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SHOULD INTERNATIONAL LAW BE PART OF OUR LAW?



**John O. McGinnis
Ilya Somin**

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JOHN O. MCGINNIS AND ILYA SOMIN

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John O. McGinnis* and Ilya Somin**

INTRODUCTION

As globalization runs its course, the domestic world is becoming full of international law. One of the sources of international law is largely unimpeachable: our own political actors, Congress and the President through statutes or the Senate and the President through treaties, 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 begun to use this interpretative strategy. Such constructions can invalidate our domestic laws.¹ Second, advocates of customary international law argue for its incorporation into domestic law directly 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 our own domestic political process. Raw international law is distinguished from “domesticated international law” which our political branches have expressly made part of our law 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

* Professor of Law,, Northwestern University School of Law. The authors received helpful comments on this article at workshops at the University of Chicago and Northwestern University and from Jide Nzelibe and Mark Movsesian. They are grateful for the research assistance of Andrew Grossman, John Lovelace, Christopher Lawnicki, and Rita Yoon.

** Assistant Professor of Law, George Mason University School of Law.

¹ See Ruth Bader Ginsburg, Keynote Address at the American Society of International Law Annual Meeting: A Decent Respect to the Opinions of [Human]kind: The Value of a Comparative Perspective in Constitutional Adjudication (April 1, 2005) *available at* [http:// www.ail.org/events/AMO/ginsburg050401.html](http://www.ail.org/events/AMO/ginsburg050401.html).

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 OF THE UNITED STATES § 102(2) (1987). Scholars have many different theories of the extent to which customary international law is part of our law.. See *infra* notes xx and accompanying text for discussions of these variations.

³ We discuss the these arguments *infra* at notes xx and accompanying text.

⁴ Articles and books by leading academics that defend the presence of international law in United States law include: 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). ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2005) (suggesting that interlocking networks of judges, regulators and NGOs help create norms that transcend national boundaries). There are fewer works by academics who deplore this trend, but the most notable are JACK GOLDSMITH & ERIC POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005) (arguing that customary international law has far less effect than advocates claim); ROBERT BORK,

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. It also shows that the processes that generate international law do not make up for the democracy deficit through other procedural virtues.⁶

Our reason for focusing on the democracy deficit is straightforward: as we discuss at greater length below, democracy is the political process agreed to be 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 attraction relative to domestic law. If international law suffers from a democracy deficit 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. We argue that not only does the democracy deficit undermine the utility of raw international law for Americans,⁹ the deficit also undermines it for foreigners. American law, in contrast, is not only presumptively beneficial for Americans because of its democratic provenance, but in many areas it is also likely to aid 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

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).

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 EU).

⁶ Other have noted the democracy deficit of international law, see Philip Alston, *Promoting Accountability in Members of the United Nations*, 15 J. TRANSNAT'L L. & POL'Y 49, 52 (2005). But this Article is the first to comprehensively describe the democracy deficit and shows its relevance to the use of international law across the range of doctrines in which international law may have force in American jurisprudence. 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 put forward some arguments about the democracy deficit of international law in a centennial essay devoted to many topics relating to the use of foreign and international law in constitutional interpretation, see John O. McGinnis, *Foreign to the Constitution*, 100 N.W.L. REV. 303 (2006), but the arguments were contained in a few pages and do not approach the comprehensive treatment here.

⁷ We discuss the reasons for this view at notes xx and accompanying text.

⁸ We consider another important standard—efficiency—by which norms are judged below 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 welfare of its own citizens. Most famously, Thomas Hobbes argued that a regime interest is in the welfare of its own citizens, not foreigners. See generally THOMAS HOBBS, *LEVIATHAN* (1660). John Rawls' classic work *A Theory of Justice*, also tests the legitimacy of social arrangements by considering their effects within a particular society. See JOHN RAWLS, *A THEORY OF JUSTICE* 8 (1971).

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* is likely to make the question of the status of raw international in domestic jurisprudence even more salient.¹⁰ In *Hamdan*, the Court did rely 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 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 reliance on international law endorsed by the political branches is unlikely to resolve the issues relating to the War on Terror that are likely to arise after *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 suspects¹² and interrogations of detainees.¹³ 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,¹⁴ the death penalty,¹⁵ and labor unions,¹⁶ 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 never 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.¹⁷ 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 strict dualism is peculiarly suitable for the legal regime of a modern democratic superpower.

¹⁰ *Hamdan v. Rumsfeld*, 126 S.Ct. 122 (2006).

¹¹ *Id.* at 2794 (“compliance with the law of war is the condition under 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 Ragava & Michael S. Mireles, Jr., *The Status of Detainees from the Iraq and Afghanistan Conflicts*, 2005 UTAH L. REV. 619 (2005) (arguing that Bush administration’s treatment of enemy combatants violated customary international law)

¹⁴ 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 US “failure to prohibit advocacy of national racial or religious hatred is in violation of . . . customary international law”).

¹⁵ Harold Hongju Koh, *Paying “Decent Respect” to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085, 1086 (2004) (arguing that “the United States’ administration of the death penalty and international human rights law are on a collision course”).

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

¹⁷ See, e.g., George Sylz, *International Law In National Courts*, 28 N.Y.U. J. INTL L. 65, 57 (1996) (“dualism regards international law and the law of states as wholly separate legal systems”).

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 supporters of the Bush Administration who claim that the president should have nearly unlimited power to interpret or ignore international law as he sees fit.¹⁸ To the extent that international law is incorporated into domestic law through treaty ratification or incorporation into 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 obviates 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 appears to be a solution to the growing coordination problems caused by global spillover effects. Second, with the demise of totalitarianism, the belief that humans 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 world-wide trend by which elites are trying to develop legal mechanisms to restrain democracy. These powerful impetuses for raw international law are likely to be enduring, 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 over the domestic transom 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 given only interpretative force, international law may exercise effective power within domestic law, thereby limiting the President and requiring Congress to engage in clear statements to avoid its strictures. We note that in all these areas, doctrinal disputes have proved intractable to textual or historical resolution, making a fresh pragmatic approach all the more useful.¹⁹

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 peace of Westphalia, international law has been constructed from the actions of nation-states many of which are far from democratic. This deficit is more than a theoretical problem because many of the states that played key roles in the creation of modern international law were totalitarian regimes.

¹⁸ 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).

¹⁹ 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, *The Nuremberg Legacy: An Unfulfilled Promise*, 63 S. CAL. L. REV. 833, 878 (1990). Others disagree. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 857 (1997) (arguing that the Framers’ endorsement of international law as “general law” is not the equivalent of granting international law the status of federal common law that can displace the actions of state governments).

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. International law with global application in the long run 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.²⁰ Part II ends by showing that the processes generating raw international law lack advantages that in other domestic legal structures, like custom or the common law, might 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 in using 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 world as a whole, even if it does not serve the parochial interests of Americans. First, we note that this claim still does not justify its use in the many cases where US domestic law does not create significant externalities. Defenders of raw international law have claimed that it should be used to 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 United States law it displaces. US 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 the legal norms that facilitate such goods. At the very least, it has better incentives 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.

²⁰ On the role of exit rights in ensuring democratic accountability, see Ilya Somin, Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty*, 89 IOWA L. REV. 1287, 1344-50 (2004); cf. ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970) (laying out general theory of how exit and voice are alternative mechanisms of imposing accountability on government).

I. THE RISE AND COMPOSITION OF RAW INTERNATIONAL LAW

Here, we briefly discuss the reasons for the rise of raw international law in our domestic law as well as some of the primary doctrinal components of raw international law. The salience and depth of these reasons shows 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, perhaps more importantly, the increasing advocacy of the use of raw international law are complex, but three are worth discussing here. First, globalization is creating a smaller world in that more actions of individuals in one nation may be more 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 struggle for power within society. 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 one state affected other states, so it can be argued that an international regime need 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.²¹ Local government addresses matters that affect only those in its locality.²² State governments address matters that affect those in the state and the federal government addresses national matters. 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 the nations' borders.²³

²¹ See Henry N. Butler & Jonathan R. Macey, *Externalities and the Matching Principle: The Case for Reallocation Environmental Regulatory Authority*, 14 YALE L. & POL'Y REV. 23 (1996) (describing matching principle as one in which the size of the government jurisdiction is proportioned to the extent of the spillovers it is designed to regulate); Mancur Olson, *The Principle of Fiscal Equivalence*, 59 AM. ECON. REV. 479 (1969) (same); Gordon Tullock, *Federalism: Problems of Scale*, 6 PUB. CHOICE 19 (1969) (same)

²² Butler and Macey, *supra* note x, at 24.

²³ See Eric A. Posner & Alan O. Sykes, *Optimal War and Use Ad Bello*, 93 GEO. L. J. 993, 1013 (2005) ("The conventional justification for international law is the existence of important externalities when decisions are made unilaterally.").

Thus, international law may be called upon to regulate these modern-day activities which cause more transnational effects of which a purely national regime would not have incentives to take account..²⁴ Pollution serves as a classic example. If man's 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.²⁵

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.²⁶ For instance, the use of international law to attack the application of the death penalty in the United States addresses an issue that has few spillover international spillover effects. The United States imposes the death penalty on crimes committed within its jurisdiction. Accordingly, the United States' 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 US soil is sentenced to death as a result.²⁷

In addition, the externality model may not serve as a complete explanation for the rise of raw international law because the expanding the scope of international regulation itself imposes political transaction costs. For instance, decisionmaking costs increase as the size of the polity is expanded.²⁸ 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.²⁹ Only an international law that was sensitive to these costs would be justified through its reduction of interstate externalities.

2. Universalism

The rise of universalism may also help explain the rise of raw international law.³⁰ If human rights are universal, all humans wherever situated on the globe deserve the benefit of

²⁴ See Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignities*, 35 VA. J. INT'L L. 121, 122 (1994) (arguing that pervasive international effects have given way to the need for an international regime).

²⁵ See Howard F. Chang, *An Economic Analysis of Trade Values to Protect the Environment*, 83 GEO. L. J. 2131, 2146 (1995) (noting that no single nation has incentives to address global warming).

²⁶ See, e.g., Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217, 217 (2000) ("International human 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.").

²⁷ 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. 512, 583-588 (2000).

²⁸ See Einer Richard Elhauge, *The Scope of the Antitrust Process*, 104 HARV. L. REV. 668, 731, (1995) ("Because 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").

²⁹ See *supra* infra notes xx and accompanying text.

