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AMERICAN HEGEMONY AND INTERNATIONAL LAW

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Hegemony is a concept of political power. It speaks to a global order structured by asymmetries of power. Modern law, in contrast, begins with an idea of equality among subjects. For domestic law, this is an equality among individuals; for international law, it is an equality among states. Legal outcomes are determined by identifying claims of right, not by measuring assertions of power. In the domestic order, we understand law by contrasting it with politics; we speak of the courts as the nonpolitical branch of government. Similarly, international institutions with legal responsibilities distinguish themselves from political decision-makers. The Security Council may provide for a great power veto, but there is no similar reflection of political power within the International Court of Justice.[1] Just for this reason, appeals to international law have been one of the tools available to weaker states in their battles with more powerful states.[2] Conversely, powerful states have been wary of adjudicatory mechanisms for settling disputes.[3]

Both internationally and domestically, political power operates at the origins of law—for example, within legislatures or treaty negotiations. But, for both, the move from political disagreement to legal resolution represents a shift of norms from inequality to equality. Once the legal rules are set, outcomes should not depend on the relative power of the disputants. To identify the operation of political power within an institution of law is to discover a "defect," a site at which reform must be pursued if the values of law are to be maintained.[4]

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1. Article 94 of the United Nations Charter, after setting forth an obligation to comply with decisions of the Court, does locate enforcement authority in the Security Council. UN Charter Art 94, §§ 1-2 (1945).
2. The best example of this is the case brought by Nicaragua against the United States. Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v United States of America*), 1986 ICJ 14.
3. Currently, of the permanent members of the Security Council only the United Kingdom has accepted the compulsory jurisdiction of the ICJ under Article 36(2) of the Statute of the Court. See Statute of the International Court of Justice, Art 36, § 2.
4. We see a current example of this in the felt legal need by the Hague Tribunal to investigate allegations of the NATO war crimes in the Kosovo campaign.

Of course, we would be wrong to think that because law follows politics, law always has the last word. A state may have the power to ignore a legal decision it does not like. It may be able to boycott legal proceedings or shift the institutional locus at which a dispute is resolved from an adjudicatory setting to one of negotiation. One of the ways in which the international order differs from the domestic order is in the much diminished range of its adjudicatory mechanisms and, conversely, the greater range for the deployment of power even in the face of legal claims. When we compare the international to the domestic order, the balance between power and law tilts dramatically in favor of power—meaning the capacity to advance state ends independently of the norms and procedures of law. Many contemporary observers, however, believe that this situation is rapidly changing, as international law gains normative strength and institutional presence.

This opposition of power and law—and the trade-off between them—offers too simple a view of the relationship between these concepts. This is not just because a great power may often find it in its interests to support the international legal order.[5] That is no doubt true, but it still assumes that power and law can be measured against each other, i.e., on a single scale of state interests. The situation we confront, however, challenges the idea that any such scale exists.

Today, we face the unique situation that the world's hegemon, the United States, understands itself as a nation under law. It understands its political power to be linked to its commitment to an internal, constitutional order of law. The traditional opposition of power to law has been transformed into a complex opposition between constitutional law and international law. This double character of law's rule—constitutional and international—creates the deep puzzle of the relationship of the United States to the emerging global order of law. At stake is the relation of the constitutional conception of popular sovereignty to the international law concept of human rights.

My ambition in this essay is not to resolve the puzzle of this relationship, but only to secure a perspective from which to better understand the troubled relationship between the United States and international law. Law does not simply impose an order on a field of activity; rather, it is constitutive of a way in which experience is organized, through the meanings that we perceive in events. At base, these two concepts of law construct different worlds, each of which appeals to values that we want to affirm, but which are nevertheless incommensurable.

I. THE IDEOLOGIES OF LAW: SOVEREIGNTY VERSUS RIGHTS

A popular thought in contemporary discussions of foreign policy begins from the observation that states participating in common markets often find themselves in a "depoliticized" relationship. This leads to the belief that the way to decrease the danger of political conflict is to increase the size and depth of transnational markets. A

5. See Louis Henkin, *How Nations Behave: Law and Foreign Policy* 10 (Praeger 1979).

country whose citizens have come to expect a certain level of economic well-being will be so dependent upon international markets and institutions—financial, communications, and trade—that its government will have to restrain its political activities in order to comply with market demands. In particular, regimes will be forced to respond to the demands for economic growth from their citizens and for financial and regulatory management from international institutions. Both pressures will lead to the rule of law, and with law will come democratization and human rights. Globalization and democratization are a linked pair, on this view, which will lead to a depoliticized world of satisfied consumers secure within the order of law.[6]

The lesson of the last decade, however, is that politics is not dead, but diverse. The hard truth may be that citizens, at many times and places, put a higher value on politics than markets; they prefer political identity to economic identity. Today, democracy is as likely to bring nationalism as markets. The problems of the most troubling regions of the world resist Western analysis precisely because the gross violations of human rights that we see cannot be attributed to a repressive regime acting against "the people." Rwanda saw the involvement of hundreds of thousands in genocide against the Tutsis; Serbia has been led by a popularly elected nationalist pursuing policies of ethnic cleansing; and in Russia, the war in Chechnya has produced surprising electoral success.

