Symposium

Globalization and Distrust

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> The same lotus of our clime blooms here in the alien water with the same sweetness, under another name.[1]

INTRODUCTION

The people of a democracy must be mercifully soothed when they find themselves ruled by the six men and one woman of the Appellate Body of the Dispute Settlement Body of the World Trade Organization. Or so might go the contemporary version of Alexander Bickel's famous indictment of the Supreme Court of the United States.[2]

FIGURE 1. A WORLD SUPREME COURT? THE APPELLATE BODY OF THE DISPUTE SETTLEMENT BODY OF THE WORLD TRADE ORGANIZATION[3]

"We know what the people imagine," Bickel wrote. "They imagine that they rule themselves . . . ."[4] But a judiciary empowered to overrule the

1. RABINDRANATH TAGORE, STRAY BIRDS 61 para. 232 (1917).
2. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 92 (1962) ("The people of a democracy must be mercifully soothed when they find themselves ruled, to whatever extent, by the nine men of the Supreme Court.").
3. Photo courtesy of the World Trade Organization.
4. BICKEL, *supra* note 2, at 92.

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judgments of the political branches on constitutional grounds renders self-rule an illusion. Bickel thus articulated the principal challenge to judicial review of the last half-century.

Today we hear echoes of Bickel's complaint, but they now raise alarms about the power of tribunals in Geneva and The Hague, not Washington, D.C. Today's democrats find the whiff of authoritarianism in the International Criminal Court, the International Court of Justice, North American Free Trade Agreement (NAFTA) tribunals, the International Tribunal for the Law of the Sea, and, especially, the (awkwardly named) Appellate Body of the Dispute Settlement Body of the World Trade Organization. Critics distrust judgments of these remote decisionmakers. They find authoritarianism in the basic processes of international law.[5] International decisionmaking processes are yet more suspect than United States federal judges—they aren't even American.

Consider Massachusetts Chief Justice Margaret Marshall's reaction when she learned that her court's judgment in a dispute would be reviewed by an international tribunal: "I was at a dinner party . . . . To say I was surprised to hear that a judgment of this court was being subjected to further review would be an understatement."[6] In the same news story, a law professor issues a dire warning: "'This is the biggest threat to United States judicial independence that no one has heard of and even fewer people understand' . . . ."[7]

Such complaints are carried not only in the popular press and academic journals, but also in the pages of the Supreme Court Reporter. Consider the words of Justice Scalia in the last case decided in the Supreme Court's 2003 Term, *Sosa v. Alvarez-Machain*:

> We Americans have a method for making the laws that are over us. We elect representatives to two Houses of Congress, each of which must enact the new law and present it for the approval of a

5. *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319 (1997) [hereinafter Bradley & Goldsmith, *Illegitimacy*]; Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) [hereinafter Bradley & Goldsmith, *Critique*]; Paul B. Stephan, *International Governance and American Democracy*, 1 CHI. J. INT'L L. 237 (2000). The claim is epitomized in the writings of John Bolton, U.N. Ambassador-Designate. *See* John R. Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT'L L. 205 (2000).

6. Adam Liptak, *Review of U.S. Rulings by Nafta Tribunals Stirs Worries*, N.Y. TIMES, Apr. 18, 2004, at 20 (internal quotation marks omitted). Despite this exclamation, Chief Justice Marshall, a native of South Africa, embraces the possibility of a global jurisprudence in which courts participate in a "global conversation about human liberty." Margaret H. Marshall, *"Wise Parents Do Not Hesitate To Learn from Their Children": Interpreting State Constitutions in an Age of Global Jurisprudence*, 79 N.Y.U. L. REV. 1633, 1656 (2004).

7. Liptak, *supra* note 6 (quoting John D. Echeverria).

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> President, whom we also elect. For over two decades now, unelected federal judges have been usurping this lawmaking power by converting what they regard as norms of international law into American law. Today's opinion approves that process in principle . . . .[8]

Abhorring the Supreme Court's admission of international law into American law, Scalia sardonically defines for the Court "American law" as "the law made by the people's democratically elected representatives."[9]

It was a domestic version of this charge, based on a belief that judicial review is inconsistent with democratic theory, that motivated John Hart Ely to respond with his classic, *Democracy and Distrust*.[10] There, Ely offers the principal rebuttal to Bickel. Ely deftly turns insulation from the political process from a vice to a virtue. The judiciary's freedom from direct politics, he proclaims, enables it to serve as a bulwark against majority tyranny. Distrust of the judiciary[11] must be juxtaposed with distrust of majoritarian political processes.

Given Ely's rescue of judicial review within our borders, can *Democracy and Distrust* help rebut today's protests of a democratic deficit at the international level? Today, distrust of globalization touches not just the formal treaty-based institutions of international law, such as the World Trade Organization (WTO) and the International Criminal Court, but often the project of international law itself. International law is made and realized through a fluid process in which "public and private actors . . . interact in a variety of . . . domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law."[12] Harold Koh has denoted this the "transnational legal process," highlighting the role of actors, other than unitary governments of nation-states, in the process of configuring and deploying international law.

Would Ely's theory find the transnational legal process consistent with popular sovereignty? The work of this article is to answer that question.[13]

This goal will strike many as a simple category mistake. After all, the international legal order does not even aspire to democracy. There is no

8. 124 S. Ct. 2739, 2776 (2004) (Scalia, J., concurring in part and concurring in the judgment).

9. *Id.*

10. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 41 (1980) (insisting on a "principled approach" to judicial review "that is not hopelessly inconsistent with our nation's commitment to representative democracy").

11. BICKEL, *supra* note 2, at 34 (describing "the premise of distrust" of judicial review).

12. Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 183-84 (1996).

13. Thus, this work should not be mistaken for a wholesale defense of all international law norms or decisions. *Cf.* Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CAL. L. REV. 1331, 1347-48 (2004) (arguing that the existing international intellectual property law regime favors wealthy, industrialized nations).

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global *demos*, no We the People in whom sovereignty is vested. Does it make sense to test today's international order for its democratic promise? Until the day a global ballot is introduced, with voting following the sun across all the time zones of the world, isn't the answer preordained? Doesn't international law, its authority not resting on a majoritarian political process, necessarily jeopardize popular sovereignty?

This certainly is the view of international law's critics, on both ends of the political spectrum. Right-wing critics in the United States argue that international law will subject this country to human rights, labor, health, environmental, and military rules not of our own making.[14] They object to the internalization of international norms in U.S. courts and the interpretation of the U.S. Constitution in light of international practice.[15] The targets of their ire are dazzlingly broad, including the International Criminal Court, the International Labor Organization, the Convention on the Law of the Sea, the Kyoto Protocol on Global Warming, the United Nations Human Rights Commission (and any other United Nations body that exists or may exist in the future, including the World Health Organization), the Comprehensive Test Ban Treaty, nongovernmental organizations such as women's groups, and corporate codes of conduct.[16] These international institutions steal power from We the People. Even if there is currently not "complete displacement" of domestic lawmaking processes,[17] over time there may well be a gradual aggrandizement of international authority at the expense of national sovereignty.

Progressive American critics of international law aim much of their fury at the WTO and other economic institutions. Lori Wallach of Public Citizen observes that the WTO implicates many domestic matters: It constrains "*domestic* food safety standards, environmental and product safety rules, service-sector regulation, investment and development policy, intellectual property standards, government procurement rules, and more."[18] International institutions are derided in other parts of the world as well, but these critiques are often coupled with complaints about the United States,

14. *See* Bolton, *supra* note 5, at 206. International economic institutions come under attack from some conservative quarters (though they remain a favorite preserve of others): "The WTO has ordered the United States to revise its clean air regulations, get rid of its ban on the harvesting of tuna and shrimp that kill dolphins and turtles, and change the way it taxes income from export sales." Stephan, *supra* note 5, at 248.

15. This topic is discussed in a recent issue of the *American Journal of International Law*. Lori Fisler Damrosch & Bernard H. Oxman, *Editors' Introduction*, 98 AM. J. INT'L L. 42 (2004).

16. Each of these international institutions receives its share of opprobrium in Bolton, *supra* note 5.

17. Paul B. Stephan, *Sheriff or Prisoner? The United States and the World Trade Organization*, 1 CHI. J. INT'L L. 49, 73 (2000).

18. Lori Wallach, *It's Not About Trade*, *in* LORI WALLACH & PATRICK WOODALL, PUB. CITIZEN, WHOSE TRADE ORGANIZATION?: A COMPREHENSIVE GUIDE TO THE WTO 1, 1 (2004).

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foreign bankers, or foreign corporations. Arundhati Roy discerns a loss of sovereignty not only to the WTO but to a triumvirate of global players, with the United States as puppet master: "For all the endless empty chatter about democracy, today the world is run by three of the most secretive institutions in the world: the International Monetary Fund, the World Bank, and the World Trade Organization, all three of which, in turn, are dominated by the United States."[19]

If Bickel has an intellectual heir among the critics of international law, it may well be Jed Rubenfeld, like Bickel a professor at Yale Law School. In an unsettling piece, Rubenfeld argues that our commitment to democratic constitutionalism justifies America's unilateralism—its disregard for international law.[20] Rubenfeld's challenge drew the attention of the past president of the American Society of International Law, Anne-Marie Slaughter, who called on lawyers to rally to international law's defense.[21]

Still, today's complaints about international law have not reached the same public din, at least in the United States, as the complaints that Ely heard while composing *Democracy and Distrust*. Ely intervened following decades of socially cataclysmic judicial rulings, from *Brown v. Board of Education* to *Roe v. Wade*. But protests of international law are likely to grow, as international regimes produce increasingly significant and controversial results. The recent expansion of the world trade order into new arenas—including intellectual property, trade in services, investment, and government procurement—widens international law's ambit. Constituencies that had been blissfully unconcerned with international legal processes may become more alarmed as their livelihoods and ways of life are threatened. This anxiety was demonstrated most tragically by the suicide of a Korean farmer at the WTO ministerial meeting in Cancún in protest of agricultural liberalization.[22]

Imagine the year 2010. Breaking news: "World Trade Organization rules that U.S. regulations against international outsourcing of services contravene commitments on government procurement and telecommunications liberalization." Breaking news: "The WTO rules that a

19. ARUNDHATI ROY, *Come September*, *in* WAR TALK 45, 74-75 (2003).

20. Jed Rubenfeld, *The Two World Orders*, WILSON Q., Autumn 2003, at 22 [hereinafter Rubenfeld, *Two World Orders*]. He develops the argument in a recent paper. Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971 (2004).

21. Anne-Marie Slaughter, *A Rallying Cry*, AM. SOC'Y INT'L L. NEWSL. (Am. Soc'y of Int'l Law, Washington, D.C.), Nov./Dec. 2003, at 1.

22. Barbara Demick, *Suicide Puts Face on Farmers' Plight*, L.A. TIMES, Sept. 19, 2003, at A3. Before his death, farmer Lee Kyung-Hae circulated the following statement in Cancún: "Human beings are in an endangered situation that uncontrolled multinational corporations and a small number of big WTO official members are leading an undesirable globalization of inhumane, environmentally degrading, farmer-killing and undemocratic policies." *Id.* (internal quotation marks omitted).

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U.S. bilateral free trade agreement violates the most-favored-nation principle because it does not liberalize trade."[23] Breaking news: "The International Criminal Court indicts Donald Rumsfeld for torture and willful killing in the war against terror."[24] Breaking news: "The WTO declares that the European Union's moratorium on approving biogenetically engineered foodstuffs lacks 'sufficient scientific evidence.'"[25]

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

But are international institutions not in fact the "least dangerous" of institutions?[26] With few exceptions,[27] they have "no influence over either

23. *See* General Agreement on Tariffs and Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125, 1154 (1994) (permitting regional free trade agreements under certain conditions); General Agreement on Trade in Services art. V, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125, 1171 (1994) [hereinafter GATS] (same with respect to services).

