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International Governance and American Democracy

Paul B. Stephan*

Does international governance threaten to crowd out American democracy? Many public figures and scholars think so. The street theater in Seattle last fall and Senator Dole's effort to establish a national tribunal to review World Trade Organization ("WTO") dispute resolution decisions both attest to the extent of the concern. As international institutions burgeon in number and significance, the residuum of authority left in our national government seems an ever diminishing domain. Extrapolating into the future, one can envision a time when the United States retains only as much sovereignty as, say, the members of the European Union or the States in our own federal system. The diminution of sovereignty brings with it a loss of democracy, as the distance between citizens and the institutions that make the most meaningful decisions grows greater.

I take this concern seriously but believe its popular formulation is too simplistic and somewhat misplaced. International governance entails not only the formal institutions and explicit agreements that generate what I have called the "new international law."¹ It also embraces a system of formulating and imposing norms on state and individual behavior that operates outside of any publicly accountable institution. A debate recently has arisen in the United States over the legitimacy of customary international law, with fierce arguments on each side. One dimension of this debate is the tension between American democracy and the adoption of customary norms through the courts.

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1. See Paul B. Stephan, *The New International Law: Legitimacy, Accountability, Authority and Freedom in the New Global Order*, 70 *Colo L Rev* 1555 (1999).

The uncritical incorporation of customary international law in US law encroaches on democracy by taking off the table choices that democratic institutions, whether federal, state or local, wish to make. To be sure, common law adjudication generally poses issues for a democracy, because the power to make law vests in the judiciary, a body designedly free of direct democratic constraints. But customary international law exacerbates this problem to the extent it involves a displacement of the common law process. It is one thing for courts, surveying precedent and relying on a variety of substantive and process preferences, to choose a rule that governs our conduct. It is another for courts to take over a prefabricated system of rules and norms, constructed by a loose alliance of like-minded academics and international law specialists through a form of advocacy that involves no democratic checks. These arguments provide a principled basis for rejecting the wholesale incorporation of customary international law into US law.

The challenge to democracy posed by the new international law also is significant, but still quite different. The investment of lawmaking authority in multilateral international bodies, whether through the negotiation of international agreements or the resolution of international disputes, engages three antidemocratic tendencies. All things being equal, this shift strengthens the Executive with respect to Congress, enhances the ability of concentrated interest groups to procure rules that benefit their own, rather than the general, welfare, and bolsters the power of the bureaucracies of international institutions. Each of these developments shrinks the realm of democratic public decision-making and makes it less likely that lawmaking will reflect the popular will.

US participation in the new international law, however, is not without democratic engagement. The multilateral agreements that make up this burgeoning field come to Congress for adoption, often after negotiations in which legislative leaders take some part. The agreements typically, although not inevitably, take the form of state-to-state commitments, with domestic legal consequences dependent on further administrative or legislative action. These limitations may be inadequate, because the agreements come as take-it-or-leave-it deals that cut short real deliberation, and the pressure on subsequent administrative and legislative actors to conform to international mandates may be too great to resist. But strategies are available, within the framework of existing democratic institutions, to contain these pressures. Congress can insist that international negotiations both go through a preclearance procedure and deal with discrete subjects so as to discourage logrolling. It also can pursue alternative routes to international cooperation. Some combination of these moves, along with reform of the institutions, can bolster democratic checks on international decision-making, even if they cannot guarantee a flourishing democratic culture in the context of the modern global economy. The democratic difficulties associated with international institutions, unlike those presented by customary international law, require pragmatic adjustments in political and lawmaking processes, not principled rejection.

I review briefly the growth in ambition and scope of modern claims for international customary law and the recent debate over the status of that body of law within US jurisprudence. I compare those developments to the rise of the new international law, which flows out of institutions created by explicit international agreements. I show how these two trends challenge American democracy and discuss possible responses. I then apply the preceding analysis to one international commitment that the United States so far has avoided, namely the permanent International Criminal Court.

I. THE GROWTH OF MODERN INTERNATIONAL LAW

Law-based international governance was once the realm of fairly idealistic specialists. International law concerned almost entirely relations among governments, rather than rules that applied of their own force to private conduct. Many questioned whether real governance, as opposed to strategic coordination of government actions to solve certain collective problems, existed anywhere outside the dreams of internationalists. The skeptics argued that without either a duly constituted lawmaker or a mechanism for enforcing its commands, the system of international relations was not "legal" in any useful sense. The epitome of the idealistic rejoinder to these charges was the League of Nations, an institution that represented great aspirations but failed utterly to achieve any significant purpose.

But since World War II, international law based on direct coercion has taken on a new purchase. This is not the place to untangle the historical, economic and political narratives that might explain this development. Rather, I note three broad trends that enabled international law to have a direct impact on American self-government.

A. *The Internationalization of Everyday Life.* The United States emerged from World War II an economic superpower engaged in a global conflict with a formidable adversary. Two points are implied by this statement. The extent of US economic engagement meant that a growing portion of everyday transactions acquired an international dimension. At the same time, the context of the Cold War increased the likelihood that simple international transactions would have complex geopolitical implications.

