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PROCESS VALUES, INTERNATIONAL LAW, AND JUSTICE*

By Paul B. Stephan

I. Introduction

Discussion of international law, as much as of any body of legal rules, invites a distinction between inputs—the processes that convert preferences and beliefs into something recognized as "law"—and outputs—the content of the legal rules generated by lawmaking processes. Most normative accounts of international law consider only the latter. Whether the topic comprises the laws of war or the nature of international human rights, discussion tends to focus on the content of the rule rather than its provenance.

There exists, however, an older tradition that considers the normative value of the international lawmaking process. It reaches back at least to Jeremy Bentham. It maintains that the content of rules cannot be separated from the means of their creation, and that lawmakers are more likely to adopt substantively desirable rules when lawmaking is structured and constrained in a particular way.[1]

A focus on the lawmaking process, I submit, permits us to explore a particular dimension of justice, namely the relationship between law and liberty. Laws that reflect the arbitrary whims of the lawmaker are presumptively unjust, because they constrain liberty for no good reason. A strategy for making the enactment of arbitrary laws less likely involves recognizing checks on the lawmaker's powers and grounding those checks in processes that allow the governed to express their disapproval. The system of checks and balances employed in the U.S. Constitution embodies this strategy, although reasonable people can debate its efficacy. As the economist A. O. Hirschman observed in an influential book, regimes that permit free movement of persons and property similarly restrict the force of arbitrary rules by allowing exit from unwanted restrictions.[2] I want to inquire into the role of checks in international lawmaking.

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[1] Jeremy Bentham, "Principles of International Law," in John Bowring, ed., *The Works of Jeremy Bentham*, vol. 2 (New York: Russell and Russell, Inc., 1962), 540.

[2] Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Cambridge, MA: Harvard University Press, 1970).

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I recognize that other process values exist—in particular, transparency and participation rights. I have discussed these issues in international lawmaking elsewhere.[3] I choose to focus here on "checking values" to avoid a subtle problem that can enter into any discussion of participation and transparency, namely an implicit assumption about the necessity of lawmaking. Once we decide that a problem requires a collective and coercive response, we want to ensure that the means of constructing that response is both fair and expeditious. Transparency and participation enhance the quality of a lawmaking process that moves inevitably toward some action. A concern for liberty, in contrast, implies a conviction that expedience sometimes must defer to fairness, and moreover that in some cases the optimal outcome is inaction. A focus on checking rests on an assumption that sometimes the interests of liberty require that a coercive authority stay its hand. Most international-law specialists regard any diminution in the scope of international law as a setback and therefore refrain from going down an analytical path that might justify less law. I therefore concentrate on checking to counteract an underlying expansionist bias in international-law scholarship.[4]

Let me deal first with a preliminary, and I believe insubstantial, objection to the way in which I have framed the problem. At first blush, it might appear that the fundamental principle of state consent provides all the checking that international lawmaking needs. This principle holds that a state (and by extension, its subjects) can be bound by a rule of international law only if that state manifests its consent to the rule. As long as states have a real choice, itself subject to internal checks on official decision making, the adoption of the rule should meet basic criteria of procedural justice. Indeed, the correlate of this principle—that each state has a veto over the adoption of international law, at least as applied to the state and its subjects—suggests that international lawmaking poses *less* of a threat to liberty than do conventional municipal lawmaking processes based on majority rule.[5] One might think that, as a result of this principle, no rule will attain the status of international law unless its adoption

[3] See Paul B. Stephan, "Accountability and International Lawmaking: Rules, Rents, and Legitimacy," *Northwestern Journal of International Law and Business* 17, no. 2/3 (1996–97): 726–29; and Paul B. Stephan, "The New International Law—Legitimacy, Accountability, Authority, and Freedom in the New Global Order," *University of Colorado Law Review* 70, no. 4 (1999): 1580–82.

[4] Typical is work over the last quarter-century by Professor Louis Henkin, the Reporter of the *Restatement (Third) of the Foreign Relations Law of the United States* and perhaps the most prominent and admired U.S. professor of international law. For a representative example of his expansionist approach to international law, see Louis Henkin, "U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker," *American Journal of International Law* 89, no. 2 (1995): 348–50. For an account of the shifts in Henkin's position over the last forty years, see Paul B. Stephan, "Courts, the Constitution, and Customary International Law," *Virginia Journal of International Law* 44, no. 1 (2003): 37–47.

[5] According to the usage of international-law scholars, "municipal" law refers to the domestic law of particular states, whether national or local.

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makes some states better off and no state worse off, because no state would embrace a rule that has greater costs than benefits.[6]

One still might argue that state consent is an insufficient safeguard for liberty, because particular states might consent to international obligations that the great majority of their subjects find objectionable. States might sacrifice the welfare of their subjects to obtain benefits for their rulers or for special groups with whom the rulers are allied. Dictatorships provide an obvious case where states may constitute disloyal agents, but even democracies face such problems.[7] I elide this issue here, because even if states were perfect agents, it would not follow that international lawmaking represents a remarkable instance of exclusively Pareto outcomes, that is, a process that benefits at least some participants and makes none worse off.

For an important range of cases, state consent is not a condition for a rule having the force of international law. First, many specialists argue for the existence of *jus cogens* or peremptory norms that apply regardless of state consent.[8] Second, the concept of state consent is artful, and opportunistic decision makers have some freedom to construe consent in ways that circumvent conventional checking processes. Third, political and economic pressure can reduce state consent to an empty formality due to the state's lack of effective options. I discuss each of these points in turn.

For at least the last sixty years, jurists have argued that the international legal system contains some fundamental rules that must exist for inter-

[6] By "rule," I mean a command that limits in some way the autonomy that a subject of international law otherwise would enjoy. The rule might reside in a treaty or similar formal instrument, or, more controversially, it might be part of an unwritten body of norms that specialists call "customary international law." For analysis of the analogous problem regarding unanimous voting that arises when creating a constitution, see James M. Buchanan, *The Limits of Liberty: Between Anarchy and Leviathan* (Chicago: University of Chicago Press, 1975); and Dennis C. Mueller, *Constitutional Democracy* (New York: Oxford University Press, 2000), 65–67.

[7] As public choice theory predicts, lawmakers concerned with reelection make laws, including international commitments, that benefit discrete and powerful groups at the expense of the general welfare. I discuss this dynamic and provide examples in Stephan, "Accountability and International Lawmaking."

[8] The *Restatement (Third) of the Foreign Relations Law of the United States* defines *jus cogens* or peremptory norms as follows:

> Some rules of international law are recognized by the international community of states as peremptory, permitting no derogation. These rules prevail over and invalidate international agreements and other rules of international law in conflict with them. Such a peremptory norm is subject to modification only by a subsequent norm of international law having the same character. It is generally accepted that the principles of the United Nations Charter prohibiting the use of force . . . have the character of jus cogens.

