

TINKERING WITH TORTURE* IN THE AFTERMATH
OF *HAMDAN*: TESTING THE RELATIONSHIP
BETWEEN INTERNATIONALISM
AND CONSTITUTIONALISM

CATHERINE POWELL**

I.	INTRODUCTION	724
II.	INTERNATIONALISM AND CONSTITUTIONALISM: CLASH OR CONVERGENCE?	732
	A. <i>Tensions Inherent in the Relationship Between Internationalism and Constitutionalism</i>	733
	B. <i>Tinkering With Torture</i>	740
III.	COMPETING CONCEPTIONS OF DEMOCRACY AND INTERNATIONAL LAW	744
	A. <i>Majoritarian Conception of Democracy</i>	745
	B. <i>Constitutional Conception of Democracy</i>	747

* The title draws on Justice Blackmun’s dissent from the denial of certiorari in *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting) (“From this day forward, I no longer shall tinker with the machinery of death.”).

** Associate Professor of Law, Fordham Law School. Former Founding Executive Director, Columbia Law School, Human Rights Institute. J.D., Yale University; M.P.A., Princeton University; B.A., Yale University. I benefited greatly from presenting drafts of this Article at the AALS-ASIL Mid-Year Conference (works-in-progress workshop), Fordham Faculty Workshop, Fordham Colloquium on International Law and International Relations Scholarship, Michigan Law School International Legal Theory Workshop, Stanford Constitutional Litigation Workshop, Temple Law School International Legal Theory Workshop, Vanderbilt International Law Theory Workshop, and Yale Law School Junior International Law Scholars Workshop. I am also grateful to Richard Banks, Michael Barr, Joshua Cohen, Grainne de Burca, Jeffrey Dunoff, Martin Flaherty, Richard Ford, Abner Greene, Jennifer Gordon, Larry Helfer, Tracy Higgins, Robert Howse, Mary Ellen O’Donnell, Mark Quarterman, Jaya Ramji-Nogales, Steven Ratner, Daniel Richmond, Peter Schuck, Peter Spiro, Kathleen Sullivan, and Benjamin Zipursky for their support and invaluable comments on earlier drafts of this Article. Thanks are also due to Tahira Clarke, Rachel Fink, Takiyah Leerdham, Michelle Magbalon, Marco Martemucci, Terence Reynolds, and Fordham Law School’s international law librarian, Victor Essien, for superb research assistance, as well as Amelie Baudot, James Hallock, and Bryant Walker Smith of the *New York University Journal of International Law and Politics* for their helpful editorial assistance.

IV.	CRITICISM OF DOMESTIC INCORPORATION OF INTERNATIONAL LAW: TWO DIFFERENT VIEWS OF THE ROLE OF DEMOCRATIC DELIBERATION	754
A.	<i>Criticism of Resort to International Law in Constitutional Interpretation</i>	755
1.	<i>The Formation of International Law</i>	756
2.	<i>Legislative and Executive Branch Incorporation of International Law</i>	760
3.	<i>Direct Judicial Incorporation of International Law</i>	763
B.	<i>Criticism of Resort to International Law to Constrain Presidential Power in the War on Terror</i>	767
1.	<i>Congressional Efforts that Deepen the Democratic Basis of International Law</i>	769
2.	<i>Executive Branch Efforts to Undermine Anti-Torture Protections: Tools for Tinkering</i>	771
3.	<i>The Judicial Response: Hamdan as a Democracy-(Rein)forcing Decision</i>	785
V.	REINFORCING DEMOCRACY IN THE AFTERMATH OF HAMDAN: TORTURE AND THE MILITARY COMMISSIONS ACT	791
A.	<i>Torture and the Majoritarian Conception of Democracy</i>	792
1.	<i>Torture and the Military Commissions Act</i>	792
2.	<i>Torture and Public Opinion</i>	796
B.	<i>Torture and the Constitutional Conception of Democracy</i>	798
VI.	CONCLUSION	799

I. INTRODUCTION

Bridging international and constitutional law scholarship, I examine the question of torture in light of democratic values. The focus in this Article is on the international prohibition on torture as this norm was addressed through the political process in the aftermath of *Hamdan v. Rumsfeld*.¹ Responding to charges that the international torture prohibition—and international law generally—poses irreconcilable challenges

1. 126 S. Ct. 2749 (2006) (holding that the President lacked authority to establish the military commission to try Hamdan and that the commission violated the Uniform Code of Military Justice and the Geneva Conventions).

for democracy and our constitutional framework, I contend that by promoting respect for fundamental rights and for minorities and outsiders, international law actually facilitates a broad conception of democracy and constitutionalism. I take on the question of torture within the context of the broader debate over the relationship between internationalism and constitutionalism. In doing so, I demonstrate how we can understand varying positions taken in this debate as reflecting different perspectives on the meaning of democracy.

Since the September 11, 2001 terrorist attacks, critics of domestic incorporation of international law have made two central arguments about the role of the democratic process in negotiating the relationship between international law and our Constitution. In one arena—federal courts—these critics have argued for *greater* democratic process before courts can be permitted to resort to international and comparative law in interpreting the Constitution. They argue that without greater democratic deliberation, reliance on international law—even binding ratified treaties—is not true to our constitutional ideals of democratic accountability, self-governance, and popular sovereignty.

In another arena—the executive branch—some of the same critics have argued for *less* democratic process in the treatment of international law in President George W. Bush’s “War on Terror.”² A weak version of this claim is that the President should have maximum flexibility in interpreting legislation implementing treaty obligations requiring humane treatment of people detained in the War on Terror.³ The stronger

2. I use the phrase “War on Terror” because it is the rubric under which the Bush Administration’s policies in the aftermath of the September 11 terrorist attacks are commonly known. However, since the term implies indefinite elasticity—for example, in its geographic and temporal scope—I use the term advisedly. For a cogent analysis of what the War on Terror is (or should be), see PHILIP BOBBITT, *TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY* (forthcoming 2008) (containing a Part entitled “Does the Idea of a War on Terror Make Sense?”).

3. For a helpful collection of essays representing different perspectives on presidential power and the U.S. War on Terror, see Symposium, *War, Terrorism and Torture: Limits on Presidential Power in the 21st Century*, 81 IND. L.J. 1139 (2006), and also see Daphne Barak-Erez, *Terrorism Law Between the Executive Model and the Legislative Model* 11 (unpublished manuscript, on file with author). Compare Martin S. Flaherty, *More Real than Apparent: Separation of Powers, the Rule of Law, and Comparative Executive “Creativity” in*

version of this claim is that application of international law constraints—even treaties that are not only ratified but implemented into legislation by *both* houses of Congress—would unconstitutionally encroach on the President’s power to wage war as Commander-in-Chief.⁴ With the revelation of abusive treatment of detainees at the Abu Ghraib detention facility in Iraq, as well as allegations of abuse at facilities in Afghanistan, Guantanamo, and at secret prisons elsewhere, these calls for executive unilateralism warrant close examination.

Critics’ arguments in these two arenas turn on fundamental separation of powers questions raised by domestic incorporation of international law. In a sense, these two positions relate to two separate issues and so are not inherently contradictory. In the War on Terror context, the issue is the scope of the Commander-in-Chief power. In the constitutional interpretation context, the issue is what constitutes law under the Constitution. However, as I will demonstrate, the two claims turn on different conceptions about the requirements and meaning of democracy.

Thus, in analyzing these claims, I ask why critics are quick to challenge international law as lacking a democratic foundation even as they are eager to dismiss the democratic legitimacy bestowed by Congressional sharing of war power. Viewed side by side, the two positions regarding the role of the democratic process are in tension. If, at the end of the day, the President can simply ignore international and even domestic law when he deems it necessary, the democracy question is

Hamdan v. Rumsfeld, in *CATO SUPREME COURT REVIEW* 51, 51 (Mark K. Moller ed., 2005–2006), available at <http://www.cato.org/pubs/scr/2006/flaherty.pdf> [hereinafter Flaherty, *More Real than Apparent*] (agreeing with the Hamdan Court’s embrace of separation of powers limits on the President) with John Yoo, *An Imperial Judiciary at War: Hamdan v. Rumsfeld*, in *id.*, at 83, 83, available at <http://www.cato.org/pubs/scr/2006/yoo.pdf> (asserting that “the *Hamdan* decision ignores the basic workings of the American separation of powers and will hamper the ability of future presidents to respond to emergencies and war with the forcefulness and vision of a Lincoln or an FDR”).

4. Of course, even without implementing legislation, ratified treaties have a democratic imprimatur insofar as the President has the “power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur[.]” U.S. CONST. art. II, § 2.

beside the point. Is the “democratic deficit” critique⁵ in the context of constitutional interpretation simply opportunistic, given this disregard for democratic participation in the context of presidential power?

The critics justify the distinction between these two democracy-related positions by claiming that “war is different” and the President’s role in war is unique. War justifies, in fact demands, less democratic deliberation, they say. We need a single decisionmaker—the President—to act with dispatch and secrecy in such a circumstance. Moreover, they argue, the War on Terror is like no other war. As such, one former senior Bush Administration official derided the Geneva Conventions⁶—the body of international humanitarian law that emerged in 1949 in the aftermath of World War II—as “quaint” and “obsolete” in the face of this “new kind of war.”⁷

5. The “democratic deficit” criticism has been transplanted to the U.S. context from the European Union. For a discussion of the democratic deficit criticism in the European context, see for example Andrew Moravcsik, *In Defense of the “Democratic Deficit”: Reassessing Legitimacy in the European Union*, 40 J. COMMON MKT. STUD. 603 (2002); Thomas W. Pogge, *Creating Supranational Institutions Democratically: Reflections on the European Union’s “Democratic Deficit,”* 5 J. POL. PHIL. 163 (1997); J.H.H. WEILER, *THE CONSTITUTION OF EUROPE: “DO THE NEW CLOTHES HAVE AN EMPEROR?” AND OTHER ESSAYS ON EUROPEAN INTEGRATION* 77-86, 349-56 (1999). For a discussion of how this criticism has been transposed into the U.S. context, see for example Martin S. Flaherty, *Judicial Globalization in the Service of Self-Government*, 20 ETHICS & INT’L AFF. 477, 478 (2006) [hereinafter Flaherty, *Judicial Globalization*].

6. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]. For convenience, text references to the Geneva Convention refer to the Third Geneva Convention unless otherwise specified. Note also that Common Articles are present in all four Geneva Conventions. Again for convenience, I cite them to the Third Convention.

7. Memorandum from Alberto R. Gonzales, Counsel to the President, to President George W. Bush, on Decision Regarding Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban (Jan. 25, 2002), *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU

Hamdan v. Rumsfeld firmly rejects the President's broad assertion of executive unilateralism in the context of military commissions used to try suspects in the War on Terror. As Jack Balkin notes, *Hamdan* is a "democracy-forcing" decision.⁸ In rejecting the expansive executive unilateralism advanced by the Bush Administration, the Court called on the President to consult with Congress in revising the rules concerning detainees. At the same time, the decision affirms the relevance and applicability of international law already implemented into U.S. law and the use of the democratic process for negotiating the relationship between international and domestic law.

Because *Hamdan* affirms the value of democratic deliberation, particularly in cases where the President tries unilaterally to undo Congress's work, this Article takes seriously the democratic deliberation objection that critics of domestic incorporation of international law selectively make. In taking this critique seriously and applying it more consistently to the War on Terror, the Article demands that these critics likewise apply a more consistent conception of democracy. Essentially, then,

GHRAIB 118, 119 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter THE TORTURE PAPERS] ("In my judgment, this new paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions requiring that captured enemy be afforded such things as commissary privileges, scrip (i.e. advances of monthly pay), athletic uniforms, and scientific instruments.").

8. Posting of Jack Balkin, *Hamdan as a Democracy-Forcing Decision*, to Balkinization, <http://balkin.blogspot.com/2006/06/hamdan-as-democracy-forcing-decision.html> (June 29, 2006); see also Neal Katyal, *Equality in the War on Terror*, 59 STAN. L. REV. 1365, 1383 (2007) (describing the *Hamdan* Court's decision to in effect "remand" the decision to Congress as "deliberation forcing"); Mark Tushnet, *The Political Constitution of Emergency Powers: Some Lessons from Hamdan*, 91 MINN. L. REV. 1451 (2007). Tushnet notes that:

Hamdan's rhetoric reinforced its assertion of the centrality of the courts in the constitutional order. And yet, *Hamdan* may be more important for what it says about the *political* aspects of the constitutional order [A]fter the decision, unlike the situation before it, the President had to obtain congressional authorization for the creation of military tribunals that departed from the requirements of the Uniform Code of Military Justice and, perhaps, Common Article 3.

Id. at 1451, 1453.

the Article makes a “jujutsu move” on the critics.⁹ It responds to their challenge on its own terms, analyzing the question of torture in light of democratic values and revealing how different positions on the question of torture itself also result from different understandings of the requirements of democracy.

Following this Introduction, Part II introduces the broader challenge for the Article, namely the presumed tensions inherent in the relationship between internationalism and constitutionalism, and places this relationship in the context of the torture debate. In fact, as the Article later demonstrates, the prohibition against torture has been thoroughly “domesticated,”¹⁰ both through the democratic process via its incorporation into legislation¹¹ and through judicial interpretation, for example in the context of Alien Tort Claims Act litigation.¹² These steps taken—whether legislatively or judicially—to domesticate the torture prohibition represent important “democracy moments.”¹³

In analyzing how different conceptions of democracy lead to different positions on the question of torture, Part III calls

9. The Japanese martial art form, jujutsu, developed around the principle of using an attacker’s energy against him rather than directly opposing it. I would like to thank Kathleen Sullivan for this analogy.

10. I borrow the term “domesticated” from John McGinnis and Ilya Somin, who distinguish between “raw international law,” which “has not been endorsed by the domestic political process,” and “domesticated international law,” which has been “expressly made law through the legislative process” John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 *STAN. L. REV.* 1175, 1177 (2007). However, for reasons discussed in Part IV.A.3, I disagree with their criticism of so-called “raw international law.”

11. *See, e.g.*, Federal Torture Statute, 18 U.S.C. § 2340 (2006); War Crimes Act, 18 U.S.C. § 2441 (2006).

12. *See* *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980).