A perfect example is the commercial dispute underlying the landmark Supreme Court case of *Banco Nacional de Cuba v Sabbatino*.² A Cuban firm owned by Americans sold sugar to a US buyer. In the midst of the revolution, the Castro government seized the sugar and resold it to the same buyer. The buyer tendered payment, and the two putative sellers asked a US court to decide which had the better claim to the money. But for the internationalization of the US economy, the producer of the Cuban sugar would not have been owned by Americans. But for the whirls and eddies

2. *Banco Nacional de Cuba v Sabbatino*, 376 US 398 (1964).

of the Cold War, the intrusion of the Cuban government into the transaction would not have had great foreign policy implications that cried out for a steady hand. Yet to the Supreme Court, the case seemed so fraught with potential repercussions that it required the fabrication of a federal rule of decision to dispose of the controversy, thereby displacing the conventional province of state property and contract law. And because Congress at that juncture had not given any guidance as to the dispute, the Court felt free to devise its own property rule to do the displacing.

Sabbatino is noteworthy because it constitutes the first instance in which the Supreme Court ruled that the international dimension of an otherwise humdrum private dispute required the imposition of a federal legal rule not based on any positive federal law and in derogation of state law. The absence of a statute meant that the Court had to take the initiative in devising the law governing the case, subject to the power of Congress later to choose a different substantive rule (as Congress promptly did in that instance³). More broadly, the case suggests that the federal courts have the duty as well as the power to nullify ordinary state law wherever a subject has international implications. In a world where such implications turned up with growing frequency, the potential shift in lawmaking authority from states to federal courts was considerable.

Another case, also the product of the 1960s, reveals another dimension of the Court's assumed power to nullify internationally inconvenient law. *Zschernig v Miller*⁴ involved an Oregon statute that cut off the rights of otherwise eligible heirs of an intestate decedent if the heirs lived in a country that did not provide reciprocal inheritance rights to US citizens. The statute had as its purpose the denial of hard currency to communist governments. But for the flows of population that the two world wars produced, it would have been unlikely that a US decedent could have heirs in a communist country. But for the Cold War, the identity of a country as communist would not matter, and a state's efforts to insist on reciprocal inheritance rights would not implicate any serious foreign policy concerns. As it was, the Court ruled that Oregon could not discriminate among foreign governments in its inheritance laws, even though no federal treaty or statute said so.

Zschernig, unlike *Sabbatino*, did not put the federal judiciary in the role of law-giver, in the sense that the Court did not assume a power to develop a federal law of inheritance for foreign heirs. Rather, the Court put out of bounds certain choices that states wished to make when addressing this task. But what ties these cases together is a conviction that normal lawmaking processes, whether the conventional development of state common law or enactments of state legislatures, must give way when they encounter disputes that have international dimensions.

3. Cuban Embargo Act, Pub L No 88-633, Part III, Ch 1, § 301, 78 Stat 1013 (1964), codified at 22 USC § 2370(e)(2) (1999).

4. *Zschernig v Miller*, 389 US 429 (1968).

Out of these two cases the lower courts and the academic community built a great edifice. This doctrinal structure has, as *Sabbatino* and *Zschemig* between them indicate, two dimensions. First, any rule which, in the eyes of the international community, constitutes a norm of customary international law is thereby binding on both the federal and state governments, absent some positive federal enactment to the contrary. Second, any action by state or local governments that has the potential for conflict with either an international norm or international relations is invalid. Until recently each of these positions seemed entrenched in US law, even though neither as such has won the Supreme Court's explicit endorsement and the actual practice of the lower courts suggests less than full adherence. A recent revisionist effort, led by Curtis Bradley and Jack Goldsmith, has touched off a pitched and occasionally intemperate debate and may have exposed the underlying weakness of this conventional wisdom.⁵ Moreover, the Supreme Court has pared away at the second position, although this past Term it passed up an opportunity to do more.⁶ But these two propositions about the boundaries of domestic lawmaking in the face of either international opinion or international problems remain orthodox, however embattled.

B. *The Human Rights Revolution*. The emergence of an argument that customary international law norms constitute binding federal law might have remained a modest technical problem, of interest only to a few specialists in the law of federal courts, but for the parallel rise of international human rights law. This movement could trace its origins to the post-World War II war crimes trials in Germany and Japan and the 1948 UN Universal Declaration of Human Rights, but it appeared on the US legal scene only a generation ago, at a time when the Cold War consensus over US foreign policy had disintegrated in the wake of Vietnam. It asserts that certain humane values, through a process of international dissemination and support, have become binding rules that constrain what states may do to both their own and other countries' citizens. Although a range of international agreements, such as the Universal Declaration, the UN Covenant on Civil and Political Rights, and the European Convention on Human Rights, provide some textual support for the movement, advocates rely largely on assertions about a consensus formed within the international community to determine what constitutes an international human right. Examples of

5. Compare Curtis A. Bradley and Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv L Rev 815 (1997) and Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va L Rev 1617 (1997) with Harold Hongju Koh, *Is International Law Really State Law?*, 111 Harv L Rev 1824 (1998) and Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 Fordham L Rev 371 (1997).

6. See *Barclays Bank PLC v Franchise Tax Board*, 512 US 298 (1994) (holding that State tax does not violate Commerce Clause simply because it impairs the ability of the United States to address the world with "one voice"); *Crosby v National Foreign Trade Council*, 120 US LEXIS 4153 (S Ct) (2000) (striking down Massachusetts sanctions against Burma on basis of inconsistency with federal sanctions statute; issue of general foreign relations preemption not addressed).

such rights include prohibitions of torture, the death penalty (either as applied to minors or in general), and criminalization of consensual sexual conduct among adults.