American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (Philadelphia: American Law Institute, 1987), sec. 102, comment k. This prestigious but unofficial source about international law is itself controversial, and not all courts regard all its pronouncements as correct. *United States v. Yousef*, 327 F.3d 56, 99–103 (2d Cir. 2003).

national law to be law, and that these rules operate prior to and independent of state consent. The war crimes trials that followed World War II, for example, meted out punishment for violations of rules of fundamental humanity and decency and treated the question of whether Germany or Japan had agreed to respect these rules as irrelevant. In the case of Japan, the deliberate decision of the Imperial Government not to adopt the 1929 Geneva Convention Relating to the Treatment of Prisoners of War made no difference in the judgments, many capital, imposed on the accused. Contemporary commentators argue that a number of rules, such as prohibitions of genocide and torture, operate universally and independently of the various conventions that codify those norms.[9]

Putting *jus cogens* rules aside, what constitutes state consent may depend on the views and authority of the decision maker. At one extreme, parliamentary adoption of a rule of international law mirrors the process of municipal lawmaking, and largely satisfies whatever process values the adopting state observes. At the other extreme, lawmakers with little democratic accountability (for example, judges with life tenure) might embrace the rule in the face of opposition by the political branches. Bentham worried much about the judges, because of what he saw as the obscurantist and secret methods of judicial lawmaking and the unrepresentative nature of the judiciary.

Beside judicial lawmaking, delegation of rulemaking authority to a third party—say, an international body such as the European Commission—also circumvents, in practice if not in form, the principle of sovereign consent. The initial delegation may satisfy municipal process values, but if it encompasses a self-executing authority—as is the case for much of the lawmaking powers of the organs of the European Community (EC)[10]—then rules created pursuant to the delegation may come about without significant checks. Moreover, if independent actors—in particular, domestic courts—possess and exercise the authority to enforce the rules generated by the exercise of delegated authority (again, as is the case for EC law), not much remains of sovereign consent.[11]

[9] M. Cherif Bassiouni, "International Crimes: Jus Cogens and Obligatio Erga Omnes," *Law and Contemporary Problems* 59, no. 4 (1996): 63–74.

[10] The European Community (until 1992, the European Economic Community) is the most important, and legally and institutionally the most developed, part of the European Union. It has lawmaking bodies (the Commission, the Council, and the European Parliament) as well as a judiciary (the Court of Justice). See note 21 below.

[11] The 1957 Treaty of Rome, which established the European Economic Community, implies, but does not explicitly state, both that the European Court of Justice (the Luxembourg court) has the authority to deliver authoritative and binding interpretations of Community law, and that the various national courts of the member states have an obligation to apply Community law in favor of national law, even if that means invalidating domestic legislation. Decisions of the Luxembourg court articulated these conclusions, which the courts of the member states in turn accepted and implemented. For further discussion, see Paul B. Stephan, Francesco Parisi, and Ben F. W. Depoorter, *The Law and Economics of the European Union* (Charlottesville, VA: LexisNexis, 2003), 294–325.

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Finally, states may have the formal authority to reject a rule of international law but, because of conditions of economic or political dependency, may lack the effective capacity to make a choice. A common example involves the financial and economic policy requirements imposed by the International Monetary Fund (IMF) on debtor states: a sovereign state can refuse to comply with IMF demands, but only if it accepts the loss of access to foreign capital as the price of its independence.[12] Similarly, a member of the World Trade Organization or the European Union theoretically could denounce its obligations under those international regimes, but the costs of extricating a state from the intertwined relationships captured in these arrangements make such a divorce a daunting prospect.[13]

Once state consent ceases to constrain international lawmaking, the question of alternative checks to protect liberty looms. Under what circumstances does the international lawmaking process as currently constituted present a threat of arbitrary force? What kinds of resistance to the results of international lawmaking can process values justify?

I address these questions in three steps. First, I explore whether international law does carry a threat of coercion. If not, concerns about arbitrary restrictions of liberty are misplaced. Second, I discuss the problems arising from delegations of lawmaking authority to international institutions, with specific reference to the 1998 Rome Statute and the body it established, the International Criminal Court. Third, I discuss the process-value issues associated with judicial lawmaking. None of these concerns justifies blanket opposition to international lawmaking. Rather, those interested in making and enforcing international rules need to grapple with these issues and provide another layer of justification for their efforts.

II. International Law as a Potential Threat to Liberty

Legal rules affect liberty in at least two ways. Rules may contribute to the establishment of a reasonably secure political, social, cultural, and economic order that provides a foundation for voluntary interactions and personal flourishing. The concept of "ordered liberty" captures this first function. In addition, rules can restrict the choices made within the framework of ordered liberty. A rule forbidding murder falls into the first category, while one punishing criticism of political authority falls into the second. In normative terms, first-category rules advance the values embedded in liberty, while second-category rules restrict liberty. Categorization depends heavily on context, rather than on a priori principles.

[12] Michael N. Barnett and Martha Finnemore, "The Politics, Power, and Pathologies of International Organizations," *International Organization* 53, no. 4 (1999): 699–732.

[13] Not to mention the opinion of some that a right unilaterally to secede from the European Community does not exist. See Joseph H. H. Weiler, "Alternatives to Withdrawal from an International Organization: The Case of the European Economic Community," *Israel Law Review* 20, nos. 2–3 (1985).

For rules to function in either way, however, some mechanism must exist to induce compliance. In municipal law, the state's coercive power (where it exists) supplies the most obvious means of enforcement, either directly or as a background threat. Other pathways to compliance include informal social sanctions. More problematically, some theorists also believe in a process of rule internalization, through which individuals impose psychic costs on themselves for rule transgressions and psychic rewards for rule compliance.[14]

International law as conventionally conceived seems to exclude all means of inducing compliance save informal social sanctions. The international community, as opposed to individual states, supposedly lacks coercive power, and societies *ex definitio* lack interior lives and psychic states.[15] Accordingly, the compliance literature for the most part concentrates on how reputation and retaliation serve to induce states to observe international law.[16]

More recently, however, scholars have identified ways in which international law can have directly coercive effect. International tribunals can issue monetary or punitive judgments that states perceive as having direct effect and therefore uncritically implement. Domestic tribunals can apply international rules in a self-perceived capacity of agent for the international lawmaker.[17] To be sure, these examples rest ultimately on the willingness of national governments and other actors to fulfill their roles in administering coercive sanctions. But this reservation is also true of municipal law, which depends fundamentally on the willingness of individuals to play their part in the execution of the law.

