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COMMENTARY

UNILATERALISM AND CONSTITUTIONALISM

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This Essay explores American unilateralism and the divergence between American and European attitudes toward international law. The United States, Professor Rubinfeld shows, has always displayed unilateralist tendencies. Since 1945, however, while Europe has grown ever more internationalist, the United States has spoken out of both sides of its mouth, acting both as a world leader in forging the new international order and as the world's chief locus of resistance against that order. To understand this phenomena, Professor Rubinfeld argues, it is crucial to distinguish between two conceptions of constitutional law. "Democratic constitutionalism" sees constitutional law as the foundational law a particular polity has given itself through a special act of popular lawmaking. "International constitutionalism" sees constitutional law not as an act of democratic self-government, but as a check or restraint on democracy, deriving its authority from its expression of universal rights and principles that transcend national boundaries. The international charters and institutions that emerged after the Second World War were built on the premises of international constitutionalism. This development was broadly acceptable among elites in Europe, where World War II had come to exemplify the potential horrors of both nationalism and democracy. As a result, the true challenge international law's supporters face today is that the existing international governance institutions are not only antinationalist, but antidemocratic—and not by accident, but by structure and design. To this extent, America, with its longstanding commitment to democratic constitutionalism, does in fact have good reason to resist international governance today. Drawing on this conclusion, Professor Rubinfeld suggests principles that could guide U.S. relations to international governance

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regimes, showing the kinds of international law that America could embrace without compromising its commitment to self-government.

INTRODUCTION

On the third day of the 2003 Iraq war, pictures of captured American soldiers appeared on Arab and, briefly, U.S. television.¹ Immediately, Washington admonished Iraq that such displays violated the Geneva Convention.² If the Convention was not honored, the President warned, those responsible would “be treated as war criminals.”³

For a split second—this was long before Abu Ghraib—it was just possible to think that the White House might be joking.

Hadn't we repeatedly broadcast photographs of prisoners we captured in Afghanistan and Iraq?⁴ Weren't we the ones who had declared Guantánamo Bay a Geneva-free zone?⁵ And above all: We were rebuking *Iraq* for violating international law? Perhaps the President would next scold the Iraqis for using military force without the approval of the United Nations Security Council.

America's can't-live-with-it, can't-kill-it relationship to international law would later play out in Iraq in other registers. Before the war, Washington threatened to make the U.N. “irrelevant.”⁶ A year

¹ *The Controversial Footage*, PBS “Wide Angle” report, at <http://www.pbs.org/wnet/wideangle/shows/aljazeera/handbook3.html> (2003) (last visited Oct. 25, 2004).

² Pamela Hess, *Geneva Convention Prohibits Filming POWs*, UNITED PRESS INT'L, Mar. 23, 2003, at <http://www.upi.com/view.cfm?StoryID=20030323-055213-8026r> (last visited Oct. 25, 2004).

³ *Id.*

⁴ See Warren Richey, *Iraq Prisoners Pose New Test for Geneva Conventions*, CHRISTIAN SCI. MONITOR, Mar. 26, 2003, at 2, available at <http://www.csmonitor.com/2003/0326/p02s01-woiq.html>.

⁵ The United States refused to apply the Geneva Conventions' prisoner-of-war protections to the Afghan combatants held at Guantánamo Bay, which to many made the Bush administration's invocation of the Conventions in Iraq seem hypocritical. See, e.g., AMNESTY INT'L, UNITED STATES OF AMERICA: INTERNATIONAL STANDARDS FOR ALL, Mar. 25, 2003, at 1–2, at <http://web.amnesty.org/library/Index/ENGAMR510452003>. In early 2002, a leaked memorandum by a chief White House legal adviser argued that the “new kind of war” in which the United States was now engaged made the Geneva Conventions “obsolete.” Toby Harnden, *Al-Qa'eda Prisoners 'Hide Stones as Weapons'*, TELEGRAPH (U.K.), Jan. 28, 2002, <http://www.telegraph.co.uk/news/main.jhtml?xml=/News/2002/01/28/wguan28.xml> (last visited Oct. 25, 2004). While the administration's position that anyone, including a U.S. citizen, could be deemed an “enemy combatant” by the President, and thereby stripped of all judicially reviewable rights, was plainly unconstitutional and has now been so held, see *Hamdi v. Rumsfeld*, 124 S.Ct. 2663 (2004); *Rasul v. Bush*, 124 S.Ct. 2686 (2004); *Rumsfeld v. Padilla*, 124 S.Ct. 2711 (2004), the applicability of the Geneva Conventions to the Afghan combatants is a more complex question, on which I take no position here.

⁶ See, e.g., *In Bush's Words: On Iraq, U.N. Must Face Up to Its Founding Purpose*, N.Y. TIMES, Sept. 13, 2002, at A10 [hereinafter *In Bush's Words*].

later, the Bush administration would have to beg Kofi Annan for U.N. help in Iraq and would be searching for other ways to put an “international face” on the occupation.⁷

Then, in mid-2004, the appalling photographs appeared of Iraqi prisoners abused and, in at least one case, apparently killed by U.S. personnel.⁸ Although the photographs took much of the world by surprise and by storm, similar American treatment of prisoners had been reported over a year earlier in Afghanistan.⁹ Ultimate responsibility for these acts has not yet been established—and may never be—but it is hard to believe that there was no connection between the administration’s position that international law was irrelevant to the war on terror and the disgrace that unfolded at Abu Ghraib.

This is an Essay on American unilateralism: its roots, its contradictions, its dangers, and its possible justifications. Setting out, I assumed, as many do, that U.S. unilateralism was something new, a product of the present administration and perhaps of the increasing influence within the administration of “hard right,” anti-internationalist voices since September 11, 2001. The reality proved much more complicated.

Part I summarizes the history of, and contradictions surrounding, U.S. unilateralism. American unilateralism is far from new. The United States has been unilateralist since the country was founded—although, historically, U.S. unilateralism was often a device for avoiding war, not making it. Since 1945, however, America has spoken out of both sides of its mouth on international law, championing internationalism in one breath, rejecting it in the next. Identifying unilateralism with an ascendant right wing of American politics suppresses both the history of unilateralism in this country and the strange two-facedness of America’s approach to internationalism

⁷ See, e.g., Paul Richter, *Bush Urges Resolve on Iraq: After Spain’s Promise to Withdraw its Forces, the President Calls on Other Wavering Coalition Countries to Keep Their Troops in Place*, L.A. TIMES, Mar. 13, 2004, at A1; Secretary of Defense Donald H. Rumsfeld, Remarks at National Press Club Luncheon (Sept. 10, 2003), at <http://www.dod.gov/transcripts/2003/tr20030910-secdef0661.html> (“[O]ur goal is to get a broad—still broader international face on it.”); Fareed Zakaria, *Bowing to the Mighty Ayatollah*, NEWSWEEK, Jan. 26, 2004, at 38 (“Washington is now asking Kofi Annan to give the United Nations’ blessings to its plan, explain that elections cannot be held precipitously, and get involved in the entire political process.”), available at <http://www.fareedzakaria.com/articles/newsweek/012604.html>.

⁸ See, e.g., Seymour M. Hersh, *Annals of National Security: Torture at Abu Ghraib*, THE NEW YORKER, May 10, 2004, at 42.

⁹ See, e.g., Press Release, Amnesty Int’l, USA: Pattern of Brutality and Cruelty—War Crimes at Abu Ghraib (May 7, 2004), at <http://news.amnesty.org/mav/index/ENGAMR510772004>.

since the Second World War. It also misunderstands the true challenge to international law today.

Part II explains how the United States came to play such inconsistent roles on the international stage—both founder of the new international order and chief force of resistance against it—after the Second World War. At the same time, it explains why American and European attitudes on international law often diverge so dramatically today.

World War II came to represent, for continental Europe, the horrors of nationalism and populism. As a result, in the war's aftermath, European elites were ready to embrace an antinationalist, antidemocratic international legal system. The United States was not. The war had a very different meaning here, which led to a very different understanding of the internationalist project pursued in its wake. Basically, the United States promoted the new internationalism as part of an ambition to Americanize as much of the world as it could, which meant both the export of American institutions, including constitutional law, and the strengthening of American global influence.

Whatever its motivations, this ambition created a contradiction at the heart of our post-war internationalist strategy. Because the point of the new international law was to Americanize, the United States, from its own perspective, did not really need international law (being already American). Accordingly, we would lead the world in creating a new international legal order to which we ourselves never fully acceded. The new international institutions would be for the rest of the world, not really for us, and certainly not superior in authority to our own legal system. As a result, in the ensuing decades, the United States frequently found itself championing international law for other countries, while rejecting or resisting it for itself.

Part III asks how this contradiction ought to be understood today. I suggest that the fundamental issue, whatever the exigencies of current affairs may be, concerns the relationship between international law and the deeper commitments of American constitutionalism. I do not refer to the debate over the correct constitutional compartment to which so-called "customary international law" ought to be assigned.¹⁰ The question is more thoroughgoing. American

¹⁰ See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) (arguing that customary international law is not federal common law, but matter of state law); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998) (objecting to Bradley's and Goldsmith's position); see also, e.g., T. Alexander Aleinikoff, *International Law, Sovereignty, and American Constitutionalism: Reflections on*

constitutionalism differs in certain fundamental respects from contemporary European constitutionalism, and the distinctive features of American constitutionalism have implications not only for the “jus cogens” or “customary international law,” but for supranational legal institutions as a whole.

At the core of any conception of constitutionalism, there has to be an account of the special authority, the higher-law status, claimed by constitutional rules and principles. One such account understands constitutionalism as an inaugurating or foundational act of democratic self-government. On this view, which I will call “democratic constitutionalism,” a constitution is, first and foremost, supposed to be the foundational law a particular polity has given itself through a special act of popular lawmaking.

A very different account sees constitutionalism not as an act of democracy, but as a set of checks or restraints on democracy. These restraints are thought to be entitled to special authority because they express universal rights and principles, which in theory transcend national boundaries, applying to all societies alike. From this universalistic perspective, constitutional law is fundamentally antidemocratic; one of its central purposes is to put limits on democratic self-government.¹¹

American constitutional history has always displayed a commitment to democratic constitutionalism. The second, universalistic conception has undoubtedly and often prominently figured in American constitutionalism as well, but it has never displaced the commitment to the first. By contrast, European constitutional developments since the Second World War have been increasingly committed to the universalistic view, with a corresponding diminution in the importance attached to democratic constitutionalism. The universalistic picture of constitutional law strongly favors supranational legal and political institutions, because the most important legal and political principles, from this perspective, transcend national boundaries and indeed exist to check national governments. For this reason, I will refer to the second conception as “international constitutionalism.”

the Customary International Law Debate, 98 AM. J. INT'L L. 91 (2004) (arguing that customary international law is neither federal common law nor state law, but in Congress's jurisdiction).

¹¹ For a fuller description of these two conceptions of constitutionalism, see *infra* Part III. See also, e.g., BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 6–7, 10–16 (1991) (distinguishing between democratic and “rights-foundationalist” views of constitutionalism); cf. Paul W. Kahn, *Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order*, 1 CHI. J. INT'L L. 1, 3–6 (2000) (contrasting American commitment to constitutional idea and myth of “popular sovereignty” with international law's emerging commitment to ideas of universal human rights).

The great new international charters and international institutions that emerged after the Second World War were built, to a large degree, on the premises of international constitutionalism. For example, these premises underlie the entire contemporary discourse of "international human rights," which is predicated on the idea that there exists an identifiable body of universal law, everywhere binding, requiring no democratic provenance. In this sense, contemporary international law is deeply antidemocratic. That is the true challenge that international law's supporters must meet today.

Part IV addresses several possible replies to this challenge. It concludes, however, that the institutions and ideologies surrounding international law, at least in its present form, do in fact pose a significant threat to democracy—not by accident, but structurally and by design. To this extent, America does in fact have a good reason to resist international governance today.

This analysis will please few readers, if any. Advocates of multilateralism and a strengthened international order will see my arguments as supporting American unilateralists. Perhaps they do, but the analysis I offer does not support American militarism, and it calls for a number of other conclusions that those who usually support U.S. unilateralism will not find so gratifying. Part V makes these conclusions clear, suggesting principles that could guide U.S. relations to international governance regimes, showing the kinds of international law that America could embrace without compromising its commitment to self-government.

I

U.S. UNILATERALISM: ITS PRESENT, ITS PAST, ITS CONTRADICTIONS

U.S. unilateralism is often described as something "new," associated with the presidency of George W. Bush:

In the 24 months of the Bush administration, America's foreign policy has become confused and incoherent because of a new and indefensible unilateralism. . . . Never before has an administration defied the accumulated wisdom of [world experts] and rejected . . . treaties agreed upon by all of the major nations.¹²

There is some truth in this kind of claim, but only some.

Undoubtedly, the United States has in the last several years displayed remarkably unilateralist tendencies. Even before March 2003, the United States had, for example, refused to submit to the

¹² Robert F. Drinan, *Bush's Unilateralism Aggravates World's Problems*, NAT'L CATHOLIC REP., Jan. 10, 2003, at 16.

International Criminal Court (ICC);¹³ refused to join the Kyoto Protocol on global warming;¹⁴ refused to join important new human rights and child-protection conventions;¹⁵ and abrogated the Anti-Ballistic Missile Treaty with Russia.¹⁶ Then we made war on Iraq.

Those who said the war violated international law¹⁷ were probably right. Washington never conceded the point, but its arguments were pretty thin.¹⁸ The legal niceties were, in any case, almost beside the point. In word and deed, the President gave every indication that the United States would make its own decision about the war, with or

¹³ See Letter from John R. Bolton, Undersecretary of State for Arms Control and International Security, to Kofi Annan, U.N. Secretary General (released May 6, 2002) (formally notifying U.N. that United States did not intend to become party to treaty creating ICC), at <http://www.state.gov/r/pa/prs/ps/2002/9968.htm>. For that treaty, see Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF. 183/9, 37 I.L.M. 999, 1002 (entered into force July 1, 2002).

¹⁴ For the Kyoto Protocol, see *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, Framework Convention on Climate Change, 3rd Sess., Dec. 10, 1997, U.N. Doc. FCCC/CP/1997/7/Add.2, 37 I.L.M. 22 (1998).

¹⁵ See Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, *opened for signature* May 25, 2000, G.A. Res. 54/263, U.N. GAOR, 54th Sess., 97th plen. mtg., Annex, Agenda Item 116(a), at 2, U.N. Doc. A/Res/54/263 (2000) (not yet in force); U.N. Comm'n H.R., Draft Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 58th Sess., Res. 2002/33, Annex, Art. 4, at 7, E/CN.4/2002/L.11/Add.4 (Apr. 23, 2002).

¹⁶ In December 2001, President Bush unilaterally announced U.S. withdrawal from the 1972 Anti-Ballistic Missile Treaty with Russia. See Editorial, *Tearing up the ABM Treaty*, N.Y. TIMES, Dec. 13, 2001, at A38.

¹⁷ See, e.g., Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1523 (2003) (arguing that Security Council resolutions provided inadequate justification for U.S. invasion of Iraq).

¹⁸ For example, we relied on U.N. Resolution 1441, adopted in November 2002, to take action in Iraq, see, e.g., Interview by Radio France with U.S. Secretary of State Colin [Powell] (Feb. 18, 2003), at <http://usinfo.state.gov/topical/pol/arms/03021908.htm>, which was rather a stretch, because that resolution seemed carefully drafted *not* to authorize war without a further Security Council resolution. Resolution 1441's reference to "serious consequences" if Iraq failed to comply with disarmament requirements, see S.C. Res. 1441, U.N. SCOR, 57th Sess., para. 13, U.N. Doc. S/RES/1441 (2002), was a deliberate departure from the "all necessary means" language (diplomatic speak for war) used in previous U.N. resolutions on Iraq. Cf. S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg., U.N. Doc. S/RES/678 (1990), 29 I.L.M. 1565 (authorizing member states "to use all necessary means to uphold and implement [U.N. resolutions] . . . and to restore international peace and security in the area"). The Americans (and British) also cited U.N. resolutions enacted in connection with the first Gulf War. See Letter from U.N. Ambassador John Negroponte to Ambassador Mamady Traore, President of the Security Council (Mar. 20, 2003), at <http://www.usembassy.it/file2003<uscore>03/alia/A3032109.htm>; Attorney General Lord Peter Goldsmith, Legal Basis for Use of Force Against Iraq (Mar. 17, 2003), at <http://www.pmo.gov.uk/output/Page3287.asp>. For the view that these decade-old resolutions could not authorize war, see Koh, *supra* note 17, at 1523–25; Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime*, 93 AM. J. INT'L L. 124, 139–41 (1999).

without U.N. authorization.¹⁹ Thus, for many, the run-up to war confirmed the idea that the current administration had opted for a "new and indefensible unilateralism."²⁰

But U.S. unilateralism, with its characteristic resistance to international treaties, including those "agreed upon by all the major nations," is decidedly not "new." The United States has been consistently unilateralist for its entire 200-year history.

