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Judicial Globalization in the Service of  
Self-Government

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# Judicial Globalization in the Service of Self-Government

Martin S. Flaherty

## **Abstract**

This working paper considers potential justifications for the democratic legitimacy of what Anne-Marie Slaughter has termed, “judicial globalization” – the reliance by U.S. judges on international and foreign legal materials in the interpretation of domestic law. Toward this end the paper offers two and a half tentative answers, one distinctive to the U.S., the other(s) with general applicability. The distinctively American response, however conservative in theory, suggests that the original understanding of the Constitution supports a strong presumption that the Constitution, and Federal law generally, be interpreted in a way that is consistent with international law, particularly with regard to fundamental rights. The more general and adventurous response, which argues that courts, in their capacity as democratic institutions charged with the responsibility of rendering principled judgments, may consult at least international law: a) to exercise a distinctive type of foreign affairs authority as well, and; b) to better discern the fundamental commitments of the American people. The balance of the paper defines the project with greater precision, then fleshes out the American and more general ways forward.

## Judicial Globalization in the Service of Self-Government

*Martin S. Flaherty\**

It is my opinion that modern foreign legal material can never be relevant to any interpretation of, that is to say, to the meaning of, the U.S. Constitution.

-- Antonin Scalia, speech, American Society of International Law, April 2, 2004<sup>1</sup>

### I. Introduction

Must the rights that American courts enforce be “made in the USA”? In formal, doctrinal terms, the answer is no, at least so long as home-grown political institutions sign off on them directly, through ratification of a treaty,<sup>2</sup> or indirectly, through failing to make a timely and persistent objection to an evolving rule of international custom.<sup>3</sup> But in a broader sense, suspicion toward alien norms still runs deep in our legal culture. International scholars have observed to the point of cliché that the nation which has done

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<sup>1</sup> Anne Gearan, *Foreign Rulings Not Relevant to High Court, Scalia Says*, THE WASHINGTON POST, at A7 (April 3, 2004).

<sup>2</sup> U.S. CONST. art. VI, (“[T]reaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land.”). See *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, sec. 102(3) (1986) [hereinafter “RESTATEMENT THIRD”]. For a historical account explaining why U.S. treaties are presumptively self-executing, see Martin S. Flaherty, *History Right? Historical Scholarship and Treaties as the Supreme Law of the Land*, 99 COLUM. L. REV. 1955 (1999).

<sup>3</sup> See *The Paquete Habana*, 175 U.S. 577 (1900); RESTATEMENT THIRD, secs. 102(2), 112(2).

so much to export its own conception of rights has fought nearly as hard to resist importing those conceptions fashioned abroad.<sup>4</sup>

Native resistance nowhere endures more strongly than where the rights at stake appear most open-ended, even among those otherwise sympathetic to the claims made in the name of such rights. Consider, for example, the two following cases. In one, the Supreme Court proclaims a right to privacy capable of trumping state statutes that criminalize abortion. For the principal basis of this right, the Court relies on evolving American tradition, this even though the issue itself remains deeply contested.<sup>5</sup> Now consider a case in which the Supreme Court holds that the constitutional bar against cruel and unusual punishments prohibits capital punishment of the mentally disabled. Here assume that the *primary* basis for this interpretation is a near complete global consensus against the practice, a consensus that most – but by no means all – states within the U.S. reflect.

However controversial the specific conclusion, the approach taken in *Roe v. Wade* is seen as sufficiently valid that disagreement invites marginalization, as Judge Bork discovered.<sup>6</sup> By contrast, an “internationalist” opinion partially invalidating capital punishment would be considered “off the wall” by all but the most zealous cosmopolitans. Just the barest mention of global death penalty practice by Justice Stevens in *Atkins v. Virginia*, for example, drew the extended wrath of Chief Justice

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<sup>4</sup> See LOUIS HENKIN, *THE AGE OF RIGHTS* (2d ed. 1996); Anthony Lester, *The Overseas Trade in The American Bill of Rights*, 88 COLUM. L. REV. 537 (1988); Martin S. Flaherty, *Aim Globally*, 17 CONST. COMM. 205 (2000).

<sup>5</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>6</sup> Contrast Scalia’s acceptance of tradition with Bork’s rejection of same while both were on the D.C. Circuit. Discuss role this played in Reagan’s choice of Scalia over Bork.

Rehnquist and Justice Scalia, jurists who acknowledge the use of domestic tradition, however grudgingly.<sup>7</sup> In more ominous fashion, less than a handful of Supreme Court opinions from last Term referring to foreign legal materials recently prompted the introduction of a bill in Congress that would prohibit the Federal judiciary from committing similar sins in future.<sup>8</sup>

Judicial globalization – domestic courts relying in some way on international and foreign law -- has begun to infiltrate the U.S. nonetheless.<sup>9</sup> To great fanfare the Court, or at least individual Justices has cited international and comparative law sources in considering the constitutionality of laws criminalizing sodomy,<sup>10</sup> affirmative action,<sup>11</sup> the juvenile death penalty,<sup>12</sup> indefinite detention,<sup>13</sup> and Federal “commandeering” of local officials.<sup>14</sup> To judge by the briefs, this current Term promises a quantum leap in the use of foreign law, thanks in no small part to the international “war on terror” post 9/11. Like it or not, the Court will have to consider international human rights and humanitarian law when reviewing the status of detainees incarcerated at Guantanamo Bay;<sup>15</sup> those captured

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<sup>7</sup> Compare *Atkins v. Virginia*, 536 U.S. 304 , 316, n. 21 (2002) (opinion of the Court) with *id.* at 322 (Rehnquist, C.J., dissenting) and *id.* at 337 (Scalia, J., dissenting).

<sup>8</sup> Cite to Bill.

<sup>9</sup> See Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT’L. L. REV. 1103 (2000); Harold Hongju Koh, *Bringing International Law Home*, 35 HOUS. L. REV. 623 (1998).

<sup>10</sup> *Lawrence v. Texas*, 537 U.S. 1102 (2003).

<sup>11</sup> *Bollinger v. Gruter*, 539 U.S. 306, 342 (Ginsburg, J, concurring).

<sup>12</sup> *Atkins*, 536 U.S. at 304.

<sup>13</sup> *Zadvydas v. Davis*, 533 U.S. 678 (2001)

<sup>14</sup> *Printz v. United States* 521 U.S. 898 (1997).

<sup>15</sup> *Al Odah v. United States*, 124 Sup. Ct. 534 (2004) (cert. granted); *Rasul v. Bush*, 124 Sup. Ct. 534 (2004) (cert. granted).

on the battlefield but detained within the U.S., whether<sup>16</sup> or not<sup>17</sup> they are American citizens; as well as the ongoing use of the Alien Tort Statute, which for twenty years has allowed aliens to bring civil actions against human rights violators in U.S. courts.<sup>18</sup>

All told, judicial globalization within the U.S. appears far enough along to demand attention, but not so far as to have produced extensive consideration over whether the practice is sound. Initial scholarship mainly concentrated on identifying and explaining the phenomenon, rather than assessing its legitimacy.<sup>19</sup> Only recently, as in the past several weeks, have studies focusing on this aspect of the practice appeared, though many of these are incidental pieces and several remain unpublished.<sup>20</sup> With the singular exception of Judge Bork,<sup>21</sup> an extended evaluation, especially from the apparently skeptical perspective of American constitutional theory, has yet to be offered.

Normatively assessing judicial globalization in this way will likely have global implications as well. As international scholars also repeat, courts around the world have generally embraced reliance on international and comparative norms when applying domestic standards, particularly with regard to fundamental rights. This very pervasiveness may create a mirror-image problem that the practice is so thoroughly ingrained that it is taken for granted without further analysis. If so, even assessment of

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<sup>16</sup> *Rumsfeld v. Padilla*, 124 Sup. Ct. 1353 (2004) (cert. granted).

<sup>17</sup> *Hamdi v. Rumsfeld*, 124 Sup. Ct. 981 (2004) (cert. granted).

<sup>18</sup> *Sosa v. Alvarez-Machain*, 124 Sup. Ct. 807 (2004) (cert. granted).

<sup>19</sup> *Cf. supra* note 9.

<sup>20</sup> See *Agora: The United States Constitution and International Law*, 98 AM. J. INT'L LAW 42 (2004) (with essays by Harold Koh, Roger Alford, Michael Ramsey, Gerald Neuman, and Alex Alienikoff); Ken I. Kersch, *Multilateralism Comes to the Courts*, 154 THE PUBLIC INTEREST (2004). There is in the works a symposium on the related topic of judicial globalization from a comparative perspective that will appear in the *Texas Law Review* with essays by Frank Michelman, Sandy Levinson, and Gary Jacobsohn.

<sup>21</sup> ROBERT H. BORK, *COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES* (2003).

judicial globalization keyed to American concerns may speak to the practice elsewhere to the extent those concerns are more widely shared.

This essay seeks to map out plausible analytic approaches to a particular aspect of reliance by American judges on foreign law. Specifically it will consider whether, and how, not just mere reference, but authoritative reliance, can be justified on grounds of democratic self-government. Toward this end it will suggest two types of tentative answer, one distinctive to the U.S., the other(s) with general applicability. The distinctively American response, however conservative in theory, suggests that the original understanding of the Constitution supports a strong presumption that the Constitution, and Federal law generally, be interpreted in a way that is consistent with international law – particularly with regard to fundamental rights. The more general response, which will also be more adventurous, argues that courts, in their capacity as democratic institutions charged with the responsibility of rendering moral judgments, may consult international law a) to exercise a distinctive type of foreign affairs authority as well, and b) to better discern the fundamental commitments of the American people. The balance of this paper will define the project with greater precision, then flesh out the American and more general ways forward.