When married to the proposition that customary international law constitutes federal law, the assertion of the existence of an international human rights law took on great significance. International human rights advocates had a means of presenting courts with rules that they themselves had devised and insisting on their enforcement. The syllogism on which they relied seems straightforward enough: (1) specialists in international law, and academics in particular, have the capacity to determine whether a consensus has formed within the international community as to the existence of a particular right; (2) those rights that exist constitute customary international law, and thus apply within the United States as federal law; therefore (3) those rights that academics perceive to rest on an international consensus bind the United States and are enforceable by US courts. After several years of boosting this concept within the academic community, human rights advocates in 1980 won an endorsement from an important Court of Appeals in the famous *Filartiga* case.⁷

In the two decades since *Filartiga*, the human rights revolution has proceeded apace. Within the academic community, the belief that a body of human rights law exists independently of any particular publicly constituted lawmaking body is an article of faith. The few persons who have questioned it have faced heated criticism. In Europe the concept has gained force through the work of the European Court of Human Rights, which parallels the European Union ("EU") in its shifting of a range of legal decision-making to the supranational level. US courts have generally talked as if they recognized the existence of this body of law, although the instances where human rights litigation succeeded in supplanting US law are few. The Supreme Court has yet to be heard from, although several of its decisions over the last decade are inconsistent with the broader claims made in the academic community.⁸ A 1991 federal statute endorses human rights litigation in a specific set of circumstances, namely when governments torture or commit extrajudicial murder, but otherwise, Congress has signaled its skepticism by refusing to allow any international human rights covenant to have domestic legal effect.⁹ One has an overall sense of transition and instability. Either human rights law will fulfill the ambitions of its academic supporters through increasingly bold accomplishments, or it will fall back, somewhat like the poverty law movement of the 1960s.

7. *Filartiga v Peña-Irala*, 630 F 2d 876 (2d Cir 1980).

8. See, for example, *Argentine Republic v Amerada Hess Shipping Co*, 488 US 428 (1989) (rejecting argument that violation of international law constitutes an exception to or a waiver of foreign sovereign immunity).

9. Torture Victim Protection Act of 1991, Pub L No 102-256, 106 Stat 73 (1992), codified at 28 USC § 1350.

C. *The Rise of International Economic Law.* The United States ended World War II convinced that it could exercise its economic power through state-to-state cooperation as much as by unilateral fiat. The initial architecture for post-War economic coordination, forged at the Bretton Woods conference in 1944, soon proved inadequate to the task, and new institutions (the Marshall and Dodge Plans, the General Agreement for Tariffs and Trade ("GATT")) supplanted or replaced those that had been promulgated or proposed while the War was still winding down (the International Monetary Fund ("IMF"), the International Bank for Reconstruction and Development ("the World Bank"), and the International Trade Organization ("ITO")). Once the European and Asian economies recovered and even began to compete with the United States, however, the original architecture regained some of its appeal. During the financial instability of the 1970s, the IMF took on greater responsibility for managing currency movements and the economic restructuring of impecunious governments, beginning with the United Kingdom under the Labour Party. The Organization for Economic Cooperation and Development ("OECD"), the offspring of the Marshall Plan, became a locus for coordination of tax, investment and competition policies. The GATT evolved from a forum for negotiating tariff rollbacks into a dispute resolution body that also promoted broader forms of deregulation. With the end of the Cold War, the IMF and the World Bank took on leading roles in the management of the former socialist countries' economies, and the GATT transformed itself into the WTO, a body that today looks a great deal like the institution that the old ITO was supposed to become. Meanwhile, the United States used the model of economic cooperation suggested by the GATT to shape its relations with its North American neighbors, first with a Canadian trade agreement and later with the North American Free Trade Agreement ("NAFTA"). A proposal to create a Free Trade Area of the Americas ("FTAA"), embracing the entire Western Hemisphere, is in the works.¹⁰

A parallel development involved the economic integration of Europe through the European Community ("EC"), which during the 1990s became the EU. Across a wide range of economic issues—currency management, competition policy, consumer protection, and employment law, as well as international trade and investment—the European organs, rather than any national government, became the decisionmaker. This shift in lawmaking and administrative authority advanced the development of a new body of international economic law both directly and indirectly. The direct effect concerned a change in incentives to reach international agreements with the EC. By presenting the outside world with a single institutional actor, the Europeans achieved economies of both scale and scope in their negotiations with other states, thereby increasing the value of agreements to be reached. At the same time, the consolidation of the EC made it more costly to ignore that institution, which could erect greater

10. See Stephan, 70 *Colo L Rev* (cited in note 1).

trade barriers and otherwise inflict larger costs on countries with which it was displeased. The indirect influence may have been even greater. The EC, and later the EU, offered an example of effective supranational governance. Its apparent success in promoting economic growth and cooperation serves as a rebuke to those who would put national sovereignty ahead of progress.

