



NORTHWESTERN
UNIVERSITY
SCHOOL OF LAW
PUBLIC LAW AND
LEGAL THEORY SERIES
No. 08-08

Democracy and International Human Rights Law

John O. McGinnis
Northwestern University School of Law

Ilya Somin
George Mason University

This paper can be downloaded without charge from the
Social Science Research Network Electronic Paper Collection at:
<http://ssrn.com/abstract=1116406>



School of Law

DEMOCRACY AND INTERNATIONAL HUMAN RIGHTS LAW

**John O. McGinnis, Professor of Law
Northwestern University School of Law**

**Ilya Somin, Professor of Law
George Mason University School of Law**

**George Mason University Law and Economics
Research Paper Series**

08-19

This paper can be downloaded without charge from the Social Science
Research Network at http://ssrn.com/abstract_id=1116406

John O. McGinnis
Stanford Clinton, Sr. Professor of Law
Northwestern University School of Law
Chicago, IL 60611
j-mcginnis@law.northwestern.edu
Ph: 312-503-3235
Fax: 312-503-2035

Ilya Somin
Assistant Professor of Law
George Mason University
School of Law
3301 Fairfax Dr.
Arlington, VA 22201
isomin@gmu.edu
Ph: 703-993-8069
Fax: 703-993-8202

Democracy and International Human Rights Law

March 2008

TABLE OF CONTENTS

INTRODUCTION.....	2
I. THE CHALLENGE OF INTERNATIONAL HUMAN RIGHTS LAW.	6
A. The Growing Scope Of International Human Rights Law	7
B. International Human Law Rights Law Changing Domestic Law.	8
II. ADVANTAGES OF DEMOCRACY IN FORMULATING HUMAN RIGHTS LAW.....	13
A. General Benefits of Democratic Processes.....	14
B. Is Human Rights Law Special?	16
C. Advantages of Supermajoritarian Democratic Processes for Determining Human Rights Law.....	17
D. What if Domestic Constitutional Law is Produced by Undemocratic Process	20
III. THE DEMOCRACY DEFICIT OF INTERNATIONAL HUMAN RIGHTS LAW.....	23
A. The Influence of Nondemocratic States.	26
B Multilateral human rights treaties	29
C. Customary International Law.	32
D. Other Sources of International Human Rights Norms.	34
1. Committees Charged with Interpreting Multilateral Human Rights Law	34
2. The International Committee of the Red Cross.....	35
IV. THE EFFECT OF THE DEMOCRACY DEFICIT ON INTERNATIONAL RIGHTS LAW.	38
A. Hate Speech.	39
B. Comparable Worth.	40
C. The Right to Housing.....	41
D. Humanitarian Law.....	42
V. REPRESENTATION REINFORCING RIGHTS: THE EXAMPLE OF FREE.....	47
MIGRATION.	47
VI. CONCLUSIONS AND IMPLICATIONS.....	57

DEMOCRACY AND INTERNATIONAL HUMAN RIGHTS LAW

John O. McGinnis* and Ilya Somin**

INTRODUCTION

International human rights law has greatly expanded since World War II. Advocates argue that it should supplement and even override domestic law in a wide range of settings. Such displacement would be desirable if international human rights law were likely to provide legal norms that are on average superior to those produced by domestic lawmaking processes. Unfortunately, the opposite is likely to be the case when international human rights law norms are used as authority to displace domestic law that would otherwise govern liberal democratic states.

As we have discussed in an earlier article,¹ most international law is made through highly undemocratic procedures. These processes lack the advantages of democratic processes, and have few if any offsetting virtues. Thus, on average, the quality of what we call “raw” international law rules that have not been ratified by domestic democratic processes is likely to be lower than that of domestic legal rules established by liberal democracies.² By contrast, international law that has been validated by the domestic lawmaking process of a democracy-- either through ordinary legislation or treaty ratification – should on average be as good as other laws enacted by the same domestic processes.³

In this Article, we extend our analysis of democracy and raw international law to the special case of international human rights law, including international humanitarian law. In that

* Stanford Clinton, Sr. Professor of Law, Northwestern University School of Law. The authors are grateful for the research assistance of Susan Courtwright-Rodriguez and Anthony Messuri and for comments provided by Robert Delahunty, Mark Movsesian, David Scheffer and participants in the Hebrew University Symposium on international human rights law and the Fordham symposium on international law.

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

¹ John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?* 59 STAN. L. REV. 1175 (2007).

² For our earlier discussion of the difference between “raw” and ratified international law, see id. at 1176-77.

³ Id.

area, advocates of human rights argue that international law has a special role to play because such rights are too fundamental to left to the vagaries of domestic democracy. We demonstrate, however, that there is good reason for skepticism about the desirability of using international human rights law to change the domestic human rights law of democratic nations.

Our demonstration rests on both theory and example. As a matter of theory we show how domestic democratic processes are likely to generate human rights norms superior to those embodied in international law. International law is often enacted through the influence of nondemocratic governments and unaccountable, unrepresentative elites from democratic states. Even the assent of democratic nations to international human rights norms is often “cheap talk,” because that assent does reflect a willingness to have these norms directly enforced. We also show that many specific international human rights norms are at best debatable and at worse potentially harmful. One of the key structural problems is that the institutions interpreting such norms are not democratic, but bureaucratic and oligarchic and thus often hostile to basic economic and personal liberties.

Nevertheless, our conclusions about international human rights law are not wholly negative. Our emphasis on democracy leads to qualified enthusiasm about the role human rights law can play in restricting the abuse of government power by nondemocratic regimes. Moreover, our embrace of democratic processes as an effective generator of human rights naturally leads to a willingness to consider domestic enforcement of international human rights that directly strengthen citizens’ control over government policy. We thus seek to reorient international human rights law from generating controversial substantive rights to protecting norms that will facilitate the leverage of citizens in controlling their own governments. In short, because there is no global democratic process, international law lacks the structure to generate substantive rights more effectively than democracy. Thus international human rights law might better focus on creating rights that facilitate rather than supplant domestic democratic processes.

Such reorientation is particularly defensible in cases where international human rights law seeks to displace the domestic law of democratic states, which are likely to generate better law through their democratic processes than that enacted through international law.⁴ As an example of international human rights law that may facilitates such leverage, we advocate rights that empower citizens to “vote with their feet” through free migration

Part I of the Article describes the wide range of arguments that advocates of international human rights law advance to justify the use of these norms to override the domestic law of democracies. Part II responds to the claim that human rights law is best developed through international lawmaking processes by explaining the advantages of democratic processes in formulating human rights law relative to nondemocratic alternatives.

In Part III, we show international human rights law has a democracy deficit. This deficit exists whether this law is embedded in multilateral human rights treaties, in customary international law, or in “softer” international law norms created by international organizations. Much of international human rights law is made either by relatively unaccountable international elites or through processes in which the governments of oppressive dictatorships wield substantial influence. Allowing such international law to override domestic law in democratic states is more likely to cause harm than good because the legislative processes that generate international law are generally inferior to those of well-functioning democracies. In addition, converging the law of various nations to a single international standard could close off valuable diversity and experimentation.

Part IV provides concrete examples of the results of the democracy deficit. We consider specific norms of international human rights law generated by international institutions and show that they are deeply controversial and potentially highly flawed. These rights are largely generated by international bureaucrats, some from authoritarian nations. Not surprisingly, some

⁴ As we discuss in Part VI, there may be stronger justification for allowing it to displace the substantive law of authoritarian states.

of these norms are inimical to personal and economic liberties that can themselves be categorized as important human rights.

The subset of international rights law that is humanitarian law is also defective in some aspects of its generation. The International Committee of the Red Cross is a private organization made up of citizens from a single country that is focused on expanding the reach of humanitarian law through its interpretations of the Geneva Convention and customary international law. But this expansion is potentially at the expense of permitting nations, like the United States, from prosecuting the war against terror—a prosecution that itself may protect human liberty. It is a striking confirmation of the lack of attention to the democracy deficit in international human rights law that the parochial nature of the ICRC is hardly mentioned, let alone evaluated, in previous discussions of whether domestic institutions in the United States and elsewhere should defer to its legal judgments.

In Part V, we sketch a new theory of representation-reinforcing international human rights law that is not as open to the democracy deficit objections to conventional approaches. Our argument is conceptually similar to John Hart Ely's classic justification of representation-reinforcing elements of judicial review.⁵ Just as Ely argued that domestic judicial review might avoid the dangers of countermajoritarianism if it helped to facilitate democratic representation, we contend that the democracy deficit of international human rights law might be obviated in cases where the international legal rules in question actually promote democracy by increasing the ability of the people to exercise control over the government policies under which they live. Ultimately, democracy is itself an institution dependent on legal norms. Precisely because human rights are best developed through democratic systems, international norms that facilitate democracy have a claim to be enforced domestically.

It might be thought that representation-reinforcement is not a very useful category for application to democracies. Well established democracies almost by definition provide rights that

⁵ JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

reinforce democracy in their own nations and (to a lesser extent) abroad. For instance, free speech rights not only help circulate ideas within democratic nations but have historically provided a platform for refugees from dictatorships to influence the nations from which they have fled.

But democratic nations could do more to promote representation-reinforcing rights. Most importantly, exit and entry rights enable citizens to “vote with their feet” for their preferred government policies. Unlike many other forms of international human rights law, migration rights strengthen democratic accountability by giving citizens an alternative means of influencing government policy, one which has some advantages over traditional ballot box voting. Migration rights are also unlikely to prevent diversity and experimentation in government policy, in the way that the imposition of other substantive international human rights norms might.

Migration rights are not the only possible form of representation-reinforcing international human rights law. There may well be other examples. Nonetheless, we put forward several reasons why migration rights are stronger candidate for enforcement through international human rights law than most others that might be suggested.

Part VI briefly explores some of the broader implications of our thesis. We suggest that international human rights law should be more aggressively used to override the domestic law of dictatorships rather than liberal democracies. Although the political processes that generate international human rights law are likely to produce less desirable outcomes than the domestic lawmaking processes of democracies, they may well be superior to those of dictatorships. In extreme cases, such as that of totalitarian states, almost any alternative legal regime is likely to be superior to that established by the state’s domestic rulers. Finally, we emphasize that our skepticism about “raw” international human rights law does not apply to international human rights norms that have been duly ratified by domestic lawmaking processes in democratic states.

I. The Challenge of International Human Rights Law.

International human rights law has greatly expanded in its scope since World War II. Unfortunately, the process for its generation has not fundamentally improved, remaining substantially undemocratic. Despite these defects, advocates increasingly urge that nations rely on the authority of international human rights law to create domestic rules of decision. We believe that such reliance is a mistake, because the process for generating international human rights is currently inferior to the domestic process in well functioning democracies. We recognize that many principles that happen to be part of international human rights laws may well be beneficial, but their presence in international human rights law itself, given its deficient production process, does not provide sufficient evidence of their beneficence. Accordingly, international human rights laws should not be used as an authority in well functioning democracies that are capable of choosing sound principles through their own superior domestic processes.

In this section, we first briefly describe the growing scope of international human rights law. We then describe the many ways in which advocates of international human rights argue that this body of law should be used as authority to create domestic rules of decision. In the sections following this one, we complete our basic analytic framework by showing that democracy is important to generating human rights and that international human rights law has a democracy deficit.

A. The Growing Scope Of International Human Rights Law

The scope of international human rights law has dramatically expanded since World War II and that expansion continues. “First generation” international human rights rights focused on the basic requisites of civil and democratic society, such as free speech.⁶ But so-called “second generation” rights are social and economic in nature, including “positive” rights against the

⁶See Katherine R. Miller, *Playground Politics Assessing the Wisdom of Writing Reciprocity into U.S. International Recognition and Enforcement Law*, 35 GEO. J. INT’L L. 239, 308 (2004).

government, such as the right to employment or housing.⁷ “Third generation” rights focus on the interests of society as a whole; for instance the right to “sustainable development.”⁸ Accordingly, the trend in international human rights laws has been from rights about which there is more consensus to rights about which there is less, and from rights which have a fairly definable core, like free speech, to those that are quite difficult to define, such as sustainable development. Moreover, by their very nature, positive rights to government-provided resources can conflict with “negative” individual rights to liberty and property.

Besides the expansion and potential conflicts created by whole new categories of rights, the range of international human rights norms now accepted or espoused is quite breathtaking. Such rights include the right to paid holidays,⁹ the right to health care,¹⁰ and the right to affirmative action.¹¹ Other rights impose duties on third third-party nations, such as the right of protection from genocide.¹² Some of these goals, like affirmative action, are controversial even as a policy matter. Yet others like increasing the availability of health care, may be desirable policy objectives, but nevertheless still raise questions about whether it is wise or prudent to categorize these goals as rights that may trump other considerations, including budgetary constraints.

B. International Human Law Rights Law As A Justification for Changing Domestic Law.

As international human rights law has expanded in scope, so too has interest grown in using this web of international law to override domestic law. International human rights law can enter the domestic sphere in a variety of ways. Most bluntly, advocates have suggested that

⁷ *Id.*

⁸ *Id.*

⁹ See Universal Declaration of Human Rights, G. A. Res. 217 (111), U.N. Doc. A/810 (1948).

¹⁰ *Id.* Art. 25 (1). See Jason B. Saunders, *International Health Care and the Single Source Financing Systems of Denmark and the Netherlands*, 18 SUFFOLK TRANSNAT’L REV. 711 (1995). (upbraiding the United States for failing to recognize this right).

