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Globalization and Distrust

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## GLOBALIZATION AND DISTRUST

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The same lotus of our clime blooms here in  
the alien water with the same sweetness,  
under another name.

- *Rabindranath Tagore, "Stray Birds"*

### INTRODUCTION

The people of a democracy must be mercifully soothed when they find themselves ruled by the six men and one woman of the Appellate Body of the World Trade Organization. Or so the contemporary version of Alexander Bickel's famous indictment of the Supreme Court of the United States might go.<sup>1</sup>

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<sup>1</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 92 (1962) ("The people of a democracy must be mercifully soothed when they find themselves ruled, to whatever extent, by the nine men of the Supreme Court.").



Figure 1. A World Supreme Court? The Appellate Body of the Dispute Resolution Body of the World Trade Organization.

“We know what the people imagine,” Bickel wrote. “They imagine that they rule themselves...”<sup>2</sup> But a judiciary empowered to overrule on constitutional grounds the judgments of the political branches renders self-rule an illusion. Bickel thus articulated the principal challenge of the last half-century to judicial review.

Today, we hear echoes of Bickel’s complaint, but now raising alarms about the power of tribunals not in Washington, D.C., but in Geneva and the Hague. Today’s democrats find the whiff of authoritarianism in the International Criminal Court, the International Court of Justice, North American Free Trade Agreement tribunals, the International Tribunal for the Law of the Sea, and, especially, the (awkwardly named) Appellate Body of the Dispute Resolution Body of the World Trade Organization. Today’s critics distrust judgments of these remote decision-makers. They find authoritarianism in the basic processes of international law.<sup>3</sup> International tribunals and decision-making processes are even more suspect than United States federal judges: they aren’t even American.

Consider Massachusetts Chief Justice Margaret Marshall’s reaction when she learned that her court’s judgment in a dispute would be reviewed by an international tribunal: “I was at a dinner party.... To say I was surprised to hear that a judgment of this court was being subjected to further review would be an understatement.”<sup>4</sup> In the same news story, a law professor issues a dire warning: “This is the biggest threat to United States

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<sup>2</sup> *Id.*

<sup>3</sup> See, e.g., the writings of Curtis Bradley, Jack Goldsmith, and Paul Stephan.

<sup>4</sup> Adam Liptak, *Review of U.S. Rulings by Nafta Tribunals Stirs Worries*, N.Y. TIMES, p. 20, Apr. 18, 2004. [summarize Mondev dispute]

judicial independence that no one has heard of and even fewer people understand.”<sup>5</sup>

Such complaints are carried not only in the popular press and academic journals, but also in the pages of the *Supreme Court Reports*. Consider the words of Justice Antonin Scalia in the last case decided in the Supreme Court’s term just ended, *Sosa v. Alvarez-Machain*:

We Americans have a method for making the laws that are over us. We elect representatives to two Houses of Congress, each of which must enact the new law and present it for the approval of a President, whom we also elect. For over two decades now, unelected federal judges have been usurping this lawmaking power by converting what they regard as norms of international law into American law. Today’s opinion approves that process in principle....<sup>6</sup>

Abhorring the Supreme Court’s admission of international law into American law, Justice Scalia sardonically defines for the Court “American law” as “the law made by the people’s democratically elected representatives.”<sup>7</sup>

It was a domestic version of this charge, based in a belief that judicial review is inconsistent with democratic theory, which motivates John Hart Ely’s classic, *Democracy and Distrust*.<sup>8</sup> There Ely offers the principal rebuttal to Bickel. Ely deftly turns insulation from the political process from a vice to a virtue. The judiciary’s freedom from direct politics, he proclaims, enables it to serve as a bulwark against majority tyranny. Distrust of the judiciary<sup>9</sup> must be juxtaposed with distrust of majoritarian political processes.

Given Ely’s rescue of judicial review within our borders, can *Democracy and Distrust* help rebut today’s protests of a democratic deficit at the international level? Today, distrust of globalization touches not just the formal treaty-based institutions of international law such as the World Trade Organization and the International Criminal Court, but often the project of international law itself. International law is made and realized through a fluid process in which public and private actors interact in multiple domestic and international fora “to make, interpret, enforce, and

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<sup>5</sup> Liptak, *supra* note 4 (quoting Professor John D. Echeverria).

<sup>6</sup> *Sosa v. Alvarez-Machain*, slip op. (S.Ct. June 29, 2004) (Scalia, J., concurring in part and concurring in the judgment).

<sup>7</sup> *Id.*

<sup>8</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 41 (1980) (seeking a “principled approach” to judicial review “that is not hopelessly inconsistent with our nation’s commitment to representative democracy”).

<sup>9</sup> BICKEL, *supra* note 1, at 34 (describing “the premise of distrust” of judicial review).

ultimately, internalize rules of transnational law.”<sup>10</sup> Harold Koh has denoted this the “transnational legal process,” highlighting the role of actors other than billiard ball-styled nation-states in the process of configuring and performing international law.

Would Ely’s theory find the transnational legal process consistent with popular sovereignty? The work of this paper will be to answer that question.

This goal will strike many as a simple category mistake. After all, the international legal order does not even aspire to democracy. There is no global *demos*, no We the People in which sovereignty is vested. Does it make sense to test today’s international order for its democratic promise? Until the day a global ballot is introduced, with voting following the sun across all the time zones of the world, is not the answer pre-ordained? Doesn’t international law, its authority not resting on a majoritarian political process, necessarily jeopardize popular sovereignty?

This certainly is the view of international law’s critics, shared by both ends of the political spectrum. Right wing critics in the United States argue that international law will subject this country to human rights, labor, health, environmental, and military rules not of our own making.<sup>11</sup> They object to the internalization of international norms in U.S. court, and the interpretation of the U.S. Constitution in light of international practice.<sup>12</sup> The targets of ire are dazzlingly broad, including the International Criminal Court, the International Labor Organization, the Convention on the Law of the Sea, the Kyoto Protocol on Global Warming, the United Nations Human Rights Commission (and any other United Nations body that exists or may exist in the future, including the World Health Organization), the Comprehensive Test Ban Treaty, non-governmental organizations such as women’s groups, and corporate codes of conduct.<sup>13</sup> Each of these international institutions steals power from We the People. International economic institutions come under attack from some conservative quarters (though they remain a favorite preserve of others): “The WTO has ordered the United States to revise its clean air regulations, get rid of its ban on the harvesting of tuna and shrimp that kill dolphins and turtles, and change the way it taxes income from import sales.”<sup>14</sup> Even if there is currently not

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<sup>10</sup> Harold Hongju Koh, *Transnational Legal Process*, 75 NEBRASKA L. REV. 181, 183-84 (1996).

<sup>11</sup> John Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT’L L. 205, 206 (2000).

<sup>12</sup> This issue is engaged in a recent issue of the *American Journal of International Law*. Lori Fisler Damrosch & Bernard H. Oxman, *Agora: The United States Constitution and International Law, Editors’ Introduction*, 98 AM. J. INT’L L. 42 (2004).

<sup>13</sup> Each of these international institutions receives its share of opprobrium in Bolton, *supra* note 11.

<sup>14</sup> Paul B. Stephan, *International Governance and American Democracy*, 1 CHI. J. INT’L L. 237, 248 (2000).

“complete displacement” of domestic law-making processes, over time there may well be a gradual aggrandizement of authority, at the expense of national sovereignty.<sup>15</sup>

Despite their many differences, I shall refer to those who find a democratic deficit in the transnational legal process as Nationalists. Standing with the transnational legal process, then, are the Transnationalists.

Progressive American critics of international law aim much of their fury at the World Trade Organization and other trade arrangements. In a new book entitled *Whose Trade Organization?*, Lori Wallach of Public Citizen observes that the WTO implicates many domestic matters: The WTO, she writes, constrains “domestic food safety standards, environmental and product safety rules, service-sector regulation, investment and development policy, intellectual property standards, government procurement rules, and more.”<sup>16</sup> International institutions are derided in other parts of the world as well, but often coupled with complaints about the United States, foreign bankers, or foreign corporations. Arundhati Roy discerns a loss of sovereignty not only to the WTO, but to a triumvirate of global players, with the United States as puppet master: “For all the endless empty chatter about democracy, today, the world is run by three of the most secretive institutions in the world: the International Monetary Fund, the World Bank and the World Trade Organization. All three of which, in turn, are dominated by the U.S.”<sup>17</sup>

If Bickel has an intellectual heir among the critics of international law, it may well be Jed Rubenfeld, like Bickel a professor at Yale Law School. In an unsettling piece, Rubenfeld justifies American unilateralism—its disregard for international law—on our commitment to democratic constitutionalism.<sup>18</sup> Rubenfeld’s challenge drew the attention of the past president of the American Society of International Law, Anne-Marie Slaughter, who called on a rebuttal from the international law community.<sup>19</sup>

Still, today’s complaints about international law have not reached the same public din, at least in the United States, as those that Ely heard while composing *Democracy and Distrust*. Ely intervened following decades of socially cataclysmic judicial rulings, from *Brown v. Board of Education*<sup>20</sup> to *Roe v. Wade*.<sup>21</sup> But protests of international law are likely to

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<sup>15</sup> Paul B. Stephan, *The U.S. and the World Trade Organization*, 1 CHI. J. INT’L L. 49, 72-73 (2000).

<sup>16</sup> Lori Wallach, “It’s Not About Trade,” in WHOSE TRADE ORGANIZATION? 1, 1 (2004).

<sup>17</sup> ARUNDHATI ROY, *THE ORDINARY PERSON’S GUIDE TO EMPIRE* (2004).

<sup>18</sup> Jed Rubenfeld, *The Two World Orders*, WILSON Q. (Aut. 2003).

<sup>19</sup> Anne-Marie Slaughter, *ASIL Insights* (2003).

<sup>20</sup> 347 U.S. 483 (1954).

grow, as international regimes produce increasingly significant and controversial results. The recent expansion of the world trade order into new arenas—including intellectual property, trade in services, investment, and government procurement—widens international law’s ambit. Constituencies that were previously blissfully unaware of international processes may become more alarmed as their livelihoods and ways of life are threatened. A Korean farmer committed suicide at the WTO Ministerial meeting in Cancun to protest the WTO’s consideration of the dismantling of agricultural subsidies.

Imagine the year 2010. Breaking News: *World Trade Organization rules that U.S. rules against international outsourcing of services contravene commitments on government procurement and telecommunications liberalization.* Breaking News: *The WTO rules that a U.S. bilateral free trade agreement violates the most-favored-nation principle because it does not liberalize world trade.*<sup>22</sup> Breaking News: *The International Criminal Court indicts Donald Rumsfeld for torture and wilful killing at the Abu Ghraib prison in 2003.*<sup>23</sup> Breaking news: *The WTO declares that the European Union’s moratorium on approving biogenetically-engineered foodstuffs lacks “sufficient scientific evidence.”*<sup>24</sup>

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<sup>21</sup> 410 U.S. 113 (1973).

<sup>22</sup> See General Agreement on Tariffs and Trade 1994 [hereinafter GATT], Art. XXIV(5), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 17 (1999), 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) (permitting bilateral or plurilateral free trade agreements under certain conditions); General Agreement on Trade in Services Art. V, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 284 (1999), 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) (same with respect to services); *see also* International Chamber of Commerce Commission on Trade and Investment Policy, *Regional trade agreements and the multilateral trading system* (Nov. 2002), available at [http://www.iccwbo.org/home/statements\\_rules/statements/2002/Regional%20trade%20agreements\\_multilateral%20trading%20system.asp](http://www.iccwbo.org/home/statements_rules/statements/2002/Regional%20trade%20agreements_multilateral%20trading%20system.asp).

<sup>23</sup> The United States is not a party to the Rome Statute creating the International Criminal Court, but that charter grants the Court jurisdiction over the crimes of genocide, war crimes and crimes against humanity if they occur in the territory of a state party, thus permitting the Court to try the nationals of non-member states. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998), 37 I.L.M. 999, at art. 12. Furthermore, the Rome Statute strips state officials of any immunity they may otherwise enjoy in international or municipal law. See Diane Marie Amann & M.N.S. Sellers, *The United States of America and the International Criminal Court*, 50 AM. J. COMP. L. 381, 392 (2002). Worried about the possibility of being brought to book before the ICC, the United States has sought “impunity agreements” with its trading partners. See Human Rights Watch, *United States Efforts to Undermine the International Criminal Court: Legal Analysis of Impunity Agreements*, available at <http://www.hrw.org/campaigns/icc/docs/art98analysis.htm>.

<sup>24</sup> This is a dispute currently before a World Trade Organization dispute resolution panel. European Communities - Measures Affecting the Approval and Marketing of

Where Bickel had been concerned principally with judicial review, the critics of international law denounce almost the entire enterprise, from the cooperative arrangements between central bankers to the policy-making institutions of the World Bank and the International Monetary Fund. After all, the personnel of *all* global institutions—not just the judicial ones—lack the legitimacy invested through popular elections. Thus, the international judicial organs—*e.g.*, the International Criminal Court, the WTO's Dispute Resolution Body, NAFTA panels, the International Tribunal for the Law of the Sea—are not uniquely problematic from the Nationalist perspective. *All* international authority is troubling.

But are not international institutions in fact the “least dangerous” of institutions?<sup>25</sup> With few exceptions,<sup>26</sup> they have “no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever.”<sup>27</sup> The decision-makers on these tribunals are so weak that they “must ultimately depend upon the aid of the executive arm [of individual states] even for the efficacy of [their] judgments.”<sup>28</sup> Even the most empowered of these entities, the United Nations Security Council, must rely on member states to voluntarily contribute to a peacekeeping force.<sup>29</sup> The World Trade Organization and the International Court of Justice issue commands, but without any gendarmes or national guard for their enforcement. The International Criminal Court must rely on the charity of its members to put the accused in the dock.<sup>30</sup>

There was a time when the critics of international law denounced it for its irrelevance, its pretence of power masking an underlying ineffectiveness. Now in the “post-ontological era”<sup>31</sup> of international law, the critique has shifted. Now international law is denounced not for being febrile, useless, and irrelevant, but rather for its vigor, effectiveness, and

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Biotech Product, DS 291 (Aug. 8, 2003). Critics denounce the WTO's consideration of the issue as “undemocratic.” Paul Geitner, *WTO Delays Decision on E.U.'s Biotech Ban*, Wash. Post, at E02 (Aug. 26, 2004). One critic says: “Every country should have the right to put public safety before the economic might of the biotechnology industry.” *Id.*

<sup>25</sup> THE FEDERALIST 78 (Hamilton).

<sup>26</sup> The World Bank and the IMF stand as the principal exceptions, holding large capital resources of their own based on earlier member contributions.

<sup>27</sup> THE FEDERALIST 78 (Hamilton).

<sup>28</sup> *Id.* The epigraph of Bickel's book, Hamilton's words serve as that book's foil. BICKEL, *supra* note 1, at ix.

<sup>29</sup> The United Nations Peacekeeping Force, numbering 59,000 personnel in July 2004 (only 427 from the United States), relies on the voluntary contributions of member-states. See United Nations, *Monthly Summary of Contributions*, available at <http://www.un.org/Depts/dpko/dpko/contributors/index.htm>.

<sup>30</sup> Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89, 92 (2003).

<sup>31</sup> THOMAS FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 6 (1995).



pervasiveness. Now rather than being critiqued for its idealism, it is subject to attack for its legitimacy.

Transnationalists leave themselves even more vulnerable to the charge of hijacking democracy by admitting to, and embracing, the normativity of the transnational legal process.<sup>32</sup> But the task of identifying the source of the norms remains elusive.<sup>33</sup> We will consider, for example, whether those values might be found in world consensus (following Thomas Franck), or a commitment to a world public order of human dignity (following the New Haven School of international law), or from the values of the norm entrepreneurs involved in the transnational legal process, or from the dialogic nature of the transnational legal process itself. Following in Ely's footsteps, we will discover the fundamental values of the transnational legal process, and assess whether they accord with democracy.

