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ARTICLE

LAW FOR STATES: INTERNATIONAL LAW,  
CONSTITUTIONAL LAW, PUBLIC LAW

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## LAW FOR STATES: INTERNATIONAL LAW, CONSTITUTIONAL LAW, PUBLIC LAW

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*International law has long been viewed with suspicion in Anglo-American legal thought. Compared to the paradigm of domestic law, the international legal system seems different and deficient along a number of important dimensions. This Article questions the distinctiveness of international law by pointing out that constitutional law in fact shares all of the features that are supposed to make international law so dubious. In mapping out these commonalities, the Article suggests that the traditional international/domestic distinction may obscure what is, for many purposes, a more important and generative conceptual divide. That divide is between “public law” regimes like international and constitutional law that constitute and govern the behavior of states and governments and “ordinary domestic law” that is administered by and through the governmental institutions of the state.*

### I. INTRODUCTION

The divide between international and domestic law runs deep in Anglo-American legal thought. Domestic law is taken to be the paradigm of how a legal system should work. Legal rules are promulgated and updated by a legislature or by common law courts subject to legislative revision. Courts authoritatively resolve ambiguities and uncertainties about the application of law in particular cases. The individuals to whom laws are addressed have an obligation to obey legitimate lawmaking authorities, even when legal rules stand in the way of their interests or are imposed without their consent. And in cases of disobedience, an executive enforcement authority, possessing a monopoly over the use of legitimate force, stands ready to coerce compliance.

Measured against the benchmark of domestic law, international law seems different and deficient along each of these dimensions. International law has no centralized legislature or hierarchical court system authorized to create, revise, or specify the application of legal norms, and as a result is said to suffer from irremediable uncertainty and po-

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litical contestation. Out of deference to state sovereignty, international law is a “voluntary” system that obligates only states that have consented to be bound, and thus generally lacks the power to impose obligations on states against their interests. As a result, the content of international law often reflects the interests of powerful states. And to the extent that international law diverges from those interests, powerful states often interpret it away or ignore it. They are able to do so because the international legal system lacks a super-state enforcement authority capable of coercing recalcitrant states to comply. These characteristics of the international legal system have led realists and other skeptics to conclude that, in both form and function, international law is a qualitatively different and lesser species of law — if it qualifies as law at all.

Constitutional law, in contrast, has been subject to few such doubts. Conceived as the overarching framework for, and thus inseparable from, the statutes, regulations, and common law rules that comprise the familiar domestic legal system, constitutional law sits securely opposite international law on the domestic side of the divide. Unlike the decentralized and institutionally incomplete international legal system, moreover, constitutional law in the United States and other countries appears closer in form to ordinary, paradigmatically “real” domestic law because it typically features a proto-legislative enactment and amendment process, as well as an authoritative judiciary to resolve ambiguities about meaning and to enforce obligations against government officials. In contrast to the dubious efficacy of international law, constitutional law is generally assumed to serve as an important and effective constraint on government behavior, a meaningful check on the interests of the powerful.

The perceived differences between international and constitutional law have taken on a normative cast as well. For centuries, theorists have worried about how to reconcile the legal constraints of international law with the idea, or ideal, of state sovereignty. Sovereignty is supposed to mean that states cannot be subject to any higher authority; international law and the institutions it creates seem to represent just such authorities. As applied to democratic states like the United States, assertions of sovereignty often blur into defenses of democratic self-determination. A deep strain of U.S. political thought portrays international law as an illegitimate attempt by democratically unaccountable foreigners to interfere with the legitimate self-governance of democratic majorities at home.<sup>1</sup> Constitutional law could, and sometimes does, provoke similar objections, since it too purports to interfere

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<sup>1</sup> For background, see generally DUANE TANANBAUM, *THE BRICKER AMENDMENT CONTROVERSY* (1988).

with the ability of the “sovereign” people to govern themselves as they see fit. Yet the most insistent proponents of U.S. sovereignty in the face of international law do not see constitutional law as a comparable threat. To the contrary, they hold up constitutional law as the ultimate expression of American sovereignty and self-government.<sup>2</sup> On this view, “[t]o support international law is to support fundamental constraints on democracy,”<sup>3</sup> but constitutional law “represent[s] the nation’s self-given law.”<sup>4</sup>

This Article questions whether these apparent differences between international and constitutional law really run as deep as is commonly supposed. Despite superficial appearances to the contrary, constitutional law, like international law, lacks a centralized legislature to specify and update legal norms, and although constitutional courts possess some ability to resolve the existence and meaning of constitutional norms, they are limited in special ways that prevent them from providing authoritative settlement. As a result, constitutional law suffers from the same kinds of foundational uncertainty and contestation over meaning that are viewed as characteristic of international law. Constitutional law also shares with international law the absence of an enforcement authority capable of coercing powerful political actors to comply with unpopular decisions. This lack of an enforcement authority raises doubts about legal compliance and, more generally, the ability of legal norms to constrain and not just reflect political interests. And in much the same way as international law, constitutional law strains to legitimate the limits it purports to impose on popular self-government by invoking various forms (or fictions) of prior sovereign consent.

There are many complexities here, which we discuss in the pages that follow. But the general point is that the basic features of international law that lead lawyers and theorists to question its efficacy and legitimacy are shared by constitutional law. Whatever one makes of the descriptive and normative doubts to which international law is perpetually subject, we argue that constitutional law should be subject to the same doubts.

We are less interested in assessing these doubts on the merits, however, than in understanding their common origins and consequences. In mapping out these commonalities, we hope to show that the tradi-

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<sup>2</sup> See, e.g., JEREMY RABKIN, *WHY SOVEREIGNTY MATTERS* 9 (1998) (“Because the United States is fully sovereign, it can determine for itself what its Constitution will require. And the Constitution necessarily requires that sovereignty be safeguarded so that the Constitution itself can be secure.”).

<sup>3</sup> Jed Rubenfeld, *Commentary, Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 2020 (2004).

<sup>4</sup> *Id.* at 1994.

tional divide between domestic and international law obscures what is, for many purposes, a more important and generative conceptual divide between public law and ordinary domestic law.<sup>5</sup> By “public law” we mean constitutional and international law — legal regimes that both constitute and govern the behavior of states and state actors. By “ordinary domestic law” we mean the usual assortment of statutes and common law that apply to private actors within a state and are administered by and through the governmental institutions of that state.<sup>6</sup> The respects in which both international and constitutional law differ from ordinary domestic law follow from the distinctive aspiration of public law regimes to constitute and constrain the behavior of state institutions and the distinctive difficulty these regimes face of not being able to rely fully on these same state institutions for implementation and enforcement.

The difficulty is indeed distinctive. We are deeply accustomed to thinking of law as created by, working through, and inextricably bound together with the political and legal institutions of the state.<sup>7</sup> Our paradigmatic conception of a legal system rests on the state’s definitive monopoly over the power to make and enforce law in a given territory. Without the backing and institutional support of the sovereign state’s consolidation of coercive power, authoritative lawmaking, and binding dispute resolution, legal order as we intuitively know it — which is to say, in the form of ordinary domestic law — cannot exist.

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<sup>5</sup> We do not mean to suggest that the distinction between international and constitutional law is incoherent or insignificant. We merely hope to show that the similarities between the two kinds of legal systems, which are suppressed by the traditional divide, are more interesting and fruitful than has been commonly recognized. To avoid any philosophical confusion, this should be understood as a pragmatic claim about the utility of working with different conceptual frameworks, not as any sort of metaphysical claim about the true joints along which reality must be cut. We are simply offering a new conceptual tool that we believe will prove useful for some purposes.

<sup>6</sup> We avoid the term “private law” because when it is used in contrast to public law it comes freighted with the unnecessary (for our purposes) theoretical and historical baggage of the public/private distinction, and because its meaning becomes even more ambiguous as it crosses the boundary between domestic and international law. We also elide intermediate cases where state actors are subject to contract, criminal, administrative, or tort laws. We call these cases “intermediate” because they implicate some of the features shared by international and constitutional law, but not others. To the extent these legal regimes are based on statutes, for example, they are not subject to the same problems of uncertainty regarding the authoritative sources of legal norms or the same concerns about constraining sovereignty. They are, however, still confronted by the absence of any super-state enforcement authority. It is worth noting that much of what is commonly described as administrative law and government contract and tort law is, in fact, straightforward constitutional law, and thus fully encompassed by our discussion.

<sup>7</sup> See, e.g., William Ewald, *Comment on MacCormick*, 82 CORNELL L. REV. 1071, 1072 (1997) (“[M]ost modern legal theorists, at least tacitly, accept Kelsen’s identification of law and state. That is, they take it for granted that the primary task of legal theory is to explicate the legal systems of the modern nation-state. The modern state is taken as the paradigm case; and on those occasions when supra-national or international law is discussed, this form of law is generally treated as a marginal case, if not neglected altogether.”).

And yet, of course, we have systems of public law, international and constitutional, which cast the state as the *subject* (and product) rather than solely the *source* of law. Even as legal systems for the state have become a familiar and ubiquitous feature of the modern world, how these systems work remains surprisingly mysterious. Most immediately puzzling, perhaps, is how public law regimes can effectively constrain the behavior of states in the absence of any super-state enforcement authority. “[W]hy do people with power accept limits to their power? . . . [W]hy do people with guns obey people without guns?”<sup>8</sup> But it is not just guns that the state possesses and systems of public law lack. Public law regimes are also missing — and must borrow or functionally recreate — institutions with the legislative and judicial capacities to authoritatively make and interpret law. Also absent from public law is the legitimate, or at least taken-for-granted authority of the state to exercise coercion through law, overriding sovereignty-based claims of self-determination and self-government. How public law regimes can work, and work effectively, despite these handicaps is a puzzle that has seldom come into clear focus in Anglo-American legal theory.<sup>9</sup> Public law has been relegated to the blurry margins, we believe, largely because the artificial divide within public law has made it easy to dismiss the international legal system as an outlier. Constitutional law is less easy to dismiss.

By assimilating constitutional and international law and examining how the two systems similarly manage the peculiar difficulties of running a legal system outside of the state, we hope to bring focus to the possibilities and limitations of public law as a distinctive legal form. More accurately, we hope to *return* focus, for we are far from the first to take this perspective; our contribution can be seen more in the nature of resurrection than invention. Many prominent western political theorists conceived of what we would today call constitutional and international law as conjoined efforts to regulate the sovereign state from an “internal” and “external” perspective.<sup>10</sup> The father of the modern conception of sovereignty, Jean Bodin, also contemplated constitutional rules and a regime of international law as limits on the oth-

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<sup>8</sup> Stephen Holmes, *Lineages of the Rule of Law*, in *DEMOCRACY AND THE RULE OF LAW* 19, 24 (José María Maravall & Adam Przeworski eds., 2003); accord NICCOLÒ MACHIAVELLI, *THE PRINCE* 71 (Leo Paul S. de Alvarez trans., 1981) (1532) (“[T]here cannot be good laws where there are not good arms . . .”).

<sup>9</sup> At the level of jurisprudence, of course, explaining the coordinated recognition of and compliance with law generally has long been identified as a fundamental problem.

<sup>10</sup> See F.H. HINSLEY, *SOVEREIGNTY* 126–213 (2d ed., Cambridge Univ. Press 1986) (1966). Even before the state emerged as a distinctive form in the sixteenth century, medieval theorists viewed the problem of regulating secular rulers in both their domestic and external affairs through the common lens of Christian theology and natural law. See *id.* at 45–125, 164–78.

erwise illimitable sovereignty of the state.<sup>11</sup> Hugo Grotius's effort to ground public international law in the will and practice of states was built upon an elaborate and influential conception of domestic sovereignty and domestic constitutional constraint.<sup>12</sup> Thomas Hobbes was less enthusiastic about attempts to constrain sovereignty, but his conception of international relations as a war of all against all and his concomitant skepticism about international law went hand-in-hand with the near-limitless power of the Leviathan over its own citizens.<sup>13</sup> And in the nineteenth century, following in Hobbes's footsteps, John Austin sharply distinguished ordinary domestic law, which he conceived as the command of the sovereign backed by force, from international law and constitutional law, both of which he believed were, for similar reasons, rules of "positive morality"<sup>14</sup> rather than laws "properly so called."<sup>15</sup>

This unifying perspective has been largely lost,<sup>16</sup> but it is ripe for recovery. Political and legal developments in recent decades have blurred the international/constitutional law divide in a number of different ways. Debates about whether the European Union is best understood as an international or a constitutional legal order — echoing U.S. debates about whether the Articles of Confederation should be classified as a treaty or a constitution<sup>17</sup> — both presuppose and prob-

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<sup>11</sup> See generally JEAN BODIN, *SIX BOOKS OF THE COMMONWEALTH* 25 (M.J. Tooley trans., Basil Blackwell 1955) (1576) (conceiving of sovereignty as "that absolute and perpetual power" vested in the commonwealth). On Bodin and constitutional constraints, see HINSLEY, *supra* note 10, at 120–25; STEPHEN HOLMES, *PASSIONS AND CONSTRAINT* 100–33 (1995); and J.H. Burns, *Sovereignty and Constitutional Law in Bodin*, 7 *POL. STUD.* 174 (1959). On Bodin and international law, see HINSLEY, *supra* note 10, at 179–83. See also *id.* at 180 (noting that Bodin's work produced "the doctrine of sovereignty in relation to the internal structure of the political community and, with regard to the relations between communities, the recognition that . . . there was a need for a new category of law [separate from natural law] — for international law").

<sup>12</sup> See generally HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* (Richard Tuck ed., 2005) (1625); HINSLEY, *supra* note 10, at 139–41; *HISTORY OF POLITICAL PHILOSOPHY* (Leo Strauss & Joseph Cropsey eds., Univ. of Chi. Press 1981) (1963); RICHARD TUCK, *PHILOSOPHY AND GOVERNMENT 1572–1651* (1993).

<sup>13</sup> See generally THOMAS HOBBS, *LEVIATHAN* (A.R. Waller ed., Cambridge Univ. Press 1935) (1651).

<sup>14</sup> JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 141 (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1832).

<sup>15</sup> *Id.* at 143; see also *id.* at 141–43; 254–64.

<sup>16</sup> Why it has been lost is an interesting and, as best we can tell, unanswered question. We suspect that the rise of positivism and written constitutionalism in the late eighteenth and early nineteenth centuries led to a conceptual splintering of international and constitutional law, although this is a story that has not yet been fully told. For an enlightening historical analysis of the relationship between international strategic affairs and domestic constitutional orders that is orthogonal to our project, see generally PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY* (2002).

<sup>17</sup> Compare Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 *U. CHI. L. REV.* 475, 478–87 (1995) (arguing that the Articles were a constitution), with Akhil Reed Amar,

lematize a qualitative distinction between the two kinds of legal regimes and lead some to wonder what should turn on the difference.<sup>18</sup> Similar questions are pressed by the so-called movement toward “global constitutionalism”<sup>19</sup> and the increasingly common characterization of international arrangements like the WTO as “constitutional.”<sup>20</sup> In the United States, judicial and political debates surrounding the war on terrorism have brought to the fore the complicated overlapping relationship between constitutional and international rights and obligations, and more abstractly, between constitutional and global justice.<sup>21</sup> Responding to these and other proliferating transpositions of the international and the constitutional, political scientists have begun to analyze some of the parallels between the architecture of international and constitutional regimes.<sup>22</sup> Our aim in this Article is to clarify, deepen, and extend these arguments, and to explain their relevance to modern legal theory, by analyzing constitutional and international law as conceptually linked forms of public law.

The Article proceeds as follows. Each of the next three Parts takes a standard critique of international law, shows how it also applies to constitutional law, and then discusses how the problem is structurally symptomatic of public law, in contrast to ordinary domestic law, and how international law and constitutional law attempt to deal with the problem in similar ways. Part II addresses the problem of legal uncertainty, which arises from the absence of centralized legislative and ju-

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*The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 464–69 (1994) (arguing that the Articles were a treaty).

<sup>18</sup> For overviews of the European Union debate, see generally Mattias Kumm, *Beyond Golf Clubs and the Judicialization of Politics: Why Europe Has a Constitution Properly So Called*, 54 AM. J. COMP. L. SUPPLEMENT 505 (2006); and J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991).

<sup>19</sup> See generally Ernest A. Young, *The Trouble with Global Constitutionalism*, 38 TEX. INT'L L.J. 527 (2003).

<sup>20</sup> See John O. McGinnis & Mark L. Movsesian, Commentary, *The World Trade Constitution*, 114 HARV. L. REV. 511 (2000); see also Jeffrey L. Dunoff, *Constitutional Conceits: The WTO's 'Constitution' and the Discipline of International Law*, 17 EUR. J. INT'L L. 647 (2006) (collecting and critically examining the meaning of “constitutional” characterizations of the WTO).

<sup>21</sup> See, e.g., *Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). On the relationship between constitutional and global justice, see David Golove, *Incorporating Global Justice into the U.S. Constitution* (Nov. 19, 2007) (unpublished manuscript, on file with the Harvard Law School Library).

<sup>22</sup> Important efforts in this regard include G. JOHN IKENBERRY, *AFTER VICTORY* (2001); Alec Stone, *What Is a Supranational Constitution? An Essay in International Relations Theory*, 56 REV. POL. 441 (1994); Clifford James Carrubba, *A Model of the Endogenous Development of Judicial Institutions in Federal and International Systems* (unpublished manuscript, on file with the Harvard Law School Library); and Jeffrey K. Staton & Will H. Moore, *The Last Pillar To Fall? Domestic and International Legal Institutions* (Nov. 22, 2008) (unpublished manuscript, on file with the Harvard Law School Library). We are especially indebted to, and build directly upon, Christopher A. Whytock, *Thinking Beyond the Domestic-International Divide: Toward a Unified Concept of Public Law*, 36 GEO. J. INT'L L. 155 (2004).

dicial institutions with widely recognized authority to determine the meaning and application of legal rules. International and constitutional law have both gone some distance toward reducing legal uncertainty by co-opting or substituting for ordinary domestic legislatures and courts, but compared to the benchmark of ordinary domestic law, their success remains only partial. Part III focuses on the absence of any super-state enforcement authority to compel compliance with legal rules. It shows that the mechanisms through which compliance is achieved must be different from the prototypical threat of coercion or punishment by the state that backs, and to some extent explains, compliance with the statutory and common law rules of ordinary domestic law. Part III also demonstrates how an alternative set of “self-enforcement” mechanisms have been developed in both international and constitutional law and theory. Part IV examines the normative problems that arise in both international law and constitutional law from the attempt to bind states and governments to law. Notwithstanding philosophical concerns about legitimate political authority over private individuals, the authority of domestic law in a well-ordered state is generally taken for granted. Not so the authority of international and constitutional law, each of which is perpetually questioned or resisted on grounds of sovereignty, self-determination, and democracy. The Article concludes by suggesting some constructive implications of assimilating international and constitutional law into a more unified vision of public law.

Three preliminary methodological points will further clarify the scope and ambition of this project. First, while we draw upon the classics of positivist jurisprudence to frame our analysis, we do not intend to make or endorse any claims at the level of jurisprudence. The conventional diagnoses of the deficiencies of international law that we take as our starting point might be understood to implicate jurisprudential claims about what should count as law or a legal system — including some claims that are controversial or have been discredited at a philosophical level. Few contemporary jurists would join Hobbes and Austin in casting sanction-based commands or sovereignty in the central roles these concepts play in the conventional wisdom about the exceptionalism of international law (and therefore in Parts III and IV of this Article, respectively). In bludgeoning international law with its Austinian deficits, conventional legal culture may display some measure of philosophical naiveté in failing to internalize H.L.A. Hart’s refutation of Austin — not to mention a selective blindness toward the applicability of the Austinian criteria to constitutional law. But another possibility is that Hobbesian and Austinian features of the legal order, or their absence, remain relevant for functional and normative reasons beyond the jurisprudential one of distinguishing law from other kinds of normative order. For those who believe that sanctions are an empirically important determinant of legal compliance, for ex-

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ample, Hart's analysis of the nature of law and legal systems provides no reason to stop caring about them. The same is true of those who believe that sovereignty or democratic self-determination are normatively significant values that legal constraints compromise. The command theory of law may be dead jurisprudentially, but some of the state-centric features of legal systems that Hobbes and Austin emphasized — including sanctions and sovereignty — retain central significance at less rarified levels of legal theory and practice.<sup>23</sup> Whatever jurisprudential progress has been made toward working out a conception of law that is relatively autonomous of the state does nothing to obviate the functional and normative imperatives that the state has long been understood to serve.

Second, consistent with our perhaps exceptionally American perspective on the apparent differences between international and constitutional law, our focus throughout is on the United States's system of constitutional law. Nonetheless, we believe that our fundamental points apply to other constitutional systems as well. Indeed, we believe that the general features of constitutional law in our focus are analytically necessary to the ambitions of any sort of constitutional regime that aspires to limit (as well as constitute) political authority.<sup>24</sup>

Finally, in case it does not go without saying, our argument is not that international and constitutional law are the same in *all* respects. Some formal differences between the two kinds of legal regime are obvious (if not entirely clear-cut). International law predominantly addresses relations between and among states, whereas constitutional law predominantly addresses the political structure of a single state; rules of international law are created primarily through treaties entered into by states or by customary state practice, whereas rules of constitutional law are created primarily by popular ratification of an authoritative text or conventions of political life that have achieved normative status as higher law; and so on. And while our analysis of the two legal regimes along the functional dimensions of uncertainty and enforcement and the normative dimension of sovereignty emphasizes important similarities, we also pause to notice differences. From a functional perspective, the size and heterogeneity of the international community may make it more difficult for the international legal sys-

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<sup>23</sup> We do not touch upon natural law theories at all, simply because these theories offer no resources for elaborating what we take to be the significant and interesting differences between public and ordinary domestic law (though they do offer resources for portraying international and constitutional law as fundamentally alike).

<sup>24</sup> Where the analytic generalizations are least transparent — particularly in Part II, with respect to the problem of legal uncertainty — we sketch out the comparative extensions. Our discussions of the problems of enforcement and sovereignty in Parts III and IV respectively should translate straightforwardly to other constitutional systems.

tem to develop institutional mechanisms for specifying and enforcing legal rules than for constitutional systems of smaller and more homogenous states to do the same.<sup>25</sup> The fact that American constitutional law is made, interpreted, and implemented exclusively by Americans may make a normative difference to those who believe that sharing governance authority with a broader political community will invariably threaten American sovereignty, or that a politico-legal community can only be sustained at the level of the nation-state. We recognize these and other differences, but the ambition of this project is to reveal an important set of similarities that such differences may have masked.