The growth in scope and influence of these international institutions dealing primarily with economic matters has not gone unnoticed. Critics of the EU complain of a democracy deficit, labor and environmental activists claim that the WTO advances the interests of multinational corporations contrary to the public welfare, and most developing nations chafe under IMF and World Bank strictures. Within the United States, Congress has set out a procedure that the Executive must follow when submitting trade agreements for approval, including those that serve as the foundation for the WTO, and has threatened to wield its funding power to impose significant restrictions on the IMF and the World Bank. Others would do more to scale back US commitments to these institutions. During debate on the 1994 Uruguay Round Agreements, for example, Senator Dole proposed that Congress condition its approval on the creation of a domestic tribunal that would undertake an independent review of WTO dispute resolution decisions. Political figures as diverse as Ralph Nader and Pat Buchanan would entirely disentangle the United States from these international commitments. The Meltzer Commission study of the IMF and the World Bank recommends significant restructuring and cutting back of their operations.¹¹

The fiasco in Seattle last fall, which proved fatal to the launching of a Clinton round of negotiations to redesign the WTO architecture, may suggest that we have reached a hiatus in the growth of these international institutional structures. But whether or not the WTO acquires new authority from its members, it remains an important governance body. Its ongoing role as dispute settler, essentially as a trade law court, will continue to have profound effects on national economic regulation.¹² Elsewhere, increases in international regulatory authority remain the dominant theme. The EU is beginning negotiations to revise its constitution with an eye to Eastern expansion; the IMF and World Bank have begun taking on new anti-corruption and environmental initiatives. The domain of international institutional governance continues to expand.

11. International Financial Institution Advisory Commission, Report of the Meltzer Commission (Mar 2000), <<http://phantom-x.gsia.cmu.edu/IFIAC/USMRPTDV.html>> (visited Sep 16, 2000).

12. See Paul B. Stephan, *Sheriff or Prisoner? The United States and the World Trade Organization*, 1 Chi J Intl L 49 (2000).

II. THE CLAIMS OF INTERNATIONAL LAW AND THE CONSTRAINTS OF DEMOCRACY

Both kinds of international law—the rules derived by courts in response to perceptions of international custom and foreign affairs complications, and the rules generated by international institutions such as the WTO, NAFTA and the IMF—pose problems for a democracy. Each involves the imposition of a legal outcome without the direct participation of the national lawmaking bodies in the law's formation. The distance between lawmaking and law enforcement presents a difficulty for a society that presumes the consent of the governed. Because it comes from the outside, international law does not go through the normal filters that a democratic system uses to thwart undesirable or harmful, as well as unwanted, laws.

But the two types differ in how they become law, and these differences have distinct implications for democracy. Court-created international law relies fundamentally on a principle of authority that leaves no room for popular decision-making. Neither voice nor exit play a role in its development or application. Institutional international law, at least for the United States, entails both. The Executive, and to a limited extent Congress, has a voice in developing the content of the international agreement that an institution will administer, each has a role in deciding how to implement the mandate of international institutions in domestic law, and both can agree to withdraw the United States from a commitment that has become unacceptable. These checks may not be enough, but they are greater than what applies to court-created law.

A. *Court-made International Law.* Most advocacy of customary international law depicts it as a body of norms that are “out there,” already formed and waiting for enforcement, much like the common law of the late 19th century. Even the more finely grained accounts of how a norm gets to become customary international law tend to glide over certain important distinctions. One factor that is said to play a crucial role in determining international custom is “state practice.” This assertion makes sense—it is hard to conceive of custom as anything other than commonly exhibited behavioral norms. But specialists then assert that state practice entails not the observable behavior of states, which is messy and often lawless, but rather what states assert as norms. By practice, in other words, they mean not what states and their agents do, but rather what they say. Practice becomes a matter of rhetorical style, not of preferences revealed by conduct.¹³

This move is critical because it shifts the authority to decipher state practice from those who observe state behavior to those who interpret statements of intent. As a practical matter, this means that the academic community's hermeneutic monopoly

13. See Jack L. Goldsmith and Eric A. Posner, *A Theory of Customary International Law*, 66 U Chi L Rev 1113, 1116–20 (1999).

comes into play. To know what constitutes customary law, we need to know what states believe their obligations to be. But because states tend to speak in open-ended, if not vacuous, terms, someone has to explain what those statements really mean. We look to scholars to perform this task. So even though, as a formal matter, authorities such as the Statute of the Permanent Court of Justice rate academic opinion last in a list of sources of international law, in reality international jurists play the primary role in determining the content of customary international law.

In what way is the process by which the community of international law scholars forms a consensus undemocratic? To join this community, a person must pass two hurdles. First, he or she must obtain an academic position of some distinction in law or international relations. Second, the other members of the community must accept that person as a genuine contributor to the conversation, rather than as an uninformed outsider. Both processes involve co-option by a group that faces little or any outside pressure or accountability and tends toward insularity. Limiting decision-making to such a group seems the antithesis of democracy.

But this observation may prove too much. Any realistic conception of a flourishing democracy must save room for institutions that do not respond readily to the popular will. One of the foundations of American democracy is a conviction that popular sovereignty expressed through public institutions must coexist with structures that constrain the popular will. Our judiciary, exercising both the august power of judicial review and the more mundane but critical function of constructing common law rules that fill in where the legislature has not spoken, checks popular excesses and keeps the system in good operating order. The First Amendment, which recognizes specific spheres of civil society that operate independently of the state (the press, religion, and other expressive communities) implies a further constraint on popular decision-making. These limitations are not so much antidemocratic as definitional. Is not the lawmaking power of the international law scholarly community simply an extension of the academic freedom that bolsters and defines the peculiarly American form of democracy?

