

Fall 2010

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### Recommended Citation

Rex D. Glensy, *Constitutional Interpretation through a Global Lens*, 75 MO. L. REV. (2010)  
Available at: <https://scholarship.law.missouri.edu/mlr/vol75/iss4/3>

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# Constitutional Interpretation Through a Global Lens

*Rex D. Glensy\**

## ABSTRACT

*This Article seeks to clarify the current debate concerning the use of non-U.S. persuasive authority within the context of constitutional interpretation. It begins by noting that commentary on comparative constitutional law often fails to make any distinction between foreign domestic sources and international law used comparatively, and thus risks evoking parallels between different systems of law that lack context and plausibility. It then draws on various normative theories and underpinnings of both domestic and international legal regimes to show that a proper comparative enterprise must take this distinction into account. The Article concludes by explaining that only when those policy goals of international law and domestic law coincide should international law materials be called upon as sources of persuasive authority for domestic constitutional interpretation.*

## I. INTRODUCTION

In the wake of *Lawrence v. Texas*<sup>1</sup> and *Roper v. Simmons*,<sup>2</sup> most of the legal world in the United States was alerted to the existence of constitutional comparative analysis.<sup>3</sup> Reactions to the use of non-U.S. persuasive authority in those decisions ranged from cheers and applause to jeers and catcalls, the latter being far more voluminous than the former.<sup>4</sup> The opposition to the practice of using foreign authority became a rallying cry that found its expression in various fora. For example, in the political arena, several members of Congress offered resolutions condemning and prohibiting constitutional

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1. 539 U.S. 558 (2003).

2. 543 U.S. 551 (2005).

3. That is not to say that important work on constitutional comparativism had not yet taken place in the United States, but merely that this issue received a certain prominence that previously had been absent.

4. See, e.g., Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57, 57-58 (2004) (disapproving of the practice); Vicki C. Jackson, *Yes Please, I'd Love to Talk with You*, LEGAL AFF., July/Aug. 2004, at 43, 46 (applauding the practice).

interpretation by methods of comparative analysis,<sup>5</sup> while, in the judicial realm, two prospective Supreme Court candidates essentially had to swear absolutist “blood oaths” repudiating the whole enterprise.<sup>6</sup> The din raised was so pervasive that it seeped out of the halls of congressional hearings to find an echo chamber in popular media.<sup>7</sup>

But the cacophony reached its most feverish pitch in the realm of legal scholarship. Scholars quickly took sides in this debate, with opinions divided ideologically between those sympathetic to an expanding view of supporting the use of foreign authority<sup>8</sup> and those who decried the very idea of constitutional comparative law.<sup>9</sup> While academics on both sides of the issue offered sound and persuasive normative analysis, most of the commentary has been

5. See H.R. Res. 568, 108th Cong. (2004); Constitution Restoration Act, H.R. 3799, 108th Cong. § 201 (2004).

6. Then-nominee Judge Roberts’ disingenuous repartee regarding this issue is crystallized by his comment implying that it would be absurd to look to foreign law as *binding* authority when no one genuinely believes that anyone participating in this debate about comparative constitutionalism is advocating using foreign or international authority as binding precedent. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before S. Comm. on the Judiciary*, 109th Cong. 42 (2005) (“If we’re relying on a decision from a German judge about what our Constitution means, no President accountable to the people appointed that judge, and no Senate accountable to the people confirmed that judge, and yet he’s playing a role in shaping a law that binds the people in this country.”); see also Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 139 (2006). Justice Alito parroted the critics’ mantra: “Well, I don’t think that we should look to foreign law to interpret our own Constitution. . . . I think the Framers would be stunned by the idea that the Bill of Rights is to be interpreted by taking a poll of the countries of the world.” *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before S. Comm. on the Judiciary*, 109th Cong. 471 (2006) (response to Sen. Coburn’s question).

7. See, e.g., Anne Gearan, *Foreign Rulings Not Relevant to High Court, Scalia Says*, WASH. POST, Apr. 3, 2004, at A7.

8. See, e.g., Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 128 (2005); Mark Tushnet, *When is Knowing Less Better Than Knowing More? Unpacking the Controversy over Supreme Court Reference to Non-U.S. Law*, 90 MINN. L. REV. 1275, 1302 (2006); Jeremy Waldron, *Foreign Law and the Modern Jus Gentium*, 119 HARV. L. REV. 129, 145-46 (2005).

9. See, e.g., Alford, *supra* note 4, at 69; Kenneth Anderson, *Foreign Law and the U.S. Constitution*, POL’Y REV., June-July 2005, at 33, 48. The left/right divide which has seemingly emerged over this issue is somewhat curious given that, at a glance, comparative analysis appears to be ideologically neutral. In other words, there is no guarantee that a properly exercised comparative look at non-U.S. law will tend either left or right.

somewhat one-dimensional.<sup>10</sup> This is because the almost singular focus of the debate has been to discuss whether it is appropriate for U.S. courts to engage in comparative constitutional analysis or not.<sup>11</sup> Although this debate is important, it should constitute the starting point (rather than an end in and of itself) for a more comprehensive and theoretical discussion about the various facets of constitutional interpretation encompassed by comparative constitutional law. This Article proposes to examine one of those facets in detail.

This Article focuses on the aspect of constitutional interpretation that can be referred to as the “international law dilemma.” In the traditional application of comparative constitutionalism in this country, an American jurist consults materials from outside the body of U.S. law that then serve as persuasive authority in a particular case to better interpret a U.S. constitutional provision at issue. For the purposes of this Article, those materials can come from two different repositories of legal opinion:<sup>12</sup> foreign domestic law<sup>13</sup> and international law.<sup>14</sup> So what is the dilemma?

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10. See, e.g., Donald J. Kochan, *Sovereignty and the American Courts at the Cocktail Party of International Law: The Dangers of Domestic Judicial Invocations of Foreign and International Law*, 29 *FORDHAM INT’L L.J.* 507, 547 (2006) (“[R]esort to international or foreign laws is uniquely un-American[!]”); Richard Posner, *Enlightened Despot*, *NEW REPUBLIC*, Apr. 23, 2007, at 53, 54-55 (reviewing AHARON BARAK, *THE JUDGE IN A DEMOCRACY* (2006)) (describing Judge Barak’s predilection for comparative constitutional interpretation as “judicial hubris” and a symptom of a “hyperactive judiciary”). Mark Tushnet has correctly called much written on this subject “talking-point scholarship” because it merely consists of a repetition of canned slogans. See Tushnet, *supra* note 8, at 1276.

11. See, e.g., Curtis A. Bradley, *The Federal Judicial Power and the International Legal Order*, 2006 *SUP. CT. REV.* 59, 59 (commenting on the spike in recent academic debate on the matter). Other scholars have expressed a similar frustration. See, e.g., Ursula Bentele, *Mining for Gold: The Constitutional Court of South Africa’s Experience with Comparative Constitutional Law*, 37 *GA. J. INT’L & COMP. L.* 219, 221 (2009); see also Lan Cao, *Culture Change*, 47 *VA. J. INT’L L.* 357, 371-74 (2007) (lamenting comparativists’ seeming ignorance of cultural differences between nations); Günther Frankenberg, *Comparing Constitutions: Ideas, Ideals, and Ideology-Toward a Layered Narrative*, 4 *INT’L J. CONST. L.* 439, 451 (2006); Paul W. Kahn, *Comparative Constitutionalism in a New Key*, 101 *MICH. L. REV.* 2677, 2679 (2003) (urging comparativists to be aware of the fact that “the field upon which [they operate] is more complex than they imagine”); Robert Leckey, *Thick Instrumentalism and Comparative Constitutionalism: The Case of Gay Rights*, 40 *COLUM. HUM. RTS. L. REV.* 425, 426, 446 (2009) (expressing dissatisfaction at the current framing of the contemporary debate about the propriety of comparative constitutionalism and its application to same-sex marriage, while noting that “comparison provokes recurring charges of shallowness and abstraction”).

12. Clearly, in theory, there are other repositories of wisdom that could serve as non-U.S. authorities, such as philosophical treatises or works of literature, but these types of sources, being essentially non-legal, fall outside the scope of this Article. Nevertheless, the appropriateness of using non-legal materials (whether domestic or

The dilemma stems from the fact that when an American judge chooses to engage in constitutional interpretation that involves comparative constitutional analysis, he or she chooses some non-U.S. legal material to compare with the United States Constitution. In other words, the object of comparison will always be domestic law (the U.S. Constitution). However, as noted above, the source of the subject of comparison (that to which the U.S. Constitution is being compared) might originate within the domestic law of a foreign state or among the body of international law. The question then arises: is it appropriate to consult international law when the issue to be resolved by the U.S. court is a *domestic* constitutional provision? If an American judge chooses a decision, for example, of the Supreme Court of Canada interpreting its own constitution as an aid to interpret a similar provision of the U.S. Constitution, the comparison would be of a *domestic*, albeit foreign, law to another *domestic* law.<sup>15</sup> Prosaically, one could say this would be comparing apples to apples (possibly McIntosh to Red Delicious). But the use of international law, which by definition is not domestic, in this context would be more akin to comparing apples to oranges. This therefore presents the intriguing conundrum of whether the comparison is intellectually and legally plausible,<sup>16</sup> given that many scholars, legislators, and judges “treat international law and domestic law as two distinct and separate realms.”<sup>17</sup>

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foreign) as sources of persuasive authority to interpret the U.S. Constitution and the proposal of a relevant methodology to so do are interesting issues to research.

13. This nomenclature is not intended to be a paradox. Rather, by “foreign domestic,” what is meant is that body of law which is the *internal* law of a foreign country comparable to the domestic laws of the U.S. (state, federal, administrative, statutory, caselaw, etc.).

14. Transnational law is contained, to a certain extent, within the definition of international law used herein. Transnational law, a concept still in a state of formation, is generally considered to be the integrated dimension of international and foreign law on the one hand, and domestic law on the other. See Harold Hongju Koh, *The Globalization of Freedom*, 26 YALE J. INT’L L. 305, 306 (2001). Because this Article distinguishes between international law and foreign domestic law, it adopts a narrow interpretation of transnational law that intends it to be a subset of international law. In other words, transnational law, as used herein, is defined as the legislative and judicial pronouncements of multi-national bodies, which includes the internal organization of the world’s legal regimes.

15. It must be reemphasized that the premise is based on accepting that consultation to foreign authorities has a role to play in U.S. constitutional interpretation.

16. John O. McGinnis, a critic of the comparative enterprise, recognizes this plausibility. See John O. McGinnis, *Foreign to Our Constitution*, 100 NW. U. L. REV. 303, 311 (2006).

17. Thomas Cottier, *Multilayered Governance, Pluralism, and Moral Conflict*, 16 IND. J. GLOBAL LEGAL STUD. 647, 648 (2009); see also Bradley, *supra* note 11, at 59 (“‘Constitutionalist’ or ‘revisionist’ scholars . . . distinguish between the international and domestic legal systems . . .”). Others have noted how the separation of international law and domestic law is artificial and how many in government go out of their way to claim that international law does not affect domestic governance. See

Part II of this Article shows that this important issue has been largely ignored by the current academic debate. It then proposes a way to explore the question systemically, which is to contextualize the process of constitutional comparison. Thus, the Article examines the respective policy motivations of the international system and domestic governance to determine whether a reasonable convergence between the two exists that justifies the use of international law within the framework of constitutional interpretation. Part III then looks at the normative underpinnings of the international legal system. It does so through a lens consisting of the ethos of the comparative enterprise that is one of shared experience and that takes its motivating impulse from Neo-Kantian ideational forces. Part IV examines the various factors behind domestic ordering of political structures. It separates domestic democracies from other types of domestic systems because of the inherent unreliability of purpose that underlines the choice of process and substance of the latter. Finally, Part V marries the policy rationales explored in Parts III and IV. It concludes that international law, as a matter of principle, is an appropriate repository into which a judge can dip to interpret domestic constitutional provisions. However, not all international law is appropriate for this purpose, and this final section of the Article explains that only international law born out of policy goals that overlap with those of domestic systems should be used in the context of constitutional interpretation.

Promoters of this method of constitutional interpretation do not advocate the supplanting of local precedent by persuasive authority, be it foreign or international. In other words, this is not a search for other forms of mandatory authority to impose on the American people – any assertion by the critics of this enterprise to the contrary is a straw man. Indeed, American judges are the primary interpreters of the U.S. Constitution in American jurisdictions, and consequently are the guardians of the rule of law and definers of the contours of rights in the United States. Nevertheless, one should always bear in mind the immortal wisdom of U.S. Supreme Court Justice Benjamin Cardozo, who opined almost one hundred years ago that “[w]e are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.”<sup>18</sup>

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Thomas Cottier & Krista Nadakavukaren Schefer, *The Relationship Between World Trade Organization Law, National and Regional Law*, 1 J. INT’L ECON. L. 83, 114 (1998).

18. *Loucks v. Standard Oil Co.*, 120 N.E. 198, 201 (N.Y. 1918).

## II. THE DILEMMA CAST

The international law dilemma within the context of constitutional interpretation has been largely ignored by academics. Nevertheless, this dilemma has not gone completely unnoticed. Some scholars who write on the general topic of comparative constitutionalism distinguish between international law (the law of supranational governance) and foreign law (the domestic law of a foreign country).<sup>19</sup> For example, Eric Posner and Cass Sunstein tangentially address the issue in the context of presenting a theoretical basis for the use of non-U.S. persuasive authority.<sup>20</sup> They note that “[t]he literature has so far not made much of [the] differences” between foreign domestic sources and international law, and “where it has, most authors have treated international law as deserving of the same consultation that foreign national law deserves.”<sup>21</sup> Posner and Sunstein specify that the *Lawrence* decision “did not cite ‘foreign law,’ in the sense of a decision of a foreign *national* court interpreting a foreign statute or constitution,” but rather “it cited international law, in the sense of an *international* court interpreting an international treaty.”<sup>22</sup> However, after correctly identifying the dilemma, Posner and Sunstein offer a summary conclusion that “the case for relying on international law is trickier than the case for relying on foreign law.”<sup>23</sup>

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19. See, e.g., Leckey, *supra* note 11, at 427; see also Diane Marie Amman, *International Law and Rehnquist-Era Reversals*, 94 GEO. L.J. 1319, 1335 (2006); Bradley, *supra* note 11, at 93 (referring to foreign and international materials); Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT’L L. 1, 3, 10 (2006); Harold Hongju Koh, *International: Law as Part of Our Law*, 98 AM. J. INT’L L. 43, 45 (2004) (noting that the U.S. Supreme Court “has regularly looked to *foreign and international* precedents as an aid to constitutional interpretation” (emphasis added)); Beth Lyon, *Tipping the Balance: Why Courts Should Look to International and Foreign Law on Unauthorized Immigrant Worker Rights*, 29 U. PA. J. INT’L L. 169, 172 (2007).

20. See Posner & Sunstein, *supra* note 6, at 164-68 (positing that the Condorcet Jury Theorem forms a sound theoretical basis for a defense of the comparative constitutional practice).

21. *Id.* at 165.

22. *Id.* (emphasis added).

23. *Id.* Others have also noted that the brouhaha about comparative analysis within the confines of constitutional interpretation “has been confused by the conflation of international law and foreign law sources and by a lack of careful distinction between various sources of international law,” and that these two sources, being “two very different types of law,” should be conceptually separated in the academic discourse concerning constitutional interpretation involving comparative analysis. Cindy G. Buys, *Burying Our Constitution in the Sand? Evaluating the Ostrich Response to the Use of International and Foreign Law in U.S. Constitutional Interpretation*, 21 BYU J. PUB. L. 1, 1-7 (2007) (correctly identifying the issue presented in this Article but then following it up by the usual arguments in favor of comparative analysis in

This dilemma over the use of international law is not totally ignored abroad. Indeed, the differentiation between foreign law and international law as different sources of authority is enshrined in the South African Constitution, which directs that all courts within that nation tasked with interpreting the Bill of Rights “must consider international law”<sup>24</sup> and “may consider foreign law.”<sup>25</sup> Thus, the judicial canon of constitutional interpretation in South Africa directs the use of international law *in all instances* when such materials are available and germane to a question of interpretation of that country’s Bill of Rights, but leaves the discretion to the courts to employ foreign domestic law. Justices from other high courts around the world have similarly commented on the difference between the two sources of law when used to aid constitutional interpretation and have noted how this difference plays out in actual decisions of such foreign high courts.<sup>26</sup> It is noteworthy that in all these situations, international law is never considered part of the “foreign law” category, unlike in the U.S., where the nomenclature “foreign” is often applied to include international law. To include international law is ironic, and somewhat of a misnomer on the part of those employing the term “foreign” in the U.S., because international law is technically not “foreign” at all but instead is part of U.S. law. Indeed, international law is formed through consistent and persistent input by the U.S. and therefore, in many respects,

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general rather than a comprehensive normative discussion pertaining to the separation of foreign domestic law from international law in this context); *see also* Timothy K. Kuhner, *The Foreign Source Doctrine: Explaining the Role of Foreign and International Law in Interpreting the Constitution*, 75 U. CIN. L. REV. 1389, 1423-24 (illustrating the different types of sources available); Justice Julia Laffranque, *Judicial Borrowing: International & Comparative Law as Nonbinding Tools of Domestic Legal Adjudication with Particular Reference to Estonia*, 42 INT’L LAW 1287, 1289 (2008) (“A distinction must be made between borrowing of international . . . law (international law as tool of domestic adjudication); and foreign law (comparative law as tool of domestic adjudication).”); Vlad F. Perju, *The Puzzling Parameters of the Foreign Law Debate*, 2007 UTAH L. REV. 167, 170 (urging “the distinction between foreign law and international law is useful to keep in mind”). *But see* Ernesto J. Sanchez, *A Case Against Judicial Internationalism*, 38 CONN. L. REV. 185, 187-89 (2005) (conflating the two sources). A further question to be addressed in this context is: if one concludes that foreign domestic law and international law should be distinguished as separate sources of persuasive authority for U.S. constitutional interpretation, how should those different sources be deployed? This issue pertaining to the use of international law is addressed in a companion piece to this Article. *See* Rex D. Glensy, *The Use of International Law in U.S. Constitutional Adjudication*, 25 EMORY INT’L L. REV. (forthcoming 2011) (manuscript on file with author).

24. S. AFR. CONST. 1996 ch. 2, § 39(1)(b).

25. *Id.* § 39(1)(c).

26. *See, e.g.*, Laffranque, *supra* note 23, at 1296, nn.25 & 26 (specifying cases where the Supreme Court of Estonia has used private international law and public international law in support of its judgments).



mirrors the domestic values of the United States. Therefore, international law is easily distinguishable from true foreign law.

The same school of thought that opposes comparative constitutionalism outright seems to be responsible for the conflation of international sources and foreign domestic sources as subjects for constitutional interpretation.<sup>27</sup> This mindset is grounded in the outdated notion of the Westphalian system, which essentially views nation-states as the sole subjects of international law, ignores international legal developments over the last sixty years, and disregards the increasingly globalized and interdependent world in particular.<sup>28</sup> In fact, it is hard to deny that many domestic laws, including the interpretations of domestic constitutions, have been increasingly inspired and influenced by international law, or, at the very least, international norms which have not yet acquired the force of law.<sup>29</sup>

Nevertheless, domestic legal regimes are set up and operated differently from the international legal system as a whole. Such regimes more clearly cohere to their domestic process than the international one. Moreover, at least on the domestic side, the goal of integration between the international system and internal process is usually quite different, as “statutory rules enacted by a national legislature are rarely enacted with an eye to international . . . conduct.”<sup>30</sup> But if this were the beginning and the end of the argument, as many skeptics of the comparative enterprise would have it, there would only be an intellectually shallow reason for ignoring the whole repository of international law that potentially could have served as an illuminating source of persuasive authority for constitutional interpretation.<sup>31</sup> The argument would likely be that international law is “different because it’s different” and that such differences cannot be reconciled. Most comparative constitutionalists would probably agree with the former sentiment but strongly disagree with the latter.

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27. See, e.g., Alford, *supra* note 4, at 57-58.

28. See Michael Zürn & Stephan Leibfried, *Reconfiguring the National Constellation*, in TRANSFORMATIONS OF THE STATE? 1, 6 (Stephan Leibfried & Michael Zürn eds., 2005).

29. See DANIEL THÜERER, 1 KOSMOPOLITISCHES STAATSRICHT 3-40 (2005). Although some argue against constructing constitutional theories of international law by referencing comparative principles, it does not follow that constitutional interpretation through comparative principles cannot benefit from an exploration of the policy goals behind foreign domestic law (as mostly embodied by constitutions) and international law. See Bardo Fassbender, *‘We the Peoples of the United Nations’: Constituent Power and Constitutional Form in International Law*, in THE PARADOX OF CONSTITUTIONALISM 269, 269 (Martin Loughlin & Neil Walker eds., 2007).

30. Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 469, 548-49 (2000).

31. See, e.g., Richard Posner, *No Thanks, We Already Have Our Own Laws*, LEGAL AFF., July/Aug. 2004, at 40 (advocating that foreign laws should not influence domestic laws in any way).

To resolve this dilemma, one of the primary issues that the constitutional comparativist must answer is whether the subject selected for comparison must itself be the fruit of a constitutional system. If the object of comparison is by definition a constitutional provision, does it necessarily follow that what it is being compared to must also be taken from that of an equivalent regime? If one answers that question in the affirmative, then unless one subscribes to a notion that international law already operates under a constitutional organization, it seems that the comparative constitutionalist's options are rather limited vis-à-vis international law.<sup>32</sup> If the current international law system is defined as constitutional, then that may be a vehicle for giving international law more gravitas and might also lead to an emerging consensus that international law is superior to domestic law.<sup>33</sup> But what if such a system is merely the product of the normative aspirations of internationalists at best, or a figment of their imaginations at worst? Are constitutional comparativists then left out in the cold with respect to using any international law source as a basis for constitutional interpretation?

Unfortunately, in an attempt to answer these questions, no help comes from the U.S. Supreme Court, which has adopted no methodology regarding the selection of sources for comparative review within the framework of constitutional interpretation and has never differentiated, in this context, between international and foreign domestic law. Indeed, "[t]he Court's approach envisions no interaction among multiple sources of law, no interplay among multiple pronouncers of law, and no accommodation to the multiple interests at stake."<sup>34</sup> A review of those multiple interests, interplays, and interactions is therefore required. Thus, any answer to whether international law is an appropriate body of law to serve as persuasive authority within the framework of constitutional interpretation must scrutinize the systems from which these bodies of law are generated. The scrutiny should take into precise account the motivating force behind the legal enactments, the process by which this generation occurs, and the context in which each pronouncement takes place.