13. This claim draws inspiration from Bruce Ackerman’s notion of “constitutional moments.” *See generally* 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 *YALE L.J.* 453, 489 (1989). Expressed as it is in positive law—at both the international and domestic levels—the prohibition against torture satisfies what Gerald Neuman has called “dual positivization.” Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 *STAN. L. REV.* 1863, 1864 (2003); *see also* Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 *COLUM. L. REV.* 1681, 1747 (2005) (“Without this convergence [of international and domestic enactment] . . . the provisions of international law would be even more like the meaningless verbal flatulence their denigrators often accuse them of being.”).

for a broader conception of democracy than that espoused by critics of international law. In fact, a strictly majoritarian conception of democracy¹⁴ might justify the President, as the people's primary elected representative, holding the power to unilaterally disregard international restrictions in the course of the War on Terror. However, a more robust vision of democracy—that is, a *constitutional* conception of democracy¹⁵—recognizes that courts, court access, and judicial oversight perform important democratic functions in the interpretation of international law by providing an avenue for those underrepresented in the electoral political process. Recent efforts to eliminate the right of habeas corpus and other forms of judicial relief restrict the vital democratic role courts play in offering such individuals a means to vindicate their basic human rights under international as well as domestic law.

In Part IV, I explore in greater detail the two democracy-related claims made by critics of domestic incorporation of international law. These critics embrace the democratic process as the litmus test for legal legitimacy in the context of constitutional interpretation, even as they assault Congress's role in the democratic process as an infringement of presidential powers in the context of the War on Terror. While examining their claims in each area, I explain how we can understand the divergent positions as reflecting different perspectives on the requirements of democracy.

Part V examines whether the political response to *Hamdan*—the Military Commissions Act of 2006¹⁶—comports with the requirements of democracy. Among other things, the Military Commissions Act eliminates habeas access for detainees to challenge torture and other abusive treatment. In failing to recognize the democratic function of the judiciary, I argue that the Military Commissions Act does not meet the requirements of the broader constitutional conception of democracy that this Article supports. By more fully protecting

14. RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 15-20 (1996). As described in greater detail in Part II, Dworkin distinguishes between two different conceptions of democracy: a majoritarian conception and a constitutional conception.

15. *Id.* at 17-19.

16. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. §§ 948a-950w and other sections of titles 10, 18, 28, and 42).

and representing *all* the people, a constitutional conception allowing court access to vindicate fundamental rights may ultimately serve a more fully representative view of democracy, particularly where rights violations target minorities and outsiders.¹⁷

My focus on the relationship between international law and the Constitution is timely since “one of the most pressing questions of contemporary constitutional law is how to think about the relationship between the national constitution and international law.”¹⁸ In resorting to *intradisciplinarity*, that is, analysis across two legal *subdisciplines*,¹⁹ this Article seeks to explore the value and challenges posed by divergence and convergence between international and constitutional law. While the prohibition on torture is a fundamental right in both international and constitutional law, the challenge remains of upholding two separate though overlapping systems—(international) human rights and (national) constitutional rights—for the protection of such fundamental rights.

Since “[b]oth systems assert an ultimate authority to evaluate whether governmental practices comply with fundamental rights, and each system sits potentially in judgment over the other,” it is essential that we find ways to strengthen the effectiveness of mechanisms to filter the harmony and dissonance between human rights and constitutional rights.²⁰ While some observers argue for greater constraints on the relationship between international law and constitutional law,²¹ others desire

17. Cf. Flaherty, *Judicial Globalization*, *supra* note 5, at 490-92; see also CHRISTOPHER L. EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* (2001).

18. Mattias Kumm, *Constitutional Democracy Encounters International Law: Terms of Engagement* 1 (N.Y. Univ. Pub. Law & Legal Theory Working Papers, Working Paper No. 47, 2006), available at <http://lsr.nellco.org/cgi/viewcontent.cgi?article=1046&context=nyu/pllltpw>; see also Alexander Alienikoff, *Thinking Outside the Sovereignty Box: Transnational Law and the U.S. Constitution*, 82 TEX. L. REV. 1989 (2004).

19. See Anupam Chander, *Globalization and Distrust*, 114 YALE L.J. 1193, 1202 n.40 (2005).

20. Neuman, *supra* note 13, at 1863.

21. See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 347-48 (2002) (Scalia, J., dissenting) (ridiculing as “irrelevant . . . the practices of the ‘world community,’ whose notions of justice are (thankfully) not always those of our people”); *Thompson v. Oklahoma*, 487 U.S. 815, 869 n.4 (1988) (Scalia, J., dissenting) (“We must never forget that it is a Constitution for the United States of America that we are expounding.”); see also H.R. Res. 97, 109th

a more interdependent relationship, informed and enhanced by the reality of globalization and the growth of transnational legal communication.²² My project is to develop a third way by considering the value of democratic deliberation in negotiating the tensions inherent in the relationship between internationalism and constitutionalism,²³ while also envisioning an institutional role for courts as facilitating both democratic values and international human rights.

II. INTERNATIONALISM AND CONSTITUTIONALISM: CLASH OR CONVERGENCE?

In this Part, I introduce the broader challenge for the Article, which is the charge that international law poses an irreconcilable obstacle for democracy and for our constitutional framework. The first Section explores the relationship between U.S. commitments to internationalism and constitutionalism and examines the presumed tensions inherent in that relationship. The second Section questions whether recent efforts to tinker with the definition of torture test the relationship between internationalism and constitutionalism. The remainder of the Article contends that different answers to this question turn on different conceptions of democracy.

Cong. (2005) (nonbinding resolution discouraging courts from considering judgments of foreign institutions); S. Res. 92, 109th Cong. (2005) (same).

22. See, e.g., Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000).

23. In this sense, this Article is an extension of my earlier work. See Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245 (2001) [hereinafter Powell, *Dialogic Federalism*]; Catherine Powell, *Lifting the Veil of Ignorance: Culture, Constitutionalism, and Women's Human Rights in Post-September 11 America*, 57 HASTINGS L.J. 331 (2005) [hereinafter Powell, *Lifting the Veil*]. It also seeks to supplement the work other scholars have begun to undertake in exploring the relationship between international and constitutional law. Particularly noteworthy for my purposes is Gerald Neuman's work, which elaborates a third alternative framework by focusing on the "institutional consequences of embodying an ideology in two parallel regimes of positive law" and examines existing "methods employed by international human rights regimes and various [national] constitutional regimes to prevent or reduce dissonance between them." Neuman, *supra* note 13, at 1864.

A. *Tensions Inherent in the Relationship Between Internationalism and Constitutionalism*

Clarifying the content of U.S. commitments to internationalism and constitutionalism is an important starting point for understanding the anxiety driving criticism of domestic incorporation of international law. Both sets of commitments involve claims to special authority as higher law, but they are conceived of in two fundamentally different ways that are in tension with each other. Constitutionalism is based on “the foundational law a particular polity has given itself through a special act of popular lawmaking” as the “inaugurating or foundational act of democratic self-government.”²⁴ On this view, “[i]t is the self-giveness of the Constitution, not its universality, that gives it authority as law.”²⁵

By contrast, internationalism “is based on the idea of universal rights and principles that derive their authority from sources outside of or prior to national democratic processes. These rights and principles constrain all politics, including democratic politics.”²⁶ The universal rights and principles inherent in internationalism emerge not from an act of democratic self-government, but rather as a check and restraint on democracy.²⁷

24. Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 1975 (2004). Rubenfeld fleshes out what he refers to as the U.S. brand of constitutionalism, namely “democratic constitutionalism,” which he further describes as a conception that “regards constitutional law as embodying a particular nation’s fundamental, democratically self-given legal and political commitments.” *Id.* at 1999.

25. *Id.* at 2006.

26. *Id.* at 1999. Rubenfeld actually uses the term “international constitutionalism” to describe this concept. I have adapted his terminology for the purposes of this Article. Describing the distinction between constitutionalism and internationalism in this way is consistent with the spirit of Rubenfeld’s project to distinguish between “democratic constitutionalism” and “international constitutionalism,” in that he is clear that the contradiction between the two forms of constitutionalism “concerns the relationship between international law and the deeper commitments of American constitutionalism.” *Id.* at 1974.

27. Rubenfeld notes that in transcending national boundaries and “applying to all societies alike,” these universal rights and principles “indeed exist to check national governments.” *Id.* at 1975 (insisting that “[i]n this sense, contemporary international law is deeply antidemocratic”). While Rubenfeld acknowledges that the commitments to constitutionalism may also constrain national democratic will, he finds comfort in the fact that “in

While internationalism is sometimes misunderstood as un-American, the United States played a leading role in the creation and development of modern international law and international institutions.²⁸ Admittedly, since its founding, the United States has also had isolationist and unilateralist tendencies.²⁹ In the aftermath of World War II, for example, Europe-

its creation and over time, constitutional law is not antinational, and is emphatically not antidemocratic [for] it aims at democracy over time." *Id.* at 1999. With great care, Rubinfeld describes the ways in which judges in the United States—even when they exercise judicial review to interpret the Constitution in ways that check the democratic decisions of the political branches—are tethered to the political process through the appointment and confirmation process as well as through the possibility of impeachment. *Id.* at 1995-96; see also McGinnis & Somin, *supra* note 10, at 1193 & n.84; STEPHEN L. CARTER, *THE CONFIRMATION MESS* 16-17 (1994) (noting growing public and press attention focused on Supreme Court confirmations).

28. Indeed, the United States was the primary driver behind the establishment of the United Nations system and the development of contemporary treaties and institutional regimes to effectuate those treaties in both public and private international law. See Sarah Cleveland, *Our International Constitution*, 31 *YALE J. INT'L L.* 1, 102 (2006) (describing the United States as the "primary instigator of the UN system and the creation of modern international treaties ranging from human rights and humanitarian law to international intellectual property and international trade"); Chander, *supra* note 19, at 1210, 1227 (noting that "the United States has historically been a major proponent and progenitor of international law norms" and discussing U.S. influence over international economic law); MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001) (describing the history of Universal Declaration of Human Rights with particular focus on Eleanor Roosevelt's role as chair of drafting commission); Annual Message to Congress by President Franklin D. Roosevelt (Jan. 6, 1941), *reprinted in* *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT* 663 (Samuel I. Rosenman ed., 1941) (paving the way for critical concepts in the Universal Declaration of Human Rights); Louis Henkin, *Rights: American and Human*, 79 *COLUM. L. REV.* 405, 415 (1979) (noting the prominence of American constitutionalism in the development of international human rights); NATALIE KAUFMAN, *HUMAN RIGHTS TREATIES AND THE SENATE* 93 (1990) (describing U.S. influence in shaping the drafting of the human rights covenants); CAROL ANDERSON, *EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944-1955*, at 30-57 (2003) (describing the role of U.S. non-governmental organizations, including, in particular, African American and Jewish organizations in securing references to human rights in the UN Charter).

29. Rubinfeld, *supra* note 24, at 1979 (discussing, inter alia, George Washington's desire to avoid "'foreign entanglements' [that] could drag the United States into 'bloody contests' in which the nation had no true inter-

ans were more motivated to embrace internationalism, since the war's horrors (particularly the Holocaust) illustrated the potential dangers of both nationalism and democracy.³⁰ To the extent American leadership in the post-World War II internationalism was motivated by "high-minded" ideals (as opposed to economic self-interest),³¹ it was often based on a conception of international law involving the *export* of American ideals.³² At the same time, the *import* of international law to

est") (citing GEORGE WASHINGTON, WASHINGTON'S FAREWELL ADDRESS 155-56 (Victor Hugo Paltsits ed., 1935) (1796)).

30. *Id.* at 1984-91 (recalling that "Hitler was elected, and Mussolini rose to power through parliamentary processes"); see also HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 306 (1973) (describing broad popular support enjoyed by Hitler); A. JAMES GREGOR, ITALIAN FASCISM AND DEVELOPMENTAL DICTATORSHIP 172-90 (1979) (describing the political victories of Italian Fascist syndicates and popular support for Mussolini in Italy); WILLIAM L. SHIRER, THE RISE AND FALL OF THE THIRD REICH: A HISTORY OF NAZI GERMANY 115-87 (1960) (describing Hitler's rise to chancellorship through constitutional processes).

31. Note that American leadership in the post-World War II internationalism was motivated as much by a desire to expand American wealth and power globally as it was to secure American-style freedom and peace. Rubinfeld, *supra* note 24, at 1987-88. Similarly, for Europeans, beyond exemplifying protection against a repeat of the horrors of World War II, "integration and international law are means of increasing economic efficiency and bringing the [U.S.] hyperpower to heel." *Id.* at 1984.

32. See *id.* at 1974 ("Because the point of the new international law was to Americanize, the United States, from its own perspective, did not really need international law (being already American)."), 1988 ("International law would be American law, made applicable to other nations."). Louis Henkin contends that "the Universal Declaration of Human Rights, and later the International Covenant on Civil and Political Rights, are in their essence American constitutional rights projected around the world." Henkin, *supra* note 28, at 415. However, while Henkin views the idea of human rights as rooted in Western (including American) philosophical thought, he is also firmly committed to the idea that the United States should apply human rights at home. See, e.g., Louis Henkin, *Editorial Comments: U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM J. INT'L L. 341 [hereinafter Henkin, *Editorial Comments*]. By contrast, U.S. government officials have often viewed international law as a means through which to extend (the American conception of) human rights, rule of law, and democracy to the rest of the world, not as a vehicle for imposing international standards on the United States. Note, for example, that while the State Department's Annual Country Reports on Human Rights document human rights abuses that occur in countries around the world, it does not include human rights abuses that occur in the United States. See also Powell, *Lifting the Veil*, *supra* note 23, at 354-55 (documenting how members of the Senate

interpret the Constitution has also been an important part of the American experience since the time of the nation's founding.³³

The monism-dualism dichotomy in international legal theory tends to view the relationship between international and constitutional law in the context of this import-export paradigm. The monist view of international law sees it as a kind of finalized external authority imported to trump national law, regardless of democratic deliberation. By contrast, the dualist perspective views the import of international law as "a corpus of foreign law which must be filtered first through the prism of national constitutional law,"³⁴ which typically requires some form of democratic deliberation before it gains real authority. Moving beyond the rigid monism-dualism dichotomy, this Article adopts the perspective that international and domestic law are neither imported nor exported to trump one another, but rather both are co-constitutive of the other³⁵ in ways that rely

Foreign Relations Committee considered the possibility of U.S. ratification of the Convention on the Elimination of All Forms of Discrimination Against Women as a way to secure women's rights overseas—and primarily in the Arab world—not in the United States).