## II. THE PROBLEM OF UNCERTAINTY

For positivists, a defining feature of law is broad agreement in society on what counts as a legal rule and on what identifiable legal rules require in concrete cases. A defining feature of the state is that its institutions foster this agreement. It has been common ground among positivist legal theorists for centuries that a well-functioning legal system requires something like the institutional apparatus of the modern state — legislatures with widely acknowledged authority to enact and modify legal norms and courts with widely acknowledged authority to adjudicate disputes about the proper interpretation of those norms — in order to coordinate understandings of what the law requires.<sup>26</sup> Thus, for Hobbes, the state comes into being to resolve disagreement about what counts as law by serving as the singular and decisive source of legal norms.<sup>27</sup> Without the centralized authority of the Leviathan, Hobbes insisted, the divergent interests, values, and perspectives of individuals in the anarchical state of nature would make it impossible to coordinate any legal order. Bringing this insight to bear on modern political order, Hart emphasized that legal systems solve the problem of “uncertainty” by providing institutions and procedures for resolving what counts as law, “either by reference to an authoritative text or to an official whose declarations on this point are authoritative.”<sup>28</sup> Hart famously described how mature legal systems accom-

<sup>25</sup> See ERIC A. POSNER, *THE PERILS OF GLOBAL LEGALISM* 11 (forthcoming 2009).

<sup>26</sup> See TERRY NARDIN, *LAW, MORALITY, AND THE RELATIONS OF STATES* 69–83 (1983) (describing the views of Hobbes, Locke, Rousseau, Kant, Bentham, and James Mill).

<sup>27</sup> See HOBBS, *supra* note 13, at 189; see also JEREMY WALDRON, *LAW AND DISAGREEMENT* 39–41 (1999). This view was hardly limited to Hobbes. See, e.g., Jeremy Waldron, *Kant's Legal Positivism*, 109 HARV. L. REV. 1535 (1996).

<sup>28</sup> H.L.A. HART, *THE CONCEPT OF LAW* 92 (2d ed. 1994); see also *id.* at 93 (“Disputes as to whether an admitted rule has or has not been violated will always occur . . . if there is no agency specially empowered to ascertain finally, and authoritatively, the fact of violation.”). Hart calls this second problem “inefficiency,” but its relationship to “uncertainty” in the intuitive sense is obvious.

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plish this task through “secondary rules” of recognition, change, and adjudication that determine what the primary legal rules are and when they have been violated.<sup>29</sup> Within the institutional framework of the modern state, these rules serve to identify legislatures and courts as the authoritative sources of legal norms and the authoritative arbiters of disputes over their meaning.

The crucial role of state institutions in coordinating public understandings of the sources and proper interpretation of legal norms has long been a reason for skepticism about international law. International society lacks a super-state — including a super-legislature and a super-judiciary — to create the kind of consensus about operative legal norms that these institutions enable within states. This deficiency is why cosmopolitan theorists have long argued for creating a global legislature and court to govern world affairs.<sup>30</sup> In fact, the development of international institutions has proceeded some distance, and the number and density of international institutions continues to increase. But the international system is still a long way from establishing anything like a single, comprehensive global legislature or court. The difficulty of creating such institutions, or of duplicating their functions through some other institutional arrangement, leads to pessimism about whether the international system can ever hope to achieve the level of consensus and certainty that is thought to characterize well-developed systems of domestic law that by definition already have the institutions of an up-and-running state at their disposal.

Our aim in this Part is to illuminate the perhaps surprisingly similar predicament of constitutional law in the United States and other countries. Of course, *all* legal systems generate some level of ambiguity and disagreement about the correct interpretation of particular rules or the right outcome of particular cases. But two characteristics distinguish constitutional law from ordinary domestic law and align it with international law. First, the institutionalized secondary rules of systems of constitutional law are less able to resolve first-order uncertainty than their counterpart institutions in ordinary domestic legal systems. In part, this is because these systems lack an ongoing legislative process. In part it is because, although courts in some systems play an important role in adjudicating disputes over the meaning of constitutional norms (or in creating and changing these norms), their authority to resolve constitutional disputes tends to be limited and contested. The second characteristic is that, in the United States and other countries, there is considerable ambiguity and debate about what, precisely, the secondary rules of constitutional law are, and how

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<sup>29</sup> See *id.* at 94–98.

<sup>30</sup> See, e.g., DEREK HEATER, *WORLD CITIZENSHIP AND GOVERNMENT* (1996).

they have been institutionalized. Officials and citizens disagree not just about the meaning of specific constitutional norms but about what counts as an authoritative source of norms, a legitimate mechanism of legal change, or a definitive adjudication of disputes over constitutional meaning. And of course there are no institutionalized “tertiary” rules to resolve this problem of uncertainty about the secondary rules of the system.<sup>31</sup>

These problems of uncertainty create special challenges for constitutional and international law that ordinary domestic legal systems do not face. Domestic legal systems can rely on the authoritative legislative and judicial institutions of the state to identify and specify legal norms. But because systems of public law aspire to stand outside of, and govern, the state, they cannot fully rely on the institutional apparatus of the state itself. Public law systems can only institutionalize the legislative and judicial functions by cautiously conscripting existing state institutions to play a meta-governance role or by building new institutions outside of the state or its conventional governance structure. Both international and constitutional law have used a combination of these strategies with some success in reducing legal uncertainty. Still, the challenges of institutionalizing the secondary rules of a legal system outside of the institutional apparatus of the state remain daunting in both areas of law.

#### A. *International Law*

International law lacks a centralized and hierarchical lawmaker akin to the legislature inside a state to specify authoritative sources of law and the mechanisms of legal change and reconciliation. It also lacks centralized and hierarchical judicial institutions to resolve the resulting legal uncertainty. As a result, its norms are imprecise, contested, internally contradictory, overlapping, and subject to multiple interpretations and claims. International law’s inability to resolve this uncertainty has fueled skepticism about its status as law; law that is unclear or unknowable, many believe, cannot be described as a real legal system, and in any case cannot be effective.<sup>32</sup>

States coordinate public understandings of what counts as law largely through the institutional mechanism of an authoritative legisla-

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<sup>31</sup> For a similar analysis at the level of positivist jurisprudence, see Jeremy Waldron, *Are Constitutional Norms Legal Norms?*, 75 *FORDHAM L. REV.* 1697 (2006). Waldron’s essential point is that constitutional norms, conceived as fundamental secondary rules in Hart’s framework, by definition lack the backing provided by such rules themselves for primary rules. Without this backing, it is unclear why constitutional norms, for Hartians, should count as law, as opposed to merely positive morality.

<sup>32</sup> See HART, *supra* note 28, at 214; LOUIS HENKIN, *HOW NATIONS BEHAVE* 22–25 (2d ed. 1979); HANS J. MORGENTHAU, *POLITICS AMONG NATIONS* 253–68 (2d ed. 1955).

ture. But of course there exists no global legislature. International legal rules are created through two decentralized mechanisms: treaties and customary international law (CIL). A treaty results from the consent of two or more nations, and binds only those nations that ratify it.<sup>33</sup> A small handful of treaties — the U.N. Charter and the Geneva Conventions, for example — have been ratified by practically every nation in the world. But even these universal laws are laboriously constructed through the same decentralized process of negotiation and consent. CIL also originates through a decentralized process; its content is derived from those customary state practices that states follow out of a sense of legal obligation (*opinio juris*).<sup>34</sup>

These decentralized lawmaking processes give rise to fundamental uncertainty about the content of international legal norms. The problem of uncertainty is most severe with respect to CIL, which lacks any clear rule of recognition. Little agreement exists as to what types of state action count as state practice.<sup>35</sup> Official pronouncements, certain types of legislation, and diplomatic correspondence are relatively (but not entirely) uncontroversial sources of CIL, but international law has no settled method for weighing or ordering these sources or for determining when they count as evidence of *opinio juris*. Bilateral and multilateral treaties are sometimes invoked as evidence of CIL, though rarely consistently or coherently.<sup>36</sup> The writings of jurists are a secondary source of CIL, but jurists rarely agree even on supposedly settled rules.<sup>37</sup> Nonbinding statements and resolutions of multilateral bodies, most notably the resolutions of the U.N. General Assembly, are also invoked as a basis for CIL, as are moral and ethical claims. Needless to say, each potentially relevant source of CIL may point in a different direction, and there is no formula or agreed-upon set of principles for reconciling them. Nor is there any authoritative institutional mecha-

<sup>33</sup> See Vienna Convention on the Law of Treaties art. 34, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

<sup>34</sup> See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) [hereinafter RESTATEMENT].

<sup>35</sup> See generally David P. Fidler, *Challenging the Classical Concept of Custom: Perspectives on the Future of Customary International Law*, 39 GERMAN Y.B. INT'L L. 198 (1996).

<sup>36</sup> Sometimes treaties are even invoked as evidence that there is no CIL on a particular issue because the treaties do not bind nonratifiers, and the obligations imposed by the treaties are exhausted by the treaties themselves.

<sup>37</sup> For example, in the famous *Paquete Habana* case, English jurists believed that, consistent with England's maritime supremacy, CIL did not prohibit the seizure of coastal fishing vessels during war, while jurists from weaker maritime states believed that such a prohibition existed. See *The Paquete Habana*, 175 U.S. 677, 701–08 (1900). In modern times, jurists claim authority as a source of CIL less for their documentation of actual state practices and more for their expertise in identifying the normative bases for a rule of CIL, a judgment that of course is often more contested than actual practices. See *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 251 n.26 (2d Cir. 2003).

nism — the equivalent of a legislature or supreme court — for definitively resolving CIL's content. The unsurprising result is frequent and persistent contestation over the content of CIL.

By comparison, the secondary rules for treaty-making are relatively well-settled, and there is much less disagreement over what counts as a treaty.<sup>38</sup> But there is still a great deal of disagreement about the content of treaty-based international law because the relationships between different treaties, and between treaties and CIL, are subject to no settled rules. The U.N. Charter is among the most fundamental of international laws, and its Article 103 provides that Charter obligations trump other international law obligations.<sup>39</sup> But when NATO countries bombed Kosovo in violation of the U.N. Charter's prohibition on the use of force, many scholars contended that there was a developing CIL exception for humanitarian intervention, and there has been much disagreement — among both scholars and nations — about this point ever since.<sup>40</sup> There are also many unsettled questions about the validity of important treaty obligations that conflict with the Charter.<sup>41</sup> Similarly, different human rights treaties (for example the European Convention on Human Rights<sup>42</sup> and the International Covenant on Civil and Political Rights<sup>43</sup>) contain different and in some respects contradictory rights, and there is disagreement among courts, legal institutions, and scholars about which prevails.<sup>44</sup> The same is true of

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<sup>38</sup> The rules of treaty formation are set forth in the Vienna Convention on the Law of Treaties, *supra* note 33.

<sup>39</sup> U.N. Charter art. 103.

<sup>40</sup> For a recent prominent view, see INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001), available at <http://www.iciss.ca/pdf/Commission-Report.pdf>. For earlier debates, see, for example, Antonio Cassese, *Ex Iniuria Ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT'L L. 23 (1999); Julie Mertus, *Reconsidering the Legality of Humanitarian Intervention: Lessons from Kosovo*, 41 WM. & MARY L. REV. 1743 (2000).

<sup>41</sup> For example, there is disagreement over whether the Rome Statute, which established the International Criminal Court, limits the U.N. Security Council's ability under Chapter VII of the Charter to delay or abrogate prosecutions. See, e.g., Bryan MacPherson, *Authority of the Security Council To Exempt Peacekeepers from International Criminal Court Proceedings*, AM. SOC'Y INT'L L., July 2002, <http://www.asil.org/insights/insigh89.htm>. And the European Court of Justice has recently (and controversially) maintained that the human rights treaty obligations of the European Community in some instances trump obligations of the U.N. Charter. See *Joined Cases C-402/05 & C-415/05, Kadi v. Comm'n*, 2008 ECJ EUR-Lex LEXIS 1954 ¶¶ 288–330 (Sept. 3, 2008). See generally Gráinne De Búrca, *The European Court of Justice and the International Legal Order After Kadi*, 51 HARV. INT'L L.J. (forthcoming Winter 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1321313](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1321313).

<sup>42</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

<sup>43</sup> International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171.

<sup>44</sup> See generally Laurence Helfer, *Forum Shopping for Human Rights*, 148 U. PA. L. REV. 285, 308–41 (1999).

obligations imposed by the World Trade Organization that conflict with obligations imposed by other treaty regimes.<sup>45</sup>

Thus, even when the relevant rules of international law can be clearly identified, it often remains unclear how overlapping and inconsistent rules are to be reconciled and systematized. In theory, the international legal system has a set of meta-rules — rules of non-retroactivity, last-in-time, the priority of *lex specialis*, and normative hierarchy (prioritizing the U.N. Charter or *jus cogens* norms) — that are supposed to help sort out these conflicts.<sup>46</sup> But in practice these rules are often contested and indeterminate.<sup>47</sup> Lacking a centralized legislative process, the international legal system commonly allows for the unbridled proliferation of contradictory norms.

One might look to courts to rectify this legal uncertainty, perhaps by analogy to the way that early common law courts constructed and clarified legal norms through a case-by-case process of adjudication, with limited legislative assistance. But the international adjudicatory system is not up to this task. The international law system does, of course, rely on courts — the domestic courts of states as well as international tribunals — to adjudicate disputes about the existence and meaning of international norms. But the ability of these courts to resolve the content of international law is severely limited by their lack of centralization, coordination, and hierarchy.

At the domestic level, both national courts and national executive branches are charged with interpreting international law. No doubt in part because states tend to interpret international law in accordance with their own (divergent) interests, international law is interpreted differently by different states. Capital-importing and capital-exporting nations, for example, traditionally have held different views about the customary international law limits on expropriation.<sup>48</sup> Similarly, while the United States and the United Kingdom believed that the 2003 invasion of Iraq was consistent with the U.N. Charter, most other nations disagreed.<sup>49</sup> The international legal system has no higher-level court or other decisionmaker capable of authoritatively resolving these kinds of transnational interpretive disputes.

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<sup>45</sup> See JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW (2003); Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13 EUR. J. INT'L L. 753, 791–805 (2002).

<sup>46</sup> See, e.g., Vienna Convention on the Law of Treaties, *supra* note 33, arts. 28, 30, 53.

<sup>47</sup> See generally Study Group of the Int'l Law Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) [hereinafter ILA Study] (*finalized by Martti Koskenniemi*).

<sup>48</sup> For a classic example of such disagreement, see *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

<sup>49</sup> See DAVID M. MALONE, THE INTERNATIONAL STRUGGLE OVER IRAQ 185–221 (2006).

The inability of multiple, self-interested national executives and courts to agree on the content of international law has driven the international system to develop its own system of courts, formally independent of the direct control of any one or several nations. While there are many such courts of various kinds in operation, their jurisdictions are narrow and segmented, creating a patchwork of adjudicative authority. This patchwork includes both gaping holes and areas of uncoordinated overlap. There are many matters — immigration, war, human rights, and so on — over which international courts have little or no authority. Even the International Court of Justice, perhaps the most powerful generalist international court, has limited jurisdiction, and its decisions have no *stare decisis* effect.<sup>50</sup> Regional courts (like the European Court of Justice) and international bodies (like the Human Rights Committee) have overlapping claims to partial jurisdiction to resolve or pronounce upon international law, here again with no second-order rules or institutional mechanisms to coordinate their decisions. When the International Court of Justice and the International Criminal Tribunal for the former Yugoslavia fundamentally disagree on the question of attributing state responsibility for rebel insurgent groups, for instance, there is no legal procedure for resolving the disagreement.<sup>51</sup>

The problem is more acute than even this, for courts (domestic and international) are not the only interpreters of international law. Jurists also serve as sources of law in some sense, and various NGOs often pronounce upon the content of law in ways that are meant to be, and are often received as, authoritative. Human rights committees disagree about the content of international human rights law, and these bodies often disagree with regional and national officials who are charged with interpreting the same law.<sup>52</sup> This proliferation of interpreters exacerbates international law's problems of ambiguity and deprives international law of its ability to resolve disputes authoritatively.<sup>53</sup> The result is a cacophony of oft-conflicting pronouncements with no authoritative method to resolve the conflicts.

In sum, although international law and associated international institutions are denser and more prevalent today than ever, these laws

<sup>50</sup> See Statute of the International Court of Justice art. 59, June 26, 1945, 3 Bevens 1179.

<sup>51</sup> Compare *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 64 ¶ 115 (June 27) (holding that state responsibility for a paramilitary group attaches if the state is in “effective control” of the group), with *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, ¶ 122 (July 15, 1999) (rejecting the ICJ’s “effective control” test and embracing instead an “overall control” test). See generally Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT’L L. 553, 562–67 (2002).

<sup>52</sup> See generally Helfer, *supra* note 44.

<sup>53</sup> Cf. William W. Burke-White, *International Legal Pluralism*, 25 MICH. J. INT’L L. 963, 965–68 (2004).

and institutions are, as a system, weak and fragmented.<sup>54</sup> What is missing is the kind of centralized, hierarchical ordering that domestic legal systems create through their legislative and judicial institutions. Unable to rely upon these institutions, the international legal system struggles to coordinate public understandings of the content and application of its norms. The result is a kind of fundamental uncertainty, not just about what international legal rules mean, but about how they can be created and changed, and how disputes over meaning can be definitively resolved.

### B. Constitutional Law

Constitutional law in the United States and in many other countries seems to bear a much closer resemblance to the idealized institutional structure of a “real” legal system. Constitutional norms are created in the first instance through a proto-legislative process like a constitutional convention (in the United States, the 1787 Philadelphia Convention). These norms are codified as a single, easily verifiable document (the U.S. Constitution), and then changed only occasionally using specified procedures for amendment (those described in Article V). Ambiguities in the meaning and application of the constitutional text are authoritatively resolved by a centralized and hierarchical judiciary (headed by the U.S. Supreme Court).

But this neat, formal picture disguises much of the actual practice of constitutional law in the United States and elsewhere. Start with the text. Of course, some constitutional systems do not start with a text at all, or they subsume a patchwork of texts into a broader set of unwritten conventions.<sup>55</sup> But even in the United States, with its paradigmatic emphasis on the authority of a written constitution, the constitutional text in fact plays a very limited role in specifying the meaning of constitutional norms. To be sure, the text of the 1789 Constitution has settled some of the basic structural features of the U.S. government in a broad-brush way: we have a bicameral Congress, a President, and a Supreme Court; states get equal representation in the Senate; Justices are nominated by the President and confirmed by the Senate; and the like. Likewise, the 1791 Bill of Rights has focused constitutional attention on certain broad aspects of government behav-

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<sup>54</sup> There is a large and growing literature on the descriptive and normative aspects of international legal fragmentation. See generally Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595 (2007); Burke-White, *supra* note 53; ILA Study, *supra* note 47; Koskenniemi & Leino, *supra* note 51.

<sup>55</sup> Great Britain and Israel are prominent contemporary examples. See generally SUZIE NAVOT, CONSTITUTIONAL LAW OF ISRAEL (2007); COLIN TURPIN & ADAM TOMKINS, BRITISH GOVERNMENT AND THE CONSTITUTION (6th ed. 2007).

ior, like speech, religion, and criminal process. But the constitutional text has contributed little to resolving the vast areas of ambiguity and disagreement that have arisen within these broad outlines. Many of the most important constitutional norms are derived from abstract textual provisions like “equal protection” or “due process” that provide little resolving power at the level of actual practices and that have been interpreted in strikingly disparate ways over the course of constitutional history. The same has been true of even seemingly more specific textual provisions like “declare war” and “commerce.” Other textual provisions, like the First Amendment’s express limitation of its prohibitions to “Congress,” have been ignored or interpreted away. Meanwhile, new fundamental constitutional rights, like abortion and sexual privacy, and new federal powers, like maintaining an Air Force, have been created without any specific textual mandate. As David Strauss summarizes, in the contemporary practice of constitutional law, “the text matters most for the least important questions,” and often does not matter at all.<sup>56</sup>

What matters much more is how ambiguous, inapposite, or non-existent constitutional text is “interpreted” to resolve constitutional issues. The problem is that constitutional lawyers and judges perpetually disagree on how to go about interpreting constitutional text. Methodologically, there is ongoing disagreement about whether constitutional norms should be derived from the text by looking to the historical understandings of the Founding generation, subsequent historical or traditional understandings or practices, moral or philosophical analysis, functional inferences from our basic structure of government, or some (indeterminate) combination. Even interpreters employing the same methodological approach routinely disagree among themselves about which direction history or moral philosophy, for example, points in any given case.

Not surprisingly, then, the range of substantive disagreement on many constitutional issues is as wide as the political and moral spectrum. Lawyers, judges, political officials, and citizens disagree about whether women have the right to an abortion; whether individuals have a right to bear arms; whether affirmative action is permitted; whether religious groups and practices must or can be afforded special treatment; whether the death penalty is constitutional; whether the President can fight an undeclared war; whether Congress’s commerce power is effectively unlimited or strictly limited to the kinds of regulations that were contemplated at the Founding; whether independent agencies and other incursions on the “unitary” executive are permitted;

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<sup>56</sup> David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 916 (1996).

whether the modern administrative state is a wholesale constitutional violation; and innumerable other fundamental questions. Historically, legal and political officials and citizens have been unable to resolve protracted constitutional disputes over foundational issues such as slavery, federalism, the regulatory state, and the freedom of political dissent. Agreement at the secondary-rule level on the authority of the constitutional text has done little to create consensus as to the primary rules of obligation that qualify as binding constitutional law.

The formal amendment process has played a similarly peripheral role as an authoritative rule of recognition for constitutional change. Formal amendments have turned out to be neither necessary nor sufficient for changing the constitution.<sup>57</sup> Some amendments have done little more than memorialize changes in constitutional norms that would have been widely recognized even in the absence of any change to the constitutional text. The abolition of slavery, for example, was accomplished by the Civil War, not by the Thirteenth Amendment.<sup>58</sup> Other amendments, like the Fifteenth, have been disregarded — effectively read out of constitutional law — for long periods of time.<sup>59</sup> But the most obvious reason for doubting the significance of the formal amendment process is that so many of the most fundamental changes in the U.S. constitutional order — including the growth of federal power, the rise of the administrative state, the increasing dominance of the President in foreign affairs,<sup>60</sup> the development of extensive protections for free speech and “privacy,” and the emergence of the constitutional law of gender equality — have taken place without any amendment (and in the case of gender equality, notwithstanding the contemporaneous failure of a proposed amendment).<sup>61</sup> These changes have been accomplished simply by interpreting, supplementing, or ignoring fixed provisions of the constitutional text in novel ways.