¹¹ The International Convention on the Elimination of Forms of Racial Discrimination, Annex to G. A. Res. 2106 20 U.N. GDOR Res. Supp. (No. 14) 47, U. N. doc. A/6014, Art. 2 (2) (1965). See also Jordan J. Paust, *Race-Based Affirmative Action and International Law*, 18 MICH J. INT’L 659, (1997) (Justice Ginsburg relied on this right in *Gruther v. Bollinger*, 539 US 306, 344 (2003) (Ginsburg, concurring).

¹² See David Aronofsky, *The International Legal Responsibility to Protect Against Genocide, War Crimes, and Crimes Against Humanity: Why National Sovereignty Does Not Proclude its Exercise*, 13 USA J. INT’L & COMP. L. 317 (2007).

domestic courts apply international human rights law directly, overriding domestic law in cases where the two conflict. Second, international human rights law can override domestic law indirectly by being used as a rule of construction in determining the meaning of constitutions and statutes. Finally, the authority of international human rights law can be used to justify changes in domestic law enacted through the ordinary legislative process. We discuss each of these routes of international human rights incorporation in turn.

We distinguish here between the use of international human rights law as an authority in its own right and appeals to principles that just happen to be part of international human rights law. We do not claim that principles contained in international human rights law are necessarily bad ones, but merely that reliance on international human rights law as an independently valid source of authority for construing domestic law is unsound..

1. Direct Overriding of Domestic Law By International Human Rights Law.

The most direct route to incorporating international human rights law into domestic law is to argue that international law, even if that law is not part of a ratified treaty, is an integral part of domestic jurisprudence. In the United States, the doctrinal basis for such a move is the slogan "international law is part of our law",¹³ taken from the Supreme Court's famous decision in the *Paquette Habana* case. Advocates thus argue that international human rights law, if incorporated into international "custom" should override contrary domestic law in the United States.¹⁴ A similar argument that customary international law is part of domestic law can be made in many other democratic nations.¹⁵

¹³ 174 U.S. 677, 700 (1900).

¹⁴ See, e.g., Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1566 (1984).

¹⁵ The Netherlands is an example. See John C. Penn, *Sexual Harrassment: Prescriptive Policies of the European Community, Ireland and New Zealand*, 6 AM. J. GEN. L. 139, 164 (1997/

The extent to which courts in the United States are likely to accept this argument in the very near future is open to doubt.¹⁶ But its popularity in the academic world suggests that it will remain a permanent temptation.¹⁷ For reasons described below, we believe that temptation should be resisted.

2. International Human Rights Law as Rule of Construction for Domestic Law.

More indirect methods of incorporating international human rights into domestic law are already bearing fruit. Courts can rely on international human rights law to construe domestic law, even if they are not making international human rights law a completely independent domestic rule of decision. International human rights law can be used as a principle of construction both at the constitutional and statutory level. This kind of use of international human rights law has been endorsed by the leading academic treatise on the subject.¹⁸

It is important to recognize that this use of international law ultimately overrides domestic lawmaking processes no less than direct judicial incorporation of international law. If the use of international law as a rule of construction alters the legal rules judges impose, it will lead to the establishment of a different legal rule from that which would have emerged from domestic political decisionmaking alone. If it does not affect either case outcomes or the rules underpinning them, then it will be entirely superfluous. In at least some cases, however, the use of international human rights law as a rule of construction will have an impact. Otherwise, it is

¹⁶ A recently decided case, *Medellin v. Texas*, No.06-9844, (Sup. Ct. Mar. 25, 2008), underscores those doubts. In deciding that the treaty at issue in the case was not self-executing, Chief Justice Roberts emphasized that it was the political branches, not the judiciary that should determine the existence and scope of the international obligations of the United States. *Id.*, slip. op at 19, 22.

¹⁷ See, e.g., Michael J. Glennon, *Raising The Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional Law*, 80 NW. U. L. REV. 321, 325 (1985); Julian Lobel, *The Limits of Constitutional Power; Conflicts between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1075 (1985); Jordan J. Paust, *The President Is Bound by International Law*, 81 AM. J. INT'L L. 377, 378 (1987).

¹⁸ See HENRY STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 1012-1013 (2000).

difficult to understand the broad enthusiasm for this approach among those who advocate expanding the influence of international law.¹⁹

In the United States, in *Roper v. Simmons*, the Supreme Court cited the Convention on the Rights of the Child as evidence of international consensus against the execution of juveniles, thereby helping to justify its interpretation of the United States Constitution as banning that practice.²⁰ Yet the United States had never ratified the Convention.²¹ In addition, the Court cited the International Covenant on Civil and Political Rights,²² even though the United States had entered a formal reservation against the Covenant's death penalty provision.²³ Thus, the Court relied on international human rights law documents that the political branches had expressly refused to incorporate into domestic law.

We do not believe that this instance of using international human rights law is likely to be an isolated one. Several Supreme Court justices have expressed enthusiasm for the use of international human rights law in constitutional interpretation.²⁴ Academics are even more insistent that integrating international human rights law into our fundamental law is necessary to ensure that judicial interpretations of the U.S. Constitution reflect the values of the wider world community.²⁵

¹⁹ See, e.g., Vicki Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 124 (2005) (discussing benefits for construing Constitution in light of international law); David Golove, *Military Tribunals, International Law and the Constitution: A Franckian-Madisonian Approach*, N.Y.U. INT'L REV. & POL. 363, 370 (2003) (discussing and approving rationale for construing constitutional powers in light of international law).

²⁰ 543 U.S. at 576.

²¹ 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).

²² 543 U.S. at 576.

²³ *Id.* at 622 (Scalia, J. dissenting).

²⁴ See Stephen Breyer, Assoc. Justice, U.S. Supreme Court, Keynote Address at the Ninety-Seventh Annual Meeting of the American Society of International Law (Apr. 4, 2003), *in* 97 AM. SOC'Y INT'L L. PROC. 265, 265 (2003); Sandra Day O'Connor, Assoc. Justice, U.S. Supreme Court, Keynote Address at the Ninety-Sixth Annual Meeting of the American Society of International Law (Mar. 16, 2002), *in* 96 AM. SOC'Y INT'L L. PROC. 348, 350 (2002) ("[C]onclusions reached by . . . the international community should at times constitute persuasive authority in American courts.")

²⁵ See, e.g., Harold Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 52-57 (2004).

Nor is this approach limited to the United States. In an important recent article, Professor Melissa Waters has shown that the courts of other nations whose constitution, like ours, do not directly incorporate international law into their domestic jurisprudence are starting to interpret their constitutions as congruent with multilateral international human rights treaties.²⁶ For instance, they are beginning to use these treaties to resolve alleged ambiguities in constitutional rights.²⁷ They also may use them to limit constitutionally granted legislative power where a contrary construction might violate international human rights law.²⁸ As Professor Waters notes, this trend “could effectively result in the subordination of all domestic law to international human rights law.”²⁹ This trend is consonant with one also noted by political scientists: political and social elites are reacting to the rise of democracy in the modern world by constructing more powerful and wide ranging roles for the judiciary, because in judicial for a they retain substantial influence.³⁰

Another method for integrating international human rights law into domestic jurisprudence is to require that domestic legislation be interpreted consistently with international law wherever possible. In the United States, advocates argue this approach gain support from ancient Supreme Court precedent, like the *Charming Betsy*,³¹ that seeks to harmonize, wherever possible, American statutory law, with the norms of the wider world.³² In particular, modern international human rights advocates suggest that the statutory authority on which the president relies in war and law enforcement operations in the war on terror should be interpreted against the background of a complex web of international human rights law and international humanitarian

²⁶ *Id.* at 686.

²⁷ *Id.* Art at 683.

²⁸ *Id.*

²⁹ See, Melissa D. Waters, *Creeping Monism; The Judicial Trend Toward Interpretative Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628 (1997).

³⁰ See RAN HIRSCH, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004).

³¹ *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

³² See Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law, and the Charming Betsy*, *Cannon*, 46 B.C.L.Rev. 293, 331-33 (2005).

law.³³ Such interpretations would constrain the President's authority by requiring that it be exercised in accordance with purported international norms.

3. International Human Rights as an Authority Justifying Legal Change.

Finally, international human rights norms may be used as authority to change the domestic regulations, statutes or constitutions of democratic nations. Many have seen this avenue as the best way to internalize international human rights norms in domestic law. For instance, Dean Harold Koh has suggested that nation states sustain bureaucratic units, devoted to such integration.³⁴ The legal advisor's office at the State Department provides an example of a bureaucracy focused on international law integration in the United States.³⁵ Besides the mode of bureaucratic integration, international human rights norms could be relied upon as authority more generally in legislative deliberation about appropriate policy.

Arguing for the adoption of principles that happen to be in international human rights law on the basis of moral or pragmatic considerations is, of course, completely consistent with ordinary democratic discourse and deliberation. Our focus is limited to the citation of international human rights law as an *authority* independent of other considerations. In so far as advocates argue that the laws of democratic nations, including the United States, should converge to international human rights law merely because such convergence is intrinsically good, it is important to examine whether the process that generates international human rights law justifies such an appeal to authority. We turn to that question in the next Part.

II. ADVANTAGES OF DEMOCRATIC PROCESSES IN FORMULATING HUMAN RIGHTS LAW.

This Part explains the benefits of democratic processes as a means for determining the content of human rights law. We start by briefly summarizing the most important general

³³ *Id.*

³⁴ See Harold Koh, *How is International Human Rights Law Enforced?*, 74 IND. L. REV. 1397, 1410 (1997).

³⁵ *Id.*

advantages of democratic lawmaking relative to authoritarianism and oligarchy. We then consider the important argument that human rights law in particular should not be developed by democratic processes because it is intended to constrain democracy. Despite some significant shortcomings, even human rights law developed by purely majoritarian democratic processes is likely to be preferable to nondemocratic alternatives. Moreover, some of the disadvantages of purely majoritarian democratic processes for formulating human rights law can be reduced by resorting to a different kind of democratic mechanism-- supermajoritarian constitutional lawmaking.

A. General Benefits of Democratic Processes.

Democracy provides an important justification for legal norms, including human rights, for several reasons. First, many political theorists argue that democratic control of government policy has intrinsic value.³⁶ 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 worth, it still has considerable instrumental benefits. Citizens are likely to be better off under a government subject to democratic checks than under one where they are largely absent.³⁷ 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.³⁸

Under some conditions, democratic governance not only protects the public against self-dealing elites, but also increases the likelihood that political institutions will reach “correct” decisions on crucial issues. The Condorcet Jury Theorem is the most famous theory outlining this

³⁶ See e.g., BENJAMIN BARBER, *STRONG DEMOCRACY* (1984); CAROLE PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* (1970).

³⁷ For a recent summary of the evidence, see MORTON HALPERIN, ET AL, *THE DEMOCRACY ADVANTAGE* 25-64, 93-134 (2005).

³⁸ For example, it is striking that no democratic nation, no matter how poor, has ever had a mass famine within its borders, whereas such events are common in authoritarian and totalitarian states. See AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 178 (1999) (famously noting that “there has never been a famine in a functioning multiparty democracy”).

possibility. The theorem assumes that the two alternatives from which voters choose have an equal a priori chance of being true.³⁹ It then holds that when individuals in a group make decisions independently of one another about the truth of propositions and each has a greater than 50-percent accuracy rate, the decision reached by the majority is likely to assess the truth of the proposition correctly.⁴⁰ Thus, majority rule is usually likely to make better decisions than insular institutions isolated from democratic control at determining what rights are actually in the public interest. One important exception to this proposition is that experts may reach better decisions than democracy if each individual voter in the democratic process is less than 50% likely to reach the right decision. Systematic biases in voter deliberations can cause such an outcome.⁴¹ Even in this case, however, the experts may not outperform the democratic process if they lack proper incentives to pursue beneficial policies.

Obviously, democratic processes also have weaknesses. Widespread political ignorance and irrationality often prevents voters from monitoring government and makes the enactment of flawed policies more likely.⁴² The disproportionate power of organized interest groups allows them to “capture” the democratic process and use it in ways that sometimes harm the interests of the general public.⁴³ For these and other reasons, democratic government may often be inferior to market or civil society institutions.⁴⁴ For our purposes, however, the important point is that democratic processes are generally superior to nondemocratic policymaking by government.

³⁹ See DENNIS MUELLER, PUBLIC CHOICE III 129 (2004).

⁴⁰ *Id.*

⁴¹ See, e.g., BRYAN CAPLAN, THE MYTH OF THE RATIONAL VOTER (2007) (describing a variety of systematic biases that may lead voters into error).

⁴² See Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty*, 89 IOWA L. REV. 1287 (2004). Ilya Somin, *Voter Ignorance and the Democratic Idea*, 12 CRITICAL REV. 413, 415-33 (1998). On the political irrationality of many voters, see CAPLAN, supra note ____.

⁴³ For a helpful 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 DENNIS C. MUELLER, PUBLIC CHOICE III 347-53, 481-89, 497-500 (2003).

⁴⁴ See, e.g., Ilya Somin, *Voter Ignorance and the Democratic Ideal*, 12 Critical Rev. 413, 447-53 (1998) (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).

Extensive evidence suggests that democratic political processes generally produce better outcomes on a wide range of indicators than do nondemocratic ones.⁴⁵

B. Is Human Rights Law Special?

Some might concede the above points for most governmental policy but suggest that concern over the democracy deficit of human rights law is misplaced, because human rights are universal, natural and countermajoritarian. Because rights are natural and universal, their validity does not depend on endorsement by any particular political process. Because rights are restrictions on democratic governments, their content should not be left up to the democratic process.

We do not have space to extensively address the metaphysical status of human rights, but we do observe that individuals have disagreed on the content and scope of these rights since the issue first arose centuries ago. Indeed, at times the some human rights claims have been in sharp tension with others. For instance, individual “negative rights” to liberty are often in tension with “positive rights” of individuals to resources through provision of the government.⁴⁶ Thus, a key question for human rights is epistemic: how are we to know what is the “right” content of human rights law? Accordingly, whatever the metaphysical status of rights, citizens need a process to determine what rights the law should enforce. Given that the process is likely to be run by the institution of government, democratic processes may well be superior to the available authoritarian and oligarchic alternatives.