33. See, e.g., Cleveland, *supra* note 28; Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998) [hereinafter Koh, *International Law*].

34. See Grainne de Burca & Oliver Gerstenberg, *The Denationalization of Constitutional Law*, 47 HARV. INT'L L.J. 243, 244 (2006) (noting that according to the monist-dualist dichotomy, "international law is either an authoritative external body of law which directly penetrates the national legal order, or a corpus of foreign law which must be filtered first through the prism of national constitutional law").

35. Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487, 490 (2005) (explaining that "the relationship between international and domestic legal norms is more properly conceived of as a co-constitutive, or synergistic, relationship in which domestic courts worldwide are becoming active participants in the dynamic process of developing international law"). Waters points out:

Law and society scholars, writing on issues arising under U.S. law, have used the term "co-constitutive" to describe the mutually reinforcing relationship between law and society (or law and culture). Viewed through a co-constitutive lens, "the relation between law and society is not unidirectional; rather, legal life and everyday social life are mutually conditioning and constraining." Thus, "co-constitutive theory explores both how law shapes society and how society shapes law. . . . Translating this concept into the interna-

on various forms of democratic deliberation. International law shapes domestic law and culture, and vice versa, in a mutually reinforcing relationship. The dialogue that occurs between these two bodies of law is mediated through executive, legislative, and judicial branches of government consistent with the constitutional conception of democracy I advance in this Article. In the context of this mutually reinforcing relationship, international law norms trickle down, move side-to-side, and trickle up.³⁶

tional context, I use the term “co-constitutive” to describe the mutually reinforcing relations between international legal norms and domestic culture and societal norms.

Id. at 490, 502 (internal citations omitted).

36. First, “international law norms ‘trickle down’ and become incorporated into domestic legal systems” which, in the United States, involve democratic “mechanisms of ‘vertical domestication.’” Harold Hongju Koh, *The 1998 Franckel Lecture: Bringing International Law Home*, 35 Hous. L. Rev. 623, 626-27 (offering a transnational legal process theory account of this “vertical story” through which international norms are internalized). Second, international law norms move side-to-side at a peer-to-peer or state-to-state level, which has the potential to “reinvigorate democracy . . . by opening areas of domestic rulemaking to a wider range of information, experience, and argument,” resulting in new forms of governance that have “a potentially democratizing destabilization effect on domestic politics.” Joshua Cohen & Charles F. Sabel, *Global Democracy*, 37 N.Y.U. J. INT’L L. & POL. 763, 766, 784-85 (2005). Cohen and Sabel elaborate on the “horizontal story” of transnational lawmaking by discussing the basic architecture of new forms of accountability and deliberation that allow for peer review of international and comparative law norms:

The requirement that each national administration justify its choice of rules publicly, in light of comparable choices by the others, allows traditional political actors, new ones emerging from civil society, and coalitions among these to contest official proposals against the backdrop of much richer information about the range of arguably feasible choices and better understanding of the argument about their merits than traditionally available in domestic debate.

Id. at 784; see also Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016 (2004) (describing the destabilizing effect of public law litigation, which I see as analogous to the destabilizing effects of international law on domestic law); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 626 (2004) [hereinafter Goodman & Jinks, *How to Influence States*] (noting how a state’s identification with a reference or peer group of states “generates varying degrees of cognitive and social pressures—real or imagined—to conform” to international law). Third and finally, international law norms trickle up. See, e.g., Janet Koven

Because international law is “incomplete,” it is interpretatively open and invites domestic actors to be involved in the process of its creation.³⁷ In the U.S. context, this means that norms developed democratically at the domestic level play a gap-filling function and have the potential to inform international law (and visa versa) through a continually iterative process.

International legal norms—and especially human rights norms—are frequently open to interpretation, and national actors are part of the interpretative community that gives meaning to them. Even the prohibition on torture—once thought to enjoy widespread consensus—is back on the agenda in the United States: not the question of torture’s legality under international law, since even the Bush Administration agrees it is illegal, but rather the question of what constitutes torture. Take, for example, Vice-President Dick Cheney’s claim when asked about waterboarding detainees that “a

Levit, *Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT’L L. 125 (2005); Janet Koven Levit, *Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law*, 32 YALE J. INT’L L. 393 (2007).

37. I would like to thank my colleague, Grainne de Burca, for bringing this point to my attention. Cass Sunstein raises an analogous point in the context of constitutional law in his concept of “incompletely theorized agreements.” Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995). Sunstein claims that “[p]articipants in legal controversies try to produce incompletely theorized agreements on particular outcomes When they disagree on an [abstract principle], they move to a level of greater particularity.” *Id.* at 1735-36. In a sense, international lawmaking works in reverse by producing incompletely theorized agreements on abstract principle when negotiators disagree on particular outcomes. *Cf.* Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992) (discussing the distinction between broad standards and precise rules as a spectrum rather than a sharp dichotomy). Indeed, international relations theorists have their own version of “incomplete contracting,” which they use to describe what states do when they make particular treaties and then delegate power to “complete” the agreement to agents (i.e. international tribunals and courts). *See, e.g.*, Karen J. Alter, *Delegation to International Courts and the Limits of Recontracting Political Power*, in *DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS* 312 (Darrin G. Hawkins et al. eds., 2006); Alec Stone Sweet & Thomas L. Brunell, *Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community*, 92 AM. POL. SCI. REV. 63. 63-81 (1998).

little dunking in water” is not torture.³⁸ The torture debate both shows that international norms should never be taken for granted and illustrates the continuous process of interpreting these norms in which national actors—courts, political actors, nongovernmental organizations, etc.—have a potential role to play.

While hardly new, the U.S. Supreme Court’s more recent resort to international and comparative law in a number of high-profile, controversial cases—involving the death penalty, affirmative action, and the rights of gays and lesbians³⁹—has triggered a tidal wave of complaints about the lack of democratic legitimacy inherent in using international law to interpret the Constitution.⁴⁰ However, although critics call for greater democratic process before courts can rely on international and comparative law in interpreting the Constitution,

38. When asked about waterboarding, Vice President Cheney said: “[T]hat’s been a very important tool that we’ve had to be able to [use to] secure the nation. . . . It’s a no-brainer for me. . . .” Interview by Scott Hennen with Vice President Richard Cheney, in Washington, D.C. (Oct. 24, 2006), available at <http://www.whitehouse.gov/news/releases/2006/10/20061024-7.html>. More recently, President Bush’s Attorney General-designate Michael B. Mukasey hedged in responding to a question during his confirmation hearings concerning whether he considered waterboarding constitutional, saying: “I don’t know what is involved in the technique. . . . If it amounts to torture, it is not constitutional.” Philip Shenon, *Senators Clash With Nominee About Torture*, N.Y. TIMES, Oct. 19, 2007, at A1 (emphasis added).

39. See, e.g., *Atkins v. Virginia*, 536 U.S. 304 (2002) (striking down executions of people with mental disabilities); *Roper v. Simmons*, 125 S.Ct. 1183 (2005) (striking down executions of juveniles); *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down anti-sodomy law); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (striking down the University of Michigan’s race-conscious freshman admissions policy); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding University of Michigan Law School’s race-conscious admissions program).

40. For discussion of the fact that the United States has a long history of resorting to international law in constitutional interpretation, see generally Cleveland, *supra* note 28. Note that while recent criticism has focused on both international and comparative law, my Article primarily examines the debate concerning the resort to international law—not the debate concerning citation of comparative practices of foreign states. While the use of comparative or foreign law in constitutional analysis raises some of the same concerns implicated by resort to international law, citation to the comparative practices of individual states raises additional complexities, such as the risk of misapplying “culturally contingent foreign practice and legitimacy concerns arising from selective and anecdotal use.” Cleveland, *supra* note 28, at 11 (noting the importance of maintaining the distinction).

many of the same critics have argued for *less* democratic process in the use (or rejection) of international law to regulate treatment of detainees captured in President Bush's War on Terror.

B. *Tinkering With Torture*

In recent debates about the validity of using coercion in the interrogation of detained terrorism suspects, the President has not publicly rejected the international prohibition on torture. On the contrary, President Bush has proclaimed that his Administration does not tolerate torture.⁴¹ At the same time, the Administration has deployed an array of structural arguments to claim that the President's has authority as Commander-in-Chief to determine the scope of domestic incorporation of international law. This supposed authority has in turn been employed to justify the use of what have euphemistically been called "enhanced interrogation techniques" to extract intelligence.⁴² Until challenged, the Administration has

41. For example, in June 2004, President Bush said:

Today . . . the United States reaffirms its commitment to the worldwide elimination of torture. . . . Freedom from torture is an inalienable human right, and we are committed to building a world where human rights are respected and protected by the rule of law. To help fulfill this commitment, the United States has joined 135 other nations in ratifying the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. America stands against and will not tolerate torture. We will investigate and prosecute all acts of torture and undertake to prevent other cruel and unusual punishment in all territory under our jurisdiction. American personnel are required to comply with *all* U.S. laws, including the United States Constitution, Federal statutes, including statutes prohibiting torture *and our treaty obligations* with respect to the treatment of all detainees.

President George W. Bush, Statement on the U.N. International Day in Support of Victims of Torture (June 26, 2004), *available at* <http://whitehouse.gov/news/releases/2004/06/20040626-19.html> (emphasis added).

42. These techniques have reportedly included methods such as waterboarding, sleep and sensory deprivation, temperature and light and dietary manipulation, and stress positions. Putting to one side the legality of using these interrogation techniques, their efficacy in gathering reliable intelligence has been challenged. For discussion of the ineffectiveness of torture, see for example Mary Ellen O'Connell, *Affirming the Ban on Harsh Interrogation*, 66 OHIO St. L.J. 1231, 1259-64 (2005) (quoting experienced interrogators). For thoughtful philosophical and jurisprudential critiques of the use of torture and ticking bomb scenarios to justify the use of torture, see

tended to authorize torture quietly—a practice that hints at its illegality.⁴³

However, in other countries, the use of moderate to harsh physical interrogation techniques on suspected terrorists has been deemed illegal as torture, or something akin to torture.⁴⁴ In fact, the United States itself prosecuted the use of water torture on U.S. soldiers in trials brought against Japanese soldiers following World War II through U.S. military commissions and the Tokyo War Crimes Tribunal.⁴⁵ How, then, do we make

David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425 (2005); Waldron, *supra* note 13.

43. The public has primarily learned about interrogation techniques that are tantamount to torture through leaks to the press or “the marvel of digital technology [which has] allowed Americans to see what their soldiers were doing to prisoners in their name,” leading Mark Danner to declare that “[w]e are all torturers now.” Mark Danner, *We are All Torturers Now*, N.Y. TIMES, Jan. 6, 2005, at A27. Torture has also been reportedly outsourced to third countries to which the United States “renders” terrorism suspects or has occurred in secret Central Bureau of Intelligence (CIA) prisons beyond the reach of monitors from the International Committee of the Red Cross. See, e.g., Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333 (2007).

44. For a comparative perspective, see for example HCJ 5100/94 Public Committee Against Torture v. Israel [1999] IsrSC 46(2) (prohibiting in a landmark decision by the Israeli Supreme Court moderate physical interrogation methods by the Israeli General Security Services, though leaving the door open to the defense of necessity); Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) (1978) (finding that when used in combination, coercive interrogation techniques—such as holding a detainee in a cold cell, depriving him of sleep, hooding him, and playing loud music in his cell—fell short of torture, but constituted cruel, inhuman or degrading treatment).

45. Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 COLUM. J. TRANSNAT'L L. 468 (2007). Note that the Tokyo War Crimes Tribunal (also known as the International Military Tribunal for the Far East) applied the same general rules and procedures as the better-known Nuremberg Trial. In the World War II context, the International Military Tribunal for the Far East described the “water treatment” as follows:

The so-called “water treatment” was commonly applied. The victim was bound or otherwise secured in a prone position; and water was forced through his mouth and nostrils into his lungs and stomach until he lost consciousness. Pressure was then applied, sometimes by jumping upon his abdomen to force the water out. The usual practice was to revive the victim and successively repeat the process.

The Judgment of the International Military Tribunal for the Far East 1946 (1948), at 1059, available at <http://www.ibiblio.org/hyperwar/PTO/IMTFE/IMTFE-8.html> (last visited Mar. 8, 2008); see also United States v. Chinsaku Yuki, *Manila* (1946), NARA NND 775011 Record Group 331 Box

sense of the fact that the President has stood up for the substantive principle that torture is wrong while simultaneously stressing his executive powers to interpret international law obligations and using those powers to justify interrogation techniques, such as waterboarding, which amount to torture (and which the United States has in the past prosecuted as torture)?⁴⁶

It is hardly surprising that the White House has tried to characterize what is essentially a substantive disagreement over the content of international law as a disagreement over structure. “Disagreements about the content of [substantive] norms are [often] recast as procedural disagreements about the requirements of derogation regimes.”⁴⁷ In the context of torture, governments rarely directly challenge the substantive content of international prohibitions. They instead deny their acts constitute torture or deflect criticism by making structural or procedural arguments. No government will stand up to say “I torture and I’m proud of it”; rather, governments say: “it

1586 (involving a defendant placing a towel over the victim’s face and continuously pouring water over them, then sitting on the victim’s stomach causing the victim to vomit). For a fuller discussion of World War II precedents, see Wallach, *supra* note 45.

46. Interrogation techniques using water to induce the sensation of drowning in the person under questioning have, in recent news accounts, generally been called “waterboarding.” See, e.g., David Johnston & James Risen, *Aides Say Memo Backed Coercion Already in Use*, N.Y. TIMES, June 27, 2004, at A1 (“Mr. Mohammed was ‘waterboarded’—strapped to a board and immersed in water—a technique used to make the subject believe that he might be drowned, officials said[.]”); Douglas Jehl & David Johnston, *C.I.A. Expands Its Inquiry into Interrogation Tactics*, N.Y. TIMES, Aug. 29, 2004, at A10 (“Former intelligence officials say that lawyers from the C.I.A. and the Justice Department have been involved in extensive discussions in recent months to review the legal basis for some extreme tactics used at those secret centers, including ‘waterboarding,’ in which a detainee is strapped down, dunked under water and made to believe that he might be drowned.”).

