DEMOCRACY AND INTERNATIONAL HUMAN RIGHTS LAW

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INTRODUCTION

International human rights law has greatly expanded since World War II. Advocates argue that it should supplement and even displace the domestic lawmaking process in a wide range of settings. Such displacement would be desirable if international human rights law were likely to provide legal norms that are on average superior to those produced by domestic lawmaking processes. Unfortunately, the opposite is likely to be the case when international human rights law norms are used as authority to displace domestic law that would otherwise govern liberal democratic states.

As we have discussed in an earlier article,[1] most international law is made through highly undemocratic procedures.[2] These processes lack the advantages of democratic processes, and have few, if any, off-

1 John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175 (2007).

2 *Id.* at 1193–95.

setting virtues of their own. Thus, on average, the quality of what we call "raw" international law rules that have not been ratified by domestic democratic processes is likely to be lower than that of domestic legal rules established by liberal democracies.[3] By contrast, international law that has been validated by the domestic lawmaking process of a democracy—either through ordinary legislation or treaty ratification—should on average be as good as other laws enacted by the same domestic processes.[4]

In this Article, we extend our analysis of democracy and raw international law to the special case of international human rights law, including international humanitarian law. In that area, advocates of human rights law argue that international law has a special role to play because such rights are too fundamental to be left to the vagaries of domestic democratic processes. We demonstrate, however, that there is good reason for skepticism about the desirability of using international human rights law to change the domestic human rights law of democratic nations.

Our analysis rests on both theory and example. As a matter of theory we show how domestic democratic processes are likely to generate human rights norms superior to those embodied in international law. International law is often enacted through the influence of nondemocratic governments and unaccountable, unrepresentative elites from democratic states. Even the assent of democratic governments to international human rights norms is often "cheap talk," because that assent does not reflect a willingness to have these norms directly enforced. We also show that many specific international human rights norms are at best debatable and at worse potentially harmful. One of the key structural problems is that the institutions interpreting such norms are not democratic, but bureaucratic and oligarchic and, thus, often hostile to basic economic and personal liberties.

We do not argue against the use of international human rights law to replace democratic decisionmaking because democracy produces perfect results. We merely contend that even a flawed democratic process is likely to produce better legal rules than the international lawmaking system. The democratic process to some degree reflects the decisions of the people either directly or, more often, through their representatives. The international law system, by contrast, reflects the views of national governments, whether demo-

3 For a discussion of the difference between raw and ratified international law, see *id.* at 1176–77.

4 *Id.* at 1176.

cratic or not, and unelected publicists, who are accountable to no one. There is no good reason to believe that such a process will better choose appropriate human rights, including minority rights, than a democracy will. This is particularly clear if one includes the constitution-making processes of complex, modern democracies as part of the domestic lawmaking system.

Nevertheless, our conclusions about international human rights law are not wholly negative. Our emphasis on democracy leads to qualified enthusiasm about the role human rights law can play in restricting the abuse of government power by nondemocratic regimes. Moreover, our embrace of democratic processes as a relatively effective generator of human rights naturally leads to a willingness to consider domestic enforcement of international human rights that directly strengthen citizens' control over government policy. We thus seek to reorient international human rights law from the generation of controversial substantive rights to protection of norms that will facilitate the leverage of citizens in controlling their own governments. In short, because there is no global democratic process, international law lacks the ability to generate substantive rights norms superior to those of democratic states. Thus, international human rights law might better focus on creating rights that facilitate rather than supplant domestic democratic processes.

Such a reorientation is particularly defensible in cases where international human rights law seeks to displace the domestic law of democratic states, which are likely to generate better laws through their democratic processes than those enacted through international law.[5] As an example of international human rights law that may facilitate such leverage, we advocate rights that empower citizens to vote with their feet through free migration.

Part I of this Article describes the wide range of situations in which advocates of international human rights law justify the use of these norms to displace the domestic law of democracies. Part II responds to the claim that human rights law is best developed through international lawmaking processes by explaining the advantages of democratic processes in formulating human rights law relative to nondemocratic alternatives. In Part III, we show why international human rights law suffers from a democracy deficit. This deficit exists whether the international law is embedded in multilateral human rights treaties, in customary international law, or in softer international law norms created by international organizations. Much of

5 As we suggest in Part VI, there may be stronger justification for allowing international human rights law to displace the substantive law of authoritarian states.

international human rights law is made either by relatively unaccountable international elites or through processes in which the governments of oppressive dictatorships wield influence. Allowing such international law to displace the domestic lawmaking process in democratic states is more likely to cause harm than good because the legislative processes that generate international law are generally inferior to those of well-functioning democracies. In addition, subordinating the law of various nations to a single international standard could close off valuable diversity and experimentation.

Part IV provides concrete examples of the democracy deficit at work. We consider specific norms of international human rights law generated by international institutions and show that they are deeply controversial and potentially highly flawed. These rights are largely generated by international bureaucrats, including many representing authoritarian governments. Not surprisingly, some of these norms are inimical to personal and economic liberties that can themselves be categorized as important human rights. The subset of international rights law known as humanitarian law is also defective in a similar way. The International Committee of the Red Cross (ICRC) is a private organization made up of citizens from a single country that is focused on expanding the reach of humanitarian law through its interpretations of the Geneva Convention and customary international law.[6] But this expansion is potentially at the expense of permitting nations, like the United States, to prosecute necessary wars, including a war against terror—a prosecution that itself may protect human liberty. It is a striking confirmation of the lack of attention to the democracy deficit in international human rights law that the parochial nature of the ICRC is hardly mentioned, let alone evaluated, in previous discussions of whether domestic institutions in the United States and elsewhere should defer to its legal judgments.

In Part V, we sketch a new theory of representation-reinforcing international human rights law that is not as open to the democracy deficit objections as conventional approaches. Our argument is conceptually similar to John Hart Ely's classic justification of representation-reinforcing elements of judicial review.[7] Just as Ely argued that domestic judicial review might avoid the dangers of countermajoritarianism if it helped to facilitate democratic representation,[8] we contend that the democracy deficit of international human rights law might be obviated in cases where the international legal rules in question actu-

6 *See infra* Part III.D.2.

7 JOHN HART ELY, DEMOCRACY AND DISTRUST 87–88 (1980).

8 *Id.* at 101–04.

ally promote democracy by increasing the ability of the people to exercise control over the government policies under which they live.

Ultimately, democracy is itself an institution dependent on legal norms. Precisely because human rights are best developed through democratic systems, international norms that facilitate democracy have a claim to be enforced domestically.

It might be thought that representation reinforcement cannot be usefully applied to democracies. Well-established democracies, almost by definition, provide rights that reinforce democracy in their own nations and, to a lesser extent, abroad. For instance, free speech rights not only help circulate ideas within democratic nations, but have also historically provided a platform for refugees from dictatorships to influence the nations from which they have fled.

But even democratic nations could do more to promote representation-reinforcing rights. Most importantly, exit and entry rights enable citizens to vote with their feet for their preferred government policies. Unlike many other forms of international human rights law, migration rights strengthen democratic accountability by giving citizens an alternative means of influencing government policy, one which has some advantages over traditional ballot box voting. Migration rights are also unlikely to prevent diversity and experimentation in government policy in the way that the imposition of other substantive international human rights norms might. Obviously, migration rights are not the only possible form of representation-reinforcing international human rights law. There may well be other examples. Nonetheless, we put forward several reasons why migration rights are stronger candidates for enforcement through international human rights law than most others that might be suggested.

Our Conclusion briefly explores some of the broader implications of our thesis. We suggest that international human rights law should be more aggressively used to displace the domestic law of dictatorships than liberal democracies. Although the political processes that generate international human rights law are likely to produce less desirable outcomes than the domestic lawmaking processes of democracies, they may well be superior to those of dictatorships. In extreme cases, such as that of totalitarian states, almost any alternative legal regime is likely to be superior to that established by the state's domestic rulers. Finally, we emphasize that our skepticism about raw international human rights law does not apply to international human rights norms that have been duly ratified by domestic lawmaking processes in democratic states.

I. THE CHALLENGE OF INTERNATIONAL HUMAN RIGHTS LAW

International human rights law has greatly expanded in scope since World War II.[9] Unfortunately, the process for its generation has not fundamentally improved, remaining substantially undemocratic. Despite these defects, advocates increasingly urge that nations rely on the authority of international human rights law to create domestic rules of decision.[10] We believe that such reliance is a mistake, because the process for generating international human rights is currently inferior to the domestic process in well-functioning democracies. We recognize that many principles that happen to be part of international human rights laws may well be beneficial, but their presence in international human rights law itself, given its deficient production process, does not provide sufficient evidence of their beneficence. Accordingly, international human rights law should not be used as an authority in well-functioning democracies that are capable of choosing sound principles through their own superior domestic processes.

In this Part, we first briefly describe the growing scope of international human rights law. We then describe the many ways in which advocates of international human rights argue that this body of law should be used as authority to create domestic rules of decision. In the Parts following this one, we complete our basic analytic framework by showing that democracy is important to generating human rights and that international human rights law has a democracy deficit.

A. The Growing Scope of International Human Rights Law

The expansion of international human rights law that began at the close of World War II continues today. "First generation" international human rights were focused on the basic requisites of civil and democratic society, such as free speech.[11] But so-called "second generation" rights are social and economic in nature, including "positive" rights against the government, such as the right to employment or housing.[12] "Third generation" rights focus on the interests of society as a whole, such as the right to sustainable development.[13]

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9 *See* Jenny S. Martinez, *Antislavery Courts and the Dawn of International Human Rights Law*, 117 YALE L.J. 550, 554 (2008).

10 *See* Margaret E. McGuinness, Medellín*, Norm Portals, and the Horizontal Integration of International Human Rights*, 82 NOTRE DAME L. REV. 755, 830 (2006).

11 *See* Katherine R. Miller, *Playground Politics: Assessing the Wisdom of Writing a Reciprocity Requirement into U.S. International Recognition and Enforcement Law*, 35 GEO. J. INT'L L. 239, 308 n.376 (2004).

12 *Id.*

13 *Id.*

Accordingly, the trend in international human rights laws has moved from rights about which there is more consensus to rights about which there is less, and from rights which have a fairly definable core, like free speech, to those that are quite difficult to define, such as sustainable development. Moreover, by their very nature, positive rights to government-provided resources can conflict with negative individual rights to liberty and property.

Besides the expansion and potential conflicts created by whole new categories of rights, the range of international human rights norms now accepted or espoused is quite breathtaking. Such rights include the right to health care[14] and the right to affirmative action.[15] Other rights impose duties on third-party nations, such as the right of protection from genocide.[16] Some of these goals, like affirmative action, are controversial even as policy matters. Others, such as increasing the availability of health care, may be desirable policy objectives, but nevertheless raise questions about whether it is wise or prudent to categorize these goals as rights that may trump other considerations, including budgetary constraints.[17]

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14 Universal Declaration of Human Rights art. 25, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948); *see also* Jason B. Saunders, Note, *International Health Care: Will the United States Ever Adopt Health Care for All?—A Comparison Between Proposed United States Approaches to Health Care and the Single-Source Financing Systems of Denmark and the Netherlands*, 18 SUFFOLK TRANSNAT'L L. REV. 711, 713–16 (1995) (noting the recognition of health care as a fundamental right under international law).

15 International Convention on the Elimination of All Forms of Racial Discrimination art. 2, § 2, *opened for signature* Mar. 7, 1966, S. EXEC. DOC. C, 95-2 (1978), 660 U.N.T.S. 195; *see also* Jordan J. Paust, *Race-Based Affirmative Action and International Law*, 18 MICH. J. INT'L L. 659, 659 (1997) (claiming that race-based affirmative action in higher education is affirmed by treaty law). Justice Ginsburg also relied on this right in *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring).

16 *See* David Aronofsky, *The International Legal Responsibility to Protect Against Genocide, War Crimes and Crimes Against Humanity: Why National Sovereignty Does Not Preclude Its Exercise*, 13 ILSA J. INT'L & COMP. L. 317, 317–19 (2007).

17 Of course, not everyone agrees with the claims of the more aggressive advocates of international human rights law. But, as we discuss below, one of the problems of international human rights law is that the materials from which international rights norms are formulated are less clear and the bodies charged with formulating human rights law less disciplined than their counterparts in the domestic process. Thus, that the content of international human rights is the subject of sharp disagreement is another reason for arguing it should not displace domestic law.

B. International Human Rights Law as a Justification for Changing Domestic Law

As international human rights law has expanded in scope, so too has interest grown in using this web of international law to displace the domestic lawmaking process. International human rights law can enter the domestic sphere in a variety of ways. First, advocates have suggested that domestic courts apply international human rights law directly, incorporating it into a domestic regime without the decisions of the democratic legislative processes. Second, international human rights law can displace the domestic lawmaking process indirectly by being used as a rule of construction in determining the meaning of constitutions and statutes. Finally, the authority of international human rights law can be used to justify changes in domestic law enacted through the ordinary legislative process. We will discuss each of these routes of international human rights incorporation in turn.

We distinguish here between the use of international human rights law as an authority in its own right and appeals to principles that just happen to be part of international human rights law. We do not claim that principles contained in international human rights law are necessarily bad ones, but merely that reliance on international human rights law as an independently valid source of authority for construing domestic law is unsound.

1. Direct Incorporation of Human Rights Law into Domestic Law Without Legislative Warrant

The most direct route to incorporating international human rights law into domestic law is to argue that international law is an integral part of domestic jurisprudence—even if that law is not part of a ratified treaty. In the United States, the doctrinal basis for such a move is the slogan "[i]nternational law is part of our law," taken from the Supreme Court's famous decision in *The Paquete Habana*.[18] Advocates therefore argue that international human rights law, if incorporated into international custom, is equal in authority to domestic law in the United States.[19] A similar argument that customary interna-

18 175 U.S. 677, 700 (1900).

19 *See, e.g.*, Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1566 (1984). We discuss the complex legal status of the *Paquete Habana* in American law at much greater length in McGinnis & Somin, *supra* note 1, at 1188–92.

tional law is part of domestic law can be made in many other democratic nations.[20]

The extent to which courts in the United States are likely to accept this argument in the near future is open to debate.[21] But its popularity in the academic world suggests that it will remain a tempting possibility.[22] For reasons described below, we believe the temptation should be resisted.

2. International Human Rights Law as a Rule of Construction for Domestic Law

More indirect methods of incorporating international human rights into domestic law are already bearing fruit. Courts can rely on international human rights law to construe domestic law, even if they are not making international human rights law a completely independent domestic rule of decision. International human rights law can be used as a principle of construction both at the constitutional and statutory levels. This kind of use of international human rights law has been endorsed by the leading academic treatise on the subject.[23]

It is important to recognize that this use of international law ultimately displaces domestic lawmaking processes no less than direct judicial incorporation of international law. If the use of international law as a rule of construction alters the legal rules judges impose, it will lead to the establishment of a different legal rule from that which would have emerged from domestic political decisionmaking alone. If it does not affect either case outcomes or the rules underpinning them, then it will be entirely superfluous. In at least some cases, how-

20 The Netherlands is an example. *See, e.g.*, John C. Penn, *Sexual Harassment: Proscriptive Policies of the European Community, Ireland, and New Zealand*, 6 AM. U. J. GENDER & L. 139, 156 n.113 (1997).