Moreover, most legal academics seem to favor extending the coercive power and reach of international law. To take just one prominent example, the International Criminal Court (ICC) has generated a cottage industry of largely celebratory work, even though it has yet to take on its first case.[18] The ICC, which came into being in 2002, represents a culmination of decades of work, led by the United States, to establish a permanent international body to investigate and prosecute human rights violations arising out of political and social catastrophes. Previously, the United Nations Security Council had established tribunals on an ad hoc basis to

[14] Robert Cooter, "Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms," *Virginia Law Review* 86, no. 8 (2000): 1577–1601.

[15] Individual states do have the capacity to impose significant sanctions, including economic punishment and, in extreme cases, use of force. International bodies, as opposed to individual states, may lend their approval to such actions, but they lack the capacity directly to bring them about.

[16] Andrew T. Guzman, "A Compliance-Based Theory of International Law," *California Law Review* 90, no. 8 (2002): 1844–51. For recent work exploring a sociology of state compliance with international law, see Ryan Goodman and Derek Jinks, "How to Influence States: Socialization and International Human Rights Law," *Duke Law Journal* 53, no. 3 (2004).

[17] Robert E. Scott and Paul B. Stephan, "Self-Enforcing International Agreements and the Limits of Coercion," *Wisconsin Law Review* n.v., no. 2 (2004): 599–614.

[18] To be precise, the court itself has yet to take up any case, although the prosecutor has commenced investigations into various atrocities alleged to have occurred in East Africa.

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deal with particular disasters. The United States ultimately opposed the final version of the Rome Statute, which created the ICC, because it allows the ICC's prosecutor and judges to decide on their own whether to act, rather than awaiting referral of a case from the Security Council (the practice with the ad hoc tribunals). Professors of international law mostly have deplored the U.S. position. More generally, the U.S. professoriat, by numbers and stature, overwhelmingly favors the exercise of judicial power, both international and domestic, to punish violations of international law; and Commonwealth and European scholars seem largely to envy, on behalf of their national courts, the power that U.S. judges wield. Thus, even if at present the coercive, and potentially liberty-threatening, dimensions of international lawmaking seem marginal, the weight of opinion would wish this lawmaking to acquire great instrumental power.

Accordingly, without exaggerating the practical significance of the issue, we can regard some instances of international lawmaking as coercive and therefore a potential threat to liberty. Individuals have been jailed (and in the case of the post–World War II proceedings, hanged) as a result of the decisions of international criminal courts, and a permanent body to carry out the prosecution and punishment of international crimes now exists. Litigants have used domestic courts to sue individuals and firms for large sums because of purported violations of international law. Business regulation increasingly turns on the decisions of international bodies. The enforceability and interpretation of a widening range of contracts turns on the meaning of international law. Each of these instances contains the potential of arbitrary encroachments on liberty.

By no means do I wish to suggest that all international lawmaking is presumptively a threat to liberty, much less that it does not contribute to the ordering of liberty necessary for human flourishing and freedom. Coercion brought against, for example, persons guilty of torture and murder does not set off many alarm bells. The point, rather, is that whenever enactment of a law creates the possibility of coercion, one legitimately can ask whether the processes involved in its enactment contain at least minimal safeguards to discourage the arbitrary exercise of power.

I also concede that whether given procedures satisfy process values depends on context, and that the contexts of international lawmaking differ in many respects from the context of domestic lawmaking. Because there is no such thing as an international government per se, clear separation of powers, much less elaborate checks and balances, is hard to construct. Because direct election of legislators is virtually absent (the European Parliament providing the only counterexample, and that a qualified one), the problem of lawmaker accountability necessarily involves agency questions.[19] In some instances, the power of national states to

[19] By an agency question, I mean the possibility that an agent (here, an international body) has different incentives than does its principal (here, the people for whom the international body acts).

(*continued on next page*)

reject rules of international law substitutes for separation of powers and checks and balances, but, as I observed above, this mechanism does not always work.

My point, in sum, is that some international rules can be sufficiently coercive to justify an inquiry into the suitability of the lawmaking processes that generated these rules. What constitutes a minimally acceptable lawmaking process is a difficult question, and a simple analogy to domestic lawmaking is an insufficient response. But the growing presence of international rules in contemporary life, and the ambitions of some for an even greater role for these rules, invites an inquiry into the legitimacy of their genesis, interpretation, and application.

III. International Institutions as a Potential Threat to Liberty

Imagine a treaty under which several states agree to establish an international agency invested with the authority to issue binding pronouncements regarding some set of topics. To make the problem more interesting, imagine that the treaty posits that the agency's determinations about its authority to issue particular pronouncements cannot be challenged in national courts. Further imagine that the treaty obligates each signatory to implement the agency's determinations, and in particular to give them "the full force of law."

This lawmaking structure is far from hypothetical. Substitute "Constitution" for "treaty" and "Supreme Court of the United States" for "international agency" and we have the structure of U.S. constitutional law (albeit due to evolved understandings rather than because of the written text of the document).[20] The 1957 Treaty of Rome constitutes the European Court of Justice in similar fashion, and the 1950 European Convention on Human Rights does much the same for the European Court of Human Rights. The 1945 Articles of Agreement of the International Monetary Fund and the International Bank for Reconstruction and Development (better known as the World Bank) arrogate an adjudicatory function for the respective executive bodies of these institutions. The 1998 Rome Statute for the International Criminal Court puts that court in the position

As a result of the 1997 Treaty of Amsterdam and the 2001 Treaty of Nice, the European Parliament, which comprises members directly elected by voters in the member states, acquired an expanded role in the creation of the legislation of the European Community. But the Community's other lawmaking organs, the European Commission and the European Council, selected by the members' governments, still dominate the process. For discussion, see Stephan, Parisi, and Depoorter, *The Law and Economics of the European Union*, 247–53.

[20] That is to say, the Supreme Court of the United States acquired the power to render authoritative and binding interpretations of the Constitution as a result of gradual public acceptance of its claim that it possessed this power, rather than because of any express language in the Constitution so providing.

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of resolving a number of issues involving the scope and meaning of international criminal law.[21]

Consider in particular what kinds of questions the International Criminal Court must address, how it must address them, and the consequences of its choices. The Rome Statute authorizes punishment of four generic crimes—genocide, crimes against humanity, war crimes, and aggression. The last category is contingent on the later adoption of a definition of that class of crimes, because the authors of the statute concluded that the concept of aggression at present lacks sufficient clarity and acceptance to support prosecutions. The statute's definitions of the three crimes currently proscribed contain many illustrations, but each rests ultimately on stated general principles that invite elaboration and expansion. To take just one of these proscribed acts, a "crime against humanity" entails imprisonment "in violation of the fundamental rules of international law" without further specification, in addition to "persecution" on the basis of, inter alia, politics or ethnic, cultural, or religious differences. But what norm constitutes a "fundamental" rule of international law? What acts amount to "persecution"? How are we to determine the causal links between persecution and difference? These are questions of critical importance that only organs of the ICC can resolve.[22] Much the same goes for other important questions, such as the existence of excuses or justifications for otherwise criminal behavior.[23] Finally, in every particular case, the court must determine either that no state with jurisdiction over an offense is conducting an investigation, or that states that have conducted or are conducting an investigation are unable or unwilling "genuinely" to act.[24]

