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2003

# Democratic Legitimacy in Human Rights: The Future of International Decision-Making

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Citation:

Douglas Lee Donoho, Democratic Legitimacy in Human Rights: The Future of International Decision-Making, 21 Wis. Int'l L.J. 1 (2003)

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# DEMOCRATIC LEGITIMACY IN HUMAN RIGHTS: THE FUTURE OF INTERNATIONAL DECISION-MAKING

DOUGLAS LEE DONOHO\*

## I. INTRODUCTION

The past decade has witnessed a significant increase in the scope and effectiveness of international governance. Most dramatically, the decisions of international organizations such as the World Trade Organization (WTO), International Monetary Fund (IMF), and World Bank have increasingly implicated policy choices once considered to be exclusively within the domestic sphere.<sup>1</sup> The increasing effectiveness and jurisdictional scope of such international institutions have generated growing popular and scholarly debate about the democratic legitimacy of international decision-making.<sup>2</sup>

Thus far, the discourse has focused on the activities of organizations whose functions are primarily economic. Perhaps because of their general ineffectiveness and current lack of authority,<sup>3</sup> international human rights institutions have received

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<sup>1</sup> See, e.g., Patti Goldman, *The Democratization of the Development of United States Trade Policy*, 27 CORNELL INT'L L.J. 631, 634-43 (1994); Jeffery Atik, *Identifying Anti-Democratic Outcomes: Authenticity, Self-Sacrifice, And International Trade*, 19 U. PA. J. INT'L ECON. L. 229, 230-39 (1998); Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 84-88, 96-112 (2000). See also *infra* notes 1-20, 28-36 and accompanying text.

<sup>2</sup> See, e.g., Goldman, *supra* note 1; Phillip R. Trimble, *Globalization, International Institutions and the Erosion of National Sovereignty and Democracy*, 95 MICH. L. REV. 1944, 1966 (1997); JEREMY RABKIN, *WHY SOVEREIGNTY MATTERS* (1998); John Bolton, *Should We Take Global Governance Seriously?* 1 CHI. J. INT'L L. 205 (2000) (one of many essays from a conference sponsored by the University of Chicago entitled: "Trends in Global Governance: Do They Threaten American Sovereignty?"); Andrew Moravcsik, *Conservative Idealism and International Institutions*, 1 CHI. J. INT'L L. 291 (2000); Joel Richard Paul, *Is Global Governance Safe for Democracy?* 1 CHI. J. INT'L L. 263 (2000); Ku, *supra* note 1. See also DAVID HELD, *MODELS OF DEMOCRACY* 341-60 (1996).

<sup>3</sup> See *infra* notes 99, 104-06, 139-46 and accompanying text. The European Court of Human Rights (ECHR) is often described as the only generally effective international human rights institution, measured in terms of state cooperation and

scant attention in this regard.<sup>4</sup> This omission is deeply ironic since the international human rights system, itself a champion of democratic liberties and democratic self-governance, may ultimately present significant anti-democratic implications for national polities as its institutional decision making framework matures.

As developed below, these potentially negative implications for local democratic governance will primarily arise with the advent of increasingly authoritative international decision-making over contestable human rights standards.<sup>5</sup> Ultimately, the future development of authoritative international governance over contestable human rights has the potential for displacing local preferences and democratically produced outcomes with those of

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compliance. See, e.g., Douglas Donoho, *Autonomy, Self-Governance and the Margin of Appreciation*, 15 EMORY INT'L L. REV. 391, 463-65 (2002); Lawrence Helfer & Anne-Marie Slaughter, *Towards a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 273-45 (1997) (promoting the European system as a model of effective international adjudication of human rights); Makua wa Mutua, *Looking Past the Human Rights Committee: An Argument for De-Marginalizing Enforcement*, 4 BUFF. HUM. RTS. L. REV. 211, 245-52 (1998).

<sup>4</sup> A 1986 article by Professor Weiler addresses similar concerns regarding the European Court of Justice's (ECJ) consideration and use of human rights standards when deciding issues of European Union law. See J.H.H. Weiler, *Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights Within the Legal Order of the European Communities*, 61 WASH. L. REV. 1103 (1986). Some of the literature addressing the democratic legitimacy of international governance generally includes references to human rights institutions. See, e.g., Ku, *supra* note 1, at 79-80, 106-10; Paul Stephans, *International Governance and American Democracy*, 1 CHI. J. INT'L L. 237, 241-42, 253-54 (2000). See also Julie Mertus, *From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Civil Society*, 14 AM. U. INT'L L. REV. 1335, 1340-41, 1355-88 (1999) (discussing potential anti-democratic implications of the development of "transnational civil society" and increased authority of non-state actors in human rights); Ernst-Ulrich Petersmann, *Constitutionalism And International Adjudication: How To Constitutionalize the U.N. Dispute Settlement System?* 31 N.Y.U. J. INT'L L. & POL. 753, 761-84 (1999) (arguing for the "constitutionalization" of international human rights law and international judicial protections).

<sup>5</sup> See *infra* notes 175-86 and accompanying text. I have used the word "contestable" here to differentiate between human rights that enjoy clear international consensus over meaning and those whose meaning is subject to continuing, reasonable debate. Little genuine controversy exists, for example, regarding the meaning of torture, summary execution or disappearances. In contrast, substantial debate exists between societies regarding the precise contours of many other rights such as privacy and free speech. See *infra* notes 92-93, 181-84 and accompanying text.



unaccountable and unrepresentative international decision-makers. This potential will become increasingly problematic for democracy as the international human rights system develops more potent forms of decision-making, particularly powers similar to judicial review.<sup>6</sup> Such decision-making also has the potential for disrupting diverse visions of democratic governance and corresponding choices regarding the appropriate balance between majoritarian rule and individual liberties.<sup>7</sup> These, and other potential implications for democracy outlined below, raise important questions regarding the future structure and process of international human rights decision-making, the authority and accountability of international decision-makers, and the appropriate legal status and domestic effect of such decisions.

Many of the issues discussed below depend on context and future institutional developments that are uncertain at best. Mediating the tensions between international human rights governance and domestic democracy will ultimately require a wide range of complex value judgments and political compromises. Accordingly, my purpose here is to describe the potential fault lines and tensions that increasingly authoritative international human rights governance may create for democratic self-rule. The point of this discussion is that such tensions should be recognized, acknowledged, and accommodated as international human rights institutions evolve more authoritative and effective decision-making.

Democratic governance in the current world order, manifested predominately in the form of nation-states,<sup>8</sup> demands that

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<sup>6</sup> See *infra* notes 137-86 and accompanying text.

<sup>7</sup> See *infra* notes 170-77 and accompanying text.

<sup>8</sup> It is clear that the current international legal order is in a period of fundamental transformation. See, e.g., James Wilets, *The Demise of the Nation-State: Towards a New Theory of the State Under International Law*, 17 BERKELEY J. INT'L L. 193 (1999). Traditional conceptions of "sovereignty," fundamental to the existing international legal order, are similarly in transition. See, e.g., John Jackson, *The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results*, 36 COLUM. J. TRANSNAT'L L. 157 (1997); Moravcsik, *supra* note 2. Despite this changing legal landscape, it remains fundamentally true that the international legal order is largely premised on the existence of independent nation-states that both create international rules and enforce them, often via international organizations created for such purposes. Most importantly for present purposes, the nation-state (and political sub-parts) remains intimately related to the concept of *demos* or shared political community that is critical to

human rights decision-making develop in ways that will account for, and enhance, self-governance and autonomy values.<sup>9</sup> This is particularly critical for those international institutions that either possess, or are in the process of developing, judicial or quasi-judicial dispute resolution authority over human rights issues.<sup>10</sup> Alternatives to enhance democratic legitimacy of future international human rights decision-making may include institutional or structural safeguards designed to ensure the accountability, responsiveness and “connected-ness” of international decision-makers and processes.<sup>11</sup> The most important response, however, may be the development of carefully crafted standards of review for contestable human rights that provide an appropriate measure of deference for genuine democratic self-governance and local autonomy. While respecting local democratic preferences, such standards should be calculated to recognize differences among rights,<sup>12</sup> the development of international consensus over norms, the myriad and subtle forms of oppression, and the democratic authenticity (or not) of local outcomes.<sup>13</sup> Given the

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democratic self-governance. Modern democracies almost inevitably manifest themselves and their shared political community in terms of the nation-state. Thus, United Nations efforts to support democracy through election monitoring are entirely organized around the concept of the nation-state as defined by the people or *demos* that it comprises. See *infra* note 21. While it is certainly possible to reasonably argue for different definitions of the appropriate *demos* (and for different definitions of the *demos* regarding different issues or subjects) see, e.g., Richard Falk & Andrew Strauss, *On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty*, 36 STAN. J. INT’L L. 191, 191-95, 207-220 (2000), the nation state will undoubtedly remain the primary manifestation of democracy for the foreseeable future. See *infra* notes 25-26.

<sup>9</sup> See *infra* notes 70-78, 149-91 and accompanying text.

<sup>10</sup> See *infra* notes 137-77 and accompanying text.

<sup>11</sup> See *infra* notes 79-85, 101-103, 110-114, 127-30, 150-75 and accompanying text.

<sup>12</sup> See *infra* notes 5, 62, 184-86, 190-91 and accompanying text. It seems reasonable to believe, for example, that the international community will eventually reach consensus over universal meaning for an increasing number of rights. Presumably, such consensus gives concrete meaning to states’ inchoate international human rights obligations, leaving little room for democratically produced variations. Even this conclusion, however, is not beyond doubt, as unresolved issues will undoubtedly arise regarding the appropriate balance between democratic choice and international consensus and the nature of states’ international human rights obligations. See *infra* notes 137-46, 170-77, 185-86.

<sup>13</sup> See *infra* notes 173-75, 185-87, and 190 and accompanying text. Given the international community’s fundamental endorsement of democratic rule, see *infra* notes 21-24 and accompanying text, it follows that the existence of genuine democracy

substantial indeterminacy and political nature of many rights,<sup>14</sup> these standards must ultimately provide some appropriate measure of respect for the social and political choices that emerge from internal domestic discourse and democratic deliberation. This should include due regard for each democratic society's preferences regarding the complex balance between majoritarian rule, public interest and the rights of minorities and individuals.<sup>15</sup>

## II. INTERNATIONAL GOVERNANCE AND DEMOCRACY: THE GENERAL CRITIQUE

In recent years, a growing chorus of critics has alleged that major international organizations suffer from various "democracy deficits."<sup>16</sup> Concerned with the relative unaccountability of international decision-makers and the potential displacement of domestic democratic choices, such critiques challenge the democratic legitimacy of international governance. These concerns

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should be a critical factor in determining the degree of deference that international decision-makers may give to local outcomes. *See also infra* notes 25, 188, 190-91 and accompanying text. The lack of authentic democratic processes, or the existence of oppressive social forces that have clearly distorted such processes, should arouse added suspicion regarding government actions and eliminate the essential rationale for such deference or respect.

<sup>14</sup> *See infra* notes 91-93, 178-86 and accompanying text.

<sup>15</sup> *See infra* notes 170-77, 189 and accompanying text.

<sup>16</sup> *See, e.g.,* Atik, *supra* note 1, at 230-39; Bill Cash, *European Integration: Dangers for the United States*, 1 CHI. J. INTL. L. 315 (2000); Goldman, *supra* note 1, at 654-60; Ku, *supra* note 1, at 84-88, 96-112; Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 COLUM. L. REV. 628, 633-44, 672-84 (1999); Jeremy Rabkin, *Is EU Policy Eroding the Sovereignty of Non-Member States?*, 1 CHI. J. INTL. L. 273 (2000); Stephans, *supra* note 4, at 237-41, 245-47; Trimble, *supra* note 2, at 1966. *See also* John McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 513-21, 534-43 (2000) (refuting the position that the WTO poses a threat to democratic governance); Gregory C. Shaffer, *The World Trade Organization Under Challenge: Democracy And The Law And Politics Of The WTO's Treatment Of Trade And Environment Matters*, 25 HARV. ENVTL. L. REV. 1 (2001); *See generally* Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law*, 93 AM. J. INT'L L. 596, 596-600, 608-19 (1999); Moravcsik, *supra* note 2, at 291-93, 304-08; J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2430-31 (1991).

overlap and parallel two related developments involving recognition of the changing nature of state sovereignty<sup>17</sup> and the increased international importance of democratic governance.<sup>18</sup> Politicians and academics alike have increasingly acknowledged that traditional notions of unfettered state sovereignty have given way in the face of significant transnational problems in an interdependent world. For a variety of reasons, states have looked to international legal disciplines over issues once thought exclusively domestic, sometimes delegating elements of traditional sovereign authority to international organizations.<sup>19</sup> Increasingly effective international regulation over some subjects,

<sup>17</sup> See *supra* notes 2, 8. See generally Louis Henkin, *That "S" Word: Sovereignty, Globalization and Human Rights, Et Cetera*, 68 *FORDHAM L. REV.* 1 (1999); J. Goldsmith, *Sovereignty, International Relations Theory, and International Law* (Book Review of S. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY*), 52 *STAN. L. REV.* 959 (2000); Jackson, *Sovereignty Debates*, *supra* note 8.

<sup>18</sup> Democratic governance has increasingly become an important criterion for government legitimacy under international law. See, e.g., THE VIENNA DECLARATION AND PROGRAMME OF ACTION, U.N. DOC. A/CONF.157/23, (1993) at ¶ 2, reprinted in, 32 *I.L.M.* 1661 (1993); Resolution on Representative Democracy, OAS, General Assembly, 5<sup>th</sup> Sess., AG/Res.1080 (XXI- 0/91) (1991); European Community: Declaration on Guidelines on Yugoslavia and on the Recognition of New States, Dec. 16, 1991, 31 *I.L.M.* 1485, 1487 (1991); Conference for Security & Co-operation in Europe, Charter of Paris for a New Europe, Nov. 19-21, 1990, Principle 1, available at <http://www.osce.org/docs/english/1990-1999/summits/paris90e.htm> (last visited Jan. 14, 2003). See generally Douglas Donoho, *Evolution or Expediency: The United Nations' Response to the Disruption of Democracy*, 29 *CORNELL INT'L L.J.* 329 (1996); DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW (Gregory Fox & Brad Roth, eds., 2000); Stephen J. Schnably, *The Santiago Commitment as a Call to Democracy in the United States: Evaluating the OAS Role in Haiti, Peru, and Guatemala*, 25 *INTER-AM. L. REV.* 393 (1994).

<sup>19</sup> Apart from the EU, the most prominent examples of this trend have occurred in the area of international trade with the advent of the WTO and NAFTA. See *supra* note 1. The IMF has also been castigated for interfering with domestic democratic priorities when it attaches significant social and financial constraints on a recipient state's policy alternatives in conjunction with structural adjustment packages. See, e.g., Antony Anghie, *Time Present and Time Past: Globalization, International Financial Institutions and the Third World*, 32 *N.Y.U. J. INT'L L. & POL.* 243, 266 & 274 (2000); Anthony Galano III, *Comment, International Monetary Fund Response to the Brazilian Debt Crisis: Whether the Effects of Conditionality Have Undermined Brazil's National Sovereignty?*, 6 *PACE INT'L L. REV.* 323, 338-49 (1994). There is a growing variety of other emerging international legal disciplines over traditionally domestic topics. A list might include the environment (e.g., Kyoto Protocol to the United Nations Framework Convention on Climate Change, FCCC/CP/7/Add.1, reprinted in 37 *I.L.M.* 2243 (1998) (standards for greenhouse gases)); food safety standards (Codex Alimentarius Commission

particularly trade, has begun to implicate a wide range of domestic policy choices involving sensitive topics such as labor, environmental protection, public health and safety.<sup>20</sup>

At the same time, democratic governance has gained significant prominence in international affairs. The United Nations, for example, now expends significant resources toward the spread of democracy.<sup>21</sup> Prominent international organizations such as the

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standards, available at <http://www.codexalimentarius.net/#>) (last visited Jan. 14, 2003) (which create a presumption of acceptable scientific basis for food standards under GATT 94); labor standards (International Labor Organization, see <http://www.ilo.org/>); product technical standards (e.g., International Organization for Standardization, ISO programs, see <http://www.iso.org/>); and conservation (Convention on International Trade in Endangered Species of Wild Flora and Fauna, done March 3, 1973, Art. XV, 27 U.S.T. 1087, 993 UNTS 243). See generally Kal Raustiala, Note: The "Participatory Revolution" In International Environmental Law, 21 HARV. ENVTL. L. REV. 537 (1997); David A. Wirth, Reexamining Decision-Making Processes in International Environmental Law, 79 IOWA L. REV. 769 (1994); Lewis Rosman, Public Participation in International Pesticide Regulation: When the Codex Commission Decides, Who Will Listen?, 12 VA. ENVTL. L.J. 329, 345-46, 357-65 (1993). The international human rights system, while presently underdeveloped, could ultimately mature in ways similar to the European Court of Human Rights (ECHR). See *infra* note 3; *supra* notes 108, 112 & 143; Donoho, *Autonomy*, *supra* note 3, at 455-62. Effective international governance over human rights issues would undeniably have pronounced implications for domestic policy choices. See *infra* notes 138-49 and accompanying text. This potential has caused an alarmist over-reaction among some conservative commentators. See, e.g., Bolton, *supra* note 2, at 212-18; Stephan, *supra* note 4, at 241-42.

<sup>20</sup> See *infra* notes 28-36 and accompanying text; *supra* notes 1 and 18. There has been some effort to create additional mechanisms for the integration of competing policy concerns before international bodies. See, e.g., Jack I. Garvey, *Trade Law and Quality Of Life—Dispute Resolution under the NAFTA Side Accords on Labor and the Environment*, 89 AM. J. INT'L L. 439, 440-53 (1995) (describing the NAFTA "side agreements" as a model for integrating other values and policy concerns into the international trade regime). But see McGinnis & Movsesian, *supra* note 16, at 518-21, 550-58 (endorsing the exclusion of such interests and limitations on WTO's potential "regulatory" functions). There has also been a trend to increase the opportunities for interest group participation in international decision-making processes, primarily via NGO's. See generally Mertus, *supra* note 4; Raustiala, *supra* note 19; William Reichert, Note, *Resolving the Trade and Environmental Conflict: The WTO and NGO Consultative Relations*, 5 MINN. J. GLOBAL TRADE 219, 226-27, 237-46 (1996). See also Bolton, *supra* note 2, at 215-18; *infra* note 36.

<sup>21</sup> See generally Donoho, *Expediency*, *supra* note 18. From election monitoring to technical assistance, the United Nations has recently devoted significant resources to the promotion and maintenance of democracy. *Id.* at 334-341. There are also indications that disruptions of democratic governance may constitute a threat to peace justifying collective action by the Security Council. See *id.* at 358-

Council of Europe, the Organization of American States and the Organization for Cooperation and Security in Europe have made democratic governance a criterion for membership and a measure of government legitimacy.<sup>22</sup> Always a champion of individual democratic liberties,<sup>23</sup> the international human rights system has also increasingly emphasized the importance of democratic self-governance in the collective sense.<sup>24</sup>

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70; U.N. SCOR, 49th Sess., 3413th mtg. at 1, U.N. Doc. S/Res/940 (1994) (authorizing "all necessary means" to bring about "the restoration of the legitimate authorities of the Government of Haiti. . .").

