Constitutional Interpretation Through a Global Lens

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CONSTITUTIONAL INTERPRETATION THROUGH A GLOBAL LENS

By

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Abstract: This Article seeks to clarify the current debate concerning the use of non-U.S. persuasive authority within the context of constitutional interpretation. It begins by noting that often commentary on comparative constitutional law fails to make any distinction between foreign domestic sources and international law used comparatively, and thus risks evoking parallels between different systems of law that lack context and plausibility. It then draws on various normative theories and underpinnings of both domestic and international legal regimes to show that a proper comparative enterprise must take this distinction into account. The Article concludes by explaining that only when those policy goals of international law and domestic law coincide should international law materials be called upon as sources of persuasive authority for domestic constitutional interpretation.

I. INTRODUCTION

In the wake of Lawrence v. Texas\textsuperscript{2} and Roper v. Simmons,\textsuperscript{3} most of the legal world in the U.S. was alerted to the existence of constitutional comparative analysis.\textsuperscript{4} Reactions to the use of non-U.S. persuasive authority in the above decisions ranged from cheers and applause, to jeers and catcalls, the latter being far more voluminous than the former. The opposition to the practice became a rallying cry that found its expression in various fora. For example, in the political arena, several members of Congress offered resolutions condemning and prohibiting constitutional interpretation by method of comparative analysis\textsuperscript{5} while in the judicial realm two prospective Supreme Court candidates had to essentially swear absolutist “blood oaths” repudiating the whole enterprise.\textsuperscript{6} The din raised was so pervasive that it seeped out of the halls of congressional hearings to find an echo chamber in the more popular media.\textsuperscript{7}

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\textsuperscript{2} 539 U.S. 558 (2003).

\textsuperscript{3} 543 U.S. 551 (2005).

\textsuperscript{4} That is not to say that important work about constitutional comparativism had not yet taken place in the United States, but merely that this issue received a certain prominence that had been absent previously.


\textsuperscript{6} Then-nominee Judge Roberts’ disingenuous repartee regarding this issue is crystallized by his comment implying that it would be absurd to look to foreign law as \textit{binding} authority when it is a fact that no one genuinely believes that anyone participating in this debate about comparative constitutionalism is advocating using foreign or international authority as binding precedent. See Eric A. Posner and Cass R. Sunstein, \textit{The Law of Other States}, 59 STAN. L. REV. 131, 137 (2006-2007); see also Confirmation Hearing on the Nomination of John G. Roberts, Jr., to Be the Chief Justice of the Supreme Court of the United States: Hearing Before S. Comm. on the Judiciary, 109th Cong. 42 (2005) (“If we’re relying on a decision from a German judge about what our Constitution means, no President accountable to the people appointed that judge, and no Senate accountable to the people confirmed that judge, and yet he’s playing a role in shaping a law that binds the people in this country.”) Justice Alito parroted the critics’ mantra:
But where the cacophony reached its most fevered pitch was in the realm of legal scholarship. Scholars quickly took sides in this debate often dividing ideologically with those sympathetic to an expanding view of the protection of rights tending to support the practice\(^8\) while those on the other side seemingly decrying the very idea of constitutional comparative law.\(^9\) While a lot of sound and persuasive normative analysis was offered by academics on both sides of the issue,\(^10\) most of the commentary has had a propensity to be somewhat one-dimensional.\(^11\) This is because the almost singular focus of the debate has been to discuss whether it is appropriate for U.S. courts to engage in comparative constitutional analysis or not.\(^12\)

“Well, I don’t think we should look to foreign law to interpret our own Constitution … I think the Framers would be stunned by the idea that the Bill of Rights is to be interpreted by taking a poll of the countries of the world.” 


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See e.g. Anne Gearan, Foreign Rulings Not Relevant to High Court, Scalia Says, WASH. POST, April 3, 2004, at A7.


See e.g. Roger P. Alford, Misusing International Sources To Interpret the Constitution, 98 AM. J. INT’L L. 57 (2004); Kenneth Anderson, Foreign Law and the U.S. Constitution, POL’Y REV., June-July 2005, at 33. The left/right divide which has seemingly emerged over this issue is somewhat curious given that, at a glance, comparative analysis appears to be ideologically neutral. In other words, there is no guarantee that a properly exercised comparative look at non-U.S. law will tend either left or right.


Although this debate is important, it should constitute the starting point (rather than an end in and of itself) for a more comprehensive and theoretical discussion about the various facets of constitutional interpretation encompassed by comparative constitutional law.\textsuperscript{13} This article proposes to examine in detail one of those facets.

The facet of constitutional interpretation that this article focuses on can be referred to as the “international law dilemma.” In the traditional application of comparative constitutionalism in this country, a U.S. jurist, to better interpret a U.S. constitutional provision that is at issue in a particular case, consults materials from outside the body of U.S. law that then end up serving as persuasive authority in that instance. For the purposes of this article, those materials can come from one of two different repositories of legal opinion:\textsuperscript{14} foreign domestic law\textsuperscript{15} and international law.\textsuperscript{16} So what is the dilemma?

The dilemma stems from the fact that, by definition, when a U.S. judge chooses to engage in constitutional interpretation that involves comparative constitutional analysis, she is choosing some non-U.S. legal material to compare with the U.S. Constitution. In other words, the object of comparison will always be domestic (the U.S. Constitution). However, as noted above, the source of the subject of comparison (that to which the U.S. Constitution is being compared) might originate within the domestic law of a foreign state or among the body of international law. The question then arises: is international law an appropriate body of law to consult when the issue to be resolved by the U.S. court is a domestic constitutional provision? That is to say, if the U.S. justice chooses some decision, for example, of the Canadian Supreme Court interpreting its own constitution as an aid to interpret a similar provision of the U.S. Constitution, the comparison would be of a domestic, albeit foreign, law to another domestic

\textsuperscript{13} Obviously, this is premised on a conclusion that posits that comparative constitutionalism is a practice in which it is appropriate to engage. Were one to reach the opposite conclusion then the conversation would end there.

\textsuperscript{14} Clearly, in theory, there are other repositories of wisdom that could serve as non-U.S. authorities such as philosophical treatises or works of literature, but these sorts of sources, being essentially non-legal, fall outside the scope of this article. Nevertheless, the appropriateness of using non-legal materials (whether domestic or foreign) as sources of persuasive authority to interpret the U.S. constitution and the proposal of a relevant methodology to so do are interesting issues to research.

\textsuperscript{15} This nomenclature is not intended to be a paradox. Rather, by “foreign domestic,” what is meant is that body of law which is the internal law of a foreign country comparable to the domestic laws of the U.S. (state, federal, administrative, statutory, caselaw, etc …)

\textsuperscript{16} Within the definition of international law used herein is contained, to a certain extent, transnational law. Transnational law, a concept still in a state of formation, is generally considered to be the integrated dimension of international and foreign law on the one hand, and domestic law on the other. See Harold Hongju Koh, \textit{The Globalization of Freedom}, 26 YALE J. INT’L L. 305, 306 (2001). Because this article distinguishes between international law and foreign domestic law, I adopt a narrow interpretation of transnational law that I intend as a subset of international law. In other words, transnational law, as used herein, is defined as the legislative and judicial pronouncements of multi-national bodies, which includes the internal organization of the world’s legal regimes.
Prosaically, one could say this would be comparing apples to apples (possibly McIntosh to Red Delicious). But the use of international law, which by definition is not domestic, in this context would be more akin to comparing apples to oranges. And this therefore presents the more intriguing conundrum of whether this comparison is intellectually and legally plausible, given that many scholars, legislators, and judges “treat international law and domestic law as two distinct and separate realms.”

Part II of this Article shows how this important issue has been largely ignored by the current academic debate. It then proposes a systemic way to explore the question that is to contextualize the process of constitutional comparison. Thus, the respective policy motivations of the international system and domestic governance are examined to see whether a reasonable convergence between the two exists which can justify the use of international law within the framework of constitutional interpretation. Part III then takes a look at the normative underpinnings of the international legal system. It does so through a lens consisting of the ethos of the comparative enterprise that is one of shared experience that takes its motivating impulse from Neo-Kantian ideational forces. Part IV examines the various factors behind domestic ordering. It separates domestic democracies from other types of domestic systems because of the inherent unreliability of purpose that underlines the choice of process and substance of the latter. Finally, Part V marries the policy rationales explored in Parts III and IV. It concludes that international law, as a matter of principle, is an appropriate repository in which one can dip to interpret domestic constitutional provisions. However, not all international law is appropriate for this purpose, and this section of the Article explains that only that international law which is born out of policy goals that overlap with those of domestic systems should be used in the context of constitutional interpretation.

What must always be remembered is that never does a promoter of this method of constitutional interpretation advocate the supplanting of local precedent by persuasive authority be it foreign or international. In other words, this is not a search for other forms of mandatory authority to impose on the American people—any assertion by the critics of this enterprise to the contrary is a straw man. Indeed, in the U.S., it will always be U.S. judges, tasked as the primary interpreters of the U.S. Constitution, and consequently the guardians of the rule of law and definers of the contours of rights in the U.S., to employ this methodology under the constraints that bind them as in all other cases. That notwithstanding, one should always bear in mind that immortal wisdom of Justice Cardozo who opined, almost one hundred years ago that “[w]e are

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17 It must be reemphasized that the premise is based on an acceptance that consultation to foreign authorities has a role to play in U.S. constitutional interpretation.
19 Thomas Cottier, Multilayered Governance, Pluralism, and Moral Conflict, 16 IND. J. GLOBAL LEGAL STUD. 647, 648 (2009); see also Bradley, supra note 12, at 59 (“‘Constitutionalist’ or ‘revisionist’ scholars … distinguish between the international and domestic legal systems”). Others have noted how the separation of international law and domestic law is artificial and how many in government go out of their way to claim that international law does not effect domestic governance. See Thomas Cottier & Krista Nadakavukaren Schefer, The Relationship Between World Trade Organization Law, National and Regional Law, 1 J. INT’L ECON. L. 83, 120 (1998).
not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.”

II. THE DILEMMA CAST

As stated in the introduction, the international law dilemma within the context of constitutional interpretation has been largely ignored by the academy. Nevertheless, this dilemma has not gone completely unnoticed. Some scholars writing on the general topic of comparative constitutionalism distinguish between international law and foreign law (meant as the domestic law of a non-U.S. country). For example, Eric Posner and Cass Sunstein tangentially address the issue within the context of presenting a theoretical basis for the use of non-U.S. persuasive authority. They note that “the literature has so far not made much of [the] differences,” between foreign domestic sources and international law, and “where it has, most authors have treated international law as deserving of the same consultation that foreign national law deserves.” They illustrate their point by specifying that the Lawrence decision “did not cite ‘foreign law’ in the sense of a decision of a foreign national court interpreting a foreign statute or constitution,” but rather “it cited international law, in the sense of an international court interpreting an international treaty.” However, after correctly identifying the dilemma, Posner and Sunstein offer a summary conclusion that “the case for relying on international law is trickier than the case for relying on foreign law” without much detail.

22 See Posner and Sunstein, supra note 6, at 164-168 (positing that the Condorcet Jury Theorem forms a sound theoretical basis for a defense of the comparative constitutional practice).
23 Id., at 165.
24 Id., (emphasis in original, footnote omitted).
25 See id. Others have also noted that the brouhaha about comparative analysis within the confines of constitutional interpretation “has been confused by the conflation of international law and foreign law sources and by a lack of careful distinction between various sources of international law,” and that these two sources, being “two very different types of law,” should be conceptually separated in the academic discourse concerning constitutional interpretation involving comparative analysis. See Cindy G. Buys, Burying Our Constitution in the Sand? Evaluating the Ostrich Response to the Use of International and Foreign Law in U.S. Constitutional Interpretation, 21 BYU J. PUB. L. 1, 1-7 (2007) (correctly identifying the issue presented in this Article but then following it up by the usual arguments in favor of comparative analysis in general rather than a comprehensive normative discussion pertaining to the separation of foreign domestic law from international law in this context). See also Justice Julia Laffranque, Judicial Borrowing: International and Comparative Law as Non-Binding Tools of Domestic Legal Adjudication with Particular Reference to Estonia, 42 INT’L LAW 1287, 1289 (2008) (“A distinction must be made between borrowing of international … law (international law as tool of domestic adjudication); foreign (comparative law as tool of domestic adjudication)”); Vlad F. Perju, The Puzzling Parameters of the Foreign Law Debate, 2007 UTAH L. REV. 167, 170 (urging “to keep in mind … the distinction between
Nor is the dilemma totally ignored abroad. Indeed, the differentiation between foreign (domestic) law and international law as different sources of authority is enshrined into the South African Constitution which directs that all courts within that state which are tasked with interpreting their own Bill of Rights, “must consider international law” and “may consider foreign law.” Thus, the judicial canon of constitutional interpretation in that country directs the use of international law in all instances when such materials are available and germane to a question of interpretation of their Bill of Rights, but leaves the discretion to the court to employ that same methodology when using foreign domestic law. Justices from other Supreme Courts around the world have similarly commented on the difference between the two sources of law when used as an aid to constitutional interpretation as well as noting how this difference plays out in actual decisions of such foreign Supreme Courts. It is noteworthy that in all these situations from abroad, international law is never considered as part of the “foreign” category unlike here in the U.S. where the nomenclature “foreign” is often applied to include international law. This is ironic, and somewhat of a misnomer on part of those employing the term “foreign” in the U.S. to include international law because international law is technically not “foreign” at all, but rather it is part of U.S. law and thus easily distinguishable from true foreign law. Indeed, international law is formed through consistent and persistent input by the U.S. and therefore, in lots of respects, mirrors the domestic values of the U.S.

The same strain of thought that opposes comparative constitutionalism outright seems to be responsible for the conflation of international sources and foreign domestic sources as subjects for constitutional interpretation. This mindset is grounded in the outdated notion of the Westphalian system which views, essentially, nation states as the sole subjects of international law and ignores the developments in international law over the last sixty years and in particular the increasingly globalized and interdependent world. In fact, it is hard to deny that many domestic laws, including the interpretations of domestic constitutions, have been increasingly inspired and influenced by international law, or, at the very least, international norms which have not yet acquired the force of law.

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28 Laffranque, supra note 25, at 1296, n. 25 & 26 (specifying cases where the Supreme Court of Estonia has used private international law and public international law in support of its judgments).
29 See Transformations of the State? 6 (Stephan Leibfried & Michael Zurn eds. 2005).
30 See Daniel Thuerer, Kosmopolitiches Staatsrecht 3-40 (2005). Although some argue against constructing constitutional theories of international law by referencing comparative principles, it does not follow that constitutional interpretation through comparative principles cannot benefit from an exploration of the policy goals behind domestic law (as mostly embodied by constitutions) and international law. See Bardo Fassbender, “We the Peoples of the United Nations”: Constituent Power
Nevertheless, there can be little argument with the statement that domestic legal regimes are set up and operate differently from the international legal system as a whole. There is a clearer coherence to the domestic process then there is in the international one. Moreover, at least on the domestic side, the goal of integration between the international system and internal process is usually far off as “statutory rules enacted by a national legislature are rarely enacted with an eye to international … conduct.” But if this were the beginning and the end of the argument, as many skeptics of the comparative enterprise would have it, it certainly would leave a very intellectually shallow reason for ignoring the whole repository of international law that potentially can serve as an illuminating source of persuasive authority for constitutional interpretation. In other words, the argument would go something like “it’s different because it’s different,” and such differences cannot be reconciled. Most comparative constitutionalists would probably agree with the former sentiment but strongly disagree with the latter.

To resolve this dilemma then, one of the primary issues that the constitutional comparativist must answer is to decide whether the subject selected for comparison must be the fruit itself of a constitutional system. In other words, if the object of comparison is by definition a constitutional provision, does it necessarily follow that what it is being compared to also be taken from an equivalent regime? If one would answer that question in the affirmative then unless one subscribes to a notion that international law already operates under a constitutional organization then it would seem that the comparative constitutionalist’s options are rather limited vis-à-vis international law. If the current international law system could be defined as constitutional, then that may be a vehicle for giving international law more gravitas, and might also lead to an emerging consensus that would make international law superior to domestic law. But what if such a system is merely the product of the normative aspirations of internationalists at best, or a figment of their imagination at worst? Are constitutional comparativists then left out in the cold with respect to using any international law source as a basis for constitutional interpretation?

Unfortunately, in an attempt to answer these questions, no help can come from the U.S. Supreme Court, which has adopted no methodology regarding the selection of sources for constitutional interpretation.

and Constitutional Form in International Law, in THE PARADOX OF CONSTITUTIONALISM 269, 269 (Martin Loughlin & Neil Walker eds., 2007).
32 Of course whether international law currently operates under a constitutional system is a matter of considerable debate in the academy. Views range the gamut from the claim that a constitutional order is already present exemplified by documents such as the UN Charter (see e.g., Bardo Fassbender, The United Nations Charter as Constitution of the International Community, 36 COLUM. J. TRANSNAT’L L. 529 (1998)), to the observation that an international constitutional order is in the process of emerging (see e.g., Erika de Wet, The International Constitutional Order, 55 INT’L & COMP. L.Q. 51 (2006)), to normative claims that such a constitutional ordering is the desirable structure for the international system. See Anne Peters, Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures, 19 LEIDEN J. INT’L L. 579, 582 (2006).
33 See Laurence R. Helfer, Constitutional Analogies in the International Legal System, 37 LOY. L. REV. 193, 204 (2003) (noting that the WTO settlement dispute system does not resemble a traditional constitutional regime).
comparative review within the framework of constitutional interpretation and has never
differentiated, in this context, between international and foreign domestic law. Indeed, the U.S.
Supreme Court’s “approach envisions no interaction among multiple sources of law, no interplay
among multiple pronouncers of law, and no accommodation to the multiple interests at stake.”
A review of those multiple interests, interplays, and interactions is what is called for and thus any
answer to whether international law is an appropriate body of law to serve as persuasive
authority within the framework of constitutional interpretation must scrutinize the systems from
which these bodies of law are generated. The scrutiny should take into precise account the
motivating force behind the legal enactments, the process by which this generation occurs, and
the context in which each pronouncement takes place. Only by understanding both the
theoretical and practical background behind the policy groundings of both domestic and
international law can the constitutional comparativist “be cautious about borrowing lessons of
legitimacy from one system to apply to another,” and determine whether the international
system is suited to serve as a body of law which can be the subject of comparison for
constitutional interpretation.