The "isolationism" usually attributed to George Washington and early U.S. foreign policy²¹ is a misnomer. The United States in its early decades was not isolationist. It was unilateralist.

A genuinely isolationist country closes its borders, seeking to keep out foreign people, foreign goods, and foreign ideas. Ming China after 1430 was isolationist, burning its ships and forbidding travel to other countries;²² so, to some degree, were Maoist China²³ and pre-Meiji Japan.²⁴ By contrast, late eighteenth-century America was wide open to immigrants and hungry for all the European ideas, fashions, and commerce it could get its hands on. What Washington famously urged the country to avoid were "*political connexion[s]*" with other countries and, in particular, treaties.²⁵ The United States should, said Washington, honor the international agreements it had made, but make no more. "So far as we have already formed engagements," he said, "let them be fulfilled with perfect good faith. Here let us stop."²⁶

¹⁹ On September 12, 2002, President Bush warned the U.N. that the United States would act on its own if the Security Council failed to take action enforcing Iraq's duty to disarm. See, e.g., *In Bush's Words*, *supra* note 6 ("Will the United Nations serve the purpose of its founding, or will it be irrelevant?"). On October 10, the White House obtained from Congress a resolution authorizing war in Iraq not contingent on U.N. approval. See H.J. Res. 114, 107th Cong. (Oct. 16, 2002) (enacted). On October 25, the United States proposed to the Security Council a resolution implicitly authorizing war, but President Bush again warned that he would not be deterred if the measure was rejected. "If the United Nations doesn't have the will or the courage to disarm Saddam Hussein," he said, "the United States will lead a coalition to disarm Saddam Hussein" David E. Sanger, *Iraq Makes U.N. Seem 'Foolish,' Bush Asserts*, N.Y. TIMES, Oct. 29, 2002, at A15.

²⁰ See Drinan, *supra* note 12, at 16.

²¹ See, e.g., 1 BRADFORD PERKINS, *THE CAMBRIDGE HISTORY OF AMERICAN FOREIGN RELATIONS: THE CREATION OF A REPUBLICAN EMPIRE 1776-1865*, at 22-23 (1993); Harlan Grant Cohen, *The American Challenge to International Law: A Tentative Framework for Debate*, 28 YALE J. INT'L L. 551, 559 (2003).

²² See LOUISE LEVATHES, *WHEN CHINA RULED THE SEAS: THE TREASURE FLEET OF THE DRAGON THRONE, 1405-1433*, at 145-75 (1994).

²³ See, e.g., CHEN JIAN, *THE CHINA CHALLENGE IN THE TWENTY-FIRST CENTURY: IMPLICATIONS FOR U.S. FOREIGN POLICY* 7 (1998).

²⁴ See, e.g., MARIUS B. JANSEN, *THE MAKING OF MODERN JAPAN* 78-79 (2000).

²⁵ See GEORGE WASHINGTON, *WASHINGTON'S Farewell Address* 155-56 (Victor Hugo Paltsits ed., 1935) (1796).

²⁶ *Id.* at 155.

Washington's reasons were twofold. First, "foreign entanglements" could drag the United States into "bloody contests" in which the nation had no true interests.²⁷ In other words, unilateralism was a means of avoiding war. Second, foreign entanglements were inimical to republican government—i.e., to self-government. "I conjure you to believe me, fellow-citizens," said Washington in his 1796 farewell address, "[f]oreign influence is one of the most baneful foes of Republican Government."²⁸ Any nation with international attachments, said Washington, is "in some degree a slave."²⁹

With the Louisiana Purchase and the Monroe Doctrine, the United States proclaimed proprietary and political interests in the whole of the Americas. The Monroe Doctrine was, quite obviously, not isolationist. On the contrary, it foreshadowed all the incursions into Central and South America that would follow in the nineteenth and twentieth centuries, including the 1857 war with Mexico, in which the United States occupied Mexico City and seized large parts of the West. But the central purpose of the Monroe Doctrine, and of the continental expansionism it licensed, remained the same goal that lay behind Washington's "isolationism": to preserve U.S. supremacy in its own sphere of action and particularly to preserve U.S. freedom of action vis-à-vis the European powers.³⁰ That goal remained paramount in 1917, when the U.S. Senate refused—alone out of all the major powers—to ratify the Treaty of Versailles, which would have brought the United States into the League of Nations.³¹ Here too, the chief objection to American internationalism was concern that the League of Nations could oblige the United States to go to war, whereas the Constitution confided the declaration-of-war power to Congress.³² U.S. foreign policy from 1787 to 1945 has been called "isolationist" and "imperialist," but it was decidedly not internationalist or multilateralist. Before 1945, the United States never submitted itself, in any sustained fashion, to international governance of any kind.

²⁷ *Id.* at 153.

²⁸ *Id.* at 155.

²⁹ *Id.*

³⁰ See, e.g., JOHN LEWIS GADDIS, *SURPRISE, SECURITY, AND THE AMERICAN EXPERIENCE* 22–25 (2004) (discussing Washington's farewell address and Monroe Doctrine as basis for U.S. "isolationism").

³¹ See AMOS YODER, *THE EVOLUTION OF THE UNITED NATIONS SYSTEM* 10–11 (1989).

³² See, e.g., HENRY C. LODGE, *THE SENATE AND THE LEAGUE OF NATIONS* 184 (1925) (quoting draft Reservation No. 3 to Treaty, under which United States would refuse any obligations to employ military force "unless in any particular case the Congress, which under the Constitution has the sole power to declare war or to authorize the employment of the military or naval forces of the United States, shall by act or joint resolution so provide").

Even after 1945, when America entered the United Nations, American unilateralism continued. Of all the major powers, the United States alone in the late 1940s and 1950s refused to join any of the great new human rights conventions.³³ As of 1993, the United States was a party to only six of twenty principal human rights agreements,³⁴ and when we did ratify such conventions, we attached "reservations" depriving them of much of their legal force.³⁵ President Clinton, considered by some a "multilateralist," refused to sign the Landmines Convention³⁶ and advised *against* U.S. submission to the International Criminal Court (ICC).³⁷ But well before we refused to participate in the ICC, we had repeatedly defied or refused to submit to the International Court of Justice (ICJ).³⁸ And before the 2003

³³ Carolyn Cox Cohan, *International Mavericks: A Comparative Analysis of Selected Human Rights and Foreign Policy Issues in Iran and the United States*, 33 GEO. WASH. INT'L L. REV. 197, 202-06 & 206 n.38 (2001).

³⁴ See LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 611-12 (3d ed. 1993).

³⁵ These "reservations" state that the treaties require no change in present U.S. law and leave the United States free to disregard international interpretations to the contrary. In the view of some, the United States is "pretending to assume international obligations but in fact is undertaking nothing." Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 344 (1995).

³⁶ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sept. 18, 1997, 36 I.L.M. 1507 (entered into force Mar. 1, 1999).

³⁷ President Clinton signed the treaty on December 31, 2000, but he did not submit it to the Senate and recommended the same policy to his successor. See *Clinton's Words: "The Right Action,"* N.Y. TIMES, Jan. 1, 2001, at A6.

³⁸ See R.P. ANAND, STUDIES IN INTERNATIONAL ADJUDICATION 1-35 (1969) (describing U.S. refusal to participate in World Court in 1930s and 1940s); HENKIN, *supra* note 35, at 344-45 (noting recent U.S. refusals to accede to International Court of Justice's (ICJ) jurisdiction). In 1999, in a suit by Germany against the United States pursuant to the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261 (under which the United States *has* consented to ICJ jurisdiction), the ICJ issued interim orders enjoining the execution of Karl LaGrand, then on death row in America, but American officials ignored the orders, the Supreme Court declined to exercise jurisdiction, and LaGrand was executed. *Forward to Symposium: Reflections on the ICJ's LaGrand Decision*, 27 YALE J. INT'L L. 423, 424 (2002); see also Cara Drinan, Note, *Article 36 of the Vienna Convention on Consular Relations: Private Enforcement in American Courts After LaGrand*, 54 STAN. L. REV. 1303, 1307-10 (2002) (describing how American courts have continued to ignore ICJ's final holding in *LaGrand* case). In the 1980s, the United States announced its intention to ignore decisions of the World Court (as it was then called) concerning Nicaragua:

[I]n 1986 the United States disregarded its own earlier commitment to accept the jurisdiction of the World Court, and even announced a refusal to comply with the Court's judgment on the merits, in which the Court ordered the United States to pay compensation for having violated international law by carrying out certain military operations in Nicaragua.

John W. Head, *What Has Not Changed Since September 11—The Benefits of Multilateralism*, 12 KAN. J.L. & PUB. POL'Y 1, 3 (2002).

Iraq war, we had used force repeatedly without Security Council approval, as, for example, when the “multilateralist” Clinton administration led the bombing of Kosovo in 1999.³⁹

Why, then, does U.S. unilateralism seem to many so new and striking? American unilateralism probably has intensified or accelerated in the last three years. But two other factors are more important.

First, what is genuinely new, as a historical matter, is the extraordinary success of internationalism in Europe and elsewhere since 1945, a development that intensified after 1989. Through their participation in the European Union, many European states today have surrendered prerogatives and trappings of national sovereignty long considered inviolable.⁴⁰ This backdrop makes U.S. unilateralism particularly conspicuous today. If the nations of Europe remained as resistant as America to international law, to international courts, and to multilateral military command structures, U.S. “exceptionalism” would not be newsworthy. It would not, precisely, be exceptional. In other words, the phenomenon requiring explanation today is not only American unilateralism, but European internationalism.

Second, and perhaps even more important, the United States has spoken out of both sides of its mouth on the subject of internationalism for the last sixty years. We were the driving engine behind the United Nations.⁴¹ Americans would be among the primary architects

³⁹ For the (standard) view that the Kosovo bombing violated international law, see generally Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1 (1999). The 1983 U.S. invasion of Grenada probably violated international law. See, e.g., Burns Weston, *The Reagan Administration Versus International Law*, 19 CASE W. RES. J. INT'L L. 295, 296 (1987). The same can be said of our attack on Libya in 1985. See, e.g., Louis Henkin, *The Use of Force: Law and U.S. Policy*, in LOUIS HENKIN ET AL., *RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE* 37, 45–46 (1989).

⁴⁰ See, e.g., Thomas M. Franck, *Clan and Superclan: Loyalty, Identity, and Community in Law and Practice*, 90 AM. J. INT'L L. 359, 369 (1996) (describing phenomenon of certain states in Europe “scrambling to surrender chunks of their precious sovereignty to the European Union, which manages migration for its member governments, as well as credit policies, trade, competition policy and aspects of foreign relations”). As the European Court of Justice put it forty years ago, “By creating a Community of unlimited duration, having its own institutions . . . and, more particularly, real powers . . . , the Member States have limited their sovereignty rights . . . and have thus created a body of law which binds both their nationals and themselves.” Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585, 593. The most visible symbol of the surrender of national sovereignty in the European Union is of course the retirement of national currencies in favor of the Euro.

⁴¹ NIALL FERGUSON, *COLOSSUS: THE PRICE OF AMERICA'S EMPIRE* 133 (2004) (“The United Nations is in large measure a creation of the United States.”). See generally RUTH B. RUSSELL, *A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES 1940–1945* (1958) (describing development of U.N. Charter as part of United States' shift from isolationism to international leadership). The name “United Nations” was chosen to honor Franklin Roosevelt, who suggested it. HANS KELSEN, *THE LAW OF THE UNITED NATIONS* 3 (1950).

of the initial human rights conventions⁴² and the strongest champions of international institutions to monitor rights violations and to govern the use of military force.⁴³ Indeed, America would press on Europe the idea of European union itself—with France, ironically, the primary locus of resistance.⁴⁴ At the same time, America would promote a new constitutionalism throughout Europe and the world, a constitutionalism in which fundamental rights as well as protections of minorities would be laid down as part of the world's basic law, ostensibly beyond the reach of ordinary political processes.⁴⁵ More than any other single country, the United States is responsible for the existing international legal system,⁴⁶ which naturally makes it rather hard for other states to understand how we can act as if that legal system does not apply to us.

This inconsistency also intensified after 1989, when rhetoric of the “end of history,” “globalization,” and a “new world order” seemed to be everywhere. During the 1990s, for example, the United States was

⁴² See, e.g., MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001) (describing history of Universal Declaration of Human Rights with particular focus on Eleanor Roosevelt's role as chair of drafting commission); Louis Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405, 415 (1979) (noting prominence of American constitutionalism in development of international human rights).

⁴³ See, e.g., JACOB ROBINSON, *HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 48 (1946) (describing how United States pressed for creation of Commission on Human Rights); RUSSELL, *supra* note 41, at 467–77 (describing U.S. role in creating U.N. Security Council to govern use of extraterritorial military force).

⁴⁴ See GEORGE WALDEN, *THE SHOEBLACK AND THE SOVEREIGN: REFLECTIONS ON ETHICS AND FOREIGN POLICY* viii (1988) (“[I]t is often forgotten how much the creation of the European Economic Community after World War II owes to the persistent prompting of U.S. diplomacy.”). On French opposition in the 1950s and 1960s, see Donato F. Navarrete and Rosa Maria F. Egea, *The Common Foreign and Security Policy of the European Union: A Historical Perspective*, 7 COLUM. J. EUR. L. 41, 45–49 (2001).

⁴⁵ See, e.g., LOUIS HENKIN ET AL., *HUMAN RIGHTS* 279 (1999) (declaring that “the United States . . . wrote human rights into law for occupied countries, as for Germany and Japan”); Andrzej Rapaczynski, *Bibliographical Essay: The Influence of U.S. Constitutionalism Abroad*, in CONSTITUTIONALISM, DEMOCRACY, AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 405, 424–39 (Louis Henkin & Albert J. Rosenthal eds., 1990) (describing U.S. influence on development of Japanese and German constitutionalism following World War II).

⁴⁶ In the words of one commentator:

Beginning with the trials at Nuremberg and continuing on with the founding of the United Nations, the . . . introduction of the “rule of law” into the international system is largely a product of American efforts and beliefs. . . . [T]he United States has played a tremendous role in developing the current system of international law, creating a body of law that is largely a reflection of American interests and philosophies.

Douglas J. Sylvester, Comment, *Customary International Law, Forcible Abductions, and America's Return to the “Savage State,”* 42 BUFF. L. REV. 555, 612 (1994).

a principal force behind the international war-crimes tribunals in the Balkans and the drafting of the ICC treaty—only to walk away from that treaty when we could not get Americans exempted from its coverage.⁴⁷

At the same time, however, in one major domain, the United States has been as consistent and devoted a champion of international law as any other country: economics. Although the United States occasionally may act unilaterally in matters of trade,⁴⁸ it was and is the world's leading proponent of multilateral economic-governance regimes.⁴⁹ The current administration may resist the ICC and the dictates of the U.N. Charter, but it supports North American Free Trade Agreement (NAFTA),⁵⁰ which subjects the United States to the jurisdiction of international-trade tribunals,⁵¹ and promotes international free trade and intellectual-property agreements all over the world.⁵² A similar tension can be seen in many who otherwise support the

⁴⁷ Lucy Martinez, *Prosecuting Terrorists at the International Criminal Court: Possibilities and Problems*, 34 RUTGERS L.J. 1, 57–58 (2001); Jelena Pejic, *The United States and the International Criminal Court: One Loophole Too Many*, 78 U. DET. MERCY L. REV. 267, 272–73, 289–90 (2001).

⁴⁸ See, e.g., Raj Bhala, *Fighting Bad Guys with International Trade Law*, 31 U.C. DAVIS L. REV. 1, 3–5 (1997) (describing use of international trade measures by United States to fight foreign drug kingpins, Fidel Castro, Iran's mullahs, and Libya's Muammar Quaddafi, "regardless of opposition from its allies and trading partners").

⁴⁹ See, e.g., William Ascher, *The World Bank and U.S. Control*, in THE UNITED STATES AND MULTILATERAL INSTITUTIONS: PATTERNS OF CHANGING INSTRUMENTALITY AND INFLUENCE 116–17 (Margaret P. Karns & Karen A. Mingst eds., 1990) (crediting United States and Great Britain with creation of World Bank); Joseph M. Schwartz, *Democracy Against the Free Market: The Enron Crisis and the Politics of Global Deregulation*, 35 CONN. L. REV. 1097, 1116 (2003) (describing United States' role in creating and promoting Bretton Woods institutions).

⁵⁰ See, e.g., Joint Press Statement, George W. Bush & Vicente Fox, Towards a Partnership for Prosperity: The Guanajuato Proposal (Feb. 16, 2001), at <http://www.whitehouse.gov/news/releases/2001/02/20010220-2.html>. [hereinafter Joint Press Statement, Bush & Fox]

⁵¹ North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., Ch. 20, 32 I.L.M. 296 (1993) (entered into force Jan. 1, 1994), implemented by North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993); see *infra* note 138.