<sup>22</sup> See *supra* note 18. All members of the Council of Europe participate in the Organization for Security and Co-operation in Europe, which has made democratic governance a pre-requisite to government legitimacy. Statute of the Council of Europe, May 5, 1949, art. 3, 87 U.N.T.S. 103, 106. See also Thomas Franck, *The Democratic Entitlement*, 29 U. RICH. L. REV. 1, 27-29 (1994). See also Thomas Grant, *An Institution Restored?* Book Review of M.J. PETERSON, *RECOGNITION OF GOVERNMENTS: LEGAL DOCTRINE AND STATE PRACTICE, 1815-1995*, 39 VA. J. INT'L L. 191, 196-99, 211 (1998). For the recognition policies of members of the European Union, see EUROPEAN POLITICAL COOPERATION, DECLARATION ON THE "GUIDELINES ON THE RECOGNITION OF NEW STATES IN EASTERN EUROPE AND IN THE SOVIET UNION," Dec. 16, 1991, reprinted in 31 I.L.M. 1486 (1992). The OAS has implicitly taken a similar stance by requiring suspension of any member state whose democratic government is removed by force. Protocol of Amendment to the Charter of the Organization of American States, OEA/ser. P./OAS Doc. AG/doc.11 (XVI-E/92), Dec.14, 1992, art. 9, reprinted in, 33 I.L.M. 1005 (1994). See *supra* note 18.

<sup>23</sup> International recognition of individual democratic liberties such as the rights to vote, free speech, petition, and participate in government, is ubiquitous among international human rights treaties and declarations. See, e.g., Universal Declaration of Human Rights, GA Res. 217 A(3), U.N. Doc. A/810, at 71, adopted, Dec. 10, 1948, Arts. 18-21; International Covenant on Civil and Political Rights, 99 U.N.T.S.171, U.N. Doc. A/6316 (1966) (ICCPR) at Arts. 18-22, 25; International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) (CERD) at Arts. 5; Convention on the Elimination of All Forms of Discrimination Against Women, 1249 U.N.T.S. 13 (CEDAW) at Arts. 7-8. The prominence of political and civil liberties in the treaty regime and its emphasis on the individual has prompted complaints that the international human rights system exhibits a "Western bias." See, e.g., Makua wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT'L L. 589, 653-56 (1996); B. Kausikan, *Asia's Different Standard*, 92 FOR. POL'Y 24, 26-34, 39 (1993).

<sup>24</sup> See Vienna Declaration, *supra* note 18 (suggesting that a government's legitimacy depends upon receiving the consent of the governed). The United Nations Commission on Human Rights (CHR) has also approved a resolution endorsing an international right to democracy. See M. Dennis, *The Fifty-Fifth Session of the Commission on Human Rights*, 94 AM. J. INT'L L. 189, 191-92 (2000) (citing CHR Res. 1999/57).

There is an obvious tension between these two developments. On the one hand, democratic governance implies the primacy of domestic (and perhaps, local) rule.<sup>25</sup> For the foreseeable future, the shared political community or *demos* that define democratic rule will continue to be the citizens of the various nation-states (and their political subdivisions), rather than geographic regions or the world community.<sup>26</sup> In contrast, international governance implies a shift in the locus of decision-making away from domestic democratic polities to international fora. Thus, an increase in the effectiveness of international rule-making and conflict resolution, and its extension to important social and economic issues, has raised serious concerns regarding an alleged

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<sup>25</sup> See *supra* note 79-80. The nation-state is clearly an imperfect measure of *demos* in many parts of the world. This is amply demonstrated by widespread ethnic conflicts, demands for secession or autonomy, and disputes over national borders poorly drawn by prior colonial interests. See Bryan Schwartz & Susan Waywood, *A Model Declaration on the Right of Secession*, 11 N.Y. INT'L L. REV. 1, 1-10, 15-17, 19-23, 33-35, 39-44 (1998); Diane Orentlicher, *Separation Anxiety: International Responses to Ethno-Separatist Claims*, 23 YALE J. INT'L L. 1, 6-9, 16-21, 44-63 (1998). The "disconnect" between government and the governed, when coupled with rabid nationalism and the quest for power, has generated horrors around the world from Kosovo to Kashmir. The resulting conflicts also demonstrate, albeit in distorted manifestations, the continuing power of the most basic aim of democracy—the desire for self-governance by those who perceive themselves as belonging to a self-defined shared community.

<sup>26</sup> One may, of course, entertain alternative visions of the appropriate *demos*, suggesting regional or even a global community of people with at least some attributes of self-rule. See Falk & Strauss, *supra* note 8. In some senses, everyone is a citizen of overlapping polities. I am, for example, a member of the world community, the western hemisphere, the Americas, the United States, the State of Florida, the County of Broward, the City of Ft. Lauderdale, and the Harbor Beach Neighborhood Association. Similarly, it is clearly the case that some such "self-governance groupings" may be issue specific. However tenuously, I may arguably be a "citizen" of NAFTA for purposes of certain economic issues. The absence of democratic attributes and mechanisms for expression of self-governance in these alternative political and legal settings is fundamentally what drives the "democracy deficit" critiques described in this paper. See *supra* notes 16-25 and accompanying text; *infra* notes 27-36, 49-52 and accompanying text. The European Union is, in many senses, a classic example of the potential evolution and complexity of overlapping "citizenships." See *infra* notes 37-46 and accompanying text. For present purposes, it is enough to understand that democratic governance implies, at minimum, self-governance by groups of people identified as belonging to a defined polity. At present, the predominate grouping for such purposes is the nation-state and its political subparts. See *supra* note 8, 25.

dilution of democratic self-governance and perceived losses in state sovereignty.<sup>27</sup>

In general, democracy deficit critiques have primarily focused on major international economic organizations such as the WTO and IMF and the liberal free market values that they epitomize.<sup>28</sup> The WTO in particular has been confronted with potentially serious political repercussions from panel decisions in trade disputes that have challenged popular domestic programs in the name of free trade.<sup>29</sup> Recent WTO panels, for example, have declared U.S. environmental programs protecting dolphins,<sup>30</sup> turtles<sup>31</sup> and air quality<sup>32</sup> inconsistent with GATT trade disciplines, thereby generating significant academic and popular controversy.<sup>33</sup> In a similar vein, a WTO panel decision recently disallowed European Union (EU) restrictions on hormone fed beef

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<sup>27</sup> See *supra* notes 19-20.

<sup>28</sup> See, e.g., Anghie, *supra* note 19, at 266-74, 252-55 (IMF & World Bank; Goldman, *supra* note 1, at 634-35, 640-44, 654-60; Ku, *supra* note 1, at 84-88, 96-112; Atik, *supra* note 1, at 230-39; Trimble, *supra* note 2, at 1966). See also McGinnis & Movsesian, *supra* note 16, at 513-21, 534-43 (refuting the position that the WTO poses a threat to democratic governance). Efforts toward international harmonization of health and safety standards for food and products via organizations such as the Codex Commission and the International Standards Organization could raise similar concerns, especially to the extent that such standards are tied into the GATT trading disciplines. See Goldman, *supra* note 1, at 679-81; Rosman, *supra* note 19, at 345-46, 357-65. See also *supra* note 18. To a lesser extent, the concern over democratic legitimacy has also spread to the still embryonic forms of transnational regulation of the environment. See, e.g., Bodansky, *supra* note 16; Shaffer, *supra* note 15; Wirth, *supra* note 19.

<sup>29</sup> See generally Shaffer, *supra* note 16; Padideh Ala'i, *A Human Rights Critique of the WTO: Some Preliminary Observations*, 33 GEO. WASH. INT'L L. & ECON. 537 (2001).

<sup>30</sup> GATT Dispute Panel Report, United States—Restrictions on Imports of Tuna, B.I.S.D. (39th Supp.) at 155 (1993), *reprinted in* 30 I.L.M. 1954 (1991); GATT Dispute Panel Report, United States—Restrictions on Imports of Tuna, June 16, 1994, GATT Doc. DS29/R, *reprinted in* 33 I.L.M. 839 (1994).

<sup>31</sup> WTO Appellate Body, United States—Import Prohibition of Certain Shrimp and Shrimp Products, Oct. 12, 1998, WT/DS58/AB/R, *reprinted in* 38 I.L.M. 118 (1999). United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58R, May 15, 1998, *modified by* Appellate Body Report, WT/DS58/AB/R, Oct. 12, 1998.

<sup>32</sup> United States Standards for Reformulated and Conventional Gasoline, WT/DS2/R, Jan. 29, 1996, *reprinted in* 35 I.L.M. 603 (1996).

<sup>33</sup> See, e.g., Michael M. Weinstein & Steve Charnovitz, *The Greening of the WTO*, (2001-11/1/01) FOREIGN AFFAIRS 147 (2001) (*available at* 2001 WL 29745973);



despite strong public sentiments regarding its potential health risks.<sup>34</sup>

Such decisions have provided powerful rhetorical ammunition for anti-globalists who complain that unaccountable international bureaucrats, disposed to favor liberal free market capitalistic values, will dilute or usurp hard-fought democratic outcomes. Highly publicized and sometimes violent public protests against the WTO have dramatically demonstrated the seriousness of this anti-globalist challenge.<sup>35</sup> The size and depth of these protests arguably reflect and fuel a growing public perception that important decisions affecting daily life are being made by unaccountable actors who are predisposed to favor free trade over other important social and political values.<sup>36</sup> Whatever the

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Patricia Hansen, *Transparency, Standards of Review, and the Use of Trade Measures to Protect the Global Environment*, 39 VA. J. INT'L L. 1017 (1999); David Driesen, *What is Free Trade?: The Real Issue Lurking Behind the Trade and Environment Debate*, 41 VA. J. INT'L L. 279 (2001) (citing and reviewing the extensive literature); Jeffrey L. Dunoff, "Trade and . . .": *Recent Developments in Trade Policy and Scholarship—And Their Surprising Political Implications*, 17 NW. J. INT'L L. & BUS. 759 (1997).

<sup>34</sup> EC Measures Concerning Meat and Meat Products (Hormones), WT/S26/R/USA (Aug. 18, 1997); EC Measures Concerning Meat and Meat Products (Hormones), GATT Doc. WT/DS26/9 (Sept. 25, 1997); Appellate Body Report, GATT Doc. WT/DS26/AB/R (Jan. 16, 1998).

<sup>35</sup> By some estimates, as many as 50,000 protesters clashed with police at the Seattle ministerial meeting of the WTO in 1999. See, e.g., John Burgess & Steven Pearlstein, *Protests Delay WTO Opening: Seattle Police Use Tear Gas; Mayor Declares a Curfew*, WASH. POST, Dec. 1, 1999, at A1, available at 1999 WL 30306155; Heath Foster & Kery Mirakami, *Schell and Stamper Can Expect To Be Severely Criticized*, SEATTLE POST-INTELLIGENCER, Dec. 4, 1999, at A6, available at 1999 WL 30557154. Other large anti-globalist protests have followed Seattle, although the events of September 11, 2001 have apparently altered the course of the protest movement. See, e.g., Anthony DePalma, *In Quebec's Streets, Fervor, Fears and a Gamut of Issues*, N.Y. TIMES, Apr. 22, 2001, at A1 (demonstrations at the third Summit of the Americas); Robert McPherson, *EU Summit Could Breathe New Life Into Anti-Global Movement*, Dec. 12, 2001, AGENCE FRANCE-PRESSE, available at 2001 WL 25084307 (describing European anti-globalist protests after September 11); Paul Vallely, *Globalization—Anti-global Protest Fights on New Front*, THE INDEPENDENT, Dec. 28, 2001, (London), available at 2001 WL 31604957; Mike Woodsworth, *Radicals Rail on Impending Economic Conference*, U-WIRE, Jan. 30, 2002, available at 2002 WL 8296614.

<sup>36</sup> See *supra* note 1-2. See also David Postman & Lynda V. Mapes, *Why WTO United So Many Foes*, SEATTLE TIMES, Dec. 6, 1999, at A22 available at WL 6303041; Press Release, Public Citizen, WTO Report: Clinton Spin Cycle Unable to Clean WTO's Record (Mar. 2, 2000), available at <http://www.citizen.org/press-room/release.cfm?ID=890> (last visited Jan. 14, 2003). The political saliency of the

merits of these positions, the significance of the debate for the future of international governance should not be doubted.

The EU, the most developed model for international governance, has also been criticized for an alleged democracy deficit.<sup>37</sup> Reflecting the EU's comprehensive scope and institutional complexity, democracy deficit critiques of EU institutions are more sophisticated than those typically aimed at other international institutions and add a dimension particularly relevant to this study. EU law, consisting of the constitutive treaties<sup>38</sup> and

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anti-globalist movement can be seen in the responses of politicians to it. President Clinton has suggested greater public access to WTO trade negotiations and the inclusion of environmental and labor issues on the organization's agenda. See Burgess & Pearlstein, *supra* note 25; Ellen Iritani, *White House Vows to Link Environment, Trade Pacts Policy*, L.A. TIMES, Nov. 17, 1999, at C17, available at 1999 WL 26196420; Postman & Mapes, *supra*. The WTO itself has responded to such protests and criticisms by increasing public and NGO access to information and promising greater transparency to WTO activities. Press Release 10, World Trade Organization, Ruggiero Announces Enhanced WTO Plan for Cooperation with NGOs (July 17, 1998) (available at [http://www.wto.org/english/news\\_e/pres98\\_e/pr107\\_e.htm](http://www.wto.org/english/news_e/pres98_e/pr107_e.htm) (last visited Jan. 14, 2003)). In an apparent effort to improve public relations, the organization's web site now includes "community forum," and "NGO" pages, see [http://www.wto.org/english/forums\\_e/forums\\_e.htm](http://www.wto.org/english/forums_e/forums_e.htm) and [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/min01\\_ngo\\_activ\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/min01_ngo_activ_e.htm) (last visited Jan. 14, 2003). In a similar vein, the WTO now invites and publishes NGO "position papers" in order to create "greater transparency and an enhanced dialogue with NGOs." See [http://www.wto.org/english/forums\\_e/ngo\\_e/pos-pap\\_e.htm](http://www.wto.org/english/forums_e/ngo_e/pos-pap_e.htm) (last visited Jan. 14, 2003). Anti-globalism has also produced some strange political bedfellows. Both Ralph Nader and Pat Buchanan, for instance, have rallied political support from opposite sides of the political spectrum behind similar anti-internationalist themes. See Postman & Mapes, *supra*.

<sup>37</sup> For an insightful discussion of the evolution of EU institutions and the dynamics that underlie current critiques of their democratic legitimacy see Weiler, *Transformation*, *supra* note 16, at 2430-31, 24-74. See also Bill Cash, *European Integration: Dangers for the United States*, 1 CHI. J. INT'L L. 315 (2000); Francesca Bignami, *The Democratic Deficit in European Community Rulemaking: A Call For Notice and Comment in Comitology*, 40 HARV. INT'L L. J. 451 (1999); Lindseth, *supra* note 16, at 633-44, 672-80; Moravcsik, *supra* note 2, at 291-93, 304-08; Rabkin, *EU Policy*, *supra* note 16; *supra* note 4. There are many reasons why one could reasonably view the EU and its institutions as *sui generis*. In contrast to other global institutions, the EU has a limited membership consisting of states with somewhat homogeneous populations, sharing a common history and cultural orientation. EU institutions enjoy a general commonality of purposes, highly evolved institutional structures, authoritative powers and a degree of popular acceptance absent in other international organizations. See Donoho, *Autonomy*, *supra* note 3, at 462-66.

<sup>38</sup> The EU's institutional structure, jurisdiction and powers have evolved enormously since its inception as a customs union in 1951. See generally Weiler, *Transformation*, *supra* note 16. This evolution has been accomplished largely through

legislative output of the European Council and Commission,<sup>39</sup> has enjoyed supremacy over domestic law for many years.<sup>40</sup> The significance of this supremacy was greatly enhanced by the European Court of Justice (ECJ),<sup>41</sup> which confirmed its own final authority in decisions over the interpretation of EU law and established doctrines of direct effect and implied powers.<sup>42</sup> Since the ECJ's authority includes the power to judge the consistency

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the adoption of a series of treaties that now constitute the "constitutional framework" and "primary" or "basic" law for the EU. *Id.* at 2407-08.

<sup>39</sup> The European Council is composed of a ministerial representative from each member state and represents the interests of the member states in EU affairs. Members of the Commission, in contrast, represent "European" interests. Together, with increasingly meaningful participation from the European Parliament, these institutions are empowered under the EU treaty structure to create binding legislation within the scope of the EU's jurisdiction. For a concise summary of these general principles see BARRY CARTER & PHILLIP TRIMBLE, *INTERNATIONAL LAW* 549-566 (3<sup>rd</sup> ed. 1999). See also *EUROPEAN UNION LAW ANTHOLOGY*, 12-23 (Kole & D'Amato, eds. 1998). These powers are constrained by the principle of "subsidiarity" that has been expressly incorporated into the governing treaty regime. *Id.* at 39-42. See generally Daniel Murphy, *Subsidiarity And/Or Human Rights*, 29 U. RICH. L. REV. 67 (1994). The subsidiarity principle limits the Union's role regarding subjects over which they share jurisdiction with national governments. See *id.* at 69-71. Correspondingly, the EU has exclusive jurisdiction over some subjects and none at all over others that fall outside the scope of the EU treaty regime. *Id.*

<sup>40</sup> See generally Weiler, *Transformation*, *supra* note 16, at 2413-17; *EU ANTHOLOGY*, *supra* note 39, at 59-65. The legal supremacy of EU "supranational" law-making obviously creates constraints upon, or displacement of, domestic democratic authority. These effects are, in contrast to those threatened by other international organizations or imagined by their critics, very real and tangible. Professor Weiler has concisely summarized this position: "Thus, the Council, a collectivity of Ministers, on a proposal of the Commission, a collectivity of nonelected civil servants, could, and in some instances must, pass legislation which is binding and enforceable even in the face of conflicting legislation passed by national parliaments." Weiler, *Transformation*, *supra* note 16, at 2466-67.

<sup>41</sup> The European Court of Justice is the primary judicial organ of the European Union. One of its primary functions is to provide uniform and authoritative interpretation EU law. Treaty Establishing the European Union, Arts. 220, 226-34. Although human rights are not an overt part of the EU's mandate, the ECJ has insisted that it must interpret and apply EU law consistently with the European Convention on Human Rights. See, e.g., *Society for the Protection of Unborn Children v. Grogan*, 1991 ECR I-4685, 3 CMLR 849 (Eur. Ct. J., Oct. 4, 1991); *Grant v. South-West Trains*, [1998] 1 CMLR 993, 1012-14, ¶¶ 43-48 (Eur. Ct. J., Feb. 17, 1998). See generally Weiler, *Transformation*, *supra* note 16, at 2417-19.

<sup>42</sup> See *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 ECR 1 (E.Ct. J. case 26/62); *Amministrazione delle Finanze dello Stato v. Simmenthal S.P.A.*, 1978 ECR 629 (E. Ct. J. case 106/77). See also Weiler, *Transformation*, *supra* note 16, at 2413-23, 2426.

of domestic legislation with supreme EU law, the ECJ has essentially given itself a power of international judicial review which extends into the domestic legal systems of the member states.<sup>43</sup> These international legislative and judicial review powers have caused critics of EU governance to single out the respective “law-making” roles of executive officers<sup>44</sup> and international jurists for special scrutiny.<sup>45</sup> As explained further below, the existence of authoritative international judicial power has

<sup>43</sup> *Id.* at 2419-22. Professor Weiler has observed that the EU’s displacement of domestic authority has been greatly facilitated by the ECJ’s enlistment of national courts in its assertion of judicial review. In particular, domestic courts found their own powers greatly enhanced in that they were required, through the EU’s certification and review process, to apply legal authority (EU law) superior to domestic legislation. *Id.* at 2426.

<sup>44</sup> Democracy critiques of EU governance often tend to focus on the process by which EU decisions are reached. Since the European Council, comprised of government ministers from each member state, must approve all EU legislation, the executive branch of each domestic government is deeply involved in EU law-making. The European Parliament, the only popularly elected institution in the EU, has very little substantive authority and provides a very limited democratic check on the law-making authority of the Council and Commission. Recent innovations such as the co-decision making procedures allow the Parliament an increasingly meaningful voice in the direction of EU legislation and policy. See Falk & Strauss, *supra* note 8, at 204-06. Whether an increase in parliamentary authority answers concerns over democratic legitimacy, however, depends on one’s perspective regarding the possibility of a true European *demos*. See, e.g., Weiler, *Transformation*, *supra* note 16, at 2468-74.