This should not surprise us. It is hardly the case that in the United States political meanings have been displaced by market meanings. We remain a deeply nationalist country. Perhaps no other country is as deeply committed to its myth of popular sovereignty. We have a sacred text—the Constitution—which we understand as the revelatory expression of the popular sovereign. We also have rituals of sovereign action—elections as well as judicial decisions. We believe that unless an assertion of governmental authority can be traced to an act of popular sovereignty, it is illegitimate. This is precisely the meaning of judicial review, which serves as a constant affirmation of our belief that we live under the rule of law, not men. Judicial review shows us explicitly the linkage of popular sovereignty and the rule of law.[7]

These points of our civic religion are so firm that we find it almost unimaginable that we would yield political or legal authority to institutions and actors outside of this web of popular sovereignty and law's rule. To do so appears to us as a form of political sin, a worshiping of false gods. Consider, for example, the resistance to any sort of international court with compulsory jurisdiction, whether the International Court of Justice or the proposed International Criminal Court, or the almost impossible task that domestic courts face in trying to understand how international law applies to such domestic issues as the death penalty. When the International Court of Justice sought a simple delay of the proceedings in a capital case to allow it to

6. The paradigm instance of this form of argument is the shift in China policy by the Clinton Administration.

7. See Paul Kahn, *The Reign of Law:* Marbury v. Madison *and the Construction of America* 214-19 (Yale 1997).

consider a claim of international law, the Supreme Court would not grant even a stay of execution and the State of Virginia went ahead with the execution.[8]

These are the judicial forms of the same demand for self-government that expresses itself as a resistance to the idea of American troops serving in combat under foreign command, or to the United Nations acting as a supervening power that can set national obligations—even including dues. While the Europeans are pursuing a deeper and deeper integration within the Union, the American political imagination remains strictly parochial. How many of us know even the simplest facts about our near neighbors, Canada and Mexico? What is the framework of political understanding within which such facts could be seen as relevant? How many think of NAFTA as anything more than a limited economic arrangement? What politician would seriously put forth an idea of American subordination to a global order of institutions or law?

We tend to forget this intense nationalism because our national values seem to us so obviously global values. Popular sovereignty expresses itself, for us, within the forms of political democracy, the rule of law, and free markets. We think of these as an inseparable set of values that together define an American national project.[9] America's relationship to the rest of the world still seems to us to be one of example: the "city on a hill" that the rest of the world is to imitate. Our political agenda of democracy, law, and markets should be adopted by all nations as their own. But even if they imitate us, we do not imagine that we will form a new political community with them such that our own conception of popular sovereignty would give way. Imitation is not the same as establishing a single international order. At best, we imagine multiple liberal states operating under their own constitutional orders, not a single order of world government—even if it were to operate under a liberal rule of law.

The rule of law, for us, is not simply a matter of getting the content of rights correct. It is first of all an expression of our sense of ourselves as a single, historical community engaging in self-government through law. To obey the law, on this conception, is to participate in the project of popular sovereignty. That project makes us a single community with a unique—and uniquely meaningful—history. Citizenship appears not just as a set of rights, but as an obligation to maintain or carry forward this common project into the future. Following the constitutional order of law, the citizen links past and future. He or she simultaneously maintains the narrative of popular sovereignty and constructs a personal narrative of self-identity. Thus, citizenship defines an orientation toward a good that is constitutive of who we are as individuals and as a people. When we elaborate that good, we inevitably speak the language of popular sovereignty through the rule of law.

For us, law is first of all an expression of the power of popular sovereignty, not a

8. See *Breard v Greene*, 523 US 371, 378 (1998).

9. For this reason, there has been a regular tendency to constitutionalize the market order. See Richard Epstein, *Takings: Private Property and the Power of Eminent Domain* (Harvard 1988); *Hammer v Dagenhart*, 247 US 251, 275-76 (1918).

matter of universal rights. Our law indeed operates as a constraint on government, but in the name of the people, not the individual.[10] Thus, we believe that we were the same nation—the same popular sovereign—operating under the same constitutional order of law, even before we got the order of rights correct. That, after all, is a fairly recent achievement, even assuming it has been achieved at all.

We want others to pursue the moral and political values that we believe in, but we will not displace the center of our conception of law from state sovereignty to international institutions. We want our morality to be "natural," but we reject natural law; law must continue to express the will of the popular sovereign. Even when the Senate ratified the International Covenant on Civil and Political Rights, it attached a declaration stating that none of the Covenant's provisions self-execute and explained that the "overwhelming majority of the provisions of the Covenant are compatible with existing U.S. law."[11] That is, ratification of the Covenant did not change the state of American law because the international legal rights were essentially the same as the constitutional rights of domestic law. This exactly expresses our understanding of ourselves as examples. Yet, it appears to the rest of the world as a form of political hypocrisy masquerading as acceptance of international law.

For a long time, this combination of views fit easily into the reigning dualist paradigm of international law. On this view, the origin of international law was the consent of states. Although the modes of expression varied across the domestic and international contexts, both contexts shared the idea that law expressed the sovereign will. This era of international law is ending.

The language of the international law scholar today is no longer the language of sovereignty; rather, it is that of the demise of sovereignty. The sovereign state is increasingly perceived as the problem to be overcome.[12] While globalization is an economic, political, and social phenomenon, for international law scholars this change in perception is largely driven by the emergence of international human rights as the paradigm through which all of international law is viewed. The international law of human rights rests on more than the positivist conception of the origins of law. We are, after all, most concerned with applying human rights law against non-consenting regimes. We do not think a state has the option of withdrawing its consent from such norms.