47. Derek P. Jinks, *The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India*, 22 MICH. J. INT’L. L. 311, 312-13 (2001). Too often, consideration of U.S. treaty obligations gets trapped within the debate over structure (whether federalism or separation of powers) rather than a debate over substance. Just as the unsuccessful U.S. ratification debates on the Convention on the Elimination of All Forms of Discrimination Against Women got caught in the trap of federalism (as I have argued elsewhere), so too the torture debate has gotten caught in the trap of separation of powers. See Powell, *Lifting the Veil*, *supra* note 23, at 336.

wasn't really me"⁴⁸; "it really wasn't torture"⁴⁹; "I wasn't really bound by the relevant international standards at the time the torture occurred"⁵⁰; or "the relevant international standards didn't apply to the location where the torture occurred."⁵¹ Such obfuscation clouds the critical question of whether governments are substantively rejecting the torture prohibition on the merits.

Some argue that if we in the United States are going to tinker with torture—if we are going to take the unprecedented step of breaching our Geneva obligations by allowing "torture lite"⁵² through "alternative" or "tough" interrogation techniques—then the President and Congress should do so

48. See, e.g., *Velasquez-Rodriguez v. Honduras Case*, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988) (rejecting Honduras' argument that there was insufficient evidence that the alleged torture was conducted by a state actor as opposed to a private actor).

49. See, e.g., *Ireland v. U.K.*, 25 Eur. Ct. of H.R. (ser. A) (1978) (finding that even when used in combination, coercive interrogation techniques—such as holding a detainee in a cold cell, depriving him of sleep, hooding him, and playing loud music in his cell—fell short of torture).

50. See, e.g., *R v. Bow Street Metropolitan Stipendiary Magistrate Ex Parte Pinochet Ugarte*, [2000] 1 A.C. 61 (H.L.) (holding that under the principle of dual criminality, former Chilean dictator Pinochet could only be held accountable for torture that occurred after the Convention Against Torture had been ratified by both Spain and the United Kingdom).

51. See *Conclusions and Recommendations of the Committee Against Torture, United States of America*, U.N. Doc. CAT/C/USA/CO/2 ¶ 15 (July 25, 2006) [hereinafter *Committee Against Torture*]. Referring to the U.S. position that its international obligations do not apply on Guantanamo, for example, the Committee notes that:

[A] number of the Convention's provisions are expressed as applying to "territory under [the State party's] jurisdiction" (articles 2, 5, 13, 16). The Committee reiterates its previously expressed view that this includes all areas under the *de facto* effective control of the State party, by whichever military or civil authorities such control is exercised. The Committee considers that the State party's view that those provisions are geographically limited to its own *de jure* territory to be regrettable [sic]. *The State party should recognize and ensure that the provisions of the Convention expressed as applicable to "territory under the State party's jurisdiction" apply to, and are fully enjoyed, by all persons under the effective control of its authorities, of whichever type, wherever located in the world.*

Id. (emphasis in original).

52. Luban, *supra* note 42, at 1437 (noting that some refer to sleep deprivation, prolonged standing in stress positions, extremes of heat and cold, bright lights and loud music as "torture lite").

openly, publicly, candidly, and substantively, with a full public record of which elected officials approve and which oppose the use of specific coercive methods of interrogation.⁵³ If torture is going to be committed in our names, these observers argue, we have the right to know the details. After all, by using torture, “we [are] relinquish[ing] the very ideological advantage” upon which the War on Terror depends.⁵⁴ The questions I pose in this Article, then, are as follows: Should a rule as fundamental as the prohibition on torture be reexamined by the democratic process, how broadly do we define that process, and what is the role of courts and international law in that process?

III. COMPETING CONCEPTIONS OF DEMOCRACY AND INTERNATIONAL LAW

This Part of the Article explores different conceptions of democracy. Differing conceptions of democracy lead to differing positions on the question of torture. By the same token, these contrasting notions of democracy lead to contrasting views on the democratic function of courts and international law in defining the domestic scope of the torture prohibition.

Here I argue that the methods used by the executive branch to unilaterally justify the use of torture ultimately undermine democracy. In fact, a “purely electoral”⁵⁵ view of democracy conceivably justifies the position that, as the people’s elected representative, the President should have absolute unilateral power in the War on Terror (putting to one side separation of powers concerns). However, this Article calls for a broader conception of democracy, one which combines robust

53. See, e.g., Posting of Martin Lederman, The CIA’s “Alternative Set of Procedures”: Calling Things by Their Right Names, to Balkinization, <http://balkin.blogspot.com/2006/09/cias-alternative-set-of-procedures.html> (Sept. 6, 2006) (persuasively calling for greater transparency in the process).

54. Danner, *supra* note 43, at A27. Danner notes that the President says we are fighting for “the promotion of democracy, freedom and human rights [which he] has so persistently claimed is America’s most powerful weapon in defeating Islamic extremism.” *Id.*

55. See Robert O. Keohane et al., *Democracy-Enhancing Multilateralism 10* (Inst. for Int’l Law & Justice, Global Admin. Law Series, IILJ Working Paper 2007/4, 2007), available at <http://iilj.org/publications/documents/2007-4.GAL.KMM.web.pdf> (explaining that understanding democracy in “purely electoral terms” is a “minimalist” approach to democracy).

procedural protections for those underrepresented in the electoral political process with substantive guarantees for fundamental rights.

As Ronald Dworkin has provocatively noted: “Democracy means government by the people. But what does that mean? [I]t is a matter of deep controversy what democracy really is.”⁵⁶ Dworkin suggests two distinct visions of democracy: majoritarian and constitutional.⁵⁷ This Part of the Article uses Dworkin’s two conceptions of democracy to reveal how different positions on the question of torture reflect different understandings of the meaning of democracy. I also show that the two democracy-related claims made by critics of domestic incorporation of international law turn on contradictory views about the requirements of democracy.

A. *Majoritarian Conception of Democracy*

The majoritarian conception of democracy involves “political procedures [that] should be designed so that, at least on important matters, the decision that is reached is the decision the majority or a plurality of citizens favors, or would favor if it had adequate information and the time for reflection.”⁵⁸ This view is consistent with the “purely electoral”⁵⁹ approach espoused by critics of domestic incorporation of international law. Among these critics, however, we observe two variants: a thin majoritarian conception and a thick majoritarian conception.

The thin majoritarian conception demands that the President should be able to unilaterally do what he wants to do—even when this means disregarding statutes regulating how the executive branch can treat detainees. Proponents of this view “[share] a belief that the biggest obstacle to a vigorous response to the 9/11 attacks was the set of domestic and international law that arose in the 1970s to constrain the President’s

56. DWORKIN, *supra* note 14, at 15. I would like to thank Joshua Cohen for encouraging me to explore Dworkin’s work on democracy and for a variety of helpful insights on the subject of democracy more generally.

57. *Id.* at 15-20.

58. *Id.* at 15-16 (describing what he calls “the majoritarian premise” or “majoritarian conception of democracy”).

59. Keohane et al., *supra* note 55, at 10.

powers in response to the excesses of Watergate and the Vietnam War.”⁶⁰

The thick majoritarian conception of democracy envisions a slightly broader view by embracing a role for Congress. As with the thin majoritarian perspective, this approach resists the role that courts play in protecting international human rights as anti-democratic. Unlike the thinner approach to majoritarianism, however, the thick view allows for checks and balances on the Executive through Congress. Also, this approach depends on greater transparency, public access to information, and democratic deliberation.⁶¹ Critics of domestic incorporation of international law who argue that international law requires greater democratic review before courts can resort to it for constitutional interpretation espouse this view. Far from being an exclusively conservative position, this thicker perspective is also advanced by the progressive left, which has pushed for more vibrant forms of democratic deliberation over international law, for example, in the context of international negotiations over trade policy. Just as I am skeptical of the ideologically conservative brand of majoritarianism, so too am I skeptical that the broad-based populism advanced by, for example, some leftist World Trade Organization protesters, goes far enough to address the broader concerns reflected in the constitutional conception described in the next section.⁶²

60. Jeffrey Rosen, *Conscience of a Conservative*, N.Y. TIMES MAG. Sept. 9, 2007, at 43.

61. In fact, one might argue that the existence of a fully informed citizenry is a prerequisite for the majoritarian conception to be coherent. See DWORKIN, *supra* note 14, at 17 (implying that the majoritarian conception depends on the notion that “a defining goal of democracy [is] that collective decisions always or normally be those that a majority or plurality of citizens would favor if fully informed and rational,” but ultimately rejecting this view as insufficient in contrast to the broader constitutional conception of democracy).

62. For discussion of criticism of international trade law from the progressive left, see Chander, *supra* note 19, at 1197 (discussing objections raised by Lori Wallach of Public Citizen). Relatedly, in the area of international economic law and development assistance, see generally JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2002) (criticizing the International Monetary Fund’s policies from the perspective of the author, a Nobel laureate in economics and former chief economist at the World Bank).

Some critics of international law advance the thin majoritarian conception in the War on Terror context even while advancing the thick view of democracy in the constitutional interpretation context. While these two democracy-related claims share a deep mistrust of courts as undemocratic, they turn on very different understandings about the requirements of democracy as regards the value of checks and balances, transparency, public access to information, and the scope of the public's participation in government decision-making.

B. *Constitutional Conception of Democracy*

An alternative to the majoritarian view is the constitutional conception of democracy. This recognizes that court access and judicial review perform important democratic functions along with the political branches. Courts perform a unique democratic function by providing a means of redress for people underrepresented in the electoral political process. Efforts to eliminate habeas corpus and other forms of judicial relief—even when these efforts are adopted through the electoral process—are antidemocratic⁶³ in that they restrict the important democratic role courts play in offering those underrepresented in the political process an alternative way to participate in and correct government decisionmaking.

This vision of constitutional democracy combines the majoritarian notion of electoral politics with constitutional factors that serve as liberal restraints on populism.⁶⁴ Such factors include, “at a minimum, the separation of powers, in particular the independence of the judiciary; the satisfaction of rule-of-law constraints in the operation of government; the en-

63. I use the term “antidemocratic” rather than “undemocratic” in an analogy to Louis Henkin’s use of the phrase “anticonstitutional” rather than “unconstitutional.” Habeas stripping, even if done through “democratic” means in a majoritarian sense, is against the spirit of democracy because of the important democratic work that courts perform. Cf. Henkin, *Editorial Comments*, *supra* note 32, at 349 (proclaiming that “[l]awyers in the United States should take arms against the anticonstitutional practice of declaring human rights conventions non-self-executing”).

64. Keohane et al., *supra* note 55, at 10 (urging us to combine the electoral controls that are “the majoritarian motor” of democracy with “non-electoral, constitutional arrangements [that] serve as necessary ‘liberal’ restraints on ‘populist’ inputs”).

trenchment of basic rights among the citizenry; and provision for public deliberation and contestation.”⁶⁵ Therefore, this perspective grounds democracy in a notion of constitutional self-government that is more fully representative of *all* the people than the raw majoritarianism of pure electoral politics.⁶⁶ The political processes included in the constitutional conception “represent means whereby the people exercise more effective control over government.”⁶⁷

In fact, the constitutional conception of democracy rejects “the majoritarian premise.”⁶⁸ Rather than idealizing the collective decisions that a majority or plurality of citizens would choose based upon full information, this view “takes the defining aim of democracy to be a different one: that collective decisions be made by political institutions whose structure, composition, and practices treat all members of the community, as individuals, with equal concern and respect.”⁶⁹ Thus, while this approach assumes that the day-to-day operation of government will be undertaken by representatives chosen through popular elections, Dworkin points out that it also “requires these majoritarian procedures out of a concern for the equal status of citizens, and not out of any commitment to the goals of majority rule.”⁷⁰ On this view, then, non-majoritarian

65. *Id.*

66. *Id.* at 2 (borrowing the phrase “constitutional self-government” from EISGRUBER, *supra* note 17).

67. *Id.* at 11. Emphasizing the limits of elections in modern mass democracies as mechanisms for registering public opinion, Keohane et al. note:

Many factors argue against identifying election results straightforwardly with the will of the people: voting procedures often allow a small portion of the electorate to decide a contest; the size of the electorate and the complexity of public issues discourage sustained attention to politics, and indeed considerable evidence suggests that voters’ knowledge of public issues and candidate positions is low; voters are offered a limited range of options from which to choose.

Id. at 11 n.15; see also JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY (2d ed. 1947); Philip Converse, *The Nature of Belief Systems in Mass Publics*, in IDEOLOGY AND DISCONTENT (David Apter ed., 1964); Larry Bartels, *Uninformed Votes*, 40 AM. J. POL. SCI. 194 (1996); Larry Bartels, *Homer Gets a Tax Cut: Inequality and Public Policy in the American Mind*, 3 PERSP. ON POL. 15 (2005).

68. DWORKIN, *supra* note 14, at 17.

69. *Id.*

70. *Id.*

institutions such as courts play an indispensable role when they are necessary to safeguard the equal status inherent in this conception of democracy. This is so because, as Dworkin notes, “[d]emocracy means government subject to conditions—. . . ‘democratic’ conditions—of equal status for all citizens.”⁷¹

While Dworkin’s focus is on the equal status of *citizens*, in his more recent work, which develops a larger theory about human rights, he insists that governments need to provide the same basic rights to noncitizens as are provided to citizens.⁷² Speaking critically of the failure to apply the same standards of justice to suspected terrorists detained in Guantanamo and elsewhere as are applied to citizen criminal suspects, Dworkin contends that this disparity shows “that we do not regard them as fully human.”⁷³ He argues for “a conception of human rights that is grounded in . . . human dignity,” which “demands that any government, whatever its traditions and practices, act consistently with some good-faith understanding of the equal intrinsic importance of people’s lives.”⁷⁴ Thus, “[w]hile different political communities can legitimately adopt different views of the basic rights that are required by human dignity, every community must protect a set of basic rights that are singled out by some reasonable interpretation of the requirements of human dignity.”⁷⁵ Once a society has developed its own understanding of the requirements of human dignity, it may “not deny the benefit of that understanding to anyone” under its power, regardless of citizenship.⁷⁶ Therefore, the American policy of indefinite detention of suspected terrorists without trial “violates the human rights of those we imprison”⁷⁷ and is “made no more acceptable by Congressional endorsement.”⁷⁸

71. *Id.*

72. RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE?: PRINCIPLES FOR A NEW POLITICAL DEBATE 43-46 (2006) [hereinafter DWORKIN, IS DEMOCRACY POSSIBLE HERE?].

