

# THE DEMOCRATIC LEGITIMACY OF INTERNATIONAL HUMAN RIGHTS LAW

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## INTRODUCTION

International human rights law is gaining strength. Its tenets have been absorbed into the discourse of international politics.<sup>1</sup> It has mobilized successful resistance to the organized violence of state and non-state actors, and contributed to democratic consolidation.<sup>2</sup> Its provisions are increasingly incorporated into domestic law.<sup>3</sup> Of course, human rights violations persist on a massive scale – a reminder that, despite the impressive achievements of the past few decades, much work remains.

Yet international human rights law has drawn increasing criticism, not least from Americans. It has been attacked on various grounds – as an imperialist project threatening local values and traditions,<sup>4</sup> as a naïve quest oblivious to the realities of power politics,<sup>5</sup> as an infringement of state sovereignty,<sup>6</sup> and as a denial of democracy.<sup>7</sup> In this Article, I do not respond to

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1. See, e.g., JACK DONNELLY, *INTERNATIONAL HUMAN RIGHTS* ch. 1 (3rd ed. 2007); Charles R. Beitz, *Human Rights as a Common Concern*, 95 *AM. POL. SCI. REV.* 269 (2001) (discussing different conceptions of human rights in international law).

2. See *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* (Thomas Risse, Stephen C. Ropp, & Kathryn Sikkink, eds., 1999) [hereinafter *THE POWER OF HUMAN RIGHTS*]; NAOMI ROHT-ARRIAZA, *THE PINOCHET EFFECT: TRANSNATIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS* (2005); Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54(2) *INT'L ORG.* 217 (2000).

3. See *FUNDAMENTAL RIGHTS IN EUROPE: THE ECHR AND ITS MEMBER STATES, 1950-2000* (Robert Blackburn & Jörg Polakiewicz eds., 2001) [hereinafter *FUNDAMENTAL RIGHTS IN EUROPE*] (discussing how the European Convention on Human Rights has been incorporated into individual European states); Christopher Harland, *The Status of the International Covenant on Civil and Political Rights (ICCPR) in the Domestic Law of State Parties: An Initial Global Survey Through UN Human Rights Committee Documents*, 22 *HUM. RTS. Q.* 187, 257 (2000) (providing table listing which countries have incorporated the ICCPR into their domestic law).

4. See *HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVES* (Admantia Pollis and Peter Schwab, eds., 1979).

5. See JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 13 (2005).

6. See JEREMY A. RABKIN, *LAW WITHOUT NATIONS?: WHY CONSTITUTIONAL*

all these objections, but instead focus on the last one, which I call the democracy objection. This objection sometimes contains echoes of the others, especially the sovereignty objection. So the other objections also need to be addressed, but I leave that task for another day.<sup>8</sup>

The democracy objection rests on two broad arguments, not always distinguished. The first is that international human rights law is insufficiently responsive to the popular will. Critics charge that the treaty-drafting process is cut off from the input of ordinary citizens<sup>9</sup> and that too much power is placed in the hands of international judges.<sup>10</sup> They also lament the indeterminate character of customary international law, which, they argue, leaves too much discretion to judges and too much influence to legal scholars.<sup>11</sup> In sum, international human rights law is said to bypass the democratic processes that, at least ideally, guide the formation of domestic law.

Whether and to what extent international human rights law excludes popular input is a matter for debate. As Oona Hathaway points out, the ratification of treaties in almost all countries follows a procedural path similar to that of domestic legislation,<sup>12</sup> so popular control over the adoption of treaty law varies according to the democratic attributes of individual states.<sup>13</sup> (In the United States, treaty ratification follows a different path from federal

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GOVERNMENT REQUIRES SOVEREIGN STATES (2005).

7. *E.g.*, Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 1986 (2004); Kenneth Anderson, *The Ottawa Convention Banning Landmines, the Role of International Non-Governmental Organizations and the Idea of International Civil Society*, 11 EUR. J. INT'L L. 91, 93 (2000); RABKIN, *supra* note 6; ROBERT H. BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES 10 (2003); David B. Rivkin, Jr., & Lee A. Casey, *The Rocky Shoals of International Law*, NAT'L INT. 62 (2000-01) 35; Madeline Morris, *The Disturbing Democratic Defect of the International Criminal Court*, 12 FINNISH Y.B. INT'L L. 109, 113 (2001). I will concentrate my analysis on the arguments of Rubenfeld and Anderson.

8. For a response to several of these objections, see Paul Schiff Berman, *Seeing Beyond the Limits of International Law*, 84 TEX. L. REV. 1265 (2006) (reviewing GOLDSMITH & POSNER, *supra* note 5).

9. *See* Rubenfeld, *supra* note 7 at 2007-08; Anderson, *supra* note 7 at 116-19.

10. *See* Rubenfeld, *supra* note 7 at 2023; BORK, *supra* note 7.

11. *See* BORK, *supra* note 7 at 38.

12. *See* Oona A. Hathaway, *International Delegation and State Sovereignty*, 71 LAW & CONTEMP. PROBS. 115, 125 n. 33 (2007).

13. This observation is in turn subject to at least two qualifications. *See id.* at 126-27, 137-40. First, treaties are usually presented to legislatures on a take-it-or-leave-it basis without opportunities for amendment, except to the extent that reservations, understandings, and declarations are permitted. Note, however, that in democracies the people exercise ultimate control over the selection of delegates charged with drafting treaties in the first place. Moreover, refusal to ratify can lead to a renegotiation of the terms of the treaty, a recurrent pattern in the evolution of the European Union. The second qualification is that powerful states may sometimes use strong-arm tactics to make weaker states ratify (or not ratify) treaties. But powerful states have also pressured weaker states when it comes to the passage of ordinary legislation. No simple contrast distinguishes the extent of popular control over domestic versus international law. *See id.* *See also* Andrew Moravcsik, *In Defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union*, 40 J. COMMON MKT. STUD. 603 (2002) (arguing that the structure of the European Union is consistent with existing advanced industrial democracies).

legislation, bypassing the House of Representatives, but requiring consent from two-thirds of the Senate.<sup>14</sup> The upshot is that treaty ratification is *more difficult* than passing ordinary legislation.) International courts owe their authority to treaties, and thus (at least in democratic countries) to the consent of the people's representatives.<sup>15</sup> Customary international law rests ultimately on the practices and statements of public officials, who, in democracies, owe their position to the democratic process.<sup>16</sup>

A second argument for the democracy objection, however, is invulnerable to such observations. This is the belief that the nation-state is the necessary locus of democracy. International human rights law allows outsiders to participate in decisions that (on this view) should be left only to us, members of the nation-state. The problem, therefore, resides in the very premise of international human rights law: the idea of a global human rights legal code that can be applied across national jurisdictions and should override contrary national laws and policies. In the critics' view, this idea is a standing affront to the democratic right of nation-states to define and redefine human rights for themselves.<sup>17</sup>

These two arguments, woven together, find forceful expression in a recent article by Yale Law School professor Jed Rubenfeld. "The entire contemporary discourse of 'international human rights,'" he writes, "is predicated on the idea that there exists an identifiable body of universal law, everywhere binding, requiring no democratic provenance. In this sense, contemporary international law is deeply antidemocratic."<sup>18</sup> Kenneth Anderson, a law professor at American University, finds in international human rights law a lack of popular consent and democratic legitimacy and asks rhetorically, "We count democratic legitimacy to be the *sine qua non* of legitimacy of the sovereign national state, but why, I wonder, do we suddenly jettison it when it comes to the international system[?]"<sup>19</sup> He describes the effort to empower international human rights law as "international legal imperialism," because it seeks "the establishment of an international system that is genuinely constitutionally supreme with respect to both nation states and the people that, in the best of cases, they democratically represent."<sup>20</sup>

14. U.S. CONST. art. II, § 2, cl. 2.

15. Some critics argue that the International Criminal Court (ICC) deviates from this rule, because it enjoys limited jurisdiction over non-party nationals. I defend the democratic credentials of the ICC below. See *infra* text accompanying notes 120-122.

16. See MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 41-50 (3d ed. 1999). Furthermore, it is widely held that states can exempt themselves from customary international law by means of early and persistent objection. See ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 7 (2005). Not all jurists accept this view, however. See ANTONIO CASSESE, INTERNATIONAL LAW 163 (2d ed. 2005).

17. In addition to the views of Rubenfeld and Anderson, discussed below, see also RABKIN, *supra* note 6.

18. Rubenfeld, *supra* note 7, at 1976.

19. Anderson, *supra* note 7, at 103.

20. *Id.* at 104. Here Anderson speaks of "international law" in general, but the examples

Such claims recall familiar criticisms of judicial review, specifically the power of domestic courts in many countries to overturn legislation held to violate constitutional rights.<sup>21</sup> In both cases, the complaint is that the popular will is thwarted, because important decisions are removed from the ordinary legislative process. Though some critics of international human rights law do not extend their objections to domestic judicial review,<sup>22</sup> the arguments against both institutions are often very similar.<sup>23</sup> In this Article I seek to defend both institutions against the charge of being undemocratic.

Debates over the legitimacy of international human rights law assume new importance after the well-publicized human rights abuses by the United States in the "Global War on Terror." Hundreds, if not thousands, of people from around the world have been secretly detained by U.S. officials, kept in incommunicado detention without charge, and subjected to inhuman treatment. Many have been tortured. Under the George W. Bush administration, many faced the prospect of lifelong imprisonment without trial,<sup>24</sup> while others faced trial before military commissions lacking in basic due process protections, and could be kept in detention despite being acquitted or completing their sentence.<sup>25</sup> U.S. courts have not stopped these policies.<sup>26</sup> They even failed for

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used in his article are two human rights treaties: the Ottawa Convention to Ban Landmines and, secondarily, the Rome Statute of the International Criminal Court. *See id.* at 92.

21. Many of these criticisms take their cue from Alexander Bickel's observation of what he called the "countermajoritarian difficulty." *See* ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 16-17 (1962). For an excellent rebuttal of the countermajoritarian critique, see Scott E. Lemieux & David J. Watkins, *Beyond the "Countermajoritarian Difficulty": Lessons from Contemporary Democratic Theory*, 41 *POLITY* 30 (2009).

22. *E.g.*, Rubinfeld, *supra* note 7, at 1993-99. *But see* BORK, *supra* note 7 (decrying what he sees as a similar pattern of judicial activism in both international human rights law and judicial review).

23. For example, see Rubinfeld, *supra* note 7, whose arguments bear a striking resemblance to Jeremy Waldron's critique of judicial review. *See* JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999); Jeremy Waldron, *A Rights-Based Critique of Constitutional Rights*, 13 *OXFORD J. LEGAL STUD.* 18 (1993).

24. For an outstanding overview, see JOSEPH MARGULIES, *GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER* (2006). Amnesty International and Human Rights Watch have produced excellent reports on the United States' detention policies. *See* AMNESTY INTERNATIONAL, *AMNESTY INTERNATIONAL REPORT 2008, STATE OF THE WORLD'S HUMAN RIGHTS* (2008), <http://thereport.amnesty.org/eng/Homepage> (last visited Nov. 24, 2008); HUMAN RIGHTS WATCH, *U.S. TORTURE AND ABUSE DETAINEES* (2004), <http://hrw.org/campaigns/torture.htm> (last visited Nov. 24, 2008).

25. *See* David Glazier, *A Self-Inflicted Wound: A Half Dozen Years of Turmoil Over the Guantanamo Military Commissions*, 12 *LEWIS & CLARK L. REV.* 131 (2008).

26. Despite dealing some significant defeats to the Bush administration, U.S. courts have not prohibited the CIA's use of "enhanced interrogation techniques" (the standard euphemism for methods widely regarded as torture). Nor have they put an end to indefinite detentions or the procedurally deficient military commissions. A complicated legal journey led to the landmark ruling of the Supreme Court in *Boumediene v. Bush*, 128 S.Ct. 2229 (2008), that inmates at Guantánamo Bay have a constitutional right to habeas corpus. The decision was not issued until six and a half years after inmates started arriving in Guantánamo Bay. The ruling, though clearly helpful to the Guantánamo Bay inmates, does not specify which law should govern their detention ("It bears repeating that our opinion does not address the content of the

over three years to halt the incommunicado detention and apparent torture of American citizen José Padilla, held on U.S. soil.<sup>27</sup> For good measure, Congress passed a law in the fall of 2006 that restricts the ability of U.S. courts to rule on the detention or treatment of foreign inmates accused of terrorism, and that, by introducing an indecipherable new definition of war crimes, gives C.I.A. officials effective impunity for many kinds of torture.<sup>28</sup>

A major reason why the government was able to implement these policies is that the United States has not bound itself to international human rights law in any but the loosest sense.<sup>29</sup> The incorporation of such law into its domestic legal system is one of the steps the United States must take if it hopes to restore human rights and place them on a secure footing. This eminently practical reason for strengthening international human rights law would be offset by the principled objection that such law subverts democracy. There is a lot at stake, therefore, in our evaluation of this objection. Does it have any merit?