III. THE GOALS OF MODERN INTERNATIONAL LAW

Comparative constitutionalism is the judicial link between one source of law and another,
i.e., the comparing to the compared. As noted above, from the point a view of a specific judicial
body, such as the U.S. Supreme Court, the compared object is always going to be the same, that
being the U.S. Constitution. However, for the purposes of this article, the subject of comparison
will always be either a foreign domestic source of law or an international source of law. This
can be best illustrated with the following algebraic equation: \( X_a \leftrightarrow X_b, X_a \leftrightarrow Y \)
where \( X \) is domestic law, \( a \) and \( b \) are different nation states, and \( Y \) is international law. The first step into
resolving the international law dilemma within the context of constitutional interpretation is to
attempt to define the parameters of \( X \) and \( Y \) to see whether there is, at least in part, a cognitive
consonance between the two major variables. It would seem appropriate to begin by defining
the \( Y \) parameter in that the nature of the dilemma lies in the supposed differences between
international law and domestic law.

Constructing a dialogical account of the goals of international law is no easy task. From
its inception, scholars, politicians and judges have held divergent opinions as to what such goals
actually are and the contemporary embodiment of these old discrepancies still survives today.
Even within the two academic disciplines (international relations and international law) that
study this area there is considerable disagreement. For example, “[t]he realist, liberal, and
constructivist schools in international relations disagree as to whether international rules and
their effects can be explained by the pursuit of national interests of states or whether internal
dynamics of international organizations and regimes limit and even hurt national interests.”
The different schools of thought within the international law sphere are similarly split.

34 Paul Schiff Berman, *Federalism and International Law Through the Lens of Legal Pluralism*, 73 Mo.
35 Margaret E. McGuiness, *Federalism and Horizontality in International Human Rights*, 73 Mo. L. REV.
1265, 1277 (2008).
36 Anne Peters & Klaus Armingeon, *Introduction—Global Constitutionalism from an Interdisciplinary
Perspective*, 16 IND. J. GLOBAL LEGAL STUD. 385, 386 (2009).
International structures have certainly taken it upon themselves to pursue lofty goals.\(^{37}\) However, over time, these goals have shifted significantly both in scope and in breadth. The scope of international law has moved from rules almost solely devoted to the relationships among nation states, to rules pertaining to the way countries treat their own subjects. Indeed, “[t]he development of international human rights law has been one of the most significant projects of the last sixty years.”\(^{38}\) The breadth of international law has moved from rules concerning only a selected amount of subject matters (such as diplomatic relations), to rules encompassing a far more varied range of topics (such as environmental protection, intellectual property, global trade, etc …)

In the context of constitutional interpretation, if international law is to have any role at all, it must share the ethos of those domestic regimes that seek out its materials, and contain sufficient policy overlap with domestic principles to be able to justify the plausibility of those cross-system comparisons which will take place. Some have suggested that this search is bound to be fruitless. For example, Roger Alford posits that “[i]nternational law functions best as a bracketed discipline that recognizes its own limits.”\(^{39}\) Although this truism can be easily applied to every set of laws, be they domestic, administrative, legislative, or otherwise, it does contain an important sentiment which is that each body of rules needs to be acutely aware of what policies it serves. Thus, for the global constitutional comparative enterprise to be effective in its use of international law, its participants must be aware of common legal and social problems embodied by the domestic and international systems respectively and attempt to resolve these issues by creating an organized system of cross-referencing and collaborative networks. Within this context, “international law is neither binding law, nor merely fodder for string cities,” but instrumental to finding a system of pluralist legal process.\(^{40}\)

The goals of international law cannot just share a policy overlap with those goals of the nations that seek it for comparative constitutional purposes, but they also must be congruent with the goals of the comparative enterprise itself. Indeed, this form of constitutional interpretation does not happen in a normative vacuum, but rather reflects a horizontal ethical bias that favors cross-border comparison. From this standpoint, constitutional interpretation via comparative reference to international law can be said to be part of the modern embodiment of Emmanuel Kant’s concept of international law, which was to be premised on a functional notion of ensuring a perpetual global state of peace. Thus, comparative analysis in this context “furthers the globalization of human rights, helps solve problems that various courts around the world might encounter, creates a coordinating transnational legal system, fosters judicial dialogue, expands


\(^{38}\) Beth Simmons, *Civil Rights in International Law: Compliance with Aspects of the “International Bill of Rights,”* 16 IND. J. GLOBAL LEGAL STUD. 437, 478 (2009).


horizons, enhances the self-awareness of participating nations, and increases the global influence of those countries which choose to engage in it."\textsuperscript{41} It is through this neo-Kantian lens, captured by contemporary ideational and liberal international theoretical underpinnings, which the goals of international law are explored below.

A. Prevention of Conflict

Modern international law was essentially born out of the ashes and devastation reeked by WWII. The unspeakable horrors unleashed by this conflict created a paradigm shift which created a collective need to reform those mechanisms that had failed to prevent the global conflagration from happening. That collective need was initially met by the formation of an umbrella organization that would act as the focal point for international norm creation—the United Nations (UN). Among the founding principles of the UN were “the desire for peace, the quest for justice, respect for the dignity of the person, humanitarian cooperation and assistance … [and to] express the just aspirations of the human spirit.”\textsuperscript{42} But these lofty goals were never supposed to be mere rhetoric but were intended to be translated into a system comprising the promulgation of rules backed up by coercive forces to ensure compliance. The contemplated targets of this set of rules were nation-states.

In light of this particular genesis, international law, at its core, is to be considered the background law of coexistence.\textsuperscript{43} Under this reading, the present international system is conceptually designed to prevent the worst Hobbesian tendencies that states may exhibit from time to time and therefore it is not merely an ordering arrangement of what exists, but rather a regime which is normatively advantageous.\textsuperscript{44} In sum, the paramount goal of international law is one that is meant to ensure the “safeguarding [of] international peace, security and justice in relations between States.”\textsuperscript{45}

The question then must arise as to how international law can position itself to create these rules that might enable it to act as our terrestrial version of the Jedi—the perennial guardians of universal peace. Some ways seem to be rather straightforward: get the UN to simply pronounce through its rule-making process global laws that prohibit the use of force. And to be sure, the UN Charter contains a ban on the use of military force as a form of resolution of conflict between quarreling nations. Moreover, the UN Security Council is tasked to decide whether a nation has acted in a way that threatens the overall goal of the UN and international law to

\textsuperscript{42} Pope Benedict XVI, Address of Benedict XVI to the Members of the UN General Assembly ¶ 1 (Apr. 18, 2008) (also stating that the UN is “charged with the responsibility of promoting peace and good will throughout the earth”), at ¶ 14.
\textsuperscript{45} Tomuschat, supra note 43, at 23; see also McGuiness, supra note 35, at 1273 (noting that international law is designed to “promot[e] peace and security.”)
maintain peace and security around the world.\textsuperscript{46} Indeed, the prohibition of armed conflict as a legitimate way of resolving disputes between nation states has long been a “central pillar” of international law.\textsuperscript{47} Related to this central pillar are various international treaties and conventions which have been enacted and ratified by the vast majority of nations such as the Convention on the Prevention and Punishment of Genocide,\textsuperscript{48} and the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.\textsuperscript{49} One can argue about the relative success that the UN and international law have had in implementing this goal, but it is undeniable that since its creation, there have not been any worldwide wars.

But the role that international law has in protecting the peace takes on more subtle tones than a mere proscription on armed conflict as an acceptable means of resolving cross-border disputes. In fact, acts by the international community that exemplify this goal of international law do not solely relate to the modern use of force doctrine. For example, back in 1977 the U.N Security Council opined that South Africa’s apartheid regime, a matter mostly internal to South Africa alone, constituted a threat to international peace under Chapter VII of the U.N. Charter.\textsuperscript{50} Thus, the underlying thrust of this goal of international law ceased to be merely a state-to-state proposition, but developed into a system of rules that permitted penetration within the confines of a single state.

Ironically, rules that serve this particular goal of international law have morphed and have taken contemporary shape developing into certain rules pertaining to the use of force against “rogue states.” These particular rules have been embraced as public goods even by those skeptical about the overall reach and pervasiveness of contemporary international law.\textsuperscript{51} The recent international intervention in the war in Kosovo almost certainly saved thousands of lives and was only possible in light of the stature of international law on the prevention of conflict. In fact, this goal of international law has been so internalized that “no respectable philosopher or lawyer” would argue that the international community had no right to interfere with an impending or ongoing breach of the peace merely on the ground that no other state was involved.\textsuperscript{52} Indeed, the goal of preservation of world peace “has been a strong antidote to realist resignation in the building of nation-states and international law.”\textsuperscript{53}

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\item See e.g. UN Security Council, Res. 1718 (Oct 14, 2006) (resolving that nuclear tests undertaking by the People’s Republic of Korea constituted a threat to global peace and security, and thus authorizing a whole set of sanctions to counteract the same).
\item See McGuiness, supra note 35, at 1276.
\item Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65.
\item Cottier, supra note 19, at 652.
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B. Implementation of Human Rights

Contrary to orthodox belief, human rights were a concern, albeit a small one, of international law even at its inception. In fact, the Treaty of Westphalia contained provisions protecting, for example, the freedom of worship for religious minorities. Nevertheless, under most circumstances, international law used not to deal with the relations between a state and its citizens, but that changed after WWII. Following the devastating treatment of people evidenced in the Holocaust, there emerged a general “recognition of the individual as the ultimate subject of modern international law by acknowledgment of fundamental rights.” As such, it would not be a stretch to say that the protection of human rights through the promulgation of international standards of behavior forms one of the normative pillars of international law.

Indeed, all UN members, through their accession to the UN Charter as a condition of membership, are tasked with the duty to respect and protect basic human rights. The former Secretary General of the United Nations, Kofi Annan, has made it clear that the very fact of membership of the UN is an acknowledgment that a country undertakes to carry out the central missions of international law being the protection of the welfare of its own citizens. Annan succinctly notes that this undertaking is part of the obligations that each state owes to the wider international community of nations.

The focus of modern international law on the delineation and implementation of universal human rights stems from an understanding that certain rights are so fundamental that they exist on a plane which is above the law and independent of it. In other words, these rights are “conceived as reflections of nonlegal principles that have normative force independent of their embodiment in law, or even superior to the positive legal system.” This ideal is the modern realization of Kant’s concept of international law as the institutor of perpetual peace. The ideational Kantian goal of ensuring perpetual peace that is certainly embodied in the ur-goal of international law described above, can also be said to hold strong sway when it comes to the protection of human rights. The universalism of these rights (and the growing acknowledgment

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55 Karolina Milewicz, Emerging Patterns of Global Constitutionalization: Toward a Conceptual Framework, 16 IND. J. GLOBAL LEGAL STUD. 413, 427 (2009); see also Anne Peters, The Merits of Global Constitutionalism, 16 IND. J. GLOBAL LEG. STUD. 397, 399 (2009) (“The ongoing process of humanizing sovereignty is the cornerstone of the current transformation of international law into a system centered on individuals”); Tomuschat, supra note 43, at 23 (saying that international law serves the purpose of safeguarding “human rights … domestically inside States for the benefit of human beings, who, in substance, are the ultimate addresses of international law.”)
59 See id.
61 See Part II, section A, part i, supra.
thereof), which serves as the background motivation for their protection and for the normative justification which allows international law to breach within domestic borders, fits in with the Kantian view that it is this endemic universality which breaches any notion of national border.\textsuperscript{62}

The Universal Declaration of Human Rights\textsuperscript{63} and its two corollaries, the International Covenant of Civil and Political Rights\textsuperscript{64} and the International Covenant for Economic, Social and Cultural Rights \textsuperscript{65} are the ultimate expression of the international law goal of protecting human rights across the globe.\textsuperscript{66} Similarly, multilateral treaties such as the Convention on the Prevention and Punishment of Genocide, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,\textsuperscript{67} also represent the crystallizing into substance of the international law policy that seeks to protect universal human rights.\textsuperscript{68} Not all of these agreements, conventions, and treaties have the same status within international law in that some were born as binding authority, others have only become binding because of the customary law process, while others still are purely statements of intention. Nevertheless, their status as international law of some sorts is beyond reproach and therefore this whole body of law must be considered when deciding whether it is, as a whole, appropriate material for comparative

\textsuperscript{62} See e.g. Jurgen Habermas, \textit{Kant’s Idea of Perpetual Peace, with the Benefit of Two Hundred Years’ Hind sight, in PERPETUAL PEACE: ESSAYS ON KANT’S COSMOPOLITAN IDEAL} 113 (James Bohman & Matthias Lutz-Bachmann eds., 1997); see also Costas Douzinas, \textit{The End(s) of Human Rights}, 26 MELB. U. L. REV. 445, 451 (2002).


\textsuperscript{64} International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966). The most notable rights enshrined by this document are: life, prohibition of torture and slavery, security, right to a fair trial, freedom of religious belief and association, and equality. See \textit{id.}, art. 7-27.


\textsuperscript{66} These agreements and statements are often referred to as the International Bill of Rights. See Louis Henkin, \textit{Preface to THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS}, at ix, ix (Louis Henkin ed., 1981); see also e.g. Karel Vasak, \textit{A 30-year Struggle}, UNESCO COUR., Nov. 1977, at 29 (identifying three generations of international human rights modeled on the French motto liberty, equality, and brotherhood being civil and political (first-liberty), economic, social and cultural (second-equality), and solidarity (third-brotherhood)). Other more regional examples include the European Convention on Human Rights now incorporated within the Lisbon Treaty as interpreted by the European Court of Human Rights.

\textsuperscript{67} Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, 1465 U.N.T.S. 85.

\textsuperscript{68} Moreover, the protection of universal human rights often takes expression through various treaties which target the protection of different minorities such as the Convention on the Rights of the Child (see Convention on the Rights of a Child, G.A. Res. 44/25, arts. 14, 15, 40, U.N. Doc. A/44/49 (Nov. 20, 1989), the Convention on the Elimination of all Forms of Racial Discrimination (see International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), art. 5, U.N. Doc. A/6014 (Dec. 21, 1965)), and the Convention for the Elimination of Discrimination Against Women. It is noteworthy that, notwithstanding the perception that the U.S. views international law and its goals askance, actually the U.S. was part of the impetus which led to the genesis of these agreements and treaties, and was also an active participant in the drafting of all of the above documents.
constitutional interpretation. Thus, even though these treaties have been implemented differently with consequent varying degree of success, they all derive from a core-shared value of promoting fundamental freedoms throughout the globe.⁶⁹

But this goal of international law was not left merely to declarations and treaties, or the rhetorical deliberations of monitoring international bodies. Rather, the international system provides for dispute resolution mechanisms for cases brought under the relevant human rights regimes such as the International Court of Justice and the Inter-American Court of Human Rights. Other enforcement mechanisms also exist to carry out international law’s goal of protecting human rights around the world. For example, specially designated international monitors or inspectors are tasked by official human rights committees such as the Security Council or the UN Human Rights Council to report back to the sending bodies which can then issue reports concerning compliance with international law rules.⁷⁰ The creation of the International Criminal Court (“ICC”) is also part of this movement which provides for prosecutions of individual violators of international human rights agreements should the accused’s home countries be unable or unwilling to do so themselves.⁷¹ Humanitarian intervention is a practice that realizes international law’s goal of protecting human rights too. The rationale behind this is that there is no moral weight given to a nation’s claim of sovereignty breach when individuals’ are having their human rights abused within the confines of that nation’s borders. In these situations, intervention is not only accepted as being part of international law, but is encouraged by some.⁷² Indeed, international law was intended to supplement the rather ineffective attempts by different nation states around the world to implement laws that provided either for universal criminal jurisdiction or for venues to pursue civil damage awards against alleged violators of human rights for crimes which occurred abroad.⁷³

The establishment of a core set of human values which are to be considered inviolable has been so successful, at least on the rhetorical front, that no individual or nation seriously argues against them. Even regimes that are known for their spotty human rights record do not dispute the right to life, for example, and do not claim the right to commit genocide or torture (even if they surreptitiously implement these odious practices). Indeed, the price paid for flagrant and wanton disregard for basic human rights as state practice, usually exacts a penalty from the international community that can range from sanctions, to humanitarian intervention, to invasion.⁷⁴ Similarly, advancing global justice is a corollary goal to the delineation and protection of fundamental human rights. This goal of international law has also seemingly

⁷⁰ See e.g. Concluding Observations of the Human Rights Committee, United States of America, UN Doc A/50/40, para 279 (concluding that the U.S. stance on allowing capital punishment for individuals who committed their crimes under the age of 18 was against the purpose of the ICCPR).
⁷² See PETER SINGER, ONE WORLD148-49 (Yale 2002).
⁷³ The U.S. Alien Tort Statute was one of such attempts.
⁷⁴ The international community’s reaction to the situations in Apartheid-era South Africa, the current crisis in Darfur, and the war in the Balkans in the early nineties are examples of consequences exacted on countries as a result of their state practice of denying basic human rights.
reached universal acceptance at least in theory (judging by the number of nations who claim they support the protection of fundamental human rights).\textsuperscript{75} Indeed, the regulation of universal human rights seems to be a topic to which international law, with its global-local ethos is ideally suited. These are notions of utmost importance for the comparative constitutional enterprise which seeks, like international law, the “word made flesh,” being the crystallization of symbolic aspirations into substantive legal rules.