Given that transnational legal process theory grew in the waters of the Legal Process school, it seems only appropriate that it would face the same questions put to its domestic progenitor. Ely's account, the "most celebrated, and the best articulated and composed, legal process theory of judicial review,"<sup>34</sup> seems then the ideal candidate for application to the transnational version of Legal Process.

I will suggest that the application of Ely's theory helps us understand the question from democracy today. The critics of international law have generally articulated their complaints in a different form than the critics of domestic judicial review. The typical Nationalist poses the following question of democratic legitimacy: Does international law grant decision-making authority to international actors who are not directly politically accountable?<sup>35</sup> But (and here I play on Bickel's aphorism) the *wrong* answer is what the wrong question begets.<sup>36</sup> Ely himself responded

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<sup>32</sup> Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2627-28 (1997); Koh, *Transnational Legal Process*, *supra* note 10, at 184; Harold Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 YALE L.J. 2391, 2406 (1994).

<sup>33</sup> Mary Ellen O'Connell, *New International Legal Process*, 93 AM. J. INT'L L. 334, 338 (1999) (observing that "Koh does not himself elaborate on these questions [of what the values of the system are] beyond indicating their importance to a methodology").

<sup>34</sup> William N. Eskridge & Philip P. Frickey, *An Historical and Critical Introduction to The Legal Process*, in HART AND SACHS *THE LEGAL PROCESS* li, cviii. Ely himself describes his work as being part of "legal process." See John Hart Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different From Legislatures*, 77 VIRG. L. REV. 833, 833 n. 4 (1991).

<sup>35</sup> This is, for example, the framework of Justice Scalia's complaint in *Sosa v. Alvarez-Machain*, where he defines "American law" as "the law made by the people's democratically elected representatives." *Sosa v. Alvarez-Machain*, slip op. (S.Ct. June 29, 2004) (Scalia, J., concurring in part and concurring in the judgment).

<sup>36</sup> Bickel writes: "No answer is what the wrong question begets..." BICKEL, *supra* note 1, at 103. This quote frames Ely's chapter, a revision of his *Harvard Law Review* forward,

to a different challenge, one fitting a constitutional lawyer. If we formulate that challenge for our own time, it might go something like this: *Does international law place basic issues beyond the reach of ordinary political processes?*

Three case studies will help frame the inquiry. First, the final case decided in the Supreme Court term just ended, *Sosa v. Alvarez-Machain*,<sup>37</sup> directs the inclusion into United States law of international law norms as sources of causes of action. Justice Scalia, as we have noted, saw the decision as an intrusion into the American system of law-making “by the people’s democratically elected representatives.” Moving from human rights to economics, the second case study takes up a 2004 World Trade Organization ruling that the United States violated its trade commitments by refusing market access to Internet gambling services provided from the Caribbean island nation of Antigua and Barbuda.<sup>38</sup> Antigua had challenged American state statutes from Alabama to Wyoming, as well as judicial decisions from federal and state courts.<sup>39</sup> That decision has revolutionary implications because it presents a template for arguing that local or national constraints in the United States on the provision of services run afoul of our international obligations. The third case study moves the focus of our inquiry around the world, to the financial crisis that engulfed Indonesia in 1997 and 1998, immiserating one of the largest populations in the world. Here we will consider the claim that the IMF has usurped popular sovereignty, with disastrous results, a claim made easier to judge by the recent release of an internal IMF report on the issue.

The move I make here is analogous in a small way to the internationalization of John Rawls’ *A Theory of Justice*. Rawls himself lived long enough to take up the task of reformulating his theory, formulated originally for institutions within a national social compact, for the world.<sup>40</sup> Ely, alas, passed away much too young, leaving us with unfinished business. In his basic theory, Ely suggests that a group of equals in an original position seeking to frame a government would adopt majority rule tempered with processes to control (1) the exclusion of persons from politics and (2) the unfair distribution of benefits and burdens between the majority and the minority.<sup>41</sup> Thus stated, Ely’s theory has purchase in a

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“Discovering Fundamental Values.” ELY, *supra* note 8, at 43, 72. Ely suggests that the quest for fundamental values proves futile because the quest is itself misguided.

<sup>37</sup> S.Ct. Case # 3-309, Slip op. (June 29, 2004).

<sup>38</sup> United States - Measures Affecting The Cross-Border Supply Of Gambling And Betting Services, WT/DS285.

<sup>39</sup> *United States v. Cohen*, 260 F.3d 68 (2<sup>nd</sup> Cir. 2001), *cert. denied*, 122 S. Ct. 2587 (2002); *Vacco ex rel. People v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844, 854 (N.Y. Sup. Ct. 1999).

<sup>40</sup> JOHN RAWLS, *THE LAW OF PEOPLES* (2001).

<sup>41</sup> Ely puckishly places this formulation of his theory in footnote 4 of an essay. Ely, *Another Such Victory*, *supra* note 34, at 833 n. 4. I quote only a small portion of that note:

broad array of political contexts from Philadelphia to Fallujah. Following Rawls,<sup>42</sup> I will suggest that we not simply adopt a global original position,<sup>43</sup> but rather that we keep Ely's theory in mind as we test international law's legitimacy from the perspective of various *national* original positions. Ultimately, the question of the compatibility of international law and democracy depends, I will suggest, on whether one sits in Kansas or Kinshasa. Ely's theory, I will argue, offers a theoretical grounding for international law beyond simply resolving collective action problems. Ely's theory helps us see the transnational legal process as a possible buttress to democracy, rather than its rival.<sup>44</sup> First, that process serves to strengthen state regulatory efforts in the face of a world increasingly characterized by global flows of goods, services, information, and people. Second, the transnational legal process creates additional resources by which minorities can protect themselves from majoritarian oppression.

Ely's syllogism goes as follows: Does judicial review remove an issue from the majoritarian political process? If not, then such review does not immediately threaten democracy. If yes (*e.g.*, judicial review based on the *Constitution*), that review can yet be justified as democracy-enhancing if it serves to protect discrete and insular minorities.

Applied to the transnational legal process, that syllogism would be rendered thusly: Does the transnational legal process remove an issue from the majoritarian political process? In the main, as I argue in Part I, because

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Approached philosophically--I have previously approached it more through an analysis of the Constitution--the general theory is that a group of equals in the "original position" attempting to frame a government would start from the presumption that no sane adult's values are to count for more or less than any other's, which would lead rapidly to the conclusion that public issues generally should be settled by a majority vote of such persons or their representatives--with two, perhaps three, exceptions: (1) where a majority of such persons votes to exclude other such persons from the process or otherwise to dilute their influence on it; (2) where such a majority enacts one regulatory regime for itself and another, less favorable one, for one or another minority; or (3) where other side constraints seem sufficiently important (and vulnerable to majority sentiment) that the framers decide by supermajority vote to designate them in a constitutional document and thereby render them immune to displacement by anything short of a similar supermajority vote in the future...

It seems to me to follow further--here comes the "legal process" part--that precisely because of their tenure, courts are the appropriate guardians of at least exceptions (1) and (2)....

<sup>42</sup> RAWLS, *THE LAW OF PEOPLES*, *supra* note 40, at 82-3 (distinguishing his argument from the cosmopolitan framework of a global original position).

<sup>43</sup> Refusing such a move to a global original position is, I will suggest, a key to preserving the democratic legitimacy of international law, particularly defending international law against Rubinfeld's claim. *See infra* notes \_\_\_-\_\_\_ and accompanying text.

<sup>44</sup> The argument that international law can be democracy-reinforcing has been made before, but I argue that the typical form of that argument is in error. *See infra* notes 132-133 and accompanying text.

of various local checks on the transnational legal process my answer is no. Thus, the transnational legal process is consistent with democracy. Part II examines the part of the transnational legal process that claims to be immune to local control—*jus cogens*, or the peremptory norms of international law. I will argue that such norms can be justified as democracy-enhancing even though they prevent majorities from doing their will. Such norms seek to protect certain classes of minorities in a world where minorities are forever at risk.

## I. THE WRONG ANSWER IS WHAT THE WRONG QUESTION BEGETS

I will approach the question of the democratic legitimacy of the transnational legal process inductively, from a number of flashpoint cases of transnational legalism. I begin with the last case of the Supreme Court term just ended, *Sosa v. Alvarez-Machain*, a case that affirms the enforcement of international law by American courts pursuant to the Alien Tort Statute.

### A. *Sosa v. Alvarez-Machain*

“We Americans have a method for making the laws that are over us.”<sup>45</sup> Justice Scalia’s sixth-grade civics lesson in *Sosa v. Alvarez-Machain* expressed his frustration with his colleagues, who, in his eyes, were turning the keys of our democracy over to foreigners.<sup>46</sup> *Sosa* tested the Alien Tort Statute, a 1789 Congressional act that empowered the federal courts to hear claims by “an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>47</sup> In the case before the Court, a Mexican doctor abducted at American direction in Mexico sued for his brief arbitrary detention by his Mexican and American captors, arguing that it violated international law.<sup>48</sup>

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<sup>45</sup> *Sosa v. Alvarez-Machain*, No. 03-339, slip op. at 13 (S.Ct. June 29, 2004) (Scalia, J., concurring in part and concurring in the judgment).

<sup>46</sup> Witness Justice Scalia’s multiple invocations of the term “democratic” in his concurrence, implying that anything other than his approach falls short by that metric. *See id.* at 13 (“The Framers would, I am confident, be appalled by the proposition that, for example, the American peoples’ democratic adoption of the death penalty, see, e.g., Tex. Penal Code Ann. §12.31 (2003), could be judicially nullified because of the disapproving views of foreigners.”); *id.* (“Though we know ourselves to be eminently reasonable, self-awareness of eminent reasonableness is not really a substitute for democratic election.”); *id.* at 14 (“American law—the law made by the people’s democratically elected representatives—does not recognize a category of activity that is so universally disapproved by other nations that it is automatically unlawful here, and automatically gives rise to a private action for money damages in federal court.”).

<sup>47</sup> 28 U.S.C. §1350.

<sup>48</sup> This was Dr. Alvarez’s second round before the Court. He had earlier sought to have a criminal case against him thrown out because it was based on his abduction and removal from Mexico outside the terms of an Extradition Treaty between the United States

Since its revival in 1980, jurists and academics had denounced that statute as authorizing an open-ended insertion of international norms into U.S. law. Judge Bork argued that, without clear evidence of Congressional intent to empower federal judges to construe international law, “to ‘construe’ is to legislate, to act in the dark.”<sup>49</sup> More recently, in the pages of the *Harvard Law Review*, critics attacked the statute as undemocratic. They worried about what they saw as a “democratic society increasingly governed by international law.”<sup>50</sup>

Finally seized of the issue, the Supreme Court this last term sided definitively with the Transnationalists.<sup>51</sup> The Court held that the Alien Tort Statute’s “jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for [a] modest number of international law violations...”<sup>52</sup> It accordingly directed judges to examine the “current state of international law, looking at those sources we have long, albeit cautiously recognized.”<sup>53</sup> These sources include not just treaties, but also “the customs and usages of civilized nations.”<sup>54</sup> And how are such customs and usages to be recognized? Through reviewing the “works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.”<sup>55</sup> The Court required that such an exercise be approached with circumspection, requiring that the international law rules have a “definite content and acceptance among civilized nations.”<sup>56</sup> The Court thus empowered federal courts to incorporate into federal common law certain well-defined norms of international law.

*Sosa* represents a Nationalist catastrophe. International law, formed in shadowy realms by unelected people, many in authoritarian states, is brought home by unelected judges, and made actionable in American courts. Popular sovereignty yields to the dictates of an international academic elite, modern publicists working hand in hand with unelected

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and Mexico. The Court held that the Treaty did not implicitly prohibit cross-border abduction. *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

<sup>49</sup> *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 815 (1984).

<sup>50</sup> Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 821 (1997).

<sup>51</sup> Amicus briefs from law professors had divided between a Nationalist brief spear-headed by Paul Stephan arguing that tort actions should be available only when authorized by the political branches, and a Transnationalist brief spear-headed by William Dodge arguing that tort actions could be found in federal common law in the special case of international law.

<sup>52</sup> *Sosa*, slip op. at \_\_\_.

<sup>53</sup> *Id.* at \_\_\_.

<sup>54</sup> *Id.* (citing *The Paquete Habana*, 175 U.S. 677, 700 (1900)).

<sup>55</sup> *Id.*

<sup>56</sup> *Sosa*, Slip op. at 38.

judges. To add insult to injury, the Court recognized that the process of norm identification was not simply a process of discovery, but one of generation.<sup>57</sup> Justice Souter observed the epistemological turn in our historical understanding of the source of common law—from “a transcendental body of law” awaiting elaboration to “discretionary judgment” of judges.<sup>58</sup> Despite this judicial license, the Court made no apologies.

However, Justice Souter did offer that Congress could “shut the door to the law of nations entirely” through legislative action, or “modify or cancel any judicial decision so far as it rests on recognizing an international norm as such.”<sup>59</sup> Justice Souter’s trust that the legislature would amend any judicial misstep echoes Gerald Neuman’s defense of the Alien Tort Statute that “federal common law decisions can be overturned by Congress.”<sup>60</sup> But does the possibility of legislative revision bear the weight of democracy?

The answer depends on how one defines “democracy.” Nationalists seem to describe democracy as demanding that *initial* decision-making powers be assigned to Congress. Anything else is inherently illegitimate. Return to Justice Scalia’s sixth-grade civics lesson: “We Americans have a method for making the laws that are over us. We elect representatives to two Houses of Congress, each of which must enact the new law and present it for the approval of a President, whom we also elect.”<sup>61</sup> Justice Scalia would require that any law that is to govern us must *first* have been enacted by popularly elected officials. Anything else becomes undemocratic. This is, of course, the refrain of the critics of the modern revitalization of the Alien Tort Statute.<sup>62</sup> Nationalists would go so far as to require Congressional action before any international law norm could be domesticated.

Bickel and Ely understood the countermajoritarian difficulty very differently. In their view, the problem for democracy lay in people’s not being able to review or alter laws *after* judicial intervention. Bickel writes, “Judicial review . . . is the power to apply and construe the Constitution, in matters of the greatest moment, against the wishes of a legislative majority, which is, in turn, powerless to affect the judicial decision.”<sup>63</sup> *The*

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<sup>57</sup> Sosa, slip op. at 31 (“Now, however, in most cases where a court is asked to state or formulate a common law principle in a new context, there is a general understanding that the law is not so much found or discovered as it is either made or created.”).

<sup>58</sup> *Id.*

<sup>59</sup> Slip op. at 37.

<sup>60</sup> Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 *FORDHAM L. REV.* 371, 383-4 (1997).

<sup>61</sup> Sosa, slip op. at 13 (Scalia, J. concurring in part and concurring in the judgment).

<sup>62</sup> Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 *CHI. J. INT’L L.* 457, 464 (2001) (“[T]his international human rights litigation vests substantial lawmaking authority in unaccountable actors.”).

<sup>63</sup> BICKEL, *supra* note 1, at 20.

*countermajoritarian difficulty is not the problem that the majority did not author the law, but rather that the majority cannot revise or repeal it.* Ely similarly observes that, “in non constitutional contexts, the court’s decisions are subject to overrule or alteration by ordinary statute.”<sup>64</sup> This possibility of revision and renunciation, as Justice Souter suggests, is amply available in the elaborations of international law under the Alien Tort Statute.

The Nationalists are not without a retort. They suggest first that this argument would “justify the creation of any (non-constitutional) federal common law.”<sup>65</sup> But this hardly follows. The suggestion that there is no democratic deficit in the case of a federal common law under the Alien Tort Statute does not imply that there may not be other reasons to eschew the creation of such a common law in other contexts. Justice Souter, for example, carefully moors the elaboration of the federal common law in the authorization of the Alien Tort Statute (now Section 1350 of Title 28): he writes, “Section 1350 was enacted on the congressional understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations.”<sup>66</sup> The possibility of federal common law in one domain does not necessarily imply federal common law in all domains.