While as we discuss below, we do not believe that governments should necessarily limit themselves to majority rule in determining what is the content of legally enforceable human rights, there are reasons that even majority rule is likely to be better than authoritarian or oligarchic

⁴⁵ See HALPERIN, *supra* note _____.

⁴⁶ The clash between these two types of rights claims is a major focus of modern political philosophy. See, e.g., WILL KYMLICKA, *THEORIES OF DISTRIBUTIVE JUSTICE* (1995) (surveying much of the relevant literature).

mechanisms in choosing the content of human rights to be protected by law. Majority rule has virtues that can help maximize citizens' welfare. One is rooted in a preference analysis of voting.⁴⁷ If each voter supports laws that provide him or her with net benefits, then the laws supported by the majority should produce total benefits that exceed total costs, because the benefits to the greater number of people in the majority will exceed the costs to the minority.⁴⁸

A second advantage of majority rule in determining human rights is implicit in the Condorcet Jury Theorem, discussed above.⁴⁹ If each individual voter is 50% or more likely to choose the "correct" package of human rights, a majority rule process will be more likely to reach the right result than other methods of decisionmaking.⁵⁰

In sum, there is little reason to believe that human rights law is an exception to the general assumption that democratic lawmaking processes are superior to authoritarianism and oligarchy. However, as discussed below, ordinary majority rule democracy may be inferior to supermajoritarian constitutional law.

C. Advantages of Supermajoritarian Democratic Processes for Determining Human Rights Law.

Mechanisms that are broadly democratic but eschew pure majoritarianism can be better at generating protections for minority rights than is majority rule. It does not follow, however, that nondemocratic institutions are better than majority rule at generating human rights protections, even for minorities. Nondemocratic institutions lack incentives to protect politically weak minorities. They may also embody prejudices that lead them to protect only some minorities

⁴⁷ See Frank I. Michelman, *Why Voting?*, 34 *LOY. L.A. L. REV.* 985, 994-96 (2001) (discussing preference model of voting)

⁴⁸ We recognize that this argument assumes, however, assumes that the average cost imposed on people harmed by the law does not exceed the average benefit to people helped by it; otherwise, the majority might pass a law that provides small benefits to itself, but imposes much larger costs on the minority. As we describe below, supermajoritarian political processes can address this difficulty.

⁴⁹ See Section ____ above

⁵⁰ See Michelman, *supra* note x, at 996 (discussing Condorcet model).

while actually being antagonistic towards others. The choice of which minorities to protect and to what degree is hardly a simple one.

We recognize that human rights law is often supposed to constrain the majority either from making rash decisions in times of crisis or from violating the rights of minorities. But achieving these goals does not depend on abandoning democratic forms of government. It only requires that we modify the majority rules of ordinary democratic politics.

One strategy to restrain majorities, for instance, is to create a democratic form of “higher politics”— constitution-making. Constitutions such as that of the United States and other countries are often made by supermajority rules.⁵¹ These rules require a broad consensus and rules made by a consensus can then be used to contain the passions of majorities in ordinary governance.⁵² Thus, for example, the United States and other democracies protect freedom of speech, which constrains majorities from abandoning that right in times of passion created by crisis or war.⁵³ Judges then enforce this democratically made consensus against majorities. Majorities are restrained but through fundamentally democratic means.

Supermajoritarian constitutionalism can also help protect minority rights. It addresses one of the main reasons that majority rule can be less than optimal-- the different intensity of preferences of voters. For instance, a majority may find some religious practices distasteful and mildly prefer that they be banned. But the minority that engages in these practices may intensely prefer that they be permitted. Under simple majority rule without constitutional restraints, there is a danger that the majority will simply ban those religious practices they dislike. Constitutional

⁵¹ For a detailed analysis of the US case, see John McGinnis & Michael Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703 (2002).

⁵² See Jon ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS 129-41, 157-61 (2000) (discussing the use of constitutions to prevent majorities from acting in the heat of passion).

⁵³ See Adrian Vermeule, *The Judicial Power in (State) and Federal Courts*, 2000 SUP. CT. REV. 357, 366 (viewing First Amendment as a precommitment device).

rules enacted by supermajority processes can help restrain such excesses.⁵⁴

One response to this problem is to create a process for determining the contents of rights that operates behind a “veil of ignorance” so that citizens will be unsure of their own future preferences, making it unclear whether they and their descendants will be in the highly intense minority or the mildly intense majority.⁵⁵ This ignorance will thus cause them to take more account of the minority’s preferences. Here too, the supermajority rule for passing and repealing a constitutional provision creates a form of democracy conducive to the protection of minority rights, because it creates such a veil of ignorance. Because of these voting rules, citizens recognize that enactments are likely to endure longer than ordinary legislation and thus are less certain about how they or their children will be affected by its long tail.⁵⁶

In real world constitution-making, of course, framers rarely operate behind a complete veil of ignorance. Nonetheless, supermajoritarian constitutionmaking is closer to a veil of ignorance than ordinary majoritarian legislation, because it is likely to last longer by virtue of being more difficult to repeal.

Even in the absence of any veil of ignorance effects, the need to win supermajority support is likely to force legislators to take greater account of minority preferences than they would under a pure majoritarian democracy. Accordingly, the majority becomes more considerate of the minority’s preferences. Thus, the United States Constitution, among others, protects the religious freedom of minorities to a greater extent than ordinary political processes would.

Accordingly this kind of formal supermajoritarian constitution-making protects human

⁵⁴ See, e.g., *Church Of Lukumi Babalu Aye v. City Of Hialeah*, 508 U.S. 520 (1993) (decision using the US Constitution to protect unpopular minority religious practice against a ban favored by the majority).

⁵⁵ See Michael A. Fitts, *Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions*, 88 MICH. L. REV. 917, 922–23 (1990) (explaining that less information can help overcome stalemates by avoiding politically contentious issues and reducing self-interest in the decisionmaking process). The veil of ignorance concept was first developed in JOHN RAWLS, *A THEORY OF JUSTICE* (1971). For the classic work arguing that supermajoritarian constitution-making improves the content of a society’s basic legal rules, see JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (1962).

⁵⁶ See Dennis C. Mueller, *Federal Government and Trumps*, 83 VA. L. REV. 1419, 1423 (1997).

rights but does so through a democratic process. Voters participate democratically in the selection of constitutional rules, but under voting rules that depart from pure majoritarianism.

We recognize that not everyone believes that such formal constitution making is sufficient to protect all necessary individual rights, particularly as the world changes. Another possible structure is a system where judges have some discretion to elaborate on constitutional text to protect individual rights. But even that system needs some substantial democratic input if jurists are to represent the values of people they govern. In the United States, for instance, an elected President nominates the justices and an elected Senate must confirm them.⁵⁷ The confirmation process subjects every part of the potential judges' career and record to substantial scrutiny.⁵⁸ Even after confirmation, the press relentlessly covers and critiques Supreme Court decisions, and the political branches of government can affect their implementation.⁵⁹ Thus, even this model of human rights elaboration has a substantial democratic element, even if it allows greater discretion for judicial elites than the more formal model under which judges enforcing the Constitution have little or no discretionary power.

In contrast, as we discuss below, the elites that contribute so much to the development of human rights law face no such democratic discipline. For example, modern publicists are generally appointed by fellow faculty members, not democratically accountable officials. Members of international organizations are often appointed by authoritarian governments. Even those appointed by democratic governments are not chosen through processes with anything like the publicity or transparency accompanying Supreme Court nominations.

D. What if Domestic Constitutional Law is Also Produced by Undemocratic Processes?

⁵⁷ U.S. CONST. Art. II, sec. 2.

⁵⁸ See William G. Ross, *Participation by the Public in the Federal Judicial Selection Process*, 43 VAND. L. REV. 1, 22 (1990) (discussing increased public scrutiny of federal court nominees).

⁵⁹ For the most important work outlining the limits on judicial power imposed by the political branches in the US, see GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS MAKE SOCIAL POLICY?* (1991) (arguing that the Supreme Court was tightly constrained in its ability to influence policy outcomes even in such areas as civil rights law). Rosenberg and other scholars emphasizing the limits of judicial power in the US may to some extent have overstated their case. See David E. Bernstein & Ilya Somin, *Judicial Power and Civil Rights Reconsidered*, 114 Yale L.J. 591 (2004).

An important objection to our argument for the advantages of supermajoritarian constitutional law is that domestic constitutional law may have been produced by undemocratic processes. If so, its democratic credentials may be no better (or even worse) than those of international law.

This objection may seem to have particular force with respect to the United States Constitution, which is much older than that of any other democratic state. As a result of its age, most of its important provisions were enacted in the 18th century, at a time when women, slaves, many free black males, and even some non-property owning men were denied the right to vote on its ratification. Even the post-civil war amendments of the 1860s were still enacted at a time when women were denied the franchise, as were many blacks.

There is no denying that this objection partly undercuts the democratic credentials of the U.S. Constitution. But from today's perspective the greatest defects in the Constitution flowing from this exclusion have been corrected. The Thirteenth Amendment prohibits slavery, the Fourteenth Amendment constrains government racial discrimination, and the Fifteenth Amendment forbids denial of the franchise on account of race.⁶⁰ The Nineteenth Amendment granted women the right to vote.⁶¹ The Constitution now grants all people the freedoms of white, male property owners in 1789 and thus today our constitutional system as well as that of other industrial nations is substantially democratic. Moreover, these changes in the Constitution occurred long before international law banned slavery and racial discrimination or required that women be given the franchise.

In fact, it is a measure of the democracy deficit of international human rights law that the ratification process that produced the Constitution was still far more democratic than that which produces international human rights law. At the time of the American Revolution, anywhere from

⁶⁰ U.S. Const. Amendments XIII, XIV, XV

⁶¹ U.S. Const. Amend. XIX

60 to 90 percent of American white males had the right to vote in their respective colonies.⁶² Property qualifications and other restrictions on the franchise were eased or abolished in many states between 1776 and the ratification of the Constitution in 1787-88.⁶³ Several states allowed free blacks, Native Americans and even noncitizen aliens to vote.⁶⁴ Moreover, many states waived property and other restrictions on the franchise for the ratification vote.⁶⁵ It is difficult to precisely estimate what percentage of the adult American population was eligible to vote in the 1787-88 elections for members of the state constitutional ratification conventions. However, it is likely that the vast majority of white males were eligible, as were a significant number of free blacks, a combined total of perhaps 30 percent of all adults.⁶⁶ This is far short of modern democratic standards. But it was still a much more representative process than that which produces most modern international law, which tends to be produced by a tiny, unrepresentative elite and influenced by representatives of authoritarian states that deny voting rights to virtually their entire populations.⁶⁷ As we discuss below, many of the most important treaties that serve as the basis for international human rights law were negotiated during the immediate post-World War II era, at a time when many of the most powerful states with veto power over the results were severely oppressive totalitarian dictatorships that make the 1780s United States seem a democratic paradise by comparison.

By the time of the ratification of the Post-Civil War amendments in the late 1860s,

⁶² See ALEX KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 7 (2000) (discussing conflicting estimates).

⁶³ *Id.* at 8-11; see also CHILTON WILLIAMSON, *AMERICAN SUFFRAGE FROM PROPERTY TO DEMOCRACY 1760 TO 1860* 20-39 (1960).

⁶⁴ *Id.* at 418 n.10.

⁶⁵ AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 7 (2005).

⁶⁶ This figure is a rough estimate based on the 1790 census data showing that the American population in 1790 was 81% white. See Campbell Gibson & Kay Jung, *Historical Census Totals on Population Statistics by Race, 1790 to 1990*, Tbl. 1 Population Div., U.S. Census Bureau, Sept. 2002, available at <http://www.census.gov/population/www/documentation/twps0056.html>. If we assume that males made up half the white population (40%) of the total and that 75% of white males (probably a low estimate based on the data cited above) had the right to vote in the ratification elections, we get a figure of 30% of the adult population eligible to vote in the ratification elections. To this should be added the relatively small numbers of free blacks who could vote.

⁶⁷ See Part III, *infra*.

restrictions on the franchise had been considerably loosened in most states.⁶⁸ Thus, the relative democratic legitimacy of these ratification processes were even stronger than those of the Founding ratification.

In sum, we believe it is wholly appropriate to criticize the democracy deficit of international human rights law by comparing and contrasting the manner in which international human rights norms are formed and the manner in which domestic human rights norms are created in democratic societies. Democracy can be combined with limits on majority rule that are themselves imposed by democratic processes, including ones that depart from pure majority rule. In this next section we show that the democracy deficit of international human rights law is substantial.

III. THE DEMOCRACY DEFICIT OF INTERNATIONAL HUMAN RIGHTS LAW.

We begin by analyzing the nature of the democracy deficit of international human rights law in a democratic state. Of course, if that nation has adopted a provision of international human rights law through its domestic democratic processes, there is no democracy deficit. The more interesting question arises when a democratic nation has not incorporated the provisions through a process as democratic as that by which incorporates its domestic norms.

It might be thought that in the absence of such incorporation, the argument for the democracy deficit is simple and compelling. It is undemocratic to impose norms on a nation that has not democratically embraced them. Similarly, it is undemocratic to impose international law on a democratic state merely because that law has been enacted by undemocratic processes operating in international institutions or authoritarian governments abroad.