³⁰ JURGEN 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).

them. Much of Western liberalism has this universal element. Rights are self-evident truths and these truths by their very nature can know no national boundaries.³¹ This philosophical impetus to use international law as a vehicle for imposing human universals has no doubt gained strength from the global media age. We are forced more than ever to see others in far away places on a daily basis. Their common humanity is much more visible to us than before.³²

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 who are enthusiastic about the expansion of international law also are also concerned to avoid imposition of Western values and to protect cultural diversity.³³ Yet most universal standards are derivative of the Western tradition,³⁴ and practices inconsistent with those standards are crucial elements of many non-Western cultures. 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 outcomes of the domestic political process. The 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 have substantial influence.³⁵ Whatever the merits of Hirschl's theory for domestic judicial review, we contend 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 the ground they have lost³⁶

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

³¹ See Coustas Douzinas, *The End(s) of Human Rights*, 26 MELBOURNE UNIV. L. REV. 445, 451 (2002) ("Human rights are the most common form of universal human morality.").

³² See Andras Sajó, *Socioeconomic Rights and the International Order*, 35 N.Y.U. INT'L L. & POL. 221, 254 (2002) (noting that visible suffering creates universal claims).

³³ See Michael J. Glennon, *International Law under Fire: Self-determination and Cultural Diversity*, 27 FLETCHER F. WORLD AFF. 75 (Fall 2003) (discussing the tension between universalism, international law, and claims of cultural diversity).

³⁴ See generally UNIVERSAL HUMAN RIGHTS? (Robert Patman ed., 2000) (criticizing the human rights community for emphasizing Western values at the expense of alternatives).

³⁵ See generally RAN HIRSCHL, JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004).

³⁶ See Donald Kochan, *The Political Economy of the Production of Customary International Law: The Role of NGOs and United States Courts*, 22 BERKELEY J. INT'L L. 240 (2004).

interpreting the Constitution. Second, customary international law can generate norms that will bind actors in our domestic world. What actors it should bind and to what degree is, as we shall see, a matter about which there is much disagreement. Finally, international law can be used as a rule of construction for construing statutes.

Here we show that in each of these doctrinal areas, the question of the quality of the processes for generating raw international law and therefore its relative democratic deficit is central to determining the appropriate scope of the doctrines discussed. We also show briefly that doctrine in these areas is not well settled by precedent, historical practice, or the consensus of scholars and thus would particularly benefit from the 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 in two court decisions that invalidated domestic law.³⁷ In *Atkins v. Virginia*, the Court applied the views expressed in the laws of “the world community” as a factor (albeit lodged in a footnote) in its decision interpreting the Eighth Amendment to prevent the execution of those with lesser mental abilities.³⁸ More recently, in *Roper v. Simmons*, the Court prominently cited international law itself as “confirmation” of its decision to ban the execution of juveniles.³⁹

In *Roper*, the Court cited the Rights of the Child Convention as evidence of international law on the execution of juveniles.⁴⁰ However, the United States never ratified the Rights of the Child Convention.⁴¹ In addition, the Court cited the International Covenant on Civil and Political Rights,⁴² but the United States has entered a formal reservation to the covenant’s death penalty provision.⁴³ Thus, the Court applied international material that the political branches expressly refused to carry into the transom of domestic law.

In addition, some Supreme Court Justices have expressed enthusiasm for the use of international law in their extrajudicial 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 as one of the “basic denominators of common fairness between the governors and

³⁷ *Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 543 U.S. 551 (2005).

³⁸ *Atkins*, 536 U.S. at 316 n.21 (citing widespread international disapproval of executing mentally retarded offenders).

³⁹ *Roper v. Simmons*, 543 U.S. at 575.

⁴⁰ *Id.* at 576.

⁴¹ Office of the United Nations High Commissioner for Human Rights, Convention on the Rights of the Child Ratification Chart, <http://www.ohchr.org/english/countries/ratification/11.htm> (last visited July 26, 2006).

⁴² *Roper*, 543 U.S. at 576.

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

⁴⁴ Sandra Day O’Connor, Keynote Address, 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.”); Stephen Breyer, Keynote Address Before the Ninety-Seventh Annual Meeting of the American Society of International Law, 97 AM. SOC’Y INT’L L. PROC. 265 (2003) (“[F]oreign experience is often important to our work.”).

the governed.”⁴⁵ Academics are even more enthusiastic and explicit about using international law to assure that judicial interpretations of the U.S. Constitution reflect the values of the wider world community. Dean Harold Koh of Yale Law School, a leading proponent, has argued that the recent Supreme Court decisions in *Roper* and *Atkins* heralded the death of “national jurisprudence” and has suggested that the time is near when “transnational legal materials” 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 presumptively higher than that of domestic law, international law perhaps should be a factor in interpreting the Constitution to invalidate domestic law. But if the opposite is true, one should be far more reluctant to use international law to displace our own law.

2. Customary International Law as Our Law.

The notion that international law is in some sense part of federal law is widely accepted. It 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. Here we briefly summarize the range of views and suggest that consideration of the quality of the processes for generating international may help use 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, or at least its most fundamental norms, such as war

⁴⁵ Ruth Bader Ginsburg, “A Decent Respect to the Opinions of [Human]kind”: The Value of a Comparative Perspective in Constitutional Adjudication, 99 AM. SOC’Y. INT’L. L. PROC. 351, 354 (2005).

⁴⁶ Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43, 52-57 (2004).

⁴⁷ Compare, e.g., Joan Larsen, *Importing Constitutional Law Norms from a “Wider Civilization”* Lawrence and *The Rehnquist Court’s Use of Foreign and International Law in Domestic Constitutional Law*, 65 OHIO L. J. 1283 (2004) (against using international law to construe the Constitution) and Sarah Cleveland, *Our International Constitution*, 115 YALE INT’L J. 1564 (2005) (in favor of using 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, *Keynote Address: Foreign Legal Authority in the Federal Courts*, 98 AM. SOC’Y. INT’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 RICHARD A. POSNER, *LAW PRAGMATISM, AND DEMOCRACY* (2003) and STEPHEN E. BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005).

⁵⁰ 175 U.S. 677 (1900).

crimes and limitations on torture, cannot be violated by the United States, even with the express authorization of Congress and the President acting together.⁵¹

The more prevalent opinion of scholars, however, is that Congress has the power to override any norm of customary international law by enacting statutes.⁵² 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.⁵³ 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.⁵⁴

While there is widespread agreement that Congress can override customary international law, there is a wide variety of views on the question of whether the President is bound by customary international law. One position holds that customary international law is binding the President unless he is exercising constitutionally granted powers.⁵⁵ Another holds that the President has no independent constitutional authority to violate customary international law and is thus always bound, unless authorized by Congress.⁵⁶ A distinct minority of scholars believe that the President has no obligation to follow customary international law whatsoever.⁵⁷

The predominant view also holds that customary international law, as determined by federal courts, can displace state law.⁵⁸ Irrespective of Congress 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.⁵⁹ Recently, some scholars have denied that

⁵¹ Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1075 (1985).

⁵² See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(1)(a) (1987) (stating that an act of Congress will supersede prior international laws if it is Congress's intent to do so).

⁵³ Henkin, *supra* note 36.

⁵⁴ 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 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 THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 reporter's note 4 (1987).

⁵⁵ 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).

⁵⁶ See Lobel, *supra* note 35; Michael Glennon, *Raising The Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 NW. U. L. REV. 321, 325 (1985); Jordan J. Paust, *The President is Bound by International Law*, 81 AM. J. INT'L L. 377, 378 (1987).

⁵⁷ See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 846 (1997); Philip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 671 (1986); Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205, 1207 (1988).

⁵⁸ See, e.g., Harold Koh, *Is International Law State Law?*, 111 HARV. L. REV. 1824 (1998)

⁵⁹ *Id.* at 1841 (discussing the status of international law as federal common law).

customary international law has the status of federal law.⁶⁰ Under this view, neither the political branches nor the states are bound by customary international law.⁶¹

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 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.⁶²

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.⁶³ For instance, in *United States v. La Jeune Eugenie*, Justice Story stated that “every doctrine that may be fairly deduced by the correct reasoning for the rights and duties of nations, and the nature of moral obligation may theoretically be said to exist in the law of nations.”⁶⁴ Assuming that natural law exists, it follows that it should trump other law.⁶⁵ 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.⁶⁶

Nor does the *Paquete Habana*—a case from early on in the era when positivism began to dominate American legal interpretation-- resolve this question.⁶⁷ 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 law of the United States and the law of nations applicable to such cases The owners of the *Paquete Habana* later sued in federal court, arguing that international law precluded its seizure.

⁶⁰ See Bradley & Goldsmith, *supra* note 44 at 817.

⁶¹ However, within the revisionist camp, 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 A.W. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT’L L. 1, 48-49 (1995); Michael D. Ramsey, *International Law as Non-preemptive Federal Law*, 42 VA. J. INT’L L. 555, 585 (2002).

⁶² The literature debating history and practice is vast. The two most important recent pieces are Bradley and Goldsmith, *supra* note x, and Koh, *supra* note 57. .

⁶³ 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).

⁶⁴ See 26 F. CAS. 832, 846 (C.C. D. Mass 1822) (No. 15, 551).

⁶⁵ See, e.g., Jules Lobel, *The Limitations of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1090-92 (1985) (asserting that several of the Framers understood natural law to be superior to any sovereign power).

⁶⁶ Moreover, it is also 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. But the law of nations did not concern a nation’s duty to its own citizens. See *La Jeunie Eugenie*, *supra* at 846. 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.

⁶⁷ 175 U.S. 677 (1900).

Justice Horace Gray held for the owners.⁶⁸ He declared that “international law is part of our law, and must be ascertained by the court of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.”⁶⁹ On the other hand, international law would govern only when there is no “controlling executive or legislative act or judicial decision.”⁷⁰ 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 analytic coherence. Doctrinally, his whole 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.⁷¹ Less noted is that 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.⁷² The *Paquete Habana* 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 doctrinal instability, the opinion has an analytic void as its core, at least in a world of positive law.⁷³ 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,⁷⁴ 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 federal rule of decision that should govern within its appropriate sphere, why should a decision of the executive or even the Congress be able to trump it?⁷⁵

⁶⁸ 175 U.S. at 714.

⁶⁹ *Id.* at 700.

⁷⁰ *Id.*

⁷¹ See, e.g., Francesco Martin, *Our Constitution as a Federal Treaty: A New Theory of United States Constitutional Construction Based on an Originalist Understanding for a New World*, 31 HAST. CONST. L. Q. 29, 308 (2004) (dismissing the controlling authority” language of *Paquete Habana* as dicta). One scholar has argued that the dicta has been wholly misconstrued as a permission for the executive to disregard international law. See, e.g., David Golove, *Military Tribunals, International Law, and the Constitution: A Frankian-Madisonian Approach*, 35 N.Y.U. J. INT’L L. & POL. 363, 391-392 (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”).