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32. Of course, whether international law currently operates under a constitutional system is a matter of considerable debate in the academy. Views range the gamut from the claim that a constitutional order is already present, exemplified by documents such as the UN Charter, *see, e.g.*, Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUM. J. TRANSNAT'L L. 529, 531-32 (1998), to the observation that an international constitutional order is in the process of emerging, *see, e.g.*, Erika de Wet, *The International Constitutional Order*, 55 INT'L & COMP. L.Q. 51, 54-57 (2006), to normative claims that such a constitutional ordering is the desirable structure for the international system, *see, e.g.*, Anne Peters, *Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures*, 19 LEIDEN J. INT'L L. 579, 580-82, 610 (2006).

33. *See* Laurence R. Helfer, *Constitutional Analogies in the International Legal System*, 37 LOY. L.A. L. REV. 193, 204 (2003) (noting that the WTO settlement dispute system does not resemble a traditional constitutional regime).

34. Paul Schiff Berman, *Federalism and International Law Through the Lens of Legal Pluralism*, 73 MO. L. REV. 1149, 1172 (2008).

Only by understanding both the theoretical and practical background behind the policy groundings of both domestic and international law can the constitutional comparativist “be cautious about borrowing lessons of legitimacy from one system to apply to another.”<sup>35</sup> At the same time, the comparativist can determine whether the international system is suited to serve as a body of law that can be the subject of comparison for constitutional interpretation.

### III. THE GOALS OF MODERN INTERNATIONAL LAW

Comparative constitutionalism is the judicial link between one source of law and another, such as the comparing to the compared. From the point of view of a specific judicial body, such as the U.S. Supreme Court, the compared object – the U.S. Constitution – is always going to be the same. However, for the purposes of this Article, the subject of comparison will always be either a foreign domestic source of law or an international source of law. This can best be illustrated with the following algebraic equation:  $Xa \leftarrow Xb$ ,  $Xa \leftarrow Y$ , where  $X$  is domestic law,  $a$  and  $b$  are different nation-states, and  $Y$  is international law. The first step in resolving the international law dilemma within the context of constitutional interpretation is to define the parameters of  $X$  and  $Y$  to see whether there is, at least in part, a cognitive consonance between the two major variables. It is appropriate to begin by defining the  $Y$  parameter because the nature of the dilemma lies in the supposed differences between international law and domestic law.

Constructing a dialogical account of the goals of international law is no easy task. From its inception, scholars, politicians, and judges have held divergent opinions as to what those goals actually are. These discrepancies still survive today. Even within the two academic disciplines (international relations and international law) that study this area there is considerable disagreement. For example, “[t]he realist, liberal, and constructivist schools in international relations disagree as to whether international rules and their effects can be explained by the pursuit of national interests of states or whether internal dynamics of international organizations and regimes limit and even hurt national interests.”<sup>36</sup> The different schools of thought within the international law sphere are similarly split.

International structures such as the UN have certainly taken it upon themselves to pursue lofty goals.<sup>37</sup> However, over time these goals have

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35. Margaret E. McGuinness, *Federalism and Horizontality in International Human Rights*, 73 MO. L. REV. 1265, 1277 (2008).

36. Anne Peters & Klaus Armingeon, *Introduction-Global Constitutionalism from an Interdisciplinary Perspective*, 16 IND. J. GLOBAL LEGAL STUD. 385, 386 (2009).

37. See Christer Söderlund, *Intra-EU BIT Investment Protection and the EC Treaty*, 24 J. INT’L ARB. 455 (2007) (characterizing the EU Charter, a prime example of transnational governance, as entailing “responsibilities and duties with regard to other persons, to the human community and to future generations”).

shifted significantly, both in scope and in breadth. The scope of international law has moved from rules almost solely devoted to the relationships among nation-states to rules pertaining to the way countries treat their own subjects. Indeed, “[t]he development of international human rights law has been one of the most significant projects of the last sixty years.”<sup>38</sup> The breadth of international law has expanded from rules concerning only a select number of subject matters (such as diplomatic relations) to rules encompassing a far more varied range of topics, such as environmental protection, intellectual property, and global trade.

If international law is to have any role at all in constitutional interpretation, it must share the ethos of the domestic regimes that seek out its materials and contain sufficient policy overlap with domestic principles to justify the plausibility of resulting cross-system comparisons. Some have suggested that this search is bound to be fruitless. For example, Roger Alford posits that “[i]nternational law functions best as a bracketed discipline that recognizes its own limits.”<sup>39</sup> Although this truism can be easily applied to every set of laws, it conveys the important sentiment that each body of rules must be informed by the policies it serves. Thus, for the global constitutional comparative enterprise to be effective in its use of international law, its participants must be aware of common legal and social problems embodied by the domestic and international systems and attempt to resolve these issues by creating an organized system of collaboration. Within this context, “international law is neither binding law, nor mere[ly] fodder for string cites” but instead is instrumental in a pluralist legal system.<sup>40</sup>

The ambitions of international law cannot only overlap in policy with the goals of the nations that seek to use it for comparative constitutional purposes; such goals must also be congruent with the goals of the comparative enterprise itself. Indeed, this form of constitutional interpretation does not happen in a normative vacuum but instead reflects a horizontal ethical bias that favors cross-border comparison. From this standpoint, constitutional interpretation through comparative reference to international law is a part of the modern embodiment of Immanuel Kant’s concept of international law, which was premised on a functional notion of ensuring a perpetual global state of peace.<sup>41</sup> Thus, comparative analysis in this context “further[s] the globalization of human rights, helps solve . . . problems that various courts

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38. Beth Simmons, *Civil Rights in International Law: Compliance with Aspects of the “International Bill of Rights”*, 16 *IND. J. GLOBAL LEGAL STUD.* 437, 478 (2009).

39. Roger P. Alford, *Four Mistakes in the Debate on “Outsourcing Authority”*, 69 *ALB. L. REV.* 653, 653 (2006).

40. See Robert B. Ahdieh, *Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination*, 73 *MO. L. REV.* 1185, 1234 (2008).

41. See, e.g., IMMANUEL KANT, *Perpetual Peace: A Philosophical Sketch*, in *KANT’S POLITICAL WRITINGS* 93, 98 (Hans Reiss ed., H. B. Nisbit trans., 1971) (1970).

around the world might encounter, creates a coordinating transnational legal system, fosters judicial dialogue, expands horizons, enhances the self-awareness of participating nations, and increases the global influence of those countries which choose to engage in it.”<sup>42</sup> It is through this neo-Kantian lens, captured by contemporary ideational and liberal international theoretical underpinnings, that this Article explores the goals of international law.

### A. *Prevention of Conflict*

Modern international law was born out of the ashes and devastation wreaked by World War II. The unspeakable horrors unleashed by this conflict created a paradigm shift that caused a collective need to reform the mechanisms that failed to prevent the global warfare. That collective need was initially met by the formation of an umbrella organization designed to act as the focal point for the creation of international norms – the United Nations (UN). Among the founding principles of the UN were “the desire for peace, the quest for justice, respect for the dignity of the person, humanitarian cooperation and assistance [and to] express the just aspirations of the human spirit.”<sup>43</sup> These lofty goals were never supposed to be mere rhetoric but instead were intended to be translated into a system comprising the promulgation of rules backed up by coercive forces to ensure compliance.<sup>44</sup> The contemplated targets of this set of rules were nation-states.<sup>45</sup>

In light of this particular genesis, international law at its core should be considered the background law of coexistence among nations.<sup>46</sup> Under this reading, the present international system is conceptually designed to prevent the worst Hobbesian tendencies that states may exhibit from time to time, and therefore it is not merely an ordering arrangement of what exists but rather a regime that is normatively advantageous.<sup>47</sup> In sum, the paramount goal of

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42. See Rex D. Glensy, *Which Countries Count?: Lawrence v. Texas and the Selection of Foreign Persuasive Authority*, 45 VA. J. INT’L L. 357, 400-01 (2005) (footnotes omitted).

43. Pope Benedict XVI, Address of Benedict XVI to the Members of the UN General Assembly (Apr. 18, 2008) (also stating that the UN is “charged with the responsibility of promoting peace and goodwill throughout the earth”) (transcript available at [http://www.vatican.va/holy\\_father/benedict\\_xvi/speeches/2008/april/documents/hf\\_ben-xvi\\_spe\\_20080418\\_un-visit\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/speeches/2008/april/documents/hf_ben-xvi_spe_20080418_un-visit_en.html)).

44. See U.N. Charter ch. V, arts. 23-32.

45. See *id.*

46. See Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law*, in 281 RECUEIL DES COURS: ACADEMIE DE DROIT INT’L DE LA HAYE 13, 56-58 (1999).

47. See, e.g., Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 1974 (2004).

international law is to ensure the “safeguard[ing] [of] international peace, security and justice in relations between States.”<sup>48</sup>

The question then arises as to how international law can position itself to create rules that enable it to act as the perennial guardian of universal peace. One answer to this question is straightforward: the UN could simply pronounce global laws that prohibit the use of force. To be sure, the UN Charter bans the use of military force as a form of resolution of conflict between quarreling nations.<sup>49</sup> Moreover, the UN Security Council is tasked to decide whether a nation has acted in a way that threatens the overall goal of the UN and international law to maintain peace and security around the world.<sup>50</sup> Indeed, the prohibition of armed conflict as a legitimate way of resolving disputes between nation-states has long been a “central pillar” of international law.<sup>51</sup> Related to this central pillar are various international treaties and conventions which have been enacted and ratified by the vast majority of nations, such as the Convention on the Prevention and Punishment of Genocide<sup>52</sup> and the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.<sup>53</sup> Although scholars debate the relative success of the UN and international law in implementing this goal, it is undeniable that there have been no worldwide wars since the UN’s creation.

International law’s role in keeping the peace is subtler than a mere proscription on armed conflict. Acts by the international community that exemplify this goal of international law relate to the modern use-of-force doctrine, which relaxed the complete prohibition of armed conflict and allowed armed conflict for humanitarian interventions such as in Bosnia, Kosovo, and, most controversially, Iraq. For example, in 1977, the UN Security Council opined that South Africa’s apartheid regime, a matter mostly internal to South Africa alone, constituted a threat to international peace under Chapter VII of the UN Charter.<sup>54</sup> As demonstrated by this act and many similar acts, the underlying thrust of this goal of international law as communicated by the UN ceased to

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48. Tomuschat, *supra* note 46, at 23; *see also* McGuinness, *supra* note 35, at 1273 (noting that international law is designed to “promot[e] peace and security”).

49. *See* U.N. Charter chs. VI-VII, arts. 33-51.

50. *See, e.g.*, S.C. Res. 1718, ¶¶ 1, 8, U.N. Doc. S/RES/1718 (Oct. 14, 2006) (resolving that nuclear tests undertaken by the People’s Republic of Korea constituted a threat to global peace and security, and thus authorizing a whole set of sanctions to counteract the same).

51. *See* McGuinness, *supra* note 35, at 1276.

52. Convention on the Prevention and Punishment of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277.

53. Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65.

54. *See* S.C. Res. 418, U.N. Doc. S/RES/418 (Nov. 4, 1977).

be merely a state-to-state proposition but developed into a system of rules that permitted penetration into a single state.

Ironically, rules that serve the peacekeeping goal of international law have morphed into a more contemporary shape – developing into certain rules pertaining to the use of force against “rogue states.” These particular rules have been embraced even by those skeptical about the overall reach and pervasiveness of contemporary international law.<sup>55</sup> The recent international intervention in the war in Kosovo almost certainly saved thousands of lives in 1999,<sup>56</sup> and was possible only in light of the stature of the international law of conflict prevention. This goal of international law has been so internalized that “no respectable philosopher or lawyer” would argue that the international community could not interfere with an impending or ongoing breach of the peace merely on the ground that no other state was involved.<sup>57</sup> Indeed, the goal of preservation of world peace “has been a strong antidote to realist resignation in the building of nation-states and international law.”<sup>58</sup>

### B. Implementation of Human Rights

Human rights also have been a concern of international law, albeit a small one, since its inception. For example, the 1648 Westphalian treaties contained provisions protecting the freedom of worship for religious minorities.<sup>59</sup> Nevertheless, under most circumstances, international law did not concern the relations between a state and its citizens until after WWII. Following the devastating treatment of people evidenced in the Holocaust, there emerged a general “recognition of the individual as the ultimate subject of modern international law by acknowledgment of fundamental rights.”<sup>60</sup> As a

55. See, e.g., John O. McGinnis & Ilya Somin, *Should International Law be Part of Our Law?*, 59 STAN. L. REV. 1175, 1237 (2007).

56. See, e.g., Noam Chomsky, *Rogue States: The Rule of Force in World Affairs*, 25 SUFFOLK TRANSNAT'L L. REV. 711 (2002) (criticizing the rationale for the modern use of force doctrine).

57. See Eric A. Posner, *International Law: A Welfarist Approach*, 73 U. CHI. L. REV. 487, 492 (2006). Admittedly, the example illustrated above is symptomatic, both of the international goal of prevention of conflict and of the parallel goal of implementing universal human rights.

58. Cottier, *supra* note 17, at 652.

59. See Hurst Hannum, *Contemporary Developments in the International Protection of the Rights of Minorities*, 66 NOTRE DAME L. REV. 1431, 1431 (1991).

60. Karolina Milewicz, *Emerging Patterns of Global Constitutionalization: Toward a Conceptual Framework*, 16 IND. J. GLOBAL LEGAL STUD. 413, 427 (2009); accord Anne Peters, *The Merits of Global Constitutionalism*, 16 IND. J. GLOBAL LEGAL STUD. 397, 399 (2009) (“The ongoing process of humanizing sovereignty is the cornerstone of the current transformation of international law into a system centered on individuals.”); Tomuschat, *supra* note 46, at 23 (saying that international law serves the purpose of safeguarding “human rights . . . domestically inside States for

result, one of the pillars of international law is now the protection of human rights through the promulgation of international standards of behavior.<sup>61</sup> Indeed, all UN members are required to respect and protect basic human rights through their accession to the UN Charter as a condition of membership.<sup>62</sup> A UN Panel made it clear that mere membership in the UN is an acknowledgment that a country desires to carry out the central mission of international law: the protection of the welfare *of its own citizens*.<sup>63</sup> The Panel noted that this undertaking is one of the obligations each state owes to the wider international community.<sup>64</sup>

The focus of modern international law on the delineation and implementation of universal human rights stems from an understanding that certain rights are so fundamental that they exist on a plane above and independent of the law. In other words, these rights are “conceived as reflections of nonlegal principles that have normative force independent of their embodiment in law, or even superior to the positive legal system.”<sup>65</sup> This ideal is the modern realization of Kant’s concept of international law as the institutor of perpetual peace.<sup>66</sup> The ideational Kantian goal of ensuring perpetual peace that is certainly embodied in the *ür*-goal of international law holds strong sway when it comes to the protection of human rights.<sup>67</sup> The universal nature of these rights (and the growing acknowledgment thereof) serves as the background motivation for their protection and for the normative justification that allows international law to breach domestic borders. This new norm comports with the Kantian view that the endemic universality of the desire to maintain peace breaches any notion of national borders.<sup>68</sup>

The Universal Declaration of Human Rights (UDHR)<sup>69</sup> and its two corollaries, the International Covenant on Civil and Political Rights<sup>70</sup> and the

the benefit of human beings, who, in substance, are the ultimate addressees of international law”).

61. See ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW 118-90 (2004).

62. See U.N. Charter art. 4, para. 1.

63. See High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, ¶ 29, U.N. Doc. A/59/565 (Dec. 2, 2004).

64. See *id.*

65. Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863, 1868 (2003).

66. See, e.g., KANT, *supra* note 41, at 102-08.

67. See *supra* Part III.A. *ÜR* is a German term often used to mean “primordial.” In other words, the term is used to describe something of ancient background.

68. See, e.g., Jürgen Habermas, *Kant’s Idea of Perpetual Peace, with the Benefit of Two Hundred Years’ Hindsight*, in PERPETUAL PEACE: ESSAYS ON KANT’S COSMOPOLITAN IDEAL 113, 127-34 (James Bohman & Matthias Lutz-Bachmann eds., 1997); see also Costas Douzinas, *The End(s) of Human Rights*, 26 MELB. U. L. REV. 445, 451 (2002).

69. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948). The focal points



International Covenant on Economic, Social, and Cultural Rights,<sup>71</sup> are the ultimate expressions of international law's goal to protect human rights across the globe.<sup>72</sup> Similarly, multilateral treaties such as the Convention on the Prevention and Punishment of Genocide and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>73</sup> also represent the gradual development of the international law policy that seeks to protect universal human rights.<sup>74</sup> Not all of these agreements, conventions, and treaties have the same status within international law. Some were born as binding authority, others have only become binding because of the customary

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of this document are civil and political rights, which appear as the first nineteen articles of the declaration. *See id.* at arts. 1-19.

70. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16, at 52, U.N. Doc. A/6316 (Dec. 16, 1966). The most notable rights enshrined by this document are: life, prohibition of torture and slavery, security, right to a fair trial, freedom of religious belief and association, and equality. *See id.* at arts. 7-27.

71. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16, at 49, U.N. Doc. A/6316 (Dec. 16, 1966).

72. These agreements and statements are often referred to as the International Bill of Rights. *See* Louis Henkin, *Preface* to THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS, at ix, ix-x (Louis Henkin ed., 1981); *see also* Karel Vasak, *A 30-year Struggle*, UNESCO COUR., Nov. 1977, at 29 (identifying three generations of international human rights modeled on the French motto "liberty, equality, and brotherhood": civil and political (first, liberty); economic, social, and cultural (second, equality); and solidarity (third, brotherhood)). Other more regional examples include the European Convention on Human Rights, which is now incorporated within the Lisbon Treaty as interpreted by the European Court of Human Rights. *See* Treaty of Lisbon, amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1, *available at* <http://eurlex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:EN:HTML>.

73. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/39/51, (June 26, 1987).

74. Moreover, the protection of universal human rights often takes expression through various treaties that target the protection of different minorities such as the Convention on the Rights of the Child, G.A. Res. 44/25, arts. 14, 15, 40, 44 U.N. GAOR Supp. No. 49, at 167, U.N. Doc. A/44/49 (Nov. 20, 1989); the Convention on the Elimination of all Forms of Discrimination Against Women, G.A. Res. 34/180, 34 U.N. GAOR Supp. No. 46, at 193, U.N. Doc. A/34/46 (Dec. 18, 1979); and the International Convention on the Elimination of all Forms of Racial Discrimination, G.A. Res. 2106 (XX), art. 5, U.N. Doc. A/6014 (Dec. 21, 1965). It is noteworthy that, notwithstanding the perception that the U.S. views international law and its goals askance, the U.S. actually was part of the impetus which led to the genesis of these agreements and treaties and was also an active participant in the drafting of all of the above documents.

law process, and still others are purely statements of intention.<sup>75</sup> Nevertheless, their status as international law of some sort is established, and therefore this whole body of law must be considered when deciding whether it is appropriate material for comparative constitutional interpretation. Even though such treaties were implemented with varying degrees of success, they all derived from a shared value of promoting fundamental freedoms throughout the globe.<sup>76</sup>

But this goal of international law was not left merely to declarations and treaties or to the rhetorical deliberations of international bodies. Rather, the international system also has dispute resolution mechanisms, such as the International Court of Justice (ICJ) and the Inter-American Court of Human Rights, for cases brought under the relevant human rights regimes. Other enforcement mechanisms exist to carry out international law's goal of protecting human rights around the world. For example, specially designated international monitors or inspectors are required by official human rights committees, such as the UN Security Council or UN Human Rights Council, to report back to the sending bodies, which then issue reports concerning compliance with international law.<sup>77</sup> The creation of the International Criminal Court (ICC) is part of this movement and provides for prosecutions of individual violators of international human rights agreements should the accused's home country be unable or unwilling to do so itself.<sup>78</sup>

Humanitarian intervention is another practice that realizes international law's goal of protecting human rights. The rationale behind this practice is that there is no moral weight given to a nation's claim of breach of sovereignty when individuals endure human rights abuses within the borders of that nation. In these situations, international law accepts and often encourages intervention.<sup>79</sup> Indeed, international law was intended to supplement the ineffective attempts by different nation-states to implement laws that provided either for universal criminal jurisdiction or for venues to pursue civil damage

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75. For example, the International Covenant on Civil and Political Rights (ICCPR), *supra* note 70, was born as a binding treaty, while the Universal Declaration of Human Rights (UDHR), *supra* note 69, being a UN General Assembly resolution, had no binding effect at inception, and was merely a statement of intention. Over time some, but not all, of its provisions have ripened into customary international law.

76. See Thomas Cottier, *Trade and Human Rights: A Relationship to Discover*, 5 J. INT'L ECON. L. 111, 125 (2002).

77. See, e.g., Human Rights Comm., *Report of the Human Rights Committee*, ¶¶ 279-81, U.N. Doc. A/50/40 (Oct. 3, 1995) (concluding that the U.S. stance on allowing capital punishment for individuals who committed their crimes under the age of 18 was against the purpose of the ICCPR).

78. See Rome Statute of the International Criminal Court art. 17, July 17, 1998, 2187 U.N.T.S. 90.

79. See PETER SINGER, *ONE WORLD: THE ETHICS OF GLOBALIZATION* 148-49 (2002).

awards against alleged violators of human rights for crimes that occurred abroad.<sup>80</sup>

The establishment of a core, inviolable set of human values through various international law treaties has been so successful, at least on the rhetorical front, that I believe no individual or nation seriously argues against them. Even some regimes known for their spotty human rights records do not dispute the right to life, for example, and do not claim the right to commit genocide or torture (even if they surreptitiously implement these odious practices). Indeed, the price paid for a state's systematic, flagrant, and wanton disregard for basic human rights usually exacts a serious penalty from the international community, ranging from sanctions or humanitarian intervention to invasion.<sup>81</sup>

Similarly, advancing global justice is a corollary goal to the delineation and protection of fundamental human rights. This goal of international law has also seemingly reached universal acceptance, at least in theory (judging by the number of nations which *claim* to support the protection of fundamental human rights).<sup>82</sup> Indeed, the regulation of universal human rights seems to be a topic to which international law, with its global-local ethos, is ideally suited. These are notions of utmost importance for the comparative constitutional enterprise, which seeks, like international law, to crystallize symbolic aspirations into substantive legal rules.