It would be remiss not to note that this goal of international law is constantly contested in many international fora by competing claims of universality\textsuperscript{76} as to certain rights falling under this umbrella and by claims of the legitimacy of cultural exceptions to these norms. These sore spots for the international human rights project should not overshadow the great progress that this neo-Kantian goal has achieved over the last half century. In other words, commentators and nation states might argue as to what these universal rights are or should be, but the argument about the fact of whether that there are such things as universal human rights has largely ceased—for that reasons alone, the international law of universal human rights can be said to be extremely successful.

In sum, the gravitational center of international law today is to set universal standards of state (and to a lesser extent private) behavior pertaining to fundamental human rights.\textsuperscript{77} The advocacy of institutionalizing international human rights standards is seemingly the next step in the evolution of international law as the supreme protector of civil rights around the world. This would make individuals full participants in international politics and provide a decisive check against the coercive power of specific governments within their own territory. Constitutional interpretation that relies on pronouncements pertaining to this area of international law appears to be a vehicle that could efficiently channel this goal of international law.

C. Delineation and Adjudication of International Relations

One of the key modern facets of international law is to provide an institutional and organizational framework for relations between different states.\textsuperscript{78} “The principle of the rule of law empirically refers to relations between nation-states, and thus implies that international law is a regulatory instrument [designed for] the regulation of inter-state relations.”\textsuperscript{79} This particular goal of international law is rooted in the concept of cosmopolitanism which is a liberal doctrine.

\textsuperscript{75} Scholars often complain about the U.S.’s somewhat ambivalent attitude towards this aspect of international law by noting that the American tradition of exceptionalism has ill-served the goal of global protection of human rights. See e.g. Harold Hongju Koh, On American Exceptionalism, 55 STAN. L. REV. 1479 (2003); see also PHILLIE SANDS, LAWLESS WORLD: AMERICA AND THE MAKING AND BREAKING OF GLOBAL RULES FROM FDR’S ATLANTIC CHARTER TO GEORGE W. BUSH’S ILLEGAL WARE (2005).

\textsuperscript{76} See Part II, section b, subpart ii infra.

\textsuperscript{77} See Margaret E. McGuiness, Exploring the Limits of International Human Rights Law, 34 GA. J. INT’L & COMP. L. 393, 401-02 (2006); see also McGuiness, supra note 35, at 1275 (the international system “is centrally concerned with achieving universal state compliance with pre-agreed categories of political, social and economic rights.”)


\textsuperscript{79} Milewicz, supra note 55, at 426-27.
premised on the dispensation of equal justice among the participants in international relations. This goal fosters cooperation among nations. It serves the responsibility to protect negotiated and customary rights of nations against the contravention of other nations. Thus, “international responsibility may fulfill an important role in maintaining the order of the international system by reinforcing the basic structure of sovereign equality” which in turn ensures “the protection of the integrity of the system.”

The clearest examples of this goal of international law are the Vienna Convention on Consular Relations, the Vienna Convention on Diplomatic Relations, and the Vienna Convention on the Law of Treaties. Among the many obligations outlined in the first of these treaties is the one that requires that foreign nationals arrested by a signatory nation be allowed to contact their own consulate that can provide them with assistance. Should there be violations by a signatory nation, the convention entrusts the International Court of Justice with jurisdiction to resolve any disputes that might arise from such a contravention. The third treaty embodies some of the most important goals of international law, which can be synthesized by the famous Rodney King truism “can’t we just all get along?” In fact, the Vienna Convention on the Law of Treaties requires settling “disputes concerning treaties, like other international disputes … in conformity with the principles of justice and international law,” which includes “universal respect for, and observance of, human rights and fundamental freedoms for all.” The UN Security Council requirement that countries enact antiterrorism legislation also falls into this policy category, as does the treaty regime created by the World Trading Organization (“WTO”).

The Supreme Court has implicitly recognized this important goal of international law by crafting several judicial doctrines to give it effect. For example, the act of state doctrine was designed by the U.S. Supreme Court to preclude its own intervention in matters in which a foreign government has acted so as to not interfere with the prerogatives of interstate relations properly left to the executive branch. Similarly, the Court has also held the that the U.S.

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80 See e.g. CHARLES BEITZ, POLITICAL THEORY AND INTERNATIONAL RELATIONS 127-61 (1979).
87 See Vienna Convention on Consular Relations art. 36. This was the article that was the center of a dispute between the United States and various other countries because of its failure to abide by it in cases where the criminal defendant was then given the death penalty and, in some instances, executed. See Medellin v. Texas, 128 S. Ct. 1346 (2008).
88 See Optional Protocol Concerning the Compulsory Settlement of Disputes, Vienna Convention on Consular Relations.
Constitution contains a foreign affairs preemption doctrine that precludes any interference by the states in pertinent decisions and rules on the matter taken by the federal government.  

One consequence of this goal of international is that it does not give rise to any substantive rights that can be exercised by individuals as opposed to nations. Thus, for example, individuals are not granted standing under the WTO legal regime (which resolves disputes arising from the trade agreement), this field being exclusively the prerogative of states that are solely bound by the rulings. The effect of this is to dissipate the force of any such rulings that tend not to be absorbed at the domestic level thus limiting the impact of WTO jurisprudence. It could be that such is the intended reach of this goal of international law, but that seems at the very least, debatable. A possible consequence of this apparent weakness of international law is that “the settlement of international disputes is increasingly legalized and juridified through the establishment of international courts and tribunals with quasi-compulsory jurisdiction.”

Indeed, the failure of nation states to comply with their duties under relevant treaties often gives rise, through operation of the treaties themselves, or by application of customary norms, to dispute resolution by apposite supranational adjudicatory bodies. Such procedures can find a forum within a treaty-agreed consented jurisdiction such as the ICJ, which under international law, does not possess any particular power to enforce treaties between nations, however, it can be, and is regularly, called upon to resolve and enforce treaty disputes.

There is also a normative conceptual element to this goal of international law that is to legalize international relations so that they are wrested away from the continuous struggle for power and self-interest that is said to infect the whole international relations regime. Thus, scholars are actively pursuing a project that seeks to transform the structure of international relations into one that more resembles the traditional operation of law.

D. Delineation and Adjudication of Individual Cross-Border Disputes

The delineation and adjudication of individual cross-border disputes can be said to be the private counterpart to international law’s goal of regulating international relations between states described above that is quintessentially a public function. This goal of international law stems from the realization that “[i]nterrelations among multiple populations across territorial boundaries have existed for centuries,” but those interrelations have proliferated and multiplied in the latter half of the twentieth century and today, “given the pervasiveness of the ideology of market capitalism, the speed of commodity, capital, and personal movement, the ubiquity of

90 See e.g. Am. Ins. Ass’n v. Garamendi, 539 U.S. 396 (2003) (nullifying a California law mandating that insurance companies doing business in the state declare any activities in which they participated in Europe during the time of the Holocaust).
91 Peters, supra note 55, at 399.
92 See e.g. HENRY J. STEINER, PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 1087-155 (3d ed. 2008) (referring to such enforcement procedures in the international human rights context).
93 See infra, at II.b.i.
A regulation and adjudicative system governing these interactions is not only desirable, but necessary. As a result of this burgeoning activity, the international community, either preemptively, but most often by playing catch-up, has created treaties and organizations whose role is to regulate and administer the plethora of interstate private relationships. The proliferation of international courts and arbitration tribunals is evidence of action being taken in furtherance of this goal of modern international law. It must be noted that at the core of this goal of international law is the protection of economic rights of those who participate in transnational business transactions which are primarily corporate entities but also, albeit to a much lesser extent, individuals. In this arena, international law gives expression to market-oriented philosophies that are designed to throw down protectionist barriers and redress the inequality of opportunities that exist in the economic activities between people in different countries. Part of this goal is to attract foreign investors and development funds by offering such investments legal protections usually not offered to domestic investors. Thus, this goal of international law is inextricably tied to the promotion of free trade and has seemingly reached global acceptance "as manifested in the universal ratification of relevant multilateral treaties." For example, treaties and arrangements agreed upon as a result of this policy of international law not only safeguard free trade and thus serve a public function but also protect the private rights of those engaged in international transactions. These protections can be transaction-based (such as granting a certain process to resolve disputes arising out of a particular transaction) or subject matter-based (such as delineating the rights and duties for intellectual property matters as does TRIPS).

International law is replete with examples of expressions of this goal of international law which include the formation of the original European Economic Community (EEC) also known as the common market (the precursor to the more encompassing EU), the World Trade Organization (WTO), the General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS), the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, and the Trade Related Aspects of Intellectual Property Rights (TRIPS). A global bankruptcy rule with courts of competent national jurisdiction acting in concert is also a substantive embodiment of this goal of international law.

Dispute settlement provisions include private commercial arbitration (agreed through contracts which might involve rules provided by the United Nations Commission on International Trade Law (UNCITRAL) or the Court of Arbitration of the International Chamber of Commerce (CAICC)), national courts, Bilateral Investment Treaties (BITs), regional

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95 See Schiff Berman, supra note 34, at 1154 n.21.
98 Peters, supra note 55, at 399.
100 These international agreements advise that the arbitral “tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties,” and “[i]n the absence of such agreement, the
agreements (such as Chapter 11 of the North American Free Trade Agreement (NAFTA)),
regional courts, world courts, and alternate dispute resolution bodies such as those provided by
the WTO. These entities’ rulings, in particular the decisions rendered by the WTO’s Dispute
Settlement Body, “have global ramifications for business operators and citizens.”

The importance of this goal to the functioning of international law is so paramount that even the UN
Security Council sometimes gets involved in dispute resolution by imposing “smart sanctions”
directed at specific businesses or individuals.

An important aspect of this area of international law is its symbiotic interplay with
domestic regimes (something of great importance within the ambit of domestic constitutional
interpretation). Thus, within this goal is the recognition that courts enforce “foreign judgments
even if they would have refused to entertain suit on the original claim on grounds of public
policy.” For example, both the Uniform Foreign Money-Judgments Recognition Act and the
UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards require a U.S.
Court to give effect to a foreign judgment or arbitral award even if the action that gave rise to the
judgment or award could not have taken place in the domestic forum. For the comparative
constitutional enterprise it is interesting to note that global trade and the establishment of the
WTO have, in effect, constructed a quasi-constitutional apparatus. Dispute resolution
mechanisms within many of these treaty regimes, although nascent, have already been described
as successfully implementing the goal of the international community in this area.

E. Lubrication (The Global Comfort Model)

As noted above, Immanuel Kant envisaged a world order in which perpetual peace was
the natural state of affairs to be realized through a global confederation of nations. The
contemporary goal of creating a worldwide functioning system responsible for lubricating the
gears of the global engine fits into this view, it being a response to the reality that a multitude of
human interactions (not solely commercial) occur on an interstate level. In other words, this is
international law in its purest sense—a body of law that seeks to smoothen the regulatory and
legal kinks which per force occur when one is engaged in any activity which has its reach
beyond one’s domestic borders. It could be said that international law in this sense functions as
the law of the world community. This goal owes its genesis to the international law mantra
that wants all constituting nations of the international system to exist in a state of juridic equality.

Tribunal shall apply the law of the Contracting State party to the dispute and such rules of international
law as may be applicable.” Convention on the Settlement of Investment Disputes Between States and

101 Andreas Føllesdal, When Common Interests are not Common: Why the Global Basic Structure should be Democratic, 16 IND. J. GLOBAL LEGAL STUD. 585, 592 (2009).
This allows for the theoretical and actual convergence around a specific norm across a multitude of nations with no preeminence granted to the exploration of which nations have in fact adopted this norm of international comportment. The impetus for this goal of international law might have a normative component but is almost certainly driven by pragmatic factors. These are primarily based around the increased globalization of interactions that find their expression in such things as international trade, Internet-based transactions, and the ease of mobility from one country to another. Indeed, “[m]ore actions of individuals in one nation are likely to affect the welfare of individuals in other nations [and] [i]nternational law offers the possibility of creating coordination mechanisms.”

An early version of the implementation of this goal of international law was the coalescence of most nations around the concept of the international law of piracy. This crime allowed any nation to try and punish pirates even though the crime might not have been committed on that nation’s territory or territorial waters, and even though the victims of that crime were not that nation’s citizens. It was necessary to have such rules on an international level so that travelers and explorers could rely on some system of deterrence while undertaking activities that were inherently perilous. A modern reiteration of these types of rules can be said to be the U.N. Convention on the Law of the Sea, the Convention for the Unification of Certain Rules Relating to International Carriage by Air (the Warsaw Convention), and its modern replacement, the Montreal Convention. Other modern incarnations of this goal have been prompted by the cross-border consumption of products that has inevitably led to hiccups that are not only legal but also practical. Although the enactment of law to smoothen rough edges that crop up as a consequence of these transactions is necessary, some scholars prefer a system of cooperative solutions taken by different national bodies that reflect the commonality of interests involved.

Nevertheless, in today’s global economy countries know that products and services being manufactured or provided within one’s borders are often supplied to a myriad of consumers that are located abroad. As a result, each country has an incentive to externalize the costs of production and distribution onto those located outside their borders. However, this kind of thinking produces a prisoner’s dilemma whereby the typical choice unfettered by any notions of cooperation will produce a multiplicity of nations, each imposing externalities outside its borders. The multiple jumble that would result is most undesirable, thus this goal of international law can be invoked to correct this collective action problem and allow people to obtain these goods and services globally without being overpowered by piling external costs. The global comfort model of international law thus resolves, through rules and regulations promulgated at the supranational level, the persistent problem of cross-border externalities. Often this promulgation comes from international organizations, such as the World Health Organization, the Food and Agriculture Organization, the International Labour Organization, the World Wildlife Fund, the IMF, or the World Bank which function as forums to promote this goal that is premised on the value of cooperation.

108 McGinnis and Somin, supra note 51, at 1182.
110 See Dinwoodie, supra note 31, at 469.
111 See Posner, supra note 52, at 540.
The proliferation of tribunals to adjudicate international disputes either solely between states, or else between states and individuals, can be seen to serve the lubricating goal of international law. These tribunals can be of general competence, specialized jurisdiction, have intercontinental or regional reach, be of a civil or criminal nature, or merely exist on an ad hoc basis for a particular type of claim with a sunset provision taking effect after a certain period of time. Indeed, the supply of public goods regulated by international treaties and agreements has proven very effective as demonstrated by the European integration schemes, at least in respect to trade relationships. Product safety, for example, is clearly an interest that is paramount to international safety that can only be successfully achieved through a high level of coordination within the global polity.

More than some other goals of international law, the lubrication goal relies heavily on implementation by national courts. Cooperative impulses thus form the backbone of the global comfort model which is formed by the numerous international conventions and agreements that direct, or encourage, the signatory nations to implement whatever specifics contained in such documents by domestic legislation—a similar effect is derived by international model laws whose function is to recommend action by national legislatures. This result is viewed as normatively desirable even if just limited to a pragmatic optic seeing that “we should accept [jurisdictional overlaps] as a necessary consequence of the fact that communities cannot be hermetically sealed off from each other.” Indeed, the implementation of common standards arguably makes the world better for everybody.

Finally, the academic and political agenda of global constitutionalism that seeks to identify and propose the adoption of constitutional principles within international law is another way in which the global comfort model is pursued. The creation of a universal norm which views the international legal system as functioning within constitutional parameters would certainly go a long way towards achieving the global comfort advocated by this goal.