## **II. U.S. Courts, International Law, and Self-Government in a Globalizing World**

Domestic application of international law by U.S. courts accounts for an important, though still discrete, slice of judicial globalization generally. Likewise, democratic self-government is but one of several normative scales against which this narrow slice may be evaluated. Before proceeding, it may be useful to consider where



these specifics fit in the larger picture, and what the other sets of normative considerations may be invoked, the better to sharpen what is and isn't at stake.

#### A. *Practices*

An initial, and what may be the most important, cut at the phenomenon of judicial globalization involves looking at the institution implementing the international norm. As one commentator has asserted on the domestic plane, "Constitutional institutions . . . are practical devices to meet practical challenges."<sup>22</sup> Some bodies will simply be better suited than others for furthering various possible goals, whether wealth maximization, peace and stability, justice, or democratic self-government. A common example in this regard is the consensus, at least in advance industrialized nations, that relatively insulated central banks comprised of financial experts better advance the cause of fostering a strong economy than would an elected legislature.<sup>23</sup> More controversially, courts with moderate but not complete insulation from popular political process have been advanced as the institution best constituted to make moral judgments from a baseline of democratic self-government.

More than at any other time in world history, there are probably as many types of institutions participating in the implementation of international legal norms as there are institutions. Traditional players, such as national executives acting with domestic legislatures, since World War II have pursued standard means of treaty-making and incorporation to an unprecedented degree.<sup>24</sup> Joining them have been entirely new

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<sup>22</sup> CHRISTOPHER L. EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* 23 (2001).

<sup>23</sup> Andrew Moravcsik, *In Defence of the "Democratic Deficit: Reassessing Legitimacy in the European Union*, 40 *JCMS* 603, 613-614 (2002).

<sup>24</sup> List of HR treaties and ratifications.



transnational bodies, both global and regional, including the WTO, the ICCPR Human Rights Committee, the EU Commission, the Inter-American Commission on Human Rights and dozens of others.<sup>25</sup> Also worthy of note are older institutions assuming entirely new international roles, as witness the movement of local governments ratifying and in some measure attempting to enforce directly international human rights instruments in particular.<sup>26</sup>

Courts nonetheless merit special attention, both generally and from the viewpoint of a human rights lawyer. The judicial facet of legal globalization has reached a point where it has not only drawn notice by prominent legal scholars,<sup>27</sup> but also the general public.<sup>28</sup> The phenomenon appears to pose particular challenges to the values of self-government, yet in self-government may lay a principal justification.<sup>29</sup> Both the prominence and the problems associated with judicial reliance on international law, finally, in large measure have to do with its relation to fundamental rights.

On many of these bases, a more compelling topic might well be the domestic application of international norms by international bodies. Here consider an amended version of the comparison with which this essay opened. Rather than *Roe v. Wade* and an “internationalist” death penalty judgment, juxtapose *Roe* and a decision by the Inter-American Commission on Human Rights holding that capital punishment of the mentally

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<sup>25</sup> Cites to Helfer, others.

<sup>26</sup> Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for the Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245 (2001).

<sup>27</sup> See *supra* note 25.

<sup>28</sup> See, e.g., Linda Greenhouse, *The Supreme Court: Homosexual Rights; Justices, 6-3, Legalize Gay Sexual Conduct in Sweeping Reversal of Court's '86 Ruling*, NEW YORK TIMES (June 27, 2003) at A1.

<sup>29</sup> See *infra* Parts III & IV.

disabled violates the U.S. obligations under the American Declaration on Human Rights.<sup>30</sup> That is, a domestic court with some democratic grounding makes a highly contested moral judgment while an almost completely insulated transnational body applies a norm that commands a global consensus in which the U.S. itself to a significant extent partakes.

This aspect of judicial globalization will likely become as prominent as its domestic cousin, the more that transnational bodies play role in implementing international law to nations and their legal systems. The comparative insularity of transnational institutions, compared even to domestic judiciaries, accordingly places the challenge to self-government in higher relief. Human rights, moreover, will probably play a more pronounced role with international tribunals than their domestic counterparts, at least to the extent that a given society's commitment to fundamental freedoms is often the first casualty of a repressive regime, while an independent judiciary that can safeguard that commitment frequently runs a close second.<sup>31</sup>

For now, walking with domestic application of international law appears more sensible than running with its transnational counterpart. Concentrating on a given nation's foreign relations law – in particular, how the domestic legal system relates to international law – requires considering any number of specific peculiarities. These peculiarities, in turn, will affect how to assess the legitimacy of how the courts of a particular country rely on international law. Different nations, for example, handle the

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<sup>30</sup> Do note explaining that the U.S, by virtue of signing the OAS Charter, is subject to the American Declaration, over which the Inter-American Commission has jurisdiction. That said, the Commission's rulings are non-binding (nor is it clear that the OAS Charter + Declaration is self-executing.)

<sup>31</sup> A classic example of the many cases in which this scenario occurs took place in Suriname in the 1970s. *See* cite to Human Rights Committee intervention on same.

question of whether a treaty it has ratified should have domestic effect in radically different ways. At one end of the spectrum, the United Kingdom treats all treaties as non-self-executing, and so requires incorporation through an Act of Parliament.<sup>32</sup> At the other end, Turkey and the Netherlands treat their treaty commitments as not only self-executing, but superior to their constitutions.<sup>33</sup> A similar range of responses characterizes how other forms of international law, such as custom, apply domestically, as well as how international law affects other forms of domestic law, such as statutes, state or provincial law, or (where it exists) common law.

Of the peculiarities that characterize the U.S., three have particular relevance to judicial reliance on international law, especially with regard to rights and self-government concerns. First and most importantly, while treaties cannot “amend” the Constitution,<sup>34</sup> the role of international law in constitutional interpretation remains an open question. Second, both treaties and customary international law apply domestically as self-executing Federal law. More specifically, treaties operate on par with Federal statutes, each equally subject to a “last in time” rule, while international custom presumably cannot override an Act of Congress, but may certainly be overridden. Finally, the Supremacy Clause expressly renders treaties superior to state law, and the conventional view remains that customary international law is likewise supreme.<sup>35</sup>

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<sup>32</sup> A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION \_\_\_ (1982).

<sup>33</sup> Cites.

<sup>34</sup> Reid v. Covert, 354 U.S. 1 (1957).

<sup>35</sup> See *supra* note 3. But see Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).

Among other things, these idiosyncrasies mean that nothing authorizes, nor prohibits, Justice Stevens from asserting that international practice should help determine how best to interpret the Eighth Amendment in a capital case.<sup>36</sup> U.S. foreign relations doctrine, moreover, at least theoretically means that courts may apply international custom directly to invalidate state law, such as certain forms of the death penalty.<sup>37</sup>

### B. *Justifications*

Just as domestic application of international law by American judges makes up a particular piece of the judicial globalization in practice, democratic self-government offers one of several normative yardsticks. Of these, principles of justice and imperatives of international peace and stability have commonly been put forward as the more promising justifications for judicial cosmopolitanism. These rationales have been popular, moreover, not just today, but also at the time of the Founding -- a point that will bear on self-government to the extent that concern about international stability in particular informed the Constitution's adoption.<sup>38</sup> As with other aspects of global judicial practice, at least briefly considering these alternative justifications helps clarify the normative stakes. Doing so will explain why seeking to legitimize judicial globalization in terms of self-government presents the greater challenge and likely, the greater rewards.

Consider, first, reliance on international human rights standards in the name of justice. On the assumption that courts are properly charged with making this type of determination, the argument runs, there is every reason domestic judges should look to

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<sup>36</sup> *Atkins*, 536 U.S. at 316, n. 21

<sup>37</sup> Cite to Restatement, Paust, Bradley, Goldsmith, others.

<sup>38</sup> *See infra* TAN \_\_-\_\_.

foreign materials as a means to developing the best answer. On this view, international norms operate less as binding rules than as relevant information, much like reliance on comparative determinations from other jurisdictions, or simply views of thinkers with no special connection to the domestic legal regime. This approach appears best to characterize the use of external legal rules the foreign courts commonly make.<sup>39</sup> This understanding perhaps most accurately describes what Justice Kennedy was up to in *Lawrence*<sup>40</sup> when he invoked European law to refute the position that the *Bowers*<sup>41</sup> Court had taken on whether the scope of privacy extended to consensual sexual relations between adults.

The normative case for this approach would appear difficult, if not impossible, to refute. Among other things, making the best judgment on fundamental questions of justice or morality will depend upon the persuasiveness of arguments advanced, intuitions based upon human experience, and consequences evident from applications of earlier judgments. None of these bases varies a priori in light of national borders. The extent that such variations may occur, moreover, may justify discounting the weight of external materials, but hardly a per se prohibition.<sup>42</sup> Anne-Marie Slaughter dismissed arguments

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<sup>39</sup> See, e.g., Catholic Common for Justice and Peace in *Zimb. v. Attorney Gen.*, No. S.C. 73/93 (Zimb. 1993), reported in 14 HUM. RTS. L. J. 323, 329 (1993). See generally Slaughter, *supra* note 9.

<sup>40</sup> *Lawrence*, 537 U.S. at \_\_\_-\_\_ .

<sup>41</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986).