73. *Id.* at 45.

74. *Id.*

75. Joshua Cohen, Taking Democracy Seriously 7-8 (reviewing DWORKIN, IS DEMOCRACY POSSIBLE HERE?, *supra* note 72) (unpublished manuscript, on file with author).

76. DWORKIN, IS DEMOCRACY POSSIBLE HERE?, *supra* note 72, at 46.

77. *Id.* at 46.

78. Cohen, *supra* note 75, at 7-8.

A defense of the role of courts in safeguarding the equal treatment inherent in the constitutional conception of democracy is also consistent with John Hart Ely's famous defense of judicial protection of minority rights as representation-reinforcing.⁷⁹ While Ely's theory of judicial review relates to minorities who are citizens, he expresses concern about those noncitizens in our midst who "cannot vote in any state, which means that any representation they receive will be exclusively 'virtual.'"⁸⁰

As with the majoritarian conception, the constitutional conception of democracy involves two variants. The thin constitutional conception of democracy envisions a role for courts when the political branches have failed to respect equal treatment, but does not necessarily embrace a role for courts to protect other substantive rights beyond the right to equality. The thick constitutional conception of democracy, by contrast, envisions a role for courts to enforce additional fundamental rights beyond the right to equality.

Neal Katyal advances a thin constitutional conception of democracy in the context of the War on Terror by insisting on

79. In his well-known theory of judicial review, Ely suggests that courts may intervene in the political process when political market failures occur, such as when:

- (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.

JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 103 (1980).

80. *Id.* at 161. Ely goes on to point out that "our legislatures are composed almost entirely of citizens." *Id.* Of course, some of the post-9/11 detainees have been American citizens of Middle Eastern or Arab descent or who practice Islam. While, as a group, the citizen detainees do not have the same experience of total political disenfranchisement as the noncitizen detainees, they are in effect a discrete and insular minority that has been targeted by a rising tide of violence and discrimination. Leti Volpp, *The Citizen and the Terrorist*, 49 *UCLA L. REV.* 1575 (2002). In fact, the very consolidation of a new identity category that groups together persons who appear "Middle Eastern, Arab, or Muslim," signals "a racialization wherein members of this group are identified as terrorists and are disidentified as citizens." *Id.* at 1576.

judicial oversight where the political branches have failed to respect equal treatment between citizens and noncitizens.⁸¹ Beyond insisting on a right of equality, however, Katyal is reluctant to “freeze a particular substantive conception of law into place,” since the “questions posed by terrorism are just too new and the dangers of asymmetrical warfare (both in probability and extent of damage) too uncertain at this early date.”⁸² While legislation is normally entitled to deference by courts, Katyal points out that the rationale for such deference is undercut “[w]hen legislation singles out powerless aliens,” since, after all, “the standard checks on government abuse, such as political accountability, fail to operate.”⁸³ The example that Katyal gives is the Military Commissions Act (MCA), which singles out noncitizens for trial in military commissions and strips habeas access to U.S. courts, while presumably leaving intact regular trials or court-martial hearings for citizen detainees.⁸⁴ Katyal argues:

Equal protection offers [a] vehicle to achieve a focus on process instead of substance. . . . [E]qual protection challenges to the MCA, for example, do not ask whether Congress can authorize military commissions or strip habeas rights; they simply say that whatever substantive rules Congress settles upon, it must apply them symmetrically to all persons.⁸⁵

81. Katyal, *supra* note 8, at 1382; *see also* DWORKIN, *IS DEMOCRACY POSSIBLE HERE?*, *supra* note 72, at 43-46.

82. Katyal, *supra* note 8, at 1365-66.

83. *Id.* at 1367.

84. *Id.* at 1379 (“[E]verything about the Equal Protection Clause—from its plain text to its original intent—shudders at the notion that access to justice could be conditioned on citizenship.”). Note that the Fourth Circuit recently held that the habeas stripping provisions of the MCA do not apply to a lawful resident alien detained in his home within the United States. *Al Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007). However, the D.C. Circuit has upheld the validity of the habeas stripping provisions as regards those noncitizens detained in Guantanamo. *See, e.g., Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005) (upholding habeas stripping provisions of the Military Commissions Act), *rev’d*, 126 S. Ct. 2749 (2006). The legality of the habeas stripping provisions of the Military Commissions Act is an issue currently before the Supreme Court. *See Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007) (upholding habeas stripping provisions of the MCA), *cert. granted*, 127 S. Ct. 3078 (2007).

85. Katyal, *supra* note 8, at 1382.

The fact that noncitizens must rely on virtual rather than actual representation means that courts should insist on equal treatment between citizens and noncitizens.⁸⁶ By bootstrapping the rights of noncitizens to those of citizens, courts could ensure that “aliens would be ‘virtually’ represented by citizens and the political process.”⁸⁷ If courts were to require that the political branches bootstrap the rights of noncitizens to citizens, they could guarantee “that the interests of those that do not have a voice in the legislature are effectively represented by those that do.”⁸⁸

However, rather than view equality as a substantive right, Katyal explains:

The structural logic of insisting on equality in this area has, as its starting point, a deep unease about the proper substantive standard. Instead, the focus rests upon the decision-making process and ensuring that the interests of those that do not have a voice in the legislature are effectively represented by those that do. Under those conditions, the legislature will be less likely to externalize their problems onto the powerless, and more likely to reach a better decision. The powerless, in effect, give their proxy vote to the powerful, knowing that when the powerful are brought within the ambit of the laws, lawmaking is likely to become fairer. The process of virtual representation . . . also has the benefit of forcing legislative reconsideration of questionable choices.⁸⁹

86. *Id.* at 1373 (citing ELY, *supra* note 79, at 161-62).

87. *Id.* at 1369.

88. *Id.* at 1382.

89. *Id.* at 1382. Interestingly, as an example of this approach in practice, Katyal cites to a case by the House of Lords in the United Kingdom which, on discrimination grounds, struck down a policy that allowed non-U.K. nationals to be detained while U.K. nationals could go free. *Id.* at 1392 (discussing *A v. Sec’y of State for the Home Dept.*, [2005] 2 A.C. 68 (H.L.)). As Katyal points out:

Sadly, the experience of Britain under the European Convention on Human Rights is far truer to our backbone of equality than that of our own politicians under our own Constitution, who conveniently forget about equality even on fundamental decisions such as who would face a military trial with the death penalty at stake. Indeed, the United Kingdom reacted to the decision by adopting laws that treated citizens and foreigners alike. Although our Foun-

By contrast, the thick constitutional conception of democracy, which this Article supports, takes a more substantive approach and is premised on the view that judicial intervention is warranted to remedy violations of fundamental rights above and beyond the basic right to equality. To the extent that “[d]emocracy means government subject to . . . ‘democratic’ conditions,”⁹⁰ we can think of the preservation of human dignity as a democratic condition ensuring basic forms of individual autonomy, personal liberty, and bodily integrity. After all, “[t]he most basic of human rights . . . is the right to be treated by government with a certain attitude: with the respect due a human being.”⁹¹ The prohibition on torture is one such fundamental right inherent in human dignity, because, as Dworkin explains:

[T]orture’s object is precisely not just to damage but to destroy a human being’s power to decide for himself what his loyalty and convictions permit him to do. Offering inducement such as a reduced sentence to an accused criminal in exchange for information, however objectionable this might seem on other grounds, leaves a prisoner’s ability to weigh costs and consequences intact. Torture is designed to extinguish that power, to reduce its victim to a screaming animal for whom decision is no longer possible—the most profound insult to his humanity, the most profound outrage of his human rights.⁹²

In this view, certain rights are so inherent in human dignity that they may not be taken away through the political process. In international law, such fundamental rights, including the prohibition on torture, are considered to be *jus cogens*. A *jus cogens* norm is a peremptory norm that can only be re-

ders broke away from Britain in part because of the King’s refusal to adhere to the basic proposition that “all men are created equal,” it is now Britain that is teaching us about the meaning of those words.

Id.

90. DWORKIN, *supra* note 14, at 17.

91. DWORKIN, IS DEMOCRACY POSSIBLE HERE?, *supra* note 72, at 42.

92. *Id.* at 38-39.

placed by another norm of comparable character.⁹³ Such norms cannot be undone by domestic legislation. While counter-majoritarian, such norms are justified and protected from the political process on the ground that they entrench rights essential to preserving basic human dignity.

Moreover, safeguarding such norms may also be justified on the grounds that deprivation of such fundamental human rights disproportionately affects minority and outsider groups. International human rights law may be viewed as “a possible buttress to democracy, rather than as its rival,” since it “creates additional resources with which minorities can protect themselves from majoritarian oppression.”⁹⁴ In this sense, *jus cogens* “can be justified as democracy enhancing,” since “[s]uch norms [often] seek to protect certain classes of minorities in a world where minorities [and vulnerable individuals more generally] are constantly at risk.”⁹⁵ Echoing Ely, David Cole reminds us that “the fact that the Constitution denies aliens the right to vote makes it much more essential that . . . basic [human] rights . . . be extended to aliens.”⁹⁶ After all, “aliens are without meaningful voice in the political bargains struck by a representative system.”⁹⁷ This is precisely why many of the earliest examples of international human rights law norms involve the treatment of foreign nationals abroad.⁹⁸

IV. CRITICISM OF DOMESTIC INCORPORATION OF INTERNATIONAL LAW: TWO DIFFERENT VIEWS OF THE ROLE OF DEMOCRATIC DELIBERATION

This Part of the Article explores in greater detail the dual- democracy-related claims made by critics of domestic in-

93. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 cmt. n (1987) (identifying the prohibition torture or other cruel, inhuman, or degrading treatment or punishment as *jus cogens*).

94. Chander, *supra* note 19, at 1203 (applying Ely’s theory internationally); see also John Hart Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different from Legislatures*, 77 VA. L. REV. 833, 833 n.4 (1991).

95. Chander, *supra* note 19, at 1203 (translating John Hart Ely to the transnational law context); see also ELY, *supra* note 79, at 103.

96. David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 981 (2002).

97. *Id.*

98. See LOUIS HENKIN ET AL., HUMAN RIGHTS 276-78 (1999) [hereinafter HENKIN ET AL., HUMAN RIGHTS].

corporation of international law in the two arenas where the relationship between internationalism and constitutionalism has been most fiercely contested. These critics call for greater democratic process as a prerequisite for the legitimacy of international law in the context of constitutional analysis, even while some of these same critics reject the democratic process as an impermissible encroachment on the President's power to wage war in the context of the War on Terror. In analyzing the claims made by critics in these two realms, this Part of the Article demonstrates in further detail how we can understand the varying positions taken in each as reflecting different perspectives on the requirements of democracy.

A. *Criticism of Resort to International Law in Constitutional Interpretation*

Critics of domestic incorporation of international law have argued for greater democratic process before courts can resort to international and comparative law in interpreting the Constitution.⁹⁹ For these critics, judicial resort to international law—even in the form of a binding ratified treaty—is not true to our constitutional ideals of democratic accountability, self-governance, and popular sovereignty without further democratic deliberation. Critics have expressed these concerns in at least three ways. First, they object that the process of international lawmaking itself is undemocratic. The second

99. Note that criticism of the internalization of international norms by U.S. courts goes beyond objections to the use of international law in constitutional interpretation. Critics raise many objections to the internalization of international law based on its effects in constitutional or statutory interpretation; in constraining what federal, state, or local governments can do; or in preventing “the President and his subordinates from exercising otherwise lawful discretionary authority.” McGinnis & Somin, *supra* note 10, at 1177.

Located on both ends of the political spectrum, right-wing and left-wing critics object that international law could “subject this country to human rights, labor, health, environmental, and military rules not of our own making.” Chander, *supra* note 19, at 1197. “The targets of their ire are dazzlingly broad, including the International Criminal Court, the International Labor Organization, the Convention on the Law of the Sea, the Kyoto Protocol in Global Warming, [the World Trade Organization (WTO),] the United Nations Human Rights Commission [], the Comprehensive Test Ban Treaty, nongovernmental organizations such as women’s groups, and corporate codes of conduct.” *Id.*

and third concerns focus on the proper roles of each branch of government in implementing international law. The second concern involves the claim that legislative and executive branch incorporation of international law should go beyond mere treaty ratification, which they see as insufficiently democratic. Third is the objection that direct judicial incorporation of international law suffers from a democratic deficit. By calling for greater democratic accountability in the form of Congressional action to implement international standards, these critics reflect the *thick* variant of the majoritarian conception of democracy outlined in Part III above.

1. *The Formation of International Law*

The first concern is that the process of international lawmaking itself is undemocratic. According to the transnational legal process approach, international law is made through a fluid, dynamic process in which “public and private actors . . . interact in a variety of . . . domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law.”¹⁰⁰ This view of international lawmaking is non-statist in that “the actors in this process are not just, or even primarily, nation-states, but include nonstate actors as well.”¹⁰¹ Emphasizing the normativity of this account, Harold Koh contends that “[f]rom this process of interaction, new rules of law emerge, which are interpreted, internalized, and enforced, thus beginning the process all over again.” The problem as far as critics are concerned is that “by admitting to, and embracing the normativity of the transnational legal process,” transnationalists “leave themselves even more vulnerable

100. Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 183-84 (1996) [hereinafter Koh, *Transnational Legal Process*] (explaining how international law is made through a transnational legal process, which “describes the theory and practice of how public and private actors—nation-states, international organizations, multinational enterprises, non-governmental organizations, and private individuals—interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law”).