Alternatively, one could describe some or all of these changes as legally valid “amendments” of the Constitution that have taken place outside of the formalities of the Article V process — but only at the equivalent expense of any clear rule for legally valid constitutional change. In Bruce Ackerman’s influential view, for example, constitutional norms may be created or revised when the American public is roused to transcend ordinary politics and engage in a higher-order form of deliberation about the public good.<sup>62</sup> Ackerman argues that

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<sup>57</sup> See David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1462–64 (2001).

<sup>58</sup> See *id.* at 1480–81.

<sup>59</sup> See *id.* at 1483.

<sup>60</sup> See *id.* at 1470–72.

<sup>61</sup> See *id.* at 1476–78.

<sup>62</sup> See, e.g., 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 19–22 (1991).

this has happened a number of times throughout American history — during Reconstruction, the New Deal, and the Civil Rights Era — and that interpreters of the Constitution should accept the new political norms that emerged during these “constitutional moments” as legally valid and binding.<sup>63</sup> Ackerman’s attempt to derive a second-order rule of valid constitutional change from the practice of American constitutional law demonstrates the complexity and interpretive contestability of any such rule. The Byzantine process that Ackerman describes — deep political contestation eventually followed by public and official acquiescence in a victorious constitutional vision — will not provide anything like the kind of crisp procedural or institutional markers of valid legal change that Hart had in mind and that prevail in systems of ordinary domestic law.<sup>64</sup>

Because the written Constitution and its formal amendments seem to play such a limited role in the U.S. system of constitutional law, it has become conventional to distinguish the big-C Constitution, consisting of the formal text and amendments, from the small-c constitution, or the “constitution in practice,” or more simply, “constitutional law.” But if the big-C Constitution and its formal amendment procedures play only a partial role in determining the content of constitutional law, then what is the ultimate rule of recognition? The answer to this question will always be complex, uncertain, and contested.<sup>65</sup> What counts as constitutional law at any given time will depend on some complicated combination of which parts of the text of the Constitution, which interpretive methods, and which first-order constitutional interpretations are recognized as authoritative by the relevant recognitional community.<sup>66</sup> But then, at any given time, there are also multiple recognitional communities, each with a very different understanding of both the substantive rules and the second-order criteria of constitutional law.<sup>67</sup> Throughout American history, presidential administrations, political parties, states, groups of judges, and social movements have developed and advocated their own constitutional visions. Consider, for example, Roosevelt’s New Deal vision of federal

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<sup>63</sup> *Id.*

<sup>64</sup> For criticisms of Ackerman along these lines, see Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman’s Theory of Constitutional Moments*, 44 STAN. L. REV. 759, 766–75 (1992) (book review); and Suzanna Sherry, *The Ghost of Liberalism Past*, 105 HARV. L. REV. 918, 930–33 (1992) (book review).

<sup>65</sup> On the complexity and uncertainty, see Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621 (1987); and Frederick Schauer, *Amending the Presuppositions of a Constitution*, in RESPONDING TO IMPERFECTION 145 (Sanford Levinson ed., 1995). On the contestation, see Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719 (2006).

<sup>66</sup> See Greenawalt, *supra* note 65, at 659–60.

<sup>67</sup> See Adler, *supra* note 65, at 747–48.

regulatory power; the recent Bush Administration's understanding of broad executive power to fight terrorism; abolitionists' antislavery constitution and the NAACP's campaign against segregation; or Southern states' constitutional defenses of slavery and Jim Crow segregation. Interpretive pluralism is a pervasive feature of American constitutional practice.<sup>68</sup>

All of this disorder and uncertainty, one might think, is beside the point in the United States's and other systems of constitutional law that can rely on courts to resolve disagreement about constitutional meaning. One might even think that the status of U.S. constitutional law as a genuine legal system depends on broad acceptance of the authority of the Supreme Court to "settle" what would otherwise be endless constitutional contestation.<sup>69</sup> Consolidating constitutional interpretation into a single, authoritative tribunal is necessary, many have thought, to avoid the situation Daniel Webster long ago decried:

Instead of one tribunal, established by all, responsible to all, with power to decide for all, shall constitutional questions be left to [multiple] bodies, each at liberty to decide for itself, and none bound to respect the decision of others; and each at liberty, too, to give a new construction on every new election of its own members? Would anything . . . with such a destitution of all principle, be fit to be called a government? No sir. . . . It should be called, rather, a collection of topics, for everlasting controversy; heads of debate for a disputatious people. It would not be a government. It would not be adequate to any practical good, nor fit for any country to live under.<sup>70</sup>

The Court does, in fact, resolve a significant number of constitutional cases and controversies, generating an elaborate, legalistic body of doctrine that is taught in law schools and presented to the public as "constitutional law." More than anything else, it is the Court's authoritative interpretations of the Constitution that lend constitutional law its law-like appearance. Certainly in the absence of the institution of judicial review, constitutional law in the United States and other countries would be viewed very differently — as more continuous with politics, morality, and custom; less certain and systematized; in short, more like international law.

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<sup>68</sup> See, e.g., Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1981–83 (2003).

<sup>69</sup> See Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1377 (1997).

<sup>70</sup> 6 REG. DEB. 78 (1830); see also KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY* 1 (2007) (connecting Webster's remarks to judicial review and judicial supremacy).

But recognizing the central role of the Court in disciplining constitutional law into a legal system should also lead us to appreciate the contingency and limitations of that role. Most obviously, the U.S. Supreme Court resolves only a small subset of constitutional questions. Some additional number of constitutional questions are resolved by the lower federal and state courts through decentralized and often heterogeneous constitutional decisionmaking on which the Supreme Court never imposes uniformity. A far greater number of constitutional issues will never be heard by any court and are decided by nonjudicial political actors in Congress, the executive branch, and state governments.<sup>71</sup> Constitutional interpretation by political actors is necessarily decentralized. Different levels and branches of government take different positions on constitutional issues, and these disputes must be settled, to the extent they are ever settled, through political contestation.<sup>72</sup> While political settlements of constitutional issues may be relatively stable and enduring, there are no clear rules for resolving constitutional disagreements or for determining which apparent resolutions should be recognized as authoritative going forward.<sup>73</sup>

Now, within its limited domain, the Supreme Court does, in fact, resolve a great deal of legal uncertainty. It does so both by resolving particular disputes over constitutional meaning and by building a relatively stable doctrinal framework that creates some measure of pre-

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<sup>71</sup> See STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM* 45 (1996) (asserting that “the meaning of most of the Constitution is determined through ordinary politics”).

<sup>72</sup> See generally KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION* (1999) (theorizing and describing the “construction” of constitutional meaning through extrajudicial politics); Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773 (2002) [hereinafter Whittington, *Extrajudicial*] (defending expansive extrajudicial constitutional interpretation).

<sup>73</sup> Indeed, clear rules do not even exist for identifying which political settlements should be regarded as constitutional, or how to distinguish constitutional interpretation by political actors from ordinary politics. Because much extrajudicial constitutional construction occurs in areas “where the text is so broad or so underdetermined as to be incapable of faithful but exhaustive reduction to legal rules,” WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION*, *supra* note 72, at 5, debate necessarily proceeds “without much attention to legal and constitutional values that lawyers and judges think important,” GRIFFIN, *supra* note 71, at 45. Without constitutional text or judicial precedent to serve as guideposts, the boundaries of constitutional law blur into ordinary politics. Keith Whittington’s capacious understanding of “constitutional subject matter” is telling: It includes, he says, any issue related to “organic structures, the distribution of political powers, individual and collective rights, structures of political participation/citizenship, jurisdiction, the role of domestic government, and international posture.” WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION*, *supra* note 72, at 9. Virtually any political issue might fit this definition. If, as Whittington and others have endeavored to demonstrate, constitutional construction in the political branches is a significant improvement over complete interpretive “anarchy” or ordinary anything-goes politics, see Whittington, *Extrajudicial*, *supra* note 72, at 804–08, it is also a far cry from the centralized, authoritative specification of constitutional law that we might look to the Supreme Court to provide.

dictability and consensus about the content of constitutional law.<sup>74</sup> That said, it is easy to exaggerate the amount of constitutional settlement that judicial review provides. One obvious limitation is that the Court's own interpretations of the Constitution are far from settled. Insoluble disagreements within constitutional culture about the legitimate sources of constitutional norms — text, history, tradition, moral philosophy, functional imperatives, and so on — are replicated among the Justices. Notwithstanding the force of precedent and stare decisis, the content of judicially created constitutional law has changed dramatically and sometimes quite suddenly, as with the New Deal switch in time,<sup>75</sup> the Court's intervention in apportionment,<sup>76</sup> and the apparent elimination and then restoration of the death penalty.<sup>77</sup> Even relatively enduring doctrinal and jurisprudential frameworks in many areas strike constitutional lawyers as remarkably indeterminate and manipulable. One does not have to believe that "constitutional rhetoric provides powerful support for virtually any outcome to any argument"<sup>78</sup> to recognize that the range of doctrinally respectable arguments in constitutional cases is unusually broad and that the line between constitutional and political decisionmaking is unusually fine.

Further blurring the line between (settled) constitutional law and (unsettled) politics is the Court's vulnerability and sensitivity to social and political disagreement. The Court's ability to settle constitutional disagreements depends on the extent to which officials and citizens are willing to accept its decisions as authoritative. Acceptance can be shallow or deep. At one level, political officials and citizens generally have been willing to comply with judicial decisions in particular cases.<sup>79</sup> At another level, however, judicial attempts to resolve conten-

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<sup>74</sup> See generally Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54 (1997); Strauss, *supra* note 56.

<sup>75</sup> Compare *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), with *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). How suddenly the switch occurred is a matter of historical debate. See Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201 (1994).

<sup>76</sup> Compare *Colegrove v. Green*, 328 U.S. 549 (1946) (holding that the legality of apportionment is a political question), with *Baker v. Carr*, 369 U.S. 186 (1962) (holding that the legality of apportionment is not a political question).

<sup>77</sup> Compare *Furman v. Georgia*, 408 U.S. 238 (1972) (appearing to declare the death penalty unconstitutional), with *Gregg v. Georgia*, 428 U.S. 153 (1976) (conditionally reapproving use of the death penalty).

<sup>78</sup> LOUIS MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION* 11 (2001).

<sup>79</sup> There have been a small number of high-profile exceptions. When the state of Georgia ignored the Supreme Court's decision in the Cherokee removal cases, see *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), President Jackson took no action to support the Court's judgment and allegedly quipped, "Well, John Marshall has made his decision, now let him enforce it." John Yoo, *Andrew Jackson and Presidential Power*, 2 CHARLESTON L. REV. 521, 534 (2008). President Lincoln famously ignored Chief Justice Taney's judicial order in *Ex Parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487). See DANIEL FARBER, *LINCOLN'S CONSTITUTION* 157–63 (2003). And President Franklin Roosevelt threatened not to enforce an unfavorable decision in

tious policy issues are often evaded or resisted, and sometimes effectively overruled. Massive resistance to desegregation in the South, the New Deal threat to pack the Court leading to its switch in time, and ongoing efforts by opponents of abortion to reverse *Roe v. Wade*<sup>80</sup> remind us that judicial decisions can provoke more controversy over constitutional meaning than they settle.<sup>81</sup>

The extent to which judicial resolutions of contested constitutional issues have been received as authoritative by officials and citizens, and how aggressively and through what channels they have been challenged, has varied over American history. As Larry Kramer has documented, the original and historically dominant understanding of American constitutionalism is premised on “popular constitutionalism,” vesting ultimate authority over the meaning of the Constitution in “the people themselves,” and denying the courts any special interpretive supremacy.<sup>82</sup> Despite a movement in recent decades toward greater public and official acceptance of judicial supremacy, the dominant understanding probably remains that nonjudicial officials need not defer to courts in the face of serious constitutional disagreements; they can go their own way, appealing to the public for support.<sup>83</sup> At the very least, it is fair to say that judicial supremacy has never gone uncontested in the United States; judicial authority has never been recognized as indisputably final.

The fragility of judicial supremacy, and the nonexistence of judicial exclusivity, is well captured in Kramer’s description of the decentralized, departmentalist system of constitutional law that, he argues, has prevailed to an underappreciated extent throughout American history and into the present:

There are no easy rules of recognition to identify how a constitutional issue arises, much less how it gets resolved. There are not even clear rules about how one knows if something *is* a constitutional issue. Instead, such matters are left to the free play of interbranch and intergovernmental politics. Actors in any institution can try to turn something into a constitutional question, and the only measure of their success or failure is how other political actors and the public respond. Nor is the ability to initiate a debate limited to formal institutions of government. Social movements, different parts of civil society, even individuals may equally launch a campaign based on a novel reading of the Constitution, with the test of valid-

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what became *Ex Parte Quirin*, 317 U.S. 1 (1942), a threat that was acknowledged in the Court’s deliberations. See David J. Danelski, *The Saboteurs’ Case*, 1 J. SUP. CT. HIST. 61, 69 (1996).

<sup>80</sup> 410 U.S. 113 (1973).

<sup>81</sup> See, e.g., Michael J. Klarman, *What’s So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 173–74 (1998).

<sup>82</sup> LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

<sup>83</sup> See Alexander & Schauer, *supra* note 69, at 1360.

ity being only whether they can persuade enough others to embrace or adopt their position.<sup>84</sup>

If offered as a description of international law, this account would hardly raise an eyebrow. More jarring when applied to contemporary U.S. constitutional law, this account nonetheless captures important features of the system that are obscured by the legalistic caricature of authoritative text, regimented change, and judicial settlement. United States constitutional law exhibits considerably less secondary-rule-induced certainty than its superficial form might suggest.

Although our focus is on U.S. constitutional law, we believe the problems of uncertainty we are describing will be faced in some form by any system of constitutional law that aspires to constrain ordinary politics. To be sure, many constitutional systems are less institutionally decentralized than the American one and feature less overt contestation over interpretive authority. Post-World War II European systems, for example, are centered on specialized constitutional courts that are, in their Kelsenian origins and formal constitutional role, supposed to be supreme over all other constitutional interpreters.<sup>85</sup> At the same time, however, perhaps as necessary compensation for their greater centralization of suprapolitical authority, European systems pull constitutional law closer to ordinary politics. These systems feature recently written and ratified constitutional texts that articulate legal rules in more detail and are easier to amend than the U.S. Constitution. A more legislative approach to drafting and updating constitutional norms is likely to bring the content of constitutional norms closer to the content of ordinary statutes. And European constitutional courts, staffed by judges who are selected through self-consciously political processes (with centrist tendencies) and appointed for limited terms,<sup>86</sup> are likely to be (even) more politically responsive than American courts.<sup>87</sup> There is very likely a trade-off between the institutional centralization and resolving power of constitutional courts and the ability of these courts to resist the political forces that constitutional law purports to regulate. The fundamental difficulty, here again, lies in the attempt to create robust and efficacious institutions of constitutional lawmaking and adjudication that stand outside and above ordinary political institutions and processes.

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<sup>84</sup> Larry D. Kramer, Lecture, *"The Interest of the Man": James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy*, 41 VAL. U. L. REV. 697, 750-51 (2006).

<sup>85</sup> See Alec Stone Sweet, *Why Europe Rejected American Judicial Review: And Why It May Not Matter*, 101 MICH. L. REV. 2744, 2779 (2003).

<sup>86</sup> See VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 464-584 (2d ed. 2006); ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* 32-60 (2000).

<sup>87</sup> See Kramer, *supra* note 84, at 746-47.

*C. Public Law*

International law and U.S. constitutional law both suffer from deep uncertainty about what counts as authoritative legal norms, and for the same basic reason. Neither legal system can rely fully upon the legal apparatus of the very state that is the subject of these norms to resolve the uncertainty. The internal institutional apparatus of the state is an untrustworthy governance mechanism for the state itself. And the external institutions that might take its place are weak and incomplete. This institutional deficit creates fundamental uncertainty in both constitutional and international law. At one level, this is because the institutional solutions to the secondary-rule questions of legal recognition, change, and adjudication are inadequate to resolve legal uncertainty. At another level, at least in the U.S. system, uncertainty is due to disagreement about these institutional solutions themselves, with no third-order structure for settling the second-order contestation.

Ordinary domestic law does not suffer from either type of uncertainty. To be sure, as legal realists and critical legal studies proponents have emphasized for generations, ordinary statutes, regulations, and common law rules are often indeterminate and contested. In ordinary domestic law no less than in constitutional and international law, ambiguous legal language and changes in facts and values routinely produce uncertainty as to the meaning and application of the relevant norms. The crucial difference is that uncertainty in the ordinary domestic legal system can, in principle, be settled through well-established and widely accepted lawmaking, law-changing, and law-applying institutions. Well-functioning domestic legal systems feature legislatures possessing unquestioned authority to resolve disputes over legal meaning (and to preempt such disputes by legislating clearly and in finely grained ways in the first place), as well as hierarchical court systems with compulsory jurisdiction possessing unquestioned authority to resolve disputes about the existence, meaning, and application of legal rules. Indeed, having these institutional mechanisms of law identification, change, and adjudication up and running and settled is a large part of what qualifies a state, or a domestic legal system, as well-functioning.

As we have described, systems of public law lack these institutional supports. International law has no legislature; instead, legal rules emerge from a relatively messy, decentralized process that creates significant ambiguity and disagreement about what counts as an authoritative legal rule and even about what the criteria of recognition should be. Constitutional law in the United States and most other countries also lacks a legislature. Instead, constitutional systems substitute occasional, quasi-legislative conventions and amendment procedures. These procedures are not designed to update the law or resolve legal uncertainty on a continuous basis, in the manner of a legislature. To

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the contrary, they are designed to lock in occasional decisions, entrenching them against routine updating.<sup>88</sup> What is more, the vast majority of the decisions locked in by formal amendment procedures are made at a high level of abstraction in order to win broad public acceptance at the time of ratification and endure in the face of changing circumstances. Uncertainty and ongoing contestation over the content and application of constitutional law are inevitable byproducts of the entrenchment and endurance of constitutional rules.

The limitations of the legislative function in international and constitutional law shift much of the institutional burden of resolving legal uncertainty onto courts. But compared to their counterparts in ordinary domestic legal systems, courts in international and constitutional legal systems have both a greater burden of uncertainty to resolve (on account of the limited legislative function) and less capacity to resolve it. To most observers, this is obvious with respect to international law, where domestic courts predictably proliferate divergent and contradictory interpretations, there is no higher-order adjudicator to impose uniformity, and the hodgepodge of international courts have limited and fragmented jurisdiction and lack hierarchical organization.

The role of courts in constitutional law is more complicated. In the United States and other constitutional systems, a hierarchically supreme court claims unilateral authority to clarify constitutional meaning and resolve disputes. Yet in practice, the authority of these courts tends to be far more limited and fragile than the authority of courts over ordinary domestic law. When courts interpret nonconstitutional law, judicial decisions that are politically unacceptable to powerful groups can be sent to the legislature for revision and definitive resolution. The ultimate availability of legislative relief gives courts political insulation from their contentious nonconstitutional decisions. But when constitutional courts interpret constitutional law in ways that are politically unacceptable to powerful groups, formal or implicit constitutional amendment hurdles often leave little legal recourse other than convincing the court to change its mind. This is why the deepest political forces for constitutional change direct their energies toward, and sometimes against, constitutional courts. It is why competing claims about constitutional meaning are so often channeled into debates about interpretive methodologies that are the vehicles for judicial revision. And it is why there is so much contestation over the sources and proper interpretation of constitutional law. Without a democratic pedigree or electoral check, constitutional courts will often be power-

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<sup>88</sup> This is true in practice even in nations like Israel and Great Britain where the constitution can change through "ordinary" legislative processes. See sources cited *supra* note 55 and accompanying text.

less to put an end to this contestation; at best they will make themselves sites of ongoing dispute. Constitutional courts that formally stand outside politics are in practice embedded in, if not overridden by, political disputes about what should count as law.

Of course, not all of constitutional law is equally uncertain and contested. In order for ordinary domestic law to operate with any greater degree of certainty than constitutional law, the parts of constitutional law that structure the basics of domestic lawmaking must be more or less settled. Indeed, without constitutional agreement on the identity and composition of the relevant institutional actors and the basic processes of ordinary domestic lawmaking and adjudication, we would not have a recognizable domestic legal system, or a state. Imagine if there were serious disagreement in the United States on whether valid statutes could be passed by the House of Representatives alone, without participation by the Senate or the President; or whether the President could routinely rule by decree; or, more fundamentally, on what the criteria for selecting the President should be, with competing Presidents claiming authority based on different elections or divine right. Constitutional chaos about these “constitutive” features of the federal government would beget similar chaos in the domestic legal system — if, again, we would recognize a functioning government or legal system at all. The existence of consolidated states and their domestic legal systems thus presupposes settlement of some of the basic institutional and procedural features of government at the constitutional level.<sup>89</sup> It is in this sense that constitutional law is often described as “constitutive” of the state. But not all (or even most) of constitutional law is best understood as constitutive in this sense.<sup>90</sup> As we have attempted to show, the stabilizing constitutional consensus on what counts as a statute or who is the President in the U.S. legal system quickly gives way to fundamental and persistent constitutional disagreements over a wide range of issues. So long as there is some core agreement on the basic institutional structure of government and the ordinary domestic lawmaking processes, broad uncertainty and contestation over other aspects of constitutional law are not inconsistent with a stable and — if the U.S. system is any indication — relatively well-functioning domestic legal system.<sup>91</sup>

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<sup>89</sup> See Adler, *supra* note 65, at 767, 782.

<sup>90</sup> Cf. Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105 (2003) (distinguishing the minimal constitutional requirements for enacting a valid law from further constitutional limitations on permissible statutory lawmaking). For a much more capacious view of constitutive constitutional law, see Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408 (2007). On the distinction between “constitutive” and “regulatory” rules more generally, see sources cited *infra* note 158.

<sup>91</sup> See Adler, *supra* note 65, at 767–68, 782.

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Still, it is important to recognize that the coherence of ordinary domestic law depends on a core of domestic constitutional certainty and that this relationship of dependence amounts to a structural difference between constitutional and international law. The coherence of ordinary domestic law simply does not depend in the same way on international law's clarity or certainty.<sup>92</sup> That said, there is a comparable relationship between the certainty of some parts of international law and the status or coherence of the state as such. For reasons we elaborate in section III.A, the state might be understood as constituted by international law rules about recognition, territorial integrity, and the like as much as by core constitutional rules creating the basic institutional structure of government. And in fact there has long been broad agreement in international law on these rules, as well as on other basic rules of the system, such as what counts as a valid treaty. As with constitutional law, this core of relative certainty that constitutes a recognizable international legal order and the states that are its primary participants is surrounded by a broad periphery of contestation and uncertainty.