What I will call the civil society argument reflects confusion about the role of academic freedom in democratic lawmaking. The academic community, as well as other members of a civil society such as human rights activists, contributes to a flourishing public space through shaping the debate. It produces research, arguments and values that inform discussion and mold views on issues of the day, including fundamental conceptions of decency and humane treatment. But giving such a group lawmaking power both displaces public discussion with a form of raw authority, and may have a corrupting influence on the group's civic function. The displacement occurs when academic judgments about the content of particular norms substitute for the normal process of promulgating norms. The risk of corruption follows from the power implicit in the group's authority to declare binding rules. Knowing that their conclusions will have direct effect on people's lives, a strain of self-consciousness and

self-censorship may enter into the community's discourse, distorting its arguments and judgments.

This last concern—that giving public weight to academic opinion may corrupt academic freedom—seems less significant in Europe and perhaps elsewhere. Part of the reason why American international law specialists seek a direct lawmaking role is to mimic their counterparts overseas. In Europe and many other countries, the jurist professor plays a central role in shaping law, much more so than the local judiciary. But this difference in institutional function reflects a less stable and enduring democratic tradition in Europe more than it suggests any special aptitude on the part of the foreign professorial class. One should not forget that Germany has had continuous democratic institutions only since 1949 (not counting the East, which came to democracy even later), and that the first directly elected leader in French history was de Gaulle. On the continent the integrity and wisdom of the professors seemed attractive in comparison to the venal and uninspiring figures that have populated popular political life, especially in the years before World War II. Although the United States also has had its share of corrupt and bumptious politicians, its democratic channels on the whole seem to have inspired greater confidence and legitimacy than do its counterparts in Europe.

But perhaps I am ignoring those democratic checks that do exist on the academy's power to proclaim international law. Congress remains free to repudiate or alter judicial interpretations of international law, including those derived from an academic consensus. It did so with respect to *Sabbatino* by rejecting the Court's interpretation of the Act of State Doctrine, and with respect to *Filartiga* by substituting more specific and limited rules governing human rights liability for the open-ended court holding. Does not this power to correct and revise answer any democratic objection to judicial incorporation of international law?

A brief answer is that relying on the power of Congress to review all nonconstitutional holdings of the judiciary proves too much. US legal doctrine generally frowns on conceding common law powers to the federal judiciary absent some explicit legislative grant of authority. We expect the courts to develop common law interstitially and to regard the legislative cues that prompt such lawmaking as constraints on the available choices of outcomes. None of this would be necessary if we regarded the power of Congress to respond as sufficient to justify any judicial lawmaking.

More to the point, we understand that the enactment of legislation is a cumbersome and costly process, more likely than not to be incomplete. Shifting the burden from the judiciary, to find legislative authority for the rule it wishes to adopt, to Congress, which would have to enact laws cancelling judicial lawmaking, would lead to a significant change in the kinds of rules that become and stay law. In the context of customary international law, this shift in lawmaking burden would ensure the survival of a greater number of rules that owe their provenance to academic perceptions of customary norms.

If the principle equating customary international law with federal common law presents democratic problems, what is the solution? A modest proposal would direct the judiciary to look to international custom and practice for potential sources or models in cases where Congress, by mandate or inference, has indicated that the courts should come up with a rule, but not to do anything more. Courts do not have to regard customary international law as something that independently determines federal common law, and, if democratic values matter, they should not. Courts can listen respectfully to the scholarly community when they have a need to search for international law, but they do not have to regard the sentiments of that community as binding.

What of the other strand of judicial lawmaking in the wake of international concerns, namely the preemption of state and local laws that might interfere with the foreign affairs powers of the federal government? The problem here is different from that posed by customary international law, because the opinion of the academic community as to what laws might interfere with federal power has no special weight. Rather, the courts themselves make the judgment as to what constitutes an unacceptable encroachment on federal prerogatives. We take for granted judicial restriction of the range of choices that state and local governments can make, pending further review by Congress, through application of the preemption doctrine and the negative Commerce Clause. But we still expect the courts to have a convincing structural argument to justify the exercise of this power. In a world where almost all economic behavior has international dimensions and the great stakes of the Cold War no longer concern us, the need to impose this particular restriction on state and local democratic governance seems less pressing. In the tax area, the Supreme Court has suggested that it now uses a different template: State law that has the potential for interfering with the foreign relations interests of the United States will be declared unconstitutional only if it directly contradicts a specific act of Congress. Whether this rule ultimately will extend to all foreign-affairs preemption claims remains uncertain.

B. *International Institutional Governance.* The growing realm of international institutional governance, conducted by such bodies as the WTO, IMF, the World Bank, and the OECD, as well as regional entities such as the NAFTA organs, increasingly collides with local governmental choices. The WTO has ordered the United States to revise its clean air regulations, get rid of its ban on the harvesting of tuna and shrimp that kill dolphins and turtles, and change the way it taxes income from export sales.¹⁴ A claim brought by a Canadian company under NAFTA, which requires World Bank arbitration of such disputes, challenges fundamental aspects of the US tort system.¹⁵ The EU has invoked the WTO dispute resolution authority in

14. See Stephan, 1 Chi J Intl L 49 (cited in note 12).

15. *Loewen Group v United States*, (Case No ARB(AF)/98/3), <<http://www.worldbank.org/icsid/cases/pending.htm>> (visited Sept 16, 2000).

seeking to overturn the US sanction regime on Cuba and the Massachusetts sanctions on Burma. It takes little imagination to conceive how these bodies might further encroach on US democratic decision-making. A glance across the Atlantic at the EU indicates how far international governance can go, once a national government commits itself to the process.