24. The United States is not a party to the Rome Statute, which created the International Criminal Court. However, the Rome Statute permits the court to try the nationals of nonmember states, by granting the court jurisdiction over crimes of genocide, war crimes, and crimes against humanity if they occur in the territory of a state party. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90. Furthermore, the Rome Statute strips state officials of any immunity they may otherwise enjoy in national or international law. *See* Diane Marie Amann & M.N.S. Sellers, *The United States of America and the International Criminal Court*, 50 AM. J. COMP. L. (SUPPLEMENT) 381, 392 (2002). Worried about the possibility of its nationals being brought to book before the International Criminal Court, the United States has sought "impunity agreements" with its trading partners. *See* HUMAN RIGHTS WATCH, BILATERAL IMMUNITY AGREEMENTS (2003), *available at* http://www.hrw.org/campaigns/icc/docs/bilateralagreements.pdf.

25. This is a dispute currently before a WTO dispute resolution panel. Request for the Establishment of a Panel by the United States, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/23 (Aug. 8, 2003). Critics denounce as "undemocratic" the WTO's consideration of the issue. Paul Geitner, *WTO Delays Decision on E.U.'s Biotech Ban; Scientists Allowed To Testify in Debate*, WASH. POST, Aug. 27, 2004, at E2 (internal quotation marks omitted). According to Adrian Bebb, a spokesperson for Friends of the Earth Europe, "Every country should have the right to put public safety before the economic might of the biotechnology industry." *Id.* (internal quotation marks omitted).

26. THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Here I am tracking Hamilton's language, originally used, of course, with respect to the federal judiciary.

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

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the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever."[28] The decisionmakers on these tribunals are so weak that they "must ultimately depend upon the aid of the executive arm [of individual states] even for the efficacy of [their] judgments."[29] Even the most empowered of these entities, the United Nations Security Council, must rely on member states to voluntarily contribute to a peacekeeping force.[30] The WTO and the International Court of Justice issue commands, but without any gendarmes or international guard for their enforcement. The International Criminal Court must rely on the charity of its member states to put the accused in the dock.[31]

There was a time when the critics of international law denounced it for its irrelevance, its pretense of power masking an underlying ineffectiveness. In the "post-ontological era" of international law,[32] the critique has shifted. International law is denounced not for being feeble, useless, and irrelevant but for being vigorous, effective, and pervasive. Now, rather than being critiqued for its idealism, it is subject to attack for its illegitimacy.

Despite their many differences, I refer to those who find a democratic deficit in the transnational legal process as "nationalists." Standing with the transnational legal process, then, are the "transnationalists."[33] Let me be clear: I do not mean that transnationalists favor all things international, or the rulings of polyglot tribunals over monolingual, parochial ones, but rather that we transnationalists believe that global or regional legal processes may, if properly fashioned, improve the human condition without imperiling local democracy.

Transnationalists leave themselves even more vulnerable to the charge of hijacking democracy by admitting to, and embracing, the normativity of the transnational legal process.[34] But the task of identifying the source of

28. THE FEDERALIST NO. 78, *supra* note 26, at 465 (Alexander Hamilton).

29. *Id.* In the epigraph to Bickel's book, Hamilton's words serve as the book's foil. BICKEL, *supra* note 2, at ix.

30. The United Nations Peacekeeping Force, numbering 58,756 personnel in July 2004 (only 427 of them from the United States), relies on the voluntary contributions of member states. *See* United Nations, Contributors to United Nations Peacekeeping Operations: Monthly Summary of Contributions (July 31, 2004) (unpublished manuscript), *available at* http://www.un.org/depts/dpko/dpko/contributors/2004/July2004_1.pdf.

31. Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89, 92 (2003).

32. THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 6 (1995).

33. I borrow here terminology from Koh, though I have redefined the terms to focus on the issue of the democratic deficit in international law. *See* Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 52-53 (2004).

34. *See* Harold Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 YALE L.J. 2391, 2406 (1994); Koh, *supra* note 12, at 184; Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2627-28 (1997) (review essay).

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the norms remains elusive.[35] I consider, for example, whether those values might be found in a commitment to a world public order of human dignity (following the New Haven School of international law) or the values of the norm entrepreneurs involved in the transnational legal process. Translating Ely, I discover the fundamental values of the transnational legal process and assess whether they accord with democracy.

Given that transnational legal process theory grew in the waters of the legal process school, it seems only appropriate that it would face the same questions put to its domestic progenitor. Ely's account, the "most celebrated, and the best articulated and composed, legal process theory of judicial review,"[36] seems then the ideal candidate for application to the transnational version of legal process.

I suggest that Ely's theory helps us determine the proper question to test the democratic bona fides of international law. The critics of international law have generally articulated their complaints in a different form from the critics of domestic judicial review. The typical nationalist poses the following question of democratic legitimacy: Does international law grant decisionmaking authority to international actors who are not directly politically accountable?[37] But the *wrong* answer is what the wrong question begets.[38] Ely himself responds to a different challenge, one befitting a constitutional lawyer. If we reformulate that challenge for our own time, it might go something like this: Does international law place basic issues beyond the reach of ordinary political processes?[39]

This will not reflect everyone's view of democracy, but doing so is not my intention. Rather I choose the vision of democracy embedded in a prominent strand of American constitutional law scholarship epitomized by Ely and test the transnational legal process against that vision. It would be

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

36. William N. Eskridge, Jr. & Philip P. Frickey, *Introduction* to HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW, at li, cxviii (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). Ely himself describes his work as being part of the legal process school. *See* John Hart Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different from Legislatures*, 77 VA. L. REV. 833, 833 n.4 (1991).

37. This is, for example, the framework of Scalia's complaint in *Sosa v. Alvarez-Machain*, where he defines "American law" as "the law made by the people's democratically elected representatives," 124 S. Ct. 2739, 2776 (2004) (Scalia, J., concurring in part and concurring in the judgment).

38. Bickel writes, "No answer is what the wrong question begets . . . ." BICKEL, *supra* note 2, at 103. This quote frames Ely's chapter three, a revision of *Discovering Fundamental Values*, his *Harvard Law Review* foreword. ELY, *supra* note 10, at 43-72. Ely suggests that the quest for fundamental values proves futile because the quest is itself misguided.

39. *See* Bruce Ackerman, *Higher Lawmaking*, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 63 (Sanford Levinson ed., 1995).

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an impossible challenge for the transnational legal process to satisfy all visions of democracy. Moreover, the application of constitutional theory to international legal theory helps create greater congruence between the conceptions of a fundamental principle, democracy, shared by two legal subdisciplines, constitutional and international law.[40]

The move I make here is analogous in a small way to the internationalization of John Rawls's *A Theory of Justice*. Rawls himself lived long enough to take up the task of reformulating his theory—developed originally for institutions within a national social compact—on a global level.[41] Ely, alas, passed away much too young, leaving us with unfinished business. In his basic theory, Ely suggests that a group of equals in an original position seeking to frame a government would adopt majority rule tempered with processes to control (1) the exclusion of persons from politics and (2) the unfair distribution of benefits and burdens between the majority and the minority.[42] Thus stated, Ely's theory has purchase in a broad array of political contexts from Philadelphia to Geneva. Following Rawls,[43] I suggest not that we simply adopt a global original position but that we keep Ely's theory in mind as we test international law's legitimacy from the perspective of various *national* original positions. Ely's theory, I argue, offers a theoretical grounding for international law beyond simply resolving collective action problems. It helps us see the transnational legal

40. The work thus manifests another virtue of intradisciplinarity. *See* Anupam Chander, *Minorities, Shareholder and Otherwise*, 113 YALE L.J. 119, 152-53 (2003) (describing intradisciplinarity).

41. JOHN RAWLS, THE LAW OF PEOPLES (1999).

42. Ely puckishly places this formulation of his theory in footnote four of an essay. Ely, *supra* note 36, at 833 n.4. I quote only a small portion of that note:

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

Id. at 834 n.4.

43. RAWLS, *supra* note 41, at 82-83 (distinguishing his argument from the cosmopolitan framework of a global original position).

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process as a possible buttress to democracy, rather than as its rival.[44] First, that process serves to strengthen state regulatory efforts in the face of a world increasingly characterized by global flows of goods, services, information, and people. Second, the transnational legal process creates additional resources with which minorities can protect themselves from majoritarian oppression.

Ely's syllogism goes as follows: Does judicial review remove an issue from the majoritarian political process? If no, then such review does not immediately threaten democracy. If yes (e.g., judicial review based on the Constitution), that review can yet be justified as democracy enhancing if it serves to protect discrete and insular minorities.

Applied to the transnational legal process, that syllogism would be rendered: Does the transnational legal process remove an issue from the majoritarian political process? In the main, as I argue in Part I, because of various local checks on the transnational legal process, the answer is no. Thus, the transnational legal process is consistent with democracy. Part II examines the part of the transnational legal process that claims to be immune to local control—*jus cogens*, or the peremptory norms of international law. I argue that such norms can be justified as democracy enhancing even though they prevent majorities from doing their will. Such norms seek to protect certain classes of minorities in a world where minorities are constantly at risk.

Three case studies frame the inquiry. First, the Supreme Court declared in *Sosa v. Alvarez-Machain* that international law can supply causes of action in American courts through federal common law.[45] The decision sustains the power of American courts to hear claims of human rights abuses brought through the jurisdictional grant of the Alien Tort Statute. In his concurrence, Scalia deplored the importation of international law norms as contrary to democratic lawmaking. The second case study moves from human rights to economics, taking up a 2004 WTO ruling that the United States violated its trade commitments by refusing market access to Internet gambling services provided from the Caribbean island nation of Antigua and Barbuda.[46] Antigua had challenged American state statutes from Alabama to Wyoming as well as judicial decisions from federal and state

44. The argument that international law can be democracy reinforcing has been made before, but I argue that the typical form of that argument is in error. *See infra* notes 130-131 and accompanying text.

45. 124 S. Ct. 2739 (2004).

46. Request for Consultations by Antigua and Barbuda, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/1, S/L/110 (Mar. 27, 2003).

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courts.[47] If sustained on appeal, that decision holds monumental implications because it presents a template for arguing that many local constraints in the United States on the provision of services via the Internet run afoul of international obligations. The third case study steps into the shoes of a developing country, inquiring into the financial crisis that engulfed Indonesia in 1997 and 1998, a crisis that immiserated one of the largest populations in the world. Here we consider the claim that the IMF has usurped popular sovereignty through its conditional lending facility.

I. THE WRONG ANSWER IS WHAT THE WRONG QUESTION BEGETS

I approach the problem of the democratic legitimacy of the transnational legal process inductively, from a number of flash-point cases of transnational legalism. The cases show that the nationalist critics have erroneously concluded that international law is undemocratic because they have misunderstood what democracy requires; asking the wrong question begets the wrong answer. I begin with the last case of the Supreme Court's 2003 Term, *Sosa v. Alvarez-Machain*, a case that affirms the enforcement of international law by American courts.

A. Sosa v. Alvarez-Machain

"We Americans have a method for making the laws that are over us."[48] Justice Scalia's sixth-grade civics lesson in *Sosa* expressed his frustration with his colleagues who, in his eyes, were turning the keys of our democracy over to foreigners.[49] *Sosa* tested the Alien Tort Statute, a 1789 congressional act that empowered the federal courts to hear claims by "an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[50] In the case before the Court, a Mexican doctor abducted at American direction in Mexico sued for his brief arbitrary

47. The challenged cases include *United States v. Cohen*, 260 F.3d 68 (2d Cir. 2001), and *People ex rel. Vacco v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844 (Sup. Ct. 1999).

48. *Sosa*, 124 S. Ct. at 2776 (Scalia, J., concurring in part and concurring in the judgment).

49. Witness Scalia's multiple invocations of the term "democratic" in his concurrence, implying that anything other than his approach falls short by that metric: "The Framers would, I am confident, be appalled by the proposition that, for example, the American peoples' democratic adoption of the death penalty could be judicially nullified because of the disapproving views of foreigners." *Id.* (citation omitted). "Though we know ourselves to be eminently reasonable, self-awareness of eminent reasonableness is not really a substitute for democratic election." *Id.* "American law—the law made by the people's democratically elected representatives—does not recognize a category of activity that is so universally disapproved by other nations that it is automatically unlawful here, and automatically gives rise to a private action for money damages in federal court." *Id.*

50. 28 U.S.C. § 1350 (2000).