I shall argue that it does not.<sup>30</sup> Very briefly: international human rights

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law that governs petitioners' detention. That is a matter yet to be determined"), and its application to detainees held in overseas locations other than Guantánamo Bay remains unclear. *Id.* at 2277. By January 2009, only three of the approximately 250 remaining Guantánamo prisoners had been released as a result of *Boumediene*, and their release came more than six months after the Supreme Court ruling. Peter Finn, *Three Algerian Detainees Set for Transfer to Bosnia*, WASH. POST, Dec. 16, 2008, at A-2.

27. Warren Richey, *U.S. Government Broke Padilla Through Intense Isolation, Say Experts*, THE CHRISTIAN SCIENCE MONITOR, Aug. 14, 2007, at 11.

28. Military Commissions Act, Pub. L. No. 109-366, 7 Stat. 2600 (2006). For a discussion of the law, see Jamie Mayerfeld, *Playing by Our Own Rules: How U.S. Marginalization of International Human Rights Law Led to Torture*, 20 HARV. HUM. RTS. J. 89, 107, 135-36 (2007). In *Boumediene v. Bush*, *supra* note 26, the Supreme Court restored the habeas corpus rights of Guantánamo Bay inmates, but did not address the numerous other court-stripping provisions of the Act. As this Article goes to press in early 2009, President Barack Obama has recently issued executive orders banning torture by the C.I.A., closing C.I.A. prisons, rejecting George W. Bush administration legal opinions on interrogation, requiring access by the International Committee of the Red Cross to all detainees in U.S. military custody, and mandating the closure of Guantánamo Bay detention center within one year. Barack Obama, Exec. Order – Ensuring Lawful Interrogations (Jan. 22, 2009), available at <[http://www.whitehouse.gov/the\\_press\\_office/EnsuringLawfulInterrogations/](http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations/)> (last visited Jan. 31, 2009); Barack Obama, Exec. Order – Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities (Jan. 22, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/ClosureOfGuantanamoDetentionFacilities/](http://www.whitehouse.gov/the_press_office/ClosureOfGuantanamoDetentionFacilities/) (last visited Jan. 31, 2009). In addition, President Obama asked prosecutors to halt military commission trials for six months while the use of such trials is reconsidered. Peter Finn, *Obama Seeks Halt to Legal Proceedings at Guantánamo*, WASH. POST, Jan. 21, 2009, at A-2. These dramatic reforms occurred neither because of court order nor congressional legislation, but because a new president assumed office more than seven years after the abuses started. Had a different president been elected in 2008, the reforms easily might not have been adopted. Moreover, the executive orders by themselves cannot stop future administrations from resuming the abuses in the future.

29. See Mayerfeld, *Playing by Our Own Rules*, *supra* note 28.

30. For other arguments defending the same view, see Robert O. Keohane, Stephen Macedo, and Andrew Moravcsik, *Democracy-Enhancing Multilateralism*, INT'L ORG. (forthcoming); and Martin S. Flaherty, *Judicial Globalization in the Service of Self-Government* 20 ETHICS & INT'L AFFAIRS 477 (2006).

law is not undemocratic, because it leaves ample room for popular self-government. The policies barred by international human rights law are policies that governments should not consider anyway, so their removal from legislative consideration represents no loss for democracy. There is no “democratic” right for legislatures to enact or even consider policies that violate human rights. Indeed, as I shall argue, the best conception of democracy is one with a built-in commitment to human rights; therefore, international human rights law, by reinforcing human rights, enhances democracy. Critics exaggerate the extent to which international human rights law has developed without state consent.<sup>31</sup> But their deeper mistake is to suppose that consent is morally required for the prohibition of human rights violations.

The difficulty with my position, some will say, is that it ignores disagreement about human rights. I do not deny such disagreement, nor that it poses a problem. But, as I argue below, the fact of disagreement is not a reason to reject international human rights law, or judicial review for that matter. The constitutionalization of human rights through domestic and international law, backed by judicial review, offers the best known method for responding to disagreements about human rights.

My goal is not to defend every provision of existing international human rights law, but rather its mission — the protection of human rights through international law. Actual international human rights law can fail its mission in different ways. First, some human rights treaties may include obligations that, even if desirable, do not correspond to *human* rights in the true sense. States may legitimately opt out of these obligations at the time of ratification. Some provisions, moreover, may actually threaten genuine human rights. The International Covenant on Civil and Political Rights (ICCPR) arguably goes astray in demanding a general legal prohibition on hate speech.<sup>32</sup> Not only is it questionable whether there is such a human right, but the prohibition, framed this broadly, may even entail the violation of human rights.<sup>33</sup> To take another example, the assertion in Common Article 1 of the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>34</sup> that “all *peoples* have the right of self-determination” may seem like an intrusion into a pair of documents avowedly dedicated to *human* rights, and may be too easily

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31. See, e.g., *supra* notes 12-16 and accompanying text.

32. 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 (1966), 999 U.N.T.S. 171 (Dec. 16, 1966), available at [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm) [hereinafter ICCPR].

33. JOHN STUART MILL, ON LIBERTY ch. 2 (Elizabeth Rapaport ed., Hackett Publishing Co. 1978) (1859). See also George Kateb, *The Freedom of Worthless and Harmful Speech*, in LIBERALISM WITHOUT ILLUSIONS: ESSAYS ON LIBERAL THEORY AND THE POLITICAL VISION OF JUDITH N. SHKLAR (Bernard Yack, ed., 1996).

34. 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 (1966), 993 U.N.T.S. 3 (Dec. 16, 1966), available at [http://www.unhchr.ch/html/menu3/b/a\\_ceschr.htm](http://www.unhchr.ch/html/menu3/b/a_ceschr.htm) [hereinafter ICESCR].

invoked to override the actual human rights of individual persons.<sup>35</sup>

Second, international human rights law may adopt flawed means of implementation. The former UN Human Rights Commission (the “Commission”) made monumental contributions to human rights, above all by overseeing the creation of the Universal Declaration of Human Rights, but also through its numerous thematic and country reports that shed light on human rights abuses throughout the world, and through the resolution process that brought public pressure to bear on repressive governments. Its impact was limited, however, by a UN voting system that allowed notorious human rights abusers, such as China, Saudi Arabia, Zimbabwe, Libya, and Sudan, to sit on the 53-member body.<sup>36</sup> These countries, not surprisingly, succeeded in blocking condemnations of many countries responsible for severe abuses. Unfortunately, the new Human Rights Council, intended to remedy the weaknesses of the Commission, may suffer from some of the same problems.<sup>37</sup>

So the existing body of international human rights law is not without flaws, and to the extent that the flaws hinder the promotion of human rights, they render international human rights law less democratic. But the flaws can be repaired; international human rights law is not undemocratic *per se*. We make it more democratic by strengthening it and bringing it into line with its stated mission.

Part I of this Article discusses the meaning and basis of human rights. I identify what I believe is a persuasive rationale that enjoys widespread (though not universal) agreement. Part II outlines the argument for the harmony of international human rights law and democracy. Since this argument presumes a conception of democracy with a built-in commitment to human rights, I devote the rest of the paper to defending such a conception of democracy. Part III argues that this conception is linguistically and philosophically respectable, while Part IV argues that it is the conception of democracy that we ought, morally, to adopt. I am especially interested in showing that persistent disagreement about human rights is no reason for rejecting either international human rights law or judicial review.

Today, international human rights law encompasses a large body of treaty and customary law.<sup>38</sup> A primary source of such law continues to be the

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35. ICCPR, *supra* note 32, at art. 1; ICESCR, *supra* note 34, at art. 1 (emphasis added). These claims may be contested. With regard to Article 1, Common Article 5 helpfully adds that “[n]othing in the present Covenant may be interpreted as implying . . . any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.” ICCPR, *supra* note 32, at art. 5; ICESCR, *supra* note 34, at art. 5. Moreover, collective self-determination has often proven a necessary bulwark for human rights. Yet history records too many occasions on which it has been used to justify the violation of human rights.

36. See DONNELLY, *supra* note 1, at 83.

37. Warren Hoge, *Dismay over New U.N. Human Rights Council*, N.Y. TIMES, March 11, 2007, at 18, available at <http://www.nytimes.com/2007/03/11/world/11rights.html>.

38. Among many excellent textbooks, see HENRY J. STEINER & PHILIP ALSTON,

Universal Declaration of Human Rights, adopted by the UN General Assembly without dissent in 1948.<sup>39</sup> Although the Declaration is not a treaty, its language has been widely reproduced in national constitutions and international treaties, and many of its provisions have acquired the status of customary international law. Its wisdom and eloquence give it lasting authority. Contemporary human rights treaties can be grouped into different categories. The UN-based treaties create formal legal obligations for ratifying states and establish international committees to monitor compliance.<sup>40</sup> The power of these committees is limited, however, because of staff and resource constraints and because the committees' views are not legally binding. Regional human rights treaties, by contrast, establish supranational courts with the power to issue legally binding judgments.<sup>41</sup> The European Convention on Human Rights, in particular, has acquired a remarkable degree of power, partly because of the energy of its Court and partly because its provisions have been incorporated into the domestic legal systems of most member states.<sup>42</sup> Human rights law is

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INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS (3rd ed. 2007).

39. Universal Declaration of Human Rights, G.A. Res. 217A (III), at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948), *available at* <http://www.un.org/Overview/rights/html> [hereinafter Universal Declaration of Human Rights].

40. These treaties include: ICCPR, *supra* note 32; ICESCR, *supra* note 34; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46 annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984) (Dec. 10, 1984), *available at* [http://www.unhchr.ch/html/menu3/b/h\\_cat39.htm](http://www.unhchr.ch/html/menu3/b/h_cat39.htm) [hereinafter Torture Convention]; 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), *available at* <http://www.unhchr.ch/html/menu3/b/1cedaw.htm>; International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966) 660 U.N.T.S. 195 (Dec. 21, 1965), *available at* [http://www.unhchr.ch/html/menu3/b/d\\_icerd.htm](http://www.unhchr.ch/html/menu3/b/d_icerd.htm); Convention on the Rights of the Child, G.A. Res. 44/25 (Nov. 20, 1989), *available at* <http://www.unhchr.ch/html/menu3/b/k2crc.htm> [hereinafter Convention on the Rights of the Child]; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990) (Dec. 18, 1990) *available at* [http://www.unhchr.ch/html/menu3/b/m\\_mwctoc.htm](http://www.unhchr.ch/html/menu3/b/m_mwctoc.htm); Convention on the Rights of Persons with Disabilities, G.A. Res. 61/611, U.N. Doc. A/Res/61/611 (Aug. 25, 2006).

41. See the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, Nov. 4, 1950), 312 E.T.S. 5, *as amended by* Protocol No. 3, E.T.S. 45; Protocol No. 5, E.T.S. 55; Protocol No. 8, E.T.S. 118; and Protocol No. 11, E.T.S. 155; *entered into force* 3 Sept. 1953 (Protocol No. 3 *on* 21 Sept. 1970, Protocol No. 5 *on* 20 Dec. 1971, Protocol No. 8 *on* 1 Jan 1990, Protocol No. 11 *on* 11 Jan 1998) [hereinafter the European Convention on Human Rights]; Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123. In 2004 a new court was established to enforce provisions of the African Charter on Human and Peoples' Rights. African [Banjul] Charter on Human and Peoples' Rights, Jun. 27, 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Jun. 10, 1998, O.A.U. Doc. OAU/LEG/AFCHPR.

42. See FUNDAMENTAL RIGHTS IN EUROPE, *supra* note 3; MICHAEL D. GOLDHABER, A PEOPLE'S HISTORY OF THE EUROPEAN COURT OF HUMAN RIGHTS (2007). Other factors have also contributed to the Convention's impact. See STEVEN GREER, THE EUROPEAN CONVENTION ON HUMAN RIGHTS: ACHIEVEMENTS, PROBLEMS AND PROSPECTS 28-30 (2006).



reinforced by the rich tradition of international humanitarian law, whose sources include the Nuremberg and Tokyo trials following World War II, the 1948 Genocide Convention, the 1949 Geneva Conventions and their Protocols (1977), the war crimes tribunals for Rwanda and the former Yugoslavia, and the Rome Statute of the International Criminal Court (1998).

This Article confines its attention to human rights law and does not address the democratic credentials of international law in general.<sup>43</sup>

#### PART I: HUMAN RIGHTS

There is a rich contemporary literature on the meaning and justification of human rights.<sup>44</sup> In this section I articulate what I believe to be a set of widely (though not universally) held beliefs underlying the human rights idea. I aim to show that human rights are grounded in a set of basic principles that can be shared by people holding diverse philosophical and religious doctrines.

Human rights are rights that we possess because we are human. They are therefore universal, the common possession of all human beings. Their universality exerts something of a downward pressure on their content: we can only identify as a human right that which we are prepared to acknowledge as the entitlement of all human beings. Human rights are also understood to be important, their fulfillment an urgent matter, so that other projects, commitments, and attachments must give way whenever they conflict with human rights.