But advocates of international human rights might plausibly respond that the democracy deficit is attenuated and the authority of these norms secured if these norms themselves have a strong democratic pedigree from sources other than those of a particular nation. Thus, advocates

⁶⁸ KEYSSAR, *supra* note _____ at 87-107.

have argued that norms found in multilateral agreements on human rights or customary international law should be treated as universal, because of the widespread agreement among nations that this kind of international law commands.

In this part we show that the basic multilateral human rights treaties and norms generated by customary international law suffer from a democracy deficit, because they do not provide real evidence of consensus or even widespread support for their provisions from the democratic nations of the world. The basic multilateral human rights treaties were negotiated at a time when totalitarian nations had veto power at the negotiating table. As a result, no one can be certain that the same provisions would have emerged from a process in which all the players were democracies. Moreover, many of the democratic states that agreed to these treaties did so only as a matter of international law and did not incorporate them into domestic law. The lack of domestic effect makes their assent "cheap talk."

Customary international law suffers from the same defects in so far as it relies on these multilateral agreements for inferences as to the content of custom. Even apart from such reliance, customary international law has multiple democracy deficits. Its content is inferred by unrepresentative groups, such as international courts and publicists. And it is generated by a process that is not transparent to the general public. This circumstance creates agency costs and undermines democratic legitimacy.

A third source of international human rights norms, generally grouped under the term "soft law," is growing in importance, but suffers from a comparable democracy deficit. These kind of norms stem from the deliberations of international organizations and commissions. The difficulty is that such entities are also not democratic even if they purport to be authoritative.

Thus, whether human rights norms are rooted in multilateral treaties or customary international law, they do not have a strong democratic pedigree. Of course, the lack of democratic provenance does not mean that their provisions are necessarily harmful. But it does show that their soundness must be defended on the basis of some other argument than their

appearance in multilateral treaties or as custom. As a result, their mere existence as rules of international law should not be the basis for direct judicial incorporation, use as a background principle of legal interpretation, or even as a reason for legislative adoption. We address the peculiar democracy deficits of multilateral international human rights agreements, customary international law and “soft law” in turn. But first we discuss a problem that afflicts them all – the influence of nondemocratic states.

A. The Influence of Nondemocratic States.

A particularly important and underappreciated element of democracy deficit of international human rights law is the pervasive influence of nondemocratic states over its content. Nondemocratic governments have little incentive to take account of the interests of either their own people or those of foreign states in determining their stances on international law.

The influence of nondemocratic states is most obvious in multilateral human right treaties which although in many cases unratified by the United States, are often claimed as a basis for customary international law.⁶⁹ Totalitarian nations such as those of the Soviet bloc were part of the give and take in negotiations on these treaties, and exercised effective veto power over their adoption.

The Soviet bloc played a substantial role in determining the content of the Universal Declaration of Human Rights, arguably the most important international human rights treaty. Joseph Stalin’s representatives successfully insisted on the inclusion of “social” and “economic” rights in the document,⁷⁰ watered down protections for political liberties and freedom of

⁶⁹ The Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg. U. N. Doc A/810 (Dec. 10, 1948), the International Covenant on Civil and Political Rights, Dec. 16, 1966, S. EXEC. DOC/ E. 95-2 (1978), 999 U.N.T.S. 171, and the International Covenant and Economic, Social and Cultural Rights, Dec. 16, 1966, S, EXEC. Doc. D, 95-2 (1978), 993 U.N.T.S. 3, all date from the Cold War period.

⁷⁰ See JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* chs. 5-6 (1999).

speech,⁷¹ and prevented the inclusion of any significant protection for private property rights.⁷² The Soviet bloc also exercised extensive influence over the content of the International Covenant on Civil and Political Rights, perhaps the second most notable international human rights treat.⁷³ We can hardly be confident that the same provisions would have emerged absent Soviet influence.

Nondemocratic states also heavily influence the content of other types of “raw international law.” To the extent that customary international law is based on state practice,⁷⁴ it is important to recognize that even today 103 of the world’s 193 nations are rated either “Not Free” or only “Partly Free” according to Freedom House’s annual Survey of political freedom around the world.⁷⁵ Thus, the majority of those states influencing the content of “state practice” are either dictatorships or at least not fully democratic. Nondemocratic states are also heavily represented in the United Nations Human Rights Council and its predecessor organization, the UN Human Rights Commission, and other international bodies that influence the development of human rights law.⁷⁶ The same is true of more narrowly focused committees tasked with interpreting and applying more specific international human rights treaties.⁷⁷

⁷¹ Id. at 60-61, 69-74 (noting that Soviet influence was responsible for the defeat of efforts to include provisions protecting the right to form opposition political parties, and for the inclusion of protections against “hate speech” in order to justify government censorship of “fascist” speech).

⁷² See MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNITED NATIONS DECLARATION ON HUMAN RIGHTS* 182-83 (2005). The Declaration does include a guarantee that “everyone has the right to own property alone as well as in association with others.” Universal Declaration of Human Rights Art. 17. However, governments were allowed to set this right aside more or less at will due to the presence of other provisions in the text intended to constrain its scope. See Morsink, *supra* note at 155-56. Soviet pressure led to the elimination of the term “private” from the phrase “right to own property” (which originally included that word), in order to indicate that Article 17 does not provide any special protection for private property relative to the government’s ownership claims. Glendon, *infra*, at 183.

⁷³ 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 (1966)(discussing the influence of the Soviet Union on provisions regarding hate speech in the International Covenant on Civil and Political Rights).

⁷⁴ See McGinnis & Somin, *supra* note _____ at 1207-1209 (discussing this source of international law).

⁷⁵ See Freedom House, *FREEDOM IN THE WORLD 2007* (2007), available at <http://www.freedomhouse.org/template.cfm?page=363&year=2007> (last visited Nov. 1, 2007).

⁷⁶ See, e.g., Human Rights Watch, *UN Rights Council Disappoints Again*, Oct. 6, 2006, <http://www.hrw.org/english/docs/2006/10/06/global14354.htm> (visited Jan. 5, 2007) (noting that

The strong influence of nondemocratic states is an important shortcoming of all raw international law.⁷⁸ But it is a particularly serious problem in the case of international human rights law. Nondemocratic states are by far the most important violators of human rights. State-sponsored mass murder is responsible for the deaths of hundreds of millions of innocent people in the twentieth century alone,⁷⁹ easily overshadowing all other causes of rights violations.

The Soviet Union, the nondemocratic government with the most influence on the content of modern international human rights law was also arguably the greatest of all twentieth century violators of human rights.⁸⁰ Current estimates of the death toll of government-sponsored mass murder in the USSR range from 20 million to as high as 61 million.⁸¹ And these figures do not even consider the Soviet governments' many other human rights violations, such as infringements on freedom of speech and religion.

The USSR and other nondemocratic states that influence the content of international human rights law have a fundamental conflict of interest. Protection for many types of human rights runs contrary to their policies and – in the case of political rights, freedom of association, and freedom of speech – might threaten their regimes' grip on power. They thus have every incentive to transform the content of rights whose implementation might interfere with their own repressive policies or threaten their hold on power.

An even more serious impediment to automatically assuming that international human rights law is beneficial is the ability of authoritarian nations to use their influence to promote “rights” that legitimize their authority and justify their use of repression against potential political

nondemocratic “[s]tates with poor human rights records dominated the [UN Human Rights] [C]ouncil’s deliberations”).¹ Reporters Without Borders, *UN Commission on Human Rights Loses All Credibility*, July 2003, available at http://www.rsf.org/IMG/pdf/Report_UNU_gb.pdf (visited Jan. 7, 2007) (documenting how UNCHR member states that are themselves human rights violators have blocked condemnation of nearly all those governments that violate human rights the most).

⁷⁷ See § II.B, *infra*.

⁷⁸ See McGinnis & Somin, *supra* note ____.

⁷⁹ See generally RUDOLPH RUMMEL, *DEATH BY GOVERNMENT* (1994) (compiling the data).

⁸⁰ Only Communist China’s death toll even begins to approach that of the USSR. See *id.*

⁸¹ For the former, see STEPHANE COURTOIS, ET AL., *THE BLACK BOOK OF COMMUNISM* 4 (trans. Jonathan Murphy & Mark Kramer 1999); for the latter, see RUDOLPH RUMMEL, *LETHAL POLITICS: SOVIET GENOCIDE AND MASS MURDER SINCE 1917* (1990).

opponents. Examples of the latter include the Soviet bloc's successful efforts to include bans on "hate speech" in the UNHCR and ICCPR, rights whose inclusion they sought in part to justify the suppression of opposition political speech by communist governments.⁸² Communist states also sponsored a longstanding and partially successful effort to use international law to justify and legitimate military interventions intended to repress domestic opposition to communist totalitarian governments.⁸³

Abortive 1980s efforts to institute a global regime of censorship through the "New World Information and Communication Order" are another case where nondemocratic regimes sought to use international law to advance their own interests.⁸⁴ Today, nondemocratic nations are spearheading efforts to establish a new international law "right" requiring the suppression of speech that "defames" religion.⁸⁵ If adopted, this law would justify censorship of speech critical of radical Islamism and of government-sponsored religions more generally.

A process for generating human rights law in which nondemocratic states play a substantial role is similar to a system for guarding chicken coops in which a great deal of authority is allocated to wolves. It empowers the very entities whose depredations it seeks to prevent. We do not assert that the fact that a totalitarian or authoritarian state supported a particular human rights norm somehow "proves" that that norm is wrong. A norm supported by even the worst of governments might turn out to be beneficial; one they oppose might turn out to be harmful. We do, however, suggest that a lawmaking process that gives nondemocratic states substantial influence over the content of human rights law will, as a general rule, produce norms

⁸² see nn. above.

⁸³ See James P. Terry, *Moscow's Corruption of the Law of Armed Conflict: Lessons for the 21st Century*, 33 NAVAL L. REV. 73 (2006).

⁸⁴ See Colleen Roach, *The U.S. Position on the New World Information and Communication Order*, 37 J. COMMUNICATION 36 (1987).

⁸⁵ See Ilya Somin, *The Effort to Ban "Defamation of Religion" and the Democracy Deficit of International Law* VOLOKH CONSPIRACY WEBLOG, Feb. 7, 2007, available at http://volokh.com/archives/archive_2007_02_04-2007_02_10.shtml#1170874980. See also Liaquat Ali Khan, *Combating Defamation of Religion*, THE AMERICAN MUSLIM, Jan. 1, 2007, available at http://theamericanmuslim.org/tam.php/features/articles/combating_defamation_of_religions/ (noting that the UN General Assembly Resolution supporting this norm was passed over the opposition of nearly all the world's liberal democracies, and pointing out that the resolution now constitutes "soft international law").

whose content is inferior to that produced by the domestic law of democratic states. That prediction is flows naturally from the interest of authoritarian rulers in blocking the enactment of norms that might curb their repressive practices, while promoting those that could facilitate them. At the very least, human rights law enacted by processes over which nondemocratic governments have extensive influence should not be accorded a presumption of validity within the domestic law of well-functioning democracies.

B. Multilateral human rights treaties

We now consider the democracy deficit of the use of provisions from multilateral treaties. Besides the influence of nondemocratic states, there is another more fundamental problem that contributes to the democracy deficit of multilateral international human rights treaties: the assent of many democratic nations to multilateral human rights treaties is cheap talk, insofar as that assent does not commit them to making the provisions of those treaties a part of their domestic law. Nations that have dualist systems with respect to international law do not make such commitments. 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.⁸⁶ Thus, even democratic ratification by dualist nations does not show that its citizens and legislators wish to have international law enforced without additional intermediate steps.⁸⁷ Many, if not most, legal systems are dualist with

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

⁸⁷ The question of how far nations may actually act to comply with international obligations simply because they are international obligations is a vast subject which we cannot address here. Our view, like that of many other modern theorists, is that states do not have a strong tendency to comply with international law for the sake of international law compliance, or even to maintain their reputation among other nation states. See GOLDSMITH & POSNER, *supra* note Jack Goldsmith & Eric A. Posner, *The New International Law Scholarship*, 34 GA. J. INT'L & COMP. L. 463, 466-72 (2006). But we certainly acknowledge that the influence of a nation's sense of obligation to comply is an empirical question. Nations could conceivably at some time in the future develop a stronger sense of obligation to international law, making their international commitments a signal of commitment more akin to domestic legislation. Just as the case for making international law a force in our system might be strengthened if it were created by a global democratic process, it could also be strengthened if it were a product of largely democratic states which had a non-instrumental sense of obligation to international law.

respect to international law.⁸⁸ For instance, the United Kingdom has a dualist system and Commonwealth nations that compose a substantial proportion of the world's democracies follow the lead of their former sovereign.⁸⁹

By contrast, treaties in nations with a monist legal system may be incorporated into domestic law once it has been concluded without further legislation.⁹⁰ But even some monist nations have complex structures through which treaties ratified as a matter of international law must pass before they will be given domestic effect.⁹¹ Others while nominally giving treaties domestic effect do not readily permit their courts to enforce those that seem vague or aspirational.⁹² As a result, the number of nations whose judiciaries actually enforce multilateral human rights treaties as rules of decision to set aside their own law seem relatively few in number.⁹³

The United States does not enforce treaties unless they are deemed self-executing, as the recent case of *Medillin v. Texas* demonstrates.⁹⁴ The political branches must intend that a treaty be given direct effect in our domestic jurisprudence. Otherwise it will be deemed non-self executing and fail to create binding federal law.⁹⁵ The United States Senate has declared all our human rights treaties to be non-self executing.⁹⁶

Beyond these important doctrinal points lie functional reasons for refusing to give these treaties direct domestic effect. Nations have many reasons for declining to implement the international rules of treaties without first subjecting them to domestic legislative processes. They may regard international law, particularly when human rights are involved, as aspirational.⁹⁷ Or

⁸⁸ See PETER MALANCZUK, *AKHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 63 (7th ed. 1997).