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detention by his Mexican and American captors and argued that it violated international law.[51]

Since its revival in 1980, jurists and academics had denounced that statute as authorizing an open-ended insertion of international norms into U.S. law. Judge Bork argued that, without clear evidence of congressional intent to empower federal judges to construe international law, "to 'construe' is to legislate, to act in the dark."[52] More recently, in the pages of the *Harvard Law Review*, Curtis Bradley and Jack Goldsmith worried about what they saw as a "democratic society increasingly governed by international law."[53]

Finally seized of the issue, the Supreme Court this last Term sided definitively with the transnationalists.[54] The Court held that the Alien Tort Statute's "jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for [a] modest number of international law violations."[55] It accordingly directed judges to examine the "current state of international law, looking to those sources we have long, albeit cautiously, recognized."[56] These sources include not just treaties, but also "'the customs and usages of civilized nations.'"[57] And how are such customs and usages to be recognized? Through reviewing the "'works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.'"[58] The Court held that such an exercise be approached with circumspection and require that international law rules have a "definite content and acceptance among civilized nations."[59] The Court thus empowered federal courts to incorporate into federal common law certain well-defined norms of international law.

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51. This was Alvarez's second round before the Court. He had earlier sought to have a criminal case against him thrown out because it was only made possible by his abduction and removal from Mexico, which he argued was outside the terms of an extradition treaty between the United States and Mexico. The Court held that the treaty did not implicitly prohibit cross-border abduction. United States v. Alvarez-Machain, 504 U.S. 655 (1992).

52. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 815 (1984) (Bork, J., concurring).

53. Bradley & Goldsmith, *Critique*, *supra* note 5, at 821.

54. An amicus brief coauthored by a nationalist, Paul Stephan, argued that tort actions should be available only when authorized by the political branches. Brief for Professors of International Law, Federal Jurisdiction and the Foreign Relations Law of the United States as Amici Curiae in Support of Petitioner, *Sosa* (No. 03-339). William Dodge, a transnationalist, coauthored another brief that argued that tort actions could be founded on federal common law concerning the special case of violations of international law. Brief of Professors of Federal Jurisdiction and Legal History as Amici Curiae in Support of Respondents, *Sosa* (No. 03-339).

55. *Sosa*, 124 S. Ct. at 2761.

56. *Id.* at 2766.

57. *Id.* at 2766-67 (quoting The Paquete Habana, 175 U.S. 677, 700 (1900)).

58. *Id.* at 2767 (quoting The Paquete Habana, 175 U.S. 677, 700 (1900)).

59. *Id.* at 2765.

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Sosa represents a nationalist catastrophe. International law, formed in shadowy realms by unelected actors, many in authoritarian states, is brought home by unelected judges and made actionable in American courts. Popular sovereignty yields to the dictates of an international academic elite, modern publicists working hand in hand with unelected judges. To add insult to injury, the Court recognized that the process of norm identification is not simply a process of discovery, but one of generation.[60] Justice Souter observed the epistemological turn in our historical understanding of the source of common law, from "'a transcendental body of law'"[61] awaiting elaboration to "discretionary judgment" of judges.[62] Despite issuing this judicial license, the Court made no apologies.

However, Souter did offer that Congress could "shut the door to the law of nations entirely" through legislative action or "modify or cancel any judicial decision so far as it rests on recognizing an international norm as such."[63] Souter's trust that the legislature would amend any judicial misstep echoes Gerald Neuman's defense of the Alien Tort Statute, which argued that "federal common law decisions can be overturned by Congress."[64]

But does the possibility of legislative revision bear the weight of democracy? The answer depends on how one defines "democracy." Nationalists seem to describe democracy as demanding that *initial* decisionmaking powers be assigned to Congress. Anything else is inherently illegitimate. Return to Scalia, who would require that any law that is to govern us must *first* have been enacted by popularly elected officials. Anything else is undemocratic. This is, of course, the refrain of the critics of the modern revitalization of the Alien Tort Statute.[65] Nationalists would go so far as to require congressional action before any international law norm could be domesticated.

Bickel and Ely understand the countermajoritarian difficulty very differently. In their view, the problem for democracy lies in people's inability to review or alter laws *after* judicial intervention. Bickel writes, "Judicial review . . . is the power to apply and construe the Constitution, in matters of the greatest moment, against the wishes of a legislative majority,

60. *Id.* at 2762 ("Now, however, in most cases where a court is asked to state or formulate a common law principle in a new context, there is a general understanding that the law is not so much found or discovered as it is either made or created.").

61. *Id.* (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

62. *Id.*

63. *Id.* at 2765.

64. Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371, 383-84 (1997).

65. *See, e.g.*, Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457, 464 (2001) ("[T]his international human rights litigation vests substantial lawmaking authority in unaccountable actors.").

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which is, in turn, powerless to affect the judicial decision."[66] The countermajoritarian difficulty is not that the majority did not author the law, but rather that the majority cannot revise or repeal it. Ely similarly observes that "in non-constitutional contexts, the court's decisions are subject to overrule or alteration by ordinary statute."[67] This possibility of revision and renunciation, as Souter suggests, is amply available in the elaborations of international law under the Alien Tort Statute.

The nationalists are not without a retort. They suggest first that this argument would "justify the creation of *any* (non-constitutional) federal common law."[68] But this hardly follows. The suggestion that there is no democratic deficit in the case of federal common law under the Alien Tort Statute does not imply that there may not be other reasons to eschew the creation of such common law in other contexts. Souter, for example, carefully moors the elaboration of the federal common law in the authorization of the Alien Tort Statute (now § 1350 of title 28): "Section 1350 was enacted on the congressional understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations."[69] The possibility of federal common law in one domain does not necessarily imply federal common law in all domains.

The second nationalist response[70] is to suggest that it may be futile to rely on Congress to do the right thing and overturn judicial common-lawmaking. Paul Stephan writes, "[T]he enactment of legislation is a cumbersome and costly process, more likely than not to be incomplete."[71] This renders the central concern quite plain. The issue reduces to the setting of the default rule—should courts apply customary international law in Alien Tort Statute cases or refuse to do so in the absence of congressional incorporation of the international law norm into national law?[72]

Given that the norm against official torture is the principal customary international law that has been domesticated by American courts in cases of jurisdiction under the Alien Tort Statute,[73] it would seem that the default should favor incorporation. War crimes[74] are likely the second, but a distant

66. BICKEL, *supra* note 2, at 20.

67. ELY, *supra* note 10, at 4.

68. Bradley & Goldsmith, *Illegitimacy*, *supra* note 5, at 347; *see also* Stephan, *supra* note 5, at 247.

69. Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2765 n.19 (2004).

70. The nationalists offer a third argument, based in a dormant Commerce Clause reading of federalism, which Koh deftly counters. *Compare* Bradley & Goldsmith, *Illegitimacy*, *supra* note 5, at 347, *with* Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1848-50 (1998).

71. Stephan, *supra* note 5, at 247.

72. Neuman, *supra* note 64, at 384.

73. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980).

74. *See* Kadic v. Karadzic, 70 F.3d 232, 241 (2d Cir. 1995).

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

Moreover, courts construing international law pursuant to the Alien Tort Statute must act with "great caution"[75] and "restraint."[76] The *Sosa* Court cited three actions recognized by Blackstone and well known at the time of the promulgation of the Judiciary Act of 1789: violation of safe conduct, infringement of the rights of ambassadors, and piracy.[77] It then commanded lower courts to "require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the eighteenth-century paradigms we have recognized."[78] The Court's restraint is not new but rather reflective of the approach suggested by many transnationalist scholars.[79]

Because of the political overtones of many international disputes, the Court affirmed a "policy of case-specific deference to the political branches."[80] For example, cases pending at the time in American courts sought damages from corporations for abetting abuses in South Africa under the apartheid regime, though the government of South Africa had objected that consideration of the issue interfered with its indigenous truth and reconciliation process.[81] In a filing in connection with those pending cases, the State Department had agreed. Such executive suggestions, the Court maintained, should be given substantial weight.

75. Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2764 (2004).

76. *Id.* at 2762.

77. *Id.* at 2756 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *68).

78. *Id.* at 2761-62; *see also id.* at 2765.

79. *See* Ryan Goodman & Derek P. Jinks, Filartiga*'s Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463, 510-11 (1997); Neuman, *supra* note 64, at 376; Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After* Erie, 66 FORDHAM L. REV. 393 (1997).

80. *Sosa*, 124 S. Ct. at 2766 n.21.

81. *Id.*

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Deference to political questions, of course, is one of the passive virtues extolled by Bickel.[82] In the political question doctrine, the act of state doctrine, the doctrine of international comity, the doctrine of forum non conveniens, and the requirements for standing and case or controversy, courts have established an array of devices by which to determine "how much to adjudicate"[83] in international disputes.[84] While Ely did not propose passivity as a solution to any countermajoritarian difficulty, such an approach is not inconsistent with his theory, so long as it does not involve a concession to majority tyranny.

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

Furthermore, taken to its logical conclusion, the nationalist understanding of democratic lawmaking would undermine *all* common law, not just the specialized federal common law authorized in *Sosa*. The vast edifice of corporate law, for example, would be called into question, being grounded on concepts such as fiduciary duties that appear only rarely in codebooks.[85] But the nationalists offer special reasons for disfavoring a federal common law drawn from international law. They suggest that (1) the elaboration of customary international law depends heavily on the

82. *See* BICKEL, *supra* note 2, at 183-98; Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567 (1985).

83. BICKEL, *supra* note 2, at 197.

84. *See* Kadic v. Karadzic, 70 F.3d 232, 249 (2d Cir. 1995) (considering the prudential doctrines of political question and act of state in adjudicating a dispute); Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277, 2302-06 (1991) (describing the political question doctrine and requirements for standing, private causes of action, and self-executing treaties as doctrines of "international passive virtues").

85. *See* Chander, *supra* note 40, at 125-42; *see also* Henry J. Friendly, *In Praise of* Erie—*and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 413, 413-14 (1964) (observing "significant steps toward the development of a federal common law of corporate responsibility" in causes of action implied in securities laws and regulations).

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writings of publicists, the international legal academic elite;[86] (2) international law rules "are not developed in the specific context of U.S. practices, culture, and institutions";[87] and (3) international disputes touch on international politics, better suited to consideration by the political branches.

These concerns are misplaced. First, the fear of the excessive influence of academics suggests that judges are unable to appraise their writings. Given the Executive's ability to provide its own view of international law through letters and amicus briefs to the court and the existence of multiple viewpoints in academic writing, the likelihood that judges will be misled by academics into erroneously finding a cause of action in international law seems remote. And again, the nationalists cannot point to a single case where judges were so misled. Second, even putting aside the fact that the United States has historically been a major proponent and progenitor of international law norms, it seems unlikely that such norms will actually be alien to American practice or culture. To the extent that the United States disagrees with an emerging norm, it can object; customary international law generally does not create obligations for a persistent objector that lodged its objections as the law emerged.[88] Of course, objectors cannot deviate from *jus cogens* norms—those peremptory international law norms with universal application—but it is difficult to imagine a *jus cogens* norm not shared by U.S. practice, culture, and institutions.[89] Again, the nationalists do not point to any particular element of international law that violates U.S. practice or culture. Third, while international disputes may touch on international politics, the judiciary, as I have noted, can manage such conflicts through prudential doctrines, including the consideration of executive suggestion. Finally, whatever the merits of each of these concerns, it remains open to Congress to disagree with any judicial pronouncement of international law. This ultimate democratic channel remains undisturbed.

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86. *See* Stephan, *supra* note 5, at 238 (describing customary international law as "a prefabricated system of rules and norms, constructed by a loose alliance of like-minded academics and international law specialists through a form of advocacy that involves no democratic checks").

87. Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1582 (2003).

88. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. d (1986).

89. The closest possibility for divergence involves the imposition of the death penalty in certain circumstances, but even there (1) the international law norm may not rise to the level of *jus cogens* and (2) the United States has acted to bring itself closer to international norms. *See* Roper v. Simmons, 125 S. Ct. 1183, 1198-200 (2005) (citing views of the world community in declaring the execution of sixteen- and seventeen-year-olds unconstitutional); Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002) (same for mentally retarded persons); Harold Hongju Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085 (2002).

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B. United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services

In 2003, the tiny island nation of Antigua and Barbuda, with a total population not much more than the college town in which I live,[90] charged the world's sole superpower with violating international trade law. Having watched the decimation of its online gambling industry by new American restrictions, the Antiguan government challenged these restrictions in the WTO. Antigua cited specifically the laws of every U.S. state but one and of many U.S. territories as well as various federal laws.[91] Relying on the General Agreement on Trade in Services (GATS), an innovation launched as part of the WTO agreements in 1995, Antigua demanded the right to provide gambling services to Americans via the Internet from its tropical isles.