<sup>42</sup> Though my interest centers on fundamental rights, the point applies more generally. To take a recent example, *Printz v. United States* featured a pointed exchange between Justices Scalia and Breyer on the question whether it followed that Federal government lacked the power to “commandeer” state officials because the United States features two levels of “sovereign” government. Justice Scalia argued that this conclusion did follow. *Printz*, 521 U.S. at \_\_\_. Justice Breyer rejected this position, indicating that it was not only possible to imagine a system in which the central sovereign government commandeered officers of the constituent sovereigns, but that this was exactly how the European Union – a system comprised of genuine sovereign states – operated. *Id.* at \_\_\_-\_\_\_ (Breyer, J., dissenting). Justice Scalia summarily rejected this example on the apparently irrelevant ground that it was “foreign.” *Id.* at \_\_\_, n. \_\_\_ (opinion of the

to the contrary pretty much with the respect they deserve when she noted that a good idea is still a good idea even if it comes from France.<sup>43</sup> And in fact the most vociferous opponents of international law don't really deny the point. Instead, critics such as Chief Justice Rehnquist and Justice Scalia consistently object based upon the threat international law poses to self-government.<sup>44</sup>

Concerns about international peace, stability, and the rule of law offer another basis for justifying deference to international law. Here the basic argument holds that courts should as much as possible conform domestic practice to international rules because doing so at a minimum will reduce the pretexts that foreign nations might have for intruding upon the nation's affairs, and at a potential maximum will promote orderly relations among nations in general. Whatever its other features, this approach relates more distinctively to international law more than any other. In part for this reason, it has a distinguished historical pedigree dating to the earliest days of the republic.<sup>45</sup>

Even so, the normative force of the international rule of law rationale in the end rests upon its empirical validity. As a matter of foreign relations theory, it may be that adherence to international law accords with basic intuitions and promotes stability. But it also may be that it has the paradoxical effect of undermining world peace, or has no discernable effect in either direction. Still another possibility is that following

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Court). For a discussion, see Martin S. Flaherty, *Are We To Be A Nation?: Federal Power vs. "States' Rights" in Foreign Affairs*, 70 COLO. L. REV. 1277, 1288-89 (1999).

<sup>43</sup> Cite to Slaughter; track down quote.

<sup>44</sup> See, e.g., *Atkins*, 536 U.S. at 322 (Rehnquist, C.J., dissenting) and *id.* at 337 (Scalia, J., dissenting).

<sup>45</sup> See *infra* TAN \_\_ - \_\_.

international rules is generally beneficial, but that discrete violations may be justified precisely because they would further stability in a particular instance.<sup>46</sup>

Given these possibilities, the real question becomes whether and when the courts have any special, or even adequate, capacity for making this type of determination. It is, in other words, a separation of powers problem. As noted, different nations answer this question in different ways in different settings. In this regard, both the United Kingdom – by never allowing courts to apply treaties absent an Act of Parliament, and the Netherlands – by compelling its courts to implement treaties even against the Constitution – deprive their judiciaries the discretion to decide when domestic adherence to international law would or would not further larger goals. Once again, the U.S. had taken complex, intermediate positions. *U.S. Reports* is replete with statements declaring the President and Congress are better placed than the courts to make sensitive foreign policy determinations.<sup>47</sup> Conversely, the Supreme Court has declared not just that customary law is part of “our law” for domestic purposes, but has taken a firm position that, unless it is impossible, statutes should be read to be consistent with the law of nations.<sup>48</sup> At the risk of granting American jurisprudence a degree of coherence it may not have, the U.S. position generally encourages the courts to conform domestic to international law, but requires them to defer to the foreign policy determinations of the political branches in specific instances.

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<sup>46</sup> Cite to IR treatment of issue.

<sup>47</sup> *See, e.g.*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

<sup>48</sup> *See infra*, TAN \_\_\_-\_\_\_.

Which leaves self-government. The argument from self-government – or more precisely, democratic self-government – rests on the hoary proposition that the legitimacy of laws is derived from popular consent. From this premise, it follows that any government that has acceded to the domestic operation of international law has no basis to object when its courts accord that source authority. Justice Scalia articulated the flip-side of this proposition with typical élan when he challenged Justice Stevens’s de minimus reliance on comparative law in *Atkins*. “But the Prize for the Court’s Most Feeble Effort to fabricate ‘national consensus,’” he declared, “must go to its appeal (deservedly relegated to a footnote) to the views of assorted professional and religious organizations, members of the so-called ‘world community,’ and respondents to opinion polls.” Driving the point home, he proclaimed the irrelevance of “the practices of the ‘world community,’ whose notions of justice are (thankfully) not always those of our people.”<sup>49</sup>

As such rhetoric might suggest, debating international law in terms of self-government tends to raise the stakes in terms of reward and challenge. Greater reward, at least as a practical matter, comes from the apparently greater commitment American legal culture has to self-government theories than to their rivals.<sup>50</sup> At least in constitutional theory, theories premised on self-government attract a more widespread following than their competitors.<sup>51</sup> Democratic, or self-government, theories currently

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<sup>49</sup> *Atkins*, 536 U.S. at 337, 348-49 (Scalia, J., dissenting).

<sup>50</sup> This is not to say, as Jed Rubenfeld argues, that U.S. legal culture is distinctively democratic compared to other systems, such as those that comprise the European Union. Jed Rubenfeld, *Two World Orders*, 27 WILSON QUARTERLY 22 (2003). For analyses that are more rigorous, see Anne-Marie Slaughter, *Leading Through Law*, in *id.* at 37; Moravcsik, *supra* note 23.

<sup>51</sup> For now, this is a nakedly impressionistic claim. To give one basis for that impression, Randy Barnett recently surveyed constitutional literature to proclaim, with what I believe is only mild overstatement, that



appear to resonate more deeply as well.<sup>52</sup> Carry the day on these grounds, in other words, and in current American legal culture one has gone a long way toward carrying the day in general. Conversely, the greater reward comes with greater difficulty. Even formal, transparent, and democratically-approved international law norms, such as treaties, appear remote from popular processes when compared with most types of domestic lawmaking. Precisely for this reason, the term “democratic deficit” dogs international lawmaking more than virtually any other current criticism.<sup>53</sup>

The apparent – though not actual -- size of this deficit depends upon the ways that a given nation’s foreign relations law mediates international law within the domestic realm. As noted, these modes vary from country to country.<sup>54</sup> From a self-government perspective, two matters are salient: first, the extent to which an international standard receives some form of domestic democratic authorization; and second, and related, the extent to which the international standard applies within the domestic legal system.

The manner in which U.S. foreign relations law handles these issues has left certain matters relatively settled and others, highly contested. Toward the settled end of the spectrum are treaties. Ratification by the President with two-thirds of the Senators present sufficiently approximates legislation by a majority of the House and Senate to provide treaties with an analogous democratic pedigree. Senate insertion of reservations,

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the most rigid type of self-government theory has carried the day when he asserted that “originalism is now the prevailing approach to the Constitution.” Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 613 (1999). For another, in his recent book, *Constitutional Self-Government*, Chris Eisgruber acknowledges a shift from premising his constitutional theory on a direct consideration of justice, to according greater weight to pursuing justice within a self-conscious framework of self-government. EISGRUBER, *supra* note 22, at 46-78.

<sup>52</sup> Another impressionistic claim, based in part on the stridency of ostensibly democratic rhetoric.

<sup>53</sup> Cf. Moravcsik, *supra* note 23.

<sup>54</sup> See *supra* TAN at \_\_\_-\_\_\_.

understandings, and declarations, which allows for discrete rejection of certain treaty provisions, reflects self-government concerns still further. As for domestic status once authorized, placing treaties on par with Federal statutes embeds them within domestic law, but only to a moderate extent that is subject to such further democratic checks as subsequent Federal legislation. Even with all this, U.S. treaty-making has been subject to controversy and modification. The ostensibly less democratic President and Senate formula has been effectively abandoned for trade accords in favor of Congressional-Executive Agreements, in part on the grounds that it is easier to get such agreements through a majority of both Houses. Conversely, even the classic treaty-making track has been considered both too easy and insufficiently democratic for opponents of human rights treaties. The unsuccessful Bricker Amendment, which sought to make all treaties non-self-executing, was an early response. Consistent Senate use of ostensibly democratic reservations, understandings, and declarations (RUDs) has been the *modus vivendi* ever since.<sup>55</sup> As a result, when a treaty does jump all of these hurdles to apply as a self-executing instrument, most potential self-government objections have already been answered.

That is not the case with either the application of constitutional international law in constitutional interpretation or its implementation as an analog to Federal common law. In each instance, customary law rather than treaties furnishes the primary source of international law and so has a correspondingly attenuated democratic pedigree even on the international plane. Whereas treaties derive their authority through fairly transparent,

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<sup>55</sup> See Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO. L. J. 649 (2002).

quasi-legislative processes, customary law results from a “mysterious”<sup>56</sup> recipe based upon a general public commitment among nations out of a sense of obligation. In a democratic check roughly analogous to RUDS, a nation may “opt out” of an evolving customary norm, but when and how frequently such an objection needs to be registered remains unclear.<sup>57</sup> The problem of “democratic deficit” only grows on the domestic plane since U.S. foreign relations law primarily accords the domestic application of international custom to the courts exclusively, rather than through either Congress, the President, or some combination.<sup>58</sup>

From the opposite angle, custom as applied to constitutional law and Federal common law diverges in terms of entrenchment. Under the *Pacquete Habana* rule, customary international law may be part of “our law,” but only just. While a customary rule may have something like the force of Federal common law, as such it is subject to statutory override and, by contrast, is also subject to override by high executive officials. And while a court may theoretically apply customary international law against the states on grounds of Federal supremacy, the Supreme Court has yet to confirm this deduction.<sup>59</sup> Conversely, international law once applied to constitutional interpretation restricts a domestic democratic response in the same manner as does any constitutional judgment. Once a Supreme Court majority relies on customary international law to settle upon one interpretation over another, the result for most practical purposes remains subject either

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<sup>56</sup> Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984).

<sup>57</sup> RESTATEMENT THIRD, sec. \_\_\_.

<sup>58</sup> One exception, for now, is the Alien Tort Statute. *But see Sosa*, 124 Sup. Ct. at 809.

<sup>59</sup> Recent scholarly commentary, moreover, has challenged the very notion whether customary international law as part of Federal law survived the middle of the last century. Cites to Bradley and Goldsmith in Harvard and Fordham. Replies by Koh, Stephens, Neuman, Jinks, Goodman.

to amendment or changes in the Court's composition through the slow processes of death, resignation, and appointment.