F. Creating a Better (or More Viable) Future

Probably the most optimistic view of the role international law is that which will, through its authoritative pronouncements “change legal consciousness over time, affect local debates, empower different local actors, and provide an alternative set of fora in which individuals and coalitions can make their voices heard.” There are certain aspects of human activity that, for their very nature, defy an effective regulation at the domestic level. In these regards national law has to depend on international law to resolve those collection action problems that would prevent the resolution of those issues whose reach is mostly felt outside the confines of a single nation state. To this end, certainly one of the most active endeavors in contemporary international law is the modern environmental movement and its embodiment in the activities of NGOs and their successful exhortation to the international community to pass measures to safeguard the global environment. Academics are trying to sort through the patchwork of international environmental protection enactments to determine whether there is such a thing as an international

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112 Schiff Berman, supra note 34, at 1183.
113 Schiff Berman, supra note 34, at 1150 (citing Paul Schiff Berman, Seeing Beyond the Limits of International Law, 84 TEX. L. REV. 1265, 1295-96 (2006)).
environmental constitution, but regardless, the current thrust of global environmentalism exemplified within international law reveals a policy of common responsibility and solidarity.\textsuperscript{114} Indeed, the goal of slowing down the progress of climate change has become one of the primary concerns of international law, and the new urgency of the matter seems to have convinced a number of players in the international system to give measures intended to reduce humankind’s carbon footprint the force of domestic law. From this point of view, environmental protection is regarded by international law as a public good held by government powers in trust for all people. This creates a vertical relationship between international law and domestic legal regimes.\textsuperscript{115}

There seems to be little debate about the fact that aggregate human economic activity has created climate change and global warming, and because of the inherently unequal economic resources between nations, the activity of those nations with large industrial outputs is having adverse, and sometimes dire, effects on some states which do not contribute to climate change and global warming in any significant amount.\textsuperscript{116} International law seems the only vehicle available for the coordination of this local-global process to resolve this most intractable of problems because no single nation will ever possess sufficient incentive to do it themselves.\textsuperscript{117} McGinnis and Somin illustrate this point thus: “it may be best for all nations … to refrain from overfishing a common body of water [because] this will produce more fish for all of them [b]ut because of collective action problems,” no country would unilaterally limit its own fishing “in the absence of an international norm that limits fishing.”\textsuperscript{118} They conclude that international law is, in theory, a vehicle that can carry this sort of norm into force.\textsuperscript{119}

This is not a new issue seeing that the UN held its first environmental conference in 1972 where it was posited that states had the primary responsibility of finding a solution to this global problem.\textsuperscript{120} This watershed event heralded a new era in international attention paid to the protection of the environment which has substantially reshaped “the landscape of international diplomacy” when environmental matters are concerned.\textsuperscript{121} Indeed, after the 1972 Stockholm meet, the United Nations Environment Programme was set up to implement the recommendations from that and subsequent conferences which were held in Montreal, Rio de Janeiro, Kyoto, and Copenhagen. Even though one may argue about the effectiveness of these conferences in setting up plausible and enforceable global environmental regulation, it is undeniable that the symbolic meaning these conferences represent coupled with the citizen

\textsuperscript{115}See generally \textit{THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT} (David Sloss & Derek Jinks eds., 2009).
\textsuperscript{116}See Howard F. Chang, \textit{An Economic Analysis of Trade Measures to Protect the Global Environment}, 83 GEO. L.J. 2131, 2146 (1995) (advocating the need for international law to come in and regulate environmental issues because no one nation will ever possess the incentive to do it for themselves).
\textsuperscript{117}See e.g. Judith Resnik, \textit{The Internationalization of American Federalism: Missouri and Holland}, 73 MO. L. REV. 1105, 1106-21 (2008) (using American Federalism to illustrate the operation of global-local relationships).
\textsuperscript{118}McGinnis and Somin, \textit{supra} note 51, at 1195.
\textsuperscript{119}Id.
\textsuperscript{121}See CAROLINE THOMAS, \textit{THE ENVIRONMENT IN INTERNATIONAL RELATIONS} 24-26 (1992).
activism that comes with them is of high behavior-influencing importance. Possibly of even greater importance are the less-heralded hundreds of bilateral and multilateral agreements that have been spawned as a result of this global goal of international law concerning all sorts of sustainability issues such as protecting endangered species, reducing the damage to the ozone layer and cleaning-up polluted areas.\textsuperscript{122}

That is not to say that there have not been hiccups in the pursuit of effective international environmental regulation and enforcement. Undeniably, the efforts to produce a binding international treaty to curb climate change has proved elusive and even seemingly less complex issues such as the international moratorium on whaling tend to be more effective in construction than in execution of their mandates.\textsuperscript{123} Nevertheless, it would be incorrect not to regard the pursuit of this goal of international law (especially as pertaining to international environmental law) as anything but a success. Within a short period of time, previously unknown terms such as “global warming,” “climate change,” “carbon footprint,” and “cap and trade” have entered into the daily lexicon and a common thematic among the younger generations is concern for the environment. The legal effect that this push has had on international law is noteworthy, as modern environmental law does not suffer from some of the defects of classic international law in that its goals have coalesced quicker resulting in a swifter process of promulgation, enactment, and amendment. Consequently, constitutive international law principles such as “the duty to prevent transboundary harm, the polluter pays principle, the precautionary principle, the principle of common but differentiated responsibility, and the principle of sustainable development” have now been firmly established in a rather short period of time as important policy goals of the global polity.\textsuperscript{124}

IV. THE GOALS OF DOMESTIC LAW

“We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”\textsuperscript{125}

“We … adopt this Constitution … so as to … establish a society based on democratic values, social justice and fundamental human rights …”\textsuperscript{126}

The next step in resolving the international law dilemma within the context of constitutional interpretation is to define the $X$ parameter to see if there is sufficient cognitive consonance between it and the $Y$ parameter just delineated above. Just a reminder that these

\textsuperscript{122} International organizations such as the World Bank and the International Monetary Fund play a large role here by securing investments for developing nations in such things as infrastructure and human capital. These form of investments usually end up getting repaid because of the increase in productivity that in turn ensures a future of greater stability and higher levels of professional and personal welfare.


\textsuperscript{124} See Bodansky, \textit{supra} note 114, at 579.

\textsuperscript{125} U. S. CONST. preamble

\textsuperscript{126} S. AFR. CONST. 1996 preamble.
variables are taken from the algebraic equation \( Xa \leftrightarrow Xb, Xa \leftrightarrow Y \) where \( X \) is domestic law, \( a \) and \( b \) are different nation states, and \( Y \) is international law.

It as axiomatic that “[d]omestic law is taken to be the paradigm of how a legal system should work.” Thus, one could begin the discussion of the goals of domestic law with a platitudinous, albeit true, abstraction such as the notion that the “fundamental value” which all societies strive to achieve is the protection of human dignity. Moreover, it can also be noted that in the most general sense, this “fundamental value” tends to be embodied in the highest order document of each nation that tends to be the constitution. However, it would be more instructive, given the context of this article, to note that international law grows out of a series of primal values that had previously matured and ripened in the domestic realm for a very long time, sometimes millennia. These values which might have started off as basic social norms and behavioral regularities were concepts such as equality, liberty, justice, fairness, democracy, protection of minorities, checks and balances, and respect for property. Because these basic precepts pre-dated the existence of domestic law, it can be argued that they formed the shape around which the concept of domestic (local) law would then be drawn. In fact Plato described the domestic state as arising “out of the needs of mankind,” implying that such an entity was derived from the aggregation of common personal preferences while Aristotle advised that the pursuit of justice had to be the focal point of any society and that fairness, reason, and equality were all seen as servants of that overarching goal. More generally, “national polities have been a structure through which to develop aspirations (some praiseworthy and others not) for different forms of human exchange and political organization.”

The observation and description of each countries’ founding documents (which in a lot of cases is the constitution) often provides more than a clue as to what the goals of that domestic organization might be. “The fundamental law which determines the manner in which public authority is to be exercised is what forms the constitution of the State.” In other words, the existence of a constitution is a reflection of the concept of constitutionalism that “is a political ideology that consists of various principles and assumptions about the dual nature of the

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129 See gen. K.C. Wheare, Modern Constitutions (2d ed. 1966). H.L.A. Hart describes constitutions as containing primary rules, being those that establish the basic polity and secondary rules, those which recognize, interpret, adjudicate, and change the primary rules. See e.g., H.L.A. Hart, The Concept of Law 100-10 (2d ed. 1994).
130 Plato, The Republic 76 (Benjamin Jowett trans., Airmont Books 1968) (further defining the State as the accumulation of the wants of lots of people). Indeed, “[h]umanity is foundational in a normative sense because states are not ends in themselves, but are composite entities whose justification lies in the fulfillment of public functions needed for human beings to live together in peace and security.” Peters, supra note 66, at 398.
131 See Aristotle, Nicomachean Ethics 122, 142 (Martin Oswald trans., 1999).
individual as a private person and public citizen, the nature of the state, and the nature of the complex set of relationships between the individual and the state.” 134 In some countries, more notably those of recent democratic transition, we have the benefit of documented deliberation which sheds considerable light as to what goals are being pursued in the creation such nations’ foundational documents. So, for example, in South Africa, in light of its Apartheid past, the framers of their Constitution strove to incorporate from other countries those concepts that would enshrine freedom and equality as the cornerstones of the new societal order. 135 The hortatory language of this preamble (as indeed the preamble to the U.S. Constitution) is not merely surplasage—rather, it is expressive in content, declaring substantive components encompassed in the broad concepts of individual rights, liberty and justice. This language is the backdrop, the mirror to which all the more detailed constitutional commitments need to be compared, and within which they need to be squared. But although it is true that the constitutions of different nations look very different, all, to a certain extent, attempt to do the same thing: they set up a structure of institutional governance, they explain how that governance will be implemented, and they delineate the relationship between that governance and the governed. In that sense, all countries are alike and therefore something else must be added to the equation if some separation between the nations is to be observed. This is because, in a sense, constitutional language is more like a scientific theory that then has to be proved or disproved through test and observation. Therefore, a simple statement of intent, ordering, and orientation cannot elucidate more than a certain amount and the practice of the state will actually form the basis of the inquiry.

The analysis of that state practice must lead to the first concession that comparative constitutional interpretation needs to make and that is to acknowledge that even if juridically all states are created equal, in reality, “some are more equal than others.” 136 Or, in the words of Posner and Sunstein, “[s]ome states are ‘better’ than others.” 137 So how does one identify the “better” and distinguish it from the “worse”? Probably the best point of departure for a reply to this question must be an examination of the democratic credentials of the regime whose materials one wishes to drawn upon as a source for constitutional interpretation. This inquiry cannot be superficial, after all, “[a]uthoritarian governments, theological governments, and liberal governments all agree that they should be concerned about improving the well-being of their citizens, even if they agree on little else.” 138 Indeed, as stated above, merely looking to see whether a state claims to look out for the well-being of its citizens would still leave the analysis of the goals of domestic law in the high seas, seeing that even totalitarian regimes would probably claim that such is their aim as well.

Rather, the inquiry must be specific and grounded in empirical evidence on the ground. The comparative enterprise starts from a philosophical premise that states that “a defining feature of law is broad agreement in society on what counts as a legal rule and on what identifiable legal
rules require in concrete cases,” while a “defining feature of the state is that its institutions foster this agreement.”\(^{139}\) The goal of domestic law here is simply to be the sole umpire of any disagreement that might arise as to what the content of a specific legal rule might be.\(^ {140}\) However, that “broad agreement” necessary to the analysis performed within the context of constitutional interpretation cannot be empirically verified in non-democratic regimes because of the large deficit between the content of the law and truth about its application. Thus, one of the driving forces behind the need to separate the goals of liberal democracies from other regimes relates to the distributive impact of laws. Because laws of general applicability are felt by the population at large, those nations that permit their populations to possess the ability to scrutinize laws through such mechanisms as individual liberty protections and regular consultations via a democratic electoral process exist on a different normative plane than those where such liberties are curtailed. It is in this light that the analysis that follows below takes place.

A. Liberal Democracies

Democracies, whose governance depends upon the regular consultation with the body politic, is, for all its imperfections, considered to be the best system for generating the norms with highest indicia of benefit for the public at large.\(^{141}\) From the most basic formulation of normative desirability, democracies are “better” than other forms of governance because they have shown to be less prone to initiate war and to make war amongst themselves.\(^ {142}\) Indeed, from the standpoint of domestic governance, democratic accountability has been described as the sine qua non of legitimacy in that it is the clearest form of government that is able to avoid the problem of imposing unavoidable costs on some for the benefit of others.\(^ {143}\) Unlike a dictatorship, one presupposes that liberal democracies seek to maximize the welfare for the average (median) citizen.\(^ {144}\)

Liberal Democracies are the end result of a long process of experimentation in governance brought about primarily (but certainly not exclusively) by the nation-states of the Western tradition. “In our Western view, only democratic systems advocating the values of liberty, equality and community, deserve the loyalty of the citizens,” and thus “the notions of legitimacy and democratic legitimacy must be considered as interchangeable.”\(^ {145}\) Indeed, even the critics of constitutional interpretation via comparative analysis ground such criticism on the

\(^{139}\) Goldsmith & Levinson, \textit{supra} note 127, at 1801.
\(^{140}\) See \textit{THOMAS HOBBES, LEVIATHAN} 189 (A.R. Waller ed., Cambridge Univ. Press 1935) (1651).
\(^{141}\) See David Estlund, \textit{Beyond Fairness and Deliberation: The Epistemic Dimension of Democratic Authority, in DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS} 173 (James Boehman & William Rehg eds., 1997).
\(^{142}\) See e.g. David A. Lake, \textit{Powerful Pacifists: Democratic States and War}, 86 AM. POL. SCI. REV. 24 (1992) (for the proposition that democracies are less prone to initiate war); \textit{see also} MICHAEL W. DOYLE, \textit{WAYS OF WAR AND PEACE: REALISM, LIBERALISM, AND SOCIALISM} (1997) (for the proposition that democracies rarely if ever make war amongst themselves).
\(^{143}\) See Føllesdal, \textit{supra} note 101, at 589.
\(^{144}\) See ANTHONY DOWNS, \textit{AN ECONOMIC THEORY OF DEMOCRACY} 52-55 (Harper & Row 1957) (explaining that welfare maximization of liberal democracies is centered around the median voter and not the entire population).
The characteristic values espoused by this system of government are both procedural and substantive: 147 on the procedural side there is the reliance on a popular plebiscite every so often (usually a short period of time) to choose those who would be empowered to govern and a system which spreads power across a multitude of institutions each serving as a check on the other, while on the substantive side there is the protection of key rights such as freedom of thought, expression, and speech as well as the assurance of a pluralist equality. All of this is important to the comparative constitutionalist whose analysis has to rely on pronouncements that are the product of a “clear, stable, and transparent” process that assures that such pronouncements represent “predictable decision-making” rather than ad hoc decisions without contextual grounding. 148

From an historical perspective liberal democracies grow out of the desire to create a constitutional make-up as a way of making the sovereign power (usually a monarchy) subject to the law rather than allowing it to exist above the law. It is this overarching principle that led to the concept of separation of powers embodied in so many constitutions. 149 Moreover, the constitution became synonymous with legality and a document (or an accepted custom) 150 through which the actions of the sovereign could be measured to determine whether such actions conformed to the law and also what redress the people might have. 151 In other words, within a liberal democracy, the constitution serves the goals of constituting the polity, organization, circumscribing the limit of government, providing redress from the government, as well as determining rights and moral guidance. 152 In addition, such constitutions also provide a certain unifying and integrating function, seeking to rally the people towards a focal point that might not otherwise be provided in light of multi-cultural forces that pull in divergent directions.

Fundamentally, what sets liberal democracies on a higher plane for the comparativist is such regimes’ devotion to the rule of law. 153 Lon Fuller succinctly summarized the contours of

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147 The bare essence of a democracy is defined in Article 25 of the ICCPR that is meant to ensure the right to vote in periodic elections “by universal and equal suffrage,” in a process held by secret ballot thus guaranteeing “the free expression of the will of the electors.” International Covenant of Civil and Political Rights, art. 25.
149 See Peters & Armingeon, supra note 36, at 388.
150 Constitutions do not have to be necessarily found written down in one place, and can, like customary international law, evolve into hardened rules as a result of custom and practice. See S.E. FINER ET AL., COMPARING CONSTITUTIONS 40 (1995). The British Constitution is one such example.
151 See CARL SCHMITT, LEGALITY AND LEGITIMACY 18 (Jeffrey Seitzer ed. & trans., 2004).
152 See e.g. ANNE PETERS, ELEMENTE EINER THEORIE DER VERFASSUNG EUROPAS 38-92 (2001).
153 This is in contrast to the rule of persons. See ANDRAS SAJO, LIMITING GOVERNMENT: AN INTRODUCTION TO CONSTITUTIONALISM 206 (1999).
the rule of law as requiring rules that are general, publicly enacted, prospective, easy to understand, consistent, feasible, and stable over a period of time.\footnote{See Fuller, supra note 148, at 39.} John Rawls encapsulated the essence of democratic pluralism when he noted that “in a democratic regime political power is regarded as the power of free and equal citizens” exercising political power “in accordance with a constitution … the essentials of which all citizens, as reasonable and rational, can endorse in the light of their common human reason.”\footnote{See Posner and Sunstein, supra note 6, at 153 (citing Jürgen Habermas, Between Facts and Norms: An Author’s Reflections, 76 DENV. U. L. REV. 937, 940-41 (1999)).} The key feature is therefore the fact that the rule of law as stated in their constitution becomes primarily a constraint on the government in a liberal democracy. As stated famously by John Adams, the constitution in a liberal democracy creates “a government of laws, not of men.”\footnote{Mass. Const. art. XXX (1780).}

Free debate is an important component that liberal democracies share with each other and which differentiates them from other system of governance. From a comparative perspective, as a consequence of free debate, “the very fact that very different societies come to the same conclusions increases one’s confidence that the norms are generally universal.”\footnote{See generally Jürgen Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (William Rehg trans., 1996).} The equally important opposite side of this coin is the ingrained right of dissent that exists in democratic constitutional systems.\footnote{The fact that autocracies mimic the processes of liberal democracies goes a long way in establishing how fundamental these processes are—after all, imitation is the best form of flattery. Moreover, the U.N. Charter declares these values as those preferred for national governance.} This right ensures that even those who reach a contrary view of a particular constitutional understanding (such as those who disagree with the very notion of constitutional comparativism) nonetheless obey the outcome of decisions on the assumption that the democratic legitimacy of the decision not only represents a majority of sorts, but also their continued dissent might eventually lead to a shift in majority whereby their understanding becomes the majority. In other words, in a democracy, the choices of the polity are always in a state of flux, albeit a rather slow one.

The competition for votes is also a fundamental aspect of domestic democratic regimes that is an important assurance for the comparative constitutionalist. That is, the delineation of different agendas before the voting public ensures that there is a value judgment as evidenced by the franchise that is reflective of that snapshot of desires which is an election. Thus, the policies which flow from this snapshot cannot be considered happenstance or imposed, and can be depended on both by the citizens responsible for the choice and any outside observer such as a judge performing comparative analysis. Emphasizing the right to vote in regularly scheduled pluralist elections\footnote{The fact that autocracies mimic the processes of liberal democracies goes a long way in establishing how fundamental these processes are—after all, imitation is the best form of flattery. Moreover, the U.N. Charter declares these values as those preferred for national governance.} might sound like such an obvious characteristic of a liberal democracy as being unworthy of note, but the vitality of any governing enterprise is wholly dependent on
dialogue, debate, argument, and the recourse to a majoritarian ethos that this point cannot be understated.\textsuperscript{160}

Of paramount importance to the constitutional comparativist is the fact that in liberal democracies, constitutional review, whether judicial or legislative, is extremely effective in absorbing the evolution of social norms and mores and integrating these within the continuing meaning of specific constitutional provisions. This is a result of liberal democracies’ emphasis on constitutional government giving expression to the political, social, and cultural identity of a nation. This fits in with the view that the constitution in liberal democracies is that set of fundamental commitments that each state gives itself and its population to be adhered to and respected not merely out of a sense of convenience, but out of an internalized sense of moral propriety.