The creation of human rights aspirations into international legal principles is constantly contested in many international fora by competing claims of universality as to certain rights falling under this umbrella and by claims of the legitimacy of cultural exceptions to these norms.<sup>83</sup> These sore spots for the international human rights project should not overshadow the great progress that this neo-Kantian goal has achieved over the last half century. In other words, commentators and nation-states might argue as to what these universal rights are or should be, but the argument about whether there are such things as universal human rights has largely ceased. For that reason

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80. The U.S. Alien Tort Statute was one such attempt. 28 U.S.C. § 1350 (2006) (giving district courts jurisdiction over civil actions by an alien for a tort "committed in violation of the law of nations or a treaty of the United States").

81. The international community's reactions to the situations in Apartheid-era South Africa, the war in the Balkans in the early nineties, and the current crisis in Darfur are examples of consequences exacted on countries as a result of their state practice of denying basic human rights.

82. Scholars often complain about the U.S.'s somewhat ambivalent attitude towards this aspect of international law by noting that the American tradition of exceptionalism has ill-served the goal of global protection of human rights. *See, e.g.*, Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1482-83 (2003); *see also* PHILIPPE SANDS, *LAWLESS WORLD: AMERICA AND THE MAKING AND BREAKING OF GLOBAL RULES FROM FDR'S ATLANTIC CHARTER TO GEORGE W. BUSH'S ILLEGAL WAR* (2005).

83. *See infra* Part IV.B.

alone, the international law of universal human rights has been extremely successful.

In sum, the gravitational center of international law today is to set universal standards of state (and, to a lesser extent, private) behavior pertaining to fundamental human rights.<sup>84</sup> The next step in the evolution of international law as the supreme protector of civil rights is the creation of uniform international human rights standards. This creation would make individuals full participants in international politics and provide a decisive check against the coercive power of specific governments within their own territories. Constitutional interpretation that relies on pronouncements pertaining to the human rights area of international law could efficiently channel this goal of international law.

### C. *Delineation and Adjudication of International Relations*

One of the key modern facets of international law is its provision of an institutional and organizational framework for relations between different states.<sup>85</sup> As stated by Karolina Milewicz, “[t]he principle of the rule of law empirically refers to relations between nation-states, and thus implies that international law is a regulatory instrument [designed for] the regulation of interstate relations.”<sup>86</sup> This particular goal of international law is rooted in the concept of cosmopolitanism, which is a classically liberal doctrine premised on the dispensation of equal justice among the nations that participate in international relations.<sup>87</sup> This goal fosters cooperation among nations<sup>88</sup> and protects negotiated and customary rights of nations from interference by other nations.<sup>89</sup> Thus, “international responsibility may fulfill an important role in maintaining the order in the international system by reinforcing the basic structure of sovereign equality,” which in turn ensures “the protection of the integrity of the system.”<sup>90</sup>

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84. See McGuinness, *supra* note 35, at 1275 (the international system “is centrally concerned with achieving universal state compliance with pre-agreed categories of political, social and economic rights”); see also Margaret E. McGuinness, *Exploring the Limits of International Human Rights Law*, 34 GA. J. INT’L & COMP. L. 393, 401-02 (2006).

85. See Gunther Teubner, *Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?*, in TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM 3, 17 (Christian Joerges et al. eds., 2004).

86. Milewicz, *supra* note 60, at 427.

87. See, e.g., CHARLES R. BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* 127-61, 181-82 (1979).

88. See Tomuschat, *supra* note 46, at 56-58.

89. See generally Albert Bleckman, *The Subjective Right in Public International Law*, 28 GERMAN Y.B. INT’L L. 144 (1985).

90. André Nollkaemper, *Constitutionalization and the Unity of the Law of International Responsibility*, 16 IND. J. GLOBAL LEGAL STUD. 535, 544-45 (2009) (citing F.V. García Amador, *International Responsibility: Report by F.V. García Amador on*

The clearest examples of this goal of international law are the Vienna Convention on Consular Relations,<sup>91</sup> the Vienna Convention on Diplomatic Relations,<sup>92</sup> and the Vienna Convention on the Law of Treaties.<sup>93</sup> One of the many obligations outlined in the first of these treaties requires foreign nationals arrested by a signatory nation to be allowed to contact their own consulate for assistance.<sup>94</sup> Should a signatory nation violate this obligation, the convention gives the International Court of Justice jurisdiction to resolve any disputes.<sup>95</sup> The third treaty, the Vienna Convention on the Law of Treaties, embodies some of the most important goals of international law, which can be synthesized by the famous Rodney King truism: “Can’t we just all get along?”<sup>96</sup> This Convention requires settling “disputes concerning treaties, like other international disputes . . . in conformity with the principles of justice and international law,” which includes “universal respect for, and observance of, human rights and fundamental freedoms for all.”<sup>97</sup> The UN Security Council requirement that countries enact antiterrorism legislation also falls into this policy of delineation and adjudication of international relations, as does the treaty regime created by the World Trade Organization (WTO).

The U.S. Supreme Court has implicitly recognized this important goal of international law by crafting several judicial doctrines to give it effect. For example, the act-of-state doctrine was designed by the Court to preclude its own intervention in matters in which a foreign government has acted, so as to not interfere with the prerogatives of interstate relations properly left to the executive branch.<sup>98</sup> Similarly, the Court also held that the U.S. Constitution contains a foreign affairs preemption doctrine, which precludes any interfe-

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*State Responsibility*, ¶¶ 54-57, U.N. Doc. A/CN.4/96 (Jan. 20, 1956) (further citations omitted)).

91. Vienna Convention on Consular Relations, *opened for signature* Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

92. Vienna Convention on Diplomatic Relations, *opened for signature* Apr. 18, 1961, 23 U.S.T. 3227; 500 U.N.T.S. 95.

93. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

94. *See* Vienna Convention on Consular Relations, *supra* note 91, at art. 36. This article was the center of a dispute between the U.S. and various other countries because of the U.S.’s failure to abide by the article in cases where the criminal defendant was then given the death penalty and, in some instances, executed. *See* *Medellín v. Texas*, 552 U.S. 491, 491 (2008).

95. *See* Vienna Convention on Consular Relations, Optional Protocol Concerning the Compulsory Settlement of Disputes, *supra* note 91, at art. 1.

96. *Like Rodney Said, ‘Can’t We All Just Get Along?’* (NPR radio broadcast Nov. 28, 2008), available at <http://www.npr.org/templates/story/story.php?storyId=97490927>.

97. Vienna Convention on the Law of Treaties, *supra* note 93, at pmb1.

98. *Samantar v. Yousuf*, 130 S. Ct. 2278, 2290 (2010).

rence by the states in pertinent decisions and rules on foreign affairs taken by the federal government.<sup>99</sup>

One consequence of the delineation of the international relations goal of international law is that it does not give rise to any substantive rights that can be exercised by individuals, as opposed to nations. Thus, individuals are not granted standing under the WTO legal regime (which resolves disputes arising from trade agreements), as the field is exclusively the prerogative of states. This dissipates the force of any rulings that tend not to be absorbed at the domestic level, thus limiting the impact of WTO jurisprudence. Perhaps this lack of individual rights is the intended reach of this goal of international law, but that is unlikely, or at the very least, debatable. A possible consequence of this apparent weakness of international law is that “the settlement of international disputes is increasingly legalized and juridified through the establishment of international courts and tribunals with quasi-compulsory jurisdiction.”<sup>100</sup> Indeed, the failure of nation-states to comply with their duties under relevant treaties often gives rise to dispute resolution by apposite supranational adjudicatory bodies, through operation of the treaties themselves or by application of customary norms.<sup>101</sup> Such procedures can find a forum within a treaty-agreed jurisdiction such as the ICJ, which, under international law, does not possess any particular power to enforce treaties between nations. However, the ICJ is regularly called upon to resolve and enforce treaty disputes.<sup>102</sup>

There is also a normative conceptual element to this goal of international law, which is that it legalizes international relations so that they are wrested away from the continuous struggle for power and self-interest that infects the whole international relations regime.<sup>103</sup> Thus, scholars are actively seeking to transform the structure of international relations into one that more resembles the traditional operation of law.<sup>104</sup>

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99. *See, e.g.*, *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 401 (2003) (nullifying a California law mandating that insurance companies doing business in the state declare any activities in which they participated in Europe during the time of the Holocaust).

100. Peters, *supra* note 60, at 399.

101. *See, e.g.*, HENRY J. STEINER ET AL., *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 1087-155 (3d ed. 2007) (referring to such enforcement procedures in the international human rights context).

102. *See, e.g.*, *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, 1994 I.C.J. 6 (Feb. 3) (adjudicating that the Aouzou Strip, a narrow band of land straddling the border between Libya and Chad, belonged to the latter country).

103. *See infra* Part III.E-F.

104. *See, e.g.*, Simon Chesterman, *An International Rule of Law?*, 56 *AM. J. COMP. L.* 331, 359-60 (2008); Judith Goldstein et al., *Introduction: Legalization and World Politics*, 54 *INT’L ORG.* 385, 398-99 (2000); Jeremy Waldron, *The Rule of International Law*, 30 *HARV. J.L. & PUB. POL’Y* 15, 24, 26 (2006).

*D. Delineation and Adjudication of Individual Cross-Border Disputes*

The delineation and adjudication of individual cross-border disputes is the private counterpart to the public goal of international law to regulate international relations between states, as described above. This private goal of international law stems from the realization that “[i]nterrelations among multiple populations across territorial boundaries have existed for centuries.”<sup>105</sup> However, those interrelations have proliferated and multiplied in the latter half of the twentieth century such that today, “given the pervasiveness of the ideology of market capitalism, the speed of commodity, capital, and personal movement, [and] the ubiquity of global media,” a regulatory and adjudicative system governing these interactions is not only desirable, but also necessary.<sup>106</sup>

As a result of this burgeoning activity, the international community has created treaties and organizations that regulate and administer the plethora of interstate private relationships, sometimes preemptively, but most often by playing catch-up. The proliferation of international courts and arbitration tribunals indicates that modern nations are taking action to adjudicate cross-border disputes.<sup>107</sup> At the core of this goal of international law is the protection of the economic rights of those who participate in transnational business transactions. These participants are primarily corporate entities but also can be individuals, albeit to a much lesser extent. In this arena, international law expresses market-oriented philosophies that are designed to tear down protectionist barriers and redress the inequality of opportunities that exist in the economic activities between people in different countries.<sup>108</sup> International law advocates also seek to attract foreign investors and development funds by offering legal protections for foreign investors. Thus, this goal of adjudicating cross-border disputes is inextricably tied to the promotion of free trade. It has reached global acceptance, “as manifested in the universal ratification of relevant multilateral treaties.”<sup>109</sup> For example, treaties and arrangements agreed upon as a result of this policy of international law not only safeguard free trade, and thus serve a public function, but they also protect the private rights of those engaged in international transactions. These protections can be transaction based (such as granting a certain process to resolve disputes arising out of a particular transaction) or subject matter based (such as delineating the rights and duties for intellectual property matters, as does the Agreement on Trade-Related Aspects of Intellectual Property Rights).<sup>110</sup>

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105. See Schiff Berman, *supra* note 34, at 1154 n.21.

106. *Id.*

107. See Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT’L L. & POL. 709, 729 (1999).

108. See JACK DONNELLY, *THE CONCEPT OF HUMAN RIGHTS* 90-96 (1985).

109. Peters, *supra* note 60, at 399.

110. Agreement on Trade-Related Aspects of Intellectual Property Rights, 1869 U.N.T.S. 299, Apr. 15, 1994.

International law is replete with examples of countries regulating international relations between states. This goal is evident in the formation of the original European Economic Community (EEC), also known as the common market (the precursor to the more encompassing EU), the World Trade Organization (WTO), the General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS), the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).<sup>111</sup> Another substantive embodiment of this goal would be the establishment of a global bankruptcy rule, where courts of competent national jurisdiction act in concert to adjudicate international bankruptcy disputes.<sup>112</sup>

Another example of international legal cooperation and furtherance of this goal is that international dispute resolution is growing in popularity. Dispute settlement provisions include private commercial arbitration (decided through contracts which might involve rules provided by the United Nations Commission on International Trade Law (UNCITRAL) or the Court of Arbitration of the International Chamber of Commerce (CAICC)),<sup>113</sup> national courts, Bilateral Investment Treaties (BITs), regional agreements (such as Chapter 11 of the North American Free Trade Agreement (NAFTA)), regional courts, world courts, and alternate dispute resolution bodies such as those provided by the WTO. These entities' rulings, and particularly the decisions rendered by the WTO's Dispute Settlement Body, "have global ramifications for business operators and citizens."<sup>114</sup> The importance of adjudicating cross-border disputes to the functioning of international law is so paramount that even the UN Security Council sometimes gets involved in dispute resolution

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111. Treaty Establishing the European Economic Community, Mar. 25, 1957; Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125 (1994); General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194; General Agreement on Trade in Services, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994); Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Oct. 14, 1966, 17 U.S.T. 1270, 575 U.N.T.S. 159; Agreement on Trade Related Aspects of Intellectual Property Rights, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

112. See Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457, 459 (1991).

113. These international agreements advise that the arbitral "[t]ribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties," and "[i]n the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute . . . and such rules of international law as may be applicable." Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 42, *approved* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159.

114. Andreas Føllesdal, *When Common Interests are not Common: Why the Global Basic Structure Should be Democratic*, 16 IND. J. GLOBAL LEGAL STUD. 585, 592 (2009).



by imposing “smart sanctions” directed at specific businesses or individuals.<sup>115</sup>

An important aspect of this area of international law is its symbiotic interplay with domestic regimes, which is of great importance within the ambit of domestic constitutional interpretation. Thus, within this goal is the recognition that courts enforce “foreign judgments even if they would have refused to entertain suit on the original claim on grounds of public policy.”<sup>116</sup> For example, both the Uniform Foreign Money-Judgments Recognition Act and the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) require a U.S. court to give effect to a foreign judgment or arbitral award even if the action that gave rise to the judgment or award could not have taken place in the domestic forum.<sup>117</sup> For the comparative constitutional enterprise, global trade and the establishment of the WTO have, in effect, constructed a quasi-constitutional apparatus whereby trade treaties are viewed as foundational documents akin to a constitution.<sup>118</sup> Dispute resolution mechanisms within many of these treaty regimes, although nascent, have already been described as successfully implementing the goal of the international community in this area.<sup>119</sup>

### *E. The Global Comfort Model*

As noted above, Immanuel Kant visualized a world order in which perpetual peace was the natural state of affairs, realized through a global confederation of nations.<sup>120</sup> The contemporary goal of creating a worldwide system responsible for lubricating the gears of the global engine comports with this view, in accordance with the reality that a multitude of human interactions (not solely commercial) occur on an interstate level. In other words, this is international law in its purest sense – a body of law that seeks to smooth the regulatory and legal kinks that occur when a nation-state is engaged in any activity that reaches beyond its borders. International law, in

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115. See Iain Cameron, *UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights*, 72 NORDIC J. INT’L L. 159, 159-60 (2003).

116. Mark D. Rosen, *Exporting the Constitution*, 53 EMORY L.J. 171, 178-79 (2004).

117. UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 3 (1963); Conference on International Commercial Arbitration, June 10, 1958, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, art. III.

118. DEBORAH Z. CASS, *THE CONSTITUTIONALIZATION OF THE WORLD TRADE ORGANIZATION: LEGITIMACY, DEMOCRACY, AND COMMUNITY IN THE INTERNATIONAL TRADING SYSTEM* 208, 237 (John H. Jackson ed., 2005).

119. See Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 44-50 (2005).

120. See IMMANUEL KANT, *Idea for a Universal History with a Cosmopolitan Purpose*, in *KANT’S POLITICAL WRITINGS* 41, 41-53 (Hans Reiss ed., H.B. Nisbet trans., 1971) (1970).

this sense, functions as the law of the world community.<sup>121</sup> The global comfort model of international law resolves the persistent problem of cross-border externalities through rules and regulations promulgated at the supranational level.<sup>122</sup> Often this promulgation comes from international organizations such as the World Health Organization, the Food and Agriculture Organization, the International Labour Organization, the World Wildlife Fund, the International Monetary Fund, or the World Bank, which function as forums to promote cooperation.

The goal of lubrication owes its genesis to the international law mantra that all nations of the international system should exist in a state of juridic equality.<sup>123</sup> This allows for theoretical and actual convergence around the specific norms within international law across a multitude of nations, with no preeminence granted to discovering which nations have actually adopted those norms. The impetus for this goal of international law might have a normative component but is almost certainly driven by pragmatic factors. These are primarily based on the increased globalization of interactions such as international trade, Internet-based transactions, and the ease of mobility from one country to another. Indeed, “[m]ore actions of individuals in one nation are likely to affect the welfare of individuals in other nations [and] [i]nternational law offers the possibility of creating coordination mechanisms.”<sup>124</sup>

An early version of the implementation of the global comfort model of international law was the coalescence of most nations around the concept of the international law of piracy at sea. This crime allowed any nation to try to punish pirates even though the crime might not have been committed on that nation’s territory or in that nation’s territorial waters and the victims of that crime were not that nation’s citizens.<sup>125</sup> These international rules were necessary so that travelers and explorers could rely on some system of deterrence while undertaking inherently perilous activities. Modern reiterations of this anti-piracy law are the UN Convention on the Law of the Sea,<sup>126</sup> the Convention for the Unification of Certain Rules Relating to International Carriage by Air (the Warsaw Convention), and its modern replacement, the Montreal Convention.<sup>127</sup> Other modern incarnations of this goal, such as GATT and

121. See Tomuschat, *supra* note 46, at 56-58.

122. See Posner, *supra* note 57, at 540.

123. See, e.g., U.N. Charter, chs. II, IV.

124. McGinnis & Somin, *supra* note 55, at 1182.

125. See, e.g., U.S. CONST. art. I, § 8, cl. 10 (“Congress shall have Power . . . To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.”).

126. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3, 21 I.L.M. 1261.

127. Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, available at [http://untreaty.un.org/unts/144078\\_158780/3/5/11624.pdf](http://untreaty.un.org/unts/144078_158780/3/5/11624.pdf).

WTO, were prompted by the cross-border consumption of products, which inevitably led to legal and practical challenges. Nations must enact laws to smooth rough edges that crop up as a consequence of these transactions. To deal with this problem, some scholars prefer that national bodies create a system of cooperative solutions that reflect the commonality of interests involved.<sup>128</sup>

Nevertheless, in today's global economy, products and services manufactured or provided within one's borders are often supplied to a myriad of consumers abroad. As a result, each country has an incentive to externalize the costs of production and distribution to consumers located outside their borders. However, this kind of thinking produces a prisoner's dilemma, whereby the typical choice, unfettered by any notion of cooperation, will produce a multiplicity of nations where each imposes externalities outside its borders. The confusion that would result is most undesirable, thus this goal of lubrication of the international system can be invoked to correct this collective action problem and allow people to obtain these goods and services globally without being overpowered by exorbitant external costs.

The proliferation of tribunals to adjudicate international disputes, either between states or between states and individuals, also serves the goal of global comfort in international law. These tribunals can be of general competence, specialized jurisdiction, have intercontinental or regional reach, or be of a civil or criminal nature. In addition, these tribunals could merely exist on an ad hoc basis for a particular type of claim, with a sunset provision taking effect after a certain period of time. Indeed, the supply of public goods regulated by international treaties and agreements has proven very effective as demonstrated by the European integration schemes, at least in respect to trade relationships.<sup>129</sup> Product safety, for example, is an interest paramount to international safety, which can only be successfully achieved through a high level of global coordination.

More than some other goals of international law, the global comfort model relies heavily on implementation by national courts. Cooperation forms the backbone of the global comfort model, which is shaped by the numerous international conventions and agreements that direct or encourage the signatory nations to implement the specifics contained in such documents through domestic legislation. International model laws, which recommend action by national legislatures, produce a similar effect.<sup>130</sup> The implementation by national courts is viewed as desirable even if just limited to a pragmatic optic, considering international participants "should accept [jurisdictional overlaps] as a necessary consequence of the fact that communities can-

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128. See Dinwoodie, *supra* note 30, at 479.

129. Treaty Establishing the European Community, Nov. 10, 1997, 1997 O.J. (C 340) 3.

130. UNODC MODEL MONEY-LAUNDERING, PROCEEDS OF CRIME AND TERRORIST FINANCING BILL (U.N. Office on Drugs and Crime 2003); UNCITRAL MODEL ON INTERNATIONAL COMMERCIAL ARBITRATION (U.N. 1994).

not be hermetically sealed off from each other.”<sup>131</sup> Indeed, the implementation of common standards arguably makes the world better for everyone.

Finally, the global comfort model is also pursued through the academic and political agenda of global constitutionalism, which seeks to identify and propose the adoption of constitutional principles within international law. The creation of a universal norm that views the international legal system as functioning within constitutional parameters would help achieve the global comfort advocated by this goal.

### F. *Creating a More Viable Future*

Probably the most optimistic view of the role of international law is that through its authoritative pronouncements, it will “change legal consciousness over time, affect local debates, empower different local actors, and provide an alternative set of fora in which individuals and coalitions can make their voices heard.”<sup>132</sup> There are certain aspects of human activity that defy effective regulation at the domestic level. In this regard, domestic law must depend on international law to resolve collective action problems that prevent the resolution of global issues.

One of the most active endeavors in contemporary international law is the modern environmental movement and its embodiment in the activities of non-governmental organizations (NGOs) and their successful exhortation to the international community to pass measures safeguarding the global environment. Academics are trying to sort through the patchwork of international environmental protection enactments to determine whether there is such a thing as an international environmental constitution.<sup>133</sup> Regardless, the current thrust of global environmental law reveals a policy of common responsibility and solidarity.<sup>134</sup> Indeed, the goal of slowing climate change has become one of the primary concerns of international law, and the new urgency of the matter seems to have convinced a number of players in the international system to enact measures intended to reduce humankind’s carbon footprint into domestic law.<sup>135</sup> Thus, in the context of international law, environmental protection may be regarded as a public good held by government powers in

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131. Schiff Berman, *supra* note 34, at 1183.