As international law expands from a doctrine of state relations to a regime of individual rights, it poses a direct challenge to the traditional, political self-conception of the nation-state. Human rights law imagines a world of depoliticized individuals, i.e., individuals whose identity and rights precede their political identifications.

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10. See Kahn, *The Reign of Law* at 202 (cited in note 7).

11. Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights, S Rep No 102-23, 102d Cong, 2d Sess 4, 26-27 (1992).

12. See, for example, Sohail Hashmi, ed, *State Sovereignty: Change and Persistence in International Relations* (Penn State 1997); Louis Henkin, *That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 Fordham L Rev 1, 2 (1999).

Similarly, the international law of commerce imagines a single, global market order in which political divisions are irrelevant. In both the domain of rights and of commerce, the state is reduced to a means, not an end. It is a means to a world of individuals whose rights are to be respected and interests served. Across both of these domains, there is an assumption that the meanings individuals choose for themselves will no longer be rooted in the traditional politics of nation-states. States themselves will become just one of any number of intermediate associations—competing, for example, with corporations and ethnic groups—in which individuals may choose to build an identity. Politics has no privileged position from the perspective of this individual-centered law.

In many states, political power has never been understood as the product of popular sovereignty. Given past uses of state power to oppress citizens, the reduction of the state from an end to a means may be an unmitigated good. But this is not the general American perception of the relationship between power and law.

In sum, while law functions in the United States as an expression of popular sovereignty that chooses to invest itself in particular rights, contemporary international law has little to do with popular sovereignty and gains its legitimacy from the defense of rights. This is the heart of the matter; is law about sovereignty or about rights?

II. TAKING POLITICS SERIOUSLY

Of course, there are individuals, both here and abroad, who no longer understand themselves within the forms of our national civic religion of popular sovereignty and law's rule. They see themselves largely as consumers, not citizens, and members of a cosmopolitan civil society that has liberated itself from the politics of nations and the claims of popular sovereignty. It may be that their world is the future world, a world in which the logic of human rights may fully realize itself. We stand to that world in about the same way that the nineteenth century secularists stood to religious communities. It was too early then to proclaim the death of God; it is too early today to proclaim the death of the state. The continuing existence of the United States as a unique political community is a matter of ultimate significance for most citizens. To see this, we need only consider the large nuclear arsenal that we insist on maintaining.

A strand of military analysis asserts that nuclear weapons are quite useless devices. On this view, American power does not depend upon such weapons, which can never be used effectively. This way of approaching nuclear weapons, as if they are part of an inventory of resources available for the battlefield, fails to grasp the political and cultural significance of such weapons. Political power is only in small part about the use or threat to use force. It is much more about the political imagination: how a state sees itself, and how it is seen by others. Nuclear weapons figure centrally in the political imagination that maintains hegemonic power. They represent the material

embodiment of an ultimate seriousness about politics that extends across the population.[13]

Thinking about nuclear weapons is only a way into the larger problem of the patterns of relationships among states. If we can imagine targeting, or being targeted, by a nuclear force, we can imagine an absolute division between states. This is a sort of test of our political consciousness—political in the largest sense. Between such countries there is not a single shared history being written. Rather, there are two different narratives of the meaning of the state, two different accounts of the past and of the future that is the fulfillment of that past. These different narratives provide the context of meaning within which each may see the other as marking a boundary that establishes the state's identity. Thus, nuclear weapons mark the boundaries of a community of sacrifice, i.e., the reach of a community that is willing to threaten self-destruction as a way of preserving an ultimate meaning.

For example, the Soviet Union was never an economic power that could compete with the West. Moreover, the deployment of what seemed a modern, nuclear-capable military was not enough to maintain its superpower status. The Soviet threat was credible not because the technology existed, but because there was a shared political understanding that the maintenance of the Soviet system was a matter of ultimate significance. A national threat to use nuclear weapons is possible only if it is the case that the population believes that maintenance of the political order is a matter of life and death, a matter for which they are willing to sacrifice. Once it became clear that the population of the Soviet Union no longer believed in the political order, its superpower status quickly collapsed, despite the technology.

In this sense, the experience of 1989 was a repetition of the experience of 1917, when the Russian troops abandoned the eastern front. The political order no longer made an ultimate claim on the individual. Recently, when President Yeltsin issued a reminder that Russia continues to have nuclear weapons and therefore claims a privileged place in the international order, the "threat" appeared embarrassingly empty.[14]

Yet, the world in which American actions were balanced by Soviet counteractions was a different world. This was not just because there was a military threat that had to be acknowledged; it was because there were two competing conceptions of the political that pushed up against each other. Each was deadly serious; each was incompatible with the other. One never knew where a conflict might turn into a symbolic representation of this deeper conflict between ultimate beliefs. The result was a series of proxy wars around the world, each of which was incredibly

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13. Paul Kahn, *Nuclear Weapons and the Rule of Law*, 31 NYU J Intl L & Polit 349, 380-81 (1999).

14. "'President Clinton permitted himself to put pressure on Russia,' Yeltsin said, loudly and deliberately, in front of television cameras after he arrived here on Thursday for a day and a half of meetings with Chinese leaders. 'It seems he has for a minute forgotten that Russia has a full arsenal of nuclear weapons.'" Erik Eckholm, *A Bristling Yeltsin Reminds Clinton of Russia's A-Arms*, NY Times A1 (Dec 10, 1999).

dangerous because of its potential to draw the U.S. and the Soviet Union into a larger conflict.[15]

If we ask whether it is conceivable that the Americans would give up nuclear weapons in the near future, the answer is a clear no. It is inconceivable not because we perceive a contemporary threat comparable to that of the Soviet Union, but because as a nation we perceive a deep divide between ourselves and others, such that war is conceivable. As long as we can imagine conflict across these differences, we will retain these weapons.