⁷² Proclamation No. 6, 30 Stat. 1769 (1898).

⁷³ Professor William Dodge sees the *Paquete Habana* in the context of the movement from natural to positive law, but is generally more sympathetic to its analysis. See William H. Dodge, *The Story of the Paquete Habana, Customary International Law as Part of Our Law*, found at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=847847#PaperDownload.

⁷⁴ 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.”).

⁷⁵ 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

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

Finally, another 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.⁷⁶ Supporters of this view argue that international law gains support from certain venerable precedents—most famously, the *Charming Betsy* case.⁷⁷ 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.⁷⁸ 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 could do so.

The canon may thus make international law present in domestic law with wide ranging consequences. For instance, the 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.⁷⁹ 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 is 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 "[a]n act of congress ought never to be construed to violate the law of

interpreted the Aliens Tort Claims Act as a congressional sanction permitting aliens to bring tort claims grounded in customary international law. 28 U.S.C. 1350 (Alien Tort Statute). . But *Sosa* does not involve a question of raw international law because Congress mandated the application of law through its jurisdictional grant. 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* suggests that international law for the purposes of the Alien Torts Claim Act must have the certainty and clarity of the kind of international tort claims recognized in 1789. But that conceptualization is also largely a matter of trying to do justice to Congress's purposes in 1789 and does not have more general implications.

⁷⁶ See Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law, and the Charming Betsy Canon*, 46 B.C. L. REV. 293, 331-333 (2005).

⁷⁷ *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

⁷⁸ *Id.* at 107.

⁷⁹ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). This authorization permits "use [of] 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."

nations, if any other possible construction remains.”⁸⁰ In contrast, the language of the *Third Restatement of Foreign Relations Law* is weaker, stating that an interpretation that does not violate international law should be applied “when fairly possible.”⁸¹ 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 be able to make the decision to violate international law.⁸²

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, 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, which makes it difficult for the public to even know what is going on. In this, it contrasts with the key domestic institutions, both legislative ruling making and judicial decisionmaking. We argue that the relationship between transparency, electoral accountability, and different 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
	High	Domestic Judicial Review	Domestic Legislation
Transparency			

⁸⁰ *Charming Betsy*, 6 U.S. at 118.

⁸¹ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note x, at 114.

⁸² 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 (1998).

	Low	Raw International Law	Ratified International Law
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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 international law than domestic law and find it more difficult to keep track of.⁸³ Domestic judicial review is undertaken by actors with little or no electoral accountability, but is arguably more transparent than raw international law, because judicial confirmations and the decisions are often a focus of public attention.⁸⁴ 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 could be rejected on the ground that it includes preferences of those outside of our polity. But there are countervailing arguments in favor of international law as well were it democratically fabricated and these arguments show that a focus on the democracy deficit is a central theoretical question for international law. First, larger representative republics may make better laws, as James Madison argued, because no one faction is likely to get control of them.⁸⁵ Second, a larger international jurisdiction can be better United States citizens if the activities within the United States have substantial spillovers on citizens of the rest of the world.⁸⁶ For instance, it may be best for all nations, including the United States, to refrain from overfishing a common body of water because, in the long run, that will produce more fish for all them. But because of a prisoner's dilemma, the United States would not unilaterally limit its fishing: in the absence of an international norm that limits fishing, the fish will disappear anyway

⁸³ See § II.E, *infra*.

⁸⁴ See, e.g., STEPHEN L. CARTER, *THE CONFIRMATION MESS* (1994) (noting growing public and press attention focused on Supreme Court confirmations).

⁸⁵ See *THE FEDERALIST* NO. 10 (James Madison) at 45-52 (ed. Rossiter 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 to escape 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* notes xx and accompanying text for our discussion of the importance of exit rights.

⁸⁶ See Jonathan I. Charney, *Universal International Law*, 87 A.J.I.L. 529, 529 (1993) (arguing that spillover effects are now so acute that a universal international law is necessary).

in the long run, because of overfishing by other states. . But international law could in theory provide a norm for coordinating among nations that may make everyone better off.⁸⁷

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.⁸⁸ Insofar as the advantages of democratic law capture truth about facts and values rather than simply collected preferences, norms that were more universally backed would seem to be at least as good as, if not better than, norms that received more parochial democratic validation.⁸⁹

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 central to responding a variety of defenses of the beneficence of international law.

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.⁹⁰ 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 that 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.⁹¹ 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,⁹² whereas such events are common in

⁸⁷ See *infra* notes xx and accompanying text for an in-depth discussion of this rationale for international law.

⁸⁸ On the epistemic nature of democracy, see David Estlund, *Beyond Fairness and Democracy: the Epistemic Nature of Democratic Authority*, reprinted in *DELIBERATIVE DEMOCRACY* 173-204 (James Bohman and William Rehg, eds., 2001). See also Frank Michelman, *Why Voting*, 34 *LOY. L. A. L. REV.* 985, 996 (2001) (discussing the epistemic argument as one of three justifications for democracy).

⁸⁹ Cf. Eric A. Posner and Cass Sunstein, *The Law of Other States*, (forthcoming *Stanford Law Review*) (considering the argument that the Constitution should be interpreted in light of the law of other states on epistemic grounds that these multiple perspectives are likely to help achieve a correct answer).

⁹⁰ See works cited note ____.

⁹¹ For a recent summary of the evidence, see MORTON HALPERIN, ET AL., *THE DEMOCRACY ADVANTAGE* 25-64, 93-134 (2005).

⁹² AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 178 (1999) (famously noting that “there has never been a famine in a functioning multiparty democracy”).

authoritarian and totalitarian states.⁹³ 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.⁹⁴ 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.⁹⁵ For these and other reasons, in many situations, democratic government may be inferior to market or civil society institutions.⁹⁶ 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. And in that 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 legal system incorporates nondemocratic elements like judicial review. But international law cannot easily be defended by this analogy. Judicial review enforces principles that are democratically fabricated by the supermajoritarian process by which the Constitution and its amendments were agreed to.⁹⁷ Moreover, as we have noted and discuss in more detail below, international law is far less transparent than judicial review.

B. The Nature of Customary International Law.

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

⁹³ 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* (1996) (documenting massive government-created famine in China in the 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 14 million people); STEPHANE COURTOIS, ET AL., *THE BLACK BOOK OF COMMUNISM* 598-602, 692-93 (trans. Jonathan Murphy & Mark Kramer 1999) (documenting government-created famines in Ethiopia and Cambodia.).

⁹⁴ *See* Somin, *supra* note ____; Ilya Somin, Ilya Somin, *Voter Ignorance and the Democratic Idea*, 12 *CRITICAL REV.* 413, 415-33 (1998).

⁹⁵ For a good presentation of the arguments on this point, WILLIAM C. MITCHELL & RANDY T. SIMMONS, *BEYOND POLITICS: MARKETS, WELFARE, AND THE FAILURE OF BUREAUCRACY* chs. 6-8 (1993); for a good recent survey of the literature on interest group power and its impact, *see* DENNIC C. MUELLER, *PUBLIC CHOICE III* 347-53, 481-89, 497-500 (2003).

⁹⁶ *See, e.g.*, Somin, *Voter Ignorance*, at 447-53 (arguing that political ignorance justifies reducing the role of government in society); DAVID C. 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 public goods).

⁹⁷ *See* John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 *Tex. L. Rev.* 703, 78-791 (2002).

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.⁹⁸ They believe that customary international law must be rooted in the widespread consensus of the actual practices of nation-states.⁹⁹ 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.¹⁰⁰ 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.¹⁰¹

Although the metric for classical customary international law is objective, its objectivity does not mean that determining the content of custom is straightforward.¹⁰² 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.¹⁰³

The classical methodology for determining the rules customary international law greatly restricts its range. Partly for that reason, it is not the consensus view of contemporary scholars.¹⁰⁴ 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 matter of fact violate human rights norms.¹⁰⁵

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-

⁹⁸ See, e.g., Arthur M. Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANS. L. 1, 32 (1988) (arguing for a more rigorous examination of evidence of state practice and *opinio juris*).

⁹⁹ See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (requiring widespread acceptance of a rule for it be customary law).

¹⁰⁰ *Id.* at comment e.

¹⁰¹ *Id.* at comment c.

¹⁰² See David J. Betterman, *Review Essay*, 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* (1999)).

¹⁰³ See Statute of the International Court of Justice, June 26, 1946, art. 38(1)(b) (allowing the “teachings of the highest qualified publicists of various nations, as a subsidiary means for determining the 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.”).

¹⁰⁴ See Kelley, *supra* note x at 476 (“Judges and writers rarely engage in a detailed enquiry into state practice.”).

¹⁰⁵ See Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law*, 95 A.J.I.L. 757, 776 (2001).

states that give the norms verbal endorsement.¹⁰⁶ These include resolutions of the General Assembly of the United Nations¹⁰⁷ and multilateral treaties.¹⁰⁸

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.¹⁰⁹ Norms that are “deeply-held” and “widely-shared” are those that may permissibly enter the canon of international law under a relaxed regime.¹¹⁰ 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.¹¹¹ 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.¹¹²

This formulation of customary international law is implicit in the World Court’s *Nicaragua v. United States* opinion.¹¹³ In finding a rule of non-intervention in customary international law, the court in *Nicaragua* looked only to *opinio juris* for its justification.¹¹⁴ 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 because customary international law is formed on a sliding scale.¹¹⁵ A lack of either state practice or *opinio juris* is compensated for by a correspondingly strong showing of the other.¹¹⁶ Precisely how much substitution is permitted is a function of the activity in question and the reasonableness of the rule asserted.¹¹⁷ 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 sections, 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.

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

1. The Role of Publicists.

¹⁰⁶ 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).

¹⁰⁷ CHRISTINE D. GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 4 (2000).

¹⁰⁸ Anthony D’Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, n. 98 (1982).

¹⁰⁹ Oscar Schachter, *Recent Trends in International Law Making*, 12 AUST. Y.B.I.L. 1, 10-11 (1988-89).

¹¹⁰ *Id.* at 11.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Nicaragua v. United States*, 1986 I.C.J. 14 (27 June).

¹¹⁴ Frederic L. Kirgis, Jr., *Appraisals of the ICJ’s Decision: Nicaragua v. United States*, 81 A.J.I.L. 146, 147 (1987).