⁵² See Greg Block, *Trade and Environment in the Western Hemisphere: Expanding the North American Agreement on Environmental Cooperation into the Americas*, 33 ENVTL. L. 501, 503 (2003) (describing Bush administration's use of trade-promotion authority to negotiate regional free trade agreements and its desire to expand free trade in Western Hemisphere through negotiation of Free Trade Area of the Americas); Proceedings of the 96th Annual Meeting of the American Association of Law Libraries Held in Seattle, Washington (statement of Robert L. Oakley), 95 LAW LIBR. J. 609, 627 (2003) (highlighting international treaties negotiated by Bush administration and supported by entertainment industry, which "have tended to merge intellectual property policy with international trade policy. And there is now a clear agenda to export U.S. copyright policies, including a longer copyright term and the use of technological protection but not including fair use, to the rest of the world").

familiar, "right-wing" pro-unilateralist position: Many of these seeming unilateralists become die-hard multilateralists when the subject turns to trade and property rights.⁵³

These complications raise a set of important questions that must be sorted out in order to understand the phenomenon of U.S. unilateralism. The first task is to explain the divergence between European and American attitudes toward international law since 1945. How could America's role change from world leader in the new internationalism to world outlier, even as Europe increasingly embraced integration and multilateralism? Part II attempts to answer this question.

II

THE TWO MEANINGS OF THE SECOND WORLD WAR

The truism that power and self-interest underlie all politics applies as much to American unilateralism and European internationalism as it does to the foreign policies of every state. Undoubtedly, the United States has been unilateralist because it could be, while most other states today are multilateralist because they must be. For us, unilateralism maximizes our freedom of action. For Europe, integration and international law are means of increasing economic efficiency and bringing the hyperpower to heel. What else needs to be said?

A good deal. Self-interest, explaining everything so well, explains little with any depth. Yes, the nations of continental Europe have been willing to surrender elements of their sovereignty regarded as inviolable only a few historical minutes ago, in exchange for hoped-for economic and political advantages. The question is why. Yes, there is no doubt that Americans, especially the current residents of the White House, often have seen unilateralism as serving the nation's interests. The question is why.

After all, even in 2003, there was a strong case to be made that America needed to be multilateral as a matter of its own self-interest. Unilateralism already had provoked resistance and hostility to U.S. interests around the world. The fact that many Americans continued (and continue, even today) almost instinctively to favor unilateralism is itself a phenomenon requiring explanation. Perceptions of national and political self-interest are not determined by facts or logic alone. They are inextricably linked to history, culture, values, and worldviews.

⁵³ See *infra* Part III.

From the beginning, the new international order that emerged after the Second World War had very different meanings in America and Europe. The reason was that the war itself meant very different things in America and Europe. Seeing these differences is essential to understanding the phenomena of U.S. unilateralism and European internationalism today.

For Europeans, World War II, with its almost sixty million deaths,⁵⁴ carried two fundamental lessons. First, it exemplified the horrors of *nationalism*. In Germany especially, the war left a deep antinationalist scar:

The trauma of the National Socialist fiasco led the Germans from a peak of boundless self-esteem, induced by a so-called nationalist "philosophy," into an abyss of universal contempt. Thereafter, everything that smacked in the slightest of the national ideal was proclaimed anathema in German literature and in the press.⁵⁵

But the turn against nationalism was by no means limited to Germany. "[N]ational sovereignty," wrote Lord Lothian in 1939, "is the root cause of the most crying evils of our time and of the steady march of humanity back to tragic disaster and barbarism."⁵⁶ Europe, too, derived a "never-again" from the war, but the European lesson was not only "Never again Auschwitz"; it was also, as Alain Finkielkraut puts it, "Never again nationalism."⁵⁷

Second, and more specifically, the war demonstrated the potential horrors of democracy. We may prefer to forget it, but Hitler was elected, and Mussolini rose to power through parliamentary processes.⁵⁸ Both claimed to speak for their people, and both were in fact broadly popular, as were the nationalism, militarism, repression, and, in Hitler's case, genocide that they pursued.⁵⁹ Unpleasant as it is

⁵⁴ See NIALL FERGUSON, *THE CASH NEXUS: MONEY AND POWER IN THE MODERN WORLD 1700–2000*, at 33 (2001) (estimating total deaths in World War II of fifty-seven million people, including 37.8 million civilians).

⁵⁵ FRANZ JOSEF STRAUSS, *CHALLENGE AND RESPONSE: A PROGRAMME FOR EUROPE* 92 (Henry Fox trans., 1970).

⁵⁶ LORD LOTHIAN, *FEDERAL UNION, THE ENDING OF ARMAGEDDON* 8 (1939).

⁵⁷ Alain Finkielkraut, *In the Name of the Other: Reflections on the Coming Anti-Semitism*, 18 *AZURE* 21, 23 (2004).

⁵⁸ See, e.g., A. JAMES GREGOR, *ITALIAN FASCISM AND DEVELOPMENTAL DICTATORSHIP 180–85* (1979) (describing political victories of Italian Fascist syndicates); WILLIAM L. SHIRER, *THE RISE AND FALL OF THE THIRD REICH: A HISTORY OF NAZI GERMANY 15–87* (1960) (describing Hitler's rise to chancellorship through constitutional processes).

⁵⁹ See HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 306 (1973) (describing broad popular support enjoyed by Hitler); see also George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 *Nw. U. L. REV.* 1557, 1590 (1996) (noting that Mussolini and Hitler were "wildly popular" in, respectively, Italy and Germany). See generally DANIEL JONAH GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* (1996) (describing

to acknowledge, Nazism and Fascism were populist movements and in fact manifestations of popular sovereignty. From the postwar European perspective, the Allies' victory was a victory not only against nationalism, but against popular sovereignty, against democratic excess.

The American experience of victory could not have differed more starkly. For Americans, the Allies' triumph was a victory *for* nationalism—for *our* nation, our kind of nationalism. It was a victory *for* popular sovereignty (our popular sovereignty) and a victory *for* democracy (our democracy). Yes, for Americans, the War held a lesson about the dangers of democracy, but the lesson was that the nations of continental Europe had proven themselves incapable of handling it when left to their own devices. If Europe was to develop democratically, it would need American tutelage and assistance. If Europe was to overcome its nationalist pathologies, it might need to become a United States (of Europe). Certain European countries might even need to have democratic institutions imposed upon them, although it would be best, of course, if they adopted these institutions themselves—or at least if they could tell themselves that they had.

These contrasting lessons profoundly shaped, in divergent ways, the European and American experience of the postwar boom in international political institutions and international law.

For continental European elites, international law would be seen as necessary because popular will and public opinion could not be trusted. "Fascism and Hitlerism have . . . *tainted European public opinion*" and "infiltrated our countries," said a French delegate at the debate on the European Convention of Human Rights, who went on:

Behind the State, whatever its form, were it even democratic, there ever lurks as a permanent temptation, this reason of State [*raison d'état*]. . . . Even parliamentary majorities are in fact sometimes tempted to abuse their power. Even in our democratic countries we must be on guard against this temptation of succumbing to reasons of State.⁶⁰

In other words, the fundamental point of international law, and particularly of international human rights law, was to *check national sovereignty*, emphatically including national *popular* sovereignty.

This remains the dominant European understanding today. The United Nations, the European Union, and international law more generally are expressly understood in Europe as *antinationalist*; they

role of ordinary German citizens in Holocaust); GREGOR, *supra* note 58, at 172–90 (describing popular support for Mussolini in Italy).

⁶⁰ 1 COUNCIL OF EUR., COLLECTED EDITION OF THE *Travaux Préparatoires* 40 (1975) (remarks of M. Teitgen) (emphasis added).

are constraints on nationalism and national sovereignty, the catastrophic perils of which were made so plain by the Second World War.⁶¹ In the words of Manfred Zuleeg, former judge on the European Court of Justice, "The purpose of European integration is to prevent the *evils of nationalism*. To this end, the founders of the European Communities established, through a series of treaties . . . a supranational power which now makes up the core of the European Union."⁶² Just as important, and for the same reasons, international law is also understood, although often more covertly, as a restraint on *democracy*, at least in the sense of placing increasing power in the hands of international experts—bureaucrats, technocrats, diplomats, and judges—at a considerable remove from popular politics and popular will.

In America, the postwar internationalism had and has a very different meaning. For Americans, the point of international law could not ultimately be antidemocratic or even antinationalist because the Allies' victory in the War had been a victory for democracy (American democracy) and for the nation (the American nation). But what, then, was the American meaning of the new internationalism? What was America doing—what did America think it was doing—when it promoted internationalism in Europe and throughout the world?

Two principal motivations lay behind America's leadership in the postwar internationalism, one high-minded, the other geopolitical, both implying a distinctively American mixture of hubris and hypocrisy. The high-minded aspiration involved America's long-held self-conceit as a beacon to mankind, a "city on the hill," charged with the mission of showing the world the way to freedom, peace, and prosperity. The Second World War had done nothing to damage that self-conception. Wasn't America light years ahead of continental Europe in the ways of democracy? Thus when drafting international human rights treaties, founding the United Nations and the World Trade Organization (WTO), imposing constitutions on Germany and Japan, and pushing Europe toward integration, Americans were able to see

⁶¹ ERNST B. HAAS, *BEYOND THE NATION-STATE: FUNCTIONALISM AND INTERNATIONAL ORGANIZATION* 452 (1964) ("Disenchantment with the nation as the harbinger of the good life was omnipresent, a disenchantment shared by labor, efficient and newer business units, intellectuals and bureaucrats—as well as by most of the political parties that appealed to these groups."); PAUL SIEGHART, *THE LAWFUL RIGHTS OF MANKIND: AN INTRODUCTION TO THE INTERNATIONAL LEGAL CODE OF HUMAN RIGHTS* 68 (1985) (describing international human rights system as "substantial retreat from the previously-sacred principle of national sovereignty").

⁶² Manfred Zuleeg, *A Community of Law: Legal Cohesion in the European Union*, 20 *FORDHAM INT'L L.J.* 623, 623 (1997) (emphasis added).

themselves as laboring generously, for the sake of people everywhere, to make the world more American.

In other words, we were bestowing on the world the gift of American law and the American way. Europe might use a different phrase—"human rights"—to describe them, but the fundamental rights guaranteed by international law were nothing other than rights already enshrined in the United States Constitution. As Louis Henkin characterized this viewpoint, "the Universal Declaration of Human Rights, and later the International Covenant on Civil and Political Rights, are in their essence American constitutional rights projected around the world."⁶³ International law would be American law, made applicable to other nations.

The second motivation was to increase American wealth and power. The great military fact confronting the Allies in the aftermath of the war was the presence of massive American and Soviet armies still occupying Europe. Initial histories of the period painted Roosevelt as clumsily trustful of a continuing American-Soviet alliance. In retrospect, as Wallerstein has argued, it seems plausible that as early as Yalta, Roosevelt and Stalin already foresaw and brokered a kind of division of the world into two spheres of influence.⁶⁴ Whether brokered or not, this global division would be the world's postwar reality. In essence, Eastern Europe and the Balkans would go to the Soviets, while Western Europe and Japan would be under American "protection," with the rest of the world an undecided battleground. Behind the "Iron Curtain," Soviet military power and a Soviet-dominated command economy would rule, while the "free world" would have a U.S.-dominated market economy and U.S. military power behind it. Hence America's internationalist crusade after 1945 was in part intended to establish, throughout as much of the world as possible, a stable legal, political and economic order in which American commerce would flow freely and American military power would reign supreme.

Both these sets of motives could be described as "imperialist." Both shared a common objective: to Americanize the world through a new international order. Naturally, therefore, America would be the great champion of the new international order. Why wouldn't America support the project of making the world more American?

But for just this reason, in the American worldview, all this internationalism, all this multilateralism, was more for the rest of the world

⁶³ Henkin, *supra* note 42, at 415.

⁶⁴ IMMANUEL WALLERSTEIN, *THE DECLINE OF AMERICAN POWER: THE UNITED STATES IN A CHAOTIC WORLD* 15 (2003).

than it was for us. This is the root-source of all subsequent American equivocation on international law. From the beginning, Americans imagined international law applying to the world, but not applying—or not applying in exactly the same way—to America.

It would be inaccurate to call America's position hypocritical, in the sense of paying pious lip service to a rule while secretly violating it. After all, it was not as if America would tell the rest of the world to abolish capital punishment while covertly continuing to put murderers to death. Rather, the American idea was that we already had the law that the international legal system would introduce elsewhere. International human rights were American rights. The notion that practices constitutional under our Bill of Rights might violate "international human rights" was not, from this point of view, a conceptual possibility. The point of the new internationalism was to Americanize. But we, needless to say, were already American.

Hence our willingness to promote international law would be second to none—except when it came to any covenants or conventions that might require a change in our own laws. The idea that international law could be a means of changing *internal* or *domestic* U.S. law was emphatically resisted by the principal organs of U.S. foreign policy. The State Department took this view in a circular published shortly after the war.⁶⁵ The rest of the world needed American law and American-modeled constitutions, but we didn't. The rest of the world might not be able to trust its own democratic self-government, but we could. We were not the ones repeatedly engulfing the world in war. We were not the ones putting Hitlers and Mussolinis into power. All we needed, all we would be accountable to, was the law we had given ourselves.

In other words, while the U.S. Senate's refusal to ratify the early human rights conventions may well have reflected Southern racism,⁶⁶

⁶⁵ According to the circular,

Treaties should be designed to promote United States interests by securing action by foreign governments in a way deemed advantageous to the United States. *Treaties are not to be used as a device for the purpose of effecting internal social changes or to try to circumvent the constitutional procedures established in relation to what are essentially matters of domestic concern.*

U.S. State Dep't Circular No. 175 (Dec. 13, 1955), *reprinted in* 50 AM. J. INT'L L. 784, 785 (1956) (emphasis added).

⁶⁶ See, e.g., David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1273–74 (2000) (describing race-based motivation for Senator Bricker's seven-year attempt to pass constitutional amendment preventing United States from entering into binding international human-rights covenant); see generally DUANE TANANBAUM: THE BRICKER AMENDMENT CONTROVERSY, A TEST OF EISENHOWER'S POLITICAL LEADERSHIP (1988) (describing history of Bricker Amendment).

it also reflected something else. Americans could not embrace the new internationalism the same way the continental European states were prepared to embrace it. The American experience of World War II did not warrant it. Americans were not yet ready to break with, or let go of, their history of independent self-government.

The Cold War prevented Europe and the "international community" from protesting U.S. unilateralism too much. Europe was too weak; American military might was too necessary. Things changed, however, after 1989. As European integration progressed and as the Soviet fall from world power turned into utter collapse, the "international community" became more discontent with American power.⁶⁷ It came to see international law as a vehicle for restraining the "hyperpower," and it became increasingly less tolerant of American "exceptionalism."

Fifteen years after the fall of the Berlin Wall, three years after September 11, and one year after the occupation of Iraq, America can no longer delude itself into imagining that the rest of the world will embrace the idea of being Americanized through the international legal and political order. International law is not American law under another name. Internationalism is not a vehicle for American power, but a counter-weight to U.S. power. It is no longer Europe that would drag an unwilling America into war through the invocation of international treaty obligations, but America that makes war in the face of Europe's invocation of international treaty obligations.

With the old illusions intact, it was possible to think of U.S. unilateralism as somehow consistent with internationalism: We would remain quintessentially American, while the rest of the world became more like us. American unilateralism, combined with multilateralism everywhere else, would eventually bring about worldwide convergence on a set of common (American) principles. Shorn of these illusions, America today has to face the reality that U.S. unilateralism directly and sometimes profoundly conflicts with the aims and values of the "international community." Yesterday, it was hubristic, but not hypocritical, when America urged other nations to join international human rights conventions the United States itself refused to ratify. After Abu Ghraib, the thought of our administration scolding another

⁶⁷ See, e.g., Samuel P. Huntington, *The Lonely Superpower*, FOREIGN AFF., Mar.-Apr. 1999, at 35, 38-43 (noting growing international impatience with and resentment of American power since 1989). See generally ROBERT KAGAN, *OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER* (2003) (describing growing disagreement between Europe and United States concerning use of military power and America's role in world affairs).

state for violating the Geneva Convention takes on a rather different hue.

What, then, are we Americans to think of U.S. unilateralism today? Should people of conscience condemn it? Or is there something to be said in its favor?

I will argue in the next section that there is. Despite the war in Iraq and the glaring failures of the occupation that followed, the United States does have good reason to continue resisting international governance regimes. International law, at least in its present form, stands in considerable tension with the fundamental commitments of American constitutionalism.

III

UNILATERALISM AND CONSTITUTIONALISM

International law enjoys a kind of higher-law status throughout much of Europe and in other parts of the world today. It is, for many, a form of constitutional law—a body of supreme law authorized to override all other laws and governmental decisions. But international law embodies a distinct conception of constitutionalism, different in important respects from what has historically been the American conception. The differences between these two competing conceptions of constitutionalism are not nearly as well known as they ought to be, but they are central to the divergent American and European attitudes toward international law today.

