cases, of course, the U.S. interest in furthering prosperity and the rule of law abroad may be overwhelmed by concern about distributional consequences. For instance, it may be the case that the United States would like, other things being equal, to prevent pollution from harming other nations, since the prosperity of other nations for which pollution is detrimental ultimately redounds to the benefit of the United States. But other things are not equal if the costs of pollution control on the United States are greater than these external benefits. And certainly sometimes that will be the case.

But the question here is whether U.S. law is likely to be better than raw international law on average. That can be the case even if in certain instances U.S. law imposes more costs than benefits. And even in those instances, international law may well be even worse than suboptimal American rules because the lack of democratic participation and transparency allows special interests to have greater leverage on the shape of international norms. Thus, because of its incentive structure, one may well think that U.S. law is to be preferred to international law for private goods even from the perspective of foreigners.

One other factor peculiar to the United States may make its laws that have direct effects on other nations even better than those of an ordinary stable hegemon: The United States is a nation of immigrants.³⁰⁹ Our citizens come from nations around the globe and the United States continues to accept large numbers of immigrants every year. Because of this immigrant influence, many Americans are likely to care about the welfare of other nations besides their own.³¹⁰ Many still have relatives in their home countries. Even if they do not have such relatives abroad, they sometimes identify with the nation of origin many generations after their forbearers left and try to shape policies in its interest.³¹¹ Such “ethnic lobbies will not always have beneficial consequences.

308. For discussion of this influence, see *supra* note 140 and accompanying text.

309. See *supra* notes 265-66 and accompanying text.

310. See Yossi Shain, *Multicultural Foreign Policy*, FOREIGN POL'Y, Fall 1995, at 69, 70 (explaining that “U.S. diasporas are Americans who maintain some affinity—be it cultural, religious, racial, or national—with their ancestral lands or their dispersed kinfolk elsewhere” and that “U.S. diasporas have also devoted their efforts to the well-being of members of their dispersed kinfolk in other countries”).

311. *Id.*

Nonetheless, the ethnic quilt of America is one of the qualities that makes its laws more likely to be good for the rest of the world.

None of these arguments suggests that American law is optimal for meeting the needs of foreigners, only that is likely to be better than raw international law as the latter is currently generated. Moreover, our arguments are based on the current processes for generating raw international law. It is conceivable that those processes will be improved in the future. If such improvements go far enough, they could result in the creation of a body of raw international law that is generally superior to American domestic law.

CONCLUSION

Both American law and raw international law are imperfect. But there are strong reasons to believe that the latter is systematically more flawed than the former. The political processes that produce U.S. law have stronger democratic controls and are less vulnerable to interest group capture than those that produce what we have called “raw” international law. This comparison provides a strong argument that Americans will be better off under a legal regime that rejects the use of raw international law to override domestic law. Only those international obligations that have been validated by domestic political processes should be part of our law because they alone can avoid the democracy deficit of raw international law.

Even from the perspective of foreign citizens, American law is likely to be more beneficial than international law when the two conflict. This proposition is most clear in cases where American law has few or no external effects. In such situations, it is overwhelmingly likely that U.S. law will produce better results overall than adherence to raw international law. But even in cases where the interests of non-Americans are directly at stake, raw international law is likely to be systematically less benign than U.S. law. The United States has a strong incentive to structure its laws in ways that facilitate the production of international public goods, often even in ways that help provide private goods to foreigners.

The arguments advanced in this Article suggest a research agenda for the future. Future research should consider the degree to which our general analysis holds up with respect to particular issue areas. There is also room for more systematic research about the incentives and interests of the political elites who “make” international law. Finally, our argument implies that the domestic legal rules of dictatorships do not have the same advantages over raw international law as those of democracies. The same may be true of transitional democracies that retain substantial elements of the previous government’s authoritarian legal rules. Future research may be able to identify issue areas where the domestic law of such states is systematically inferior to international law and thereby show that the former should be compelled to give way to the latter.

For the moment, however, we believe that that the burden of proof has shifted to those who advocate displacement of American law by raw international law as a matter of legal doctrine. The political branches should be able to incorporate international law into domestic law through the ordinary legislative processes that ensure democratic control over lawmaking. But raw international law should not be allowed to become part of our law.