21 A recently decided case, *Medellín v. Texas*, 128 S. Ct. 1346 (2008), underscores those doubts. In deciding that the treaty at issue in the case was not self-executing, Chief Justice Roberts emphasized that political branches, not the judiciary, should determine the existence and scope of the international obligations of the United States. *See id.* at 1358.

22 *See, e.g.*, Michael J. Glennon, *Raising* The Paquete Habana*: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 NW. U. L. REV. 321, 325 (1985) (suggesting that customary international law places limits on the President); Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1075 (1985) (stating that neither the President nor Congress has the power to violate norms of international law); Jordan J. Paust, *The President* Is *Bound by International Law*, 81 AM. J. INT'L L. 377, 378 (1987) (declaring "emphatically" that the President cannot violate customary international law).

23 *See* HENRY J. STEINER ET AL., INTERNATIONAL HUMAN RIGHTS IN CONTEXT 1098–108 (3d ed. 2008).

ever, the use of international human rights law as a rule of construction will have an impact. Otherwise, it is difficult to understand the broad enthusiasm for this approach among those who advocate expanding the influence of international law.[24]

In the United States, in *Roper v. Simmons*,[25] the Supreme Court cited the Convention on the Rights of the Child[26] as evidence of international consensus against the execution of juveniles, thereby helping to justify its interpretation of the U.S. Constitution as banning that practice.[27] Yet the United States, which has signed the Convention, never ratified it.[28] In addition, the Court cited the International Covenant on Civil and Political Rights,[29] even though the United States had entered a formal reservation against the Covenant's anti-death penalty provision.[30] Thus, the Court relied on international human rights law documents that the political branches had expressly refused to incorporate into domestic law.

We recognize that this is not an unambiguous use of international human rights law, because the Court did not declare that executing juveniles was against international human rights law, but simply deployed evidence from human rights treaties to reach its conclusion. Nevertheless, several Supreme Court Justices have expressed enthusiasm for the use of international human rights law in constitutional interpretation.[31] Academics are even more insistent that integrating

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24 *See, e.g.*, David Golove, *Military Tribunals, International Law, and the Constitution: A Franckian-Madisonian Approach*, 35 N.Y.U. J. INT'L L. & POL. 363, 370 (2003) (discussing and approving the rationale for construing constitutional powers in light of international law); Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 124 (2005) (discussing benefits for construing the Constitution in light of international law).

25 543 U.S. 551 (2005).

26 Convention on the Rights of the Child art. 37, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3.

27 *See Roper*, 543 U.S. at 576.

28 *See id.*; Office of the U.N. High Comm'r for Human Rights, Status of Ratifications of the Principal International Human Rights Treaties (June 9, 2004), http://www.unhchr.ch/pdf/report.pdf.

29 *See Roper*, 543 U.S. at 576; *see also* International Covenant on Civil and Political Rights art. 6(5), *adopted* Dec. 19, 1966, 999 U.N.T.S. 171 ("Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age . . . .").

30 *See Roper*, 543 U.S. at 622–23 (Scalia, J., dissenting) ("'The United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person . . . including such punishment for crimes committed by persons below eighteen years of age.'" (quoting S. Comm. on Foreign Relations, International Covenant on Civil and Political Rights, S. Exec. Rep. No. 102-23, at 11 (1992))).

31 *See* Stephen Breyer, Assoc. Justice, U.S. Supreme Court, Keynote Address at the Ninety-Seventh Annual Meeting of the American Society of International Law (Apr. 4,

international human rights law into our fundamental law is necessary to ensure that judicial interpretations of the U.S. Constitution reflect the values of the wider world community.[32]

Nor is this approach limited to the United States. In a recent article, Professor Melissa Waters has shown that the courts of other nations whose constitutions, like ours, do not directly incorporate international law into their domestic jurisprudence are starting to interpret their constitutions as congruent with multilateral international human rights treaties.[33] For instance, they are beginning to use these treaties to resolve alleged ambiguities in constitutional rights.[34] They also may use them to limit constitutionally granted legislative power where a contrary construction might violate international human rights law.[35] Professor Waters suggests that this trend "could effectively result in the subordination of all domestic law to international human rights law."[36] We certainly do not believe that such total subordination is likely to happen soon. But the trend is significant enough to require evaluation before reaching the possible culmination envisioned by Professor Waters. This tendency is also consonant with one noted by political scientists: political and social elites are reacting to the rise of potentially hostile political forces constructing more powerful and wide-ranging roles for the judiciary, because in judicial fora they retain substantial influence.[37]

Another method for integrating international human rights law into domestic jurisprudence is to require that domestic legislation be interpreted consistently with international law wherever possible. In the United States, advocates who argue this approach gain support from ancient Supreme Court precedent, like *Murray v. Schooner Charming Betsy*,[38] that seeks to harmonize, wherever possible, Ameri-

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2003), *in* 97 AM. SOC'Y INT'L L. PROC. 265, 265 (2003); Sandra Day O'Connor, Assoc. Justice, U.S. Supreme Court, Keynote Address at the Ninety-Sixth Annual Meeting of the American Society of International Law (Mar. 16, 2002), *in* 96 AM. SOC'Y INT'L L. PROC. 348, 350 (2002) ("[C]onclusions reached by . . . the international community should at times constitute persuasive authority in American courts.").

32 *See, e.g.*, Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 52–57 (2004).

33 *See* Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretative Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 686 (2007).

34 *Id.* at 683.

35 *Id.*

36 *Id.* at 686.

37 *See, e.g.*, RAN HIRSCHL, TOWARDS JURISTOCRACY 11–12 (2004).

38 6 U.S. (2 Cranch) 64, 118 (1804).

can statutory law with the norms of the wider world.[39] In particular, modern international human rights advocates suggest that the statutory authority on which the President relies in military and law enforcement operations in the War on Terror should be interpreted against the background of a complex web of international human rights law and international humanitarian law.[40] Such interpretations would constrain the President's authority by requiring that it be exercised in accordance with purported international norms.

3. International Human Rights Law as an Authority Justifying Legal Change

Finally, international human rights norms may be used as authority to justify change in the domestic regulations, statutes, or constitutions of democratic nations. Many have seen this avenue as the best way to internalize international human rights norms in domestic law. For instance, Harold Hongju Koh has suggested that nation states establish bureaucratic units devoted to such integration.[41] The Office of the Legal Advisor to the Department of State provides an example of a bureaucracy focused on international law integration in the United States.[42] Besides this mode of bureaucratic integration, international human rights norms could be relied upon as authority more generally in legislative deliberation about appropriate policy.

Arguing for the adoption of principles that happen to be in international human rights law on the basis of moral or pragmatic considerations is, of course, completely consistent with ordinary democratic discourse and deliberation. Our objections are limited to the use of international human rights law as an *authority* independent of other considerations. Consider this analogy: we would be wary of relying, either in the judiciary or in the legislature, on propositions from the Bible or the Koran on the basis of their intrinsic authority, even if many of the normative propositions in these works also have sound pragmatic justifications on which legislatures should and do rely.[43] Insofar as advocates argue that the laws of democratic nations, including the United States, should converge with international human

39 *See* Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law, and the* Charming Betsy *Canon*, 46 B.C. L. REV. 293, 330–33 (2005).

40 *Id.* at 332–33.

41 *See* Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1410 (1999).

42 *See id.* As this article goes to press, Dean Koh has been appointed to the position of Legal Advisor to the Department of State by President Barack Obama.

43 *See* John O. McGinnis, *Foreign to Our Constitution*, 100 NW. U. L. REV. 303, 310–11 (2006).

rights law merely because such convergence is intrinsically good, it is important to examine whether the process that generates international human rights law justifies such an appeal to authority. We turn to that question below.

II. ADVANTAGES OF DEMOCRATIC PROCESSES IN FORMULATING HUMAN RIGHTS LAW

This Part explains the benefits of democratic processes as a means for determining the content of human rights law. We start by briefly summarizing the most important general advantages of democratic lawmaking relative to authoritarianism and oligarchy. We then consider the important argument that human rights law in particular should not be developed by democratic processes because it is intended to constrain democracy. Despite some significant shortcomings, however, even human rights law developed by purely majoritarian democratic processes is likely to be preferable to nondemocratic alternatives. Moreover, some of the disadvantages of using purely majoritarian democratic processes to formulate human rights law can be reduced by resorting to a different kind of democratic mechanism—supermajoritarian constitutional lawmaking.

Obviously, there is a longstanding debate over the definition of democracy. For our purposes, we define democracy in the minimalist sense popularized by Joseph Schumpeter: a political regime in which voters have the power to change rulers through regular, free elections.[44] We do not contend that minimalistic Schumpeterian democracy is the best possible democratic process, but merely that a polity that meets Schumpeter's criterion is likely to, on average, produce better human rights norms than the international lawmaking process.

Even under the minimalistic definition of democracy advanced here, some governments are not clearly either democratic or undemocratic. For example, Freedom House's annual survey of political freedom around the world, which uses criteria roughly similar to ours, classifies numerous nations as "partly free."[45] Our argument suggests that international human rights law is highly unlikely to produce better norms than those developed by the domestic lawmaking processes

44 *See* JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 250, 270–72 (Harper Colophon Books 1976) (1942).

45 *See* Press Release, Freedom House, Freedom in the World 2009: Freedom Retreats for Third Year (Jan. 12, 2009), *available at* http://www.freedomhouse.org/template.cfm?page=70&release=756 ("The number of Partly Free countries is 62, or 32 percent of all countries assessed by the survey and 20 percent of the world's total population.").

of well-established democracies. With respect to partly democratic nations, it implies that the more democratic they are in our sense of the term, the more likely they are to produce better human rights policies than those generated by international law. We suggest that the overriding of domestic law by international human rights law may be more defensible in the case of authoritarian states or partly democratic nations that are relatively close to the authoritarian end of the spectrum.[46]

A. General Benefits of Democratic Processes

Democracy provides an important justification for legal norms, including human rights, for several reasons. First, many political theorists argue that democratic control of government policy has intrinsic value.[47] If the governed do not have any meaningful control over their rulers, it is far from clear that the latter have any inherent right to wield the power that they possess. Second, even if democratic control has little or no inherent worth, it still has considerable instrumental benefits. Citizens are likely to be better off under a government subject to democratic checks than under one in which they are largely absent.[48] More generally, democracy serves as a check on self-dealing by political elites. It helps ensure, at least to some extent, that leaders enact policies that serve the interests of their people, because the leaders' continuing right to govern is directly dependent on the people's expressed preferences.[49]

Under some conditions and assumptions, democratic governance may not only protect the public against self-dealing elites, but also increases the likelihood that political institutions will reach "correct" decisions on crucial issues. The Condorcet Jury Theorem is the most famous theory asserting this possibility. The theorem assumes that the two alternatives from which voters choose have an equal a priori chance of being true.[50] It then holds that when individuals in a group make decisions independently of one another about the truth of pro-

46 *See infra* notes 224–28 and accompanying text.

47 *See, e.g.*, BENJAMIN R. BARBER, STRONG DEMOCRACY 117–20 (2003); CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 4–5 (1970).

48 For a recent summary of the evidence, see MORTON H. HALPERIN ET AL., THE DEMOCRACY ADVANTAGE 25–64, 93–134 (2005).

49 For example, it is striking that no democratic nation, no matter how poor, has ever had a mass famine within its borders, whereas such events are common in authoritarian and totalitarian states. *See* AMARTYA SEN, DEVELOPMENT AS FREEDOM 178 (1999) (famously noting that "there has never been a famine in a functioning multiparty democracy").

50 *See* DENNIS C. MUELLER, PUBLIC CHOICE III 129–30 (2003).

positions and each has a greater than fifty percent accuracy rate, the decision reached by the majority is likely to assess the truth of the proposition correctly.[51]

Others have applied the Condorcet Theorem as an argument for majority rule in the legislature.[52] In order to translate the theory to the legislative context, however, one needs to make one of two additional assumptions, because the Condorcet Theorem assumes a search for objective truth. One possible assumption is that legislators, at least in part, have a common view of the public interest, and perhaps some understanding of efficiency.[53] An alternative assumption is that factual predictions about the likely results of legislation are important to evaluating whether to vote yes or no on legislation. We think both of these assumptions are warranted, at least under some circumstances, and that the Condorcet Theorem thus sheds some light on the actions of legislators. We caution, however, that a preference model of legislation, discussed above, where legislators vote based on some combination of their preferences and the preferences of their constituents, captures more of the reality of the legislative process.[54]

Under the Condorcet paradigm, majority rule is more likely to result in better decisionmaking than are insular institutions isolated from democratic control when determining what rights are actually in the public interest. One important exception to this proposition is that experts may reach better decisions than democracy if each individual voter in the democratic process is less than fifty percent likely to reach the right decision. Systematic biases in voter deliberations can cause such an outcome.[55] Even in this case, however, the experts may not outperform the democratic process if they lack proper incentives to pursue beneficial policies.

Obviously, democratic processes also have weaknesses. Widespread political ignorance and irrationality often prevent voters from monitoring government and make the enactment of flawed policies

51 *See id.*

52 Prominent among legal theorists are Frank I. Michelman and Jeremy Waldron. *See* David M. Estlund, Jeremy Waldron, Bernard Grofman, & Scott L. Feld, *Democratic Theory and the Public Interest: Condorcet and Rousseau Revisited*, 83 AM. POL. SCI. REV. 1317, 1317–28 (1989); Frank I. Michelman, *Why Voting?*, 34 LOY. L.A. L. REV. 985, 995–96 (2001) (offering the Condorcet Jury Theorem as part of the epistemic justification for majority rule).

53 *See* John O. McGinnis & Michael B. Rappaport, *The Condorcet Case for Supermajority Rules*, 16 SUP. CT. ECON. REV. 67, 73, 103 (2008).

54 For a discussion of other assumptions of the Condorcet Jury Theorem as applied to legislatures, see *id.* at 102.

55 *See, e.g.*, BRYAN CAPLAN, THE MYTH OF THE RATIONAL VOTER 23–49 (2007) (describing a variety of systematic biases that may lead voters to error).

more likely.[56] The disproportionate power of organized interest groups allows them to "capture" the democratic process and use it in ways that sometimes harm the interests of the general public.[57] For these and other reasons, democratic government may often be inferior to market or civil society institutions.[58] For our purposes, however, the important point is that democratic processes are generally superior to nondemocratic policymaking by government. It simply does not follow from the weaknesses of democracy that nondemocratic governments perform better. Extensive evidence suggests that democratic political processes generally produce better outcomes on a wide range of indicators than do nondemocratic ones.[59]

B. Is Human Rights Law Special?

Some might concede the above points for most areas of public policy but suggest that concern over the democracy deficit of human rights law is misplaced, because human rights are by nature universal, natural, and countermajoritarian. Because rights are natural and universal, their validity does not depend on endorsement by any particular political process. Because rights are restrictions on democratic governments, their content should not be left up to the democratic process.

We do not have space to extensively address the metaphysical status of human rights. But we do observe that individuals have disagreed on the content and scope of these rights since the issue first arose centuries ago.[60] Indeed, at times some human rights claims have been in sharp tension with others. For instance, individual nega-

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56 *See* Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1291 (2004) [hereinafter Somin, *Political Ignorance*]; Ilya Somin, *Voter Ignorance and the Democratic Ideal*, 12 CRITICAL REV. 413, 415–33 (1998) [hereinafter Somin, *Voter Ignorance*]. On the political irrationality of many voters, see CAPLAN, *supra* note 55.