United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services tests the international trade order's compatibility with democracy.[92] It serves up the nationalist specter: an international tribunal sitting in judgment of the laws of the various states and of Congress. Even more importantly, it does so in the context of American rules regulating trade in services, not goods. The case represents the WTO Dispute Settlement Body's first direct engagement with the Internet. One might even find in the case the seeds of a cross-border revolution in outsourcing of services.

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

The expansion in 1995 of the trade regime into services, long the preserve of local control, exposed even more of a nation-state's regulatory infrastructure to international appraisal. Under GATS, nation-states agreed

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90. Antigua and Barbuda is home to more than 68,320 people, while Davis, California is home to 62,200. CIA, The World Factbook—Antigua and Barbuda, http://www.cia.gov/cia/publications/factbook/geos/ac.html (last updated Feb. 10, 2005) (estimating the population as of July 2004); CITY OF DAVIS, PRELIMINARY BUDGET 2002-2003, at 2-5 (2002), *available at* http://www.city.davis.ca.us/finance/budget/02-03/pdfs/05_02_City_Profile.pdf.

91. *See* Request for Consultations by Antigua and Barbuda, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/1, S/L/110 (Mar. 27, 2003).

92. *Id.*

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to provide other member states with most-favored-nation treatment in services (with specified exceptions), but only agreed to provide national treatment (awarding foreigners the same treatment as citizens) to the extent of explicit commitments in GATT schedules.[93] This reversed the GATT presumption, which obliges national treatment unless an exception is specifically made. The limited nature of GATS commitments reflects hesitancy about the virtues of free trade when it comes to services. Expanding the trade regime to include services is controversial: According to one commentator, "Services provide means to introduce fresh, foreign perspectives, construct cross-border transactions and affiliations, question the value of parochial knowledge and custom, and undermine the competence of local regulation."[94] International rules for services threaten a long history of local services regulation and local systems of service delivery.[95] At the same time, free trade in services expands the constituencies vulnerable to global competition from blue-collar to white-collar employees.

But the critics of GATS, and of the WTO more generally, do not decry the increased competition trade brings. Rather, they fear the loss of local control over public policy in the expansion of the trade regime beyond tariffs. They observe that industry will wield the trade agreements as weapons against national regulation.[96] Moreover, services seem to implicate the most personal of commercial transactions: "By subjecting the service sector to WTO disciplines, almost no human activity from birth (health care) to death (funeral services) remains outside WTO's purview."[97] The death of regulation seems at hand, with consumer and worker protections the first to go.

Antigua's case perfectly illustrates the concern of international trade law's critics, at least at first glance. Antigua challenged a host of American laws that regulate an activity that many find morally repugnant and even dangerous. It even challenged criminal convictions under these laws.[98] Antigua argued that the United States prohibited the cross-border provision

93. CHRISTOPHER ARUP, THE NEW WORLD TRADE ORGANIZATION AGREEMENTS: GLOBALIZING LAW THROUGH SERVICES AND INTELLECTUAL PROPERTY 110-17 (2000).

94. *Id.* at 97.

95. *See* William J. Drake & Kalypso Nicolaïdis, *Ideas, Interests, and Institutionalization: "Trade in Services" and the Uruguay Round*, 46 INT'L ORG. 37, 38 (1992).

96. Bradley, *supra* note 87, at 1574 (arguing that the WTO's Dispute Settlement Body is "reviewing the validity of, and ordering changes to, U.S. domestic laws that affect international trade"); Wallach, *supra* note 18, at 2.

97. Lori Wallach & Patrick Woodall, *The WTO's General Agreement on Trade in Services: Perpetual Servitude*, *in* WALLACH & WOODALL, *supra* note 18, at 109, 110.

98. *See* United States v. Cohen, 260 F.3d 68 (2d Cir. 2001); United States v. Syrax, 235 F.3d 422 (9th Cir. 2000); People *ex rel.* Vacco v. World Interactive Gaming Corp., 714 N.Y.S.2d 844 (Sup. Ct. 1999).

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of gambling services through the Internet, in violation of American commitments under GATS to open "other recreational services" to trade.

The United States challenged Antigua's claim at every turn. It argued that it had never committed to opening up competition in gambling services, which should be considered "sporting" services explicitly carved out from the American liberalization commitment. Even if the United States had made such a commitment, the maintenance of public morals compelled it to prohibit cross-border online gambling.[99] Such operations, the United States argued, might promote money laundering and fraud and risk gambling by youths and addicted adults.[100]

Dispute resolution under GATS follows the same procedure as that for trade in goods.[101] The General Council of the WTO, which is composed of one representative from each WTO member state, sits also as the organization's Dispute Settlement Body (DSB). The decision of the WTO's initial review panel is automatically adopted by the DSB, barring either appeal or unanimous rejection of the report by the DSB. An appeal from the panel decision is heard by three members of the Appellate Body, which is composed of seven individuals serving four-year terms.[102] If the panel or the Appellate Body rules against the respondent, then the respondent must either conform to the obligations or face retaliatory sanctions by the complaining state.[103]

In the Antigua-United States dispute, Director-General Supachai Panitchpakdi appointed the panelists in the absence of agreement among the parties.[104] He chose as chairperson B.K. Zutshi, a former Indian ambassador to GATT and chief negotiator for New Delhi on services during the Uruguay Round, and as panelists Virachai Plasai, the head of the treaty

99. A nation is permitted to maintain a trade-restrictive measure if "necessary to protect public morals or to maintain public order." GATS, *supra* note 23, art. XIV(a), 33 I.L.M. at 1177.

100. First Written Submission of the United States, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 12, WT/DS285 (Nov. 7, 2003), *available at* http://ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file732_5581.pdf.

101. *See generally* Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125, 1226 (1994) [hereinafter DSU].

102. For a photograph of the current members, see Figure 1.

103. DSU, *supra* note 101, art. 19(1), 33 I.L.M. at 1237 (requiring conformity for measures inconsistent with WTO obligations); GATS, *supra* note 23, art. XXIII(2), 33 I.L.M. at 1183 (authorizing a member state, acting after the approval of the Dispute Settlement Body, to suspend its obligations and commitments with respect to the noncompliant state).

104. Constitution of the Panel Established at the Request of Antigua and Barbuda, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 3, WT/DS285/3 (Aug. 26, 2003).

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division of Thailand's Ministry of Foreign Affairs, and Richard Plender, a trade attorney based in the United Kingdom.[105]

The panel's unanimous ruling in favor of Antigua was hailed by Antigua's WTO ambassador as a "great victory" for a "little country."[106] The panel held that the United States had indeed committed to market access for gambling services and that the commitment extended to all means of delivery, including the Internet.[107] Moreover, the panel rejected the American defense of the protection of public morals, concluding that the United States had failed to talk in good faith with Antigua about effecting a solution that might have met American concerns while permitting Antigua market access.[108]

Whatever the results of the pending appeal of the panel decision, the threat to American democracy from a small Caribbean nation seems overblown. Even after losing a case in the WTO, popular sovereignty in the United States remains secure. Should the United States negotiate to permit Antiguan corporations (many of which are likely to be owned by Americans[109]) to provide gambling services to Americans through the Internet, such services are likely to be strictly regulated to allay concerns about money laundering, fraud, and gambling by minors.[110]

But the United States does not even have to go that far. It could simply permit Antigua to resume its case and seek DSB authorization for retaliatory sanctions. Antigua claims the loss of ninety billion dollars over three years because of the American rules[111] and thus could seek to exact an amount from U.S. exporters equivalent to what it expects to continue to lose in the future.[112] As of October 31, 2004, the WTO had authorized the

105. *Id.* ¶ 4.

106. Daniel Pruzin, *Antigua-Barbuda Wins WTO Interim Ruling Against U.S. Internet Gambling Restrictions*, 21 Int'l Trade Rep. (BNA) 514, 514 (Mar. 25, 2004) (internal quotation marks omitted).

107. Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 6.287, WT/DS285/R (Nov. 10, 2004).

108. *Id.* ¶ 6.534. The panel decision was not unprecedented in international law. In a case decided in 2003, the European Court of Justice held that European obstacles to the operations of online gambling companies from the United Kingdom might violate the European Union's guarantee of the freedom to provide services, unless the restrictions could be justified by legitimate national goals. *See* Case C-243/01, Criminal Proceedings Against Gambelli, Nov. 6, 2003, 2003 WL 102098.

109. Antigua welcomes foreign investors, generally permitting foreigners to own one hundred percent of a local corporation. *See* High Comm'n for Ant. & Barb., Incentives for Investors, http://www.antigua-barbuda.com/finance_investment/incentives_for_investors.asp (last visited Mar. 3, 2005).

110. One can imagine, for example, requiring authentication procedures that help assure the age of the gambler and disallow participation by anonymous persons.

111. Pruzin, *supra* note 106, at 514.

112. The United States exported $127 million worth of goods to Antigua in 2003. Census Bureau, Foreign Trade Statistics, http://www.census.gov/foreign-trade/balance/c2484.html (last modified Feb. 7, 2005).

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suspension of concessions five times, indicating that in those cases countries had refused to comply with WTO rulings.[113] Recently, the WTO authorized sanctions for the American failure to repeal a provision in an antidumping law known as the Byrd Amendment, which transfers fines exacted on "dumping" foreign companies to their American competitors.[114] That case is likely to prove to be quite expensive, because the winning complainants include many of the world's largest economies: Brazil, Canada, Chile, the European Union, India, Japan, Mexico, and South Korea. The European Union, for its part, has refused to comply fully with the requirements of WTO rulings in two cases involving animals.[115] In one case, the European Union refused to withdraw a regulation barring the import of fur from animals trapped through leghold traps.[116] And despite an adverse Appellate Body ruling, the European Union continues its ban on the import of beef from countries employing certain hormones for growth. In the latter case, the United States and Canada imposed, with WTO authorization, retaliatory duties of $116.8 million (U.S.) and $11.3 million (Canadian), respectively.[117]

Noncompliance does not come free. In addition to the harm caused to a nation's exporters by retaliatory sanctions, the costs of noncompliance would be impediments to free trade, with their concomitant deadweight losses generally dispersed widely among the nation's and the world's consumers. Equally important, by refusing to stand by its WTO commitments, the United States would undermine its own efforts to exact compliance from the many states it has accused of abridging their WTO commitments.[118] As Koh notes, "[F]or any nation consciously to ignore

113. Dispute Settlement Body, *Draft Annual Report (2004): Addendum: Overview of the State of Play of WTO Disputes*, WT/DSB/W/269/Add.1 (Nov. 11, 2004). The cases are the U.S. and Ecuadorian claims against the European Union regarding bananas, the U.S. and Canadian claims against the European Union regarding hormones and meat, the Canadian claim against Brazil regarding export financing for aircraft, the European Union claim against the United States regarding the taxation of "foreign sales corporations," and the Brazilian claim against Canada regarding financial support for aircraft. *Id.* The number of claims would be higher if one were to count separately all claimants with respect to each subject in dispute—for instance, if one counted the Ecuadorian and American claims against the European Union as two cases, rather than one as I have counted them here.

114. *See, e.g.*, Original Complaint by Brazil, *United States—Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/ARB/BRA (Aug. 31, 2004).

115. *See* Sebastiaan Princen, *EC Compliance with WTO Law: The Interplay of Law and Politics*, 15 EUR. J. INT'L L. 555 (2004).

116. After winning the case, the United States and Canada agreed nonetheless to meet certain standards for fur traps to satisfy the European Union's demands. *Id.* at 563-65. Because of this agreement, the European Union did not face retaliatory sanctions.

117. *Id.* at 570.

118. *See* OFFICE OF THE U.S. TRADE REPRESENTATIVE, DISPUTE SETTLEMENT UPDATE 1-6 (2004), *available at* http://ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/asset_upload_file316_5697.pdf (summarizing pending disputes brought by the United States in the WTO).