¹¹⁵ *Id.* at 149.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

As discussed above, publicists play a very large role in the modern conception of customary international law. That role undermines democratic accountability, because they 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.¹¹⁸ 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 who care-- the professors, the writers of leading casebooks and articles."¹¹⁹

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 any dimension 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 eleven to two.¹²⁰ A group with such unrepresentative values is unlikely to generate unrepresentative norms. The unrepresentative nature of publicists might be unimportant if they were tightly constrained by means of 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.

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.¹²¹ But, in actuality, their appointments reflect the influence of national governments and regional blocs.¹²² Some of

¹¹⁸ Kirgis, *supra* note X at 11

¹¹⁹ See Louis Sohn, *Sources of International Law*, 25 GA. INT'L L. AND COMP. 399 (1996).

¹²⁰ See John O. McGinnis, et. al., *The Patterns and Implications of Political Contributions by Elite Law School Faculties*, 93 GEORGETOWN L. J. 1167, 1182-183 (2005). (discussing political campaign contributions of international law professors).

¹²¹ To be seated on the ICJ, justices must be approved by a majority of both the General Assembly and Security Council. See *The International Court of Justice* 23 92004) found at www.icjciij.org/icjwww/igeneralinformation/ibbluebook.pdf

¹²² See Ruth MacKenzie and Phillippe 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

the nations, such as China, which traditionally are allowed to name judges, are dictatorships.¹²³ Many of the nations within regional groupings that are responsible for the nomination of other justices are also authoritarian. 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.¹²⁴ Accordingly, some justices of the Court either will be appointed by authoritarian governments outright or will reflect the substantial influence of authoritarian governments.

Even for a democratic government, like the United States, the process for nominating an ICJ justice is nothing like the deliberative process that leads to the appointment of Supreme Court Justices. 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.¹²⁵ While members of these groups are appointed by the government, they operate with more insulation from political control.¹²⁶ Second these choices lack public deliberation and are made behind closed doors. There is nothing resembling the Senate confirmation process, which allows public scrutiny. As a result of this lack of transparency and relative obscurity of the position, American citizens are unlikely to be able to even name the U.S. nominee to the ICJ at the time of his nomination.¹²⁷ 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.¹²⁸ 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 be 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

Court of Justice election process that is highly politicized and where influential nations exert outsize 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).

¹²³ A Chinese Justice has sat on the International Court of Justice since 1985.

¹²⁴ See www.icj-cij.org/icjwww/igeneralinformation/inotice.pdf (listing composition of current ICJ) (visited Aug. 25, 2006). The five authoritarian states represented on the Court are China, Jordan, Madagascar, Morocco, and Sierra Leone. The two tenuous democracies are Russia and Venezuela. .

¹²⁵ ICJ Stat. art. 4.1, art. 5.2

¹²⁶ See Mark L. Movsesian, *International Judgment and National Courts* 43 (copy on file with authors)..

¹²⁷ Thomas Buergenthal’s nomination to replace the retired Stephen M. Schwebel as an ICJ justice merited almost no mention in the United States’ press. Even momentous events, such as the withdrawal from compulsory jurisdiction by the United States, do not receive much media attention. See Michael J. Glennon, *Appraisals of the ICJ’s Decision: Nicaragua v. United States*, 81 A.J.I.L. 121, 125 (1987).

¹²⁸ *Appropriate Hierarchy* at 243, n. 42.

through negotiations with nondemocratic governments. Second, even the democratic nations that sign these agreements rarely apply them of their own force to displace their own laws.¹²⁹ Thus, the norms are what economists call “cheap talk.”¹³⁰ By contrast, domestic law has stronger democratic credentials.

We first consider the democracy deficit of treaties. 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 governments were not 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 will 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 were negotiated at a time when totalitarian states were a powerful force in the international community and had veto power over the treaties’ content.¹³¹ 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.¹³² Even today, 103 of the world’s 192 nations are either “[u]nfree” or only “partly free,” according to Freedom House’s annual survey of political freedom around the world.¹³³

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 conclude 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. We do not deny that some norms of international law might be defensible on the basis of some other kind of justification.¹³⁴

Even were treaties to be the outcome of a more democratic consensus, it remains questionable whether the treaties actually represent a considered judgment that the norms they embody be reflected in a nation’s law. Many, if not most, legal systems are dualist with respect

¹²⁹ 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 notes xx and accompanying text.

¹³⁰ As economists explain, cheap talk is the opposite of costly signaling. See Daniel Rodriguez & Barry Weingast, *The Positive Political Theory of Legislation: New Perspectives on the Civil Rights Act of 1964 and Its Legislative History*, 151 U. PA L. REV. 1417, 1456 (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.

¹³¹ The International Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social Cultural Rights all date from the Cold War Period.

¹³² 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 influence of Soviet Union on provisions regarding hate speech in the International Covenant on Civil and Political Rights).

¹³³ Freedom House, *FREEDOM IN THE WORLD 2006* (2006), available at <http://www.freedomhouse.org/termplate.cfm?page=15&year=2005> (last visited July 23, 2006).

¹³⁴ For a fuller discussion of this point, see *infra* notes x and accompanying text.

to international law.¹³⁵ 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.¹³⁶ Thus, even democratic ratification by dualist nations does not show that its citizens wish to have international law enforced by the judiciary without intermediate steps by their own elected representatives.

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 when human rights are involved, as aspirational.¹³⁷ Or they could believe that the international rules are too vague or open ended to be given automatic effect.¹³⁸ 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,”¹³⁹ and is thus a less plausible source of norms to displace those by which a democratic nation actually agrees to be bound.¹⁴⁰

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 their own citizens.¹⁴¹

These problems are even more acute with other sources of international law, such as U.N. assembly resolutions or the decisions of U.N. agencies.¹⁴² Such resolutions do not even purport to have binding force, which raise serious questions about their sincerity.¹⁴³ Moreover, nations’ failure to agree to give them direct effect renders it likely that their principles will be vague and aspirational rather than determinate rules suitable for implementation.¹⁴⁴ Like multilateral

¹³⁵ See PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 63 (1997).

¹³⁶ See John H. Jackson, *The Status of Treaties in Domestic Legal Systems*, 86 A.J.I.L. 310, 14 (1992).

¹³⁷ 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).

¹³⁸ See Matthew D. Thurlow, *Protecting Cultural Property in Iraq: How American Military Policy Comports with International Law*, 8 YALE H.R. & DEV. L.J. 153, 183 (presenting the possibility that nations prefer vague language in order to create conflicting standards).

¹³⁹ See *supra* note 131.

¹⁴⁰ *Id.*

¹⁴¹ See, e.g., Arthur M. Wiesburd, *The Significance and Determination of Customary International Human Rights Law: 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 mechanisms, raising doubts that states intend for them to have a legal character).

¹⁴² For a theory of international law that would give such multilateral forums the authority to construct customary international law, see Johnathan I. Charney, *Universal International Law*, 87 A.J.I.L. 529, 543 (1993).

¹⁴³ Davis R. Robinson, *Expropriation and the Restatement (Revised)*, 78 A.J.I.L. 176 (1984) (noting that resolutions of the U.N. General Assembly are nonbinding).

¹⁴⁴ See Roberts, *supra* note x at 769-70 (observing that modern custom is often aspirational rather than realistic).

agreements, such resolutions are also the product of negotiations in which nondemocratic governments play a key role.

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

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.¹⁴⁵ 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.¹⁴⁶ 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.¹⁴⁷ Whether nations are engaging in a given practice out of a sense of obligation is also not self-evident.¹⁴⁸ *Opinio juris* thus also requires interpretation.¹⁴⁹ 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.

It is true that the materials from which the classical concept of customary international law draws--the concrete practices of states taken out of legal obligation-- might be thought to be more determinate than the materials relied upon in modern customary international law. But even these practices may have a democracy deficit. First, the classic conception of custom does not require that the decisions of governments to follow a practice should be in keeping with the will of their people.¹⁵⁰ Customary international law does not inquire into the internal governance of a nation from which a practice emerges.

¹⁴⁵ Jeremy A. Rabkin, *War, International Law, and Sovereignty: Reevaluating the Rules of the Game in a New Century: Recalling the Case for Sovereignty*, 5 CHI. J. INT'L L. 435, 454 (Winter, 2005).

¹⁴⁶ Roberts, *supra* note, x, at 757-60 (describing the process of norm creation under the traditional approach).

¹⁴⁷ See, e.g., CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2 vols. 2005) (compiling and categorizing state practices as part of an ICRC study).

¹⁴⁸ Theodor Meron, *The Geneva Conventions as Customary Law*, 81 A.J.I.L. 348, 367 (1987) ("To be sure, it is difficult to demonstrate such *opinio juris*.").

¹⁴⁹ *Id.*

¹⁵⁰ See Philip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 727-31 (1986) (arguing that the process of norms creation in customary international law has almost no exposure to the democratic process in the United States).

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.¹⁵¹ Many democratic nations insulate their policies on certain issues from popular control. For instance, European peoples would like to apply the death penalty in certain circumstances, but their elites prevent the sentiments from becoming law and assure continued abolition.¹⁵²

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.¹⁵³ 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 dangerously suboptimal.¹⁵⁴

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 proceeds much faster and, according to some, at an ever accelerating rate.¹⁵⁵ As a result, the nature of the world's social problems changes ever faster.

In this context, the dead hand problem is peculiarly acute. To take but one example, customary international is perhaps best interpreted to preclude preemptive attacks, at least without the agreement of the Security Council.¹⁵⁶ Nevertheless, the possibility of weapons of mass destruction may render that rule anachronistic. We are not here trying to determine whether a 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

¹⁵¹ *Id.*

¹⁵² See Ivan Briscoe, *U.S. Death Penalty: Victims Seize the High Ground*, THE UNESCO COURIER, Oct. 2000, at 42 (explaining that in European nations, like Britain and France, "clear majorities supported the [death] penalty, though political leaders resolved to push through with abolition all the same"). 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--and not popular support--led to the abolition of the death penalty in France when "French presidential candidate Francois Mitterrand declared his opposition to the death penalty, despite opinion polls showing popular support").

¹⁵³ Van Hoof, *supra* note x at 114.

¹⁵⁴ 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, 1712 (1996).

¹⁵⁵ See RAY KURZWEIL, *THE SINGULARITY IS NEAR* 10-20 (2005) (arguing that technology is changing at an ever accelerating rate).

¹⁵⁶ See Thomas Graham, Jr., *Is International Law Relevant to Arms Control?: 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").