57 For a helpful summary of the arguments on this point, see WILLIAM C. MITCHELL & RANDY T. SIMMONS, BEYOND POLITICS 102–75 (1994). For a good recent survey of the literature on interest group power and its impact, see MUELLER, *supra* note 50, at 347–53, 481–89, 497–500.

58 *See, e.g.*, DAVID SCHMIDTZ, THE LIMITS OF GOVERNMENT 103–04, 132–33 (1991) (arguing that the private sector will often perform better than democratic government in providing public goods); Somin, *Voter Ignorance*, *supra* note 56, at 431–35 (arguing that political ignorance justifies reducing the role of government in society).

59 *See* HALPERIN ET AL., *supra* note 48, at 12–15.

60 Thus, we take no position on whether rights are, in some sense, natural or human constructs—rules of thumb that have been discovered to promote human flourishing.

tive rights to liberty are often in tension with positive rights of individuals to resources provided by the government.[61]

Thus whether or not human rights are universal, a key question for human rights remains epistemic: how are we to know what is the "right" content of human rights law? Accordingly, whatever the metaphysical status of rights, citizens need a process to determine what rights the law should enforce. Given that the process is likely to be run by the institution of government, democratic processes tend to be superior to the available authoritarian and oligarchic alternatives.

While, as we discuss below, we do not believe that governments should necessarily limit themselves to majority rule in determining what the content of legally enforceable human rights is, there are reasons that majority rule is likely to prove better than authoritarian or oligarchic mechanisms in choosing the content of human rights to be protected by law. Majority rule has virtues that can help maximize citizens' welfare. One is rooted in a preference analysis of voting.[62] If each voter supports laws that provide him or her with net benefits, then the laws supported by the majority should produce total benefits that exceed total costs, because the benefits to the greater number of people in the majority will exceed the costs to the minority.[63]

A second advantage of majority rule in determining human rights is implicit in the Condorcet theorem.[64] If each individual voter is fifty percent or more likely to choose the "correct" package of human rights, a majority-rule process will be more likely to reach the right result than will other methods of decisionmaking.[65]

We recognize that majoritarian democracy has shortcomings as a mechanism for determining the content of human rights. For instance, majorities may consistently outvote certain religious minorities and forbid them from engaging in practices that are very important to them, simply because they are distasteful the majority. In the next subpart we will consider the role of nonmajoritarian political structures in protecting human rights. These alternatives, however,

61 The clash between these two types of rights claims is a major focus of modern political philosophy. *See, e.g.*, JOHN E. ROEMER, THEORIES OF DISTRIBUTIVE JUSTICE (1998) (surveying much of the relevant literature).

62 *See* MICHELMAN, *supra* note 52, at 994–96 (discussing preference model of voting).

63 We recognize that this argument assumes, however, that the average cost imposed on people harmed by the law does not exceed the average benefit to people helped by it; otherwise, the majority might pass a law that provides small benefits to itself, but imposes much larger costs on the minority. As we describe in Part II.C, supermajoritarian political processes can address this difficulty.

64 *See supra* Part II.A.

65 *See* Michelman, *supra* note 52, at 996 (discussing the Condorcet model).

are still far more democratic than the process that defines international human rights. But, even with majority rule's flaws, it does not follow that nondemocratic institutions are better than majority rule at generating human rights protections, even for minorities. Nondemocratic institutions lack incentives to protect politically weak minorities. They may also embody prejudices that lead them to protect only some minorities while actually being antagonistic towards others. Moreover, the choice of which minorities to protect and to what degree is hardly a simple one that groups insulated from public opinion are likely to get right. In sum, there is little reason to believe that human rights law is a systematic exception to the general assumption that democratic lawmaking processes are superior to authoritarianism and oligarchy.

C. Advantages of Supermajoritarian Democratic Processes for Determining Human Rights Law

We also recognize that human rights law is often needed to constrain the majority either from making rash decisions in times of crisis or from violating the rights of minorities. But achieving these goals does not depend on abandoning democratic forms of government. It only requires that we modify the majority rules of ordinary democratic politics. Mechanisms that are broadly democratic but eschew pure majoritarianism can sometimes better generate protections for minority rights than can majority rule.

One strategy to restrain majorities, for instance, is to create a democratic form of higher politics—constitution-making. Constitutions such as those of the United States and other countries are often made by supermajority rules.[66] These rules require a broad consensus that can then be used to constrain the influence of majorities in ordinary governance.[67] Thus, for example, the United States and other democracies protect freedom of speech, which constrains majorities from abandoning that right in times of passion created by crisis or war.[68] Judges then enforce this democratically made consensus against majorities. Majorities are restrained, but through fundamentally democratic means.

66 For a detailed analysis of the supermajoritarian character of the U.S. Constitution, see John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703 (2002).

67 *See* JON ELSTER, ULYSSES UNBOUND 129–41, 157–61 (2000) (discussing the use of constitutions to prevent majorities from acting in the heat of passion).

68 *See* Adrian Vermeule, *The Judicial Power in the State (and Federal) Courts*, 2000 SUP. CT. REV. 357, 366 (viewing the First Amendment as partly a "precommitment device").

Supermajoritarian constitutionalism can also help protect minority rights. It addresses one of the main reasons that majority rule can be less than optimal—the different intensities of voter preferences. For instance, a majority may find some religious practices distasteful and mildly prefer that they be banned. But the minority that engages in these practices may intensely prefer that they be permitted. Under simple majority rule without constitutional restraints, there is a danger that the majority will simply ban those religious practices that they dislike. Constitutional rules enacted by supermajority processes can help restrain such excesses.[69]

One response to this problem is to create a process for determining the contents of rights that operates behind a "veil of ignorance" so that citizens will be unsure of their own future preferences, making it unclear whether they and their descendants will be in the highly intense minority or the mildly intense majority.[70] This ignorance will thus cause them to take more account of the minority's preferences. Here, too, the supermajority rule for passing and repealing a constitutional provision creates a form of democracy conducive to the protection of minority rights, because it creates such a veil of ignorance. Because of these voting rules, citizens recognize that enactments are likely to endure longer than ordinary legislation and thus are less certain about how they or their children will be affected by its long tail.[71] Thus, the veil of ignorance can promote countermajoritarian rights.

In real world constitution-making, of course, framers rarely operate behind a complete veil of ignorance. Nonetheless, supermajoritarian constitution-making is closer to a veil of ignorance than ordinary majoritaritarian legislation, because it is likely to last longer by virtue of being more difficult to repeal. Even in the absence of any veil of ignorance effects, the need to win supermajority support is likely to force legislators to take greater account of minority preferences than they would under a pure majoritarian democracy. Accord-

69 *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32 (1993) (utilizing the U.S. Constitution to protect unpopular minority religious practice against a ban favored by the majority).

70 *See* Michael A. Fitts, *Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions*, 88 MICH. L. REV. 917, 921–23 (1990) (explaining that less information can help overcome stalemates by avoiding politically contentious issues and reducing self-interest in the decisionmaking process). The veil of ignorance concept was first developed by John Rawls. *See* JOHN RAWLS, A THEORY OF JUSTICE 118–23 (rev. ed. 1999). For the classic work arguing that supermajoritarian constitution making improves the content of a society's basic legal rules, see JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT 302–06 (1962).

71 *See* Dennis C. Mueller, *Federalist Governments and Trumps*, 83 VA. L. REV. 1419, 1423 (1997).

ingly, the majority becomes more considerate of the minority's preferences. Thus, the U.S. Constitution, among others, protects the religious freedom of minorities to a greater extent than ordinary political processes would.

Some have objected that supermajoritarian processes—and the United States' amendment process in particular—are too stringent to create new rights.[72] We disagree. Consider the Nineteenth Amendment, which granted women the right to vote.[73] This was a new political right, and it was granted through the amendment process despite the fact that its beneficiaries were—in many cases—not even represented in the franchise electing the legislature that voted by a two-thirds majority to propose the Amendment.[74] Accordingly, this kind of formal supermajoritarian constitution-making has the demonstrated capacity to protect human rights, but does so through a democratic process. Voters participate democratically in the selection of constitutional rules, but under voting rules that depart from pure majoritarianism.

We recognize, however, that not everyone believes that such formal constitution-making is sufficient to protect all necessary individual rights, particularly as the world changes. Another possible structure is a system where judges have some discretion to elaborate on constitutional text to protect individual rights. But even that system needs some substantial democratic input if jurists are to represent the values of the people they govern. In the United States, for instance, an elected President nominates the Justices and an elected Senate must confirm them.[75] The confirmation process subjects every part of the potential Justices' careers and records to substantial scrutiny.[76] Even after confirmation, the press relentlessly covers and critiques Supreme Court decisions, and the political branches of government can affect their implementation.[77] Thus, this model of human rights elabora-

72 *See, e.g.*, JOHN R. VILE, THE CONSTITUTIONAL AMENDING PROCESS IN AMERICAN POLITICAL THOUGHT 137–48 (1992).

73 U.S. CONST. amend. XIX.

74 For an argument that the judicial anticipation of rights through a living-constitution philosophy of interpretation of the Constitution rather than through originalism has undermined the amendment process in modern times, see John O. McGinnis & Michael B. Rappaport, *Reconciling Precedent and Originalism*, 103 NW. U. L. REV. (forthcoming 2009).

75 U.S. CONST. art. II, § 2.

76 *See* William G. Ross, *Participation by the Public in the Federal Judicial Selection Process*, 43 VAND. L. REV. 1, 6–24 (1990) (discussing increased public scrutiny of federal court nominees).

77 For the most important work outlining the limits on judicial power imposed by the political branches in the United States, see GERALD N. ROSENBERG, THE HOLLOW

tion has a substantial democratic element, even if it allows greater discretion for judicial elites than the more formal model under which judges enforcing the Constitution have little or no discretionary power.

In contrast, the elites that contribute so much to the development of human rights law face no such democratic discipline.[78] For example, modern publicists are generally appointed by fellow faculty members, not democratically accountable officials. Members of international organizations are often appointed by authoritarian governments. Even those appointed by democratic governments are not chosen through processes with anything like the publicity or transparency accompanying Supreme Court nominations.

Thus, it is crucial to understand that our argument here is a comparative one. We do not claim that domestic processes that qualify as democratic under our broad definition of democracy are perfect at generating human rights, just that their processes are better than the international human rights processes we describe below.

D. What If Domestic Constitutional Law Is Also Produced by Undemocratic Processes?

An important objection to our argument for the advantages of supermajoritarian constitutional law is that domestic constitutional law may have been produced by undemocratic processes. If so, its democratic credentials may be no better (or even worse) than those of international law. This objection may seem to have particular force with respect to the U.S. Constitution, which is much older than that of any other democratic state.[79] As a result of its age, most of its important provisions were enacted in the eighteenth century, at a time when women, slaves, many free black males, and even some non-property-owning white men were denied the right to vote on its ratification. Even the post–Civil War Amendments of the 1860s were still enacted at a time when women and many blacks were denied the franchise.

There is no denying that this objection partly undercuts the democratic credentials of the U.S. Constitution. But from today's perspec-

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HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 72–106 (1991) (arguing that the Supreme Court is tightly constrained in its ability to influence policy outcomes even in such areas as civil rights law). However, Rosenberg and other scholars emphasizing the limits of judicial power in the United States may to some extent have overstated their case. *See* David E. Bernstein & Ilya Somin, *Judicial Power and Civil Rights Reconsidered*, 114 YALE L.J. 591, 595–98 (2004) (book review).

78 *See* discussion *infra* Part III.

79 *See* Louis Henkin, *Revolutions and Constitutions*, 49 LA. L. REV. 1023, 1035 (1989).

tive the greatest defects in the Constitution flowing from this exclusion have been corrected. The Thirteenth Amendment prohibits slavery,[80] the Fourteenth Amendment constrains government racial discrimination,[81] and the Fifteenth Amendment forbids denial of the franchise on account of race.[82] The Nineteenth Amendment grants women the right to vote.[83] The Constitution now grants all citizens the freedoms enjoyed by white, male property owners in 1789 and, thus, today our constitutional system, as well as that of other industrial nations, is substantially democratic. Moreover, these changes in the Constitution occurred long before international law banned slavery and racial discrimination,[84] or required that women be given the franchise.

In fact, it is a measure of the democracy deficit of international human rights law that the ratification process that produced the Constitution in the 1780s was still far more democratic than that which produces international human rights law today. At the time of the American Revolution, anywhere from forty to ninety percent of American white males had the right to vote in their respective colonies.[85] Property qualifications and other restrictions on the franchise were eased or abolished in many states between the mid-1770's and the ratification of the Constitution in 1787 to 1789.[86] Several states allowed free blacks, Native Americans, and even noncitizen aliens to vote.[87] Moreover, many states waived property qualifications and other restrictions on the franchise for the ratification vote.[88] It is difficult to precisely estimate what percentage of the adult American population was eligible to vote in the 1787 and 1788 elections for members of the state constitutional ratification conventions. However, it is likely that the vast majority of white males were eligible, as were a significant number of free blacks, which is a combined total of perhaps thirty percent of all adults.[89] This is far short of modern democratic stan-

80 U.S. CONST. amend. XIII.

81 *Id.* amend. XIV.

82 *Id.* amend. XV.

83 *Id.* amend. XIX.

84 The first official ban on slavery in international law was the Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253.

85 *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE 7 (2000) (discussing conflicting estimates).

86 *See id.* at 8–11; *see also* CHILTON WILLIAMSON, AMERICAN SUFFRAGE 20–39 (1960) (describing the electorate at the time of the Revolution in England and the colonies).

87 *See* KEYSSAR, *supra* note 85, at 418 n.10.

88 *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION 7 (2005).

89 This figure is a rough estimate based on the 1790 census data showing that the American population in 1790 in large cities was about eighty-one percent white. *See*

dards. But it was still a much more representative process than that which produces most modern international law, which tends to be produced by a tiny, unrepresentative elite and influenced by representatives of authoritarian states that deny voting rights to virtually their entire populations.[90] As we discuss below, many of the most important treaties that serve as the basis for international human rights law were negotiated during the immediate post–World War II era, at a time when many of the most powerful states with veto power over the results were severely oppressive totalitarian dictatorships that make the 1780s United States seem like a democratic paradise by comparison.

By the time of the ratification of the post–Civil War Amendments in the late 1860s, restrictions on the franchise had been considerably loosened in most states.[91] Thus, the relative democratic legitimacy of these ratification processes was even stronger than those of the Founding ratification.

E. The Insufficiency of Democratic Override

Some have suggested that the imposition of international human rights law is not problematic, because democracies can always override the international norm.[92] Note that this objection would not apply even on its own terms insofar as international human rights norms were used as constitutional or to interpret constitutional law. Constitutional law norms cannot generally be overridden by ordinary democratic procedures.

Even when the status of international human rights is not entrenched through constitutional interpretation, making it law until it is overridden by the democratic process gives it the same status as a statute despite the large differences in quality between the two kinds

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Campbell Gibson & Kay Jung, *Historical Census Totals on Population Statistics by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for Large Cities and Other Urban Places in the United States* 115 tbl.A-1 (U.S. Census Bureau, Working Paper No. 76, 2002), *available at* http://www.census.gov/population/www/documentation/twps0076.pdf. If we assume that males made up half the white population (forty percent of the total) and that seventy-five percent of white males (probably a low estimate based on the data cited above) had the right to vote in the ratification elections, we get a figure of thirty percent of the adult population eligible to vote in the ratification elections. To this should be added the relatively small numbers of free blacks who could vote.

90 *See infra* Part III.A.