101. *Id.* at 184 (noting further that “transnational law transforms, mutates, and percolates up and down, from the public to the private, from the domestic to the international level and back down again”).

to the charge of hijacking democracy,” as “the task of identifying the source of the norms remains elusive.”¹⁰²

More specifically, the concern that the international law-making process is undemocratic has two intertwined dimensions—one relating to customary international law and the other relating to treaties.

a. *Customary International Law*

Even where customary international law has not been “domesticated” by the political process, part of the problem, according to McGinnis and Somin, is the open-ended way in which customary law rules are made. Customary international law is created when nation-states engage in a practice out of a sense of legal obligation.¹⁰³ While “the metric for . . . customary international law is objective, its objectivity does not mean that determining the content of custom is straightforward.”¹⁰⁴

The nub of the problem, as far as McGinnis and Somin are concerned, is that because “[s]tate practices are multifarious and often obscure,” “cataloguing them requires special expertise” and thus depends on “the authority of experts in customary international law . . . to make such assessments.”¹⁰⁵ These experts, they argue, are typically drawn from a group of largely unrepresentative and politically unaccountable individuals, namely law professors in the United States (who lean “Democratic rather than Republican by a ratio of over five to one”)¹⁰⁶ and international law judges (who “can create more power for themselves by expanding the scope of international

102. Chander, *supra* note 19, at 1200 (recounting this concern, though Chander himself is a self-proclaimed transnationalist); see also Mary Ellen O’Connell, *New International Legal Process*, 93 AM. J. INT’L L. 334, 338 (1999) (“Koh does not himself elaborate on these questions [of what the values of the system are] beyond indicating their importance to a methodology.”).

103. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (1987) (requiring widespread acceptance of a rule for it to be customary law).

104. McGinnis & Somin, *supra* note 10, at 1200; see also David J. Bettermann, *Constructivism, Positivism, and Empiricism in International Law*, 89 GEO. L. J. 469, 486 (2001) (reviewing ANTHONY C. AREND, *LEGAL RULES AND INTERNATIONAL SOCIETY* (1999)) (“[C]ustomary international law has always been quite elusive. When is there sufficient state practice? And when is there sufficient *opinio juris*?”).

105. McGinnis & Somin, *supra* note 10, at 1200.

106. *Id.* at 1202; see also Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 58 n.3 (2007) (noting a disconnect in the

law” and “thus have an institutional stake in a wider scope for custom”).¹⁰⁷

One response to this concern is that the domestic judges asked to interpret this “raw international law” are smart people able to assess the writings of scholars and international jurists in a fair and balanced way. Moreover, in light of “the Executive’s ability to provide its own view of international law through letters and amicus briefs to the court and the existence of multiple viewpoints in academic writing, the likelihood that judges will be misled by academics into erroneously finding a cause of action in international law seems remote.”¹⁰⁸ Indeed, in the well-known *Filartiga* case, which held the prohibition against torture to be a customary international law norm, the executive branch filed an amicus brief in support of Dolly and Dr. Joel Filartiga’s efforts to get relief for the torture of Joelito Filartiga.¹⁰⁹

These critics also challenge the democratic legitimacy of customary international law by objecting that it suffers from the problem of the dead hand. Because it “requires widespread consensus among states, once formulated it is difficult to change [and] locks old norms in place even if they are dangerously suboptimal.”¹¹⁰ Yet this is a general problem with any entrenched norm, including domestic constitutional norms.¹¹¹

immigration field between the views of immigration law scholars and those of the public).

107. McGinnis & Somin, *supra* note 10, at 1204 (describing as undemocratic the method through which international law judges are typically appointed, which lacks the transparency of the U.S. federal judge nomination and appointment process and includes judges from authoritarian governments); see also Paul B. Stephan, *International Governance and American Democracy*, 1 CHL. J. INT’L L. 237, 238 (2000) (describing customary international law as “a prefabricated system of rules and norms, constructed by a loose alliance of like-minded academics and international law specialists through a form of advocacy that involves no democratic checks”).

108. Chander, *supra* note 19, at 1210 (contending that critics “cannot point to a single case where judges were so misled”).

109. Memorandum for the United States as Amicus Curiae Supporting Petitioners, *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980), 1980 WL 340146.

110. McGinnis & Somin, *supra* note 10, at 1209.

111. Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1712 (1996).

b. *Treaties*

Furthermore, these critics argue that treaties lack “serious democratic bona fides” and therefore require greater domestic democratic review.¹¹² Treaties often result from negotiations with nondemocratic governments. Moreover, “even the democratic nations that sign these treaties often do not apply them of their own force to displace their own laws,” indicating that the norms contained in them are what economists refer to as “cheap talk.”¹¹³ Thus, critics argue, treaty norms are too aspirational and vague to be given automatic effect.¹¹⁴ At bottom, the argument reduces to this:

As treaties represent bargains between national governments, we cannot be sure that democratic nations would have agreed to all of the provisions if nondemocratic governments were not present at the bargaining table. Thus, unlike the case where customary international law is based on state practices considered individually, . . . multilateral treaties will contain norms that would have been rejected by the democratic process if considered in their own right.¹¹⁵

These concerns seem misguided as well. Since ordinary domestic legislation may also contain a package of norms that were bargained for collectively rather than individually, this does not distinguish treaties as any more undemocratic than ordinary legislation. Moreover, while critics of international lawmaking, such as Justice Antonin Scalia, offer the “sixth-grade civics lesson” view of American law as “the law made by

112. McGinnis & Somin, *supra* note 10, at 1207 (calling the use of treaties as evidence of customary international law a “double democracy deficit,” since not only are the sources democratically illegitimate, but “the power to interpret these documents is [also] lodged in an undemocratic and unrepresentative elite”—the international judiciary).

113. *Id.* at 1204. McGinnis and Somin point out that for economists, “‘cheap’ talk is the opposite of costly signaling” and that “[t]here is much less reason to believe that ratifying a treaty represents the real preferences of the domestic polity if the members of the polity are not willing to have the rules enforced against themselves.” *Id.* at 1204 n.139.

114. *Id.* at 1206.

115. *Id.* at 1204-05.

the people's democratically elected representatives,"¹¹⁶ the fact is that "many forms of 'American' law are not made by elected representatives,"¹¹⁷ including decisions of administrative agencies and constitutional courts.¹¹⁸ Indeed, "many sources that jurists legitimately rely upon in interpreting the Constitution are not created through democratic decisionmaking . . . [such as] consideration of the common law, historical sources, social science and scientific data, law and economics theory, pragmatic policy concerns, and judge-made rules of construction, including principles of *stare decisis*."¹¹⁹

2. *Legislative and Executive Branch Incorporation of International Law*

As a corollary to the argument that the *formation* of treaties is undemocratic, a second concern about resort to international law in constitutional analysis is that the *incorporation* of treaties through ratification is not sufficiently democratic. One criticism, made prominently by John Yoo, is of the fact that treaties are made by the President with the advice and consent of the Senate, but not the House of Representatives, which has no role in treaty ratification.¹²⁰ As a result, Yoo ar-

116. Chander, *supra* note 19, at 1201 n.37, 1204 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 751 (2004) (Scalia, J., concurring in part and dissenting in part)) (describing Scalia's approach as providing a "sixth-grade civics lesson").

117. Cleveland, *supra* note 28, at 103.

118. See, e.g., Kumm, *supra* note 18, at 15:

On the one hand, . . . the emergence of the *administrative state*. . . in the first half of the 20th century has involved significant delegation of regulatory authority to administrative institutions of various kinds. Whether an area of monetary policy, antitrust policy or environment policy, many of the core decisions are no longer made by [the legislative branch]. On the other hand, liberal constitutional democracies have developed in the second half of the 20th century to include *constitutional courts* with the authority to strike down laws generated by the legislative process on grounds of constitutional principle.

(emphasis in original).

119. Cleveland, *supra* note 28, at 103.

120. JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION IN FOREIGN AFFAIRS AFTER 9/11*, at 224 (2005) [*hereinafter* YOO, *THE POWERS OF WAR AND PEACE*]. Note that this claim builds on Yoo's earlier work, which made similar arguments. See, e.g., John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV.

gues, treaties should be presumed non-enforceable in the courts until Congress has indicated otherwise by implementing legislation passed by both Houses.¹²¹ This theory is a clear example of the thicker variant of the majoritarian conception of democracy.

On this basis, Yoo argues that the doctrine that ratified treaties are non-self-executing “promotes democratic government in the lawmaking process by requiring the consent of the most directly democratic part of the government, the House of Representatives, before the nation can truly implement treaty obligations at home.”¹²² On this view, treaties represent mere aspirations and lack the force of law.¹²³

The Constitution, of course, says otherwise. The Supremacy Clause explicitly states that ratified treaties are the “supreme Law of the Land” on par with ordinary legislation.¹²⁴ Further, in an early well-known case, the Supreme Court held that treaties are “to be regarded . . . as equivalent to an act of the legislature.”¹²⁵ The constitutional text, statements made by the framers, and Supreme Court precedent are strong evidence for the traditional view that ratified treaties, with or

1955, 1961 (1999) (arguing that the view that treaties are automatically enforceable in courts is not consistent with the Framers’ notions of democratic self-government and popular sovereignty); John C. Yoo, *Treaties and Public Law Making: A Textual and Structural Defense of Nonexecution*, 99 COLUM. L. REV. 2218 (1999) (asserting that constitutional text and structure require implementation of treaty obligations by federal statute).

121. YOO, THE POWERS OF WAR AND PEACE, *supra* note 120, at 224 (“Establishing a process in which the House takes part through implementing legislation provides yet another safeguard for popular sovereignty.”).

122. YOO, THE POWERS OF WAR AND PEACE, *supra* note 120, at 224.

123. See also McGinnis & Somin, *supra* note 10, at 1205-06 (indicating that “[a] nation’s decision to ratify [treaty] norms does not necessarily mean that they intend to apply them to their own citizens”); Arthur M. Wiesburd, *The Significance and Determination of Customary International Human Rights Law: The Effect of Treaties and Other Formal International Acts on the Customary Law of Human Rights*, 25 GA. J. INT’L & COMP. L. 99, 134-36 (1996) (arguing that human rights treaties generally lack true enforcement mechanisms, raising doubts that states intend for them to have a legal character).

124. U.S. CONST. art. VI (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

125. *Foster v. Neilson*, 27 U.S. 253, 314 (1829).

without implementing legislation, are binding law enforceable in courts.¹²⁶ Indeed, scholars have noted that a primary impetus for convening the Constitutional Convention was the failure of state governments to enforce treaties.¹²⁷ By making treaties the “Law of the Land,” the Supremacy Clause solved this problem. Indeed, the framers unanimously decided not to include treaty enforcement in Congress’s enumerated powers; doing so would have been “superfluous[,] since treaties were to be ‘laws.’”¹²⁸ As David Cole points out:

Yoo’s account turns that conclusion on its head; his reading would render superfluous the Supremacy Clause’s assertion that treaties are laws. If treaties had domestic force only when implemented by a subsequent statute, as Yoo maintains, then the statute itself would have the status of the “Law of the Land,” not the treaty.¹²⁹

Admittedly, in recent years, the United States has frequently attached declarations at the time of treaty ratification specifying the treaty as non-self-executing: that is, unenforceable until Congress has implemented it by means of ordinary legislation. Even without such instructions, courts are some-

126. See, e.g., Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as ‘Supreme Law of the Land,’* 99 COLUM. L. REV. 2095 (1999) (refuting Yoo’s argument on the status of treaties); Carlos Manuel Vazquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154 (1999) (same); see also Jack Rakove, *Solving a Constitutional Puzzle: The Treatymaking Clause as a Case Study*, in PERSPECTIVES IN AMERICAN HISTORY 233, 264 (Bernard Bailyn et al. eds., 1984) (noting that the framers “were virtually of one mind when it came to giving treaties the status of law”).

127. Henry Paul Monaghan, *Article III and Supranational Judicial Review*, 107 COLUM. L. REV. 833, 853 & nn. 112-14 (2007); Wythe Holt, “*To Establish Justice*”: *Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1438-49, 1452 (1989) (providing a comprehensive account of the hostility of American states, mainly in the South, toward British and Glasgow creditors before, during, and after the Revolutionary War and pointing to state violations of the Jay Treaty as one of the reasons for the Constitutional Convention of 1787); David Cole, *What Bush Wants to Hear*, N.Y. REV. OF BOOKS, NOV. 17, 2005, at 10 (book review) [hereinafter Cole, *What Bush Wants to Hear*].

128. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 389-90 (Max Farrand ed., 1911).

129. Cole, *What Bush Wants to Hear*, *supra* note 127, at 10.

times inclined to find treaties not enforceable.¹³⁰ Yoo would take the additional step of creating a presumption *against* enforceability in the absence of implementing legislation passed by both houses of Congress.¹³¹

Even if this criticism were not flawed, which I dispute, in the torture context, Congress has passed legislation—enacted by both the House and Senate—implementing the anti-torture protections found in ratified treaties. These statutory anti-torture protections are, thus, not vulnerable to criticism based on the legislative ratification of treaty law. I discuss this below in Part IV.B.

3. *Direct Judicial Incorporation of International Law*

The third complaint is that direct judicial incorporation of international law suffers from a democratic deficit. Curtis Bradley and Jack Goldsmith, for example, object to what they call the “modern position” on customary international law.¹³² They argue that the view that customary law has the domestic legal status of federal common law is inconsistent with basic understandings regarding American representative democracy, federal common law, separation of powers, and federalism. As such, these critics conclude that courts should not ap-

130. See, e.g., *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005) (finding, *inter alia*, that Hamdan’s claim under the Geneva conventions was non-self-executing), *rev’d on other grounds*, 126 S. Ct. 2749 (2006).

131. For more extensive criticism of this, see Cole, *What Bush Wants to Hear*, *supra* note 127, at 10; Cass Sunstein, *The 9/11 Constitution*, NEW REPUBLIC, Jan. 16, 2006, at 4 (book review).

132. Curtis A. Bradley & Jack L. Goldsmith III, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) [hereinafter Bradley & Goldsmith, *Customary International Law*]; Curtis A. Bradley & Jack L. Goldsmith III, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319 (1997); see also Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665 (1986); A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT’L L. 1 (1995); cf. Curtis Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 524-32 (1998) (arguing that extending the “Charming Betsy” canon from statutory interpretation—where there is a presumption of consistency of statutes with international law—to constitutional interpretation is problematic, because the canon rests on the separation of powers considerations and its application to the constitutional interpretation would deprive the political branches of the opportunity to decide whether they want to violate international law).

ply customary law as federal law unless expressly authorized to do so by the President and Congress through legislation. Again, this reflects the thicker variant of the majoritarian conception of democracy.