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 destruction¹⁵⁷

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.¹⁵⁸ 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.¹⁵⁹ This result is not accidental and is not primarily caused by stupidity or by low availability of information. Most voters are “rationally ignorant” about politics.¹⁶⁰ Because of the low significance of any single vote,¹⁶¹ 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

¹⁵⁷ 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 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.

¹⁵⁸ See Paul B. Stephen, *Accountability and International Lawmaking: Rules, Rents and Democracy*, 17 NW. J. INT'L L. & BUS. 681, 699-702 (1996-1997) (explaining that citizens face higher costs monitoring international than domestic rules).

¹⁵⁹ See, e.g., Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty*, 89 IOWA L.REV. 1287, 1288-91 (2004) (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 Ilya Somin, *Voter Ignorance and the Democratic Idea*, 12 CRITICAL REV. 413 (1998) (assessing dangers of voter ignorance and critically analyzing literature on the subject); For other studies showing low levels of political knowledge, see e.g., ERIC R.A.N. SMITH, *THE UNCHANGING AMERICAN VOTER* (1989); Stephen E. Bennett, “*Know-Nothings*” *Revisited: The Meaning of Political Ignorance Today*, 69 SOC. SCI. Q. 476 (1988) [hereinafter Bennett, “*Know Nothings*”]; Stephen E. Bennett, *Know-Nothings Revisited Again*, 18 POL. BEHAV. 219 (1996); Stephen E. 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).

¹⁶⁰ The idea of rational ignorance was first introduced in ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 238-76.

¹⁶¹ See Riker & Ordeshook, *supra* note 121 (demonstrating that the chance of any one vote determining the outcome of a presidential election is roughly one in one hundred million).

party.¹⁶² 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.¹⁶³ 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.¹⁶⁴

Most citizens are thus often ignorant of very 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, in the domain of international law, it is more difficult for citizens to make up for their ignorance by using "information shortcuts" 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.¹⁶⁵ If citizens 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 are 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 percent of survey respondents claim to have heard of the United Nations, the most prominent international lawmaking body. On the other hand, only 48 percent can name as many as three of the five members of the Security Council, by far the most powerful legal authority within the UN system, and only 1 percent in a 1997 survey knew the name of Kofi Annan, the UN Secretary

¹⁶² *Id.*

¹⁶³ For a general discussion of collective action theory, see the classic work by MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION* (1965). See generally RUSSELL HARDIN, *COLLECTIVE ACTION* (1982) (extending Olson's argument with various applications to political participation).

¹⁶⁴ For studies showing little or no increase in political knowledge over time, see works cited *supra* note _____. 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).

¹⁶⁵ See *supra* notes xx and accompanying text.

General.¹⁶⁶ As of 2005, just 43 percent, knew that President George W. Bush opposes the Kyoto Protocol on global warming, despite the intense controversy over his decision to withdraw the US signature on the agreement. Only 35 percent claim to be aware of the International Criminal Court, despite the extensive public controversy over the US decision not to join this institution. Although 58 percent claim to know about the World Bank, 57 percent admit ignorance of its companion institution, the International Monetary Fund..¹⁶⁷

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 below 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 percent of Americans claim to have heard of – making it by far the best-known international legal institution –, an even larger number (96 percent) claim knowledge of the U.S. Congress. Although Congress is not an exact equivalent of the UN, 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 the

¹⁶⁶ 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.

¹⁶⁷ 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 complete fictitious legislation invented by researchers, see Stanley Payne's famous finding that 70% of respondents expressed opinions regarding the nonexistent "Metallic Metals Act." STANLEY PAYNE, *THE ART OF ASKING QUESTIONS* 18 (1951);

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 percent 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 percent who realize that the “great majority” scientists agree that global warming “exists and could do significant damage” and a further 39 percent who state that scientists are “divided” on the subject.¹⁶⁸

Finally, the Secretary General of the UN 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 the United States, easily the most widely recognized domestic politician.¹⁶⁹ But even the vice president, a less powerful and more obscure executive branch leader, enjoys far greater public recognition than UN Secretary General Kofi Annan.¹⁷⁰

¹⁶⁸ 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).

¹⁶⁹ On the rare occasions when the public is asked to identify the president, some 99 percent can do so. *See* DELLI CARPINI & KEETER, *supra* note __ at 91.

¹⁷⁰ 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.

Table 2:
Comparing Public Knowledge of Domestic and International Legal Institutions

Domestic Institution		Comparable International Institution		% Difference in Favor of Domestic Institutions
Claim to have heard of U.S. Congress ¹⁷¹	96	Claim to have heard of United Nations ¹⁷²	73	23
Claim to have heard of Federal Reserve Board Chairman ¹⁷³	77	Claim to have heard of World Bank ¹⁷⁴	58	19
Know “great majority” of scientists believe that global warming exists. ¹⁷⁵	52 (39 percent believe scientists are “divided”)	Know President Bush Opposes Kyoto Treaty on Global Warming ¹⁷⁶	43	9
Claim to have heard of Federal Reserve Board Chairman ¹⁷⁷	77	Claim to have heard of International Monetary Fund ¹⁷⁸	43	34
Know US Supreme Court determines		Claim to have heard of		

¹⁷¹ Democracy Corps Poll, Apr. 20-24, 2006, Roper Center Accession No. 1650558. This survey asked respondents not whether they had heard of Congress per se, but of “the Republican Congress.” One would expect that even more respondents would claim to have heard of Congress without the potentially confusing party moniker.

¹⁷² Gallup survey, Sept. 19, 2005, Roper Center Accession No. 1635437

¹⁷³ Gallup Survey, Mar. 14-15, 2003, Roper Center Accession No. 0423320.

¹⁷⁴ Gallup survey, Sept. 19, 2005, Roper Center Accession No. 1635437

¹⁷⁵ PIPA/Knowledge Networks Survey, June 22-26, 2005, *in* PIPA/KNOWLEDGE NETWORKS POLL: AMERICANS ON CLIMATE CHANGE 2005, at 3 (2005).

¹⁷⁶ *Id.* at 2.

¹⁷⁷ Gallup Survey, Mar. 14-15, 2003, Roper Center Accession No. 0423320.

¹⁷⁸ Gallup survey, Sept. 19, 2005, Roper Center Accession No. 1635437.

constitutionality of laws ¹⁷⁹	58	International Criminal Court ¹⁸⁰	35	23
Know name of US Vice President ¹⁸¹	61	Know name of Secretary General of the UN (1997) ¹⁸²	1	60

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 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

¹⁷⁹ Delli Carpini & Keeter, *supra* note __ at 70 (citing 1992 data).

¹⁸⁰ Gallup survey, Sept. 19, 2005, Roper Center Accession No. 1635437 Gallup survey, Sept. 19, 2005, Roper Center Accession No. 1635437.

¹⁸¹ Pew Research Ctr. Survey, Apr.-May 2002, Roper Center Accession No. 0419025.

¹⁸² CNN/USA Today Survey, Nov. 21-23, 1997, Roper Center, , Accession No. 0288889 .

¹⁸³ For extensive citations to the literature, see Ilya Somin, *Voter Ignorance and the Democratic Ideal*, 12 Critical Rev. 413, 419-33 (1998).; Somin, *supra* note ____; Ilya Somin, *When Ignorance is No Bliss: How Political Ignorance Threatens Democracy*, Cato Inst. Policy Analysis No. 525, Sept. 22, 2004. 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 and the Democratic Ideal*, at 419-31.

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

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 office-holders 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 US 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 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

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 ____ 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 percent 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*, and Somin, *Ignorance is No Bliss*.

¹⁸⁷ Somin, *Countermajoritarian Difficulty*, at.

¹⁸⁸ For discussion, see, e.g., Ilya Somin, *Resolving the Democratic Dilemma?* 16 Yale J. Reg. 401 (1999).

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

¹⁹⁰ *Id.*

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.

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 immediately, it will become more significant if 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 has more attractive ones.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 means 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 jurisdictions with more attractive policies. As a result, such 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.

¹⁹¹ For detailed discussion, see Ilya Somin, *Countermajoritarian Difficulty*; 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); 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* 51-66 (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 ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* (1970). For arguments that exit is often a superior means for imposing democratic control on government, see Somin, *Countermajoritarian Difficulty*, *supra* note _____ at 1344-50.

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 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 US and other attractive destinations.

If raw international law is made universally applicable to all states, including the US, there is a danger that it can be used to undermine the power of exit rights to improve the lives of immigrants. 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 had little applicability to domestic legal arrangements.¹⁹⁷ If US 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 law 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 that most conservatives are sympathetic to. Yet, ironically or not, the importance of exit rights through international emigration is an important consideration against the presumptive acceptance of raw international law.

2. The Case of Restrictions on “Hate Speech.”

While this problem is a largely 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 use international law to criminalize “hate speech.”

Some advocates of American adherence to raw international law argue that the customary international law requires the US to criminalize so-called “hate speech.”¹⁹⁸ This norm has a

¹⁹⁴ See § II e. , *supra*.

¹⁹⁵ See Somin, *Political Ignorance*, *supra* note ___, at 1344-47.

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

¹⁹⁷ See notes xx and accompanying text.

¹⁹⁸ 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 US “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”); Stephanie Farrior, *Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, 14

variety of antecedents, most importantly the International Covenant on Civil and Political Rights. It forbids “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”¹⁹⁹

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, claims that Denmark’s willingness to permit publication of the Mohammed cartoons that angered many Muslims in late 2005 and early 2006 may violate international laws against “hate speech” and initiated a UN investigation of the matter.²⁰⁰ Given that several of the cartoons involved criticism of Muslim support for suicide bombing,²⁰¹ 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 overcome by “effective national laws and policies,” possibly including “criminal sanctions.”²⁰²

Oriana Fallaci, a controversial Italian writer who has harshly criticized Islam for allegedly promoting terrorism and undermining civil liberties in Europe, is currently on trial for “hate speech” under Italy’s domestic hate speech law.²⁰³ If convicted, she faces up to two years in prison.²⁰⁴ Prosecutions such as this one could also 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 that of Fallaci, two Australian clergymen were convicted for claiming that Islam is a violent religion.²⁰⁵

BERKELEY J. INT’L L. 1, 4-12 (1996) (discussing international law forbidding “hate speech” and arguing that the U.S. is in violation of international legal norms).

¹⁹⁹ International Covenant on Civil and Political Rights art. 20(2), Dec. 16, 1966, U.N.G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force March 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 notes xx and accompanying text (modern customary international law does not require unanimity to create rule of international law. Indeed, the Supreme Court noted that consensus against juvenile executions represented by the Rights of the Child Convention as a 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 notes xx and accompanying text.