In sum, both constitutional and international law lack the full complement of institutional mechanisms that the state has established to resolve legal uncertainty by coordinating secondary rules of recognition, change, and adjudication. Despite this severe handicap, both systems have managed to achieve some degree of coordination and consensus, focused upon a core set of operative principles that define and order states and their domestic legal systems. Moreover, systems of constitutional law in the United States and, more recently, other countries, have succeeded to a remarkable — albeit, we emphasize again, limited — extent in reducing uncertainty throughout the system by consolidating interpretive authority in a centralized or hierarchical system of constitutional courts. International law has enjoyed similar success at developing more centralized lawmaking institutions, like the U.N. Security Council and the World Trade Organization, for certain issues. While there remains no single international tribunal with hierarchical authority and general jurisdiction, the European Court of Justice and the appellate body of the World Trade Organization might be seen as steps in that direction.

The extent of institutional development or irresolvable legal uncertainty in international law and in various constitutional law systems is difficult to measure and compare. That said, we might expect systems of constitutional law to have an easier time than the international sys-

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<sup>92</sup> One might think that international law is “constitutive” of ordinary domestic laws that make reference to international law concepts (for example, statutes that employ concepts of nationality or asylum), but this is a different, less direct, and contingent conception of “constitutive” compared to the way that the core of constitutive constitutional law constitutes domestic law.

tem in overcoming the coordination and collective action barriers to developing successful secondary-rule solutions to the problem of uncertainty. One inescapable difference between international and constitutional law is that the international system requires the coordination and cooperation of a larger number of persons and groups with more heterogeneous interests, values, and understandings.<sup>93</sup> (Of course, the same could be said of larger states as compared to smaller ones, noting the limiting case of a single world state.) All else being equal, greater size and heterogeneity raise the costs of developing and coordinating authoritative institutions or second-order norms with the capacity to reduce uncertainty. This observation lends some credence to the conventional belief that international law is distinctively anarchical and uncertain, and perhaps presents a reason for greater optimism about the uncertainty-reducing capacity of constitutional systems.

In any event, the present, if not inevitable, fact of the matter is that the secondary-rule-level institutional architecture of both international and constitutional law (in the United States and other countries) remains quite incomplete and ineffective compared to what well-ordered states take for granted in administering their systems of ordinary domestic law. As a result, both constitutional and international law continue to confront coordination problems in attempting to achieve legal certainty — problems that ordinary domestic law has long since solved.

Finally, while this Part has presented uncertainty as a “problem,” we should acknowledge that the negative normative gloss is dispensable or even reversible. Many scholars exalt the normative virtues of pluralistic, fragmented, and contested public law systems. Thus, international “pluralists” maintain that unified, hierarchical systems tend to favor powerful over weak interests; suppress legitimate differences among nations, peoples, and groups; and prevent changes in governmental structures that might better reflect contemporary preferences. The prevailing, nonhierarchical system of international law, they argue, allows for ongoing experimentation and contestation in ways that promote optimal change, empower weaker groups, enhance accountability, check powerful interests, and promote individual self-governance.<sup>94</sup> Along similar lines, some constitutional theorists em-

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<sup>93</sup> Cf. ALBERTO ALESINA & ENRICO SPOLAORE, *THE SIZE OF NATIONS* (2003) (arguing that heterogeneity of constituent preferences is the limiting factor on state size).

<sup>94</sup> For variations on these arguments, see Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007); Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 YALE J. INT'L L. 301 (2007); Burke-White, *supra* note 53; Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, 271 RECUEIL DES COURS 101, 351–55 (1998); Koskenniemi & Leino, *supra* note 51; Nico Krisch, *The Pluralism of Global Administrative Law*, 17 EUR. J. INT'L L. 247 (2006); and Nico Krisch, *The Case for Pluralism in Postnational Law* (Sept. 2008) (unpublished manuscript, on file with the Harvard Law School Library).

brace the diversity, inclusivity, and generativity of interpretive pluralism and popular constitutionalism, even at the expense of settlement and certainty.<sup>95</sup> We can remain agnostic on these normative matters. Our conclusion is simply that, for better or worse, a relatively high degree of uncertainty or pluralism inheres in all public law systems.

### III. THE PROBLEM OF ENFORCEMENT

The legal positivist tradition running from Hobbes to Austin defined law as the commands of a sovereign backed by sanctions. For Hobbes, “Law, properly is the word of him, that by right hath command over others”;<sup>96</sup> and not just by right, but by might: “Covenants, without the Sword, are but Words . . . .”<sup>97</sup> In the traditional positivist view, sovereign states are the only possible source of law, because sovereign states hold a monopoly on the legitimate use of coercive force. This understanding obviously bodes poorly for the status of international law, which lacks a super-state standing above ordinary states with the power to coerce them. Thus, seeing no sovereign to which states could be subject, Hobbes dismissed the possibility of any kind of international law beyond the thin natural laws that would prevail in the ungoverned international state of nature.<sup>98</sup> Austin likewise argued that “the law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author.”<sup>99</sup> At best, in Austin’s view, the law of nations could be understood as a form of “positive morality,” more akin to the “laws” of honor and fashion than to genuine legal systems.<sup>100</sup>

Hart and his successors have largely succeeded in vanquishing this sanction-based account of law<sup>101</sup> and, by doing so, rehabilitating the

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<sup>95</sup> See, e.g., SEIDMAN, *supra* note 78; Reva B. Siegel, Lecture, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323 (2006).

<sup>96</sup> HOBBS, *supra* note 13, at 109.

<sup>97</sup> *Id.* at 115.

<sup>98</sup> See *id.* at 116–17.

<sup>99</sup> 1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 121 (Robert Campbell ed., 1875).

<sup>100</sup> See AUSTIN, *supra* note 14, at 141–42.

<sup>101</sup> A good statement of the pre-Hartian conventional wisdom is:

Most lawyers hold in common a view of international law which runs somewhat as follows: There is a great difference between positive law — law with a policeman behind it — and so-called international law. International law is a body of vague rules for the attention of the political scientist and the amusement of the law student not much interested in law. It should not be confused with real law, which, as Mr. Justice Holmes pointed out, is “the articulate voice of some sovereign or quasi-sovereign that can be identified,” [S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting),] and “does not exist without some definite authority behind it,” [Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)]. Law is the command of a sovereign backed by force. And

possibility that international law could qualify as genuine law. Nonetheless, the absence of any centralized enforcement authority continues to be regarded as a crucial and distinctive deficiency at a functional level, if not a jurisprudential one. If law is not enforced, why should we expect anyone to comply with it? Law without enforcement and compliance may still be law, but perhaps it is not the kind anyone cares much about in the real world. Embracing this view, some political scientists and legal scholars express doubt that international law imposes serious constraints on state behavior, and therefore dismiss international law as functionally irrelevant. Others seek to rehabilitate the significance of international law by hypothesizing functions other than behavioral constraint that an international legal regime might serve. Even those who do believe that international law significantly constrains and influences the behavior of states recognize that the absence of an overarching executive with the power to coerce presents a special challenge that must be overcome. At the very least, then, the mechanisms and extent of enforcement and compliance in international law are seen as a distinctive set of puzzles or problems that do not arise in domestic legal systems backed by the power of sovereign states.

Here again, however, the domestic versus international distinction is not the right one. Domestic constitutional law, just as much as international law, lacks a coercive enforcement mechanism standing above the state to ensure that the government complies. As Hobbes and Austin both recognized, no system of public law, domestic or international, can be grounded in the sanctioning power of the sovereign state.<sup>102</sup> The puzzle of how a legal regime can coerce the compliance of states in a world where there is no entity more powerful than the state thus arises no less urgently in domestic constitutional law than it does in international law. Yet very little of international law's obsession with the problem of enforcement and compliance has spilled over into constitutional law. This Part emphasizes that the absence of a centralized enforcement authority creates structurally similar, and equally pressing, problems for international and constitutional law — problems that will inevitably arise when public law regimes are ap-

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however much it is hoped that nations will abide by acknowledged rules some day, they do not now; nor can they ever be compelled to do so, at least in the absence of world government. Only woolly thinking would confuse positive law enforced by our courts — our Constitution, our civil and criminal laws — with the moral directives which go by the name of international law.

Roger Fisher, *Bringing Law To Bear on Governments*, 74 HARV. L. REV. 1130, 1130–31 (1961) (footnotes omitted). Fisher argues against the conventional view described in this passage.

<sup>102</sup> This is why Austin believed that constitutional law, like international law, was not law but rather positive morality. See AUSTIN, *supra* note 14, at 141–42. Hobbes spoke generally of legal (or “justice”) constraints on the state, which he viewed as impossible. HOBBS, *supra* note 13, at 85.

plied against powerful state actors. It also describes the very similar set of solutions that have been developed independently by theorists of international relations and constitutional law.<sup>103</sup>

### A. *International Law*

Until relatively recently, international law scholarship in the United States was dominated by black-letter doctrinalism that sought to identify formal international law rules, and normative work that argued about how international law rules should be interpreted and that criticized nations' violations of those rules.<sup>104</sup> Antecedent questions of how it might be possible for such law to guide or constrain nations were mostly ignored.<sup>105</sup> There seemed to be an implicit assumption in the field that international law rules generated their own compliance — even while scholars were complaining about violations of these rules.

The long realist tradition in political science, by contrast, has focused more on compliance issues, and has been skeptical about international law's impact on national behaviors. The main source of this skepticism is international law's lack of a centralized enforcement mechanism. The absence of an executive power above or outside of states that can enforce international law against states led realists to doubt that international law had much of an effect on state behavior. Without "an executive authority with power to enforce the law," said Louis Henkin in summing up this view, "[t]here is no police system whose pervasive presence might deter violation."<sup>106</sup> Very rarely one may see limited forms of multilateral sanctions for international law violations, but they only occur in special and extreme circumstances when the national interests of the sanctioning countries happen to coincide. In general, though, international law's enforcement mechanisms "are not systematic or centrally directed, and . . . accordingly they are precarious in their operation."<sup>107</sup>

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<sup>103</sup> For a useful and overlapping survey of the similar approaches taken by political scientists to questions of international and constitutional legal compliance, see Whytock, *supra* note 22, at 167–69.

<sup>104</sup> See Jack Goldsmith, *Sovereignty, International Relations Theory, and International Law*, 52 *STAN. L. REV.* 959, 982–83 (2000) (reviewing STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (1999)); W. Michael Reisman, *International Incidents: Introduction to a New Genre in the Study of International Law*, in *INTERNATIONAL INCIDENTS* 3, 6–7 (W. Michael Reisman & Andrew R. Willard eds., 1988).

<sup>105</sup> The exceptions tended to be scholars who came from other fields within law. See ABRAM CHAYES, *THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW* (Univ. Press of Am. 1987) (1974); HENKIN, *supra* note 32; Fisher, *supra* note 101.

<sup>106</sup> HENKIN, *supra* note 32, at 24.

<sup>107</sup> J.L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 101 (6th ed. 1963) (1928); see also ABRAM CHAYES & ANTONIA HANDLER

Realists pointed out that in the absence of a centralized police agency, international law would be enforced, if at all, through self-help. And self-help meant that powerful nations would dominate the international legal system. As Hans Morgenthau explained:

There can be no more primitive and no weaker system of law enforcement than [international law]; for it delivers the enforcement of the law to the vicissitudes of the distribution of power between the violator of the law and the victim of the violation.<sup>108</sup>

Powerful nations, Morgenthau emphasized, “can violate the rights of a small nation without having to fear effective sanctions on the latter’s part” and can “proceed against the small nation with measures of enforcement under the pretext of a violation of its rights, regardless of whether the alleged infraction of international law has actually occurred or whether its seriousness justifies the severity of the measures taken.”<sup>109</sup>

This logic led realists to think that international law would inevitably reflect the distribution of power among nations. Powerful states or coalitions would use political, military, or economic pressure to force weaker states to embrace legal rules that serve the interests of the powerful. There are certainly many examples of this kind of power politics in international law: anti-proliferation regimes that allow nuclear nations to maintain nuclear weapons but ban non-nuclear nations from seeking them; intellectual property agreements that significantly advantage first-world rights holders; the customary international law rule prohibiting expropriation of alien property; and the U.N. Charter, which gives powerful nations a veto in the Security Council. Moreover, when international law for whatever reason fails to reflect the interests of powerful nations, they often violate it with impunity. Morgenthau argued that the U.N. Charter would be ignored by militarily powerful nations. Today he would likely say that NATO’s bombing of Kosovo and the 2003 invasion of Iraq, not to mention hundreds of other violations of the Charter,<sup>110</sup> bear out his view.

To the extent international law does not reflect power politics, realists believe that much of its apparent influence can be explained — or explained away — as nations doing what they would have done any-

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CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 32–33 (1995).

<sup>108</sup> MORGENTHAU, *supra* note 32, at 270–71.

<sup>109</sup> *Id.* at 271. Morgenthau qualified this point by noting that much of international law is self-enforcing, *see id.*, but the sentiment expressed here influenced generations of realist scholars and other international law skeptics who doubted whether international law had a more than non-trivial effect on state behavior.

<sup>110</sup> *See* MICHAEL J. GLENNON, *LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO* 19–30, 112–20 (2001).

how, in the absence of law. If legal rules track national self-interest, then apparent compliance with rules may have nothing to do with law. Behavioral patterns among nations that may seem regularized and law-like may merely reflect a "coincidence of interest."<sup>111</sup> Thus, the reason the vast majority of nations do not commit genocide, a realist would say, is not because international law prohibits genocide, but rather because these nations have no interest in committing genocide or because they would privately lose more than they would gain from doing so. Many nations that ratified the Nuclear Non-Proliferation Treaty or the Mine Ban Treaty have neither an interest in these weapons nor the resources to develop them. In these and other contexts, realists think that much of what seems like compliance with international law is in fact just coincidence of interest. Or, more modestly, they believe that most treaties, especially multilateral treaties, reflect very shallow cooperation that does not require nations to depart much from what they would otherwise do.<sup>112</sup>

In sum, the absence of a Hobbesian enforcement mechanism leads realists to doubt whether international law has ever made much of a difference to international politics. If much of what passes for international law compliance is nothing more than states acting in their immediate self-interest, or the coincidence of international law tracking these interests because powerful states influence its content or because international law reflects the common private interests of all (or most) nations, then there is no puzzle of compliance to be solved.

Over the past quarter century, international relations scholars known generally as institutionalists have employed the tools of game theory to show how, contra the realists, international law and institutions can shape a nation's behavior even without any higher-level enforcement authority.<sup>113</sup> Institutionalists conceptualize much of international relations as a prisoners' dilemma game, in which two or more states know that restraining the pursuit of short-term or private interests will make them better off in the medium or long term, but each worries that if it cooperates in the short term the other will cheat. Nations can overcome this dilemma and achieve mutually beneficial outcomes if (among other things) they know what counts as cooperation.

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<sup>111</sup> JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 27–28 (2005); see LISA L. MARTIN, *COERCIVE COOPERATION: EXPLAINING MULTILATERAL ECONOMIC SANCTIONS* 33–36 (1992).

<sup>112</sup> See, e.g., George W. Downs et al., *Is the Good News About Compliance Good News About Cooperation?*, 50 *INT'L ORG.* 379 (1996); see also *COOPERATION UNDER ANARCHY* (Kenneth A. Oye ed., 1986).

<sup>113</sup> See, e.g., ROBERT O. KEOHANE, *AFTER HEGEMONY* (1984); Robert O. Keohane & Lisa L. Martin, *The Promise of Institutional Theory*, 20 *INT'L SECURITY* 39, 41–42 (1995); Duncan Snidal, *The Game Theory of International Politics*, in *COOPERATION UNDER ANARCHY*, *supra* note 112, at 25.

The role of treaties and customary international law, institutionalists posit, is to establish the terms of cooperation and the organizations and other regimes that promote self-enforcing international relations by monitoring compliance (including monitoring by international judges), promoting iteration, linking issues, and providing other sorts of useful information. And compliance with these international laws and the organizations established by them looks law-like, because even in the absence of a centralized enforcer, nations forego their short-term interests to follow the rule embodied in the treaty or custom. Many international laws — concerning diplomatic immunity, extradition, the World Trade Organization, investment and arms control treaties, the law of the sea, the laws of war, and other subjects — can be understood as solutions to some version of a prisoners' dilemma.<sup>114</sup>

Institutionalists recognize that the prisoners' dilemma is not the only strategic logic that nations face. International affairs sometimes seem to follow the logic of coordination games, in which two or more nations benefit from engaging in the same or symmetrical action and have no incentive to depart from that action once it is agreed upon, but cannot initially agree on which of many possible common actions should be chosen, often because the choice has distributional consequences.<sup>115</sup> Treaties and customary international law can help select and embed the focal point for coordination and can also establish institutions for modifying or updating that focal point as times change. Treaties ranging from boundary settlements to communication protocols may reflect the logic of coordination. Combining the two strategic logics, treaties can also solve the coordination problem that arises in choosing which cooperative outcome will count as a solution to a prisoners' dilemma.<sup>116</sup>

Moving beyond realism, institutionalism shows how nations with oft-conflicting interests can use international law to achieve mutually beneficial outcomes, and how international law can have bite in influencing these outcomes even in the absence of coercive enforcement from above. Unlike realism, institutionalism can account for why na-

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<sup>114</sup> For elaboration of the claims in this paragraph, see the sources cited *supra* note 113, as well as GOLDSMITH & POSNER, *supra* note 111; ANDREW GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* (2008); ROBERT E. SCOTT & PAUL B. STEPHAN, *THE LIMITS OF LEVIATHAN: CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW* (2006); and JOEL P. TRACHTMAN, *THE ECONOMIC STRUCTURE OF INTERNATIONAL LAW* (2008).

<sup>115</sup> See, e.g., Stephen D. Krasner, *Global Communications and National Power: Life on the Pareto Frontier*, 43 *WORLD POL.* 336 (1991); James D. Morrow, *Modeling the Forms of International Cooperation: Distribution Versus Information*, 48 *INT'L ORG.* 387 (1994); Duncan Snidal, *Coordination Versus Prisoners' Dilemma: Implications for International Cooperation and Regimes*, 79 *AM. POL. SCI. REV.* 923 (1985).

<sup>116</sup> See GOLDSMITH & POSNER, *supra* note 111, at 33–34.

tions would bother to expend resources to negotiate and enter into treaties and follow and debate customary rules. But realism and institutionalism are broadly similar in their methodological premises. Both understand international relations as a function of instrumental national behavior. Both see compliance with international law — whether based on coincidence of interest, coercion, cooperation, coordination, or some other strategic logic — as resulting from nations of different strengths pursuing their interests on the international stage.<sup>117</sup> And both hold that nations create and comply with international law when, and only when, the perceived benefits of doing so outweigh the costs.

These premises divide rationalist approaches to international relations from another influential tradition, one that seeks to explain international law compliance and related issues in noninstrumental terms. The most important strand of this tradition, constructivism, focuses on factors that rationalist models downplay or ignore, most notably the “construction” of the international system itself and the actors who populate it.<sup>118</sup> Reduced to its simplest form, constructivism seeks to endogenize national interests. It argues that nations’ interests are shaped by international structures and thus that realism and institutionalism get it backward in seeking to explain international behavior, including international law, as a function of exogenous national interests. At the most fundamental level, constructivists argue, international legal and other norms constitute the state’s identity. In an important sense a state does not become a state unless and until it is “recognized” under international law by other states. Recognition is what permits states to perform important functions of statehood, including treaty-making, receiving ambassadors, conferring and receiving international immunities, participating in international organizations, excluding foreign authority, and the like. Recognition and the rules that shape it cannot, however, be understood in instrumental terms; they are, in Alexander Wendt’s phrase, simply “intersubjective understandings or norms.”<sup>119</sup> Similarly, territorial sovereignty is derivative

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<sup>117</sup> The realist and institutionalist frameworks can be combined because the distribution of power can and usually does influence the form and content of the cooperation or coordination that international law fosters. See Goldsmith, *supra* note 104, at 963–64.

<sup>118</sup> See generally JOHN GERARD RUGGIE, *CONSTRUCTING THE WORLD POLITY* (1998); ALEXANDER WENDT, *SOCIAL THEORY OF INTERNATIONAL POLITICS* (1999).

<sup>119</sup> Alexander Wendt, *Anarchy Is What States Make of It: The Social Construction of Power Politics*, 46 *INT’L ORG.* 391, 412 (1992); see also John W. Meyer et al., *World Society and the Nation-State*, 103 *AM. J. SOC.* 144 (1997); John Gerard Ruggie, *Continuity and Transformation in the World Polity: Toward a Neorealist Synthesis*, 35 *WORLD POL.* 261, 275–79 (1983) (book review).

of the international system because there is no concept of territorialism without a concept of the other.<sup>120</sup>

International lawyers invoke similar ideas. Henkin criticized rational choice accounts of international law for ignoring the “‘givens’ of international relations,”<sup>121</sup> such as nations and nationhood, territoriality, recognition, the establishment of diplomatic relations, and other characteristics associated with national sovereignty.<sup>122</sup> The international behaviors captured by rational choice explanations, he argued, presuppose a robust international legal system so familiar that it seems invisible.<sup>123</sup> This system, Henkin maintained, “shape[s] the policies of nations and limit[s] national behavior” by establishing the international rules of the game.<sup>124</sup> The upshot of Henkin’s analysis is that the constitutive principles of the international legal system have a significant influence on national behaviors that precede, and cannot be explained by, the instrumental rationality of states.

Constructivists further emphasize that the identities and interests of states can change over time as a result of engagement with international law itself. The process of negotiation, mutual education, and principled argument related to the creation of and compliance with international law has a feedback effect on how national actors see themselves and their interests. Constructivists see international law and its associated institutions as creating and dispersing beliefs and standards of appropriate behavior that have a powerful socializing effect on international relations.<sup>125</sup>

It is a short step from these ideas to the congeries of noninstrumental compliance theories that have grown up in international law scholarship in the last few decades in response to the influence of political science and other disciplines. Noninstrumental compliance theories contend that nations follow international law because it is the right or moral or legitimate thing to do. Thomas Franck, for example, maintains that international law emerges from a “right” process and, if seen as legitimate, “exerts a pull toward compliance.”<sup>126</sup> Whether a rule is seen as possessing legitimacy depends on four elements: the textual determinacy of the international law rule, its symbolic validation through ritualized practice, its coherence in the sense of consistent application,

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<sup>120</sup> See A.D. Smith, *States and Homelands: The Social and Geopolitical Implications of National Territory*, 10 MILLENNIUM: J. INT’L STUD. 187 (1981).