It is exactly the process by which the prosecutor and the court must make these fundamental substantive choices that is troubling. Under the terms of the Rome Statute, the prosecutor and the court act hermetically. Each must convince itself of the plausibility of its interpretations, and the court may refuse to accept the prosecutor's determinations. But no out-

[21] The Treaty of Rome (1957) created the European Economic Community, which the 1992 Maastricht Treaty renamed as the European Community. The European Community is the principal element of the European Union. The Council of Europe, a body of states that antedates the organizations that became the European Union and that always has had more members than those organizations, promulgated the 1950 European Convention on Human Rights, which in turn established the Strasbourg court. At the end of World War II, the victors established the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (the World Bank) to organize and reform the international financial system. The Soviet Union participated in the negotiations that produced the Articles of Agreement for the IMF and the World Bank, but it and its satellites declined to join those organizations.

[22] See Paul B. Stephan, "International Governance and American Democracy," *Chicago Journal of International Law* 1, no. 2 (2000): 253–56.

[23] See Rosa Ehrenreich Brooks, "Law in the Heart of Darkness: Atrocity and Duress," *Virginia Journal of International Law* 43, no. 3 (2003): 867–69.

[24] See Paul B. Stephan, "U.S. Constitutionalism and International Law: What the Multilateralist Move Leaves Out," *Journal of International Criminal Justice* 2, no. 1 (2004): 13–14.

side body can override these decisions. By the terms of article 16 of the statute, the United Nations Security Council may order a one-year delay of an investigation or prosecution, but such action would require the consent of all five permanent members of the Security Council and in any event would not be conclusive.

In effect, then, the prosecutor and the judges—each subject to no outside review once selected for a nonrenewable nine-year term—have the power to decide whether individual states have "genuinely" pursued an offense, whether particular conduct constitutes an offense, and what constitutes an acceptable excuse or justification for conduct otherwise constituting an offense. They must make these determinations in the face of scanty precedent or historical background, and in contexts that often implicate deep geopolitical antagonisms. They do have access to a burgeoning body of scholarly advice about how they should go about their work, but this, as scholarship typically does, contains as many points of view as there are authors. At bottom, only such internal constraints rooted in the construction of professional identities as these actors might possess (if any) constrain their exercise of significant coercive power.

What the Europeans call the Luxembourg and Strasbourg courts—the EC's European Court of Justice (in Luxembourg) and the Council of Europe's European Court of Human Rights (in Strasbourg)—present similar issues. At the same time, some differences between these bodies, and between them and the ICC, are apparent. Although the Luxembourg court has final say on the interpretation of the Treaty of Rome (the foundational instrument of the European Community), the existence of a separate EC lawmaking process complicates and to some extent confounds the court's freedom of action. Moreover, the court's jurisdiction does not extend beyond the twenty-five members of the EC. Finally, even though the court's decrees are said to have direct effect, they have practical significance only to the extent that national governments comply with them. The Luxembourg court has evinced a fairly high degree of tolerance for foot-dragging and circumvention, suggesting that less coercion attends its edicts than one might assume. Finally, the Luxembourg court has carried on in various forms for fifty years, creating a history that provides an additional layer of constraint.

The Strasbourg court is nested in a different institutional structure. It has functioned in one capacity or another since 1959, but only since 1998 have all persons with human rights claims against the forty-four states bound by the European Convention enjoyed an unqualified right to file suit.[25] Due at least in part to this structural change, the twenty-first cen-

[25] Protocol 11, Convention for the Protection of Human Rights and Fundamental Freedoms, *European Treaty Series* no. 155, effective November 1, 1998. Before the amendment, individuals could only direct a request for investigation and prosecution of human rights violations to the European Human Rights Commission, an independent international body created by the European Convention. For a discussion of the pre-1998 practice of European

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tury has seen a remarkable increase in the number of the court's controversial decisions, such as those concerning the rights of sexual minorities, the right to die, and the procedures for conducting police investigations.[26] The Strasbourg court faces no counterpart legislative or executive organs, unlike the Luxembourg court. Moreover, the Strasbourg court's ability to enforce its decisions through fines operates fairly automatically, limiting the power of intransigent states to undermine its judgments.[27]

I discuss these bodies because they present the most straightforward instances of delegation of coercive lawmaking power to an international body. Other instances of potentially greater significance exist. Under legal theories that enjoy wide circulation in the academic community and modest support in some domestic courts, various international bureaucracies, such as the United Nations Human Rights Commission and the International Committee of the Red Cross, enjoy a more diffuse power to create "customary international law," which some courts regard as binding. Were this theory to gain widespread credence, many international bodies would take on the role of coercive lawmakers.

For two reasons, however, I defer discussion of these bodies to the next section. First, at present the claims for their lawmaking capacity are outliers rather than mainstream legal doctrine. Second, their actions take on the nature of customary international law only if courts reach this conclusion. The legitimacy of this process thus is part of a broader inquiry about domestic common law methods as means of international lawmaking.

Are the constraints that currently operate on the International Criminal Court, the European Court of Justice, and the European Court of Human Rights sufficient to protect against arbitrary restrictions of liberty? One possible response is that every constitutional court, most particularly the Supreme Court of the United States, functions in this manner, and most people consider the development and empowerment of these institutions a good thing. Why shouldn't these international courts work as well as these national courts do?

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states in response to rulings of the Strasbourg court, see Tom Barkhuysen, Michiel van Emmerik, and Piet Hein van Kempen, eds., *The Execution of Strasbourg and Geneva Human Rights Decisions in the National Legal Order* (The Hague: Martinus Nijhoff Publishers, 1999).

[26] *Atlan v. United Kingdom,* 34 European Human Rights Reports 33 (2002) (*ex parte* hearings to consider government privilege to withhold evidence in criminal trial); *Pretty v. United Kingdom,* 35 European Human Rights Reports 1 (2002) (right to die); *I. v. United Kingdom,* 36 European Human Rights Reports 53 (2002) (rights of transgendered); *Beck, Copp, and Bazeley v. United Kingdom* (48535/99) [2002] ECHR 679 (October 22, 2002) (right of homosexuals to serve in armed services).

[27] Monetary awards issued by the Strasbourg court become debts that constitute a straightforward obligation of the defendant state. According to the website of the court: "To date States which have been ordered to make payments under Article 50 have consistently done so." Since 1996, the court has added interest charges to judgments not satisfied within three months. http://www.echr.coe.int/Eng/EDocs/EffectsOfJudgments.html (accessed March 16, 2005).