Yet none of these international institutions appeared on the scene full-blown and without the consent of the United States. Each rests its authority on an international agreement that the United States helped to draft and then approved through the normal lawmaking channels. Almost without exception, each can do nothing that has a direct effect on US law. Rather, the United States must make a separate decision, reached through normal domestic processes, to implement whatever mandate an international organization imposes. And in each case the United States retains the right to withdraw from these institutions, a choice that it can make either globally, by outright renunciation of its obligations, or incrementally, through withholding funds for their activities. What more in the way of democratic deliberation and accountability can one ask?

The response, I think, is that international negotiations, conducted on a multilateral basis, present significant structural problems for a democracy. The difficulty lies in a dilemma. Multilateral agreements can bring great benefits to a nation by solving collective action problems at the international level. To achieve these benefits, a democratic state must have the capacity to make binding promises to other nations, thereby tying itself to the proverbial mast in the face of an uncertain future. We should not forget that one of the principal motivations for the creation of the United States was the need for a government that could make responsible and enforceable international commitments. But such agreements also present a potential for abuse, because they may contain rules that serve special interests rather than the general welfare. Moreover, there are substantial reasons for believing that the risk of international negotiations producing harmful agreements is somewhat greater than the comparable risk of domestic politics generating welfare-reducing legislation. The dilemma, then, is that an essential component of American democracy can bring about a surrender of lawmaking power to institutions that may not serve our interests.

The core of the problem lies in two tendencies of most forms of democratic governance, each of which may result in what economists call government failure. First, governments do not always pursue the common good, but instead may respond disproportionately to discrete and well-organized groups. Second, agents of governance may have their own agenda. Social theorists, going back to Max Weber, have assumed that bureaucracies seek to maximize their power, whether expressed in larger budgets or greater discretionary authority over other people's lives and property.

Thus within any system of democratic self-rule there exists the potential for lawmaking that causes more harm than good.

Several aspects of international lawmaking, as the United States and other nations currently conduct the process, increase the likelihood of mischief.¹⁶ First, governments carry out international negotiations in secrecy so as not to tip their hand to the other players. By controlling the information needed to evaluate the deal, they make it harder for others to monitor what they do. This means that the Executive has an advantage in negotiating with Congress over the content of these agreements. Some interest groups may have a similar edge because of their technical expertise regarding the issues at stake, and thus may find it easier to strike side deals with the Executive that Congress cannot adequately evaluate. Second, the structure of multilateral negotiations gives the Executive a potentially even greater advantage. The agreement that concludes such negotiations becomes a take-it-or-leave-it package, which Congress must endorse in its entirety or not at all. Because it has influence over the composition of the package, the Executive can decide whether to salt the deal with provisions of concern to interest groups. Knowing that the Executive can produce special benefits (or inflict special harms) as long as the number and extent of such provisions do not break the deal, interest groups will lobby the Executive to obtain these favors. A careful review of any major trade agreement of the last quarter-century would uncover many instances where, hiding behind layers of technical verbiage and arcane formulations, handouts are given to favored groups such as automobile makers, textile manufacturers, farmers, and the entertainment industry, usually at the expense of American consumers.

Finally, the hypothetical right to exit an agreement does not do much to check the tendency of the Executive to propose, and Congress to accept, arrangements that may harm the general welfare. First, as noted in the context of legislative overrides of judicial adoption of customary international law, we normally do not regard the ability of Congress to rewrite the law as an adequate mechanism for forestalling the production of bad law. Moreover, in the context of multilateral agreements, the cost of withdrawal likely will exceed the harm caused by any particular decision reached at the international level. The power to repudiate an international commitment thus becomes an empty threat.

If we can imagine cases where the Executive will build into international agreements provisions that do not serve the general welfare, then it also becomes plausible to imagine that the Executive might tolerate a certain level of aggrandizement on the part of international bureaucracies. All things being equal, the Executive might prefer keeping these institutions on a short leash, but they also might regard an ambitious and therefore meddling international bureaucracy as a fair

16. For a fuller discussion, see Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 *Nw J Intl L & Bus* 681 (1996-97).

price to pay for an ongoing bargaining process that increases its authority at the expense of Congress. Followers of the WTO as well as readers of the Meltzer Commission report on the IMF and the World Bank will have a ready supply of examples of mission creep and other forms of bureaucratic expansion.¹⁷

These arguments point to a potential problem, not necessarily a clear and present danger. We must explore the seriousness of the threat to democratic decision-making that the current complex of international institutions poses. Many of the demonstrators in Seattle believed that the case is proved, that the WTO (and by proxy, perhaps, the other major institutions of international governance) serves the interests of large corporations and manifests dangerous indifference to the environment and global labor conditions. A less alarming (and alarmed) perspective might indicate that the current system contains some unattractive aspects, but that no institution currently in existence limits US discretionary decision-making as comprehensively as, say, the EU does its members.

At the same time, we need to pay attention to the trends. Over the last two decades international institutions have significantly augmented the scope and depth of their authority. Interest groups that historically regarded themselves as outsiders to these bodies, in particular human rights, environmental, and labor advocacy organizations, have begun to lobby them directly. Broadening the political base of the institutions might lead to more representative outcomes, but it might also encourage wasteful rent-seeking and bring about other unattractive outcomes, if different from what we have seen. The example of the EU beckons, as a model of administrative fiat based on technocratic consensus supplanting democratic decision-making.