Human rights are concerned with the interests of individual persons; they adopt the perspective of the individual.<sup>45</sup> This does not imply individualism of

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43. For a discussion showing how international law can sometimes undermine both human rights and democracy, see Kim Lane Scheppele, *The Migration of Anti-Constitutional Ideas: The Post-9/11 Globalization of Public Law and the International State of Emergency*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 347 (Sujit Choudhry ed., 2006). For a discussion of how to balance the claims of domestic democracy and international law, see Matthias Kumm, *Democratic Constitutionalism Encounters International Law: Terms of Engagement*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS*, 256 (Sujit Choudhry ed., 2006).

44. The following list is only a sample: CHARLES R. BEITZ, *THE IDEA OF HUMAN RIGHTS* (forthcoming); SEYLA BENHABIB, *THE RIGHTS OF OTHERS* (2004); ALLEN E. BUCHANAN, *JUSTICE, LEGITIMACY AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW* ch. 3 (2004); Joshua Cohen, *Minimalism About Human Rights: The Best We Can Hope For?*, 12 *JOURNAL OF POLITICAL PHILOSOPHY* 190 (2004); JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* (2nd ed. 2007); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1979); JAMES GRIFFIN, *ON HUMAN RIGHTS* (2008); MICHAEL IGNATIEFF, *HUMAN RIGHTS AS POLITICS AND IDOLATRY* (Amy Gutmann ed., 2001); GEORGE KATEB, *THE INNER OCEAN* (1992); Amartya Sen, *Elements of a Theory of Human Rights*, 32 *PHILOSOPHY AND PUBLIC AFFAIRS* 315 (2004); JAMES NICKEL, *MAKING SENSE OF HUMAN RIGHTS* (2nd ed. 2007); BRIAN OREND, *HUMAN RIGHTS: CONCEPT AND CONTEXT* (2001); HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY* (2d ed. 1996); WILLIAM J. TALBOTT, *WHICH RIGHTS SHOULD BE UNIVERSAL?* (2005); Charles Taylor, *Conditions of an Unforced Consensus on Human Rights* in *THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS* (Joanne R. Bauer and Daniel A. Bell eds., 1999); and JEREMY WALDRON, *LIBERAL RIGHTS* (1993).

45. For a cogent defense of this principle, see IGNATIEFF, *supra* note 44, at 63-77.

a rigid or extreme variety, since human rights also protect a wide range of social activity. But human rights value social groups because of their benefits to people, rather than the other way round. The starting point is the vulnerability of the individual; the main object, to protect individuals from various kinds of harm. These harms are typically inflicted by groups, although one of the principal harms inflicted is to deprive individuals of the benefits and rewards of social life.

Human rights, despite their superficial variety, possess an underlying rationale. There is a point to human rights. If we look, for example, at the Universal Declaration of Human Rights and the entitlements asserted over the course of its thirty articles, we can perceive unifying themes and persistent concerns. I do not mean here to introduce anything intellectually abstruse or metaphysically controversial, just to elicit some general values that are reflected in, and rendered more concrete by, specific enumerations of human rights. These are familiar values, whose appeal is widely felt, although not everyone accords them the same degree of importance.

The following is an attempt to render the basic ideas that underlie human rights. The precise wording is unimportant: other people may prefer different formulations that convey the same general idea.

On the account I present, human rights may be tied to the following four principles:

1. *Persons Have a Fundamental Interest in Security*

There are certain fates which all people have an interest in avoiding. These include untimely death, severe injury, physical confinement, torture, terror, disease, chronic or severe pain, hunger, starvation, abandonment, forced isolation or separation, social humiliation, and lack of basic education and socialization. Everyone ought, as much as possible, to be protected from these evils. Of the various principles that support the human rights idea, this is the least contested.<sup>46</sup> It underlies some of the most firmly established human rights, such as the right not to be tortured, arbitrarily imprisoned, or extrajudicially executed. The main challenge – a partial one – is from those who deny the existence of socioeconomic rights, such as economic subsistence, social security, and primary and secondary education.

2. *Persons Have a Fundamental Interest in Autonomy*

Everyone should be allowed to lead a life of their own choosing. They

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46. In Stuart Hampshire's words, "There is nothing mysterious or 'subjective' or culture-bound in the great evils of human experience, re-affirmed in every age and in every written history and in every tragedy and fiction: murder and the destruction of life, imprisonment, enslavement, starvation, poverty, physical pain and torture, homelessness, friendlessness. That these great evils are to be averted is the constant presupposition of moral arguments at all times and in all places...." STUART HAMPSHIRE, *INNOCENCE AND EXPERIENCE* 90 (1990).

should be allowed to think their own thoughts, make their own plans, and choose their own company. The principle of autonomy recognizes that, once our most basic needs are guaranteed, individuals should be given considerable scope to define what is, for each, the most desirable life. In the world as a whole, belief in individual autonomy is somewhat less robust than belief in individual security. It encounters resistance from traditional cultures (which believe individuals should adhere to prescribed roles), conservative religious groups (which seek the legal enforcement of scriptural rules limiting religious freedom, sexual freedom, and women's freedom), and autocratic governments (which limit freedom of expression and association). When critics complain about the "Western" bias of human rights, they generally have in mind the importance attached to personal autonomy.

### 3. *Persons are Inviolable*

Persons may not be treated as means only. They cannot be used as a mere instrument for the pursuit of other goals, however worthy. That includes the goals of furthering other people's security or autonomy. In the example well known to moral philosophers, a surgeon may not kill a healthy man to save the lives of five other people in need of the man's transplanted organs. For the same reason, the police may not suspend due process and thereby condemn a certain number of innocent people to punishment, even if doing so will save a larger number of citizens from violent crime. Inviolability affirms our status as creatures *whom it is morally forbidden* to injure in certain egregious ways. Although philosophers debate how best to explain the principle of inviolability, it is politically indispensable for blocking the consequentialist rationales used by governments to justify all manner of cruelties.<sup>47</sup>

### 4. *Persons Deserve to be Recognized and Treated as Equals*

This principle goes beyond noting our equal inviolability and equal interest in security and autonomy. It upholds a claim to be accorded equal standing in the communities, especially the political communities, to which we belong. The principle excludes arbitrary or invidious discrimination, rigid social caste systems, and stigmatization of entire groups. It bars the political subordination of one group of people to another. Equality is incorporated into most completed conceptions of human rights. It is emphasized by the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights,<sup>48</sup> as well as the 14<sup>th</sup> Amendment to the U.S. Constitution.<sup>49</sup> It

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47. For a thorough philosophical defense, see 2 F. M. KAMM, *MORALITY, MORTALITY: RIGHTS, DUTIES, AND STATUS* (1996). For a helpful discussion, see Thomas Nagel, *Personal Rights and Public Space*, 24 *PHIL. & PUB. AFF.* 83 (1995).

48. Universal Declaration of Human Rights, *supra* note 39, at art. 7; ICCPR, *supra* note 32, at art. 26.

49. U.S. CONST. amend. XIV, § 1.

is trumpeted in the classical human rights texts of John Lilburne,<sup>50</sup> John Locke,<sup>51</sup> and Thomas Jefferson.<sup>52</sup> An argument can be mounted (though I will not take time to do so here) that it is an essential political condition for the respect of one's other rights.

Security, autonomy, inviolability, and equality are the point of human rights. If we are asked, "Why human rights?", these are the principles we can invoke. Their powerful appeal explains why the idea of human rights is so difficult to resist.

This may not be the philosophically most airtight, or intellectually most rigorous, way of explaining human rights. Yet it has decisive virtues. Stealing from John Rawls, we may call this a "political conception" of human rights.<sup>53</sup> That is, it is an argument for human rights with which a great many people can agree, although their reasons for supporting it may vary.<sup>54</sup> Do we want a deeper, philosophically more solid justification? There are a great many to choose from: Kantianism, consequentialism, contractualism, intuitionism, conventionalism, social constructionism, communicative rationality, Aristotelian perfectionism, natural law, and any number of different religions. Each has been identified as providing the strongest basis for human rights. All have inspired discussions that enrich our understanding and appreciation of the values constitutive of what I am calling the "political conception." All the same, they tend to place heavy demands on our intellects, especially as they seek ever greater rigor – i.e., they can be quite difficult to understand – and each is premised on the denial of at least some of the others. Focusing on these deeper justifications can therefore bring uncertainty and dissension. It is worth recalling the existence of an overlapping consensus on a set of core principles that make sense of, help explain, and render coherent the human rights idea, even if the search for reasons behind the principles leaves us perplexed and divided.<sup>55</sup>

The important point about the political conception of human rights is that it is self-sustaining.<sup>56</sup> It can stand on its own. It furnishes its own reasons to

50. JOHN LILBURNE, *THE FREE-MAN'S FREEDOM VINDICATED* (1646), *reprinted in* GREAT BRITAIN ARMY COUNCIL, *PURITANISM AND LIBERTY: BEING THE ARMY DEBATES* 317 (A. S. P. Woodhouse ed., 2d ed. 1950).

51. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* § 4 (C. B. Macpherson ed., Hackett Publishing Co. 1980) (1690).

52. *THE DECLARATION OF INDEPENDENCE* pmbl., para. 2.1 (U.S. 1776).

53. JOHN RAWLS, *POLITICAL LIBERALISM* § 2, at 11-15 (1993). I leave aside Rawls' discussion of human rights in JOHN RAWLS, *THE LAW OF PEOPLES* § 10, at 78-81 (1999).

54. For defense of a similar approach, applied to legal reasoning in general, see Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 *HARV. L. REV.* 1733 (1995).

55. For a contrasting perspective, see Eunjung Katherine Kim, *On the Significance of an Overlapping Consensus on Human Rights* (2008) (Ph.D. dissertation, University of Washington) (arguing that the justificatory force of an overlapping consensus is less than often supposed).

56. Rawls draws close to this idea when he uses the term "freestanding" to describe a political conception of justice. RAWLS, *supra* note 53, § 2, at 12-13. He means that in public

believe in human rights, and the reasons are satisfying ones. They are satisfying, even if some of us will want to buttress them with additional support from the particular, more controversial theoretical commitments we individually subscribe to. But no doubt, for others, the reasons are *fully* satisfying (or very nearly so). Such people will not feel a particular need to seek deeper reasons. Nor should any Socratic types among us take them to task for intellectual complacency. Perhaps belief in the sufficiency of the political conception – reliance on the values it expresses – possesses its own kind of wisdom.

The fact is that we do care about people's vulnerability to calamity and people's ability to make their own choices in life (not have others decide for them). We care that people be spared the worst griefs, terrors, and humiliations. We care that their capacity to think, decide, and act not be forced down by the overriding preferences of others. For some of us, this is a moral starting point; for others, an inference from prior moral, religious, or philosophical premises. In either case, these are robust convictions, difficult to shake, which we have little reason to doubt, and which supply their own motivating power.

As befits a political conception of human rights, nothing about this story is original. The idea that security and autonomy are the two fundamental interests underpinning human rights has been invoked by many thinkers, though in different ways. Ronald Dworkin writes, "Government must treat those whom it governs with concern, that is, as human beings who are capable of suffering and frustration, and with respect, that is, as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived."<sup>57</sup> George Kateb echoes this idea, though he notes as a third feature of the human condition our capacity to treat others as equals:

Public and formal respect for rights registers and strengthens awareness of three constitutive facts of being human: every person is a creature capable of feeling pain, and is a free agent capable of having a free being, of living a life that is one's own and not somebody else's idea of how a life should be lived, and is a moral agent capable of acknowledging that what one claims for oneself as a right one can claim only as an equal to everyone else.<sup>58</sup>

The idea makes clear and immediate sense. Major human rights declarations and manifestos acquire a new coherence when read in the light of these premises, though inviolability and equality (ideas of equal intuitive

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discourse, reference need not be made to any of the comprehensive doctrines from which a political conception may be derived. We may go further and propose that a political conception need not be derived from any comprehensive doctrine at all.

57. DWORKIN, *supra* note 44, at 272.

58. KATEB, *supra* note 44, at 5.

power) are also prominent in such documents.

Of course not everyone believes in human rights. Personal freedom is the value most frequently contested – whether in the name of tradition, community, or religion. Some of the fiercest and most determined opposition comes from religious fundamentalists who believe themselves authorized to coerce others into scripturally required forms of belief and behavior. This is a tyrannical attitude, rightly resisted, because it forces other people to conform their own lives to religious views they do not share.<sup>59</sup>

The human rights idea, as has often been pointed out, is not a totalizing doctrine. It is not a comprehensive blueprint for what to think or how to live. It deliberately leaves many areas open for individual and collective judgment, valuing people's ability to decide important matters on their own. It is therefore compatible with a wide range of ethical, political, and religious viewpoints. All it does is erect certain limits: not to impose great suffering, and not to stifle individual autonomy. We should not be deterred when these limits are challenged in the name of "culture." Every culture is a mixture of good and bad; the aspects of a culture that authorize human rights violations are among the aspects that need to be reformed. To say that certain human rights should be rejected because they offend "our culture" cannot settle matters for any thinking person.

It is curious that arguments against universal human rights often draw inspiration from a principle central to the human rights idea. The principle is autonomy: living according to one's own values, not having other people impose their values on one, not being coerced. The idea of universal human rights is accused of being imperialistic or coercive. This gets things backwards.