Also, unlike autocracies or theocracies which develop erratically (or not at all) through consideration of preservation and power, or merely the whim of the ruler, it is very likely that in this increasingly globalized world, constitutional developments in one liberal democracy will track those in another. This commonality of development ties directly into comparative constitutional interpretation as one of the mantras of this enterprise is that there be a selection of sources in part premised on the democratic quotient of the process that produced the source.\textsuperscript{161} “It may well be that democracies, because they are democratic, are more likely to incorporate information about what is true.”\textsuperscript{162} The “truth” of a rule, as opposed to a rule that is the product of a haphazard combination of aggregated preferences, is a value that is priceless to the comparative constitutionalist, and democratic rulemaking produces rules that are normatively superior to rules promulgated through other processes because of the universal imprimatur that the democratic rules come with. Democracy in this optic thus represents “a body of truths vouched for by the suffrage of mankind.”\textsuperscript{163}

One must stress the fact that the value placed by constitutional interpretation to consult sources that originate from liberal democracies is not that these regimes will always come up with the same answers to the same problems. In fact, it is the pluralism of thought that is attractive to the comparative enterprise, so long as it is based in process of multiple inputs which owes its genesis to a democratic impulse. The building and interpretation of constitutional norms is supported by this “overlap in the work of democratic polities,” all of which have as a goal the granting of governing authority and the limits of that authority.\textsuperscript{164} Modern constitutions in democracies strive for inclusion of all citizens (even though interpretive preferences will always emerge), and aim to cement the legitimization and limits of the constituted government. The importance of the constitutional understandings given effect by the top interpretative bodies of democratic regimes is to give that same democratic imprimatur on the very constitutional provisions that are being interpreted. Given the commonness of values shared by open and

\textsuperscript{161} See Glensy, supra note 10, at 411-420.
\textsuperscript{162} See Posner and Sunstein, supra note 6, at 159.
\textsuperscript{164} See Resnik, supra note 132, at 46-47.
democratic societies, it seems quite self-evident that it makes sense to look to one’s brethren nations for the best solutions when confronted with a similar problem—if only to confirm, clarify, or cement one’s own solution.

Democracies also convey reliable information about the relative desires of their population in that elections are meant to sort out the more popular from the less popular.\textsuperscript{165} In other words, there is a presumption that democratic rule, over a period of time, will respond to the desires of the population as a whole and implement rules and regulations which are in the best interest of the citizenry.\textsuperscript{166} This check is presumably a result of public accountability nurtured by such values as freedom of thought, assembly, the press, etc … Indeed, some have argued that it is not only reliable information about a particular society that is gleamed from its democratic credentials, but that democracy inhibits the worst inequities apparent in non-democratic nations such as famine and disease as a result of the internalized belief by the elected governments that the lack of provision of the minimum necessities of life will not be tolerated by the voting public.\textsuperscript{167}

Democracies seem to be better able to provide for their citizens than authoritarian regimes. Studies have shown that (with notable exceptions such as Singapore and China), democratic governance is best able to provide for the necessary public goods such as economic growth, employment, and security.\textsuperscript{168} Moreover, it has been noted, that even in the poorest democratic countries, major public disasters such as disease and famine are a rarity, the majority of these catastrophic events seemingly hitting non-democratic states with a beyond-random frequency.\textsuperscript{169} In other words, the average citizens of democracies do better in most senses than their counterparts in other types of regimes.

That is not to say that the only value of a democracy is instrumental to the public good that it produces for its citizens. A lot of scholars have focused on the intrinsic value of a democracy over its non-democratic governance by noting that without an inherent preference for democratic governance that places ultimate power over the governed, those who actually do govern cannot be said to possess any such power to do so.\textsuperscript{170} This also derives from the basic assumption about the concept of justice in liberal democracies that is one of coherence around a basic normative belief in fairness and equality.\textsuperscript{171} When this basic assumption is in dispute or in a state of flux, as it is in autocratic government, no uniformity of application of law can result, and therefore few empirical results can be gleaned for the purposes of comparative analysis. Nevertheless, it is important to take into account the shortfalls of democratic government as well.

\begin{footnotesize}
\begin{enumerate}
\item See Robert E. Goodin, Reflective Democracy 108 (2005).
\item See Charles R. Beitz, Political Equality 113 (1989).
\item See Amartya Sen, Democracy as a Universal Value, J. Democracy, July 1999, at 3, 7-8.
\item See Morton H. Halperin et al., The Democracy Advantage: How Democracies Promote Prosperity and Peace 25-64, 93-134 (2005).
\item See Amartya Sen, Development as Freedom 178 (1999).
\item See e.g. Benjamin Barber, Strong Democracy (1984).
\item See e.g. John Rawls, A Theory of Justice (rev. ed., O.U.P 1999) (1971); see also Cottier, supra note 19, at 654 (“cultural homogeneity and political consensus on basic values as an alleged prerequisite for democracy in mature societies is the result of a long-term historical process and experience”).
\end{enumerate}
\end{footnotesize}
For example, political expediency, which often makes politicians sacrifice the long-term welfare of the body politic for the immediate or medium-term benefit in order to get elected.

Ursula Bentele, in her informative interviews of the justices of the South African Supreme Court, summarizes that for most of the justices on that court, a country whose sources are worthy for comparison must be “an open, democratic society, preferably with a comparable adversarial system of adjudication in which the issues of a case are formulated and debated, and culminate in a reasoned judgment explaining the outcome.”

Probably a good sum up of the reasons constitutional interpretation via comparative analysis should distinguish between democracies and non-democracies is that in a democracy not all means are available to it to reach a result and there are limits imposed upon it by its own electorate as well as unshakable intrinsic core values.

B. Others

One must be careful not to overestimate the role of constitutions in ensuring a democratic form of governance. History is replete with constitutions that either establish authoritarian regimes or else purport to create a democratic form of governance but then include provisions on government checks and balances that are so weak that they end up creating a de facto dictatorship with a constitutional imprimatur. Moreover, constitutions are not necessarily an end point in governance, that zenith that once achieved cannot be lost. Indeed, Miltonian parables are evidenced throughout the world where countries have passed from constitutional democracies to autocracies, oligarchies, or outright dictatorships. It is not uncommon for non-liberal regimes to proclaim the same goals for their governed in their constitutions, as do their democratic counterparts. For example, the Chinese government has tasked itself with the role of maintaining “social harmony,” a concept, in abstract, not too far away from the pursuit of happiness, but its method of implementing that goal is markedly different from what a liberal democracy would do. In other words, no autocracy comes out in favor of despotism or repression, but the reality that transpires is usually one of a highly centralized government accountable to no one other than itself. That is why regimes that are not democratic differ from liberal democracies in that often the governmental goals are at odds with those of the governed. This does not necessarily mean that theocracies or autocracies will always enact abhorrent laws, but only that if a choice exists in which a law can either be the expression of the regime’s will or the expression of popular will, and those choices are incompatible with one another, then the former will usually prevail. This means that the facet largely absent from autocracies is pluralist governance, which is said to be more effective at identifying and proposing solutions to specific issues that continually arise within a nation-state. It is not that autocratic societies lack all pluralist impulses; it is just that the argument within an autocracy would tend to take place in private amongst elements picked by the governing institutions as opposed to the governed.

172 Bentele, supra note 12, at 237 (further revealing that a lot of the justices on the South African Supreme Court found the Canadian Supreme Court to be “far and away [their] favorite source of plunder.”)

173 Interestingly, certain constitutional courts were able to operate in conditions of executive and legislative dictatorship. See e.g. ROBERT BARROS, CONSTITUTIONALISM AND DICTATORSHIP: PINOCHET, THE JUNTA, AND THE 1980 CONSTITUTION 36-40, 87-88, 96-98 (2002).

Even though authoritarian regimes do not seek to maximize the welfare of the entire population, or the average citizen, but rather cater to a very narrow slither of the population being the ruling class, they are subjected to a limiting aspect of governance. That limiting aspect is that even these kinds of regimes cannot deprive the general populace of too much, or else they risk revolt and overthrow. Admittedly, because of collective action problems, and a pre-designated imbalance of power between the governing class and the governed in an autocracy, the risk of revolt is usually rather easy to keep in check absent extraordinary circumstances. Therefore, the question of civil rights is a clear differentiator between democratic and autocratic regimes. Implementation of civil rights is weak in countries with authoritarian governance. Moreover, history has shown that (with very few and easily explainable exceptions) the willful disregard of basic civil rights leads to a poor general welfare and generally less prosperous nations. In democracies, the mobilization of citizens seeking to implement a civil right or safeguard a civil liberty is a facet of daily life but in autocracies not only is the event rare, but also is often met with repressive crackdowns. Indeed, the danger inherent in popular mobilization in an autocracy leads to the conclusion that the government (through all of its institutions which most often are directly in control of the executive) rarely speaks for the people.

Moreover, another characteristic of illiberal societies is to play a shell game with respect to those rights which most of the world holds dear by formally endorsing them in the international sphere but then reserving their enforcement within their own borders. Countries that exhibit this disdain for even the most fundamental aspect of the rule of law are of little interest to the contemporary constitutional comparativist. The weight of evidence of the current trend in comparative analysis is that “courts typically [do not consult] the legal materials … of failed states such as the Soviet Union or authoritarian states such as China and Cuba.”

Authoritarian regimes do not select norms based on popular will most of the time, but rather on the limited motivator of what is best for the ruling class. In other words, these regimes enact rules which are not the reflection of the will of the demos and therefore it is unlikely that these rules produce positive ripples among the population as a whole, although exceptions, such as in the area of criminal law, to this assumption do exist. However, the exceptions are more the result of accidental convergence than on policy considerations that hold the common good of the people in highest regard. Furthermore, short-term decisions by

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176 A noteworthy example of this is China. See Kolodner, supra note 174, at 484.
177 See Posner and Sunstein, supra note 6, at 175.
178 This limited view of the nature of governance has been reflected in the behavior of totalitarian regimes within the international sphere. For example, enough authoritarian regimes exist in the world to prevent not only action, but even minimal criticism at the international level on even the most egregious human rights violations, such as the Darfur crisis, exhibiting a lack of consciousness among the ruling class of these nations as to what might constitute the basic necessities of governance. Similar behavior by undemocratic regimes has been demonstrated within the confines of the UN Commission on Human Rights and its successor body, the UN Human Rights Council. See JEAN-CLAUDE BUHRER, REPORTERS WITHOUT BORDERS, UN COMMISSION ON HUMAN RIGHTS LOSES ALL CREDIBILITY (2003) available at http://www.rsf.org/IMG/pdf/Report_ONU_gb.pdf
authoritarian rulers do not serve the goal of political stability because those who make these
decisions are often not assured of power for long periods. Autocracies also tend to be more
unitary and less disaggregated than democracies but that is not to say that disaggregation does
not occur within non-democratic states and the consequences of this process are noteworthy to
the constitutional comparativist.\(^{179}\) Consequently, autocratic societies tend to confront problems
that liberal democracies do not face, usually because such problems have been resolved long ago.
For example, in authoritarian regimes, the right to a fair trial is often speculative, if it exists at
all, while in most liberal democracies, even though its application has been spotty throughout
history, this right has longstanding roots beginning with the Magna Carta.\(^{180}\)

A lot of scholars argue that non-democratic regimes should be denied many benefits
granted by the international legal system such as, at a minimum, being booted from prominent
international organizations, or, at the extreme, being subject to invasion by liberal democracies
that would then substitute the autocracy for a democracy.\(^{181}\) \(^{181}\) It is no stretch to say that if
international law can disregard the mantra of equality of nations and shun non-democratic
regimes, so can comparative constitutionalism. This is bolstered by the fact that “it is doubtful
that repressive dictators with allow international law norms to override their own laws in any
situations where doing so might endanger the dictator’s grip on power.”\(^{182}\) In fact, it is important
to note that most non-democracies around the world have signed onto the international law
treaties that enshrine fundamental human rights. The cynics say that this is pure lip service;
however, others believe that even “in non-democracies, ratification [of one of these treaties]
injects a new model of rights into the domestic discourse, potentially altering expectations of
domestic groups” which will now operate with higher confidence.\(^{183}\)

Another plausible reason for this separation is the value that democracies, to the
exclusion of all other regimes, place on the protection of basic human rights and how post-
totalitarian regimes are fully aware that it is this aspect of democratic governance, above all else,
which is most worthy of emulation. This is empirically backed up by the evidence which shows
that one of the first things emerging democracies try to do in their transitional governance phase,
is to immediately implement a human rights regime which seeks to incorporate those universal
notions of human rights derived either from democratic countries or from the international
system at large. It is noteworthy that emerging democracies which rise from the ashes of a
totalitarian and autocratic past focus their “moral redefinition” on the new regimes commitment
to upholding human rights, presumably, in contrast to the old regime’s violation of the same.\(^{184}\)

\(^{179}\) Examples of bodies who have “detached” themselves from their autocratic executives might be the
former Supreme Court of Zimbabwe, the Supreme Court of pre-democratic Ukraine, and the current
Supreme Constitutional Court of Egypt.

\(^{180}\) See Magna Carta, art. 39 (1215).

\(^{181}\) See e.g. BUCHANAN, supra note 56, at 452-53; see also BEITZ, supra note 80, at 90-92.

\(^{182}\) McGinnis and Somin, supra note 51, at 1199.

\(^{183}\) See Simmons, supra note 38, at 445 (stating that under this view, international legal instruments
perform an educational role).

\(^{184}\) See James T. Richardson, Religion, Constitutional Courts, and Democracy in Former Communist
Countries, ANNALS AM. ACAD. POL. & SOC. SCI., Jan. 2006, at 129, 135-36 (“In contrast to the presumed
moral worth of nativism against the colonial rulers, the task in the era of new constitutionalism is the
moral definition of democratic political community”).
Lack of deliberation of undemocratic regimes leaves normative doubt as to the motivation behind the enactment of rules, although it is beyond speculation that, in most occasions, responsiveness to the will of the population and desire to improve general welfare are not among these reasons. In other words, there is little constitutional legitimacy in non-democratic regimes in that there is nothing “constitutive” about their decisions seeing that these are not tethered to any notion of minimal constitutional standards. They are, therefore, of no use to comparative constitutional interpretation.

However, a deeper analysis leads to a more complex conclusion than the simple equation democracy equals good while everything else equals bad. Many different societies accept the notion of a universality of certain rights but are not convinced that this universality is the product of a Western notion of secular governance. One such social group is the religious (of many different denominations and faiths) who ground the endowment of unalienable human rights in the divine and believe that such divine rules should form the basis of government, indeed, constitutional government—hence, the birth and/or formation of the theocracy.

While a comparativist might find dictatorships so repugnant that they can be easily placed outside the realm of sources for comparison, theocracies raise more subtle issues. The goal of a theocratic country is to govern its citizen according to the dictates of the particular religion espoused by the governing elite, which usually, but not always, represents the prevalent faith in that specific theocracy. In other words, a theocracy is “a mode of governance prioritizing conception of the good that is strict and comprehensive in its range of teachings.” Clearly, because faith-based rights are not easily divined, the interpretation and indeed the power to rule is usually delegated to religious elites that tend to be unelected and unaccountable to the people. This fact is one which would tend to exclude theocratic nations, even ones with constitutions, from the comparative enterprise because “religion tends to subordinate those communities of unbelievers over which it might assert political authority,”—a trait of despotism. Indeed, not only do theocracies trend towards despotism, but where secular despots might be willing to accede to negotiation, “religion divides and does not compromise,” and whereas it might play lip service towards the acknowledgment of other faiths, it “cannot accept equality among those of different faiths.” Equality, being a fundamental norm of modern democratic society, makes

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188 Larry Cata Backer, God(s) Over Constitutions: International and Religious Transnational Constitutionalism in the 21st Century, 27 MISS. C.L. REV. 11, 37 (2008); see also Backer, supra note 187, at 115 (noting that “[b]ecause not every member of a religious community believes the same way and with the same intensity, religion cannot serve as a unifying framework”). It must be noted that the advocacy of theocracy is not a non-Western phenomenon exclusively even in the contemporary world. Indeed, the evangelical Christian right-wing in the United States advocate exactly that form of
theocracies incompatible with the fundamental tenets of constitutional comparativism and therefore illegitimate.\textsuperscript{189}

The goal of making the government synonymous with a specific religion also violates another tenet of democratic societies, and that is the separation of church from state. This is not to say that democratic countries cannot embrace religion or even a state religion as many countries in Europe have (with the notable exception of adamantly secular France), but that in theocracies “state religion is enshrined as the principal source that informs all legislation and methods of judicial interpretation.”\textsuperscript{190} When God becomes the lawmaker,\textsuperscript{191} rather than an inspiration to do unto others as you would have done unto yourself, no dissent is permissible, as arguing with God becomes a thankless, and frankly, losing proposition. Thus, there is no separation, and the only argument can be of theological interpretation, not of pluralism, which is essential to a democracy and vital to the comparative constitutional enterprise.

That is not to say that all theocracies, by a different reasoning, reach conclusions that a democracy would not reach. Indeed, in speaking of the Universal Declaration of Human Rights, a foundational universal document forming the cornerstone of modern international law, Pope Benedict XVI has stated that the principles it embodies “are based on the natural law inscribed on human hearts,” by which the pontiff means granted or derived from the divine.\textsuperscript{192} The Pope further warns that a refusal to acknowledge the religious origin of these norms “would effectively privilege an individualistic approach, and would fragment the unity of the person.”\textsuperscript{193} But it is this kind of reasoning that makes theocratic pronouncements suspect to the comparativist. After all, analytical methods are at the disposal of the comparativist to separate domestic regime from domestic regime or domestic regime from international regime, but what methodology does one use to prefer one theocracy over another—or to it more bluntly, to prefer one religion or strand of religion, to another. Thus, even though a theocracy such as the Vatican can adopt universal norms such as the prohibition of torture that are of interest to those partaking government, albeit of a fundamentalist Christian perspective. \textit{See e.g. Rousas J. Rushdoony, The Institutes of Biblical Law} (1973). Lest there be any doubt, the recent anti-abortion and anti-GLBT legislative pushes by popular referendum frequently, if not exclusively, invoke biblical mandates. The result of religious-driven frenzy, even under the guise of law, is almost always oppression.\textsuperscript{189} \textit{See} Ran Hirschl, \textit{The Theocratic Challenge to Constitution Drafting in Post-Conflict States}, 49 WM. & MARY L. REV. 1179, 1186-89 (2008). One need not look much further than to the deliberations pertaining to Article 18 of the ICCPR which sought to enshrine the freedom of religion and the attitude pertaining thereto of Saudi Arabia and other theocratic nations which refused to accept a right to change one’s religion as stated in the UDHR. \textit{See} Bahiyiyih G. Tahizib, \textit{Freedom of Religion or Belief: Ensuring Effective International Legal Protection} 73 (1996).