What might be done to improve the odds that international commitments will accord with democratic preferences? I note but put aside proposals to improve the transparency of the international institutions, not because they are undesirable, but because this move shifts attention away from what the United States can do with its own lawmaking process. I also reject the proposal that all international commitments be regarded as "treaties" and therefore subject to supermajority Senate approval under Article II of the Constitution. This ingenious idea, most famously associated with Laurence Tribe, not only has a problematic constitutional foundation, but does not do justice to the array of strategies available to governments seeking to act in concert.¹⁸ Instead, I want to suggest three approaches that we might take through a combination of legislative reform and constitutional reinterpretation. Neither is a panacea, but together they at least hint at the kinds of strategies that might result in better, if more limited, commitments to international governance.

17. Report of the Meltzer Commission (cited in note 11).

18. See Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv L Rev 1221 (1995).

First, the United States might extend the preclearance and information-forcing rules now applicable to trade agreements through the “fast track” procedure to other kinds of international agreements, such as extensions of additional funds to the IMF. Requiring the Executive to seek advance approval from Congress as a condition of entering into negotiations has its drawbacks, both because the Executive still has an information advantage in the face of uncertainty, and because this condition might foreclose desirable bargaining opportunities. But by forcing the Executive to enter into a debate about the objects of a negotiation before fabricating a “take-it-or-leave-it” proposition, this approach redresses at least some of the imbalance between the branches.

Second, the federal government might take a page from some of the State constitutions, which contain “single subject” provisions limiting the scope of individual bills. This strategy seeks to reduce logrolling, a process that allows lawmakers to trade support for undesirable proposals as a means of creating a political foundation for the enactment of legislation. Recall the dozens of separate instruments that made up the Uruguay Round Agreements, on which Congress voted as a single package. Questions as diverse as the design of the WTO, the strength of intellectual property regimes, the liberalization of telecommunications and financial services, food safety standards and tariff reduction all found their way into an integrated bargain. If the object is to generate more bargains, then this kind of logrolling may be attractive. But if we wish to let democratic politics, messy though they may be, intrude on this process, then Congress might well insist that future trade (and other) agreements be negotiated piecemeal and be presented for separate approval.

Of course, reducing the opportunities for logrolling might have an undesirable if unintended consequence. Governments faced with constraints on their ability to trade concessions need not accept inaction as their only alternative. Instead, they might choose to embrace an open-ended standard that effectively delegates legal decision-making to an enforcement agency.¹⁹ If largely unrestrained decision-making by an international body seems no more desirable than the kinds of special-interest pandering that logrolling facilitates, then one would have to craft a strong antidelegation rule to buttress a “single subject” requirement.

Third, we might do well to remember that top-down control is not the only approach to solving collective action problems. Rather than setting up international agencies to address international regulatory problems, we might consider allowing individual countries greater freedom to offer regulatory packages into which businesses might contract. Roberta Romano has suggested such a scheme for

19. See Alan Schwartz and Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U Pa L Rev 595, 613–15 (1995); Giancarlo Spagnolo, *Issue Linkage, Delegation, and International Policy Cooperation* (Working Paper) (Cambridge 1999) <<http://www.hse.se/personal/spagnolo>> (visited Sept 10, 2000).

securities regulation, several scholars have debated the merits of this approach in bankruptcy, and I have explored ways in which this strategy might be implemented in intellectual property and antitrust law.²⁰ Competition among regulatory systems also has drawbacks, but even conceding the risk of market failure, it remains an underutilized approach.

Finally, note the contrast in the suggested approach to judicial incorporation of international law and to US commitments to international governance. The former involves a reconceptualization of the relationship between international and US common law, because the lawmaking process here is largely conceptual and driven by abstract arguments derived from normative propositions. Thus I argue that, as a matter of principle, courts should flatly reject the argument that customary international law, simply by being identified as such, constitutes the law of the United States. That argument has an authoritarian foundation which cannot easily be reconciled with democratic norms. The problem of entanglements with international institutions, by contrast, involves political economy more than principle. It suggests the need for rethinking institutional design, but not for wholesale rejection of this process.

III. A CASE STUDY: THE INTERNATIONAL WAR CRIMES TRIBUNAL

The present debate over the legitimacy of the claims of international law on the United States takes on a sharp focus when it comes to the Rome Statute of the International Criminal Court.²¹ Representatives of the United States for many years promoted the concept of an international body that could try international offenses, and played a leading role in the negotiations that produced the Rome Statute in 1998. Yet the Clinton administration, perhaps deterred by the baleful gaze of the Republican majority in the US Senate, ultimately decided not to embrace the Statute.²² Internationalists largely have been aghast at the US failure to support the International Criminal Court ("ICC"), decrying what they see as a short-sighted refusal to advance the development of an international law of criminal responsibility. Here, both strands of the interaction of international governance and US democracy come together. The authority of the Court, although based on a treaty, involves the application of a body of human rights law that remains significantly underdeveloped and thus in need of interpretative construction, and the Court is an international institution with its own agenda and interests.

20. Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 *Yale L J* 2359 (1998); Paul B. Stephan, *Regulatory Cooperation and Competition—The Search for Virtue*, in George Bermann, et al, eds, *Transatlantic Regulatory Cooperation* (Oxford forthcoming 2000).

21. Rome Statute for the International Criminal Court, UN Doc A/Conf 183/9, (1998).

22. For an account of the US decision not to accept the Statute, see David J. Scheffer, *The United States and the International Criminal Court*, 93 *Am J Intl L* 12 (1999).