There always have been two quite different conceptions of constitutionalism and its relationship to democracy. For convenience, I am going to call one of these two conceptions of constitutionalism more characteristically American and the other more characteristically European, but I want to stress at the outset that these are shorthand associations. Both conceptions have advocates on both sides of the Atlantic. Moreover, there are multiple, distinct, competing strands of constitutionalism within Europe, just as there are many perspectives on constitutionalism in America. Nevertheless, the transatlantic divide on this point is real, and, although the existence of these two conceptions of constitutional law has been insufficiently recognized, the differences between them are essential to understanding U.S. unilateralism and European internationalism today.

A. Two Kinds of Constitutionalism

Here is one way constitutionalism can be understood: Constitutional rights are universal. They are rights people have by nature, by virtue of being persons, by reason of morality, or by reason of Reason

itself. Constitutional principles—essentially the liberal principles of the Enlightenment—possess an authority superior to that of politics, including, of course, democratic politics. This special authority, residing in a normative domain higher than that of politics, is what allows constitutional law properly to displace the outcomes of political decisionmaking, including democratic decisionmaking.⁶⁸

On this view, constitutional principles and structures ought in principle to be supra-national. Constitutional rights transcend national boundaries. Constitutional principles are superior to claims of national sovereignty or self-determination. Constitutional law stands above nation-states, and hence it is only natural that international actors should frame the world's constitutions, interpret these constitutions, and enforce them.

These are abstract propositions. To make this attitude toward constitutionalism more concrete, let me tell a story exemplifying it. For several years, I have served as a United States Observer at the Council of Europe, an organization of European states formed in 1949 and a precursor of the European Union. One of my first duties there was to participate on a committee attempting to draft a constitutional charter for Kosovo. The committee consisted of distinguished jurists and constitutionalists from all over the world. We met in Paris and in a palatial setting in Venice, where Tintoretto's and Carpaccio's hung from the walls. The proceedings were expert in every respect. I noticed, however, that the committee had no Kosovar members.

I was not certain whether this absence was deliberate, so I made inquiries. It was deliberate. Committee members explained to me that involving Kosovars in the drafting of a constitution for Kosovo was quite unnecessary and would have mired the process in factional politics. But shouldn't Kosovo's Constitution be responsive to Kosovo society? Yes, I was told, but there was no need to worry. The committee had made a three-day fact-finding mission to Pristina, ensuring that local conditions would be taken into account.

Might it at least have been desirable, I asked, to draft a transitional document, on the model of the interim South African Constitution, creating institutions through which Kosovars could later write and ratify their own charter? No, was the committee's answer. It was a constitution we were drafting, and constitutions are meant to be permanent. They have to conform to international principles and norms.

⁶⁸ Of course, the fundamental rights derived from universal liberal principles will differ, according to the predilections of the theorist deriving them. See generally RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1986) (emphasizing rights of equal concern and respect); RICHARD EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) (emphasizing rights of private property).

It would not do to encourage revision or redrafting once the new constitution had been installed.

I am not trying to diminish the job the committee performed. The text they drew up was exemplary, though never enacted. The point is simply to illustrate the competition between two very different understandings of constitutional law.

The committee's work exemplified *international constitutionalism*. On this view, it is not particularly important that a constitution be the product of a national participatory political process, through which people commit to writing the fundamental values or principles that will govern their society. What matters is that the constitution recognize human rights, protect minorities, establish the rule of law, and set up stable democratic political institutions, preferably of a parliamentarist variety in which the chief executive is not directly elected by the people. (The committee eventually followed the latter principle right down to the organization of municipal governance in Kosovo. The mayors of each town were to be chosen by an elected city council, not by popular vote. When I asked why, the committee members replied, puzzled by the fact that I did not already know the answer, that this would make the mayor's office "more democratic.")

In this constitutionalism, a democratic ratification process, if pursued at all, is pursued primarily for reasons of expedience. Ratification of a new constitution may be instrumentally valuable—a means of procuring acquiescence—but, in principle, having a committee of expert jurists draw up a constitution is equally satisfactory. Having that constitution imposed by an occupying power can be awkward, but in principle it too would be acceptable, so long as the occupying power was recognized as valid under international law.

The alternative conception is *democratic constitutionalism*. On this view, a constitution is not to be conceptualized as something prior to or outside of democratic politics. On the contrary, a nation's constitution ought to be made through national democratic processes, because the business of the constitution is to allow people to make their own fundamental law—to decide for themselves on the enduring legal and political commitments that will govern the polity in the future. These commitments will include fundamental rights that stand against majority rule at any given moment, but these counter-majoritarian rights are not therefore counter-democratic. The reason they are not counter-democratic is *not* that they guarantee the neces-

sary conditions or processes of democratic rule.⁶⁹ Nor is it that they capture the "true" historic "soul" or "character" of the nation.⁷⁰ The reason these constitutional rights are democratic is that they represent the nation's self-given law, enacted through a special, democratic, constitutional politics, subject to democratic amendment processes in the future. Over time, on this view, constitutional law is supposed to evolve in a fashion that continues to express national interpretations and reinterpretations of these fundamental national commitments.

From this perspective, a democratic process of constitution-making, particularly when it comes to ratification, is crucial. But the work of drafting and ratification is only the beginning. Just as important, if not more so, is the work of constitutional interpretation, because constitutional law must somehow remain the nation's self-given law even as it is reworked through judicial interpretation and reinterpretation. In international constitutionalism, interpretation of the constitution by a body of international jurists is in principle not only satisfactory; it is *superior* to local interpretation, which invariably involves constitutional law in internal, partisan, and ideological political disputes. By contrast, in democratic constitutionalism, a process of national interpretation is as crucial as is the process of national constitution-making.

Let's be frank: Americans have at times been the most aggressive proponents of international constitutionalism, seeking to disseminate or impose (American) constitutional principles around the world, without much concern about whether these principles reflect other nations' self-given commitments. But when Americans export the American Constitution in this way, they are not exporting American constitutionalism. The U.S. Constitution differed in one fundamental respect from any democratic constitution that any large state had ever had: It was enacted through a process of popular deliberation and consent.⁷¹

For this reason, democratic constitutionalism is much more deeply ingrained in American thought and practice (concerning our

⁶⁹ Depicting the Constitution as essentially serving a process-protecting function of this kind was Ely's solution to counter-majoritarian difficulty. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 87 (1980).

⁷⁰ De Maistre was among the first explicitly to advance the idea that a constitution should express a particular people's "soul" or "character" in opposition to the idea that a people or a constituent assembly could make a nation's constitution through a democratic politics. See, e.g., Joseph de Maistre, *Des souverainetés particulières et de nations*, in 1 *ŒUVRES COMPLÈTES* 325 (1884); JOSEPH DE MAISTRE, *ESSAY ON THE GENERATIVE PRINCIPLE OF CONSTITUTIONS* xvii (C.M. Lombard, trans., 1977); JOSEPH DE MAISTRE, *CONSIDERATIONS ON FRANCE* 91, 97 (Richard A. Lebrun, trans., 1974).

⁷¹ See *infra* note 87.

own constitutional law) than it is in contemporary European thought and practice (concerning international law). The narrative Americans tell themselves is that their fundamental law was made by the people. International law does not share that narrative, and for a good reason: International law was made in response to the most cataclysmic expression of “popular will” the world had ever known.

Consider the differing American and European views on the appointment of judges and, more generally, on the relationship between politics and law. In Europe, the judicial appointment process tends to take place within a civil service system viewed as highly insulated from political pressures.⁷² Claims about “American realism” are often overstated, but there is undoubtedly in the United States, as compared to Europe, a greater understanding that all law—including judge-made law (*i.e.*, judicial decisions), and especially *constitutional* law—is a political product. Hence if law is to remain democratically legitimate, then the courts interpreting it must retain strong connections to the nation’s democratic political system.

Americans at bottom tend to be highly skeptical about the claims of a nonpolitical, neutral constitutional law. They are well aware that judges’ values invariably inform constitutional law. Europeans tend to have a different attitude, which is often expressed in the form of a more dogmatic insistence on the separateness of politics from law, including constitutional law.⁷³ The evolution of European thought on this matter is a long and complicated story, which I will only outline here.

There was for a long time a deep tradition of distrust for judges, and especially distrust for constitutional judges, in European political thought.⁷⁴ Yet this skepticism about “government by judiciary” coex-

⁷² See, e.g., MAURO CAPPELLETTI, *JUDICIAL REVIEW IN THE CONTEMPORARY WORLD* 65 (1971) (noting meritocratic, bureaucratic judicial appointment process in most European countries); Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1529, 1538 (2000) (same). The appointment of judges to contemporary European constitutional courts is typically confided, however, to a legislative body, but here too mechanisms are used to avoid “ideological” appointments. See, e.g., John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 L. & CONTEMP. PROBLEMS 41, 65 (2002) (observing that while appointments to new constitutional courts may be made by political bodies, supermajority requirements limit appointment of judges with “immoderate ideological views”).

⁷³ See, e.g., MARTIN SHAPIRO & ALEC STONE SWEET, *ON LAW, POLITICS, AND JUDICIALIZATION* 203 (2002) (“European academic lawyers labour continuously to separate law from politics and, by extension, to distinguish what constitutional courts do from what political institutions do.”).

⁷⁴ Before the Second World War, most European states rejected judicial review on the ground that it would establish government by judiciary and allow judges to usurp parliamentary supremacy. See *infra* note 91; see also Mauro Cappelletti, *The ‘Mighty’ Problem of Judicial Review and the Contribution of Comparative Analysis*, 2 LEGAL ISSUES OF EUR.

isted with faith in an expert, neutral bureaucratic rationality and, relatedly, in claims of universal right and in the logic of a dogmatic, apolitical legal reason. The result was a deeply ambiguous attitude toward judicial review and constitutional law.

This ambiguity was perfectly expressed in Hans Kelsen's tremendously influential model of constitutional law, in which a judicial council—I will call it a court, although Kelsen precisely did not—would be charged with ensuring the conformity between governmental action and the sovereign will of the people expressed in a constitutional text. The Kelsenian constitutional court was *not* to have jurisdiction to enforce constitutional *rights*, because, as Kelsen saw it, the business of enforcing fundamental rights was so inexorably political that judges trying to carry it out would inevitably be drawn into the sovereign business of positive lawmaking.⁷⁵ As a result, Kelsen's understanding of constitutional law stood in unresolved equipoise, one foot in politics, the other in law. Constitutionalism was neutral, rational, and legal enough to assure the conformity of state action with fundamental structural principles. But it was not quite neutral or rational or legal enough to assure the conformity of state action with fundamental guarantees of justice or liberty.

Postwar-European constitutionalism has shed this equivocation. European constitutionalism today invests courts with full jurisdiction over constitutional rights, thus breaking radically from its Kelsenian roots.⁷⁶ But it has not yet fully confronted the significance of this departure; it has not fully confronted the deep problems of democratic authority created when courts arrogate to themselves the power to interpret and enforce fundamental rights, or the truth in Kelsen's insight that decisions about the meaning of constitutional rights are in some ineradicable and fundamental sense political in character.⁷⁷ On

INTEGRATION 1, 2 (1979) (noting historic European opposition to judicial review); Louis Favoreu, *Constitutional Review in Europe*, in CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 38, 42–44 (Louis Henkin & Albert J. Rosenthal, eds., 1990) (same).

⁷⁵ E.g., Hans Kelsen, *La garantie juridictionnelle de la constitution*, 44 *REVUE DU DROIT PUBLIC* 197 (1928); see HERMAN SCHWARTZ, *THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE* 17–18 (2000) (discussing Kelsen's deliberate omission of bill of rights from his constitution to restrict tribunal to “negative lawmaking”); ALEC STONE SWEET, *GOVERNING WITH JUDGES* 36 (2000) (discussing Kelsen's belief that constitutional rights would lead to positive lawmaking by judges).

⁷⁶ See SCHWARTZ, *supra* note 75, at 18–21; STONE SWEET, *supra* note 75, at 37–38.

⁷⁷ As Stone Sweet puts it,

Although [European] legal scholars today appear to be parroting Kelsen's constitutional theory, they also claim that constitutional courts inherently function to protect constitutional rights, and that this function is basic to the legitimacy of review. . . . [T]he orthodox position . . . is that rights possess ‘supraconstitutional’ status (their contents can not be altered by constitutional revision),

the contrary, what makes the new European constitutionalism cohere—what gives European constitutional courts their claim to legitimacy—is the ideology of universal or “international human rights,” which owe their validity to no particular nation’s constitution, and which possess therefore a supranational and almost supraconstitutional character, making them close to unamendable and rendering them peculiarly fit for interpretation by international juridical experts.

Thus in European constitutionalism, there is an association between the idea of “higher law” and that of supranational or international law. International law is higher than local law procedurally, in that its norms and tribunals stand above their domestic counterparts within the legal hierarchy. More important, it is higher than national law substantively, in that it derives from a higher source of authority and serves higher purposes. This “higher law” status of international law is almost an article of faith for contemporary international lawyers and non-governmental organizations.

By contrast, in America, where judges still can decry the introduction of international precedents as if they were in the presence of the first spores of a new virus,⁷⁸ it would be nothing short of scandalous to suggest that U.S. constitutional questions be decided by an international tribunal, claiming supremacy over our legal system, as our Supreme Court claimed supremacy over the states in the early 1800s. International law has never quite achieved higher-law status in America; it almost has lower-law status. In the American constitutional perspective, law gains no special authority by virtue of being international law, and courts obtain no special legitimacy by virtue of being international courts. On the contrary, from the American perspective, *national* constitutional courts, which remain embedded within the nation’s democratic processes, are an essential feature of constitutionalism.

There are several important ways that constitutional courts and constitutional law, on the American view, remain interwoven with the

which is akin to a natural law, not a positivist, position. In a sentence, orthodox constitutional scholarship in Europe only selectively embraces elements of Kelsen’s constitutional theory, while implicitly rejecting the fundamental positivism of the rest of his thinking. In consequence, Kelsenians are led to defend what cannot be defended, namely, that constitutional judges are only negative legislators.

STONE SWEET, *supra* note 75, at 135–36.

⁷⁸ See, e.g., *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997) (criticizing Justice Breyer’s dissent because it “would consider the benefits that other countries, and the European Union, believe they have derived from federal systems that are different from ours. We think such comparative analysis inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one.”).

nation's processes of democratic self-governance. One of these, as already noted, is the phenomenon of a politically charged judicial nomination mechanism. But there are others: For example, (1) the fact that the judges are themselves members of the national polity and imbued with the nation's particular political and legal culture; (2) the always-open possibility of amendment through national political processes; and, perhaps most important but least understood, (3) periodic but decisive contests between the judicial and political branches.

Such periodic contests are and always have been a well-known feature of American constitutionalism. The first took place in 1800, when Thomas Jefferson famously sought to undo the Federalist takeover of the judiciary attempted in the waning days of the Adams administration.⁷⁹ Jefferson largely won this battle, but the Supreme Court might be said to have won the war, establishing its power of judicial constitutional review in the famous case of *Marbury v. Madison*.⁸⁰ The most intense such battle of the twentieth century involved Roosevelt's "court-packing plan" to overcome judicial opposition to the New Deal.⁸¹ Here the Supreme Court may be said to have won the battle (against court packing), but lost the war.

The seismic shocks that result to the judicial and political systems as a consequence of these periodic contests are much written about. But these clashes are too often portrayed as crisis-like events to be avoided at all costs, episodes in which the political branches attempt (sometimes successfully) to overwhelm the judiciary with improper pressures.⁸² In fact, they can play a crucial role in maintaining the

⁷⁹ See generally RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* (1971) (describing conflict between Jefferson and Federalists); JAMES F. SIMON, *WHAT KIND OF NATION: THOMAS JEFFERSON, JOHN MARSHALL, AND THE EPIC STRUGGLE TO CREATE A UNITED STATES* 104-90 (2002) (same).

⁸⁰ 5 U.S. (1 Cranch) 137 (1803); see James M. O'Fallon, *Marbury*, 44 STAN. L. REV. 219, 221-42 (1992) (describing *Marbury*'s historical context). Just six days after *Marbury*, the Court upheld Jefferson's elimination of a number of Federalist-appointed judgeships. See *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803).

⁸¹ See generally JOSEPH ALSOP & TURNER CATLEDGE, *THE 168 DAYS* (1938) (detailing history of President Roosevelt's court-packing plan); L. BAKER, *BACK TO BACK: THE DUEL BETWEEN FDR AND THE SUPREME COURT* (1967) (same).