132. *Id.* at 1150 (citing Paul Schiff Berman, *Seeing Beyond the Limits of International Law*, 84 TEX. L. REV. 1265, 1295-96 (2006)).

133. *See, e.g.*, Daniel Bodansky, *Is There an International Environmental Constitution?*, 16 IND. J. GLOBAL LEGAL STUD. 565 (2009).

134. *Id.* at 575.

135. For example, European nations have adopted comprehensive cap and trade legislation. *See, e.g.*, A. Denny Ellerman & Barbara K. Buchner, *The European Union Emissions Trading Scheme: Origins, Allocation, and Early Results*, 1 REV. ENVTL. ECON. & POL’Y 66 (2007).

trust for all people. This creates a vertical relationship between international law and domestic legal regimes.<sup>136</sup>

It is generally recognized that aggregate human economic activity has created climate change and global warming, and, because of the inherently unequal economic resources between nations, the activity of nations with large industrial outputs has adverse and sometimes dire effects on some nations that do not significantly contribute to climate change and global warming.<sup>137</sup> International law seems to be the only vehicle available for the coordination of this local-global process to resolve this most intractable of problems, because no single nation will ever possess sufficient incentive to do it itself.<sup>138</sup> McGinnis and Somin illustrate this point thus: “it may be best for all nations . . . to refrain from overfishing a common body of water [because] this will produce more fish for all of them . . . [b]ut because of collective action problems,” no country would unilaterally limit its own fishing “in the absence of an international norm that limits fishing.”<sup>139</sup> They conclude that international law should be a vehicle to carry this sort of norm into force.<sup>140</sup>

This is not a new issue. The UN held its first environmental conference in 1972, where members posited that nation-states had the primary responsibility of finding a solution to this global problem.<sup>141</sup> This watershed event heralded a new era in international attention to environmental protection, which substantially reshaped “the landscape of international diplomacy” when environmental matters are concerned.<sup>142</sup> Indeed, after the 1972 Stockholm meeting, the UN established its Environment Programme to implement the recommendations from that conference and subsequent conferences held in Montreal, Rio de Janeiro, Kyoto, and Copenhagen.<sup>143</sup> Even though the

136. See generally THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT (David Sloss ed., 2009).

137. See Howard F. Chang, *An Economic Analysis of Trade Measures to Protect the Global Environment*, 83 GEO. L.J. 2131, 2146 (1995) (advocating the need for international law to regulate environmental issues because no one nation will ever possess the incentive to do so for itself).

138. See, e.g., Judith Resnik, *The Internationalization of American Federalism: Missouri and Holland*, 73 MO. L. REV. 1105, 1106-21 (2008) (using American federalism to illustrate the operation of global-local relationships).

139. McGinnis & Somin, *supra* note 55, at 1195.

140. *Id.*

141. See United Nations Conference on the Human Environment, June 5-16, 1972, *Declaration of the U.N. Conference on the Human Environment*, art. 2, princ. 7. U.N. Doc. A/CONF.48/14/Rev. 1 (Nov. 1973).

142. See CAROLINE THOMAS, *THE ENVIRONMENT IN INTERNATIONAL RELATIONS* 24-26 (1992).

143. See *Report of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev.1 (June 1972), available at <http://www.unep.org/Documents/Multilingual/Default.asp?documentid=97>; United Nations Environment Programme, Overview, <http://www.unep.org/resources/gov/overview.asp> (last visited Sept. 25, 2010).

effectiveness of these conferences in setting up plausible and enforceable global environmental regulation is arguable, the symbolic meaning of these conferences and the citizen activism that results is highly important in influencing global behavior. Possibly of even greater importance are the hundreds of less-heralded bilateral and multilateral agreements. These agreements, which resulted from this global goal of international law, concern all sorts of sustainability issues, such as protecting endangered species, reducing the damage to the ozone layer, and cleaning-up polluted areas.<sup>144</sup>

That is not to say that there have not been challenges in the pursuit of effective international environmental regulation and enforcement. The efforts to produce a binding international treaty to curb climate change have proved elusive. Even less complex issues, such as the international moratorium on whaling, tend to be more effective in constructing their mandates rather than in executing them.<sup>145</sup> Nevertheless, the pursuit of a more viable future, especially that pertaining to international environmental law, has been successful. Within the past 30 years, previously unknown terms such as “global warming,” “climate change,” “carbon footprint,” and “cap and trade” have entered the daily lexicon, and a common theme among the younger generations is concern for the environment. This push has had a noteworthy effect on international law, as modern environmental law does not suffer from some of the defects of classic international law. Its goals have coalesced quickly, resulting in a swift process of promulgation, enactment, and amendment. Consequently, constitutive international environmental law principles such as “the duty to prevent transboundary harm, the polluter pays principle, the precautionary principle, the principle of common but differentiated responsibility, and the principle of sustainable development” have been rapidly and firmly established as important policy goals of the global polity.<sup>146</sup>

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144. International organizations such as the World Bank and the International Monetary Fund play a large role here by securing investments for developing nations in such things as infrastructure and human capital. See The World Bank Group, Private Participation in Infrastructure Database, <http://ppi.worldbank.org/> (last visited Sept. 25, 2010); International Monetary Fund, Borrowing Arrangements, <http://www.imf.org/external/about/borrow.htm> (last visited Sept. 25, 2010). These forms of investments usually end up getting repaid because of the increase in productivity that in turn ensures a future of greater stability and higher levels of professional and personal welfare.

145. See Jan Klabbbers, *Constitutionalism Lite*, 1 INT’L ORG. L. REV. 31, 43-44 (2004).

146. See Bodansky, *supra* note 133, at 579.

## IV. THE GOALS OF DOMESTIC LAW

*We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.*<sup>147</sup>

*We . . . adopt this Constitution . . . so as to . . . establish a society based on democratic values, social justice and fundamental human rights . . . .*<sup>148</sup>

The next step in resolving the international law dilemma within the context of constitutional interpretation is to define the  $X$  parameter to see if there is sufficient cognitive consonance between it and the  $Y$  parameter just delineated above. These variables are taken from the algebraic equation  $Xa \leftarrow Xb$ ,  $Xa \leftarrow Y$  where  $X$  is domestic law,  $a$  and  $b$  are different nation-states, and  $Y$  is international law.<sup>149</sup>

It is axiomatic that “[d]omestic law is taken to be the paradigm of how a legal system should work.”<sup>150</sup> Thus, one could begin the discussion of the goals of domestic law with a platitudinous, albeit true, abstraction such as the notion that the “fundamental value” that all societies strive to achieve is the protection of human dignity.<sup>151</sup> Moreover, in the most general sense, this “fundamental value” tends to be embodied in the highest order document of each nation, usually a constitution.<sup>152</sup> However, international law grows out of a series of primal values that matured and ripened in the domestic realm for many years. These values, which often began as basic social norms and behavioral regularities, include equality, liberty, justice, fairness, democracy, protection of minorities, checks and balances, and respect for property. Because these basic precepts pre-dated the existence of domestic law, they shaped the early concept of domestic (local) law. Plato described the domes-

147. U.S. CONST. pmbl.

148. S. AFR. CONST. 1996 pmbl.

149. *See supra* Part III.

150. Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1792 (2009).

151. *See* Walter F. Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703, 758 (1980).

152. *See* K. C. WHEARE, MODERN CONSTITUTIONS 1-13 (2d ed. 1966). H. L. A. Hart describes constitutions as containing primary rules, or those that establish the basic polity, and secondary rules, those which recognize, interpret, adjudicate, and change the primary rules. *See, e.g.*, H. L. A. HART, THE CONCEPT OF LAW 100-10 (2d ed. 1994).

tic state as arising “out of the needs of mankind,”<sup>153</sup> implying that such an entity was derived from the aggregation of common personal preferences, while Aristotle advised that the pursuit of justice had to be the focal point of any society and that fairness, reason, and equality were all seen as servants of that overarching goal.<sup>154</sup> More generally, Judith Resnik noted that “national polities have been a structure through which to develop aspirations (some praiseworthy and others not) for different forms of human exchange and political organization.”<sup>155</sup>

The observation and description of each country’s founding documents (often a constitution) usually provides more than a clue as to the goals of that domestic organization. “The fundamental law which determines the manner in which . . . public authority is to be exercised is what forms the constitution of the State.”<sup>156</sup> The existence of a constitution reflects the concept of constitutionalism that “is a political ideology [consisting] of various principles and assumptions about the dual nature of the individual as [a] private person and public citizen, the nature of the state, and the nature of the complex set of relationships between the individual and the state.”<sup>157</sup> Some countries, usually those of recent democratic transition, documented their deliberations on this matter.<sup>158</sup> These documents shed considerable light on the creation of such nations’ foundational documents, and on the goals pursued therein. For

153. PLATO, *THE REPUBLIC* 76 (Benjamin Jowett trans., Airmont Books 1968) (further defining the State as the accumulation of the wants of lots of people). Indeed, “[h]umanity is foundational in a normative sense because states are not ends in themselves, but are composite entities whose justification lies in the fulfilment [sic] of public functions needed for human beings to live together in peace and security.” Peters, *supra* note 60, at 398.

154. See ARISTOTLE, *NICOMACHEAN ETHICS* 118, 122, 141-42 (Martin Ostwald trans., 1999).

155. Judith Resnik, *Law as Affiliation: “Foreign” Law, Democratic Federalism, and the Sovereignty of the Nation-State*, 6 INT’L J. CONST. L. 33, 36 (2008).

156. EMER DE VATTEL, *LE DROIT DES GENS OU PRINCIPES DE LA LOI NATURELLE: APPLIQUÉS À LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS* Livre 1, ch. 3, § 27 (James Brown Scott ed., Carnegie Inst. of Washington 1916) (1758) (emphasis omitted).

157. Edward A. Harris, *Living with the Enemy: Terrorism and the Limits of Constitutionalism*, 92 COLUM. L. REV. 984, 986 (1992) (reviewing JOHN E. FINN, *CONSTITUTIONS IN CRISIS: POLITICAL VIOLENCE AND THE RULE OF LAW* (1991)).

158. For example, the negotiators of the Constitution of the Republic of South Africa set forth 34 Constitutional Principles with which the new Constitution had to comply. See Constitutional Court of South Africa – The Constitution, <http://www.constitutionalcourt.org.za/site/theconstitution/thecertificationprocess.htm> (last visited Sept. 26, 2010). When the Constitutional Assembly, tasked to write the new constitution, promulgated its first draft, it was sent for approval to the Constitutional Court, which rejected it for not complying with some of the 34 constitutional principles. *Id.* Only upon correction and resubmission did the Constitutional Court accept the proposed constitution as valid. *Id.* All of these proceedings were open to public scrutiny, and still are today.



example, the framers of the South African Constitution strove to incorporate international concepts that would enshrine freedom and equality as the cornerstones of the new societal order, in light of its apartheid past.<sup>159</sup> The hortatory language of this preamble, as in the preamble to the U.S. Constitution, is not merely surplusage – rather, it is expressive in content, declaring substantive components encompassed in the broad concepts of individual rights, liberty, and justice. This language is the backdrop, the mirror to which all the more detailed constitutional commitments need to be compared, and within which they need to be squared. Although it is true that the constitutions of various nations look very different, to a certain extent, each constitution attempts to do the same thing: set up a structure of institutional governance, explain how that governance will be implemented, and delineate the relationship between that governance and the governed. In that sense, all countries are alike, and therefore something else must be added to the equation if one is to distinguish between nations. This is because constitutional language is like a scientific theory that has to be proved or disproved through test and observation. Therefore, a simple statement of intent, ordering, and orientation cannot elucidate more than a certain amount of the goals of domestic ordering, and the practice of the state will actually elucidate on whether those goals are being fulfilled.

The analysis of that national practice leads to the first concession required of comparative constitutional interpretation: even if juridically, all states are created equally, in reality, “some . . . are more equal than others.”<sup>160</sup> Or, in the words of Posner and Sunstein, “[s]ome states are ‘better’ than others.”<sup>161</sup> So how does one identify the “better” and distinguish it from the “worse”? Answering this question requires an examination of the democratic credentials of the regime whose materials are the source of constitutional interpretation. This inquiry cannot be superficial. After all, “[a]uthoritarian governments, theological governments, and liberal governments all agree that they should be concerned about improving the well-being of their citizens, even if they agree on little else.”<sup>162</sup> Merely looking to see whether a state *claims* to look out for the well-being of its citizens still leaves the analysis of the goals of domestic law far from resolution, considering even totalitarian regimes likely would purport to look out for their citizens’ well-being.

The inquiry into the goals of domestic governance must be specific and grounded in empirical evidence. The comparative enterprise starts from a philosophical premise that “a defining feature of law is broad agreement in society on what counts as a legal rule and on what identifiable legal rules

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159. See, e.g., François du Bois & Daniel Visser, *The Influence of Foreign Law in South Africa*, 13 *TRANSNAT’L L. & CONTEMP. PROBS.* 593, 625-33 (2003).

160. GEORGE ORWELL, *ANIMAL FARM* 112 (1946); see also Karen Knop, *Here and There: International Law in Domestic Courts*, 32 *N.Y.U. J. INT’L L. & POL.* 501, 503 (2000).

161. Posner & Sunstein, *supra* note 6, at 174.

162. Posner, *supra* note 57, at 500.

require in concrete cases,” while a “defining feature of the state is that its institutions foster this agreement.”<sup>163</sup> Here, the goal of domestic law simply is to be the sole umpire of any disagreement that might arise regarding the content of a specific law.<sup>164</sup> However, that “broad agreement” necessary to constitutional interpretation cannot be empirically verified in non-democratic regimes because of the large deficit between the content of the law and the truth about its application. Thus, one of the driving forces behind the need to separate the goals of liberal democracies from other regimes relates to the distributive impact of laws. Because the general population feels the effects of laws of general applicability, nations that permit their populations to scrutinize laws – through such mechanisms as individual liberty protections and pluralist elections via a democratic electoral process – exist on a different normative plane than those where such liberties are curtailed. The next section is analyzed in this light.

### A. Liberal Democracies

The democratic state of government, which depends upon regular consultation with the body politic, is, for all its imperfections, considered to be the best system for generating norms with highest indicia of public benefit.<sup>165</sup> From the most basic formulation of normative desirability, democracies are “better” than other forms of governance because they have shown to be less likely to initiate war and to make war among themselves.<sup>166</sup> Indeed, from the standpoint of domestic governance, democratic accountability has been described as the sine qua non of legitimacy, in that it is the clearest form of government that can avoid the problem of imposing unavoidable costs on some for the benefit of others.<sup>167</sup> Liberal democracies seek to maximize the welfare of the average citizen.<sup>168</sup>

Liberal democracies are the end result of a long process of experimentation by governments, primarily Western nation-states. Lenaerts and Desomer

163. Goldsmith & Levinson, *supra* note 150, at 1801.

164. See THOMAS HOBBS, *LEVIATHAN* 189 (A.R. Waller ed., Cambridge Univ. Press 1935) (1651).

165. See David Estlund, *Beyond Fairness and Deliberation: The Epistemic Dimension of Democratic Authority*, in *DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS* 173, 173-74 (James Bohman & William Rehg eds., 1997).

166. See, e.g., David A. Lake, *Powerful Pacifists: Democratic States and War*, 86 *AM. POL. SCI. REV.* 24 (1992) (democracies are less prone to initiate war); see also MICHAEL W. DOYLE, *WAYS OF WAR AND PEACE: REALISM, LIBERALISM, AND SOCIALISM* 205-311 (1997) (liberal states rarely if ever make war amongst themselves).

167. See Føllesdal, *supra* note 114, at 589.

168. See ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 52-55 (1957) (explaining that welfare maximization of liberal democracies is centered on the median voter and not the entire population).

note that “[i]n our Western view, only democratic systems, advocating the values of liberty, equality and community, deserve the loyalty of the citizens,” and thus “the notions [of] legitimacy and democratic legitimacy must be considered as interchangeable.”<sup>169</sup> Indeed, even critics of constitutional interpretation via comparative analysis ground their criticism on a source’s lack of democratic accountability.<sup>170</sup> There is a special character to democratic governance that is not shared by other forms of rule, such as autocracies or theocracies.

Democracies espouse both procedural and substantive characteristic values.<sup>171</sup> On the procedural side, democracies regularly rely on a popular vote to choose those who should govern on a system which spreads power across a multitude of institutions each serving as a check on the other. On the substantive side, democracies protect key rights such as freedom of thought, expression, and speech, as well as the assurance of a pluralist equality. All of this is important to the comparative constitutionalist whose analysis must rely on pronouncements that are the product of a “clear, stable, [and] transparent” process.<sup>172</sup> This process assures that such pronouncements represent “predictable decision-making” rather than ad hoc decisions.<sup>173</sup>

Liberal democracies have grown out of the desire to create a constitutional framework that subjects the sovereign power (usually a monarchy) to the law, rather than allowing it to exist above the law. This overarching principle led to the concept of separation of powers embodied in so many constitutions.<sup>174</sup> Moreover, constitutions became synonymous with legality and served as documents (or accepted customs)<sup>175</sup> through which actions of a sovereign were measured to determine (1) whether such actions conformed to

169. Koen Lenaerts & Marlies Desomer, *New Models of Constitution-Making in Europe: The Quest for Legitimacy*, 39 COMMON MKT. L. REV. 1217, 1220 n.15 (2002).

170. See Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 88 (2005).

171. The bare essence of a democracy is defined in Article 25 of the ICCPR and is meant to ensure the right to vote in periodic elections “by universal and equal suffrage” in a process held by secret ballot, thus guaranteeing “the free expression of the will of the electors.” International Covenant on Civil and Political Rights, art. 25, Mar. 23, 1976, available at [www2.ohchr.org/English/law/ccpr.htm](http://www2.ohchr.org/English/law/ccpr.htm).

172. See, e.g., Daniel C. Esty, *Good Governance at the World Trade Organization: Building a Foundation of Administrative Law*, in THE FUTURE OF INTERNATIONAL ECONOMIC LAW 71, 73 (William J. Davey & John Jackson eds., 2008) (citing LON L. FULLER, THE MORALITY OF LAW (1964)).

173. *Id.*

174. See Peters & Armingeon, *supra* note 36, at 388.

175. Constitutions do not necessarily have to be written down in one place, and can, like customary international law, evolve into hardened rules as a result of custom and practice. See S. E. FINER ET AL., COMPARING CONSTITUTIONS 40-47 (1995). The British Constitution is one such example. *Id.*

the law and (2) whether redress was available.<sup>176</sup> In other words, within a liberal democracy, the constitution serves the goals of constituting the polity, organizing the institutional structure, circumscribing the limit of government, providing redress from the government, and determining rights and moral guidance.<sup>177</sup> Constitutions also provide a certain unifying and integrating function, seeking to rally people toward a focal point that might not otherwise be provided in light of divergent multi-cultural forces.

Liberal democracies are set on a higher plane for the comparativist due to their devotion to the rule of law.<sup>178</sup> Lon Fuller succinctly summarized the contours of the rule of law as requiring rules that are general, publicly enacted, prospective, easy to understand, consistent, feasible, and stable over a period of time.<sup>179</sup> John Rawls encapsulated the essence of democratic pluralism when he noted that “in a democratic regime political power is regarded as the power of free and equal citizens” exercising political power “in accordance with a constitution . . . the essentials of which all citizens, as reasonable and rational, can endorse in the light of their common human reason.”<sup>180</sup> The key feature in a liberal democracy is, therefore, that the rule of law, as stated in a country’s constitution, primarily becomes a constraint on the government in a liberal democracy. As famously stated by John Adams, a liberal democracy’s constitution creates “a government of laws . . . not of men.”<sup>181</sup>

Liberal democracies all exhibit the important component of free debate, which differentiates them from other systems of governance. From a comparative perspective “the very fact that very different societies come to the same conclusions increases one’s confidence that the norms are generally universal.”<sup>182</sup> The equally important opposite side of this coin is the ingrained right to dissent that exists in democratic constitutional systems.<sup>183</sup>

176. See CARL SCHMITT, *LEGALITY AND LEGITIMACY* 18 (Jeffrey Seitzer ed. & trans., 2004).

177. See, e.g., ANNE PETERS, *ELEMENTE EINER THEORIE DER VERFASSUNG EUROPAS* 38-92 (2001).

178. This is in contrast to the rule of persons. See ANDRÁS SAJÓ, *LIMITING GOVERNMENT: AN INTRODUCTION TO CONSTITUTIONALISM* 206 (Cent. European Univ. Press 1999) (1995).

179. See FULLER, *supra* note 172, at 39.

180. JOHN RAWLS, *JUSTICE AS FAIRNESS* 40-41 (Erin Kelly ed., 2001). Rawls also notes that a democratic society, which will always possess competing views within it about the important public issues of the day, will crystallize its concept of reason around a constitutional consensus as declared, after open contest, by the supreme court of the land. See JOHN RAWLS, *POLITICAL LIBERALISM* 158-60 (1993).

181. MASS. CONST. art. XXX.

182. See Posner & Sunstein, *supra* note 6, at 153 (citing MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 77-78 (2001)).

183. See generally JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (William Rehg trans., MIT Press 1996) (1992).

This right ensures that even those who disagree with a particular constitutional understanding nonetheless comply with the outcome of that decision. They do so with the assumption that the democratic legitimacy of the decision not only represents a majority of sorts, but also that their continued dissent might eventually lead to a shift in majority whereby their understanding becomes the majority. In other words, the choices of the public in a democracy are always in a slow state of flux.

The competition for votes is also a fundamental aspect of domestic democratic regimes. Candidates' delineation of their differing agendas before the voting public and the voter's subsequent choices at the ballot ensure comparative constitutionalists that the resulting policy decision was the will of the people. Elections reflect the public's value judgment. Thus, the policies which flow from this snapshot cannot be considered happenstance or imposed subjectively. In addition, the citizens responsible for the choice and any outside observers, such as judges performing comparative analysis, can depend on these decisions and trust that they reflect the will of the governed. Emphasizing the right to vote in regularly scheduled pluralist elections might seem like an obvious characteristic of a liberal democracy, but its importance cannot be understated.<sup>184</sup> Indeed, the vitality of any governing enterprise is wholly dependent on dialogue, debate, argument, and recourse to a majoritarian ethos.<sup>185</sup>

Of paramount importance to the constitutional comparativist is the fact that, in liberal democracies, constitutional review appears to be extremely effective in absorbing the evolution of social norms and integrating these within the meaning of specific constitutional provisions. This results from liberal democracies' emphasis on constitutional government, which expresses the political, social, and cultural identity of a nation. The effectiveness of constitutional review comports with the view that the constitution, in a liberal democracy, is a set of fundamental commitments that each state and its population adhere to and respect not merely out of a sense of convenience, but also out of an internalized sense of moral propriety.