The second Nationalist response<sup>67</sup> is to suggest that it may be futile to rely on Congress to do the right thing and overturn judicial common law-making. Paul Stephan writes, “[T]he enactment of legislation is a cumbersome and costly process, more likely than not to be incomplete.”<sup>68</sup> This renders the central concern quite plain. The issue reduces to the setting of the default rule—should courts apply customary international law in Alien Tort Statute cases or should courts refuse to do so, in the absence of congressional incorporation of the international law norm into municipal law?<sup>69</sup>

Given that the norm against official torture is the principal customary international law violation that has been domesticated by American courts in cases of jurisdiction under the Alien Tort Statute,<sup>70</sup> it

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<sup>64</sup> ELY, *supra* note 8, at 4.

<sup>65</sup> Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 *FORDHAM L. REV.* 319, 347 (1997); *see also* Stephan, *International Governance*, *supra* note 14, at 247.

<sup>66</sup> *Sosa*, slip op. 37, n. 19.

<sup>67</sup> The Nationalists offer a third argument, based in a “dormant commerce clause” reading of federalism, that Koh deftly counters. *Compare* Bradley & Goldsmith, *Current Illegitimacy*, *supra* note 65, at 347 *with* Harold Hongju Koh, *Is International Law Really State Law?*, 111 *HARV. L. REV.* 1824, 1848-50 (1998).

<sup>68</sup> Stephan, *International Governance*, *supra* note 14, at 247.

<sup>69</sup> Neuman, *supra* note 60, at 384.

<sup>70</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

would seem that the default should favor incorporation. War crimes<sup>71</sup> are likely the second, but a distant second, in alien claims for violations of international law. It seems hard to imagine that enforcing the norm against torture or pursuing war criminals is undemocratic. In the rare case that a polity would choose through majoritarian processes to engage in such conduct, I would think that it would not be illegitimate to intervene nonetheless. (Indeed, I will argue as much in Part II.) The Nationalist will argue that my citation to cases involving torture and war crimes misses the point, that customary international law will likely grow in unforeseeable ways. (Of course, one of the remarkable elements of the Nationalist claim is the failure to identify *any* final judgment reflecting judicial excess in the last quarter-century of the application of the Alien Tort Statute.) If the bulk of cases fits comfortably within what democracies would prefer, then it certainly seems appropriate to set the default rule to favor application.

Moreover, courts construing international law pursuant to the Alien Tort Statute must act with “great caution”<sup>72</sup> and “restraint.”<sup>73</sup> The Supreme Court cites to three actions recognized by Blackstone and well-known at the time of the promulgation of the Judiciary Act of 1789: violation of safe conducts, infringement of the rights of ambassadors, and piracy.<sup>74</sup> It then enjoins lower courts to “require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18<sup>th</sup> century paradigms we have recognized.”<sup>75</sup> The Court’s restraint is not new, but rather reflective of the approach suggested by many Transnationalist scholars.<sup>76</sup>

Because of the political overtones of many international disputes, the Court affirmed a “policy of case-specific deference to the political branches.”<sup>77</sup> Cases pending in American court, for example, sought damages from corporations for abetting abuses in South Africa under the Apartheid regime, though the Government of South Africa had objected that consideration of the issue interfered with the indigenous truth and

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<sup>71</sup> *Kadic v. Karadzic*, 70 F.3rd 232 (2d Cir. 1995), reh’g denied, 74 F.3rd 377 (2d Cir.), cert. denied 518 U.S. 1005 (1996).

<sup>72</sup> *Sosa*, slip op. at 34 (suggesting “great caution in adapting the law of nations to private rights”).

<sup>73</sup> *Sosa*, slip op. at 31.

<sup>74</sup> *Sosa*, slip op. at 20 (citing 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68 (1769)).

<sup>75</sup> *Sosa*, slip op. at 30-31; *see also id.* 38.

<sup>76</sup> Neuman, *supra* note 60, at 376; Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393 (1997); Ryan Goodman and Derek Jinks, *Filartiga’s Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463, 510-11 (1997).

<sup>77</sup> *Sosa*, slip op. at 39, n. 21.



reconciliation process.<sup>78</sup> In a filing in connection with the pending cases, the United States State Department had agreed. Such executive suggestions, the Court offered, should be given substantial weight.

Deference due to political questions, of course, is one of the “passive virtues” extolled by Bickel.<sup>79</sup> In the political question doctrine, the act of state doctrine, the doctrine of international comity, the doctrine of *forum non conveniens*, and the requirements for standing and case or controversy, courts have established an array of devices by which to determine “how much to adjudicate”<sup>80</sup> in international disputes.<sup>81</sup> While Ely did not propose passivity as a solution to any countermajoritarian difficulty, such an approach is not inconsistent with his theory, so long as it does not involve a concession to majority tyranny.

Thus far I have framed the argument in defensive terms, defending the common law function exercised by federal courts pursuant to the Alien Tort Statute against the charge of being undemocratic. But the argument can also be framed in more positive terms. The legal process school focused our attention to institutional competence—the relative capabilities of various institutions of government to resolve contemporary problems. Ely, for example, claimed that the federal judiciary’s unique position outside the direct political process made it an appropriate organ to discipline that process. Similarly, if the issue is who can best review the difficult plethora of legal material that constitute international law, it seems that it is the judiciary. After all, divining the law from a dazzling array of sources is exactly what judges are good at. Thus, it seems appropriate that, recognizing that international law would grow over time and desirous of recognizing that law in United States courts, at least with respect to certain types of claims, Congress has placed the authority to pronounce that law with the judiciary.

Furthermore, taken to its logical conclusion, the Nationalist understanding of democratic law-making would undermine *all* common law, not just the specialized federal common law authorized in *Sosa*. The vast edifice of corporate law, for example, would be called into question, being grounded on concepts such as fiduciary duties that appear only rarely in codebooks.<sup>82</sup> But the Nationalists offer special reasons to disfavor a

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<sup>78</sup> *Id.*

<sup>79</sup> See BICKEL, *supra* note 1, at 111-98; Anthony T. Kronman, *Alexander Bickel’s Philosophy of Prudence*, 94 YALE L. J. 1567 (1985).

<sup>80</sup> BICKEL, *supra* note 1, at 197.

<sup>81</sup> Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L. J. 2277, 2299 (1991) (describing requirements for standing, private cause of action, and self-executing treaty, and the political question doctrine as doctrines of “international passive virtues”); *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995) (Newman, C.J.) (considering prudential doctrines of political question and act of state in adjudicating dispute).

<sup>82</sup> Anupam Chander, *Minorities, Shareholder and Otherwise*, 113 YALE L. J. 119

federal common law drawn upon *international* law. They suggest that (1) the elaboration of customary international law depends heavily on the writings of “publicists,” who consist in an international legal academic elite;<sup>83</sup> (2) international law rules “are not developed in the specific context of U.S. practices, culture, and institutions;”<sup>84</sup> and (3) international disputes touch upon international politics, better suited to consideration by the political branches.

These concerns are misplaced. First, the fear of the excessive influence of academics suggests that judges are unable to appraise their writings. Given the executive’s ability to provide its own view of international law through letters and amicus briefs to the court and the existence of multiple viewpoints in academic writing, the likelihood that judges will be misled by academics into erroneously finding a cause of action in international law seems remote. And again, the Nationalists cannot point to a single case where judges were misled by academics into adopting a rule. Second, even putting aside the fact that the United States has long been the strongest proponent of international law norms, it seems unlikely that such norms would actually be alien to American practice or culture. To the extent that the United States disagrees with an emerging norm, it can object; customary international law generally does not create obligations for a “persistent objector” during the formation of that law.<sup>85</sup> Of course, objectors cannot deviate from *jus cogens* norms—those peremptory international law norms with universal application—but it is difficult to imagine the *jus cogens* norm not shared in U.S. practice, culture, and institutions. Again, the Nationalists do not point to any particular element of international law that does violate U.S. practice or culture. Third, while international disputes may touch upon international politics, the judiciary, as we have noted,<sup>86</sup> can manage such conflicts through prudential doctrines, including consideration of executive suggestion. Finally, whatever the merits of each of these concerns, it remains open to Congress to disagree with any judicial pronouncement of international law. This ultimate democratic channel remains undisturbed.

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(2003). See also Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 413-14 (1964) (observing “the development of a federal common law of corporate responsibility” including through causes of action found to be implied in securities laws and regulations).

<sup>83</sup> Stephan, *International Governance*, *supra* note 14, at 238 (describing customary international law as “a prefabricated system of rules and norms, constructed by a loose alliance of like-minded academics and international law specialists through a form of advocacy that involves no democratic checks”).

<sup>84</sup> Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1582 (2004).

<sup>85</sup> AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS §102, comment d (1987) [hereinafter RESTATEMENT (THIRD)].

<sup>86</sup> See *supra* notes 79-81.

## B. Antigua v. United States

In 2003, the tiny island nation of Antigua and Barbuda, with a total population not much more than the college town in which I live,<sup>87</sup> charged the world's sole superpower with violating international trade law. Having watched the decimation of its online gambling industry by new American restrictions, the Antiguan government challenged these restrictions through the World Trade Organization. Antigua cited specifically the laws of the majority of American states, from Alabama to Wyoming,<sup>88</sup> as well as various federal laws. Relying on the General Agreement on Trade in Services (GATS), an innovation launched as part of the WTO agreements in 1995, Antigua demanded the right to provide gambling services to Americans via the Internet from its tropical isle. And it won.

*United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*<sup>89</sup> tests the international trade order's compatibility with democracy. It serves up the Nationalist specter: an international tribunal sitting in judgment of the laws of the various states and of Congress. Even more importantly, it does so in the context not of American rules regulating trade in goods—from fish to fowl, and shoes to cars—but rather in the context of American rules regulating trade in *services*. Especially important in a digitized age, the case represents the World Trade Organization Dispute Resolution Body's first direct confrontation with the Internet. One might even find in *Antigua v. United States* the seeds of a crossborder outsourcing of services revolution.

The seeds were sown decades ago, as the world trade system expanded beyond its foundational concern with tariffs. The Tokyo Round of trade liberalization negotiations conducted between 1973 and 1979 concluded with agreements to restrict measures that had the effect of restricting foreign trade in goods. With that round, the trade regime had moved from the borders of countries to their interior, concerned with how local laws and technical standards can be manipulated to protect domestic suppliers.

The expansion in 1995 of the trade regime into services, long the preserve of local control, exposed even more of a nation-state's regulatory

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<sup>87</sup> Antigua and Barbuda are home to 68,320 people, while Davis, California is home to 62,200. Central Intelligence Agency, *The World Factbook*, available at <http://www.cia.gov/cia/publications/factbook/geos/ac.html> (estimate of July 2004); City of Davis, *City Profile: Population and Housing*, available at <http://www.city.davis.ca.us/aboutdavis/cityprofile/index.cfm?topic=5>.

<sup>88</sup> Antigua cited the laws of 49 states, as well as many U.S. territories. See *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Request for Consultations by Antigua and Barbuda, WT/DS285/1 S/L/110, pp. 2-9 (Mar. 27, 2003).

<sup>89</sup> WT/DS285.

infrastructure to international appraisal. Under GATS, nation-states agreed to provide other member states with most-favored-nation treatment in services (with specified exceptions), but only agreed to provide national treatment to the extent of explicit commitments in GATT schedules. This reversed the GATT presumption, which obliges national treatment unless an exception is specifically made. The limited nature of GATS commitments reflects hesitancy about the virtues of free trade when it comes to services. Expanding the trade regime to include services is controversial: according to one commentator, “Services provide means to introduce fresh, foreign perspectives, construct cross-border transactions and affiliations, question the value of parochial knowledge and custom, and undermine the competence of local regulation.”<sup>90</sup> This posed a grave threat to a long history of services regulation and local systems of service delivery.<sup>91</sup> Free trade in services expands the constituencies vulnerable to global competition beyond workers making steel and cars.

But the critics of GATS and the WTO do not challenge the increased competition it brings. Rather they suggest that local control over public policy is lost in the expansion of the trade regime beyond tariffs. They observe that industry will wield the trade agreements as weapons against national regulation. An industry representative might argue, for example: “If you strengthen that pesticide law, the U.S. will have problems with the Codex Alimentarius under the new GATT...”<sup>92</sup> They suggest that the WTO’s Dispute Settlement Body is “reviewing the validity of, and ordering changes to, U.S. domestic laws that affect international trade.”<sup>93</sup> Moreover, services seem to implicate the most personal of commercial transactions: “By subjecting the service sector to WTO disciplines, almost no human activity from birth (health care) to death (funeral services) remains outside WTO’s purview.”<sup>94</sup> Critics worry that free trade in services means the death of regulation, especially the loss of consumer and worker protections. Regulations, after all, can be recast as “non-tariff barriers.” Figure 2 shows a banner unfurled in Seattle at the Ministerial Conference of the WTO in 1999, depicting one vector representing the WTO and another vector, running the opposite way, representing democracy.

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<sup>90</sup> CHRISTOPHER ARUP, *THE NEW WORLD TRADE ORGANIZATION AGREEMENTS: GLOBALIZING LAW THROUGH SERVICES AND INTELLECTUAL PROPERTY* 97 (2000).

<sup>91</sup> William J. Drake & Kalypso Nicolaïdis, *Ideas, interests, and institutionalization: “trade in services” and the Uruguay Round*, 46 INT’L ORG. 37, 38 (1992).

<sup>92</sup> WALLACH & WOODALL, *supra* note 16, at 3.

<sup>93</sup> Bradley, *International Delegations*, *supra* note 84, at 1574.

<sup>94</sup> WALLACH & WOODALL, *supra* note 16, at 110.



Figure 2. Protest at WTO Ministerial Conference in Seattle.

The case brought by Antigua seems to illustrate the concern perfectly. Antigua challenged a host of American laws that regulated an activity that many found morally repugnant and even dangerous. Antigua even challenged criminal convictions based on these laws.<sup>95</sup> Antigua argued that the United States had failed to open gambling to international competition by maintaining and enhancing state and federal laws that effectively prohibited gambling services from outside the United States to American consumers. It asserted that in so doing the United States violated its commitments under GATT to open “entertainment” and “other recreational services.”

The United States offered a host of defenses. It first suggested that laws preventing online gambling are not “measures” preventing market access, at least as defined in GATS.<sup>96</sup> Alternatively, even if they are “measures,” the United States never committed to open up competition in *gambling* services, which should be considered “sporting” services explicitly carved out from the American liberalization commitment. Alternatively, even if the United States committed to open up competition in gambling and has failed to do so, there are strong moral reasons to refuse

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<sup>95</sup> See *United States v. Syrax*, 235 F.3d 422 (9<sup>th</sup> Cir. 2000), *cert. denied*, 532 U.S. 988 (2001); *United States v. Cohen*, 260 F.3d 68 (2<sup>nd</sup> Cir. 2001), *cert. denied*, 122 S. Ct. 2587 (2002); *Humphrey ex rel. State v. Granite Gates Resorts, Inc.*, 568 N.W.2d 715, 721 (Minn. Ct. App. 1997); *State v. Interactive Gaming & Communications Corp.*, No. CV97-7808 (Mo. Cir. Ct. 22 May 1997); *Vacco ex rel. People v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844, 854 (N.Y. Sup. Ct. 1999).