91 KEYSSAR, *supra* note 85, at 87–116.

92 *See* Anupam Chander, *Globalization and Distrust*, 114 YALE L.J. 1193, 1207 (2005) (arguing for the use of international law, such as the principal customary international law norm against official torture, as a default rule in a democracy).

of enactments. Legislative norms themselves are only law until the legislature decides to repeal them. Yet everyone understands that the status of being enacted into law gives a norm staying power. This is so for two well-known reasons. First, legislatures can address a only a limited agenda at any one time and thus legislative inertia would be on the side of the norm. Second, legislative processes also often have inbuilt constraints that make is hard to enact or repeal laws, even if the action would have substantial support. For instance, in the United States' effectively tricameral system, it takes a substantial political consensus of the House, Senate, and President to pass a law, including a law repealing an international human rights norm.[93]

In sum, we believe it is wholly appropriate to criticize the democracy deficit of international human rights law by comparing and contrasting the manner in which international human rights norms are formed with the manner in which domestic human rights norms are created in democratic societies. Democracy can be combined with limits on majority rule that are themselves imposed by democratic processes, including ones that depart from pure majority rule. In the next section, we show that the democracy deficit of international human rights law is substantial.

III. THE DEMOCRACY DEFICIT OF INTERNATIONAL HUMAN RIGHTS LAW

We begin by analyzing the nature of the democracy deficit of international human rights law in a democratic state. Of course, if that nation has adopted a provision of international human rights law through its domestic democratic processes, there is no democracy deficit. The more interesting question arises when a democratic nation has not incorporated the provision through a process as democratic as that by which it incorporates its domestic norms.

It might be thought that in the absence of such incorporation, the argument for the democracy deficit is simple and compelling. It is undemocratic to impose norms on a nation that has not democratically embraced them. Similarly, it is undemocratic to impose international law on a democratic state merely because that law has been enacted by undemocratic processes operating in international institutions or authoritarian governments abroad.

But advocates of international human rights might plausibly respond that the democracy deficit is attenuated and the authority of these norms is secured if the norms have a strong democratic pedi-

93 *See* McGinnis & Somin, *supra* note 1, at 1226–27 (detailing the consensus required to repeal law).

gree from sources other than those of the particular nation in question. Thus, advocates have argued that norms found in customary international law or multilateral agreements on human rights should be treated as universal because of the widespread agreement among nations that this kind of international law commands.[94]

Basic multilateral human rights treaties and norms generated by customary international law suffer from a democracy deficit because they do not provide real evidence of consensus or even widespread support for their provisions from the democratic nations of the world. The basic multilateral human rights treaties were negotiated at a time when totalitarian nations had veto power at the negotiating table. As a result, no one can be certain that the same provisions would have emerged from a process in which all the players were democracies. Moreover, many of the democratic states that agreed to these treaties did so only as a matter of international law and did not incorporate them into domestic law. The lack of domestic effect makes their assent cheap talk.

Customary international law suffers from the same defects insofar as it relies on these multilateral agreements for inferences as to the content of custom. Even apart from such reliance, customary international law has multiple democracy deficits. Its content is inferred by unrepresentative groups, such as international courts and publicists. And it is generated by a process that is not transparent to the general public. This circumstance creates agency costs and undermines democratic legitimacy.

A third source of international human rights norms, generally grouped under the term "soft law," is growing in importance, but suffers from a comparable democracy deficit. These kinds of norms stem from the deliberations of international organizations and commissions. The difficulty is that such entities are also not democratic even if they purport to be authoritative.

Thus, whether human rights norms are rooted in multilateral treaties or customary international law, they do not have a strong democratic pedigree. Of course, the lack of democratic provenance does not mean that their provisions are necessarily harmful; nor does it suggest that democratic states should not, if they choose, incorporate these norms into domestic law by their usual legislative processes. But it does show that their soundness must be defended on the basis

94 *See, e.g.*, Forti v. Suarez-Mason, 672 F. Supp. 1531, 1540 (N.D. Cal. 1987) (characterizing international torts as "universal, definable, and obligatory international norms," because of the "universal consensus in the international community as to their binding status").

of some other argument than their appearance in multilateral treaties or their status as custom. As a result, their mere existence as rules of international law should not be the basis for direct judicial incorporation, use as a background principle of legal interpretation, or even as a reason for legislative adoption. We address the peculiar democracy deficits of multilateral international human rights agreements, customary international law, and soft law in turn. But first we discuss a problem that afflicts them all: the influence of nondemocratic states.

A. The Influence of Nondemocratic States

A particularly important and underappreciated element of democracy deficit of international human rights law is the influence of nondemocratic states over its content. Nondemocratic governments have little incentive to take account of the interests of either their own people or those of foreign states in determining their stances on international law. The influence of nondemocratic states is most obvious in multilateral human rights treaties that, although in many cases are not ratified by the United States, are often claimed as a basis for customary international law.[95] Totalitarian nations such as those of the Soviet bloc played a key role in negotiationg these treaties, and exercised effective veto power over their adoption.

The Soviet bloc influenced the content of the Universal Declaration of Human Rights (UDHR), arguably the most important international human rights treaty. Joseph Stalin's representatives successfully advocated inclusion of social and economic rights in the document,[96] watered down protections for political liberties and freedom of speech,[97] and blocked the addition of any significant protection for private property rights.[98] The Soviet bloc also exercised influence

95 The Universal Declaration of Human Rights, *supra* note 14; the International Covenant on Civil and Political Rights, *supra* note 29; and the International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3, all date from the Cold War period.

96 *See generally* JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 157–238 (1999) (discussing the development of these rights within the declaration).

97 *See id.* at 60–61, 69–72 (noting that Soviet influence was responsible for the defeat of efforts to include provisions protecting the right to form opposition political parties and for the inclusion of protections against "hate speech" in order to justify government censorship of "fascist" speech).

98 *See* MARY ANN GLENDON, A WORLD MADE NEW 182–83 (2001). The Declaration does include a guarantee that "everyone has the right to own property alone as well as in association with others." Universal Declaration of Human Rights, *supra* note 14, art. 17. However, governments were allowed to set this right aside more or less at will due to the presence of other provisions in the text intended to constrain its scope. *See*

over the content of the International Covenant on Civil and Political Rights (ICCPR), perhaps the second most notable international human rights treaty.[99] These treaties represent bargains among national governments. The democratic governments had to engage in give and take in international negotiation. As a result, we cannot be confident that the same provisions would have emerged absent communist influence. We are, of course, not suggesting that all the provisions in these treaties are necessarily harmful, only that we cannot be confident of their merits by virtue of the process that generated them.

Nondemocratic states also influence the content of other types of raw international law. To the extent that customary international law is based on state practice,[100] it is important to recognize that even today 104 of the world's 193 nations are rated either "Not Free" or only "Partly Free" according to Freedom House's annual survey of political freedom around the world.[101] Thus, the majority of those states influencing the content of state practice are either dictatorships or at least not fully democratic. Nondemocratic states are also heavily represented in the U.N. Human Rights Council and other international bodies that influence the development of human rights law.[102] The same is true of more narrowly focused committees tasked with

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MORSINK, *supra* note 96, at 155–56. Soviet pressure led to the elimination of the term "private" from the phrase "right to own property," in order to indicate that Article 17 does not provide any special protection for private property relative to the government's ownership claims. *See* GLENDON, *supra*, at 183.

99 *See* Stephanie Farrior, *Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, 14 BERKELEY J. INT'L L. 1, 21–23 (1966) (discussing the influence of the Soviet Union on provisions regarding hate speech in the International Covenant on Civil and Political Rights).

100 *See* McGinnis & Somin, *supra* note 1, at 1207–09 (discussing this source of international law).

101 *See* Press Release, Freedom House, *supra* note 45.

102 Nondemocratic states also had significant representation in the U.N. Human Rights Council's predecessor organization, the U.N. Human Rights Commission. *See* JEAN-CLAUDE BUHRER, REPORTERS WITHOUT BORDERS, U.N. COMMISSION ON HUMAN RIGHTS LOSES ALL CREDIBILITY 4–5, 7 (2003), *available at* http://www.rsf.org/IMG/pdf/Report_ONU_gb.pdf (documenting how U.N. Commission on Human Rights member states that are themselves human rights violators have blocked condemnation of nearly all those governments that violate human rights the most); *see also* Human Rights Watch, UN: Rights Council Disappoints Again (Oct. 5, 2006), http://www.hrw.org/english/docs/2006/10/06/global14354.htm (noting that nondemocratic "[s]tates with poor human rights records dominated the [U.N. Human Rights] [C]ouncil's deliberations").

interpreting and applying more specific international human rights treaties.[103]

The influence of nondemocratic states is an important shortcoming of all raw international law.[104] But it is a particularly serious problem in the case of international human rights law. Nondemocratic states are by far the most important violators of human rights. State-sponsored mass murder is responsible for the deaths of hundreds of millions of innocent people in the twentieth century alone,[105] easily overshadowing all other rights violations. The Soviet Union—the nondemocratic government that exercised the most influence on the content of modern international human rights law—was also arguably the greatest of all twentieth century violators of human rights.[106] Current estimates of the death toll of government-sponsored mass murder in the USSR range from twenty million to as high as sixty-one million.[107] And these figures do not even consider the Soviet governments' many other human rights violations, such as infringements on freedom of speech and religion.

In short, nondemocratic states that influence the content of international human rights law have a fundamental conflict of interest. They have every incentive to transform the content of rights whose implementation might interfere with their own repressive policies or threaten their hold on power.

An even more serious impediment to automatically assuming that international human rights law is beneficial is the ability of authoritarian nations to use their influence to promote rights that legitimize their authority and justify their use of repression against potential political opponents. Examples of the latter include the Soviet bloc's successful efforts to include bans on hate speech in the UDHR and ICCPR, rights whose inclusion they sought in part to justify the suppression of opposition political speech under communist governments.[108] Communist states also sponsored a longstanding and partially successful effort to use international law to justify and legiti-

103 *See infra* Part III.D.1.

104 *See* McGinnis & Somin, *supra* note 1, at 1204.

105 *See generally* R.J. RUMMEL, DEATH BY GOVERNMENT 1–28 (1994) (compiling the data).

106 Only Communist China's death toll even begins to approach that of the USSR. *See id.* at 5 fig.1.1.

107 For the former, see STÉPHANE COURTOIS ET AL., THE BLACK BOOK OF COMMUNISM 4 (Mark Kramer ed. & trans., Jonathan Murphy trans., Harvard Univ. Press 1999); for the latter, see R.J. RUMMEL, LETHAL POLITICS 24 (1990).

108 *See supra* note 97 and accompanying text.

mate military interventions intended to repress domestic opposition to communist totalitarian regimes.[109]

Abortive 1980s efforts to institute a global regime of censorship through the New World Information and Communication Order are another case where nondemocratic regimes sought to use international law to advance their own interests.[110] Today, nondemocratic nations are spearheading efforts to establish a new international human "right" requiring the suppression of speech that "defames" religion.[111] If adopted, this law would justify censorship of speech critical of radical Islamism and of government-sponsored religions more generally.

A process for generating human rights law in which nondemocratic states play a substantive role is similar to a system for guarding chicken coops in which some authority is allocated to wolves. It empowers the very entities whose depredations it seeks to prevent. We do not assert that the fact that a totalitarian or authoritarian state supported a particular human rights norm somehow proves that the norm is wrong. A norm supported by even the worst of governments might turn out to be beneficial, and one they oppose might turn out to be harmful. We do, however, suggest that a lawmaking process that gives nondemocratic states substantial influence over the content of human rights law will, as a general rule, produce norms whose content is inferior to that produced by the domestic law of democratic states. That prediction flows naturally from the interest of authoritarian rulers in blocking the enactment of norms that might curb their repressive practices, while promoting those that could facilitate them. At the very least, human rights law enacted by processes over which nondemocratic governments have influence should not be accorded a presumption of validity within the domestic law of well-functioning democracies.

109 *See* James P. Terry, *Moscow's Corruption of the Law of Armed Conflict: Important Lessons for the 21st Century*, 53 NAVAL L. REV. 73, 73–75 (2006).

110 *See* Colleen Roach, *The U.S. Position on the New World Information and Communication Order*, J. COMM., Autumn 1987, at 36, 36.

111 *See* Posting of Ilya Somin to the Volokh Conspiracy, http://volokh.com/archives/archive_2007_02_04-2007_02_10.shtml#1170874980 (Feb. 7, 2007, 15:01 EST); *see also* Liaquat Ali Khan, *Combating Defamation of Religions*, AM. MUSLIM, Jan. 1, 2007, http://theamericanmuslim.org/tam.php/features/articles/combating_defamation_of_religions (noting that the U.N. General Assembly Resolution supporting this norm was passed over the opposition of nearly all the world's liberal democracies, and pointing out that the resolution may constitute "soft international law").

B. Multilateral Human Rights Treaties

Besides the influence of nondemocratic states, there is another more fundamental problem that contributes to the democracy deficit of multilateral international human rights treaties: the assent of many democratic nations to multilateral human rights treaties is cheap talk, insofar as that assent does not commit them to making the provisions of those treaties a part of their domestic law. Nations that have dualist systems with respect to international law do not make such commitments. In dualist systems, international legal obligations are separate from domestic legal obligations and do not displace contrary domestic law without action by the government to incorporate international law into domestic legislation.[112] Thus, even democratic ratification by dualist nations does not show that its citizens and legislators wish to have international law enforced without additional intermediate steps.[113] Many, if not most, legal systems are dualist with respect to international law.[114] For instance, the United Kingdom has a dualist system, and Commonwealth nations, which compose a substantial proportion of the world's democracies, follow the lead of their former sovereign.[115]

By contrast, treaties signed by nations with monist legal systems may be incorporated into domestic law once they have been concluded without further legislation.[116] But even some monist nations have complex structures through which treaties ratified as a matter of international law must pass before they will be given domestic

112 *See* John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310, 314–15 (1992).

113 The question of how far nations may actually go to comply with international obligations simply because they are international obligations is a vast subject which we cannot address here. Our view, like that of many other modern theorists, is that states do not have a strong tendency to comply with international law for the sake of international law compliance, or even to maintain their reputation among other nation states. *See* Jack Goldsmith & Eric A. Posner, *The New International Law Scholarship*, 34 GA. J. INT'L & COMP. L. 463, 466–72 (2006). But we certainly acknowledge that the influence of a nation's sense of obligation to comply is an empirical question. Nations could conceivably at some time in the future develop a stronger sense of obligation to international law, making their international commitments a signal of commitment more akin to domestic legislation. Just as the case for making international law a force in our system might be strengthened if it were created by a global democratic process, it could also be strengthened if it were a product of largely democratic states that had a noninstrumental sense of obligation to international law.

114 *See* PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 63 (7th rev. ed. 1997).

115 *See* ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 187–99 (2d ed. 2007).