Because the human rights idea claims that individuals should be free to live as they choose, it is not properly described as coercive. It seeks a reduction of coercion in every walk of life. Insisting on universal human rights is not about imposing one's views on others. It is about stopping others from imposing *their* views on others.<sup>60</sup>

## PART II: THE HARMONY OF INTERNATIONAL HUMAN RIGHTS LAW AND DEMOCRACY

The thesis of this Article is that international human rights law strengthens rather than undermines democracy. The argument for this proposition may be briefly stated:

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59. See the powerful arguments of JOHN LOCKE, A LETTER CONCERNING TOLERATION (John Horton & Susan Mendus eds., Routledge 1991) (1689); and RAWLS, POLITICAL LIBERALISM, *supra* note 53.

60. Self-described friends of human rights sometimes forget to uphold this logic. For example, it is wrong to make women, Muslim or not, wear a veil against their will. But a woman should be allowed without penalty to wear a veil at home, at school, and in the workplace if she so chooses.

*First premise:* Democracy is a form of government founded on two principles: rule by the people and respect for human rights. Under democracy, laws emerge from a process of popular deliberation and decision-making, subject to the proviso that human rights are not violated.

*Second premise:* While domestic institutions such as a bill of rights, a representative legislature, an independent judiciary, and political checks and balances are necessary for the protection of human rights, they are not sufficient. Such institutions may fail for any number of reasons. International human rights law helps prevent such failure. It reinforces human rights at the domestic level.

*Conclusion:* Because international human rights law reinforces human rights, it serves one of the two constitutive features of democracy. Far from displacing democracy, it bolsters democracy.

In what follows, I shall devote most of my attention to the first premise in this argument. A full defense of the second premise lies beyond the bounds of this paper, but let me suggest, in broad outline, the form such a defense would take. There are several reasons why the defense of human rights may fail at the domestic level. (1) Necessary human rights safeguards have not been established. (2) The necessary safeguards are formally in place, but are not well developed. Relevant institutions lack adequate resources and staff, or personnel are not properly trained. Practices and procedures that defend human rights are not integrated into bureaucratic routines. (3) Political leaders subvert or undermine human rights safeguards in order to bolster their power or pursue otherwise unobtainable goals. (4) The voting public, media, and elites demonstrate weak support for, or poor understanding of, human rights. Consequently, they mount little resistance to systematic human rights violations or the dismantling of human rights safeguards. (5) Domestic institutions do not cope adequately with the international dimension of human rights. They do not prevent foreigners from violating the human rights of citizens and residents. Or they do not restrain the government and citizenry from violating the human rights of foreigners. (6) Perpetrators of human rights crimes are not brought to justice before domestic courts.

International human rights law helps to address these problems. It bestows added authority on human rights, and becomes a resource for educating citizens, bureaucrats, and elites about the value and significance of human rights. It gives states a formal obligation to institute human rights safeguards, and to improve the functioning of such safeguards once established. (The latter goal is promoted by devices such as the reporting mechanism of the UN-based treaties and the rulings of regional human rights courts.)<sup>61</sup> It identifies gaps in the domestic human rights regime that national law (even in relatively free societies) may have overlooked.<sup>62</sup> It raises the costs to leaders who remove

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61. See SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE (2006); GREER, *supra* note 42.

62. FUNDAMENTAL RIGHTS IN EUROPE, *supra* note 3.

human rights safeguards or systematically violate human rights.<sup>63</sup> It withdraws impunity from major human rights violators, and provides a remedy for individuals whose rights have been violated by foreign governments.<sup>64</sup>

Some people may deny that international human rights law is effective.<sup>65</sup> This view, even if true, would not invalidate the *project* of international human rights law, just so long as we can identify reforms that would make it effective.<sup>66</sup> But the claim is not plausible anyway: the indisputable impact of the European Convention on Human Rights is a lesson in what international human rights law is capable of achieving. The effectiveness of international human rights law is a vast and complex subject, our understanding of which is still in its infancy. By and large it has exerted most influence on states that take it most seriously – those which ratify human rights treaties without crippling reservations, scrupulously adhere to their treaty commitments, and incorporate them into domestic law.<sup>67</sup> That these states' human rights records are already comparatively good does not show that international human rights law is superfluous, for there may still be room for significant improvement, and, moreover, backsliding is deterred. What it shows is that international human rights law furthers the *domestic* purposes of states that are genuinely committed to human rights.

For purposes of this Article, let us assume as true the second premise of my argument – that international human rights law makes, or can make, important contributions to the defense of human rights. The first premise — that respect for human rights is a constitutive element of democracy — is likely to prompt wider skepticism. I will use the rest of this Article to defend it. I will argue that it presents a conception of democracy that is both linguistically reasonable and morally attractive.

### PART III: HUMAN RIGHTS AS PART OF THE DEFINITION OF DEMOCRACY

The claim, to repeat, is that democracy rests on two principles: popular self-government and respect for human rights. For convenience, I shall sometimes refer to this as the “compound conception of democracy.” This

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63. See THE POWER OF HUMAN RIGHTS, *supra* note 2.

64. These are among the functions of the International Criminal Court. See Jamie Mayerfeld, *The Mutual Dependence of External and Internal Justice: The Democratic Achievement of the International Criminal Court*, XII FINNISH Y.B. INT'L L. 71 (2001).

65. Oona A. Hathaway raises doubts about the effectiveness of international human rights law in her article, *Do Human Rights Treaties Make a Difference?* Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002). For criticisms of Hathaway's article, see Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 EUR. J. INT'L L. 171 (2003). For a sustained defense of the effectiveness of international human rights law, see BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (forthcoming Jul. 31, 2009).

66. Hathaway herself offers proposals to this effect. Hathaway, *supra* note 65, at 2020-25.

67. DONNELLY, *supra* note 1, at 87-88.



understanding of democracy is not particularly exotic. “Majority rule plus individual rights” is a familiar shorthand. Political scientists who study democracy in comparative perspective not infrequently include both components in their definition of the term.<sup>68</sup> It is striking that the measure of democracy most frequently used by scholars of comparative politics is the Freedom House ranking of countries as “free, partly free, or not free” – a ranking based in equal measure on political rights and civil liberties.<sup>69</sup> The former refer to rights of political participation. The latter refer to individual rights that face possible violation by governments, even popularly elected ones.

So the compound conception of democracy does not depart notably from existing usage. The main revision is that it refers to “human rights” rather than “civil liberties.” If human rights are thought to include social and economic rights as well as civil and political rights, the revision may seem significant. My own view, though I do not defend it here, is that human rights *should* include social and economic rights such as economic subsistence, education, and dignified conditions of work.<sup>70</sup> But the revision does not make a big difference to the argument presented in this Article. That is because contemporary international human rights law is predominantly concerned with civil and political rights.<sup>71</sup> Because civil and political rights provisions form the bulk of contemporary international human rights law, critics usually have these provisions in mind when voicing the democracy objection.<sup>72</sup>

It is true that basic socioeconomic entitlements are recognized as human rights under such international instruments as the Universal Declaration of Human Rights, the ICESCR, and the European Social Charter, the weakness of the available remedies notwithstanding. Readers skeptical about social and

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68. For example: “A democratic system ... requires (1) *government accountability* achieved through elections (and other political processes) open to the participation of virtually all adults, and (2) *respect for individual and group rights* guaranteed through legal processes and constitutional structures.” Mary Ellen Fischer, *Introduction to ESTABLISHING DEMOCRACIES* 4 (Mary Ellen Fischer ed., 1996). “In mature democracies, government policy, including foreign and military policy, is made by officials chosen through free, fair, and periodic elections in which a substantial proportion of the adult population can vote; the actions of officials are constrained by constitutional provisions and commitments to civil liberties; and government candidates sometimes lose elections and leave office when they do.” JACK SNYDER, *FROM VOTING TO VIOLENCE, DEMOCRATIZATION AND NATIONALIST CONFLICT* 25-26 (2000).

69. See Freedom House, *Freedom in the World*, <http://www.freedomhouse.org/template.cfm?page=15> (last visited Nov. 24, 2008).

70. The classic argument for this view is SHUE, *supra* note 44.

71. Only a few treaties such as the ICESCR and the European Social Charter devote themselves exclusively to social and economic rights. ICESCR, *supra* note 34; European Social Charter, C.E.T.S. No. 35, (Oct. 18, 1961). The Convention on the Rights of the Child, not surprisingly, asserts the right of children to health care, education, and a decent standard of living. Convention on the Rights of the Child, *supra* note 40.

72. The ICCPR, *supra* note 32; the Torture Convention, *supra* note 40; the European Convention on Human Rights, *supra* note 41; and the Rome Statute of the International Criminal Court (Statute of the ICC), A/CONF, 183/9 (July 1, 2002) – to mention a few of the flashpoints – do not include social or economic rights.

economic rights may question the democratic legitimacy of international human rights law for this reason. But such readers could still believe in the democratic legitimacy of international laws protecting civil and political rights.

The compound conception of democracy resembles the theory of political legitimacy expressed in the celebrated human rights declarations of the eighteenth century, including the founding documents of the American republic. The declarations asserted that human rights are primary and that the only legitimate form of government is one which respects human rights. They demanded representative government, with separation of powers, as the political system best suited to the defense of human rights and the realization of the people's will, but they took the precaution of itemizing certain individual rights that their elected representatives must not transgress. The declarations combine a desire for representative government with a commitment to human rights. Madison wrote in the *Federalist Papers*: "To secure the public good and private rights against the danger of [majority] faction, and at the same time to preserve the spirit and the form of popular government, is . . . the great object to which our inquiries are directed."<sup>73</sup> If we want a conception of democracy faithful to the political vision of the American founders, we should choose the compound conception of democracy.

Those who challenge international human rights law in the name of the American tradition of democracy confront the embarrassing fact of the founders' belief in a set of natural rights that limit legitimate government activity. To avoid this embarrassment, scholars sometimes resort to questionable historical narrative. Thus, Jed Rubenfeld distinguishes between what he calls European and American understandings of constitutionalism.<sup>74</sup> Europeans are drawn to "international constitutionalism," which "is based on the idea of universal rights and principles that derive their authority from sources outside of or prior to national democratic processes."<sup>75</sup> Eighteenth-century America, Rubenfeld tells us, rejected this understanding, inventing an alternative conception of "democratic constitutionalism" to take its place.<sup>76</sup> Under democratic constitutionalism, constitutional rights "represent the nation's self-given law."<sup>77</sup> He elaborates:

This is the reason why it is much less typical for Americans (as compared to Europeans) to speak of "human rights." The American constitution does not claim the authority of universal law. It claims rather the authority of democracy – of law made by "the People," of self-given law. "Human Rights"

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73. JAMES MADISON, THE FEDERALIST NO. 10: THE SAME SUBJECT CONTINUED: THE UTILITY OF THE UNION AS A SAFEGUARD AGAINST DOMESTIC FACTION AND INSURRECTION 125 (Isaac Kramnick ed., 1987) (1787).

74. Rubenfeld, *supra* note 7, at 1999.

75. *Id.*

76. *Id.* at 2001.

77. *Id.* at 1994.

are natural rights. Constitutional rights are man-made.<sup>78</sup>

This view is not supported by the text of the U.S. Constitution or its well-known antecedents, the Declaration of Independence and the Virginia Bill of Rights. The Declaration of Independence states, “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”<sup>79</sup> The Virginia Bill of Rights, appearing only a few weeks earlier, opens with the following words: “That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity.”<sup>80</sup> Did the signers of the Declaration of Independence forget their belief in natural rights in eleven short years? The text of the Constitution suggests not, for the Ninth Amendment states as plainly as one could imagine that the Constitution is not the source of our rights: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”<sup>81</sup> Madison drafted the Bill of Rights in fulfillment of a promise to his fellow Virginians, many of whom had opposed the original Constitution because such a bill was lacking.<sup>82</sup> His earlier ambivalence about adding a Bill of Rights reflected a fear that it would imply the non-existence of rights not mentioned;<sup>83</sup> the purpose of the Ninth Amendment was to prevent any such implication.<sup>84</sup> The wording of other clauses suggests that the Constitution recognizes rights that exist independently of its authority.<sup>85</sup> Jefferson, for his part, maintained his belief in the universal underpinnings of constitutional rights. Writing to Madison in December 1787,

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78. *Id.* at 2000-01.

79. THE DECLARATION OF INDEPENDENCE pmbl. (U.S. 1776). Rubinfeld acknowledges the Declaration of Independence but refuses to associate its doctrine of natural rights with American constitutionalism. Rubinfeld, *supra* note 7, at 2001.

80. VA. BILL OF RIGHTS art. 1 (1776), available at [http://www.constitution.org/bor/vir\\_bor.htm](http://www.constitution.org/bor/vir_bor.htm).

81. U.S. CONST. amend. IX.

82. JACK N. RAKOVE, JAMES MADISON AND THE CREATION OF THE AMERICAN REPUBLIC 88-92 (3d ed. 2007).

83. JAMES MADISON TO THOMAS JEFFERSON (October 17, 1788), in JAMES MADISON: WRITINGS 418, at 420 (Jack Rakove ed., 1999).