²⁰⁰ Paul Belien, *UN to Investigate Racism of Danish Cartoonists*, THE BRUSSELS JOURNAL, Dec. 7, 2005, available at <http://www.brusselsjournal.com/node/546>.

²⁰¹ The cartoons are available at <http://ala-mierda.blogspot.com/2005/12/los-12-chistes-que-la-onu-y-la.html> (visited Aug. 2, 2006).

²⁰² Louise Arbour, U.N. High Commissioner for Human Rights, Remarks at International Day for the Elimination of Racial Discrimination Panel Discussion (Mar. 21, 2005).

²⁰³ See Margaret Talbot, *The Agitator*, THE NEW YORKER, May 29, 2006, available at http://www.newyorker.com/printables/fact/060605fa_fact.

²⁰⁴ Id.

²⁰⁵ These incidents are discussed in John Leo, *Free speech on the run: The Spreading Practice in Europe, Canada of Setting up Some Groups in Law as beyond Criticism*, GRAND RAPIDS PRESS, Mar. 9, 2006, at A14.

Currently, Fallaci, and other 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.²⁰⁶ In extreme cases, they could even seek refuge in the United States and thereby continue to speak and write on controversial issues. Fallaci herself now spends 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.²⁰⁷ 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 the power of exit. The ICCPR and related treaties²⁰⁸ 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 mechanism that ensures its quality.²⁰⁹ 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 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.²¹⁰ Accordingly, some have argued by analogy that customary international law is efficient.²¹¹

²⁰⁶ See, e.g., ORIANA FALLACI, *THE FORCE OF REASON* (2006) (U.S. edition of the book which led to the Italian trial).

²⁰⁷ Mark Steyn, *Celebrate Tolerance or You're Dead: Oriana Fallaci Appeals to Europe to Save Itself*, MACLEAN'S, Apr. 28, 2006, available at http://www.macleans.ca/culture/books/article.jsp?content=20060501_125827_125827 (visited Aug. 26, 2006).

²⁰⁸ 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, incitement to racial discrimination." International Convention on the Elimination of All Forms of Racial Discrimination art. 4, Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).

²⁰⁹ 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 area part of emerging norms of international law. But it is not at all clear these rights are more important than other policies, like restrictions on the use of force that frustrate humanitarian interventions, that are damaging to oppressed minorities.

²¹⁰ See Robert Cooter, *Centralized Law for a Complex Economy: The Structural Approach to the Law Merchant*, 144 U. PA. L. REV. 1643, 1660 (1996).

²¹¹ See Anthony D. D'Amato, *Modifying U.S. Acceptance of Compulsory Jurisdiction of the World Court*, 79 AM J. INT'L 385, 482 (1985) ("The rules of international law . . . grew out of [state] interactions over centuries of

The first shortcoming of this argument is similar to that which leads to the democracy deficit. The actors generating international custom are states, not people. 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.²¹²

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.)²¹³ But as Eugene Kontorovich has shown, these conditions are rarely satisfied in the case of international custom.²¹⁴ There are now almost 200 nation states.²¹⁵ Far from homogenous, nations have different interests defined by geographic position, level of development, and religious identification.²¹⁶ Many never interact in substantial ways. And nations tend to not to interact in reciprocal ways, often because they are so heterogeneous.²¹⁷ 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.²¹⁸

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.²¹⁹ 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 rule 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.²²⁰

practice.... Thus the rules, almost by definition are the most efficient rules for avoiding international conflict and for accommodating the collective self-interests of all states.”).

²¹² See *Appropriate Hierarchy*, *supra* note x., at 242-245.

²¹³ See Eugene Kontorovich, *Inefficient Customs in International Law* 29-33, WM. & MARY L. REV. (forthcoming 2006).

²¹⁴ *Id.*

²¹⁵ See United States, List of Member States, U.N. Press Release ORG/1360/Rev. 1 (2005), <http://www.un.org/Overview/growth.htm> (last visited August 7, 2006).

²¹⁶ Kontorovich, *supra* note x., at 39.

²¹⁷ *Id.* at 40.

²¹⁸ *Id.* at 43.

²¹⁹ For this analogy, see, e.g., Jonathan Turley, *Dualistic Values in the Age of International Legal Jurisprudence*, 44 HASTINGS L. J. 185, 268-269 (1993).

²²⁰ 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

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.²²¹ 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.²²² But international courts do not compete with other courts. Different types of international disputes are generally assigned to their own courts. For instance, trade disputes are assigned to the appellate body of the WTO²²³ whereas disputes over war and peace are assigned to the ICJ.²²⁴ Nor is there substantial competition between national and international courts. Generally, states are parties in international courts and individuals or non-state entities are parties in national courts. The evidence on the International Court of Justice shows that what often motivates justices is the narrow parochial interests of their state and its government rather than broader concerns about efficiency for the governments of the world, let alone their citizens.²²⁵

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 the effect of the low quality of the process for generating raw international law on several doctrinal areas. First, we show that it provides powerful reasons not to use it as a factor in interpreting the Constitution to overturn domestic statutes. Second, we show that its 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 casts doubt on the deployment of a canon of construction that would interpret U.S. statutes to conform to international law.

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

courts since 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.”).

²²¹ See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 321-327 (1993) (arguing that judges choose efficient rules).

²²² Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 910-911 (1992) (describing competition among courts).

²²³ See Understanding on Rules and Procedures, Governing the Settlements of Disputes, Apr. 15, 1994 WTO Agreement, Annex 2, Legal Instruments—Results of the Uruguay Round, vol. 31, 33 L.L.M. 126 (1994).

²²⁴ The International Court of Justice is the principal organ of the United Nations, Art. 92 U.N. Charter and, as such, adjudicates issues about the appropriate use of force under the United Nations Charter.

²²⁵ See Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1 (2005) (discussing how judges follow the interest of the nations).

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 the norms embodied in United States law are necessarily good ones in cases where they conflict with international ones.

But the presumptively low quality of raw international law undermines the premise of this argument. The discrepancy between international law and domestic law does not impeach the latter if the former is of low quality.

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, 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 is 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 – and most prevalent 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.²²⁷ Such an infusion of raw international law into our 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 conceived as part of our law until Congress affirmatively overrules it. Some have argued that this approach is quite 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 one Congress cannot bind another.²³⁰ Thus, Congress's ability to supersede

²²⁶ See John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 769-775 (2002) (discussing the way bicameralism and presentment generate high quality laws).

²²⁷ See, e.g., Lobel, *supra* note x, at 1075.

²²⁸ See John O. McGinnis & Mike Rappaport, *A Pragmatic Defense of Originalism* (forthcoming NW. U. L. REV. 92006) (discussing the quality that supermajority rules give to constitutional provisions).

²²⁹ See Anupam Chander *Globalization and Distrust*, 114 YALE L. J. 1193, 1207 (2005).

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

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, US 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 Congress authorization, using international law to curb his power also effectively overrides Congress. The case against this position is exactly the same as that 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 problem with this canon flows from our previous discussion: there is no reason to sustain a canon whose effect is to interpret United States 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

²³¹ See U.S. Const. Art. 1, sec 7.

²³² See JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 233-249 (1962) (illustrating how bicameralism requires a greater than majoritarian consensus).

²³³ See notes xx and accompanying text. See Paust, *THE PRESIDENT*, *supra* note x, at 378 (1987).

²³⁴ See Wuerth, *supra* note x, at 331-333.

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

better results than they otherwise would.²³⁶ As applied to the President, the *Charming Betsy* canon cannot easily be understood to be an attempt to reflect Congress' 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.

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 democratic legitimacy. The President is elected by the entire nation and thus there is at least some presumption that he represents their 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 offices²³⁷ and thus the President acts in foreign affairs with an even greater presumption of democratic bona fides in domestic affairs.

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.²³⁸ 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 Steel*, the first is category one authority and the second is category two authority, described by him as the "zone of twilight."²³⁹

The President's electoral mandate is again a powerful argument for permitting him to take actions 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

²³⁶ See Larry Marshall, "Let Congress Do It": *The Case for an Absolute Rule of Statutory Construction*, 88 MICH. L. REV. 177, 228 (1995) (offering both an intent- and results-based rationale for canons of construction).

²³⁷ 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 congressional ones).

²³⁸ We do not address arguments that the scope of executive power is actually constituted by international law. See Golove, *supra* note x, (suggesting the President's 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 paper. Given our view of the quality for international law, we obviously do not believe that it would be a pragmatically sound interpretation of the Constitution.

²³⁹ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952).

should be able to override the President, but whether raw international law should be able to do so.²⁴⁰

It might be thought, however, 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. For example, 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.²⁴¹ 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.²⁴² Declaring war is again an example of an area in which that contention is quite plausible.

But the conclusion that the President has systematic institutional failings or that a more substantial consensus should be sought than the President can provide is an argument that he should not have inherent power in that area, not that he should be constrained by raw 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 type of authority) or the power of initiative in the absence of congressional action (in the case of category two type of 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.²⁴³ Arguing about whether the President has violated it allows Congress to deflect its 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, such as limiting executive spending on wars and other foreign policy initiatives, to constrain the President.²⁴⁴

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

²⁴⁰ This point once again differentiates our argument from that of Yoo, *supra* note ____.

²⁴¹ See William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 740-56 (1997).

²⁴² See JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 4 (1993) (emphasizing need for deliberation and reasoning from multiple perspectives that only legislatures can bring).

²⁴³ See *supra* notes xx and accompanying text.

²⁴⁴ See JOHN HART ELY, *supra* note x, at 28-29 (1993) (noting strong textual and consensus support for congressional cut-offs of spending).

executive authority.²⁴⁵ Under this view, the President would be required to personally 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 have authority to 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 thought to reflect the President's outlook and there is a presumption that he would approve of their actions.²⁴⁶ Moreover, the President has many 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.²⁴⁷

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 presumptively higher than those decisions. Moreover, the scope of international law is quite unclear because of its uncertain method of derivation.²⁴⁸ Thus, the President would have to invest substantial time in 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 many 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.²⁴⁹ Courts, in fact, have on occasion followed raw international law when it conflicts with state law.²⁵⁰ 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

²⁴⁵ See *Paquete Habana*, 175 U.S. 677 (1900). 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.

²⁴⁶ See *Robert v. Percival*, *Checks Without Balances: Executive Office Oversight of the Environmental Protection Agency*, 54 LAW & CONTEMP. PROBS. 127 (1991) ("The president's appointment and removal powers [already] guaranteed that his views will carry considerable weight with his appointees").

²⁴⁷ 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 want to decide himself will not be an energetic executive.

²⁴⁸ See notes xx and accompanying text.