<sup>45</sup> The existence of legislative supremacy controlled primarily by executive officers, and international judicial review, are both characteristics that distinguish the EU from virtually all other international institutions. The WTO, for example, has extremely limited capacity for creating binding rules. See generally RAJ BHALA, INTERNATIONAL TRADE LAW: THEORY AND PRACTICE 201-243 (2<sup>nd</sup> ed. 2001); Ku, *supra* note 1, at 96-99; McGinnis & Movsesian, *supra* note 16, at 530-33. Ironically, it is the policing function of the WTO’s dispute settlement panels which has caused the most public controversy. See *supra* notes 31 to 36. Although the WTO may, in a sense, create rules binding on its members by adopting “waivers,” “amendments” or “interpretations” of the agreements by super-majority voting, panel decisions are not directly binding beyond the parties to the dispute. BHALA, *supra* at 204-06, 213-14, 240-43. The failure to comply with a panel decision (subject to appellate review) may eventually lead to a sanction in the form of permission for the aggrieved party to “suspend concessions.” Essentially invoked by removing trading benefits—a generally useless remedy for all but the largest states—neither the Panel decision nor such sanctions are directly binding or enforceable within the U.S. domestic legal system. See 19 U.S.C. § 3512 (a)(1) (1994). In essence, the WTO is not truly a regulatory body with the power to create or enforce binding rules on its members but rather a supervisory institution with limited capacity for meaningful enforcement. But see John H. Jackson, *The WTO Dispute Settlement Understanding—Misunderstandings on the Nature*

particularly significant implications for democratic self-governance.<sup>46</sup>

Such concerns parallel the well-trodden debate over the democratic legitimacy of judicial review in American Constitutional Law described below.<sup>47</sup> They also present, however, special problems particular to their international context that are especially relevant to international judicial or quasi-judicial resolution of human rights issues.<sup>48</sup>

### III. INTERNATIONAL DEMOCRACY DEFICIT AND DEMOCRATIC DISPLACEMENT

There are, of course, many permutations to the emerging democratic legitimacy critiques of international decision-making. Two related themes, however, predominate. The first involves serious questions regarding the democratic legitimacy of the processes by which international organizations make decisions. Such questions primarily focus on the structure of international organizations and a perceived lack of democratic attributes in their decision-making processes. One might describe this theme as "international democratic deficit." The patently undemocratic nature of UN decision-making provides one example. Depending upon whose ox is being gored, UN decision-making could be castigated as either power oriented and unrepresentative of the interests of weaker states (the Security Council)<sup>49</sup> or, in contrast,

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of *Legal Obligations*, 91 AM. J. INT'L L. 60, 60-64 (1997) (refuting descriptions of WTO rulings as non-binding). Human rights institutions, with the exception perhaps of the ECHR, have even more modest potential for creating effectively binding obligations. See *supra* note 3; *infra* notes 104-106, 112, 142-49 and accompanying text.

<sup>46</sup> See *infra* notes 149-86 and accompanying text. See also Weiler, *Transformation*, *supra* note 16, at 2452-74.

<sup>47</sup> See *infra* notes 117-36 and accompanying text.

<sup>48</sup> See *infra* notes 137-83 and accompanying text.

<sup>49</sup> The Security Council is the only U.N. institution with the legal authority to issue orders binding on the entire world community. It may do so only with regard to issues of peace and security and upon the affirmative vote of 9 out of its 15 members, including the United States, the United Kingdom, France, China and the Russian Federation (the permanent five). United Nations Charter, art. 23, 27, 39. Although limited to issues of peace and security, an expanding conception of threats to peace and lack of institutional checks on its power have caused increasing concern about the legitimacy of Security Council decision-making. See Donoho, *Expediency*, *supra* note 18, at 370-79; David Caron, *The Legitimacy of*

overly solicitous of small, less populated states without regard to population or economic power (the General Assembly).<sup>50</sup> In either case, the interests and voices of common people are only indirectly and tenuously represented, if at all.<sup>51</sup> Similar complaints may be raised about most major international organizations, which after all, were created by sovereign states to serve state interests. Perhaps one sign of the sensitivity of international organizations to such accusations is the increasing tendency to include non-governmental organizations in the process of normative development.<sup>52</sup>

The second, and closely related theme, involves the threat of what might be called "democratic displacement." This theme invokes perceived losses in democratic self-rule as increasingly authoritative international organizations allegedly displace the majoritarian preferences of domestic populations. The basic argument is straightforward and powerful. Since international decision-makers are foreign bureaucrats or experts, neither culturally connected nor directly accountable through elections,<sup>53</sup>

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*the Collective Authority of the Security Council*, 87 AM. J. INT'L L. 552, 562-66 (1993); Burns H. Weston, *Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy*, 85 AM. J. INT'L L. 516 (1991).

<sup>50</sup> Organized around the premise of sovereign equality, the General Assembly operates on the principle of "one state, one vote." No distinctions in voting power are made on the basis of population, economic power or other criteria, and the votes of China and tiny Pacific Ocean mini-states like the Republic of Nauru carry equal weight. See, e.g., Thomas Franck, *United Nations Based Prospects For a New Global Order*, 22 N.Y.U. J. INT'L L. & POL. 601, 615-17 (1990). Although the General Assembly has no binding authority beyond budgetary matters, such voting arrangements present deeply anti-democratic implications since the collective and individual voices of people living in more populous societies are devalued.

<sup>51</sup> See Michael Reisman, *Amending the UN Charter: The Art of the Feasible*, 88 AM. SOC. INT'L L. PROC. 108 (1995).

<sup>52</sup> See generally Raustiala, *supra* note 19. See also Mertus, *supra* note 4, at 1385-88; Garvey, *supra* note 20, at 440-42, 448-51 (praising NAFTA for increasing participation); Falk & Strauss, *supra* note 8, at 194-205 (outlining the role of "international civil society" in the development of international legal regimes). The lack of public participation and transparency of WTO proceedings is a common criticism of that organization. See, e.g., Goldman, *supra* note 1, at 631-32, 643-48; Garvey, *supra* note 20, at 448-50. The WTO itself seems aware of the public relations problem involved. See *supra* note 36.

<sup>53</sup> See, e.g., *supra* notes 39, 44; *infra* notes 101-103, 110-111, 165-72. Accountability may be created, of course, in a variety of ways other than through direct elections. Thus, for example, many human rights institutions are composed of experts who are subject to review and periodic appointment by the state

their decisions displacing democratically produced domestic policies lack the responsiveness and accountability necessary for democratic legitimacy.<sup>54</sup> The most radical version of this claim asserts that international governance is inherently and unalterably undemocratic in that it excessively dilutes the voice of individuals and societal groups and represents no recognizable *demos* to justify its authority.<sup>55</sup>

These parallel concerns over “international democratic deficit” and “democratic displacement” are closely entwined. Thus, the perceived lack of fair democratic decision-making processes within international organizations exacerbates the concerns raised by the threat that international decisions may displace domestic, democratically generated policies. When international decisions lacking democratic authenticity and pedigree displace domestic democratic choice, democracy itself is usurped. Taken together, these inter-related themes challenge the wisdom and legitimacy of the current trend towards international resolution of important transnational issues. More positively, they speak to the need for developing an appropriate balance between increased international governance and the preservation of local autonomy and democratic self-rule. Reminiscent of the traditional struggle between central and local authority,<sup>56</sup> democratic

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participants. In this sense there may be a form of indirect accountability to the people via executive branch officers. This is, to say the least, a very attenuated form of accountability. It is arguable whether global institutions with global constituencies can ever, as a matter of basic structure, be responsive to any particular population in the sense that democratic governance probably demands. *See infra* notes 159-162 and accompanying text.

<sup>54</sup> *See supra* notes 1-2, 16, 35-36 and accompanying text.

<sup>55</sup> Undoubtedly some extreme critics of international governance believe that concerns over national sovereignty and democratic displacement render all forms of authoritative international decision-making inherently illegitimate. *See, e.g.,* Bolton, *supra* note 2; Cash, *supra* note 16. *See also* Stephan, *supra* note 4. In this view, the traditional consent based forms of international legal decision-making are adequate to address any transnational problems that may confront the world. Global interdependence is not, however, simply a hackneyed platitude. The complexity of modern transnational problems presents the real potential that increasingly authoritative international governance may be a functional necessity for some issues. The essential debate, therefore, will probably focus on the appropriate scope, form and limits of authoritative international decision-making and not on its existence.

<sup>56</sup> *See, e.g.,* Vicki Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223 (2001).

legitimacy critiques of international governance raise fundamental questions about the appropriate locus of decision-making authority.

It is ironic that the rising importance of democratic governance within international law has been accompanied by a growing public perception that international governance itself is a counterforce that limits democratic expression. It is, therefore, vital that international organizations develop processes and institutional structures that properly account for, endorse, and respect domestic democratic self-governance. As detailed below, this may be particularly important for the international human rights system, which is often confronted with immensely complex and highly contested moral issues that lie at the heart of democratic self-rule.<sup>57</sup>

#### IV. THE MEANING OF DEMOCRATIC LEGITIMACY

Domestic acceptance of increasingly authoritative international decision-making in human rights will undoubtedly depend, in significant part, upon the democratic pedigree of such decisions. Is it possible to develop non-controversial criteria for evaluating the democratic legitimacy of current and future human rights decision-making? What do people mean when they speak about democratic legitimacy?

Many critiques of international governance essentially rely on democracy as the sole criterion of institutional legitimacy. Often legitimacy is no more than a loose rhetorical adjective rather than a concrete legal or political concept. Clearly it may mean different things to different people in different contexts.<sup>58</sup>

<sup>57</sup> See *infra* notes 170-77, 183-86 and accompanying text.

<sup>58</sup> Concepts of legitimacy have long been critical to the work of social and political theorists ranging from Max Weber to Jurgen Habermas. See generally Allan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379, 387-89, 392-93, 397, 423 (1983) (reviewing and critiquing theories concerning the role of "legitimacy" in fostering compliance with domestic legal norms). See also John Yoo, 2001 Symposium: *Bush v. Gore*, In *Defense of the Court's Legitimacy*, 68 U. CHI. L. REV. 775 (2001) (reviewing various uses of legitimacy concepts); Tom Tyler and Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703 (1994) (providing a detailed analysis of legitimacy concepts as applied to the abortion decisions). Legitimacy has also figured prominently in international law discourse. See generally THOMAS FRANCK, THE



For present purposes, however, it is enough to understand “democratic legitimacy” as a conclusion that a particular exercise of authority is justified in light of shared democratic ideals.<sup>59</sup> Legitimacy in this sense requires not only a formal legal mandate appropriately created and exercised, but also acceptance of the process and its outcomes by those being governed.<sup>60</sup> Political and popular acceptance may be prompted by a variety of considerations including: perceptions of fair process, deference to expertise, meaningful opportunities for participation, adequate representation of diverse interests, transparency, and consistency in decision-making over time.<sup>61</sup> It also undoubtedly depends on substantive outcomes that are generally consistent with the dominant cultural, political and moral sensibilities of the society in question.<sup>62</sup> Similarly, the perceived legitimacy of an institution depends on public belief that the institution is, in process and

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POWER OF LEGITIMACY AMONG NATIONS (1990) (focusing on the role of legitimacy in explaining state compliance with international legal norms); Oscar Schacter, *Towards a Theory of International Obligation*, 8 VA. J. INT'L L. 300, 311-12, 314 (1968); Jose Alvarez, *The Quest for Legitimacy: An Examination of The Power of Legitimacy Among Nations*, 24 N.Y.U. J. INT'L L. & POL. 199, 242-43 (1991); Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 716-31 (1986); Caron, *supra* note 50, at 556-61.

<sup>59</sup> The concept of legitimacy has many permutations and possible meanings. See generally Tyler & Mitchell, *supra* note 58. See also Yoo, *supra* note 58, at 777-83; Bodansky, *supra* note 16, at 600-06, 612-13. Professor Bodansky has aptly noted that democratic attributes are only one possible measure of legitimacy. *Id.* at 599-600, 620-23. Many critics of international governance have ignored such subtleties focusing instead on a more central and basic question—do the decision-making processes and decisions of international organizations exhibit those characteristics of democracy which might justify their exercises of authority. See *supra* notes 1-2, 16, 28-29, 35-36 and accompanying text.

<sup>60</sup> See, e.g., Weiler, *supra* note 16, at 2468-70; Bodansky, *supra* note 16, at 600-06, 612-13, 620-23; Yoo, *supra* note 58, at 777-83.

<sup>61</sup> See, e.g., Yoo, *supra* note 58, at 777-83; Tyler & Mitchell, *supra* note 58, at 712-15, 733-41, 747-51. See also THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS, 7, 22, 25-26 (1995) (equating “legitimacy,” *inter alia*, with procedural fairness, utilitarianism, a desire for order, and right process).

<sup>62</sup> This point is often emphasized by non-western human rights advocates. See, e.g., A. An-Naim, *What Do We Mean by Universal?*, 4/5 Index on Censorship 120 (1994); A. al-Hibri, *Islam, Law and Custom: Redefining Muslim Women's Rights*, 12 AM. U. J. INT'L L. & POL'Y 1, 3-4 (1997) (describing the importance of developing human rights norms consistently with cultural imperatives); Daniel Bell, *The East Asian Challenge to Human Rights: Reflections on an East-West Dialogue*, 18 HUM. RTS. Q. 641, 656-60 (1996). From a primarily functional perspective, there is also reason to believe that the effectiveness of human rights ultimately depends, at some level, on their consistency with the prevailing social,

action, representative of basic values shared in that society over issues of equality, liberty, justice, tradition, community and personal freedom.<sup>63</sup> Ultimately, most of the factors relating to democratic pedigree and character may be seen as coalescing in a public perception that an institution and its decisions are fairly made, representative, responsive and alterable.

As further described below, questions exist concerning both the formal and perceived (political and popular) democratic legitimacy of present and future international human rights governance.<sup>64</sup> On the formal level, there is little doubt that international human rights institutions have been properly created and entrusted with *some degree* of legal authority pursuant to the adoption and approval of their constitutive treaties. Rather, the potential controversy over formal legitimacy will concern the proper scope of their legal mandate and limitations on the domestic legal status of their decision-making.<sup>65</sup> Recent controversies over the authority of the International Covenant on Civil and Political Rights' Human Rights Committee (HRC) to dictate limits on reservations and withdrawals are initial examples.<sup>66</sup>

I believe, however, that the primary thrust of democratic legitimacy concerns for future international human rights governance will more likely focus on the political or socially perceived legitimacy of international institutions rather than their formal legal mandate.<sup>67</sup> As the authority of human rights institutions

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cultural and religious traditions of the society in which they are to be applied. See Donoho, *Autonomy*, *supra* note 3, at 422.

<sup>63</sup> See Weiler, *supra* note 16, at 2469. Modern societies are a complex mixture of competing social and moral values. Thus, for example, every modern society undoubtedly values both individual autonomy and community. Different societies, however, manifest such values with differing emphasis and priorities. Such differences may result in very different conclusions regarding the proper balance between individual rights and community interests, and produce varying substantive outcomes in concrete cases, particularly in the application of amorphous concepts such as privacy or highly contested moral issues. See *infra* notes 170-77, 189 and accompanying text.

<sup>64</sup> See *infra* notes 65-72 and accompanying text.

<sup>65</sup> See *infra* notes 66, 94, 104-105, 112, 139-44 and accompanying text.

<sup>66</sup> See Donoho, *supra* note 3, at 430 n. 110 (describing the debate over the HRC's assertion of authority over the validity of reservations in General Comment 24); *infra* note 112 and accompanying text.

<sup>67</sup> See *infra* notes 155-78 and accompanying text.

grows, important questions will arise concerning the degree to which their decision-making is, or may become, sufficiently consistent with and supportive of the ideals of democratic self-governance. Thus, democratic critiques of international human rights governance will likely measure institutional legitimacy in terms of the existence or non-existence of critical democratic attributes and perceived consistency with the needs of authentic democratic self-governance.

These considerations are not, of course, the only important measures of institutional legitimacy. It is important to recognize that other measures of legitimacy, such as functionality, political independence, and expertise, may reasonably be seen as critical for many human rights problems.<sup>68</sup> In particular, expertise and independence may be vital to effective enforcement of international human rights standards against oppressive governments.<sup>69</sup> As described further below, however, such alternative measures of institutional legitimacy may sometimes pose troubling implications for democracy, depending on the stress one places on majoritarianism and the locus of decision-making.<sup>70</sup> More importantly, in light of the international communities' new enthusiasm for democracy, no measure of legitimacy seems as vital to the future shape of international human rights decision-making as the attributes of democratic self-governance. Democratic rule may have already become the international talisman for the legitimacy of government itself.<sup>71</sup> This is, of course, a value judgment that will not be shared by all.

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<sup>68</sup> Most democracies have many decidedly undemocratic institutions that are deeply involved in governance. The United States Federal Reserve Board and European Central Bank, for example, have been purposefully isolated from traditional democratic controls in favor of political independence and functional effectiveness. Similarly, the United States federal judiciary, with a Constitutional guarantee of lifetime tenure and the self-allocated power of judicial review, is commonly assailed as an undemocratic institution. See *infra* notes 117-125 and accompanying text. Although some would undoubtedly disagree, it seems beyond serious question that all of these institutions enjoy, despite undemocratic characteristics, widely accepted "legal legitimacy" in both formal authority and general public perception.

<sup>69</sup> See *infra* notes 113-14, 126, 132-33 and accompanying text (discussing the competing values of judicial resolution of human rights issues).

<sup>70</sup> See *infra* notes 154-86 and accompanying text.

<sup>71</sup> See *supra* notes 22 and 24.

From this view, international human rights institutions may best achieve legitimacy if they identify and account for core principles essential to the various forms of democratic governance. The decisions of international human rights organizations are more likely to enjoy acceptance if they derive from institutional structures and decision-making processes that are consistent with, and not disruptive of, democratic self-governance. Such criteria are not, however, only useful for evaluating and enhancing the democratic legitimacy of international decision-making processes. Such criteria also help to evaluate and respond to the more extreme claim that international decision-making over certain issues, even if perfectly democratic in process and form, nevertheless disrupts core democratic values by usurping decisions more appropriately made by local or national communities.<sup>72</sup>

This raises basic questions about what criteria might be used to enhance the democratic legitimacy of human rights organizations. There is, of course, no singularly accepted version of genuine democracy.<sup>73</sup> Democracies come in a variety of forms and reflect the distinct viewpoints of the world's diverse communities. Democratic rule may be more or less direct, proportional, parliamentary, representative or decentralized. It may emphasize legislative supremacy or not.<sup>74</sup> The strongly anti-majoritarian

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<sup>72</sup> See *supra* notes 35-36, 53-55 and accompanying text.

<sup>73</sup> See generally HELD, *supra* note 2; ROBERT DAHL, ON DEMOCRACY 3-4, 36-37, 119-24, 136-41 (Yale Univ. Press 1998); Brad Roth, *Evaluating Democratic Progress*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW (Fox & Nolte eds., 2000). See also R. Ezethan, *The Right to Democracy: A Qualitative Inquiry*, 22 BROOK. J. INT'L L. 495, 502-03, 513-14 (1997); Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000); Gregory Fox & George Nolte, *Intolerant Democracies*, in DEMOCRATIC GOVERNANCE, *supra* at 389, 406-21. As explained below, the existence of differing approaches to democratic governance may have special significance in the context of international human rights, which often involve fundamental questions regarding majority rule, individual rights and restrictions on government. See *infra* notes 170-77, 189 and accompanying text.