⁸² See, e.g., Charles Gardner Geyh & Emily Field Van Tassel, *The Independence of the Judicial Branch in the New Republic*, 74 CHI.-KENT L. REV. 31, 88 (1998) (arguing that "when Congress and the President have tested the constitutional limits of their power over the courts . . . the result has typically been a constitutional crisis" and rejecting notion that such confrontations should be "held aloft as defining features of a constitutional democracy in good repair"); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1443 (1987) (decrying expansion of Commerce Clause due to pressure from executive branch through court-packing plan).

judiciary's embeddedness within and connections to a particular nation's long-term democratic development.⁸³

These connections are not to be thought of as failed or inchoate substitutes for answerability to popular will. The ideal is not to make constitutional courts responsive to popular will or to popular opinions. If that were the ideal, regularly electing constitutional judges would be a simpler, better means of achieving the desired result. To create a judiciary answering to political or popular will at any given moment in time would mark the end of judicial independence. The point is different: It is to create an institution of constitutional law answerable to the nation's project of political self-determination over time.

To summarize, then, I have distinguished two conceptions of constitutional law:

(1) International constitutionalism is based on the idea of universal rights and principles that derive their authority from sources outside of or prior to national democratic processes. These rights and principles constrain all politics, including democratic politics. Because these rights and principles are supranational, they can and in theory should be both designed and interpreted by neutral international experts, rather than by national political actors, who are likely to involve constitutional law in partisan conflict.

(2) Democratic constitutionalism regards constitutional law as embodying a particular nation's fundamental, democratically self-given legal and political commitments. At any given moment, these commitments operate as checks and constraints on national democratic will, but in its creation and over time, constitutional law is not anti-national, and it is emphatically not antidemocratic. Rather, it aims at democracy over time. Hence it is critical for constitutional law to be made and interpreted not by international experts, but by national political actors and judges.

B. Three Contrasts

To bring home the differences between these two conceptions of constitutionalism, and to indicate further the transatlantic divide between them, let me offer a series of three contrasts. The first is historical, the second theoretical, the third practical.

⁸³ For an account along these lines, see Professor Whittington's nuanced description of the court-packing episode, Keith E. Whittington, *Yet Another Constitutional Crisis?*, 43 WM. & MARY L. REV. 2133-38 (2002), which precisely suggests that Roosevelt's actions avoided a constitutional crisis and emphasizes the respects in which Roosevelt and Congress remained within their constitutional powers even as they wrestled with a recalcitrant Court.

1. *Historical Contrast*

The historical contrast prefigured all the rest. In 1789, the revolutionary national assembly of France promulgated a Declaration of the Rights of Man and Citizen.⁸⁴ This document spoke in the language of universal rights. The rights of *man* were at issue, not merely the rights of Frenchmen.

In the same year, 1789, the American Congress promulgated a Bill of Rights, which, far from proclaiming universal law, was not intended even to apply to the American states.⁸⁵ For example, while the American First Amendment originally forbade *national* religious establishments, it did not forbid religious establishments in the *states*.⁸⁶ If the peoples of the several states wanted to establish religion, that was their business. The American Constitution spoke not in the language of universal rights, but rather in that of popular sovereignty.

Such is the governing myth, at any rate, of American constitutional law: The supreme law is and must be the people's self-given law. From the outset, American constitutional law was understood *not* as an external force *checking* self-government, but as a central piece—the most fundamental piece—of self-government itself.⁸⁷ The world-historical question posed by American constitutionalism—and its world-historical character was understood at the time—was whether, to quote from the first page of the *Federalist Papers*, a constitution could be made from “reflection and choice,”⁸⁸ or, as Madison would later reiterate the same point, by “deliberation and consent.”⁸⁹ In other words, American democracy would not start *after* the Constitution was made; it was to start with the making of the Constitution itself.

This is the reason why it is much less typical for Americans (as compared to Europeans) to speak of “human rights.” The American Constitution does not claim the authority of universal law. It claims rather the authority of democracy—of law made by “the People,” of

⁸⁴ DECLARATION OF THE RIGHTS OF MAN AND CITIZEN (Fr. 1789), *reprinted in* THE FRENCH REVOLUTION AND HUMAN RIGHTS: A BRIEF DOCUMENTARY HISTORY 77–79 (Lynn Hunt ed., 1996).

⁸⁵ The Bill of Rights originally applied only to the federal government, not to the state governments. See *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833); AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 140–45 (1998).

⁸⁶ See, e.g., AMAR, *supra* note 85, at 32–42 & 324 n.62.

⁸⁷ See JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 165–68 (2001) (describing act of constitution-writing in America as itself constitutive element of democracy).

⁸⁸ THE FEDERALIST NO. 1, at 1 (Alexander Hamilton).

⁸⁹ THE FEDERALIST NO. 38, at 233 (James Madison) (Edward Mead Earle ed., 1964).

self-given law. "Human rights" are natural rights. Constitutional rights are man-made.

Americans in the late eighteenth century did not invent constitutional democracy. There had been democratic constitutions before, where that term referred to a constitution establishing a democratic (as opposed to aristocratic or monarchic) form of government. There also had been bills of rights before, and most of the rights laid down in the American Bill of Rights had roots in British law. But late eighteenth-century America did invent *democratic constitutionalism*.

No large state, past or present, had ever had a constitution that was democratically made. This was the true innovation of American constitutionalism. America added something to the idea of democracy itself: Democracy was not to consist only of electoral, representative government effectuating the present will of the governed; it also was to consist of—indeed it begins with—a constitution that was itself democratically made, a constitution setting forth the nation's fundamental, self-given political and legal commitments, to endure over time.

International constitutionalism begins instead with declarations of universal Enlightenment rights and truths that are supposed to supersede politics altogether. I am not saying that American constitutionalism rejects the idea of universal, Enlightenment principles. The Constitution was written and ratified by people who believed deeply in—who participated in—the Enlightenment. Many Americans since then have believed in Enlightenment principles. I certainly do. Our Declaration of Independence, with its famous references to "inalienable" rights, and to "truths" we hold "self-evident," spoke nearly the same language of natural law and universalism as did the French Declaration of the Rights of Man and Citizen.

But the truth about self-evident truths is that they cannot govern, not by themselves. If Enlightenment principles are to be made into governing law, it must be done by real human beings, who will disagree with one another, perhaps radically, about what the principles are or how to interpret them or how to apply them in real life. How are these disagreements to be resolved? The American answer was: not by philosophers, nor by kings, nor by demagogues who claim to speak for the people, but by the people themselves, through democratic deliberation and consent, first in the making of a Constitution, then in the election of representatives.

2. *Theoretical Contrast*

The second contrast makes the same point at the level of constitutional theory. Contemporary American constitutional theorists are

unendingly concerned with the so-called "counter-majoritarian difficulty"—the problem posed by the fact that constitutional law is designed to allow unelected judges to override the outcomes of the democratic legislative process.⁹⁰ Europeans used to share this obsession, which in part underlay their frequent rejection of the entire institution of constitutional law.⁹¹ But this is no longer so. While there of course remains anxiety in Europe about judicial overreaching in constitutional matters,⁹² the idea that constitutional law as such faces a fundamental theoretical difficulty in explaining its own democratic legitimacy—particularly in explaining the democratic legitimacy of counter-majoritarian judicial review—no longer has nearly as much bite in Europe as it does in America. As Professor Ferreres Comella of Barcelona puts it:

The view has emerged in many quarters that the major problem regarding the legitimacy of constitutional review hinges on the question of what the constitutional court should do with a particular statute once it appears to contravene the constitution, and not on the question of what should be the correct interpretation of the con-

⁹⁰ For the canonical formulation, see ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 16–17 (2d ed. 1986).

⁹¹ Throughout the nineteenth century in Europe, and in many countries until much later, judicial review was condemned on the ground that it would violate the principle of parliamentary supremacy. See, e.g., RAYMOND CARRÉ DE MALBERG, *LA LOI, EXPRESSION DE LA VOLONTÉ GÉNÉRALE* (1984) (describing earlier French view, dominant for almost two centuries after French Revolution, under which judicial interference with legislation, understood as expressing popular will, was considered criminal offense); A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 87 (10th ed. 1959) (1885) (arguing that no "person or body of persons, executive, legislative or judicial" in the British Empire "can pronounce void any enactment passed by the British Parliament on the ground of such enactment being opposed to the constitution, or on any ground whatever, except, of course, its being repealed by Parliament"); DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 6–9 (1989) (describing German engagement with judicial review, which was once "alien to theory of judicial decision in Germany," and general rejection of judicial review before World War II); Michael H. Davis, *The Law/Politics Distinction, the French Conseil Constitutionnel, and the U.S. Supreme Court*, 34 AM. J. COMP. L. 45, 47 (1986) (noting France's historical rejection of judicial review).

⁹² Indeed, the distinctive features of the basic model of constitutional review in Europe—for example, the existence of a single, centralized constitutional court, "abstract" review, and limitations on standing to sue—were arguably designed to serve democratic ends by avoiding judicial overreaching. See STONE SWEET, *supra* note 75, at 32–37 (comparing European and American models and noting influence of Kelsen on European constitutional review); Michael H. Davis, *A Government of Judges: An Historical Re-View*, 35 AM. J. COMP. L. 559, 574 (1987) ("[T]he obligatory and quasi-exclusive reference to the 'Supreme Court' has become a part of our constitutional mythology, alongside other received ideas: the American system is a good one but that system is dangerous because it leads to a 'Government of Judges.'" (quoting LOUIS FAVOREU, *RAPPORT GÉNÉRAL INTRODUCTIF, COURS CONSTITUTIONNELLES EUROPÉENES ET DROITS FONDAMENTAUX* 26 (1982))).

stitution, or who should have the authority to render that interpretation. That a court should have the power to impose its interpretation of the constitution on the popular branches does not seem to some European scholars to pose an issue of democratic legitimacy at all.⁹³

The reason is that European constitutionalists have internalized the ideology of “international human rights,” which causes the fundamental idea behind the “counter-majoritarian difficulty” to seem misguided or simply obtuse. If the very point of constitutional law is to enforce counter-majoritarian rights and thus to check democracy, what sense can it make to charge constitutional law with being counter-majoritarian or undemocratic? Of course constitutional law is counter-democratic. There is no fundamental theoretical problem of legitimacy when international constitutionalism restrains popular sovereignty, because the validity of international human rights law derives from sources other than (and higher than) popular sovereignty. As we saw earlier, the “international lawyer” holds that the “views of political majorities are simply irrelevant to the validity” of international human rights law, because such rights “are only meaningful as counter-majoritarian rights.”⁹⁴

So described, constitutionalism is above politics. That European constitutionalists should hold this view is unsurprising. European constitutionalism—in its present, vigorous, post-Kelsenian, human-rights-enforcing form—emerged primarily in and through international governance, not through national democratic developments. Thus for Europeans, the new constitutionalism is naturally perceived as a kind of supranational juridical venture, not as a public thing, not as something belonging to the demos and its politics.

For Americans, by contrast, constitutional law cannot be outside politics in this fashion. It cannot merely check democracy. It must

⁹³ Victor Ferreres Comella, *The European Model of Constitutional Review of Legislation: Toward Decentralization?*, 2 INT’L J. CONST. L. 461, 486 (2004) (citation omitted). The major European nation for which this observation is least true is England. See, e.g., ERIC BARENDT, AN INTRODUCTION TO CONSTITUTIONAL LAW 18 (1998) (“For the most part, lawyers and politicians [in the United Kingdom] accept the argument . . . that judicial review of legislation is undemocratic, because it may lead to the invalidation by a few judges of a measure which had been enacted in Parliament by a democratically elected majority.”); see also Lord Browne-Wilkinson, *A Bill of Rights for the United Kingdom—The Case Against*, 32 TEX. INT’L L.J. 435, 435–36 (1997) (stating that overwhelming opinion in United Kingdom rejects judiciary’s power to overrule Parliament). Even after the enactment of the Human Rights Act, 1998, c.42 (Eng.), judges are not empowered to strike down an act of Parliament as a violation of fundamental rights, but rather required, “[s]o far as it is possible,” to interpret statutes to avoid incompatibility with a number of guarantees incorporated from the European Convention on Human Rights, *id.* § 3(1).

⁹⁴ Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 HARV. INT’L L.J. 1, 60 (1995).

answer to democracy. It must have its source and basis in democratic constitutional politics. It must always be, somehow, part of politics—part of democratic politics, writ large—even though it can invalidate the outcomes of the democratic process at any given moment.

3. *Practical Contrast*

The third contrast is practical and is important to current conflicts between Europe and the United States. It involves the question of whether there must be one order of human rights applicable to all nations.

On the European view, human rights transcend national politics. Therefore, at least ideally, human rights ought to be uniform throughout the world. By contrast, on the American view, democratic nations can differ at least on some matters of fundamental rights.

For example, America does not take the view that every nation in the world must see the freedom of speech as America sees it. The freedom of speech is famously stricter and stronger in the United States than in many other nations. In the United States, a person has the constitutional right to make statements in favor of Nazism that might land that person in jail in Germany.⁹⁵ Yet the United States does not demand that Germany change its law on this point or that Germany be expelled from international organizations unless it makes this change.

Again, in America, it has been a bedrock principle of constitutional freedom for over 100 years that there must be no established churches at any level of government.⁹⁶ But the American position is not that every country must therefore disestablish. Half the European Union has an established religion (or what in America would be considered an establishment of religion).⁹⁷ Democratic nations, from an American point of view, can disagree about this principle.

But turn to the death penalty and to contemporary European attitudes about it. Capital punishment is now viewed as a human rights violation by the European community, and on this ground,

⁹⁵ Sionaidh Douglas-Scott, *The Hatefulness of Protected Speech: A Comparison of the American and European Approaches*, 7 WM. & MARY BILL RTS. J. 305, 343–44 (1999).

⁹⁶ See, e.g., *Lee v. Weisman*, 505 U.S. 577 (1992); *Reynolds v. United States*, 98 U.S. 145 (1878).

⁹⁷ England, Greece, Denmark, Sweden and Finland essentially have national churches, and other European states, such as Spain and Italy, grant particular churches (the Catholic church, in Spain's case) special recognition or privileges. See CAROLYN EVANS, *FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 19–22 (2001) (describing various state-church relationships in Europe); Dr. Sophie C. van Bijsterveld, *Church and State in Western Europe and the United States: Principles and Perspectives*, 2000 B.Y.U. L. REV. 989 (same).

Europeans routinely excoriate the United States, where the death penalty remains in force in some jurisdictions.⁹⁸ European diplomats and politicians occasionally call for the United States to be expelled from international organizations because of this “human rights violation.”⁹⁹

This position is logical given the European conception of constitutionalism. Human rights are “universal.” Therefore, once the death penalty has been deemed a human rights violation, it is a scandal if any nation refuses to recognize it.

For Europeans, one great marker of successful constitutional development is international *consensus and uniformity*. Internationalists will point to such consensus as if it were supremely validating—as if the fact of agreement on the death penalty throughout the “international community” were itself a source of legal validation and authority. In this, they may be following the rhetoric of the “*jus cogens*” and “customary international law,”¹⁰⁰ but there is also the added feature that, from a European point of view, the asserted universality of human rights means that these rights *ought* to be universally accepted. If a right is universal, it ought to be in force everywhere. A “fundamental difference in values” on constitutional rights is, as such, problematic and “deplorable,”¹⁰¹ while consensus becomes a marker of success, a proof that the agreed-upon principle really has

⁹⁸ See Harold Hongju Koh, A United States Human Rights Policy for the 21st Century, 46 ST. LOUIS U. L.J. 293, 309–10 n.41 (2002) (“In many European capitals, outrage over American capital punishment has triggered angry street demonstrations, with one former U.S. ambassador even reporting that his embassy has received an anti-death penalty petition signed by 500,000 local citizens.”).

⁹⁹ The Council of Europe repeatedly promises to expel the United States from its observer status in that body on this ground. E.g., *Abolition of the Death Penalty in Council of Europe Observer States*, Res. 1253 (June 25, 2001), <http://assembly.coe.int/documents/adoptedtext/ta01/eres1253.htm> (last visited October 25, 2004) [hereinafter *Abolition of the Death Penalty*]; see also, e.g., Koh, *supra* note 98, at 310 (“I have little doubt that America’s continuation of the practice has undermined our claim to moral leadership in international human rights, and probably contributed to our recent, stunning loss of the United States’ seat on the United Nations Human Rights Commission.”).

¹⁰⁰ According to these doctrines, a norm of international law—indeed even a treaty—can become “binding on all states,” even those that have not consented to it, just by virtue of its widespread acceptance by other states. See Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT’L L. 529, 541 (1993). For a case in point, see Ernst-Ulrich Petersmann, *How to Reform the United Nations: Lessons from the International Economic Law Revolution*, 2 UCLA J. INT’L L. & FOREIGN AFF. 185, 186 (1997–98), stating that “the increasing number and membership of worldwide and regional human rights conventions have led to the widely-held view that the majority of the human rights listed in the 1948 Universal Declaration of Human Rights have become customary law binding on all states.”

¹⁰¹ See *Abolition of the Death Penalty*, *supra* note 99, § 10 (“The Assembly deplores the fundamental difference in values regarding the abolition of the death penalty between the Council of Europe on the one hand and Japan and the United States on the other hand.”).

the universality claimed for it. The more consensus and uniformity there is throughout the international community concerning a constitutional principle, the greater the strength of that principle, and the greater the constitutional success is considered to be.