As noted, the demands of self-government pose an even greater challenge for transnational bodies.<sup>60</sup> In threshold institutional terms, the ICCPR Human Rights Committee or the Inter-American Human Rights Court have less of a democratic grounding than domestic courts.<sup>61</sup> Nor is it clear that the delegation of jurisdiction to such institutions via attenuated treaty processes cures the problem. With regard to the international standards that such bodies apply, the picture remains the same or slightly worse. The democratic deficit attached to treaties or international custom stays more or less the same whether implemented by a domestic or transnational adjudicator. The degree of intrusion, however, is arguably worse insofar as the transnational ruling may overturn the determinations of both domestic courts and legislatures "from above." Though less pointed, the problem of democratic legitimacy remains even if all the transnational actor does is declare a state in violation of international law without domestic effect, to the extent that any such official determination pressures a defendant nation to alter its internal practices.

All this, moreover, is but a subset of the still larger problem of democratic legitimacy as it relates to international human rights law generally. As such, the transnational enforcement problem will likely prove far more important than its domestic counterpart in the long run. For the present, however, hazarding answers to address the latter problem will have to suffice as challenge enough.

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<sup>60</sup> See *supra* TAN notes \_\_\_-\_\_\_.

<sup>61</sup> Cite to respective treaty provisions regarding the composition of each body.

### III. Mr. Scalia, Meet *Charming Betsy*

During the spring of 1800 a U.S. Naval frigate under the command of Captain James Murray, bordered and captured a merchant schooner off the coast of Barbados. As was the standard practice of the day, Murray and his crew claimed *The Charming Betsy* as a lawfully taken prize. Critical to their claim was the Nonintercourse Act of 1800, which prohibited American trade with France, with which the U.S. was waging undeclared hostilities.<sup>62</sup> Murray and his men duly brought *The Charming Betsy* to the U.S. and sued to have their claims to the vessel legally recognized in Federal court. All went smoothly until the schooner's owner, Jared Shattuck, intervened to argue that while the *Betsy* had been American-owned when it left France, it had been sold to him mid-voyage. Ostensibly a Dutch national, Shattuck argued that the Act prohibiting American trade with France no longer applied to the vessel, nor should it be so construed.<sup>63</sup>

In an opinion by Chief Justice Marshall, the Supreme Court ruled against the Navy men. Marshall reasoned that the Act could be read to extend not just to ships that had been American-owned throughout a voyage to and from France, but also to ships – such as *The Charming Betsy* – that had been American upon leaving French ports, but sold subsequently to foreigners. Marshall nonetheless rejected this possible reading on the ground that the capture of a ship owned by nationals of a neutral state would violate the law of nations, and to interpret the statute in this manner would thus have been inconsistent with what is now called customary international law. Going beyond the case at hand, Marshall declared generally that “an act of Congress ought *never* to be construed

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<sup>62</sup> Quote language from Act..

<sup>63</sup> *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 115 (1804).

to violate the law of nations *if any other possible construction obtains.*<sup>64</sup> In a somewhat softer version, the “*Charming Betsy* canon” has remained part of U.S. foreign relations law ever since.<sup>65</sup>

*The Charming Betsy* did not elaborate the basis for the canon that bears its name. Most, if not all, of the internationalist justifications considered earlier might nonetheless be advanced. Consulting the law of nations rule plausibly facilitates making judgments about justice. In this case the evolving custom that broadly protects neutrals from assault by warring nations may be, and was, viewed as a reflection of fundamental fairness and justice.<sup>66</sup> The canon also arguably furthers a national interest in adherence to peace, stability, and the international rule of law.<sup>67</sup> In this regard the presumption cuts strongly in favor of peaceful trade and commerce. That Marshall himself conjured the rule also suggests an originalist foundation. A young but significant member of the Virginia Ratifying Convention, Marshall commonly articulated mainstream Federalist defenses of the new Constitution.<sup>68</sup>

Despite not a few recent human rights briefs to the contrary, applying the *Charming Betsy* canon to statutes is not the same thing as applying it to the Constitution. As noted, the stakes are much higher in the constitutional setting. Professor Curtis Bradley has explained why through focusing upon separation of powers. In a nutshell, an

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<sup>64</sup> *Id.* at 118 (emphasis added).

<sup>65</sup> See RESTATEMENT THIRD, at sec. \_\_\_\_ (“quote formulation.”).

<sup>66</sup> Cite to Vattel.

<sup>67</sup> See Immanuel Kant, *On Perpetual Peace* in KANT’S POLITICAL WRITINGS 105 (Hans Reiss, ed. 1970) (1795).

<sup>68</sup> Cf. Martin S. Flaherty, *John Marshall, McCulloch v. Maryland, and We the People: Revisions in Need of Revising*, 43 WM. & MARY L. REV. 1339 (2002).

internationalist presumption applied to statutes is subject to formally democratic check by the President and Congress, who can make clear an intent to depart from international law by passing a statute that clearly does so. In this way, the “so-called” political branches remain free to determine that, in certain instances, violation of international law may better promote justice or, more likely, further U.S. interest in a stable world. As with any statutory presumption, the canon’s accommodation of other concerns ultimately bows to the demands of self-government in a fairly straightforward and transparent fashion.<sup>69</sup>

The balance shifts in the constitutional context. The lack of democratic checks in this setting weakens the case of an internationalist presumption from a self-government perspective. It does not mean, however, that the canon cannot be sustained. Dissatisfaction at the polls could always lead to the election of a President and Senate who will approve a less internationally-inclined judiciary.<sup>70</sup> Then there is always Article V. But at least for some – and among them the greatest opponents of judicial globalization – a theoretically more powerful justification comes not from the availability of attenuated democratic checks. Rather, and especially for the likes of Justice Scalia and Judge Bork, the better democratic defense would come from a more supermajoritarian authorization of the canon by We the People. In a word, originalism.<sup>71</sup>

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<sup>69</sup> Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L. J. 479 (1998).

<sup>70</sup> Cf. EISGRUBER, *supra* note 22, at 64-66.

<sup>71</sup> In this regard Judge Bork is especially vulnerable. On one hand he has written the classic, if flawed, modern defense of originalism. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990). On the other hand, he has launched a prominent recent attack on domestic judicial use of foreign law. BORK, *supra* note \_\_\_\_.

To the extent this basis obtains, the analysis moves from theory to history. More precisely, the question becomes whether the Founding generation expected, if at all, domestic judges to try to conform Federal law to the law of nations, including and especially Constitutional law. Avoiding history “lite” requires approaching this inquiry with the sensibilities of a historian rather than of a lawyer. Otherwise, the originalist’s central purpose of venturing outside the law to seek authority becomes no more than a polemical sham.<sup>72</sup>

At a minimum, a credible historicist approach requires a broad survey of primary and secondary sources, as well as a broad conception of the relevant context. As to sources, the question implicates the standard plethora of Eighteenth-century constitutional materials, yet could not enjoy anything like the scholarly work that exists on the domestic side. As to the context, the most basic framework would require considering, first: the general influence of the law of nations on Eighteenth-century Anglophone political thought; second, the international law implications of independence, the Revolution, and the so-called “Critical Period”; and only then, what (if anything) the Founders believed to be the relation between their new Constitution, international law, and the role of the judiciary as evidenced in the Federal Convention, the document it produced, the ratification debates, and early practice.<sup>73</sup>

As the “if anything” signals, an honest approach must also be open to finding answers in any direction, no answers at all, or too many answers at once.<sup>74</sup> For the

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<sup>72</sup> For a defense of this idea, see Marin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 95 (1995).

<sup>73</sup> Cf. Flaherty, *History Right?*, *supra* note 2.

<sup>74</sup> See Flaherty, *History “Lite,” supra* note 72, at \_\_\_-\_\_\_.



moment, a general familiarity with the period must suffice to suggest a working hypothesis to accompany this foregoing research agenda. This hypothesis for the moment supposes that discerning the law of nations complemented the project of constitutional thought, that American thinkers were particularly open to the influence of the law of nations, and that an important stream in Founding thought supported the idea that, where possible, interpretation of the Constitution should conform to international law.

The law of nations would exert an enormous influence over the Founding generation in part because the “science” of government proceeded together with the “science” of international law. This correlation was first of all temporal. Modern international law commenced around the time of Europe’s colonization of the New World. While the actual origins are more complex, a single date of birth is conventionally assigned to the Treaty of Westphalia of 1648. Not coincidentally, the architects of the modern law of nations included several leading figures of the Enlightenment in general. Writing just before the Westphalian model was in place, the Dutch scholar Hugo Grotius compiled and updated classical learning in such works as *De Jure Belli Ac Pacis*. Later writers achieving similar eminence included Samuel Puffendorf, Jean Jacques Burlamaqui, and most of all, Emmerich de Vattel, whose *The Law of Nations or the Principles of Natural Law* became probably the most cited international law treatise during the eighteenth century.<sup>75</sup>

More importantly, the law of nations and constitutional thought complemented one another in purpose, method, and result. Each project, among other things, sought to

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<sup>75</sup> See generally, ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS \_\_\_-\_\_\_ (rev. ed. 1954).

reconcile and develop general propositions about law and government with consideration of actual human and institutional behavior – with constitutional thought focusing on the place of the individual and international law, the place of the relatively new nation state. This parallel orientation not only led to substantial cross-fertilization, it also led to mutually reinforcing conclusions. This is not to ignore the primacy of national sovereignty, perhaps the chief legacy of international law during this period. Yet sovereignty – especially the idea that how nations treated those subject to its jurisdiction within its borders – did not then mean the same type of barriers that it would come to mean later for at least two reasons. First, the principles of justice that informed the law of nations also informed domestic thought precisely because of the two projects’ parallels. Second, Vattel’s work in particular emphasized a fairly robust conception of both legal and moral obligations nations assumed with regard to established international law rules.<sup>76</sup>

It should come as no surprise, therefore, that historians and legal scholars commonly reference Vattel, Burlamaqui, Puffendorf, and Grotius as comparable to Locke, Montesquieu, and Blackstone in their influence on American thinkers<sup>77</sup> Among others, Franklin, Hamilton, Jefferson, Jay, and John Adams cited the work of the era’s great international jurists, and not only for international propositions. As Bernard Bailyn noted, “In pamphlet after pamphlet the American writers cited . . . Grotius, Pufendorf, Burlamaqui, and Vattel on the laws of nature and of nations, and on the principles of

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<sup>76</sup> See DAVID LANG, *FOREIGN POLICY IN THE EARLY REPUBLIC* (1985); Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 NW. U. L. REV. 1027 (2002).