<sup>74</sup> See, e.g., HELD, *supra* note 2, at 33, 55, 61, 99, 116, 152-53, 157-58, 197, 217-18, 358-59 (providing brief summaries of major variations); DAHL, PREFACE TO DEMOCRATIC THEORY 4-7, 36-51 (Univ. Chicago Press 1956); Steven Crowley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 701-12, (1995) (providing a clear description of the basic tensions between majoritarianism and individual rights in constitutional democracies).

structure of American constitutional democracy, with its emphasis on separation of powers, federalism and a powerful independent judiciary, is hardly the only model for authentic democratic governance.<sup>75</sup> Indeed, even within American society, the balance between individual and majoritarian interests, and the appropriate role of government institutions in democracy, remain contested and evolving political issues.

There are, of course, important implications to these differences. The most important of these concern choices regarding the relationship between the majority and individuals or minorities, and the appropriate role and authority of various government institutions.<sup>76</sup> Societies with a more communal orientation, or those favoring legislative supremacy and a greater emphasis on majority rule, may evaluate the requirements for democratic legitimacy in international decision-making differently.<sup>77</sup> This is particularly true with regard to dispute resolution in human rights and the potential evolution of institutional powers similar to judicial review.<sup>78</sup>

In a world of profound diversity, are there fundamental characteristics of democratic governance that can be usefully identified? Despite the varied manifestations of democracy, it seems likely that such core characteristics do exist. Abraham

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<sup>75</sup> See, e.g., Ackerman, *supra* note 73; DAHL, *supra* note 73, at 119-24, 136-41.

<sup>76</sup> See *infra* notes 170-77 and accompanying text. See also DAHL, *supra* note 74 at 1-32.

<sup>77</sup> See *infra* notes 84, 170-73, 189 and accompanying text. Many African and Asian societies tend to define human rights through a more communal perspective than their Western counterparts. Much of the early literature regarding "non-western" orientations towards human rights focused on social, economic and political preferences regarding the role of individuals in society and in relationship to government. This literature emphasizes, for example, socialistic economic relations, the importance of duties, society's collective interests, "group" oriented social relations and a rejection of traditional liberal notions of rights dominated by individual autonomy. See, e.g., J. COPPER, F. MICHAEL & Y. WU, HUMAN RIGHTS IN POST-MAO CHINA 67-71 (John Copper, et al., eds., 1985); T. CAMPBELL, THE LEFT AND RIGHTS: A CONCEPTUAL ANALYSIS OF THE IDEA OF SOCIALIST RIGHTS, 2-11, 103-22 (1983); A. Legesse, *Human Rights in African Political Culture*, in THE MORAL IMPERATIVES OF HUMAN RIGHTS: A WORLD SURVEY 123-24, 128-30 (K. Thompson ed., 1980).

<sup>78</sup> See *infra* notes 170-77, 189 and accompanying text. As further developed below, questions about the democratic legitimacy of judicial review in American constitutional law revolve around a conception of liberal democracy that is strongly anti-majoritarian in nature. See *infra* note 126.

Lincoln famously described democracy as government “of the people, by the people and for the people.” This simple aphorism, perhaps never accurate in practice, captures the core concept of democratic rule in all of its manifestations. At the heart of the democratic concept lies the core value of self-rule by a shared community of people.<sup>79</sup>

Self-rule does not, of course, necessarily require direct democracy. It does, however, suggest the necessary attributes for popular empowerment—meaningful opportunities to participate and be heard, the ability to change representation and reject policies through periodic elections, and reasonably transparent deliberative processes.<sup>80</sup> Thus, authentic democracies inevitably include mechanisms to engender: (a) accountability and responsiveness of decision-makers to those being governed (typically through genuine periodic elections); (b) broad-based representation of different social interests; (c) access to government officials and processes; (d) transparency in decision-making and dispute resolution processes; (e) freedom to organize and express political opinion; (f) access to information; and, (g) the potential for democratic revision (processes for popular rejection of prior rule-making).<sup>81</sup>

Also ubiquitous to modern democracy are institutional safeguards that provide checks on the exercise of power. Most importantly for human rights, these typically include constraints on majoritarian rule which protect the interests of minority groups

<sup>79</sup> See, e.g., DAHL, *supra* note 73, at 35-36; HELD, *MODELS*, *supra* note 2, at 352-53, 337-38 (describing challenges to this concept posed by global “interconnectedness”) See also *supra* notes 25-26. See The Declaration of Independence ¶ 2 (U.S. 1776) (“Governments. . . [derive] their just powers from the consent of the governed. . .”); Universal Declaration of Human Rights, G.A. Res. 217/ art. 21.

<sup>80</sup> See DAHL, *supra* note 74, at 34-36, 67-84; HELD, *supra* note 2, at 177-82. See also Mark Graber, *The Law Professor as Populist*, 34 U. RICH. L. REV. 373, 391-94 (2000) (describing variations in democratic theory regarding participation and populism); Lino Graglia, *Revitalizing Democracy*, 24 HARV. J. L. & PUB. POL’Y 165 (2000) (arguing in favor of decentralized democratic practices such as direct referendum and against judicial review); Richard Parker, *Power to the Voters*, 24 HARV. J. L. & PUB. POL’Y 179 (2000) (summarizing trend toward populism in modern democratic constitutional thinking); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (Princeton Univ. Press, 1998).

<sup>81</sup> See, e.g., DAHL, *supra* note 73, at 37-43, 84-99; DAHL, *PREFACE*, *supra* note 74, at 34-36, 67-84; HELD, *supra* note 2, at 118-20.

and individuals.<sup>82</sup> The strength of such safeguards and specific human rights outcomes may vary among democratic societies depending upon the balance struck between competing interests. Variations in the degree to which democratic societies choose to constrain the "tyranny of the majority" must be considered in evaluating the democratic implications of international human rights decision-making.<sup>83</sup> Such decision-making could, for example, conceivably develop the system's current anti-majoritarian premises in ways that displace or disrupt divergent domestic approaches to this balance of interests.<sup>84</sup> This important consideration is further elaborated upon below.

In summary, concerns over the democratic legitimacy of international governance, described generally above, seem to rest primarily on the coalescence of the following factors:

(1) the degree to which an institution has the capacity for authoritative rule creation, either through direct means or indirectly in the form of dispute resolution and interpretation of indeterminate norms;

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<sup>82</sup> See, e.g., DAHL, *supra* note 74, at 36.

<sup>83</sup> See *infra* notes 170-77 and accompanying text.

<sup>84</sup> The international human rights system clearly reflects a Western ideological heritage, which is generally designed to trump majority rule in favor of certain individual liberties. See generally, Makau wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT'L L. 589, 605-06 (1996). See also Bihari Kausikan, *Asia's Different Standard*, 92 FOR. POL'Y 24 (1993); Amanda Pollis & Peter Schwab, *Human Rights: A Western Construct with Limited Application*, in HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVES 1-14 (A. Pollis & P. Schwab eds., 1979); Raimundo Pannikar, *Is the Notion of Human Rights a Western Concept?*, DIOGENES 120, 75-102 (1982). Some academics have unabashedly embraced this western, liberal orientation as a superior model for improving the human condition. See, e.g., Jack Donnelly, *Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights*, 76 AM. POL. SCI. REV. 303 (1982). These commentators suggest that Western notions about rights are functionally required to limit the oppressive power of the modern, industrialized, bureaucratic state. See, e.g., *id.* at 311-12; Rhoda Howard, *Dignity, Community and Human Rights*, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVE: A QUEST FOR CONSENSUS 81 (Abdullahi An-Na'im ed., 1992). See also Reza Afshari, *An Essay on Islamic Cultural Relativism in the Discourse of Human Rights*, 16 HUM. RTS. Q. 235, 248-52 (1994); Thomas Franck, *Is Personal Freedom a Western Value?*, 91 AM. J. INT'L L. 593, 624-27 (1997). But see, Samuel Huntington, *The West: Unique, Not Universal*, 1996 FOREIGN AFF. 28, 29-35, 37 (Nov/Dec) (refuting the idea that modernity requires the universalization of Western culture).

(2) the potential that such internationally generated outcomes may displace domestically produced democratic preferences (either directly via legal supremacy, or indirectly as a result of negative consequences when the international rule is not complied with);

(3) an institutional deficiency in democratic attributes (accountability, responsiveness, broad-based representation of interests, fair and transparent processes of deliberation, checks and balances and some meaningful connection between decision-makers and those governed);<sup>85</sup> and,

(4) a potentially wide scope of jurisdictional authority creating the possibility that international decisions may invade subjects traditionally, or more appropriately, left to national or local democratic discretion.

The coalescence of these factors, in different degrees for different institutions, gives rise to potentially profound implications for the future of international governance and the continuing development of international solutions for transnational problems. The wider an institution's scope of authority and jurisdiction, the more pronounced its potential implications for domestic democratic processes.

The remainder of this paper focuses on evaluating the democratic legitimacy of current and future international decision-making by the human rights system's developing institutions. To what degree are the factors described above reflected in the existing system? What forms of future international governance in human rights present concerns for democratic self-governance? Does respect for democratic values suggest limits on international decision-making in human rights? Perhaps most importantly, what do concerns regarding democratic legitimacy imply about the future evolution of international human rights institutions?

In order to evaluate such questions, it is necessary to trace out the manner in which the human rights system currently renders its decisions and how that output may affect domestic policy choices. The questions involved are complicated somewhat by

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<sup>85</sup> See *infra* notes 101-03, 110-11, 150-177 and accompanying text.



the wide range of institutional arrangements and relative immaturity of the international system.<sup>86</sup> Similarly, as explained below, there are competing models of international human rights “governance” reflected in the existing system. The evolution of these models, which may be loosely characterized as promotional versus enforcement oriented regimes, will shape the future function of human rights institutions.<sup>87</sup>

The following section briefly describes the typical decision-making processes of important human rights institutions and their legal status. It also details the ways such decisions may become legally authoritative within domestic legal systems or create other consequences relevant to democratic choice. Subsequent sections evaluate the democratic credentials of these international decision-making processes and trace out their potential implications for domestic democracy. This discussion tentatively identifies the various ways in which future, more authoritative international governance over highly contested moral issues may present problematic implications for democratic self-governance.

## V. INTERNATIONAL HUMAN RIGHTS DECISION-MAKING PROCESSES

Concern about the democratic legitimacy of international governance is most pronounced when unaccountable or unrepresentative international decision-makers have the capacity to generate rules and decisions that are, in some sense, binding or authoritative within domestic legal systems. Thus, an initial consideration regarding the democratic legitimacy of human rights

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<sup>86</sup> Judicial or quasi-judicial institutions, for example, arguably raise special concerns for democratic self-governance analogous to the persistent debate over judicial review that is *de rigueur* in U.S. constitutional law. Monitoring functions and the work of overtly political institutions like the U.N. Commission on Human Rights, in contrast, raise far different issues. See *infra* notes 94-116 and accompanying text.

<sup>87</sup> The simultaneous operation of differing approaches to human rights law complicates the evaluation of their implications for democracy. For example, the degree to which one considers the primary function of human rights institutions to be promotion versus enforcement may significantly affect the perceived need for authoritative international institutions and one's view on the primacy of national implementation of human rights standards. See *infra* notes 94, 144-46 and accompanying text.

decision-making is the existing and future capacity of human rights institutions to generate binding rules and decisions that may displace domestic democratic preferences.

In terms of basic normative structure, the current international human rights system is relatively well-developed in a series of major multilateral treaties covering a wide array of subjects.<sup>88</sup> In recent years, these basic treaty texts have been widely adopted.<sup>89</sup> The process by which such norms are created and approved typically presents little conflict with democratic self-governance. The basic treaty texts are commonly negotiated by state representatives who, while somewhat removed from the fray of democratic politics, are theoretically accountable members of the executive branch. More importantly, the requirement that each state give its consent to the treaty text through its domestic processes should satisfy any concerns over the democratic legitimacy of the basic international obligations created, at least in functioning democracies.<sup>90</sup>

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<sup>88</sup> Over the past fifty years, the international community has generated a comprehensive network of general human rights standards, primarily set forth as inchoate abstractions in multilateral treaties. These treaties comprehensively cover civil and political rights (ICCPR, *supra* note 23), economic and social rights (International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, [ICESCR]), racial discrimination (CERD, *supra* note 23, 660 U.N.T.S. 195), gender discrimination (Convention on the Elimination of All Forms of Discrimination Against Women, 1249 U.N.T.S. 13 [CEDAW]), torture (Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, U.N. GAOR, 39<sup>th</sup> Sess., Supp. No. 51, at 197, U.N. Doc. A/Res/39/46 (1984)[CAT]) and children's rights (Convention on the Rights of the Child, G.A. Res. 25, U.N. GAOR 44<sup>th</sup> Sess., Supp. No. 49, U.N. Doc. A/RES/44/25 (1989) [Children's Convention]). See Douglas Donoho, *The Role of Human Rights in Global Security Issues: A Normative and Institutional Critique*, 14 MICH. J. INT'L L. 827, 847-50, 859-68 (1993).

<sup>89</sup> Among the hundreds of international human rights instruments promulgated under U.N. authority since 1945, there are at least 7 major multilateral treaties, with over 100 states parties each. The ICESCR, ICCPR, and conventions on Genocide, Racial Discrimination, Women, Torture and Children have 142, 144, 130, 156, 165, 119, and 191 states parties, respectively. See MILLENNIUM SUMMIT MULTILATERAL TREATY FRAMEWORK, Sept. 6-8, 2000, U.N. Doc. DPI/2130.

<sup>90</sup> State consent, manifested through ratification or other domestic process, is fundamental to the creation of a binding international human rights treaty obligation. See MARK JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 16-20 (1<sup>st</sup> ed. 1988); Vienna Convention on the Law of Treaties, *adopted* May 22, 1969, art. 34 U.N. Doc. A/CONF.39/27, *reprinted in* 8 I.L.M. 679, 693 (1969). Customary international law obligations, in contrast, are not strictly based upon affirmative

Most conventional international human right norms, however, are stated in abstract and general terms.<sup>91</sup> For most rights, particularly those commonly implicated in controversial moral and social issues such as privacy, equal protection, due process and freedom of speech, it is impossible to determine specific contextual meaning based on a reading of the text alone.<sup>92</sup> Like all legal rules, international human rights norms are subject to an inherent degree of ambiguity, subjectivity and indeterminate meaning.<sup>93</sup> Given the textual indeterminacy and malleable nature of these rights, the critical questions concern the process by

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state consent. See Restatement (Third) of the Foreign Relations Law of the United States, § 102, cmt. b-d (1987); *infra* note 139.

<sup>91</sup> There are good and practical reasons why most international human rights are expressed in very general and abstract terms. See Donoho, *supra* note 88, at 839. Such abstraction provides flexibility and allows diverse states with divergent views on the specific meaning of rights to join international human rights treaties in the first instance. Agreement over such abstract and generally stated norms tells us very little about the actual depth of agreement over what those rights will mean to different societies in their concrete manifestations. The most significant implications for democratic self-governance arise from the process of developing the specific meaning of inchoate human rights norms and their eventual implementation as authoritative law with concrete applications within domestic systems.

<sup>92</sup> The specific manifestation of most international human rights is still unsettled. See Donoho, *supra* note 3, at 428-31. See also Michael Perry, *Normative Indeterminacy and the Problem of Judicial Role*, 19 HARV. J.L. & PUB. POL'Y 375, 382-83 (1996); Henry Steiner, *Book Review of INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL*, 84 AM. J. INT'L L. 603, 604-05 (1990); Donoho, *supra* note 88, at 837-43, 847-50. The specific meaning of many human rights remains underdeveloped. Reasons for this include the relative newness of the norms and the international system's limited capacity for rendering authoritative interpretations of rights. See *id.* at 866-68.

<sup>93</sup> See *supra* notes 91-92 and accompanying text. See also Martin Koskenniemi, *The Future of Statehood*, 32 HARV. INT'L L.J. 397, 399-400, 405-06 (1991); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1371-1382 (1984); Henry Steiner, *Political Participation as a Human Right*, 1 HARV. HUM. RTS. Y.B. 77-86 (1989); Donoho, *supra* note 3, at 839-47; Philip Alston, *The Best Interests Principle: Towards A Reconciliation of Culture and Human Rights*, 8 INT'L J.L. & FAM. 1, 18 (1994). Although the textual indeterminacy of rights stated solely in abstract terms is manifest, a significant measure of concrete meaning may be added through the process of interpretation and application. See *infra* notes 94-100 and accompanying text. There is, however, a deeper level of indeterminacy that surrounds all legal concepts, even after generations of exegesis by sophisticated legal processes. Thus, rights discourse in the United States has included a significant challenge to liberalism's reliance on rights as an instrument of constructive social change based, at least in part, on their inherent indeterminacy. See, e.g., Tushnet, *infra* note 93 at 1363-94. See generally Anthony Chase, *The Left on Rights: An*

which these general inchoate obligations are given specific meaning and may bind domestic polities in concrete ways. Two methods for developing the concrete specific meaning of abstract norms stand out for present purposes: (1) monitoring, supervisory and promotional activities by international institutions; and, (2) application and interpretation by international judicial or quasi-judicial dispute settlement mechanisms. Each of these processes is described briefly below.<sup>94</sup>

#### A. INTERNATIONAL SUPERVISORY, MONITORING AND PROMOTIONAL FUNCTIONS

International supervision and scrutiny of human rights plays a critical function that lies at the heart of the international system. International human rights are fundamentally designed to create an external check on the potential abuses that governments have historically imposed on their own citizenry.<sup>95</sup> While

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*Introduction*, 62 TEX. L. REV. 1541, 1553-61 (1984) (summarizing distinct critiques of rights).

<sup>94</sup> A less obvious, but perhaps important, mechanism for developing the meaning of general human rights norms occurs when the states themselves take seriously their basic obligation of national implementation. The international system is generally premised on the primacy of national implementation of rights. See, e.g., Christine Cerna, *East Asian Approaches To Human Rights*, 2 BUFF. J. INT'L L. 201, 210 (1996); Jack Donnelly, *International Human Rights: A Regime Analysis*, 40 INT'L ORG. 599, 613-15 (1986). See also *Certain Aspects of the Laws on the Use of Languages in Education in Belgium*, 1 EHRR 252, 284 (A/6) (1968) (convention mechanisms are subsidiary to national implementation of rights). Although subject to international review and scrutiny, each state party currently enjoys significant interpretive discretion in their initial implementation of the rights. See Donoho, *supra* note 3, at 431-32. Despite this, the locus of final interpretive authority over the meaning of rights is more ambiguous. If each state's own decisions about the appropriate meaning of rights were conclusive, there would be little concern for the democratic pedigree and authenticity of international human rights standards. On the other hand, one might reasonably question the purpose of international standards under such conditions. Human rights outcomes would vary considerably among nations and the central benefits of internationalizing human rights would be diluted. See Douglas Donoho, *Relativism Versus Universalism in Human Rights: The Search For Meaningful Standards*, 27 STAN. J. INT'L L. 345, 356-60 (1991). Presumably there is, therefore, some form of shared authority to interpret the specific meaning of rights between domestic and international institutions. As described below, the precise contours of this shared authority are poorly defined, potentially controversial and still evolving. See *infra* notes 144-46 and accompanying text.

<sup>95</sup> See LOUIS HENKIN, *THE RIGHTS OF MAN TODAY* 29-30 (Westview Press, 1978); Richard Bilder, *An Overview of International Human Rights Law*, in GUIDE TO

the precise contours of this function are the subject of continuing debate,<sup>96</sup> the internationalization of human rights implies, at minimum, that the international community and its institutions are to play some significant role in determining the ultimate meaning of rights.<sup>97</sup> This function is primarily served by international organizations, which supervise, monitor, promote and enforce the inchoate obligations contained in treaty texts. These international processes provide a potentially critical layer of concrete meaning to human rights standards. It is here that potentially authoritative international legal rules and decisions regarding human rights are developed. The critical considerations concern the authority of such decision-makers and their interpretive output in relation to domestic legal processes and national implementation of the rights. This, in turn, will vary among international institutions depending upon their mandate.