⁸⁹ ANTHONY ABSET, *MODERN TREATY LAW AND PRACTICE* 187–143 (2007).

⁹⁰ See ABSET *supra*, at 183.

⁹¹ See, e.g. *id.* at 184–185 (discussing treaty process in Germany and the Netherlands)

⁹² See, e.g., at 183–184 (discussing France).

⁹³ We have consulted database of international law cases to be found at <http://ildc.oxfordlawreports.com/uid=108317/subscriber/?&authstatuscode=202> to confirm this result

⁹⁴ *Medellin v Texas*, No. 06-984, slip. op. 19 (Sup. Ct. 2008).

⁹⁵ *Id.*

⁹⁶ See Thomas Burgenthal, *The Evolving International Human Rights System*, 100 A.J.I.L. 783, 807 (2006).

⁹⁷ See Donald J. Kochan, *No Longer Little Known but Now a Door Ajar: An Overview of the*

they may believe that the international rules are too vague or open-ended to be given automatic effect.⁹⁸ Whatever their reasons, when nations do not agree to have international law trump their own law, international law is, in economic terms, “cheap talk,”⁹⁹ and is a less plausible source of norms to displace those by which a democratic nation actually agrees to be bound.¹⁰⁰

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 may be most self-evident when authoritarian and totalitarian nations participate in their formation. But on closer inspection the even more important point is the attenuated nature of most nations’ agreement to these norms. The refusal to give treaties domestic force detracts from the clarity, force, and perhaps the sincerity of the commitment to the norms embodied in them.¹⁰¹

Thus, it is bootstrapping to argue that a nation which has not incorporated an international human rights principle into its domestic law should incorporate it by virtue of the democratic authority conferred by its presence in multilateral treaties. These treaties do not represent the general assent of other democratic nations for domestic incorporation.

Even if such assent could be inferred, it would not necessarily justify incorporation of international law into the domestic law of democracies that had not themselves ratified the treaty in a way that overrides contrary domestic legal rules. As we have argued elsewhere, divergent legal rules among different democracies are often justified by the need to account for differing

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).

⁹⁸ See Matthew D. Thurlow, Note, *Protecting Cultural Property in Iraq: How American Military Policy Comports with International Law*, 8 YALE HUM. RTS. & DEV. L.J. 153, 183 (2005) (presenting the possibility that nations prefer vague language in order to create conflicting standards).

⁹⁹ See *supra* note .

¹⁰⁰ *Id.*

¹⁰¹ See, e.g., Arthur M. Weisburd, *The Effect of Treaties and Other Formal International Acts on the Customary Law of Human Rights*, 25 GA. J. INT’L & COMP. L. 99, 134-36 (1996) (arguing that human rights treaties generally lack true enforcement mechanisms, raising doubts that states intend for them to have a legal character)..

local conditions and by the desirability of preserving diversity among legal systems so that migrants can “vote with their feet” for the system of government they prefer.¹⁰²

C. Customary International Law.

Customary international law has several important shortcomings from the standpoint of democratic accountability. The first is that nations do not have to assent to a principle of customary international law in order for one to be created. Instead, nations are considered to have consented to a principle simply if they failed to object. Obviously, this measure of assent compares unfavorably to domestic democracy. Domestic political actors cannot create norms by failing to object but must affirmatively embrace a practice to make it law, assuring deliberation and accountability.

A second defect is that such treaties and other international declarations are little more than “cheap talk” if nations do not actually enforce them.¹⁰³ Many nations flout such international norms and most others, as discussed above, do not give them domestic effect enforceable by their courts.¹⁰⁴ In contrast, when the Constitution includes rights or Congress passes legislation protecting them, there is an enforcement system that provides evidence that those norms are actually embraced sincerely.

At least provisions in negotiated agreements have the virtue of being written down, which at least in theory enables citizens to access and assess them. The latter may ensure at least a small modicum of democratic accountability. By contrast, customary principles of international human

¹⁰² McGinnis & Somin, *supra* note _____ at 1217-20.

¹⁰³ As economic analysis shows, “cheap talk” is the opposite of costly signaling. See Daniel B. Rodrigues & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1445-46 (2003). There is much less reason to believe that ratifying a treaty represents the real preferences of the domestic polity if the members of the polity are not willing to have the rules enforced against themselves.

¹⁰⁴ See, e.g., Arthur M. Weisburd, *The Effect of Treaties and Other Formal International Acts on the Customary Law of Human Rights*, 25 GA. J. INT’L & COMP. L. J. 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).

rights, unlike domestic statutes, do not rest on any canonical text. Someone must assess how widespread is a practice and whether it reflect a legal norm.¹⁰⁵

The most important group responsible for determining the answers to these questions are “publicists” who in modern parlance are largely international law professors. Unlike Supreme Court justices, law professors are not selected by elected officials or subjected to public scrutiny. As a result, there is no mechanism for assuring that their views are in any way representative. For instance, a recent study has shown, that elite international law professors in the United States are highly unrepresentative of the general population, leaning Democratic rather than Republican by a ratio of approximately five to one.¹⁰⁶ If such an ideologically skewed group is doing the choosing, we are going to get ideologically unrepresentative norms. This point again has even more resonance in human rights than in other areas of law. Given the culture wars about the content of such rights, it is even more likely that ideological imbalance in ranks of publicists will lead to idiosyncratic human rights norms than in less contentious issues, like the criteria for state recognition.

Fourth, as we have shown before, survey research shows not surprisingly that average Americans understand less well what goes on in Geneva and other foreign parts than Washington.¹⁰⁷ This point is likely not confined to Americans. Individuals in other states are likely to know more about what happens in the government bodies of their own capital than those of international lawmaking institutions. This relative ignorance exacerbates the agency costs arising from the power of publicists, also contributing to the democracy deficit.

Accordingly, there are multiple democracy deficits in customary international law. Some of them seem substantially worse in the human rights context than in others. Thus, in the area of

¹⁰⁵ Frederic L. Kirgis, Jr., *Custom on a Sliding Scale*, 81 AM. J. INT’L L. 146, 147 (1987).

¹⁰⁶ See John O. McGinnis et. al., *The Patterns and Implications of Political Contributions by Elite law School Faculty*, 93 GEO. L. J. 1167, 1182-83 (2003) (discussing political campaign contribution patterns of international law professors).

¹⁰⁷ We have discussed citizens’ comparative ignorance of international law at length elsewhere. See John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law*, 59 STAN. L. REV. 1175, 1210-1217 (2007).

human rights, one should be particularly wary of importing customary international law into the domestic law of democratic nations.

C. Other Sources of International Human Rights Norms.

1. Committees Charged with Interpreting Multilateral Human Rights Law

Besides norms that are deemed formally part of customary international law, there are other important sources of human rights norms. Most salient are international bodies with formal duties in providing glosses and articulations of central human rights treaties, including the Covenant on Civil and Political Rights, the Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of Discrimination Against Women, the Rights of the Child Convention and the Geneva Convention. These are generally “softer law” than norms expressly and specifically provided in the multilateral treaty or custom. Nevertheless, as Professor Waters suggests, domestic courts are now relying on soft law as interpretive tool.¹⁰⁸ As a result these norms have potential domestic effect as well. Accordingly, we offer our evaluation of the democracy deficit of the international organizations that generate these norms as well.

We begin by considering the committees that elaborate on various multilateral human rights treaties. All major multilateral international human rights covenants have committees responsible for monitoring compliance with their terms and issuing reports elaborating on them. We consider committees from the four above mentioned covenants because they seem to us among the most important and representative of the human rights treaties.

While state parties to these treaties can elect anyone nominated by a government party to the treaties, it is quite clear from their membership that there is an attempt, as with most international bodies, to elect a group that is representative geographically with due consideration

¹⁰⁸ Waters, *supra* note x, at 667 (showing how courts are using treaties as bridge to incorporate soft law).

given to electing a substantial number from powerful states.¹⁰⁹ Moreover, all these four committees in fact have substantial numbers of members nominated by nations that cannot be considered firmly democratic¹¹⁰—certainly not nearly as democratic as the United States or the states of Western Europe.¹¹¹ Even fully democratic nations, such as the United States, nominate members in a process that is far less transparent and publicized than, for instance, the Supreme Court nomination process. As a result, a narrow class of insiders, mostly former diplomats and law professors, tend to be the appointees.¹¹² This lack of diversity also contributes to a lack of representativeness and democratic legitimacy on such committees.

2. The International Committee of the Red Cross.

The International Committee of the Red Cross (ICRC) has assumed for human rights advocates the role of preferred interpreter of the Geneva Convention.¹¹³ We say “assumed” because, unlike the committees discussed above, which are given such official roles by their respective multilateral treaties, the Geneva Conventions do not provide a formal interpretative

¹⁰⁹ See Dana G. Fischer, *Reporting under the Covenant of Civil and Political Rights: The First Five Years of the Human Rights Committee*, 76 A. J. I. L. 142, 143 (1982).

¹¹⁰ The dangers of allowing nondemocratic nations to influence the content of human rights law are explored more fully in Section II.C below.

¹¹¹ The Committee on Civil and Political Rights has members from two authoritarian nations, Egypt and Tunisia, and from one nation whose democratic credentials are increasingly shaky, Ecuador. The Committee on Economic, Social and Cultural Rights has four members from authoritarian regimes, China, Belarus, Jordan, Egypt and four from states whose democratic credentials are suspect, Algeria, Cameroon, Ecuador and Russia. The Committee on the Rights of Women has members from the authoritarian nations of Egypt, Qatar, Tunisia, and Uganda and two members from nations whose democratic credentials are questionable at best, Algeria and Bangladesh. The Committee on the Elimination of All Forms of Discrimination Against Women include three members from authoritarian or totalitarian regimes - China, Cuba and Egypt -and two from regimes whose democratic credentials are suspect: Algeria and Bangladesh.

¹¹² See Joanna Harrington, *Punting Terrorists, Assassins and Other Undesirables: Canada, the Human Rights Committee and Requests for Interim Measures of Protection*, 48 MCGILL L. REV. 45, 63 (2003); see also the discussion of the US nomination process for the International Court of Justice in McGinnis & Somin, *supra* note _____ at 1203-1204.

¹¹³ We recognize that there is a debate about whether humanitarian law should be categorized as part of human rights law. See See DAVID P. FORSYTHE, *THE HUMANITARIANS: THE INTERNATIONAL COMMITTEE OF THE RED CROSS* 193. By discussing humanitarian law in this article we do not mean to take sides in that debate. We include humanitarian law in our analysis, because, however it is categorized, the role of the Red Cross as a putatively authoritative interpreter raises democracy deficit questions of t not unlike those of other committees charged with implementing international human rights law.

role to the ICRC. To be sure, the ICRC is given a monitoring role: and has often taken the place affected state parties in the role of checking on the conditions of prisoners of war,¹¹⁴ as, for instance, when the Red Cross checked on the conditions of both Allied and Axis prisoners in the Second World War. Nevertheless, this monitoring function does not entail a formal interpretive role, let alone a privileged interpretative role.¹¹⁵

Even in the context of the international law world, the ICRC is a peculiarly unrepresentative body. Unlike the committees that elaborate on the rights included in various covenants, none of the members of this committee are nominated by any democratically accountable government. While the name of the organization is the *International Committee of the Red Cross*, the committee is in fact a self-perpetuating body composed entirely of Swiss citizens.¹¹⁶ Switzerland is the world's most famously neutral nation. This history gives its citizens a very distinctive perspective on humanitarian law as even a sympathetic accounting of its mission acknowledges.¹¹⁷ The perspective of those who are either part of or amenable to a particular organization, even one as no doubt worthy as the ICRC, is likely to be narrower still. They will tend to be interested in advancing the ideals and interests of that organization rather than neutrally interpreting the law. Almost all organizations tend to expand their jurisdictional reach. One would expect that they would use materials to expand the ambit of humanitarian rule, and, as we will see, that expectation is fulfilled.¹¹⁸

It is a signal confirmation of the unreflective nature of much commentary on human rights law in general and humanitarian law in particular that the parochial and undemocratic nature of the ICRC is never discussed. Instead, even such eminent scholars as Dean Harold Koh call for “governments and intergovernmental organizations” to rely on the opinions of the ICRC

¹¹⁴ See Eric Posner, *International Law and Disaggregated States*, 32 U. FLA. ST. L. REV. 797, 816 (2005).

¹¹⁵ See Jeremy Rabkin, *After Guantanamo, The War over Geneva Convention*, NATIONAL INTEREST 1,8 (summer 2002) (detailing ICRC's attempt to expand its role under the Geneva conventions).

¹¹⁶ See DAVID P. FORSYTHE, *supra* note, x at 202 (2005).

¹¹⁷ *Id.*, at

¹¹⁸ See *infra* notes xx and accompanying text.

because of its lack of parochialism.¹¹⁹ But because of its structure as a single private organization chosen from citizens of a single nation small nation the ICRC is as parochial as individual nation states themselves – arguably more so.

The parochial nature of the ICRC raises questions about the deference it should be given in fabricating and construing humanitarian law. To be sure, humanitarian law as the law of military conflict among nations is different from much of human rights law in that the actions of one nation have substantial spillovers from one state to another. For this reason, it may be optimal in principle to have international rules on this subject when it is not optimal to have international rules on many human rights subjects that we have discussed above.

But the world does not have a legitimate international rulemaker in humanitarian law, certainly not one with any democratic legitimacy. As a result one needs to make a pragmatic argument that the structure of the ICRC is likely to lead it to make better interpretations of humanitarian law than a nation state before suggesting that the nation state defer to the organization's interpretations. Here we discuss whether the ICRC or the United States is likely to reach better interpretations, given their respective structures and incentives.