84. JAMES MADISON, SPEECH IN CONGRESS PROPOSING CONSTITUTIONAL AMENDMENTS, JUNE 8, 1789, in JAMES MADISON: WRITINGS, *supra* note 83 at 448-49. Madison’s belief in inalienable rights that no government has authority to infringe is forcefully proclaimed in JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENT, JUNE 20, 1785 in WRITINGS, *supra* note 83, at 29-36.

85. Consider the language of the Fourth Amendment: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” U.S. CONST. amend. IV. Also: “The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” U.S. CONST. art. I, § 9. The wording implies that the right to habeas corpus would still bind the government even if the Constitution never mentioned it.

the author of the Declaration of Independence had this to say: "Let me add that a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference."<sup>86</sup>

It is true that the Constitution was ratified by the people's representatives, and that it permits amendments when approved by a super-majority of state legislatures and members of Congress. But this is no reason to infer any belief on the framers' part that the U.S. government was unconstrained by natural rights or that the Constitution would remain legitimate if it were amended to authorize the violation of natural rights.<sup>87</sup> The Virginia Bill of Rights, the Declaration of Independence, and the Ninth Amendment plainly tell us the contrary.<sup>88</sup>

The double commitment of the American founders to human rights and popular self-government found permanent expression in the U.S. Constitution and survives in current understandings of the term "democracy." Moreover, as I shall now discuss, these two values are not independent of each other. In the view of most theorists who have turned their attention to the matter, human rights and popular self-government are strongly connected. The upshot is that we do not need to choose between them. If we embrace one, we should embrace the other, too.

The connection has been drawn in different ways. One view holds that popular self-government is impossible, even unintelligible, unless the people enjoy all the rights and liberties necessary to form and express opinions about public policy.<sup>89</sup> These rights assume even greater importance if one associates popular self-government not with the expression of people's pre-existing preferences, but with informed public deliberation.<sup>90</sup> The rights needed to maintain popular self-government include, at a minimum, freedom of thought and discussion and freedom of association and assembly. There is disagreement on how many rights are required: all human rights, or only civil

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86. THOMAS JEFFERSON, TO JAMES MADISON, DECEMBER 20, 1787, in THE PORTABLE THOMAS JEFFERSON 428, 430 (Merrill D. Peterson ed., 1975). Jefferson identified the rights that he believed should be included: "freedom of religion, freedom of the press, protection against standing armies, restriction against monopolies, the eternal and unremitting force of the habeas corpus laws, and trials by jury in all matters of fact triable by the laws of the land and not by the law of Nations." *Id.* at 429.

87. The truth is that the *original* Constitution was illegitimate because of provisions that supported slavery. It was (if one may say so) illegitimate on its own terms. Note that one cannot lean on the slavery provisions of the original Constitution to deny that it expressed a commitment to natural rights and simultaneously assert that it expressed a commitment to democracy. Slaves did not "ordain and establish" the Constitution. Neither did women.

88. See Miriam Galston & William A. Galston, *Reason, Consent, and the U.S. Constitution: Bruce Ackerman's "We the People,"* 104 ETHICS 446, 452-59 (1994).

89. See ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION ch. 1 (1971); DAVID BEETHAM, DEMOCRACY AND HUMAN RIGHTS ch. 5 (1999).

90. See Stephen Holmes, *Constitutionalism,* in 1 THE ENCYCLOPEDIA OF DEMOCRACY 299-306 (Seymour Martin Lipset ed., 1995).

and political rights?<sup>91</sup> All civil and political rights, or only some? Another question is whether popular self-government requires respect for the human rights of foreigners. What is agreed is that it requires many (if not all) human rights. In a nutshell: “If you like popular self-government, you’ll want human rights.”

Another view holds that popular self-government is necessary to make human rights secure.<sup>92</sup> Popular election of legislative and executive officials is among the devices needed to prevent government’s abuse or culpable neglect of the people. Citizens have enough enlightened self-interest and empathy to exert a salutary watch on government’s activities. So important is the role of representative institutions in preventing government misconduct that some thinkers classify popular self-government as a human right in itself. In brief: “If you like human rights, you’ll want popular self-government.”

A third view holds that the values that underlie one of these two principles (human rights or popular self-government) underlie the other as well. Often the argument is posed in terms of autonomy. We value popular self-government (the argument runs) because we value autonomy – being able to exercise some control over the direction of our lives. Popular self-government is an important dimension of autonomy, but not the only one. Autonomy depends on a complete package of human rights.<sup>93</sup> Or (to run the argument in the other direction) we value human rights because of the importance we attach to autonomy. But we ought to recognize that popular self-government is a crucial dimension of autonomy.<sup>94</sup> In sum: “If you like popular self-government, you already like human rights (or vice versa).”

This broad sketch ignores the different versions of each type of argument. Moreover, there are other ways of connecting popular self-government and human rights not captured in this three-part scheme.<sup>95</sup> *How* one connects these values matters for the practical implications of one’s view. Needless to say, those who perceive a connection argue with each other about how the connection should be drawn.

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91. For the argument that it requires all human rights, including social and economic rights, see BEETHAM, *supra* note 89.

92. SHUE, *supra* note 44, at ch. 3; AMARTYA SEN, *DEVELOPMENT AS FREEDOM* ch. 6 (1999); TALBOTT, *supra* note 44, at chs. 6-7.

93. *See generally* CAROL C. GOULD, *GLOBALIZING DEMOCRACY AND HUMAN RIGHTS* (2004); MICHAEL GOODHART, *DEMOCRACY AS HUMAN RIGHTS: FREEDOM AND EQUALITY IN THE AGE OF GLOBALIZATION* (2005). George Kateb proposes that the common underlying value is equal respect for persons. *See* George Kateb, *Remarks on Robert B. McKay*, “*Judicial Review in a Liberal Democracy*,” in *NOMOS XXV: LIBERAL DEMOCRACY* 145, 149 (J. Roland Pennock & John W. Chapman eds., 1983) [hereinafter *Remarks on Robert B. McKay*].

94. WALDRON, *LAW AND DISAGREEMENT*, *supra* note 23, at chs. 10-11.

95. *See e.g.*, RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996). Jürgen Habermas’ argument for the co-originality of public and private autonomy seems to combine elements of all three types of argument. *See* JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* ch. 3 (William Rehg trans., 1996).

I will not enter into the details of this debate, but will content myself with the assertion that each of the three kinds of argument contains a substantial degree of truth. (This is not to endorse every version of each argument.) Popular self-government becomes meaningless unless citizens are free to express and advocate their views without fear. Representative institutions provide an important check on government abuse. Autonomy, offered as a reason for popular self-government, is an argument for human rights also.<sup>96</sup> All of these arguments give us a reason to adopt the compound conception of democracy.

Theorists who draw a connection between human rights and popular self-government usually refer to the latter as “democracy.”<sup>97</sup> I find no compelling reason for this practice. Perhaps theorists tacitly assume that a single concept must refer to a single idea. This assumption is unwarranted: a single concept can (and in this case should) refer to two (or multiple) ideas in combination. We should avoid the assumption that because the compound conception defines democracy as *bounded self-government*, the conception itself is *less democratic*. The mistake of thinking so has played havoc with our understanding of democracy and human rights. Consider the analogy with liberty. As Locke plausibly observed, our liberty is not diminished by laws that prohibit morally criminal acts such as murder, because liberty *never included* permission to commit such acts.<sup>98</sup> In the same way, prohibitions on human rights violations are no limitation of democracy, because democracy never included permission to violate human rights. As George Kateb writes, speaking of the judicial protection of human rights, “What judicial review may take away from the majority, the majority could never claim. The legitimate will of the majority is the constitutional will, the constitutionally restricted will of the majority.”<sup>99</sup> Democracy is not group license.

To sum up, the compound conception of democracy draws support from linguistic usage, constitutional tradition, and political theory. In the immediately preceding paragraphs, I have described different ways of theorizing the connection between popular self-government and human rights. I won't try to choose between the alternative accounts. In the next and final section of this Article, I will switch gears and argue that the only *morally legitimate* conception of democracy is one with a built-in commitment to human rights. If we want our conception of democracy to be morally legitimate, the compound conception is the one we should adopt.

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96. I hesitate to assert the converse, for reasons articulated by TALBOTT, *supra* note 44, at 140. However, I am not ready to deny it either.

97. One exception is GOODHART, *supra* note 93.

98. LOCKE, *supra* note 51, at § 6. “Though [the state of nature] be a *state of liberty*, yet it is not a *state of licence* . . . . The *state of nature* has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind who will but consult it, that being all *equal and independent*, no one ought to harm another in his life, health, liberty, or possessions.” *Id.*

99. Kateb, *Remarks on Robert B. McKay*, *supra* note 93, at 148-49.

I have resisted the equation of “democracy” with popular self-government *simpliciter*. Some readers may think that, because of the practical and conceptual connections between popular self-government and human rights, such resistance is unnecessary. We do not need to build human rights into the *definition* of democracy, they will say, because the above-noted connections show that a commitment to “democracy,” understood simply as popular self-government, necessarily entails a commitment to human rights. I shall not follow this path, partly because I do not want the compound conception of democracy made hostage to such connections. Although the connections are strong, it takes considerable work to argue that they are airtight, and the success of such efforts is uncertain. It can be doubted, for example, whether popular self-government requires a complete or only a partial set of human rights. (Nor is it certain whether it precludes human rights violations against foreigners.) And while representative institutions generally reinforce human rights, they may undermine them in some circumstances.<sup>100</sup> There is reason to believe, for example, that the introduction of representative institutions in ethnically divided societies sometimes gives an impetus to civil war.<sup>101</sup> While the compound conception of democracy draws support from the practical and conceptual connections between popular self-government and human rights, it should not be made dependent on them.

My goal has been to recommend a conception of democracy as popular self-government bounded by respect for human rights. Of course I cannot compel readers to adopt this definition; people may use terms as they choose. But I have sought to show that this definition has certain virtues, and that, at the very least, it is neither eccentric nor self-contradictory. It should not be ignored. In the rest of the Article, I shall argue that this conception of democracy is morally preferable. To avoid dogmatism, I shall refer to this conception as “constitutional democracy.” I believe that democracy *is* constitutional democracy, but I realize that not everyone agrees.

#### PART IV: DEFENDING CONSTITUTIONAL DEMOCRACY

I shall now turn to a defense of constitutional democracy, understood here as the view that human rights should place limits on popular self-government. This view has many opponents, particularly those who consider it an infringement on democracy. Opponents include both critics of international human rights law and domestic-level judicial review. Both groups fault what they see as the removal of important questions from the realm of political debate and contestation, quintessentially located in the ordinary legislative process. By the “ordinary legislative process” I have in mind the set of policy

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100. See Charles Beitz, *Democracy and Human Rights*, 7 HUM. RTS. AND HUM. WELFARE 100 (2007), available at <http://www.du.edu/gsis/hrhw/volumes/2007/symposium-2007.pdf>.

101. See SNYDER, *supra* note 68; and NEIL DE VOTTA, BLOWBACK: LINGUISTIC NATIONALISM, INSTITUTIONAL DECAY, AND ETHNIC CONFLICT IN SRI LANKA (2004).

debates – between legislators, between rival candidates seeking popular election to legislative office, and among an engaged public – that culminate in laws passed by a legislative majority.<sup>102</sup>

A complication is that not all “pro-democratic” critics of international human rights law extend their objections to domestic-level judicial review. Rubinfeld argues that American-style judicial review meets the criteria of “democratic constitutionalism” because the Constitution and its amendments were ratified by a super-majority of Congress and the states.<sup>103</sup> The weakness of this argument is that, given the difficulty of amending the Constitution, the American public has little ability to rewrite constitutional rights clauses. If citizens want to alter these provisions, a minority favoring the status quo can “undemocratically” defeat a majority favoring constitutional change. Not surprisingly, such attempts rarely get far and almost never succeed.<sup>104</sup> Indeed, treaty law is much more easily altered than the Constitution. Treaty ratification requires the support of the President and consent of two thirds of the Senate, rather than two thirds of both Houses and three quarters of the states.<sup>105</sup> Also, if Congress passes a statute expressly contradicting a previously ratified treaty, the statute will prevail in U.S. courts.<sup>106</sup> The same is not true for a statute that contradicts the Constitution.

Rubinfeld’s arguments against international human rights law undermine judicial review as well. If political deliberation is the proper way to resolve a disagreement over human rights, we should not be bound by constitutional restrictions ratified by earlier generations of citizens any more than by international human rights law. One suspects that Rubinfeld’s conception of “democratic constitutionalism” rests in part on a nationalist identification with earlier generations of American citizens who got to make the decisions. Their constitutional decisions are ours also, because we imagine them as ourselves.<sup>107</sup>

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102. As Kim Lane Scheppele argues, however, the legislative process is not always as representative as we may think. Kim Lane Scheppele, *Democracy by Judiciary. (Or Why Courts Can Sometimes Be More Democratic than Parliaments)*, in *RETHINKING THE RULE OF LAW IN POST-COMMUNIST EUROPE: PAST LEGACIES, INSTITUTIONAL INNOVATIONS, AND CONSTITUTIONAL DISCOURSES* (Adam Czarnota, Martin Krygier, & Wojciech Sadurski eds., 2005).