Essentially the offspring of states, it is not surprising that most international human rights organizations are currently limited to supervisory or monitoring roles rather than judicial or quasi-judicial functions. Many of the major international human rights treaties create institutional "committees" of experts.<sup>98</sup> These committees of experts invariably have a relatively constricted mandate typically consisting of monitoring and promotional activities, such as reviewing state prepared reports on national implementation and offering "general comments."<sup>99</sup>

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INTERNATIONAL HUMAN RIGHTS 3, 3-9 (H. Hannum ed., 1984). See also Jack Donnelly, *Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights*, 76 AM. POL. SCI. REV. 303, 311-12 (1982).

<sup>96</sup> See Donoho, *supra* note 3, at 430 n. 110 (describing the debate over the HRC's assertion of authority over the validity of reservations in General Comment 24); *supra* notes 94, 144-46.

<sup>97</sup> See *supra* note 94.

<sup>98</sup> See generally Donoho, *supra* note 88, at 859-62. There are currently six major treaty-based monitoring institutions operating in cooperation with the United Nations system. Each of these "committees" is entrusted with monitoring state compliance with the rights recognized in their respective treaty texts.

<sup>99</sup> See generally Torkel Opsahl, *The Human Rights Committee*, in THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL (P. Alston ed., 1992); Donoho, *supra* note 88, at 859-62; S. Coliver & A. Miller, *International Reporting Procedures*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE at Ch. 10 (177-201) (H. Hannum ed. 1994) (summarizing reporting procedures under each of the six major multilateral treaties); A. Byrnes, *The "Other" Human Rights Treaty Body: The Work of the Committee on the Elimination of Discrimination Against Women*, 14 YALE J. INT'L L. 1, 42-51 (1989) (describing the use of general

Some institutions, such as the Inter-American Commission on Human Rights and the HRC, have both quasi-judicial and supervisory functions within their mandate.<sup>100</sup>

On the one hand, it is clear that international human rights institutions with supervisory or monitoring functions lack certain democratic attributes. One might reasonably complain, for example, that the treaty-based committees are generally composed of unaccountable elite, chosen by national executive branches with no electoral or other meaningful connection to the populations whose rights are being addressed.<sup>101</sup> More critically perhaps, the norms that they supervise are, by their nature,

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comments by various treaty bodies). The major multilateral treaties also provide moribund inter-state complaint procedures that have never been invoked.

<sup>100</sup> The Inter-American Commission on Human Rights, which must be distinguished from the Inter-American Court of Human Rights, has been empowered by the OAS to serve monitoring functions under the OAS Charter and the American Declaration on the Rights and Duties of Man. The Commission also serves a quasi-judicial function, along with the Inter-American Court, under the Inter-American Convention on Human Rights. See Cecilia Medina, *The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture*, 12 HUM. RTS. Q. 439 (1990); V. Rodriguez & M. Seitles, *The Development of the Inter-American Human Rights System: A Historical Perspective and A Modern-Day Critique*, 16 N.Y.L. SCH. J. HUM. RTS. 593 (2000). See generally GUIDE TO HUMAN RIGHTS PRACTICE, *supra* note 99, at Chs. 7-9. The Human Rights Committee is entrusted with the usual array of monitoring activities by the ICCPR. See generally Donoho, *supra* note 88; DOMINIC MCGOLDRICK, *THE HUMAN RIGHTS COMMITTEE* (Oxford Univ. Press 1991). It also has quasi-judicial functions under the ICCPR's Optional Protocol. Optional Protocol to the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171(302-46). See generally McGoldrick, *supra*. See also Mutua, *supra* note 3, at 245-52. The Committee on the Elimination of Racial Discrimination created by CERD, *supra* note 88, at art. 14, and the Committee Against Torture created by CAT, *supra* note 88, at art. 22, also have quasi-judicial functions that have, to date, been modest in scope and effect. See generally INTERNATIONAL HUMAN RIGHTS IN CONTEXT (Philip Alston & Henry Steiner eds., 1996) at 560-61. See also *infra* note 112. Significant efforts have been made to create a similar petitioning system under CEDAW. See, e.g., A. Byrne & J. Connors, *Enforcing the Human Rights of Women: A Complaints Procedure for the Women's Convention?*, 21 BROOK. J. INT'L L. 679 (1996). The General Assembly officially adopted the text of the Optional Protocol to CEDAW in October, 1999. G.A. 54<sup>th</sup> Sess., Agenda Item 109, U.N. Doc. A/Res/54/4 (1999). As of June, 2000, five states had ratified the Protocol. See MILLENNIUM SUMMIT, *supra* note 89, at 28.

<sup>101</sup> By the terms of the treaties they monitor, committee experts are generally selected for renewable terms by vote of the states parties based upon minimal selection criteria. Selection of the 18 HRC experts under the ICCPR is illustrative. The treaty itself merely requires that candidates for the committee have "recognized competence" in human rights and that states consider the "usefulness" of

indeterminate and underdeveloped, allowing these experts significant interpretive flexibility. As explained below, it is often argued that unaccountable decision-makers are most problematic for democracy when they lack objective criteria for interpreting and applying indeterminate standards.<sup>102</sup> Complaints may be raised, therefore, that any particular standard articulated by such supervisory bodies is not authentically democratic since it is not derived from a process responsive to the polity concerned.<sup>103</sup>

On the other hand, although the treaty-based committees may lack certain democratic attributes, complaints about the democratic legitimacy of their monitoring work are significantly tempered by the committees' limited authority and function. States have uniformly been unwilling to give international human rights institutions binding authority as a part of the treaty-based

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prior "legal experience." See, e.g., ICCPR, *supra* note 94, at Art. 28. While experts serve in their personal capacity, they simultaneously continue their full-time occupations, including government appointments. See Henry Steiner, *Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?* in THE FUTURE OF THE U.N. HUMAN RIGHTS TREATY MONITORING 28-29 (Alston & Crawford eds., 2000) [hereinafter Treaty Monitoring]; Andrew Clapham, *UN Human Rights Reporting Procedures: An NGO Perspective*, in TREATY MONITORING, *supra* at 188. See also Mutua, *Enforcement*, *supra* note 3, at 222-23 (doubting the actual independence of experts from the state that nominates them). It appears that virtually all countries entrust responsibility for selecting and voting on candidates exclusively to their executive branch of government. Nor are candidates subjected to any deliberative democratic review process. *C.f.* Clapham, *supra* at 189 (noting that even interested NGO's are not generally given a candidate's *curriculum vitae* prior to election). Similarly, election of the experts takes place at the UN, among a mass of other elective posts, and is subject to inevitable political considerations and vote trading. See James Crawford, *The UN Human Rights Treaty System: A System in Crisis?*, in TREATY MONITORING, *supra* at 1, 4-5, 9 (also describing the election process as "haphazard" with "limited account of qualifications"); Clapham, *supra* at 188-89. The political nature of the process, according to one observer, precludes a "uniformly high quality" among committee experts. See Steiner, *supra* at 42. One might, of course, see the absence of democratic checks as a positive attribute since it isolates committee members from the pressures of popular political controversy or public opinion. See *infra* note 113-14.

<sup>102</sup> See *infra* notes 120, 179-80 and accompanying text.

<sup>103</sup> See also *infra* notes 150-69 and accompanying text. Although committee deliberative processes are not generally very transparent, well publicized or accessible to the public, there has been significant improvement in this regard resulting from the persistent work of NGO's. See, e.g., Steiner, *supra* note 101, at 36, 38-39.

monitoring processes.<sup>104</sup> Indeed, although not without some controversy, it does not appear that states generally consider committee interpretations of rights resulting from their supervisory functions as authoritative in any sense.<sup>105</sup> Perhaps reflecting this, the committees have, in general, taken a “promotional” approach to their monitoring functions that favors “persuasion” and “dialogue” with the state rather than pretending to dictate particular results. Consequently, committee views have no binding domestic legal effect, little practical consequence and may be easily resisted if contrary to domestic democratic preferences. In essence, supervisory and monitoring decisions by international institutions, as currently constituted, have limited potential for disrupting domestic democratic preferences. Democratic polities may choose to follow international institutional leadership, or not, according to domestic preferences. In general, this pattern is consistent with the promotional model of international human rights governance that dominates the treaty-based processes. However, to the extent that the monitoring work of the treaty-

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<sup>104</sup> Committee views during the reporting process are not technically binding under the terms of the respective treaties. See, e.g., ICCPR *supra* note 23, at Art. 40. Nor are such views given direct legal effect in domestic legal systems. See Steiner, *supra* note 101, at 50-52. Indeed, neither committee views regarding state reports nor general comments are presented in forms that facilitate direct incorporation. See Opsahl, *supra* note 99, at 412-414, 415 (former member of the HRC noting that general comments are “neither scholarly studies nor secondary legislative acts” and that their generality may cause “problems of application to specific cases. . .”). Nor do either address specific individual violations of rights. See Coliver & Miller, *supra* note 99; Opsahl, *supra* note 99, at 412-415.

<sup>105</sup> See Donoho, *supra* note 3, at 430 n.110 (describing the controversy over the HRC’s adoption of General Comment 24 regarding state reservations and the explicit rejection by the United States, the United Kingdom and France of such interpretive authority). See also Coliver & Miller, *supra* note 99, at 188 (“countries routinely fail to implement committee recommendations”). There is ample evidence that governments have yet to take the preparation, presentation and dialogue over state reports very seriously. Mutua, *Enforcement*, *supra* note 3, at 228-29. Apparent disrespect for the reporting process is reflected in the extremely poor performance of states in preparing and timely submitting reports. See Anne Bayefsky, 91 ASIL PROC. 460, 467 (1997). But see Martin O’Flaherty, *The Reporting Obligation Under Article 40 of the International Covenant on Civil and Political Rights: Lessons to be Learned from Consideration by the HRC of Ireland’s First Report*, 16 HUM. RTS. Q. 515 (1994) (suggesting that under “favorable conditions”, the reporting process can be “productive”).



based expert committees should become more authoritative, additional concerns for democratic self-governance, as described below, should be addressed.<sup>106</sup>

## B. JUDICIAL AND QUASI-JUDICIAL FUNCTIONS

The developing judicial and quasi-judicial functions of international human rights institutions present more critical potential implications for democracy. There are three such institutions of some prominence: the Inter-American Court of Human Rights (IACHR);<sup>107</sup> the European Court of Human Rights (ECHR);<sup>108</sup> and the HRC.<sup>109</sup> While there are differences among these institutions in their basic processes, mandates and authority, each provides a means for redressing individual complaints that a government has violated its obligations under an international human rights treaty.

The judges or experts who serve on these bodies are not elected by popular vote or otherwise directly accountable to the

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<sup>106</sup> See *infra* notes 137-86 and accompanying text.

<sup>107</sup> See *supra* note 100.

<sup>108</sup> The ECHR is an institution created pursuant to the European Convention on Human Rights and is a constituent part of the Council of Europe, which was created in 1949 after World War II. See VAN DIJK & VAN HOOF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 1-2 (Kluwer Law & Taxation Publishers, 1998). There are currently 39 European states within the Council of Europe, subject to the Human Rights Convention and its institutions. In 1998, Protocol 11 to the Convention revamped its institutional structure to phase out the European Commission of Human Rights, which previously reviewed all cases prior to their submission to the ECHR. See Protocol 11, Eur. T.S. No.155, reprinted in 33 I.L.M. 943 (1994). See generally J. Black-Branch, *Observing and Enforcing Human Rights Under the Council of Europe: The Creation of a Permanent European Court of Human Rights*, 3 BUFF. J. INT'L L. 1 (1996).

<sup>109</sup> See *supra* note 98-100. In 1998, the Organization of African Unity (OAU) adopted a Protocol to the African Charter on Human and Peoples' Rights which, when ratified by 15 OAU states, will establish an African Court on Human and Peoples' Rights to complement the work of the pre-existing African Commission on Human and Peoples' Rights. See generally Nsongurua Udombana, *Toward The African Court On Human And Peoples' Rights: Better Late Than Never*, YALE HUM. RTS. & DEV. L.J. 45 (2000).

general population.<sup>110</sup> Nor are they selected through any confirmation or approval process that provides opportunities for meaningful public and political review of their qualifications. Other than the promotion and protection of human rights within their jurisdictional mandate, they have no political constituency and are not representative of any particular society.<sup>111</sup> Finally, at least with regard to the ECHR and IACHR, the decisions of these institutions are at least theoretically binding, albeit sometimes unenforceable.<sup>112</sup> While the practical authority of these institutions may vary, each has a theoretically authoritative role to play

<sup>110</sup> The appointment and removal process for judges and experts varies, of course, by institution. See *supra* note 104 (regarding selection of treaty-based committees). The 39 full-time judges on the ECHR, for example, are nominated for renewable 6-year terms by each state party. The nominees must "possess the qualifications required for appointment to the highest judicial office or be jurisconsults of recognized competence." European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222 at arts. 39, 40 (1950) (hereinafter "European Convention"). Traditionally, there is to be one judge from each state party, elected by the Parliamentary Assembly of the Council of Europe, in a process that now includes interviews. See Andrew Drzemczewski, *The European Human Rights Convention: A New Court of Human Rights in Strasbourg as of November 1, 1998*, 55 WASH. & LEE L. REV. 697, 702-04 (1998). The Parliamentary Assembly, which consists of representatives from national legislatures, routinely confirms the selection of each state's executive branch. See Sally Kenney, *The Members of the Court of Justice of the European Communities*, 5 COLUM. J. EUR. L. 101, 125 n.102 (2000). Judges who serve on the IACHR and on the Inter-American Commission are selected by the state parties in a process occasionally marred by "cronyism rather than qualifications" and state politics. See Jo Pasqualucci, *The Inter-American System: Establishing Precedents and Procedures in Human Rights Law*, 26 U. MIAMI INTER-AM. L. REV. 297, 359 (1994-95). There is, at this date, no mechanism in place to create public review and deliberation regarding candidates for the Inter-American positions. It is probably fair to say that these international decision-makers are publicly accountable in only the most indirect sense that their continuing appointment may depend upon the (sometimes) elected executive branches of the member states. The appointment process of these international jurists and experts may be contrasted to the public deliberation and review that typically accompanies the appointment of federal judges in the United States. See *infra* note 157.

<sup>111</sup> See *infra* notes 150-169 and accompanying text.

<sup>112</sup> The decisions of the ECHR and IACHR are both technically binding. Most agree that "views" of the HRC regarding individual communications are not (although the HRC believes otherwise). See, Mutua, *supra* note 3, at 233-35. The HRC itself has declared that states parties to the Optional Protocol are obligated to enforce its recommendations on individual petitions. See Steiner, *supra* note 101, at 30. In this regard, the ECHR is frequently praised as a model for effective international enforcement of human rights. See generally Helfer & Slaughter, *supra* note 3. In contrast to the ECHR decisions, however, actual enforcement of

and, at minimum, the international system presumes eventual compliance with their decisions. Ultimately, the international system hopes to gain sufficient respect for the decisions of such institutions so that states will eventually choose to comply with their decision-making (as has been the case for the ECHR).

While many of these characteristics, particularly independence, may reasonably be seen as strengths with regard to the protection and promotion of human rights,<sup>113</sup> their international context potentially creates some arguably troubling implications for domestic democracy. As explained below, the point of tension here is similar to that which confronts domestic constitutional systems utilizing the judiciary as a check on majoritarian rule. A group of generally unaccountable decision-makers is entrusted with the resolution of important social debates that have the potential to displace majoritarian choices regarding highly contested moral and social issues. There are, of course, many sound reasons why any particular democratic society might favor

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the Inter-American system's judgments has continued to prove problematic. See, e.g., H. Jarmul, *The Effect Of Decisions Of Regional Human Rights Tribunals On National Tribunals*, 28 N.Y.U. J. INT'L L. & POL. 311, 317-18 (1997). But see F. Cuevas, *Honduras Pays Victims' Families*, DENVER POST, Nov. 10, 2000 at A45 (reporting that the Honduran Government, after 14 years of intransigence, recently paid \$1.6 million dollars to victims' families pursuant to the Inter-American Court's 1986 judgment in the Velazquez disappearances case.) See also Lawrence Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832, 1870-94 (2002) (regarding the withdrawal from HRC's jurisdiction by three Caribbean nations, etc.). States have similarly tended to ignore the recommendations of the HRC. See Helfer & Slaughter, *supra* note 3, at 345 (noting that the HRC's follow up process regarding Optional Protocol decisions, received state responses on only 81 out of 154 cases finding violations, and that in only 30% of these 81 cases did the state express a willingness to comply). A lack of enforcement power tempers democratic legitimacy concerns as states will not generally find it difficult to resist unpalatable decisions by the HRC and similar institutions.

<sup>113</sup> See *infra* notes 126, 132-33 and accompanying text. It is reasonable to believe that independence from the political and social passions of the day, to the extent that is possible, see *infra* notes 128-29, is important, if not essential, to the effective protection of individual liberties. See, e.g., Erwin Chemerinsky, *Losing Faith: America Without Judicial Review?* 98 MICH. L. REV. 1416, 1425-32 (2000). United Nations institutions, focusing on manipulation of courts by government officials, have also promoted the ideal of judicial independence within member states. United Nations, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Basic Principles on the Independence of the Judiciary, U.N. Doc. A/Res/40/146 (Dec. 13, 1985).

this institutional arrangement.<sup>114</sup> Such choices, however, typically reflect an on-going domestic political debate about the appropriate role for government institutions and the desired balance between individual rights and majoritarian rule. The persistent debate over judicial review in U.S. constitutional law clearly manifests this on-going process.<sup>115</sup> Many of the considerations involved in that debate are relevant to the context of international human rights decision-making. The international context, however, presents important special considerations concerning the appropriate locus of, and constraints on, decision-making that may create problematic implications for domestic democracy. These considerations are identified and discussed further in the next section.<sup>116</sup>

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<sup>114</sup> Good summaries of these benefits may be found in Chemerinsky, *supra* note 113, at 1423-35; Lawrence Sager, *Thin Constitutions And The Good Society*, 69 *FORD. L. REV.* 1989, 1993-98 (2001); Larry Alexander & Fredrick Schauer, *Defending Judicial Supremacy: A Reply*, 17 *CONSTIT. COMM.* 455, 472, 476-83 (2000); Seth Kreimer, *Exploring the Dark Matter of Judicial Review: A Constitutional Census of the 1990's*, 5 *WM. & MARY BILL RTS J.* 427, 428, 466-72 (1997) (describing the courts' role in constraining the administrative state and lower level bureaucratic decision-making); Martin Redish, *Judicial Discipline, Judicial Independence, And The Constitution: A Textual And Structural Analysis*, 72 *S. CAL. L. REV.* 673, 674-75, 683-90 (1999). The positive role that courts and judicial review may play in the effective protection of individual rights and minorities has long animated the jurisprudence of the United States Supreme Court. See, e.g., *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts"); *U.S. v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

<sup>115</sup> See *infra* notes 126, 132-133 and accompanying text. The ongoing dialogue over judicial review in the jurisprudence of the Supreme Court itself clearly reflects the centrality of the basic tension between individuals and the majority in a constitutional democracy. See *infra* notes 128-129. Erwin Chemerinsky, *The Supreme Court, 1988 Term: Foreword: The Vanishing Constitution*, 103 *HARV. L. REV.* 43, 61-73 (1989) (the Supreme Court has "internalized" the "majoritarian paradigm" regarding judicial review and the role of courts in democracy). Martin Flaherty, *Constitutional Asymmetry*, 69 *FORDHAM L. REV.* 2073, 2075-78 (2001) (describing the logic of the counter-majoritarian critique at work in the opinions of Justice Scalia).