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global standards not only would ensure constant frictions with the rest of the world, but also would diminish that nation's ability to invoke those international rules that served its own national purposes."[119] If noncompliance became routine, then the benefits of trade liberalization would be eroded and economic productivity stifled. Nonetheless, the availability of that option helps ensure the trade regime's compatibility with national democracy. The fact that a nation can refuse to comply with a WTO ruling does not render the WTO Dispute Settlement Body a dead letter. Exporters in a given country who suffer retaliatory sanctions are likely to employ local political processes to try to bring the country into compliance. The European Union has even targeted American exporters in politically powerful swing states, hoping thereby to increase political pressures for compliance. But this politicking is exactly what democracy involves.

Yet another option exists that is compatible with democracy. The United States might simply offer to pay Antigua the amount it has lost—and will continue to lose—due to the restrictions. This was the American strategy in response to a 2000 WTO ruling that American music licensing exemptions (e.g., for restaurants) violated TRIPS's[120] copyright obligations.[121] The United States made a lump sum payment of $3.3 million to the European Union, to a fund established to finance activities of general interest to music copyright holders.[122] The arrangement covers the three-year period ending December 21, 2004.[123] As in the breach of a contract, the breaching party can simply make the counterparty whole and thus largely indifferent to the breach.[124] This suggests a rather happy, democracy-compatible view of the WTO regime.

But why should the WTO have the right to put countries in the position where, through their democratic processes, they must decide either to acquiesce to its rulings or accept financial sanction? Because each member state accepted that regime through its internal political processes, seeing it as a means to induce trading partners to comply with commitments to liberalize trade.[125]

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119. Koh, *supra* note 33, at 44.

120. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125, 1197 (1994).

121. Panel Report, *United States—Section 110(5) of the US Copyright Act*, WT/DS160/R (June 15, 2000).

122. OFFICE OF THE U.S. TRADE REPRESENTATIVE, *supra* note 118, at 10.

123. *Id.*

124. Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 J. LEGAL STUD. S179, S181-82 (2002).

125. *Cf.* John H. Jackson, *The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results*, 36 COLUM. J. TRANSNAT'L L. 157, 177-78 (1997)

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Phillip Trimble argues that "popular review" of international decisions would sustain democracy in the face of international institutions, but only where such review would permit the people "to reject the decision . . . without being punished" for that rejection.[126] But why does such review have to be cost free in order to be democratic? As a matter of course, democracies make choices that are costly. In a related argument, Stephan suggests that the right to exit from an international treaty commitment is an "empty threat" because "the cost of withdrawal likely will exceed the harm caused by any particular decision reached at the international level."[127] But such a cost-benefit analysis does not prove the right to exit to be empty; rather, it suggests that the harm is not particularly severe and that the benefit of entering into multilateral arrangements more than compensates for any associated costs. What's more, the argument concedes that the international agreement is better for the country than its absence would be. Should not a democracy be able to choose an international commitment that it feels is likely to prove beneficial over time? Finally, an objecting country could repudiate its obligations selectively rather than renounce a given treaty in its entirety.

John Jackson has suggested that, under international law, the United States *must* comply with a final DSB ruling—that the WTO system does not permit efficient breaches, at least not lasting ones.[128] If a nation's ordinary political processes cannot reverse an earlier commitment, even after paying a price, it raises concerns for democratic legitimacy. Such a legislative entrenchment, where one session of Congress purports to bind future sessions, undermines continuing popular sovereignty.[129] But the handful of cases in which states (including Brazil, Canada, and the United States as well as the member states of the European Union) have chosen to face sanctions rather than conform to WTO rulings suggests that

("[Many states believe that the] WTO treaty texts are vitally important to improving a rule-oriented international economic system that should enhance the predictability and stability of the circumstances of international commerce.").

126. Phillip R. Trimble, *Globalization, International Institutions, and the Erosion of National Sovereignty and Democracy*, 95 MICH. L. REV. 1944, 1968 (1997).

127. Stephan, *supra* note 5, at 250.

128. John H. Jackson, *International Law Status of WTO Dispute Settlement Reports: Obligation To Comply or Option To "Buy Out"?*, 98 AM. J. INT'L L. 109, 123 (2004). *But see* Schwartz & Sykes, *supra* note 124, at S190-92.

129. *See generally* Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. B. FOUND. RES. J. 379, 403-05 (observing the transitory nature of the legislative mandate, which allows the people to speak through periodic elections); Anupam Chander, Note, *Sovereignty, Referenda, and the Entrenchment of a United Kingdom Bill of Rights*, 101 YALE L.J. 457, 471, 471-73 (1991) ("Democracy cannot be sustained if more and more subjects can continually be declared outside the operation of normal democratic processes.").

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compliance may not be necessary, though the paucity of such cases reflects the general wisdom of compliance.

The possibility of noncompliance suggests that one popular argument about international trade regimes may be precisely backward. Defenders of such regimes suggest that international trade law enhances democracy by committing a country to free trade, benefiting consumers instead of narrow, entrenched constituencies that profit from protectionist policies. John McGinnis and Mark Movsesian explain that "[i]nternational free trade and domestic democracy share a common enemy—protectionist interest groups. Therefore, constitutive structures that restrain such groups can simultaneously reinforce both trade and democracy."[130] Referring to the fast-track procedure whereby Congress granted the Executive the power to negotiate wide-ranging trade agreements that cannot be disaggregated on congressional review, Robert Keohane and Joseph Nye, Jr. write, "Congress agreed to 'tie itself to the mast' as it sailed past specific protectionist sirens."[131] But the possibility of noncompliance—either in the form of accepting retaliatory sanctions or of making compensating payments—suggests that the international trade regime may not play this vaunted role with great certainty. Having lost when trade commitments were being made, constituencies seeking protection against international competition might instead seek to head off any enforcement of those obligations.

The irony is that democracy lies not in committing oneself to free trade above all else, as McGinnis and others would argue, but in being able to choose another important value on an ongoing basis without the dead hand of the past for a ruler. Democracy persists as long as We the People, even when faced with a WTO ruling that calls into question a host of local regulations, can still assert our will over such regulation through normal political processes. Such a possibility strengthens, rather than weakens, international law, confirming its compatibility with national democracy.

C. *Indonesia and the International Monetary Fund*

> Joko works as a *becak* (three-wheeler) driver. . . . Before the economic crisis, he could earn a profit of Rp. 8,000 to Rp. 10,000 a day (US$1 to $1.25). Now, though, he has very few customers. He sometimes comes home in the evenings without any earnings at all

130. John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 604 (2000).

131. Robert O. Keohane & Joseph S. Nye, Jr., *The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy*, *in* EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM 264, 267 (Roger B. Porter et al. eds., 2001).

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> and even asks [his spouse] Wulan for money to pay the daily *becak* rent. If he defaults on the rent, the owner may not let him operate the vehicle again. . . .
>
> . . . Wulan used to collect scrap materials to help earn income for the family, but with no one at home to care for her children, they became sick and malnourished. She stopped working in order to care for and spend time with them, but now she has no money for daily necessities, nor can she afford to send her children to school. Whenever she is completely out of money, Wulan pawns her clothes at a government-run pawnshop for Rp. 5,000 (75 cents) apiece. She has no other assets and very few clothes left. She dreads the day when she will be forced to borrow from the local moneylender, who charges 20 percent interest per month.[132]

The immiseration of millions of Indonesians like Joko and Wulan in 1997 and 1998 resulted from forces far beyond their control. A currency crisis in Thailand in May 1997 caused the international financial markets to review holdings in all emerging-market countries, especially in Southeast Asia, for evidence of error. Until then, Indonesia had been a darling of the investment community.[133] It ran a moderate current account deficit of less than four percent of GDP.[134] Its public fiscal balance was in surplus.[135] But despite "healthy" fundamentals,[136] market sentiment turned bearish, and Indonesia suffered the national version of a bank run.[137] Foreigners and rich Indonesians withdrew their money in search of safer banks and safer currencies. A crisis of confidence destabilized the financial markets, which

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

133. INDEP. EVALUATION OFFICE, IMF, THE IMF AND RECENT CAPITAL ACCOUNT CRISES: INDONESIA, KOREA, BRAZIL 61 (2003) (noting that foreign private debt in Indonesia rose from $38 billion in 1995 to $65 billion just before the crisis and $82 billion by the end of 1997).

134. *Id.* at 62. By comparison, in 2003 the U.S. current account deficit was 4.8% of GDP. This statistic is calculated from figures for current account deficit, *see* News Release, Bureau of Economic Analysis, U.S. International Transactions (Dec. 16, 2004), *available at* http://www.bea.gov/bea/newsrel/transnewsrelease.htm (reporting U.S. current account deficit of $531 billion in 2003), and figures for GDP, *see* Bureau of Econ. Analysis, Current-Dollar and "Real" Gross Domestic Product (Feb. 25, 2005) (unpublished table), *available at* http://www.bea.doc.gov/bea/dn/gdplev.xls (reporting U.S. GDP of $11 trillion in 2003).

135. INDEP. EVALUATION OFFICE, *supra* note 133, at 62 fig.A1.1. By contrast, the U.S. federal budget deficit was 3.4% of GDP in 2003. CBO, THE CYCLICALLY ADJUSTED AND STANDARDIZED BUDGET MEASURES: UPDATED ESTIMATES 2 tbl.1 (2004), *available at* http://www.cbo.gov/ftpdocs/58xx/doc5802/09-14-BudgetMeasures.pdf.

136. Richard Borsuk & Jay Solomon, *Indonesia Might Need IMF Aid, Economists Say*, WALL ST. J., Oct. 7, 1997, at A17.

137. *See* STEPHEN GRENVILLE, IMF, NO. BP/04/3, THE IMF AND THE INDONESIAN CRISIS 9-12 (2004), *available at* http://www.imf.org/External/NP/ieo/2004/bckgn/BP043.pdf.

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in turn destabilized the real economy, which in turn reduced confidence.[138] Indonesia went from "being a miracle to needing one."[139] It was the hardest hit of the Asian tigers in the financial crisis, suffering the deepest and most prolonged GDP decline—real GDP fell thirteen percent during the 1998-1999 fiscal year.[140] While the previous two decades had seen the proportion of the population in poverty decline from sixty percent to twelve percent, the crisis left more than a quarter of Indonesia's 207 million people in poverty.[141] Because of the crisis, more than twenty-five million people joined the ranks of the poor.

But Michel Camdessus, the IMF's managing director, saw the crisis as a "'blessing in disguise,'" providing an opportunity to make needed reforms in an authoritarian system that gave state preferences to President Suharto's family and friends.[142] Before it committed funds to Indonesia, the IMF insisted on "structural conditionality," requiring not only reforms in the banking sector at the heart of the crisis but also in the industrial and agricultural sectors. The IMF demanded deregulation in numerous industries, including wood, cloves, and palm oil.[143] Paul Volcker derided the IMF structural conditionality outside the financial sector as looking less like a program to solve a financial crisis and more like a "'recipe'" for cooking.[144] The public centerpiece of the program was the cancellation of the National Car Project, which had sought to create a local automotive industry. In many people's eyes, the National Car Project wasted state resources on an uneconomic vanity project and was especially suspect because it involved Suharto's son. The United States, the European Union, and Japan had long sought the cancellation of the National Car Project, and had even brought complaints before the WTO in 1996 that Indonesia was

138. *See* IMF Staff, Recovery from the Asian Crisis and the Role of the IMF, http://www.imf.org/external/np/exr/ib/2000/062300.htm#II (last updated June 23, 2000) ("[A] change in market sentiment could and did lead into a vicious circle of currency depreciation, insolvency, and capital outflows, which was difficult to stop.").

139. *See* EAST ASIA IN CRISIS: FROM BEING A MIRACLE TO NEEDING ONE? (Ross H. McLeod & Ross Garnaut eds., 1998).

140. By contrast, during the Great Depression real GDP in the United States fell thirty percent in the period from 1929 to 1933, and it fell two percent during the recession of 1981-1982. *Great Depression*, ENCYCLOPAEDIA BRITANNICA ONLINE, http://search.eb.com/eb/article?tocId=234440 (last visited Mar. 3, 2005).

141. Mukherjee, *supra* note 132, at 183 (noting that in late 1998 and early 1999 the poverty rate reached twenty-seven percent).

142. Richard Borsuk, *IMF Head Says Indonesian Crisis Could Be a Blessing*, WALL ST. J., Nov. 13, 1997, at A19; *see also* INDEP. EVALUATION OFFICE, *supra* note 133, at 76 (describing opportunities for reform during crisis); Michel Camdessus, The Asian Financial Crisis and the Opportunities of Globalization, Address at the Second Committee of the United Nations General Assembly (Oct. 31, 1997), *available at* http://www.imf.org/external/np/speeches/1997/mds9715.htm (same).