The divide in the world, across which we imagine the possibility of conflict, is twofold: we perceive both China and Islamic states as radically different from ourselves.[16] Of course, these other political orders are not themselves single unities. Each has many different currents responding to perceptions of sameness and difference with the West. We should not, in the manner of Huntington, ignore internal differences or think that the future is closed to change.[17] Neither, however, should we ignore the reality of a reciprocal sense of opposition and potentially unbridgeable difference. Conflict does not necessarily follow from difference, yet these differences are perceived as "unbridgeable" by many precisely because there is a sense that something of ultimate seriousness is at issue. To bridge the difference might be to give up something central to the idea of the self.

As long as the possibility of conflict forms a background condition of our lives, we continue to live in the same world of politics that has occupied the West since the age of revolutions began some two hundred years ago. This is a world that invests its political life with an ultimate seriousness, represented simultaneously by the concepts of a popular sovereign giving itself the law and of mass armies constructed from a mobilized citizenry. Citizen mobilization is simultaneously a political and a military act. We imagine the Constitution as the product of just such a mobilization, and we imagine the defense of the state through the citizen army. Both are expressions of popular sovereignty.

Only in this historical context did it become possible to link the rule of law to the threat of nuclear destruction. The same political imagination was at work as is present in our understanding of the Civil War as an expression of popular sovereignty under law's rule. Our faith in political meaning is a "fighting faith." The fundamental right of the nation-state is the right to draft its citizens, the right to require sacrifice of its citizens for the sake of maintenance of the state. For us, there is an imaginative linkage of military service and the right to vote.[18] Both are instances of a norm of citizen

15. See Hans Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* 427-31 (Knopf 3d ed 1960).

16. We speak today of "rogue" states as a way of demonizing Islamic states, that is, as a way of identifying them as the threatening other.

17. See Samuel Huntington, *The Clash of Civilizations and the Remaking of World Order* (Simon & Schuster 1996).

18. Consider the relationship of the 15th Amendment to the military service of black Americans in the Civil War, and the similar effect of military service on the birth of the modern civil rights

equality under the rule of law.

Of course, we don't seek out conflict in the way that many Westerners romanticized war a hundred years ago. Nor is my focus on nuclear weapons an endorsement of a politics of nuclear threat. My point is only about the meaning of politics. Nuclear weapons remind us that the era of national politics is not yet over, that politics continues to have an ultimate significance, and that politics has not been completely displaced by markets. Nor is it likely to be for some time. This is the perception of the world within which the language of hegemony makes sense, and the perception that explains why the United States is not likely to give up its hegemonic position to an ideal of equality under international law. The point is *not* about cause and effect, but about the imaginative construction of a meaningful world.

A hegemonic power carries forward an understanding of the ultimate significance of politics and embodies that vision in a certain material capacity. This is why Bill Gates, despite the fact that he is richer than many countries in the world, does not threaten to become a hegemonic power: there is no political vision of ultimate significance. Nor is the mere presence of nuclear weapons enough to create a politics of ultimate significance. A symbol cannot create its own meaning. Where political identity loses its ultimate significance, nuclear weapons will appear absurdly dangerous as well as a simple waste of resources. Accordingly, we have seen their abandonment in some of the states that emerged from the old Soviet Union.

International law does not see this world of politics based on power, threat, and sacrifice. Indeed, its contemporary ambition is to overcome this world, to achieve a fundamentally depoliticized global order of equality among states and universal respect for the individual. To those most committed to the regime of international law, it made perfect sense to ask the International Court of Justice to declare the possession of nuclear weapons a violation of law, since such weapons are deeply incompatible with both of these values. The Court came very close to concluding that such weapons were indeed illegal.[19] That we nevertheless continue to perceive hegemony within a global order of asymmetrical power, as well as to perceive conflicts and potential conflicts among states in substantial portions of the world, speaks to the limited success of this international law project.

Of course, all states are willing to enter into negotiations over issues of common concern and to accept treaty regimes that advance their political interests. There is no reason to think that the United States is any less interested in reaching such agreements than it ever has been. These agreements include various weapons regimes: chemical, biological, and nuclear.[20] The United States is also aggressively pursuing

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movement.

19. For a general discussion, see Kahn, 31 NYU J Intl L & Pol at 349 (cited in note 13).

20. See, for example, Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space, and Under Water, 1963 14 UST 1313, TIAS No 5433 (1963); Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and

agreements to create open transnational markets with appropriate regulatory mechanisms. Yet, expertise in running an international economy is one thing; political authority is another.

International law has been about more than management, and more than mutually convenient treaty arrangements, at least since the Universal Declaration of Human Rights was set forth in 1948. In the next section, I explore the contemporary ideology of international law. This is an ideology that has experienced a fundamental shift from a political world of state sovereignty to a depoliticized world of human rights.

III. THE POST-WAR COMPROMISE

Just in the period in which the United States has emerged as the hegemonic power, there has been a fundamental shift in the character and grounds of international law. In part, this represents the same triumph of the West that is expressed in American hegemony. Western ideas of rights and of individuals have come to occupy the center of international law. Having won the Cold War, the United States now finds its victory challenged by some of the very tactics it used to pursue that War.