<sup>77</sup> BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 27 (1967) See also John Yoo [and me] on treaties.

government.”<sup>78</sup> For that matter, so too did the “domestic thinkers” such as Locke, Blackstone and Montesquieu themselves.<sup>79</sup>

Independence augmented this theoretic commitment to international law for several practical reasons. First, the revolutionary act of the American people assuming “among the Powers of the Earth, the separate and Equal Station to which the Laws of Nature and Nature’s God entitle them”<sup>80</sup> of necessity reoriented thinking about the direct applications of international law from questions of how constituent units fit within an Empire, to the place of the new republic itself within the law of nations. Second, Vattel and other international jurists self-consciously sought to expand the space for peaceful trade, a goal ideally tailored for an emerging nation dependent on trans-Atlantic commerce but lacking a navy.<sup>81</sup> Third and closely related, Vattel in particular sought to adapt the classical law of nations in ways that promoted the interests of comparatively weak republics in the face of aggrandizing empires.<sup>82</sup> Fourth, and also related, U.S. violations of its treaty obligations as a result of the Confederation Congress’s inability to secure the compliance of the several states, posed a tangible threat to national security by giving the United Kingdom and other powers the pretext to commit their own violations, often with military forces. Finally, an increased affinity for the law of nations had the tendency to reinforce itself, in the sense that international law enjoined states to uphold it

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<sup>78</sup> See Curtis A. Bradley & Martin S. Flaherty, *Executive Essentialism in Foreign Affairs* 105 MICH. L. REV. \_\_\_ (forthcoming 2004).

<sup>79</sup> Cites.

<sup>80</sup> DECLARATION OF INDEPENDENCE, para. 1.

<sup>81</sup> Cf. Anne-Marie Slaughter, *The Alien Tort Statute and The Judiciary Act of 1789*, 83 Am. J. Int’l L. 461, 482-83 (1989).

<sup>82</sup> See Thomas H. Lee, *International Law, International Relations Theory, and Preemptive War: The Vitality of Sovereign Equality in a Unipolar World*, \_\_\_ LAW & CONTEMP. PROB. (forthcoming 2004)

“as a moral imperative – a matter of national honor” complete with duties and obligations as well as rights.<sup>83</sup>

Individual expressions of concern about U.S. failure to comply with the law of nations pepper the Confederation period.<sup>84</sup> Perhaps even more indicative, however, are official positions. As early as 1781, for example, Congress passed a resolution calling on the states to “provide expeditious, exemplary and adequate punishment” for offenses “against the law of nations” including violation of safe-conducts, “infractions of the immunities of ambassadors and other public ministers . . . and infractions against treaties and conventions to which the United States are a party,” noting that these were only those “which are most obvious.”<sup>85</sup> The resolution further called upon the states to establish tribunals with the authority to consider other offenses “not contained in the foregoing enumeration.”<sup>86</sup>

Nor were the states always recalcitrant. Three years later the Pennsylvania Supreme Court convicted a French noble for an attack on a fellow national, who also happened to be the French Consul in Philadelphia, in violation of the law of nations.<sup>87</sup> In more celebrated fashion, Alexander Hamilton prevailed in the noted “proto”-judicial review case of *Rutgers v. Waddington*,<sup>88</sup> employing international law arguments replete

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<sup>83</sup> Slaughter, *Alien Tort Statute*, *supra* note \_\_\_, at 484-85.

<sup>84</sup> Cites.

<sup>85</sup> 21 J. CONT. CONG. 1136-47 (1781). *See* Slaughter, *Alien Tort Statute*, *supra* note \_\_\_, at 476-78.

<sup>86</sup> 21 J. CONT. CONG., *supra* note \_\_\_, at 1136.

<sup>87</sup> *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) (1784).

<sup>88</sup> *See* GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* \_\_-\_\_ (1969).

with references to Grotius and Vattel.<sup>89</sup> He did this, moreover, because the 1777 New York Constitution expressly incorporated the law of nations, a provision that prompted the Mayor's Court to give a contorted interpretation of the subsequent Trespass Act to save the statute.<sup>90</sup>

It would fall to the Federal Constitution to determine how far to translate the general affinity for the law of nations seen so far into lasting imperatives. As is a basic feature of U.S. foreign relations law, the document itself deals with international law – and foreign affairs generally – in a scattered fashion. Nor does the text specifically deal with the matter at hand – that is, the interpretive weight for international law – the type of textual gap that is a common feature of constitutional law in general. Added up, however, the various specific provisions demonstrate an internationalist bent. More strikingly, “all Treaties made, or which shall be made,” are rendered not just self-executing, but “the Supreme Law of the Land.”<sup>91</sup> Significant in this regard is the further decision to facilitate treaty-making by involving the President and omitting the House of Representatives, while impeding involvement in conflict by vesting the War Power in Congress. Worth mentioning as well is Article III's express grant of jurisdiction for maritime and admiralty cases as well as for an array of possible cases involving foreign envoys and nations. On a strict reading, of course, these provisions may be seen as exhaustive, and so leave no place for judicial appeal to international law in other

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<sup>89</sup> “Hamilton's Briefs in *Rutgers v. Waddington*,” in *THE LAW PRACTICE OF ALEXANDER HAMILTON* \_\_\_-\_\_\_ (Julius Goebel Jr. et al eds. 1964).

<sup>90</sup> *Id.* at \_\_\_-\_\_\_.

<sup>91</sup> U.S. CONST. art. VI, cl. 2. See Flaherty, *History Right?*, *supra* note 2.

instances. The larger context, however, suggests that these clauses instead reflect a more general commitment.

Such a commitment specifically emerges in the Federal Convention. Although the delegates did not discuss international law frequently, the statements they made reveal a pronounced affinity. Typically, Madison set the tone in focusing upon the volatile mix of the states' violations of international law and national security. Critiquing the rival Pinckney Plan, Madison asked, "Will it prevent those violations of the law of nations & of Treaties which if not prevented must involve us in the calamities of foreign wars? . . . The existing confederacy does <not> sufficiently provide against this evil."<sup>92</sup> Whatever their differences, moreover, Madison and Pinckney both supported Madison's pet dream of a Congressional veto on state legislation, in part as a way to police local laws violating treaty commitments in particular.<sup>93</sup> To Congress, moreover, is given the power to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."<sup>94</sup>

Other exchanges displayed a similar orientation. During the debate on Congress's power over offenses against the law of nations, James Wilson objected to vesting authority to define those violations, "To pretend to *define* the law of nations which depend on the authority of all the Civilized Nations of the World, would have a look of arrogance, that would make us ridiculous."<sup>95</sup> Wilson lost the point, though not because the other delegates did not share his concerns. Rather, the delegates appear to have been

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<sup>92</sup> 1 RECORDS OF THE FEDERAL CONVENTION 316 (Max Farrand, ed. 1966).

<sup>93</sup> *Id.* at 164.

<sup>94</sup> U.S. CONST. art. I, sec. 8, cl. 10.

<sup>95</sup> 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note \_\_\_, at 615.

moved by an earlier argument by Madison, stressing that in the context of enacting criminal offenses, only the precision of legislative definition by Congress would suffice with regard to either the law of nations or the common law.<sup>96</sup>

The ratification debates – for many originalists the dispositive source – address the need for the nation to play the part of good international citizen both more clearly and more extensively. Two venerable sources must suffice to convey the general picture. One is the ratification debates in Virginia, which dealt with international law and foreign relations more thoroughly than any other state. Despite sharp disagreements over questions such as whether the treaty-making process safeguarded regional interests, Federalists and Antifederalists alike agreed on the necessity of the United States honoring its specific obligations and comporting with the law of nations generally.<sup>97</sup> In one colloquy, one of the Constitution’s defenders went so far as to assure opponents that the President and Senate could not make a treaty ceding territory without approval of Congress because such an action would violate the law of nations.<sup>98</sup>

*The Federalist*, that reigning chestnut source, likewise stresses the urgency for good international citizenship.<sup>99</sup> As in the Virginia debates, certain passages proceed fairly far down the road. While he stops short of a *Charming Betsy* presumption for the constitution, John Jay for example clearly anticipates *The Pacquete Habana* rule that the Federal courts shall expound customary international law, even though the Constitution itself makes no express incorporation. Arguing for the primacy of the national

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<sup>96</sup> *Id.* at 316.

<sup>97</sup> Cites from *History Right?*

<sup>98</sup> *Id.*

<sup>99</sup> See, e.g., THE FEDERALIST No. 80 (Hamilton) (C. Rossiter, ed. 1961).

government in foreign affairs, Jay declared that “treaties, as well as the law of nations, will always be expounded in one sense, and executive in the same manner” by the Federal judiciary, as opposed to the thirteen judiciaries of the several states.<sup>100</sup>

Early practice brings the historical tack full circle to *The Charming Betsy* itself. While specific reference to the interpretative role of international law would be surprising in the settings considered so far, whether and how the early Federal judiciary approached the question almost by definition has the potential to yield evidence of original understandings that would be on point. As noted, *The Charming Betsy* itself falls short in focusing on statutes. So too do various opinions cited by Anne-Marie Slaughter, which nonetheless strongly illustrate the support that Founding judges had for international law.