Other scholars see Bradley and Goldsmith's argument as revisionist, noting that the view that customary international law has the status of federal common law is neither "modern" nor inconsistent with the founders' visions of democracy, separation of powers, and federalism. As Harold Koh pointedly states: "Every schoolchild knows that the failures of the Articles of Confederation led to the framing of the Constitution, which established national governmental institutions to articulate uniform positions on such uniquely federal matters as foreign affairs and international law."¹³³ Koh's view finds support in the post-*Erie* jurisprudence of the Supreme Court, which has continued to "recogniz[e] the need and authority . . . to formulate what has come to be known as 'federal common law' in areas where "a federal rule of decision is 'necessary to protect uniquely federal interests,'" such as "international disputes implicating . . . our relations with foreign nations."¹³⁴

Though history and precedent fail to support their position, Bradley and Goldsmith ultimately argue that allowing judges to apply international law is normatively undemocratic:

Unelected federal judges apply customary international law made by the world community at the expense of state prerogatives. In this context, of course, the interests of the states are neither formally

133. Koh, *International Law*, *supra* note 33, at 1825 ("As so often happens, the hornbook rule—international law, as applied in the United States, must be federal law—makes obvious sense."); *see also* Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 *FORDHAM L. REV.* 371 (1997) [hereinafter Neuman, *Sense and Nonsense*]; Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 *FORDHAM L. REV.* 393 (1997); Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 *FORDHAM L. REV.* 463 (1997).

134. *Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-41 (1981) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964)); *see also* *Sosa v. Alvarez-Machain*, 542 U.S. 692, 692 (2004) (affirming that customary international law has some standing as federal law).

nor effectively represented in the lawmaking process.¹³⁵

In a sense, this is an international variation of Alexander Bickel's classic countermajoritarian concern regarding judicial review.¹³⁶ Bradley and Goldsmith echo Bickel's complaint that judicial review violates principles of democratic self-governance by displacing the majoritarian decisions of the people, as represented by their elected officials, with the views of unelected, unrepresentative, and unaccountable judges. Justice Clarence Thomas has likewise complained that "[w]hile Congress, as the legislature, may wish to consider the actions of other nations on any issue it likes, this Court's . . . jurisprudence should not impose foreign moods, fads, or fashions on Americans."¹³⁷ Gerald Neuman has tried to address this concern about customary international law by pointing out that judicial enforcement of international law as federal common law "can be overturned by Congress."¹³⁸ However, when judges resort to international law to interpret the Constitution, the decision cannot be overturned by the legislature. At the same time, constitutional analysis relying on international law "is no more, or less, countermajoritarian than any other."¹³⁹

135. Bradley & Goldsmith, *Customary International Law*, *supra* note 132, at 868.

136. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 92 (1962) ("The people of a democracy must be mercifully soothed when they find themselves ruled, to whatever extent, by the nine men of the Supreme Court."); *see also* Chander, *supra* note 19, at 1194-96; Cleveland, *supra* note 28, at 101-02.

137. *Foster v. Florida*, 537 U.S. 990 (2002) (Thomas, J., concurring in denial of certiorari).

138. Neuman, *Sense and Nonsense*, *supra* note 133, at 383-84. *But see* Stephan, *supra* note 116, at 247 (suggesting that it may be futile to rely on Congress to overturn judicial common-lawmaking since "the enactment of legislation is a cumbersome and costly process, more likely than not to be incomplete"). Ultimately, "[t]he issue reduces to the setting of the default rule—should courts apply customary international law in Alien Tort Statute cases or refuse to do so in the absence of congressional incorporation of the international law norm into national law?" Chander, *supra* note 19, at 1207 (referencing Neuman, *Sense and Nonsense*, *supra* note 133, at 84).

139. Cleveland, *supra* note 28, at 101 ("[T]o the extent that the Constitution imposes limits on legislative decisionmaking through individual rights provisions and the structures of federalism and separation of powers, judicial enforcement of those rights and relationships is necessarily nonmajoritarian.

Furthermore, acknowledging that constitutional analysis as a general matter is somewhat countermajoritarian does not concede that it is also undemocratic, whether it involves international law or otherwise. As John Hart Ely famously explained, constitutional protections for individual rights and the judiciary's independence from direct politics were intentionally designed as a bulwark against raw majoritarianism.¹⁴⁰ Judicial review is thus "justified as democracy enhancing if it serves to protect discrete and insular minorities."¹⁴¹ The democracy-enhancing role of judicial review has been echoed by other scholars, primarily in the context of domestic public law litigation. For example, Abram Chayes notes in his groundbreaking work that public law litigation enriches the institutional repertory of our democracy, because courts are less susceptible to capture than legislatures or regulatory agencies.¹⁴²

The *Filartiga* case¹⁴³ shows the judiciary's role in safeguarding rights where the political branches cannot due to interest group capture or simply because they lack the institutional competence. The defendant, Americo Norberto Pena-Irala, had been accused of torturing Joel Filartiga in Peru. Pena-Irala relocated to the United States and sought asylum. While the Executive's primary choice was either to deport Pena-Irala or grant him asylum, the courts were further able to consider the Filartiga family's torture claim. The Alien Tort Claims Act gave them this opening by providing district courts with jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." However, the statute does not specify which customary norms constitute the "law of nations." Critics of customary law have therefore claimed that "customary law" for the statute's purposes should be confined to those norms already established when the Alien Tort Claims Act was in-

Courts [thus] engage in constitutional analysis with caution, since their decisions bind the political branches.").

140. ELY, *supra* note 79, at 130-31.

141. Chander, *supra* note 19, at 1203. Chander also observes that "Ely deftly turns insulation from the political process from a vice to a virtue." *Id.* at 1196.

142. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

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

cluded as part of the First Judiciary Act in 1789,¹⁴⁴ particularly in the absence of more contemporary enactments by Congress.¹⁴⁵

In sum, in calling for *greater* democratic accountability in the various ways summarized here, critics of resort to international and comparative law in constitutional interpretation reflect the *thick* variant of the majoritarian conception of democracy.

B. *Criticism of Resort to International Law to Constrain Presidential Power in the War on Terror*

As we have seen, in one arena—federal courts—critics of domestic incorporation of international law have argued for *greater* democratic process before courts can look to international and comparative law to interpret the Constitution. However, in another arena—the executive branch—some of the same critics have argued for *less* democratic process in the treatment of international law in the President’s War on Terror. In fact, some critics assert that the President may disregard domestic laws incorporating international law such as, for example, legislation implementing and validating the international prohibition on torture. These critics bristle at efforts to apply international law constraints—even treaty norms not only ratified but implemented into legislation by *both* houses of

144. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 749-50 (2004) (Scalia, J., concurring in part and dissenting in part). A majority of the Supreme Court has rejected this view, though the Court has been careful to establish criteria for assessing what customary norms may come within the ambit of the Act. *Id.* at 747-48 (explaining that the norms that may constitute customary norms for the purposes of the Alien Torts Claims Act must have concreteness and enjoy widespread consensus).

145. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 816 (D.C. Cir. 1984) (Bork, J., concurring in per curiam opinion), *cert. denied*, 470 U.S. 1003 (1985) (“Under the possible meaning I have sketched, section 1350’s current function would be quite modest, unless a modern statute, treaty, or executive agreement provided a private cause of action for violations of new international norms which do not themselves contemplate private enforcement. Then, at least, we would have a current political judgment about the role appropriate for courts in an area of considerable international sensitivity.”). To resolve any doubt, Congress responded to Judge Bork’s concern by updating the Alien Torts Claims Act in enacting the Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (Torture Victim Protection) (2000)).

Congress, which can hardly be said to suffer from a democracy deficit. In this case, the objection is that application of such norms would impermissibly infringe on the President's power to wage war as Commander-in-Chief. This approach reflects the thinner variant of the majoritarian conception of democracy, which, as discussed above in Part III, asserts that the President, as the people's elected representative, should be able to unilaterally do what he wants to do in, for example, his War on Terror—even when this means disregarding statutes regulating how the executive branch can treat detainees.

Not surprisingly, many of these critics are current or former executive branch counsel. In fact, across administrations, executive branch lawyers have argued for broad executive authority;¹⁴⁶ neither party has a monopoly on this position. However, as I will discuss, lawyers for the Bush Administration have pursued these arguments with unprecedented zeal.

In discussing the role of each branch of government in implementing international law norms that constrain U.S. treatment of detainees, this Section loosely tracks the previous Section. However, this Section focuses on how the *thinner* variant of the majoritarian conception of democracy leads to the claim that *less* democratic review is warranted in the treatment of international law in the War on Terror generally and in the context of the use of torture specifically. In the first Subsection below, I discuss Congressional implementation of the international law prohibition on torture. In the second Subsec-

146. For example, Walter Dellinger, the head of the Justice Department Office of Legal Counsel under President Clinton, supported the use of presidential signing statements to justify nonenforcement by the President of statutes that were clearly unconstitutional. 17 Op. Off. Legal Counsel 131, 132-34 (1993); 18 Op. Off. Legal Counsel 199, 199 (1994).

However, Dellinger says that the problem with the Bush Administration's signing statements is that some of his constitutional views are fundamentally wrong. Walter Dellinger, Op-Ed., *A Slip of the Pen*, N.Y. TIMES, July 31, 2006, at 17, available at http://www.nytimes.com/2006/07/31/opinion/31Dellinger.html?_r=1&oref=slogin. Further, noting that senior Bush Administration officials are citing the 1994 memorandum Dellinger wrote establishing a legal basis for signing statements, Dellinger argues that these officials "largely ignore the memo's cautionary guidelines." *Id.* "The Bush administration's frequent and seemingly cavalier refusal to enforce laws, which is aggravated by avoidance of judicial review and even public disclosure of its actions, places it at odds with [the principles outlined in the Dellinger memo] and with predecessors of both parties." *Id.*

tion, I explore the methods the executive branch has used to undermine the democratic basis of these international standards. These include secret legal memos justifying the use of torture (the “torture memos”) and the use of presidential signing statements. Beyond supporting an expansive view of executive power, these methods are themselves designed to squelch democratic debate. In the third Subsection, I examine the judiciary’s firm rebuff in the *Hamdan* decision of the Executive’s claims of permissible unilateralism in the context of military commissions. Here, the Article considers the relevance of the Court’s decision for the torture debate and democracy.

1. *Congressional Efforts that Deepen the Democratic Basis of International Law*

Before Congress ever explicitly considered it, the prohibition on torture had been established variously as a customary norm,¹⁴⁷ an aspect of *jus cogens*,¹⁴⁸ and a provision of numerous treaties, including treaties ratified by the United States.¹⁴⁹ Long before *Hamdan*, Congress as a whole deepened the democratic basis of the international prohibition on torture by implementing it in domestic legislation. This domestication helped fulfill U.S. obligations found in previously ratified treaties requiring legislation criminalizing torture. For example, Congress implemented the anti-torture protections found in the Geneva Conventions of 1949 through the enactment of the War Crimes Act.¹⁵⁰ Before the Military Commissions Act amended it, the War Crimes Act criminalized all violations of Common Article 3 (common to all four Geneva Conventions) as war crimes.¹⁵¹ Among other things, Common Article 3 pro-

147. See, e.g., *Filartiga*, 630 F.2d at 876.

148. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 cmt. n (1987) (identifying torture prohibition as *jus cogens* norm).

149. See, e.g., Convention Against Torture or Other Cruel, Inhuman, or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85, 23 I.L.M. 1027, as modified by 24 I.L.M. 535 (1985) [hereinafter Convention Against Torture]; International Covenant on Civil and Political Rights (ICCPR), Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976). Note that the provisions of article 41 (interstate complaints) of the ICCPR entered into force on March 28, 1979.

150. 18 U.S.C. § 2441 (2001).

151. For changes wrought by the Military Commissions Act, see the discussion *infra* Part IV.

hibits inhumane treatment, “cruel treatment and torture,” and “outrages upon personal dignity, in particular humiliating and degrading treatment.”¹⁵² Further, Congress implemented the anti-torture protections found in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Torture Convention”) through enactment of the Federal Torture Statute.¹⁵³ While ratification of the Geneva Conventions and Torture Convention (as well as of the International Covenant on Civil and Political Rights) gave the international torture prohibition a democratic imprimatur, the War Crimes Act and Federal Torture Statute represent additional “democracy moments” for the prohibition.¹⁵⁴

In the face of these explicitly democratic legislative efforts to reaffirm the international prohibition on torture, executive branch lawyers have made a series of arguments to claim that application of these laws to the President would unconstitutionally encroach on his power to wage war as Commander-in-Chief. Not only did executive branch officials advance the position that legislation criminalizing torture could be dis-

152. See, e.g., Third Geneva Convention, *supra* note 6, art. 3. The Third Geneva Convention requires that governments “undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed . . . grave breaches of the present Convention.” *Id.* art. 129. Among other things, grave breaches include “torture or inhuman treatment,” “willfully causing great suffering or serious injury to body or health,” or “willfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.” *Id.* art. 130. As for other violations (so-called “nongrave” breaches), the Third Geneva Convention further provides that governments “shall take measures necessary for the suppression of all acts contrary to the [other] provisions of the present Convention.” *Id.* art. 129. Such violations include, inter alia, “cruel treatment” and “outrages upon personal dignity, in particular humiliating and degrading treatment.” *Id.* art. 3(a), (c). For further discussion and criticism of the distinction between grave and “nongrave” breaches—particularly as this distinction is made in the Military Commissions Act—see *infra* Part IV.

153. 18 U.S.C. § 2340A (2006). The Convention Against Torture requires that “[e]ach State Party shall ensure that all acts of torture are offenses under its criminal law.” Convention Against Torture, *supra* note 149, art. 4.

154. Note that while the United States has ratified the International Covenant on Civil and Political Rights, which prohibits torture as well as cruel, inhuman, or degrading treatment or punishment, Congress has not passed implementing legislation as regards these treaty obligations. Nonetheless, as a ratified treaty, it is federal law under the Supremacy Clause of the federal Constitution. U.S. CONST. art. VI; see *supra* Part III.A.2 (discussing this point).

counted, but they moreover took this stance secretly through internal memos or quietly through a presidential signing statement rather than more publicly (for example, through veto). In this sense, the White House position on torture suffers from a “double democracy deficit”: It resists international norms democratically implemented through legislation, and it displays this resistance largely behind closed doors rather than exposing it to the sunlight of democratic debate.¹⁵⁵ We can understand this position as reflecting the thin majoritarian conception of democracy.