\textsuperscript{190} Ran Hirschl, \textit{supra} note 189, at 1189.

\textsuperscript{191} \textit{See e.g. Benedict de Spinoza, A Theologico-Political Treatise and A Political Treatise} 65 (R.H.M. Elwes trans., Dover Publ. 1951) (1670) (describing governance by God as acting and directing “all things simply by the necessity of His nature and perfection, and that His decrees and violations are eternal truths …”).

\textsuperscript{192} \textit{See Pope Benedict XVI, supra} note 42, at ¶ 6.

\textsuperscript{193} \textit{Id.}, at ¶ 11.
in comparative analysis, the process, being not subject to legal review or analysis, makes the substance of the rule irrelevant.¹⁹⁴

V. OVERLAPPING INTERESTS

Under a government aesthetic than wants everything to be neatly confined into its own box, each layer of government would only address what affects it so that local governments deal only with local matters, national governments deal only with national matters, and the international system need only concern itself with what operates above the national sphere. Indeed, one of the most ancient concepts of law is that of competence—that idea whereby the “law seeks to more effectively delimit each entity’s jurisdiction and authority and thereby eliminate … overlaps.”¹⁹⁵ This somewhat rigid concept of delineation, “of jurisdictional line-drawing [which] has been prevalent … in the international/transnational realm”¹⁹⁶ is a long-standing status quo that comparative law enthusiasts have to constantly come up against. After all, it is easier to draw demarcating lines than it is to blur them because a straight line is conceptually more attractive than a smudge.¹⁹⁷ Nevertheless, it is doubtful that this neat line-drawing scenario ever existed since the dawn of modern age law, but it is certain that it does not exist in the contemporary world. Multiple layers of overlapping relationships and networks have created a basic need for pluralistic forms of governance than can integrate all layers when tasked to legislate, regulate, or adjudicate matters that exhibit such multifaceted characteristics. The policy here is not an exemplification of a normative preference for harmonization or an attempt to create a “world-wide legal culture,”¹⁹⁸ but rather a realization that the contemporary legal world cannot function without some reconciliation between overlapping interacting regimes. Thus, even though some believe that the international and domestic regimes share nothing in common while others argue that the two are purely different manifestations of the same unitary whole, the truth, as it often is, lies somewhere in between.

Constitutional interpretation through comparative analysis can be but one way to achieve this integrated pluralist form of governance and the neo-Kantian goal of positive international governance. The beginning of this exploration can take the form of an examination of the most abstract norms of both domestic and international systems as a way of providing context. Indeed, certain scholars claim that in the most abstract sense, both domestic and international law

¹⁹⁴ The summation for the suspect nature of theocracies is nicely summed up by Sayed Hadi Khosrow-Shahi, the leader of the Iranian delegation at the UN Human Rights Commission who when asked, in 1982, what was the Iranian position on the Universal Declaration of Human Rights, replied that Iran believed in the “supremacy of Islamic laws, which are universal” and when other laws conflict with this then Iran would “choose the divine laws.” Jason Lawrence Reimer, Comment, Finding Their Own Voice? The Afghanistan Constitution: Influencing the Creation of a Theocratic Democracy, 25 PENN ST. INT’L L. REV. 343, 360 (2006) (quoting the Iranian representative).
¹⁹⁵ See Schiff Berman, supra note 34, 1167.
¹⁹⁶ See id.
¹⁹⁷ See Robert B. Ahdieh, Dialectical Regulation, 38 CONN. L. REV. 863, 867 (2004) (commenting that for many there is “some visceral sense of law’s project as one of categorization, clear definition, and line-drawing).
evolve out of the same sets of pre-legal norms. In other words, “there are certain principles of right and justice which are entitled to prevail of their own intrinsic excellence” and which pervade both types of regimes. This is similar to the concept of a constitution viewed as the accumulation of the “meta-norms, … higher-order legal rules and principles that specify how all other lower-order legal norms are to be produced, applied, enforced, and interpreted.” But this concept need not be specifically circumscribed to domestic orderings alone but can easily be expressed at an international level. As noted by Paul Schiff Berman, any “practices for managing overlap should encourage decisionmakers to wrestle explicitly with questions of multiple community affiliation and the effects of activities across territorial borders.” Direct contact and interaction between judges of different courts and regimes promotes international understanding and might be the prelude to managing the overlap and bridging the gap between domestic and international.

What is certain is that little help in resolving the international law dilemma comes from the U.S. Supreme Court seeing that its constitutional interpretation which relies on comparative analysis is often ah hoc and therefore does not illuminate much as to adherence to some underlying theory or methodology. At maximum, one can say that “[t]he Court has treated foreign and international materials as evidence that may be relevant to the interpretation of vague or uncertain constitutional provisions.” But the Supreme Court notwithstanding, it is obvious that international law is undergoing rapid constitutionalization which means “the emergence of constitutional law within a given legal order.” The timeliness and relevance of this discussion is highlighted by the fact that “[t]he wall between international and domestic realms has not yet collapsed, although major cracks are indeed visible.” Perhaps constitutional interpretation via comparative analysis is a factor that is contributing to this merger.

Based on the goals of domestic and international law outlined in Parts III and IV above, there is little doubt that much complementarity between these different repositories of rules exists. Many scholars evidence this overlap by pointing, for example, to how the ICC and national governments can both play a role in the prosecution of the most egregious international

199 See HANS KELSEN, GENERAL THEORY OF LAW AND STATE 325 (1945); see also HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 417-18 (1952).
201 See Sweet, supra note 209, at 626. This is akin to H.L.A. Hart’s proposition that secondary rules cure the defects that claim pre-legal regimes “such as inefficiency, stasis, and uncertainty.” Id., at 625
202 Schiff Berman, supra note 34, at 1173 (discussing practices in the context of his theory of legal pluralism). One methodology that Berman uses to illustrate how legal pluralism can look in practice is the “margin of appreciation” doctrine employed by the European Court of Human Rights which “allows domestic polities some room to maneuver in implementing [the court’s] decision in order to accommodate local variation.” Id.; see also Laurence R. Helfer & Anne-Marie Slaughter, Toward a Theory of Effective Supranational Adjudication, 107 YALE L.J. 273, 316-17 (1997).
204 Bradley, supra note 12, at 93.
205 Peters, supra note 32, at 582.
206 Perju, supra note 25, at 203.
violations of human rights through the creation of a hybrid system of justice. Indeed, there is evidence to prove that the creation of the ICC has positively impacted domestic systems leading to prosecutions of the perpetrators of human rights abuses. Others point to the similarities between the abstract ideals of domestic governance and international law. While excessive abstraction might make for good philosophical axioms such as “equality before the law,” as noted above, they make for little comparative use. Similarly, excessive focus on minutiae also yields nothing for the comparativist because even identical twins will look slightly different under a microscope. For example, the critics of comparativism might cry a disapproving “Aha!” by noting that certain supreme courts of other nations are comprised of seven, eleven, or thirteen judges and therefore their rulings should not be of any use to the U.S. Supreme Court because it is comprised of nine judges. No one is seriously making this exact point, but the illustration is appropriate to show how differences can always be found if all one searches for are differences.

However, the greatest wall that the critics keep erecting in the path towards ecumenical comparativism is that of structural uniqueness—that concept which holds all nations as having a legal structure that is fundamentally unparalleled anywhere else, and thus not subject to any comparison. According to the critics, this is especially acute when one delves into the realm of constitutional comparison, because one of the favorite sources of foreign material for comparison, being international law, does not even possess a codified single document, but is scattered into various treaties, texts, resolutions, and customary law. This fact, therefore, should be reason enough to discourage even the most willing and learned comparativist. Thus, the argument goes, domestic systems are comprised of legislatures, which promulgate laws to be generally obeyed by those subject to them, and courts which resolve disputes about those laws between private parties or between private parties and the government, whose rulings are also generally obeyed by the parties to the judicial process. In case of disobedience, either to the legislated rules, or the judicial orders, the domestic system provides for enforcement mechanisms that either punish or ensure compliance. In contrast to this layout, the critics argue that international law possesses none of these characteristics in that there is no centralized legislature, or structured court system, and no traditional enforcement mechanisms akin to those available within domestic regimes. To these background criticisms the comparative constitutionalist can


209 However, if one espouses the “thin” view of constitutions as being merely a delineation of meta-norms about how the lower rungs of the legal system should operate which are then implemented by statute, then the international legal system could be said to already incorporate a “thin” constitution. See e.g. Alec Stone Sweet, Constitutionalism, Legal Pluralism, and International Regimes, 16 IND. J. GLOBAL LEGAL STUD. 621 (2009) (stating that treaty regimes such as that of the European Court of Human Rights, the European Union, or the World Trade Organization embody this definition of constitutionalism and that the European Court of Justice, the Appellate Body of the World Trade Organization, and the European Court of Human Rights are de facto constitutional courts). In light of the recent ratification of the Treaty of Lisbon (which was a substitute for the defunct (and never ratified) European Constitution, but actually incorporates a substantial amount of the European Constitution’s precepts), the ECJ and ECHR are now de jure Constitutional Courts.
simply reply “so what”?210 There is a difference between constitutional structure and the norms that these contain. While a body politic might not have the former, it certainly will have the latter. The question for the comparative constitutional enterprise when seeking sources from international law is the whether there is a world body politic, and if there is not, does that matter? The answer lies in the fact that the ethos of comparative law is not parallel structures, but of parallel ideas or principles. As explained in parts II, III, and IV, structural differences are mere icing, and it is the goals and policies to be tasted underneath which the comparative enterprise strives to bring together.

Comparative constitutional skeptics and enthusiasts can at least agree on one thing: the increasing intricacy of legal principles dispersed into a multiplicity of overlapping networks has caused an increasing coming together of domestic law and international law, and this contact is only destined to increase both in quantity and in complexity.211 Constitutional interpretation that is able to methodologically and systemically sift through foreign domestic law and international law is one vehicle where this density can be ordered to great effect. In light of the focus on principle over structure, this section explores not what common forms exist between domestic regimes and international ones, but rather, what brings them together (and distinguishes them) from the point of view of their respective goals and motivating forces.

Because comparative constitutionalism is fundamentally about the comparison of constitutions it is most compelling when it is a constitutional document that is being compared to the U.S. Constitution.212 While most nation states offer this availability, international law lacks such a foundational document. Nevertheless, there are certain international treaties and/or conventions that serve as a quasi-constitutional framework within their context, and, indeed, certain courts such as the European Court of Human Rights serve as a quasi-constitutional court.

To determine whether the comparativist should distinguish between international sources of law and foreign sources of law, the inquiry should not yield to overzealous surface-feature categorizations, but rather follow a more functional approach. This is important because by emphasizing structure or functionality would lead, for example, the excessive particularist to claim that the United Kingdom and Israel, for example, do not possess constitutions, which is factually inaccurate. The constitutions of these countries are simply not written down in any one place, but are rather an accumulation of certain basic laws—that same organization can be claimed of the international system.213

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210 This criticism is a non-starter when applied to comparing foreign domestic law to U.S. constitutional provisions because the structure of international law is irrelevant to that analysis.
212 Clearly this is not always the case as sometimes legislative or statutory documents provide the subject matter to which the U.S. Constitution is confronted.
213 Many contemporary scholars adopt this functional approach when dealing with constitutions. See Anne van Aaken, Defragmentation of Public International Law Through Interpretation: A Methodological Proposal, 16 IND. J. GLOBAL LEGAL STUD. 483, 487 n.17 (2009).
A. Where Foreign Domestic Law Acts Alone

The constitution is traditionally envisioned as a nation “thing.” Through a centralized quasi-legislative process of adoption which places constitutional law at the top of the legal totem pole, it regulates the government substantially more than private individuals, it is centralized and rather difficult to amend, and is hierarchically superior than other laws in the land. Moreover, it is widely regarded as serving as an important check on government behavior. These features make it look different to most of the international law framework. The absence of anything resembling one constitution on the international sphere must alert even the most receptive comparativist between finding “false domestic analogies” between domestic regimes and the international order. But domestic constitutional law goes further than ensuring order, it also seeks to create moral normative dimension to its directives. In this light, constitutional interpretation that relies on international law cannot deny that the morality of international law is, at a very profound level, quite distinct from the national personalities of the various states.

Similarly, there is an argument that domestic law grows out of and is a symptom of a particular culture. These cultural traits can be ethnic, symbolic, religious, educational, class-based or caste-based, but regardless, the agglomeration of these traits is sometimes believed to be synonymous with a national culture that is supposedly unique for each different state. The individual trait-based groups, which can function as “norm-generating communities,” can exert a certain power on an international level, but they have substantially more clout at the national level where collective action coordination hurdles are far easier to overcome. Through societal osmosis, it is claimed that those cultural affects seep into law and form the basis of some sort of jurisprudential philosophy. This understanding of a constitution is known as “thick”

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214 See e.g. Peters & Armingeon, supra note 36, at 389 (cautioning the advocates of international constitutionalism from making overreaching comparative claims and urging global constitutionalists to identify and advocate the application of constitutionalist principles “such as the rule of law, checks and balances, human rights protection, and possibly democracy, in the international legal sphere in order to improve the effectiveness and the fairness of the international legal order”); see also Neil Walker, The EU and the WTO: Constitutionalism in a New Key, in THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES 31, 39 (Grainee de Burca & Joanne Scott eds., 2001).

215 See generally JOHN RAWLS, POLITICAL LIBERALISM (1996); see also Frank Michelman, Integrity- Anxiety?, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 267-68 (Michael Ignatieff ed., 2005) (“In order to maintain a public discourse on governmental performance regarding people’s rights, Americans apparently need some point of normative reference more publicly objective than it feels as though morality can be for us. Enter constitutional law.”)


217 See 1 BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 6 (Thomas Nugent trans., rev. ed., New York, The Colonial Press 1899) (1751); see also Resnik, supra note 132, at 64-65 (noting that if law constitutes part of national identity to be proud of the pride should only flow “if the content of that law makes for an identity one admires and is willing to work … to bring into being”).

218 Indeed, people often see themselves as being part of a multiple set of groups. See e.g. AVIGAIL I. EISENBERG, RECONSTRUCTING POLITICAL PLURALISM 2 (1995).


220 See e.g. Sanchez, supra note 25 (expressing the theory that each national legal identity is unique and therefore not subject to the comparative practice).
and essentially claims that a constitution constitutes a form of culture in and of itself.221 Even from nation state to nation state “respective histories, social context and constitutional design differ markedly.”222 Thus, legal scholars have persistently claimed that because of the different concepts of morality and culture, there really can be no solid grounding for a universally applicable international law.223

Indeed, the critics of the comparative enterprise latch a substantial amount of their opposition on the alleged cultural uniqueness of U.S. domestic law in general and/or of constitutional law in particular. One should not dismiss this claim out of hand in that cultural differences certainly exist between different nations around the world. However, if examined in detail, this is not the exact claim that the critics make—their claim is that such cultural differences result in incomparable legal constitutional regimes.224 But these are not the areas where domestic law acts alone, despite the claims made by the critics. Because cultural diversity does not necessarily equate to moral differences, and a shared morality can certainly serve as a basis for legal comparison, simply pointing out superficial cultural differences between states does not really advance the criticism very much.225 The real question to be asked in this context is whether a differing national identity is bound to its law? In other words, do those unique cultural affectations translate into a unique legal identity? The unnerving answer is that sometimes they do and sometimes they do not, and where the line falls will depend on contextual situations of which constitutional interpreters need to be fully apprised.

One facet of domestic governance that, in a lot respects is unique in and of itself in every nation is that of government setup. Thus, domestic institutional arrangements “are often

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221 See e.g. Robert C. Post, Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law, 117 HARV. L. REV. 4 (2003). Some scholars do not see this as the nail in the coffin of comparative constitutionalism, but rather as an exhortation for the enterprise to be more culturally aware. See Brenda Cossman, Migrating Marriages and Comparative Constitutionalism, in THE MIGRATION OF CONSTITUTIONAL IDEAS 209, 209 (Sujit Choudhry ed., 2006). Another way to express this is that international law “lacks the symbolic-aesthetical dimension inherent in national constitutional law,” seeing that “the primary function of constitutions is storing the meaning of a political community” which embodies “revolutionary ideas” which makes a national constitution the property of its people who have sacrificed a lot to achieve its enactment. See Peters, supra note 55, at 400 (citing Ulrich Haltern, Internationales Vergassungsrecht?, 128 ARCHIV DES ÖFFENTLICHEN RECHTS 511, 533-34 (2003)).

222 Minister of Finance v. Van Heerden 2004 (6) SA 121 (CC) at 135-36 (comparing the equality jurisprudence of the United States and South Africa).


224 Posner and Sunstein make this point and go on to note that “[i]f a court subscribes to this strong form of cultural relativism, then it should not consult foreign law.” See Posner and Sunstein, supra note 6, at 150; see also KATHARINA PISTOR ET AL., THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT 1960-1995, at 35 (1999) (“law and legal evolution are part of the idiosyncratic historical development of a country, and that they are determined by multiple factors, including culture, geography, climate, and religion.”)