But some surprisingly well-known opinions come closer.<sup>101</sup> One is Justice Chase’s statement in *Calder v. Bull*, that the Court may declare a state law unconstitutional if it violated the principles common to free republics.<sup>102</sup> Another is Marshall’s majority opinion in *Fletcher v. Peck*, which actually does invalidate a state statute *both* for violating the Contracts Clause *and* on grounds nearly identical to those articulated by Chase.<sup>103</sup> These opinions are often too quickly pegged as relying on “natural law.” This assessment may not be entirely wrong, but neither is it entirely correct. Jurists of the day would have seen such generality as evidence of natural law. Yet generality also serves as part of the definition for customary international law, which during this period was seen as congruent with the law of nations. To this extent, Chase

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<sup>100</sup> The FEDERALIST No. 3 (Jay), *supra* note \_\_, at 15.

<sup>101</sup> Slaughter, *supra* note \_\_, *Alien Tort Statute*, at 482-84.

<sup>102</sup> *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 386 (opinion of Chase, J.).

<sup>103</sup> *Fletcher v. Peck*, 10 U.S. (3 Cranch) 87 (1810).



and Marshall provide a surprisingly strong basis to suppose that looking to the law of nations when interpreting the Constitution is not only not new, but at the very least not precluded by Founding understandings, and may well be consistent with those understandings that prevailed at the time.

Turning to the past nonetheless means confronting a host of by now familiar problems. Even accepting originalist premises, the research necessary to transcend “history ‘lite’” may fall short of demonstrating that *The Charming Betsy* canon had a constitutional sibling. It may be that, for the purposes of interpreting the nation’s constitutive law, the Founders’ commitment to Westphalian sovereignty trumped their affinity for the law of nations. More likely, different views expressed at the time may in effect “only suppl[y] more or less apt quotations from respected sources on each side of any question,” and so “largely cancel each other.”<sup>104</sup>

Nor do the potential problems end should thorough study reveal a dominant understanding. To cite just one that may be obvious already, a Founding embrace of the law of nations may no longer be relevant to the modern world. Recall in this regard that one concern common to nearly all statements desiring the U.S. to comport with international law was a type of national security concern characteristic of weak nations, historically unstable republics in particular. To borrow from Larry Lessig’s more wide-ranging brand of originalism, a desire for good international citizenship on this basis may simply not “translate” to the brave new world of American global hegemony.<sup>105</sup> This is not to deny that such translation may not still be possible. The benefits of comporting with international law may still be sufficient to support the application of this particular

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<sup>104</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-35 (Jackson, J., concurring).

<sup>105</sup> See Lawrence Lessig, *TEXAS L. REV.*; *STAN. L. REV.*; *FORDHAM. L. REV.*

original understanding unless and until another round of higher lawmaking amends it. Either way, the problem of vastly changed context would need to be addressed.

Beyond all this are the many problems with originalism itself. These objections need not be reviewed, other than to note that they insure originalist arguments will fall upon deaf ears for a significant portion of American legal culture. One need not be a “crit,” moreover, to suspect that originalist arguments that do not support the preconceived notions of certain originalists will wind up falling on deaf ears as well. Perhaps most importantly, even a relatively successful originalist defense of American judicial globalization by definition will not provide a self-government basis for the practice in the rest of the world. For all these reasons, the search for justification should not end aboard *The Charming Betsy*.

#### **IV. Judicial Foreign Relations Authority and the Global Mirror**

The search for a broader justification of judicial globalization first requires clarifying the demands of democratic self-government. Such a clarification points to a rejection of the simple majoritarianism that undergirds conventional attacks on judicial borrowing, and in its place suggests a model in which moderately insulated courts promote democratic self-government through rendering moral judgments on behalf of the people they represent. Applied to judicial globalization, this conception supports two arguments in favor of the use of international law domestically. First, with regard to domestic law requiring fundamental moral judgments, courts are presumptively superior to the executive or legislature in determining the weight of international norms as a matter of judicial foreign affairs authority. Second, in many instances international law

norms themselves – in particular customary international law -- presumptively reflect commitments that are widely held domestically as well as globally.

A. *From Majority Rule to Self-Government*

Clarifying the requirements of democratic self-government starts with proceeding beyond simple majoritarianism. Some form of majoritarianism – for present purposes, rule through electoral and legislative majorities – sustains most charges alleging a democratic deficit. Originalism, whatever its other flaws, does attempt to address the requirements of democratic self-government conceived in this fairly simple manner. Originalism, however, is not the only path, if only because the simple majoritarian conception fails to meet sustained scrutiny either as a matter of practice or theory. Looking mainly at transnational and comparative practice, Andrew Moravcsik convincingly (if exceptionally) refutes the charge that the European Union suffers from a democratic deficit in part because its less obviously democratic mechanisms track similar and settled arrangements in its constituent liberal democracies.<sup>106</sup> Turning to domestic theory, Chris Eisgruber’s work on constitutional self-government goes a good distance toward explaining why this should be so.<sup>107</sup> Out of these lines of argument a more general and sophisticated justification for judicial globalization flows.

A thicker and more accurate conception of modern democracy starts with the premise that government cannot presume to speak for the people “unless it takes into account the interests and opinions of all the people.”<sup>108</sup> Many common, non-majoritarian

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<sup>106</sup> Moravcsik, *supra* note 23, at 613-14.

<sup>107</sup> EISGRUBER, *supra* note 22.

<sup>108</sup> *Id.* at 50.

mechanisms facilitate this larger goal of impartiality, or of a more thoroughgoing representativeness.<sup>109</sup> Written constitutions entrenched through supermajority requirements are simply a different way to capture democratic sentiment where stability, deliberation, and concern about overreaching by mere majorities is highly valued.<sup>110</sup> Likewise, insulated institutions such as independent agencies and central banks seek to supplement democratic sentiment where special expertise and insularity are prerequisites.<sup>111</sup> These and other institutions compensate for common structural failures that simple majoritarianism entails. Among these, especially salient is the anomaly of deference to voters who have little reason to take their civic responsibilities seriously given that they need not make public their commitments, offer reasons for their selections, nor expect their individual votes to materially influence outcomes.<sup>112</sup> None of this is to say that legislatures or executives elected by secret ballot should not have an important or even primary place in constitutional democracy. It is, however, to insist that other, less obviously democratic institutions promote self-government more thoroughly conceived.

Like courts. Judges with the authority to engage in constitutional review facilitate more comprehensive representativeness for at least two sets of reasons. First, constitutional and analogous law dealing with fundamental rights tends to deal with

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<sup>109</sup> Eisgruber himself favors the term “impartiality”. *Id.* at 19-20, 52-56. I believe something like comprehensive representativeness is closer to the mark. Regardless of the term, the goal remains overcoming the problem that majoritarianism across the board means that only a fraction of the people in general can prevail in the course of democratic decision-making. *Id.*

<sup>110</sup> *Id.* at 20-25.

<sup>111</sup> *Id.* at 52-65.

<sup>112</sup> *Id.* at 50-51.

moral judgments rather than allocative or other preferences.<sup>113</sup> It follows that judgments of this sort are best made on moral reasons with popular grounding. Second, courts typically strike a balance between accountability and insularity. Article III courts in the U.S., for example, reflect more straightforward majoritarian preference through Presidential appointment with the advice and consent of the Senate, through Congressional authority over jurisdiction via the Exceptions Clause, and through amendment. Insularity famously rests upon life tenure, and less notably through salary protection.<sup>114</sup> These two sets of reasons combine to indicate that the judiciary has the comparative institutional advantage over the so-called “political branches” to handle matters of political morality of this sort. On this basis, judicial review facilitates, rather than frustrates, the project of self-government.

#### B. *Judicial Foreign Affairs Authority*

Nothing forecloses the possibility that the judiciary may have a comparative democratic advantage in other areas as well, especially where moral judgment is in play. My claim here is that one such area is judicial reliance on international law to interpret domestic constitutional principles. This claim could rest on an assertion that looking abroad aids in determining what moral judgments have a popular grounding domestically. I shall return to this idea of “a global mirror” later. For now, the argument rests not on a possible international law angle or the judiciary’s core comparative advantage in making moral judgments. Rather, the argument rests upon a further comparative advantage the judiciary has in exercising a specialized aspect of foreign affairs authority. This aspect of

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<sup>113</sup> *Id.* at 52-56.

<sup>114</sup> *Id.* at 57-66. Judicial insularity, and the disinterestedness that results, accord the judiciary the further advantage of greater moral responsibility, enforced in part by concern over reputation. *Id.* at 59-64.

foreign affairs authority, which judicial globalization makes more pressing, is the power to determine how far the nation's fundamental moral commitments should comport with the commitments made by the world community as expressed through international law. Put another way, who is in the best position to determine whether and how far the U.S. should or should not be a global outlier with regard to domestic judgments about free speech, equality, criminal process, and capital punishment?

Conventional wisdom holds that the courts are the last place to vest foreign affairs powers. Whereas the three branches tend to zealously guard their turf domestically, all three preach judicial deference in foreign affairs. The judiciary itself, moreover, sounds this theme as much as the others. Emblematic here is Justice Sutherland's majority opinion in *United States v. Curtiss-Wright*, in which the Court deferred to F.D.R.'s executive order prohibiting arms shipments to Bolivia in part on the ground that the President was the "sole organ" of U.S. foreign relations.<sup>115</sup> In fact the Court's deference to the President or Congress is more rhetorical than real, and in any event complex and selective.<sup>116</sup> More importantly, careful consideration of the matter reveals that the judiciary is the best placed institution for determining how far domestic moral

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<sup>115</sup> See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (referring to the "very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations"). The genesis of the "sole organ" language is a speech made by John Marshall in 1800 while he was a member of the House of Representatives. President Adams had ordered the extradition to Great Britain of Thomas Nash, alias Jonathan Robbins, who was accused of murder while aboard a British ship. Although Adams acted pursuant to a treaty with Great Britain, he was criticized on the ground that the extradition request from Great Britain should have been processed by judicial action, not executive action. It was in this context that Marshall, defending Adams, proclaimed: "The president is the sole organ of the nation in its external relations, and its sole representative with foreign nations." 10 ANNALS OF CONGRESS 596, 613 (1800). Marshall went on to argue that the President "is charged to execute the laws," that a treaty "is declared to be a law," and that the President therefore has the power to fulfill U.S. responsibilities under an extradition treaty. *Id.* Marshall therefore was not making any claim about unspecified substantive powers.