103. Rubinfeld, *supra* note 7, at 1994. He is influenced by the arguments of Bruce Ackerman regarding the dualist character of U.S. law. See BRUCE ACKERMAN, *I WE THE PEOPLE: FOUNDATIONS* (1991). Rubinfeld (*supra* note 7, at 1995, 1998) says that another reason for associating American judicial review with democratic constitutionalism is that the process of appointing judges is highly politicized: the people shape the content of constitutional rights inasmuch as they can influence the selection of judges whose task it is to interpret those rights. One can take this argument only so far, since judges must frame their interpretations within limits set by the constitutional text.

104. Rubinfeld, *supra* note 7, at 1998. Rubinfeld claims that the possibility of amending the Constitution shows that constitutional rights derive their authority from the people’s endorsement. However, the high constitutional hurdles to constitutional amendment suggests the opposite.

105. U.S. CONST. art. II, § 2, cl. 2.

106. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

107. Stanley N. Katz argues convincingly that a certain kind of reverence for the



In what follows, I shall assume that the “pro-democratic” critics of international human rights law and judicial review (not always the same people) locate their preferred venue for settling human rights questions in the ordinary legislative process. Rubinfeld may object that his preferred venue is the domestic legislative *and* judicial process. However, this makes little difference in practice. There are few conflicts between international human rights law and the U.S. Constitution. International human rights law seeks to supplement rather than displace the provisions of the U.S. Constitution.<sup>108</sup> Therefore, in practice, international human rights law seeks to decide matters that, in the United States, would otherwise be left to the ordinary legislative process.

We may now turn to the argument for constitutional democracy. That argument is very straightforward. Constitutional democracy is the best form of democracy because it is committed to respect for human rights. International human rights law, because it strengthens respect for human rights, is not undemocratic in any objectionable sense.

Yet constitutional democracy faces continuing theoretical resistance. Some objections have almost obtained the status of conventional wisdom. Even thinkers who assert the primacy of human rights temper their view with damaging qualifications. Jürgen Habermas writes:

However well-grounded human rights are, they may not be paternalistically foisted, as it were, on a sovereign. Indeed, the idea of citizens’ legal autonomy demands that the addressees of law be able to understand themselves at the same time as its authors. It would contradict this idea if the democratic legislator were to discover human rights as though they were (preexisting) moral facts that one merely needs to enact as positive law.<sup>109</sup>

Habermas claims that human rights and popular self-government require each other, but adds, in a manner reminiscent of Jean-Jacques Rousseau, that the specific content of human rights must be spelled out through political deliberation.<sup>110</sup> Jeremy Waldron, a well-known defender of human rights, has

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Constitution has raised psychological though not legal obstacles to the domestic incorporation of international human rights. Katz, *A New American Dilemma?: U.S. Constitutionalism vs. International Human Rights*, 58 U. MIAMI L. REV. 323 (2003).

108. An exception is Article 20(2) of the ICCPR, requiring prohibition of hate speech, in conflict with the First Amendment as interpreted by the Supreme Court. Since (as noted) I believe that Article 20(2) ought to be modified if not removed, I believe that the United States was entitled to enter a reservation against it at the time of ratification. 138 CONG. REC. S4781-01 (daily ed. April 2, 1992) (U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights) [hereinafter U.S. RUDs to the ICCPR], first reservation.

109. Jürgen Habermas, *On the Internal Relation between the Rule of Law and Democracy*, in *THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY* 260 (Ciaran Cronin & Pablo De Greif eds., MIT Press 1998) (1996).

110. HABERMAS, *BETWEEN FACTS AND NORMS*, *supra* note 95, at 125. See JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT*, Book II, ch. 4, at 205 (G. D. H. Cole trans., Everyman 1993)

argued at length that the legal definition of human rights should be left to the ordinary legislative process. He defends this view in the name of the right to participation, which he calls “the right of rights.”<sup>111</sup> Both Habermas and Waldron trouble the notion of constitutional democracy as it is defined here.

What could the objection to constitutional democracy be? Some may say that it limits public autonomy. This does not seem plausible. There is no limitation of public autonomy worth complaining about if we insist, in advance of political deliberation, that people have the right to be free from religious persecution, censorship, arbitrary imprisonment, unfair trials, capital punishment, and cruel and degrading treatment, especially torture; and that they have the right to education, economic subsistence, health care, and dignified conditions of labor. Public autonomy is not enhanced in any desirable way by letting citizens propose violations of human rights. Public proposals to reintroduce slavery or torture,<sup>112</sup> for example, would not enhance but on the contrary degrade our political discourse.<sup>113</sup>

Some people may object that the last example is oversimplified. We now agree that slavery and torture are wrong, but not everyone agrees that capital punishment or the denial of health care or primary education is a violation of human rights. It is precisely because we disagree about the content of certain portions of the human rights catalogue that we should let the content of human rights be determined through political deliberation.

The bulk of my discussion will be devoted to answering this objection, but I want to begin by suggesting that it does less work than advertised. If we look hard enough, we will find citizens who support the reintroduction of slavery or the use of torture. Surely that is no reason to open the legislative process to the possible adoption of these practices. It is not because we *agree* about the wrongness of slavery and torture that such proposals should be kept off the legislative table. It is because they constitute an unacceptable assault on human dignity. That, however, is a feature shared with other all other human rights violations. The reason why slavery and torture should be kept off the legislative table is the same reason why other human rights violations should be kept off the legislative table.

Moreover, the example of slavery and torture is far from irrelevant in the context of international human rights law since several treaties (not to mention principles of customary international law) are specifically directed to prohibiting these kinds of extreme human rights violations. Such treaties include the Slavery Convention, the Torture Convention, the Genocide

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(1762).

111. WALDRON, LAW AND DISAGREEMENT, *supra* note 23, chs. 10-13; Waldron, *A Rights-Based Critique of Constitutional Rights*, *supra* note 23, at 36-38.

112. Torture is now a topic of political debate in the United States, and Congress recently passed a law facilitating its use. *See supra* note 28. These developments do not represent a gain for public autonomy.

113. This is not an argument for censorship. Individuals should not face punishment for advocating human rights violations, but we may take precautions to prevent their proposals from taking effect.

Convention, the Human Trafficking Convention, the Consent to Marriage Convention, the Forced Disappearances Convention (not yet in force), and the treaty creating the International Criminal Court, authorized to punish individuals guilty of genocide, war crimes, and crimes against humanity.<sup>114</sup> Prohibitions against torture, slavery, and extrajudicial killing are also built into other treaties such as the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the African Charter on Human and Peoples' Rights, and the American Convention on Human Rights.<sup>115</sup>

Insistence on respect for those rights that *truly are* human rights does not limit public autonomy in any objectionable way. The problem is that we do not agree about the content of human rights. Political deliberation, it is suggested, is the right way to resolve such disagreement. Human rights legitimately constrain normal democratic politics if and only if they are endorsed by the people, as represented by the electoral and deliberative mechanisms of the legislative process.

The argument from disagreement (as we might call it) is widespread. Referring to the Declaration of Independence, Rubenfeld writes:

[T]he truth about self-evident truths is that they cannot govern, not by themselves. If Enlightenment principles are to be made into governing law, it must be done by real human beings, who will disagree with one another, perhaps radically, about what the principles are or how to interpret them or how to apply them in real life. How are these disagreements to be resolved? The American answer was: . . . by the people themselves, through democratic deliberation and consent . . . .<sup>116</sup>

Disagreement about rights is Waldron's underlying argument for leaving the legal definition of human rights to the legislative branch of government. He puts the word "disagreement" in the title of his book-length critique of judicial

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114. Slavery Convention of 1926, 60 L.N.T.S. 254, *entered into force* March 9, 1927; Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/RES/39/46 (Dec. 10, 1984); Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, *entered into force* Jan. 12, 1951; Council of Europe Convention on Action against Trafficking in Human Beings, E.T.S. No. 197 (May 16, 2005); Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages, 521 U.N.T.S. 231, *entered into force* Dec. 9, 1964; International Convention for the Protection of All Persons from Forced Disappearance, G.A. Res. 61/177, U.N. Doc. A/61/488 (Dec. 20, 2006); Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, *entered into force* Jul. 1, 2002.

115. ICCPR, *supra* note 32 at arts. 6, 7, 8; European Convention on Human Rights, *supra* note 41 at arts. 2, 3, 4; African Charter on Human and Peoples' Rights, *supra* note 41 at arts. 4, 5; American Convention on Human Rights, *supra* note 41 at arts. 4, 5, 6.

116. Rubenfeld, *supra* note 7, at 2001.

review.<sup>117</sup>

The argument may seem plausible, but it is, I shall argue, misleading. Its weaknesses appear when we stop to ask *why* disagreement about human rights is a problem. Three possible reasons may be distinguished:

1. *The legitimacy problem.* It is wrong to impose a conception of human rights on someone who disagrees with it.
2. *The fallibility problem.* Disagreement about human rights shows that someone has an incorrect view, and it might be us.
3. *The political weakness problem.* If I have the correct understanding of human rights, but others disagree, I have less chance of successfully realizing my conception of human rights.

As I shall argue, the first of these is a false problem, while the second and third, though genuine problems, are not resolved by referring questions about rights to the ordinary legislative process. Moral disagreement poses a less formidable objection to international human rights law and judicial review than critics have supposed.

#### A. *The Legitimacy Problem*

The thought is that it is wrong to impose one's conception of human rights on those who do not share it. As Michael Ignatieff writes, "If human rights principles exist to validate individual agency and collective rights of self-rule, then human rights practice is obliged to seek consent for its norms and to abstain from interference when consent is not freely given."<sup>118</sup>

But this view is wrong. Human rights do not require consent. That they do not is part of their point. Human rights allow us to take certain actions regardless of other people's opinions, just as they place obligations on other people whether or not the other people agree.

This point may be illustrated by means of a primal example. If you form a desire to kill me, I have a right to defend myself. When you raise your weapon to strike me, I may knock it from your hand. It does not matter whether you or anyone else agrees, because my right to life does not depend on anyone's agreement. There is nothing wrong with the imposition of my conception of human rights on you when I knock the weapon from your hand.

Of course, my right to life extends beyond permission to defend myself in situations of immediate peril. Just as I may knock the weapon from your hand, I may demand institutional arrangements that provide me with a reasonable degree of safety. I have a right to general protection by a police force of some kind, and to a socially maintained threat that people attempting to kill me will be punished. I also have a right to institutional devices that protect me from being killed by government agencies (including the police). To say that my

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117. WALDRON, *LAW AND DISAGREEMENT*, *supra* note 23, at ch. 5. *See also* the pointed remarks of RABKIN, *supra* note 6, at 163.

118. IGNATIEFF, *supra* note 44, at 18.

right to these things requires general consent is a gratuitous and impertinent demand. It raises an illegitimate hurdle to the fulfillment of my rights.

My right to life is not the only human right that I have. Just as I may insist on my right to life, I may insist on the essentials of a dignified existence – on a right to food, shelter, clothing, decent working conditions, freedom of speech, freedom of religion, freedom from abuse, and the right to a fair trial. These rights do not depend on consent. To say that they do is to make my dignity hostage to other people's opinions.

It makes all the difference in the world whether human rights precede or derive from public deliberation. Imagine we are speaking to a young West African girl who is being threatened with forced early marriage.<sup>119</sup> If we believe that human rights precede public deliberation, we may say, "You have the right to an education; to health training and basic medical care; to be trained in an occupation of your choice; to be spared the severe pain and danger of genital cutting and attendant loss of sexual pleasure; to choose your own spouse; to be free from domestic violence; to refuse sex; to decide whether to have children, and, if so, how many; and to have an equal voice in the conduct of your marriage and your community." (These are all rights that the institution of forced early marriage denies.)

However, if we believe that human rights are derived from public deliberation we must instead say something like the following: "You have the right (perhaps not now, but at least when you become an adult) to participate equally with all the other members of your community in determining what rights you have. We cannot guarantee that you have a right to an education, etc., because that will depend on what your community ends up deciding." And further: "If your father wants to force you into marriage with a much older (and perhaps polygamous) man of his choosing, you have the right (or will have it, when you are an adult, after your forced marriage) to engage your father in a dialogue about whether you have a right to refuse. But if your father is not persuaded that you have such a right, it would be wrong to refuse his demand in the name of your human rights."

I submit that the first message does far more good than the second. It does more to help girls take control of their future, and makes a greater ultimate contribution to the creation of communities built on equal respect for the dignity and agency of all their members. Deriving human rights from public deliberation is the death of human rights. Human rights are the precondition of any healthy form of public deliberation.