<sup>121</sup> HENKIN, *supra* note 32, at 15.

<sup>122</sup> See *id.* at 15–17.

<sup>123</sup> See *id.* at 22.

<sup>124</sup> *Id.*

<sup>125</sup> See MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY (1996); RUGGIE, *supra* note 118; WENDT, *supra* note 118.

<sup>126</sup> THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 24 (1990) (emphasis omitted).

and “adherence,” by which he means the quality of being validated by an infrastructure of rules about rules.<sup>127</sup> When an international law possesses these four elements, it is and appears to be “legitimate” and for this reason induces compliance. Harold Koh, by contrast, explains compliance in terms of “internalization.”<sup>128</sup> He says that a nation may follow international law because it has “*internalized* the norm and has incorporated it into its own internal value system.”<sup>129</sup> Internalization is the process of international law coming into domestic legal structures, interacting with domestic law and processes, and being interpreted by domestic actors who then learn to comply with the law because it is part of domestic law.<sup>130</sup>

In short, international relations theorists, and more recently, international lawyers, have devoted considerable attention to the puzzle of why states comply with international law in the absence of any external enforcement authority. Solutions to this puzzle have taken two general forms. Rationalists (including realists and institutionalists) see compliance as turning on the alignment between international law rules and institutions and the short- or long-term self-interest of states. Constructivists (and aligned legal theorists) see compliance as a product of the normative force of international law and its ability to shape the interests and values of states, as well as their very identities, in its image.

### B. *Constitutional Law*

Constitutional theorists, though long obsessed with the normative legitimacy of imposing constitutional constraints on democratic decisionmaking,<sup>131</sup> have all but ignored the analytically prior question of whether and how it is possible for such constraints to be imposed. More so even than their international counterparts, constitutional lawyers have been content to assume that simply writing down a rule of constitutional law — in the text of the U.S. Constitution or an opinion by the U.S. Supreme Court — will somehow automatically constrain the behavior of the government officials subject to that rule. Seldom do they pause to ask why Congress, the President, or the political majorities who elect them would have any incentive to comply.

When such questions are raised, moreover, the answers tend to begin and end with judicial review. Indeed, only when confronted with

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<sup>127</sup> See *id.* at 52, 91, 152, 184.

<sup>128</sup> Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) (book review).

<sup>129</sup> *Id.* at 2600 n.3.

<sup>130</sup> See *id.* at 2659; cf. HENKIN, *supra* note 32, at 60–61 (explaining international compliance with international law on the basis of the “habit and inertia of continued observance”).

<sup>131</sup> We discuss this issue in Part IV, below.

the prospect of eliminating judicial review do constitutional lawyers and theorists begin to harbor serious doubts about compliance.<sup>132</sup> If left to their own devices, constitutional lawyers suppose, the political branches of government might indeed be disinclined to take constitutional prohibitions seriously. This is another reason, in addition to the settlement function, why judicial review is commonly regarded as the most crucial feature of the constitutional order. Courts are cast as powerful enforcement agents, prevailing upon the political branches of government to comply with their commands.

But of course courts cannot play any such role. Courts are merely subdivisions of government, lacking the powers of purse and sword that might be used to coerce the compliance of other government officials and their constituents. One might well wonder, “Why . . . would the government accept the limits imposed by a truly independent court? Why would people with money and guns ever submit to people armed only with gavels?”<sup>133</sup> With or without judicial review, constitutional law shares with international law the challenge of coercing the compliance of powerful political actors — or the inability to do so.

This challenge weighed more heavily on the original designers of the U.S. Constitution than it has on modern constitutional lawyers. James Madison clearly recognized that in the absence of any super-government to police and prevent transgressions, constitutional law could create nothing more than “parchment barriers.”<sup>134</sup> Along with other Federalist Framers, he was correspondingly skeptical of the value of constitutional rights conceived as protections of individuals or minorities against dominant political majorities. Justifying to Thomas Jefferson his opposition to including a bill of rights in the Constitution, Madison noted that “experience proves the inefficacy of a bill of rights on those occasions when its controul is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State.”<sup>135</sup> The problem, Madison explained, was that “[i]n our Governments the real power lies in the majority of the Community.”<sup>136</sup> In the absence of any stronger force capable of stand-

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<sup>132</sup> See, e.g., MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 95–128 (1999) (exploring how the constitution might be “self-enforcing” in the absence of judicial enforcement).

<sup>133</sup> Matthew C. Stephenson, “*When the Devil Turns . . .*”: *The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59, 60 (2003); accord WHITTINGTON, *supra* note 70, at 26 (arguing that “[t]he Court cannot stand outside of politics and exercise a unique role as guardian of constitutional verities” because “the Court’s judgments will have no force unless other powerful political actors accept the . . . priority of the judicial voice”).

<sup>134</sup> THE FEDERALIST NO. 48, at 305 (James Madison) (Clinton Rossiter ed., 1999).

<sup>135</sup> Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in JACK N. RAKOVE, *DECLARING RIGHTS: A BRIEF HISTORY WITH DOCUMENTS* 160, 161 (1998).

<sup>136</sup> *Id.*

ing up to the power of majorities, we should expect that rights “however strongly marked on paper will never be regarded when opposed to the decided sense of the public.”<sup>137</sup>

At the same time, however, Madison saw the possibility of converting parchment limitations into meaningful constraints on government behavior. If constitutional law could not be enforced by an external power greater than the federal government, Madison hoped that it could be made politically self-enforcing by aligning the political interests of officials and constituents with constitutional rights and rules. Enforcement on this model would be decentralized and internal to the political system, not externally imposed. Thus, Madison famously theorized that the constitutional separation of powers between the legislative and executive branches could be made self-enforcing by leveraging the “personal motives” of “those who administer each department” to preserve and expand their own power: “Ambition must be made to counteract ambition.”<sup>138</sup> Likewise, Madison argued that state governments would be motivated and empowered through various channels of political influence to protect their turf against federal encroachment, preserving the federal power-sharing arrangement built into the constitutional design.<sup>139</sup>

Not all of the structural and political mechanisms Madison envisioned have worked in the ways he anticipated or hoped.<sup>140</sup> Nonetheless, his basic insight that constitutional law must be somehow self-enforcing if it is to constrain government behavior points to international law as a better analogy for constitutional enforcement and com-

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<sup>137</sup> *Id.* at 163. Madison thus believed that the best hope for protecting rights would be structural features of the political system, like the extended republic and large federal election districts, which would make it more difficult for potentially tyrannical majority factions to capture the federal government. Other Federalists shared Madison’s view. See MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 96–100 (2006). Graber quotes Roger Sherman: “No bill of rights ever yet bound the supreme power longer than the honey moon of a new married couple, unless the rulers were interested in preserving the rights.” *Id.* at 98 (emphases omitted) (internal quotation marks omitted).

<sup>138</sup> THE FEDERALIST NO. 51 (James Madison), *supra* note 134, at 319; cf. JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* 260–379 (1980) (arguing that the Supreme Court should not adjudicate constitutional conflicts between the executive and legislative branches because under the Constitution, each of these is fully capable of asserting its own interests).

<sup>139</sup> See THE FEDERALIST NO. 45 (James Madison), *supra* note 134, at 285; accord CHOPER, *supra* note 138, at 171–94; Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 364–65; Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

<sup>140</sup> See Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915 (2005); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312 (2006).

pliance than ordinary domestic law. Indeed, to the extent that subsequent constitutional theorists have thought about how constitutional law works to influence and constrain government, they have unwittingly followed in the footsteps of international law and international relations theorists. The mechanisms through which constitutional law might constrain — or fail to constrain — government behavior are, not surprisingly, very similar to the mechanisms through which international law might or might not constrain the behavior of states.

Thus, one view of U.S. constitutional law tracks the skepticism of international realists that law can stand in the way of political self-interest. Political scientists and constitutional historians have long observed that judicial interpretations of constitutional law generally track the preferences of politically powerful domestic constituencies, particularly national-level majorities. Most of the Court's major interventions have been to impose an emerging or consolidated national consensus on local outliers.<sup>141</sup> There is no great puzzle of compliance when state or regional minorities are subject to the will of national majorities, who enjoy political, financial, and military supremacy. The analogy is to powerful states in the international arena coercing weaker ones. Indeed, a remarkable fact of constitutional history is how seldom the Court has attempted to stand against the unified policy preferences of a dominant national majority. The exception that may prove the rule in U.S. constitutional history is the Court's opposition to the New Deal — which provoked a political backlash that nearly destroyed the Court.<sup>142</sup> If, as a number of studies have suggested, "the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States,"<sup>143</sup> then there may not be much constitutional compliance in need of explanation.

The convergence of constitutional law with the interests of the politically powerful should hardly be surprising. Constitutional law is pervasively shaped by the same political forces that it purports to regulate. This is obviously true when political actors outside the Court interpret constitutional rules that govern their own conduct — often, if not invariably, in ways that permit them to do whatever best serves their immediate political interests.<sup>144</sup> But it is also true of judicially

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<sup>141</sup> Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 6 (1996).

<sup>142</sup> See Barry Friedman, *The Will of the People: Judicial Power and Constitutional Meaning* 1–6 (Nov. 17, 2008) (unpublished manuscript, on file with the Harvard Law School Library).

<sup>143</sup> Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court As a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957).

<sup>144</sup> See Alexander & Schauer, *supra* note 69, at 1368 ("Occasional rhetoric notwithstanding, there are few examples of Congress subjugating its own policy views to its views about constitu-

interpreted and “enforced” constitutional rules. One does not have to believe the most extreme claims of attitudinalist political scientists or legal realists to recognize that the constitutional opinions of Supreme Court Justices are affected by their political proclivities, especially in the kinds of politically salient and controversial cases where compliance might be a serious issue. The politics of Justices and judges will roughly track the politics of the Presidents who appointed them, which in turn will roughly track the politics of political majorities. Even if there were no alignment between the political preferences of the Justices and political majorities, however, the Court would still be constrained by dominant political opinions. As the New Deal example reminds us, the Court lacks the power to push constitutional law very far from the center of political gravity. Throughout American history, unpopular judicial decisions that lack the backing of powerful political constituencies have been, if not outright resisted, ignored or evaded.<sup>145</sup> The Justices have every incentive not to advertise the fragility of the Court’s authority by issuing opinions that will be overridden by the political branches, so instead they limit themselves to a relatively narrow range of politically permissible outcomes. This means treading lightly in areas where elected officials have intense political preferences, like economic regulation and foreign affairs; steering clear of the most publicly salient political issues; and seldom venturing beyond vetoing particular laws or executive actions by issuing more “affirmative” policy directives.<sup>146</sup>

In sum, many constitutional rules, as interpreted by courts or elected officials, serve to lock doors that powerful political actors do not much care about opening. In constitutional law and international law alike, we may observe little overt noncompliance, but a large part of the explanation in both areas is probably the predictable concurrence between the legal rules and the political interests of the officials and public who are supposedly “bound” by them.

That said, there do seem to be cases in which powerful political coalitions act in accord with constitutional rules that cut against their

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tional constraints.”); Richard Fallon, *Constitutional Constraints* (2008) (unpublished manuscript, on file with the Harvard Law School Library). Some commentators nonetheless remain hopeful that Congress could play a more judicious role in constitutional interpretation. See, e.g., Paul Brest, *The Conscientious Legislator’s Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975); Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277 (2001).

<sup>145</sup> Famous examples include Southern resistance to *Brown v. Board of Education*, 347 U.S. 483 (1954), and right-wing resistance to *Roe v. Wade*, 410 U.S. 113 (1973). See generally Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431 (2005).

<sup>146</sup> See Mark A. Graber, *Looking Off the Ball: Constitutional Law and American Politics*, in OXFORD HANDBOOK ON PUBLIC LAW (forthcoming); Frederick Schauer, *The Supreme Court, 2005 Term—Foreword: The Court’s Agenda—and the Nation’s*, 120 HARV. L. REV. 4 (2006).

immediate self-interest. Populous states tolerate equal representation of small states in the Senate, and popular Presidents leave office at the end of their second terms. National majorities grudgingly accept the occasional countermajoritarian judicial decision prohibiting school prayer or requiring procedural protections for criminal defendants.<sup>147</sup> Genuine puzzles as to why powerful political actors are willing to abide by inconvenient constitutional limitations may arise less often than constitutional lawyers imagine, but they cannot always be dismissed as merely apparent. Constitutional compliance, like international law compliance, must be explained.

Although constitutional theorists have made much less progress in developing such explanations than have their international law counterparts, their halting efforts have followed a very similar trajectory.<sup>148</sup> One set of explanations for constitutional compliance put forward by political scientists basically tracks the game-theoretical logic of international institutionalism. Like powerful states at the international level, powerful political actors at the domestic level may be willing to sacrifice their short-term interests in exchange for the broader or longer-term benefits of cooperating through constitutional rules. Thus, compliance with some constitutional rules might be understood as representing a cooperative equilibrium in an iterated prisoners' dilemma game. Democrats in control of the national government may refrain from suppressing Republican political speech on the tacit understanding that Republicans will similarly respect free speech when they are in control; states may refrain from protectionism (or submit to congressional or judicial policing of trade regulation) in order to avoid the noncooperative equilibrium of trade warfare; prevailing majorities may protect property rights in the hope of economic prosperity if subsequent majorities reciprocate. Enforcement of the constitution more generally might be understood as an equilibrium resulting from the tacit agreement of two or more social groups to rebel against a government that transgresses the rights of either group.<sup>149</sup>

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<sup>147</sup> Nonetheless, prayer in public school continues unabated in some parts of the country, *see* Peter Applebome, *Prayer in Public Schools? It's Nothing New for Many*, N.Y. TIMES, Nov. 22, 1994, at A1, and many of the practical effects of criminal procedure protections have been evaded or undermined in various ways by police and prosecutors, *see generally* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997).

<sup>148</sup> Christopher Whytock has drawn insightful parallels between compliance theories in international law and compliance theories in political science accounts of domestic public law. *See* Whytock, *supra* note 22.

<sup>149</sup> Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245 (1997); Barry R. Weingast, *Self-Enforcing Constitutions: With an Application to Democratic Stability in America's First Century* (Nov. 2005) (unpublished manuscript), available at <http://polisci.stanford.edu/faculty/documents/weingast-self-enforcing%20constitutions.pdf>.

Continuing along institutionalist lines, complementary accounts of constitutional compliance emphasize the benefits of coordination. Compliance with constitutional law might follow from the self-interested calculation of most political actors that even less-than-ideal constitutional rules and institutions are often better than none at all. If the benefits of working within a relatively uncontested constitutional framework outweigh the disadvantageous constraints and inequalities produced by such a framework, and the costs of dissolution or renegotiation are high, mutual compliance may be sustainable. Political actors and their constituents might not find it in their interests to violate particular constitutional rules if the result will be a breakdown of the larger constitutional game.<sup>150</sup> In particular, we might understand the authority of the text of the U.S. Constitution as resting on its distinctive utility as a focal point for political coordination. The document possesses historical and sociological salience, and it conveniently combines specificity on low-stakes issues (where agreement is more important than any particular outcome) and generality on high-stakes issues (where the value of agreement may not be sufficient to settle outcomes).<sup>151</sup> We might also understand the settlement of non-textual constitutional issues as instances of successful coordination. For example, ambiguous separation of powers questions, like the President's authority to wage war without a congressional declaration, can be resolved by focal regularities of practice that are not worth the political costs of controversy to unsettle.<sup>152</sup>

Institutionalist logic can also explain the utility of judicial review. By identifying defections from constitutional norms or by generating salient constitutional interpretations that become focal points for coordination, courts can facilitate cooperation or coordination around an agreed-upon set of norms.<sup>153</sup> In this view, the Court plays an important role in enforcing constitutional law not because it can exercise coercive power over political actors but because judicial interpretations of constitutional law assist these actors in furthering their own interests.

Courts may advance the interests of powerful political actors in other ways, as well. Governing parties or coalitions may cede power to, and foster political support for, an independent judiciary in order to

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<sup>150</sup> See RUSSELL HARDIN, *LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY* 82–140 (1999).

<sup>151</sup> See David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 *YALE L.J.* 1717, 1733–37 (2003).

<sup>152</sup> See generally Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 *U. PA. L. REV.* 991 (2008).

<sup>153</sup> See David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 *GEO. L.J.* 723 (2009); Stephenson, *supra* note 133, at 61.

entrench policy against subsequent control of government by political rivals,<sup>154</sup> or to hedge the risk of all-or-nothing reversals of political fortune.<sup>155</sup> A relatively autonomous judiciary may also assist dominant political coalitions in implementing their policy agendas and maintaining popular support by deciding contentious issues that political leaders would prefer to avoid and by pushing ahead on policy fronts that have been blocked in the political branches.<sup>156</sup> If maintaining an independent judiciary is useful to powerful political actors for any or all of these reasons, they may be willing to tolerate and even support constitutional decisions that cut against their immediate interests.

All of these broadly rationalist explanations stem from the intuitive insight that legal regimes may be capable of *constraining* powerful political actors because (and only to the extent that) they are to an even greater degree *enabling* for these actors.<sup>157</sup> This is true at the level of states in international law and at the level of government officials, institutions, constituencies, and factions in domestic constitutional law. From this perspective, the interests of the relevant political actors are treated as fixed, and compliance with public law is explained as nothing more than a complex strategy for furthering these interests.

Other perspectives on constitutional compliance dispense with these rationalist assumptions. Consistent with the insights of constructivism in international relations theory, constitutional theorists have long recognized the possibility that the interests of political actors may be endogenous to constitutional law. Indeed, at some level, this seems inarguable. Just as international law in an important sense creates states, constitutional theorists emphasize that a central function of constitutional law is to create, or constitute, a state's domestic political identity. Whatever else a constitution accomplishes, it must establish the basic set of political institutions that comprise a recognizable state. In doing so, the constitution will necessarily construct the interests and identities of political actors. Before constitutional law can constrain the political interests of the President or Congress, there must *be* a President and a Congress. From this perspective, it is nonsensical to

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<sup>154</sup> See RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 50–99 (2004); Howard Gillman, *How Parties Can Use the Courts To Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 AM. POL. SCI. REV. 511, 511 (2002).

<sup>155</sup> See TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (2003); see also Mark J. Ramseyer, *The Puzzling (In)Dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721 (1994).

<sup>156</sup> See WHITTINGTON, *supra* note 70, at 287–88; Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35 (1993); Keith E. Whittington, "Interpose Your Friendly Hand": *Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583, 584–86 (2005).

<sup>157</sup> See STEPHEN HOLMES, PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY (1995).

talk about legal compliance in terms of legal constraints on pre-legal interests. There is no sense in assessing the effect of constitutional law by contrast to what the President would do “in the absence of constitutional law,” since neither the President nor his capability to do anything would exist at all without constitutional law. On this constitutive level, at least, the constitution’s role in creating a system of government ensures that it will have already shaped the interests and behavior of political actors before any question of constitutional constraints on these actors arises.<sup>158</sup>

The constructivist insight may be extended to the more routine operation of constitutional law, beyond the constitutive stage. No less than international law, constitutional law may affect the behavior of officials and citizens by changing, not just constraining or creating, their interests and values. While constitutional lawyers and theorists have paid much less attention than their international counterparts to the sociological or social-psychological processes through which legal norms can affect the motivations and interests of political actors, many seem to share the belief that constitutional law exerts a strong “compliance pull” over political officials and citizens. To some extent this may be because constitutional law, or parts of it, corresponds to pre-legal moral and political values to which citizens and officials are deeply committed. But it may also be the case that constitutional law inculcates and reinforces a set of moral and political values, building its own compliance constituency.

For example, the idea that constitutional law might “educate” officials and citizens in political virtue has a distinguished pedigree in constitutional thought. Even while doubting the capacity of parchment constitutional barriers to stand in the way of political interests, Madison acknowledged the possibility, pressed by many Anti-Federalists, that an unenforced Constitution might shape these interests by inculcating values in the citizenry.<sup>159</sup> Subsequent constitutional theorists have embraced this “educational” understanding of the Constitution, and especially of judicially created constitutional law, presenting the Supreme Court as “an educational body, and the Justices

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<sup>158</sup> See Fallon, *supra* note 74. On the existence of a meaningful philosophical distinction between “constitutive” and “regulatory” rules, compare JOHN R. SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* 39–42 (1969), who distinguishes these two types of rules, with JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 108–11 (1990), who denies a coherent distinction.

<sup>159</sup> Letter from James Madison to Thomas Jefferson, *supra* note 135, at 162 (“The political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion.”).

[as] teachers in a vital national seminar.”<sup>160</sup> Constitutional scholars have argued, for instance, that the Supreme Court’s decision in *Brown v. Board of Education*<sup>161</sup> helped teach the country that racial segregation is wrong; what was once a deeply controversial decision became accepted and entrenched as political preferences were shaped in its image.<sup>162</sup>

Also prevalent in constitutional theory is the idea that the “legitimacy” of constitutional law, or of the Supreme Court as an institution, might play a causal role in fostering compliance.<sup>163</sup> Sometimes the claim takes a Weberian cast: it is the *legal* legitimacy, or legality, of the Constitution, or judicial decisions interpreting the Constitution, that attracts the support of officials and citizens. The Court itself has expressed this view in a number of cases, arguing that public support for the institution of judicial review rests on the public’s belief that the Justices are following the law rather than their own moral or political preferences.<sup>164</sup> A similar claim, more along the lines of Franck’s “right process” account of international law,<sup>165</sup> is that certain formal or procedural features of constitutional law contribute to perceptions of legitimacy. In international and constitutional law alike, the social psychology literature lends some support to the view, long intuited by judges and lawyers, that the perceived procedural fairness of judicial decisionmaking plays an important role in establishing legitimacy and

<sup>160</sup> Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952); see also Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961 (1992). But see Klarman, *supra* note 81, at 175–79 (arguing that “the historical accuracy . . . of the Court’s educational function is dubious,” *id.* at 177).

<sup>161</sup> 347 U.S. 483 (1954).

<sup>162</sup> See, e.g., David J. Garrow, *Hopelessly Hollow History: Revisionist Devaluing of Brown v. Board of Education*, 80 VA. L. REV. 151 (1994); Mark Tushnet, *The Significance of Brown v. Board of Education*, 80 VA. L. REV. 173 (1994).

<sup>163</sup> See Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005) (sorting out the various types of legitimacy and their roles in constitutional law).