116 *See id.* at 146.

effect.[117] Others, while nominally giving treaties domestic effect, do not readily permit their courts to enforce those that seem vague or aspirational.[118] As a result, the number of nations whose judiciaries actually enforce multilateral human rights treaties as rules of decision that set aside their own law seem relatively few in number.[119]

The United States does not enforce treaties unless they are deemed self-executing, as the recent case of *Medellín v. Texas* demonstrates.[120] The political branches must intend that a treaty be given direct effect in our domestic jurisprudence. Otherwise it will be deemed non-self-executing and fail to create binding federal law.[121] The U.S. Senate has declared all the provisions in our human rights treaties to be non-self-executing.[122]

Beyond these important doctrinal points lie functional reasons for refusing to give these treaties direct domestic effect. Nations have many reasons for declining to implement the international rules of treaties without first subjecting them to domestic legislative processes. They may regard international law, particularly when human rights are involved, as aspirational.[123] Or they may believe that the international rules are too vague or open-ended to be given automatic effect.[124] Whatever their reasons, when nations do not agree to have international law trump their own law, international law is, in economic terms, cheap talk, and is a less plausible source of norms to displace those norms to which a democratic nation actually agrees to be bound.[125]

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117 *See, e.g.*, *id.* at 147–48 (discussing the treaty process in Germany and the Netherlands).

118 *Id.* at 146–47 (discussing the treaty process in France).

119 To confirm this result, we consulted a database of international law cases that may be found at Oxford Univ. Press, Reports on International Law, http://ildc.oxfordlawreports.com/uid=108317/subscriber/?&authstatuscode=202 (last visited Apr. 2, 2009).

120 *See* 128 S. Ct. 1346, 1356 (2008).

121 *Id.*

122 *See* Thomas Buergenthal, *The Evolving International Human Rights System*, 100 AM. J. INT'L L. 783, 806 n.114 (2006).

123 *See* Donald J. Kochan, *No Longer Little Known But Now a Door Ajar: An Overview of the Evolving and Dangerous Role of the Alien Tort Statute in Human Rights and International Law Jurisprudence*, 8 CHAP. L. REV. 103, 131 (2005) (noting that customary international law is often aspirational and not legally enforceable).

124 *See* Matthew D. Thurlow, Note, *Protecting Cultural Property in Iraq: How American Military Policy Comports with International Law*, 8 YALE HUM. RTS. & DEV. L.J. 153, 183 (2005) (presenting the possibility that nations prefer vague language in order to create conflicting standards).

125 *Id.*

Thus, norms created by multilateral agreements are unlikely to be as beneficial as those created by democratic domestic political processes. The democracy deficit of multilateral agreements may be most self-evident when authoritarian and totalitarian nations participate in their formation. But on closer inspection, the even more important point is the attenuated nature of most nations' agreement to these norms. The refusal to give treaties domestic force detracts from the clarity, force, and perhaps the sincerity of the commitment to the norms embodied in them.[126]

It is bootstrapping to argue that a nation which has not incorporated an international human rights principle into its domestic law should incorporate it by virtue of the democratic authority conferred by its presence in multilateral treaties. These treaties do not represent the general assent of other democratic nations for domestic incorporation.

Even if such assent could be inferred, it would not necessarily justify incorporation of international law into the domestic law of democracies that had not ratified the treaty in a way that overrides contrary domestic legal rules. As we have argued elsewhere, divergent legal rules among different democracies are often justified by the need to account for differing local conditions and by the desirability of preserving diversity among legal systems so that migrants can vote with their feet for the system of government they prefer.[127]

C. Customary International Law

Customary international law has several important shortcomings from the standpoint of democratic accountability. The first is that nations do not have to assent to a principle of customary international law in order for one to be created. Instead, nations are considered to have consented to a principle simply if they failed to object or continue to object persistently.[128] Obviously, this measure of assent com-

126 *See, e.g.*, Arthur M. Weisburd, *The Effect of Treaties and Other Formal International Acts on the Customary Law of Human Rights*, 25 GA. J. INT'L & COMP. L. 99, 134–35 (1996) (arguing that human rights treaties generally lack true enforcement mechanisms, raising doubts that states intend for them to have a legal character).

127 McGinnis & Somin, *supra* note 1, at 1217–19.

128 The persistent objectors rule provides that states which have persistently objected during the emergence of a custom are not bound by it as a rule of international law. *See* Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 765 n.90 (2001). It has been widely accepted that the persistent objector rule is not applicable to *jus cogens* norms and thus has limited scope. In the absence of a persistent objector doctrine, the process for forming international norms is even more problematic, because they

pares unfavorably to domestic democracy. Domestic political actors cannot create norms by failing to object but must affirmatively embrace a practice to make it law, assuring deliberation and accountability.

A second defect is that such treaties and other international declarations are little more than cheap talk if nations do not actually enforce them.[129] Many nations flout such international norms and most others, as discussed above, do not give them domestic effect enforceable by their courts.[130] In contrast, when the U.S. Constitution includes rights or Congress passes legislation protecting those rights, there is an enforcement system that provides evidence that such norms are actually embraced sincerely.

At least provisions in negotiated agreements have the virtue of being written down, which in theory enables citizens to access and assess them. The latter may ensure a small modicum of democratic accountability. By contrast, customary principles of international human rights, unlike domestic statutes, do not rest on any canonical text. Someone must assess how widespread a practice is and whether it reflects a legal norm.[131]

An important group responsible for determining the answers to these questions are publicists who in modern parlance are largely international law professors.[132] Unlike Supreme Court Justices, law professors are not selected by elected officials or subject to public scrutiny. As a result, there is no mechanism for assuring that their views are in any way representative. For instance, a recent study has shown that elite international law professors in the United States are highly unrepresentative of the general population, leaning Demo-

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may not reflect even the attenuated consent by the democratic state that is implicit in the persistent objector rule.

129 As economic analysis shows, cheap talk is the opposite of costly signaling. *See* Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1445–47 (2003). There is much less reason to believe that ratifying a treaty represents the real preferences of the domestic polity if the members of the polity are not willing to have the rules enforced against themselves.

130 *See, e.g.*, Weisburd, *supra* note 126, at 134–36.

131 *See generally* Frederic L. Kirgis, Jr., *Custom on a Sliding Scale*, 81 AM. J. INT'L L. 146, 147 (1987) (describing the process of assessing international customary law).

132 *See* Sean D. Magenis, *Natural Law as the Customary International Law of Self-Defense*, 20 B.U. INT'L L.J. 413, 424 n.57 (2002) ("The role of publicists is especially important in shaping international law because of the dearth of 'black letter law' on the subject."); *see also* John O. McGinnis, *Contemporary Foreign and International Law in Constitutional Construction*, 69 ALB. L. REV. 801, 806 (2006) (discussing the role of law professors and other publicists).

cratic rather than Republican by a ratio of approximately five-to-one.[133] If such an ideologically homogeneous group is doing the choosing, we are likely to get unrepresentative norms. This point again has even more resonance in human rights than in other areas of law. Given the "culture wars" over the content of such rights,[134] it is even more likely that ideological imbalance in ranks of publicists will lead to idiosyncrasy in human rights norms than in less contentious issues, such as the criteria for state recognition.

Fourth, as we have shown before, survey research shows, perhaps not surprisingly, that average Americans understand less well what goes on in Geneva and other foreign parts than Washington does.[135] This point is probably not confined to Americans. Individuals in other states are likely to know more about what happens in the governmental bodies of their own capital than those of international lawmaking institutions. This relative ignorance exacerbates the agency costs arising from the power of publicists, also contributing to the democracy deficit.

Accordingly, there are multiple democracy deficits in customary international law.[136] Some of them seem substantially worse in the human rights context than in other fields. Thus, in the area of human rights, we should be particularly wary of importing customary international law into the domestic law of democratic nations.

D. Other Sources of International Human Rights Norms

1. Committees Charged with Interpreting Multilateral Human Rights Law

Besides norms that are deemed a formal part of customary international law, there are other important sources of human rights norms. Most salient are international bodies with formal duties in providing glosses and articulations of central human rights treaties, including: the ICCPR; the Covenant on Economic, Social and Cul-

133 *See* John O. McGinnis et al., *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 GEO. L.J. 1167, 1182–83 (2005) (discussing political campaign–contribution patterns of international law professors).

134 For a brief discussion of these culture wars and the debate over human rights, see generally Rhoda E. Howard, *Human Rights and the Culture Wars: Globalization and the Universality of Human Rights*, 53 INT'L J. 94 (1998) (discussing the new challenges posed by globalization to the theory that human rights are universal in principle).

135 We have discussed citizens' comparative ignorance of international law at length elsewhere. *See* McGinnis & Somin, *supra* note 1, at 1210–17.

136 Here we are discussing the democratic deficit of modern views of customary international law. For a discussion of the democratic deficit of more classical views of custom, see *id.* at 1207–10.

tural Rights; the Convention on the Elimination of Discrimination Against Women; the Rights of the Child Convention; and the Geneva Convention. These are generally softer law than norms expressly and specifically provided in the multilateral treaty or custom.[137] Nevertheless, as Professor Waters suggests, domestic courts are now relying on soft law as an interpretive tool.[138] As a result, these norms have potential domestic affect as well. Accordingly, we offer our evaluation of the democracy deficit of the international organizations that generate these norms.

We begin by considering the committees that elaborate on various multilateral human rights treaties. All major multilateral international human rights covenants have committees responsible for monitoring compliance with their terms and issuing reports elaborating on them. We consider committees from the four covenants mentioned above because they seem to us among the most important and representative of the human rights treaties.

While state parties to these treaties can elect anyone nominated by a government party to the treaties, it is quite clear from their membership that that there is an attempt, as with most international bodies, to elect a group that is representative geographically with due consideration given to electing a substantial number from powerful states.[139] Moreover, all these four committees in fact have substantial numbers of members nominated by nations that cannot be considered firmly democratic[140]—certainly not nearly as democratic as the United States or the states of Western Europe.[141] Even fully demo-

137 *Cf.* Craig Segall, Book Note, 24 STAN. ENVTL. L.J. 341, 342–43 (distinguishing "hard treaty law" from the "softer 'law' of declarations, norms, and behavioral standards").

138 Waters, *supra* note 33, at 666–67 (showing how courts are using treaties as bridges to incorporate soft law).

139 *See* Dana D. Fischer, *Reporting Under the Covenant on Civil and Political Rights: The First Five Years of the Human Rights Committee*, 76 AM. J. INT'L L. 142, 143 (1982).

140 The dangers of allowing nondemocratic nations to influence the content of human rights law are explored more fully *supra* Part III.A.

141 The Human Rights Committee has members from two authoritarian nations—Egypt and Tunisia—and from one nation whose democratic credentials are shaky—Morocco. *See* Office of the U.N. High Comm'r for Human Rights, Human Rights Committee—Members, http://www2.ohchr.org/english/bodies/hrc/members.htm (last visited Apr. 2, 2009). The Committee on Economic, Social and Cultural Rights has four members from authoritarian regimes—China, Belarus, Jordan, and Egypt—and four from states whose democratic credentials are suspect—Algeria, Cameroon, Morocco, and Russia. *See* Office of the U.N. High Comm'r for Human Rights, Committee on Social, Economic, and Cultural rights—Members, http://www2.ohchr.org/english/bodies/cescr/members.htm (Apr. 2, 2009). The Committee on the Rights of the Child has members from the authoritarian nations of Egypt, Qatar, Tunisia, and

cratic nations, such as the United States, nominate members in a process that is far less transparent and publicized than, for instance, the Supreme Court nomination process. As a result, a narrow class of insiders, mostly former diplomats and law professors, tend to be the appointees.[142] This lack of diversity also contributes to a lack of representativeness and democratic legitimacy on such committees.

2. The International Committee of the Red Cross

The ICRC has assumed, for human rights advocates, the role of preferred interpreter of the Geneva Conventions.[143] We say "assumed" because unlike the committees discussed above, which are given such official roles by their respective multilateral treaties, the Geneva Conventions do not provide a formal interpretative role to the ICRC. To be sure, the ICRC is given a monitoring role, and has often taken the place of affected state parties in the role of checking on the conditions of prisoners of war.[144] For instance, the Red Cross checked on the conditions of both Allied and Axis prisoners during the World War II. Nevertheless, this monitoring function does not entail a formal, let alone a privileged, interpretive role.[145]

Uganda, and two members from nations whose democratic credentials are questionable at best—Algeria and Bangladesh. *See* Office of the U.N. High Comm'r for Human Rights, Committee on the Rights of the Child—Members, http://www2.ohchr.org/english/bodies/crc/members.htm (last visited Apr. 2, 2009). The Committee on the Elimination of Discrimination Against Women includes three members from authoritarian or totalitarian regimes—China, Cuba, and Egypt—and two from regimes whose democratic credentials are suspect—Algeria and Bangladesh. *See* Office of the U.N. High Comm'r for Human Rights, Committee on the Elimination of Discrimination Against Women—Members, http://www2.ohchr.org/english/bodies/cedaw/membership.htm (last visited Apr. 2, 2009).

142 *See* Joanna Harrington, *Punting Terrorists, Assassins and Other Undesirables: Canada, the Human Rights Committee and Requests for Interim Measures of Protection*, 48 McGILL L.J. 55, 63 & n.48 (2003); *see also* McGinnis & Somin, *supra* note 1, at 1203–04 (discussing the U.S. nomination process for the International Court of Justice).

143 We recognize that there is a debate about whether humanitarian law should be categorized as part of human rights law. *See* DAVID P. FORSYTHE, THE HUMANITARIANS 250–59 (2005). By discussing humanitarian law in this Article, we do not mean to take sides in that debate. We include humanitarian law in our analysis because, however it is categorized, the role of the Red Cross as a putatively authoritative interpreter raises democracy deficit questions not unlike those of other committees charged with implementing international human rights law.

144 *See* Eric A. Posner, *International Law and the Disaggregated State*, 32 FLA. ST. U. L. REV. 797, 816 (2005).

145 *See* Jeremy Rabkin, *After Guantanamo: The War over the Geneva Convention*, NAT'L INTEREST, Summer 2002, at 15, 22–23 (detailing ICRC's attempt to expand its role under the Geneva conventions).

Even in the context of the international law world, the ICRC is a peculiarly unrepresentative body. Unlike the committees that elaborate on the rights included in various covenants, none of the members of this committee are nominated by any democratically accountable government. While the name of the organization is the *International* Committee of the Red Cross, the committee is in fact a self-perpetuating body composed entirely of Swiss citizens.[146] Switzerland is the world's most famously neutral nation. This history gives its citizens a very distinctive perspective on humanitarian law, as even a sympathetic accounting of its mission acknowledges.[147] The perspective of those who are either part of or amenable to a particular organization, even one as no doubt worthy as the ICRC, is likely to be narrower still. They will tend to be interested in advancing the ideals and interests of that organization rather than neutrally interpreting the law, as almost all organizations tend to expand their jurisdictional reach.[148] One would expect that they use materials to expand the ambit of humanitarian rule, and, as we will see, that expectation is fulfilled.[149]

The parochial and homogenous nature of the ICRC helps explain why it may fail to give adequate consideration to opposing views.[150] Small homogenous groups often become increasingly extreme in their views over time, for reasons Cass Sunstein has explained.[151] The structural flaws of the ICRC are an interesting example of the broader phenomenon of the influence of small, unrepresentative elite groups on international law.[152]

In fact, it is a powerful confirmation of the unreflective nature of much commentary on human rights law in general, and humanitarian law in particular, that the parochial and undemocratic elements of the ICRC are never discussed. Instead, even such eminent scholars as Dean Harold Hongju Koh call for "governments and nongovernmental organizations" to rely on the opinions of the ICRC because of its alleged *lack* of parochialism.[153] However, because of its structure as a

146 *See* FORSYTHE, *supra* note 143, at 202.

147 *Id.* at 237–41.

148 *See* Stephen Zamora, *Regulating the Global Banking Network—What Role (If Any) for the IMF?*, 62 FORDHAM L. REV. 1953, 1954 (1994) (noting "the propensity of international organizations to expand their jurisdiction").