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The most obvious rejoinder is that international organs are different from national courts. To begin with, they draw on agents from different states with various cultures, historical experiences, and professional identities. They confront a greater range of contested issues than do most bodies, and they do so without the benefit of an unstated cultural consensus or broad historical memory. Yes, most institutions may go through a period of foundational angst, during which the absence of a developed institutional culture or guidance from precedent may complicate choices about appropriate actions. But the international organs present an aggravated case. The Supreme Court of the United States, for instance, enjoyed the benefit of its justices' common grounding in British common law, a frame of reference that they shared with virtually all lawyers of their day. Nothing similar binds the ICC or the Strasbourg or Luxembourg courts.

The absence of cultural and historical constraints might not matter as much if these organs largely engaged in technocratic exercises to reach important but obscure results. One could imagine an international tribunal that, for example, settled disputes over the ownership of particular locations on the radio spectrum based exclusively on issues of engineering and simple rules of allocational priority. Interestingly, the real-world analog to this hypothetical organ—the dispute resolution services of the Internet Corporation for Assigned Names and Numbers (ICANN), which deals with ownership of internet domain names—does not purport to bind national legal systems, which remain free to reject ICANN outcomes.[28] An analogous process, the settlement of investment disputes by international arbitration, has generated heated criticism exactly for its narrow focus on property rights at the expense of other values.[29] The mandates of the ICC and the Luxembourg and Strasbourg courts go far beyond technocratic problems, however. They extend to deep and culturally divisive issues such as the duty to refuse an illegitimate order, the role of amnesty and reconciliation in the wake of conflict, the balance between press freedom and protection of individual reputation and group sensitivities, and the rights, powers, and immunities of members of marginalized groups.

There is a point of view that maintains that institutions not subject to conventional democratic constraints ought to resolve emotionally charged and divisive issues, because democracy breaks down under stress. According to this argument, resolution of fundamental problems requires reasoned deliberation, which a society awash in passion cannot sustain. In

[28] The Internet Corporation for Assigned Names and Numbers is a nonprofit corporation established in the Commonwealth of Virginia to administer the domain name assignment system. All contracts for domain names now contain a clause providing for arbitration of ownership disputes under ICANN rules. For a fuller description of the legal basis of this process, see *Barcelona.com, Inc. v. Excelentisimo Ayuntamiento de Barcelona,* United States Court of Appeals for the Fourth Circuit, 330 F.3d 617 (2003).

[29] See Muthucumaraswamy Sornarajah, *International Law on Foreign Investment,* 2d ed. (Cambridge: Cambridge University Press, 2004).

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lieu of neglecting these problems, a nation can turn to disinterested decision makers operating behind a cloak of moral authority.[30] For proponents of this argument, a different system of checks must apply to such tribunals. Rather than submitting their decisions to formal institutional constraints, the wielders of this power instead must display due regard for the limits of their moral authority. This intangible constraint, in turn, implicates an alliance between the tribunal and its commentators, as the weight of scholarly opinion presumably can bolster or reduce the authority behind a controversial decision.

Even as applied to a well-entrenched and successful institution such as the Supreme Court of the United States, this argument invites considerable skepticism. Whatever the particular endowments of the Supreme Court justices, their collective ability to sense the intangible limits on their authority is impaired by the cloistered lives that their institutional roles impose on them. Institutional checks on an organ's lawmaking powers exist precisely because individual judgment and discretion are not always sufficient to prevent great blunders. The history of the Supreme Court's more ambitious constitutional decision making—the infamous *Dred Scott* decision, only the second occasion on which the Court struck down a federal statute, comes to mind[31]—suggests why something more than intuitive self-restraint may be necessary.[32]

An extension of the democracy-breakdown argument to an international tribunal seems especially implausible. The idea that such institutions from their inception will wield sufficient moral authority to overcome deep conflict strikes me as wishful thinking. The probability that jurists from different nations can build coalitions that withstand local passions and entrenched political opposition veers toward nil. More likely is the rise of perceptions that particular decisions represent national prejudice. The prosecution of Slobodan Milosevic by the UN's special court for the former Yugoslavia (a precursor of the ICC) appears to have united Serbs in a conviction that the rest of Europe hates them, rather than leading them to the realization that their former leader had disgraced their nation with his policies. Conflicts between the British House of Lords and the Strasbourg court give the impression that a controlling majority of the human rights tribunal has thrown its lot in with a Franco-

[30] See Cass Sunstein, "Constitutionalism and Seccession," *University of Chicago Law Review* 58, no. 3 (1991): 69–70.

[31] *Dred Scott v. Sandford,* 60 U.S. (19 How.) 393 (1856). This infamous Supreme Court decision invalidated the Missouri Compromise, a congressional enactment intended to limit the spread of slavery to new territories of the United States, on the ground that the legislation infringed constitutionally protected interests of slave owners. The first instance of Supreme Court invalidation of federal legislation was *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803), a decision involving the power of Congress to assign certain cases to the Court's jurisdiction.

[32] See Cass Sunstein, "The Dred Scott Case with Notes on Affirmative Action, the Right to Die, and Same-Sex Marriage," *The Green Bag* 1, no. 1 (1997).

German cabal intent on undermining traditional underpinnings of British liberty in favor of a continental conception of social-democratic *dirigisme*.[33] The point is not that in either case these fears are well founded, but rather that they exist and may become more powerful with the growth and development of international tribunals.

One might sensibly respond that all international organs, the ICC and the Luxembourg and Strasbourg courts included, operate under one basic constraint, namely the process for choosing their members. A selection process that allows for state dissent, combined with limited terms for the persons selected, sets up an *ex ante* check on what an organ can do. States may miscalculate what a judge will do once seated—the United States has some familiarity with this problem—but, with some delay, they can correct for that.

In some instances where discretion is concentrated in a single person, such as the prosecutor of the ICC, the selection power, or more precisely the power not to reappoint, may serve as a check on the actor. In other cases, the selection power may deter extreme deviations from an organ's stated responsibilities. Often, however, the structure of selection of members of these organs militates against discipline. The common practice of international tribunals, including the ICC and the Luxembourg and Strasbourg courts, entails allocating positions to individual states or cohesive blocs of states. As a result, stable coalitions can form to marginalize persons selected by dissident states. In the case of the ICC, for example, a single judge selected by the United States could not defeat a coalition of states hostile to U.S. exercises of power, a scenario that is far from hypothetical.[34]

I do not mean to suggest that any of these tribunals face an insurmountable hurdle. It is not inconceivable that the ICC, for example, might simultaneously avoid taking on any deeply controversial cases while dealing with those obvious outrages that occur. Perhaps, over a decade or more, the leadership of the court might acquire a reputation for balanced action and careful exercise of its powers, thereby accruing moral authority and general respect. But this would take luck as well as prudence. Were a conflict to arise that pitted great powers against each other or

[33] The British courts and the Strasbourg court have differed in several instances, including disagreements over the proper elements of the criminal justice process, *Atlan v. United Kingdom,* 34 European Human Rights Reports 33 (2002) (rejecting rule of *Regina v. Davis,* [1993] 2 All English Reports 643 [C.A.], on obligation of prosecution to disclose statements of confidential informants); over the extent of tort immunity for police officers, *Osman v. United Kingdom,* 29 European Human Rights Reports 245 (2000) (rejecting decision of *Osman v. Ferguson,* [1993] 4 All English Reports 344 [C.A.], on scope of immunity); and over the existence of a privilege under the law of defamation for comment on public figures, *Reynolds v. Times Newspapers,* [2001] Appellate Cases 127 (H.L.) (disregarding Strasbourg court decisions).