Americans do not always understand this view. At any rate, they do not always share it. In American constitutionalism, the U.S. Constitution is supposed to reflect our own fundamental legal and political commitments—not a set of commitments that all civilized nations must share. It is the self-giveness of the Constitution, not its universality, that gives it authority as law. Hence consensus in the “international community” cannot be regarded in the United States as the compelling source of legal or constitutional authority that it is often made out to be in Europe.

Thus unilateralism has staying power in American foreign policy not only for reasons of self-interest. It also reflects an American commitment to democratic constitutionalism—which is to say, to self-government. Europe does not share this commitment in quite the same way or to the same degree. The continental European understanding of the state tends to favor centralized government,¹⁰² so it is not entirely surprising that European nations should be relatively more comfortable with governance by international experts, dispensing Enlightenment reason and bureaucratic rationality, from their offices in Belgium or Strasbourg. The cataclysmic lessons of the twentieth century may make this path the right one for Europe. That does not make it right for the United States.

IV

IS INTERNATIONAL LAW REALLY ANTIDEMOCRATIC?

I have said that international law today rests on a fundamentally antidemocratic conception of fundamental law in tension with American understandings and American commitments to self-government. Many, however, would dispute the assertion that international law today is antidemocratic. This section examines that assertion with greater care, responding to certain objections that might be made against it.

A. Treaties are Democratically Ratified

A first objection is that I have overlooked an obvious, decisive fact: All U.S. treaties must be ratified by the Senate and hence are themselves democratically enacted. The whole idea (it will be said)

¹⁰² See, e.g., LARRY SIEDENTOP, *DEMOCRACY IN EUROPE* 102–21 (2001) (describing three different “models of the state” vying for influence in European Union).

that international law is antidemocratic is therefore false. So long as treaties require ratification by democratically elected representatives, where is the problem?

The most direct answer to this problem can be given in three words: the European Union. The E.U. is a creation of international treaties, each one of which was enacted by democratically elected officials in the several states that have subscribed to them. If that fact alone were sufficient to make international governance democratic, the famous "democratic deficit" in the E.U. could not exist. To observe that the E.U. suffers from a "democratic deficit" would involve some kind of intellectual confusion. But the E.U.'s democratic deficiencies are real,¹⁰³ and they demonstrate that treaty-making in international law does not guarantee the creation of democratic governance regimes.

As in the United States, treaty formation in most countries is governed by a special process in which, characteristically, the legislature plays a lesser role.¹⁰⁴ Historically, there is no particular difficulty understanding this. Given an international law world in which treaties largely concerned state-to-state or even "prince-to-prince" relations, it was natural to confide the treaty power largely to the crown or, later, to the executive branch of government. The ordinary legislative process could be more popular—i.e., more democratic—because ordinary legislation concerned matters directly of popular concern, while the treaty-making process concerned matters outside the people's ken and was therefore properly insulated or distanced from the more democratic branches of government. Today, however, as treaties impinge increasingly on domestic affairs, the old forms of treaty formation have less to recommend them.

Treaties are exceptions to ordinary lawmaking. Not only are they made outside the ordinary, democratic lawmaking process, but they can also claim to impose obligations on a country that the nation's legislature cannot thereafter amend or undo.¹⁰⁵ Ordinarily, what one

¹⁰³ For a careful exposition of the antidemocratic leanings shown so far in the European-integration movement, see *id.* at 1, 24, 102; J.H.H. WEILER, THE CONSTITUTION OF EUROPE: "DO THE NEW CLOTHES HAVE AN EMPEROR?" AND OTHER ESSAYS ON EUROPEAN INTEGRATION 77–86, 349–56 (1999). For additional discussions, see Jürgen Habermas, *Citizenship and National Identity: Some Reflections on the Future of Europe*, 12 PRAXIS INT'L 1, 7–13 (1992); Giandomenico Majone, *Europe's 'Democratic Deficit': The Question of Standards*, 4 EUR. L.J. 5, 5–7, 14–27 (1998); Thomas W. Pogge, *Creating Supranational Institutions Democratically: Reflections on the European Union's "Democratic Deficit"*, 5 J. POL. PHIL. 163, 163 (1997).

¹⁰⁴ For a useful survey of numerous states' treaty-making processes, see COUNCIL OF EUR., *EXPRESSION OF CONSENT BY STATES TO BE BOUND BY A TREATY* (1987).

¹⁰⁵ In the European Union, domestic courts are empowered or required to set aside national legislation when incompatible with European Community law. See generally THE

legislature does, a later legislature can undo. A past legislature, in principle, cannot bind a future one. This basic rule of democratic legislation ensures that law made today is always subject to repeal through the ordinary democratic process tomorrow. The great exception to this rule is of course constitutional law, the importance of which precisely lies in the fact that it cannot be changed through the ordinary legislative process. This is why constitutional enactments are of special concern in democratic countries, demanding specially heightened forms of democratic mobilization and participation if they are to claim legitimate authority.

But treaties also can present themselves as exceptions to this fundamental rule of democratic legislation. Treaties can also claim to be law beyond the power of a democratic legislature to change. Yet unlike constitutions, treaties require *less*, not more, democratic mobilization and participation in order to be enacted. They are drafted frequently in secret, signed by executive officers, usually presented to legislators on a take-it-or-leave-it basis, and in the United States do not even require the consent of the more representative house. Hence their claim to supersede the ordinary legislative process is highly problematic from the democratic point of view.¹⁰⁶

EUROPEAN COURT AND THE NATIONAL COURTS—DOCTRINE AND JURISPRUDENCE: LEGAL CHANGE IN ITS SOCIAL CONTEXT chs. 1–7 (Anne-Marie Slaughter et al. eds., 1997) [hereinafter *THE EUROPEAN COURT AND THE NATIONAL COURTS*] (describing accommodations to this principle in national legal systems of different member states). In some European states, all treaties have a status superior to domestic legislation. In the Netherlands, for example, the constitution makes national statutes inapplicable if they conflict with an international treaty—while, interestingly, barring judges from invalidating a statute (but not a treaty) if it conflicts with the constitution. See *NETHERLANDS CONST.* arts. 94, 104. For a general survey of the effects of treaties under the domestic law of various European nations and the United States, see 7 *UNITED KINGDOM NATIONAL COMMITTEE OF COMPARATIVE LAW, THE EFFECT OF TREATIES IN DOMESTIC LAW* (Francis G. Jacobs & Shelley Roberts eds., 1987) [hereinafter *THE EFFECT OF TREATIES*].

¹⁰⁶ As Benvenisti puts it, ratification cannot cure the democratic difficulties in the treaty-making process, which

permits very little public scrutiny of the negotiators' acts and omissions because ratification does not allow for amendments; thus many alternatives necessarily remain unexplored. Even the domestic debate on ratification often remains clouded because the access of the public and legislators to information concerning international negotiations is invariably limited. Little is known about the options offered and discussed, as negotiators have little incentive to provide accurate information on their performance to the general public.

Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 *MICH. L. REV.* 167, 200 (1999) (internal footnotes omitted); see also Robert Howse, *Transatlantic Regulatory Cooperation and the Problem of Democracy*, in *TRANSLATLANTIC REGULATORY COOPERATION: LEGAL PROBLEMS AND POLITICAL PROSPECTS* 469–80 (George A. Bermann et al. eds., 2000) (analyzing different models of democracy and their implication for transatlantic regulatory cooperation).

In the United States, this problem is ameliorated to some extent by our rule that a subsequently enacted congressional statute supercedes a treaty.¹⁰⁷ International lawyers are sometimes scandalized when they learn of this rule.¹⁰⁸ It is incomprehensible to some of them that the United States could so overtly, so officially, declare that it regards itself free, as a legal matter, to dishonor its international law obligations if it chooses to do so.

Here, then, is another manifestation not only of the fundamental difference between American and European conceptions of constitutional democracy but of the implications of this difference for international law. The fact that the President chiefly manages U.S. foreign relations exacerbates, rather than relieves, American constitutional anxieties about the ability of treaties to override the ordinary legislative process. From the American point of view, when treaty law and statutory law are compared, it is not a mark in a treaty's favor that it is brought into effect by the President, with the consent of the Senate, rather than through the ordinary legislative process.¹⁰⁹ Thus it is

¹⁰⁷ See, e.g., *Breard v. Greene*, 523 U.S. 371, 376 (1998) (rejecting Paraguayan citizen's habeas corpus petition based on violations of Vienna Convention due to subsequently enacted Anti-terrorism and Effective Death Penalty Act of 1996). The later-in-time rule, which also permits a subsequent treaty to override a prior statute, is often traced to *Taylor v. Morton*, 23 F. Cas. 784 (C.C.D. Mass. 1855) (No. 13,749) (Curtis, J., on circuit), *aff'd on other grounds*, 67 U.S. (2 Black) 481 (1862).

¹⁰⁸ And not only Europeans: Consider the reaction of the Chinese foreign minister to *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581 (1889), where the Court upheld a federal statute despite its violation of a treaty guaranteeing rights of Chinese immigrants residing in America before 1880 to leave and re-enter the United States freely:

In my country we have acted upon the conviction that where two nations deliberately and solemnly entered upon treaty stipulations they thereby formed a sacred compact from which they could not be honorably discharged except through friendly negotiations and a new agreement. I was, therefore, not prepared to learn through the medium of that great tribunal that there was a way recognized in the law and practice of this country whereby your Government could release itself from treaty obligations without consultation with or the consent of the other party to what we had been accustomed to regard as a sacred instrument.

Detlev F. Vagts, *The United States and Its Treaties: Observance and Breach*, 95 AM. J. INT'L L. 313, 317-18 (2001) (quoting Letter from Chang Yen Hoon, Minister Plenipotentiary of China, to James G. Blaine, U.S. Secretary of State (July 8, 1889), 1890 FOREIGN RELATIONS OF THE UNITED STATES 132, 133).

¹⁰⁹ In holding that treaties are "subject to such acts as Congress may pass for its enforcement, modification, or repeal" the Supreme Court relied on the democratic deficiencies of the treaty process:

A treaty is made by the President and the Senate. Statutes are made by the President, the Senate and the House of Representatives. The addition of the latter body to the other two in making a law certainly does not render it less entitled to respect in the matter of its repeal or modification than a treaty made by the other two. If there be any difference in this regard, it would seem

unsurprising that the United States should have settled long ago on the rule that an act of Congress trumps a treaty.

By contrast, the European commitment to international law rests on the idea that international law is superior to domestic law. If it were not, international law could not accomplish its essential objective, which is to check national sovereignty, including national popular sovereignty. Formally, a number of European states have the same rule as does the United States (under which a later-enacted statute supersedes a treaty),¹¹⁰ but the European Community framework depends on the idea of the supremacy of Community law over domestic legislation, just as European lawyers, in their attitude toward human rights law, characteristically assume the supremacy of international human rights conventions. In these ways, international treaty law functions in Europe as a constitutional-law substitute, presenting itself as a body of higher law that checks the power of ordinary national legislatures.¹¹¹ International constitutionalism celebrates this result; American constitutionalism resists it.

More fundamentally, while international law can of course be justiciable in national courts, the natural juridical destination of international law is an international tribunal, if for no reason other than that the interpretation of international law by national courts will always be vulnerable to charges of partisanship. In 2003, I attended a meeting of mostly Latin American lawyers, where the question of the legality of the Guantánamo detentions was discussed. A consensus quickly emerged that American courts should not have jurisdiction to decide this question; the issue involved international law, and a dispute over international law called for “neutral” judges. Only an international tribunal could claim this neutrality.

The shift from national courts to international tribunals has serious implications for democracy. These implications are not apparent to most internationalists, whose thinking runs as follows: Once an issue is taken to be a matter of *law*, particularly a matter of constitutional law, the issue has been removed from the political domain. And once this has been done—once an issue has been placed

to be in favor of an act in which all three of the bodies participate. And such is, in fact, the case in a declaration of war, which must be made by Congress, and which, when made, usually suspends or destroys existing treaties between the nations thus at war.

Edye v. Robertson, 112 U.S. 580, 599 (1884).

¹¹⁰ See Francis G. Jacobs, *Introduction to THE EFFECT OF TREATIES*, *supra* note 105, at xxviii–xxix.

¹¹¹ See, e.g., Alec Stone Sweet, *Constitutional Dialogues in the European Community*, in *THE EUROPEAN COURT AND NATIONAL COURTS*, *supra* note 105, at 305–08 (describing the “process of constitutionalising the treaty system” that has taken place in Europe).

in the domain of law, rather than politics—then democratic principles have little to say about whether the court that decides the law is a national or international court. What counts is that the court gets the law right. Hence the only question is which tribunal is likely to be the better, more impartial adjudicator. If a society is prepared to judicialize an issue, doesn't that mean the society wants to see the issue resolved by nonpolitical actors?

The answer is no—at least from the American perspective. Judges may, in one sense, be nonpolitical actors, but the judiciary is nevertheless a governmental institution, embedded within a larger political process, and it makes a great difference, democratically speaking, whether adjudication occurs in national or international courts. As noted earlier, the many indirect connections between a nation's judiciary and its democratic processes are critical to ensuring that law retains its claim to legitimate authority in a society that claims to be self-governing.

The ordinarily subordinate relationship of court to legislature, together with the embeddedness of the judiciary within a larger democratic political process, is overturned by the phenomenon of international tribunals. These tribunals do not stand clearly below any particular nation's legislature. They do not answer to any nation's legislature. They may, moreover, lay claim to an authority superior to—not reversible by—any nation's legislature. When the power of fundamental lawmaking inherent in judicial review is confided to an international tribunal, the aspirations of democratic constitutionalism have been left behind, replaced by those of international constitutionalism.

An internationalist might reply that courts do not "make law" and hence that the difficulty I'm describing does not exist. This response would only highlight the point made above: The internationalist perspective relies on a belief in the separability of law from politics that rings false to American ears. And it probably will begin to ring false to European ears before too long, if it has not begun to do so already.

B. World Government Without World Democracy

Another objection to the argument I have made would run as follows. International law is not *inherently* antidemocratic. If there were a world legislative body effectively representing democratic world opinion, international law could be perfectly democratic. Thus if the United States is genuinely interested in democracy, unilateralism is not the way to achieve it. Couldn't we instead work to create

global democratic institutions and thus bring about world democracy—governance by world public opinion?

Yes, but there is no world democracy at present, and no realistic prospect of it. The U.N. General Assembly is not a representative body of world opinion; it is composed of unelected delegates, many of whom are appointed by autocratic regimes. The rule of one-state-one-vote, which governs in the General Assembly, also can distort claims of “world opinion.”

Even if there were a realistic prospect of world democracy today, it is not clear that the United States should support it. World public opinion would very likely be, if not anti-American, unfriendly to many of the interests, principles, and values that Americans consider important. More than this, the choice between world democracy and a world of democracies does not obviously favor the former. A world of democracies, in which independent nation-states each have their own self-given constitution, offers possibilities of heterogeneity that world democracy might lack.

To be sure, the alliance of democracy with the nation-state is a contingent historical fact. According to Habermas, the alliance is a fortuitous, unfortunate product of the fact (or what he takes to be the fact) that democracy and the nation-state emerged at the same historical moment—“twins born of the French Revolution.”¹¹² But Habermas’s anti-nationalism is characteristically European. It is simultaneously Franco-centric, tracing both democracy and nationhood to the French Revolution, and Germano-phobic, traumatized by the Second World War. If the nation-state and democracy are “twins,” there are at least two sets of these twins, and the set born a few years before the French Revolution, on the other side of the Atlantic, did not undergo the same development and the same traumas that might demand a separation of the later-born pair.

International constitutionalism, which Habermas favors, does damage to the prospects for variation, experimentation, and pluralism that national democracy opens up. So long as democracy is allied with *national* self-government—rather than with *world* governance—

¹¹² According to Habermas:

Nation-state and democracy are twins born of the French Revolution National consciousness and republican conviction in a sense proved themselves in the willingness to fight and die for one’s country. This explains the complementary relation that originally obtained between nationalism and republicanism: one became the vehicle for the emergence of the other. However, this social-psychological connection does not mean the two are linked at the conceptual level.

Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* 493, 495 (William Rehg trans., 1996).

democracy remains an experimental ideal, dedicated to the possibility of variation, perhaps radical variation, among different peoples. Democratic national constitutionalism may be parochial *within* a given nation, but it is cosmopolitan *across* nations.¹¹³ Democratic peoples are permitted, even expected, to take different paths. They are permitted, even expected, to go to hell in their own way.

C. International Law as a Precondition of Democracy

A final objection: The fundamental rights and processes that international law protects are not antidemocratic; they are necessary conditions of democracy. As such, they enable democracy to exist, regardless of whether they themselves were democratically enacted. Indeed, it is a logical error to demand that these rights and processes be themselves made, interpreted, or enforced through democratic channels. These rights and processes are prior to democracy. They are implicit in democracy's first principles. Because they are democracy's "necessary conditions," they may or perhaps even must (in this view) be imposed undemocratically from above.