<sup>116</sup> See *infra* notes 126, 131-32, 171 and accompanying text.

## VI. THE DEMOCRATIC LEGITIMACY OF INTERNATIONAL JUDICIAL DECISION-MAKING

### A. DEMOCRACY AND JUDICIAL REVIEW IN AMERICAN CONSTITUTIONAL LAW

The potential for increasingly authoritative judicial decision-making in international human rights poses tensions for democratic self-governance analogous to those created by judicial review in constitutional democracies.<sup>117</sup> Perhaps the most prominent modern exposition of these tensions appears in Alexander Bickel's book, *The Least Dangerous Branch*.<sup>118</sup> Bickel essentially argued that judicial review, the power of courts to void legislative acts as unconstitutional, is inconsistent with representative democracy. Since the power of judicial review allows unelected, independent and largely unaccountable judges to overturn majoritarian legislative preferences, Bickel described it as a "deviant institution in American democracy."<sup>119</sup> Famously

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<sup>117</sup> There are many good summaries of the debate over judicial review and the major works that it has produced. See, e.g., TERRY PERETTI, IN DEFENSE OF A POLITICAL COURT (Princeton Univ. Press 1999); Frank Cross, *Institutions and Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1529 (2000); Martin Adler, *Judicial Restraint in the Administrative State: Beyond the Counter Majoritarian Difficulty*, 145 U. PA. L. REV. 759 (1997). There are, of course, many permutations to democracy based critiques and defenses of judicial review. Whatever the merits of these perspectives, both the proponents and critics of judicial review generally acknowledge the critical tension between democracy and authoritative judicial disapproval of legislative acts. See Rebecca Brown, *Accountability, Liberty and the Constitution*, 98 COLUM. L. REV. 531 (1998) (critiquing academic acceptance of Bickel's counter-majoritarian premises and refuting the generally accepted notion that "political accountability is the *sine-qua-non* of legitimacy in government action"). The significance of this tension depends, of course, on a number of variables including the basic design of government.

<sup>118</sup> ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* (Yale Univ. Press 1962). Bickel's primary arguments, although hardly novel, were timely and have generated a flood of commentary. Some have described this outpouring, which appears in no danger of abating, as "an obsession" among American constitutional scholars. See Barry Friedman, *The History of the Counter Majoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 335-36 (1998). Erwin Chemerinsky has even complained that concern over the appropriate role of the judiciary in democracy has largely defined the Rehnquist Court's jurisprudence. See Chemerinsky, *supra* note 115.

<sup>119</sup> BICKEL, *supra* note 118, at 18. Bickel's arguments are premised on the (questionable) primacy of the majoritarian electoral process: "[N]othing can finally depreciate the central function that is assigned in democratic theory and practice to the

coined as the “counter-majoritarian difficulty,” this alleged usurpation of majoritarian democracy is most problematic in constitutional cases where the textual authority is highly indeterminate and thus subject to manipulation and the influence of personal biases.<sup>120</sup> Critics of judicial review have also argued that it tends to undermine the vitality of deliberative democracy and devalue the legislative function.<sup>121</sup>

The main thrust of these arguments is that providing an unaccountable judiciary the power to overturn majoritarian legislative preferences undermines democratic self-governance by

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electoral process; nor can it be denied that the policy-making power of representative institutions, born of the electoral process, is the distinguishing characteristic of the system. Judicial review works counter to this characteristic.” *Id.* at 19. Many commentators have questioned this seemingly facile equation of the political branches with representation of “the people” of the United States. See, e.g., Akhil Reed Amar, *Philadelphia Revisited: Constitutional Amendment Outside Article V*, 55 U. CHI. L. REV. 1043, 1085-87 (1988).

<sup>120</sup> See, e.g., Lino Graglia, *Revitalizing the Constitution*, 24 HARV. J.L. & PUB. POL’Y 165, 176-77 (2000) (“The Court has made the Fourteenth Amendment an empty vessel into which it can pour any meaning, converting it into a grant of unlimited policymaking power.”); JOHN HART ELY, *DEMOCRACY AND DISTRUST* 14 (Harvard Univ. Press 1980) (noting that many constitutional provisions are “difficult to read responsibly as anything other than quite broad invitations to import into the constitutional decision process considerations that will not be found in the language of the amendment or the debates that led up to it.”) See Erwin Chemerinsky, *Wrong Questions Get Wrong Answers: An Analysis of Professor Carter’s Approach to Judicial Review*, 66 B.U. L. REV. 47, 47-48, 69-70 (1986); Cross, *supra* note 117, at 1540-1550. See generally PERETTI, *supra* note 117, at 38-42, 50-53 (summarizing the various strains of the indeterminacy critic of judicial review).

<sup>121</sup> See Cass Sunstein, *The Supreme Court 1995 Term: Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6, 7-9, 19-20, 33-37 (1996) (arguing for a “minimalist” approach to constitutional interpretation that enhances political deliberation and democratic decision-making). See generally Mark Tushnet, *Policy Distortion and Democratic Deliberation: Comparative Illumination of the Counter Majoritarian Difficulty*, 94 MICH. L. REV. 245, 250-56, 266-70 (1995). See also Paul D. Carrington, *Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court*, 50 ALA. L. REV. 397 (1999). In perhaps the earliest academic exposition on the counter majoritarian difficulty, James Thayer espoused essentially this rationale for limiting judicial review to cases involving “very clear” constitutional error “not open to rational question.” See James Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893). See also Robin West, *The Aspirational Constitution*, 88 NW. U. L. REV. 241 (1993) (part of a symposium on Thayer); Tushnet, *Policy Distortion*, *supra* at 245-50.

displacing majoritarian rule by that of the judiciary.<sup>122</sup> These critiques are essentially reliant on the following factual premises: (1) unelected or otherwise unaccountable judges as authoritative decision-makers; (2) the power to void or overturn legislative or executive actions; (3) binding judicial authority and legal supremacy rendering judicial decisions difficult or impossible to reverse; and (4) indeterminate, malleable textual authority that provides room for the imposition of personal judicial values.

The primary point for most critics of judicial review is that judicial decision-making should be limited in ways consistent with democratic self-governance.<sup>123</sup> John Hart Ely, for example, has famously argued for a “representation-reinforcing” theory that would limit judicial review to decisions necessary to “correct” deficiencies in the democratic processes.<sup>124</sup> Politically conservative theoreticians, such as Robert Bork, have argued for significant interpretive limitations on judicial authority, advocating doctrines such as strict textualism and “originalism,” supposedly designed to reduce the influence of personal biases.<sup>125</sup>

A great many American scholars have attempted to reconcile judicial review with American democracy. Many have argued that judicial review is entirely consistent with the anti-majoritarian elements embedded in our Constitution.<sup>126</sup> Other

<sup>122</sup> See *supra* notes 117-120; *infra* notes 124-25. See also Cross, *supra* note 117, at 1529-33 (reviewing common arguments).

<sup>123</sup> See CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES*, 17-23 (Aspen Press 2d ed. 2001); PERETTI, *supra* note 117, at 11-20, 24-36, 59-63, 72-77 (summarizing major approaches focused on this theme).

<sup>124</sup> ELY, *supra* note 120, at 87-88, 101-03. Even commentators more generally supportive of judicial review have responded to the debate by arguing for limitations on the judicial role which are designed to ameliorate its potential negative effects on majoritarian democracy. See generally PERETTI, *supra* note 117 at 11-77 (summarizing the major works). See also Brown, *supra* note 117, at 531-38.

<sup>125</sup> See, e.g., Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1, 3-6, 17 (1971); Lino A. Graglia, *Constitutional Interpretation*, 44 SYRACUSE L. REV. 631, 631-36 (1993) (defending an originalist, textualist interpretation of the Constitution); Raoul Berger, *Against an Activist Court*, 31 CATH. U. L. REV. 173 (1982). See also PERETTI, *supra* note 117, at 17, 27-29 (providing a concise summary).

<sup>126</sup> See, e.g., Chemerinsky, *supra* note 120, at 48, 65-67; Redish, *supra* note 114, at 674-75, 683-700; PERETTI, *supra* note 117, at 26, 36, 55-61. See also RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY*, 132-49, 198-99 (Harvard Univ. Press 1977) (“The Constitution, and particularly the Bill of Rights, is designed to protect individual citizens and groups against certain decisions that a majority of

analysts have described process or structural limits on the implications of judicial review based on the nature of the judicial decision-making. According to some, the threat of "law-making" by judges is significantly restrained by judicial temperament and training, institutional checks, and the role of logic and precedent.<sup>127</sup> Similarly, socialization and cultural connection limits the potential that judges will stray from majoritarian preferences.<sup>128</sup> American judges are, after all, products of American social, legal and political culture and almost inevitably share mainstream sensibilities.<sup>129</sup> Others have stressed that structural checks on judicial power such as impeachment, the appointment process,

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citizens might want to make, even when that majority acts in what it takes to be the general or common interest." *Id.* at 133).

<sup>127</sup> See also PERETTI, *supra* note 117, at 12, 15; Cross, *supra* note 117, at 1537-38 (reviewing arguments about the special qualities of judges and describing some of their shortcomings).

<sup>128</sup> Some scholars have similarly questioned whether the premises of the "counter-majoritarian dilemma" are empirically justified, pointing out that judges rarely rule counter to prevailing majoritarian political and social values. See, e.g., Reed, *supra* note 119, at 1085-87; Cross, *supra* note 117, at 1536-45, 1554-76 (critiquing the empirical assumptions of the CMD debate and citing studies); Chemerinsky, *supra* note 115, at 82; Graber, *supra* note 80, at 381-82 (citing his own study); PERETTI, *supra* note 117, at 55-56, 84-112. See also MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS*, *supra* note 80, at 153 ("... we see the courts regularly being more or less in line with what the dominant national political coalition wants. ... It offers essentially random changes, sometimes good and sometimes bad, to what the political system produces.") But see Chemerinsky, *Losing Faith*, *supra* note 113, at 1416-17, 1422-31 (noting the trend in constitutional scholarship to discount the positive effects of judicial review and castigating Tushnet for the "systematic minimization of the benefits of judicial review and exaggeration of its costs").

<sup>129</sup> See, e.g., Michael Klarman, *What's So Great About Constitutionalism?*, 93 Nw. U. L. REV. 145, 146, 188-92 (1998) (arguing that federal judges are from the American "cultural elite" and rarely stray from popular opinion being subject to "internal" cultural restraints and the same "cultural milieu" that produces the legislation that they review). One could similarly argue that judges tend to be socially and politically conservative elite who have generally used judicial review to reinforce embedded and unjust social relations. See Ran Hirschl, *The Struggle for Hegemony: Understanding Judicial Empowerment Through Constitutionalization in Culturally Divided Polities*, 36 STAN. J. INT'L L. 73, 75 (2000). See also West, *supra* note 121, at 247-48. Recognizing these features of the American judicial process, several prominent progressive constitutional scholars have joined traditionally conservative calls for curtailment of judicial review. See, e.g., TUSHNET, *TAKING THE CONSTITUTION*, *supra* note 80; West, *supra* note 121. Development of this trend is somewhat ironic in that judicial review, prompted in many cases by the American experience, has begun to gain prominence throughout the world. See *infra* note 154.



congressional control over federal jurisdiction, and the potential for democratic revision, reduce the negative implications of judicial review for American democracy.<sup>130</sup>

Although the variations are many, arguments defending the democratic legitimacy of judicial review focus on three related themes. First, liberal constitutional democracy does not simply consist of blind adherence to majority rule. Rather, authentic democracy may and often does include effective constraints on majoritarian preferences in favor of minorities and individual liberties.<sup>131</sup> This is undoubtedly of particular importance in heterogeneous, pluralistic, and multi-cultural societies and to international human rights. Second, there are important functional justifications for judicial review, including the alleged neutrality and independence of judges from the political process.<sup>132</sup> Who, other than judges, are in a position to check the excesses of democratic rule? Judicial review, in this sense, preserves the integrity of the constitution and provides a necessary check on other branches of government.<sup>133</sup> Third, the power of judicial

<sup>130</sup> See generally PERETTI, *supra* note 117, at 133-37, 150; Michael Perry, *The Authority of the Text, Tradition, and Reason: A Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 551 (1985). One of the most troubling implications of judicial review for some critics is its potential for rendering the legislature powerless in constitutional cases. See, e.g., BICKEL, *supra* note 118, at 20; *Planned Parenthood v. Casey*, 505 U.S. 833, 989 (1992) (Scalia, dissenting).

<sup>131</sup> See, e.g., Chemerinsky, *Wrong Questions*, *supra* note 120, at 48-50, 65-68 (the American Constitution is intentionally anti-majoritarian, and judicial review strengthens commitment to preserve certain values over majoritarian will). See also *supra* notes 114 and 126. Citing a study by Robert Dahl, Steven Crowley has noted that modern transitions to democratic rule have inevitably included some mechanisms for constraining majority rule. See Crowley, *supra* note 74, at 704. It is equally true that the international human rights system is largely premised on the Western liberal ideal that rights act primarily as limitations on governmental action (and, in democracies, majority rule) in favor of individuals. See *supra* notes 84 and 95.

<sup>132</sup> See, e.g., Chemerinsky, *Wrong Questions*, *supra* note 120, at 69; Cross, *supra* note 117, at 1537-62, 1576 (reviewing and critiquing the common reasons given for favoring judicial review including the idea that the court is the institution best suited to provide a check on the potential excesses of majority rule).

<sup>133</sup> This was, in essence, one of Justice John Marshall's primary rationales in *Marbury* when he suggested that the Constitution, in the absence of judicial review, would reduce "to nothing what we have deemed the greatest improvement on political institutions—a written constitution". See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-178 (1803). Some commentators have suggested that judicial review should also be favored for the related benefits of authoritative settlement

review may in fact enhance democracy by providing moral leadership,<sup>134</sup> protecting the democratic process and ensuring adequate opportunities for political participation by all members of the polity.<sup>135</sup> One might even suggest that “value voting” by judges, in accordance with the political orientation of those who placed them in office, is an inevitable and positive feature of democratic governance.<sup>136</sup>

In essence, the primary defense of judicial review in the American constitutional context has been that it serves an important check on majoritarian rule that is both historically and functionally part of the American system of democracy. As described below, however, this particular defense reflects a distinctly American view of democracy and human rights that is not necessarily shared by other cultures. In any case, the fundamental choices involved reflect political judgments and an on-going balance of interests that arguably may be best left to domestic democratic processes. In other words, the role of authoritative judicial decision-making in democracy is itself a highly contested issue at the center of democratic choice that may not be suitable for a definitive and uniform international resolution.

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of highly contested social and political issues. See Lawrence Alexander & Frederick Schauer, *Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1361-62, 1371-80 (1997).

<sup>134</sup> See PERETTI, *supra* note 117, at 22, 57-58, 68 (describing some of these positions); Graber, *supra* note 80, at 403 (judicial review's capacity to enhance public debate over issues).

<sup>135</sup> This is essentially the gatekeeper or “representation - reinforcing” function espoused by Ely. ELY, *supra* note 120. Ely's arguments concerning preserving political participation and democratic process are primarily designed to describe the appropriate limits of judicial review. Other critics of judicial review have similarly argued that it tends to undermine the vitality and effectiveness of our deliberative processes as legislators worry less about constitutional considerations, presuming that their excesses will be corrected by the courts. See ELY, *supra* note 120.

<sup>136</sup> Terry Peretti, for example, accepts complaints about the role of political bias in the court's decision-making but provides reasons why “value-voting” should be seen as an asset in American democracy. Peretti argues that “value-voting” by judges exercising judicial review actually enhances democracy since the appointment process is itself a political process reflecting majoritarian orientation and outcomes. See PERETTI, *supra* note 117, at 5, 78-102, 133-35, 152. Since judges tend to decide cases consistently with the viewpoint of their original political sponsors, judicial review is simply another manifestation of the democratic political process. *Id.*

B. IMPLICATIONS OF THE COUNTER-MAJORITARIAN  
DEBATE FOR INTERNATIONAL JUDICIAL  
DECISION-MAKING

What are the potential implications of the debate over judicial review for international human rights decision-making? Initially, it is important to recognize that there are both significant similarities and differences between international judicial and quasi-judicial decision-making and the power of judicial review exercised by domestic constitutional courts.

Some of the factors that render judicial review controversial in the domestic context<sup>137</sup> are only partially evident in the international human rights system. While international judicial and quasi-judicial proceedings have increased in their scope, frequency and authority, the existing human rights system is premised on the primacy of national implementation and authority.<sup>138</sup> In most domestic legal systems, neither inchoate human rights treaty obligations nor subsequent international interpretations of rights are given "direct effect."<sup>139</sup> Thus, although

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<sup>137</sup> See *supra* notes 117-25 and accompanying text.

<sup>138</sup> See *supra* note 94, *infra* notes 139-146 and accompanying text. Ubiquitous exhaustion of remedy requirements is one manifestation of such primacy.

<sup>139</sup> Most states have traditionally followed, in effect, what is often described as the "dualist" approach to international law by denying international legal obligations any "direct effect" within the domestic legal system absent some positive act of incorporation. See, e.g., MARK JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 85-86, 97-102 (3d ed. 1999). See also Thomas Buergenthal, *Modern Constitutions and Human Rights Treaties*, 36 COLUM. J. TRANSNAT'L L. 211, 215-20 (1997) (describing trends away from the dualist approach). The United States generally follows a hybrid approach allowing that some treaties may be given direct effect through the judicial doctrine of "self-execution." See JANIS, *supra* at 86-96. The United States Senate has uniformly designated human rights treaties as "non self-executing" in the ratification process. See, e.g., Buergenthal, *supra* at 229-22. In contrast, many members of the European Convention on Human Rights have agreed to the direct incorporation of its obligations, including recently, the United Kingdom. See, e.g., Slaughter & Helfer, *supra* note 3, at 295; (U.K.) Human Rights Act, 1998, ch. 42, reprinted in 38 I.L.M. 464 (1999). Ironically, customary international human rights law is treated more generously than treaties by U.S. courts. See, e.g., *Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d Cir. 1980). In part because customary rules lack the potential democratic check of incorporation, there is continuing controversy over the appropriateness of their domestic legal status. See, e.g., Trimble, *supra* note 58, at 718-23. See also Patrick Kelly, *The Twilight Of Customary International Law*, 40 VA. J. INT'L L. 449 (2000).

there is some evidence of a trend to the contrary,<sup>140</sup> international treaty obligations are often not deemed authoritative domestically until “incorporated” into the domestic legal system, typically by the legislature. A requirement of domestic incorporation arguably provides a potentially important “democratic filter” through which international rules must pass before becoming binding domestic law, thereby significantly improving the democratic authenticity of international human rights treaty obligations.<sup>141</sup>

In addition, while some prominent human rights institutions have at least technically binding judicial authority that might supplant domestic interpretations of rights, this power is not widespread among international institutions and is not reinforced by effective enforcement powers.<sup>142</sup> Outside of the arguably *sui generis* context of Europe,<sup>143</sup> major human rights institutions such as the IACHR and the HRC have encountered significant problems engendering state compliance.<sup>144</sup> Since the decisions of

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<sup>140</sup> See Buergenthal, *supra* note 139, at 215-20. Judge Buergenthal observes that Western and Latin American democracies have increasingly given international human rights treaty obligations authoritative domestic legal status, sometimes superior to ordinary legislation. *Id.*

<sup>141</sup> See Catherine Powell, *Dialogic Federalism: Constitutional Possibilities For Incorporation Of Human Rights Law In The United States*, 150 U. PA. L. REV. 245, 260-68 (2001) (discussing a democratic deficit resulting from federal adoption of human rights treaties without active participation from the public or state and local governments).