<sup>96</sup> GATS, Art. XVI.

to permit online gambling.<sup>97</sup> Specifically, the United States argued that online gambling operations are often anonymous and thus difficult to trace, promoting organized crime, money laundering, and fraud.<sup>98</sup> It also observed that making gambling available via home computers presented risks for youth and addicted adults.<sup>99</sup>

Dispute resolution under GATS follows the same procedure as that for trade in goods. The General Council of the World Trade Organization, which is composed of one representative from each WTO member state, sits also as the Dispute Settlement Body (“DSB”) of that organization. When a member state challenges another member state’s compliance with WTO obligations, the challenger can seek resolution of the dispute through the DSB. The Secretariat of the WTO recommends three panelists to sit on the dispute, with the Director-General of the WTO empowered to select panelists lacking agreement among the parties.<sup>100</sup> The decision of the panel is automatically adopted by the DSB, barring either appeal or a *unanimous* rejection of the report by the DSB. An appeal from the panel decision is heard by three members of the Appellate Body, which is composed of seven individuals serving four year terms.<sup>101</sup> If the panel or Appellate Body concludes that a measure is inconsistent with a WTO obligation, “it shall recommend that the Member concerned bring the measure into conformity...”<sup>102</sup> If the state refuses to bring its rules into compliance, the complaining state can suspend its own trade concessions towards the noncompliant state.<sup>103</sup>

In the case of the Antigua-United States dispute, the parties could not agree on the panelists, and so the Director-General, Supachai Panitchpakdi, appointed the panelists.<sup>104</sup> He chose B.K. Zutshi, a former Indian ambassador to GATT and chief negotiator for New Delhi on services during the Uruguay Round; Virachai Plasai, the head of Thailand’s Treaty Division of the Ministry of Foreign Affairs; and Richard Plender, a U.K.-

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<sup>97</sup> A nation is permitted to maintain a trade restrictive measure if “necessary to protect public morals or to maintain public order.” GATS, Art. XIV(a).

<sup>98</sup> *First Written Submission of the United States*, WT/DS285, Nov. 7, 2003, at 4.

<sup>99</sup> *Id.*

<sup>100</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes [hereinafter “DSU”], art. 8(7), Marrakesh Agreement Establishing the World Trade Organization, Annex 2, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994).

<sup>101</sup> For a photograph of the current members, *see supra* Figure 1.

<sup>102</sup> DSU, art. 19(1).

<sup>103</sup> GATS, Art. XXIII(2) (if the Dispute Settlement Body so authorizes, a member-state can suspend its obligations and commitments with respect to the non-compliant state).

<sup>104</sup> Secretariat of the World Trade Organization, *Constitution of the Panel Established at the Request of Antigua and Barbuda*, Aug. 26, 2003, available at <http://www.natlaw.com/pubs/spabbs1.htm>.

based trade attorney.<sup>105</sup> The panel issued a preliminary ruling on March 24, 2004, upholding the Caribbean nation's claim.<sup>106</sup> Antigua's WTO Ambassador hailed the 270-page confidential preliminary ruling as a "great victory" for a "little country."<sup>107</sup> The panel confirmed its interim report in a final ruling on April 30.<sup>108</sup> Days before the panel was to make its ruling public, however, the two countries asked the panel to suspend its work, and the panel complied.<sup>109</sup> This marked the first time that the WTO had failed to make public a final WTO panel ruling as a result of an agreement between the parties.<sup>110</sup>

According to officials, the panel held that the United States had indeed committed to market access for gambling services, and that the commitment extended to *all means of delivery, including the Internet*.<sup>111</sup> Moreover, the panel rejected the American defense of public morality, offering that the United States had failed to talk in good faith with Antigua on effecting a solution that might have met American concerns while permitting Antigua market access.<sup>112</sup>

Antigua presumably agreed to the American request to suspend the panel report because it believed that it would fare better through a privately negotiated settlement—with a favorable panel decision in hand—than through continuing the WTO dispute resolution process. Antigua faced some risk that the panel's report would be weakened or reversed on appeal. For its part, the United States likely saw the public release of the panel report as a threat. The panel report would have offered other countries the blueprint for cases against the United States with respect to various services, including gambling. If the United States had lost its appeal, then it would face the prospect of either complying or suffering retaliation. If the

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<sup>105</sup> *Id.* To prevent the selection of panels entirely from industrialized nations, in cases involving a developing country, the developing country can request that at least one panelist hail from another developing country. DSU, art. 8(7).

<sup>106</sup> *Antigua-Barbuda Wins WTO Interim Ruling Against U.S. Internet Gambling Restrictions*, 21 INT'L TRADE REP. 514 (Mar. 25, 2004).

<sup>107</sup> *Id.*

<sup>108</sup> Daniel Pruzin, *WTO Issues Final Ruling Backing Complaint Against U.S. Online Gambling Restrictions*, 21 INT'L TRADE REP. 787 (May 6, 2004).

<sup>109</sup> Daniel Pruzin, *U.S., Antigua in Talks to Resolve WTO Dispute Over Internet Gambling*, 21 INT'L TRADE REP. 1155 (July 8, 2004).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* The panel decision was not unprecedented in international law. In a case decided in 2003, the European Court of Justice had held that European obstacles to the operations of United Kingdom online gambling companies might violate the European Union's guarantee of the freedom to provide services, unless the restrictions can be justified by legitimate national goals. See *Gambelli* (Case C-243/01), E.C.J., Nov. 6, 2003, available at <http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&docrequire=alldocs&numaff=&datefs=2003-1-1&datefe=2004-12-31&nomusuel=gambelli&domaine=&mots=&resmax=100>.

Dispute Settlement Body's Appellate Body upheld the panel decision, then Antigua would ask the United States to modify or withdraw its trade restrictive measures to permit gambling services from Antigua.<sup>113</sup> If the United States refused to comply, then Antigua could return to the WTO Dispute Settlement Body for authorization to suspend its trade commitments vis-à-vis imports from the United States to impose a penalty roughly equivalent to the loss arising from the American GATS violation.<sup>114</sup>

The threat to American democracy from a small Caribbean nation seems overblown. Even after losing a case in the WTO, popular sovereignty in the United States remains secure. Should the United States negotiate to permit Antiguan corporations (many of which are likely to be owned by Americans<sup>115</sup>) to provide gambling services to Americans through the web, it is likely to be strictly regulated to allay concerns about money laundering, fraud, and gambling by minors.<sup>116</sup>

But the United States does not even have to go that far. It could simply permit Antigua to resume its case and seek DSB authorization for retaliatory sanctions. Antigua claims that over the last three years, it has suffered \$90 million in damages from the American trade restrictions. Antigua could accordingly seek to exact an equivalent amount from United States exporters. Such a move would, of course, make the American products subject to retaliation less competitive in Antigua. As of June 30, 2004, the WTO has authorized the suspension of concessions seven times, implying that in seven cases countries refused, at least for a while, to comply with earlier WTO rulings.<sup>117</sup> An eighth case was recently added to the list, with the WTO authorizing sanctions for the American failure to repeal a provision in an anti-dumping law known as the "Byrd Amendment" which transfers fines exacted on "dumping" foreign companies to their American competitors.<sup>118</sup> That case is likely to prove to be quite expensive,

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<sup>113</sup> If the measure is determined by the DSB to have nullified or impaired such a benefit, the Member affected shall be entitled to a mutually satisfactory adjustment, which may include the modification or withdrawal of the measure. DSU, Article XXI(2).

<sup>114</sup> If the DSB considers that the circumstances are serious enough to justify such action, it may authorize a Member or Members to suspend the application to any other Member or Members of obligations and specific commitments. DSU, Art. 22.

<sup>115</sup> Antigua welcomes foreign investors, generally permitting foreigners to own one-hundred percent of a corporation. See Government of Antigua and Barbuda, *Incentives for Investors*, at [http://www.antigua-barbuda.com/finance\\_invstmnt/body\\_incent\\_invest.html](http://www.antigua-barbuda.com/finance_invstmnt/body_incent_invest.html)

<sup>116</sup> One can imagine, for example, requiring authentication services that help assure the age of the gambler and refuse participation from anonymous persons. Perhaps also the gambling regime might require geocalizing technology that would assure (with a high degree of confidence, but not full assurance) that the gambler was not gambling from an American jurisdiction that forbids such activity.

<sup>117</sup> World Trade Organization, *Update of WTO Dispute Settlement Cases* at ii, WT/DS/OV/21 (30 June 2004).

<sup>118</sup> WT/DS217 and WT/DS234; see *WTO Authorizes Sanctions on U.S. for Antidumping Law*, WALL ST. J. ONLINE, Aug. 31, 2004, at



as the winning complainants include many of the world's largest economies: Brazil, Canada, Chile, the European Communities, India, Japan, Korea and Mexico. The European Union, for its part, has refused to comply fully with the requirements of WTO rulings in two cases involving animals.<sup>119</sup> In one case, the EU refused to withdraw a regulation barring the import of animals trapped through leghold traps.<sup>120</sup> And despite an adverse Appellate Body ruling, the EU continued its ban on the import of beef from countries employing certain hormones for growth. In the latter case, the United States and Canada imposed, after WTO authorization, retaliatory duties of 116.8 million U.S. dollars and 11.3 million Canadian dollars, respectively.<sup>121</sup>

Non-compliance does not come free. In addition to the harm caused to a nation's exporters by the retaliatory removal of trade concessions vis-à-vis that nation, the cost of non-compliance would be impediments to free trade, with their concomitant dead-weight losses generally dispersed widely among the nation's and the world's consumers. Equally importantly, by refusing to stand by its WTO commitments, the United States would undermine its own efforts to exact compliance from the many states we have accused of abridging their WTO commitments.<sup>122</sup> As Harold Koh notes, "for any nation consciously to ignore global standards not only would ensure constant frictions with the rest of the world, but also would diminish that nation's ability to invoke those international rules that served its own national purposes."<sup>123</sup> If a practice of noncompliance became routine, then the benefits of trade liberalization would be eroded, and economic productivity stifled. Nonetheless, the availability of that option helps ensure the trade regime's compatibility with national democracy.

The fact that a nation can refuse to comply with a WTO ruling does not render the WTO DSB a dead letter. Exporters who suffer retaliatory sanctions are likely to employ local political processes to try to bring the country into compliance. The European Union has even targeted American exporters in politically powerful "swing states," hoping thereby to increase political pressures for compliance. But this politicking is exactly what democracy involves.

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[http://online.wsj.com/article/0,,SB109395997886305693,00.html?mod=home\\_whats\\_news\\_us](http://online.wsj.com/article/0,,SB109395997886305693,00.html?mod=home_whats_news_us) (describing WTO ruling authorizing retaliatory sanctions for U.S. failure to comply with earlier WTO ruling requiring repeal of Byrd Amendment).

<sup>119</sup> Sebastiaan Princen, *EC Compliance with WTO Law: The Interplay of Law and Politics*, 15 *EUR. J. INT'L L.* 555 (2004).

<sup>120</sup> After winning the case, the United States and Canada agreed to meet certain standards for fur traps to meet EU demands. Princen, *supra* note 119, at 563-65.

<sup>121</sup> Princen, *supra* note 119, at 570.

<sup>122</sup> See United States Trade Representative, *Dispute Settlement Update* 1-6 (Mar. 9, 2004) (summarizing currently pending disputes brought by the United States in the WTO).

<sup>123</sup> Harold Hongju Koh, *International Law as Part of Our Law*, 98 *AM. J. INT'L L.* 43 (2004).

Yet another option exists that is compatible with democracy. Antigua estimates the cost over the last three years of American trade restrictions on gambling to have cost its businesses \$90 million. The United States might simply offer to pay Antigua the amount it has lost—and will continue to lose—due to the restrictions. Consider for example a WTO panel’s ruling that United States music licensing exemptions (e.g., for restaurants) violated TRIPS<sup>124</sup> copyright obligations.<sup>125</sup> Instead of either modifying its own law or permitting the EU to issue retaliatory sanctions, the United States made a lump-sum payment of \$3.3 million to the EU, to a fund established to finance activities of general interest to music copyright holders.<sup>126</sup> The arrangement covers the three-year period ending December 31, 2004.<sup>127</sup> As in the breach of a contract, the breaching party can simply make the counterparty whole, and thus largely indifferent to the breach.<sup>128</sup> This suggests a rather happy, democracy-compatible view of the WTO regime.

Philip Trimble argues that “popular review” of international decisions would sustain democracy in the face of international institutions, but only where such review would permit the people “to reject the decision ... without being punished” for that rejection.<sup>129</sup> But why does such review have to be cost-free in order to be democratic? As a matter of course, democracies make choices that are costly.

In a related argument, Paul Stephan suggests that the right to exit from an international treaty commitment is an “empty threat” because “the cost of withdrawal likely will exceed the harm caused by any particular decision reached at the international level.”<sup>130</sup> But such a cost-benefit analysis does not prove the right to exit to be empty; rather it suggests that the harm is not particularly severe, and that the benefit of entering into multilateral arrangements more than compensates for any associated costs. What’s more, the argument concedes that the international agreement is better for the party than its absence. Should not a democracy be able to choose an international commitment that it feels is likely to prove beneficial over

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<sup>124</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights [hereinafter TRIPS], Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

<sup>125</sup> Panel Report, United States-Section 110 (5) of the US Copyright Act, WT/DS160/R (15 June 2000).

<sup>126</sup> United States Trade Representative, *Dispute Settlement Update* 10 (Mar. 9, 2004), *a v a i l a b l e* *a t* [http://www.ustr.gov/Trade\\_Agreements/Monitoring\\_Enforcement/Dispute\\_Settlement/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/Section_Index.html).

<sup>127</sup> *Id.*

<sup>128</sup> Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 J. LEGAL STUD. S179 (2002).

<sup>129</sup> Philip R. Trimble, *Globalization, International Institutions, and the Erosion of National Sovereignty and Democracy*, 95 MICH. L. REV. 1944, 1968 (1997).

<sup>130</sup> Stephan, *International Governance*, *supra* note 14, at 250.

time? Furthermore, an objecting country could repudiate its obligations selectively, rather than renounce the treaty in its entirety.

John Jackson has prominently suggested that, under international law, the United States *must* comply with a final DSB ruling—that the WTO system does not permit “efficient breach,” at least not ones that continue over time.<sup>131</sup> This view may be problematic from the standpoint of democratic legitimacy if it suggests that the ordinary political process within a country cannot reverse an earlier commitment, even after paying a price. In any case, it is not the view that countries have clearly embraced over the short history of the WTO.

The possibility of non-compliance suggests that one popular argument about international trade regimes may be precisely backward. Defenders of international trade regimes suggest that international trade law enhances democracy by committing a country to free trade, benefiting consumers instead of narrow entrenched constituencies that benefit from protectionist policies. John O. McGinnis and Mark L. Movsesian explain: “International free trade and domestic democracy share a common enemy—protectionist interest groups. Therefore, constitutive structures that restrain such groups can simultaneously reinforce both trade and democracy.”<sup>132</sup> Referring to the “fast-track” procedure whereby Congress granted the executive the power to negotiate wide ranging trade agreements that could not be disaggregated upon Congressional review, Robert Keohane and Joseph Nye write: “Congress agreed to ‘tie itself to the mast’ as it sailed by specific protectionist sirens.”<sup>133</sup> But the possibility of non-compliance—either in the form of accepting retaliatory sanctions or making compensating payments—suggests that the international trade regime may not play this vaunted role with great certainty. Having lost when trade commitments were being made, constituencies seeking protection against international competition might instead seek to head off any enforcement of those obligations.

The irony is that democracy lies not in committing oneself to free trade above all else as McGinnis and others would argue, but rather in being able to choose another important value on a current basis. Democracy persists as long as We the People, even faced with a WTO ruling that calls into question a host of local regulations, can still assert our will through

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<sup>131</sup> John H. Jackson, *International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to “Buy Out”?*, 98 AM. J. INT’L L. 109, 123 (2004) (“[T]he result of a WTO dispute in a panel or (sometimes) appellate report ... is to create an international law obligation to comply with that report (when it is adopted, as they almost always are).”).