[34] For an earlier treatment of this problem that did not consider the possibility of stable coalitions, see Paul B. Stephan, "Courts, Tribunals, and Legal Unification—The Agency Problem," *Chicago Journal of International Law* 3, no. 2 (2002): 336–38.

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otherwise seriously divided world opinion, the tribunal would find it exceedingly hard to seem neither partisan nor toothless.

In the case of the ICC, the risks seem especially unnecessary. An obvious model of easily imposed institutional checks existed at the time of the adoption of the Rome Statute. Since the creation of the United Nations, all war crimes tribunals depended on authorization by the Security Council, a body that acts only in the absence of the disapproval of any of the five traditional nuclear powers.[35] In the past, each opportunity for international intervention in the face of domestic inability to redress gross misconduct depended on the existence of the level of consensus that Security Council action entails. Requiring the ICC to await a Security Council resolution before taking jurisdiction over any particular conflict—the position for which the United States continues to hold out, and the reason for its refusal to ratify the 1998 Rome Statute—would have preserved this institutional structure.

In the abstract, one might see a contradiction between the creation of an institution intended to bring the most terrible kinds of crimes to justice and the retention of a great-power veto over its actions. This objection, however, rests on confusion of the two bases of the ICC's jurisdiction. Credible allegations of the commission of an international crime, one should recall, by themselves are insufficient to justify action by the ICC. The ICC also must determine that no state possesses the capacity and desire to engage in a "genuine" effort to prosecute. Its jurisdiction, in other words, depends fundamentally on a determination that state-level action has failed. This latter consideration, unlike the determination of the existence of the elements of a crime, rests on irreducibly political and contestable considerations.

The Security Council is an appropriate body to make judgments about national incapacity to prosecute international crimes. Expecting a free-standing international institution to go after superpowers seems bizarre. In no other area touching on fundamental interests of a great power do we expect the United Nations to impose its will. It is not excessively cynical to believe that the proponents of the ICC who rejected the U.S. position did so largely out of a conviction that the threat to act against great powers would be empty, but that its hollowness would go unnoticed in at least some quarters.

I see nothing objectionable in general about a great-power veto over certain kinds of UN actions. One can embrace the concept of fundamental equality of all people without extending it to states: the United Nations since its inception has embraced the principle that some states are more equal than others. Each great power can prevent the United Nations from

[35] The five great powers—the United States, Russia, Great Britain, France, and China—do not have to endorse an action of the Security Council, but for any decision to have effect none must exercise its veto. The establishment of past ad hoc war crimes tribunals involved either the active support or passive acquiescence of all five.

authorizing sanctions against itself or its clients. Allowing great powers also to have a veto over capacity-to-prosecute determinations seems a natural extension of the present structure of the international order.

The Strasbourg court represents a different set of institutional problems. On the one hand, the Council of Europe has no counterpart to the UN's Security Council: there is no club of regional powers that possesses a veto over actions undertaken on behalf of the Council of Europe. Constraining the court's mandate, itself only recently unleashed, thus would involve the construction of a new institution. On the other hand, the court's coercive power, although real enough, is less than that of a comparable common law court. In particular, it lacks the power to nullify laws or practices of which it disapproves or to order nonmonetary punishment for persons who disobey its mandates. Individual states thus can resist its orders at the cost of the payment of fines. Sufficient resistance, in turn, might deter the court from undertaking more challenging projects.

My broader point does not concern the particular value of the ICC, the Strasbourg court, or similar institutions. Rather, I wish to respond to the tendency of many scholars to see these organs as the wave of the future.[36] Judicial bodies no less than other instruments of state power can flourish under conditions of limited power. As more international organs acquire self-executing powers that can operate without substantial state cooperation, greater effort will be required to devise checks other than withdrawal of state consent. The current imbroglio over the refusal of the U.S. to recognize the ICC sheds some light on potential alternatives as well as illustrating the politics of institutional maximalism.

IV. Domestic Enforcement of International Law as a Potential Threat to Liberty

Different checking problems arise when independent national courts create, interpret, and impose international law. The problems are subtle, because the means of judicial lawmaking vary among systems and the uses of international law vary from analogy to direct authority. National courts also may differ in what sources and methods they use to ascertain what constitutes international law. Each of these factors can complicate the question of whether international lawmaking by national courts presents distinctive issues of accountability and constraint.

One important difference between national and international courts is that international institutions have acquired coercive powers relatively recently, and the most interesting and possibly worrisome cases involve proposals for future powers. As a result, institutional-design issues remain

[36] See, e.g., Anne-Marie Slaughter, "Judicial Globalization," *Virginia Journal of International Law* 40, no. 4 (2000): 1124; and Jenny S. Martinez, "Toward an International Judicial System," *Stanford Law Review* 56, no. 2 (2003): 432.

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central. Domestic courts, by contrast, constitute facts on the ground. The common-law courts in particular have rich as well as lengthy histories. Accordingly, it seems unrealistic to talk about reforming domestic courts as a means of limiting their ability to resort to international law. Rather, more subtle issues of cultural norms and prestige arise.

In the United States, discussion of the role of international law in domestic adjudication often involves one of two categorical claims, each of which I wish to criticize. First, some authorities have suggested that foreign sources of law, including international law, should have no role in the shaping of judicial determinations of domestic law.[37] At the opposite extreme, some scholars have argued that foreign sources should enjoy a privileged status, in the sense that their "otherness" itself strengthens the case for their respectful assimilation.[38] I believe that both these claims display a lack of appreciation of the multiple functions of precedent and authority in the common law process.

A judge might look to outside experiences for various reasons. On occasion, local law itself refers to foreign law, whether due to conventional choice-of-law rules or the application of a doctrine that involves some comparative assessment (such as the *forum non conveniens* doctrine used to dismiss lawsuits that would benefit from being brought in another jurisdiction). Alternatively, judges might seek evidence of the instrumental effects of a particular rule and look at the experience of other jurisdictions as an empirical test. Similarly, judges might look to other sources to expand their conceptual apparatus. Finally, a judge might apply foreign law out of an independent sense of obligation. Unless one wishes to defend judicial ignorance and narrow-mindedness, only the last function raises any difficulties.