<sup>142</sup> See *supra* notes 104-05, 112 and accompanying text. The Inter-American Court's judgments are technically enforceable in the domestic courts of member states. See American Convention on Human Rights, Nov. 22, 1969, arts. 61, 63, 68, 1144 U.N.T.S. 123. Judgments of the ECHR are directly enforceable in the domestic courts if so provided by the member state's domestic law. European Convention, *supra* note 110, at art. 213. See Slaughter & Helfer, *supra* note 3, at 295.

<sup>143</sup> See *supra* note 37. The work of the European human rights institutions, particularly the ECHR, has clearly attained authoritative status among member states resulting in frequent revision of national law in response to the system's output. See generally Slaughter & Helfer, *supra* note 3; Andrew Drzemczewski, *Principle Characteristics of the New ECHR Control Mechanism, As Established by Protocol 11*, 15 HUM. RTS. L.J. 81, 82-83 (1994).

<sup>144</sup> See *supra* note 104-05, 112 and accompanying text. In this sense, democratic approval of the treaty text merely begs the more important question regarding what specifically the state has actually agreed to do. In most human rights treaties, for example, the primary promise is to “implement” or “recognize” rights through national implementation including legislation if necessary. See, e.g., ICCPR, *supra* note 23, at art. 2. Does this obligation also imply an obligation to implement such rights precisely according to international definitions or applications

international human rights institutions have, at best, ambiguous legal status and are not generally enforceable directly within most domestic legal regimes, compliance typically depends upon the will of executive or legislative authorities. Recalcitrant governments have not found it difficult, outside of Europe, to ignore disfavored international juridical decisions.<sup>145</sup>

Thus, international human rights judicial and quasi-judicial decision-making either does not enjoy, or has not effectively demonstrated, binding supremacy over national legislative preferences.<sup>146</sup> In the absence of binding authority, the implications

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that are subsequently developed by the HRC? See *supra* notes 94 and 105, (Gen. Com. 24). Or does initial state consent to the treaty merely signify an agreement by the state to pursue such general inchoate obligations in a manner consistent with the sensibilities of its people, reserving a margin of discretion in specific applications? See Donoho, *Autonomy*, *supra* note 3, at 420-28. The former view obviously has significant implications for democratic self-governance, while the latter may be seen as undermining the effectiveness of human rights. *Id.* While there is no clear consensus about the appropriate functions of the international human rights system, it seems apparent that "internationalizing" rights serves the general purpose of seeking progressive improvement in the human condition by modifying how governments treat their own citizens. Although the specific meaning of rights may vary by context and place, the international system presumes the existence of certain transcendent, universal values, that all individuals are entitled to solely by virtue of their status as human beings. Facilitating the achievement of these values through international mechanisms, such as those described here, is undoubtedly a primary justification for the internationalization of rights. See, e.g., Catherine Powell, *Introduction: Locating Culture, Identity and Human Rights*, 30 COLUM. HUM. RTS. L. REV. 201, 202-03 (1999); Donoho, *Relativism*, *supra* note 94, at 356-60; Rhoda Howard, *Dignity, Community, and Human Rights*, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS 81 (A. An-Na'im ed., 1992). See also Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AM. J. INT'L L. 848 (1983).

<sup>145</sup> See *supra* notes 104-05, 112.

<sup>146</sup> The relationship between domestic and international decision-makers over the interpretation or application of rights is critical but uncertain. Whether given direct effect or legislatively incorporated, one might reasonably argue that domestic institutions should have a significant role, if not supremacy, in determining the meaning of international rights once incorporated into domestic law. Some commentators have emphasized the positive potential for human rights from domestic interpretive contributions. See, e.g., Karen Knop, *Here and There: International Law in Domestic Courts*, 32 N.Y.U. J. INT'L L. & POL. 501, 504-06, 516-17, 526-33 (2000) (describing a system without significant domestic interpretive authority as "fraught with the anxiety of imperialism" and advocating the "translation" versus "transmittal" of binding international norms). See also Harold Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 Hous. L. REV. 623, 642-43 (1998) (discussing the "domestication" of international norms and the process by which states may "internalize" such rules). The question, however, remains fraught with ambiguity and will depend on, among other

for democracy of international decision-making in human rights are far less pronounced. Although government officials might conceivably "hide" behind an international decision,<sup>147</sup> fears of democratic displacement by unaccountable international actors are, practically speaking, insignificant. Actual enforcement depends upon action by accountable domestic actors who are presumably responsive to democratic political and electoral processes. In this fashion, the practical necessity of national enforcement arguably provides another critical domestic filter, which may serve to preserve democratic prerogatives.

The existing deficit in international judicial authority in human rights does not, of course, render the democratic legitimacy of such decision-making irrelevant. There is a discernable trend internationally to utilize adjudicative solutions to international problems, including human rights.<sup>148</sup> Even when not binding or effectively enforceable, the decisions of international institutions may have important legal, economic or political consequences for the society concerned. When an international institution has adjudged a nation to have violated its international obligations, other nations may act accordingly. Moreover, a primary goal of international judicial and quasi-judicial human

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things, the future evolution of international institutional authority and potential constitutional limitations. See, e.g., Mark Weisburd, *International Courts and American Courts*, 21 MICH. J. INT'L L. 877, 892-900 (2000) (arguing that U.S. courts are not bound by ICJ judgments, and that an agreement to be bound would violate Article III). See also Brian Havel, *The Constitution In An Era Of Supranational Adjudication*, 78 N.C. L. REV. 257, 282-90 (2000).

<sup>147</sup> Similar kinds of complaints were raised against the Australian government's perfectly reasonable decision to accept the judgment of the HRC that criminalization of consensual sodomy by Tasmania violated the ICCPR. *Toonen v. Australia*, U.N. Hum. Rts. Comm., No. 488, U.N. Doc. CCPR/c/50/D/488/1992 (1994). The Australian popular press castigated the Australian federal government primarily for "abdicating" sovereignty to an unaccountable international body rather than for its support of the HRC's substantive position. See INTERNATIONAL HUMAN RIGHTS IN CONTEXT 739-41 (H. Steiner & P. Alston, eds., 1996) (providing excerpts).

<sup>148</sup> See generally Petersmann, *supra* note 4; Benedict Kingsbury, *Foreword: Is The Proliferation Of International Courts And Tribunals A Systemic Problem?*, 31 N.Y.U. J. INT'L L. & POL. 679 (1999); John Barton & Barry Carter, *International Law And Institutions For A New Age*, 81 GEO. L.J. 535, 561 (1993); Bolton, *supra* note 2, at 212-16 (complaining of "efforts by human rights groups to judicialize, on an international basis, various issues, thus removing them from the purview of national politics").

rights institutions must ultimately be to engender sufficient credibility, respect and legitimacy that their decisions are respected and voluntarily enforced.

Most importantly, tracing the implications of such decision-making for democratic self-governance may provide important insights regarding the future development of the international human rights institutions and their authority. Should the international community follow the European model and accept the judicial and quasi-judicial decisions of the IACHR, the HRC and other international human rights institutions as binding or directly enforceable within their respective domestic systems? The answer to this basic question depends, to a significant degree, on the democratic characteristics of such institutions and the implications of such authority for domestic democratic processes. It is critical, in this regard, that international judicial and quasi-judicial processes evolve in ways that will enhance democratic self-governance and autonomy.<sup>149</sup>

Many of the allegedly “anti-democratic” characteristics of judicial review that have caused domestic controversy appear equally applicable to international human rights decision-making. Indeed, the central fear that unaccountable decision-makers will interpret indeterminate rules in accordance with personal biases and without democratic deliberation or revision is clearly multiplied by the international context. Decision-makers on international judicial and quasi-judicial bodies are clearly not accountable, in any meaningful sense, to the people whose lives their decisions concern.<sup>150</sup> For better or worse, the judges and experts who serve on major international human rights institutions will inevitably be highly educated, often Western oriented, elite.<sup>151</sup> Being selected from a wide range of countries, international human rights experts and judges are, by definition, predominately persons from societies other than the disputing

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<sup>149</sup> See *supra* notes 67-87 and accompanying text, *infra* notes 183-191 and accompanying text.

<sup>150</sup> See *supra* notes 101-03, 110 and accompanying text; *infra* notes 151-169 and accompanying text.

<sup>151</sup> Human rights treaties generally provide that only persons of prominence, education and experience should be appointed to serve. See *supra* notes 101 and 110. This hardly seems surprising and may make tremendous sense. Experience and proven competency are clearly important criteria when selecting decision-makers.

parties.<sup>152</sup> Whatever their other merits, these decision-makers are truly faceless for the vast majority of the world's population and culturally disconnected from the various domestic societies their decisions concern.<sup>153</sup>

Such conditions of independence are probably by design and have important merits. Constitutional democracies frequently choose to create strong, independent judiciaries, at least in part to protect individual liberties and isolate judges from short-term political passions.<sup>154</sup> Access to independent decision-makers may be critical to effective international protection of human rights which, after all, are essentially designed to provide limitations on how governments may treat their own citizens.

Yet, the degree of isolation and independence of international judicial decision-makers from democratic political

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It also explains, however, why international decision-makers in human rights institutions will inevitably tend to be persons from the highly educated, elite classes. The same accusation may, of course, be leveled at members of domestic judiciaries. See, e.g., Klarman, *supra* note 129, at 146, 188-92 (describing culturally elite biases of federal judges); *supra* note 129. Judicial tribunals are not, by nature, populist institutions historically.

<sup>152</sup> Most international human rights institutions require, either by rule or practice, that the experts who serve on them come from different countries. See (last visited Jan. 14, 2003). The ECHR's practice is that there be one judge from each member of the Convention, although cases are now generally heard by 7 judge chambers. See Drzemczewski, *supra* note 143.

<sup>153</sup> The web site for the UN High Commissioner for Human Rights provides an informational chart for everyone who serves on the major treaty-based bodies. One may argue, of course, that culture is irrelevant to the meaning of human rights standards. See Donoho, *Autonomy*, *supra* note 3, at 404, 408-09, 417. Whatever the merits of this debate, it seems indisputable that such "connectedness" has relevance to the *democratic legitimacy* of decision-making generally. Indeed, the grounding of jurists in social context provides an important justification for authoritative judicial decision-making within democracy. *Id.*

<sup>154</sup> There is an increased reliance on judicial review worldwide. See Gustavo Fernandes de Andrade, *Comparative Constitutional Law: Judicial Review*, 3 U. PA. J. CONST. L. 977, 977-78 (2001); Bojan Bugaric, *Courts As Policy-Makers: Lessons From Transition*, 42 HARV. INT'L L.J. 247, 249-55, 260-62, 277-79 (2001). The justifications for judicial independence are usually broader than improving the courts' effectiveness as a check on majoritarian preferences and protection for individual rights. Judicial independence may be seen as part of an overall system of checks and balances in the distribution of governmental power. Indeed, this was one of the primary rationales for judicial review articulated by Justice Marshall in *Marbury v. Madison*. Thus, judicial review is arguably an important component of the American commitment to constitutionalism, federalism, checks and balances and limits on the authority of central government generally.



processes is pronounced and has unique characteristics. First, international decision-makers and the rules they apply will be perceived as, and essentially are, extrinsic to the domestic polity. If for no other reason, international legal outcomes will, therefore, be perceived as external to the domestic democratic process.<sup>155</sup> The perception that such "extrinsic" authority lacks democratic legitimacy is exacerbated by the international decision-makers' lack of social and cultural connection to any particular domestic polity. Whatever else its merits, the extrinsic nature of international decision-making will inevitably produce concerns over democratic legitimacy, particularly as its authority grows.

Second, the problem of "extrinsic-ness" is worsened by the largely secretive and inaccessible processes by which international judges and experts are selected. Currently, such appointments are essentially still a function of international relations, left exclusively to executive branch discretion, largely untouched by democratic deliberative processes.<sup>156</sup> The lack of transparency and democratic responsiveness of international selection processes might be contrasted to the appointment of U.S. federal judges whose confirmation proceedings are widely publicized, often contested and include the opportunity for elected representatives to review and reject candidates.<sup>157</sup>

Third, confirmation and other mechanisms for introducing democratic accountability to judicial decision-making, such as impeachment, recall or periodic election, may be impractical and ineffective in the international context.<sup>158</sup> Implementation of such checks on judicial power would not only be cumbersome

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<sup>155</sup> See, e.g., Jonathan Turley, *Dualistic Values in the Age of International Legitimacy*, 44 HASTINGS L.J. 185 (1993); Stephan, *supra* note 4, at 238-42, 245, 253-56.

<sup>156</sup> See *supra* notes 104-05, 110.

<sup>157</sup> See generally PERETTI, *supra* note 117, at 82-85, 100-104, 112, 133-134 (discussing how the appointment process itself may reinforce democratic values). The highly politicized appointment process in the United States may also be contrasted to the European approach which is based on a civil service model focusing on professional judicial experience and training. *Id.* at 85. It may also be contrasted to the system of electing of judges preferred by many U.S. states.

<sup>158</sup> See *infra* notes 159-62 and accompanying text; *supra* note 130.

but also highly impractical for global institutions with wide membership.<sup>159</sup> Practically speaking, opportunities and motivations for exercising such mechanisms would necessarily be diffuse internationally. For obvious reasons, international judges and experts serving on global institutions come from many different countries. Their decisions may affect different societies with divergent social, religious and cultural orientations quite differently. Rarely would there be a sufficient coalescing of interests among diverse democratic populations to exercise effective control over the selection of international judges and experts, or their decisions.<sup>160</sup> The diffusion of interests over specific substantive issues might have the same practical disabling effect.<sup>161</sup> Thus, even if mechanisms for improving the democratic

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<sup>159</sup> The practical problems in implementing effective checks may be an inherent problem for global international human rights institutions. For example, even if domestic review mechanisms for the selection of international judges were created, they would be irrelevant for most countries. There are necessarily a limited number of positions available on international human rights institutions, some of which will be reserved, as a practical matter, for large, powerful countries. Thus, outside of regional institutions with limited state membership, most countries have little potential that a candidate from their society will serve on such bodies. Although international experts and judges clearly do not "represent" their countries of origin, the cultural, social and political connection of judges provides an important explanation of why judicial review may be consistent with democratic self-governance. See *supra* notes 128-29, 144-46 and accompanying text. Adoption of accountability mechanisms may, however, simply beg the question of whether a shared community or *demos* exists that might effectively deploy them. In a sense, the capacity of mechanisms such as confirmation, recall, or periodic election to enhance the democratic legitimacy of judicial review depends upon the existence of a shared community or *demos* that is entitled to exercise them. While one may reasonably believe that such a shared community is evolving in Europe under the European Convention and the EU, its existence globally, or even regionally, is currently doubtful. See *supra* notes 8, 25-6, 44, 55.

<sup>160</sup> Assume, for example, that a fundamentalist Muslim legal expert, who holds views on the rights of women that are anathema to most Westerners, is proposed by the Iranian government for membership on the HRC. (One could just as easily imagine a Roman Catholic candidate morally opposed to abortion and same-sex marriage, or someone like Robert Bork, being promoted as a candidate.) It is not at all certain that sufficient international consensus against such candidates could be raised by interested governments (or people, were more direct approval mechanisms adopted). The potential disabling effect of such diffusions of interests may, of course, also occur regarding not only judicial philosophy or orientation but also any particular substantive issue.

<sup>161</sup> For example, while most Americans favor the death penalty and the right of a woman to choose an abortion, contrary regional sensibilities on those controversial issues means that it would be improbable that Americans could organize an

accountability of international decision-makers were created, the practical capacity of people to effectively exercise such control would be limited at best. This practical reality is similar to the dilution of democratic voting power that accompanies the expansion of democratic governmental authority from, for example, a state to federal level or from a national to supranational institution like the EU. As described above, the potential diminution or dilution of democratic voice that may accompany the transfer of authority to ever-larger political communities is a central complaint of those who criticize the democratic legitimacy of international governance generally.<sup>162</sup>

Finally, many of the moderating social factors and legal doctrines that help legitimize independent judicial review in constitutional democracies may have limited applicability internationally. For example, many commentators have argued that the debate over judicial review in U.S. constitutional law is misleading since empirical evidence suggests that judges naturally tend to reflect, and ultimately ratify, the dominant moral and political views of American society.<sup>163</sup> Studies demonstrating that Supreme Court Justices have overwhelmingly voted with the general political orientation of the administration that promoted them to the bench, provide evidence that domestic democratic preferences limit and shape judicial output.<sup>164</sup> Even if their jobs are protected from the short-term whims and passions of the political process, federal judges remain vested participants in American society. Their decision-making is necessarily seeped in American political and cultural traditions. Similarly, American judges find themselves constrained, some would argue, by legal doctrines training and temperament that demand suppression of

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effective international countermand to an authoritative decision by the IACHR declaring capital punishment or abortion illegal.

<sup>162</sup> See *supra* notes 16, 29-36, 49-56 and accompanying text.

<sup>163</sup> See *supra* notes 128-29. See generally PERETTI, *supra* note 117, at 84-104, 112 (summarizing this frequently made argument); Cross, *supra* note 117, at 1554-57. See also Klarman, *supra* note 129, at 191-92.

<sup>164</sup> See PERETTI, *supra* note 117, at 112; Cross, *supra* note 117, at 1544-45. Anyone doubting this proposition need only review the court's recent opinion in *Bush v. Gore*, 531 U.S. 98 (2000), an opinion routinely castigated for the apparent influence of political preferences on its outcome and reasoning. See generally Michael Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CAL. L. REV. 1721, 1724-47 (2001); John Yoo, *Bush v. Gore: In Defense of the Court's Legitimacy*, 68 U. CHI. L. REV. 775 (2001).

personal biases, recognition of institutional limitations and deference to democratic processes.<sup>165</sup> In essence, the cultural, social, political and philosophical “connected-ness” of judges tempers the anti-democratic implications of their independent authority.

Whether such ameliorating factors constrain the anti-democratic implications of international judicial decision-making is doubtful at best. Decision-makers on international human rights institutions necessarily come from a wide variety of backgrounds, cultures and political settings. While some significant commonalities in background and orientation may exist among international decision-makers,<sup>166</sup> their differences will be pronounced. International human rights decision-makers can not, as a group, be seeped in the cultural, social, political or judicial traditions of any one particular democratic society. As a group, such decision-makers lack the “connected-ness” to democratic societies that some argue tempers the anti-democratic implications of judicial independence.

Practically speaking, it is impossible for such decision-makers to be responsive to the various divergent traditions of the diverse domestic polities under their jurisdiction.<sup>167</sup> Each international judge or expert arguably has only his own political, cultural and social biases upon which to base his decision-making over rights that are generally indeterminate and open to divergent interpretations.<sup>168</sup> Whatever the merits of the on-going debate over the universality of rights,<sup>169</sup> global diversity and the

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<sup>165</sup> See, e.g., PERETTI, *supra* note 117, at 135-37. See also Cross, *supra* note 117, at 1537-38.

<sup>166</sup> See *supra* notes 101 and 151 and accompanying text.

<sup>167</sup> In one sense this begs the obvious question of whether international decision-makers should be responsive to the world's diversity. See generally Donoho, *Autonomy*, *supra* note 3; *infra* notes 185-87 and accompanying text. Although related to the debate over universal rights, the question here concerns the degree to which an international decision-maker should account for such diverse traditions out of respect for democratic voice.

<sup>168</sup> See *infra* notes 178-85 and accompanying text; *supra* notes 91-93. There are, of course, potential benefits from this diversity of backgrounds. If human rights are based upon universal values, the diverse viewpoints brought to the international judicial table could greatly contribute to the evolution of standards with universal acceptability.

<sup>169</sup> See Donoho, *Autonomy*, *supra* note 3. See also *supra* notes 62-63, 84, 94, 144.

unavoidable disconnect between international judges and domestic polities will tend to undermine the perceived democratic legitimacy of international human rights decision-making.