In the aftermath of World War II, international law came to embody a dramatic division between its substantive law and its institutions. The institutions reflected the reality of state power—political, military, and economic—while the substantive law reflected an ideal of universal rights in a single, global community. This division represented a kind of compromise between nationalism and globalism, between the reality of power and the normative aspiration of law. There was a first suggestion of this arrangement at Nuremberg, where the military victors controlled the Tribunal but purported to apply a universal, humanitarian law. The disjunction between institutional structure and substantive law meant that there were no prosecutions of any Allied officers, despite allegations of violations of law.

International institutions assumed the global order to be fundamentally an order of independent states. Governments were representatives of these states, and international law was the product of governmental actors seeking coordination among themselves in order to advance their own state's interests. This produced a positivist view of law: the source of international law was the consent of state governments. The

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the Ocean Floor and in the Subsoil Thereof, 1972 23 UST 701, TIAS No 7337 (1972); Treaty on the Non-Proliferation of Nuclear Weapons, 1970 21 UST 483, TIAS No 6839 (1970); Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 1972 26 UST 583, TIAS No 8062 (1975); Declaration on the Prohibition of Chemical Weapons, 28 ILM 1020 (1989); Comprehensive Nuclear-Test-Ban Treaty, UN Doc A/Res/46/29 (1991); Treaty on Conventional Armed Forces in Europe, 30 ILM 1 (1991); Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction, 32 ILM 800 (1993).

paradigmatic product of this age of multinational institutions was the multilateral convention that only came into force through state consent.

This view was compatible with the political reality of differentiated state power. In fact, it enshrined these differences in power at the very pinnacle of the post-war institutional structure—the Security Council. The possession of the veto was critical to Senate ratification of the Charter; it meant that the United States could not be compelled by international law to take any action to which it did not consent.[21] American political power was also reflected in the most important international financial institutions created at the time.[22] Moreover, as long as new international law had to locate its source in state consent, political power had an open field in which to operate. Negotiation is a form of contest, reflecting the ability of states to form coalitions based on persuasion, interest, and threat. The recent events in Seattle at the WTO meeting serve as a striking reminder of the linkage of politics and law.

Yet, from the very beginning of the Charter regime, there was a new element at work: the international law of human rights. Human rights reflect a different idea of the nature of the international community under law. On this view, the fundamental constituents of the international community are individuals, not states. By virtue of their common membership in a global community, individuals bear legal rights that they may assert against their own governments. State governments gain legitimate powers as the agents of these individuals, not as representatives of some collective entity—the state—that exists apart from its individual members.[23] The tasks of government, accordingly, are limited to the satisfaction of individual needs and the protection of their rights.

The source of international law, on this view, cannot be found in consent, although the nature of international institutions has made it difficult to formulate alternative grounds. This conceptual aporia over the source of human rights law led to the doctrine of *jus cogens*, which declares the limits of consent at the foundation of modern international legal norms. Human rights norms establish the minimal conditions of this new legal order, without which we could not speak of it as a legal

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21. See Ruth Russell, *A History of the United Nations Charter: The Role of the United States* 403 (Brookings 1958) (the Senate would "undoubtedly find unacceptable" any provision that did not give the United States veto power); see also Cordell Hull, 2 *The Memoirs of Cordell Hull* 1683 (MacMillan 1948) ("[W]e felt that only if the United States retained the right to veto a proposal that force or other sanctions be applied, which would naturally include American action, could we hope to obtain Congressional approval of United States membership in the international organization.").

22. A weighted voting and management system is used by the World Bank in its operations. Voting power of a member varies in proportion to the number of shares held by that member. The number of shares a country receives depends on the amount it contributes. Since the richer countries contribute the most, they have the most shares, and consequently the most voting power. See Articles of Agreement of the International Bank of Reconstruction and Development Art V, § 3(a), 2 UNTS 162 (1945); see Articles of Agreement of the International Development Association VI, § 3, 439 UNTS 270 (1960).

23. There was, accordingly, a kind of natural logic to the movement toward claiming a "human right" to representative government. See Thomas Franck, *The Emerging Right to Democratic Governance*, 86 Am J Intl L 46, 47 (1992).

order at all.

This post-war bifurcation of international institutions and substantive law had a number of causes. Historically, modern human rights law is a kind of contemporary overlay on an older system of international law, which purported to be nothing more than the positive law of states. Modern international institutions emerged from and reflected the older understanding, even as the substantive law was changing. Functionally, the bifurcation operated within the tactics of the Cold War; governments could appeal to international law as a ground of criticism of others without worrying too much about the implications of that law for their own behavior.[24] The rhetoric of human rights provided a legal ground by which to overcome claims of state sovereignty. This seemed an easy rhetorical device when the norms were one's own and the subject at which they were directed was the political enemy.

Human rights law was, in large part, a rhetorical project caught up in larger ideological battles. Governments did not have to take the substantive law too seriously, because they were confident in their control of the institutions. They could declare law with respect to the autonomy of the individual, welfare rights, the limits on governments, and the renunciation of force, understanding full well that there were no institutions that would enforce these norms. They could compete in the proclamation of rights, without submitting themselves to an effective regime of law. Rights talk, for a long time, was cheap yet useful. Throughout the period of the Cold War, there was no correlation between the character of a regime and its willingness to sign the endless stream of new conventions purporting to establish one human rights norm after another.