In certain contexts, there is substance to this objection. For failed states, or societies making a transition from autocracy to self-rule, international law and international bodies can clearly help to bring about democratization, if only by assisting in the implementation of elections. But as applied to states with functioning democratic processes, international law cannot claim this initial, democracy-inaugurating mantle.

With respect to democratic states, the claim that international law protects democracy's "necessary conditions" is not incoherent, but it is deeply implausible. Yes, most of us may find appeal in this argument some of the time—when discussing the international law we support. But we will suddenly see its holes as soon as the discussion turns to other aspects of international governance we do not find so appealing.

Consider the peculiar inconsistency that has characteristically eaten away at the familiar American "right-wing," pro-unilateralist position. Proponents of this position frequently ridicule international law and international institutions. America, it is said, should resist the very idea of "international norms" that "make it harder and harder for the United States to act independently in its own legitimate

¹¹³ On the virtues of "democratic experimentalism," see generally ROBERTO MANGABEIRA UNGER, *DEMOCRACY REALIZED: THE PROGRESSIVE ALTERNATIVE* (1998), and Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

interest.”¹¹⁴ The United States has no reason to submit to a “U.N. bureaucracy supposedly representing ‘all mankind.’”¹¹⁵ International courts cannot be trusted because they are “[u]nchecked by [the] democratic institutions of a sovereign state[.]”¹¹⁶ Above all, the United States must insist on its right of self-determination: “[T]he course of this nation does not depend on the decisions of others.”¹¹⁷

Below this unilateralist drumbeat, however, a different tune is played. The same people who make these statements turn out to be champions of international law—when the subject turns to economics. The current administration rejects the International Criminal Court, but supports NAFTA,¹¹⁸ which subjects the United States to the jurisdiction of international trade tribunals¹¹⁹ and promotes international free trade and intellectual-property agreements all over the world.¹²⁰ Those who deride “‘international norms’” on the topic of human rights somehow feel quite differently about the international “principle” enforced by the WTO.¹²¹ Those who typically insist on American sovereignty somehow overcome that anxiety when the topic turns to trade.¹²² *The Wall Street Journal*, which no one could accuse of left-wing sympathies, becomes a veritable one-worlder on the subject of NAFTA:

Reformist Mexican President Vicente Fox raises eyebrows with his suggestion that over a decade or two Nafta should evolve into something like the European Union He can rest assured that there

¹¹⁴ John R. Bolton, *Kofi Annan's U.N. Power Grab*, THE WKLY. STANDARD, Oct. 4, 1999, at 13–14. Mr. Bolton is Undersecretary of State.

¹¹⁵ William Safire, *The Purloined Treaty*, N.Y. TIMES, Apr. 9, 2001, at A17.

¹¹⁶ Editorial, *Washington Post v. International Law*, WALL ST. J., June 23, 2002, <http://www.opinionjournal.com/editorial/feature.html?id=110001883>.

¹¹⁷ George W. Bush, *The State of the Union* (Jan. 28, 2003), reported in *President's State of the Union Message to Congress and the Nation*, N.Y. TIMES, Jan. 29, 2003, at A12.

¹¹⁸ See, e.g., Joint Press Statement, Bush & Fox, *supra* note 50.

¹¹⁹ North American Free Trade Agreement, Dec. 17, 1992, ch. 11, 32 I.L.M. 296 (entered into force Jan. 1, 1994), implemented by North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993). On NAFTA's tribunals, see *infra* note 138.

¹²⁰ See *supra* note 52.

¹²¹ John R. Bolton, *Beijing's WTO Double-Cross; Surprise! China is Trying to Keep Taiwan Out of the World Trade Organization*, THE WKLY. STANDARD, Aug. 14, 2000, at 19, 20 (“Defending the integrity of the WTO against Beijing's efforts to politicize it [by excluding Taiwan] reflects a deep commitment both to the principle of free trade and to the long-term viability of the WTO as an institution.”).

¹²² See, e.g., William Safire, *Laughter After Nafia*, N.Y. TIMES, Oct. 21, 1993, at A21 (“[T]he America-lasters . . . would have us believe a free trade bloc on our side of the Atlantic and Pacific somehow dilutes U.S. sovereignty. Baloney.”).

is one voice north of the Rio Grande that supports his vision. To wit, this newspaper.¹²³

A mirror-image self-contradiction appears on the “left.” According to a familiar left-wing critique of globalization, multilateral forces such as the International Monetary Fund (IMF) and the WTO are choking off the freedom of developing countries to chart their own, differing economic, cultural, and social paths. This critique deploys arguments that sound quite hostile to international law in general. Thus when Amnesty International challenges the IMF and supranational corporations, it writes that a “new breed of world ‘super-bodies’” is trying to dictate policy to poorer countries, “leav[ing] the governments with little power to make their own choices or control their nation’s affairs.”¹²⁴

But “world ‘super-bodies’” are evidently unattractive only on economic matters. Amnesty International is of course an avid proponent of “world ‘super-bodies’” on matters of human rights, the use of military force, the prosecution of war crimes, and so on.¹²⁵ A world *economic* order is a threat to national self-determination, but a world order on capital punishment or environmental protection somehow is not. When it comes to human rights or environmental protection, the left’s anxiety about denying developing nations the power to “make their own choices or control their nation’s affairs” tends to disappear.

These complementary left- and right-wing contradictions are not hard to explain. Both sides essentially raise the same objection when they are objecting to internationalism: International law is antidemocratic. The right tends to make this claim in terms of “U.S. sovereignty,” while the left tends to speak of “U.S. hegemony,” but these are two sides of a single coin. The right-wing argument about “U.S. sovereignty” is an argument about America’s right to govern itself. The left-wing argument about “U.S. hegemony” is an argument about other nations’ right to govern themselves. But both sides forget about international law’s antidemocratic qualities when international law promotes the goals they like.

¹²³ Robert L. Bartley, Editorial, *Open NAFTA Borders? Why Not?*, WALL ST. J., July 2, 2001, at A15.

¹²⁴ Amnesty Int’l, *AI on Human Rights and Labor Rights*, in THE GLOBALIZATION READER 187, 188 (Frank J. Lechner & John Boli eds., 2000); see, e.g., OXFAM INT’L, DEMOCRACY AND ACCOUNTABILITY: THE IMF’S DEFICIT, INTERNATIONAL BRIEFING PAPER, SEPT. 2000 (on file with author).

¹²⁵ See, e.g., AMNESTY INT’L, INTERNATIONAL JUSTICE NOW! TIME FOR AN EFFECTIVE INTERNATIONAL CRIMINAL COURT (AI Index: IOR 40/15/98, May 1, 1998), at <http://web.amnesty.org/library/index/ENGIOR400151998>; OXFAM INT’L, UP IN ARMS: CONTROLLING THE INTERNATIONAL TRADE IN SMALL ARMS (Jul. 2001), at <http://www.oxfamamerica.org/pdfs/upinarms.pdf>.

It is just here that the argument from democracy's "necessary conditions" becomes superficially appealing to both camps. Conservatives will claim that strong property rights, takings law, and a market economy are essential preconditions of a flourishing democracy. To this argument, the left will quickly and plausibly reply that the existence of property rights and a capitalist economy, or at the least the particular form this should take, is very much a matter for independent nations to decide for themselves.¹²⁶ In other words, the left would see through arguments for the transcendental democratic necessity of the IMF or WTO, insisting on the possibilities for significant economic variation among self-governing states.

But the left will then insist that the international order it champions—a world human rights order, along with perhaps a world environmental and military order—is a precondition of democracy. From this perspective, an international legal regime that forced the United States to abolish its death penalty laws, or forced Islamic states to abolish their veil laws, would not be acting antidemocratically, regardless of whether the abolished laws had been democratically enacted. On the contrary, capital punishment and the veiling of women are matters of "human rights," and human rights are necessary conditions of democracy's possibility. Again, there is nothing incoherent in the abstract about such claims, but they are neither persuasive nor candid.

Abolishing the death penalty can notionally be thought of as a precondition to democracy—or a "necessary implication" of the right to "equal respect" that democracy "entails"—but the argument is makeshift. If we oppose the death penalty, we almost certainly do so because of views we hold about the requirements of justice and morality independent of the requirements of democracy. If we oppose Islamic laws requiring women to wear veils, we do so because we have a certain view about sexual equality, not because such laws could not be democratic in a particular society. Someone who means genuinely to promote and defend democracy in the Islamic world ought to be prepared to respect its outcomes—even if, at least to some substantial degree, that means respecting the right of Islamic societies to diverge from us on matters of sex equality, the proper relationship between church and state, and so on.

There is such a thing as illiberal democracy, just as there is such a thing as non-capitalist democracy, and if we are to be candid, we will not pretend otherwise. To the liberal's claim that human rights, as

¹²⁶ See, e.g., Robert Howse, *The Boundaries of the WTO: From Politics to Technocracy—and Back Again: The Fate of the Multilateral Trading Regime*, 96 AM. J. INT'L. L. 94, 98–106 (2002).

propounded by the “international community,” are necessary conditions or implications of democracy, the right will plausibly reply that the existence of these rights, or at the very least the particular form they should take, is very much a matter on which democratic nations may differ.

The question of democracy’s preconditions is difficult and much belabored. This much, however, is certain: Claims that any particular legal order is a transcendental democratic necessity should be received with extreme skepticism.¹²⁷ We usually see through these claims when made on behalf of ideologies or policies with which we disagree; we ought be equally skeptical of these claims when made on behalf of ideologies or policies we favor.

The fact is that there are some rights or principles that many value more than we value democratic self-government itself. For the right, property rights have always been more likely to trump democracy. For the left, human rights, the use of force, and environmental protection are more likely to do so. These rights seem to people to “trump” democracy not because they are democracy’s “preconditions,” but because, quite simply, they seem more important than democracy.

That is why the right is internationalist where international law pursues a property- and commerce-protecting agenda, while the left is internationalist where international law pursues an human rights or use-of-force or environmental protection agenda. In each case, support for international law is adventitious. If the WTO began imposing serious wealth redistribution all over the world (in the name of “fair trade”), while the International Court of Justice prohibited abortion and mandated the death penalty for certain crimes (in the name of the “human rights of the fetus and the crime victim”), left- and right-wingers would quickly reverse their current alignments. The right would presumably discover that the WTO is a threat to national sovereignty, while the left would presumably begin resisting the hegemony of international human rights law.

D. International Law and Democracy

International law is antidemocratic. The existing international governance organizations are famous for their undemocratic opacity, remoteness from popular or representative politics, elitism, and unac-

¹²⁷ See ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 7 (1996) (defining “institutional fetishism” as “the belief that abstract institutional conceptions, like political democracy, the market economy, and a free civil society, have a single natural and necessary institutional expression”).

countability.¹²⁸ International governance institutions and their officers tend to be bureaucratic, diplomatic, technocratic—everything but democratic. That is why internationalization, as the sociologist and former German member of parliament Sir Ralf Dahrendorf puts it, “almost invariably means a loss of democracy.”¹²⁹

In the last ten years or so, it became common for internationalists to reply to this problem by pointing to the growing influence of non-governmental organizations (NGO) in international law circles, as if these equally unaccountable, self-appointed, unrepresentative NGOs somehow exemplified world public opinion, and as if the antidemocratic nature of international governance were a kind of small accountability hole that these NGOs could plug.¹³⁰ This invocation of NGOs as world democratizers served only to highlight how out of touch many internationalists are with what would be actually necessary to democratize international law. The brute fact is that there is no world democratic polity today; the largest entities in which democracy exists are nation-states. As a result, international law can and does frequently conflict with democracy.

The problem is not only institutional—a matter of making international bodies more “transparent” or “accountable.” The problem is also ideological. There is an antidemocratic worldview built into the fundamental premises of a good deal of international law thought and

¹²⁸ See, e.g., WEILER, *supra* note 103, chs. 2, 10; Robert O. Keohane, *International Institutions: Can Interdependence Work?*, FOREIGN POL’Y, Spring 1998, at 82, 92 (arguing that European-level actions remain little scrutinized by national parliaments and voters); James N. Rosenau, *Governance and Democracy in a Globalizing World*, in RE-IMAGINING POLITICAL COMMUNITY: STUDIES IN COSMOPOLITAN DEMOCRACY 28 (Daniele Archibugi et al. eds., 1998) [hereinafter RE-IMAGINING POLITICAL COMMUNITY] (arguing that democracy as known within countries does not exist on global level); Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AM. J. INT’L L. 489 (2001) (discussing increasing strain on democracy as institutions of international integration are made stronger).

¹²⁹ Ralf Dahrendorf, *The Third Way and Liberty: An Authoritarian Streak in Europe’s New Center*, FOREIGN AFF., Sept./Oct. 1999, at 13, 16.

¹³⁰ For a very effective description and critique of the symbiotic “romance” of international-governance institutions with non-governmental institutions (NGO), see Kenneth Anderson, *The Ottawa Convention Banning Landmines, the Role of International Non-Governmental Organizations and the Idea of International Civil Society*, 11 EUR. J. INT’L L. 91, 104–19 (2000); see also Richard Falk, *The United Nations and Cosmopolitan Democracy: Bad Dream, Utopian Fantasy, Political Project*, in RE-IMAGINING POLITICAL COMMUNITY, *supra* note 128, at 308, 321–28, discussing influence of NGOs on U.N. conferences commenting on major policy issues and arguing that enduring results of participation are questionable; Beate Kohler-Koch, *Organized Interests in European Integration: The Evolution of a New Type of Governance*, in PARTICIPATION AND POLICY-MAKING IN THE EUROPEAN UNION 42, 54–56 (Helen Wallace & Alasdair R. Young eds., 1997), arguing that institutional reform and not just broader access for affected parties is necessary to achieve actual accountability and transparency.

practice. This worldview finds its clearest expression in the international human rights discourse, where the views of democratic majorities in a given country or, indeed, throughout the entire world, will be said to be “simply irrelevant” to the validity and authority of international law:

[T]he international lawyer [holds] that there are certain things a society cannot choose to do to itself. Where . . . human rights are concerned, international law looks past the fiction which underlies the social contract metaphor and prescribes rules regarding individual citizens. The views of political majorities are simply irrelevant to the validity of such rules. Indeed, these rules are only meaningful as counter-majoritarian rights¹³¹

Democracy does not have much standing here. Consider how this view would regard the controversy over the death penalty, which the “international community” condemns as a violation of human rights law. Actual public opinion in Europe, however, tends to *favor* capital punishment, in some countries at about the same rate as in the United States.¹³² For the “international lawyer,” however, this fact is “simply irrelevant.” Because the “social contract” is a “fiction”—which means, presumably, that not every individual really consents to the state’s authority—“international law” is somehow entitled to step into the breach and, where “human rights are concerned,” to “prescribe [the] rules.”¹³³

International free trade law may not speak in quite the same language, but it is plainly (and sometimes openly) even more antidemocratic. After all, one of the express goals of free trade law is to circumvent domestic democratic politics on trade issues, which might in any given country at any given time happen to favor protectionism, worker-safety, environmental-protection or other goals above the benefits of investment and trade.¹³⁴ Democracy, pro-freetraders will say, lets farmers or labor unions use their voting power to buy rent-seeking deals from government; as a

¹³¹ Fox & Nolte, *supra* note 94, at 60.

¹³² See Jeffrey L. Kirchmeier, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States*, 73 U. COLO. L. REV. 1, 83–88 (2002) (discussing polls showing that majorities of population in Great Britain, Canada, France, Germany, and Austria supported death penalty despite legislation against it).

¹³³ Fox & Nolte, *supra* note 94, at 60.

¹³⁴ See, e.g., Robert O. Keohane & Joseph S. Nye, Jr., *The Club Model of Multilateral Cooperation and the World Trade Organization: Problems of Democratic Legitimacy*, in EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM 264, 264–91 (Roger B. Porter et al. eds., 2001) (arguing that international economic regimes were expressly designed to keep public and officials or representatives from other branches out of trade decisions).

result, free trade, which promises benefits to all, needs to be protected from the inefficiencies of democratic politics.

Thus the left is correct to say that international economic regimes can be deeply antidemocratic, and the right is correct to say the same of international human rights regimes. Left and right are both right, but both have left something out. They omit to mention that the very objection they make to internationalism applies to the international law they support.

Democracy is not the only value in the world. International law could be worth supporting even if it is antidemocratic. The point is a matter of candor. To support international law is to support fundamental constraints on democracy. International law is *by design* a constraint on popular sovereignty. It was designed, in the wake of World War II, to be made, interpreted, and enforced by international actors operating at a considerable remove from popular democratic politics. It has developed in accordance with this design.