<sup>132</sup> John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 604 (2000).

<sup>133</sup> Robert O. Keohane & Joseph S. Nye, Jr., *The Club Model of Multilateral Cooperation*, in EFFICIENCY, EQUITY, AND LEGITIMACY 264, 267 (Roger B. Porter et al. 2001).

normal political processes over such regulation.

### **C. Indonesia and the International Monetary Fund**

*Wulan and her husband, Joko, come from poor families that have always eked out their living in the informal sector. They reside in the densely crowded squatter settlement of Tanjungrejo in East Java, where most people work as scavengers, day laborers, rickshaw drivers, and petty traders. Wulan is the ninth of thirteen children, only four of whom have lived to adulthood... Wulan married Joko when she was 21; she has two children who are now 8 and 12 years old. Joko works as a becak (three-wheeler) driver. He rents his vehicle from the owner at a daily rate of 40,000 rupiah (about US\$5 at the time of the study). Before the economic crisis, he could earn a profit of Rp. 8,000 to Rp. 10,000 a day (US\$1 to \$1.25). Now, though, he has very few customers. He sometimes comes home in the evenings without any earnings at all and even asks Wulan for money to pay the daily becak rent. If he defaults on the rent, the owner may not let him operate the vehicle again. Joko once tried to break out of this cycle by going to Malaysia as a migrant laborer, borrowing Rp. 1.5 million (US\$191) from a moneylender for the trip. However, because he did not go through legal channels he could not get a regular job. During the year he spent abroad, he only once sent home money, which Wulan used to pay off most of her debts.*

*Their landlord, in addition to charging rent, requires that all households sell any scavenged material to him at whatever price he determines. Households that work for him are allowed to use the local well that he built rather than a public well half a kilometer away. Wulan used to collect scrap materials to help earn income for the family, but with no one at home to care for her children, they became sick and malnourished. She stopped working in order to care for and spend time with them, but now she has no money for daily necessities, nor can she afford to send her children to school. Whenever she is completely out of money, Wulan pawns her clothes at a government-run pawnshop for Rp. 5,000 (75 cents) apiece. She has no other assets and very few clothes left. She dreads the day when she will be forced to borrow from the local moneylender,*

*who charges 20 percent interest per month. She knows that once she resorts to this she will inevitably sink deeper and deeper into debt.*<sup>134</sup>

The immiseration of millions of Indonesians such as Wulan and Joko in 1997 and 1998 resulted from forces far beyond their control. A currency crisis in Thailand in May 1997 caused the international financial markets to review holdings in all emerging market countries, especially in Southeast Asia, for evidence of error. Indonesia had been a darling of the investment community, with the stock of foreign private debt in that country rising from \$38 billion in 1995 to \$65 billion just before the crisis and \$82 billion by the end of 1997.<sup>135</sup> It ran a moderate current account deficit of less than 4% of GDP.<sup>136</sup> Its public fiscal balance was in surplus.<sup>137</sup> But, after many years of high growth and despite “healthy fundamentals,”<sup>138</sup> market sentiment turned bearish, and Indonesia suffered the national version of a bank run.<sup>139</sup> Anyone who could, including both foreigners and rich Indonesians, pulled their money out in search of safer banks and safer currency. A crisis of confidence destabilized the financial

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<sup>134</sup> Nilanjana Mukherjee, *Indonesia: Coping with Vulnerability and Crisis*, in VOICES OF THE POOR: FROM MANY LANDS 181, 181-82 (Deepa Narayan & Patti Petesch eds. 2002). The “Voices of the Poor” project is an effort by the World Bank to listen to the viewpoints of people who are traditionally outside the policy-formulation process.

<sup>135</sup> INTERNATIONAL MONETARY FUND INDEPENDENT EVALUATION OFFICE, THE IMF AND RECENT CAPITAL ACCOUNT CRISES: INDONESIA, KOREA, BRAZIL, ANNEX I: INDONESIA 61 (2003) [hereinafter IMF INDONESIA EVALUATION REPORT].

<sup>136</sup> *Id.* at 62. As a point of comparison, in 2003, the U.S. current account deficit was 4.8% of GDP. This is calculated from figures for current account deficit at <http://www.bea.gov/bea/newsrel/transnewsrelease.htm> (reporting current account deficit of \$530,668 million in 2003) and figures for GDP at <http://www.bea.doc.gov/bea/dn/gdplev.xls> (reporting GDP of \$11,004,000 million in 2003).

<sup>137</sup> IMF INDONESIA EVALUATION REPORT, *supra* note 135, at 62. As a point of contrast, the United States federal budget deficit was 3.4 % of GDP in 2003. CONGRESSIONAL BUDGET OFFICE, CYCLICALLY ADJUSTED AND STANDARDIZED BUDGET MEASURES, UPDATED ESTIMATES 2 (Sept. 2004), available at <http://www.cbo.gov/ftpdocs/58xx/doc5802/09-14-BudgetMeasures.pdf>. The IMF Managing Director recently complained about the United States fiscal deficit. Elizabeth Becker, *I.M.F. Chief Sees Potential Hazard in U.S. Fiscal Policies*, N.Y. TIMES, at W1 (Sept. 21, 2004) (reporting IMF Managing Director Rodrigo de Rato’s complaint that the United States fiscal deficit of over four percent of its gross domestic product posed “a risk not only for the United States economy, but for the world economy”).

<sup>138</sup> Richard Borsuk & Jay Solomon, *Despite Its Healthy Fundamentals, Indonesia Might Need IMF Aid*, ASIAN WALL ST. J. 1, Oct. 7, 1997.

<sup>139</sup> Stephen Grenville, *The IMF and the Indonesian Crisis* 12 n. 17 (May 2004). Jeffrey Sachs, *The IMF and the Asian Flu*, 9 AMERICAN PROSPECT (1998), available at <http://www.prospect.org/print/V9/37/sachs-j.html> (“Each investor understood that Thailand, Indonesia, and Korea would be pushed into outright default if enough creditors pulled the plug on new loans. In the end, each creditor started to rush for the doors precisely because the other creditors were doing the same thing.”).

markets, which in turn destabilized the real economy, which in turn reduced confidence.<sup>140</sup> Indonesia went from “being a miracle, to needing one.”<sup>141</sup>

Indonesia was the hardest hit of the Asian tigers in the Asian Financial Crisis, suffering the deepest and most prolonged GDP decline. Real GDP fell 13% during the 1998/1999 fiscal year.<sup>142</sup> While the previous two decades had seen the proportion of the population in extreme poverty decline from 60 percent to 12 percent, the crisis left more than a quarter of Indonesia’s 207 million people in poverty.<sup>143</sup> Put another way, more than twenty-five million people joined the ranks of the poor as a result of this financial crisis. While the problems abated over time, Indonesia still bears the burdens of the era: “One of every three dollars the country earns from exports goes to service debt, unemployment is in double digits, and corruption continues.”<sup>144</sup>

But Michel Camdessus, the IMF’s managing director, saw the crisis as a “blessing in disguise,” providing an opportunity to make needed reforms in an authoritarian system that gave state preferences to President Suharto’s family and friends.<sup>145</sup> Before it committed funds to Indonesia, the IMF insisted on “structural conditionality,” requiring not only reforms in the banking sector at the heart of the crisis, but also reforms in the industrial and agricultural sector. The IMF demanded deregulation in numerous industries, including wood, cloves, and palm oil.<sup>146</sup> Paul Volcker derided the IMF structural conditionality outside the financial sector as looking less like a program to solve a financial crisis and more like a “recipe” for cooking<sup>147</sup> The public centerpiece of the program was the cancellation of the National Car Project, a public effort to create a local automotive

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<sup>140</sup> See International Monetary Fund, *Recovery from the Asian Crisis and the Role of the IMF*, June 2000 (“[A] change in market sentiment could and did lead into a vicious circle of currency depreciation, insolvency, and capital outflows, which was difficult to stop.”), at <http://www.imf.org/external/np/exr/ib/2000/062300.htm#box2> (last visited Oct. 20, 2003).

<sup>141</sup> See Ross McLeod, *Indonesia, in EAST ASIA IN CRISIS: FROM BEING A MIRACLE TO NEEDING ONE* (Ross McLeod & Ross Garnaut eds., 1998).

<sup>142</sup> By contrast, real GDP during the Great Depression in the United States fell 30% in the period from 1929 to 1933, and fell 2% during the recession of 1981 to 1982. Christina D. Romer, *Great Depression*, in *ENCYCLOPÆDIA BRITANNICA* (2003).

<sup>143</sup> Mukherjee, *supra* note 134, at 182 (noting that in late 1998/early 1999, the poverty rate reached 27 percent).

<sup>144</sup> Peter Waldman, *Indonesia Sours on U.S. And Exposes Weakness In American Behavior*, WALL ST. J. Eur. A1, Feb. 11, 2004.

<sup>145</sup> Richard Borsuk, *IMF Head Says Indonesian Crisis Could Be a Blessing*, WALL ST. J. A19, Nov. 13, 1997; Michel Camdessus, *The Asian Financial Crisis and the Opportunities of Globalization*, Address at the Second Committee of the United Nations General Assembly, New York, October 31, 1997; IMF INDONESIA EVALUATION REPORT, *supra* note 135, at 76.

<sup>146</sup> IMF INDONESIA EVALUATION REPORT, *supra* note 135.

<sup>147</sup> *Id.* at 77; GRENVILLE, *supra* note 139, at 12 n. 17.

industry. In many people's eyes, the National Car Project reflected state resources wasted on un-economic vanity projects, and was especially suspect because of the role of President Suharto's son in the project. The United States, the European Union, and Japan had long sought the cancellation of the National Car Program, and had even brought complaints before the WTO in 1996 that Indonesia was violating its national treatment obligation through preference for Indonesian-made car parts.<sup>148</sup> As the *Wall Street Journal* reported contemporaneously on the IMF structural conditionality program, "The reforms should increase competition and reduce prices in Indonesia, but also signal the IMF's attempt to use the current crisis to force President Suharto's government to weaken the rules that preserve the oligarch's control over sectors of the economy."<sup>149</sup>

Picture January 1998: IMF Managing Director Michel Camdessus, his demeanor stern, arms folded, standing over President Suharto, hunched over as he signs the Letter of Intent with the IMF.<sup>150</sup> Later that year, Indonesian economic officials agreed to restructure private debt, avoiding default by converting short-term private sector obligations into government-guaranteed long-term obligations.<sup>151</sup> This agreement, which was blessed by the IMF, was reached in Frankfurt, across the world from Indonesia. Years later, an internal investigation at the IMF would concede problems with feelings of "country ownership" vis-à-vis the IMF program.<sup>152</sup>

It is easy to see why critics of the IMF might complain of a democracy deficit. In the IMF, they find "an unaccountable autocracy in which the people most affected by its operations have no chance to participate."<sup>153</sup> One commentator accuses the IMF of hypocrisy: "Although Washington preaches democracy, the IMF conducts itself like a dictator. Those most affected by the IMF's policies have little influence on the conditions imposed."<sup>154</sup>

Is IMF intervention democratic? Can decisions made faraway in the IMF's Washington headquarters or in conference rooms in Frankfurt be consistent with Indonesian popular sovereignty?

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<sup>148</sup> The WTO panel decisions ultimately were resolved in the complainants' favor. See *Indonesia—Certain Measures Affecting the Automobile Industry*, WTO DS 54/DS 55/DS 59/DS 64 (1998). Grenville, *supra* note 147, 12 n. 18.

<sup>149</sup> Borsuk, *supra* note 145.

<sup>150</sup> Grenville, *supra* note 139, at 11 n. 16. The picture itself may be viewed at <http://wwwarc.murdoch.edu.au/asiaview/apr98/jakarta.htm>.

<sup>151</sup> IMF INDONESIA EVALUATION REPORT, *supra* note 135, at 78.

<sup>152</sup> *Id.* at 79.

<sup>153</sup> Catherine H. Lee, *To Thine Own Self Be True: IMF Conditionality and Erosion of Economic Sovereignty in the Asian Financial Crisis*, 24 U. PA. J. INT'L ECON. L. 875 (2003); John W. Head, *Seven Deadly Sins: An Assessment of Criticisms Directed at the International Monetary Fund*, 52 U. KAN. L. REV. 521, 532 (2004).

<sup>154</sup> John V. Paddock, *IMF Policy and the Argentine Crisis*, 34 U. MIAMI INTER-AM. L. REV. 155, 180-81 (2002).

It is important to disentangle two related questions: (1) Is the IMF a democratic institution in the way that it operates? And (2) is IMF economic assistance, and concomitant conditionality, consistent with the maintenance of national democracies? The first question is straightforward. The IMF does not purport to be democratic in its operations. Like all other major international institutions, it does not offer a franchise to the people of the world. Unlike many international institutions, the IMF does not even operate on the principle of one nation, one vote. Rather voting power is distributed according to each member's contributions to IMF capital, which are in turn based broadly on that state's relative size in the world economy. The Executive Directors of the United States, Japan, Germany, France, and the United Kingdom wield voting power far in excess of their relative populations: 17.14%, 6.15%, 6.01%, 4.96%, and 4.96%, respectively, of the total voting power.<sup>155</sup> As Iris Marion Young writes of the world's premier multilateral financial institutions, "Since voting power within the IMF and the World Bank depends on economic contribution to them, they do not even pretend to be inclusive and democratic."<sup>156</sup> Their undemocratic character is confirmed in the selection of their leaders, with the Managing Director of the IMF and the President of the World Bank selected, in an unwritten agreement among the major voting powers, "according to the wishes of the United States (in respect of the World Bank) or western Europe (in respect of the IMF)."<sup>157</sup>

With respect to the second question (whether the IMF undermines local democracy), while it is not indifferent to complaints that it undermines national democracy, the IMF itself does not accept such criticisms. Consider the IMF's own appraisal of its intervention in Indonesia.<sup>158</sup> That review suggests that, with respect to the crucial banking sector, the IMF "identified the key issues but *did not take a strong enough position.*"<sup>159</sup>

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<sup>155</sup> See International Monetary Fund, *IMF Members' Quotas and Voting Power, and IMF Board of Governors*, at <http://www.imf.org/external/np/sec/memdir/members.htm> (last updated Sept. 24, 2004). The IMF Executive Board has recently considered revising the quota formula, including perhaps increasing representation for countries that receive large capital flows. International Monetary Fund, *Report of the IMF Executive Board to the International Monetary and Financial Committee (IMFC) on Quotas, Voice and Representation* (Sept. 12, 2003), at <http://www.imf.org/external/np/fin/2003/quota/eng/091203.htm>.

<sup>156</sup> IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* 274 (2002).

<sup>157</sup> Ngaire Woods, *Making the IMF and the World Bank More Accountable*, 77 INT'L AFF. 83, 88 (2001).

<sup>158</sup> In 2001, the IMF established an Independent Evaluation Office to review IMF interventions. That office evaluated the IMF's conduct in three financial crises—Indonesia in 1997/1998, Korea in 1997/1998, and Brazil in 1998/1999—and issued its appraisal in 2003.

<sup>159</sup> *Id.* at 83 (emphasis added).



While the IMF acknowledged errors in its advice,<sup>160</sup> the “single greatest cause of the failure of the November 1997 program was the lack of a comprehensive restructuring strategy.”<sup>161</sup> Should it have the crisis to do over again, the IMF it seems would have adopted a stronger, *more interventionist* stance.