225 This distinction between shared culture and shared morality is not lost on Posner and Sunstein who note that it is the latter which is more important in the comparative enterprise. See Posner and Sunstein, supra note 6, at 151 (“If Germany rejects the death penalty simply because of its Nazi past, for example, and if that rejection does not offer a general moral lesson, this rejection has little informational value for the United States.”)
peculiarly the product of political compromise in historically situated moments, generally
designed as a practical rather than a principled accommodation.”

Therefore, comparative analysis on matters of constitutional structure such as federalism issues in the U.S. is likely not to be particularly useful.

Another facet of domestic governance that relates to liberal democracies only and that is often pointed to as being distinctive from international law is that of democracy. Thus, “[o]ne school of thought argues that requirement[s] for democracy are not met beyond the level of nation-states.”

The notion is that the domestic law of democracies operates under an assumed rule that a government’s actions will be checked every so often and thus, unlike international law, it is subject to frequent correction or reversal by the plebiscite. Put another way, the popular sovereignty to which liberal democracies delegate their ultimate source of power grant an inherent responsibility to those governing (especially in the area of protection of substantive civil rights) which international law lacks.

The is a large element of truth in these representations, but the main question to be addressed is not whether the role of democratic governance exists in international law making procedures (it does not—international law enactors are not directly accountable to the citizens of nation states), but rather whether the pronouncements are the product of a democratic process, albeit indirect, to which the people, albeit indirectly, have the chance to express their voices and punish those (through the normal process of democratic accountability) who transgress on the mandate that they have been given. From this more nuanced point of view, it is difficult to see how, for example, the appointment of Ban Ki-Moon as UN General Secretary is much different than the appointment of Justice Samuel Alito to the U.S. Supreme Court. The people of the U.S. do not appoint Supreme Court justices, but they know when voting for their favored executive, that this is part of the role that the executive will take on. Similarly, the people of the U.S. do not appoint the UN General Secretary, but they know (or should know) that the U.S. executive in power will play a large part in that appointment process. If there is no democratic problem for the one example, there should be none for the other. After all, in the same way nation-states consist of citizens with a diversity of views, there is also a similar amount of “legitimate diversity in the global polity.”

Given the above, which constitutional issues are inappropriate vehicles for reliance on international law because the aspects of domestic law that they represent do not overlap with international interests sufficiently to form a cogent basis as a source of material for U.S. constitutional material? The overarching answer, which should always be tempered by a case-by-case analysis, lies in the determination of whether the constitutional provision to be interpreted is the product of a certain facet of American law which is exceptional, either to the U.S. or to domestic law in general, and thus incapable of having comparable companions within the context of international law. Those facets can be the result of historical specificity, cultural uniqueness, structural peculiarities, or other things, but the key is that any court wishing to make use of international law materials should begin its analysis by making such evaluation. Once that

227 Peters & Armingeon, supra note 36, at 386.
is done, and assuming the result is one of potential overlap, then the proposed international material should be scrutinized in a similar fashion.

B. Where International Law Acts Alone

Even with all the goodwill and enthusiasm of the global constitutionalists who seek to appropriate various international documents as de facto or de jure constitutions, most commentators claim that, unlike states, the international regime is “a sort of constitutional wasteland or empty quarter.”

From a structural and process perspective, the constituent documents of the modern international system, such as the UN Charter, do not operate as an effective way to restrain unapproved conduct by those expected to abide by their rules unlike their domestic counterparts. Indeed, there is no international uber-legislature empowered to enact laws or create a constitution for the world nor is there an uber-judiciary empowered to adjudicate issues arising under international law in a way that creates generally binding decisions.

Moreover, from an overall structural perspective, it is states, not people, which make international law and states, not people, which have most obligations under international law. Following from this, “[o]ne of the most persistent sources of perplexity about the obligatory character of international law has been the difficulty felt in accepting or explaining the fact that a state which is sovereign may also be ‘bound’ by, or have an obligation under, international law.”

A possible answer is that international law is more about governance rather than government. The difference between these two descriptions comes from the fact that government is about a certain coercive hierarchical control while governance has less hierarchy and coercion and relies more on the voluntariness of the participating parties. Given this fact, the stress on the democratic legitimacy of governance is diminished. Some have stated that this facet is actually welcome. Andrew Moravcsik, for example, notes that international organizations do not require much in the form of democratic credentials, while others have argued that any further democratization of international institutions would undermine the very goals of international law.

It cannot be denied that international organizations and international law are not organized in a democratic way, at least in the sense that is normally applied to that concept. The fundamental reference point for the demos is the people, and, with remarkably few exceptions, when international law seeks majoritarian consensus (such as in the shaping of customary law, or the adoption of resolutions from the general assembly of the UN), the majority is defined as one

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231 HART, supra note 129, at 220.


234 The IMF apportions votes according to the amount of money contributed to it.
of nations and not individuals. Therefore, if one is to accept that individuals form the building blocks of any democracy, something expressed in domestic liberal democracies, international law fails to meet that standard. However, is that something that is fundamentally exclusive of international law or is it also part of the operational mechanics of domestic law? For example, “a treaty [might be] less likely to reflect the independent judgments of the states than national law,” because states could enter into treaties, “despite their doubts about particular rules or norms rather than because of them.” But a piece of domestic legislation might be the product of the same type of deliberative process.

The related point is not that democratic deficit is inexistent in domestic regimes, but rather that it is higher for the international system. Thus, international law does not have a mechanism of democratic control empowering individuals to stand guard as a direct and constant check on its content through regular submissions to a franchise. On the other hand, states can and do assert checks on the formation and implementation of international law but this does not fully make up the democratic deficit because as has been shown above, the treatment of individuals now forms a large part of international norms and these subjects of international law do not possess the same democratic power within the international regime as states do. Similarly, as noted above, a corollary to this high level of democratic deficit is international law’s structural impediment to being able to hold its lawmakers directly accountable to a democratic electorate as well as its asserted low transparency.

There are other systemic features of international law that are peculiar to it. For example, “[t]he new deniers of international law justify the ostensibly non-legal character of international law by turning to the lack of hard enforcement mechanisms and the democratic deficit prevalent in international law.” Another such feature is that the appointment procedures to international panels often suffer from a certain lack of transparency compared to their equivalent domestic panels. Two further quirks in international law (and something that is extremely controversial even within international circles) are the ability for a court to opine on a matter even when the relevant parties to the controversy have explicitly not agreed to the court’s jurisdiction (which is something contemplated as proper under international rules), and amorphous rules of recognition especially when compared with those of domestic regimes.

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235 For example, in the general assembly of the UN, every nation has one vote, so that the votes of Vanuatu (population 231,000) or Sao Tome and Principe (population 161,000) are worth the same as China (population 1,325,640,000) or India (population 1,139,965,000).
236 See Posner and Sunstein, supra note 6, at 165-166.
237 See e.g. Føllesdal, supra note 101 (advocating for a democratic international system).
239 See McGinnis and Somin, supra note 51, at 1193.
240 Peters, supra note 55, at 405.
241 For example, the ICJ has a panel of fifteen judges meant to represent the various legal systems of the world that serve for a period of nine years and can be reelected. They are nominated by the various national groups within the Permanent Court of Arbitration, and then are elected by the UN General Assembly and the UN Security Council. See ICJ Statute, Art. 9.
242 This occurred in 2004, when the ICJ issued a declaratory ruling pertaining to the legality under international law of the separation fence dividing Israel and the West Bank despite the fact that Israel had never assented to the ICJ’s jurisdiction.
Another facet of international law that philosophically and practically distinguishes it from domestic law is the fact that international relations (which tug at international law relationships) are often antagonistic and therefore tend to present anti-constitutional trends (such as willful disobedience of international law).\textsuperscript{243} These trends that have a certain divisive quality stand in direct opposition to the goals of unity and organization that a domestic constitutional regime is designed to implement. The right of withdrawal from most aspects of international law that nations possess is certainly something that the comparativist should absorb when using international law sources as the subject of comparison. This right of exit is certainly something that has no parallel in domestic constitutional structures.\textsuperscript{244} And lastly, the notion of international responsibility, that law which exists to provide redress for injury caused to a person usually by a state and provides for the maintenance of international order, does not really have any domestic parallels.

Certain characteristics of either domain are unique and constitutional interpretation in the comparative vein should acknowledge this fact, and cherish it. For example, it is difficult to characterize international breaches in terms of tort or contract, seeing that both are subjected to the same array of secondary rules. Indeed, sometimes the line between civil and criminal in international law violations and their resolution might be quite difficult to define as well.

All the above crystallizes the point that in many respects, both in operation and in substance, international law functions rather differently than do domestic legal systems. Given the different goals and policies that were illustrated in part III above, the question then to be answered is what legal rules of international law do not possess sufficient interest overlap with domestic law to constitute an appropriate denominator for comparison within the dynamic of constitutional interpretation. The answer to that question, again made on a case-by-case basis, must take into account the procedural genesis of the international rule, its scope and goals, as well as its substantive content. The combination of these factors will yield a plausible reason for why constitutional interpretation can best be served by consulting, or ignoring, particular materials of international law. For example, international law rules on the prevention of conflict, the regulation of international relations, or which embody a state’s pursuance of its self-interest (such as the right to systematically object to a rule of customary law) might have little to inform domestic constitutional interpretation which tends not to concern itself with these matters. Other international rules might be better suited as sources for domestic constitutional interpretation—the methodology for identifying these is discussed below.

C. The Twilight Where the Two Meet

“Everyone has the right to freedom of thought, conscience and religion: this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”\textsuperscript{245}

\textsuperscript{243} See Peters, supra note 32 at 602-05.
\textsuperscript{244} See Helfer, supra note 33, at 228-31.
\textsuperscript{245} Universal Declaration of Human Rights, art. 18.
“Everyone has the following fundamental freedoms: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression.”  

“Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with other and in public or private, to manifest his religion or belief, observance, practice and teaching.”

“Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.”

“Everyone has the right to freedom of conscience, religion, thought, belief and opinion.”

Without looking at the footnotes at the bottom of this passage, (and without prior knowledge) is it possible to identify which of the preceding quotations comes from a domestic document and which comes from an international one? All five provisions seek to protect the freedom of religion and all of them clearly derive from a background policy that allows for freedom of conscience and thought. Thus, all of the above statements, whether contained in domestic or international documents, share a common ethos that can be traced to a widespread set of values that transcends any notion of national border.

There can be no question that there has been an evolutionary convergence of domestic law and international law. The post-war realities dictated that certain international norms would be created that would be considered universal and inviolable. Furthermore, these norms would not only operate above the nations, as a check on behavior by a state towards another state, but would also be reflected within the internal laws of each nation, as a check on behavior by a state towards its own citizens. As such, a commonality arose between the international and the domestic as these universal rules became elevated to uber-law status among the community of

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246 Canadian Charter of Rights and Freedoms, Part I, art. 2.
247 International Covenant of Civil and Political Rights, art. 18, ¶1.
249 South African Constitution, Ch. 2, art. 15, ¶1.
251 See Judith Resnik, Law as Affiliation: “Foreign” Law, Democratic Federalism, and the Sovereignty of the Nation-State, 6 INT’L J. CONST. L. 33, 47 (2008) (“Ideas, norms, rules, and practices—shaped by parallel questions and needs—do not stop at the lines that people draw across land. Over time, the origins of precepts blur.”)
nations. The process and substance that currently constitutes international law is increasingly shaped by the constituent domestic constitutional regimes that share a commitment to the protection of human rights around the world. When a country signs onto an international human rights obligation, this is then integrated into domestic law either through legal means, or else through a process of norm-strengthening internalization. And, almost as a mirror image, “national laws … have transnational origins, coming from importation, adaptation, osmosis, and ‘decanting’.”

As a result of these synergies, domestic courts should act as “agents of the international order.” The jurisdictions of international adjudicatory bodies are increasingly overlapping with matters that are traditionally the province of domestic courts, and implementation of these orders in the domestic realm would certainly streamline the process. But persuasive reference of decisions from one system to another offers even more possibility. Both constitutional law and international law adopt an interpretative methodology that in effect creates a situation where “the text matters most for the least important questions” leaving the distinct impression that for the questions of the highest import, it is the principles at play which will dictate the outcome. Indeed, these principles take the form of both legal regimes seeking to implement the rule of law, protect human rights, conform, when possible, to international obligations, and judicial review.

The interrelatedness of contemporary governance makes it simply impossible to draw a bright line between the domestic and the international because no matter where that line is drawn there will be seepage in either direction at all times and no claim of exclusive sovereignty is able to change that nowadays. Thus, an enterprise that seeks delineations but not impenetrable walls is both normatively preferable and practically responsible. In that vein, the fact that international law no longer just concerns the relations among states (if ever this was its sole function) and has morphed into a body of law that seeks to delineate also citizenry/state relationships brings this system of legal rules much closer to that of domestic constitutional regimes which set forth a gold standard of protection of the rights of their own citizens. Cottier advises that we think of the “international, regional, and domestic levels as a single and ideally coherent regulatory architecture of multilayered governance.” He further notes that “[r]ecourse to shared legal rights and obligations in positive law of all or most states is an important and often ignored component in discussing the fundamental problem of shared constitutional values within the international community.”

This rapprochement between the domestic and the international is evidenced in numerous forums and in a multitude of texts. For example, the mandate of the executive branch of the EU,

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252 Resnik, supra note 132, at 46 (citing H. Patrick Glenn, Persuasive Authority, 32 McGill L.J. 261, 261 (1987)).
256 Cottier, supra note 19, at 656.  
257 Id., at 659.
the European Commission, is to “promote the general interest of the Union and take appropriate initiatives to that end.” \(^{258}\) which, in broad terms, reflects the ideals of the preamble to the U.S. Constitution. Another expression of the solidifying of international law around norms derived from domestic regimes is the Universal Declaration of Human Rights. \(^{259}\) International human rights are the “offspring of the human rights that were originally codified at the national level.” \(^{260}\) The transference of these rights from the national to the international was not accidental, but part of a concerted effort to place these rights in the whole collective consciousness of humankind. The process is bidirectional considering that certain domestic regimes seek to give their norms a global flavor: “[i]n construing and applying our [South African] Constitution, we are dealing with fundamental legal norms which are steadily becoming more universal in character.” \(^{261}\)

Most domestic regimes are descriptively constitutional and such definition is not considered controversial even for those countries, such as the United Kingdom, which do not operate under a regime which has a single document called “the” constitution. \(^{262}\) More controversial, but certainly arguable, is the fact that certain international regimes also operate under structural premises that positively resemble constitutional designs. These regimes count, among others, the European Court of Human Rights (which interprets in a judicial review sense the European Convention on Human Rights, the Court of Justice of the European Union (which interprets, since December 1, 2009, the Treaty of Lisbon, being the operative organizing document of the European Union), the World Trade Organization, \(^{263}\) and possibly the International Court of Justice which is tasked to interpret the binding international law human rights provisions from the UN Charter. \(^{264}\) Like their purely domestic counterparts, these regimes


\(^{259}\) See MARY ANN GLENDON, A WORLD MADE ANEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (2001). Indeed, in the drafting of the declaration, those tasked with this process compiled a list of concepts derived from the domestic judgments of different countries which hailed from all corners of the world. See id., at 57.

\(^{260}\) CHRISTIAN TOMUSCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM 25 (2003). These rights “are the complex of ‘Enlightenment rights’ that in their day were crucial in overthrowing feudalism and shattering the uncontested divine right of kings.” Simmons, supra note 38, at 440 (citing MICHELINE ISHAY, THE HISTORY OF HUMAN RIGHTS: FROM ANCIENT TIMES TO THE GLOBALIZATION ERA 7-8 (2004)).

\(^{261}\) Ferreira v. Levin & Others; Vryenhoek v. Powell NO & Others 1996 (1) SA 984, 1025 (CC) (S. Afr.)

\(^{262}\) Interestingly, the process of deciphering what constitutes constitutional law under the British system in many ways resembles the process of recognizing which rules of international law have risen to the level of binding customary law.

\(^{263}\) The following commentators have argued in favor of allocating a constitutional dimension to certain international and transnational regimes: STEVEN GREER, THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2006); G. Federico Mancini, The Making of a Constitution for Europe, 26 COMMON MKT. L. REV. 596 (1989) (referencing the precursors to the Treaty of Lisbon); CASS, supra note 104.

\(^{264}\) See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion, 1971 I.C.J. 16, 57 (June 21) (opining that Articles 55 and 56 of the UN Charter constitute binding international human rights law). Indeed, some are urging the view that the UN Charter is to be regarded as an emerging international constitution. See e.g. Thomas M. Franck, Is the U.N. Charter a Constitution?, in VERHANDELN FUR DEN
set out primary rules that are codified and secondary rules that explain how to deal with a disruption to the primary rules. The normative fundament of domestic constitutional systems is closely matched by these international regimes, seeing that the base document for all of these different systems serves as a statement of principles and goals as well as setting the tenor for how these should be carried out. Most importantly, the highest judicial bodies in these three treaty regimes, again like a lot their domestic counterparts, possess the power of judicial review which includes the power to strike down non-conforming lower-order legal rules which might take the form as national laws legislatively enacted. There can be little doubt that these regimes have governed efficiently and effectively. Given all these similarities, it is difficult to refute the claim that these regimes are in all effect “constitutional.”

The integrated functioning of the ECHR that interprets the substance of the European Convention on Human Rights as applied by the constituent members of the Council of Europe who then are tasked with implementing its rulings is a prime example of the compatibility between domestic law and an overarching transnational umbrella. This system has thus migrated from a slightly haphazard agglomeration of various economic and human rights treaties to a closely-knit regime that has granted a “constitutional” dimension to the rights enshrined in the European Convention. Indeed, both the EU treaty regime as currently embodied in the Treaty of Lisbon and the ECHR closely resemble domestic constitutional constructions in that they have evolved into models that allow individuals to press their judicially enforceable rights against states within the appositely delineated court systems. This is an example of international tribunals proceeding cautiously in their early days, and, as they “felt out” the terrain of their jurisdiction and carefully observed the level of compliance with their rulings, like their domestic counterparts, slowly gaining in confidence and now exercising broad inherent discretionary powers.