As we have described above, the ICRC is a non-democratic and insular institution and this raises doubts about the quality of its determinations. But it might be argued that any individual nation, even a democratic one, will be imperfect in reaching humanitarian law determinations as well. It too has parochial interests. Nevertheless there is a plausible argument that United States is likely to reach better determinations about the appropriate legal norms, particularly about the public goods involved in preserving global security.

Norms produced by a small and undemocratic elite makes it unlikely that its norms will focus on producing global public goods.¹²⁰ Since the benefits of the new public good will usually flow overwhelmingly to the general population rather than to the elites, it seems unlikely that the

¹¹⁹ See Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1512 (2008).

¹²⁰ This point is discussed in greater detail in McGinnis & Somin, *supra* note _____ at 1238-39.

latter will devote themselves to developing norms that increase public goods production. 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, such as the positive publicity and reputation for humaneness that generally accrues to an organization that expands the reach of a body of “humanitarian law.”

In contrast to such bureaucracies, the US has strong incentives to contribute to the provision of global public goods, including sound norms of humanitarian law. Since the United States is by far the world’s largest economy, producing some 20% of world GDP,¹²¹ it will often have incentives to provide public goods that further economic growth and prosperity, even if many other nations choose to free-ride. Global security is one such public good.

Humanitarian law is intimately connected with this global public good because it attempts to assure reasonable protection of military and civilians during wars. It, of course, necessarily involves a tradeoff between rights protections and the preservation of a military’s ability to fight necessary wars. The United States because of its position in the international system would be in a good position to make such tradeoffs, because of its active military presence around the world and its interest in maintaining the security of the world economy. Given that its soldiers are involved in many conflicts around the world, it is acutely concerned with the welfare of military combatants. Moreover, given that it is a nation of immigrants, its citizens are likely to have at least some concern for the well-being of civilians worldwide as well. Of course, we are not suggesting that the United States will make all the right calls; particular administrations and politicians may commit grave errors. Nevertheless it far from clear that in the long run its democratic processes are not more likely to fashion more sensible norms than is the ICRC.

IV. The Effect of the Democracy Deficit on International Human Rights Law.

¹²¹ 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.*

The democracy deficit of international human rights law casts doubt on the necessary beneficence of international human rights norms relative to those established by domestic democratic institutions. Our purpose in this part is not to show that any particular international human rights norms are wrong: But we will endeavor to briefly demonstrate that international human rights norms are highly contestable and indeed potentially conflict with other norms of human rights that people can reasonably hold. That openness to contestation underscores one of the main points of this paper: that at least as to broadly democratic nations, international human rights norms may displace norms that are better for the nation concerned. Moreover, following human rights norms has the potential defect of imposing a uniform rule that discourages a diversity of approaches. It is the diversity of approaches that will lead to experimentation and competition and these processes our time are more likely to lead to an optimal set of rights.

This danger is becoming particularly acute as the scope of international human rights expand.. Here we will very briefly look at three “rights” within human rights law and a set of rights and duties within humanitarian law which have a degree of international recognition and show that there is no consensus about their effects. This lack of consensus underscores our two major points. It would be a mistake to enforce international human rights against democratic nations, because there is no reason to believe that these rights will be better than the decisions reached by that nation’s domestic political process. Second, the lack of consensus shows that there are considerable benefits from the diversity and competition that come from allowing a diversity of legal rules in different nations rather than a uniform approach dictated by internationalizing a set of rights.

A. Hate Speech.

Some international law advocates believe that hate speech violates customary international law. The ICCPR in fact forbids “any advocacy of national, racial, or religious hatred

that constitutes incitement to, hostility discrimination or violence.”¹²² Louise Arbour, the United Nations Commissioner for Human Rights opened an investigation of whether Denmark’s willingness to permit cartoons of the prophet Mohammed violated international laws against hate speech. She also argued that international law bans “xenophobic arguments in political discourse.”¹²³

The desirability of laws against hate speech is obviously a deeply contestable issue. The United States, for instance, not only does not have laws against hate speech, but its Constitution forbids such laws.¹²⁴ While an international law requirement for hate speech rules may have its roots in a conception of human dignity, a prohibition of such laws also can be a rooted in a strong view of individual freedom. While the requirement can be defended on the grounds that it protects minorities, so too can a prohibition on hate speech laws. In practice “hate speech” laws can be used to silence politically unpopular minority groups at least as easily as the more powerful majority.¹²⁵ It is not our purpose to resolve this debate here, just to use it to show that following an international norm in this matter would prematurely end debate and experimentation about a difficult political issue.

B. Comparable Worth.

The Committee on the Elimination of Discrimination against women has glossed that convention as a requiring comparable worth. The language the committee uses is “equal remuneration for work of equal value.”¹²⁶ It is quite clear that the Committee does not contemplate that the market should be responsible for determining the value of work. The Committee suggests that nations “consider . . . job evaluation systems based on gender neutral

¹²² International Covenant on International and Political Rights art. 20(2), Dec.. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

¹²³ McGinnis & Somin, *supra* note _____ at 1220.

¹²⁴ *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

¹²⁵ See DAVID E. BERNSTEIN, *YOU CAN’T SAY THAT* (2003).

¹²⁶ General Recommendations Adopted by the Committee of the Elimination of Discrimination Against Women 240 HRI/GEN 1/ Rev. 7.

criteria that would facilitate the comparison of the value of those with jobs of a different nature, in which women presently predominate, with those in which men presently predominate.”¹²⁷

Comparable worth is another contestable idea about which there is no consensus. One strong argument against it is the lack of objective criteria to evaluate the worth of a job. Another is that it would require a bureaucracy to make such determinations and this bureaucracy, like others, would be subject to rent-seeking and make poor decisions, even if there were some objective way to measure such value.¹²⁸ Furthermore, creating a government agency that, in effect sets pay levels for all jobs, would at a stroke eliminate most of the advantages of a market economy and saddle the state with a system of central planning under which the state would have to allocate labor, since the market could no longer use the price system to do so.¹²⁹ Finally, comparable worth interferes with the liberty of individual employees freely to strike a bargain with their employees for their services.¹³⁰ This latter point underscores that the conflicting conceptions of rights are issue in comparable worth. Its supporters emphasize women’s group claim rights, while its opponents emphasize the rights of all individuals to be free from government coercion in their contractual relationships.

C. The Right to Housing.

A variety of international human rights documents hold that there is a right to adequate housing. This is a right that states are obligated to enforce and thus it is a claim right to resources rather than a negative liberty. Of course, that kind of right can conflict with individual liberties.

The Committee on Economic, Social and Cultural Rights elaborated on this right in 1991 in way that underscores this conflict. It includes suggestions that everyone, including renters,

¹²⁷ *Id* at 241.

¹²⁸ See George Rutherglen, *The Theory of Comparable Worth as a Remedy for Gender Discrimination*, 82 GEO. L. J. 135, 136 (1993). 0

¹²⁹ *Id.*

¹³⁰ For a good summary of the case against comparable worth, including the above and other arguments, see ELLEN FRANKEL PAUL, *EQUITY AND GENDER: THE COMPARABLE WORTH DEBATE* (1989).

“should have protections which guarantees legal security against forced evictions.” and “forced evictions are prima facie” inconsistent with the Covenant.¹³¹ It is difficult to be completely sure of the meanings of these claims but they suggest that as a general matter landlords should not have the right to evict tenants, even though eviction is the ultimate means to assure that rents are to paid and that rental contracts are voluntary.

This conception would severely undermine individual rights to contract for housing. It not only threatens property rights of landowners. It makes it less likely that the poor and those with low credit ratings can obtain housing, because landlords will be less likely to lend to such individuals unless they know they can forcibly evict them in the case of nonpayment of rent.¹³²

Once again, we are not here seeking to prove that a system of strong private property rights, including the right to call on the state to evict individuals for nonpayment of rent, is a superior system to one in which those rights are curtailed in the interest of enforcing a right to housing. We do, however, believe that it is clear that a housing system that depends on private enterprise, including contractual freedom between renters and owners, has virtues and should not be limited by international fiat.

D. Humanitarian Law

Here we consider the positions of the ICRC on humanitarian law. We compare its conclusions on controversial issues of humanitarian law with those of the United States. As in our previous discussions, our purpose here is not to show that the ICRC’s judgments are clearly wrong but that they are eminently contestable. Given the incentives of the United States and the ICRC described above, there is no reason to prefer a priori the results reached by the ICRC to those of the United States.

¹³¹ General Comments Adopted by the Committee on Economic, Social and Cultural Rights 20, HRI/Gen/1/Rev. 7.

¹³² For a brief discussion of the economic logic behind this conclusion, see RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 514-18 (5th Ed. 1998).

The recent conflicts with Al Qaeda have occasioned dramatic examples of the differences between the United States and the ICRC on humanitarian law. The ICRC, for instance, has argued that al-Qaeda and Taliban prisoners should be treated as prisoners of war.¹³³ This problem is in keeping with the ICRC's basic stance of attempting to treat individuals captured in war as either POWs or as civilians, minimizing the number of the category of illegal combatants.¹³⁴ There has been an understandable concern that people in this third category may be subject to abuse.

In contrast, the United States government has interpreted the conventions not to provide these protections, although it has committed publicly to treat these prisoners humanely.¹³⁵ The United States position has much to recommend it. It seems consistent with the language of the Geneva Convention,¹³⁶ which extends the status of prisoner of war only to those who are in military organization with command and control and wear uniforms.¹³⁷ More generally, the United States has retained the category of illegal combatant, who are neither POWs nor civilians.¹³⁸ This position can be defended as encouraging irregular combatants to conform to the rules of war to gain the advantages of that status. Such incentives help to preserve the bedrock distinction in humanitarian law between combatants and civilians, because without insignia and military command and control, it is difficult for armies to distinguish between combatants and civilians.¹³⁹ The result of such confusion is more civilian casualties.

¹³³ See Ingrid Wuerth, *The President's Power to Detain "Enemy Combatants: Modern Lessons from Mr. Madison's Forgotten War*, 98 N.W.L. REV. 1567, 1615 (2004).

¹³⁴ See John Ip, *National Security: Detention, War Powers, and Anti-Proliferation*, 16 TRANSNAT'L & CONTEMP. PROBS. 773, 822 (2007).

¹³⁵ See Press Release, Dep't of Defense, DOD Briefing, Secretary Rumsfeld and Gen. Myers (Feb. 8, 2002), available at <http://www.Defenselink.mil/news/Feb.2002/t02082002.t0208sd.html>.

¹³⁶ See Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT'L L. J. 367, 374 (2004) (stating that both ICRC and United States position "enjoy non-trivial textual and historical support.") The United States argued that Geneva Convention did not provide direction that irregular forces, like al-Qaeda, should enjoy lawful combatant status. *Id.*

¹³⁷ Geneva Convention, 154, art. 4(A)(2), 6 U.S.T. at 3320, 75 U.N.T.S. at 138-40

¹³⁸ See John B. Bellinger, *Reflections on Transatlantic Approaches to International Law*, 17 DUKE J. COMP. & INT'L L. 513, 521 (2007)

¹³⁹ "A central purpose of the Geneva Convention was to protect innocent civilians by distinguishing very clearly between combatants and noncombatants." Jim Garamone, *Rumsfeld Explains*

The ICRC has also taken the position that members of terrorist organizations like Al Qaeda that are captured in non-international conflicts (i.e. where no other state is a party) cannot be held as enemy combatants at all, regardless of whether they are given POW status.¹⁴⁰ Instead, they must be either tried as civilians or released. The Fourth Circuit relied expressly on the conclusions of the ICRC in determining that the United States could not hold Ali Saleh Kahlah al-Maari, a member of Al Qaeda captured in the United States, as an enemy combatant.¹⁴¹ This judicial opinion demonstrates the authoritative weight that is accorded the opinions of this particular NGO.

Once again the United States as well as many international law scholars disagree with the ICRC.¹⁴² The argument that terrorists captured in non-international conflicts cannot be enemy combatants relies heavily on the notion that Protocol I of the Geneva Convention has become customary international law.¹⁴³ But the United States refused to sign Protocol I of the Geneva Convention precisely because it was concerned about its protections for terrorists.¹⁴⁴ We have already discussed our reservations about using custom in preference to more democratic forms of norm creation.

Moreover, as a policy matter, it is hardly obvious that nations should not be able to prosecute terrorists who are fighting as members of military organizations in proceedings designed for military combatants. Because of the need to protect intelligence sources and methods and to

Detainee Status, U.S. Dep't of Defense News (Feb. 8, 2002) ("A central purpose of the Geneva Convention was to protect innocent civilians by distinguishing very clearly between combatants and noncombatants) available at <http://www.defenselink.mil/news/Feb2002/n02082002_200202086.html>

¹⁴⁰ This position is in keeping with the basic tenet of the ICRC that there are no "black holes" in Geneva Convention and that all combatants must be treated either as prisoners of war or civilians. See Peter Van Hongsberg, *Chasing "Enemy Combatants" and Circumventing International Law: A License for Sanctioned Abuse*, 12 UCLA J. INT'L L. FOR. AFF. 1, 9 (2007).

¹⁴¹ *Al Maari v. Wright*, 487 F. 3d 160, 174 (4th Cir. 2007), rehearing en banc granted, ___ F. 3d ___ (2008).

¹⁴² See, e.g., Curtis Bradley and Jack Goldsmith, *Congressional Authorization and the War on Terror*, 118 HARV. L. REV. 2047, 2115 (2005).

¹⁴³ See generally Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3.