On the one hand, those who attack any use of foreign or international law in the common law process are guilty of confusing these different functions and thereby weaken the force of their arguments. On the other hand, those who argue for privileging this category of law have tended to collapse these functions exactly because some seem obviously appealing, thus obscuring the need to defend the more difficult one. In the United States, neither the critics nor the apologists have sufficiently explored the specific issues surrounding the positing of a foreign-source obligation to apply foreign law.

[37] *Thompson v. Oklahoma,* 487 U.S. 815, 868 n. 4 (1988) (Scalia, J., dissenting); *Stanford v. Kentucky,* 492 U.S. 361, 369 n. 1 (1989); *Atkins v. Virginia,* 536 U.S. 304, 347–48 (2002) (Scalia, J., dissenting); *Lawrence v. Texas,* 539 U.S. 558, 598 (2003) (Scalia, J., dissenting).

[38] See Laurence R. Helfer and Anne-Marie Slaughter, "Toward a Theory of Effective Supranational Adjudication," *Yale Law Journal* 107, no. 2 (1997); and Harold Hongju Koh, "International Law as Part of Our Law," *American Journal of International Law* 98, no. 1 (2004): 45–48. These scholars cite with approval the claim of a prominent appellate judge, the former Dean of Yale Law School, that, with respect to the constitutional jurisprudence of countries that have drawn their inspiration from the United States, "Wise parents do not hesitate to learn from their children." *United States v. Then,* 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi, J.).

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One argument that I note in order to disregard it is the claim that the privileging of foreign and international authority masks a substantive agenda, namely the importation of *bien-pensant* social-democratic values.[39] It may be true that some advocates of the privileging position fail to explain why the decisions of, for example, the Strasbourg court should count but the law and practices of non-European states do not.[40] Behind this failure may lie undefended normative preferences. However, the more persuasive advocates of using foreign and international law acknowledge the point and mount a general defense of their position.[41] It is this general defense that I wish to address.

The basic argument for giving authoritative effect to international law rests on conformity and safety in numbers. A judicial consensus that crosses national boundaries, so the argument goes, matters more than a split of legal authority. To maximize the deference judges qua judges get from society, they should stick together. Thus, a foreign decision—say, the conclusion by the Strasbourg court that the European Convention on Human Rights contains an implicit ban on the criminalization of sodomy—should influence the Supreme Court of the United States in deciding whether the U.S. fundamental law similarly has an unstated but effective limit on governmental power. Moreover, this influence should rest on grounds other than instrumental observations (civilization as we know it did not come to an end in Europe after the Strasbourg court reached its judgment) or conceptual innovation (the particular arguments used to construct an implicit rule from general language in a fundamental text).[42] Rather, other courts should follow the Strasbourg court because doing so enhances their authority as well as that of the European body.[43]

How does this accretion of authority work? First, the appearance of consensus serves as a secondary source of persuasion. Doubters will be more reluctant to challenge widely held beliefs than those that are openly contested. Second, persons may feel some social pull toward conformity and away from deviance. Cooperation across courts thus builds social pressure.

Accepting that this dynamic exists and can bolster judicial authority, one can still question whether it should proceed unchecked. Judicial authority, one might believe, does not work as an end in itself. We want to empower judges to the extent that they will act in ways that make us

[39] Jeremy Rabkin, "Is EU Policy Eroding the Sovereignty of Non-Member States?" *Chicago Journal of International Law* 1, no. 2 (2000): 273–90.

[40] Roger P. Alford, "Misusing International Sources to Interpret the Constitution," *American Journal of International Law* 98, no. 1 (2004): 64–69.

[41] Helfer and Slaughter, "Toward a Theory of Effective Supranational Adjudication."

[42] For instances of the "civilization did not end" kind of argument, see *Atkins v. Virginia*, 536 U.S. 304, 316 n. 21 (2002); and *Lawrence v. Texas*, 539 U.S. 558, 576–77 (2003).

[43] *Atkins v. Virginia; Lawrence v. Texas;* Slaughter, "Judicial Globalization." For a recent instance of the Supreme Court making this kind of argument, see *Roper v. Simmons*, 543 U.S. (2005).

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better off than we would be if they did not act, but not otherwise. For lawyers, of course, this is a hard point to acknowledge, because at least some set of lawyers inevitably will benefit from any accretion of judicial power. Proponents and opponents of any particular move, whether litigators or judges, will grow more powerful from having their controversy gain salience and perhaps will enjoy material rewards as well. Academics will have more to discuss authoritatively. But if we can broaden our horizons to consider the welfare of society, surely we must acknowledge that judges, like other state actors, are capable of arbitrary exercises of power that may threaten liberty.

Checking the lawmaking capacity of judges is tricky, however, because the common law methodology constitutes a style of argument rather than a naked assertion of raw power. Recent proposals in the U.S. Congress to forbid judges from relying on foreign precedent strike me as silly. Judges "rely" on precedent both when they weave it into their arguments and when they act on the basis of their understanding of it, and only the former can be observed. The legislation, in effect, seeks to regulate how judges write opinions, not what they do. The gesture seems empty.

A deeper problem is categorical. Conventional common law methodology simply fills in gaps that legislative enactments can supersede. But constitutional interpretation—in Europe, this means interpretation of the Treaty of Rome and the Convention on Human Rights—operates independently of legislative enactments. Legislatures have no authority to direct courts on how to interpret or apply constitutions.[44] As a result, legislatures cannot override either interpretive strategies or outcomes as to constitutional questions, even where the courts rely on international law. To the extent that courts frame their decisions as constitutional interpretation, Congress in the United States, and national parliaments in Europe, cannot do anything about controversial decisions (involving, for example, the rights and privileges of sexual minorities or the scope of capital punishment) that may incorporate outside sources of authority.

Put aside the problem that, in at least some instances, judges can bring international law into their decisions in ways that displace national legislatures. Are the outcomes based on international law necessarily desirable? The "safety in numbers" argument has a certain appeal. Some regularities in international practice maximize welfare independent of their effect on judicial prestige and power. Justice Antonin Scalia, a leading opponent of the incorporation of international law into constitutional decision making, still argues that the interpretation of international treaties requires judges to take account of the understandings of the treaty parties, including those understandings expressed by courts in other coun-

[44] *Dickerson v. United States,* 530 U.S. 428 (2000) (statute intended to determine scope of remedy for violations of constitutional protection against self-incrimination unconstitutionally infringes on judicial prerogatives).

tries.[45] A more formal way of putting the point is that some legal structures have built into them the possibility of network effects, and that efforts of judges to develop these effects can be defended without privileging judicial prerogatives as such.[46]

In sum, two problems face any effort to limit judicial aggrandizement based on the promotion of international solidarity. First, the legislative process cannot plausibly regulate rhetorical moves, as distinguished from discrete outcomes, and also cannot respond to outcomes placed on a constitutional footing. Second, some international solidarity is good, but separating the desirable, network-effects instances from judicial opportunism is hard. No categorical or structural approach seems to work.