<sup>164</sup> See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). As Justice Scalia’s dissenting opinion explained:

As long as this Court thought (and the people thought) that we Justices were doing essentially lawyers’ work up here — reading text and discerning our society’s traditional understanding of that text — the public pretty much left us alone. Texts and traditions are facts to study, not convictions to demonstrate about. But if in reality our process of constitutional adjudication consists primarily of making *value judgments*; . . . if, as I say, our pronouncement of constitutional law rests primarily on value judgments, then a free and intelligent people’s attitude towards us can be expected to be (*ought* to be) quite different. The people know that their value judgments are quite as good as those taught in any law school — maybe better. If, indeed, the “liberties” protected by the Constitution are, as the Court says, undefined and unbounded, then the people *should* demonstrate, to protest that we do not implement *their* values instead of *ours*.

*Id.* at 1000–01 (Scalia, J., dissenting).

<sup>165</sup> FRANCK, *supra* note 126.

motivating compliance.<sup>166</sup> Constitutional rules or judicial decisions that appear to be “neutral,” “principled,” or “impartial” may win public approval, regardless of the public’s agreement or disagreement with the outcomes on the merits.<sup>167</sup>

### C. Public Law

It is no accident that domestic separation of powers theories and international balance of power theories originated in approximately the same period, in conjunction with the rise of the sovereign state.<sup>168</sup> Both theories, and their many cognates, recognize (and follow from the fact) that there is no sovereign above the sovereign and thus that public law compliance must be conceived and explained by decentralized self-enforcement. Put differently, public law cannot rely on the enforcement capacity of states for compliance. Lacking the kind of “external” enforcement mechanism that states provide for ordinary domestic law, public law regimes must be internally self-enforcing through some combination of rationally self-interested and normative, internalized, or role-based motivations.

We have attempted to show that the various motivations for and mechanisms of compliance, to whatever extent they are effective, are likely to be similar on the international and constitutional fronts. We take no position here on how effective any of these self-enforcement mechanisms might be, or on the extent to which international or constitutional law does, in fact, constrain or shape the behavior of political actors. Nor do we offer any relative judgment about whether these mechanisms operate more effectively in international law or constitutional law. It may turn out that the compliance deficit really is espe-

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<sup>166</sup> See Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703 (1994).

<sup>167</sup> From a more anthropological perspective, legal scholars have also suggested that the symbolic trappings of constitutional and judicial authority — ranging from deification of the Founding Fathers to the temple-like architecture and oracular mystery of the Supreme Court — contribute to legitimacy-based compliance. See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 29–33 (1962) (describing the Supreme Court’s “mystic” capacity to legitimate laws and policies in the public mind); SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 9–53 (1988) (characterizing the Constitution as part of America’s “civil religion”); Thomas C. Grey, *The Constitution As Scripture*, 37 STAN. L. REV. 1 (1984).

<sup>168</sup> For the historical origins of balance of power theories, see generally MICHAEL SHEEHAN, *BALANCE OF POWER: HISTORY AND THEORY* (1996); and Alfred Vagts & Detlev F. Vagts, *The Balance of Power in International Law: A History of an Idea*, 73 AM. J. INT’L. L. 555 (1979). For the historical origins of separation of powers theories, see generally R.C. VAN CAENEGEM, *HISTORICAL INTRODUCTION TO WESTERN CONSTITUTIONALISM* (1995); and M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* (2d ed. 1998). See also Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1496–97 & n.283 (1987) (identifying in *The Federalist Papers* the connection between the Framers’ thinking about federalism and separation of powers, on the one hand, and the international balance of powers, on the other).

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cially severe in international law, not because the international system's lack of top-down enforcement is distinctive, but because other features of the international system make self-enforcement difficult.

One obvious difference between the circumstances of international law and constitutional law is that the interests and values of national populations, as reflected in the policy preferences of their states, are more heterogeneous than the interests and values of domestic political constituencies. From a rationalist perspective, the greater the heterogeneity of interests, the higher the costs of coordinating, monitoring, and agreeing upon violations, and thus the more difficult it becomes to sustain cooperative or coordinated equilibria. Heterogeneity may have similar implications from a normative or constructivist perspective. The less agreement exists about procedural or substantive values, or about criteria of legitimacy, the less likely it is that the relevant parties — states in the international system or domestic political constituencies of various forms — will share the compliance pulls of legal normativity or role identity. Rationalists and constructivists might agree, then, that the capacity of public law to constrain the behavior of states and governments will depend on the ratio of shared to conflicting interests and values in its subject populations. Within both the international and domestic constitutional law spheres, that ratio will be higher with respect to issues on which states and domestic constituencies tend to share interests (international trade or domestic national security, for example) than others on which states and domestic constituencies are differently situated (global warming or economic redistribution, for example). And in general we would expect that larger and more heterogeneous populations will have a more difficult time achieving legal compliance than smaller and more homogeneous ones, with the international population as the limiting case. Greater heterogeneity may well make compliance with international law more difficult to achieve than compliance with domestic constitutional systems.<sup>169</sup>

Nonetheless, we think it illuminating to emphasize what the international and constitutional law systems have in common, namely the absence of state enforcement. The contrast is with domestic legal systems, which ordinarily can rely upon the enforcement power of the state to coerce legal compliance. This is not to suggest that the threat of state-imposed sanctions is the only explanation for compliance with ordinary domestic law or to deny that people obey statutes and judicial decisions for many of the same reasons states obey international law and government officials and their constituents obey constitutional law. The rules of ordinary domestic legal systems may create focal

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<sup>169</sup> Beyond heterogeneity of interest, the number of parties probably also matters, especially from a rationalist perspective. See GOLDSMITH & POSNER, *supra* note 111.

points for coordination or otherwise facilitate game-theoretical, interest-based compliance.<sup>170</sup> Compliance with these rules may also turn on perceptions of substantive justice or procedural legitimacy, or on the internalization of the values they embody.<sup>171</sup> And of course, people, like states and governments, may find themselves acting consistently with legal rules because these rules simply track how people would choose to behave in any case. The constructivist/constitutive insight that law can (or inevitably will) shape, not just constrain, its subjects is also familiar in its application to ordinary domestic law. As critical legal scholars have emphasized, law pervasively shapes nominally private or pre-legal preferences, interests, values, and self-understandings. It may thus be deeply misleading to imagine law as an external constraint on a pre-legally constituted agent possessed of a legally exogenous set of interests.<sup>172</sup>

That said, the existence of a state enforcement apparatus standing behind legal rules is an indisputably significant part of the explanation for compliance with ordinary domestic law. Whether the threat of government-imposed sanctions is viewed as predominant or as merely one among several major determinants of legal compliance, few would doubt its importance in explaining how ordinary domestic law influences behavior. A central, definitional feature of states is that they possess the power to coerce behavior, and law promulgated by and through states is backed by that power. Public law is not.<sup>173</sup>

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<sup>170</sup> See Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649 (2000).

<sup>171</sup> See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006); Cass R. Sunstein, *Endogenous Preferences*, *Environmental Law*, 22 J. LEGAL STUD. 217 (1993).

<sup>172</sup> See, e.g., Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 102-13 (1984).

<sup>173</sup> J.L. Brierly both recognizes and seeks to minimize the differences between international and ordinary domestic law with respect to the problem of enforcement:

The fundamental difficulty of subjecting states to the rule of law is the fact that states possess power. The legal control of power is always difficult, and it is not only for international law that it constitutes a problem. The domestic law of every state has the same problem, though usually (but not, as the persistence of civil wars proves, invariably) in a form less acute. In any decently governed state domestic law can normally deal effectively with the behavior of individuals, but that is because the individual is weak and society is relatively strong; but when men join together in associations or factions for the achievement of some purpose which the members have in common the problem of the law becomes more difficult.

BRIERLY, *supra* note 107, at 48. Brierly is right, of course, that weak states may be beset by domestic enforcement deficits; they may lack the power to enforce their laws effectively against recalcitrant groups like ethnic minorities, drug cartels, or economically influential corporations. But the problems of enforcing ordinary domestic law in consolidated and stable (as opposed to failed) states pale in comparison to the problems of enforcement in inherently "stateless" international and constitutional regimes. States possess the power to coercively enforce most of their laws against most actors in their territories most of the time. International and constitutional regimes do not.

## IV. THE PROBLEM OF SOVEREIGNTY

Hand in hand with the rise of the modern state came the idea, or ideal, of sovereignty.<sup>174</sup> The sovereign state was conceived as a political organization exercising unrivaled authority within its borders, including the supreme power to make and enforce law. The sovereign thus stands above law and cannot itself be subject to legal constraint. As Austin bluntly put it, “Supreme power limited by positive law[] is a flat contradiction in terms.”<sup>175</sup> This understanding of unlimited state sovereignty was in part premised on perceived practical realities. As discussed in the previous Part, for positivist legal theorists, the absence of any centralized enforcement authority standing above states meant that there was no reliable way of coercing their compliance. But it was also, and perhaps more fundamentally, normative. For Hobbes and other early theorists of the state, the unshackled autonomy of the sovereign followed from its origins in the social contract. Starting from the condition of natural freedom, persons contracted to vest authority in a sovereign Leviathan to whom they would be subject. The act, or fiction, of contracting was what legitimated the exercise of sovereign authority and the concomitant sacrifice of individual autonomy. There was, however, no meta-contract that could create a legitimate super-authority capable of binding the sovereign. Illimitable sovereignty was a corollary of popular consent.

In the extreme version of state sovereignty imagined by Hobbes and Austin, even fully consensual limitations on sovereign power — consented to, that is, by the sovereign itself — were an impossibility. Sovereignty, once vested, was understood to be inalienable. While recognizing that “sovereign bodies have attempted to oblige themselves, or to oblige the successors to their sovereign powers,” Austin proclaimed the futility of subjecting sovereign power even to self-limitation, because “[t]he immediate author of a law of the kind, or any of the sovereign successors to that immediate author, may abrogate the law at pleasure.”<sup>176</sup> Or, in Hobbes’s formulation of the same principle:

The Sovereign of a Common-wealth . . . is not subject to the Civill Lawes. For having power to make, and repeale Lawes, he may when he pleaseth, free himselfe from that subjection, by repealing those Lawes that trouble him, and making of new; and consequently he was free before. For he is free, that can be free when he will: Nor is it possible for any person to be bound to himselfe; because he that can bind, can release; and therefore he that is bound to himselfe onely, is not bound.<sup>177</sup>

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<sup>174</sup> See generally HINSLEY, *supra* note 10.

<sup>175</sup> AUSTIN, *supra* note 14, at 212.

<sup>176</sup> *Id.*

<sup>177</sup> HOBBS, *supra* note 13, at 190.

Of course, one need not go as far as Hobbes in making sovereignty illimitable. The status of sovereignty might be seen, as it often has been since Hobbes, as empowering the sovereign to enter into binding contracts or commitments, including legal ones. As in ordinary contract law, the *ex ante* power to commit may enhance sovereign autonomy and power, even accounting for (or, precisely because of) the *ex post* limitations on renegeing that make those commitments credible. An important move beyond Hobbes, then, is to raise consent theory up a level, allowing sovereign consent to legitimate legal constraints on sovereign power.

This Part thus discusses how the (perceived) problem of reconciling an all-powerful sovereign (whether a state or a democratic people) with the possibility of legal constraints has played out in international law and constitutional law. Both legal regimes have insisted upon the superiority of sovereign authority to any kind of legal constraint, while accepting sovereign consent as a legitimate means of alienating (or exercising) sovereign authority. This set of premises has led constitutional and international lawyers and theorists to rely heavily on consent theory, in its various permutations, to preserve the theoretically absolute freedom of sovereign and democratic will while recognizing a robust set of nominally self-imposed legal limitations. As this Part attempts to show, the essential justificatory logic of sovereignty, constraint, and consent has created a remarkably similar set of theoretical dynamics in constitutional and international law.

In both areas of public law, one might well question whether this justificatory game is worth the candle. The harder we press on the very idea of sovereign consent, the more difficult it is to hold onto the conception of a singular, omnipotent sovereign or a vision of consent grounded in the autonomous exercise of sovereign will. Indeed, for Hart, the difficulty of squaring the theory of absolute sovereignty with the well-established practices of constitutional and international law was reason enough to dismiss sovereignty from a theory of law.<sup>178</sup> Hart's dismissal may have much to recommend it. The absolutist conception of the sovereign state, which never fully matched reality, has come to seem increasingly anachronistic as sovereignty has been divided and subdivided, and as globalization and related forces have made territorial borders less significant and governmental control over domestic affairs less than absolute. Nonetheless, traditional conceptions of state sovereignty — and, relatedly, of the sovereignty of the people within a state — remain central to normative debates about the validity of international and constitutional law. If (some) theorists of the state have escaped the artificial bounds of sovereignty, public law

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<sup>178</sup> HART, *supra* note 28, at 66–78 (constitutional law); *id.* at 220–26 (international law).

frameworks remain securely in their grasp. Moreover, even as the traditional conception of sovereignty has fallen into some doubt, its legal and political implications have been normatively reinvigorated in modern times by enduringly robust commitments to democracy and national self-determination. If classical state sovereignty is on its way to obsolescence, democratic self-determination stands ready to take its place.

#### A. *International Law*

In international law, “sovereignty” signifies the idea that a state or a nation exercises effective and supreme control within a territory and is formally independent of any external or superior authority structure, including other states and international organizations.<sup>179</sup> Sovereignty defines the states that make up the system that international law purports to regulate. It also underlies fundamental international law concepts like territorial jurisdiction, recognition, sovereign equality, and diplomatic immunity. In these respects, sovereignty is essential to the legal construction of the international order.

On the other hand, since the decline of natural law and the rise of positivism in the nineteenth century, sovereignty has also been a major source of doubt about whether international law imposes genuine legal obligations on states.<sup>180</sup> “One of the most persistent sources of perplexity about the obligatory character of international law,” wrote Hart in *The Concept of Law*, “has been the difficulty felt in accepting or explaining the fact that a state which is sovereign may also be ‘bound’ by, or have an obligation under, international law.”<sup>181</sup> The idea that states are the supreme law-creating and law-enforcing entities in a territory seems incompatible with the idea that states are subject to the legal constraints of international law.<sup>182</sup> If states are sovereign, they cannot be subject to the legal obligations that international law purports to impose. And to the extent that they can be sub-

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<sup>179</sup> Krasner distinguishes four senses of sovereignty. The definition in the text captures two of these senses: Westphalian sovereignty, political organization based on “the exclusion of external actors from domestic authority structures” within a given territory, and domestic sovereignty, “the formal organization of political authority within the state and the ability of public authorities to exercise effective control within the borders of their own polity.” STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* 4 (1999). Below we will discuss a third sense of sovereignty, what Krasner calls international legal sovereignty, or “the practices associated with mutual recognition, usually between territorial entities that have formal juridical independence.” *Id.* at 3. We do not discuss his fourth sense, interdependence sovereignty, which is “the ability of public authorities to regulate the flow of information, ideas, goods, people, pollutants, or capital across the borders of their state.” *Id.* at 4.

<sup>180</sup> For a discussion of earlier trends in this direction, see HINSLEY, *supra* note 10, at 158–97.

<sup>181</sup> HART, *supra* note 28, at 220.

<sup>182</sup> See BRIERLY, *supra* note 107; MORGENTHAU, *supra* note 32, at 288; NARDIN, *supra* note 26, at 116.

ject to genuine legal constraints under international law, then they cannot be sovereign.

International law's primary solution to this puzzle has been to hold tight to the concept of sovereignty while insisting that any obligation imposed by international law must result from states' *consent* to be bound.<sup>183</sup> Chief Justice Marshall explained the relationship between consent and sovereignty in *The Schooner Exchange*:<sup>184</sup>

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.

All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.<sup>185</sup>

Marshall's dictum is not a nineteenth-century relic. Although modern theorists debate the point, and there are many proponents of nonpositivistic conceptions of international law, consent has long been and remains the dominant understanding of the legal basis of international law in governments, courts, and the academy. "State consent is the foundation of international law," Henkin argues in his 1995 book on international law.<sup>186</sup> "The principle that law is binding on a state only by its consent remains an axiom of the political system, an implication of state autonomy."<sup>187</sup>

On the conventional consent-based theory of international law (also known as voluntarism or auto-limitation), states must expressly consent to treaties and expressly or impliedly consent to CIL, and it is only by virtue of state consent that these legal obligations become binding. Unfortunately, this idealized picture of the consensual basis of international law does not reflect the way international law op-

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<sup>183</sup> See, e.g., WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW 4 (8th ed. 1924) (explaining that sovereign states are "independent beings, subject to no control, and owning no superior," and thus that a state "is only bound by rules to which it feels itself obliged in conscience after reasonable examination to submit").

<sup>184</sup> *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812).

<sup>185</sup> *Id.* at 136; see also *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7) ("International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.").

<sup>186</sup> LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 27 (1995).

<sup>187</sup> *Id.*; see also IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 2 (2d ed. 1973) (indicating that international rules are law because "the general consent of states creates rules of general application").

erates and cannot explain why international rules should be legally binding. Recognizing these problems, international lawyers have deployed various fictions and conceptual contortions related to consent in an attempt to square the concept of sovereignty with international law obligations.

The most basic problem with grounding international law in consent is that state consent cannot by itself create legally binding obligations.<sup>188</sup> Consent may well be the method for creating international law (though we will question that assumption in a moment), but only some prior rule or norm can link consent to legal obligation. If consent works to create a binding legal rule between nations, therefore, it must be by virtue of some background rule of international law that makes consensual agreements binding. The main candidate for such a rule is *pacta sunt servanda*, a rule of international law reflected in both treaties and CIL, which holds that agreements must be respected. But of course *pacta sunt servanda* could not itself have become a binding legal rule solely through state consent. Asserting that states have consented to *pacta sunt servanda* in treaties and CIL simply pushes back the inquiry a step to why *that* consent should be considered binding. Consent can never work its way out of this regress to create legally binding international laws on its own.<sup>189</sup> The legally obligatory nature of international law must come from somewhere or something else.

A similar analytic point applies to the constitutive aspects of international law — what Morgenthau calls “necessary” international law<sup>190</sup> and Henkin calls the “givens”<sup>191</sup> or the “axiomatic ‘constitutional’” concepts.<sup>192</sup> These are the aspects of international law that are the “logical precondition for the existence of a multiple state system.”<sup>193</sup> They include the international law concepts of statehood, territorial integrity and impermeability, nationality, recognition, the establishment of diplomatic relations, and other characteristics associated with national sovereignty. The international legal rules establishing these characteristics are understood to be constitutive of state sovereignty, for they define what it means to be a sovereign state. But of course these rules cannot be created by sovereign consent, since the

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<sup>188</sup> See BRIERLY, *supra* note 107; Gerald G. Fitzmaurice, *The Foundations of the Authority of International Law and the Problem of Enforcement*, 19 MOD. L. REV. 1 (1956).

<sup>189</sup> In addition to the sources cited in the previous footnote, see FRANCK, *supra* note 126, at 187; and Gerald G. Fitzmaurice, *Some Problems Regarding the Formal Sources of International Law*, in SYMBOLAE VERZIJL 153 (Martinus Nijhoff ed., 1958).

<sup>190</sup> MORGENTHAU, *supra* note 32, at 253.

<sup>191</sup> HENKIN, *supra* note 186, at 15.

<sup>192</sup> *Id.* at 31.

<sup>193</sup> MORGENTHAU, *supra* note 32, at 288.

rules themselves create the sovereigns with authority to consent.<sup>194</sup> Like *pacta sunt servanda*, these rules must be presupposed, and premised on something other than state consent, in order for the international legal system to get off the ground.

Moving beyond foundational rules, international law might hope to ground the vast bulk of “ordinary” treaty obligations and CIL in state consent. But even here consent is often fictitious, especially with respect to CIL. The canonical definition of CIL requires only “general and consistent,” not unanimous, state practice.<sup>195</sup> When courts, diplomats, and scholars identify CIL, they do not require evidence of actual or even tacit consent by every state. Rather, they selectively rely on salient instances of state practice (usually the practices of powerful Western nations), scattered treaties, the pronouncements of international bodies and scholars, and moral and functional arguments.<sup>196</sup> These substitutes for actual consent are necessary because there are too many states and too many potential instances of state consent (or nonconsent) to examine individually. In the absence of a multinational meeting where states vote on a legal principle, it is practically impossible to tell whether each of 190 nations has consented to a CIL norm.

In many cases, nations have never, in fact, considered the issue, yet their silence is often interpreted as consent.<sup>197</sup> What nations must say or do to demonstrate that they consent to a CIL rule out of a sense of legal obligation is unclear and inconsistent. National policy statements, legislation, and diplomatic papers are the least controversial sources of consent, but they rarely evince a clear intent to be bound as a matter of law. Matters become murkier when universal state consent is inferred from treaties that either do not bind every state or do not bind them in the way proposed under CIL. Especially in the human rights context, the identification of CIL consent has become so hard to square with the facts that courts and scholars have dropped any pretense that CIL is grounded in actual state practice.<sup>198</sup> The modern doctrine of *jus cogens*, or “peremptory norms,” is a striking example of the drift away from a consent-based conception of CIL. *Jus cogens*

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<sup>194</sup> H. LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 95–96 (1933) (“The sovereignty of the State in international law is a quality conferred by international law. It cannot, therefore, be either the basis or the source of the law of nations.”).

<sup>195</sup> RESTATEMENT, *supra* note 34, § 102(2).

<sup>196</sup> KAROL WOLFKE, *CUSTOM IN PRESENT INTERNATIONAL LAW* 52–85 (1993); Jonathan I. Charney, *Universal International Law*, 87 *AM. J. INT’L L.* 529, 537 (1993).

<sup>197</sup> For a discussion of the related phenomenon of imposing demanding requirements before a state can opt out of a developing norm of CIL by “persistently objecting,” see Curtis A. Bradley, *The Juvenile Death Penalty and International Law*, 52 *DUKE L.J.* 485, 516–18 (2002).