¹⁴⁴ See Josh Kastenburg, *The Customary Law of War and Combatant Status*, 39 GONZ. L. REV. 495, 532 (2003/2004).

move swiftly so as to discourage an enemy with the military capability to kill thousands of civilians, military tribunals may be better adapted than civilian courts to punish those who are taking up arms on behalf of foreign powers.¹⁴⁵ Thus, in each of these current controversies the United States is advancing a position that has legal and policy justification.

Beyond such dramatic conflicts, there is strong evidence of more systemic differences between the United States and the ICRC. The ICRC recently published a massive study entitled *Customary International Humanitarian Law*, which sought to codify the customary law of humanitarian law.¹⁴⁶ The general counsels of the State Departments and Defense Departments replied at length to this study, disputing its methodology and giving four examples of rules of humanitarian law proclaimed by the ICRC which it believed did not represent internationally binding legal norms.¹⁴⁷ All of the disputes were examples of where the ICRC wanted to expand the reach of humanitarian obligations. For instance, the ICRC wanted to make it a war crime to inflict “widespread long-term and severe damage to environment” even when damage occurs as part of achieving a legitimate military objective.¹⁴⁸ As discussed above, given its mission and organization interests, it is hardly surprising that the ICRC would want to expand the reach of humanitarian law even at the expense of effective war prosecution.¹⁴⁹

We also observe that United States State and Defense Departments’ methodological complaints about the ICRC parallel the concerns we have about the low quality of customary

¹⁴⁵ See John O. McGinnis, *Executive Power in the War on Terror*, 146 POLICY REVIEW 63 (2007-2008).

¹⁴⁶ JEAN-MARIE HENCKAERTS & LOUISE DOSWOLD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* (1997).

¹⁴⁷ Letter from John Bellinger, Legal Advisor to the State Department and William J. Haynes to Dr. Jaco Kelllenberger, President, International Committee of the Red Cross (November 3, 2006).

¹⁴⁸ *Id* at 7.

¹⁴⁹ The United States was not the only nation that had substantial disagreements with the ICRC. NATO disputed its conclusions with respect to the Kosovo intervention. Larry Minear, Ted van Baarda, and Marc Sommers, *Nato And Humanitarian Action In The Kosovo Crisis*, Occasional Paper #36 (2000), available at <http://www.ipb.org/disarmdevelop/militarisation%20of%20aid/NATO%20and%20Humanitarian%20Action%20in%20the%20Kosovo%20Crisis.pdf> (describing differing and sometimes conflicting interpretations of the Geneva Convention provisions between NATO and the ICRC, and implications during the Kosovo Crisis).

international law generally. For instance, the United States complains that the ICRC unduly relies on statements of the General Assembly and the ICRC itself as evidence of state practice.¹⁵⁰ We likewise regard such statements as cheap talk because they do not show that states are actually following the practice in question. The United States also complains that the ICRC does not give much weight to negative practice, which parallels our concern that states can be counted as affirmatively consenting to an international norm even if they object to it.¹⁵¹

The United States also complains that the report “fails to pay due regard to the practices of specially affected states.”¹⁵² This includes in particular the United States. This objection also has resonance with our concerns. The practices of the most affected states would be far more probative than those not affected by particular rules at issue, because the talk of the former would be less “cheap.”

We do not contend that all of the practices adopted by the United States in the War on Terror are justified. Indeed, we have previously criticized the Bush Administration’s excessive claims of unbounded executive power, its detention policies for terrorism suspects, and its assertions that virtually any form of torture is legal if ordered by the executive.¹⁵³ However, these flaws are best corrected by reliance on domestic legislative and judicial checks on executive power rather than through reliance on international legal norms that have not been ratified by the domestic democratic process. To some extent, both Congress and the Supreme Court have already begun to curb the Bush Administration’s excesses.¹⁵⁴

¹⁵⁰ *Id.* at 2.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ See John O. McGinnis, *Losing the Law War: The Bush Administration’s Strategic Errors*, unpublished manuscript (2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1010354; McGinnis, *Executive Power in the War on Terror*; Ilya Somin, *Systematic Shortcomings of Broad Executive Power in Times of Crisis*, Volokh Conspiracy Weblog, Aug. 23, 2007, available at <http://volokh.com/posts/1187914017.shtml>.

¹⁵⁴ In 2006, Congress enacted the McCain Amendment in response to the Administration’s use of torture. The Supreme Court has repudiated the administration’s claims of unbounded executive power on several occasions. See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 556 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); and *Rasul v. Bush*, 542 U.S. 466 (2004).

These examples illustrate that the democracy deficit has real consequences in human rights law and humanitarian law. With respect to international human rights laws that have few spillovers from one nation to another, like the right to housing, these norms try to impose contestable notions of right on democratic nations and retard the process of demonstration and competition that a diversity of norms would provide. With respect to international human rights norms, that do have spillover effects on other nations, like humanitarian law, it is not at all clear that international norms are likely to strike a better balance than democracy in the United States.

V. Representation Reinforcing Rights: THE Example OF Free Migration.

A. Representation Reinforcing Rights

While we are generally skeptical of the desirability of using raw international human rights law to override the domestic law of democratic states, we believe representation reinforcing rights are an exception. As discussed in the Introduction,¹⁵⁵ this exception flows from our theory. Democracy is itself an institution that depends on norms. Because international human rights are best developed through democratic systems, international norms that facilitate democracy have a claim to be enforced domestically. In other words, the democracy deficit objection to the enforcement of international human rights loses force when those rights themselves directly provide the framework or infrastructure that allows citizens to exercise control over their governments. In such cases, the use of raw international law to override the domestic law of democratic states may serve to promote rather than to undermine democratic accountability.

Of course, exactly what the content of representation reinforcing rights are is open to debate. We believe that in order to qualify for domestic enforcement these rights must contribute directly or substantially to democratic control by citizens over their nations. It is not enough hat

¹⁵⁵ See _____.

these rights are arguably beneficial in some other way, like contributing to human welfare or economic prosperity generally.

As we also noted in the introduction, most democracies already incorporate many democracy reinforcing rights, such as free speech. Thus, the most interesting question posed by this conceptualization of domestically enforceable international human rights law is whether there are important other rights that may be democracy reinforcing that liberal democracies do not yet generally incorporate. For that reason, we choose to focus on the rights of migration as an example of a powerful democracy reinforcing rights that liberal democracies do not provide. As described below, these rights actually strengthen popular leverage over government policy by enabling more people to “vote with their feet.”

We do not contend that broad migration rights are enshrined yet in current international human rights law either. It is quite clear that they are not, although such rights would build on certain rights of emigration and refuge that have recognition in international law.¹⁵⁶ But our underlying normative contention is that international human rights advocates should shift their efforts to developing rights, like rights of migration, that facilitate people’s leverage over their governments so as to choose appropriate norms for themselves, but not make that choice for them by having international law enforce a thick set of substantive rights. Thus, it is not surprising that the example we choose is not yet the most intense focus of concern in the international human rights community.

Migration rights are not the only “representation-reinforcing” mechanism that might be appropriately enacted at the international law level. There may well be other examples. However, we show that they are an unusually compelling example because their beneficiaries generally have little or no representation in any existing domestic democratic processes.

B. The Advantages of “Foot Voting.”

¹⁵⁶ See § V.C, *infra*.

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.¹⁵⁷ Even very poor and severely oppressed groups, such as blacks in the Jim Crow era American South, have been able to take advantage of exit rights to improve their lot.¹⁵⁸

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 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.”¹⁵⁹ Often, citizens have stronger incentives to acquire the information needed to effectively “vote with their feet” than they do for purposes of traditional ballot box voting. The latter are subject to a serious collective action problem that creates “rational ignorance,” while the former are not.¹⁶⁰

¹⁵⁷ 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).

¹⁵⁸ 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).

¹⁵⁹ 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.

¹⁶⁰ See Somin, *Political Ignorance*, supra note ____, at 1344-47. For a discussion of the concept of rational ignorance, see Ilya Somin, *Voter Ignorance and the Democratic Ideal*, 12 *Critical Rev.* 413 (1998). The core idea is that voters have little incentive to acquire significant amounts of political knowledge because the chance that any one vote will influence the outcome of an election is vanishingly small. Thus, most citizens are “rationally ignorant,” a conjecture supported by extensive polling data showing that most citizens know very little about government and politics. For a survey of recent data, see Ilya Somin, *When Ignorance Isn’t Bliss: How Political Ignorance Threatens Democracy*, CATO INST. POL’Y ANALYSIS, Sept. 22, 2004.

Most analyses of foot voting focus on migration within a single nation, usually one with a federalist system of government.¹⁶¹ However, the idea is also applicable to international migration.

The vast majority of the population of the United States consists either of immigrants or descendants of immigrants who came here fleeing poverty or oppression that they experienced under their own governments. From 1941 to 2000, the United States admitted 27.6 million legal immigrants and 3.5 million refugees.¹⁶² Australia, Canada, New Zealand, and Israel have also been prominent destinations for immigrants fleeing hostile government policies.

For citizens of nondemocratic states – which still include the majority of world’s population – foot voting through emigration may be the only way for them to have any say in the policies that they live under. Obviously, such people include the vast bulk of the world’s poorest and most oppressed people.

C. Migration Rights in Current International Law.

The importance of migration rights is partly recognized by current international law. Human rights treaties such as the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights recognize a right to emigration.¹⁶³ However, this “right to leave” has not been coupled with an equally strong right to enter. Indeed, recent political trends have seen renewed efforts to curtail entry into the United States, Australia, and Western Europe. Unfortunately, the right to leave may have little value for potential migrants who have nowhere to go.

¹⁶¹ The classic work in the field is Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. Pol. Econ. 416 (1956).

¹⁶² ROGER DANIELS, *GUARDING THE GOLDEN DOOR: AMERICAN IMMIGRATION POLICY AND IMMIGRANTS SINCE 1882* 191, 235 (2004).

¹⁶³ ICCPR, Art. 12; UNHCR, Art. 13. For a complete survey of international law on the right to leave, see Colin Harvey & Robert Barnidge, *Human Rights, Free Movement, and the Right to Leave in International Law*, 19 INT’L J. REFUGEE L. 1, 2-5 (2007).

Current international law, such as the 1951 Convention Relating to the Status of Refugees requires states to grant entry to migrants only if they have a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.”¹⁶⁴ Even then states are only required to refrain from expelling refugees once they have arrived within their borders; they remain free to deny entry at the border.¹⁶⁵ This approach is also followed in US refugee law,¹⁶⁶ and in that of European Union states. Thus, migration rights can be denied to potential immigrants who have “suffered the adverse effects of harmful government policies without being specifically targeted for “persecution” on the basis of any of the above categories. For example, a citizen of an oppressive society cannot claim the right to enter the United States or the EU “merely” because the absence of free political debate in his country leads to the enactment of harmful government policies that reduce his or her well-being. He must prove that he has been specifically targeted for persecution because of his opposition to the government. Similarly, the law allows states to deny entry to “economic” migrants – even if their poverty is in large part due to flawed policies enacted by their home governments.

Moreover, even in democratic states, domestic political processes are unlikely to give full weight to the interests of potential immigrants. By definition, such people are not yet citizens, do not have the right to vote, and are unlikely to be able to exercise political influence in other ways. Thus, political leaders can neglect their interests – or even falsely blame them for alleged “harms” that they have not caused – with relatively little fear of political retribution. It is thus not surprising that anti-immigrant political movements have flourished in both the US and several European nations in recent years, while parties seeking to increase immigration are extremely

¹⁶⁴ UN Convention Relating to the Status of Refugees (1951), § I.A.1.

¹⁶⁵ This distinction underpins, for example, the U.S. “wet foot, dry foot” policy on Cuban refugees under which they are allowed to stay if they arrive on U.S. soil, but can be denied entry into the United States if intercepted by U.S. authorities at sea. See Associated Press, *Cuban-Americans Question Wet Foot, Dry Foot Policy*, NEWSMAX.COM, Jan. 11, 2006, available at <http://archive.newsmax.com/archives/articles/2006/1/11/113342.shtml>.

¹⁶⁶ See, e.g., *Sael v. Ashcroft*, 386 F.3d 922, 924 (9th Cir. 2004) (summarizing the US law). For a summary of European Union law, see Rosemary Byrne, et al., *Understanding Refugee Law in an Enlarged European Union*, IIS Discussion Paper No. 11, (Nov. 2003).

rare. These problems reflect an “antiforeign bias” that routinely afflicts voters, causing them to underestimate the benefits of international trade and migration, while overestimating its harms.¹⁶⁷

D. Democracy, Foot Voting, and the Case for an Expanded International Right to Entry.

From the standpoint of promoting democratic accountability through foot voting, the distinction between victims of “persecution” and other potential migrants makes little sense. Even potential migrants who have not been targeted for persecution on the basis of race, religion or political beliefs may still suffer the ill effects of oppressive or misguided government policies. For example, repression of the right to freedom of speech and political organization affects not only would-be speakers, but also all other citizens of the society in question, who are forced to live under a political process that they have no right to influence.

Similarly, “economic” migrants are in many cases fleeing poverty that is in large part caused by the flawed policies of the governments they live under. Development economists have long recognized that most poor countries could generate rapid economic growth by adopting appropriate policies, some as straightforward as enforcing the rule of law.¹⁶⁸ Indeed just as political refugees are fleeing their nations because they are targeted by discriminatory and fundamentally unjust laws, so are economic migrants. The major reason that an immigrant from a third world nation has greater earning power in a developed nation is that free markets and the rule of law increase the value of his human capital.¹⁶⁹

¹⁶⁷ For a detailed analysis, see Caplan, *Myth of the Rational Voter*, supra note ____.