143. INDEP. EVALUATION OFFICE, *supra* note 133, at 77.

144. *Id.*; *see also* GRENVILLE, *supra* note 137, at 12 n.18.

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violating its national treatment obligation through preferences for Indonesian-made car parts.[145]

Picture January 1998: IMF Managing Director Michel Camdessus, his demeanor stern, arms folded, standing over a hunched President Suharto as he signs the letter of intent with the IMF.[146] Later that year, Indonesian economic officials agreed to restructure private debt, avoiding default by converting short-term private-sector obligations into long-term government-guaranteed obligations.[147] This agreement, blessed by the IMF, was reached in Frankfurt. Years later, an internal investigation at the IMF would concede problems with feelings of "country ownership" vis-à-vis the IMF program.[148] It is easy to see why critics of the IMF might complain of a democracy deficit. The people most affected by the IMF's operations—those in the states that borrow from the IMF—have little representation among its governors.[149]

Before we seek to appraise the IMF's democratic legitimacy, it is useful to distinguish between two visions of democracy—call the first "global democracy" and the second "national democracy." The first conception imagines a democracy at the global level, encompassing all the world's people, where humankind is the sovereign. The second conception imagines a world composed of democracies operating at the nation-state level, with popular sovereignty largely within national boundaries. These may seem too narrow a set of possibilities given the complexity of today's world, a world in which increasingly there are overlapping sovereignties.[150] Yet the principal mechanism through which democracy is exercised remains the nation-state system.

The IMF, for its part, does not claim to be globally democratic. Like all other major international institutions, it does not offer a franchise to the people of the world. Unlike many international institutions, the IMF does not even operate on the principle of one nation, one vote. Rather, voting power is distributed according to each member's contributions to IMF

145. The WTO panel decisions ultimately were resolved in the complainants' favor. *See* Panel Report, *Indonesia—Certain Measures Affecting the Automobile Industry*, WT/DS54/R et al. (July 2, 1998); GRENVILLE, *supra* note 137, at 12 n.18.

146. GRENVILLE, *supra* note 137, at 11 n.16. The picture itself may be viewed at David Bourchier, Face-Off in Jakarta: Suharto vs the IMF, http://wwwarc.murdoch.edu.au/asiaview/apr98/jakarta.htm (last visited Mar. 3, 2005).

147. INDEP. EVALUATION OFFICE, *supra* note 133, at 78.

148. *Id.* at 79.

149. John W. Head, *Seven Deadly Sins: An Assessment of Criticisms Directed at the International Monetary Fund*, 52 U. KAN. L. REV. 521, 532 (2004); *see* Catherine H. Lee, Comment, *To Thine Ownself Be True: IMF Conditionality and Erosion of Economic Sovereignty in the Asian Financial Crisis*, 24 U. PA. J. INT'L ECON. L. 875 (2003); John V. Paddock, Comment, *IMF Policy and the Argentine Crisis*, 34 U. MIAMI INTER-AM. L. REV. 155, 180-81 (2002).

150. *See* Anupam Chander, *Diaspora Bonds*, 76 N.Y.U. L. REV. 1005, 1048-50 (2001).

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capital, which are in turn based largely on states' relative size in the world economy. The governors and directors representing the United States, Japan, Germany, France, and the United Kingdom wield voting power far in excess of their countries' relative populations: 17.14%, 6.15%, 6.01%, 4.96%, and 4.96%, respectively, of the total votes.[151] The multilateral economic institutions' globally undemocratic character is confirmed in the selection of their leaders, with the managing director of the IMF and the president of the World Bank selected, in an unwritten agreement among the major voting powers, "according to the wishes of the United States (in respect of the World Bank) or western Europe (in respect of the IMF)."[152]

The closer issue is whether the IMF is compatible with national democracy. Can decisions made in the IMF's Washington headquarters or in conference rooms in Frankfurt be consistent with Indonesian popular sovereignty?

Consider the IMF's own appraisal of its intervention in Indonesia.[153] That review suggests that, with respect to the crucial banking sector, "the IMF identified the key issues but *did not take a strong enough position.*"[154] While the IMF acknowledges errors in its advice, the "single greatest cause of the failure of the November 1997 program was the lack of a comprehensive bank restructuring strategy."[155] Should it have the crisis to do over again, it seems the IMF would have adopted a stronger, *more* insistent stance. The IMF seems to believe that enlightened rule from afar is superior to local dictatorial rule. Camdessus, a Frenchman, would better protect the people of Indonesia than Suharto would. Indeed, the IMF's post-crisis assessment concludes that "most of the reform measures [required by the IMF] were almost universally applauded within Indonesia, except by a small number of powerful elites."[156] The problem of the lack of a feeling of "country ownership" in Indonesia, the IMF evaluation suggests, resulted

151. *See* IMF, IMF Members' Quotas and Voting Power, and IMF Board of Governors, http://www.imf.org/external/np/sec/memdir/members.htm (last updated Mar. 3, 2005). The IMF Executive Board has recently considered revising the quota formula, including perhaps increasing representation for countries that receive large capital flows. IMF, Report of the IMF Executive Board to the International Monetary and Financial Committee (IMFC) on Quotas, Voice and Representation (Sept. 12, 2003) (unpublished manuscript), *available at* http://www.imf.org/external/np/fin/2003/quota/eng/091203.htm.

152. Ngaire Woods, *Making the IMF and the World Bank More Accountable*, 77 INT'L AFF. 83, 88 (2001). Similarly, the European Union and the United States assert powerful influence over WTO decisionmaking. *See* Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247, 264-67 (2004).

153. In 2001, the IMF established an Independent Evaluation Office to review IMF interventions. That office evaluated the IMF's conduct in three financial crises—Indonesia in 1997-1998, Korea in 1997-1998, and Brazil in 1998-1999—and issued its appraisal in 2003. Montek S. Ahluwalia, *Foreword* to INDEP. EVALUATION OFFICE, *supra* note 133, at vii.

154. INDEP. EVALUATION OFFICE, *supra* note 133, at 83 (emphasis added).

155. *Id.* at 1.

156. *Id.* at 79.

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because "the key political authority, the President, did not buy into the reform process."[157] For the IMF, establishing "country ownership" of the reform program requires "an effective communications strategy."[158]

While the IMF argument may have some traction when it comes to authoritarian states—internationally reputable technocrats might make for better philosopher kings than local dictators—in the case of Indonesia, several factors suggest the IMF overreached. First, the local autocrats had in place a well-regarded and proven economic team with a track record of successful economic management, at least before the financial crisis. Second, the international advisers might have been compromised by commitments to deregulatory measures and the sanctity of contract, commitments that served the economic interests of the IMF's major shareholders.[159] Third, the international community has not vested the IMF with the power to employ its authority and capital to act as "king-unmaker."[160] Indeed, even after the installation of a democratically elected government in Indonesia, the IMF, confident of its own prescriptions, resisted the new government's plan to anchor the rupiah through a currency board.[161]

Defenders of the IMF are not without alternative arguments. Indeed, an argument can be made that IMF intervention strengthened democracy in Indonesia. The IMF intervention followed only upon an Indonesian request for assistance. Unlike the WTO, which imposes ongoing obligations on its members, the IMF imposes substantive policy obligations only on those nations that seek its assistance on one-off bases. In October 1997, after watching the rupiah tumble thirty-five percent, Indonesia turned to the IMF for assistance to help restore international confidence in the country.[162] The IMF made available billions of dollars in loans, but it expected that the country would abide by economically sound policies. The deal struck with the IMF was a contract—imposing obligations on both parties. The IMF structural conditionality was a component of a deal that was, overall,

157. *Id.*

158. *Id.* at 43. Jeffrey Sachs observes that for the IMF, "'[o]wnership' is simply a buzzword meaning happier compliance with the directives from Washington." Jeffrey Sachs, *The IMF and the Asian Flu*, AM. PROSPECT, Mar.-Apr. 1998, at 16, 21.

159. *See* Peter Waldman, *Indonesia Sours on U.S. and Exposes Weakness in American Behavior*, WALL ST. J. EUR., Feb. 11, 2004, at A1 (noting that after Suharto resigned, "American diplomats and legislators strove to protect [Indonesian] contracts" with Americans).

160. Editorial, *IMF 1, Democracy 0*, ASIAN WALL ST. J., June 21, 1999, at 14.

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

162. Richard Borsuk & Darren McDermott, *Indonesia Turns to IMF for Aid*, WALL ST. J., Oct. 9, 1997, at A13.

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beneficial to the country and its people. At least this must be the ex ante view of the nation entering into such an agreement.

Contracts, of course, are an expression of sovereignty and autonomy. Historically, slaves and women were denied the right to contract on their own behalf, further reducing their ability to control their environments. Yet contracts can have coercive features. Contracting during crises is especially suspect. When one party lacks the power to say no without disastrous consequences, the terms of the deal may be unjust.[163] Desperate exchanges must be judged carefully. Indeed, at common law, such deals may be unenforceable if one party employed its monopoly power over a necessary resource to extract an extravagant price. Moreover, in the case of international agreements between the government of a country and a foreign financial institution, it is not always to be assumed that the government's motivation in entering a contract is to benefit the people.[164]

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

> When the most powerful governments of the world inform a poor developing country that it must agree with the IMF or else lose access to foreign aid, the goodwill of major governments, the chances for debt restructuring, and the confidence of private markets (which are encouraged by the G-7 to use IMF agreements as focal points for their own bargaining), the notion of voluntarism is a bit stretched.[165]

The world financial community's assessment of a country in crisis follows largely the IMF's views, and thus states reject the IMF at their own peril. Jeffrey Sachs writes, "The IMF gets its way in the developing world because to disagree publicly with the IMF is viewed in the international community as rejecting financial rectitude itself."[166]

Of course, immense pressure is not the same as inescapable coercion. Indonesia's neighbor, Malaysia, pointedly did not seek an IMF program of financial assistance. This left Malaysia free to adopt policies that the IMF would likely not have tolerated, principally the institution of temporary

163. Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 754-63 (1982).

164. *See, e.g.*, Anupam Chander, *Odious Securitization*, 53 EMORY L.J. 923, 924-27 (2004).

165. Sachs, *supra* note 158, at 18.

166. *Id.*

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capital controls to slow the outflow of capital from the country.[167] But Malaysia's case was different from Indonesia's, and few countries are willing to risk venturing alone on their own program in the midst of a financial crisis.[168] Rejection may only be a theoretical possibility.

Not only is *rejection* of the IMF's program extremely unlikely, even *review* of that program has historically been difficult. The letter of intent that Suharto signed ceremoniously in public was not itself made public, and thus the exact nature of the conditions that he had accepted were unknown. Secrecy in such conditions makes it difficult for the populace to review, revise, or reject the IMF's conditionality.[169] (The IMF has made public many of its letters of intent subsequent to the Indonesian crisis.)

I have assumed thus far that the IMF's conditionality is oriented toward improving the national economy. But what if the IMF conditioned its aid on the institution of reforms designed to protect besieged minority communities within the nation-state?[170] Such a move might well be consistent with Ely's version of democracy. Ely sees such a protective stance as appropriate for unelected judges because it preserves the equality of the members of society who are unlikely to be protected through majoritarian processes. I return to this claim in Part II.

Joko and Wulan, the couple at grave risk as a result of the Indonesian financial crisis, are powerless in the face of national and international economic and political forces. Doing away with international institutions may, however, do little to remedy their plight. Rather, international institutions need to be careful not to exploit their roles in a crisis by demanding reforms far beyond those necessary to deal with the crisis at hand.[171]

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167. On the Malaysian capital controls, see JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 122-25 (2002); and Ethan Kaplan & Dani Rodrik, *Did the Malaysian Capital Controls Work?*, *in* PREVENTING CURRENCY CRISES IN EMERGING MARKETS 393 (Sebastian Edwards & Jeffrey A. Frankel eds., 2002).

168. Paul Krugman's call in *Fortune* for capital controls helped assure the Malaysian authorities that not everyone in the international finance community would denounce their economic heterodoxy. *See* Paul Krugman, *Saving Asia: It's Time To Get Radical*, FORTUNE, Sept. 7, 1998, at 74.