The IMF seems to have taken the view that control from its headquarters in Washington was more democratic than control from a palace in Jakarta. The IMF offered a variation on the Democratic Superiority of Global Rules in a Compromised Local Political Process claim<sup>162</sup>: enlightened rule from afar is superior to local dictatorial rule. Michel Camdessus, a Frenchman, would better protect the people of Indonesia than President Suharto. Indeed, the IMF’s post-crisis assessment concludes that “most of the reform measures [required by the IMF] were almost universally applauded within Indonesia, except by a small number of powerful elites.”<sup>163</sup> The problem of the lack of a feeling of “country ownership” in Indonesia, the IMF evaluation would later suggest, resulted because “the key political authority, the President, did not buy into the reform process.”<sup>164</sup> For the IMF, establishing “country ownership” of the reform program requires “an effective communications strategy,” not “wider consultation.”<sup>165</sup>

Jeffrey Sachs observes that for the IMF, “‘Ownership’ is simply a buzzword meaning happier compliance with the directives from Washington.”<sup>166</sup> But the IMF argument does seem to have some traction when it comes to authoritarian states: Internationally reputable technocrats

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<sup>160</sup> A crucial issue relates to the IMF’s views as to the exchange rate regime and capital account convertibility. As the IMF notes in a new paper, “some have argued that the IMF, in concert with some major shareholder governments, had encouraged member countries to liberalize the capital account—prematurely as alleged—and thereby subjected them to the volatility of international capital flows.” Independent Evaluation Office International Monetary Fund, *The IMF’s Approach to Capital Account Liberalization 2* (July 2004). Unlike Indonesia, Malaysia responded to the financial crisis by instituting capital controls in 1998, “aimed at restricting portfolio capital outflows by subjecting the repatriation of the proceeds from sale of Malaysian securities by nonresidents to a 12-month holding period.” *Id.* at 8. The IMF’s Independent Evaluation Office (IEO) has yet to itself assess the Malaysian measure but notes that “the Malaysian experience has received some positive academic assessment.” *Id.* The IEO attributes this positive reception potentially “to the controls’ strictly temporary nature, the supporting policies..., Malaysia’s institutional capacity, and a generally favorable external environment.” *Id.*

<sup>161</sup> INTERNATIONAL MONETARY FUND INDEPENDENT EVALUATION OFFICE, THE IMF AND RECENT CAPITAL ACCOUNT CRISES: INDONESIA, KOREA, BRAZIL, INDONESIA 1 (2003) [hereinafter IMF CAPITAL ACCOUNT CRISES REPORT].

<sup>162</sup> See *supra* notes \_\_\_-\_\_\_ (discussing the claim of WTO defenders that the WTO helps prevent against interest group capture of national decision-making).

<sup>163</sup> IMF INDONESIA EVALUATION REPORT, *supra* note 135, at 79.

<sup>164</sup> *Id.*

<sup>165</sup> IMF CAPITAL ACCOUNT CRISES REPORT, *supra* note 165, at 43.

<sup>166</sup> Sachs, *supra* note 139.

might make for better philosopher kings than local dictators. Yet in the case of Indonesia the local autocrats had in place a well-regarded and proven economic team with a track record of successful economic management, at least pre-financial crisis. Second, the international advisors might have been compromised by commitments to deregulatory measures and the sanctity of contract, commitments that served the economic interests of the IMF's major shareholders.<sup>167</sup> Third, the international community has not vested the IMF with the power to employ its authority and capital to act, in the words of the *Wall Street Journal*, as "king-unmaker."<sup>168</sup> Indeed, even after the installation of a democratically elected government in Indonesia, the IMF, confident of its own prescriptions, resisted the new government's plan to anchor the rupiah through a currency board.<sup>169</sup>

Defenders of the IMF are not without alternative arguments. Indeed, an argument can be made in favor of democratic consistency of IMF intervention, one applicable to both authoritarian and democratic states. The IMF intervention followed only upon an Indonesian request for assistance. Unlike the WTO, which imposes ongoing obligations on its members, the IMF imposes substantive policy obligations only on those nations that seek its assistance on one-off bases. In October 1997, after watching the rupiah tumble 35%, Indonesia turned to the IMF for assistance to help restore international confidence in the country.<sup>170</sup> The IMF made available billions of dollars in loans, but expected that the country would abide by economically sound policies. The deal struck with the IMF was a contract—one that required something from each party. The IMF structural conditionality was simply a part of a deal that was, overall, beneficial to the country and its people. At least this must be the *ex ante* view of the nation entering into such an agreement.

Contracts, of course, are an expression of sovereignty and autonomy. Historically, slaves and women were denied the right to contract on their own behalf, further reducing their ability to control their environment. Yet, contracts can have coercive features. Contracting during

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<sup>167</sup> "After Mr. Suharto resigned amid the 1998 Asian economic crisis, U.S. officials poured in to Indonesia to advocate a new era of democracy, transparency and rule of law. At the same time, amid talk in Jakarta of canceling business deals that had enriched Suharto's friends, American diplomats and legislators strove to protect the contracts." Peter Waldman, *Indonesia Sours on U.S. And Exposes Weakness In American Behavior*, WALL ST. J. EUR. A1, Feb. 11, 2004.

<sup>168</sup> Editorial, *IMF 1, Democracy 0*, ASIAN WALL ST. J., June 20, 1999.

<sup>169</sup> The *Journal* blamed the U.S. government for the IMF's intransigence and imperial manner: "Since the IMF will be taking orders from Treasury, Mr. Summers should be held responsible for the Fund's latest ukase in Indonesia, where the arrival of democracy means that locals can go through the motions of an election, but outsiders still get to set monetary policy." *Id.*

<sup>170</sup> Richard Borsuk and Darren McDermott, *Indonesia Turns to IMF for Aid*, WALL ST. J. A13, Oct. 9, 1997.

crises is especially suspect. When one side to the deal lacks the power to say no without disastrous consequences, the terms of the deal may be unjust.<sup>171</sup> Desperate exchanges must be judged carefully. Indeed, in the common law, such deals may be unenforceable if one party employed its monopoly on a necessary resource to extract an extravagant price. Moreover, in the case of international agreements between the government of a country and a foreign financial institution, it is not always to be assumed that the government's motivation in entering a contract is the benefit of the people.<sup>172</sup>

Examined from the perspective of the kind of question that Bickel and Ely asked of constitutional judicial review—Do We the People of Indonesia retain the ability to review, revise, and reject the IMF conditions?—the IMF's interventions appear increasingly undemocratic. Nations may be able theoretically to review and repeal the IMF package, but the pressure during a crisis to take the package offered by the IMF is extraordinary:

[w]hen the United States informs a poor developing country that it must agree with the IMF or else lose access to foreign aid, the goodwill of major governments, chances for debt restructuring, and the confidence of the private markets, which are encouraged by the G-7 to use IMF agreements as the focal points for their own bargaining, the notion of voluntarism is a bit stretched.<sup>173</sup>

The world financial community's assessment of a country in crisis follows largely the IMF's views, and thus states reject the IMF at their own peril. Sachs writes, "The IMF gets its way in the developing world because to disagree publicly with the IMF is viewed in the international community as rejecting financial rectitude itself."<sup>174</sup> Of course, immense pressure is not the same as inescapable coercion. Indonesia's neighbor, Malaysia, pointedly did not seek an IMF program of financial assistance. This left Malaysia free to adopt policies that the IMF would likely not have tolerated, principally the institution of temporary capital controls to slow the outflow of capital from the country.<sup>175</sup> But Malaysia's case was different than Indonesia, and few countries are willing to risk venturing alone on their

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<sup>171</sup> MARGARET JANE RADIN, *CONTESTED COMMODITIES* (2001).

<sup>172</sup> Anupam Chander, *Odious Securitization*, EMORY L. J. (2004).

<sup>173</sup> Sachs, *supra* note 139.

<sup>174</sup> *Id.*

<sup>175</sup> On the Malaysian capital controls, see Ethan Kaplan & Dani Rodrik, *Did the Malaysian Capital Controls Work? in* PREVENTING CURRENCY CRISES IN EMERGING MARKETS (S. Edwards & J. Frankel, eds., 2002); JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 122-26 (2002).

own program in the midst of a financial crisis.<sup>176</sup> Rejection may only be a theoretical possibility.

Not only is *rejection* of the IMF's program extremely difficult, even *review* of that program has historically been difficult. The Letter of Intent (LOI) that President Suharto signed ceremoniously in public was not itself made public, and thus the exact nature of the conditions that he had accepted were not available for public review. Secrecy in the conditions makes it difficult for the populace to review, revise, or reject the IMF's conditionality.<sup>177</sup> The IMF has made many of its LOIs subsequent to the Indonesian crisis public.

I have assumed thus far that the IMF's conditionality is oriented towards improving the national economy. But what if the IMF conditioned its aid on the institution of reforms designed to protect besieged minority communities within the nation-state? Such a move might well be consistent with Ely's version of democracy. Ely sees such a protective stance as appropriate for unelected judges because it preserves the equality of the members of society who are unlikely to be protected through majoritarian processes. I will return to this claim at the end of Part II.

Wulan and Joko, the husband and wife at grave risk as a result of the Indonesian financial crisis, are powerless in the face of national and international economic and political forces far beyond their control. Doing away with international institutions may, however, do little to remedy their plight. Rather international institutions need to be careful not to exploit their roles in crisis to demand reforms far beyond those necessary to deal with the crisis at hand.<sup>178</sup>

## II. DISCOVERING FUNDAMENTAL VALUES IN INTERNATIONAL LAW

International law can be understood as simply the solution to the various collective action problems that afflict humankind, from

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<sup>176</sup> The American economist Paul Krugman's call in *Forbes* magazine in August 1998 for capital controls helped assure the Malaysian authorities that not everyone in the international finance community would denounce their economic heterodoxy. Paul Krugman, *Capital Control Freaks: How Malaysia Got Away with Economic Heresy*, SLATE.COM, Sept. 27, 1999 at <http://slate.msn.com/id/35534/>.

<sup>177</sup> See JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 228-29 (2002) ("The absence of open discourse means that models and policies are not subjected to timely criticism... Secrecy ... undermines democracy."); Sachs, *supra* note 139 ("[A]ll IMF program documents should be made ... open to public debate and critical scrutiny").

<sup>178</sup> Yet another possibility is the emergence of well-capitalized regional institutions to address local difficulties. In 1997, Japan offered \$100 billion to establish an Asian Monetary Fund, an offer that was rebuffed by the United States and the IMF. STIGLITZ, *supra* note 177, at 112. Regional institutions might be more likely to constrain their policy demands on local states.

transboundary environmental flows to the rapid movement of capital and people.<sup>179</sup> But this proves an inadequate basis for much of the broad edifice of international law. Human rights law, in particular, is difficult to characterize as a response to an n-person prisoners' dilemma problem. In this Part, I will consider a number of proffered bases upon which to found a broad theory of international law, concluding that they may be incomplete, viewed from the perspective of their consistency with the notion of popular self-rule. I will argue that Ely's "representation-reinforcing theory of judicial review,"<sup>180</sup> duly modified, provides the needed supplement, indeed offering an alternative basis upon which to rest much of international law.

I begin by returning to my argument in Part I. There I suggested that Nationalists asked the wrong question about the transnational legal process (*viz.*, Are foreigners making decisions affecting Americans?), leading inevitably to the conclusion that democracy and international law were fundamentally incompatible. I suggested that posing the right question (*viz.*, Do We the People retain the power to review international issues through ordinary political processes?) helps us recognize the compatibility of democracy and international law. Relying on three case studies, I demonstrated that international law permits the people (at least the peoples of economically powerful states) to review, revise and reject its rules.

But international lawyers will recognize that this is an overstatement. International law actually lays claim to a grand superiority over national law. Indeed, the claim is even "super-constitutional"<sup>181</sup>—not even domestic constitutional processes are permitted to deviate from this potent element of international law. I refer, of course, to *jus cogens*.<sup>182</sup> These are the peremptory norms of international law, which are not susceptible to local derogation.<sup>183</sup> Can we still defend international law

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<sup>179</sup> Robert O. Keohane, *The Demand for International Regimes*, in INTERNATIONAL REGIMES 141, 170 (Stephen D. Krasner ed., 1983). Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L. J. 1397, 1402 (1998) (describing legal and international relations scholars who take such a view).

<sup>180</sup> ELY, *supra* note 8, at 181.

<sup>181</sup> South West Africa (Second Phase) (Eth. v. S. Afr.; Liber. v. S. Afr.), 1966 I.C.J. 6, 250, 297-98 (July 18) (Tanaka, J., dissenting).

<sup>182</sup> For an introduction and citations to the extensive literature on *jus cogens*, see MAURIZIO RAGAZZI, THE CONCEPT OF INTERNATIONAL OBLIGATION *ERGA OMNES* 43 n. 1 and accompanying text (1997).

<sup>183</sup> RESTATEMENT (THIRD), *supra* note 85, at § 102, comment k (1987) ("Some rules of international law are recognized by the international community of states as peremptory, permitting no derogation."); Vienna Convention on the Law of Treaties, Art. 53 ("[A] peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted...."). See also JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 242-53 (2002).

when it purports to impose upon the world a set of rules that afford no compromise? How can international law claim the authority to impose such fundamental values?

Ely was skeptical that the judiciary could discover fundamental values in constitutional interpretation. He canvassed various sources for such values, from the judge's own preferences to tradition, and found each wanting. But as a number of scholars have pointed out, Ely's own theory required a set of fundamental values in order to make procedural choices.<sup>184</sup> Like Rawls' approach, Ely's account requires only a thin theory of such values.<sup>185</sup> Ely's particular commitment is to an egalitarian democracy.<sup>186</sup> I will suggest that Ely's thin theory can be usefully adapted to the international setting to form a transnational legal process that can make useful distinctions between different kinds of minorities.

### A. Treaties

Treaties offer an obvious starting point for discovering international values. After all they represent the agreement of their signatories, or at least the agreement of the governments in place at the time of ratification. All one need do is faithfully apply the principles and rules set forth therein. But even more so than the U.S. Constitution,<sup>187</sup> treaties invite interpretation and reference standards beyond the text. Take for example the Rome Statute authorizing the International Criminal Court. As Madeline Morris notes, the Statute prohibits crimes against humanity, but even this leaves room for disagreement: "It is true that the prohibitions of genocide, war crimes, and crimes against humanity are unquestionable. But applying that law will turn out to be far more complex, and politically fraught, than are the definitions of the core prohibitions."<sup>188</sup> For a second example consider GATS's exemption for trade restrictive measures "necessary to protect *public*

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<sup>184</sup> See Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131 (1980); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980). Ely himself admits as much, saying at least his commitments are overt. See John Hart Ely, *Professor Dworkin's External/Personal Preference Distinction*, 1983 Duke L. J. 959, 980-81.

<sup>185</sup> That is not to say that Ely's thin theory of values is uncontroversial. His vision of an egalitarian democracy where majorities cannot run roughshod over the minority entails a greater degree of state intervention than many libertarians would abide.

<sup>186</sup> Ely writes that democracy entails both voting and egalitarianism: "Popular control and egalitarianism are surely both ancient American ideals; indeed, dictionary definitions of 'democracy' tend to incorporate both." ELY, *supra* note 8, at 76. His commitment to egalitarianism is perhaps most evident in his discussion of the treatment of minorities. *Id.* at 135-79.

<sup>187</sup> ELY, *supra* note 8, at 13 ("[T]he constitutional document itself, the interpretivist's Bible, contains several provisions whose invitation to look beyond their four corners...").

<sup>188</sup> Madeline Morris, *The Democratic Dilemma of the International Criminal Court*, 5 BUFF. CRIM. L. REV. 591, 597 (2002).

*morals.*”<sup>189</sup> GATS even requires the decision-maker to evaluate whether a member state has granted “sympathetic consideration” to the appeals of other member states.<sup>190</sup> The treaty never even defines the word “service.”

A clause-bound interpretivism, denying the judge any normative source outside the document, is likely to prove impossible in a large array of cases.<sup>191</sup> Thus, treaties are unlikely to settle entirely the demand for a source of values clearly representing the popular will. This, of course, does not mean that treaties are irrelevant to discovering fundamental values, only that they are likely to be an incomplete source.