Most of us see this some of the time, but few see it all the time, because most of us tend to fall, to one extent or another, into the trap just described. When international law pursues results we're against, we see the threat it poses to self-government, whether our own or others'. We overcome this scruple, however, when international law promotes goals we favor. To be sure, we will not readily admit that the principles we like—the right principles, the ones we want international law to protect—are antidemocratic. We will say, instead, that they are “part of” democracy, that they are implications or “necessary conditions” of democracy, “properly understood.” If we lean to the right, we will have property rights primarily in mind; if to the left, human rights.

Candor would be better served if we forthrightly acknowledged the highly problematic relationship between international law and democracy. The whole point of international law, in its present form, is to supersede the outcomes of political processes, including democratic processes. If, therefore, Americans remain committed to self-government, they do in fact have reason to resist international governance today.

Some moral philosophers today like to defend the rights they like by asserting that these rights derive from the concept of democracy itself, or from the principles on which democracy rests.¹³⁵ So we are to believe that illiberal democracy, or illiberal “constitutional” democracy, is somehow a contradiction in terms. But of course there will be

¹³⁵ See, e.g., RONALD DWORKIN, *FREEDOM'S LAW* 15–35 (1996) (advancing concept of “constitutional” democracy, demanding respect for certain democratic conditions).

many different philosophers offering different accounts of the rights that “derive” from democracy’s first principles. Undoubtedly, some minimal rights of voting and speaking can be persuasively grounded in an account of democracy’s pre-conditions, but beyond that, to adjudicate among different versions of democracy’s fundamental rights, democracy allows but one solution: democracy itself.

VI

WHAT IS TO BE DONE?

I am not arguing in any categorical sense against international law as such. The task ahead is to think much more clearly about the kinds of international governance we ought to support and the contexts in which we ought to support it. This section offers suggestions along these lines.

A. Limitations of Democracy

First of all, against brutal dictatorships and in failed states, the case I have made against international governance does not apply at all. Post-World War II Germany and Japan offer examples of states where the forcible imposition of international governance for a period of time worked to make democracy possible. If the world is fortunate, international governance may prove equally successful in the states of the former Yugoslavia. The antidemocratic nature of international law hardly counts against it when it is applied to states with no pretense to democracy in the first place.

Second, democracy is not the only value in the political world. There may be states so desperately poor that they prize economic growth more than democracy in the short run. There may be states that have good reason to distrust popular self-government. There may be states where the citizens so distrust any politicians who might come to power, whether democratically elected or not, that they would prefer international governance to self-government. There may be states where people feel, perhaps because of the state’s small size, that their nation’s affairs are so dependent on international affairs that genuine national self-government is not really a possibility for them any more, in any event. If such states opt for international governance, nothing I have said dictates that they have made the wrong choice. All I have said is that the choice should be understood for what it is.

This point is very important because a great deal of international law today, as applied in a great number of countries, may be explained by one or another of the factors just listed. The states of continental

Europe may be right to maintain an antidemocratic international law system as a check against fascist movements. The peoples of some developing countries may be so brutally mistreated by their own governments that they stand in desperate need of international governance. The United States has no reason to oppose international law in such cases. On the contrary, it should be prepared in appropriate cases to throw its weight behind international law for such states. Yes, this will create precisely the seemingly hypocritical spectacle of the United States championing international law abroad, even as we resist it in our own case. But as we have seen, this is not quite hypocrisy. It is rather a matter of respect for the fact that other peoples do not have our luxuries and that they may have reason to prefer international governance, even if we do not.

Moreover, democracies too are capable of atrocity. The Serbs' genocidal campaigns of the 1990s were brought about when Serbian democracy swept Slobodan Milosevic to power in a landslide. We should not be afraid to use international law against such regimes, but neither should we suppose that it was the violation of international law that makes these atrocities atrocious or actionable. Serbian ethnic cleansing did not demand intervention because it violated *jus cogens* or the international conventions Yugoslavia had signed. The significance of my point is this: It means we should not necessarily regard ourselves as bound by international law when slaughters of this magnitude unfold. The lesson of Kosovo in 1999 is, sadly, that U.S. unilateralism, rather than international law, may sometimes be the only force ready to stand against ethnic slaughter, even in Europe's own backyard.

B. *The Difference Between Buying a Car and Marrying Your Car Dealer*

The United States should strive to forge international coalitions and to work together with the "international community" wherever possible. It will be called a cliché, but America always should show a decent respect for the opinions of mankind. The crucial transition to beware is the moment when international *cooperation* shifts to international *governance*. If the United States means to remain self-governing, then international treaties—just as Washington said—always will be problematic, because they threaten to make our law answerable to international governance, rather than self-government.

But not all international treaties are equally in tension with self-government. As an analogy, think of an individual entering into a contract. If you enter a contract with a car dealer, agreeing to make

certain installment payments in the future in exchange for getting a car today, you probably have not in any significant way compromised your basic ability to govern yourself. On the contrary, you have used a legal apparatus to help you get what you want.

If, however, you *married* your car dealer, that would be a very different kind of contract. Now you have joined yourself in a special kind of union with your car dealer, and your attitude to your own self-governance will presumably change dramatically. You may now be committed, morally or legally or psychologically, to taking into account your car dealer's opinions or welfare whenever you make important decisions. At the very least, you and your car dealer will have joint control over many of your assets.

If, finally, you not only married your car dealer, but then agreed to the jurisdiction of a special "international family court" with exclusive jurisdiction over "all marital and family disputes," you would have radically altered your ability to govern yourself. Yes, it was you who agreed to all this; you may have taken every step voluntarily. But that doesn't change the fact that you have radically altered your ability to govern yourself going forward. A person can sell himself into slavery voluntarily, but he will still be a slave thereafter.

The European Union is an instance of an international "marriage" of this sort. Through the E.U., various states merge themselves in a special way with one another, pledging to take each other's opinions and interests into account in their most important decisions, and vowing to submit themselves to supranational governance bodies to manage their affairs. This is why the E.U. suffers from a "democracy deficit," despite the fact that the member states voluntarily consented to all the treaties creating it.

The rest of the world wants the United States to tie knots that would bind us to other nations in similar fashion. It is easy to see why that would be in their interests. It is harder to see why it would be entirely in ours, especially if our interests are understood to include, indispensably, an interest in being our own governors. The critical feature of international treaties, from this point of view, is the creation of supranational bodies charged with implementing or enforcing them. For this reason, the United States was right to stay out of the International Criminal Court, but, as I will say more about in a moment, wrong to have submitted itself as cavalierly as it has to international economic-governance bodies.

The United States should be much more willing to sign a treaty when the treaty is more like an ordinary contract in the sense just described—i.e., when the agreement is narrow in scope, and when it creates no third-party, supranational entities empowered to supervise

U.S. policy or to make, interpret or apply U.S. law. Such treaties can be advantageous for many reasons, for example, where collective action problems require collective pre-commitment mechanisms to reach results many states seek, but none can attain without the others' cooperation. Numerous problems in today's "globalized" environment may take the form of prisoner's dilemma, and limited treaties covering these problems are perfectly acceptable. There are many such treaties already in existence; these should be the models for the kind of international law that the United States is prepared to accept.

On the other hand, we ought to have much greater reservations about American participation in the international economic regimes that we currently promote all over the world. First of all, we should not be in the business of sabotaging democracy in the developing world. Needless to say, the IMF, World Bank and WTO do not force countries to accept their "structural adjustment" policies, but when third-world elites, often corrupt, accept billions of international dollars, incurring massive debt on behalf of their countries and agreeing to IMF- or World Bank-dictated social and economic policy for years to come, democracy in those countries suffers a very serious blow.¹³⁶ If such "structural adjustment" regimes really brought prosperity to these countries, we could at least tell ourselves that we were acting in their manifest best interests. The reality is otherwise. Developing countries surrender their self-government into the capable hands of the world economic order, and they often find themselves no better off—and sometimes in utter ruin—years later.¹³⁷ If the United States

¹³⁶ See Howse, *supra* note 126, at 104 ("[E]ven before the Asian crisis, the Washington consensus became visible as merely an *ideology*, imposed on developing countries by the International Monetary Fund (IMF) and bitterly contested in political struggle everywhere."); Steven A. Ramirez, *Market Fundamentalism's New Fiasco: Globalization as Exhibit B in the Case for a New Law and Economics*, 24 MICH. J. INT'L L. 831, 846–47 (2003) (reviewing JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2002)) ("Stiglitz has presented a compelling economic argument that lawyers must think about how to create a global legal structure to support a more open and transparent financial architecture.").

¹³⁷ See PAUL MOSLEY ET AL., *AID AND POWER: THE WORLD BANK AND POLICY-BASED LENDING, ANALYSIS AND POLICY PROPOSALS* 193–94 (1991) (concluding that developing countries under structural adjustment regimes did *worse* economically than comparable countries not under such regimes); Howse, *supra* note 126, at 104 (arguing that IMF policies have not produced even "narrow success" on their own terms, and observing that these policies are now challenged by "mainstream economists"); Jason Morgan-Foster, Note, *The Relationship of IMF Structural Adjustment Programs to Economic, Social, and Cultural Rights: The Argentine Case Revisited*, 24 MICH. J. INT'L L. 577, 590 (2003) ("[I]n 1998, Argentina was the IMF's poster child. Two years later, Argentina was the scene of the largest sovereign default in human history."). For a general discussion of IMF structural-adjustment policies, see ERIK DENTERS, *LAW AND POLICY OF IMF CONDITIONALITY* (1996).

is genuinely interested in seeing a world of self-governing states, we should be a force for democracy in the developing world, not a force against it.

But our own self-government is also at stake. The multilateral economic institutions to which we belong have many of the “marital” characteristics described a moment ago. Americans should be very concerned to learn that congressional efforts to stop the outsourcing of American jobs, or to pass environmental-protection or worker-safety statutes, could well run into serious obstacles in the multilateral trade organizations and international free trade tribunals that we have erected. Under NAFTA and the WTO, an international tribunal can rule American environmental, worker or consumer protection measures illegal.¹³⁸ So far as the threat to self-government is concerned, there is no difference between an international free trade tribunal and an international human rights tribunal.

To be sure, U.S. unilateralism on trade could lead to destructive, escalating rounds of protectionism, but not all laws called “protectionist” are equally bad. As Nobel Prize-winning economist Joseph Stiglitz has pointed out, “[H]idden in NAFTA was a new set of rights—for business—that potentially weakened democracy throughout North America.”¹³⁹ NAFTA allows businesses to sue in an international tribunal for “damages” caused to them by U.S. land-use regulations deemed (by the tribunal) to “expropriate” their investments—essentially a protection against “regulatory takings” not afforded by the U.S. Constitution, which could, depending on how the free trade tribunals rule, significantly obstruct U.S. policy-making, and which could, moreover, be triggered by laws perfectly defensible on economic and other grounds.¹⁴⁰ In any event, I am not arguing for

¹³⁸ See, e.g., Douglas A. Kysar, *Law, Environment and Vision*, 97 NW. U. L. REV. 675, 713–16 (2003) (discussing ability of WTO panels to strike down American environmental-protection regulations); Dana Krueger, Note, *The Combat Zone: Mondeev International, Ltd. v. United States and the Backlash Against NAFTA Chapter 11*, 21 B.U. INT’L L.J. 399, 401–02, 417, 425 (2003) (describing procedure under little-publicized Chapter 11 of NAFTA allowing international tribunal to rule illegal American laws and regulations, to overturn conclusions reached by American judiciary, and to order compensation for “takings” that would not be recognized as compensable under U.S. constitutional law).

¹³⁹ Joseph E. Stiglitz, Editorial, *The Broken Promise of NAFTA*, N.Y. TIMES, Jan. 6, 2004, at A23.

¹⁴⁰ See *id.*; Marc R. Poirier, *The NAFTA Chapter 11 Expropriation Debate Through the Eyes of a Property Theorist*, 33 ENVTL. L. 851, 852–71 (2003) (describing NAFTA procedure and cases involving “expropriation” claims). According to Frank Loy, a former Undersecretary of State for Global Affairs in the Clinton administration and former chairman of the Environmental Defense Fund, the NAFTA expropriation cases raise the question of whether NAFTA

has unacceptably compromised our nations’ right to legislate in a way so as to protect the environment and the health of their citizens. . . . Regulating the

protectionism. The point is simply that U.S. economic policies should be governed by America's democratic legislative processes, not by international courts.

CONCLUSION: THE DANGER OF DOUBLE UNILATERALISM

Because of the 2003 war in Iraq, U.S. unilateralism is now associated in the minds of many with U.S. war-making and occupation. I want, therefore, to reemphasize the point: I have made no arguments here for or against the war in Iraq, and I certainly have made no case for U.S. militarism. The unilateralism I have defended derives from the aspirations of democracy; it would violate its own principles if it became an engine of empire. It would not justify—on the contrary, it would emphatically condemn—a new, self-appointed American mission to civilize by force, to colonize, to Americanize the world.

But the great and unsettling fact of twenty-first century global governance is that America seems doomed to become something like a world police force. With the development of small, uncontainable technologies of mass destruction, and with the inability of the U.N. to do the job, the United States will be in the business of using force abroad against real or feared criminal and terrorist activity to a far greater extent than ever before. As this process unfolds, American presidents will face a strong and dangerous temptation.

For reasons of political advantage or for reasons more genuinely high-minded American presidents may be tempted to use the role of world's law enforcer as a justification for, or vehicle of, a new American militarism, in which the United States is constantly making or preparing for war. This result would spell the end of the American democratic ideal—as well as, most likely, the end of American peace and prosperity. Democracies can make war when they have to, but they cannot become military states without surrendering the spirit of freedom that makes democracy worthwhile.

If, therefore, the United States is to be unilateralist abroad, it is imperative that in our own domestic politics we retain and reinvigorate the traditional constitutional mechanisms that serve to check presidential overreaching. Since September 11, 2001, the White House has flirted with a dangerous *double* unilateralism, joining the

environment requires a delicate balancing of important public interests, and many believe that the balance has been tilted by these cases in such a way so that many environmental laws and regulations are threatened. . . . I am talking about whether these NAFTA-protected investments curtail the ability of nations to protect their citizenry.

Frank E. Loy, *On a Collision Course? Two Potential Environmental Conflicts Between the U.S. and Canada*, 28 CAN.-U.S. L.J. 11, 18–19 (2002).

executive's willingness to act without international consent abroad to an effort to bypass Congress and the judiciary at home. In December 2001, the President on his own motion announced U.S. withdrawal from an important missile treaty with Russia.¹⁴¹ The President's initial insistence that he needed no approval from Congress in order to make war on Iraq¹⁴² was another vivid example of this *domestic unilateralism*. Another was the creation of a U.S. executive enclave in Cuba, governed by U.S. military forces yet assertedly outside of U.S. judicial jurisdiction.¹⁴³ And another is the President's assertion of a power to deem any individual, including an American citizen arrested on American soil, an "enemy combatant" and on that basis to imprison him indefinitely with no judicial review.¹⁴⁴

If Americans are prepared to support unilateralism abroad, they have a special, heightened responsibility to resist presidential unilateralism at home. With the White House prepared to project America's military force outside our territory in defiance of the U.N. Security Council, Congress has an obligation to exercise its constitutional role as a check on presidential war-making. At the same time, the judiciary has an obligation to extend, everywhere U.S. force exerts itself, the protections and constraints on the executive imposed by U.S. constitutional or statutory law.

Yet the indications on this front are not hopeful. The U.S. Congress does not seem to function as a check on presidential global ambition. The judiciary has restricted, rather than extended, the extraterritorial reach of U.S. legal protections,¹⁴⁵ and today is in danger of capitulating in the face of gross executive abuses. The American people themselves do not seem to expect or demand otherwise.

These are serious failures. A lockstep Congress and judiciary would fail to discharge responsibilities essential to U.S. world power. It is not clear today that the American system of checks and balances

¹⁴¹ See *supra* note 16.

¹⁴² See Mike Allen & Julie Eilperin, *Bush Aides Say Iraq War Needs No Hill Vote*, WASH. POST, Aug. 26, 2002, at A1.

¹⁴³ *Rasul v. Bush*, 215 F. Supp. 2d 55, 56 (D.D.C. 2002), *rev'd*, 124 S.Ct. 2686 (2004) ("It is the government's position that the scope of those rights [possessed by detainees at Guantanamo] are for the military and political branches to determine . . ."); *id.* at 68–70 (explaining the government's position that Guantanamo Bay is "not part of the sovereign territory of the United States").

¹⁴⁴ See *Padilla v. Bush*, 233 F. Supp. 2d 564, 571–72 (S.D.N.Y. 2002), *dismissed by Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004).

¹⁴⁵ See, e.g., *United States v. Alvarez-Machain*, 504 U.S. 655, 657 (1992) (holding that forcible abduction of defendant, Mexican citizen, from Mexico by U.S. agents did not bar criminal prosecution); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269–70 (1990) (rejecting extraterritorial application of Fourth and Fifth Amendments to non-citizens).

can or will provide the requisite counter-weights to presidential power. If we cannot restrain ourselves, we will leave the world nowhere to appeal—but heaven.