149 *See infra* notes 169–84 and accompanying text.

150 *See infra* Part IV.D.

151 *See generally* Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 85–97 (2000) (explaining group polarization in detail).

152 This point is discussed in greater depth in McGinnis & Somin, *supra* note 1, at 1202–07.

153 *See* Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1512 (2003).

single private organization chosen from citizens of a single small nation, the ICRC is as parochial as individual nation states themselves—arguably much more so.

The parochial nature of the ICRC raises questions about the deference it should be given in fabricating and construing humanitarian law. To be sure, humanitarian law, like the law of military conflict among nations, is different from much of human rights law in that the actions of one nation have substantial spillovers into another. For this reason, it may be optimal in principle to have international rules on this subject when it is not optimal to have international rules on many human rights subjects that we have discussed above.

But the world does not have a recognized international rulemaker in humanitarian law, and certainly not one with any democratic legitimacy. As a result, one needs to make a pragmatic argument that the structure of the ICRC is likely to lead it to make better interpretations of humanitarian law than a nation state before suggesting that the nation state defer to the organization's interpretations. Is the ICRC or the United States more likely to reach better interpretations? As described above, the ICRC is a nondemocratic and insular institution, which raises doubts about the quality of its determinations. But it might be argued that any individual nation, even a democratic one, will be imperfect in reaching humanitarian law determinations as well. It, too, has parochial interests. Nevertheless, there is a plausible argument that United States is likely to reach better determinations about the appropriate legal norms, particularly about the public goods involved in preserving global security.

Norms produced by a small and undemocratic elite are unlikely to focus on producing global public goods.[154] Since the benefits of the new public good will usually flow overwhelmingly to the general population rather than to the elites, it seems unlikely that the latter will devote themselves to developing norms that increase public-goods production. This is especially true if the necessary time, resources, and political capital can instead be devoted to the production of norms that provide greater benefits to the elites themselves, such as the positive publicity and reputation for humaneness that generally accrue to an organization that expands the reach of a body of humanitarian law.

In contrast to such bureaucracies, the United States has strong incentives to contribute to the provision of global public goods, including sound norms of humanitarian law. Since the United States

154 This point is discussed in greater detail in McGinnis & Somin, *supra* note 1, at 1238–39.

is by far the world's largest economy, producing some twenty percent of world GDP,[155] it will often have incentives to provide public goods that further economic growth and prosperity, even if many other nations choose to free ride. Global security is one such public good.

Humanitarian law is intimately connected with this global public good because it attempts to assure reasonable protection of military and civilians during wars. Of course, it necessarily involves a tradeoff between the protection of rights and the preservation of a military's ability to fight necessary wars. The United States, because of its position in the international system, would be in a good position to make such tradeoffs, due to its active military presence around the world and its interest in maintaining the security of the world economy. Given that its soldiers are involved in many conflicts around the world, the United States is acutely concerned with the welfare of military personnel. Moreover, given that it is a nation of immigrants, its citizens are likely to have at least some concern for the well-being of civilians worldwide as well. Of course, we are not suggesting that the United States will make all the right calls; particular administrations and politicians may commit grave errors. Nevertheless it is far from clear that in the long run its democratic processes are not more likely to fashion more sensible norms than is the ICRC.

IV. THE EFFECT OF THE DEMOCRACY DEFICIT ON INTERNATIONAL HUMAN RIGHTS LAW

The democracy deficit of international human rights law casts doubt on the supposed beneficence of international human rights norms relative to those established by domestic democratic institutions. Our purpose is not to show that any particular international human rights norms are wrong. But we will endeavor to briefly demonstrate that international human rights norms are highly contestable, and indeed potentially conflict with other norms of human rights that people can reasonably hold. That openness to contestation underscores one of the main points of this Article: that at least as to broadly democratic nations, international human rights norms may displace norms that are better for the nation concerned. Moreover, following human rights norms has the potential defect of imposing a uniform rule that discourages a diversity of approaches. It is the diversity of approaches that will lead to experimentation and competition,

155 Figure computed from the Central Intelligence Agency, World Fact Book, Rank Order—GDP (Purchasing Power Parity), https://www.cia.gov/library/publications/the-world-factbook/rankorder/2001rank.html (last visited Feb. 24, 2009). The U.S. GDP is $14.58 trillion, 20.6% of the world total of over $70 trillion. *Id.*

and these processes in time are more likely to lead to an optimal set of rights.

This danger is becoming more acute as the scope of international human rights expands. Here, we very briefly look at three rights within human rights law and a set of rights and duties within humanitarian law which have a degree of international recognition and show that there is no consensus about their effects. This lack of consensus underscores our two major points. First, it would be a mistake to enforce international human rights against democratic nations because there is no reason to believe that these rights will be better than the decisions reached by that nation's domestic political process. Second, the lack of consensus shows that there are considerable benefits from the diversity and competition that come from allowing a diversity of legal rules in different nations rather than a uniform approach dictated by internationalizing a set of rights.

A. Hate Speech

Some international law advocates believe that "hate speech" violates customary international law. The ICCPR in fact forbids "[a]ny advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence."[156] Louise Arbour, the former U.N. Commissioner for Human Rights, opened an investigation of whether Denmark's willingness to permit cartoons of the prophet Mohammed violated international law against hate speech.[157] She also argued that international law bans "xenophobic arguments in political discourse."[158]

The desirability of laws against hate speech is a deeply contestable issue. The United States, for instance, not only does not have laws against hate speech, but its Constitution forbids such laws.[159] While an international law requirement for hate speech rules may have roots in a conception of human dignity, a prohibition of such laws also can be a rooted in a strong view of individual freedom. Although the requirement can be defended on the grounds that it protects minorities, so too can a prohibition on hate speech laws. In practice, hate speech laws can be used to silence politically unpopular minority

156 International Covenant on Civil and Political Rights, *supra* note 29, art. 20(2).

157 *See* Paul Belien, *UN to Investigate Racism of Danish Cartoonists*, BRUSSELS J., Dec. 7, 2005, http://www.brusselsjournal.com/node/546.

158 Louise Arbour, U.N. Comm'r for Human Rights, Remarks at International Day for the Elimination of Racial Discrimination Panel Discussion (Mar. 21, 2005).

159 *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 396 (1992).

groups at least as easily as the more powerful majority.[160] It is not our purpose to resolve this debate here, just to use it to show that following an international norm in this matter would prematurely end debate and experimentation about a difficult political issue.

B. Comparable Worth

The Committee on the Elimination of Discrimination Against Women has interpreted its organic treaty convention as requiring comparable worth. The language the Committee uses is "equal remuneration for work of equal value."[161] It is quite clear that the Committee does not contemplate that the market should be responsible for determining the value of work. The Committee suggests that nations "consider . . . job evaluation systems based on gender-neutral criteria that would facilitate the comparison of the value of those jobs of a different nature, in which women presently predominate, with those in which men presently predominate."[162]

Comparable worth is another contestable idea about which there is no consensus. One strong argument against it is the lack of objective criteria to evaluate the worth of a job. Another is that it would require a bureaucracy to make such determinations and this bureaucracy, like others, would be subject to rent seeking and make poor decisions, even if there were some objective way to measure such value.[163] Furthermore, creating a government agency that, in effect, sets pay levels for all jobs would, at a stroke, eliminate most of the advantages of a market economy and saddle the state with a system of central planning under which the state would have to allocate labor, since the market could no longer use the price system to do so.[164] Finally, comparable worth interferes with the liberty of individual employees to freely strike a bargain with their employers for their ser-

160 *Cf.* DAVID E. BERNSTEIN, YOU CAN'T SAY THAT! 4–8 (2003) (describing opposition to restrictive speech laws because they had been used to stifle the civil rights movement and are likely to be used against unpopular minority groups more generally).

161 U.N. Comm. on the Elimination of Discrimination Against Women, *General Recommendation No. 13: Equal Remuneration for Work of Equal Value*, U.N. Doc. A/44/38 (8th Sess. 1989), *reprinted in* U.N. High Comm'r for Human Rights, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, at 240, U.N. Doc. HRI/GEN/1/Rev.7 (May 12, 2004).

162 *Id.*

163 *See* George Rutherglen, *The Theory of Comparable Worth as a Remedy for Gender Discrimination*, 82 GEO. L.J. 135, 136 (1993).

164 *Id.*

vices.[165] This latter point underscores that the conflicting conceptions of rights are at issue in comparable worth. Its supporters emphasize women's group-claim rights, while its opponents emphasize the rights of all individuals to be free from government coercion in their contractual relationships.[166]

C. The Right to Housing

A variety of international human rights documents hold that there is a right to adequate housing. This is a right that states are obligated to enforce, and thus, it is a claim right to resources rather than a negative liberty. Of course, that kind of right can conflict with individual liberties.

In 1991, the U.N. Committee on Economic, Social and Cultural Rights elaborated on this right in a way that underscores this conflict. It included suggestions that everyone, including renters, "should possess a degree of security of tenure which guarantees legal protection against forced eviction" and "forced evictions are prima facie" inconsistent with the Covenant.[167] It is difficult to pin down the meanings of these claims. But one plausible reading suggests that, as a general matter, landlords should not have the right to evict tenants, even though eviction is the ultimate means to assure that rents are paid and that rental contracts are voluntary.

This conception would severely undermine individual rights to contract for housing. It not only threatens property rights of landowners, but it also makes it less likely that the poor and those with low credit ratings can obtain housing, because landlords will be less likely to lend to such individuals unless they know they can forcibly evict them in the case of nonpayment of rent.[168]

Once again, we are not seeking to prove that a system of strong private property rights, including the right to call on the state to evict individuals for nonpayment of rent, is superior to one in which those rights are curtailed in the interest of enforcing a right to housing. We

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165 For a good summary of the case against comparable worth, including the above and other arguments, see generally ELLEN FRANKEL PAUL, EQUITY AND GENDER 39–61 (1989).

166 *Compare* Rutherglen, *supra* note 163, at 135 (explaining that supporters tend to connect "pay equity" with the broader right of "gender equity"), *with* PAUL, *supra* note 165, at 109–11 (noting objections to the inefficiencies of comparative worth's "interference with the market").

167 Comm. on Econ., Soc. & Cultural Rights, *Report on the Sixteenth and Seventeenth Sessions*, annex IV, No. 7, U.N. Doc. E/1998/22 (June 20, 1998).

168 For a brief discussion of the economic logic behind this conclusion, see RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 514–18 (5th ed. 1998).

do, however, believe that it is clear that a housing system that depends on private enterprise, including contractual freedom between renters and owners, has virtues and should not be limited by international fiat.

D. Humanitarian Law

Here we consider the positions of the ICRC on humanitarian law. We compare its conclusions on controversial issues of humanitarian law with those of the United States. As in our previous discussions, our purpose here is not to show that the ICRC's judgments are clearly wrong, but that they are eminently contestable. Given the different incentives of the United States and the ICRC described above, there is no reason to prefer a priori the results reached by the ICRC to those of the United States.

The recent conflicts with al Qaeda have occasioned dramatic examples of the differences between the United States and the ICRC on humanitarian law. For instance, the ICRC has taken the position that members of terrorist organizations like al Qaeda that are captured in noninternational conflicts (that is, where no other state is a party) cannot be held as enemy combatants at all, regardless of whether they are given POW status.[169] Instead, they must be either tried as civilians or released. A panel of the Fourth Circuit relied expressly on the conclusions of the ICRC in determining that the United States could not hold Ali Saleh Kahlah al-Marri, a member of al Qaeda captured in the United States, as an enemy combatant.[170] This judicial opinion demonstrates the authoritative weight that is accorded the opinions of this particular NGO.

The United States as well as some international law scholars disagreed with the ICRC.[171] The argument that terrorists captured in noninternational conflicts cannot be enemy combatants relies heavily

169 This position is in keeping with the basic tenet of the ICRC that there are no "black holes" in the Geneva Convention and that all combatants must be treated either as prisoners of war or civilians. *See* Peter Jan Honigsberg, *Chasing "Enemy Combatants" and Circumventing International Law: A License for Sanctioned Abuse*, 12 UCLA J. INT'L L. & FOREIGN AFF. 1, 9 (2007).

170 Al-Marri v. Wright, 487 F.3d 160, 185 (4th Cir. 2007), *rev'd en banc sub nom.*, Al-Marri v. Pucciarelli, 534 F.3d 213 (4th Cir. 2008), *vacated as moot sub nom.*, Al-Marri v. Spagone, No. 08-368, 2009 WL 564940 (U.S. Mar. 6, 2009).

171 *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2115–16 (2005).

on the notion that Protocol I of the Geneva Convention[172] has become customary international law. But the United States refused to sign Protocol I of the Geneva Convention precisely because it was concerned about its potential use as protection for terrorists.[173] We have already discussed our reservations about using custom in preference to more democratic forms of norm creation.[174]

Moreover, as a policy matter, it is hardly obvious that nations should not be able to hold terrorists who are fighting as members of military organizations under procedures different from those used for other detainees. Civilian tribunals may not be designed to comport with the need to protect intelligence sources and methods and to move swiftly so as to discourage an enemy with the military capability to kill thousands of civilians. Military tribunals may be better adapted than civilian courts to punish those who have taken up arms as members of terrorist groups.[175] Thus, in this current controversy, the United States is advancing a position that has legal and policy justification.

Beyond such a dramatic conflict, there is strong evidence of more systemic differences between the United States and the ICRC—differences that may be important for how wars are fought in the future. The ICRC recently published a massive study entitled *Customary International Humanitarian Law*, which seeks to codify the customary law of humanitarian law.[176] The general counsels of the Department of State and Department of Defense replied at length to this study, disputing its methodology and giving four examples of rules of humanitarian law proclaimed by the ICRC which it believed did not represent internationally binding legal norms.[177] All of the disputes were examples of where the ICRC wanted to expand the reach of humanitarian

172 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *adopted* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

173 *See* Josh Kastenberg, *The Customary International Law of War and Combatant Status: Does the Current Executive Branch Policy Determination on Unlawful Combatant Status for Terrorists Run Afoul of International Law, or Is It Just Poor Public Relations?*, 39 GONZ. L. REV. 495, 532 (2004).

174 *See supra* Part III.C.

175 *See* John O. McGinnis, *Executive Power in the War on Terror*, POL'Y REV., Dec. 2007–Jan 2008, at 63, 73.

176 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2005).

177 Letter from John Bellinger, III, Legal Advisor, U.S. Dep't of State, & Willam J. Haynes, General Counsel, U.S. Dep't of Defense, to Dr. Jakob Kellenberger, President, Int'l Comm. of the Red Cross (Nov. 3, 2006), *reprinted in* 46 I.L.M. 514, 514–31 (2007) [hereinafter Letter from John Bellinger].

obligations. For instance, the ICRC wanted to make it a war crime to inflict "widespread, long-term and severe damage to the natural environment" even when damage occurs as part of achieving a legitimate military objective.[178] As discussed above, given its mission and orginazational interests, it is hardly surprising that the ICRC would want to expand the reach of humanitarian law even at the expense of effective war prosecution.[179]

We also observe that U.S. State and Defense Departments' methodological complaints about the ICRC parallel the concerns we have about the low quality of customary international law generally. For instance, the United States complains that the ICRC unduly relies on statements of the General Assembly and the ICRC itself as evidence of state practice.[180] We likewise regard such statements as "cheap talk" because they do not show that states are actually following the practice in question. The United States also complains that the ICRC does not give much weight to negative practice, which parallels our concern that states can be counted as affirmatively consenting to an international norm even if they object to it.[181]

Moreover, the United States argues that the report "fails to pay due regard to the practices of specially affected states."[182] This includes, in particular, the United States. This objection also has resonance with our concerns. The practices of the most affected states would be far more probative than those not affected by particular rules at issue, because the talk of the former would be less "cheap."