## B. Consensus

International law, by and large, operates by consensus. Treaties, of course, represent the consensus of their signatories. Even customary international law, while not requiring explicit agreement of all states, permits a persistent objector to refuse in timely fashion the application to it of an international law rule with which it disagrees.<sup>192</sup> Can consensus provide the values necessary in the international system?

Thomas Franck powerfully argues that the fundamental international legal commitment is to fairness.<sup>193</sup> He recognizes that fairness is subject to varying interpretations—from societies that accept the Koranic injunction to cut off the hands of thieves to societies that deny women rights.<sup>194</sup> Where critics suggest that this leaves him open to the charge of moral relativism—where what is fair depends on the eye of the beholder—Franck responds that there is in fact significant and usable agreement on the fundamentals. He suggests that such consensus can be discovered in treaties: “[T]here is already general agreement among societies on a broad range of first principles and ... this agreement is evidenced by the negotiated texts of the most important global regimes: those governing human rights, trade, aspects of the environment, the use of force and diplomatic immunities, as well as establishing the parameters of treaty

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<sup>189</sup> GATS, art. XIV(a) (emphasis added).

<sup>190</sup> GATS, art. XXII(1).

<sup>191</sup> This, of course, is Ely’s conclusion with respect to the U.S. Constitution. ELY, *supra* note 8, at 12-13.

<sup>192</sup> RESTATEMENT (THIRD), *supra* note 85, § 102 reporters’ note 2; ANTHONY D’AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 70 (1971); Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y. B. INT’L L. 1, 21 (1985).

<sup>193</sup> FRANCK, *FAIRNESS*, *supra* note 31.

<sup>194</sup> FRANCK, *FAIRNESS*, *supra* note 31, at 14. *Cf.* Trimble, *supra* note 129, at 1953-54 (contesting possibility of international consensus on principles or processes for cooperation); *id.* at 1956 (calling “quest for a universal story” “quixotic”).

obligation.”<sup>195</sup> As we have noted, even treaties often require an interpreter to seek guidance outside the text.

The difficulty is that consensus, as Ely argued, may well consist in norms that are “uselessly general.”<sup>196</sup>

### C. Cosmopolitanism—A Global Difference Principle

Yet another type of fundamental value system can be found in the philosophy of cosmopolitanism.<sup>197</sup> Cosmopolitans declare themselves *citizens of the world*, and accordingly commit themselves to human, not just national, projects. A popular type of cosmopolitan ethic rests in a global variation on Rawls’ original position, where the rules for world society are to be devised.<sup>198</sup> “Denied knowledge of the country into which one is to be born (which is, after all, ‘an accident of birth’), the participants in this deliberation would choose to diminish the importance of one’s country to one’s flourishing, mindful that any of them might land in an impoverished or otherwise unlucky country.”<sup>199</sup> The participants in this global original position would choose a global difference principle, ordering social relations to improve the lot of the least advantaged worldwide.<sup>200</sup> Cosmopolitanism’s principal focus is on creating an international order that promotes distributive justice.

Cosmopolitans thus argue that through the application of public reason, we can fashion moral principles for a global society. For his part, Ely rejects, with characteristic verve, the possibility that the judiciary can find fundamental values through reason: he writes, “Some moral philosophers feel that utilitarianism is the answer, others feel just as strongly it is not.... The Constitution is supposed to follow the flag, but is it really supposed to keep up with the *New York Review of Books*?”<sup>201</sup> Reason may not be as unequivocal as cosmopolitans suggest. Ironically, Rawls himself disagreed with the cosmopolitans on how to internationalize his theory. Instead of a single global original position as the cosmopolitans

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<sup>195</sup> Thomas M. Franck, *Epistemology at a Time of Perplexity*, 13 *EURO. J. INT’L L.* 1025, 1027 (2002).

<sup>196</sup> ELY, *supra* note 8, at 64.

<sup>197</sup> See Martha Nussbaum, *Patriotism and Cosmopolitanism*, *BOSTON REV.*, Oct./Nov. 1994; Brian Barry, *Statism and Nationalism: A Cosmopolitan Critique*, 41 *NOMOS* 12, 25 (1999); Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, 25 *U. MICH. J.L. REFORM* 751 (1992).

<sup>198</sup> THOMAS W. POGGE, *REALIZING RAWLS* 240 (1989).

<sup>199</sup> Anupam Chander, *Diaspora Bonds*, 76 *N.Y.U. L. REV.* 1005, 1044 (2001).

<sup>200</sup> Compare Rawls’ original formulation of the difference principle, meant to be applied within a society. JOHN RAWLS, *A THEORY OF JUSTICE* s. 46 (1971) (“Social and economic inequalities are to be arranged so that they are ... to the greatest benefit of the least advantaged...”).

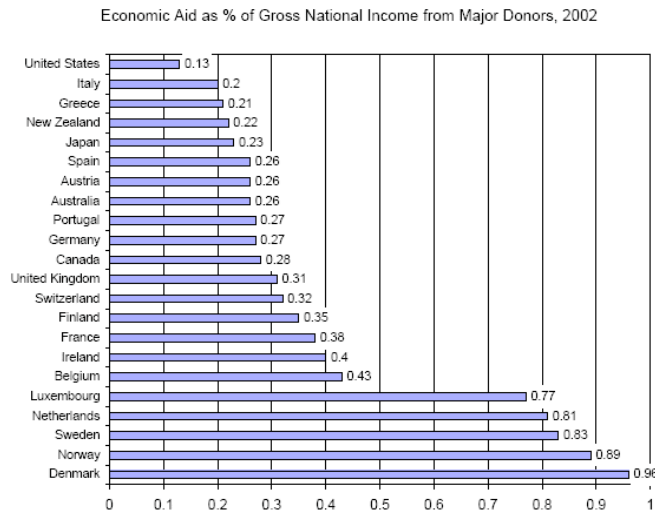
<sup>201</sup> ELY, *supra* note 8, at 58.



would prefer, Rawls argued for a two stage approach in his book, *The Law of Peoples*: first, engage in an original position dialog domestically within each liberal society, and then second, between those societies (followed by another move to include illiberal but “decent” societies).<sup>202</sup> Thus, the choice of a global difference principle remains controversial.

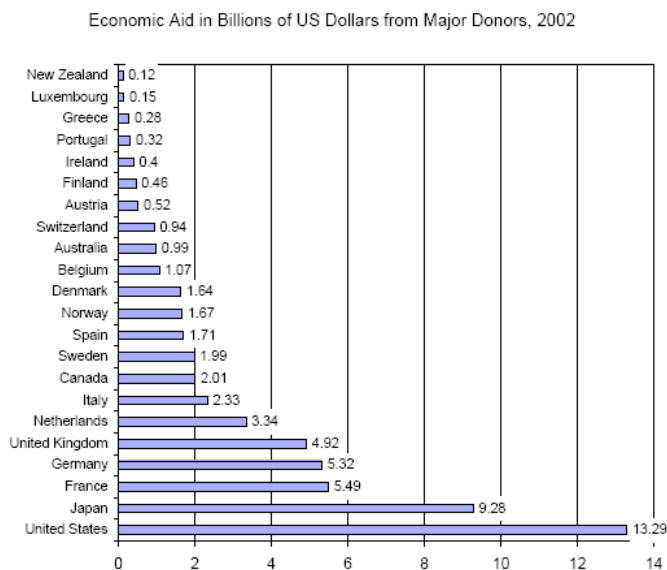
A common cosmopolitan ethics seems also inconsistent with actual practice. Consider the small sums allocated for foreign aid by the world’s richer nations. Figure 3 shows that the United States contributed merely 0.13%—a little more than 1/10<sup>th</sup> of one percent—of its gross national income in economic aid in 2002, while the most generous (as a percentage of its national income), Denmark, contributed almost one percent.

Figure 3<sup>203</sup>



<sup>202</sup> JOHN RAWLS, *THE LAW OF PEOPLES* (1999).

<sup>203</sup> Curt Tarnoff & Larry Nowels, *Foreign Aid: An Introductory Overview of U.S. Programs and Policy* 21, Congressional Research Service, Apr. 15, 2004, available at <http://fpc.state.gov/documents/organization/31987.pdf>.

Figure 4<sup>204</sup>

Ely also worries that judicial reference to reason will be “flagrantly elitist,”<sup>205</sup> choosing the values of the elite judges over those of the common person. He notes bitingly: “The list of values the Court and the commentators have tended to enshrine as fundamental is a list with which readers of this book will have little trouble identifying: expression, association, education, academic freedom.... But watch most fundamental rights theorists start edging toward the door when someone mentions jobs, food, or housing....”<sup>206</sup> This criticism may be more difficult to level against cosmopolitans. They rely largely on “public reason” in the hypothetical original position among ordinary representatives. They also champion exactly the values that Ely suggests that elites are likely to ignore.

Some Nationalists go so far as to suggest that not only is international law often inconsistent with democracy, but that cosmopolitan actions by nation states are fundamentally at odds with democracy.<sup>207</sup> Jack Goldsmith argues that the United States has no cosmopolitan duties because “theoretical, practical, and moral factors limit the duty of liberal democracies to engage in cosmopolitan action.”<sup>208</sup> Goldsmith first argues, relatively non-controversially, that “widespread and intense cosmopolitan

<sup>204</sup> *Id.* at 20. It is worth noting that Japan was the top contributor for more than a decade in dollar terms, only overtaken by the United States since 2001. *Id.*

<sup>205</sup> ELY, *supra* note 8, at 59.

<sup>206</sup> ELY, *supra* note 8, at 59.

<sup>207</sup> Jack Goldsmith, *Liberal Democracy and Cosmopolitan Duty*, 55 STAN. L. REV. 1667 (2003).

<sup>208</sup> *Id.* at 1669.

sentiments simply do not exist.”<sup>209</sup> Voters will throw out leaders who commit their countries to cosmopolitan policies that they dislike. The problem with Goldsmith’s argument is not in its descriptive claim—as we have seen,<sup>210</sup> foreign aid is relatively paltry even from the most generous of states—but in its normative overtones. Goldsmith would prefer cosmopolitan action by voluntary groups rather than by states, because “centralized coercion is not needed in the former case.”<sup>211</sup> However, such an argument would defeat not just policies directed outward, but all state structures not receiving unanimous endorsement, such as taxation. Goldsmith suggests that the “national interest” offers a limiting principle for a reformed “realistic cosmopolitanism.”<sup>212</sup> National interest would be narrowly defined according to the “strategic and security interests” of the nation-state; a nation-state would be free “to enhance its welfare in ways that help others.”<sup>213</sup> Apparently, the new “realistic cosmopolitanism” is Nationalism. Ely’s theory would certainly not declare a policy undemocratic simply because that policy sought principally to help others outside the polity. As Ely writes about affirmative action, there is “nothing constitutionally suspicious about a majority’s discriminating against itself...”<sup>214</sup> Should a society want to commit itself to cosmopolitan action, it can do so without jeopardizing its democratic nature.

Yet, still, given that cosmopolitanism remains less a theory about who we are than about who we might aspire to be,<sup>215</sup> it seems an inadequate foundation for discovering fundamental global values.

#### **D. Cosmopolitanism—Utility Maximization**

The principle of utility maximization, seeking the maximization of the satisfaction of the aggregate desires of individuals the world over, might offer an alternative normative commitment for international law.<sup>216</sup> Utilitarianism offers a cosmopolitan theory that would take everyone worldwide into account in its calculations. Utilitarianism has no theory to justify restricting its calculus to national borders. The philosopher Peter Singer, for example, has articulated a cosmopolitan vision resting on

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<sup>209</sup> *Id.* at 1677.

<sup>210</sup> *See supra* Figures 3 and 4.

<sup>211</sup> *Id.* at 1694.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> ELY, *supra* note 8, at 172.

<sup>215</sup> Chander, *Diaspora Bonds*, *supra* note 199, at 1047.

<sup>216</sup> Utilitarianism pays attention to individuals without distinction. As Ely describes it, “Utilitarianism claims that people are treated as equals when the preferences of each, weighted only for intensity, are balanced in the same scales, with no distinctions for persons or merit.” Ely, *Dworkin*, *supra* note 184, at 968. Ely himself at various points expresses sympathy for utilitarianism.

utilitarianism.<sup>217</sup> Classical economics as formulated by Adam Smith grew up in response to the existing mercantile theories that pitted national economies against each other.

Issues of justice, especially distributional justice, lead many to be skeptical of a utilitarian rule, so it is a very controversial normative principle in the first instance.<sup>218</sup> Second, even if one accepts utilitarianism as a normative principle, it is difficult to know how to operationalize it. Given the impossibility of interpersonal comparisons of utility, it is difficult to formulate the proper policies to maximize utility. Advocates of the free market note that the market expresses such preferences without need for policy-makers. However, this proves true only in the absence of market imperfections. A utilitarian principle by itself would likely prove open to broad interpretation and argument on the part of the decision-maker.

### **E. Natural Law**

International law has never truly shed its natural law origins.<sup>219</sup> To this day, international tribunals cite “principles of humanity” as motivating decisions.<sup>220</sup> Again, the fundamental defect as a normative principle is that notions such as “principles of humanity” leave large amounts of room for debate and interpretation.<sup>221</sup> What Ely writes about the invocation of “natural law” in domestic constitutional jurisprudence seems equally applicable to its invocation in international law: “It has thus become increasingly evident that the only propositions with a prayer of passing themselves off as ‘natural law’ are those so uselessly vague that no one will notice—maxims of the ‘No one should needlessly inflict suffering’ sort.”

### **F. World Public Order of Human Dignity**

The New Haven School of International Law has developed perhaps the most explicit and robust set of normative commitments for a world

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<sup>217</sup> PETER SINGER, *ONE WORLD: THE ETHICS OF GLOBALIZATION* (2002).

<sup>218</sup> See, e.g., AMARTYA SEN & BERNARD WILLIAMS, *UTILITARIANISM AND BEYOND* (1982); JOHN RAWLS, *A THEORY OF JUSTICE* (rev. ed. 1999).

<sup>219</sup> Modern international law developed in significant part through the writings of natural law theorist Hugo Grotius. Detlev Vagts & David J. Bederman, *Hugo Grotius and International Relations Theory*, 86 AM. J. INT’L L. 411 (1992).

<sup>220</sup> International Court of Justice, *Advisory Opinion in Legality of Nuclear Threat and Use* (1996).

<sup>221</sup> This echoes an early critique by McDougal, Lasswell, and Reisman. See Myres S. McDougal *et al.*, *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 VIRG. J. INT’L L. 189 (19\_\_), reprinted in MYRES S. MCDUGAL & W. MICHAEL REISMAN, *INTERNATIONAL LAW ESSAYS* 43, 76 (1981) (“The naturalists have ... seldom achieved a comprehensiveness and clarity in goal postulation which would effectively assist problem solving in international law.”).

public order. The founders of the school, Myres McDougal and Harold Lasswell, undertook historical and anthropological research to inventory human desires.<sup>222</sup> They concluded that “[a]ll people value power, enlightenment, wealth, well-being, skill, affection, respect and rectitude.”<sup>223</sup> Underlying even these values is an overall commitment to a world public order of human dignity.<sup>224</sup> In identifying these values, McDougal and Lasswell rely on a consensus in the aims of world’s major systems of public order, which differ not on their broad goals, but in the “details of the institutionalized patterns of practice by which they seek to achieve such goals...”<sup>225</sup>

The New Haven School’s systematization of the information relevant to legal decision and the process of such a decision produces a more rational decision, one more likely to achieve the desired normative goals.<sup>226</sup> But it “does not promise or guarantee one correct, single answer to the question(s) posed...”<sup>227</sup> To the contrary, the results of the application of the values and procedures of the New Haven School may be quite varied, even with respect to the same set of facts. This puts a lie to the old complaint that the New Haven School tilts in favor of authorizing American actions as consistent with international law.<sup>228</sup> But, at the same time, it does not eliminate the need for the decision-maker to give more specific content to

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<sup>222</sup> Siegfried Wiessner and Andrew R. Willard, *Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity*, 93 AM. J. INT’L L. 316, 318 (1999).