This gap between the substance of international law and the institutions of the international order did not simply represent a deplorable hypocrisy. The competing political ideologies of the post-war era shared a universal aspiration: each tended to see in human rights law a vehicle for advancing its own ideological agenda. Every modern state claims to combine democracy and a theory of rights: we live in an age of "people's republics." The discourse of rights was a way of saying that matters of principle, not just power, were at stake.

Moreover, over time, some states did make institutional commitments to the emerging international law, incorporating such norms into their domestic law, either through constitutional provisions or judicial decisions. Even where that was not the case, the gap in the international order often reflected divisions of domestic responsibilities between legal advisors and policymakers. Governments are not unitary subjects; they are made up of many individuals and institutions with different views about the role that international law should play in determining domestic policy. Thus, the post-war compromise worked at multiple levels, from the international to the domestic.

24. See Lea Brilmayer, *The Odd Advantage of Reliable Enemies*, 32 Harv Intl L J 331, 331-32 (1991).

This uncertainty over fundamentals proved to be extremely productive from the perspective of human rights law. Over the course of a generation, human rights activists—inside and outside of governments—gained control of the agenda for the creation of substantive law. Activists could do so because they were useful. Also, the gap between law and institutions meant that governments did not have to confront their own confused conceptions about the nature of a global legal order. It also meant that there was not a tremendous amount of pressure to reduce tensions within the substantive law—for example, clashes between positive and negative rights.

This uneasy compromise makes it a difficult era to characterize. We can speak of this as an age of tremendous growth in human rights law, but we must simultaneously recognize this as an age of gross violations of human rights. Should we look to the genocide convention or the outbreak of genocidal behavior to characterize this age? The prohibition on torture or the tortured deaths of hundreds of thousands from El Salvador to Rwanda? Should we look to the prohibition on the use of force—the central tenet of the U.N. order—or the millions of dead in numerous wars that characterized this same period?

It was an age that promised constraints on the state through international law yet reached a kind of apotheosis of the state in the adoption of policies of mutually assured destruction. The realist could be dismissive of international law, while the idealist could describe all of the recalcitrant facts as a kind of rearguard action by outmoded political institutions. Similarly, the triumph of the West at the conclusion of the Cold War resists easy characterization. Was it a triumph of Western human rights values—values of liberal individualism against a collectivist idea of the state—or was it the triumph of Western power? Was it our ideas or our military-technological edge, our conception of rights or our economic power that triumphed? Of course, it was both, but that just means that the ambiguity that infused the post-World War II compromise has not been resolved even with the end of the Cold War.

Rather than understanding this division of responsibilities as the set of political conditions that made possible the development of an international law of rights, human rights activists and international law scholars often declare the global institutional order still to be in a "primitive state." An international order dominated by states fails to meet the implicit needs of an international legal order of rights. There must be a match between the substantive law of a single global community and the institutions that represent that community. In particular, the new world order needs depoliticized courts and, along with the courts, executive agencies willing to enforce judicial orders.

Thus, the most prominent symbol of the gap between institutions and substantive law was the failure to replicate the Nuremberg Tribunal at any point throughout the Cold War, despite the proliferation of human rights law and the countless violations of that law. Similarly, the most prominent symbol of a human-rights triumphalism is the widespread enthusiasm for the proposed International

Criminal Court.[25] The rapid advance of support for an International Criminal Court is just one of a number of contemporary indications that the international law of human rights is moving from the rhetoric of opposition to an institutionalized, global regime.

The effort by the Security Council to turn its intervention in the former Yugoslavia into an expression of law, through pursuit of criminal prosecutions, suggests that law is penetrating the most political of international institutions. Security Council action in the Balkans is just one of a growing number of interventions approved by the Council on humanitarian grounds—for example, in Haiti, Rwanda, Cambodia, Angola, and East Timor. These actions are no longer grounded in the idea of a "threat to the peace"—the actual, textual ground for Security Council intervention under Chapter Seven—but rather in the idea of a violation of the international law of human rights. The Council is increasingly becoming an agency of law enforcement—no longer a forum for political confrontation.

International law is also deeply penetrating domestic institutions elsewhere in the world. The best example is the prosecution of the Chilean former-dictator General Augusto Pinochet for violations of human rights law. This prosecution occupied both the Spanish and British courts. These ordinary domestic courts are actively giving an institutional life to the international law of human rights, which had no institutional presence throughout the years that Pinochet actually exercised power. Similarly, Belgian courts are prosecuting Rwandans for their participation in the Rwandan genocide of 1994. Even American courts have allowed civil actions in damages for torts in violation of international human rights standards.[26]

Effective juridification of international law is advancing in a decentralized manner. Thus, the same penetration of domestic institutions by the rules of international law is present in many of the new constitutions emerging at the end of the Cold War.[27] The new constitutional courts easily speak a transnational language

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25. The International Criminal Court would be the world's first permanent court with jurisdiction over war crimes. Its constitution is the Rome Statute that was adopted by the United Nations Diplomatic Conference on Plenipotentiaries on the Establishment of an International Criminal Court on July 17, 1998. See Rome Statute on the International Criminal Court, UN Doc A/Conf 183/9 (1998).