<sup>116</sup> See, e.g., *Sabbatino*, 376 U.S. at 398.

determinations should or should not depart from the analogous conclusions reached by most of the rest of the world. This conclusion follows, moreover, for the two sets of reasons that judicial review itself promotes self-government: first, the nature of the decision to be made; and second, its relation to the institutional strengths of the judiciary versus the weaknesses of the elected branches.

Turn first to the determination to be made. As noted, fixing how far domestic moral judgments should comport with analogous international positions is most accurately seen as a foreign relations power, but one of a qualitatively different sort than most others. The determination resembles the usual run of foreign relations choices in requiring a cost/benefit analysis of multilateral engagement versus unilateral abstention. Whether and to what extent to participate in NAFTA, and provide opportunities to domestic information industries, or go it alone in an effort to protect the manufacturing sector, to a significant extent comes down to balancing preferences. As such, this kind of decision will be more amenable to more traditional majoritarian means so long as these have proportionate safeguards for minority interests.

But this point will not hold true for all foreign relations decisions. Arguably, the decision to pursue national security alone free from the constraints of other governments or transnational bodies, or to do so with the advantages that a multilateral alliance brings, is less a matter of preference than expertise. More to the immediate point, determining how much or little the nation will comport with a global consensus on a fundamentally moral question likewise appears qualitatively different. First, it is important to remember that this decision comes in the context of making a domestic moral judgment, and permits a foreign affairs cost/benefit analysis only to the extent that the domestic decision permits

a range of answers. Second, costs and benefits in this context themselves will often, though not always, be moral in character. Permitting the execution of minors may promote national security on some assumption that foreign teenage suicide bombers pose a threat. Doing so, however, may come at the moral costs of relegating the country to outlier status, not to mention of adopting such a position in its own right. Finally, both these factors make clear that a capacity to assess moral reasons with a popular grounding will be critical in exercising foreign relations authority in this specialized setting.

It is at this point that the second, institutional, set of considerations comes into play. When making the morally-inflected determinations of how far domestic constitutional interpretations should comport with analogous international ones, judiciaries that share the main features of U.S. Article III courts enjoy an advantage over U.S.-style executives or judiciaries for the same reasons that U.S. courts are better suited to make moral judgments directly. The same combination of accountability and insularity apply to the extent that overall context of the determination to be made remains making a domestic judgment, that some of the costs and benefits will come in moral terms, and that a capacity to assess moral judgments undergirds the entire process.

Yet distinctive international factors point to the courts as well. Ordinarily, the other branches, especially the executive, boast various institutional advantages in assessing circumstances overseas. That superiority shifts to the courts when it comes to figuring out moral judgments of the global community as expressed, among other things, through customary international law and other foreign legal sources. While this advantage would always have been present, Slaughter's work suggests that it has



experienced a new twist insofar as judges today compare and contrast constitutional decisions not just through reported decisions, but face to face.<sup>117</sup>

Conversely, the case for the political branches founders for similar reasons. Without the insularity of life tenure, the President and Congress lack the sense of disinterestedness and moral responsibility to make them particularly well-suited to determining what “cruel and unusual punishment” means as a threshold domestic matter, what the moral costs or benefits would be in departing from international conceptions of parallel concepts such as “cruel, inhuman, or degrading treatment,” or in simply determining the range of colorable domestic interpretations or the scope of the international ones.

Here, too, distinctive international factors further undercut the competing branches’ claims. Without attempting a comprehensive survey, some features call into question such certain democratic assertions even on mundane majoritarian grounds. Often noted in this regard is the Senate’s supermajority requirement for treaties, which has permitted potentially small minorities to block meaningful ratification of human rights treaties even where there is broad public support. By contrast, other international mechanisms serve to enhance the court’s democratic pedigree in a manner similar to controlling jurisdiction. Specifically, in international law the Executive always has an option of declaring that the country is essentially “opting out” of an evolving customary norm. In this circumstance, a court could not take into account that the U.S. had departed from an international consensus, at least to the extent of violating it. Of course, a President intent on depriving courts of such arguments could always opt out of

<sup>117</sup> See Slaughter, *supra* note 7.

international norms across the board. Such a move, however, would involve foreign relations costs of its own, which would at a minimum discourage this easy option.

### *C. A Global Mirror*

The foreign affairs authority justification may be sufficient, but it is not exclusive. Reliance on international law for constitutional interpretation also reflects the courts' comparative advantage in its core function of rendering moral judgments with a popular grounding. Starting with the nature of this function, this second claim assumes that the popular grounding necessary for such moral judgment rests not just on the courts' democratic pedigree, but also on the popular basis of the constitutional principles that frame the moral judgments to be rendered. Here my critical, and frankly counterintuitive argument, is that international law, including customary international law, presumptively reflects commitments that are widely held globally as well as internationally. Turning next to institutional competence, it again follows that judges are better placed to determine the content and extent of popular moral judgments made transnationally, as well as whether there is sufficient reason to believe that the U.S. has rejected any global consensus that may exist.

As before, seeking a democratic justification for assigning a particular task to an unelected judiciary requires consideration of the task. And as before, such consideration indicates that constitutional judicial review – at least of rights-bearing provisions – entails decisions based upon moral reasons that have some popular foundation. For similar reasons, the same entailment holds true for federal common law claims that themselves implicate rights. Yet at this point it is critical to ask what constitutes the requisite popular foundation? Eisgruber's own articulation clearly relies on the democratic foundations of

the judiciary, the institutional component of the argument.<sup>118</sup> Yet it also suggests that part of the justification rests upon the popular basis of the moral reasons themselves. This reading in part follows from statements arguing that Supreme Court justices “are better positioned to represent the people’s convictions about what is right.”<sup>119</sup> It derives more specifically from his assertions that the government must ensure that the vision of justice it puts forth has “some popular appeal” and that a responsible government “must sift among competing moral claims by its citizens.”<sup>120</sup>

The requirement for a popular basis for the judgments themselves should be more robust than Eisgruber’s theory implies. In part this stipulation is simply pragmatic. More people who are concerned about judicial overreaching will rest easier if the judgments courts make have a popular basis in addition to the judges’ own democratic pedigree. That reality, however, among other things derives from considerations of “fit” that are deeply entrenched in American constitutional culture, and likely other constitutional cultures as well. For one thing, concern about the democratic grounding for fundamental moral judgments accounts for the widespread insistence, shared not just by originalists, that the abstract textual foundation for such judgments reflect not just formal majoritarian, but extended supermajoritarian approval.<sup>121</sup> More relevantly, concern for a

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<sup>118</sup> EISGRUBER, *supra* note 22, at 64-68.

<sup>119</sup> *Id.* at 5.

<sup>120</sup> *Id.* at 55-56. These suggestions, and more importantly the need for some popular grounding itself, earlier led me to applaud Eisgruber’s theory for allowing space for arguments making reference to history and tradition on the grounds that these provided evidence of “some popular appeal.” Martin S. Flaherty, *The Better Angels of Self-Government*, 71 FORDHAM L. REV. 1773, 1781-87 (2003). His handling of how this should be done, however, further led me to criticize his theory to the extent that his theory would permit reliance on idiosyncratic sources or figures. *Id.*

<sup>121</sup> This intuition, moreover, spans the political Left, *see, e.g.*, BRUCE ACKERMAN, 1 WE THE PEOPLE (FOUNDATIONS) (1991), 2 WE THE PEOPLE (TRANSFORMATIONS) (1998), CASS R. SUNSTEIN, THE PARTIAL

popular basis for the moral reasons that realize the text's general commitments best explains the Supreme Court's enduring reliance on tradition under the banner of the Due Process Clause and the Eighth Amendment.<sup>122</sup> While such use of tradition may be seen merely as aiding moral reasoning through examining general experience, the Court's own statements make clear that positions that the American people, or significant segments of the American people, have staked out on contraceptives, abortion, sodomy, or aspects of the death penalty matter because they have been taken by the American people.

Elaborated in this fashion, the task of implementing particular rights raise obvious questions about foreign materials. For present purposes, the key inquiry becomes whether turning to international law aids the effort of determining whether a particular interpretation has a significant, popular, American grounding. Skeptics answer obviously not. For them, judicial globalization misfires to begin with because self-government implies direct, positivist, usually majoritarian (or supermajoritarian) procedures, and neither the courts' indirect democratic pedigree nor reliance on popular sentiment expressed outside these procedures suffices. Even if they did, there would remain the simple problem of borders. It appears counterintuitive, to say the least, to try to discover American values by looking outside America. For both sets of reasons, Bork, Kersch, and others question reliance on foreign legal materials insofar as the practice reflects an undemocratic judicial elite teaming up with undemocratic foreign legal elites to override

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CONSTITUTION (1993), and Right, *see, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997), BORK, TEMPTING, *supra* note \_\_\_.

<sup>122</sup> With regard to the role tradition plays in Due Process, *see* *Poe v. Ullman*, 367 U.S. 497 (1961) (Harlan, J., dissenting); *Roe* 410 U.S. at 113; *Bowers*, 478 U.S. at 186; *Lawrence*, 537 U.S. at 1102. For the Eighth Amendment, *see* *Trop v. Dulles*, 356 U.S. 86 (1958).

the democratic wishes of the domestic citizenry.<sup>123</sup> For better or worse, the “undemocratic” judges issue has been addressed. The border problem, however, remains.