<sup>223</sup> *Id.*

<sup>224</sup> Myres S. McDougal *et al.*, *The World Constitutive Process of Authoritative Decision*, in INTERNATIONAL LAW ESSAYS 191, 201 (Myres S. McDougal & W. Michael Reisman eds., 1981) [hereinafter INTERNATIONAL LAW ESSAYS]. The Universal Declaration of Human Rights declares in its first article: “All human beings are born free and equal in dignity and rights.”

<sup>225</sup> Myres S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse System of Public Order*, 53 AM. J. INT’L L. 1 (1959), reprinted in INTERNATIONAL LAW ESSAYS, *supra* note 224, at 15, 19.

<sup>226</sup> As Wiessner and Willard describe:

One of its distinctive features [of the New Haven School] is its highly integrated capital stock of concepts and propositions about human behavior that can be used to focus one’s attention on any problem for purposes of inquiry and action.... Policy-oriented jurisprudence provides a stable frame of reference, including a series of heuristics for “mapping” any social, legal or decision context and an all-inclusive set of intellectual tasks that can be used by scholars, advisers or decision makers for purposes of self-orientation and strategic intervention in the flow of pertinent events.... Maximizing intelligence on any given issue, it enhances the making of better, more informed choices.

*Id.* at 334.

<sup>227</sup> Wiessner & Willard, *supra* note 222, at 334.

<sup>228</sup> O’Connell, *supra* note 33, at 350 (The New Haven School “has been subjected to the heavy criticism that its policies and norms are those of its creators and that they were too closely tied to the interests of the United States to be the norms of the international community.”); Symposium, *McDougal’s Jurisprudence: Utility, Influence, Controversy*, 79 ASIL PROC. 266, 271 (1985) (remarks of Oscar Schachter).

the identified values or to choose which values will be maximized at any moment. Given that the values do not reduce to some more fundamental unit of dignity (a “dignit”?), the decision-maker cannot engage in a merely ministerial maximization equation.

The problem, as Ely would see it, is that despite the identification of values and procedures, the values are articulated at a level of generality that leaves too much room for interpretation to the decision-maker. Such wide latitude in interpretation of an allegedly superior law would render that law potentially undemocratic.

### G. Transnational Legal Process

Harold Koh describes the transnational legal process as requiring norm internalization, but where do the norms to be internalized originate? When they “bring international law home,”<sup>229</sup> are societies simply internalizing norms developed on foreign shores?

Koh does not imagine such a one-way process of passive reception. He suggests instead a dialogic process, with continuous efforts to contest and revise existing norms.<sup>230</sup> At the forefront of this process, are the “transnational norm entrepreneurs” who seek to operationalize the norms of international law in domestic contexts. Koh identifies as examples Aung San Su Kyi, the Dalai Lama, Jose Ramos Horta, and Bishop Carlos Belo.<sup>231</sup> Grassroots organizations as well participate in the transnational legal process. Not only are such persons operationalizing international law, they are also helping to shape it. Consider the case of the transnational issue network, Women Living Under Muslim Law. In interpreting both human rights texts and the Koran, this network, Madhavi Sunder writes, reimagines international law in a particular cultural context.<sup>232</sup>

How does such a process choose what norms are to be domesticated and what new norms should be created? Transnationalists do not seek deference to some sort of global “nose count.”<sup>233</sup> The transnational legal process remains ultimately democratic exactly *because of the norm internalization process*, which transforms a rule from an “external sanction” to an “internal imperative.”<sup>234</sup> “This,” Koh writes, “is the democratic

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<sup>229</sup> See generally Harold Hongju Koh, *Bringing International Law Home*, 35 HOUS. L. REV. 623 (1998).

<sup>230</sup> Koh, *Transnational Legal Process*, *supra* note 10, at 205 (describing how “noncomplying state seeks actively to promote its departure from international norms as the new governing international rule”).

<sup>231</sup> Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L. J. 293, 303 (2002).

<sup>232</sup> See Madhavi Sunder, *Piercing the Veil*, 112 YALE L. J. 1399 (2003).

<sup>233</sup> Koh, *International Law*, *supra* note 123, at 55.

<sup>234</sup> Koh, *International Human Rights Law*, *supra* note 179, at 1400.

process in action.”<sup>235</sup> Transnational norm entrepreneurs and issue networks often have no more power than that of persuasion, of the authority that comes from moral standing and cogent argument. Even authoritarian states observe this process, internalizing international law norms, which they find necessary to participate in the international political and economic process.<sup>236</sup>

Yet, such a democracy-consistent transnational legal process cannot account independently for the existence of *jus cogens* norms that claim to be authoritative *even in the absence of internalization*. Koh’s theory explains why nations obey international law, but it does not explain how international law can claim a special authority to supervene domestic processes. I suggest that Ely’s theory offers a helpful answer.

## H. Representation-Reinforcement

Unlike contemporary critics of the transnational legal process, Ely recognizes not just the dangers of anti-democratic rule, but also the dangers of rule through majoritarian processes. Speaking of the Nazi rise to power through popular appeals, he says: “A regime this horrible is imaginable in a democracy only because it so quintessentially involved the victimization of a discrete and insular minority.”<sup>237</sup> This is precisely Jed Rubenfeld’s characterization of the lesson the European powers drew from World War II.<sup>238</sup> For Europeans, accordingly, “the fundamental point of international law was to address the catastrophic problem of nationalism—to check ... national popular sovereignty.”<sup>239</sup> The Ely view and the European view coincide, establishing a foundation for international law founded on a vision of an egalitarian democracy. *Jus cogens* can be understood as the effort to

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<sup>235</sup> Koh, *International Law*, *supra* note 123, at 55. Catherine Powell, *The Role of Transnational Norm Entrepreneurs in the U.S. “War on Terrorism,”* 5 THEORETICAL INQUIRIES IN L. 47, 77 (2004) (“Regardless of whether or not international human rights law is binding on the U.S. as a technical matter, as a practical matter, enforcement of these standards will not be effective unless the public understands what they are and accepts them as democratically legitimate. In this sense, human rights norms must live or die based on their merits, as reflected in acceptance or rejection of these merits through democratic means.”).

<sup>236</sup> Koh, *Bringing International Law Home*, *supra* note 229, at 675-76; *cf.* Robert O. Keohane, *When Does International Law Come Home?*, 35 HOUS. L. REV. 699, 705-13 (1998) (arguing that authoritarian states might effectively resist norm-internalization practiced through state-society relations).

<sup>237</sup> ELY, *supra* note 8, at 181-82. I disagree with Ely’s criterion for judging which minorities are the most vulnerable to systematic abuse in a majoritarian process. *See infra* note 251 and accompanying text.

<sup>238</sup> Rubenfeld, *supra* note 18, at \_\_\_ (“Nazism and fascism were manifestations, however perverse, of popular sovereignty.”).

<sup>239</sup> *Id.*

counter both the abuses of power in an authoritarian state and the tyranny of the majority in an ostensibly democratic one.

It is unsurprising, then, that the concept of *jus cogens* developed very much as a response to the Holocaust. The Genocide Convention adopted shortly after the war included a number of subscriptions that attached reservations and understandings of certain provisions in the Convention (prominently including in the ratification instrument deposited by the United States).<sup>240</sup> The United Nations General Assembly sought an advisory opinion of the International Court of Justice as to whether such reservations and understandings were permissible. The Court ruled that the “object and purpose of the Convention ... limit ... the freedom of making reservations.”<sup>241</sup> While the Court did not go so far as to assert that the obligations of the Convention applied to all states regardless of subscription, the case made it clear that certain international obligations were intended to be “definitely universal in scope.”<sup>242</sup>

Just exactly what international norms have the strength of *jus cogens* is controversial.<sup>243</sup> But “[n]aming a few norms of *jus cogens* is easy.”<sup>244</sup> The following international crimes, one scholar writes, are *jus cogens*: “aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices, and torture.”<sup>245</sup> All of these norms can be seen, some more readily than others, as serving a norm of representation reinforcement.

Writing in 1967, McDougal, Lasswell, and Reisman seemed to suggest that international law should seek to reinforce representation, even if only instrumentally: “An instrumental goal of a public order of human dignity is of course the equipping of all individuals for full participation in authoritative decision.”<sup>246</sup> Despite this assertion, I do not suggest that international law has developed *jus cogens* norms with my normative structure in mind. Ely himself suggested that the Warren Court’s jurisprudence evinced a broad concern with process, but he sought to give it

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<sup>240</sup> Convention on the Prevention and the Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

<sup>241</sup> Advisory Opinion of the International Court of Justice on Reservations to the Convention on the Prevention and the Punishment of the Crime of Genocide, 1951 I.C.J. REP. 15, 24 (May 28).

<sup>242</sup> *Id.* at 23.

<sup>243</sup> RAGAZZI, *supra* note 182, at 48; M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, L. & CONTEMP. PROBS. 63, 67 (1996); Anthony D’Amato, *It’s a Bird, it’s a Plane, it’s Jus Cogens!*, 6 CONN. J. INT’L L. 1 (1990). *See, e.g.*, RAGAZZI, *supra* note 182, at 66 (describing dispute between Norway and the United Kingdom over whether a specific maritime norm qualified as *jus cogens* in context of fisheries dispute).

<sup>244</sup> *Id.* [RAGAZZI] at 49.

<sup>245</sup> Bassiouni, *supra* note 243, at 68.

<sup>246</sup> McDougal *et al.*, *supra* note 224, at 191.



an analytical coherence that the law-givers had themselves perhaps missed.<sup>247</sup> My effort to supply a theoretical ground here for international law, in both its peremptory and non-peremptory forms, is akin to Ely's efforts with respect to the Court's Constitutional adjudication.

Viewed from the Archimedean perspective of the original position, it seems reasonable to suppose that a rational person would insist on basic safeguards. "You and I, here and now," would require that our society obey certain fundamental rules, whatever the political—or even constitutional—process might otherwise permit. Indeed, Rawls proposes that deliberation in an original position would result in agreement to "honor human rights" and not "instigate war" except in self-defense.<sup>248</sup>

The invocation of the original position here offers a limiting principle to Ely's representation reinforcement in this context. Representation-reinforcement might go so far as to require full-fledged democratic institutions in all states. That would give *jus cogens* a content far beyond its current bounds. However, as Rawls argues, it may be possible to maintain decent societies that are not democratic.<sup>249</sup>

International law stands, like Ely's judges, outside the direct domestic political process. Thus, it offers the opportunity to resist the pathologies of that process that distribute the benefits and burdens of society in a systematically inequalitarian way. Consider, for example, efforts in the 1950s to bring international law norms against racism to bear against American state oppression of the African-American minority,<sup>250</sup> and efforts in later years to bring the same norms to bear against South African state oppression of the Black majority. Such an approach requires an amendment to Ely's theory. International experience confirms Bruce Ackerman's observation that it is not only "discrete and insular minorities" who are vulnerable to oppression.<sup>251</sup> Indeed, I have suggested elsewhere that there is room in Ely's broader theory to encompass not only numerical minorities as at risk, but majorities as well.<sup>252</sup> Ely himself allows that women—though a majority—could form a suspect class either because of laws denying them the franchise or because, even with the franchise, they might have accepted a popular notion of their own inferiority.<sup>253</sup>

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<sup>247</sup> ELY, *supra* note 8, at 74.

<sup>248</sup> RAWLS, *LAW OF PEOPLES*, *supra* note 40, at 37.

<sup>249</sup> *Id.* at 59-62.

<sup>250</sup> Louis Henkin, *U.S. Ratification of Human Rights Treaties: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 348 (1995).

<sup>251</sup> Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. R. 713, 718-31 (1985).

<sup>252</sup> Chander, *Minorities*, *supra* note 82, at \_\_\_-\_\_\_. For Ackerman's reconstruction of the test for vulnerable minorities, see Ackerman, *supra* note 251, at 740-46.

<sup>253</sup> ELY, *supra* note 8, at 164-70. He does not believe, however, that American women of 1980 face such a disability. *Id.* at 166-69.

A crucial part of Ely's theory is that it gives us an ability to discriminate—between those who need the channels of political change cleared for them, and those who do not; between minorities and those who are dominant in society; between vulnerable and strong minorities; between Non-Governmental Organizations (NGOs) that are well-represented through national plenipotentiaries, and NGOs who represent the voices not heard by diplomats. Ely's theory does not require a kind of dumb proceduralism, where every claim able to affect a particular ontological status—say “minority” or “NGO”—needs to be treated equally.

Some may find a circularity in my argument that *jus cogens* norms are consistent with democracy *if* they are consistent with democracy. Ely faces the same critique and responds in typically devastating fashion: “There may be an illusion of circularity here: my approach is more consistent with representative democracy because that's the way it was planned. But of course it isn't any more circular than setting out to build an airplane and ending up with something that flies.”<sup>254</sup>

Cosmopolitans might see my suggestion of a democratic international law as inadequate to address the material conditions of a world in which literally billions of people lack the capabilities to live a healthy life, let alone participate in a democracy. International law, they might suggest, should require affirmative obligations of support, not just impose prohibitions against affirmative wrongdoing. As I have argued, there is nothing undemocratic about a state, through its normal political channels, *choosing* to bestow benefits on others.<sup>255</sup> But affirmative obligations for wealth transfer required by international law despite national determinations to the contrary might seem to violate self-rule.<sup>256</sup> Rawls suggests that peoples do have “a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political and social regime.”<sup>257</sup> He believes that peoples would have accepted such a responsibility through the cooperative dialog of a second original position between representatives of peoples. This is, as Rawls concedes, an “especially controversial” principle,<sup>258</sup> and I leave it for further consideration at a later date. It may be, for example, that it is a proper philosophical claim about what the moral obligations of a people are, but may be an improper legal imposition on all states. Alternatively, it might be that just as individuals in a second order original position among peoples would accept restraints against state oppression, they would accept affirmative obligations that spanned borders.

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<sup>254</sup> ELY, *supra* note 8, at 102.

<sup>255</sup> See *supra* notes 207-214 and accompanying text.

<sup>256</sup> Cf. Paul W. Kahn, *The Question of Sovereignty*, 40 STAN. J. INT'L L. 259 (2004) (distinguishing between positive and negative sovereignty).

<sup>257</sup> RAWLS, LAW OF PEOPLES, *supra* note 40, at 37, 105-120.

<sup>258</sup> *Id.* at 37 n. 43.

International law offers resources of authority to transnational norm entrepreneurs and transnational issue networks who seek to defeat national efforts to oppress certain groups. But the mere declaration, even on solid democratic grounds, of the existence of inviolable norms of international law, does not make it so. The ongoing genocide in Darfur in the Sudan makes this painfully clear. The persistence of oppression demonstrates that international law is not always successful in the task of protecting minorities against oppression, but that should not lead us to yield the enterprise or to pronounce it corrupt.

## CONCLUSION

The spectre of Abu Ghraib haunts international law. The world's superpower has in just a couple of years been willing to discard the Geneva Conventions as "quaint,"<sup>259</sup> snub the United Nations Charter's limits on the use of force, and "un-sign" the statute creating an International Criminal Court.<sup>260</sup> With the world's preeminent liberal democracy eschewing international legal constraints, international law remains in ill repute. Informing international law with Ely's vision of a legal infrastructure that buttresses an egalitarian democracy should help enhance international law's authority and legitimacy.

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<sup>259</sup> Harold Hongju Koh, *Transnational Legal Process After September 11th*, 22 *BERKELEY J. INT'L L.* 337 (2004).

<sup>260</sup> Alberto Gonzalez, *Decision re Application of the Geneva Conventions on Prisoners of War to the Conflict with Al Qaeda and the Taliban* (draft, Jan. 25, 2002).