<sup>198</sup> See, e.g., *Filártiga v. Peña-Irala*, 630 F.2d 876, 882 (2d Cir. 1980); *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 14 (June 27).

rules — including prohibitions on slavery, genocide, and torture — are by definition binding on states regardless of consent.<sup>199</sup>

The status of new states is a further problem for a consent-based theory of CIL. New states find themselves subject not only to the “necessary” or “axiomatic” international laws that define their statehood, but also to CIL rules to which they obviously did not, and clearly would not, consent. A famous example is the objection of the Soviet Union and post-colonial states to CIL rules that prohibited them from expropriating foreign-controlled local property.<sup>200</sup> These states were met with rebukes from powerful western states that maintained, successfully, that the principle of consent did not apply to well-settled rules of international law.<sup>201</sup> Today the rule appears to be that “[u]pon achieving statehood, a state becomes subject to customary international law as it has developed to that time.”<sup>202</sup> Henkin awkwardly tries to square this approach with consent theory by arguing that the rule “can be explained (and even justified) in that . . . customary law is not *created* but *results*; that it is therefore not a product of the will of states but a ‘systemic creation,’ reflecting the ‘consent’ of the international system, not the consent of individual states.”<sup>203</sup> J.G. Starke is closer to the truth when he says that “[t]he idea that in such an instance there is ‘tacit’ or ‘implied’ consent, merely strains the facts,” and that “[t]he reality is that other states look to the new state to comply with the whole body of established international law.”<sup>204</sup>

It is not only CIL that runs into problems with consent theory. Treaty law, too, has in many respects drifted away from any meaningful basis in state consent. The consensual basis for many treaties has always been questionable. Even during the long period before the middle of the last century, when most treaties were bilateral and formally consent-based, “unequal” treaties imposed by the West on the East, and treaties of peace imposed by various victors on the defeated, stretched the meaning and normative basis of voluntary consent.<sup>205</sup> But the post–World War II period has seen the rise of universal international organizations and universal treaties that have begun to dis-

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<sup>199</sup> See Vienna Convention on the Law of Treaties, *supra* note 33, arts. 53, 64, 1155 U.N.T.S. at 344, 347; *Siderman v. Argentina*, 965 F.2d 699, 715 (9th Cir. 1992); RESTATEMENT, *supra* note 34, § 102 cmt. k & reporters’ note 6.

<sup>200</sup> See J.G. STARKE, INTRODUCTION TO INTERNATIONAL LAW 25 (9th ed. 1984).

<sup>201</sup> See *id.*

<sup>202</sup> RESTATEMENT, *supra* note 34, § 206 cmt. a; see also *id.* § 102 cmt. d.

<sup>203</sup> HENKIN, *supra* note 186, at 36.

<sup>204</sup> STARKE, *supra* note 200, at 25.

<sup>205</sup> See Ingrid Detter, *The Problem of Unequal Treaties*, 15 INT’L & COMP. L.Q. 1069 (1966); Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 AM. J. INT’L L. 495, 533–35 (1970).

pense even with the formality of consent. A growing number of treaties purport to bind nonconsenting parties. Article 2(6) of the United Nations Charter, for example, provides that the U.N. must ensure that nonmember states act in accordance with the Charter, and Articles 27(3) and 42 provide that nine of fifteen Security Council members can (as long as one of the big five does not veto) order enforcement actions against or over the objection of a minority voting member. The aspiration toward universal treaty obligations has also spurred a modern movement to invalidate treaty reservations (that is, explicit statements of nonconsent to certain treaty terms) in order to bind states to treaty terms to which they did not and would not consent.<sup>206</sup> Toward the same end, the statute of the International Criminal Court authorizes the court to prosecute nationals of nonparties who commit crimes in the territories of party states.<sup>207</sup>

A further source of pressure on consent in the treaty context comes from the ever-expanding array of “global governance” institutions created by treaty. International regimes like the ICJ, the WTO, NAFTA, and the Chemical Weapons Convention now routinely bind states with regulatory decisions to which the states have not specifically consented. State consent to these decisions must instead be traced back to the initial treaty that created and empowered these organizations. But some of these treaties stretch delegation so far that one might question whether the delegated authority is grounded in a plausible conception of consent. For example, some treaty regimes establish rules that can be changed by the organization created by the treaty, without the need for later consent by signatory states. And sometimes these powers of amendment or change are not even subject to a veto by dissenting states.<sup>208</sup> There is no clear answer to the question of how far an initial act of state consent to an institutional arrangement can be stretched — temporally or topically — to legitimate the streams of obligations flowing from that arrangement. But legitimating global governance entirely through ex ante, treaty-based forms of consent strikes many as artificial or fictitious.

Up to now, our focus has been on attempts to reconcile international law and state sovereignty through the requirement (or fiction) of state consent. But we should also recognize that consent is not the only strategy international law has used to resolve this tension. Another approach has been to reconceptualize state sovereignty by incor-

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<sup>206</sup> See Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 AM. J. INT'L L. 531 (2002).

<sup>207</sup> See Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, LAW & CONTEMP. PROBS., Winter 2001, at 13.

<sup>208</sup> See MALGOSIA FITZMAURICE & OLUFEMI ELIAS, CONTEMPORARY ISSUES IN THE LAW OF TREATIES (2005).

porating international law constraints into its definition. A recent example is the United Nations–sponsored attempt to defend humanitarian intervention against objections grounded in the traditional, sovereignty-based requirement of territorial nonintervention. A report by the International Commission on Intervention and State Sovereignty argues that state sovereignty actually entails an obligation to protect the population within the state’s territory from humanitarian emergencies and related human rights abuses.<sup>209</sup> If the territorial state is unwilling or unable to meet these obligations, the report argues, then the international community has a secondary obligation to intervene for that purpose.<sup>210</sup> Commentators have recognized that the “responsibility to protect” response reinterprets the institution of sovereignty such that the “rights of the sovereign — understood as a shield from intervention — depend upon its capacity to fulfil[l] [certain] responsibilities” in the international order set forth in the U.N. Charter.<sup>211</sup>

Whatever one makes of consent-based and other attempts to reconcile international law with state sovereignty, what is important for present purposes is to recognize the deep tension between the idea of inlimitable sovereignty and legal constraints on the state. One response to this tension is to do away with sovereignty. And indeed, contemporary theorists of international law often dismiss sovereignty as anachronistic, arbitrary, or outweighed by more pressing concerns. An especially unapologetic example is “cosmopolitan” moral theory. Many cosmopolitan theorists argue that international morality (and therefore, ideally, international law) imposes a duty on nations to act to help peoples in other states and enhance global welfare, regardless of domestic political preferences. So, for example, many believe that the United States should ratify the Kyoto Protocol and the treaty establishing the International Criminal Court, should have intervened to stop genocides in Rwanda and Sudan, and should give much more foreign aid, even if these actions would on balance diminish U.S. welfare and thus would be viewed by America’s political leadership as inconsistent with the United States’s national interest.<sup>212</sup>

But sovereignty is not so easy to dismiss, especially when it is joined with democratic self-determination. As David Luban has ar-

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<sup>209</sup> See INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, *supra* note 40.

<sup>210</sup> See *id.*

<sup>211</sup> Asli U. Bali, *Legality and Legitimacy in the International Order: The Changing Landscape of Nuclear Nonproliferation*, in LEGALITY AND LEGITIMACY IN GLOBAL POLITICS (R. Falk et al. eds., forthcoming 2009) (manuscript at 7, on file with the Harvard Law School Library).

<sup>212</sup> See, e.g., MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* (2006); Michael J. Green, *Institutional Responsibility for Global Problems*, 30 PHIL. TOPICS 79, 86 (2002); Thomas W. Pogge, *Cosmopolitanism and Sovereignty*, in *POLITICAL RESTRUCTURING IN EUROPE: ETHICAL PERSPECTIVES* 89 (Chris Brown ed., 1994).

gued in response to demands that democracies engage in humanitarian intervention:

In a democracy, the political support of citizens is a morally necessary condition for humanitarian intervention, not just a regrettable fact of life. If the folks back home reject the idea of altruistic wars, and think that wars should be fought only to promote a nation's own self-interest, rather narrowly conceived, then an otherwise-moral intervention may be politically illegitimate. If the folks back home will not tolerate even a single casualty in an altruistic war, then avoiding all casualties becomes a moral necessity.<sup>213</sup>

One important reason why democratic states do not engage in more cosmopolitan action is because the citizens and elected officials in those states do not support it. This is not just a practical constraint on the realization of moral good but also, for many, a competing moral imperative, grounded in the moral claims of democratic self-government. In moral theory and international law alike, there is no easy escape from the challenge of reconciling normative constraints and demands on the state with the traditional claims of state sovereignty and self-determination.<sup>214</sup>

### B. *Constitutional Law*

Constitutional law confronts the same paradox of sovereignty as international law. If sovereignty means that states have the right to govern themselves as they please, then how can law — international or constitutional — legitimately impose constraints? In the constitutional law and theory of democratic states like the United States, this paradox has taken a distinctive form, stemming from the fundamental premise that sovereignty is vested not in the government but in “the people.” Once the sovereign “state” is identified with the people, sovereignty comes close to meaning democracy, and the difficulty comes in explaining how constitutional law legitimately can place limits on the democratic exercise of popular will.

An initial solution, central to Founding-era debates over the purposes and possibilities of constitutionalism, was to conceive of constitutional law primarily as a constraint upon government officials imposed by the sovereign people.<sup>215</sup> If constitutional law served to protect the citizens, and their capacity for self-governance, against the unrepresent-

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<sup>213</sup> David Luban, *Intervention and Civilization: Some Unhappy Lessons of the Kosovo War*, in *GLOBAL JUSTICE AND TRANSNATIONAL POLITICS: ESSAYS ON THE MORAL AND POLITICAL CHALLENGES OF GLOBALIZATION* 79, 85–86 (Pablo de Greiff & Ciaran Cronin eds., 2002) (footnotes omitted).

<sup>214</sup> See GOLDSMITH & POSNER, *supra* note 111, 205–24.

<sup>215</sup> See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787*, at 567–92 (1969).

tative and potentially tyrannical machinations of their governors, then it might be seen as furthering rather than undermining popular sovereignty. Thus conceived, many of the structural provisions of the Constitution and Bill of Rights were designed to constrain the self-serving behavior of federal officials and to protect institutions of state and local self-government that would insulate citizens from these officials' potentially despotic reach.<sup>216</sup>

But casting constitutional law as a popular sovereignty-enhancing solution to the agency problem of representative government would never be a fully adequate account. For one thing, the Constitution was supposed to be perpetually binding, even against changes in popular opinion. This created an obvious tension with the ongoing sovereignty of the people and was a source of great consternation for some members of the Founding generation. Echoing Jefferson's well-known objection,<sup>217</sup> Daniel Webster argued that "the very attempt to make *perpetual* constitutions, is the assumption of a right to control the opinions of future generations; and to legislate for those over whom we have as little authority as we have over a nation in Asia."<sup>218</sup> Furthermore, it was widely understood that the Constitution was meant not just to protect the people against their governors but also against each other. As Madison put it, "It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part."<sup>219</sup> If the Constitution was to prevent dominant factions, including majorities of the sovereign people, from capturing government for their own selfish ends, then it became difficult to explain how a constitution could legitimately restrain them. In Webster's words, "A Bill of Rights against the encroachments of Kings and Barons, or against any power independent of the people, is perfectly intelligible; but a Bill of Rights against the encroachments of an elective Legislature, that is, against our *own* encroachments on ourselves, is a curiosity in government."<sup>220</sup>

These Founding-era concerns about how to reconcile constitutionalism with popular sovereignty have evolved into the "central obsession" of modern constitutional law and theory, the so-called "counter-

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<sup>216</sup> See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION*, at xii–xiii (1998).

<sup>217</sup> Jefferson wrote to Madison that "no society can make a perpetual constitution . . . . The earth belongs always to the living generation." Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 488, 491 (Adrienne Koch & William Peden eds., 1944).

<sup>218</sup> WOOD, *supra* note 215, at 379 (quoting Daniel Webster, *Government*, AM. MAG., Dec. 1787).

<sup>219</sup> THE FEDERALIST NO. 51 (James Madison), *supra* note 134, at 320.

<sup>220</sup> WOOD, *supra* note 215, at 378 (quoting Webster, *supra* note 218).

majoritarian difficulty.”<sup>221</sup> The difficulty lies in justifying the imposition of binding constitutional obligations on a democratically sovereign political populace — a difficulty analogous to that of justifying the imposition of international legal obligations on sovereign states. As in international law, moreover, constitutional law’s primary solution to the difficulty has been rooted in contract and consent. The Constitution is conventionally understood as a Lockean social contract, or compact, entered into by “the people” with each other. Just as the consent of sovereign states legitimates international law, popular sovereign consent to the Constitution and its amendments legitimates constitutional law.

Unfortunately, the problems with a consent-based theory of constitutional obligation are no less glaring than the problems with a consent-based understanding of international law. In constitutional law, the problems become visible at the beginning, with the initial act of consent that was supposed to make the 1789 Constitution binding as law. To the extent that Americans consented to the original Constitution, they were far from unanimous. How many or which groups of the people must have consented to the Constitution in order to bring “the people” on board is far from clear as a matter of consent theory, but the consensual pedigree of the Constitution must be tarnished by the disenfranchisement of women, blacks, and poor whites in most states; the low turnout among eligible voters; and the narrow margins of victory in critical states.<sup>222</sup> It is not even clear whether a bare majority of the population at the time supported ratification.<sup>223</sup> Even more severe democratic doubts might be raised about the coercive ratification process of the Reconstruction Amendments,<sup>224</sup> which can be seen as little different from the imposition of treaty obligations on defeated states by the victors in war.

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<sup>221</sup> See Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334 (1998). The difficulty became especially pronounced after the Civil War and Reconstruction Amendments reoriented the Bill of Rights away from ensuring that popular majorities maintained effective control over government and toward protecting individuals and minorities against these same majorities. See AMAR, *supra* note 216. The Civil Rights and Warren Court eras went even further in placing the protection of individual and minority rights at the center of constitutional law, thereby bringing the countermajoritarian difficulty into sharp relief. See Friedman, *supra*, at 341 n.23.

<sup>222</sup> This is true despite the fact that the ratification process was remarkably democratic and inclusive by the standards of the time. See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 7 (2005); see also Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475, 563–64 (1995).

<sup>223</sup> See David S. Law & David McGowan, *There Is Nothing Pragmatic About Originalism*, 102 NW. U. L. REV. COLLOQUY 86, 90 (2007).

<sup>224</sup> See 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 266–69 (1998); John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375 (2001).

In any event, historical headcounting is not going to resolve the problems with consent-based theories of constitutional obligations. A deeper problem, familiar from international law, is that nobody consented to a prior theory of political obligation that would render constitutional consent morally or legally binding in perpetuity. If popular sovereignty is taken to be the fundamental principle of law and political morality, then it is not obvious how it can be constrained on an ongoing basis by even entirely consensual obligations entered into by the people. What could prevent the people from changing their minds? Recall that Hobbes and Austin thought the answer was nothing.

A different answer put forward by subsequent constitutional and political theorists is that constitutional commitments might actually be sovereignty-enhancing for the people in much the same way that the availability of binding contracts is autonomy-enhancing for individuals. Playing off the contract analogy, the idea is that enabling the people to make “precommitments” through a constitution might facilitate rather than impede their sovereignty by allowing them to accomplish things that would otherwise be impossible.<sup>225</sup> For example, it is often argued that constitutional law enables our popular sovereignty by allowing us to commit to respecting civil liberties even in times of war or crisis, when we might be tempted — by panic, myopia, or some other decisionmaking pathology — to do things that we would later regret. If so, then perhaps popular sovereignty can be reconciled with, and indeed advanced by, constitutional constraints. In a related move, constitutional theorists have suggested that, while all expressions of authentic popular sovereignty must be vindicated, not every expression of popular will is authentic. Theorists of “dualist democracy” maintain that true popular sovereignty manifests itself only occasionally and insist that decisions made at these “constitutional moments” should endure against the sub-sovereign vicissitudes of ordinary politics.<sup>226</sup>

Precommitment and dualist democracy theories both attempt to explain how the people can bind themselves while still remaining sov-

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<sup>225</sup> See HOLMES, *supra* note 11, at 134–77.

<sup>226</sup> Thus, in Ackerman’s account, American history has seen periodic moments of “constitutional politics” in which the people were awakened from the slumbers of “ordinary politics” to engage in serious and sustained deliberation about the public good, which led to enduring constitutional change. See ACKERMAN, *supra* note 62; ACKERMAN, *supra* note 224. Chief Justice Marshall was thinking along similar lines in *Marbury v. Madison*:

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.

5 U.S. (1 Cranch) 137, 176 (1803).

ereign. They do so by distinguishing between true and false exercises of popular will and then asserting that the former should trump the latter. Not surprisingly, the two theories face similar problems. One kind of problem arises in distinguishing the “true” form of the people’s will from other apparent expressions of popular preference. For precommitment theorists, the challenge is to explain why, for example, decisions made during peacetime about the appropriate trade-offs between national security and individual liberty should prevail over the different trade-offs that might win political support during wartime. The typical approach is to deride wartime political decisionmaking as pathological and aberrant while exalting peacetime decisionmaking as healthy and normal. But this is unconvincing without some independent criteria for determining the authenticity of expressions of democratic will or for negating the straightforward inference that the people simply have different preferences at different times and in different contexts.<sup>227</sup> Dualists face the similar challenge of distinguishing constitutional from normal politics and establishing the normative superiority of the former over the latter. Should political moments characterized by mass political mobilizations and active social movements necessarily be exalted over more mundane forms of politics? Reconstruction and the civil rights movement are indeed attractive manifestations of popular sovereignty in its activist mode.<sup>228</sup> The 1920s Ku Klux Klan crusade and massive resistance to desegregation in the wake of *Brown* are less attractive.<sup>229</sup> In any event, it is far from obvious that the qualitative form of politics changed dramatically enough during those political moments that have been identified as constitutional to create a difference in kind. Historians tend to see momentous periods like the Founding, Reconstruction, and the New Deal as exhibiting the same messy mixture of high-minded, public-spirited discourse and self-interested dealmaking that may invariably characterize American politics. If popular sovereignty is expressed continuously through ordinary democratic politics, not just on special occasions, then neither precommitment nor dualist attempts to justify constitutionalism can succeed.

A further problem with both theoretical approaches is their shared premise that “the people” are a unified decisionmaking entity, persisting through historical time. We might doubt whether past and future generations of Americans have enough in common to justify lumping them together as a unitary political actor that has the legitimate au-

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<sup>227</sup> See ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE 59–86 (2007).

<sup>228</sup> See Klarman, *supra* note 64, at 770.

<sup>229</sup> See *id.*

thority to bind “itself” over long periods of time.<sup>230</sup> The longer the obligatory force of consent is stretched through time, the less convincing it is to see the consenters as the same “people” as the people who are bound. As David Strauss observes, echoing Noah Webster:

[I]t would be bizarre if the current Canadian parliament asserted the power to govern the United States on such matters as . . . race discrimination, criminal procedure, and religious freedom. But we have far more in common — demographically, culturally, morally, and in our historical experiences — with Canadians of the 1990s than we do with Americans of the 1780s or 1860s.<sup>231</sup>

If constitutionalism is less about a singular and persisting American people giving priority to its own good decisions over its bad ones and more about one majority of Americans imposing its decisions on a different majority, then the challenge of reconciling it with popular sovereignty reasserts itself.

All of what has been said so far assumes, as a best-case scenario for consent-based theories of constitutionalism, that the constitutional norms being enforced are identical to the norms that were originally blessed with the people’s consent. Contractarian understandings of constitutionalism demand that constitutional interpreters — courts and other political actors — accurately reflect the original understanding of the parties to the constitutional contract, or the original meaning of the constitutional text.<sup>232</sup> If constitutional interpreters are deriving constitutional law from nonoriginalist sources and methods, or if originalist sources and methods do not accurately track consent, then it becomes less clear how popular consent can legitimate constitutional practice.<sup>233</sup> In a system of constitutional law like the United States’s, in which strict originalist interpretation is far from the universal practice, many of the extant constitutional norms will have no consensual pedigree. When a democratically deficient decisionmaker like the Supreme Court imposes constitutional rules and rights upon democratic majorities, the standard way of resolving the apparent tension with popular sovereignty is to imagine that judges are doing nothing more than channeling the original “voice of the people.” The traditional fiction of judicial review is that “when a court strikes down a popular statute or practice as unconstitutional, it may always reply to the re-

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<sup>230</sup> See, e.g., Frank I. Michelman, *Constitutional Authorship by the People*, 74 NOTRE DAME L. REV. 1605, 1620–29 (1999).

<sup>231</sup> Strauss, *supra* note 56, at 880.

<sup>232</sup> See Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 655 (2008).

<sup>233</sup> For attempts to solve this problem, see JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* 178–95 (2001); and Michelman, *supra* note 230.

sulting public outcry: ‘We didn’t do it — you did.’”<sup>234</sup> But once we come to see judges as in some significant sense “making” constitutional law, then judicial review adds another layer of difficulty to consent-based constitutionalism.

Given these problems with consent theory, it is no wonder that constitutional law, like international law, has looked beyond consent for alternative ways of reconciling constitutional constraints with popular sovereignty. The most important innovation in post–New Deal constitutional theory has been the rise (and also, perhaps, the fall) of political process theory.<sup>235</sup> The basic move of process theory is similar to the move of building international law norms into the definition of state sovereignty. It is to recast constitutional law not as contradicting but as facilitating or perfecting popular sovereignty by correcting flaws in the democratic processes through which popular will is expressed. Thus, constitutional prohibitions on disenfranchising minorities or suppressing political speech, even if supported by present political majorities, need not be understood as constraining or contradicting popular sovereignty. To the extent that popular sovereignty, or democracy, is conceived as more complex and substantive than simple majoritarian decisionmaking, any number of constitutional limitations might be understood as sovereignty- or democracy-enhancing. Perhaps true democracy cannot exist without a complete complement of liberal rights and protections for minorities, regardless of what pseudo-democratic majorities may prefer or vote for.<sup>236</sup> Once we go this far, however, it becomes hard to see what is left of any distinctive democratic values related to popular decisionmaking or self-government.<sup>237</sup> The tension between popular sovereignty and constitutionalism has been dissolved simply by doing away with the former.

### C. Public Law

Sovereignty, long understood as the defining feature of the modern state, appears to leave no room for public law constraints. Interna-

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<sup>234</sup> Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 705 (1975); see also *United States v. Butler*, 297 U.S. 1, 62 (1936) (“[T]he judicial branch of the Government has only one duty, — to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.”); THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 134, at 463, 464 (distinguishing judicial “will” from “judgment”).

<sup>235</sup> The canonical statements of process theory are *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); and JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

<sup>236</sup> Cf. RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 1–38 (1996) (defending “the constitutional conception of democracy,” *id.* at 17, that rejects the majoritarian premise).

<sup>237</sup> See Jeremy Waldron, *Judicial Review and the Conditions of Democracy*, 6 J. POL. PHIL. 335 (1998).

tional and constitutional law have come up with a number of similar ways of negotiating or disguising this tension — primarily by relying on expansive or fictitious notions of consent, but also by privileging some exercises of sovereignty over others, or by redefining sovereignty to make it compatible with legal constraints. So long as the Hobbesian ideal of sovereignty remains influential, however, none of these theoretical maneuvers is likely to succeed in fully dispelling doubts about the legitimacy of public law regimes.