²⁴⁹ See, e.g., Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561 (1984). See also notes xx and accompanying text.

²⁵⁰ See, e.g., *Republic of Argentina v. New York*, 25 N.Y. 2d 252, 91969 (prohibiting New York from taxing diplomatic property because of its conflict with customary international law).

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 have less of a presumption of quality for the nation as whole than federal law. It represents only the preferences of citizens of the particular state. Moreover, by regulating matters of foreign policy, state decisions can impose costs on the nation as whole.

But these are arguments for restricting state laws to matters that affect state citizens, not to giving force to raw international law.²⁵¹ 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.²⁵²

Other doctrinal developments make it particularly unnecessary to use international law to police the states rather than rely on federal actors, acting within the area of responsibility. The Supreme Court has recently interpreted the Constitution to permit 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 Assurance Association v. Garamendi*, the Court held that the President alone can override state law when state laws are in tension with an area of foreign policy over which the Constitution provides for Presidential control.²⁵³ 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 believe that such is necessary to enforce federal interests.²⁵⁴ Under those circumstances, the state decisions would not be overruled unless a democratically elected federal actor--either the President or Congress--took action.²⁵⁵

²⁵¹ 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, 124-25 (2004) (arguing that federal judicial power should be used to restrict the extraterritorial application of state law).

²⁵² See notes xx and accompanying text.

²⁵³ *American 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).

²⁵⁴ *Id.* at 414 (discussing the President's "vast share of the responsibility for the conduct of foreign relations").. Determining when breaches of international law affect foreign relations would seems to be within the President's purview as would making sure that states comply. See also Julian Ku, *Structural Conflicts in the Interpretation of Customary International law*, 45 SANTA CLARA L. REV. 857, 864 (2005) (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").

²⁵⁵ At least one of the current authors has reservations about *Garamendi* as matter of constitutional law. The Court should make it clear that the federal government should have authority to displace state law only with respect to issues that fall within the enumerated powers of Congress or the President himself. Cf. Nicholas 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' enumerated powers under Article I of the Constitution). With respect to the former, perhaps congressional statute should be required in addition to or instead of presidential action. If Congress fails to the act, then the area is left within state authority. But we do not address disputes about the correctness of *Garamendi* here. The existence of *Garamendi*'s broad presidential preemption makes it even clearer that international law itself is not necessary to police state interference with foreign affairs.

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.

Thus, we believe it is a mistake to give any kind of authority to international law that would preempt the actions of the other branches within the sphere of the authority that the Constitution or statutory law gives them.²⁵⁶

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 is worse than American law for Americans, we should 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. It may actually be in the interest of the United States to take account of those concerns because that will encourage other nations' to take account the concerns of our citizens through recognizing the same international norms in their own law.²⁵⁷ Alternatively, even if it not strictly in the interest of the United States, it is simply just to take account of the interests of other nations and not privilege our own parochial interests.

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 any such assumption is unwarranted. On average, United State law is likely to be better than international law even for foreigners. This conclusion is easiest to defend in situations where US law has no spillover effects onto other nations. But there are two major categories of situations where US law does have potential spillover effects: the provision of international public goods and cases where US

²⁵⁶ 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, 467-474 (2002); A. M. Weisburd, *State Courts, Federal Courts, and International Cases*, 48-56 (1995). These authors would thus apply conflicts rules to determine when international law should be applied. Young, *id.* at 470-474. These arguments are subtle, but other commentators still believe that in some circumstances, this view would give international law preemptive force. See Michael D. Ramsey, *International Law as Non-preemptive Federal Law*, 42 VA. J. OF INT'L LAW 553, 578 (2002).

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 would be doubtful 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.

²⁵⁷ One response to the argument that it is in the interest of the United States to have more norms of international law is that, if this is so, the political branches of the United States can expressly make these norms part of our law through treaties or statutes. The need for raw international law based on this theory must be premised on some notion that the political branches are defective and will systematically fail to embrace international norms even when it is the United States interest to do so.

actions might either create private goods for foreign citizens or inflict private harms. While US law is flawed, raw international law is, overall, likely to be even worse in all three situations.

A. *Situations in which United States Law Has No Direct Spillovers.*

Many United States 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.²⁵⁸ So do many other laws providing or denying what some international law advocates view as human rights. It might seem 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, as we have seen, that supposition would be wrong. International norms that have emerged from multilateral international human rights agreements address numerous matters that have no direct spillovers. The International Convention on the Rights of the Child,²⁵⁹ the International Covenant on Economic, Social and Cultural Rights,²⁶⁰ and the International Covenant on Civil and Political Rights,²⁶¹ are but a few of the examples. As we have discussed above, these Conventions do not emerge from a process that offers any evidence of quality sufficient to trump United States laws. But here we focus on the damage to foreigners, if the United States follows such raw international law rather than its own laws.

United States autonomy to pursue distinctive norms in matters, which have no direct spillovers, has several advantages. First, it offers an alternative to international norms of which at least some foreigners can take advantage. While we do not have completely open borders, we permit substantial immigration.²⁶² One advantage of having distinctive norms is that we 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 US has been a favored destination of immigrants and refugees for some 200 years.²⁶³ From 1941 to 2000 alone, the United States admitted 27.6 million legal immigrants and 3.5 million refugees,²⁶⁴ 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.²⁶⁵ Once again, it is worth noting that the US policy of permitting large-scale

²⁵⁸ 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 ORE. L. REV. 131 (2002).

²⁵⁹ See, e.g., International Convention on the Rights of the Child, Art. 26-30 (entered into force Sept. 2, 1990) (mandating that children receive various governmental welfare and education benefits)

²⁶⁰ See International Covenant on Economic, Social and Cultural Rights, Art. 6-7 (entered into force Jan. 3, 1976) (mandating state recognition of a “right to work” and rights to welfare benefits).

²⁶¹ See the discussion of the ICCPR at nn. _____ and accompanying text.

²⁶² See discussion of the benefits of exit rights in § II.F *infra*.

²⁶³ See generally DANIELS, *supra* note ____.

²⁶⁴ ROGER DANIELS, *GUARDING THE GOLDEN DOOR: AMERICAN IMMIGRATION POLICY AND IMMIGRANTS SINCE 1882* 191, 235 (2004).

²⁶⁵ See generally *id.* at chs. 8-10 (discussing varied motivations of post-World War II immigrant groups).

immigration, opposed by many conservatives, strengthens the case against allowing international law to supersede US law, a position most anti-immigration conservatives tend to support.

The second benefit to foreigners of distinctive US legal norms is that of information. The costs and benefits of our norms will be available for all to see.²⁶⁶ Particularly in an era of increased empirical social science testing, over time we will be able to test the effects of differences in norms between the United States and other nations.²⁶⁷ Such diversity benefits foreigners as foreign nations can decide to adopt our good norms and avoid our bad norms.

The only noteworthy counterargument is that US norms will have more harmful effects than those of raw international law, yet other nations will still copy them. But both parts of this seem doubtful. First, US law emerges from a democratic process that creates at least some likelihood that they will cause less harm than rules that emerge from the nondemocratic processes that create international law,. Second, other democratic nations can use their own political processes to screen out American norms that might cause harm of copied.

Of course, many nations remain authoritarian.²⁶⁸ But our norms are not likely to have much influence on their choice of norms. Authoritarian states are likely to select norms in interests of those in authority, regardless of the norms we adopt. It is true that sometimes they might cite our norms as cover for their decision. 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, it is important to emphasize that US 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 US domestic law. But they are at least equally likely to copy harmful international law norms that penetrate into the US domestic legal system. 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 harmful legal rules adopted by the US, the harm caused by this perverse form of imitation is likely to be even greater if the US allows raw international law to override domestic law than if it 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 directly. If one is concerned about global welfare, one may legitimately worry that the United

²⁶⁶ For a discussion of how the flow of information among nations may improve policy, see Wolfgang Kerber & Oliver Budenski, *Competition in Competition Laws: Mission Impossible*, reprinted in the NEW ANTITRUST PARADOX (M. Greve and R. Epstein, eds. 2003).

²⁶⁷ On the increasing opportunities for empirical test of policies that differ from jurisdiction to jurisdiction, see John O. McGinnis, *Age of the Empirical*, 137 POLICY REVIEW 63, 73 (2006).

²⁶⁸ See *supra* notes xx and accompanying text.

States may at time adopt norms that favor its own citizens at the expense of the global citizenry. But international law will be better for other citizens only if, on average, it is likely to have better effects than the United States law.

These benefits of international law in their direct consequences for world citizens are open to doubt because of the defects we have noted in the international law fabrication process. In contrast, United States law is, on average, likely to have better consequences for foreign citizens.

1. Providing International Public Goods.

An obvious situation where US law may be 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.²⁶⁹ Public goods are nonrivalrous and nonexcludable.²⁷⁰ Once a “nonrivalrous” good is produced, consumption by one person or state does not prevent simultaneous consumption by others. The “nonexclusivity” 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.²⁷¹ A classic example is the reduction of air pollution in a city.²⁷² 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 them.

Left to themselves, individual nations, including the US, 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 US, 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 that are produced by financial 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 is not limited to a refusal to make a financial contribution, but might also

²⁶⁹ For a broad survey of international public goods problems, see generally TODD SANDLER, *GLOBAL COLLECTIVE ACTION* (2004).

²⁷⁰ For a helpful short explanation of these two conditions, see MUELLER, *supra* note ____ at 10-11; see also RICHARD A. MUSGRAVE, *A PURE THEORY OF PUBLIC FINANCE* 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).

²⁷¹ For an analysis emphasizing the importance of excludability to the provision of international public goods, see Peter Drahoš, *The Regulation of Public Goods*, 7 *J. INT. ECON. L.* 321, 322-28 (2004).

²⁷² See Todd Sandler, *Global and Regional Public Goods: A Prognosis for Action*, 19 *FISCAL STUD.* 221, 221-23 (1998) (analyzing the reduction of air pollution as a public good).

involve failure to obey norms that promote international public goods.²⁷³ “The definition of international norms and their enforcement are public goods whose production requires complex collective action among agents with diverse interests and capabilities.”²⁷⁴

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.²⁷⁵ 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.²⁷⁶ The fact that one state benefits from the norm does not inhibit others from doing so, thereby making it a nonrivalrous good. Similarly, states that do not aid in the creation or enforcement of the norm can still benefit from it, thus making it nonexclusive.²⁷⁷

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 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 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.²⁷⁸ Thus, even a relatively small number of “free riding” or indifferent states can prevent

²⁷³ 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*, 14 J. ECON. PERSP. 137 (2000).