We do not contend that all of the practices adopted by the United States in the War on Terror are justified. Indeed, we have previously criticized the Bush administration's excessive claims of unbounded executive power, its detention policies for terrorism suspects, and its assertions that virtually any form of torture is legal if ordered by the executive.[183] However, these flaws are best corrected

178 *Id.* at 520–21.

179 The United States was not the only nation that had substantial disagreements with the ICRC. NATO disputed its conclusions with respect to the Kosovo intervention. *See* Larry Minear et al., *NATO and Humanitarian Action in the Kosovo Crisis* 66 (Thomas J. Watson, Jr. Inst. for Int'l Studies, Occasional Paper No. 36, 2000), *available at* www.reliefweb.int/library/documents/natokosovo36.pdf (describing differing and sometimes conflicting interpretations of the Geneva Convention provisions between NATO and the ICRC with respect to the Kosovo Crisis).

180 Letter from John Bellinger, *supra* note 177, at 515.

181 *See id.*

182 *Id.*

183 *See, e.g.*, McGinnis, *supra* note 175, at 67–75; Posting of Ilya Somin to the Volokh Conspiracy, http://volokh.com/posts/1187914017.shtml (Aug. 23, 2007, 16:06 EST).

by reliance on domestic legislative and judicial checks on executive power rather than through reliance on international legal norms that have not been ratified by the domestic democratic process. To some extent, both Congress and the Supreme Court have already begun to curb the Bush administration's excesses.[184] As this article goes to press, the Bush administration's more controversial policies are under review by the Obama administration, and some may well be modified or reversed.

These examples illustrate that the democracy deficit has real consequences for human rights law and humanitarian law. International human rights norms that try to impose contestable notions of rights on matters that have few spillovers from one nation to another, like a decision about whether to adopt comparable worth, usurp the proper function of democratic nations and retard the process of demonstration and competition that a diversity of norms would provide. As the examples of humanitarian law suggest, it is not at all clear that even international norms that address matters with substantial spillover effects are likely to strike a better balance than the domestic political processes of democratic states.

V. Representation-Reinforcing Rights: The Example Of Free Migration

A. Representation-Reinforcing Rights

While we are generally skeptical of the desirability of using raw international human rights law to displace the domestic law of democratic states, we believe representation-reinforcing rights are an exception. As discussed in the Introduction, this exception flows from our theory. Democracy is itself an institution that depends on norms. Because international human rights are best developed through democratic systems,[185] international norms that facilitate democracy have a claim to be enforced domestically. In other words, the democracy deficit objection to the enforcement of international human rights loses force when those rights themselves directly provide the framework or infrastructure that allows citizens to exercise control over

184 In 2006, Congress enacted the McCain Amendment in response to the Administration's use of torture. *See* Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739 (codified in scattered sections of 10, 28, 42 U.S.C.). The Supreme Court has repudiated the administration's claims of unbounded executive power on several occasions. *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 653 (2006) (Kennedy, J., concurring); Hamdi v. Rumsfeld, 542 U.S. 507, 537–38 (2004) (plurality opinion); Rasul v. Bush, 542 U.S. 466, 484 (2004).

185 *See supra* Part II.

their governments. In such cases, the use of raw international law to displace the domestic law making processes of democratic states may serve to promote rather than to undermine democratic accountability.

Of course, the exact content of representation-reinforcing rights is open to debate. We believe that in order to qualify for domestic enforcement these rights must contribute directly or substantially to democratic control by citizens over their nations. It is not enough that these rights are arguably beneficial in some other way, such as contributing to human welfare or economic prosperity generally.

As we also noted in the Introduction, most democracies already incorporate many representation-reinforcing rights, such as free speech, into their constitutions. Thus, the most interesting question posed by this conceptualization of domestically enforceable international human rights law is whether there are other important representation-reinforcing rights that liberal democracies do not yet generally incorporate. For that reason, we choose to focus on the rights of migration as examples of powerful democracy-reinforcing rights that liberal democracies do not provide. As described below, these rights actually strengthen popular leverage over government policy by enabling more people to "vote with their feet."

We do not contend that broad migration rights are enshrined in current international human rights law. It is quite clear that they are not, although such rights would build on certain rights of emigration and refuge that have recognition in international law.[186] But our underlying normative contention is that international human rights advocates should shift their efforts to developing rights, like rights of migration, that facilitate people's leverage over their governments so as to choose appropriate norms for themselves, instead of making that choice for them by having international law enforce a thick set of substantive rights. Thus, it is not surprising that the example we choose is not yet the most intense focus of concern in the international human rights community.

Migration rights are not the only representation-reinforcing mechanism that might be appropriately enacted at the international law level. There may well be other examples. However, we show that migration rights are an unusually compelling case because their beneficiaries generally have little or no representation in any existing domestic democratic process.[187]

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186 *See infra* Part V.C.

187 For a more detailed defense of international migration rights as a democracy enhancing measure, see Ilya Somin, *Tiebout Goes Global: International Migration as a*

B. The Advantages of "Foot Voting"

One of the advantages of decentralized federalism is the ability of citizens to "vote with their feet" and exit a jurisdiction whose policies harm their interests by moving to one that has more attractive ones.[188] Even very poor and severely oppressed groups, such as blacks in the Jim Crow era American South, have been able to take advantage of exit rights to improve their lot.[189]

In addition to providing a means for migrants to improve their personal circumstances, exit rights also function as another tool for imposing democratic control over government policy. Jurisdictions that adopt harmful policies oppressing or impoverishing their citizens risk losing valuable labor, capital, and tax revenue to jurisdictions with more attractive policies. As a result, such governments have incentives to change their policies to conform more closely with the interests of their people. In some respects, such government accountability through "exit" is actually more effective than traditional accountability through voting and other forms of "voice."[190] Often, citizens have stronger incentives to acquire the information needed to effectively "vote with their feet" than they do for purposes of traditional ballot box voting. The latter are subject to a serious collective action problem that creates "rational ignorance," while the former are not.[191]

Tool for Voting With Your Feet, 74 MO. L. REV. (forthcoming 2009) (symposium on federalism and international law).

188 For detailed discussion, see John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 106–12 (2004); Ilya Somin, *Closing the Pandora's Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 GEO. L.J. 461, 464–65 (2002); Somin, *Political Ignorance*, *supra* note 56, 1344–52.

189 *See* WILLIAM COHEN, AT FREEDOM'S EDGE 248–73 (1991); FLORETTE HENRI, BLACK MIGRATION 51–66 (1975); David E. Bernstein, *The Law and Economics of Post-Civil War Restrictions on Interstate Migration by African-Americans*, 76 TEX. L. REV. 781, 783–84 (1998).

190 For the distinction between exit and voice, see ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY 3–4 (1970). For arguments that exit is often a superior means for imposing democratic control on government, see Somin, *Political Ignorance*, *supra* note 56 at 1344–52.

191 *See* Somin, *Political Ignorance*, *supra* note 56, at 1344–47. For a discussion of the concept of rational ignorance, see Somin, *Voter Ignorance*, *supra* note 56, at 436. The core idea is that voters have little incentive to acquire significant amounts of political knowledge because the chance that any one vote will influence the outcome of an election is vanishingly small. Thus, most citizens are "rationally ignorant," a conjecture supported by extensive polling data showing that most citizens know very little about government and politics. For a survey of recent data, see Ilya Somin, *When Ignorance Isn't Bliss: How Political Ignorance Threatens Democracy*, POLICY ANALYSIS (Cato Inst.), Sept. 22, 2004, at 1, 6–9, *available at* http://www.cato.org/pubs/pas/pa525.pdf.

Most analyses of foot voting focus on migration within a single nation, usually one with a federal system of government.[192] However, the idea is also applicable to international migration.

The vast majority of the population of the United States consists of either immigrants or descendants of immigrants who came here fleeing poverty or oppression that they experienced under their own governments. From 1941 to 2000, the United States admitted 27.6 million legal immigrants and 3.5 million refugees.[193] Australia, Canada, New Zealand, and Israel have also been prominent destinations for immigrants fleeing hostile government policies.[194]

For citizens of nondemocratic states—which still include the majority of world's population—foot voting through emigration may be the only way for them to have any say in the policies that they live under. Obviously, such people include the vast bulk of the world's poorest and most oppressed people.

C. Migration Rights in Current International Law

The importance of migration rights is partly recognized by current international law. Human rights treaties such as the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights recognize a right to emigration.[195] However, this "right to leave" has not been coupled with an equally strong right to enter. Indeed, recent political trends have seen renewed efforts to curtail entry into the United States, Australia, and Western Europe.[196] Unfortunately, the right to leave may have little value for potential migrants who have nowhere to go.

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192 The classic work in the field is Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

193 ROGER DANIELS, GUARDING THE GOLDEN DOOR 191, 235 (2004).

194 *See* U.N. Dep't of Econ. & Soc. Affairs, Population Div., *International Migration 2006*, U.N. Doc. ST/ESA/SER.A/256 (Mar. 2006), *available at* http://www.un.org/esa/popuation/publications/2006Migration_Chart/Migration2006.pdf.

195 International Covenant on Civil and Political Rights, *supra* note 29, art. 12; Universal Declaration of Human Rights, *supra* note 29, art. 13. For a complete survey of international law on the right to leave, see Colin Harvey & Robert P. Barnidge, Jr., *Human Rights, Free Movement, and the Right to Leave in International Law*, 19 INT'L J. REFUGEE L. 1 (2007).

196 *See e.g.*, Margaret Kengerlinsky, *Immigration and Asylum Policies in the European Union and the European Convention on Human Rights*, 12 GEO. PUB. POL'Y REV. 101, 101 (2007) (noting the "fortress Europe" mentality and its recent impact on immigration and asylum policy); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557, 1591–92 (2008) (discussing the impact of September 11 on immigration and policy in the United States); Catherine Skulan, *Australia's Mandatory Detention of "Unauthorized" Asylum Seekers: History, Politics, and Analysis*

Current international law, such as the 1951 Convention Relating to the Status of Refugees, requires states to grant entry to migrants only if they have a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion . . . ."[197] Even then states are only required to refrain from expelling refugees once they have arrived within their borders; they remain free to deny entry at the border.[198] This approach is also followed in U.S. refugee law, and in that of E.U. states.[199] Thus, migration rights can be denied to potential immigrants who have suffered the adverse effects of harmful government policies without being specifically targeted for "persecution" on the basis of any of the above categories. For example, a citizen of an oppressive society cannot claim the right to enter the United States or the European Union "merely" because the absence of free political debate in his country leads to the enactment of harmful government policies that reduce his or her well-being. He must prove that he has been specifically targeted for persecution because of his opposition to the government. Similarly, the law allows states to deny entry to "economic" migrants—even if their poverty is in large part due to flawed policies enacted by their home governments.

Moreover, even in democratic states, domestic political processes are unlikely to give full weight to the interests of potential immigrants. By definition, such people are not yet citizens, do not have the right to vote, and are unlikely to be able to exercise political influence in other ways. Thus, political leaders can neglect their interests—or even falsely blame them for alleged "harms" that they have not caused—with relatively little fear of political retribution. It is therefore not surprising that anti-immigrant political movements have flourished in both the United States and several European nations in recent years, while parties seeking to increase immigration are rare.

Under International Law, 21 GEO. IMMIGR. L.J. 61, 71–76 (2006) (discussing recent developments in Australia).

197 Convention Relating to the Status of Refugees art. 1.A(2), July 28, 1951, 189 U.N.T.S. 150.

198 This distinction underpins, for example, the U.S. "wet foot, dry foot" policy on Cuban refugees under which they are allowed to stay if they arrive on U.S. soil, but can be denied entry into the United States if intercepted by U.S. authorities at sea. *See Cuban-Americans Question 'Wet Foot, Dry Foot' Policy*, NEWSMAX, Jan. 11, 2006, http://archive.newsmax.com/archives/articles/2006/1/11/113342.shtml.

199 For a summary of U.S. law, see Sael v. Ashcroft, 386 F.3d 922, 924–25 (9th Cir. 2004). For a summary of EU law, see Rosemary Byrne et al., *Understanding Refugee Law in an Enlarged European Union* (Inst. Int'l Integration Studies, Discussion Paper No. 11, 2003), *available at* http://www.forcedmigration.org/events/prague2004/byrne-paper.pdf.

These problems reflect an "antiforeign bias" that routinely afflicts voters, causing them to underestimate the benefits of international trade and migration, while overestimating its harms.[200]

D. Democracy, Foot Voting, and the Case for an Expanded International Right to Entry

From the standpoint of promoting democratic accountability through foot voting, the distinction between victims of "persecution" and other potential migrants makes little sense. Even potential migrants who have not been targeted for persecution on the basis of race, religion, or political, beliefs may still suffer the ill effects of oppressive or misguided government policies. For example, repression of the right to freedom of speech and political organization affects not only would-be speakers, but also all other citizens of the society in question who are forced to live under a political process that they have no right to influence.

Similarly, "economic" migrants are in many cases fleeing poverty that is in large part caused by the flawed policies of the governments they live under. Development economists have long recognized that most poor countries could generate rapid economic growth by adopting appropriate policies, some as straightforward as enforcing the rule of law.[201] Indeed just as political refugees are fleeing their nations because they are targeted by discriminatory and fundamentally unjust laws, so are economic migrants. The major reason that an immigrant from a third world nation has greater earning power in a developed nation is that free markets and the rule of law increase the value of his human capital.[202]

In many cases, enormous advances in the economic status of the poor could be achieved simply by allowing them to acquire enforce-

200 For a detailed analysis, see CAPLAN, *supra* note 55, at 38–39.

201 For one of the most influential summaries of the evidence, see Jeffrey D. Sachs & Andrew Warner, *Economic Reform and the Process of Global Integration*, *in* 1 BROOKINGS PAPERS ON ECONOMIC ACTIVITY 1 (William C. Brainard & George C. Perry eds., 1995). *See also* NATHAN ROSENBERG & L.E. BIRDZELL, JR., HOW THE WEST GREW RICH 20–32 (1986) (explaining how Western nations' greater prosperity relative to most other states is primarily the result of innovative policy choices); Mancur Olson, Jr., *Big Bills Left on the Sidewalk: Why Some Nations Are Rich, and Others Poor*, J. ECON. PERSP., Spring 1996, at 3, 13–15 (showing that policy choices have an enormous impact on the relative wealth or poverty of nations).

202 *See generally* Douglass C. North, *Why Some Countries Are Rich and Some Are Poor*, 77 CHI.-KENT L. REV. 319, 320 (2001) (discussing systemic differences between rich and poor countries).

able property rights[203] and by integrating the nation in question more closely with the world economy.[204] All too often, migrants who are fleeing generally adverse economic and political conditions are no less victims of their governments than those who have been targeted for individualized "persecution" of the sort currently recognized as grounds for asylum rights by international law. While migration rights would be most useful for the poor in developing nations, whose exit opportunities would allow them to pressure their own governments for better policies, they may also be helpful to those in more advanced societies, because citizens' enhanced ability to exit would provide greater leverage against policies that aid special interests at the expense of the public.[205]

Some scholars have argued for stronger international migration rights on deontological moral grounds.[206] Others advocate such changes because they are likely to greatly increase the well-being of migrants from repressive and underdeveloped societies, and also to provide economic benefits to the societies that take them in.[207] We sympathize with both claims. However, our purpose is to emphasize an additional and generally ignored advantage of international migration rights: the opportunity to strengthen democratic accountability by enabling more people to "vote with their feet" against repressive or dysfunctional governments in their home societies. As in the case of domestic federal systems, international foot voting allows citizens greater choice over the government policies they live under, and provides them greater leverage to force states to adopt better policies in order to prevent skilled migrants and valuable taxpayers from departing.