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119. I draw instruction from the work of human rights NGO Tostan, whose courses on human rights have helped persuade hundreds of villages in Senegal to collectively renounce female genital cutting and early marriage. See Tostan: Community-led Successes, <http://www.tostan.org> (last visited Nov. 24, 2008). Early marriage is a worldwide problem. See UNICEF: Innocenti Research Centre, *Early Marriage: Child Spouses*, 7 INNOCENTI DIG., Mar., 2001, <http://www.unicef-icdc.org/publications/pdf/digest7e.pdf> (last visited Nov. 24, 2008).

Confusion about consent bedevils discussions of international human rights law. Anderson writes that in today's world authority must "be perceived to be legitimate by those over whom [it] is exercised."<sup>120</sup> This is untrue: a law prohibiting murder does not require the consent of the would-be murderer. Some American critics of the International Criminal Court have invoked the principle of consent to protest the Court's jurisdiction over war crimes, crimes against humanity, and genocide committed on the territory of a state party by citizens of a non-state party.<sup>121</sup> Such jurisdiction is illegitimate, the critics complain, because the state whose citizens stand accused has not given its consent. This argument denies the right of vulnerable states to invoke the assistance of an international court in defending their inhabitants from foreign-perpetrated atrocities. Arguments like this abuse the notion of consent. It is a mistake to suppose that, until an individual or a state grants its consent, no rules apply.<sup>122</sup> We might call this the law of the jungle, but it is not a view with which we should want to associate the idea of democracy.

The Declaration of Independence states that governments "deriv[e] their just powers from the consent of the governed[.]"<sup>123</sup> It is a mistake, I have argued, to suppose that human rights themselves require our consent, and the Declaration of Independence certainly expresses no such view.<sup>124</sup> Indeed one can go further and argue that the very idea of "government by consent" implies a government constrained by human rights not derived from consent. The argument proceeds as follows.

Suppose that "government by consent" means that no one may be governed without his or her consent. This sets a high bar: laws must receive consent not from the majority but from everyone. Of course no law can literally satisfy such a requirement. But we may say that a legitimate government is one that comes as close to meeting this requirement as possible. It does not apply laws that receive literally every person's consent – that is impossible – but instead laws that are *capable* of receiving every person's consent, in the sense that everyone has reason to accept them. Now, there are some laws that *cannot* receive everyone's consent. Let us call them "unreasonable" laws. Laws that permit or authorize human rights violations fall under this category. Such laws impose unacceptable costs on their victims. Because there is no possible justification for these laws, we will not attempt to justify them. For this reason, government by consent excludes human rights violations from legislative

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120. Anderson, *supra* note 7, at 113.

121. See Lee A. Casey & David B. Rivkin, Jr., *The International Criminal Court vs. the American People*, Backgrounder #1249, THE HERITAGE FOUNDATION, Feb. 5, 1999, <http://www.heritage.org/research/internationalorganizations/BG1249.cfm> (last visited Nov. 25, 2008). See also Morris, *supra* note 7, at 110-11.

122. See Jamie Mayerfeld, *The Democratic Legacy of the International Criminal Court*, 28 FLETCHER F. OF WORLD AFF. 147, 153 (2004).

123. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

124. See Galston & Galston, *supra* note 88, at 454-55.

consideration.<sup>125</sup>

### *B. The Fallibility Problem*

I have argued that the authority of human rights does not depend on consent.<sup>126</sup> But how do we know that our conception of human rights is the right one? Other people may disagree, and if so, their disagreement shows that we may be mistaken.

This is a serious problem, but notice that the problem is the possibility of error rather than disagreement itself. We could all agree and all be mistaken. Disagreement is not the problem, but rather a sign of the problem. Nor does it always signify a problem. When you raise your weapon to kill me, I may be reasonably sure, despite your apparent disagreement, that I have a right to defend myself. It is clear in this situation that I am right and you are wrong.

But not all cases are this clear-cut. The possibility of error grows when we try to draw up a complete human rights code and apply it in practice. How to prevent such error is a vast question demanding our full attention. I do not pretend to offer a full answer, but hope to show that an intelligent response to the problem does not entail the rejection of international human rights law or judicial review.

The mistake to be avoided here is an all-embracing skepticism from which political deliberation is thought to be the only outlet. The reasoning to be avoided goes like this: "Ultimately, we do not know how to prevent error about human rights. To prevent such error, we would need a standard that distinguishes truth from error, but our very fallibility places such a standard out of reach. Our views are shrouded in doubt, as are the methods needed to resolve such doubt. Under these circumstances, the only reasonable policy is to let the people decide, through ongoing political deliberation, which human rights we do and do not have."

Such skepticism is excessive. We are confident that such practices as torture, slavery, extrajudicial execution, race and sex discrimination, and the denial of due process are wrong. Centuries of experience and reflection have nourished and reinforced these convictions, and have generated theoretical insights into the nature, basis, and content of our human rights. We don't have to start from scratch; we may retain our reasonable convictions, and use them to test new arguments and theories, and to assess the reliability of alternative procedures for formulating and applying human rights codes.

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125. One problem with the phrase "government by consent" is that it leaves the status of non-citizens unclear. If the "governed" do not include foreigners, are we theoretically free to violate their human rights? The problem continues to haunt the theoretical literature on democracy. For an indispensable discussion, see GOODHART, *supra* note 93, at chs. 6-7.

126. This is not to deny that agreement about human rights has justificatory, rhetorical, and political value. Clearly it does, as my remarks in the text accompanying notes 53-55 *supra* and notes 153-55 *infra* acknowledge. For a discussion of the moral significance of agreement, see Kim, *supra* note 55.

John Rawls coined the term “reflective equilibrium” to describe such reasoning.<sup>127</sup> The idea has been further refined, with particular reference to human rights, in recent work by William Talbott.<sup>128</sup> The goal is to avoid skepticism on the one hand and epistemic complacency on the other. On Talbott’s account, we improve the reliability of our moral judgments when we strive to adopt an impartial perspective informed by empathic understanding of the needs and interests of others. To avoid error, we must stand guard against, and endeavor to correct, the distorting influence that self-interest and social pressure can exert on our beliefs. When we take these steps, we can form reasonably reliable, though not infallible, moral judgments about particular kinds of acts. These moral judgments in turn justify broader moral principles that make sense of our beliefs as a whole and that in some instances cause us to re-examine and revise our particular moral judgments. The more we bring our particular moral judgments and moral principles into equilibrium, and the more we test our moral beliefs against other people’s arguments and against the known facts about human nature and human society, the more reliable our moral beliefs become.<sup>129</sup>

Debate is essential to this process. It exposes faulty reasoning and the operation of influences (such as self-interest and social pressure) likely to produce error. It contributes new information and new ideas. Therefore, we need to guarantee the communicative and associative freedoms and minimum welfare provisions that give all persons a voice and permit them to hear what others have to say. We also need to promote universal education, an independent media, and a vigorous civil society. If debate is to promote understanding rather than error, however, we need to lay a foundation of public support for and understanding of basic human rights values. Knowledge of human rights law and the values on which it rests should be a required element of everyone’s education. Such education does not prevent citizens from revising their views about human rights through further reflection and debate. Of course, the pedagogic effect of human rights law itself must not be underestimated.<sup>130</sup>

Human rights education, freedom of thought and discussion, and mutual encouragement to engage in equilibrium moral reasoning help foster trustworthy views about human rights in the general public. We still face the

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127. JOHN RAWLS, *A THEORY OF JUSTICE* 20 (Belknap Press of Harvard University Press 1971).

128. TALBOTT, *supra* note 44. Part of this paragraph is reproduced from Jamie Mayerfeld, *William Talbott’s WHICH RIGHTS SHOULD BE UNIVERSAL?: An Overview and Appreciation*, 7 *HUM. RTS. AND HUM. WELFARE* 68, 69 (2007), available at <http://www.du.edu/gsis/hrhw/volumes/2007/symposium-2007.pdf>.

129. TALBOTT, *supra* note 44, at chs. 2-4.

130. See MADISON, *supra* note 83, at 501. “In proportion as government is influenced by opinion, it must be so, by whatever influences opinion. This decides the question concerning a *Constitutional Declaration of Rights*, which requires an influence on government, by becoming a part of the public opinion.”



question of which system to adopt for formulating and applying an enforceable human rights code. While this task should be informed by debate, the debate must be properly *structured* in order to generate good outcomes. The protection of human rights should not be dictated by the ordinary legislative process, where human rights become one issue in a sea of other issues – an issue, moreover, to which the voting public has historically devoted little attention. Unless human rights are constitutionally entrenched, we can expect them to be eroded by legislative patterns of logrolling and scapegoating, and by the competitive bidding of legislators seeking to prove their toughness on hot-button issues like crime, terrorism, and immigration. What is necessary is a constitutional structure in which human rights are given primacy and in which difficult questions about human rights receive the undivided attention of qualified deliberators.

We need to distinguish between the adoption and enforcement of a human rights code. As to the former, the task of drafting human rights provisions in domestic constitutions and international treaties is sensibly entrusted to learned and intelligent people who have demonstrated a sincere commitment to and sophisticated understanding of human rights, and who collectively represent, either through personal experience or acquired knowledge, a reasonable cross-section of social interests.<sup>131</sup> There are different ways of selecting such people, and political constraints will often dictate which method is adopted. But we should strive to prevent uncommitted or unqualified people from playing too great a role. A common danger at the domestic level is the influence of those seeking to preserve or restore authoritarian forms of rule.

A common danger at the international treaty level is the influence of delegates seeking to undermine rather than strengthen the protection of human rights.

Human rights non-governmental organizations (NGOs) play an invaluable role in both settings.<sup>132</sup> Though not given voting powers, they remind delegates of relevant precedents in international law and domestic bills of rights. They share lessons learned from the history of human rights abuses and give voice to the victims of those abuses. They mobilize pressure from a broader constituency of human rights supporters. They provide logistical and technical assistance to delegates in the pro-human rights camp. Their vigilance deters maneuvers to undermine human rights. Though not popularly elected, NGO leaders are evaluated by peers who are passionately committed to the cause of human rights. They have been tested by the discipline of producing factual reports whose every detail must survive microscopic examination and by the experience of challenging hostile governments in highly charged settings. Their contributions to human rights law are difficult to overstate. Contrary to

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131. For an illuminating discussion of the institutional processes favoring the adoption of legitimate human rights codes, see Allen E. Buchanan, *Human Rights and the Legitimacy of the International Order*, 14 *LEGAL THEORY* 39, 61-65 (2008).

132. See WILLIAM KOREY, *NGOS AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: "A CURIOUS GRAPEVINE"* ch. 8 (1998); and MERRY, *supra* note 61.

the claims of some scholars,<sup>133</sup> their participation in the treaty-drafting process is vital to the legitimacy of international human rights law.

Submission of constitutional bills of rights and international human rights treaties to legislative ratification or popular referendum does not alter the fact that the actual work of drafting tends, for practical reasons, to be handled by a relatively small number of people. The point is to choose individuals fit for the task. In objection to this view, some might point to the South African Constitution, claiming that it shows how to involve the public more directly in the drafting process. The Constitutional Assembly, its members chosen by direct or indirect popular election, made extensive use of talk radio, television, mailings, and the internet to inform citizens about the drafting process and to solicit their input.<sup>134</sup> Citizens responded with millions of “petitions, comments, objections, and proposals.”<sup>135</sup> Passage of the Constitution required approval by two thirds of the Assembly. I am persuaded that this process succeeded in instilling in the public a deeper loyalty to and understanding of the final Bill of Rights. However, what must be remembered is that public deliberations occurred within clear boundaries, demarcated in advance. The Constitutional Court was assigned the duty of rejecting any constitutional provisions in conflict with the Constitutional Principles in the Interim Constitution, one of which stated that “[e]veryone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution . . . .”<sup>136</sup> In other words, the people were free to develop and expand, but not water down, internationally recognized human rights.<sup>137</sup>

After a human rights code is adopted, some mechanism is needed to ensure compliance from the executive and legislative branches of governments.

It makes sense to establish a separate governmental body – call it a court – with the responsibility of monitoring and enforcing such compliance. Such a system has been adopted, with important variations, in many countries around the world. Certain factors are likely to increase the quality and effectiveness of judicial decisions concerning human rights: a reasonably complete human rights code (but not so detailed as to magnify the risk of constitutional error); a constitutional structure that gives primacy to human rights and is sufficiently specialized so that the relevant judges can give sustained attention to human

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133. Anderson, *supra* note 7, at 113-14.

134. See Albie Sachs, *The Creation of South Africa's Constitution*, 41 N.Y.L. SCH. L. REV. 669, 675-77 (1997); see also Christina Murray, *A Constitutional Beginning: Making South Africa's Final Constitution*, 23 U. ARK. LITTLE ROCK L. REV. 809, 816 (2001).

135. Sachs, *supra* note 134, at 675.

136. S. AFR. (Interim) CONST. 1993, sched. 4, princ. II, available at <http://www.info.gov.za/documents/constitution/93cons.htm#SCHEDUL4>.