Our emphasis on the common predicament of international and constitutional law with respect to sovereignty stands in sharp contrast to a common view in the United States. Many believe that international law poses a distinctive and disturbing threat to sovereignty and democratic self-government, whereas constitutional law is the ultimate embodiment of those very principles. Eloquently expressing such a view, Jed Rubenfeld portrays international law as fundamentally anti-democratic in its aspiration to impose external constraints on democracy and popular sovereignty. As its foil, he presents constitutional law, which he describes as a fundamentally democratic reflection of our own, “self-given” legal and political commitments.<sup>238</sup> Yet Rubenfeld recognizes that international and constitutional law alike “stand against majority rule at any given moment,”<sup>239</sup> “are . . . made outside the ordinary, democratic lawmaking process [and] impose obligations on a country that the nation’s legislature cannot . . . amend or undo,”<sup>240</sup> and operate as “bod[ies] of higher law that check[] the power of ordinary national”<sup>241</sup> governance. The crucial difference, for Rubenfeld and others, seems to be that constitutional law is legitimated by the consent of the American “people” in a way that international law is not.<sup>242</sup>

It is true, of course, that if the legitimacy of a legal system turns on it being the construction of Americans and only Americans, then international law is disqualified at the outset. But we have a hard time seeing why the consent-based arguments put forward by constitutional theorists are more compelling than the very similar consent-based arguments put forward by theorists of international law. The threat to national sovereignty, or the “democracy deficit,” presented by the

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<sup>238</sup> Rubenfeld, *supra* note 3; see also JEREMY A. RABKIN, *LAW WITHOUT NATIONS?: WHY CONSTITUTIONAL GOVERNMENT REQUIRES SOVEREIGN STATES* 18–44 (2005) (presenting international law as a threat to state sovereignty and, synonymously, “constitutional government”).

<sup>239</sup> Rubenfeld, *supra* note 3, at 1993.

<sup>240</sup> *Id.* at 2007.

<sup>241</sup> *Id.* at 2010.

<sup>242</sup> See *id.* at 1975 (contrasting “democratic constitutionalism” and “international constitutionalism”); see also John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 *STAN. L. REV.* 1175 (2007) (describing the democratic deficits of various forms of international law in contrast to domestic law, including constitutional law).

European Union does not strike us as different in kind than the threat or deficit presented by constitutional constraints on national legislative decisionmaking. One might doubt whether the consent of the states that created European regional institutions through treaties is sufficient to legitimate ongoing governance by these institutions; but one might also doubt whether the consent of the American people through the ratification of the U.S. Constitution and its amendments (formal or informal) is sufficient to legitimate constitutional constraints on democratic decisionmaking. As we have discussed, the arguments and counterarguments on both sides are quite similar in form.

In substance, of course, there may be significant differences of degree in the democratic deficiencies created by various international and constitutional arrangements. It is certainly possible that the U.S. system of constitutional law is structured to be reliably more responsive to democratic majorities, or to the right kind of majorities, than international regimes like the European Union. But whether this is in fact the case is not a question that can be answered by democratic theory alone. One would have to delve much deeper into the institutional details of how constitutional norms are created and sustained; the domestic mechanisms of treaty formation, ratification, and compliance; and, ultimately, how closely the substantive norms of constitutional and international law correspond to the policy preferences of national majorities or some other sovereignty-possessing decisionmaking entity. The answers to these questions will surely differ among international rules and rulemaking institutions and among systems of constitutional law. Perhaps a more finely-grained empirical and institutional investigation would, in the end, reveal some gross difference in the democratic pedigrees of international and constitutional law. Looking from the lofty perspective of sovereignty and consent theory, however, what stand out are the near-perfect symmetries.

The striking asymmetry, here again, is between public law regimes like international and constitutional law, on the one hand, and ordinary domestic law on the other. Political sovereignty is a characteristic of states, governments, and peoples, but not of the ordinary persons and entities subject to domestic law. No one would say that tort law or environmental regulation is a threat to the sovereignty of individuals or corporations. Sovereignty has always meant the power to make law for others without any higher-order legal constraint. Private individuals and entities do not make law for others, and they are ubiquitously subject to higher-order legal constraints.

At a deeper level, however, the tension between sovereignty and legal constraint as applied to states tracks a similar tension between individual autonomy and legitimate political authority. For Hobbes, the sovereign state comes into existence when the people collectively transfer their natural rights and autonomous decisionmaking authority to the state in exchange for the benefits of state-provided order and pro-

tection. Before this transfer occurs, in the state of nature, there is no legitimate source of political or legal authority above the individual — persons are essentially in the position of sovereign states.<sup>243</sup> From the perspective of the individual, the legal and political authority of the state demands justification in just the same way that the authority of international and constitutional law demands justification from the perspective of the state. And the justification provided by Hobbes and other social contract theorists for the authority of the state over the individual is the same as the standard justification for the authority of international and constitutional law: namely, consent.<sup>244</sup>

The consent theory of international law thus emerged from the same social contractarian perspective that was invented to justify how free and independent (that is, sovereign) individuals could be subject to state authority and bound by ordinary domestic law.<sup>245</sup> It should not be surprising, therefore, that the problems with consent-based justifications for public law at the level of sovereign states, governments, and peoples are all anticipated by the well-known problems with consent theory at the level of individual political obligation. A voluminous literature in political philosophy addresses the difficulties of justifying the binding moral force of consent, moving from actual to tacit or hypothetical consent, and the like.<sup>246</sup>

We should recognize, then, that the need to justify legal constraints on autonomous decisionmaking (by states, governments, and individuals), the prevalence of justifications based on consent, and a predictable set of difficulties with those justifications are, at some level of abstraction, common to international, constitutional, and ordinary domestic law. At the same time, however, we should also recognize the very different levels of urgency with which these justificatory demands and responses are pressed in public and ordinary domestic law. Whatever the philosophical difficulties of justifying state coercion in the ordinary domestic legal system, in practice the authority of the domestic

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<sup>243</sup> See JOHN STUART MILL, ON LIBERTY 81 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859) (“Over himself, over his own body and mind, the individual is sovereign.”).

<sup>244</sup> See HART, *supra* note 28, at 224 (drawing the connection between consent-based theories of international law and social contract theories of individual political obligation). For Hobbes, of course, consent is hypothetical rather than actual.

<sup>245</sup> See generally RICHARD TUCK, THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT (1999).

<sup>246</sup> Useful surveys include Leslie Green, *Law and Obligations*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 514, 525–28 (Jules Coleman & Scott Shapiro eds., 2002); and Tom Christiano, *Authority*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2004), <http://plato.stanford.edu/entries/authority>. Of course, there are other well-known justifications for political authority over the individual that do not rely on consent. These lines of thought could conceivably be extrapolated to justify the imposition of public law on the state without invoking consent theory.

legal system is nearly uncontested.<sup>247</sup> When it comes to ordinary statutory and common law rules, there is little hand-wringing, within or outside of the legal system, about individualizing consent or otherwise justifying the sacrifice of individual autonomy. The situation in international and constitutional law is quite different. Serious doubts about the legitimacy of coercing states and governments, sounding in sovereignty and democracy, are central to legal and political discourse, and these doubts have significant effects on the internal structure and perceived legitimacy of the international and constitutional legal systems.

Here again, the divide between public law and ordinary domestic law is crucial. The definitive political accomplishment of the sovereign state was to secure a legitimate monopoly over the use of coercive force. Legitimizing that monopoly meant overcoming longstanding objections and doubts about the superiority of collective over individual decisionmaking authority. These objections and doubts have not been overcome, however, with respect to the decisionmaking authority of individual states. The two faces of state sovereignty mark the distinction between ordinary domestic and public law. Internal sovereignty reflects the widely acknowledged legitimacy of domestic legal coercion, even at the expense of individual autonomy. External sovereignty reflects the widely acknowledged *illegitimacy* of the coercion of states through public law. It is this legitimation gap that presents a distinctive challenge for international and constitutional law.

## V. CONCLUSION

The state emerged by the sixteenth century in Europe following a lengthy and haphazard process through which secular rulers consolidated and centralized political power into territorial units. Everywhere that it appeared, the state brought with it an important idea and a novel set of institutions. The idea was sovereignty, the notion that there is an absolute political authority in the territory, and none above or outside it. And the institutions were authoritative centralized mechanisms for identifying, clarifying, and enforcing the law that governed in the territory.<sup>248</sup> In fact, the idea of sovereignty was crucial to

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<sup>247</sup> At least this is the case in consolidated, stable states and governments, of which there are many. Governmental and legal authority are, of course, contested in contexts of revolution or insurgency. And even in stable states during ordinary times, there will always exist fringe groups who contest political and legal authority — tax resisters, utopian secessionists, and the like. These groups are to be distinguished from civil disobedients, who accept the legitimacy of legal rules but violate them as a form of protest in the hope of instigating legal change.

<sup>248</sup> “[T]he Europe in which these states emerged was a mosaic of laws, jurisdictions, and judicial procedures for the settlement of disputes about property and transactions of everyday living,” Michael Oakshott has observed. MICHAEL OAKSHOTT, ON HUMAN CONDUCT 187 (1975).

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the creation of the centralized legal institutions of the state, for it was the concept that explained and legitimized the political authority of these institutions. This concept of a final and absolute authority inside the state also implied the independence of sovereign states from one another. Supreme territorial authority within the state and international independence without are, as F.H. Hinsley has emphasized, “the inward and outward expressions, the obverse and reverse sides, of the same idea.”<sup>249</sup>

Since the sixteenth century, these inward and outward expressions of sovereignty, together with the state’s apparent monopoly on the institutional apparatus for making and enforcing laws, have given rise to serious doubts about the possibility of law outside the state. Can law be brought to bear on the sovereign that is itself the author of law, and if so, how? The answers to these questions are what we today call constitutional and international law. Sharing common origins in the rise of the sovereign state, these dual systems of public law were invented to limit otherwise limitless state power, from the inside and from the outside.

This understanding was central to political theory for centuries, but it has been largely lost.<sup>250</sup> Our ambition has been to reconnect and reconceive international and constitutional law as common solutions to the same basic problem of legally constituting and constraining the state. Systems of public law must confront a set of fundamental difficulties that do not arise in the same way in systems of ordinary domestic law administered *by* states. These difficulties include the proliferation of legal uncertainty that is threatened when a legal system cannot rely upon the legislative and adjudicatory institutions of the state to coordinate understandings of what the law requires; the opportunity for noncompliance that arises when law is not backed by a coercive authority equivalent to the state; and the inevitable tension between sovereignty and legal constraint. We have attempted to show how these difficulties afflict both international and constitutional law and to describe the similar set of resources developed by the two systems to deal with them.

The fulcrum of this analysis is the state and its characteristic set of features. As we have tried to make clear throughout, at some level, *all* forms of law, including ordinary domestic law, must confront the problems of uncertainty, enforcement, and sovereignty. The crucial difference between ordinary domestic law and public law is simply that the

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“The emergence of a state was,” he adds, “the legal integration of the inhabitants of its territory and the transformation, by recognition and destruction, of local law and local courts into the law and courts of a state.” *Id.*

<sup>249</sup> See HINSLEY, *supra* note 10, at 158.

<sup>250</sup> See *supra* note 16 and accompanying text.

state, by definition, has solved these problems for ordinary domestic law but not for public law. The success of any legal system depends on coordinating the shared understanding and behavior of a large number of people. Collective agreement must be forged on what counts as a legal rule and on the legitimacy of imposing such rules on noncomplying individuals. And collective action must be mobilized to enforce these rules in the face of recalcitrance. In one sense, "the state" is simply a shorthand way of expressing that these coordination and collective action problems have been successfully solved. Conversely, where we do not recognize a state, we are acknowledging that these problems have not been solved. But of course the distinction is not all-or-nothing. If solving collective action problems is a matter of degree, then so too might we see the state.

Viewed in this light, international law and constitutional law might be understood as projects of partial state-building. Both types of legal system have gone some distance toward developing the institutional resources to coordinate public understandings of the content and application of law, creating mechanisms for securing compliance, and coalescing agreement on the legitimacy of legal coercion. In some respects both systems have duplicated the traditional institutional means and mechanisms of state-run legal systems; in other respects they have substituted different means and mechanisms that might be seen as functional substitutes. Conceivably, either or both of the systems could develop sufficiently good solutions to the collective action problems associated with uncertainty, enforcement, and sovereignty that there would be no point in distinguishing public from ordinary domestic law at all. Indeed, at that stage, we might no longer recognize constitutional or international regimes as public law governing states but instead see them simply as the ordinary domestic legal systems of a new (super-)state. International and constitutional law remain far from that stage of development. Nonetheless, understanding what unifies international and constitutional law and creates the divide between public and ordinary domestic law helps us to appreciate how that divide might be closed.

This understanding may help us to come to grips with the rapidly changing legal architecture of a globalizing world. As supranational governance institutions like those of the European Union develop legislative, executive, and judicial institutions and consolidate legal and political authority, they begin to resemble the governments of ordinary states, and the treaties that brought them into existence begin to resemble constitutions. The line between a thick, institutionalized treaty arrangement among sovereign states and the emergence of a new federal state becomes vanishingly thin. There is no great mystery to any of this; it is, as many have observed, the same process through which the United States was created out of the post-Revolution confederation of states. More to our point, it is a vivid illustration of the architec-

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tural similarity and interchangeability of international and constitutional law. Persistent debates about whether arrangements like the EU are “really” international legal institutions or are instead burgeoning inchoate constitutions seem to presuppose precisely the deep conceptual and normative distinction between international and constitutional law that we have attempted to dissolve. We might better understand the promise and limitations of global governance by looking beyond these distinctions and instead focusing upon the problems that any successful legal system must solve; the characteristic solutions available to both state-run domestic legal systems and systems of public law that cannot rely upon a consolidated state; and what it means for the latter to transform into the former.

Turning inward from the world to the academy, we also hope our perspective can shed new light on public law as a field of academic inquiry. We have attempted to show how constitutional and international law, proceeding along parallel tracks, have dealt with a common set of practical and theoretical problems. Lawyers and theorists on both sides of the divide have approached these problems with similar analytic tools, and they have converged on a remarkably similar range of solutions. Yet they have done so in nearly complete isolation from one another, with little comparative borrowing or illumination. Our hope is that recognizing the commonalities of their respective enterprises will produce intellectual synergies between international and constitutional theorists along the dimensions we have addressed here, as well as a number of others.

For example, in both international and constitutional law and theory, states, governments, and political institutions are commonly portrayed as self-interested, self-aggrandizing empire-builders, intent on maximizing their absolute or relative power. The assumption that self-interested states, “at a minimum, seek their own preservation and, at a maximum, drive for universal domination” is the central tenet of the classical realist approach to international relations.<sup>251</sup> As it happens, similar assumptions serve as the central organizing principles of structural constitutional law and theory. Discussions of federalism often start from the premise that an imperialistic national government will seek to expand the policy space it controls at the expense of state governments, while equally imperialistic state governments, if afforded sufficient channels of influence, will compete for power and defend their own turf. Similarly, the law and theory of constitutional separation of powers presume that an imperialistic legislative branch of the federal government will seek to aggrandize itself at the expense of the executive, and vice versa.

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<sup>251</sup> KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* 118 (1979).

On the international relations side, these premises about state motivation and behavior have been subject to critical analysis and revision. Neorealist and institutionalist theorists point out that states pursue a broad range of interests other than power maximization and question why states would have any intrinsic interest in aggrandizing themselves and crushing their competitors as opposed to pursuing policy goals that would more obviously further the welfare of their citizens. Institutionalists emphasize that shared policy goals and the possibility of mutual gains from cooperative arrangements among states may create cooperative rather than conflictual political dynamics in the international sphere. At the same time, liberal theorists focus attention on the formation of state "interests" by domestic political actors and institutions, viewing state-level policy goals and decisionmaking not as the self-originating decisions of (personified) states but as the outcome of domestic political processes. These arguments take many different forms and point in a number of different directions, but the common denominator is a dismantling of the simplistic realist vision of states as single-minded maximizers of their own power relative to that of "competitor" states. All of these critiques and methodological reassessments are equally applicable to modeling government behavior in the domestic realm. Yet they have scarcely penetrated the consciousness of constitutional lawyers and theorists, most of whom are barely aware of their crudely realist premises, let alone the possibility of more sophisticated, and perhaps more realistic, alternatives.<sup>252</sup>

Another promising opportunity for intellectual arbitrage relates to the normative frameworks applied by international and constitutional law to assess the rightness of state and government behavior. Both fields commonly apply the principles of personal morality to assess the political behavior of state actors. International lawyers and theorists of international relations often think of state sovereignty as the equivalent of personal autonomy, explaining states' rights to territorial integrity, nonintervention, and self-determination on the analogy to personal liberty and equality.<sup>253</sup> They further argue that standards of just war can be derived from legal and moral rules regarding permissible self-defense and harm to innocents at the personal level;<sup>254</sup> and similarly, that states should pay reparations to the victims of wartime atrocities, human rights violations, or global warming based on principles of corrective justice of the sort that would govern a tort suit be-

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<sup>252</sup> For an effort to articulate and criticize these premises along the lines suggested above, but without any recognition of the parallels with international relations theory, see generally Levinson, *supra* note 140.

<sup>253</sup> See generally TUCK, *supra* note 245; MICHAEL WALZER, *JUST AND UNJUST WARS* (1977).

<sup>254</sup> See generally WALZER, *supra* note 253.

tween two private individuals.<sup>255</sup> All of these approaches to understanding and evaluating the behavior of states in the international sphere have close counterparts in constitutional law and theory. Constitutional law, too, recognizes “rights” and “interests” of states and governments. Many constitutional rules closely track agent-centered principles of personal morality in placing much greater weight on harms government actively inflicts than on harms it merely fails to prevent, and on intentional harms, as opposed to merely predictable or avoidable ones.<sup>256</sup> And the structure of constitutional adjudication is based on the same transactional, corrective justice model of harm-causing as classical common law and personal morality.<sup>257</sup>

Yet there is every reason to doubt that the structure and principles of normative assessment developed in the context of private individuals can be applied in just the same way to state actors and institutions. States and government are not like ordinary, private persons and cannot necessarily be held to the same standards of morality or legality.<sup>258</sup>

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<sup>255</sup> The Alien Tort Statute and litigation under it exemplify this approach for human rights violations and related war crimes. See *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (describing this litigation); Beth Stephens, *Taking Pride in International Human Rights Litigation*, 2 CHI. J. INT’L L. 485 (2001) (defending this litigation). In the environmental context, see Matthew D. Adler, *Corrective Justice and Liability for Global Warming*, 155 U. PA. L. REV. 1859, 1867 (2007).

<sup>256</sup> For instance, government is generally immune from constitutional liability for failing to prohibit race discrimination or censorship of speech by private businesses, and government’s failure to prevent the destruction of homes in New Orleans by Hurricane Katrina does not count as a constitutional taking requiring just compensation. Even when government does take action, its constitutional responsibility is usually limited to cases in which the harm it causes was in some sense “intentional.” Government policies that are not aimed at race or speech or religion are generally immune from constitutional challenge, even where these policies have obvious and severe discriminatory effects.

<sup>257</sup> See Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311 (2002).

<sup>258</sup> Consider the widely acknowledged principle of liberal political morality that government must regard its citizens impartially and treat them all with equal concern and respect. Ronald Dworkin refers to this principle as the “special and indispensable virtue of sovereigns.” RONALD DWORKIN, *SOVEREIGN VIRTUE* 6 (2000). The virtue is “special” precisely because most people would *not* insist that private individuals treat everyone with equal concern; we generally think that people are permitted to display greater concern for their own lives and the lives of people close to them than for the lives of distant strangers. In fact, there is good reason to think that questions of political justice ought to be approached across the board quite differently from questions of personal morality and legality. John Rawls famously begins *A Theory of Justice* by identifying justice as the distinctive “first virtue” of “social institutions” like the state. JOHN RAWLS, *A THEORY OF JUSTICE* 3 (1971). Principles of justice, in Rawls’s view, apply to the “basic structure” of society, comprising “the political constitution, the legally recognized forms of property, and the organization of the economy, and the nature of the family.” JOHN RAWLS, *POLITICAL LIBERALISM* 258 (1993). Principles of justice do not, however, apply to “individuals and their actions in particular circumstances.” RAWLS, *A THEORY OF JUSTICE*, *supra*, at 54. Rawls thus proposes an “institutional division of labor” between government and private individuals, in which government is responsible for maintaining the background conditions of systemic social justice, while individuals in their day-to-day lives are subject to a different set of more localized

As it happens, there is a long tradition in international law theory — dating back to Grotius, and clearly expressed by Christian Wolff and Emmerich de Vattel — of self-consciousness and skepticism about analogizing states to persons for purposes of moral analysis. Drawing on this tradition, some international relations theorists have questioned whether states' rights to self-determination and noninterference can usefully be understood on the model of personal autonomy and liberty, especially in situations where the autonomy and liberty of the real-life persons living in states would be improved by humanitarian intervention. As Charles Beitz puts it, "States are not sources of ends in the same sense as are persons. Instead, states are systems of shared practices and institutions within which communities of persons establish and advance their ends."<sup>259</sup> Or as one of us stressed in earlier work, states unlike persons "do not have projects and life plans; nor do states experience welfare or utility. States are vehicles through which citizens pursue their goals . . ."<sup>260</sup> Constitutional theorists would do well to join their international counterparts in questioning the extent to which personal morality is a good fit for the state, and in developing more suitable normative frameworks.<sup>261</sup>

In these and no doubt other respects, the divide between international and constitutional thought has been a barrier to progress. We have tried to show that the barrier is an unnecessary one. Indeed, it is a relatively recent creation, cutting off a long tradition of seeing international and constitutional law as two sides of the same coin: addressing the "external" and "internal" manifestations of the sovereign state. This Article is the beginning of an attempt to recover and renew that approach to political and legal thought, which, we believe, still has much to teach us about how law works.

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moral constraints. RAWLS, *POLITICAL LIBERALISM*, *supra*, at 268; *see also* THOMAS NAGEL, *EQUALITY AND PARTIALITY* 53–62 (1991).

<sup>259</sup> CHARLES R. BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* 180 (1979).

<sup>260</sup> GOLDSMITH & POSNER, *supra* note 111, at 193 (arguing against the idea that states have a personified moral obligation to obey international law).

<sup>261</sup> *See* Daryl J. Levinson, *Personified Government and Constitutional Morality* (Apr. 4, 2009) (unpublished manuscript, on file with the Harvard Law School Library).