¹⁶⁸ For one of the most influential summaries of the evidence, see Jeffrey D. Sachs & Andrew Warner, *Economic Reform and the Process of Global Integration*, 1 BROOKINGS PAPERS ON ECON. 1 ACTIVITY (1995); see also NATHAN ROSENBERG & L.E. BIRDZELL, *HOW THE WEST GREW RICH* (1986) (explaining how Western nations’ greater prosperity relative to most other states is primarily the result of superior policy choices); Mancur Olson, *Big Bills Left on the Sidewalk: Why Some Nations are Rich and Others Poor* 10 J. ECON. PERSPECTIVES 3 (1996) (showing that policy choices have an enormous impact on the relative wealth or poverty of nations).

¹⁶⁹ See generally Douglass C. North, *Why Some Countries are Rich and Some are Poor*, 77 CHI. KENT L. REV. (2001).

In many cases, enormous advances in the economic status of the poor could be achieved simply by allowing them to acquire enforceable property rights¹⁷⁰ and by integrating the nation in question more closely with the world economy.¹⁷¹ All too often, migrants who are fleeing generally adverse economic and political conditions are no less victims of their governments than those who have been targeted for individualized “persecution” of the sort currently recognized as grounds for asylum rights by international law. While migration rights would be most useful for the poor in developing nations, whose exit opportunities would allow them to pressure their own governments for better policies, they may also be helpful to those in more advanced societies, because citizens’ easier ability to exit would provide greater leverage against policies that aid special interests at the expense of the public.¹⁷²

Some scholars have argued for stronger international migration rights on deontological moral grounds.¹⁷³ Others advocate such changes because they are likely to greatly increase the well-being of migrants from repressive and underdeveloped societies, and also provide economic benefits to the societies that take them in.¹⁷⁴ We sympathize with both claims. However, our purpose is to emphasize an additional and generally ignored advantage of international migration rights: the opportunity to strengthen democratic accountability by enabling more people to “vote with their feet” against repressive or dysfunctional governments in their home societies. As in the case of domestic federal systems, international foot voting allows citizens greater choice over the

¹⁷⁰ See, e.g., HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL* (2000) (showing how the poor in many Third World countries suffer from their lack of enforceable property rights).

¹⁷¹ See, e.g., JAGDISH BAGHWATI, IN *DEFENSE OF GLOBALIZATION* 51-67 (2004). (showing how free trade and openness to foreign investment provide enormous benefits to the world’s poorest citizens).

¹⁷² See, e.g., William Carney, *The Political Economy of Corporate Charters*, 26 J. LEG. STUD. 153 (1997).

¹⁷³ See, e.g., Joseph Carens, *Aliens and Citizens: The Case for Open Borders*, in *THEORIZING CITIZENSHIP* (Ronald Beiner, ed., 1995); Jonathon W. Moses, *Two (Short) Moral Arguments for Free Migration*, in *ANVENDT ETIKK VED NTNU*, (May Thorseth ed. 2003).

¹⁷⁴ See, e.g., LANT PRITCHETT, *LET MY PEOPLE GO: BREAKING THE GRIDLOCK ON GLOBAL MOBILITY* (2006); Jonathon Moses & Bjorn Letnes, *If People Were Money: Estimating the Gains and Scope of Free Migration*, in *POVERTY, INTERNATIONAL MIGRATION, AND ASYLUM* (George J. Borjas & Jeff Crisp, eds. 2005).

government policies they live under, and provides them greater leverage to force states to adopt better policies in order to prevent skilled migrants and valuable taxpayers from departing.

Unlike many other types of international law, a right to free migration does not undermine the ability of democratic states to adopt diverse approaches to various policy issues. States with free entry and exit rights can still enact a wide range of different policies, so long as they do not inhibit freedom of movement. Indeed, as scholars of domestic federalism have emphasized, freedom of movement might stimulate policy innovation by governments, as they compete for economically valuable migrants.¹⁷⁵

We do not claim that our argument justifies an “open borders” international law norm. Even in combination with the moral and economic case for free migration rights, it will not outweigh all possible justifications for restricting immigration in particular instances. Thus, an international immigration rights would still allow nations to restrict the numbers and kinds of immigrants they receive when they have a substantial justification.

Indeed, in some cases, free migration could actually undermine democratic governance. For example, it is theoretically possible that the rapid in-migration of a large group hostile to liberal democracy could result in the election of a governing party that would undermine the very liberties that make the country in question attractive to immigrants in the first place. In such a scenario, restrictions on immigration may be necessary to maintain democratic government despite the very real harms that they cause.¹⁷⁶ Nevertheless, international law migration rights

¹⁷⁵ See, e.g., GEOFFREY BRENNAN & JAMES M. BUCHANAN, *THE POWER TO TAX* 173-86 (1980); ALBERT BRETON, *COMPETITIVE GOVERNMENTS* (1996); ALBERT BRETON & ANTHONY SCOTT, *THE DESIGN OF FEDERATIONS* 13-19 (1980); THOMAS R. DYE, *COMPETITION AMONG GOVERNMENTS* (1990); James M. Buchanan, *Federalism as an Ideal Political Order and an Objective for Constitutional Reform*, 25 *PUBLICUS* 19 (1995); Wallace E. Oates, *An Essay on Fiscal Federalism*, 37 *J. ECON. LIT.* 1120, 1134-37 (1999); Wallace E. Oates & Robert Schwab, *Economic Competition Among Jurisdictions: Efficiency Enhancing or Efficiency Distorting?* 35 *J. PUB. ECON.* 333 (1988); Tiebout, *supra* note _____; Barry Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 *J. L. ECON. & ORG.* 1 (1995); and Ralph K. Winter, *Private Goals and Competition Among State Legal Systems*, 6 *HARV. J. L. & PUB. POL’Y* 127 (1983).

¹⁷⁶ We do not believe that either the United States or most European nations are currently faced with such a threat.

would be an important thumb on the scale in democratic nations, pushing in favor of more liberal immigration policies.¹⁷⁷

The importance of foot voting does not provide a comprehensive blueprint for international migration law. It does, however, provide an important and generally overlooked consideration in favor of broadening international rights to entry and exit. At the very least, we should consider the possibility of enacting much stronger entry rights for migrants fleeing states with nondemocratic governments where foot voting is the only practicable way for most citizens to choose the government policies they wish to live under.

E.. Migration Rights as a Form of Representation-Reinforcing International Law.

Our defense of international migration rights on the ground that they foster democratic choice rather than undermine raises the question of whether the same argument might justify the overriding of domestic law by other international law norms. In the domestic sphere, a variety of arguments have been made to justify the overriding of seemingly majoritarian legislative enactments on the ground that doing so promotes representation-reinforcement in other ways.¹⁷⁸ Similar arguments could be made in the international sphere. For example, some scholars claim that the absence of anti-hate speech laws may “silence” racial minorities and reduce their ability to participate in the political process.¹⁷⁹ Others argue that proportional representation systems are more democratic than first past the post ones.¹⁸⁰ Perhaps, therefore imposition of hate speech norms or PR electoral systems through international law might make facilitate representation-reinforcement.

¹⁷⁷ We do not necessarily believe that international norms should be directly enforced by the judiciary. As discussed in part I, there are a variety of methods by which international law can be integrated into domestic law, including as independent authority for imposition of rules by domestic executive branch agencies and legislatures. The comparative advantages of different enforcement mechanisms will vary depending on the norm in question.

¹⁷⁸ The classic work is of course Ely, *supra* note _____. For citations to more recent literature, see Somin, *Political Ignorance and the Countermajoritarian Difficulty*.

¹⁷⁹ See, e.g., MARI MATSUDA, ET AL., *WORDS THAT WOUND* (1990).

¹⁸⁰ See, e.g., AREND LIJPHART, *PATTERNS OF DEMOCRACY* (1999).

There are, however, three important reasons why there is a stronger representation-reinforcement argument for imposing migration rights on democratic states than other possible international law norms. First and most important, migration rights facilitate the representation of people who have no voice whatsoever in existing democratic processes in entry states. In the case of those whose states of origin are nondemocratic, they lack any representation in any democratic processes anywhere. This situation is qualitatively different from that of citizens of established democracies, who generally have at least some substantial voting rights, even if imperfect ones. One possible analogy within a democracy is the situation of black in the Jim Crow-era South, at a time when they were denied the right to vote. Yet even they could potentially gain that right by migrating to the North, as many in fact did.¹⁸¹ By contrast, citizens of nondemocratic nations have no hope of gaining the franchise unless they are allowed to migrate to a democracy.

Second, most potential representation-reinforcing reforms for democratic states are subject to serious disagreement on the merits. It is far from clear, for example, that PR is really more democratic in a meaningful sense than first past the post. By definition, a mature democracy is likely to already provide those representation-reinforcing policies whose democracy-promoting elements are beyond serious contestation. Therefore, there is a strong case for avoiding the imposition of a single, unitary international rule on widely controversial aspects of the democratic process.

Obviously, migration rights are also highly disputed on a variety of grounds. However, there is little if any doubt that extending them would promote democracy from the standpoint of the migrants, whose ability to choose the form of government they live under would be greatly increased. As noted above,¹⁸² we are willing to accept restrictions on migration rights where migration would undermine democracy by introducing an extremely large population of immigrants hostile to basic liberal democratic values.

¹⁸¹ See nn. _____ and accompanying text.

¹⁸² See nn. _____ and accompanying text.

Finally, an additional reason for giving preference to migration rights is the truly enormous gains in human well-being that might result from enabling residents of poor and undemocratic regimes freer access to more advanced and more liberal societies. The income gains alone are staggering.¹⁸³ A Mexican worker immigrating to the US, for example, can expect a permanent two to six-fold increase in his or her wages.¹⁸⁴ Gains in protection for basic human rights are potentially even greater. Numerous governments engage in extensive repression of ethnic, religious and other types of minority groups. Often, the repression exceeds anything found in liberal democratic states. In the most extreme (but far from uncommon) cases, genocide and mass murder have led to the deaths of over 200 million people during the past century.¹⁸⁵ Lesser but still severe forms group repression also abound under authoritarian and totalitarian governments. If even a small fraction of those suffering from such abuses can avail themselves of the opportunity to migrate to freer societies, the potential human rights benefits would be enormous.

There may well be other representation-reinforcing reforms that could be imposed on democracies through international human rights law that are similar in nature to migration rights. We do not contend that the migration rights are the only representation-reinforcing norm that could ever be legitimately generated by international law for domestic enforcement. We do, however, suggest that migration rights are an unusually strong candidate because of the way in which they provide a voice for those who otherwise lack any access to representation, the lack of controversy over their representation-reinforcement effects, and the truly enormous size of the benefits they create.

¹⁸³ For estimates of the income gains, see PRITCHETT, *supra* note ____.

¹⁸⁴ COUNCIL OF ECONOMIC ADVISERS, *ECONOMIC REPORT OF THE PRESIDENT* 191 (2007).

¹⁸⁵ See generally RUDOLPH RUMMEL, *DEATH BY GOVERNMENT* (1994) (compiling the data).

VI. CONCLUSIONS AND IMPLICATIONS

We have argued that raw international human rights law should generally not be allowed to provide authority to create the domestic human rights law of democratic states. This conclusion flows naturally from the democracy deficit of all raw international law, which makes it likely that its norms will generally be less beneficial than those of domestic law generated by democratic processes. In the case of human rights law, international lawmaking processes are particularly suspect because of the extensive influence of repressive nondemocratic governments who have an interest in suppressing human rights rather than promoting them.

While it may not be desirable for international human rights law to provide rules of decision in the domestic law of democracies, our analysis points to a different conclusion for nondemocratic states. In many cases, international human rights law norms may well be superior to the domestic law of dictatorships. In the extreme case of totalitarian states that suppress virtually all human rights or engage in mass murder,¹⁸⁶ almost any set of legal rules is likely to be preferable to those enacted by the state's domestic rulers.

This factor points to the possibility that we should strive for an asymmetric system of international human rights law: one that regulates dictatorships more strictly than democracies. While traditional international law has historically sought to treat all states as possessing equal rights and obligations, the merits of this view in the field of human rights law seem dubious. In particular, there may be a much stronger case for imposing substantive legal norms (as opposed to those that merely facilitate democratic processes) through international law on dictatorships than on democracies. While we cannot fully expound on the strengths and weaknesses of an asymmetric system of international human rights law in this article, the possibility merits further inquiry.

¹⁸⁶ See works cited in nn. _____ above.

Obviously, the role of nondemocratic states in influencing the content of international human rights law is a major obstacle to the creation and enforcement of rules that would impose meaningful constraints on such states. Thus, reform efforts will have to focus on limiting the influence of such states on the content of international human rights norms, as well as on ensuring that the resulting laws will be adequately enforced against them. The issues involved are complex, and we cannot even begin to resolve them here. Their consideration is, however, a logical extension of our analysis that should be undertaken in future research.

We are not wholly negative about the contribution international law can make to human rights even in democratic nations. For instance, if nations ratify future human rights treaties and make them self-executing within their domestic systems, we do not object to their enforcement. Under those circumstances the proclamation of such norms would not be “cheap talk” and their content is likely to be no worse than that of ordinary domestic law because it has to pass through the same legislative processes. We would also note that, while the world is not yet pervasively democratic, the prospects for such treaties are better today than they were in immediate post-World War II era when the most important previous multilateral human rights treaties were negotiated. The Soviet Union has disappeared and with it most of the rest of the communist bloc. The time may be ripe for the negotiation of new human rights treaties that could supersede those produced in the aftermath of World War II, when totalitarian states were able to exercise substantial influence over their content.

International human rights law can potentially play a useful role in limiting the abuses of nondemocratic governments and perhaps in promoting norms that enhance citizens’ control over their governments, such as promoting international mobility. But it also has serious shortcomings that should make us wary of allowing it to override the domestic law of democratic states.