Also, in this increasingly globalized world, it is likely that constitutional developments in one liberal democracy will track those in another, unlike in autocracies or theocracies, which develop erratically or not at all through their leaderships' desire to preserve power or merely at the whim of the ruler. This commonality of development directly relates to comparative constitutional interpretation, as one of the mantras of comparativism is that there be a selec-

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184. The fact that autocracies mimic the processes of liberal democracies goes a long way in establishing the extent to which these processes are fundamental – after all, imitation is the best form of flattery. See Jörg Faust, *Autocracies and Economic Development: Theory and Evidence from 20th Century Mexico*, 32 *HIS. SOC. RES.* 305, 307 (2007). Moreover, the U.N. Charter declares these values as those preferred for national governance. See, e.g., U.N. Charter art. 1.

185. See SAMANTHA BESSON, *THE MORALITY OF CONFLICT: REASONABLE DISAGREEMENT AND THE LAW* 254, 333 (2005).

tion of legal sources premised in part on the democratic quotient of the process that produced the source.<sup>186</sup> “It may well be that democracies, because they are democratic, are more likely to incorporate information about what is true.”<sup>187</sup> The “truth” of a rule, as opposed to a rule that is the product of a haphazard combination of aggregated preferences, is of priceless value to the comparative constitutionalist. In addition, democratic rulemaking produces rules that are superior to rules promulgated through other processes, because of the universal imprimatur that accompanies democratic rules. Democracy through this lens thus represents “a body of truths vouched for by the suffrage of mankind.”<sup>188</sup>

Constitutional interpreters value sources that originate from liberal democracies, but not because these regimes always come up with the same answers to the same problems. In fact, pluralism of thought is attractive to the comparative enterprise, so long as it is based in a process of multiple inputs which owes its genesis to a democratic impulse. The building and interpretation of constitutional norms is supported by these converging plural ideas, or this “overlap in the work of democratic polities,” all of which have as a goal the granting of governing authority and the limiting of that authority.<sup>189</sup> Modern constitutions in democracies must strive for inclusion of all citizens (even though interpretive preferences will always emerge) and aim to cement the legitimization and limits of the constituted government. The top courts of democratic regimes give effect to the importance of their country’s constitutional understandings, and, in doing so, provide that same democratic imprimatur to the very constitutional provisions that are being interpreted. Given the common values shared by open and democratic societies, these societies should look to fellow nations for the best solutions when confronted with similar problems – if only to confirm, clarify, or cement their own solution.

Democracies, through regular elections, also convey reliable information about the relative desires of their populations, in that elections are designed to sort out the more popular positions from the less popular ones.<sup>190</sup> In other words, there is a presumption that democratic rule, over a period of time, will respond to the desires of the population as a whole and implement rules and regulations which are in the best interest of the citizenry.<sup>191</sup> This guiding factor is presumably a result of public accountability nurtured by such values as freedom of thought, freedom of assembly, and freedom of the press. Indeed, some scholars have argued that not only can reliable information about a particular society be gleaned from its democratic credentials, but

186. See Glensy, *supra* note 42, at 411-20.

187. See Posner & Sunstein, *supra* note 6, at 159.

188. GARRY WILLS, *INVENTING AMERICA: JEFFERSON’S DECLARATION OF INDEPENDENCE* 188 (Vintage Books 1979) (1978).

189. See Resnik, *supra* note 155, at 46-47.

190. See ROBERT E. GOODIN, *REFLECTIVE DEMOCRACY* 108 (2003).

191. See CHARLES R. BEITZ, *POLITICAL EQUALITY: AN ESSAY IN DEMOCRATIC THEORY* 113 (1989).

also that democracy inhibits the worst inequities apparent in non-democratic nations.<sup>192</sup> For example, democracies often manage to avoid famine and disease as a result of democratic leaders' internalized beliefs that the voting public will not tolerate the lack of the minimum necessities of life.<sup>193</sup>

Democracies are often better able to provide for their citizens than authoritarian regimes. With notable exceptions such as Singapore and China, studies have shown that democratic governance is best able to provide for the necessary public goods such as economic growth, employment, and security.<sup>194</sup> Moreover, even in the poorest democratic countries, major public disasters such as disease and famine are rare. The majority of these catastrophic events occur in non-democratic states with a beyond-random frequency.<sup>195</sup> In other words, the average citizens of democracies do better in most senses than their counterparts in other types of regimes.

That is not to say that a democracy's only value is the public good that it produces for its citizens. Many scholars have focused on the intrinsic superiority of a democracy over its non-democratic counterpart by noting that a government that is not granted the power to govern by its people cannot inherently possess any power over them.<sup>196</sup> This also derives from the basic assumption about the concept of justice in liberal democracies: one of coherence around a basic normative belief in fairness and equality.<sup>197</sup> When this basic assumption is in dispute or in a state of flux, as it is in autocratic government, no uniform application of law results. Therefore, few empirical results can be gleaned for the purposes of comparative analysis. Nevertheless, it is important to take into account the shortfalls of democratic government as well. For example, political expediency often makes politicians sacrifice the long-term welfare of the body politic for an immediate or medium-term benefit in order to get elected.

Ursula Bentele, in her informative interviews of the justices of the South African Supreme Court, summarizes that most of the justices on that court believe that a country whose sources are worthy for comparison must be "an open, democratic society, preferably with a comparable adversarial system of adjudication in which the issues of a case are formulated and debated, and

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192. See Amartya Sen, *Democracy as a Universal Value*, J. DEMOCRACY, July 1999, at 3, 7-8.

193. *Id.*

194. See MORTON H. HALPERIN ET AL., THE DEMOCRACY ADVANTAGE: HOW DEMOCRACIES PROMOTE PROSPERITY AND PEACE 25-64, 93-134 (2005).

195. See AMARTYA SEN, DEVELOPMENT AS FREEDOM 178 (1999).

196. See, e.g., BENJAMIN R. BARBER, STRONG DEMOCRACY (1984).

197. See, e.g., JOHN RAWLS, A THEORY OF JUSTICE 10 (rev. ed. 1999) (1971); see also Cottier, *supra* note 17, at 654 ("Cultural homogeneity and political consensus on basic values as an alleged prerequisite for democracy in mature societies is the result of a long-term historical process and experience.").

culminate in a reasoned judgment explaining the outcome.”<sup>198</sup> One of the main reasons constitutional interpretation via comparative analysis should distinguish between democracies and non-democracies is that a democracy is limited by the electorate and its own core values because not all means are available to reach a certain result.

### B. Non-Democracies

One must be careful not to overestimate the role of constitutions in ensuring a democratic form of governance. Many nations have constitutions that either establish authoritarian regimes or else purport to create a democratic form of governance, but then include provisions with government checks and balances that are so weak that they end up creating a de facto dictatorship with a constitutional imprimatur.<sup>199</sup> Moreover, constitutions are not necessarily an end point in governance; as John Milton states in *Paradise Lost*, that zenith, once achieved, can be lost. Indeed, Miltonian parables are evidenced throughout the world where countries have passed from constitutional democracies to autocracies, oligarchies, or outright dictatorships.<sup>200</sup>

It is not uncommon for non-democratic regimes to proclaim the same goals for their governed in their constitutions, as do their democratic counterparts. For example, in 1947, the Chinese government took on the role of maintaining “social harmony,” a concept, in abstract, not too far from the pursuit of happiness in America’s Declaration of Independence.<sup>201</sup> However, the Chinese government’s method of implementing that goal is markedly different from what a liberal democracy would do. Generally, no authoritarian regime comes out in favor of despotism or repression, but the reality that transpires is one of a highly centralized government accountable to no one other than itself. That is why non-democratic regimes differ from liberal democracies, in that often the governmental goals of a non-democracy are at odds with those of the governed. This does not necessarily mean that theo-

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198. Bentele, *supra* note 11, at 237 (further revealing that a lot of the justices on the South African Supreme Court found the Canadian Supreme Court to be “‘far and away . . . [their] favorite source of plunder” (quoting Justice Albie Sachs, Interview with Albie Sachs, Justice, Constitutional Court of S. Afr., in Johannesburg, S. Afr. (Feb. 22, 2007)).

199. See, e.g., CONST. OF THE ARAB REP. OF EGYPT (1971); Qanuni Assassi Jumhuri’i Isla’mai Iran [The Constitution of the Islamic Republic of Iran] 1358 (1980); CONST. OF SYRIA (1973).

200. Interestingly, certain constitutional courts were able to operate in conditions of executive and legislative dictatorship. See, e.g., ROBERT BARROS, CONSTITUTIONALISM AND DICTATORSHIP: PINOCHET, THE JUNTA, AND THE 1980 CONSTITUTION 36-40, 87-88, 96-98 (2002).

201. See, e.g., Eric Kolodner, *Religious Rights in China: A Comparison of International Human Rights Law and Chinese Domestic Legislation*, 16 HUM. RTS. Q. 455, 466 (1994) (emphasis omitted).



cracies or autocracies will always enact abhorrent laws. Instead, it only means that if a choice exists in which a law can either be the expression of the regime's will or the expression of popular will, and those choices are incompatible with one another, then the will of the regime usually prevails. The facet largely absent from autocracies is pluralist governance, which is more effective at identifying and proposing solutions to specific issues that continually arise within a nation-state because of its reliance on popular input through the voting process. Autocratic societies do not lack all pluralist ideals; instead, private arguments within an autocracy, as opposed to among the governed, develop with regard to the governing institutions.

Because authoritarian regimes do not seek to maximize the welfare of the entire population, or the average citizen, but rather seek to cater to a very narrow sliver of the population – that of the ruling class – authoritarian regimes *are* subject to a limiting aspect of governance.<sup>202</sup> Even authoritarian regimes cannot deprive the general populace of too much, or else they risk revolt and overthrow.<sup>203</sup>

Because of collective action problems and a pre-designated imbalance of power between the governing class and the governed in an authoritarian regime, the risk of revolt is usually easy to avoid, absent extraordinary circumstances. This is because an authoritarian regime may apparently privilege a small plurality of the population (such as the military) that will then act as the enforcer of that authoritarian rule. Therefore, the question of civil rights is a clear differentiator between democratic and authoritarian regimes because civil rights seek to benefit everyone, rather than the few. Arguably, implementation of civil rights is weak in authoritarian countries. Moreover, history has shown that (with very few and easily explainable exceptions) the willful disregard of basic civil rights leads to a poor general welfare and, generally, a less prosperous nation. In democracies, citizens mobilize and seek to implement a civil right or safeguard a civil liberty every day, but in autocracies, not only are those events rare, they are often met with repressive crack-downs. Indeed, the danger inherent in popular mobilization in an autocracy leads to the conclusion that the government rarely speaks for the people.

Moreover, another characteristic of non-democratic societies is to disrespect the rights which most of the world holds dear by formally endorsing them in the international sphere but reserving enforcement within their own borders.<sup>204</sup> Contemporary constitutional comparativists are rarely interested in countries that exhibit this disdain for even the most fundamental aspect of the rule of law. The weight of evidence of the current trend in comparative analysis is that “courts typically [do not consult] the legal materials . . . of

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202. See ALBERTO ALESINA & ENRICO SPOLAORE, *THE SIZE OF NATIONS* 70 (2003).

203. *Id.* at 70-71.

204. China is a noteworthy example. See Kolodner, *supra* note 201, at 484.

failed states such as the Soviet Union or authoritarian states such as China and Cuba.<sup>205</sup>

Authoritarian regimes usually do not select norms based on popular will, but rather on the limited motivator of what is best for the ruling class.<sup>206</sup> In other words, these regimes enact rules that do not reflect the will of the people. Therefore, it is unlikely that these rules produce positive ripples among the population as a whole, although exceptions could exist. However, any exceptions are more the result of accidental convergence than policy considerations that hold the common good of the people in highest regard.

Furthermore, short-term decisions by authoritarian rulers do not serve the goal of political stability, because those who make the decisions are often not assured of long-term power. Autocracies also tend to be more unitary than democracies, but that is not to say that disaggregation does not occur within non-democratic states.<sup>207</sup> The consequences of this process are noteworthy. Consequently, autocratic societies tend to confront problems that liberal democracies do not face. For example, in authoritarian regimes, the right to a fair trial is often speculative, if it exists at all.<sup>208</sup> On the other hand, in most liberal democracies, this right has longstanding roots beginning with the Magna Carta, even though its application has been sporadic throughout history.<sup>209</sup>

Scholars argue that non-democratic regimes should be denied many benefits granted by the international legal system, such as, at a minimum, denial of membership in prominent international organizations.<sup>210</sup> At the extreme, some argue that liberal democracies should invade non-democratic regimes and then replace the autocracy with a democracy.<sup>211</sup> If international

205. See Posner & Sunstein, *supra* note 6, at 175.

206. This limited view of the nature of governance is reflected in the behavior of totalitarian regimes within the international sphere. For example, enough authoritarian regimes exist in the world to prevent action, but even minimal criticism at the international level on even the most egregious human rights violations, such as the Darfur crisis, exhibit a lack of consciousness among the ruling class of these nations as to what might constitute the basic necessities of governance. See JEAN-CLAUDE BUHRER, REPORTERS WITHOUT BORDERS, UN COMMISSION ON HUMAN RIGHTS LOSES ALL CREDIBILITY (2003), available at [http://www.rsf.org/IMG/pdf/Report\\_ONU\\_gb.pdf](http://www.rsf.org/IMG/pdf/Report_ONU_gb.pdf). Similar behavior by undemocratic regimes has been demonstrated within the confines of the UN Commission on Human Rights and its successor body, the UN Human Rights Council. See *id.*

207. Examples of bodies who have “detached” themselves from their autocratic executives might be the former Supreme Court of Zimbabwe, the Supreme Court of pre-democratic Ukraine, and the current Supreme Constitutional Court of Egypt.

208. Simmons, *supra* note 38, at 468-69.

209. See Magna Carta, art. 39 (1215).

210. See, e.g., BUCHANAN, *supra* note 61, at 452-53; see also BEITZ, *supra* note 87, at 90-92.

211. BUCHANAN, *supra* note 61, at 452-53; see also BEITZ, *supra* note 87, at 90-92.

law can disregard the mantra of equality of nations and shun non-democratic regimes, so can comparative constitutionalism. This idea is bolstered by the fact that “it is doubtful that repressive dictators will allow international law norms to override their own laws in any situations where doing so might endanger the dictator’s grip on power.”<sup>212</sup> In fact, most non-democracies around the world have signed the international law treaties that enshrine fundamental human rights.<sup>213</sup> Although this might be pure lip service, some scholars believe that even “in non-democracies, ratification [of one of these treaties] injects a new model of rights into the domestic discourse, potentially altering expectations of domestic [public interest] groups,” which will now operate with higher confidence.<sup>214</sup>

Another plausible reason for the separation between democracies and non-democracies is the value democracies place on the protection of basic human rights, unlike all other regimes. Post-totalitarian regimes<sup>215</sup> are fully aware that this aspect of democratic governance – the protection of basic human rights – should be emulated above all else.<sup>216</sup> This is empirically supported by evidence, which shows that one of the first things emerging democracies try to do in their transitional governance phase is immediately implement a human rights regime that seeks to incorporate universal notions of human rights, derived either from democratic countries or from the international system at large.<sup>217</sup> Likewise, emerging democracies that rise from the ashes of a totalitarian or autocratic past focus their “moral redefinition” on the new regime’s commitment to upholding human rights, presumably in contrast to the old regime’s violation of those rights.<sup>218</sup>

Non-democratic regimes’ lack of deliberation leaves normative doubt as to the motivation behind the enactment of rules; although in most situations, responsiveness to the will of the population and desire to improve the general welfare are not among these reasons. In other words, there is little constitu-

212. McGinnis & Somin, *supra* note 55, at 1199.

213. For example, the countries that signed the ICCPR affirmed their commitment to protecting these human rights. See International Covenant on Civil and Political Rights, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en) (last visited Sept. 26, 2010).

214. See Simmons, *supra* note 38, at 445 (stating that, under this view, international legal instruments perform an educational role).

215. As used in this context, the term “post-totalitarian regimes” is intended to describe those countries that have transitioned from authoritarian governance to democracy, such as many Eastern European and South American nations, and South Africa.

216. See James T. Richardson, *Religion, Constitutional Courts, and Democracy in Former Communist Countries*, ANNALS AM. ACAD. POL. & SOC. SCI., Jan. 2006, at 129, 133.

217. *Id.* at 134.

218. *Id.* at 135-36 (“In contrast to the presumed moral worth of nativism against the colonial rulers, the task in the era of new constitutionalism is the moral definition of democratic political community.”).

tional legitimacy in non-democratic regimes, because there is nothing constitutive about their decisions, considering these regimes are not tethered to any notion of minimal constitutional standards.<sup>219</sup> They are, therefore, of no use to comparative constitutional interpretation.

However, a deeper analysis leads to a more complex conclusion than the simple equation that democracy equals good, while everything else equals bad. Many societies accept the notion of a universality of *certain* rights, but are not convinced that this universality is the product of a Western notion of secular governance.<sup>220</sup> One such social group is the religious (of many different denominations and faiths) who ground the endowment of unalienable human rights in the divine and believe that such divine rules should form the basis of government, indeed, constitutional government – hence, the birth and/or formation of theocracy.

While a comparativist might find dictatorships so repugnant that they can be easily placed outside the realm of sources used for comparison, theocracies raise more subtle issues. A theocratic country aims to govern its citizens according to the tenets of the particular religion espoused by the governing elite. Usually this religion is the prevalent faith in that specific theocracy. In other words, a theocracy is “a mode of governance prioritizing conception of the good that is strict and comprehensive in its range of teachings.”<sup>221</sup> Because faith-based rights are not easily divined, the interpretation and the power to rule usually are delegated to religious elites who tend to be unelected and unaccountable to the people.<sup>222</sup> This fact tends to exclude theocratic nations, even ones with constitutions, from the comparative enterprise, because “religion tends to subordinate those communities of unbelievers over which it might assert political authority,” a trait of despotism.<sup>223</sup> Indeed, not only do theocracies trend towards despotism, but where secular despots might be willing to accede to negotiation, “[r]eligion divides and does not compromise.”<sup>224</sup> Whereas a theocracy might say it acknowledges other faiths, it

219. See Rosalind Dixon, *A Democratic Theory of Constitutional Comparison*, 56 AM. J. COMP. L. 947, 980 (2008).

220. See *infra* notes 221-31 and accompanying text.

221. LUCAS SWAINE, *THE LIBERAL CONSCIENCE: POLITICS AND PRINCIPLE IN A WORLD OF RELIGIOUS PLURALISM* 6-7 (2006) (emphasis omitted); see also Brenda Oppermann, *The Impact of Legal Pluralism on Women's Status: An Examination of Marriage Laws in Egypt, South Africa, and the United States*, 17 HASTINGS WOMEN'S L.J. 65, 67 (2006) (describing a theocracy as a “government administered in accordance with a divine system of law”).

222. For example, the Islamic Republic of Iran rests much of its governing authority on an unelected Council of Guardians. See Qanuni Assassi Jumhuri'i Isla'mai Iran [The Constitution of the Islamic Republic of Iran] 1358 (1980), arts. 91-99.

223. Larry Catá Backer, *Theocratic Constitutionalism: An Introduction to a New Global Legal Ordering*, 16 IND. J. GLOBAL LEGAL STUD. 85, 106 (2009).

224. Larry Catá Backer, *God(s) Over Constitutions: International and Religious Transnational Constitutionalism in the 21<sup>st</sup> Century*, 27 MISS. C. L. REV. 11, 36 (2008).

“cannot accept equality among those of different faiths.”<sup>225</sup> As a fundamental norm of modern democratic society, equality makes theocracies incompatible with the fundamental tenet of constitutional comparativism: that all sources of authority be the product of constitutional regimes that allow all opinions to be equally contested, and therefore equality makes theocracies illegitimate.<sup>226</sup>

The goal of making a government synonymous with a specific religion also violates another tenet of most democratic societies: the separation of church and state. This is not to say that democratic countries cannot embrace religion or even promulgate a state religion as many countries in Europe have, but that in theocracies, “state religion is enshrined as the principal source that informs all legislation and methods of judicial interpretation.”<sup>227</sup> When God becomes the lawgiver,<sup>228</sup> no dissent is permissible, as arguing with God becomes a thankless, and, frankly, a losing proposition. Thus, there is no separation, and the only argument can be of theological interpretation, not of pluralism, the latter being essential to a democracy and vital to the comparative constitutional enterprise.

That is not to say that all theocracies reach conclusions that a democracy would not reach using different reasoning. Indeed, in speaking about the

225. *Id.*; see also Backer, *supra* note 223, at 115 (noting that “[b]ecause not every member of a religious community believes the same way and with the same intensity, religion cannot serve as a unifying framework”). It must be noted that the advocacy of theocracy is not exclusively a non-Western phenomenon, even in the contemporary world. See Backer, *supra* note 224, at 16. Indeed, the evangelical Christian right-wing in the United States advocates exactly that form of government, albeit of a fundamentalist Christian perspective. See, e.g., ROUSAS JOHN RUSHDOONY, *THE INSTITUTES OF BIBLICAL LAW* 782-93 (1973). Lest there be any doubt, the recent anti-abortion and anti-GLBT legislative pushes by popular referendum frequently, if not exclusively, invoke biblical mandates. See, e.g., *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 985-86 (2010); *Abortion Referendum*, WTVY.COM, Nov. 2, 2008, <http://www.wtv.com/home/headlines/33726099.html> (“We need to acknowledge that our right to life comes from our creator, not from the delivery doctor at birth but from our creator the moment we are created, which is that moment of fertilization.”). The result of religious-driven frenzy, even under the guise of law, is almost always oppression.