137. Moreover, the Constitutional Court acted on its duty, ruling that the 1996 Constitution made amendment of the Bill of Rights too easy and therefore left human rights inadequately entrenched. The Constitutional Assembly made the requisite alterations in the Final Constitution of 1997. Sachs, *supra* note 134, at 678; Murray, *supra* note 134, at 835-37.

rights; the appointment of judges with a demonstrated commitment to and sophisticated understanding of human rights; an obligation to issue human rights rulings as reasoned judgments, with the right of outvoted judges to publish dissenting opinions; direct access to the judicial system by individuals whose rights have been violated or are under threat; a system of abstract review that permits inspection of legislation on human rights grounds prior to enactment; and a rule of precedent that makes human rights rulings binding on lower-court judges and other government officials.<sup>138</sup>

Legislatures have too many policy issues to address and are too vulnerable to electoral pressure to be given the final word in interpreting and enforcing human rights. We need a corrective to what Kateb describes as the “energies of interests” that “animate laws, regulations, and acts.”<sup>139</sup> Human rights need more attention, and attention less influenced by extraneous interests, than legislators can supply. There is also some justification for choosing those entrusted with the final guardianship of human rights by means other than direct popular election. As Kateb writes, we want judges “un beholden to anyone, to be free of identifiable supporters, to have only one prepossession – namely, that in favor of protecting the rights of individuals.”<sup>140</sup> (I do not discount the possibility of direct popular election, but it would have to be designed in a manner, perhaps as yet undiscovered, that would preserve the necessary level of judicial impartiality.) Needless to say, these observations do not imply that judicial review, by itself and regardless of its form, guarantees respect for human rights. Judicial review is only one element of an adequate system of rights protection, and it must be judicial review of the right kind. The flaws in the U.S. political system that contribute to violations of human rights include a flawed system of judicial review.<sup>141</sup>

Debate does not end with the adoption of human rights codes and mechanisms for their implementation. The codes become available for public inspection and criticism. Judges charged with their interpretation and enforcement must defend their opinions against collegial criticism, and such disagreements stimulate (and respond to) a debate in the public at large. Citizens and legislatures can register satisfaction or dissatisfaction with judicial rulings. The debate extends across national borders. Increasingly, judges test

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138. An expanding literature on comparative constitutional law has shed light on the factors that contribute most to protecting rights. See TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES*, ch. 1 (Cambridge University Press 2003) (1967); see also ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE*, ch. 4 (2000); and HERMAN SCHWARTZ, *THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE*, ch.2 (The University of Chicago Press 2000) (1931).

139. Kateb, *Remarks on Robert B. McKay*, *supra* note 93, at 150.

140. *Id.*

141. Flaws include the excessive politicization of the appointments process, procedural rules that limit individual access to the courts, the absence of abstract review, and, perhaps most important, an incomplete and underspecified bill of rights. Too many writers continue to assume that the general advisability of judicial review may be inferred directly from its record in the United States.

their own reasoning against human rights arguments made by foreign courts.<sup>142</sup>

International courts, such as the European Court of Human Rights, listen carefully to the domestic courts of member states, but sometimes find reasons for overturning their decisions.<sup>143</sup> Differences in the way particular treaties and constitutions define human rights force us to evaluate and compare. Why is this human right defined differently here than there? Which definition is better and why?

Debate does not merely shape the judicial interpretation and application of human rights codes. It may also illuminate defects in the codes themselves, thereby encouraging their revision. Such revisions can be accomplished in different ways: through ordinary legislation (when not prohibited by constitutional law), constitutional amendment, adoption of a new constitution, ratification of a human rights treaty, domestic incorporation of treaty law through legislation or constitutional amendment, negotiation of a new human rights treaty, or the amendment of an existing human rights treaty. This process is most advanced in Europe, where concerted and continuing dialogue among numerous domestic and international actors has led to profound changes in the human rights provisions of domestic statutory and constitutional and international treaty law.<sup>144</sup> A similar, if less accelerated, process can be observed elsewhere in the world – for example, in the domestic constitutional and legislative reforms prompted by ratification of the Rome Statute of the International Criminal Court.<sup>145</sup>

Though domestic legislatures should not be given exclusive power to make and unmake human rights law, they can make constructive contributions to domestic and international debates over human rights. They can add human rights protections to those already existing under the constitution, ratify human rights treaties and incorporate their provisions into domestic law, and seek to amend their national constitutions. And, within limits set by customary international law and *jus cogens*, they can sometimes “talk back” to international human rights law. They can refuse to support ratification of human rights treaties. They can accompany ratification with substantive reservations (where these are not barred by the terms of the treaty, and do not oppose a treaty’s “object and purpose”).<sup>146</sup> In some countries they can even pass legislation in direct conflict with previous treaty commitments. Such laws,

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142. See Sujit Choudry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819, 827 (1999); ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 79-82 (2004).

143. FUNDAMENTAL RIGHTS IN EUROPE, *supra* note 3, at ch. 3.

144. See *id.*; see also GOLDHABER, *supra* note 42, at ch. 17; FRANK SCHIMMELFENNIG, STEFAN ENGERT, & HEIKO KNOBEL, *INTERNATIONAL SOCIALIZATION IN EUROPE: EUROPEAN ORGANIZATIONS, POLITICAL CONDITIONALITY AND DEMOCRATIC CHANGE* ch.3 (2006); and JANNE HAALAND MATLÁRY, *INTERVENTION FOR HUMAN RIGHTS IN EUROPE* ch. 2 (2002).

145. WILLIAM A. SCHABAS, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* 20 (2d ed. 2004).

146. Vienna Convention on the Law of Treaties art. 19, May 23, 1969, 1155 U.N.T.S. 331.

though invalid under international law,<sup>147</sup> are often upheld by domestic courts.<sup>148</sup>

Is legislative resistance to international human rights law morally legitimate? Yes, if the law being resisted is not genuinely required by human rights (or indeed undermines genuine human rights). What if there is disagreement on this very point? Then, at the very least, a national legislature should present a credible good-faith argument that its resistance does not subvert (or is indeed necessitated by) human rights. Mattias Kumm argues that widely ratified human rights treaties are entitled to a certain measure of deference, given that they “establish a common point of reference negotiated by a large number of states across cultures” and therefore overcome “limitations connected to national parochialism.”<sup>149</sup> This does not mean that such treaties are 100% correct, but it does mean that national legislatures should give human rights-based reasons when seeking exemption from specific treaty provisions. Such reasons have the potential to persuade other members of the international community. Just as national legislatures can learn from international human rights law, so international human rights law can learn from national legislatures.

The United States provides an example of what not to do. When ratifying human rights treaties, it routinely exempts itself from all obligations not already enshrined in U.S. law.<sup>150</sup> (The obligations it rejects include several that would pose no conflict with the Constitution.) There is no discussion whether U.S. law would be improved by assuming new obligations – no discussion whether these obligations remedy a failure of existing U.S. law to protect genuine human rights.<sup>151</sup> In this way, the United States found itself narrowing treaty prohibitions on the use of “cruel, inhuman, or degrading treatment or punishment,” and stating, in response to a treaty prohibition on the execution of juvenile offenders, that it reserved the right “to impose capital punishment on any person (other than a pregnant woman).”<sup>152</sup> By refusing to reevaluate its laws and policies in light of international human rights law, the United States demonstrates a dangerous oblivion to its own fallibility.

Disagreement about human rights is troubling because it points out the possibility that our conception of human rights is mistaken. Deliberation is needed to minimize the possibility of error. But the necessary deliberation is compatible with, and indeed requires, the constitutionalization of human rights

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147. *Id.* art. 27.

148. AUST, *supra* note 16, at 81.

149. Kumm, *supra* note 43, at 278.

150. Mayerfeld, *Playing by Our Own Rules*, *supra* note 28, at 118.

151. *See International Covenant on Civil and Political Rights: Hearing Before the S. Comm. on Foreign Relations*, 102d Cong. (1991).

152. U.S. RUDs to the ICCPR, *supra* note 108, second and third reservations; 136 CONG. REC. S17486-01 (daily ed. Oct. 27, 1990) (U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), first reservation.

through domestic and international law, backed by judicial review. International human rights treaties and domestic bills of rights encourage disciplined inquiry into the meaning of human rights. They foster constructive debate. There is little reason to believe – and much reason to doubt – that the fallibility problem is properly addressed by handing over human rights controversies to the ordinary legislative process. Therefore, we have not yet encountered a good argument for rejecting international human rights law or constitutional bills of rights.

### *C. The Political Weakness Problem*

Finally, disagreement poses the problem of political weakness. To make human rights secure, we need the support of the powerful. If I lived under an absolute despot, it would be worth my while to convert him or her to a sound conception of human rights. If we live in a society ruled by the people, it is worth our while to convert *them* to a sound conception of human rights. Disagreement in a society ruled by the people raises the danger that people with a faulty conception of human rights, or none at all, will run roughshod over human rights.

Persuading the despot or the empowered demos to adopt a sound conception of human rights will win us some temporary protection, but needless to say neither absolute despotism nor unfettered popular self-government can provide reliable protection of human rights in the long term. The best system is constitutional democracy – that is, popular self-government bounded by human rights. So our task is to persuade the absolute despot or the empowered demos, as the case may be, to give way to the establishment of constitutional democracy.

However, even after the creation of constitutional democracy the people may disagree about the content of human rights. Perhaps a majority subscribe to the wrong conception of human rights, and perhaps they will use the power of their numbers to impose a flawed constitutional bill of rights or to block adoption of sound international human rights law. The best solution to this problem is the kind of constitutional system discussed above. But perhaps the people will block such a system, or successfully exert pressure on the judicial guardians of constitutional and international law to cast bad decisions. In that case we must persuade the people to correct their views. Public debate is one of the necessary means – along with human rights education and the enshrinement of human rights values in international treaties and declarations, bills of rights, and ordinary laws – for correcting public opinion.

There is, however, a crucial difference between acknowledging that public persuasion may be necessary to provide human rights with the requisite degree of popular support, and saying that a conception of human rights is illegitimate without collective endorsement. The point is that we need to use a variety of means to cultivate and maintain the people's support for a sound conception of human rights and for the constitutional architecture that fosters accurate understanding of human rights and gives them maximum protection.

The people, when persuaded of such views, will not insist on opening the legislative process to the reconsideration of genuine human rights. There are no grounds here for rejecting constitutional bills of rights or international human rights law.

Another point should be noted. It is a mistake to think that, if human rights lack sufficient popular support, granting legislatures the power to define human rights will solve the problem. Courts tend to be more popular than legislatures.<sup>153</sup> If transferring the definition of human rights from a judicially enforced bill of rights to a legislature vested with parliamentary supremacy reduces the popular backlash against human rights, the reason will not be that the protection of controversial human rights has been entrusted to a more highly respected guardian. Rather, in all likelihood it will be that controversial human rights are no longer being protected.

Backlashes against human rights sometimes take on a national cast, with resentment focused on the international sources of human rights law.<sup>154</sup> But resistance to international human rights law should be combated, not meekly accepted. One helpful strategy is to develop domestic counterparts to international human rights law in the form of national legislation and bills of rights.<sup>155</sup> Another is to redouble our arguments for the legitimacy of international human rights law.

#### CONCLUSION

International human rights law is not “undemocratic” in any objectionable sense. It bars policies that governments should not undertake anyway. Some readers may object that a flawed conception of human rights could lead international human rights law to exclude policies that are in fact blameless, and that such exclusions would constitute a regrettable restriction of democracy. This danger should not be exaggerated, however; nor should the corresponding benefit be overlooked. Since the vast majority of international human rights obligations are morally justified (most uncontroversially so in the realm of civil and political rights, where international human rights law enjoys its greatest leverage), the danger of excluding some blameless policy options pales next to the gain for human rights.

No system of human rights protection is infallible. If we are serious about protecting human rights, we cannot wait for an infallible system that will

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153. See Vanessa A. Baird, *Building Institutional Legitimacy: The Role of Procedural Justice*, 54 POL. RES. Q. 333, 334 (2001); see also JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *CONGRESS AS PUBLIC ENEMY: PUBLIC ATTITUDES TOWARD AMERICAN POLITICAL INSTITUTIONS* (1995).

154. A trend that some are observing in Britain. See Francesca Klug, *A Bill of Rights: What For?*, in *TOWARDS A NEW CONSTITUTIONAL SETTLEMENT*, at 5-6 (Chris Bryant ed., The Smith Institute 2007), available at [http://www.lse.ac.uk/collections/humanRights/articlesAndTranscripts/FK\\_SmithInstitute\\_07.pdf](http://www.lse.ac.uk/collections/humanRights/articlesAndTranscripts/FK_SmithInstitute_07.pdf).

155. *Id.* at 8.

never come. The proper response to mistaken provisions in international human rights law is not the removal of a “democratic deficit”; it is the correction of the mistaken provisions. As I have argued, there are important resources within international human rights law itself for making the necessary corrections. These resources include the recognizably democratic practices of dialogue, debate, and persuasion.

To say that international human rights law subverts democracy is to adopt an unworthy conception of democracy. On the best conception of democracy, there is no conflict. Indeed, international human rights law strengthens democracy. Human rights require international protections, but the existing protections are far from adequate. Rather than criticize international human rights law as undemocratic, we should study how human rights may be more effectively promoted through international law.