Checking of international lawmaking by domestic courts thus requires approaches that operate internally to the domestic legal culture, as opposed to the institutional-design approaches discussed in Section III with respect to international organs. That is to say, the judges must limit their own actions, because limits imposed from outside seem neither reliable nor plausible. Framed in this manner, the problem resembles that involving constitutional development: internalization by judges of certain norms becomes the only effective means of guarding against excesses.

Earlier I questioned whether internalized cultural norms alone can function as checks on international tribunals such as the ICC and the Strasbourg court. The points I raised—lack of cultural solidarity and internalized norms—do not apply to many of the domestic courts that many scholars have asked to contribute to international lawmaking. These bodies, and in particular the federal courts of the United States, operate against a powerful background of tradition and well-developed professional identity. It is not patently inconsistent, then, to expect internalized cultural norms to do some work in checking domestic courts, but to expect less with regard to international tribunals.

The process of internalizing skepticism about the reliance on international authority has several dimensions. Those who select judges—in the United States, the president and a majority of the Senate do this for the most influential members of the judiciary—may try to predict whether a candidate has such skepticism, although *ex ante* predictions of this kind are notoriously unreliable.[47] Leading figures in the judiciary—in the United States, this means first and foremost the members of the Supreme Court—might expound on the reasons for adopting a more skeptical posture. And

[45] *Olympic Airways v. Hussain*, 540 U.S. 644, 659–62 (2004) (Scalia, J., dissenting).

[46] "Network effects" rest on the rediscovery by some economists and legal theorists of activities that entail positive returns to scale, which is to say that increasing the level of the activity increases the average net benefits associated with each unit of that activity. For application of the theory to international relations, see Kal Raustiala, "The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law," *Virginia Journal of International Law* 43, no. 1 (2002): 63–68.

[47] John C. Jeffries, Jr., "In Memoriam: Lewis F. Powell, Jr.," *Harvard Law Review* 112, no. 3 (1999): 597–600.

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those who interact publicly with the judiciary and play a role in shaping judicial reputations, particularly members of the scholarly community, might praise or condemn judges based on whether they display a critical perspective toward claims of foreign authority.

The praise of skepticism runs against a certain grain in the legal academy. Legal scholarship for the most part avoids the scientific method, which means that the expounding of nonfalsifiable claims incurs no costs. Partly for this reason, creativity and shock value count for more than usefulness. A predictable egotism and self-regard leads, if not ineluctably then frequently, to ambitious claims that require the suspension of skepticism. The current popularity for judicial participation in international lawmaking reflects these factors at least to some extent.

Academia contains other forces, however, that may push the debate in another direction. Normal competitive pressures ensure that no conventional wisdom remains unchallenged for long, and an increase in the salience of a position tends to lead to greater critical scrutiny. In the last few years, we have seen in the United States the beginning of a serious debate about the legitimacy and value of the incorporation of international law into domestic common law. Although some of the antagonists have held on to reductive and absolute positions, new scholarship has taken a more nuanced and sophisticated approach to the problem. In particular, the image of international law as a monolithic authority, as well as the portrayal of domestic incorporation as an all-or-nothing proposition, has been superseded by analytically rich accounts that recognize multiple dimensions of the problem.[48]

One consequence of the increasing sophistication of the debate is the subversion of arguments based on the authority, as distinguished from the usefulness, of international law. To be sure, some scholars insist doggedly on the existence of a clear line of practice in which domestic courts consistently over the centuries have used a monolithic body of "international law" to shape municipal norms.[49] But a growing consensus about the complexity of the issue lightens this purported historical burden by demonstrating that earlier judicial practices, far from being canonical evidence of a general pattern, represent discrete responses to distinguishable problems. This necessary first step makes possible a shift in the terms of debate. We now can make normative judgments about the products of

[48] See T. Alexander Aleinikoff, "International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate," *American Journal of International Law* 98, no. 1 (2004); and Ernest A. Young, "Sorting Out the Debate over Customary International Law," *Virginia Journal of International Law* 42, no. 2 (2002). Both these recent works owe a substantial conceptual debt to A. M. Weisburd, "State Courts, Federal Courts, and International Cases," *Yale Journal of International Law* 10, no. 1 (1995).

[49] Koh, "International Law as Part of Our Law"; Gerald L. Neuman, "The Uses of International Law in Constitutional Interpretation," *American Journal of International Law* 98, no. 1 (2004).

the common law process freed from false constraints based on authoritarian claims.[50]

A move away from obligatory reliance on international law in favor of more nuanced and consequentialist discussions may have a salutary effect on the common law process. Judges (much like all people) sometimes seek to avoid the pain associated with difficult decisions by depicting themselves as compelled to reach a result. Arguments based on authority invite the actor to disregard the actor's intuitions about the action's consequences or the extent to which it will displease relevant audiences. Restricting the domain of authority increases the likelihood that the actor will take into account the implications of the action. So cautioned, the actor—in this case, common law judges—may hesitate more often before encroaching on liberty.

V. Conclusion

It may seem odd to think of international law as a potential threat to liberty, and hence to justice. Certainly its proponents see it as a beacon of hope, a means of civilizing the too violent and cruel tendencies of international politics and promoting humane values. I recognize these aspirations, but note that the last century was littered with regimes that attracted adherents by their noble ideals but that too often became instruments of awful crimes.[51] The manifest good faith and eloquence of those who wish to broaden the scope of international law is not itself sufficient to foreclose an inquiry into the possibility of this threat.

The threat I describe is largely potential. Most specialists would argue that the central problem with international law is its inefficacy, not its power. I argue that this rejoinder is backward looking. The trend over the last twenty years involves the accretion of authority by international institutions, and more frequent and more significant invocations of international law by national lawmakers. I do not argue that either development necessarily is a bad thing. I do argue that the time for critical analysis of these trends is now.

Law, University of Virginia

[50] *Ullonoa Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 170–71 (2d Cir. 2003) (rejecting argument that claims of international law experts constitute an independent source for determining the law of the United States); *United States v. Yousef*, 327 F.3d 56, 74 and n. 35 (2d Cir. 2003) (same).

[51] Stéphane Courtois, Nicolas Werth, Jean-Louis Panné, Andrzej Paczkowski, Karel Bartosek, and Jean-Louis Margolin, *The Black Book of Communism: Crimes, Terror, Repression*, ed. Mark Kramer, trans. Jonathan Murphy and Mark Kramer (Cambridge, MA: Harvard University Press, 1999).

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