There are nonetheless reasons to believe that looking abroad in this context does help clarify popular sentiment at home. The first, and likely most controversial, arises from an assumption of commonality among constitutional cultures. In colloquial terms, we look abroad not because *we* can learn from *them*, but because *they’re* like *us*, and so can confirm what appear to be our own commitments or can tip the scales where those commitments appear conflicting. Especially in the context of international human rights law, this assumption runs in the face of philosophical, anthropological, and cultural objections that emphasize difference.<sup>124</sup> Assuming commonality in this instance, however, is a far cry from such cases as western human rights activists making similar assumptions when ostensibly imposing their alien standards on indigenous cultures.

By comparison, judicial reliance on international standards takes place in a context in which relevant differences are modest. To begin with, those domestic rights with international law analogues are those that tend to command overlapping consensus across substantially different cultures. Suggestive here is Richard Rorty’s speculation that non-rational human sentiment points to such an overlap, even if rational philosophy cannot.<sup>125</sup> More concretely, and contrary to a frequent caricature, the effort to hammer out the foundational Universal Declaration of Human Rights rested on a conscious cross-cultural effort, including an important UNESCO report attempting to set out various

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<sup>123</sup> See BORK, *supra* note 21; cf. Kersch, *supra* note 20.

<sup>124</sup> See, e.g., Richard A. Schweder, “When Cultures Collide: Which Rights? Whose Tradition of Values?: A Critique of the Global Anti-FGM Campaign,” (forthcoming, 2004)

<sup>125</sup> Richard Rorty, *Human Rights, Rationality, and Sentimentality* in ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 1993, at 111 (S. Schute & S. Hurley, eds. 1993).

overlaps.<sup>126</sup> Moreover, the specific cultures in play here are essentially the constitutional culture of the United States and the parallel cultures of other nations that generate international human rights law, a process in which the United States has played a substantial, if uneven, part. Ironically, the usual relativist critique of human rights tends to emphasize this particular overlapping consensus by juxtaposing generally local or regional conceptions against imperialist human rights norms advanced by liberal states, the North, the West, or more directly, the United States and its allies.<sup>127</sup>

To the extent that such an assumption about commonality in this context holds, it follows that international, or even much foreign constitutional law, reflects not simply basic commitments of other nations, but commitments that have a sufficient grounding within the United States to form the requisite basis for judicial judgments. At the end of the day, of course, all this turns on empirical inquiry, not to mention further definition of what counts as a sufficient popular grounding. In any particular instance, moreover, an assumption about commonality could be rebutted, arguably, the U.S. conception of a right to own guns.<sup>128</sup> My claim at present simply is that the inquiry is worth pursuing.

A second set of reasons to look above, to international law, as a reflection of popular domestic commitments below has to do with democratic process. As any comparativist would indicate, liberal democracies vary significantly in the mechanisms they employ to register popular sentiment, including and especially for the purposes of

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<sup>126</sup> See MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 73-78, 222-23 (2001).

<sup>127</sup> Cites to critiques of human rights movement.

<sup>128</sup> See MICHAEL BELLESISLES, *ARMING AMERICA: THE ORIGINS OF A NATIONAL GUN CULTURE* (2000) to the extent that his central thesis appears to have survived the controversy.

treaties and customary international law.<sup>129</sup> International human rights standards commanding general global assent, have therefore not only survived the hurdles of international lawmaking rules, but have also navigated differing domestic systems that do not necessarily channel democratic preference in similar ways.

The diversity of national mechanisms -- parliamentary, presidentialist, unicameral, bicameral -- theoretically filter in only those norms that genuinely command broad cross-border agreement. On this theory, formal outlier states may still be just that, nations in which popular sentiment has roundly rejected a proposed standard. Yet this view points to the possibility that an outlier result may be a function of a particularly idiosyncratic domestic mechanism.<sup>130</sup> As one example, take the supermajority requirement for Senate ratification of treaties. Since the early 1950s, the two-thirds rule has directly precluded meaningful ratification of human rights treaties even when it has been clear that substantial -- and at times, substantial majority -- support for specific commitments existed.<sup>131</sup> This phenomenon, to take another example, was in turn driven by pathologies of federalism, through which *Federalist* No. 10-style democratic process breakdown helped sustain resistance to anti-discrimination norms that again commanded substantial support both nationally and internationally. To be clear, none of this is to argue that such specific idiosyncrasies should not count for their constituted purposes. It is, however, at least to assert that Senate diminution of treaties or enacted practices in some localities, either of which formally make the United States an outlier, should not be

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<sup>129</sup> Cf. VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* (1999).

<sup>130</sup> Cf. Moravcsik.

<sup>131</sup> See Spiro, *supra* note 55.

enough to prevent a court from assuming that an established international law standard helps reflect a widely accepted norm within the United States. For this purpose, neither the Senate, nor especially a minority of the states, should be seen as proxies for America.

One further reason for pursuing a “global mirror” justification returns to the timely objection procedure for customary international law. Earlier the device appeared as a formal, democratic check to legitimize the exercise of judicial foreign affairs authority.<sup>132</sup> In the present setting, it serves a similar role insofar as it affords the Executive (or possibly Congress, though not the Senate alone), to declare U.S. outlier status not just for the purposes of international law, but in so doing, as a declaration that insufficient popular support exists for the nation to go along with an emerging global consensus. An observer with a degree of stamina might at once ask at this point why the Executive should be seen as a proxy for America, and so preclude judicial use of international law on self-government grounds, when that role is presumptively denied to the Senate or the states.

The short answer comes down to greater institutional confidence that the President will ordinarily be a more responsible marker for those situations in which the U.S. as a whole has materially parted company from the rest of the world. Part of this confidence rests upon the (James) Wilsonian observation that the presidency is the sole nationally elected office. A larger measure derives from the President’s primacy in foreign affairs. As noted, the Executive is ordinarily seen as the institution best situated to analyze the diplomatic cost of taking a particular position. It is always possible, perhaps inevitable, that either a candidate or incumbent President will support a domestic

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<sup>132</sup> See *infra* TAN \_\_\_-\_\_\_.



position that possibly violates international law, as did Governor Clinton in failing to commute the sentence of a mentally deficient capital defendant.<sup>133</sup> Directly proclaiming to the world that the U.S. will assume outlier status for international custom has apparently entailed sufficient cost that it has not yet been a course Presidents have followed on a regular basis. That of course might change if the domestic cost clearly becomes an effective authorization to the courts to rely on international law in close constitutional cases. The price of embracing the outlier role in such a proactive manner, however, indicates that the Executive still would do so only when an evolving standard has de minimis domestic support -- or if Texas has the swing electoral votes in the next election.

Turning from task to institution, the judiciary enjoys as good or better an advantage in this setting as it does in exercising foreign affairs authority. The reasons for this superiority track those previously noted. From the earliest days of the republic, courts have assumed a broad expertise in formally discerning rules established in foreign legal materials. At least through the early twentieth century, for example, a staple of domestic common law jurisprudence involved reliance on English common law decisions. More closely on point, domestic courts throughout our history have surveyed foreign legal sources to make the kind of judgments about international law that parallel constitutional and Federal common law questions.

In the Supreme Court itself, this tradition extends at least as far back as *Ware v. Hylton*,<sup>134</sup> and continues through *Lawrence*.<sup>135</sup> Whether and how this tradition has ebbed

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<sup>133</sup> Cite to news account of same.

<sup>134</sup> 3 U.S. (3 Dall.) 199 (1796).

and flowed remains understudied. But as *Lawrence* and similar cases indicate, the U.S. judiciary -- however parochial it may have been in recent decades -- has been reviving its old international expertise. As *Slaughter* suggests, moreover, face to face discussion among judges of different jurisdictions has added a new and important informal mechanism aiding courts in discerning international judgments. Determining the moral judgments made in international law, in sum, has always been a core judicial function. Nor has it been one in which even the Executive has presumed to assert superior expertise.

Not only are courts comparatively suited to interpreting international law, they are likewise well-fitted for determining when national tradition offers so little support for a global norm that it cannot support an equivalent judgment domestically. Judicial advantage in this respect comes first from above. By definition, integral to interpreting international custom is the corollary matter of deciding when a state has declined to adhere to an evolving rule through persistent objection. As with the determination of the customary rule itself, passing upon valid “opt outs” has also been a core judicial function. From below, distinctive judicial practice limits the potential role international law to serve this function in at least two ways. First, the judiciary has established the practice of concluding when tradition or other indicators of popular commitment are so slim that they cannot sustain a particular constitutional judgment.<sup>135</sup> In such an instance, contrary international sources would indicate national divergence rather than allegiance with the international position. Second, on the *Charming Betsy* model, it also has traditionally

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<sup>135</sup> *Lawrence*, 537 U.S. at \_\_\_-\_\_ .

<sup>136</sup> See *supra* note 122.

fallen to the judiciary to decide when domestic legal materials taken together remain sufficiently indeterminate to permit reliance on international law in the first place.

## **V. Conclusion**

Critics of judicial globalization may not be right in rejecting it, but they are correct in demanding a more convincing normative basis than has been developed to date. For both theoretical and pragmatic reasons, no normative foundation will likely be as powerful or convincing as one sounding in democratic self-government. The foregoing analysis suggests at least two and a half ways to answer this challenge. The originalist approach is the analytically straightforward, yet also the most parochial and labor-intensive. The judicial foreign affairs and global mirror approaches, by contrast, promise greater applicability across liberal systems, yet make for a more complex and difficult sell. On further review, research, and reflection not all of them may prevail. Together and separately, however, they do constitute a start worth continuing.