169. *See* STIGLITZ, *supra* note 167, at 228-29 ("The absence of open discourse means that models and policies are not subjected to timely criticism. . . . Secrecy also undermines democracy."); Sachs, *supra* note 158, at 21 ("[A]ll IMF program documents should be made . . . open to public debate and critical scrutiny.").

170. *Cf.* Galit A. Sarfaty, Note, *The World Bank and the Internalization of Indigenous Rights Norms*, 114 YALE L.J. (forthcoming May 2005) (commending World Bank efforts to tie assistance to improved treatment of indigenous peoples).

171. Yet another possibility is the emergence of well-capitalized regional institutions to address local difficulties. In 1997, Japan offered $100 billion to establish an Asian Monetary Fund, an offer that was rebuffed by the United States and the IMF. STIGLITZ, *supra* note 167, at 112. Regional institutions might be more likely to restrain the policy demands they make on local states.

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II. DISCOVERING FUNDAMENTAL VALUES IN INTERNATIONAL LAW

International law can be understood as simply the solution to the various collective action problems that afflict humankind, from transboundary environmental flows to the increasingly rapid movement of capital and people.[172] But this proves an inadequate basis for much of the edifice of international law. Human rights law, specifically, is difficult to characterize as a response to an *n*-person prisoners' dilemma. The two modes of international law—the first, as common endeavor with respect to common problems, and the second, as fundamental human rights—pose different sets of concerns for compatibility with national democracy. I consider each in turn to demonstrate that international law, in both these modes, buttresses rather than erodes national democracy.

A. *International Law as Common Endeavor*

The consensual admission of states to international legal regimes furthers those states' ability to regulate their environment in an increasingly interrelated world.[173] Consent is a touchstone of all treaty-based international institutions, and it exists (at least indirectly) in customary international law through the persistent objector doctrine.[174] International law thus embodies sovereignty itself—the ability to give law unto oneself, including through contracts. But consensual entry to a regime does not immunize that regime against attack. The WTO and the IMF, for example, remain controversial even though their dictates (styled as "conditions" in the case of the IMF) depend on the consent of states to such international authority. In Part I, I suggested that this nationalist critique was misplaced. Nationalists ask the wrong question to test the compatibility of national democracy with the transnational legal process (namely, Are foreigners making decisions affecting Americans?), leading inevitably to the conclusion that democracy and international law are fundamentally incompatible. I suggested that posing the right question (namely, Do We the People retain the power to review international obligations through ordinary political processes?) helps us recognize the compatibility of democracy and international law.

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172. *See* Robert O. Keohane, *The Demand for International Regimes*, *in* INTERNATIONAL REGIMES 141, 170-71 (Stephen D. Krasner ed., 1983) (arguing that international regimes arise where there is market failure, including the problem of public goods, in international relations); Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1402 (1999) (describing legal and international relations scholars who take such a view).

173. *See* Kal Raustiala, *Rethinking the Sovereignty Debate in International Economic Law*, 6 J. INT'L ECON. L. 841 (2003).

174. *See supra* note 88 and accompanying text.

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Relying on three case studies, I demonstrated that international law permits the people (at least those of economically powerful states) to review, revise, and reject its rules. Not only is admission to international legal regimes consensual, the international legal obligations established by those regimes are not of a constitutional order and thus do not require higher lawmaking to review, revise, or reject them. That is, they are not constitutionally entrenched and do not disable future iterations of We the People from remaking the obligations for themselves. By contrast, Bickel and Ely are concerned about a high court capable of pronouncements of a constitutional character, not subject to review through the ordinary political process.[175] This is not to say that international law cannot be constitutional; the compacts forming the European Union attest to that possibility. Rather my claim is that the principal objects of the nationalist critique—from NAFTA and the WTO to the International Criminal Court—do not amend the United States Constitution (nor for that matter the Mexican or Canadian Constitutions).

Yet Ely has another concern about the ordinary political process: a legislature that refused to legislate, one that preferred to transfer decisionmaking responsibility to administrative agencies.[176] Recently, scholars have applied the nondelegation doctrine to the transnational legal process, arguing that certain international institutions might violate the principle,[177] even while acknowledging that that principle has little vitality in contemporary constitutional jurisprudence. I suggest that this application is inapt, at least when viewed from Ely's perspective. Ely is concerned about legislative inertia prompted by a desire to avoid difficult questions. That is plainly not the motivation for legislative approval of the vesting of decisionmaking authority in international institutions. International tribunals are created because it is necessary to have a neutral arbiter of international rules. Moreover, the authority granted to such institutions is not open-ended but rather carefully delimited in heavily negotiated international treaties. It is far from the delegation without "policy direction" about which Ely worries.[178]

Slaughter has described the difficulties created for accountability by the rise of transgovernmental networks of officials.[179] While institutions such

175. *See supra* notes 66-67 and accompanying text.

176. *See* ELY, *supra* note 10, at 131-34.

177. *See* Bradley, *supra* note 87; Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71 (2000); Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492 (2004).

178. *See* ELY, *supra* note 10, at 133.

179. Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, 24 MICH. J. INT'L L. 1041 (2003).

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as the Basel Committee on Banking Supervision are certainly recondite, both entry into such institutions and the enforcement of their directives are subject to national review. But, as Slaughter suggests, their accountability and performance might improve if they were to share more information with the public.[180]

B. *International Law as Fundamental Human Rights Protection*

International law does lay claim to superiority over national law in certain instances even in the absence of state consent. Indeed, international law's claim is "super-constitutional"[181]—not even domestic constitutional processes are permitted to deviate from this potent element of international law. I refer, of course, to *jus cogens*.[182] These are the peremptory norms of international law, which are not susceptible to local derogation.[183] Can we still defend international law when it purports to impose on the world a set of rules that afford no compromise? How can international law claim the authority to impose such fundamental values?

Ely is skeptical that the judiciary could discover fundamental values in constitutional interpretation. He canvassed various sources for such values, from tradition to the judge's own preferences, and found each wanting. But as a number of scholars have pointed out, Ely's own theory requires a set of fundamental values in order to make procedural choices.[184] Like Rawls's approach, Ely's account requires only a thin theory of such values.[185] Ely's particular commitment is to an egalitarian democracy.[186] But what is the

180. *Id.* at 1058-65.

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

182. For an introduction and citations to the extensive literature on *jus cogens*, see MAURIZIO RAGAZZI, THE CONCEPT OF INTERNATIONAL OBLIGATIONS *ERGA OMNES* 43-50 & n.1 (1997).

183. Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331, 344; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. k (1986).

184. *See* Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131 (1981); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980). Ely himself admits as much but responds that at least his commitments are overt. *See* John Hart Ely, *Professor Dworkin's External/Personal Preference Distinction*, 1983 DUKE L.J. 959, 980-81; *see also* Michael C. Dorf, *The Coherentism of* Democracy and Distrust, 114 YALE L.J. 1237 (2005).

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

186. Ely writes that democracy entails both voting and egalitarianism: "Popular control and egalitarianism are surely both ancient American ideals; indeed, dictionary definitions of 'democracy' tend to incorporate both." ELY, *supra* note 10, at 76. His commitment to egalitarianism is perhaps most evident in his discussion of the treatment of minorities. *Id.* at 135-79.

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content of such a thin theory for international law, and how can we justify that content? Consider some possibilities.

1. *Transnational Legal Process*

Koh describes the transnational legal process as requiring norm internalization, but where do the norms to be internalized originate? When they "bring international law home,"[187] are societies simply internalizing norms developed on foreign shores? Koh does not imagine such a one-way process of passive reception. He suggests instead a dialogic process, with continuous efforts to contest and revise existing norms.[188] At the forefront of this process are the "transnational norm entrepreneurs" who seek to operationalize the norms of international law in domestic contexts. Koh identifies as examples Aung San Suu Kyi, the Dalai Lama, José Ramos Horta, and Bishop Carlos Belo.[189] Grass-roots organizations participate in the transnational legal process as well. Such actors are not only operationalizing international law but are also helping to shape it. Consider the case of the transnational issue network Women Living Under Muslim Law. Madhavi Sunder observes that, in interpreting both human rights texts and the Qur'an, this network reimagines international law in a particular cultural context.[190]

How does such a process choose what norms are to be domesticated and what new norms should be created? Transnationalists do not seek deference to "some kind of global 'nose count.'"[191] The transnational legal process ultimately remains democratic exactly because of the "'norm internalization'" process, which transforms a rule from an "external sanction" to an "internal imperative."[192] "That," Justice Breyer observes, "is the democratic process in action."[193] Transnational norm entrepreneurs and

187. *See generally* Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623 (1998).

188. Koh, *supra* note 12, at 205 ("In some cases, . . . the noncomplying state seeks actively to promote its departure from international norms as the new governing international rule.").

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

190. Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399 (2003).

191. Koh, *supra* note 33, at 56.

192. Koh, *supra* note 172, at 1400.

193. Stephen Breyer, *Keynote Address*, 97 AM. SOC'Y INT'L L. PROC. 265, 268 (2003); *see* Catherine Powell, *The Role of Transnational Norm Entrepreneurs in the U.S. "War on Terrorism,"* 5 THEORETICAL INQUIRIES L. 47, 77 (2004) ("Regardless of whether or not international human rights law is binding on the U.S. as a technical matter, as a practical matter, enforcement of these standards will not be effective unless the public understands what they are and accepts them as democratically legitimate. In this sense, human rights norms must live or die based on their merits, as reflected in acceptance or rejection of these merits through democratic means."); *see also* Koh, *supra* note 119, at 56 ("Through a time-honored dialogic process,

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issue networks frequently have no more power than that of persuasion and the authority that comes from moral standing and cogent argument. Even authoritarian states often observe this process, internalizing international law norms that they find necessary to participate in the international political and economic process.[194]

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

2. *A World Public Order of Human Dignity*

The New Haven School of international law has developed perhaps the most explicit and robust set of normative commitments for a world public order. The founders of the School, Myres McDougal and Harold Lasswell, built on historical and anthropological research to develop a classification scheme that would inventory human desires.[195] They conclude that people value security, enlightenment, wealth, well-being, skill, affection, respect, and rectitude.[196] Underlying even these values is a commitment to a world public order of human dignity.[197] In identifying these values, McDougal and Lasswell rely on a consensus among the aims of the world's major systems of public order, which differ not in their broad goals but in the

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litigants, activists, publicists, and academic commentators seek to inform, influence, and improve this kind of judicial decision making.").

194. Koh, *supra* note 187, at 674-77. *But see* Robert O. Keohane, *When Does International Law Come Home?*, 35 HOUS. L. REV. 699, 705-13 (1998) (arguing that authoritarian states might effectively resist norm internalization practiced through state-society relations).

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

196. *Id.*; *see* Myres S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, *in* MYRES S. MCDOUGAL & W. MICHAEL REISMAN, INTERNATIONAL LAW ESSAYS: A SUPPLEMENT TO INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 15, 35-38 (1981).

197. Myres S. McDougal et al., *Theories About International Law: Prologue to a Configurative Jurisprudence*, *in* MCDOUGAL & REISMAN, *supra* note 196, at 43, 45 [hereinafter McDougal et al., *Theories*] ("Despite scattered islands of national and ethnic parochialism, the vast majority of the peoples of the world demand for themselves and acknowledge the fundamental right of others to the minimum conditions for a dignified human existence."); *see also* Myres S. McDougal et al., *The World Constitutive Process of Authoritative Decision*, *in* MCDOUGAL & REISMAN, *supra* note 196, at 191, 201 [hereinafter McDougal et al., *World Constitutive Process*]. The Universal Declaration of Human Rights declares in its first article, "All human beings are born free and equal in dignity and rights." Universal Declaration of Human Rights art. 1, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg. U.N. Doc. A/810 (Dec. 12, 1948).

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"details of the institutionalized patterns of practice by which they seek to achieve such goals."[198]

The New Haven School's systematization of the information relevant to legal decisions and of the decisionmaking process produces more rational decisions that are more likely to achieve the desired normative goals.[199] But the New Haven School "does not promise or guarantee one correct, single answer to the question(s) posed."[200] To the contrary, the results of applying its values and procedures may be quite varied, even with respect to the same set of facts. This puts a lie to the old complaint that the New Haven School tilts in favor of authorizing American actions as consistent with international law.[201] But at the same time, it does not eliminate the need for the decisionmaker to give more specific content to the values identified by McDougal and Lasswell or to choose which of those values will be maximized at any moment. Given that the values do not reduce to some more fundamental unit of dignity (a "dignit"?), the decisionmaker cannot engage in a merely ministerial maximization equation.