26. See *Filartiga v Pena-Irala*, 630 F2d 876, 887 (2d Cir 1980), and generally cases litigated under the Alien Torts Claims Act, 28 USC § 1350 (1994). The Belgian prosecutions are reported in Fiona McKay, *Universal Jurisdiction in Europe: Criminal Prosecutions in Europe Since 1990 for War Crimes, Crimes Against Humanity, Torture, and Genocide*. This is available online at <http://www.redress.org/unijeur.html> (visited Mar 4, 2000).

27. South Africa has incorporated many basic doctrines of human rights into its constitutional law. For example, section 28 of the 1996 Constitution sets out a detailed list of children's rights, drawing on a number of international law sources, including the African Charter on the Rights and Welfare of the Child (1990) and the United Nations Convention on the Rights of the Child (1989). See S Afr Const Art 2(28). See also Barbara Bennett Woodhouse, *Recognizing Children's Rights: Lessons from South Africa*, 26 Hum Rts 15 (Spring 1999). Many of the new states in the former East Germany adopted constitutional provisions that drew from international human rights law. For example,

in which there is a common view of the meaning and nature of rights. These constitutional courts analyze claims of rights by drawing freely on international, comparative, and domestic sources.[28] To all of this, we need to compare the reaction of Justice Scalia, speaking for the U.S. Supreme Court, to the very modest effort of Justice Breyer to draw on some comparative sources "to cast an empirical light on the consequences of different solutions" to issues of federalism: "[w]e think such comparative analysis inappropriate to the task of interpreting a constitution."[29]

The post-War compromise allowed the United States to have it both ways: it could pursue a moral agenda through law, while pursuing a political agenda through institutions. The United States now finds itself without the conceptual tools to understand how to overcome this double life. It stands in its own mind for the rule of law. It can have no normative objections to the idea of subjecting the abusers of human rights to the sanctions of law. Yet, it also stands for a vibrant conception of popular sovereignty. It believes in the moral values of human rights; it believes in its own political sovereignty. It cannot put these two ideas together in a single, coherent manner.

The moral content of international relations is being absorbed by claims of legal right, leaving less and less room for a morally driven politics outside of law. The United States still wants a moral discourse that is not a legal discourse. To the rest of the world, however, this insistence on both law and power looks like a form of a

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Brandenburg in its constitution declares its support for the rights of the European Social Charter. See *Verfassung Brandenburg* Art 2(3), available online at <http://www.brandenburg.de/land/mi/recht/lverf/index.htm> (visited Mar 4, 2000). See also Peter Quint, *The Constitutional Guarantees of Social Welfare in the Process of German Unification*, 47 Am J Comp L 303, 311 (Spring 1999). In 1994, Argentina endowed nine international human rights treaties with constitutional standing. Section 75(22) of the Argentinian Constitution states, among other things, that "several human rights treaties enjoy constitutional status." These treaties are: American Declaration of Rights and Duties on Man; American Convention on Human Rights; Universal Declaration of Human Rights; International Covenant on Economic, Social, and Political Rights; International Covenant on Civil and Political Rights; Convention on the Prevention and Punishment of the Crime of Genocide; International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination Against Women; Convention Against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment. See Arg Const Art 75(22); see also, Janet Koven Levit, *The Constitutionalization of Human Rights in Argentina: Problem or Promise?*, 37 Colum J Transnatl L 281, 291-92 (1999).

28. For example, in *State v Makwanyane*, 3 S Africa L Rep 391, paras 40-115 (Const Ct 1995), the South African Constitutional Court addresses whether the death penalty is constitutional and draws on American, Indian, Canadian, Tanzanian, and German case law. Similarly, in *Marckx v Belgium*, 2 Eur Hum Rts Rep 330, para 41 (1979), the European Court cited the domestic law decisions of many European states to determine whether a Belgian Civil Code provision violated the European Convention on Human Rights. See also Hoyt Webb, *The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law*, 1 U Pa J Const L 205, 207-208 (1988); Justice Aharon Barak, *Hermeneutics and Constitutional Interpretion*, 14 Cardozo L Rev 767, 772-73 (1993) (arguing the Israeli law does and ought to recognize the importance of comparative law sources).

29. See *Printz v United States*, 521 US 898, 921 n 11, 977 (Breyer dissenting).

discredited colonial discourse. To them, the resistance of the United States to anything that looks like a subordination of its own political center to international legal institutions suggests that human rights law may be a continuation of a Cold War political strategy, directed now at the Third World.

IV. INTERNATIONAL LAW AND AMERICAN HEGEMONY

I have argued that the problem of international law for the United States is not a problem of substantive morality, but rather of political identity. The real problem that the United States has with international law is not at the level of norms. The international legal order has been deeply influenced by the liberal ideas that are central to our own conceptions of morality and of the limits of state authority. If the matter were simply one of the substantive content of the norms, international law would not appear as troubling as it does. But that is hardly the whole of the story. At stake is a conception of the meaning of the state and of the relationship of citizen identity to that meaning.

Today, politics is a good deal like physics: the reality we see is context-dependent. When our perspective is framed by those nations against which we cannot conceive of an armed struggle, we see a world of economic transactions, of individual consumers competing in a global market. Between such neighbors, politics can be largely displaced by markets. Countries may compete for competitive advantages within such markets, but there is nothing of ultimate significance at stake in their positions. They accept third-party adjudications of disputes; they envision multinational institutions as the vehicles of regulation; they foresee no issue that will pose an unbridgeable gap between them, but only a continuing evolution of rules and institutions that will bring them together. This is law's domain. This has been, for example, the dominant story of the European Union, as the European Court has pursued a path of juridification that gives supremacy and direct effect to the law of the Union. This does not necessarily mean the emergence of a single state within such transnational communities. It does mean, however, that the politics of statehood operates with distinctly less at stake, that political identity is itself controlled by commitments to, and understandings of, this larger community.