226. See Ran Hirschl, *The Theocratic Challenge to Constitution Drafting in Post-Conflict States*, 49 WM. & MARY L. REV. 1179, 1186-89 (2008). One need not look much further than the deliberations pertaining to Article 18 of the ICCPR, which sought to enshrine the freedom of religion and the attitude pertaining thereto, in conflict with Saudi Arabia and other theocratic nations that refused to accept a right to change one’s religion as stated in the UDHR. See BAHIIYIH G. TAHZIB, *FREEDOM OF RELIGION OR BELIEF: ENSURING EFFECTIVE INTERNATIONAL LEGAL PROTECTION* 70-77 (1996).

227. Hirschl, *supra* note 226, at 1189.

228. See, e.g., BENEDICT DE SPINOZA, *A THEOLOGICO-POLITICAL TREATISE AND A POLITICAL TREATISE* 65 (R.H.M. Elwes trans., Cosimo, Inc. 2007) (1883) (describing governance by God as acting and directing “all things simply by the necessity of His nature and perfection, and that His decrees and violations are eternal truths”).

UN's Universal Declaration of Human Rights, a foundational universal document forming the cornerstone of modern international law, Pope Benedict XVI stated that the principles the declaration embodies "are based on the natural law inscribed on human hearts," by which the pontiff meant granted or derived from the divine.<sup>229</sup> The Pope further warned that a refusal to acknowledge the religious origin of these norms "would effectively privilege an individualistic approach, and would fragment the unity of the person."<sup>230</sup>

But comparativists should be suspicious of theocratic pronouncements precisely because of this kind of theocratic reasoning. After all, the comparativist has access to analytical methods that separate domestic regimes from each other or domestic regimes from international ones. Yet comparativists likely struggle to determine what methodology to use to prefer one theocracy over another – or to put it more bluntly, to prefer one religion or strand of religion, over another. Thus, even though a theocracy like the Vatican can adopt universal norms, such as the prohibition of torture, that are of interest to those partaking in comparative analysis, the process, free from legal review or analysis, makes the substance of that norm irrelevant.<sup>231</sup>

## V. OVERLAPPING INTERESTS

Under a government aesthetic that confines everything into its own box, each layer of government would only address what affects it: local governments would deal only with local matters, national governments with only national matters, and the international system with only what operates above the national sphere. Indeed, one of the most ancient concepts of law is that of competence – the idea whereby the "[l]aw seeks to more effectively delimit each entity's jurisdiction and authority and thereby eliminate . . . overlaps."<sup>232</sup> This somewhat rigid concept of delineation, "of jurisdictional line-drawing [which] has been prevalent . . . in the international/transnational realm,"<sup>233</sup> is the status quo with which comparative law enthusiasts constantly struggle.

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229. See Pope Benedict XVI, *supra* note 43.

230. *Id.*

231. The suspect nature of theocracies was nicely highlighted by Sayed Hadi Khosrow-Shahi, the leader of the Iranian delegation at the UN Human Rights Commission, who, when asked in 1982 about Iran's position on the UDHR, replied that Iran believed in the "supremacy of Islamic laws, which are universal," and when other laws conflict with this, then Iran would "choose the divine laws." Jason Lawrence Reimer, Comment, *Finding Their Own Voice? The Afghanistan Constitution: Influencing the Creation of a Theocratic Democracy*, 25 PENN ST. INT'L L. REV. 343, 360 (2006) (quoting the Iranian representative).

232. Schiff Berman, *supra* note 34, at 1167.

233. *Id.*

After all, it is easier to draw demarcating lines than it is to blur them, because a straight line is conceptually more attractive than a smudge.<sup>234</sup>

Nevertheless, it is doubtful that this neat line-drawing scenario ever existed, but it definitely does not exist in the contemporary world. Multiple layers of overlapping relationships and networks have created a basic need for pluralistic forms of government that can integrate all layers when tasked to legislate, regulate, or adjudicate matters that exhibit such multifaceted characteristics. Constitutional comparativism does not exemplify a normative preference for harmonization or attempt to create a “world-wide legal culture,” but rather realizes that the contemporary legal world cannot function without some reconciliation between overlapping, interacting regimes.<sup>235</sup> Thus, even though some scholars believe that international and domestic regimes share nothing in common,<sup>236</sup> while others argue that the two are purely different manifestations of the same unitary whole,<sup>237</sup> the truth lies somewhere in between.

Constitutional interpretation through comparative analysis is but one way to achieve this integrated pluralist form of governance and the neo-Kantian goal of positive international governance. This exploration begins by examining the most abstract norms of both domestic and international systems to provide context. Indeed, certain scholars claim that, in the most abstract sense, both domestic and international law evolve out of the same sets of pre-legal norms.<sup>238</sup> In other words, “[t]here are . . . certain principles of right and justice which are entitled to prevail of their own intrinsic excellence”<sup>239</sup> and which pervade both types of regimes. This is similar to the concept of a constitution viewed as the accumulation of “meta-norms . . . higher-order legal rules and principles that specify how all other lower-order legal norms are to be produced, applied, enforced, and interpreted.”<sup>240</sup> This concept need not be specifically circumscribed to domestic orderings alone, but can easily be expressed at an international level. As noted by Paul Schiff

234. See Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863, 867 (2006) (commenting that for many there is “some visceral sense of law’s project as one of categorization, clear definition, and line-drawing”).

235. Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1286 (1999).

236. See Alford, *supra* note 4, at 58.

237. See, e.g., Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997).

238. See HANS Kelsen, GENERAL THEORY OF LAW AND STATE 325 (Anders Wedberg, trans., 1945); see also HANS Kelsen, PRINCIPLES OF INTERNATIONAL LAW 417-18 (1952).

239. Edward S. Corwin, *The “Higher Law” Background of American Constitutional Law*, 42 HARV. L. REV. 149, 152 (1928) (emphasis omitted).

240. See Alec Stone Sweet, *Constitutionalism, Legal Pluralism, and International Regimes*, 16 IND. J. GLOBAL LEGAL STUD. 621, 626 (2009). This is akin to H. L. A. Hart’s proposition that secondary rules cure the defects that claim pre-legal regimes, “such as inefficiency, stasis, and uncertainty.” *Id.* at 625.

Berman, any “practices for managing overlap should encourage decisionmakers to wrestle explicitly with questions of multiple community affiliation and the effects of activities across territorial borders.”<sup>241</sup> Direct contact and interaction between judges of different courts and regimes promotes international understanding and might be the prelude to managing the overlap and bridging the gap between domestic and international.

The U.S. Supreme Court provides little help in resolving the international law dilemma, considering that its constitutional interpretation, which relies on comparative analysis, is often decided on a case-by-case basis and therefore does not illuminate an adherence to some underlying theory or methodology.<sup>242</sup> At the maximum, “[t]he Court has treated foreign and international materials as evidence that may be relevant to the interpretation of vague or uncertain constitutional provisions.”<sup>243</sup> But notwithstanding the U.S. Supreme Court, international law is undergoing rapid constitutionalization, which is “the emergence of constitutional law within a given legal order.”<sup>244</sup> The timeliness and relevance of this discussion is highlighted by the fact that “[t]he wall between international and domestic realms has not yet collapsed, although major cracks are indeed visible.”<sup>245</sup> Perhaps constitutional interpretation via comparative analysis is a contributing factor to this merger.

Based on the goals of domestic and international law outlined in Parts III and IV above, there is little doubt that these different repositories of rules have much in common. For example, many scholars explain this overlap by pointing to how the ICC and national governments can both play a role in the prosecution of the most egregious international violations of human rights through the creation of a hybrid system of justice.<sup>246</sup> Indeed, there is evidence to prove that the creation of the ICC has positively impacted domestic

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241. Schiff Berman, *supra* note 34, at 1173 (discussing practices in the context of his theory of legal pluralism). One methodology that Berman uses to illustrate how legal pluralism can look in practice is the “margin of appreciation” doctrine employed by the European Court of Human Rights (ECHR), which “allows domestic polities some room to maneuver in implementing [the court’s] decisions in order to accommodate local variation.” *Id.* at 1175; *see also* Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *YALE L.J.* 273, 316-17 (1997).

242. *See* Sanford Levinson, *Looking Abroad When Interpreting the U.S. Constitution: Some Reflections*, 39 *TEX. INT’L L.J.* 353, 362-63 (2004).

243. Bradley, *supra* note 11, at 93.

244. Peters, *supra* note 32, at 582.

245. Perju, *supra* note 23, at 203.

246. *See, e.g.*, William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 *HARV. INT’L L.J.* 53, 57 (2008); *see also* Brian Concannon, Jr., *Beyond Complementarity: The International Criminal Court and National Prosecutions, a View from Haiti*, 32 *COLUM. HUM. RTS. L. REV.* 201, 225 (2000).



systems, leading to prosecutions of the perpetrators of human rights abuses.<sup>247</sup> Others point to the similarities between the abstract ideals of domestic governance and international law.<sup>248</sup> While excessive abstraction might make for good philosophical axioms such as “equality before the law,” as noted above, they make for little comparative use. Similarly, excessive focus on minutiae also yields nothing for the comparativist. For example, the critics of comparativism might cry a disapproving “Aha!” and note that certain high courts of other nations are comprised of seven, eleven, or thirteen judges, and therefore their rulings should not be of any use to the U.S. Supreme Court because it is comprised of nine justices. Though this may be an extreme example, differences can always be found if one only searches for differences.

However, the greatest wall that critics continue to erect in the path toward constitutional comparativism is that of structural uniqueness – that concept which holds all nations as having a legal structure that is fundamentally unparalleled and thus not subject to any comparison.<sup>249</sup> Accordingly, this is especially acute when one delves into the realm of constitutional comparison, because one of the favorite sources of foreign material for comparison is international law.<sup>250</sup> International law is structurally unique because it does not consist of a single codified document but instead is scattered into various treaties, texts, resolutions, and customary law.<sup>251</sup> This fact, therefore, should

247. See Elena A. Baylis, *Reassessing the Role of International Criminal Law: Rebuilding National Courts Through Transnational Networks*, 50 B.C. L. REV. 1 (2009).

248. See, e.g., Elizabeth M. Schneider, *Transnational Law as a Domestic Resource: Thoughts on the Case of Women's Rights*, 38 NEW. ENG. L. REV. 689 (2004) (exploring the use of international law as a means of achieving domestic women's rights reform).

249. See Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT'L L. 69, 73-74 (2004); see also MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS* 4-5 (2d ed. 1994) (“Variations in the political, moral, social and economic values which exist between any two societies make it hard to believe that many legal problems are the same for both except on a technical level.”).

250. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 576-78 (2005) (citing international law); *Lawrence v. Texas*, 539 U.S. 558, 572-73 (2003) (same).

251. However, if one espouses the “thin” view of constitutions as being merely a delineation of meta-norms about how the lower rungs of the legal system should operate, which are then implemented by statute, then the international legal system could be said to already incorporate a “thin” constitution. See, e.g., Sweet, *supra* note 240, at 639-43 (arguing that treaty regimes such as that of the ECHR, the European Union, or the World Trade Organization (WTO) embody this definition of constitutionalism and that the European Court of Justice (ECJ), the Appellate Body of the WTO, and the ECHR are de facto constitutional courts). In light of the recent ratification of the Treaty of Lisbon (which was a substitute for the defunct, and never ratified, European Constitution, but actually incorporates a substantial amount of the European Constitution's precepts), the ECJ and ECHR are now de jure constitutional courts. See Treaty of Lisbon, *supra* note 72.

be reason enough to discourage even the most willing and learned comparativist, because the lawmaking systems in domestic regimes supposedly are vastly different from international systems. Domestic systems, after all, are comprised of legislatures that promulgate laws to be obeyed by the general public, and courts resolve disputes about those laws. In case of disobedience of the laws or judicial orders, the domestic system provides enforcement mechanisms that either punish noncompliance or otherwise ensure compliance.

In contrast to this layout, critics argue that international law possesses none of these characteristics: there is no centralized legislature or structured court system and no traditional enforcement mechanisms akin to those available within domestic regimes.<sup>252</sup> To these background criticisms, the constitutional comparativist can simply reply, “So what?”<sup>253</sup> There is a difference between constitutional structure and the norms that such structures contain. While a body politic might not have a constitutional structure, it certainly will have substantive norms. The question for the comparative constitutional enterprise when seeking sources from international law is whether there is an international body politic, and if there is not, does that matter? The answer lies in the fact that the ethos of comparative law is not comprised of parallel structures, but parallel ideas or principles. As explained in Parts II, III, and IV, structural differences are mere icing; it is the goals and policies underneath that the comparative enterprise strives to bring together.

Comparative constitutional skeptics and enthusiasts agree on one thing: the increasing intricacy of legal principles dispersed into a multiplicity of overlapping networks has caused an increasing collaboration between domestic and international law, and this contact is destined to increase both in quantity and in complexity.<sup>254</sup> This complexity can be minimized through a constitutional interpretation that methodologically and systemically sifts through foreign domestic law and international law. In light of the focus on principle over structure, this section explores not what common forms exist between domestic regimes and international ones, but rather, what brings them together (and distinguishes them) from the point of view of their respective goals and motivating forces.

For a U.S. citizen, comparative constitutionalism can be most compelling when a constitutional document is compared to the U.S. Constitution.<sup>255</sup> While most nation-states have a constitution, international law, of course, lacks such a foundational document. Nevertheless, there are certain international treaties and conventions that serve as a quasi-constitutional framework

252. See, e.g., Alford, *supra* note 4, at 57-59.

253. This criticism is a non-starter when applied to comparing foreign *domestic* law to U.S. constitutional provisions because the structure of international law is irrelevant to that analysis.

254. See Neil Walker, *Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders*, 6 INT’L J. CONST. L. 373, 382 (2008).

255. Clearly, this is not always the case, as sometimes legislative or statutory documents provide the subject matter with which the U.S. Constitution is confronted.

within their jurisdictions.<sup>256</sup> Indeed, certain courts, such as the European Court of Human Rights (ECHR), serve as quasi-constitutional courts.<sup>257</sup>

To determine whether the comparativist should distinguish between international sources of law and foreign sources of law, the inquiry should not yield to overzealous surface-feature categorizations, but rather follow a more functional approach. This is important because emphasizing structure or functionality could lead an excessive particularist, for example, to claim that the United Kingdom and Israel do not possess constitutions, which is technically true, yet factually inaccurate. The countries' constitutions simply are not written down in any one place, but are instead an accumulation of certain basic laws – that same organization can be claimed of the international system.<sup>258</sup>

### A. Foreign Domestic Law Uncompared

The constitution is traditionally envisioned as belonging to a particular nation. Through a centralized quasi-legislative process of adoption that places constitutional law at the top of the legal totem pole, a constitution regulates the government substantially more than private individuals, is centralized and rather difficult to amend, and is hierarchically superior to other laws in the land. Moreover, a constitution serves as an important check on government behavior. These features make the constitution look different than most international law framework. The absence of anything resembling *one* constitution on the international sphere must caution even the most receptive comparativist against finding “false domestic analogies” between domestic regimes and the international order.<sup>259</sup> But domestic constitutional law goes further than ensuring order; it also seeks to create moral normative dimen-

256. See, e.g., Treaty of Lisbon, *supra* note 72.

257. The ECHR is tasked with the constitutional review of the Charter of Fundamental Rights of the European Union, which is incorporated into the Treaty of Lisbon. See EUROPEAN COURT ON HUMAN RIGHTS IN BRIEF (2009), available at [http://www.echr.coe.int/NR/rdonlyres/DF074FE4-96C2-4384-BFF6-404AAF5BC585/0/Brochure\\_EN\\_Portes\\_ouvertes.pdf](http://www.echr.coe.int/NR/rdonlyres/DF074FE4-96C2-4384-BFF6-404AAF5BC585/0/Brochure_EN_Portes_ouvertes.pdf).

258. Many contemporary scholars adopt this functional approach when dealing with constitutions. See, e.g., Anne van Aaken, *Defragmentation of Public International Law Through Interpretation: A Methodological Proposal*, 16 IND. J. GLOBAL LEGAL STUD. 483, 487 & n.17 (2009).

259. See, e.g., Peters & Armingeon, *supra* note 36, at 389 (cautioning the advocates of international constitutionalism from making overreaching comparative claims and urging global constitutionalists to identify and advocate the application of constitutionalist principles, “such as the rule of law, checks and balances, human rights protection, and possibly democracy, in the international legal sphere in order to improve the effectiveness and the fairness of the international legal order”); see also Neil Walker, *The EU and the WTO: Constitutionalism in a New Key*, in THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES 31, 39 (Gráinee de Búrca & Joanne Scott eds., 2001).

sions to its directives.<sup>260</sup> In this light, constitutional comparativists who rely on international law cannot deny that the morality of international law is, at a very profound level, quite distinct from the national personalities of the various states.<sup>261</sup>

Similarly, some argue that domestic law grows out of and is a symptom of a particular culture.<sup>262</sup> These cultural traits can be ethnic, symbolic, religious, educational, class-based, or caste-based,<sup>263</sup> but regardless, the agglomeration of these traits is sometimes believed to be synonymous with a national culture that is supposedly unique for each different state.<sup>264</sup> Individual trait-based groups, which can function as “norm-generating communities,”<sup>265</sup> can exert a certain power on an international level, but they have substantially more clout at the national level, where it is likely that collective-action coordination hurdles are far easier to overcome. Some scholars claim that those cultural effects seep into law and form the basis of some sort of jurisprudential philosophy through societal osmosis.<sup>266</sup> This “thick” understanding of a constitution essentially claims that a constitution constitutes a form of culture in and of itself.<sup>267</sup> Even from nation-state to nation-state, “respective histo-

260. See generally RAWLS, *supra* note 180. See also Frank I. Michelman, *Integrity-Anxiety?*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 267-68 (Michael Ignatieff ed., 2005) (“In order to maintain a *public* discourse on governmental performance regarding people’s rights, Americans apparently need some point of normative reference more publicly objective than it feels as though morality can be for us. Enter constitutional law.”).

261. See TERRY NARDIN, LAW, MORALITY, AND THE RELATIONS OF STATES 241 (1983).

262. See 1 BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 6 (Thomas Nugent trans., rev. ed., 1899); see also Resnik, *supra* note 155, at 64-65 (noting that if law constitutes part of national identity, pride in one’s country should only flow “if the content of that law makes for an identity one admires and is willing to work . . . to bring into being”).

263. Indeed, people often see themselves as being part of many groups. See, e.g., AVIGAIL I. EISENBERG, RECONSTRUCTING POLITICAL PLURALISM 2 (1995).

264. See GLENDON ET AL., *supra* note 249, at 4-5.

265. Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 43 (1983).

266. See, e.g., Sanchez, *supra* note 23, at 226-33 (expressing the theory that each national legal identity is unique and therefore not subject to the comparative practice).

267. See, e.g., Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003). Some scholars do not see this as the nail in the coffin of comparative constitutionalism but rather as an exhortation for the enterprise to be more culturally aware. See Brenda Cossman, *Migrating Marriages and Comparative Constitutionalism*, in THE MIGRATION OF CONSTITUTIONAL IDEAS 209, 228 (Sujit Choudhry ed., 2006). Another way to express this is that international law “lacks the symbolic-aesthetical dimension inherent in national constitutional law,” seeing that “the primary function of constitutions is storing the meaning of a political community,” which embodies “revolutionary ideas” and makes a national constitution the property of its people who have sacrificed to achieve its enactment. See Peters, *supra* note 60, at 400.

ries, social context and constitutional design differ markedly.”<sup>268</sup> Thus, legal scholars persistently claim that because of the different concepts of morality and culture, there is no solid grounding for a universally applicable international law.<sup>269</sup>

Indeed, the critics of the comparative enterprise focus a substantial amount of their opposition on the alleged cultural uniqueness of U.S. domestic law in general and of constitutional law in particular.<sup>270</sup> One should not dismiss this claim out of hand, as cultural differences certainly exist between different nations around the world. However, if examined in detail, this is not the exact claim the critics make – their claim is that such cultural differences result in incomparable legal constitutional regimes.<sup>271</sup> But domestic law does not act alone in these areas, despite the claims made by the critics.<sup>272</sup> Because cultural diversity does not necessarily equate to moral differences, and because a shared morality can certainly serve as a basis for legal comparison, simply pointing out superficial cultural differences between states does not validate the criticism.<sup>273</sup> The real question to ask in this context is whether those unique cultural affectations translate into a unique legal identity. The unnerving answer is that sometimes they do and sometimes they do not, and where the line falls will depend on contextual situations of which constitutional interpreters need to be fully apprised.

One facet of domestic governance that is, in many respects, unique to every nation is that of the government’s origination. Thus, domestic institutional arrangements “are often peculiarly the product of political compromise in historically situated moments, generally designed as a practical rather than

268. *Minister of Finance & Others v. Van Heerden*, 2004 (6) SA 121 (CC) at 135-36 (S. Afr.) (comparing the equality jurisprudence of the United States and South Africa).

269. See, e.g., ANDREW HURRELL, ON GLOBAL ORDER: POWER, VALUES, AND THE CONSTITUTION OF INTERNATIONAL SOCIETY 10 (2007).

270. See GLENDON ET AL., *supra* note 249, at 4-5.

271. Posner and Sunstein make this point and go on to note that “[i]f a court subscribes to this strong form of cultural relativism, then it should not consult foreign law. . . .” See Posner & Sunstein, *supra* note 6, at 150; see also KATHARINA PISTOR ET AL., THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT 1960-1995 35 (1999) (“[L]aw and legal evolution are part of the idiosyncratic historical development of a country, and . . . are determined by multiple factors, including culture, geography, climate, and religion.”).

272. GLENDON ET AL., *supra* note 249, at 4-5.

273. This distinction between shared culture and shared morality is not lost on Posner and Sunstein, who note that it is the latter which is more important in the comparative enterprise. See Posner & Sunstein, *supra* note 6, at 151 (“If Germany rejects the death penalty simply because of its Nazi past, for example, and if that rejection does not offer a general moral lesson, this rejection has little informational value for the United States.”).

a principled accommodation.”<sup>274</sup> Therefore, comparative analysis on matters of constitutional structure, such as federalism issues in the U.S., is not particularly useful.

Another facet of domestic governance that only relates to democratic regimes and that is often pointed to as being distinct from international law, is that of the very existence of democracy. Thus, “[o]ne school of thought argues that requirements for democracy are not met beyond the level of nation-states.”<sup>275</sup> The notion is that the domestic law of democracies operates under an assumed rule that a government’s actions will be checked every so often, and thus, unlike international law, it is subject to frequent correction or reversal by the citizens. Put another way, the popular sovereignty to which liberal democracies delegate their ultimate source of power grants an inherent responsibility to those governing, which international law lacks.