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203 *See generally* HERNANDO DE SOTO, THE MYSTERY OF CAPITAL (2000) (showing how the poor in many third world countries suffer from their lack of enforceable property rights).

204 *See, e.g.*, JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION 52–64 (2004) (showing how free trade and openness to foreign investment provide enormous benefits to the world's poorest citizens).

205 *Cf.* William J. Carney, *The Political Economy of Competition for Corporate Charters*, 26 J. LEGAL STUD. 303, 315 (1997) (explaining exit in the corporate context).

206 *See, e.g.*, Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, *in* THEORIZING CITIZENSHIP 229, 241 (Ronald Beiner ed., 1995); Jonathon W. Moses, *Two (Short) Moral Arguments for Free Migration*, 2 ANVENDT ETIKK VED NTNU 25, 25–30 (2003).

207 *See, e.g.*, LANT PRITCHETT, LET THEIR PEOPLE COME 2–3 (2006); Jonathon Moses & Bjorn Letnes, *If People Were Money: Estimating the Gains and Scope of Free Migration*, *in* POVERTY, INTERNATIONAL MIGRATION AND ASYLUM 188 (George J. Borjas & Jeff Crisp eds., 2005).

Unlike many other types of international law, a right to free migration does not undermine the ability of democratic states to adopt diverse approaches to various policy issues. States with free entry and exit rights can still enact a wide range of different policies, so long as they do not inhibit freedom of movement without strong justification. Indeed, as scholars of domestic federalism have emphasized, freedom of movement might stimulate policy innovation by governments, as they compete for economically valuable migrants.[208]

We do not claim that our argument justifies an "open borders" international law norm. Even in combination with the moral and economic case for free migration rights, it will not outweigh all possible justifications for restricting immigration in particular instances. Thus, an international immigration rights norm would still allow nations to restrict the numbers and kinds of immigrants they receive when they have a justification for doing so.[209]

Indeed, in some cases, free migration could actually undermine democratic governance. For example, it is possible that the rapid immigration of a large group hostile to liberal democracy could result in the election of a governing party that would undermine the very liberties that make the country in question attractive to immigrants in the first place. In such a scenario, restrictions on immigration may be necessary to maintain democratic government despite the very real harms that they cause.[210] Nevertheless, international law migration rights would be an important thumb on the scale in democratic nations, pushing in favor of more liberal immigration policies.[211]

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208 *See, e.g.*, GEOFFREY BRENNAN & JAMES M. BUCHANAN, THE POWER TO TAX 172–86 (1980); ALBERT BRETON, COMPETITIVE GOVERNMENTS 31–34 (1996); ALBERT BRETON & ANTHONY SCOTT, THE DESIGN OF FEDERATIONS 13–19 (1980); THOMAS R. DYE, AMERICAN FEDERALISM 1–31 (1990); James M. Buchanan, *Federalism as an Ideal Political Order and an Objective for Constitutional Reform*, PUBLIUS, Spring 1995, at 19, 19–23; Wallace E. Oates, *An Essay on Fiscal Federalism*, 37 J. ECON. LITERATURE 1120, 1134–37 (1999); Wallace E. Oates & Robert M. Schwab, *Economic Competition Among Jurisdictions: Efficiency Enhancing or Distortion Inducing?*, 35 J. PUB. ECON. 333, 335–42 (1988); Tiebout, *supra* note 192, at 418–20; Barry R. Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 J.L. ECON. & ORG. 1, 5–6 (1995); Ralph Winter, *Private Goals and Competition Among State Legal Systems*, 6 HARV. J.L. & PUB. POL'Y 127, 129–30 (1982).

209 In this Article we do not consider the issues raised by national decisions to deport people for illegal entry.

210 We do not believe that either the United States or most European nations are currently faced with such a threat.

211 We do not necessarily believe that international norms should be directly enforced by the judiciary. As discussed *supra* Part I, there are a variety of methods by which international law can be integrated into domestic law, including as independent authority for imposition of rules by domestic executive branch agencies and leg-

The importance of foot voting does not provide a comprehensive blueprint for international migration law. It does, however, provide an important and generally overlooked consideration in favor of broadening international rights to entry and exit. At the very least, we should consider the possibility of enacting much stronger entry rights for migrants fleeing states with nondemocratic governments where foot voting is the only practicable way for most citizens to choose the government policies they wish to live under.

E. Migration Rights as a Form of Representation-Reinforcing International Law

Our defense of international migration rights on the ground that they foster democratic choice raises the question of whether the same argument might justify the overriding of domestic law by other international law norms. In the domestic sphere, a variety of arguments have been made to justify the overriding of seemingly majoritarian legislative enactments on the ground that doing so promotes representation-reinforcement in other ways.[212] Similar arguments could be made in the international sphere. For example, some scholars claim that the absence of anti-hate speech laws may "silence" racial minorities and reduce their ability to participate in the political process.[213] Others argue that proportional representation (PR) systems are more democratic than first past the post ones.[214] Perhaps, therefore, imposition of hate speech norms or PR electoral systems through international law might facilitate representation reinforcement.

There are, however, three important reasons why there is a stronger representation-reinforcement argument for imposing migration rights on democratic states than other possible international law norms. First and most important, migration rights facilitate the representation of people who have no voice whatsoever in existing democratic processes in entry states. In the case of those whose states of origin are nondemocratic, they lack any representation in any democratic process anywhere. This situation is qualitatively different from that of citizens of established democracies, who generally have at least some substantial voting rights, even if imperfect ones. One possible

islatures. The comparative advantages of different enforcement mechanisms will vary depending on the norm in question.

212 The classic work is of course ELY, *supra* note 7. For citations to more recent literature, see Somin, *Political Ignorance*, *supra* note 56, at 1352–70.

213 *See, e.g.*, MARI J. MATSUDA ET AL., WORDS THAT WOUND 93–96 (1993).

214 *See generally* AREND LIJPHART, PATTERNS OF DEMOCRACY 301–09 (1999) (arguing for proportional representation over majoritarian democracy).

analogy within a democracy is the situation of black Americans in the Jim Crow era South, at a time when they were denied the right to vote. Yet even they could potentially gain that right by migrating to the North, as many in fact did.[215] By contrast, citizens of nondemocratic nations have no hope of gaining the franchise unless they are allowed to migrate to a democracy.

Second, most potential representation-reinforcing reforms for democratic states are subject to serious disagreement on the merits. It is far from clear, for example, that PR is really more democratic in a meaningful sense than first past the post. By definition, a mature democracy is likely to already provide those representation-reinforcing policies whose democracy promoting elements are beyond serious contestation. Therefore, there is a strong case for avoiding the imposition of a single, unitary international rule on widely controversial aspects of the democratic process.

Obviously, migration rights are also highly disputed on a variety of grounds. However, there is little if any doubt that extending them would promote democracy from the standpoint of the migrants, whose ability to choose the form of government they live under would be greatly increased. As noted above, we are willing to accept restrictions on migration rights where migration would undermine democracy by introducing an extremely large population of immigrants hostile to basic liberal democratic values.[216]

Finally, an additional reason for giving preference to migration rights is the truly enormous gains in human well-being that might result from enabling residents of poor and undemocratic regimes freer access to more advanced and more liberal societies. The income gains alone are staggering.[217] A Mexican worker immigrating to the United States, for example, can expect a permanent two-to-sixfold increase in his or her wages.[218]

Gains in protection for basic human rights are potentially even greater. Numerous governments engage in extensive repression of ethnic, religious and other types of minority groups. Often, the repression exceeds anything found in liberal democratic states. In the most extreme (but far from uncommon) cases, genocide and mass murder have led to the deaths of over 200 million people during the past century.[219] Lesser but still severe forms of group repression also

215 *See supra* note 189 and accompanying text.

216 *See supra* Part V.D.

217 For estimates of the income gains, see PRITCHETT, *supra* note 207, at 18–22.

218 COUNCIL OF ECON. ADVISERS, ECONOMIC REPORT OF THE PRESIDENT 191 (2007), *available at* http://www.gpoaccess.gov/eop/2007/2007_erp.pdf.

219 *See generally* RUMMEL, *supra* note 105, at 1–28 (compiling the data).

abound under authoritarian and totalitarian governments. If even a small fraction of those suffering from such abuses can avail themselves of the opportunity to migrate to freer societies, the potential human rights benefits would be enormous.

Some might contend that the poorest and most oppressed are unlikely to be able to migrate. That will certainly be true in the case of many people. However, history shows that even severely oppressed people often emigrate if allowed entry by liberal democratic states. Examples include the Vietnamese and Cambodian "boat people" who fled highly oppressive totalitarian regimes in the 1970s and 1980s.[220] Recent studies show that a liberalization of immigration regimes by advanced nations would lead to enormous wage gains by migrants from many of the world's poorest countries.[221] Not all of the world's poor and oppressed populations are mobile; but enough are to ensure that freer international migration would lead to major benefits for them.

Some of the potential representation-reinforcement gains from migration rights could be realized even if the migrants were not granted full citizenship rights by their host countries, and were instead brought in as temporary guest workers. Such migrants could still greatly increase their economic well-being and be able to "vote with their feet," thereby exercising some choice over the policies they wish to live under.[222] Guest worker programs in Germany, Singapore, and elsewhere have offered valuable opportunities to migrants from poor countries.[223] These programs extend migration rights to citizens of poor and oppressed societies without allowing them to dilute the voting power of current residents of liberal democratic states.

There may well be other representation-reinforcing reforms that could be imposed on democracies through international human rights law that are similar in nature to migration rights. We do not contend that the migration rights are the only representation-reinforcing norm that could ever be legitimately generated by interna-

220 *See generally* NGHIA M. VO, THE VIETNAMESE BOAT PEOPLE, 1954 AND 1975–1992 (2005) (discussing the causes and dynamics of their flight).

221 *See, e.g.*, PRITCHETT, *supra* note 207, at 2–4, 18–22; Moses & Letnes, *supra* note 207, at 188.

222 For a variety of proposals along these lines, see PRITCHETT, *supra* note 207, at 42–44.

223 *See, e.g.*, RITA CHIN, THE GUEST WORKER QUESTION IN POSTWAR GERMANY 38–41 (2007) (describing massive and longstanding German guest worker programs); Kerry Howley, *Guests in the Machine*, REASON, Jan. 2008, at 20, 22–33 (describing benefits of guest worker programs in various countries, focusing especially on Singapore's extensive program).

tional law. We do, however, suggest that migration rights are an unusually strong candidate because of the way in which they provide a voice for those who otherwise lack any access to representation, and the truly enormous size of the benefits they create.

CONCLUSIONS AND IMPLICATIONS

We have argued that raw international human rights law should generally not be given the authority to alter the domestic human rights law of democratic states. This conclusion flows naturally from the democracy deficit of all raw international law, which makes it likely that its norms will generally be less beneficial than those of domestic law generated by democratic processes. In the case of human rights law, international lawmaking processes are particularly suspect because of the extensive influence of repressive nondemocratic governments who have an interest in suppressing human rights rather than promoting them.

While it may not be desirable for international human rights law to provide rules of decision in the domestic law of democracies, our analysis points to a different conclusion for nondemocratic states. In many cases, international human rights law norms may well be superior to the domestic law of dictatorships. In the extreme case of totalitarian states that suppress virtually all human rights or engage in mass murder,[224] almost any set of legal rules is likely to be preferable to those enacted by the state's domestic rulers.

This factor points to the possibility that we should strive for an asymmetric system of international human rights law: one that regulates dictatorships more strictly than democracies. While traditional international law has historically sought to treat all states as possessing equal rights and obligations, the merits of this stringent perspective in the field of human rights law seem dubious. In particular, there may be a much stronger case for imposing substantive legal norms (as opposed to those that merely facilitate democratic processes) through international law on dictatorships than on democracies. Of course, the governments of such nations are unlikely to enforce human rights directly against themselves. But outside institutions, including international tribunals, may well be justified in enforcing international human rights norms that displace the nation's own norms, when such institutions have jurisdiction over a matter. While we cannot fully expound on the strengths and weaknesses of an asymmetric system of

224 *See supra* notes 104–09 and accompanying text.

international human rights law in this article, the possibility merits further inquiry.[225]

Obviously, the role of nondemocratic states in influencing the content of international human rights law is a major obstacle to the creation and enforcement of rules that would impose meaningful constraints on such states. Thus, reform efforts will have to focus on limiting the influence of such states on the content of international human rights norms, as well as on ensuring that the resulting laws will be adequately enforced against them. The issues involved are complex, and we cannot even begin to resolve them here. Their consideration is, however, a logical extension of our analysis that should be undertaken in future research.

We are not wholly negative about the contribution international law can make to human rights even in democratic nations. For instance, if nations ratify future human rights treaties and make them self-executing within their domestic systems, we do not object to their enforcement. Under those circumstances the proclamation of such norms would not be "cheap talk" and the content of the treaties is likely to be no worse than that of ordinary domestic law because they have to pass through the same legislative processes. The European Convention on Human Rights (ECHR) is perhaps a system of international legal norms that exemplifies some of the potential of international law created by democratic states that then embody it in their own domestic law. The ECHR was drafted and signed by a set of overwhelmingly democratic nations, and has since served as a means of curbing a number of human rights abuses through litigation in the European court system.[226] A few nondemocratic nations, most notably Russia, have joined the ECHR system and ECHR litigation may have helped curb abuses in that country. Recently, Russian President Dmitri Medvedev called for legal reform in Russia in order to reduce the number of Russian cases going to the European Court on Human Rights in Strasbourg.[227] If the ECHR really does succeed in forcing improvements in Russian human rights practices, it would be a

225 We also note that nations transitioning to democracy with weak law-creating institutions may choose to create mechanisms to enforce international law against themselves. *See* Tom Ginsburg, *Locking in Democracy: Constitutions, Commitment, and International Law*, 38 N.Y.U. J. INT'L L. & POL. 707, 712 (2006).

226 For recent analyses, see A EUROPE OF RIGHTS (Helen Keller & Alec Stone Sweet eds., 2008) (compiling assessments of the impact of the ECHR on European legal systems).

227 *See Medvedev: Russia Must Improve Courts*, BOSTON GLOBE, Dec. 3, 2008, at A3. Russian cases have accounted for a remarkable twenty percent of the European Court of Human Rights' total caseload since 1998. *Id.*

notable example of a system of international norms set up by democratic states improving human rights in a nondemocratic society, as well as in the democratic states themselves. In these respects, the ECHR contrasts with international human rights regimes where the influence of nondemocratic states is stronger.[228]

International human rights law can potentially play a useful role in limiting the abuses of nondemocratic governments and perhaps in promoting norms that enhance citizens' control over their governments, such as promoting international mobility. But it also has serious shortcomings that should make us wary of allowing it to displace the domestic lawmaking process of democratic states.

228 *See supra* Part III.A.