When the context switches to those nations with which we can imagine conflict, politics reappears in just those forms that have been so troubling for two centuries. It is a politics of ultimate meanings, making sacrificial claims. Now, the values of trade seem completely incommensurate with political values. From this perspective, and in this domain, international law continues to operate as it always has, as rules of engagement for potential adversaries. This does not make it less important—or, for that matter, more important—than the alternative form of international law. The mistake is to think that law inevitably moves states from this condition of potential adversaries to membership in a single transnational community. Law, in and of itself, cannot change our conception of who we are or the place of politics in that self-understanding.

Hegemonic power is perfectly at home with the state-oriented perspective on

international law.[30] It has no place in a global order of human rights law. The post-war compromise captured the deep division within international law between a state-oriented and an individual-oriented perspective. The end of that compromise has left the United States in a confusing situation. Having used international law as a tactical resource in the Cold War, how should the U.S. react to its own victory?

International law scholars have, for the most part, seen this tension between sovereignty and rights only in the negative light cast by authoritarian states. State sovereignty is often interposed as a defense against an international concern with abuse of human rights within authoritarian regimes. While we should be skeptical of such claims, we should also recognize that the defense is available only because there is a serious conflict of values at stake. The United States shows us that conflict in the sharpest form, because it shows us the authentic values at stake, not a perverted image of those values. Speaking the language of legal rights, or insisting that international law really is law, simply will not move the center of American political identity.

Scholars of constitutional law see the world in a different light. Because they think of law as the expression of popular sovereignty, they think that every expression of law must carry its own possibility of institutional application. In particular, there must be courts that speak in the name of the popular sovereign against the changing vagaries of day-to-day politics. Law without remedial power never makes the break between law and politics. Accordingly, these scholars come to international law with a deep skepticism, seeing it as yet another expression of political interests external to the real rule of law.

The scholar cannot resolve this tension. He or she is in no position to claim that the ideology of rights is more compelling than that of popular sovereignty. It may indeed be true that rights are safer than sovereignty, but safety is only one value. Indeed, safety may not be an ultimate value in the way that sovereignty has been for many communities, including our own. As a member of the political community, the scholar is entitled to have a position on the direction in which the community should move or the meanings it should pursue, but scholarship provides no special claim to expertise in this dimension. The scholar can, however, call attention to structures of thought—the assumptions and beliefs—that lie behind the conflicts we experience at this moment in the life of the nation and in the development of a global order.

I have tried to examine the contemporary conflict over law's meaning that we experience as a two hundred-year-old community, living under a constitution that defines us as a people. At base, we are living through a conflict that was first perceived in revolutionary France, when that nation sought to combine nationalism and Enlightenment. As the French armies "liberated" one country after another, they did not know whether the appropriate revolutionary action was to declare each state free to make itself, having been liberated from illegitimate and unreasonable forms of power, or whether each should become an extension of revolutionary France. If the

30. Not surprisingly, Soviet scholars insisted that state consent was the sole basis of all international law. See Grigorii Tunkin, *Theory of International Law* 157-58 (Harvard 1974).

order of law is the order of reason, what is the ground for differentiation among states? Should they not all converge toward a single order of rights? Like the politics of revolutionary France, human rights purport to be a compelling and universal expression of reason. Does that mean there is no longer a place for the forms of civic faith that have fueled the politics of nationalism? Where is popular sovereignty in the empire of rights?

No more than France will we be able to reconcile an intense national political consciousness with a global order that claims to be the triumph of reason. The change demanded is of Copernican dimensions: a recognition that we are not the center of the universe, but only another element in a universal order. Unlike the Copernican revolution, there is no truth of the matter here. We cannot say "we should be" anything. We cannot even say that the virtues of law point uniquely to a global order of human rights law, as opposed to a domestic order of constitutional law.

This tension between our conception of the nation as an expression of popular sovereignty under law and the international legal order of rights is likely to have deep effects on the development of international law. We cannot import into law hierarchies of power without undermining the normative claim of law. A law asymmetrical in its reach and application does not appear to be law at all. This means that, with respect to just those potential conflicts that the United States sees as grounding the necessity of the maintenance of its own power, law is not likely to have a mitigating effect. The project of a global order of law founded on universal rights will be seen as a Western project, a kind of cultural imperialism doing work for a more traditional political imperialism. Nor is this view completely wrong. To the degree that we believe in the values for which the United States stands—values of democracy, law, and markets—we should support these assertions of power. But we should not think that framing the issue as one of international law somehow eliminates politics or delegitimates opposing claims.

Much of the world today is tired of the politics of nation-states that has marked the modern era as one of deep and unrelenting violence. The European Union confronts a large number of states that want to enter, even though entry will require a reordering of the relationship among the conceptions of state, sovereignty, and law. Much of Latin America, too, has experienced a disgust with the politics of the nation and is turning toward a world of markets and international law. For many who distrust their own national politics—a wholly justified distrust in many parts of the world—the promise of international law is its restraint on these domestic political forces. But not everyone wants to be a part of an expanding European Union or a part of an international order of law that limits national politics. In particular, the United States does not. Neither do significant elements within China and the Islamic states. This is our world, and speaking the language of law is not going to make it any different.