²⁷⁴ Eyal Benvenisti & Ariel Porat, *Implementing The Law By Impartial Agents: An Exercise In Tort Law And International Law*, 6 THEORETICAL INQUIRIES IN LAW 1, 21 (2005).

²⁷⁵ For a more detailed application of public goods theory to the control of rogue states, see SANDLER, *supra* note ___, at 144-61.

²⁷⁶ For purposes of simplification, we abstract away from the possibility that some governments actually benefit from the activities of certain terrorist groups. In such a situation, elimination of the terrorist groups 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).

²⁷⁷ Cf. John Yoo, *Force Rules: UN Reform and Intervention*, 6 CHI. J. INT’L. L. 641, 655-59 (2006) (arguing that military intervention eliminate rogue states, terrorist groups, and “human rights disasters” is an “international public good” that is likely to be “undersupplied”).

²⁷⁸ See § ___, *infra*.

the establishment of a public goods-producing legal norm.²⁷⁹ If a public good is being 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.²⁸⁰ 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 preemptive strikes and might foster their overthrow, even if such norms were in the interest 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 formed 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 good-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.²⁸¹ This is especially 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

²⁷⁹ 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).

²⁸⁰ According to Freedom House's annual survey of political freedom around the world, 103 of the world's 192 governments are either "Unfree" or only "partly free." See nn. ____ and accompanying text.

²⁸¹ But cf. Posner, *supra* note at 512-13, 539 (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" 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 MORTON HALPERIN, ET AL., *THE DEMOCRACY ADVANTAGE* 25-64, 93-134 (2005) (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).

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.²⁸² By so doing, they have actually impeded the production of an international public good, generating the “public bad” of increased protectionism.²⁸³

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.²⁸⁴ Even if states have strong incentives to obey customary international law despite the lack of centralized enforcement,²⁸⁵ our analysis suggests that this will not result in 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 to do so than United States law does when the two conflict.

c. American Incentives to Provide International Public Goods.

In many situations, the US 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,²⁸⁶ 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 US is likely to receive, it will often be a “high demander” of such goods, wanting to “consume” more of them than other nations. As

²⁸² Until 2004, Europe had a moratorium on genetically modified foods. See *EU Displays Split on Biotech Food*, INT’L HERALD TRIBUNE, Mar. 12, 2006, at 12. Even when that ban was lifted approval for such foods remains 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, *Global Multilateralism*, *supra* note x, at 260-262. Europe first advanced this kind of argument in a WTO case about the use of beef hormones. It argued that 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 WTO Appellate Body Report on EC Measures Concerning Meat and Meat Products (Hormones) WT/DS26/AB/R 9(Jan. 16, 1998), http://www.wtol.org/English/tratop_e/dispu_ehormab.pdf.

²⁸³ For instance, private good of a ban on GMO foods benefits well-organized protectionist interests in the European Union and international elites supported by these interest groups have a strong incentive to try to enshrine it in international law, despite the fact that doing so creates a public bad for most of the world, especially poor consumers in developing nations.

²⁸⁴ See SANDLER, *supra* note ____ at 87-90 (explaining reasons why efforts at provision of international public goods will often fail without centralized enforcement); Goldsmith & Posner & *supra* note ____ at 1132 (making similar point).

²⁸⁵ 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).

²⁸⁶ FIGURE COMPUTED FROM *Rank Order – GDP (Purchasing Power Parity)*, CIA WORLD FACT BOOK, available at <https://www.cia.gov/cia/publications/factbook/rankorder/2001rank.html> (visited Aug. 10, 2006). US GDP is \$12.36 trillion, 20.3% of the world total of \$ 60.71 trillion. *Id.*

economist David Haddock has recently shown,²⁸⁷ high demanders often have incentives to produce public goods in situations where other beneficiaries choose not to contribute, because the high demander knows that he or she is the only one willing to produce that part of the total that only it wants. For example, if the US would like to consume 10 units of a global public good while the rest of the world would be satisfied with 8, the United States will have a strong incentive to produce units 1 through 8 as well as 9 and 10, since this is the only way that the last two units will ever be produced. By assumption, it will be impossible for the US to free ride on the production of the last two units by other states, since the latter did not even want them in the first place.

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 these goods cannot be provided without it.²⁸⁸ For instance, the optimal way to counter the worldwide threat of WMDs depends in large part on US law regarding armed conflict, from rules that define the circumstances under which the President can use force to those that defines the proper treatment of enemy combatants. Because the US 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. 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.²⁸⁹

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.”²⁹⁰ 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.²⁹¹ Empirical evidence suggests that the international public goods are more likely to be provided in situations where provision is

²⁸⁷ David Haddock, *Irrelevant Externality Angst*, Paper presented at the Latin American & Caribbean Law & Economics Ass’n Conference, May 2006 (on file with authors); See also RUSSELL HARDIN, *COLLECTIVE ACTION* 72-73, 135-36 (1982) (making a less detailed version of a similar argument).

²⁸⁸ For arguments that a strong hegemon is needed to provide global public goods for this reason, see CHARLES P. KINDLEBERGER, *THE WORLD IN DEPRESSION* (1973) (arguing that the lack of a global economic hegemon led to the Great Depression).

²⁸⁹ 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 & Richard Zeckhauser, *An Economic Theory of Alliances*, 48 REV. ECON & STATISTICS 266 (1966).

²⁹⁰ 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).

²⁹¹ 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 won’t be produced. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 48-50 (Rev. ed. 1971).

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.²⁹²

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.²⁹³ Therefore, there is no systematic reason to expect that the US will shirk on the production of appropriate norms for global order, even in the absence of pressure from international customary law.

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 the question of 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 costs of adhering to the Protocol outweigh any potential benefits. Disagreements over public goods can arise both because nations often have heterogeneous preferences about ends²⁹⁴ 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 US assessment of the situation is wrong, then underproduction of a public good may indeed occur. However, there is no systematic reason to believe that the US assessment is more likely to be in error than that arising from raw international law. Given the large benefits that the US is likely to reap from the production of most genuine global public goods as a result of the relative size of the US economy, the US 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 US has more incentive to contribute to than do 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, including norms for other nations’ domestic use. 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

²⁹² See SANDLER, *supra* note ____ at 35.

²⁹³ See *id.* (emphasizing the key role of the U.S. in producing international public goods).

²⁹⁴ Eric A. Posner, *International Law: A Welfarist Approach*, 73 U. CHI. L. REV. 487, 502-504 (2006) (emphasizing the importance of heterogeneous preferences to theories of international law).

extend the peace and prosperity of the world.²⁹⁵ 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 alone or international public goods that benefit many nations. By no means are we arguing that the US will always take foreign private goods into account in the development of its domestic legal 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.²⁹⁶ As a result, it has an interest in keeping open the avenues of trade that make other nations prosperous and thereby in fostering sound commercial and trade practices around the world.²⁹⁷ By contrast, it is far from clear that the elites who generate raw international law have as much interest in promoting international trade.²⁹⁸

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 dictatorships,²⁹⁹ and nearly always refrain from attacking each other.³⁰⁰ Moreover, governments that respect the rule of law are more likely to respect the property rights that United States citizens will acquire by investing some of the vast wealth of the United States abroad.³⁰¹ 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 governments), and

²⁹⁵ This is in fact the official policy of the United States. Bureau of Democracy, Human Rights & Labor, U.S. Dep't of State, Policy on Democracy, available at <http://www.state.gov/g/drl/democ/> (last visited Aug. 25, 2006) (discussing its interest in promoting prosperity and democracy in other nations).

²⁹⁶ From the beginning of the post-war 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, *THE GREENING OF THE GATT* 243 (1994).

²⁹⁷ 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 World Trade System Despite U.S. Constitutional Constraints*, 17 MICH. INT'L L. J. 967, 969 (1996). The United States was largely responsible for obtaining the more powerful dispute resolution system that is at the heart of the modern WTO. See William R. Spence, *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).

²⁹⁸ For discussion of left of center beliefs of United States publicists, see notes xx and accompanying text.

²⁹⁹ See David A. Lake, *Powerful Pacifists: Democratic States and War*, 86 AM. POL. SCI. REV. 24 (1992)

³⁰⁰ 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., JAMES LEE RAY, *DEMOCRACY AND INTERNATIONAL CONFLICT* (1995); MICHAEL W. DOYLE, *WAYS OF WAR AND PEACE* (1997); BRUCE RUSSETT, *GRASPING THE DEMOCRATIC PEACE* (1993). But see JOANNE GOWA, *THE ELUSIVE DEMOCRATIC PEACE* (1999) (arguing that democratic peace theory is flawed). For a strong rebuttal to such "realist" objections to the democratic peace, see James Lee Ray, *Does Democracy Cause Peace?* 1 ANNUAL REVIEW OF POLITICAL SCIENCE . 27 (1998).

³⁰¹ See Dinah Shelton, *Protecting Human Rights in a Globalized World*, B.C. INT'L AND COMP. L. REV. 273, 286 (2002) (stating that the rule of law is a long term prerequisite to trade and investment).

international institutions such as the United Nations (where nondemocratic governments have a powerful influence).³⁰²

All of these 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 higher likelihood of peace and prosperity.

In some cases, of course, the US 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 United States would like, other things be equal, to prevent pollution from harming other nations, since the prosperity of others 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 United States law is likely to be better overall. That can be the case even if in certain instances United States law imposes more costs than benefits. And even in those instances, international law may well be worse than even suboptimal American rules, because the lack of democratic participation and transparency may allows special interests to have greater leverage on the shape of international norms.

Thus, because of its incentive structure, one may well think that United States 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 the ordinary stable hegemon. The United States is a nation of immigrants.³⁰³ Our citizens come from nations around the globe and it continues to accept a large number of immigrants every year. Because of its immigrant background, many Americans are likely to care about the welfare of other nations besides their own.³⁰⁴ They often still have relatives in their home country. Even if they do not have relatives, they often identify with the nation many generations after their forbearers left and try to shape policies in their interest.³⁰⁵ The ethnic crazy quilt of America is one the qualities that makes its law more likely to be good for the rest of the world.

To be clear, none of these arguments suggest 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 process for generating international law. It is certainly conceivable that those processes will be greatly improved in the

³⁰² For discussion of this influence, see *supra* notes xx and accompanying text.

³⁰³ See notes xx and accompanying text.

³⁰⁴ See Yossi Shain, *Multicultural Foreign Policy*, 100 FOREIGN POL'Y 69, 70 (1995) (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").

³⁰⁵ *Id.*

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 control 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 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.

For the moment, however, we believe 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.