The main question is not whether the role of democratic governance exists in international lawmaking procedures,<sup>276</sup> but instead whether international pronouncements are the product of a democratic process, albeit an indirect one. In the latter, people have the chance to express their voices, albeit indirectly, and punish those (through the normal process of democratic accountability) who transgress on the mandate they have been given. From this more nuanced point of view, it is difficult to see how, for example, the appointment of Ban Ki-Moon as UN Secretary-General is much different than the appointment of Justice Samuel Alito to the U.S. Supreme Court. U.S. citizens do not appoint Supreme Court justices, but they know when voting for their favored executive that this is one role of the executive. Similarly, the people of the U.S. do not appoint the UN secretary-general, but they know (or should know) that the president will play a large part in that appointment process. If there is no democratic problem for the first example, then there should be none for the second. After all, in the same way nation-states consist of citizens with a diversity of views, there is also a similar amount of “legitimate diversity in the global polity.”<sup>277</sup>

The question arises as to which constitutional issues should be informed by international law when domestic policies do not overlap with international interests in such a way as to form a cogent source for U.S. constitutional interpretation. The overarching answer, which should always be tempered by a case-by-case analysis, lies in the determination of whether the constitutional provision at issue is the product of a certain facet of American law which is

274. See Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 273 (2001).

275. Peters & Armingeon, *supra* note 36, at 386.

276. In fact, democratic governance does not play a role in international lawmaking. Those who enact international law are not directly accountable to the citizens of any nation-state.

277. Nico Krisch, *The Pluralism of Global Administrative Law*, 17 EUR. J. INT’L L. 247, 248 (2006).

exceptional, either to the U.S. *or to domestic law in general*, and thus incapable of having comparable companions within the context of international law.

Those facets can be the result of historical specificity, cultural uniqueness, or structural peculiarities, among other things, but any court that desires to use international law should begin its analysis by making such an evaluation. Once that is done, and assuming the result is one of potential overlap, then the proposed international material should be scrutinized similarly.

### *B. International Law Uncompared*

Even with all the goodwill and enthusiasm of the global constitutionalists who seek to appropriate various international documents as *de facto* or *de jure* constitutions, commentators claim that, unlike states, the international regime is “a sort of constitutional wasteland or empty quarter.”<sup>278</sup> From a structural and process perspective, the constituent documents of the modern international system, such as the UN Charter, do not effectively restrain unapproved conduct by those expected to abide by their rules, unlike their domestic counterparts.<sup>279</sup> Indeed, there is no international *über-legislature* empowered to enact laws or create a constitution for the world, nor is there an *über-judiciary* empowered to adjudicate issues arising under international law in a way that creates generally binding decisions.

Moreover, from an overall structural perspective, nations, not people, make international law; and nations, not people, have most obligations under international law. As a result, “[o]ne of the most persistent sources of perplexity about the obligatory character of international law has been the difficulty felt in accepting or explaining the fact that a state which is sovereign may also be ‘bound’ by, or have an obligation under, international law.”<sup>280</sup> A possible answer is that international law is more about governance than government. *Government* is about a certain coercive hierarchical control, whereas *governance* has less hierarchy and coercion and relies more on the voluntariness of participating parties. Given this fact, the stress on the democratic legitimacy of governance is diminished. Some welcome this result. Andrew Moravcsik, for example, notes that international organizations do not require much in the form of democratic credentials,<sup>281</sup> while others argue that any

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278. Philip Allot, *Intergovernmental Societies and the Idea of Constitutionalism*, in *THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS* 69, 92 (Jean-Marc Coicaud & Veijo Heiskanen eds., 2001).

279. See IAN BROWNLIE, *THE RULE OF LAW IN INTERNATIONAL AFFAIRS* 214 (1998).

280. HART, *supra* note 152, at 220.

281. See Andrew Moravcsik, *Is There a “Democratic Deficit” in World Politics? A Framework for Analysis*, 39 *GOV'T & OPPOSITION* 336, 347 (2004).

further democratization of international institutions would undermine the very goals of international law.<sup>282</sup>

International organizations and international law are not organized in a democratic way, at least not in the normal definition of that concept. The fundamental reference point for a democracy is the people, and, with remarkably few exceptions,<sup>283</sup> when international law seeks majoritarian consensus (such as in the shaping of customary law or in the adoption of resolutions propounded by the General Assembly of the UN), the majority is defined as one of nations and not individuals.<sup>284</sup> Therefore, if one accepts that individuals form the building blocks of any democracy, then international law fails to meet that standard. However, is that idea fundamentally exclusive of international law, or is it also part of the operational mechanics of domestic law? For example, “a treaty [might be] less likely to reflect the independent judgments of the states than national law,” because nations could enter into treaties “despite their doubts about particular rules or norms rather than because of them.”<sup>285</sup> But a piece of domestic legislation might be the product of the same type of deliberative process.

A related point is not that democratic deficit<sup>286</sup> is nonexistent in domestic regimes, but rather that it is higher for the international system.<sup>287</sup> Thus, international law does not have a mechanism of democratic control that empowers *individuals* to stand guard as a direct and constant check on its content through the vote.<sup>288</sup> On the other hand, nations can and do check the formation and implementation of international law, but this does not fully make up for the democratic deficit. As shown above, the treatment of individuals now forms a large part of international norms, and these individuals do not possess the same democratic power within the international regime as

282. See Giandomenico Majone, *A European Regulatory State?*, in EUROPEAN UNION: POWER AND POLICY-MAKING 263, 263-77 (Jeremy J. Richardson ed., 1996).

283. One such exception is the IMF, which apportions votes according to the amount of money contributed to it. See International Monetary Fund, Country Representation, <http://www.imf.org/external/about/govrep.htm> (last visited Sept. 26, 2010) (explaining the IMF’s governance structure).

284. For example, in the General Assembly of the UN, every nation has one vote, so that the votes of Vanuatu (population 221,552) or Sao Tome and Principe (population 175,808) are worth the same as China (population 1,330,141,295) or India (population 1,173,108,081). U.N. Charter art. 18, para 1; see also International Data Base, <http://www.census.gov/ipc/www/idb/country.php> (last visited Oct. 7, 2010).

285. See Posner & Sunstein, *supra* note 6, at 165-66.

286. As used here, “democratic deficit” means a situation where democratic governance relies on the election of representatives to carry on the business of governing rather than have all the people decide on all matters of daily governing.

287. See, e.g., Føllesdal, *supra* note 114 (advocating for a democratic international system).

288. See, e.g., Philip Alston, *Richard Lillich Memorial Lecture: Promoting the Accountability of Members of the New UN Human Rights Council*, 15 J. TRANSNAT’L L. & POL’Y 49, 51-57 (2005).



nations do. Similarly, a corollary to this high level of democratic deficit is international law's structural impediment to holding its lawmakers directly accountable to a democratic electorate as well as its asserted lack of transparency.<sup>289</sup>

International law possesses other unique systemic features. For example, "[t]he new deniers of international law justify the ostensibly non-legal character of international law by turning to the lack of hard enforcement mechanisms and the democratic deficit prevalent in international law."<sup>290</sup> Another example is that the appointment procedures to international panels often suffer from a lack of transparency compared to their equivalent domestic panels.<sup>291</sup> Two further controversial quirks in international law are foreign courts' tendencies to opine on a matter even when the relevant parties to the controversy have explicitly denied the court's jurisdiction<sup>292</sup> and amorphous rules of recognition (being those rules designed to help ascertain what the substantive content of international law actually is), especially when compared with those of domestic regimes.

International law is philosophically and practically distinguished from domestic law, because international relations are often antagonistic and therefore tend to present anti-constitutional trends, such as willful disobedience of international law.<sup>293</sup> These trends, which have a certain divisive quality, directly oppose the goals of unity and organization adopted and implemented by domestic constitutional regimes. For example, nations possess the right of withdrawal from most aspects of international law,<sup>294</sup> and the comparativist should consider this right when using international legal sources as the subject of comparison. This right of exit has no parallel in domestic constitu-

289. See McGinnis & Somin, *supra* note 55, at 1193. For example, the structural impediment is that the electorate does not get to vote on who will get to represent it on various international bodies, nor does it, to a large part, get to see how these various international bodies work.

290. Peters, *supra* note 60, at 405.

291. For example, the ICJ has a panel of fifteen judges meant to represent the various legal systems of the world. I.C.J. Statute, art. 3. These judges serve for a period of nine years and can be re-elected. *Id.* at art. 13. They are nominated by the various national groups within the Permanent Court of Arbitration and then elected by the UN General Assembly and the UN Security Council. *Id.* at art. 9.

292. This occurred in 2004, when the ICJ issued a declaratory ruling pertaining to the legality under international law of the separation fence dividing Israel and the West Bank, despite the fact that Israel had never assented to the ICJ's jurisdiction. See Arie M. Kacowicz, *The ICJ's Advisory Opinion and International Relations Theory: The Normative Dimension of International Relations and the Advisory Opinion of the ICJ on the Separation Barrier*, 38 ISR. L. REV. 348 (2005).

293. See Peters, *supra* note 32, at 602-05.

294. For example, if a nation persistently objects to the formulation of a rule of customary international law, it will not be bound by it. Similarly, if a nation signs a treaty but reserves some of its provisions, those provisions will not be binding upon that nation.

tional structures.<sup>295</sup> And finally, the notion of international responsibility, which exists to provide redress for injury caused to a person by their native country and to maintain international order, does not have any equivalent domestic parallels.

Certain characteristics of either domain are unique, and constitutional interpretation in the comparative vein should acknowledge this fact and cherish it. For example, it is difficult to characterize international breaches in terms of tort or contract, considering both are subject to the same array of secondary rules. Indeed, sometimes the line between civil and criminal international law violations and their resolution might be quite difficult to define.

In many respects, both in operation and in substance, international law functions differently from domestic legal systems. Given the different goals and policies discussed in Part III, the next question is what international legal rules do not possess sufficient interest-overlap with domestic law to constitute an appropriate basis for comparison within the dynamic of constitutional interpretation. The answer to that question also must be determined on a case-by-case basis and must consider the procedural genesis of the international rule, its scope and goals, and its substantive content. The combination of these factors will yield a plausible reason as to why constitutional interpretation can best be served by consulting or ignoring particular materials of international law, depending on the circumstance. For example, international laws on the prevention of conflict, the regulation of international relations, or the embodiment of a state's pursuance of its self-interest<sup>296</sup> might have little to offer domestic constitutional interpretation, which tends not to concern itself with these matters. Other international rules might be better suited as sources for domestic constitutional interpretation. The methodology for identifying these instances is discussed below.

### *C. The Twilight Where Domestic and International Law Meet*

*Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.*<sup>297</sup>

*Everyone has the following fundamental freedoms: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression . . .*<sup>298</sup>

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295. See Helfer, *supra* note 33, at 228-31.

296. Such international laws may include the right to systematically object to a rule of customary law.

297. Universal Declaration of Human Rights, *supra* note 69, at art. 18.

298. Canadian Charter of Rights and Freedoms, pt. I, art. 2.

*Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*<sup>299</sup>

*Everyone has the right to freedom of thought, conscience and religion. This right includes the freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.*<sup>300</sup>

*Everyone has the right to freedom of conscience, religion, thought, belief and opinion.*<sup>301</sup>

Without looking at the footnotes following this passage and without prior knowledge, is it possible to identify which of the preceding quotations comes from a domestic document and which comes from an international one? All five provisions seek to protect the freedom of religion and clearly derive from a policy that allows for freedom of conscience and thought.<sup>302</sup> Thus, all of the above statements, whether contained in domestic or international documents, share a common ethos that can be traced to a widespread set of values that transcends any national border.<sup>303</sup>

There has been an apparent evolutionary convergence of domestic law and international law. The post-WWII realities dictated that certain international norms would be created, which would be considered universal and inviolable. Furthermore, these norms would not only operate above nations,

299. International Covenant of Civil and Political Rights art. 18, ¶ 1, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16 at 52, U.N. Doc. A/6316 (Mar. 23, 1976).

300. Charter of Fundamental Rights of the European Union art. 10, ¶ 1, 2000 O.J. (C 364) 1, (entered into force on Dec. 1, 2009, through ratification of the Lisbon Treaty); *see also* EU CONST. art. II-70 (not ratified), *available at* [http://en.euabc.com/upload/rfConstitution\\_en.pdf](http://en.euabc.com/upload/rfConstitution_en.pdf).

301. S. AFR. CONST. 1996, ch. 2, art. 15, ¶ 1.

302. These are by no means the only international documents that enshrine the freedom of religion. *See, e.g.*, African Charter on Human and Peoples' Rights art. 8, June 27, 1981, 21 I.L.M. 58; Organization of American States, American Convention on Human Rights art. 12, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; Organization for Security and Cooperation in Europe, The Final Act of the Conference on Security and Cooperation in Europe princ. VII, Aug. 1, 1975, 14 I.L.M. 1292.

303. *See* Resnik, *supra* note 155, at 47 ("Ideas, norms, rules, and practices – shaped by parallel questions and needs – do not stop at the lines that people draw across land. Over time, the origins of precepts blur.").

as a check on behavior by a state towards another state, but would also reflect the internal laws of each nation, as a check on behavior by a state towards its own citizens. As such, a commonality arose between the international and the domestic as these universal rules became elevated to über-law status among the community of nations.

The process and substance that currently constitutes international law is increasingly shaped by the constituent domestic constitutional regimes that share a commitment to the protection of human rights around the world. When a country signs onto an international human rights obligation, the obligation is then integrated into domestic law either through legal means or through a process of internalization.<sup>304</sup>

As a result of these synergies, domestic courts should act as “agents of the international order.”<sup>305</sup> The jurisdictions of international adjudicatory bodies increasingly overlap with matters that are traditionally the province of domestic courts,<sup>306</sup> and implementation of these orders in the domestic realm would certainly streamline the process. But persuasive reference of decisions from one system to another offers even more possibility. Both constitutional law and international law adopt an interpretative methodology that, in effect, creates a situation where “the text matters most for the least important questions.”<sup>307</sup> This leaves the distinct impression that, for the most important questions, the principles at play will dictate the outcome. Indeed, these principles take the form of legal regimes that seek to implement the rule of law, protect human rights, and, when possible, conform to international obligations and judicial review.

The interrelatedness of contemporary governance makes it simply impossible to draw a bright line between the domestic and the international because, no matter where that line is drawn, there will be seepage in either direction at all times, and no claim of exclusive sovereignty will change that. Thus, an enterprise that seeks delineations but not impenetrable walls is both preferable and practically responsible. In that vein, international law not only concerns international relations (even if this was ever its sole function), but it also has morphed into a body of law that seeks to delineate citizenry/state relationships. This brings the international system of legal rules much closer to that of domestic constitutional regimes, which set forth a gold standard of protection of the rights of its own citizens. Thomas Cottier advises that we

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304. This is where countries comply with international obligations without passing domestic laws to that effect, merely by changing their behavior voluntarily. *See, e.g.,* Harold Hongju Koh, *Internalization Through Socialization*, 54 DUKE L.J. 975 (2005).

305. RICHARD A. FALK, *THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER* 72 (1964).

306. *See, e.g.,* Ernest A. Young, *Institutional Settlement in a Globalizing Judicial System*, 54 DUKE L.J. 1143 (2005).

307. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 916 (1996).

think of the “international, regional, and domestic levels as a single and ideally coherent regulatory architecture of multilayered governance.”<sup>308</sup> He further notes that “[r]ecourse to shared legal rights and obligations in positive law of all or most states is an important and often ignored component in discussing the fundamental problem of shared constitutional values within the international community.”<sup>309</sup>

This rapprochement between the domestic and the international is evidenced in numerous forums and in a multitude of texts. For example, the mandate of the European Commission, the executive branch of the European Union (EU), is to “promote the general interest of the Union and take appropriate initiatives to that end,” which, in broad terms, reflects the ideals of the preamble to the U.S. Constitution.<sup>310</sup> Another expression of the solidifying of international law around norms derived from domestic regimes is the Universal Declaration of Human Rights.<sup>311</sup> International human rights are the “offspring of the human rights that were originally codified at [the] national level.”<sup>312</sup> The transference of these rights from the national to the international was not accidental but part of a concerted effort to place these rights in the whole collective consciousness of humankind.<sup>313</sup> The process is bidirectional, considering that certain domestic regimes seek to give their norms a global flavor. For example, the Constitutional Court of South Africa noted, “[i]n construing and applying our [South African] Constitution, we are dealing with fundamental legal norms which are steadily becoming more universal in character.”<sup>314</sup>

Most domestic regimes are descriptively constitutional, and such a definition is not considered controversial even for those countries, such as the United Kingdom, which do not have a single document called “the constitution.”<sup>315</sup> It is also arguable that certain international regimes similarly operate

308. Cottier, *supra* note 17, at 656.

309. *Id.* at 659.

310. Treaty of Lisbon, *supra* note 72, at art. 9D, ¶ 1.

311. See Universal Declaration of Human Rights, *supra* note 69. Indeed, in drafting the declaration, the framers compiled a list of concepts derived from the *domestic* judgments of different countries, which hailed from all corners of the world. See GLENDON, *supra* note 182, at 56-57.

312. CHRISTIAN TOMUSCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM 25 (2003). These rights “are the complex of ‘Enlightenment rights’ that in their day were crucial in overthrowing feudalism and shattering the uncontested divine right of kings.” Simmons, *supra* note 38, at 440 (citing MICHELINE R. ISHAY, THE HISTORY OF HUMAN RIGHTS: FROM ANCIENT TIMES TO THE GLOBALIZATION ERA 7-8 (2004)).

313. See TOMUSCHAT, *supra* note 312, at 28-36.

314. *Ferreira v. Levin & Others; Vryenhoek & Others v. Powell & Others* 1996 (1) SA 984, 1025 (CC) (S. Afr.).

315. See Background Note: United Kingdom, <http://www.state.gov/r/pa/ei/bgn/3846.htm> (last visited Sept. 26, 2010) (noting the lack of one written constitution in the United Kingdom). Interestingly, the process of deciphering what constitutes constitutional law under the British system in many ways resembles the process of recog-

under structural premises that positively resemble constitutional designs.<sup>316</sup> These regimes include, among others, the European Court of Human Rights,<sup>317</sup> the Court of Justice of the European Union,<sup>318</sup> the World Trade Organization,<sup>319</sup> and possibly the International Court of Justice (ICJ).<sup>320</sup> Like their purely domestic counterparts, these regimes set out primary rules that are codified and secondary rules that explain how to deal with a refusal to follow the primary rules.<sup>321</sup>

The normative goal of domestic constitutional systems is closely matched by these international regimes, considering the base document for all of these different systems serves as a statement of principles and goals as well as sets the tenor for how these principles and goals should be carried out. Most importantly, the highest judicial bodies in these three, and potentially four, treaty regimes, again like many of their domestic counterparts, possess the power of judicial review. This power includes the authority to strike down non-conforming lower-order legal rules that might take the form of national laws legislatively enacted. There can be little doubt that these regimes have governed efficiently and effectively. Given all these similarities,

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nizing which rules of international law have risen to the level of binding customary law.

316. The following commentators have argued in favor of allocating a constitutional dimension to certain international and transnational regimes: CASS, *supra* note 118, at 208, 237; STEVEN GREER, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS: ACHIEVEMENTS, PROBLEMS AND PROSPECTS* (2006); G. Federico Mancini, *The Making of a Constitution for Europe*, 26 COMMON MKT. L. REV. 595 (1989) (referencing the precursors to the Treaty of Lisbon).

317. See GREER, *supra* note 316, at 169. The European Court of Human Rights interprets, in a judicial review sense, the European Convention on Human Rights. *Id.*

318. See The Court of Justice, [http://europa.eu/institutions/inst/justice/index\\_en.htm](http://europa.eu/institutions/inst/justice/index_en.htm) (last visited Sept. 26, 2010). Since December 1, 2009, the Court of Justice has interpreted the Treaty of Lisbon, the operative organizing document of the European Union.

319. The World Trade Organization: The WTO, [http://www.wto.org/English/thewto\\_e/thewto\\_e.htm](http://www.wto.org/English/thewto_e/thewto_e.htm) (last visited Sept. 26, 2010).

320. History, International Court of Justice, <http://www.icjci.org/court/index.php?p1=1&p2=1> (last visited Sept. 26, 2010). The ICJ interprets the binding international law human rights provisions from the UN Charter. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16, 57 (June 21, 1971) (opining that the UN Charter constitutes binding international human rights law). Indeed, some urge the view that the UN Charter is to be regarded as an emerging international constitution. See, e.g., Pierre-Marie Dupuy, *The Constitutional Dimension of the Charter of the United Nations Revisited*, 1 MAX PLANCK Y.B.U.N.L. 1, 8 (1993); Thomas M. Franck, *Is the U.N. Charter a Constitution?*, in VERHANDELN ÜUR DEN FRIEDEN 96-97, 99-100 (Jochen Abr. Frowein et al. eds., 2003).

321. See sources cited *supra* notes 316-20.

it is difficult to refute the claim that these regimes are all, in effect, “constitutional.”<sup>322</sup>

The integrated functioning of the ECHR that interprets the substance of the European Convention on Human Rights, as applied by the constituent members of the Council of Europe who then implement its rulings, is a prime example of the compatibility between domestic law and an overarching transnational umbrella.<sup>323</sup> This system has thus evolved from a slightly haphazard agglomeration of various economic and human rights treaties to a closely-knit regime that grants a “constitutional” dimension to the rights enshrined in the European Convention.<sup>324</sup> Indeed, both the EU treaty regime, as currently embodied in the Treaty of Lisbon, and the ECHR closely resemble domestic constitutional constructs in that they have evolved into models that allow individuals to assert their judicially enforceable rights against states within the appositely delineated court systems. This is an example of international tribunals proceeding cautiously in their early days: as they felt out the terrain of their jurisdiction and carefully observed the level of compliance with their rulings, they slowly gained confidence and now exercise broad inherent discretionary powers like their domestic counterparts.<sup>325</sup>

The convergence of abstract policy from the domestic and international realms often takes shape when specific incarnations of these norms are contested. For example, *Roper v. Simmons* and *Atkins v. Virginia* both illustrate how international norms that trend against the imposition of the death penalty (at least in certain particular instances) can provide evidence for domestic solutions.<sup>326</sup> After all, the notion of universal rights, as enshrined in several international law texts, is merely a reiteration of the concept of individual rights under domestic law.<sup>327</sup> Indeed, “U.S. Constitutional concepts of indi-

322. See, e.g., Jeffrey L. Dunoff, *Constitutional Conceits: The WTO's 'Constitution' and the Discipline of International Law*, 17 EUR. J. INT'L L. 647, 656 (2006); see also John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 512 (2000); Ernest A. Young, *The Trouble with Global Constitutionalism*, 38 TEX. INT'L L.J. 527, 528 (2003).