The convergence of abstract policy thrusts emanating from the domestic and the international realm often takes shape when specific incarnations of these norms are being contested. For example, Roper and Atkins both illustrate how international norms that are trending against the imposition of the death penalty (at least in certain particular instances) can provide evidence for domestic solutions in a way that creates a congruous overlap. After all, the notion of universal rights, enshrined in several international law texts, is merely a reiteration of the concept of individual rights under domestic law. Indeed, “U.S. Constitutional concepts of


269 See MAURICE CRANSTON, WHAT ARE HUMAN RIGHTS? 1 (Taplinger Pub. Co. 1973) (“Human rights is a twentieth-century name for what has been traditionally known as natural rights or, in a more exhilarating phrase, the rights of man.”); see also LOUIS HENKIN, THE AGE OF RIGHTS 1, 2 (Columbia
individual rights together with international human rights law share common natural law foundations and the development of each has greatly influenced the development of the other. Such reciprocal influence of one legal regime on the other is also reflected through the policy that human rights derive in part from the desire to curtail the power of the state. In fact, the protection of individuals from the unlimited sovereignty of the state is a primary goal of domestic constitutional law. Similarly, the background principles of international law are grounded in notions of constraint of state behavior through reference to domestic constitutional principles of limitation of powers.

Scholars both inside and outside the legal realm have commented that there are certain prerequisites that need to exist before norm-based social structures such as legal regimes can form. These quasi-global social norms count, among others, the norms of liberty, equality, and reciprocity, which by their nature know neither province nor boundary and are easily transplantable from one country to another, or from one legal system to another—they are, in common parlance, the shared values of pluralistic societies. All of these norms are traceable to the single generative norm of human dignity which, given its role “in the constellation of values that characterizes any modern constitutional democracy, foreign law could be used as persuasive authority” to determine the meaning of any provision impacted by it.

The effect of these background principles cannot be underestimated as they permeate many theories of government that percolate into definitions of things such as sovereignty, cosmopolitanism, constitutionalism, and democracy. For example, “[t]he normative status of sovereignty is derived from humanity, that is, the legal principle that human rights, interests, needs, and security must be respected and promoted. This normative status is also the telos of the international legal system.” Also, cosmopolitanism is based upon the premise that all

University Press 1990) (noting that the modern iteration of human rights does not seek to justify itself by appealing to any notion of natural rights); van Aaken, supra note 213, at 491 (“the classical functions of the nation-state, such as safeguarding individual liberty, freedom, and safety, are transferred to the international sphere.”)

270 Buys, supra note 25, at 2.

271 See JEAN BODIN, SIX BOOKS OF THE COMMONWEALTH 25 (M.J. Tooley trans., Basil Blackwell 1955) (1576) (also indicating that international law can serve as one check on the state’s unlimited exercise of sovereignty over its citizens).

272 See e.g. HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE (Richard Tuck ed., 2005) (1625).

273 See Rex D. Glensy, Quasi-Global Social Norms, 81, 93 (2005); see also Alvin W. Gouldner, The Norm of Reciprocity: A Preliminary Statement, in FRIENDS, FOLLOWERS, AND FACTIONS 28 (Steffen W. Schmidt et al. eds., 1977); Alec Stone Sweet, Judicialization and the Construction of Governance, 32 COMP. POL. STUD. 147, 149 (1999) (“[p]romises made are to be kept; debts incurred are to be repaid; kindnesses received are to be recognized and returned”).


275 See Perju, supra note 25, at 184. The question of the substantive import of “dignity” within contemporary constitutional jurisprudence is one of great interest that is worthy of academic exploration. See Rex D. Glensy, The Right to Dignity, at 11 (work in progress).

276 Peters, supra note 55, at 398 (citation omitted).
human being share traits common to the human condition.\textsuperscript{277} Similarly, “\textit{p}rinciples of international law and notably of international economic law, such as human rights, non-discrimination, equal conditions of competition … operate much as constitutional principles.”\textsuperscript{278} Therefore, all of the substantive areas, such as human rights law, environmental law, and labor law, which are given shape by these principles and norms are equally applicable in both the domestic and international regimes.\textsuperscript{279}

There is no doubt that both domestic law and international law overlap in the definition of the substantive rights that are most worthy of protection,\textsuperscript{280} but the two different regimes might not necessarily come to the same conclusion as to what the specific details of those rights should be. For example while one might find near unanimity on the concept of freedom of speech, one might find less agreement on whether that right includes the right to advocate the overthrow of one’s government—different domestic laws and international law might have differing views as to whether that specific activity is liable to legal sanction or whether it is protected speech. Nevertheless, the important matter to the comparativist in this case is the agreement on the abstract, as the shaping of the contours is usually the activity for which the comparative analysis is being employed.

Domestic courts are, in many cases, in a better position to give substance to those international law goals because the parties are directly subject to the jurisdiction of the domestic court are more likely to abide by any rulings those courts might issue. Indeed, the U.S. Alien Tort Statute is one such vehicle of a domestic legislation giving effect to the fundamental international law goal of safeguarding universal human rights through purely domestic means.\textsuperscript{281} Curiously, it was enacted at the very dawn of the U.S. by the first Congress in 1789 and has been an instrumental vehicle of litigating international human rights claims within domestic U.S. courts ever since.\textsuperscript{282}

Even skeptics of the comparative enterprise admit that “American law … is not only likely to be beneficial for Americans because of its democratic origin, but in many areas is also likely to benefit foreigners.”\textsuperscript{283} Even if somewhat reductive, that would seem to be a concession that foreign domestic law if democratically enacted can be of some benefit to Americans as well. And what of international law internalized by domestic foreign law? Given the substantial

\textsuperscript{277} See KWAME ANTHONY APPIAH, COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS, at xv (2006).
\textsuperscript{278} Cottier, \textit{supra} note 19, at 647.
\textsuperscript{279} See Bruno-Otto Bryde, \textit{International Democratic Constitutionalism, in TOWARDS WORLD CONSTITUTIONALISM: ISSUES IN THE LEGAL ORDERING OF THE WORLD COMMUNITY} 106 (Ronald St. John MacDonald & Douglas M. Johnston eds., 2005) (”international law tries to bind these actors … to substantive constitutional principles, especially the rule of law and human rights.”)
\textsuperscript{280} See e.g., Besson, \textit{supra} note 160, at 331 (noting that principles and values in law are “essentially incomplete theorized agreements”).
\textsuperscript{282} See Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980); see also 28 U.S.C. § 1350 (2006) (“The district court shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”)
\textsuperscript{283} McGinnis and Somin, \textit{supra} note 51, at 1178.
overlap illustrated above, it would seem that the benefits could also flow in this direction. These critics also note that “the two disciplines” of international and domestic law “are largely harmonious.” 284 Therefore, this appears to open the door to “multilayer constitutionalism,” being the intellectual framework that overcomes the classic division between domestic and international law and encourages the type of processes encapsulated by constitutional interpretation via comparative analysis.

Another aspect that has been highlighted as being an impediment to crossover references to international law by domestic constitutional courts is the notion that there are substantial structural differences between domestic constitutional regimes and the international system which makes comparing rules between them a futile exercise. Goldsmith and Levinson offer a nuanced and highly persuasive counter-critique to this. Specifically they debunk three main contentions made by those who claim such differences: (1) that international law alone lacks a centralized promulgation system which leads to uncertainty as to what the law actually is; (2) that international law alone lacks proper enforcement mechanisms; and (3) that international law alone does not constrain its constituent elements and thus eludes any notion of sovereignty. 285

As to the first contention, they note that “two characteristics distinguish constitutional law with ordinary domestic law and align it with international law” those being that in Constitutional law (like in international law) “the institutionalized secondary rules … are less able to resolve first-order uncertainty … because these systems lack an ongoing legislative process,” and that in most domestic constitutional systems “there is considerable ambiguity and debate about what, precisely, the secondary rules … are.” 286 In particular, Goldsmith and Levinson explain that like for constitutional law, which has a myriad of generic and potentially conflicting substantive protections (such as protections of religious liberty and equality guarantees), similarly international law has such a conflict as the fundamental charters of the international system such as the U.N. Charter, the European Convention on Human Rights, 287 and the International Covenant on Civil and Political Rights 288 have conflicting provisions that courts have not properly resolved in a uniform way. 289 Moreover, neither the U.S. Constitutional system nor international law “can rely fully upon the legal apparatus of the very state” to resolve these conflicts because of disagreement as to the nature of the proffered institutional solutions and because both systems lack a legislative process to resolve such disputes. 290

As to the second contention, Goldsmith and Levinson dispute the notion that international law alone lacks and enforcement mechanism. Indeed, they point out that the question of enforcement is not an appropriate distinction to apply to the domestic versus the international because “[d]omestic constitutional law, just as much as international law, lacks a coercive

284 Alford, supra note 39, at 655.
285 See Goldsmith & Levinson, supra note 127, at 1797.
286 Id., at 1802.
290 See Goldsmith & Levinson, supra note 127, at 1817.
enforcement mechanism standing above the state to ensure that the government complies.”

For example, judicial review is not a method of ensuring compliance, but merely an avenue for a declaration of rights and has no direct means of coercing obedience – a decree by the International Court of Justice fares similarly. Indeed, just as there is no country in the world that can force the U.S. to comport with its international obligations, there is no entity within the U.S. that can force it to comply with a court ruling that it might seek to ignore. What might induce compliance in both fora has been the subject of intense and continued academic debate with theories proposed and counter-proposed, however, for the purposes of this article, it is only necessary to note that the speculations for the reasons the U.S. complies with constitutional opinions by the U.S. Supreme Court which are adverse to it mirror quite closely those assumptions for why it might comply with international law rules which it is known to dislike.

Lastly, as to the third contention, Goldsmith and Levinson explain that the traditional concept of “sovereignty” peddled in the academy, being the notion that a country has the right to govern itself as best it sees fit, is not reflected in reality. They state that “[i]f sovereignty means that states have the right to govern themselves as they please, then how can law – international or constitutional – legitimately impose constraints?” Thus, if the ultimate power of a democratic nation is to be found within its body politic, being the people, then it becomes difficult to comprehend constitutional law within this framework because it often counteracts majoritarian impulses. In this respect, constitutional law acts as a limitation of sovereignty in ways that are similar, if not identical, to the accusation made of international law and its interaction with domestic regimes. All in all, they successfully dispel the argument that “apparent differences between international law and constitutional law really run as deep as is commonly supposed.”

It must be emphasized that constitutional interpretation by method of comparative analysis in addition to serving those international law goals identified above as less controversial, might also advanced those goals that are more controversial (in other words, those goals whose normative desirability is more contested) and that share sufficient commonality with the goals of domestic law. Thus, the way the realist view of the international system might be reflected within the context of comparative analysis would probably result in a normative directive that instructs courts to cite international sources adopted by allied states and to willfully ignore those materials that are favored by rivals or enemies. Similarly, comparative constitutional law could also serve the interests of advancing Western ideals by fostering the reciprocity norm that in this context would work by having U.S. courts rely as persuasive authority on international

291 Id., at 1823.
292 Among the reasons posited by scholars for the compliance with such rulings are reputational considerations, signaling, concerns about the rule of law, and strategic behavior.
293 Goldsmith & Levinson, supra note 127, at 1852.
294 Thus, if the majority of a country wants to impose burdens upon a minority, but not on that majority, under the usual concept of sovereignty, it should simply be allowed to do so.
295 These descriptions are not a recent phenomenon, but merely a reiteration of ancient arguments which go back to the founding of the U.S. See e.g. Barry Friedman, The History of Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy, 73 N.Y.U. L. Rev. 333, 334 (1998).
296 Goldsmith & Levinson, supra note 127, at 1797.
law as an attempt to encourage other nations around the world to do the same. This would enhance judicial predictability in non-Western countries that would adopt constitutional interpretative methods similar to our own.

An important intellectual thrust to the bringing together of international law and domestic law is idea “societal constitutionalism.”298 This is the notion that constitutional theory can be adapted on the global scale by abandoning the state-centric model and substituting it for an approach that holds relevant elements within society as the primary driving force behind particular world interactions and thus would constitute the proper polity for regulation. These diverse polities, depending on the nature of their behavior, would then form a multitude of societies governed by overlapping trans-border constitutional frameworks.

In sum, there are numerous goals and policies that international law and domestic constitutional law share with each other. These exist both in the abstract realm of societal ideals as well as in the more concrete form of specific substantive laws. Thus, as concisely claimed by Goldsmith and Levinson, international law and constitutional law both strive to find “common solutions to the same basic problem of legally constituting and constraining the state.”299 It follows then that both legal systems can benefit from mutual consultation when the context is appropriate. Indeed, domestic constitutional courts and international human rights tribunals are already addressing similar issues such as those pertaining to individual freedoms.300 The blueprint for comparative constitutional interpretation has therefore already been written. Like for constitutional norms on human rights, international norms on the same subjects are particularly susceptible to differing interpretations with judges exercising a considerable amount of discretion (whether they admit it or not) in reaching conclusions presented by issues in this area. Comparative law as a method of constitutional interpretation should be seen as a tempering of the potentially almost-unfettered discretion that these problems present.

As noted above, constitutional comparativism need not operate in a vacuum. Comparative impulses are on display in the operation of numerous constitutional courts, such as in South Africa and Canada, as well as in the set up of transnational bodies of which the EU is the prime example. Courts are ideally situated because they are both norm receptors and norm generators in both international and domestic law, their role being fully exemplified by their absorption of global values into the internal law of states through the process of internalization.301 Consequently, a lot of the consternation uttered by the critics to the very enterprise of comparative constitutionalism is akin to Don Quixote charging at the windmills with his jousting lance. As aptly expressed by Judith Resnik, those opposed to comparative practice on grounds that it erodes sovereignty “have a dismal record, in that American law is constantly being made and remade through exchanges … with normative view from abroad.

299 Goldsmith & Levinson, supra note 127, at 1863.
300 See Neuman, supra note 60, 1900.
Laws, like people migrate [and] [l]egal borders, like physical ones, are permeable, and seepage is everywhere.\textsuperscript{302}

Continuing the metaphor described by Resnik, bringing international law and domestic law closer through common consultation within the context of constitutional interpretation is a way to contain and recycle that seepage. Through the search of policy and substantive commonalities, “the fundamental idea is that what counts is to look at the substance, not at the formal category of conflicting norms.”\textsuperscript{303} The basic common norms shared by both systems, procedural fairness, inclusiveness and participation, when relevant to a particular case or controversy, are justifiable avenues for bringing international law and domestic law together. The key remains to provide the enterprise with the secure normative grounding that can withstand criticism to the charge that international law is insufficiently suited for the task—a charge refuted by the observations illustrated above.

VI. CONCLUSION

Comparativism is inherently about selectivity—as is all of the common law. Judges are always parsing, filtering, and, indeed, selecting what authority they believe to be most binding and persuasive to reach their decision rule. Thus, Justice Scalia’s bemoaning the selective nature of comparative analysis can be equally applied to any context within a judicial decision, and therefore does not actually become a critique of comparative constitutionalism, but rather, of decisional rule itself.\textsuperscript{304} The increasing realities of a globalized world make it so that this form of constitutional interpretation is destined to form a part of the cross-national networks that already characterize much of the modern international legal system.\textsuperscript{305}

International law plays a large role in the development of this new legal world order—it can serve as a focal point for constitutional consultation by domestic courts when the situation is right. Such situations, to be decided on a case-by-case basis, stem from the finding of a proper link between the two legal systems. There can be little argument that notions of justice, fairness, equality, due process, are values inherent in all cultures and religions of the world, as well as basic tenets of international law, regardless of the terms in which they are expressed.\textsuperscript{306} It is to the bringing together of these common denominators that the comparative constitutionalist looks for wisdom, guidance, confirmation, challenge, or curiosity.

\textsuperscript{302} Judith Resnik, \textit{Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism}, 57 \textit{EMORY L.J.} 31, 63-64 (2007).


\textsuperscript{305} See generally ANNE-MARIE SLAUGHTER, \textit{A NEW WORLD ORDER} 65-104 (2004).

As shown above, indulging in excessively particular descriptions of either legal system not only serves no real purpose, but is not grounded in any real notion of meaningful difference. The tensions that might exist between the domestic and the international might also exist between the domestic law of one nation and another, or within the domestic law of a single nation. One factor that should always be remembered is that it should not be the substantive law of each country that is the sole determinant as to whether a reference is possible, “but rather the reasoning at work in confronting a common problem or issue.” From this vantage point international law should now be seen as an extremely attractive source of persuasive authority for constitutional interpretation. Indeed, constitutional law and international law have both been long described as being reflections of rules of “positive morality” rather than as traditional “law.” The key point is that “[a]ll relations, whether domestic or international, are inherently human; differences are differences in degree, rather than principle.” This is part of the mantra underlying the Kantian principle and the ideational and liberal theories of international governance. It is when that common principle or positive morality of purpose is identified in a particular instance that the comparative practice comes into play and what makes international law especially pertinent as a source of authority for domestic constitutional interpretation.

Nevertheless, “[t]he divide between international and domestic law runs deep in the Anglo-American legal thought,” and therefore leaves the comparativist in a constant state of providing justifications for the enterprise. See Goldsmith & Levinson, supra note 127, at 1792.

See Bentele, supra note 12, at 226.


Cottier, supra note 19, at 654. It is to this common humanity that the Rev. Martin Luther King, Jr., appealed when he noted that and “injustice anywhere is a threat to justice everywhere.” Martin Luther King, Jr., Letter from Birmingham Jail (Apr. 16, 1963).