There is another, perhaps more important, facet to this "disconnect" problem. Since few rights are absolute, their practical application inevitably involves striking some balance between the needs and wants of individual rights holders and the public interest.<sup>170</sup> In constitutional democracies, this balance is reflected in the classic tension between majority rule and constitutional limitations which favor individuals and minority groups.<sup>171</sup> Different societies naturally approach these issues in different ways, reaching varying specific outcomes that reflect deep political and social choices regarding the relationship of individuals to society and the appropriate role of government institutions. The manner in which this balance is struck is often largely determinative of particular outcomes in human rights cases.

Although the international human rights system clearly reflects a Western orientation,<sup>172</sup> there appears to be no current international consensus about the appropriate balance between majoritarian preferences, perceived public interest and the needs and desires of minorities and individuals.<sup>173</sup> Nor does a consensus exist regarding which institutions should be entrusted with this

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<sup>170</sup> See Donoho, *Autonomy*, *supra* note 3, at 444-50.

<sup>171</sup> A significant part of the U.S. Supreme Court's rights jurisprudence is designed to accommodate this inevitable balancing of interests in ways consistent with the perceived political structure of American constitutional democracy. *See id.*; *supra* note 118. The jurisprudence of the ECHR similarly reflects such tensions but also attempts to accommodate special considerations involving its status as an international institution and national domestic prerogatives. Donoho, *Autonomy*, *supra* note 3, at 455-56, 460-62.

<sup>172</sup> *See supra* notes 84 and 131.

<sup>173</sup> The primary thrust of most literature discussing diverse, non-Western, orientations towards human rights essentially involves these basic values regarding individualism versus community. *See supra* notes 77 and 84. Arguably, international decision-makers are ill-equipped to evaluate the interests of the defendant's democratic majority to which they are foreign and unfamiliar. This rationale is the driving force behind the ECHR's practice of allowing member states a "margin of appreciation" in their implementation of rights. *See generally* H. Yourow, *THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE* (1996); VAN DIJK & VAN HOOF, *supra* note 109, at 82-95, 731-35.

complex, evolving and fundamentally political act of balancing.<sup>174</sup> Given the profound diversity that characterizes the world community, the lack of consensus over such issues should hardly be surprising. Indeed, there is no real consensus about this balance even within the highly developed rights jurisprudence of the U.S. Supreme Court. Even a casual observer of the court would readily recognize that its members hold widely divergent views regarding the appropriate balance between majoritarian interests and individuals', and the court's role in determining that balance.<sup>175</sup>

These differing views are not merely abstractions. Rather, a judge's perspective regarding the tension between individual and community interests inevitably has a direct impact on the concrete outcome of rights disputes. The particular balance struck, itself a politically contested issue, is typically determinative of the concrete meaning of individual rights in practice. Thus, whether the right of privacy includes the right to assisted suicide may depend upon, among other factors, a particular society's traditional priorities regarding competing public and individual interests.<sup>176</sup> It also depends upon which institutions and processes are entrusted with this balancing of interests. Among the world's diverse democracies, this institutional question may be answered in different ways depending upon, among other things, the stress given to majoritarianism and legislative supremacy.

All of this raises important, potentially troubling, questions regarding the development of authoritative international judicial solutions to highly contested human rights issues. To the extent

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<sup>174</sup> Within domestic systems, these choices typically involve the allocation of power between branches of government, or between local, state and central governments. In the international context, these choices similarly involve the allocation of power and authority but focus on its allocation among sovereign governments, and between those governments and intergovernmental institutions.

<sup>175</sup> A justice's views regarding the appropriate balance between individual rights and the public interest overlap similar concerns over institutional roles in American democracy. Thus, for example, it is common to find justices arguing about whether the Court should adopt a narrow approach to implicit constitutional liberties in order to appropriately limit the judicial role. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 989 (1994); *Glucksberg v. Washington*, 521 U.S. 702, 720-21 (1997); *Bowers v. Hardwick*, 478 U.S. 186, 190-96 (1986).

<sup>176</sup> See, e.g., *Glucksberg v. Washington*, *supra* note 175.

that international consensus over the appropriate accommodation between majoritarian and individual interests is lacking, on precisely what basis are international decision-makers to strike the necessary balance? Should international decision-makers attempt to adopt the particular orientation that the relevant domestic system has previously exhibited toward such issues? Even assuming that this difficult and amorphous task would be possible, it seems obvious that domestic decision-makers would be far better situated to evaluate the competing interests involved. In any case, why should the balance struck by international decision-makers be preferred over that which may be reached through domestic democratic processes, including judicial institutions?

Ultimately, it seems probable that international decision-makers will be forced to strike balances between majoritarian and individual interests based on ill-defined, arguably non-existent international standards. In the absence of clear international consensus regarding such issues, particularly the appropriate allocation of authority between judicial and political institutions, the international judge or expert is essentially left with only his or her own personal (and cultural) preferences to work from. Indeed, this seems inevitable even if clear international standards are someday developed. While such accusations may also be leveled within domestic democratic systems, the international decision-maker is not confined by the host of cultural, social, political and professional factors that constrain and guide judges grounded in a particular domestic setting.<sup>177</sup> Perhaps more fundamentally, the commitment of these issues to international adjudicatory processes may, in essence, supplant domestic democratic preferences regarding the allocation of institutional authority. In other words, the commitment of highly contested

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<sup>177</sup> Although one might argue that there is a universal culture of human rights that might similarly constrain international decision-makers, the meaning of international rights is currently too underdeveloped and indeterminate to serve this function. See Donoho, *Autonomy*, *supra* note 3, at 391-96, 429-30; *supra* notes 91-93; *infra* note 181. The persistent debate over the universality of rights and the role of context and culture in determining their meaning demonstrate that many human rights norms have no universally accepted specific contextual meaning that transcends cultural and political boundaries. Donoho, *Autonomy*, *supra*.

human rights issues to international judicial or quasi-judicial authority itself reflects a certain view of the judicial role in democracy that is clearly not universally shared among all societies.

The potential anti-democratic implications of international judicial resolution of contestable human rights standards are exacerbated by the significant indeterminacy of existing international norms.<sup>178</sup> In significant respects, the domestic debate over the democratic legitimacy of judicial review is driven by the recognition that the specific meaning of rights is often highly indeterminate.<sup>179</sup> Whether conservative or progressive, what critics of judicial review most fear is that such indeterminacy allows unaccountable judges to substitute personal values and favored outcomes for those that would emerge from deliberative democratic processes.<sup>180</sup> This indeterminacy critique of judicial review is more powerful internationally than in the context of domestic constitutional decision-making. The norms with which international human rights decision-makers are entrusted are both significantly indeterminate and highly underdeveloped. In the context of an enormously diverse world, the specific meaning of abstractions such as equal protection, free speech, and privacy is uncertain at best.<sup>181</sup> Many would also argue that the specific

<sup>178</sup> See *supra* notes 91-93 and accompanying text.

<sup>179</sup> See *supra* notes 120, 125 and accompanying text. This indeterminacy is especially acute internationally where profound diversity prevails and consensus over the meaning and practical application of rights has yet to develop among the world's diverse societies. See e.g., Donoho, *Autonomy*, *supra* note 3, at 391-96, 429-30. Indeed, many people argue that the specific meaning of some rights must ultimately depend, in some degree, upon the cultural, social and political context in which they are to be applied. *Id.* at 399-410, 420-23.

<sup>180</sup> But see West, *supra* note 121, at 249-51. (suggesting that the meaning of constitutional doctrine in the United States is more or less highly developed, determinate and conservative in substance).

<sup>181</sup> See Donoho, *Autonomy*, *supra* note 3, at 391-96, 427-31. The right of privacy, for example, is recognized in many of the major human rights treaties. Yet, it is abundantly clear that substantial disagreement exists among (and within) societies and governments regarding the precise meaning and content of the right. The potential interface between privacy and sexual orientation issues provides just one of the many potential examples. See Andrew Koppelman, *Why Gay Legal History Matters*, (book review), 113 HARV. L. REV. 2035, 2057-58 (2000) (noting the indeterminacy of the term "privacy" and divergent applications of the concept among U.S. states); Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 726-27 (1999) (discussing competing visions of privacy within the American polity); Brenda Thornton, *The New International Jurisprudence on the Right of Privacy: A Head-On Collision With Bowers v. Hardwick*, 58 ALB. L.



meaning of such abstractions is necessarily contextual and ultimately political in nature.<sup>182</sup>

The highly indeterminate nature of many international human rights standards exposes international decision-makers directly to the critique that judges are simply deciding cases based on their own personal values.<sup>183</sup> This criticism is especially powerful when international judges or experts attempt to use such norms to evaluate domestic democratic resolutions of highly contested social and moral issues. Such issues frequently involve moral judgments and dilemmas over which different societies, and the people within them, may disagree profoundly. Within every authentically democratic society, the resolution of such charged moral issues involves an ongoing process of political and social contestation bounded by culture, tradition and context. Whatever their "universality," there are deep and profound ways in which some human rights values are indigenous and culturally bound.<sup>184</sup> Recognition of this does not deny the existence of universal norms, the potential for change, or the potential for cross-cultural learning. It does, however, have significant implications for the appropriate locus of decision-making, particularly for highly contested human rights issues over which reasonable people may differ. International decision-making in this regard may be seen as inevitably divorced from the process of dialogue and political deliberation that allows societies to work out, in a democratic fashion, the resolution of deep moral issues. The potential

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REV. 725, 758-74 (1995); J. Cohen, *Is There A Duty Of Privacy? Law, Sexual Orientation, And The Construction Of Identity*, 1996 TEX. J. OF WOMEN & L. 88, 88-93. Compare *Bowers v. Hardwick*, 478 U.S. 186 (1986) with, *Toonen v. Australia*, U.N. Hum. Rts. Comm., No. 488, U.N. Doc. CCPR/c/50/D/488/1992 (1994) (Tasmanian sodomy law violates the ICCPR). See also *Dudgeon v. United Kingdom*, 4 EHRR 149 (1981) (sodomy laws violate the European Convention on Human Rights); accord, *Norris v. Ireland*, 13 EHRR 186 (1991); *Modinos v. Cyprus*, 16 EHRR 485 (1993); James Wilets, *Conceptualizing Private Violence Against Sexual Minorities As Gendered Violence: An International And Comparative Law Perspective*, 60 ALB. L. REV. 989, 1024-30 (1997).

<sup>182</sup> See, e.g., B. Kausikan, *Asia's Different Standard*, 92 FOR. POL'Y 24, 39 (1993). See also Donoho, *Autonomy*, *supra* note 3, at 400-04, 427-31.

<sup>183</sup> See *supra* notes 120 and 125 and accompanying text.

<sup>184</sup> See generally Donoho, *Autonomy*, *supra* note 3, at 391-92, 400-06 (reviewing literature). Some have suggested that constitutional authority and meaning is itself based on the moral consensus of democratic society. See L. Simon, *The Authority Of The Constitution And Its Meaning: A Preface To A Theory Of Constitutional Interpretation*, 58 S. CAL. L. REV. 603, 613-15, 618 (1985).

range of outcomes under international norms are wide in scope but, unlike domestic decision-makers, international judges and experts are not constrained by any particular cultural context or other jurisprudential restraints that help to preserve and respect democratic choice.<sup>185</sup> The resolution of such issues may also involve deeply political questions regarding the social order and the relationship between individuals and governments that may best be resolved through the unruly process of democratic political deliberation.<sup>186</sup> The resulting outcomes, one might argue, should not lightly be disturbed by international review.

## VII. IMPLICATIONS FOR THE FUTURE DEVELOPMENT OF THE INTERNATIONAL HUMAN RIGHTS SYSTEM

The potential tensions between international human rights decision-making and democratic self-governance raise important questions regarding the future development of the international human rights system. What limitations on international human rights decision-making authority might be necessary and appropriate to preserve local democratic deliberation and choice?

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<sup>185</sup> To the extent that international consensus exists over the meaning of rights, one might reasonably argue that international community values outweigh domestic preferences, giving the international decision an alternative (non-democratic) basis for legitimacy. International consensus over the specific meaning of rights, however, is currently limited, probably extending no further than those rights involving the physical integrity of persons. See *supra* notes 91-93, 178-184 and accompanying text. Although international consensus over the meaning of rights will undoubtedly increase over time, many important human rights issues involve open-end concepts without fixed meaning and contestable moral and political judgments that depend on contexts which evolve over time. These judgments are, in essence, at the heart of democratic deliberation and self-governance.

<sup>186</sup> In the domestic context, some favor an authoritative judicial role based upon the positive influence that courts may have in the development of a moral dialogue about the protection of individuals and minorities within society. See *supra* notes 134-36 and accompanying text. Similarly, international institutions might well serve an important moral leadership role. There is, however, an important sense in which this argument takes a highly backward view of democratic self-governance. Moral leadership from international judges and experts implies a top-down evolution of critical moral judgments based on the sensibilities of (currently) unaccountable and culturally "disconnected" decision-makers rather than based on democratic deliberation and choice. This is true even if one uncritically accepts the idealist perspective that international judges represent the views of the international community. This vision of human rights decision-making narrowly cabins democratic self-rule with a decidedly anti-populist perspective.

How can international decision-makers preserve and protect fundamental international human rights values while at the same time respect and promote democratic self-governance? Does respect for democracy require continued adherence to the generally ineffectual "promotional" model of human rights?

Most fundamentally, these questions involve deep political choices regarding the appropriate allocation of decision-making authority between domestic and international actors. They also involve basic choices regarding the processes of human rights decision-making and, in particular, the potential role of independent international judges and experts. Ultimately, international human rights institutions and the international community must develop a human rights jurisprudence that answers these basic questions and accounts for the needs of domestic democratic self-governance.

There are, on the one hand, many reasons to promote increasingly authoritative international decision-making over some human rights issues. There are good and rational reasons, for example, that human rights lawyers often favor judicial resolution of individual human rights problems. The advantage that prompts this preference is the introduction of independent decision-makers who are not beholden to the alleged perpetrator (by definition an executive or legislative branch of government).<sup>187</sup> In the international context, this preference is often magnified by the paucity of effective domestic remedies for human rights abuses in those countries where they are most clearly needed. Human rights advocates quite appropriately seek remedies

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<sup>187</sup> Although there is growing recognition of the importance of subjecting certain non-state actors to international human rights obligations, most human rights treaties are exclusively directed at governments. Some important exceptions to this pattern have developed in the field of international humanitarian law, especially under the leadership of the International Criminal Tribunals for the Former Yugoslavia and Rwanda. See, e.g., S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/872 (1993) (Tribunal's Statute); S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/808 (1993). See Gabrielle Kirk McDonald, *The International Criminal Tribunals: Crime & Punishment in the International Arena*, 25 NOVA L. REV. 463 (2001). See also Justice Louise Arbour, *Access to Justice: The Social Responsibility of Lawyers: The Prosecution of International Crimes: Prospects and Pitfalls*, 1 WASH. U. J.L. & POL'Y 13 (1999); Barbara Crossette, *Crimes Against Humanity: A New Legal Weapon to Deter Rape*, N.Y. TIMES, Mar. 4, 2001, sec. 4, at 5 (rape held to constitute crime against humanity by ICTY).

outside of the legal regime that has perpetrated the abuses they hope to address. Thus, access to an independent decision-maker arguably provides a vital reason to favor international resolution of some human rights disputes and even, perhaps, the development of authoritative international judicial review. After all, who else may be able to protect the rights of minorities and disfavored individuals from an oppressive government?

On the other side of the ledger, however, international governance over highly contested human rights issues, and in particular authoritative judicial resolution of such issues, poses important concerns for democratic self-governance. As described above, many of these concerns parallel those that have prompted the vigorous debate over judicial review in American society.<sup>188</sup> These concerns are, however, more pronounced in the international context and less likely to be ameliorated by contextual, institutional and culturally based democratic constraints. There is, in essence, substance to the claim that international experts and judges are unaccountable decision-makers, left to make important moral decisions over indeterminate legal norms in ways necessarily disconnected from domestic democratic polities. International decisions may, if given authoritative status, potentially displace local democratic outcomes through international processes that are currently deficient in democratic attributes. Similarly, the adoption of significant international judicial authority has the potential to displace domestic approaches to the basic political choice as to how best to protect individuals and minorities under majority rule.<sup>189</sup> Regardless of its potential merits, it should be recognized that authoritative international decision-making over human rights issues lies in tension with domestic democratic expression of such basic political choices.

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<sup>188</sup> See *supra* notes 117-36 and accompanying text.

<sup>189</sup> For example, many commentators suggest that judicial review is entirely consistent with American democracy's anti-majoritarian tilt. See *supra* notes 131-32. This justification arguably has limited applicability in the international context where there is no consensus regarding such issues. Many societies clearly do not demonstrate the strong anti-majoritarian tendencies of American society and are, on balance, more likely to emphasize communitarian interests rather than those of individuals. See *supra* notes 63, 77, 84. The point is that, whether for right or wrong, democratic self-governance itself suggests that these diverse visions of the good society be allowed to evolve.

What conclusions, on balance, can be drawn from this? First, it seems indisputable that authentic democratic self-governance strongly favors a central role for domestic institutions in the interpretation and application of international human rights. For example, international judicial authority is not necessary to bring the advantages of judicial review to human rights disputes. Domestic judicial institutions could satisfy the functional advantages of judicial review if not otherwise hindered by oppressive political forces.<sup>190</sup> Whatever the merits of domestic judicial review and the debate over its implications for democracy, its exercise by domestic judges is far less problematic for democracy than similar international authority. Similarly, in a functional democracy undistorted by oppressive social and political forces, national legislative and executive branches, checked by the courts, would be far better situated than international institutions to implement international human rights standards in ways consistent with domestic democratic processes and sensibilities. In some senses, the international system's current emphasis on national implementation of rights and direct incorporation may be the most favorable arrangement for the promotion of democratic self-governance. Democratic legitimacy concerns may also argue in favor of the promotional model of international supervision with modest enforcement powers, except over certain rights which enjoy a consensus over meaning among states and a clear substantive content. Although rights fitting this description may currently only include such heinous wrongs as torture, war crimes, prolonged arbitrary detention and summary execution, the list will undoubtedly grow over time.

Second, democratic self-governance also demands that international decision-makers give a significant degree of respect and deference to the difficult moral judgments that democratic societies make about highly contested human rights issues. If nothing else, concerns over the democratic legitimacy of future authoritative international human rights decision-making suggest the development of institutional constraints and a jurisprudence that

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<sup>190</sup> Judicial independence has been an important theme among many international human rights institutions in recent years. See *supra* note 113. It is probably no accident that repressive governments typically dismantle the judiciary as a first order of business. The absence of an effective domestic judicial branch provides an argument in favor of more searching international review.

takes into account its potential anti-democratic tendencies. Such concerns may, for example, caution against authoritative international judicial resolution of certain moral issues that are highly contested within democratic societies. Similarly, international institutions may institute doctrines which favor deference to democratic resolutions of highly contested and difficult moral issues over which diverse societies may reasonably differ. One likely mechanism for exercising this deference would be the deployment of standards of reviews that could account for the proper role of international decision-makers and democratic preferences. Such standards of review, similar to the margin of appreciation doctrine utilized by the ECHR,<sup>191</sup> should be designed to provide a degree of respect for domestic democratic choices that avoids unnecessary substitution of international preferences for those produced through authentic democratic expression.

### VIII. CONCLUSION

There is an inherent tension between international governance over human rights and domestic democracy. The lack of democratic attributes among existing international human rights institutions may exacerbate this tension and raise concerns over their democratic legitimacy. Thus, as the authority of the international human rights system evolves, this tension should be openly acknowledged and accommodated in ways that provide an appropriate degree of respect for democratic processes, particularly regarding complex, highly contested moral issues.

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<sup>191</sup> See generally Donoho, *Autonomy*, *supra* note 3, at 450-66.