323. See Treaty Establishing the European Community art. 220, Nov. 10, 1997, 1997 O.J. (C 340) 3.

324. See Ernst-Ulrich Petersmann, *Human Rights, International Economic Law and 'Constitutional Justice'*, 19 EUR. J. INT'L L. 769, 780 (2008).

325. See CHESTER BROWN, A COMMON LAW OF INTERNATIONAL ADJUDICATION 55-56 (2007) (describing and listing some of those inherent powers).

326. See *Roper v. Simmons*, 543 U.S. 551, 554 (2005); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).

327. See MAURICE CRANSTON, WHAT ARE HUMAN RIGHTS? 1 (1973) (“Human rights is a twentieth-century name for what has been traditionally known as natural rights or, in a more exhilarating phrase, the rights of man.”); see also LOUIS HENKIN, THE AGE OF RIGHTS 1-2 (1990) (noting that the modern iteration of human rights does not seek to justify itself by appealing to any notion of natural rights); van Aaken, *supra* note 258, at 491 (“[C]lassical functions of the nation-state, such as safeguarding individual liberty, freedom, and safety, are transferred to the international sphere.”).

vidual rights together with international human rights law share common natural law foundations and the development of each has greatly influenced the development of the other.<sup>328</sup> Such reciprocal influence of one legal regime on the other is also reflected through the policy that human rights derive in part from the desire to curtail the power of the state.<sup>329</sup> In fact, the protection of individuals from the unlimited sovereignty of the state is a primary goal of domestic constitutional law.<sup>330</sup> Similarly, the background principles of international law are grounded in notions of constraint of state behavior through reference to domestic constitutional principles of limitation of powers.<sup>331</sup>

Scholars, both inside and outside the legal realm, have commented that certain prerequisites must exist before legal regimes can form.<sup>332</sup> These quasi-global social norms include, among others, liberty, equality, and reciprocity, which, by their nature, know neither province nor boundary and are easily transplantable from one country to another or from one legal system to another.<sup>333</sup> They are, in common parlance, the shared values of pluralistic societies.<sup>334</sup> All of these norms are traceable to the single generative norm of human dignity and, given its role “in the constellation of values that characterizes any modern constitutional democracy, foreign law could be used as persuasive authority.”<sup>335</sup>

The effect of these underlying principles cannot be underestimated, as they permeate many theories of government that help define things such as sovereignty, cosmopolitanism, constitutionalism, and democracy. For example, “[t]he normative status of sovereignty is derived from humanity, that is, the legal principle that human rights, interests, needs, and security must be

328. Buys, *supra* note 23, at 2.

329. See JEAN BODIN, *SIX BOOKS OF THE COMMONWEALTH* 25-27 (M.J. Tooley trans., Basil Blackwell 1955) (1576).

330. See *id.* (indicating that international law can serve as one check on the state’s unlimited exercise of sovereignty over its citizens).

331. See, e.g., HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* (Richard Tuck ed., Liberty Fund 2005) (1625).

332. See Rex D. Glensy, *Quasi-Global Social Norms*, 38 *CONN. L. REV.* 79, 81 (2005); see also Alec Stone Sweet, *Judicialization and the Construction of Governance*, 32 *COMP. POL. STUD.* 147, 149 (1999) (“Promises made are to be kept; debts incurred are to be repaid; kindnesses received are to be recognized and returned.”) (referencing Alvin W. Gouldner, *The Norm of Reciprocity: A Preliminary Statement*, in *FRIENDS, FOLLOWERS, AND FACTIONS: A READER IN POLITICAL CLIENTELISM* 28 (Steffen W. Schmidt et al. eds., 1977)).

333. See Glensy, *supra* note 332, at 93.

334. See BUCHANAN, *supra* note 61, at 28-29; SIMON CANEY, *JUSTICE BEYOND BORDERS: A GLOBAL POLITICAL THEORY* 56 (2005).

335. See Perju, *supra* note 23, at 184. The question of the substantive import of “dignity” within contemporary constitutional jurisprudence is one of great interest worthy of academic exploration. See Rex D. Glensy, *The Right to Dignity* 11 (October 15, 2010) (unpublished manuscript, on file with author).



respected and promoted. This normative status is also the telos of the international legal system.”<sup>336</sup> Also, cosmopolitanism is based upon the premise that all human beings share traits common to the human condition.<sup>337</sup> Similarly, “[p]rinciples of international law and notably of international economic law, such as human rights, non-discrimination, [and] equal conditions of competition . . . operate much as constitutional principles.”<sup>338</sup> Therefore, all of the substantive areas, such as human rights law, environmental law, and labor law, which are shaped by these principles and norms, are equally applicable in both the domestic and international regimes.<sup>339</sup>

Both domestic law and international law overlap in their definitions of the substantive rights most worthy of protection,<sup>340</sup> but the two different structures might not necessarily agree on what the specific details of those rights should be. For example, while one might find near unanimity on the concept of freedom of speech, one might find less agreement on whether that right includes the right to advocate the overthrow of one’s government – domestic law and international law might have varying views as to whether that specific activity is liable to legal sanction or whether it is protected speech. Nevertheless, the important matter to the comparativist is the agreement in the abstract, as the comparative analysis usually shapes the contours of the discussion.

In many cases, domestic courts are better positioned to give substance to those international law goals because the parties are directly subject to the jurisdiction of the domestic court and are more likely to abide by rulings those courts issue. Indeed, the U.S. Alien Tort Statute is one such vehicle of domestic legislation which gives effect to the fundamental international law goal of safeguarding universal human rights through purely domestic means.<sup>341</sup> Curiously, it was enacted at the very dawn of the United States by the first Congress in 1789, and has been an instrumental vehicle for litigating international human rights claims within domestic U.S. courts ever since.<sup>342</sup>

336. Peters, *supra* note 60, at 398.

337. See KWAME ANTHONY APPIAH, *COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS*, at xv (2006).

338. Peters & Armingeon, *supra* note 36, at 395.

339. See Brun-Otto Bryde, *International Democratic Constitutionalism, in TOWARDS WORLD CONSTITUTIONALISM: ISSUES IN THE LEGAL ORDERING OF THE WORLD COMMUNITY* 103, 106 (Ronald St. John MacDonald & Douglas M. Johnston eds., 2005) (“[I]nternational law tries to bind these actors . . . to substantive constitutional principles, especially the rule of law and human rights.”).

340. See, e.g., BESSON, *supra* note 185, at 331 (noting that principles and values in law are essentially “incomplete[] theorised agreement[s]”).

341. See Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 *YALE J. INT’L L.* 1, 7-8 (2002).

342. See *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) (litigating over the U.S. Alien Tort Statute); see also 28 U.S.C. § 1350 (2006) (“The district courts shall

Even skeptics of the comparative enterprise admit that “American law . . . is not only likely to be beneficial for Americans because of its democratic origin, but in many areas is also likely to benefit foreigners.”<sup>343</sup> That statement seems to be a concession that foreign domestic law, if democratically enacted, can benefit Americans as well. And what of international law internalized by domestic foreign law? Given the substantial overlap illustrated above, it would seem that benefits could also flow in this direction. These critics also note that “the two disciplines” of international and domestic law “are largely harmonious.”<sup>344</sup> These statements open the door to “multilayer constitutionalism,” which “overcomes the classic division between domestic and international law” and encourages the type of processes encapsulated by constitutional interpretation via comparative analysis.<sup>345</sup>

Critics highlight another aspect as an impediment to crossover references to international law by domestic constitutional courts – the notion that there are substantial structural differences between domestic constitutional regimes and the international system, which makes comparing rules between them a futile exercise. Goldsmith and Levinson offer a nuanced and highly persuasive counter-critique to this criticism.<sup>346</sup> Specifically, they debunk three main contentions made by those who claim such differences: (1) that international law alone lacks a centralized promulgation system which leads to uncertainty as to what the law actually is; (2) that international law alone lacks proper enforcement mechanisms; and (3) that international law alone does not constrain its constituent elements and thus eludes any notion of sovereignty.<sup>347</sup>

As to the first contention, they note that “two characteristics distinguish constitutional law from ordinary domestic law and align it with international law,” those being that, in constitutional law (like in international law), “the institutionalized secondary rules . . . are less able to resolve first-order uncertainty . . . because these systems lack an ongoing legislative process,” and that, in most domestic constitutional systems, “there is considerable ambiguity and debate about what, precisely, the secondary rules . . . are.”<sup>348</sup> In particular, Goldsmith and Levinson explain that, just as constitutional law has a myriad of generic and potentially conflicting substantive protections (such as protections of religious liberty and equality), international law’s fundamental charters, such as the UN Charter, the European Convention on Human

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have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

343. McGinnis & Somin, *supra* note 55, at 1178.

344. Alford, *supra* note 39, at 655.

345. See Peters & Armingeon, *supra* note 36, at 394-95.

346. See Goldsmith & Levinson, *supra* note 150, at 1798-801.

347. See *id.*

348. *Id.* at 1802.

Rights,<sup>349</sup> and the International Covenant on Civil and Political Rights,<sup>350</sup> have conflicting provisions that courts have not properly resolved in a uniform way.<sup>351</sup> Moreover, neither the U.S. constitutional system nor international law “can rely fully upon the legal apparatus of the very state” to resolve these conflicts because these systems disagree as to the nature of the proffered institutional solutions, and because both systems lack a legislative process to resolve such disputes.<sup>352</sup>

As to the second contention, Goldsmith and Levinson dispute the notion that international law alone lacks an enforcement mechanism. Indeed, they point out that the question of enforcement is not an appropriate distinction to apply to the domestic versus the international realm, because “[d]omestic constitutional law, just as much as international law, lacks a coercive enforcement mechanism standing above the state to ensure that the government complies.”<sup>353</sup> For example, judicial review is not a method of ensuring compliance but merely an avenue for a declaration of rights. It has no direct means of coercing obedience – a decree by the International Court of Justice fares similarly. Indeed, just as no country in the world can force the U.S. to comport with international obligations, no entity within the U.S. can force it to comply with a court ruling that it seeks to ignore. What might induce compliance in both fora has been the subject of intense and continued academic debate, with multiple theories proposed and counter-proposed.<sup>354</sup> However, for the purposes of this Article, it is only necessary to note that the speculation for the reasons the U.S. complies with adverse constitutional opinions authored by the U.S. Supreme Court mirror quite closely those assumptions for why the U.S. might comply with international law rules, which it is known to dislike.<sup>355</sup>

349. See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

350. See International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16, at 52, U.N. Doc. A/3166 (Mar. 23, 1976).

351. See Goldsmith & Levinson, *supra* note 150, at 1805 (citing Laurence Helfer, *Forum Shopping for Human Rights*, 148 U. PA. L. REV. 285, 308-41 (1999)).

352. *Id.* at 1817.

353. *Id.* at 1823.

354. See, e.g., Alex Geisinger & Michael Ashley Stein, *A Theory of Expressive International Law*, 60 VAND. L. REV. 77 (2007); ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* (2008); Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations and Compliance*, in HANDBOOK OF INTERNATIONAL RELATIONS 538 (Walter Carlsnaes et al., eds., 2002).

355. Among the reasons posited by scholars for the compliance with such rulings are reputational considerations, signaling, concerns about the rule of law, and strategic behavior. See, e.g., Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229 (2004) (analyzing reputational concerns and strategic behavior); Andrew T. Guzman, *Reputation and International Law*, 34 GA. J. INT'L & COMP. L. 379

Finally, as to the third contention, Goldsmith and Levinson explain that the traditional concept of “sovereignty” peddled in the academy, that a country has the right to govern itself as best it sees fit, is not reflected in reality. They state that “[i]f sovereignty means that states have the right to govern themselves as they please, then how can law – international or constitutional – legitimately impose constraints?”<sup>356</sup> Thus, if the ultimate power of a democratic nation is found within its body politic – the people – then it becomes difficult to comprehend constitutional law within this framework because it often counteracts majoritarian impulses.<sup>357</sup> In this respect, constitutional law acts as a limitation of sovereignty in a similar way, if not identical, to the accusation that international law interacts with domestic regimes in a way that also significantly curtails the ability of those domestic regimes to engage in unchecked power over their own territory.<sup>358</sup> In sum, Goldsmith and Levinson successfully dispel the argument that “apparent differences between international law and constitutional law really run as deep as is commonly supposed.”<sup>359</sup>

Constitutional interpretation by method of comparative analysis might also advance more controversial goals in addition to serving those international law goals identified above as less controversial. In other words, it may advance those goals whose normative desirability is more contested, while at the same time promoting those goals that share sufficient commonality with the goals of domestic law. Thus, a realist view of the international system would probably result in a normative directive that instructs courts to cite international sources adopted by allied states and to willfully ignore those materials that are favored by rivals or enemies.<sup>360</sup> Similarly, comparative constitutional law could also serve the interests of advancing Western ideals by fostering reciprocity, which, in this context, would allow U.S. courts to rely on international law as persuasive authority in an attempt to encourage other nations around the world to do the same. This would enhance judicial

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(2006) (looking at reputational issues); William B.T. Mock, *Game Theory, Signaling, and International Legal Relations*, 26 GEO. WASH. J. INT’L L. & ECON. 33 (1992) (examining signaling).

356. Goldsmith & Levinson, *supra* note 150, at 1852.

357. Thus, if the majority of a country wants to impose burdens upon a minority, but not on that majority, under the usual concept of sovereignty, it should simply be allowed to do so.

358. See, e.g., Barry Friedman, *The History of Counter-majoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 393-404 (1998). These descriptions are not a recent phenomenon, but merely a reiteration of ancient arguments which go back to the founding of the U.S. *Id.* at 334.

359. Goldsmith & Levinson, *supra* note 150, at 1794, 1797.

360. See Frederick Schauer, *The Politics and Incentives of Legal Transplantation, in GOVERNANCE IN A GLOBALIZING WORLD* 253, 260 (Joseph S. Nye, Jr. & John D. Donohue eds., 2000) (illustrating this view on a domestic-domestic, or country to country, basis).

predictability in non-Western countries that choose to adopt constitutional interpretative methods similar to those adopted by America.

An important intellectual thrust to the collaboration of international law and domestic law is the idea of “societal constitutionalism.”<sup>361</sup> This is the notion that constitutional theory can be adapted on the global scale by abandoning the state-centric model and substituting it for an approach that holds relevant elements within society as the primary driving force behind particular world interactions.<sup>362</sup> Therefore, this model would constitute the proper polity for regulation. These diverse political entities, depending on the nature of their individual behavior, would then form a multitude of societies governed by overlapping trans-border constitutional frameworks.

In sum, international law and domestic constitutional law share numerous goals and policies. These goals and policies exist both in the abstract realm of societal ideals as well as in the more concrete form of specific substantive laws. Thus, as concisely stated by Goldsmith and Levinson, international law and constitutional law both strive to find “common solutions to the same basic problem of legally constituting and constraining the state.”<sup>363</sup> It follows, then, that both legal systems can benefit from mutual consultation when the context is appropriate. Indeed, domestic constitutional courts and international human rights tribunals are already addressing similar issues, such as those pertaining to individual freedoms.<sup>364</sup> The blueprint for comparative constitutional interpretation has therefore already been written. Like constitutional norms on human rights, international norms on the same subject are particularly susceptible to differing interpretations, as judges exercise a considerable amount of discretion in reaching conclusions presented by international issues. Therefore, comparative law as a method of constitutional interpretation tempers the almost-unfettered discretion that these problems present.

As noted above, constitutional comparativism need not operate in a vacuum. Comparative impulses exist in numerous constitutional courts, such as in South Africa and Canada, as well as in transnational bodies, of which the EU is the prime example. Courts are ideally situated to perform this comparison because they are both norm receptors and norm generators in both international and domestic law; their role is fully exemplified by absorption of global values into the internal law of states through the process of internalization.<sup>365</sup> Consequently, much of the consternation uttered by the critics to the

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361. See, e.g., Gunther Teubner, *Breaking Frames: Economic Globalization and the Emergence of Lex Mercatoria*, 5 EUR. J. SOC. THEORY 199, 208-09 (2002); DAVID SCIULLI, *CORPORATE POWER IN CIVIL SOCIETY: AN APPLICATION OF SOCIETAL CONSTITUTIONALISM* (2001).

362. See Teubner, *supra* note 361, at 208-09.

363. Goldsmith & Levinson, *supra* note 150, at 1863.

364. See Neuman, *supra* note 65, at 1900.

365. See Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 205 (1996).

very enterprise of comparative constitutionalism is akin to Don Quixote charging at the windmills with his jousting lance.<sup>366</sup> As aptly expressed by Judith Resnik, those opposed to comparative practice on grounds that it erodes sovereignty “have a dismal . . . record[,] in that American law is constantly being made and remade through exchanges . . . with normative views from abroad. Laws, like people, migrate [and] [l]egal borders, like physical ones, are permeable, and seepage is everywhere.”<sup>367</sup>

Bringing international law and domestic law closer through common consultation within the context of constitutional interpretation is a way to contain and recycle that seepage. Through the search of policy and substantive commonalities, “the fundamental idea is that what counts is the substance, not at the formal category of conflicting norms.”<sup>368</sup> The basic common norms shared by both systems – procedural fairness, inclusiveness, and participation, when relevant to a particular case or controversy – are justifiable avenues for bringing international law and domestic law together. The overarching goal remains to provide the enterprise with secure normative grounding that can withstand the criticism that international law is insufficiently suited for the task – a charge refuted by the observations illustrated above.

## VI. CONCLUSION

Comparativism is inherently about selectivity – as is all of common law. Judges are always parsing, filtering, and, indeed, *selecting* the authority they believe to be the most binding and persuasive to reach their decision. Thus, Justice Scalia’s bemoaning the selective nature of comparative analysis<sup>369</sup> can be equally applied to *any* context within a judicial decision and therefore actually does not become a critique of comparative constitutionalism, but rather, of decisional rule itself.<sup>370</sup> The increasing realities of a globalized world make this form of constitutional interpretation destined to become part

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366. See MIGUEL DE CERVANTES, *DON QUIXOTE* (Edith Grossman trans., 2003).

367. Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 *EMORY L.J.* 31, 63-64 (2007).

368. Anne Peters, *The Globalization of State Constitutions*, in *NEW PERSPECTIVES ON THE DIVIDE BETWEEN NATIONAL AND INTERNATIONAL LAW* 251, 306 (Janne Nijman & André Nollkaemper eds., 2007).

369. See *Lawrence v. Texas*, 539 U.S. 558, 598 (Scalia, J., dissenting) (lamenting the majority’s ignoring of the laws of those countries that retained proscriptions on sodomy).

370. See Transcript of Debate on Foreign Law: Constitutional Relevance of Foreign Court Decisions, Justices Stephen Breyer and Antonin Scalia (Jan. 13, 2005), available at <http://www.freerepublic.com/focus/f-news/1352357/posts>.

of the cross-national networks that already characterize much of the modern international legal system.<sup>371</sup>

International law can play a large role in the development of this new legal world order – it can serve as a focal point for constitutional consultation by domestic courts when the situation is right. The proper situations for using comparative analysis, which should be determined on a case-by-case basis, only occur when there is a proper link between the two legal systems. Notions of justice, fairness, equality, and due process are values inherent in all cultures and religions of the world, as well as basic tenets of international law, regardless of the terms in which they are expressed.<sup>372</sup> The constitutional comparativist looks to the combination of these shared denominators for wisdom, guidance, confirmation, challenge, and curiosity.

As shown above, excessive indulgence in particular descriptions of either legal system serves no real purpose and is not grounded in any real notion of meaningful difference.<sup>373</sup> Tensions that might exist between the domestic and the international might also exist between the domestic law of one nation and another, or within the domestic law of a single nation. One factor should always be remembered: the substantive law of each country should not be the sole determinant as to whether a reference is possible, “but rather the reasoning at work in confronting a common problem or issue.”<sup>374</sup> From this vantage point, international law is an extremely attractive source of persuasive authority for constitutional interpretation. Indeed, constitutional law and international law both have long been described as reflections of rules of “positive morality” rather than as traditional “law.”<sup>375</sup> The key point is that “[a]ll relations, whether domestic or international, are inherently human; differences are differences in degree, rather than principle.”<sup>376</sup> This is part of the mantra underlying the Kantian principle regarding ideational and liberal

371. See generally ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 65-103 (2004).

372. See generally EQUITY IN THE WORLD’S LEGAL SYSTEMS: A COMPARATIVE STUDY (Ralph A. Newman ed., 1973), in 1 CALIFORNIA WESTERN SCHOOL OF LAW U.S.I.U. STUDIES IN JURISPRUDENCE.

373. See Goldsmith & Levinson, *supra* note 150, at 1792. Nevertheless, “[t]he divide between international and domestic law runs deep in Anglo-American legal thought,” and therefore leaves the comparativist in a constant state of providing justifications for the enterprise. *Id.*

374. See Bentele, *supra* note 11, at 226.

375. See JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 141-43 (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1832) (traditional “law” being the rules of conduct backed up by the threat of enforcement for transgressors).

376. Cottier, *supra* note 17, at 654. It is to this common humanity that the Rev. Martin Luther King, Jr. appealed when he noted that an “[i]njustice anywhere is a threat to justice everywhere.” Letter from Martin Luther King, Jr. to Fellow Clergymen (Apr. 16, 1963), available at [http://www.africa.upenn.edu/Articles\\_Gen/Letter\\_Birmingham.html](http://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html) (Letter from a Birmingham Jail).

theories of international governance.<sup>377</sup> The comparative practice comes into play when that common principle, or positive morality of purpose, is identified in a particular instance. In that instance, international law is an especially pertinent source of authority for domestic constitutional interpretation.

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377. See KANT, *supra* note 41.