The ICC matters to American democracy, if at all, only if it has the capacity to criminalize the conduct of Americans. US persons would come within the Court's jurisdiction if either (1) the United States accedes to the Statute or (2) they were to engage in wrongful conduct on the territory of a state that has acceded, or on board a vessel or aircraft registered in a state that has acceded. Objections to either possibility come in two flavors, procedural and substantive. I will put aside the claim that the Court's proceedings may not accord with fundamental notions of fairness as outside the scope of my argument.²³ Instead I address what I consider a deeper problem—the transfer of lawmaking authority to an international institution.

The Statute sets in motion a process of crime definition that will unfold at the international level. The process will have two forms. First, two-thirds of the states that have acceded to the Statute may vote to amend or expand the definition of covered offenses. In particular, the Statute envisions a new crime of "aggression," to be defined by a conference and adopted by two-thirds vote. Second, many terms in the definitions of covered crimes contain deep interpretive problems and thus call on the Court to determine its own jurisdiction.

At first glance, the express authority of the parties to amend the definition of crimes may not seem to pose much of a problem, because Article 121(5) specifies that such amendments will not apply to the nationals of a state otherwise party to the Statute that does not accept the amendment. But two troubling possibilities exist.²⁴ First, Article 5(2) provides for criminalization of "aggression" once the parties define that offense pursuant to Article 121. If such definition constitutes an "amendment" of Article 5, then a dissenting state's veto right under Article 121(5) applies (unless that state has never accepted the Statute, in which case its nationals would be subject to the new definition if they act in countries that have approved it). But if fleshing out the crime of aggression was considered merely implementation, and not amendment, then a serious issue arises. A two-thirds majority could decide to criminalize behavior that the United States might consider the normal conduct of its foreign relations. Second, even with the veto check on the amendment process, amendments might shape the content of the provisions that do apply to US nationals. The Court could regard amendments as indicative of the meaning of the unamended provisions. Such back door use of *ex post* events to interpret a preexisting enactment is not unknown in American jurisprudence.

23. I also will ignore another problem that has provoked some criticism, namely the Prosecutor's unchecked authority to decide whether to bring a case. See *id.* at 14. This issue exacerbates the problem of court lawmaking, but is secondary to the fundamental question.

24. I am putting aside a third troubling possibility, namely that the Statute will come into force without US participation and that the parties then will create new crimes. The right under Article 121(5) to object to amendments applies only to parties. As a consequence, under this scenario US persons acting in the territory of parties (including persons who act through agents) would be subject to any new crimes no matter what objections the United States posed.

Even without amendments or implementation of the “aggression” crime, enough indeterminacy exists in the definitional elements of the crimes covered by the Statute to give the Court plenty of opportunities for creative lawmaking. This should not be surprising. Although the notion of war crimes and various conventions giving content to that concept have been around for the better part of a century, the occasions when disinterested tribunals have applied these principles to concrete cases have been few. Great opportunities exist for the Court to expand its powers. To take just two examples, Article 7, which deals with crimes against humanity, criminalizes imprisonment “in violation of the fundamental rules of international law” and “persecution” (defined as “severe deprivation of fundamental rights contrary to international law”) on the basis of political, racial, ethnic, cultural, religious or gender status. Think how these concepts, tersely expressed in the Due Process and Equal Protection Clauses of the Fourteenth Amendment, have given free play to our own Supreme Court. Should we expect greater restraint from the ICC?

Perhaps my concerns seem far-fetched, and at any rate insensitive to the potential for people of good will to mold the Court into an instrument for justice and decency. Perhaps the most troubling possibilities will not transpire if the United States plays a constructive role under the Statute, rather than boycotting the Court as it currently is doing. The thrust of my argument, however, suggests that someone convinced of the value of American democracy and seeking to advance its underlying principles has a legitimate basis for resisting US engagement with the Court.

IV. CONCLUSION

The penetration of international law into mainstream US legal debates has provoked both enthusiasm and indignation. Those who want to give greater force to claims derived from international law see this move as serving important ends—it strengthens, or at least expresses, certain normative goals that they favor; it bolsters law as a humanistic institution that operates free of narrow national interest; and it promotes the roles of international law specialists in the lawmaking process. Critics respond at many levels, but concern about democratic self-governance seems to dominate. Because international law comes from outside the national lawmaking process, it undermines the institutions through which a democratic republic rules itself. So framed, the debate seems absolute. One must take international law or leave it, without much room for distinguishing among international norms and the processes that generate them.

But the debate need not be so absolute. I have shown that arguments for the uncritical embrace of customary norms rest on different premises from those involving the acceptance of delegated international governance through international institutions. One can remain deeply skeptical of the former set of claims and still accept the desirability of some delegations to some international institutions. Seen from the perspective of democratic self-governance at the level of the nation-state, the

desirability of these delegations turns on the way the democratic process addresses them. One may oppose open-ended delegations of lawmaking authority over a significant range of issues and still respect a narrow and focused decision to respect a specified set of international determinations.

The Rome Statute creating the ICC illustrates the point. It establishes an international institution with broad authority to create and apply a body of human rights law, informed only by general aspirational statements in various international documents that for the most part have not been tested in concrete disputes. Opposition to the ICC does not require that one reject all international entanglements, and a principled supporter of, for example, trade dispute resolution through the WTO may still object to this particular commitment. The broader point is that democracy and international governance can coexist and even thrive, once one attends to democracy's needs and possibilities.