The problem, as Ely would see it, is that despite the identification of goals and procedures, the values of the New Haven School are (and perforce must be, to be flexible enough to cover the human condition) articulated at a level of generality that leaves significant room for interpretation to the decisionmaker. Such latitude in the interpretation of a putatively superior law renders that law potentially undemocratic. Yet the proponents of the New Haven School are committed democrats, demanding that all who interact in the world legal process "should both share in the exercise of authoritative power in that process and be made subject to such power."[202] Many will find the New Haven School's commitments attractive and its process of value identification sufficiently democratic. Yet there is another possibility that is even more directly compatible with democracy.

198. McDougal & Lasswell, *supra* note 196, at 19.

199. *See* Myres S. McDougal et al., *Theories*, *supra* note 197, at 52-60 (identifying criteria required of international law jurisprudence).

200. Wiessner & Willard, *supra* note 195, at 334.

201. *See* O'Connell, *supra* note 35, at 350 ("[The New Haven School] has been subjected to the heavy criticism that its policies and norms are those of its creators and that they were too closely tied to the interests of the United States to be the norms of the international community."); *see also McDougal's Jurisprudence: Utility, Influence, Controversy*, 79 AM. SOC'Y INT'L L. PROC. 266, 271 (1985) (remarks of Oscar Schachter).

202. McDougal et al., *World Constitutive Process*, *supra* note 197, at 201. The requirement that those who exercise power be subject to it anticipates Ely's argument that legislation that singles out persons different from the legislators should be viewed with suspicion.

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3. *Representation Reinforcement*

I argue that Ely's "representation-reinforcing theory of judicial review,"[203] duly modified, helps us recognize the transnational legal process as compatible with the notion of popular self-rule.

Unlike contemporary critics of the transnational legal process, Ely recognizes not just the dangers of antidemocratic rule but also those of rule through majoritarian processes. Speaking of the Nazi rise to power through popular appeals, he says, "A regime this horrible is imaginable in a democracy only because it so quintessentially involved the victimization of a discrete and insular minority."[204] This is precisely Rubenfeld's characterization of the lesson the European powers drew from World War II.[205] For Europeans, accordingly, "the fundamental point of international law was to address the catastrophic problem of nationalism—to check . . . national popular sovereignty."[206] The Ely view and the European view coincide, establishing a foundation for international law in the promotion of an egalitarian democracy. *Jus cogens* becomes an effort to counter both the abuses of power in an authoritarian state and the tyranny of the majority in an ostensibly democratic one.

It is unsurprising, then, that the concept of *jus cogens* developed very much as a response to the Holocaust. The Genocide Convention adopted shortly after the war included a number of subscriptions that attached reservations and understandings of certain provisions in the Convention (prominently included in the ratification instrument deposited by the United States).[207] The United Nations General Assembly sought an advisory opinion of the International Court of Justice as to whether such reservations and understandings were permissible. The Court ruled that the "object and purpose of the Convention . . . limit . . . the freedom of making reservations."[208] While the Court did not go so far as to assert that the obligations of the Convention applied to all states regardless of subscription, the case made it clear that certain international obligations were intended to be "definitely universal in scope."[209]

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203. ELY, *supra* note 10, at 181.

204. *Id.* at 182. I disagree with Ely's specific criterion for judging which minorities are the most vulnerable to systematic abuse in a majoritarian process. *See infra* note 220 and accompanying text.

205. Rubenfeld, *Two World Orders*, *supra* note 20, at 24 ("Nazism and fascism were manifestations, however perverse, of popular sovereignty.").

206. *Id.* (emphasis omitted).

207. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

208. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 24 (May 28).

209. *Id.* at 23.

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Exactly which international norms have the strength of *jus cogens* is controversial.[210] But "[n]aming a few norms of *jus cogens* is easy."[211] "[T]he following international crimes," one scholar writes, "are *jus cogens*: aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices, and torture."[212] All of these norms can be seen, some more readily than others, as serving a norm of representation reinforcement. Certain governmental actions are transparently antidemocratic, in the sense that they single out certain groups for opprobrium and abuse. The torture of individuals and the waging of aggressive war do not require any careful scrutiny to determine that they abuse minorities. It becomes unnecessary to construct review mechanisms to "flush[] out unconstitutional motivations"[213] when the motivations are clear. It seems appropriate then to simply ban such actions entirely, as international law undertakes to do.

Writing in 1967, Myres McDougal, Harold Lasswell, and Michael Reisman seemed to suggest that international law should seek to reinforce representation, even if only instrumentally: "An instrumental goal of a public order of human dignity is of course the equipping of all individuals for full participation in authoritative decision."[214] I do not suggest that international law developed *jus cogens* norms with my normative structure in mind. For his part, Ely suggests that the Warren Court's jurisprudence evinced a broad concern with process, but he sought to give it an analytical coherence that the lawgivers had themselves perhaps missed.[215]

Viewed from the Archimedean perspective of the original position, it seems reasonable to suppose that a rational person would insist on basic safeguards. "You and I, here and now," would require that our society obey certain fundamental rules, whatever the political—or even constitutional—process might otherwise permit. Indeed, Rawls proposes that deliberation in an original position would result in agreement to "honor human rights" and not "instigate war" except in self-defense.[216] The invocation of the original position here offers a limiting principle to Ely's representation reinforcement in this context. Representation reinforcement might go so far as to require full-fledged democratic institutions in all states. That would

210. *See* RAGAZZI, *supra* note 182, at 48; *see, e.g.*, *id.* at 66 (describing a dispute between Norway and the United Kingdom over whether a specific maritime norm qualified as *jus cogens*); *see also* M. Cherif Bassiouni, *International Crimes:* Jus Cogens *and* Obligatio Erga Omnes, LAW & CONTEMP. PROBS., Autumn 1996, at 63, 67; Anthony D'Amato, *It's a Bird, It's a Plane, It's* Jus Cogens*!*, 6 CONN. J. INT'L L. 1 (1990).

211. RAGAZZI, *supra* note 182, at 49.

212. Bassiouni, *supra* note 210, at 68.

213. ELY, *supra* note 10, at 153.

214. McDougal et al., *World Constitutive Process*, *supra* note 197, at 191.

215. ELY, *supra* note 10, at 74.

216. RAWLS, *supra* note 41, at 37.

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give *jus cogens* a content far beyond its current bounds. However, as Rawls argues, it may be possible to maintain decent societies that are not liberal.[217]

International law stands, like Ely's judges, outside the direct domestic political process. Thus, it offers the opportunity to resist the pathologies of that process that distribute the benefits and burdens of society in a systematically inegalitarian way. Consider, for example, efforts in the 1950s to bring international law norms against racism to bear on American state oppression of the African-American minority,[218] and efforts in later years to bring the same norms to bear on South African state oppression of the black majority. Such an approach requires an amendment to Ely's theory. International experience confirms Bruce Ackerman's observation that it is not only "discrete and insular minorities" who are vulnerable to oppression.[219] Indeed, I have suggested elsewhere that there is room in Ely's broader theory to encompass not only numerical minorities who are at risk, but majorities as well.[220] Ely himself allows that women—though a majority—could form a suspect class either because of laws denying them the franchise or because, even with the franchise, they might have accepted a popular notion of their own inferiority.[221]

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

Some may find circularity in my argument that *jus cogens* norms are consistent with democracy if they are consistent with democracy. Ely faces the same critique and responds in typically devastating fashion: "There may be an illusion of circularity here: my approach is more consistent with representative democracy because that's the way it was planned. But of course it isn't any more circular than setting out to build an airplane and ending up with something that flies."[222]

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217. *Id.* at 59-62.

218. *See* Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 348 (1995).

219. Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 718-31 (1985).

220. Chander, *supra* note 40, at 162-64. For Ackerman's reconstruction of the test for vulnerable minorities, see Ackerman, *supra* note 219, at 740-46.

221. ELY, *supra* note 10, at 164-70. He does not believe, however, that American women of 1980 faced such a disability. *Id.* at 166-69.

222. *Id.* at 102.

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Cosmopolitans might see my suggestion of a democratic international law as inadequate to address the material conditions of a world in which billions of people lack the capability to live a healthy life, let alone participate in a democracy. International law, they might suggest, should require affirmative obligations of support, not just prohibitions against affirmative wrongdoing. Despite claims to the contrary, there is nothing undemocratic about a state, through its normal political channels, *choosing* to bestow benefits on others.[223] The possibility of affirmative obligations for wealth transfer required by international law seems trickier.[224] Rawls suggests that peoples do have "a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political and social regime."[225] He believes that peoples would have accepted such a responsibility through the cooperative dialogue of a second-order original position between representatives of peoples. This is, as Rawls concedes, an "especially controversial" principle,[226] and I leave it for further consideration at a later date. It may be, for example, that morality may dictate affirmative support obligations, but law may not. Alternatively, it may be that just as individuals in a second-order original position among peoples would accept restraints on state oppression, they would accept affirmative obligations that spanned borders.

The fact that international law is consistent with democracy is unsurprising when one considers its source. Despite the sometimes idealistic rhetoric of international law's publicists, international law is ultimately made in sober recognition of existing financial, political, and military constraints, by entities that jealously guard their independence.

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

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223. *See* Jack Goldsmith, *Liberal Democracy and Cosmopolitan Duty*, 55 STAN. L. REV. 1667 (2003). Goldsmith would prefer cosmopolitan action by voluntary groups rather than by states because "centralized coercion is not needed in the former case." *Id.* at 1694. However, this argument would defeat not just altruistic foreign aid but all state policies that fail to receive unanimous endorsement, like taxation or the hoarding of an enormous nuclear arsenal.

224. *Cf.* Paul W. Kahn, *The Question of Sovereignty*, 40 STAN. J. INT'L L. 259, 260-65 (2004) (distinguishing between positive and negative sovereignty).

225. RAWLS, *supra* note 41, at 37.

226. *Id.* at 37 n.43.

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CONCLUSION

The specter of Abu Ghraib haunts international law. The world's superpower has in just a couple of years been willing to discard the Geneva Conventions as "quaint,"[227] snub the United Nations Charter's limits on the use of force,[228] and "unsign[]" the International Criminal Court treaty.[229] With the world's preeminent liberal democracy eschewing international legal constraints, international law seems in retreat. Allegations of a democratic deficit in the transnational legal process have retarded efforts to address common global problems. Informing international law with Ely's vision of a legal infrastructure that buttresses an egalitarian democracy should help enhance international law's authority and legitimacy. And such an approach should yield a more just international law. Yet this is not enough. This article seeks to resolve the question of democratic legitimacy definitively so that we can move on to the greater challenges at hand—especially the predicament of a world in which a billion people face malnutrition and destitution.[230]

227. Memorandum from Alberto R. Gonzales to President George W. Bush (Jan. 25, 2002), *available at* http://www.msnbc.msn.com/id/4999148/site/newsweek (regarding application of the Geneva Conventions to the War on Terror).

228. *See* Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT'L L. 607 (2003) (arguing that the invasion of Iraq violated the United Nations Charter). *But see* William H. Taft IV & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AM. J. INT'L L. 557 (2003) (arguing that the invasion of Iraq was consistent with international law); John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT'L L. 563 (2003) (same).

229. Harold Hongju Koh, *Jefferson Memorial Lecture: Transnational Legal Process After September 11th*, 22 BERKELEY J. INT'L L. 337, 348 (2004).

230. *See* MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP ch. 4 (forthcoming 2005) (manuscript at 1, on file with author) (noting that a child born in Sweden has a life expectancy of 79.9 years, while a child born in Sierra Leone has a life expectancy of 34.5 years); U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2004: CULTURAL LIBERTY IN TODAY'S DIVERSE WORLD 129 (2004), *available at* http://hdr.undp.org/reports/global/2004/pdf/hdr04_complete.pdf (reporting that "[m]ore than 800 million people suffer from undernourishment . . . . [and m]ore than a billion people survive on less than $1 a day" even after adjusting for purchasing power parity).

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