2. *Executive Branch Efforts to Undermine Anti-Torture Protections: Tools for Tinkering*

The different positions taken by critics of international law in the context of constitutional analysis on the one hand, and the War on Terror on the other, turn on conflicting conceptions of the requirements of democracy in implementing international law domestically.¹⁵⁶ The underlying subtext in

155. I borrow the phrase “double democracy deficit” from McGinnis and Somin, who use it, by contrast, to describe what they perceive to be the democratic illegitimacy of customary international law. McGinnis & Somin, *supra* note 10, at 1207.

156. A related topic that is beyond the scope of this Article is whether the President has authority to violate international law more generally. For an excellent discussion of this, see Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 154-57 (2004). Violating international law is distinct from a President’s decision to withdraw from the treaty. “For treaty withdrawals—at least withdrawals that are valid under international law—the conventional view is that the President may act without the approval of Congress.” Larry R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579, 1590 n.25 (2005); *see also* Jinks & Sloss, *supra*, at 154-57 (distinguishing between treaty withdrawals and treaty violations when analyzing the President’s authority under the Constitution and concluding that “[a]s long as a presidential decision to suspend, terminate, or withdraw from a treaty complies with international law, the President’s action is consistent with his constitutional duty to ‘take Care that the Laws be faithfully executed’”); Joshua P. O’Donnell, Note, *The Anti-Ballistic Missile Treaty Debate: Time for Some Clarification of the President’s Authority to Terminate a Treaty*, 35 VAND. J. TRANSNAT’L L. 1601, 1625 (2002) (“The most widely-held modern view on the topic is that the President has the authority to terminate treaties, but it is still a highly controversial topic.” (internal quotations omitted)); *Goldwater v. Carter*, 444 U.S. 996 (1979) (holding on political question grounds in challenge brought by congressional representatives against President Carter’s termination of a mutual defense treaty with Taiwan in accordance with the treaty’s termination clause that there is no judicially enforceable

these varying positions is that war—particularly *this* war—is different. Emphasizing the structural advantages of the executive branch in swift decisionmaking and readier access to information,¹⁵⁷ supporters of this view argue for expansive and often unilateral executive authority in times of war and, thus,

constitutional constraint that precludes the President from exercising a treaty termination clause unilaterally (i.e., without a congressional vote) on the basis of his Article II powers).

157. Summarizing arguments made by critics, Mark Tushnet notes:

The executive branch is nominally unified under the President, and so can develop a single position, whereas Congress has many members who seek to advance both a general view and more parochial interests. The President has readier access to relevant information than Congress does, and can keep the information secret even from Congress. Finally, the President can act quickly, whereas Congress takes time to deliberate and enact legislation.

Tushnet, *supra* note 8, at 1470 (citing ERIC POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 170 (2007)); see also POSNER & VERMEULE, *supra*, at 170 (including among the “institutional disadvantages” of Congress a “lack of information about what is happening” and an “inability to act quickly and with one voice”); *id.* at 170 (“[C]ongressional deliberation is slow and unsuited for emergencies. Congress has trouble keeping secrets and is always vulnerable to obstructionism at the behest of members of Congress who place the interests of their constituents ahead of those of the nation as a whole.”); *United States v. Curtiss-Wright Ex. Corp.*, 299 U.S. 304, 320 (1936) (noting that in foreign affairs, the President “has his confidential sources of information”); *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2823 (2006) (Thomas, J., dissenting) (emphasizing that “the structural advantages attendant to the executive branch—namely, the decisiveness, ‘activity, secrecy, and dispatch’ that flow from the Executive’s ‘unity’ . . . led the Founders to conclude that the ‘President ha[s] primary responsibility—along with the necessary power—to protect the national security and to conduct the nation’s foreign relations”). *But see* Mark Tushnet, *The Political Constitution of Emergency Powers: Some Lessons from Hamdan*, 91 MINN. L. REV. 1451, 1470 (2007), in which Tushnet speculates:

One might wonder, though, about whether these characteristics give the President much of an advantage over Congress, except in the very short run. It is easy to exaggerate the unity within the executive: It is part of the folk-lore of Washington, for example, that the Department of State and the Department of Defense are regularly at odds over the proper response to external threats. Leaks from within the executive bureaucracy are common, and not always at the behest of the President. Specialized committees and their professional staff members can over time acquire expertise and information equivalent to, or exceeding, that of the President’s political appointees and employees in the executive bureaucracy. Congress can organize itself to engage in real-time oversight of executive operations, and at least has attempted to do so by requiring

for the thin majoritarian conception of democracy. This view has been advanced to support presidential power even in the face of Congressional limitations in various aspects of the War on Terror, including the use of warrantless wiretapping and the detention and treatment of terrorism suspects. Moreover, by arguing that the War on Terror has no geographic or temporal boundaries, critics argue that the framework developed in Justice Robert Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*¹⁵⁸ does not apply. These claims were made in (1) internal "torture memos" written by executive branch lawyers to secretly justify executive authority to use coercive interrogation techniques on detainees¹⁵⁹ and (2) a presidential signing statement limiting the reach of legislation concerning treatment of detainees.

a. *The Torture Memos*

Here I focus on two of the torture memos. The first, by Jay S. Bybee ("Bybee Opinion"), then-Assistant Attorney General of the Office of Legal Counsel (OLC), concerns implementation of the Federal Torture Statute and U.S. obligations under the Torture Convention.¹⁶⁰ The second, by John Yoo ("Yoo Opinion"), then-Deputy Assistant Attorney General of OLC, concerns implementation of the War Crimes Act and U.S. obligations under the Geneva Conventions.¹⁶¹ Opinions

that the President notify a select group of congressional leaders [the so-called "gang of Eight"] of some operations.

158. 343 U.S. 579 (1952); see *infra* Part III.B.4.

159. The "torture memos" became public only when they were eventually leaked to the press. For a collection of these memos, see THE TORTURE PAPERS, *supra* note 7. See generally MARK DANNER, TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR (2004).

160. Memorandum from Jay Bybee, Ass't Att'y Gen., U.S. Dep't of Justice, Office of Legal Counsel, to Alberto Gonzales, Counsel to the President, Regarding Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002), available at <http://news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf> [hereinafter Bybee Opinion]. In fact, this memorandum was "also written by [John] Yoo . . . but it was signed by Mr. Bybee and for several years has been commonly known as the Bybee memo." Mark Mazzetti, '03 U.S. Memo Approved Harsh Interrogations, N.Y. TIMES, Apr. 2, 2008, at A1.

161. Note too that another Office of Legal Counsel attorney, Robert J. Delahunty, assisted with this Opinion. Memorandum from John Yoo, Deputy Ass't Att'y Gen., U.S. Dep't of Justice, Office of Legal Counsel and Robert J. Delahunty, Special Counsel, U.S. Dep't of Justice, to William J. Haynes

provided by the Justice Department's OLC determine authoritatively the executive branch's legal position on non-litigation matters.¹⁶²

i. *The Bybee Opinion*

The August 1, 2002 Bybee memorandum opinion, sent to then-Counsel to the President Alberto R. Gonzales, addressed standards of conduct for interrogation. Apparently in response to a request from White House Counsel Gonzales, the Bybee Opinion seeks to answer whether U.S. officials can use tactics tantamount to torture against terrorism suspects without being held criminally responsible under the Federal Torture Statute.

The legal analysis contained in the Bybee Opinion is flawed in several respects. As others have discussed in greater detail,¹⁶³ this Opinion uses an "absurdly narrow definition of torture."¹⁶⁴ Moreover, the Bybee Opinion asserts a number of excuses, including presidential war powers, self-defense, and the defense of necessity, which "ignore the absolute nature of the ban on torture in the Torture Conventions Article 2, as well as the legitimate scope of self-defense and necessity under international law."¹⁶⁵

For the purposes of this Article, the most significant way in which the Bybee Opinion distorts the law is by using a thin

II, Gen. Counsel, Dep't of Def., Regarding Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002) [hereinafter Yoo Opinion], reprinted in *THE TORTURE PAPERS*, *supra* note 7, at 38. While I discuss the Yoo Opinion second, it is chronologically first when compared to the Bybee Opinion.

162. For a discussion of the proper role of the Office of Legal Counsel, see Harold Hongju Koh, *Protecting the Office of Legal Counsel from Itself*, 15 *CARDOZO L. REV.* 513 (1993); Dawn Johnsen, *Guidelines for the President's Legal Advisors*, 81 *IND. L.J.* 1345 (2006).

163. See, e.g., José E. Alvarez, *Torturing the Law*, 37 *CASE W. RES. J. INT'L L.* 175 (2006); Harold Hongju Koh, *Can the President Be Torturer in Chief?*, 81 *IND. L.J.* 1145 (2006) [hereinafter Koh, *Torturer-in-Chief*]; Waldron, *supra* note 13, at 1681.

164. Koh, *Torturer-in-Chief*, *supra* note 163, at 1150.

165. Alvarez, *supra* note 163, at 183-84 (citing, inter alia, Convention Against Torture, *supra* note 149, art. 2(2) (stating that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture")).

majoritarian view of democracy to conclude that legislation criminalizing torture simply does not apply to the President or his subordinates in interrogating suspected terrorists. The Opinion claims that “[a]ny effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution’s sole vesting of the Commander-in-Chief authority in the President.”¹⁶⁶ Asserting that “[o]ne of the core functions of the Commander in Chief is that of capturing, detaining, and interrogating members of the enemy,”¹⁶⁷ the Opinion contends that “Congress lacks authority under Article I to set the terms and conditions under which the President may exercise his authority as Commander in Chief to control the conduct of operations during a war.”¹⁶⁸ By claiming that even subordinates cannot be prosecuted for torture if they were “carrying out the President’s Commander-in-Chief powers,” the Bybee Opinion concludes that these officials cannot be punished under the Federal Torture Statute for “aiding the President in exercising his exclusive constitutional authorities.”¹⁶⁹ As one observer has noted, “[we are left with the conclusion that] the Constitution licenses the President to be ‘torturer in chief.’”¹⁷⁰

In fact, in the area of foreign affairs and warfare, Congress has substantial authority that it shares with the President. “On its face, the Constitution divides power over foreign affairs.”¹⁷¹ Congress has power “to provide for the common De-

166. Bybee Opinion, *supra* note 160, at 39; *see also id.* at 34:

In order to respect the President’s inherent constitutional authority to manage military campaign against al Qaeda and its allies, [the Federal Torture Statute] must be construed as not applying to interrogations undertaken pursuant to his Commander-in-Chief authority.

167. *Id.* at 38.

168. *Id.* at 34-35.

169. *Id.* at 35.

170. Koh, *Torturer-in-Chief*, *supra* note 163, at 1151.

171. Cole, *What Bush Wants to Hear*, *supra* note 127, at 8; *see also* Ingrid B. Wuerth, *International Law and Constitutional Interpretation: The Commander-in-Chief Clause Reconsidered*, 106 MICH. L. REV., at 9-10 (forthcoming 2008), available at <http://ssrn.com/abstract=988509> (“This analysis shows that the Constitution deliberately gave Congress control over the development and interpretation of important war-related questions of international law, even at the expense of the President’s power to control strategic decisions around the deployment of force.”).

fense”;¹⁷² to raise and regulate the military;¹⁷³ to define “Offenses against the Law of Nations”;¹⁷⁴ to regulate international commerce;¹⁷⁵ to “declare War”;¹⁷⁶ to “grant Letters of Marque and Reprisal” (authorizing lesser forms of conflict);¹⁷⁷ to “make Rules for the Government and Regulation of the land and naval Forces”;¹⁷⁸ and, significantly, to “make Rules concerning *Captures* on Land and Water.”¹⁷⁹ Furthermore, Congress has power to “make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”¹⁸⁰ Pursuant to these sources of authority, Congress has enacted, for example, the Uniform Code of Military Justice (UCMJ), which prohibits torture of interrogatees.¹⁸¹

Certainly, the Commander-in-Chief power grants the President “the supreme command and direction of the military and naval forces.”¹⁸² This clause recognizes the need for the President to exercise unified control over the armed forces, particularly with regard to battlefield operations. But the power to regulate the treatment of wartime detainees is shared between the legislative and executive branches. Unfortunately for those who insist on a strong executive in wartime and are thus cynical about both international law and the role of Congress in incorporating international law constraints on executive action, “the framers held precisely the opposite views.”¹⁸³ As David Cole points out, the framers “were intensely wary of executive power,” particularly in light of their experience with

172. U.S. CONST. art. I, § 8, cl. 1.

173. *Id.* art. I, § 8, cls. 12, 13, 14.

174. *Id.* art. I, § 8, cl. 10.

175. *Id.* art. I, § 8, cl. 3.

176. *Id.* art. I, § 8, cl. 11.

177. *Id.*

178. *Id.* art. I, § 8, cl. 14.

179. *Id.* art. I, § 8, cl. 11 (emphasis added).

180. *Id.* art. I, § 8, cl. 18.

181. Koh, *Torturer-in-Chief*, *supra* note 163, at 1157. Koh notes that “[i]n 1950, Congress passed the Uniform Code of Military Justice (UCMJ) in order to ensure fairness and openness in the trials and treatment of military defendants.” *Id.* at 1157 n.60.

182. THE FEDERALIST No. 69 (Alexander Hamilton).

183. Cole, *What Bush Wants to Hear*, *supra* note 127, at 8.

the British monarch.¹⁸⁴ Thus, they wanted to place more constraints—not fewer—on the decision to go to war. Furthermore, “as leaders of a new and vulnerable nation, they were eager to ensure that the mutual obligations they had negotiated with other countries would be honored and enforced.”¹⁸⁵

A subsequent legal opinion issued in 2004 by Daniel Levin, Acting Assistant Attorney General, OLC, withdrew the Bybee Opinion.¹⁸⁶ However, although the Levin Opinion withdrew the Bybee Opinion, it did not formally repudiate its reasoning. As Koh points out, “[i]nformally, [Levin’s withdrawal] stated only that [Bybee’s] reasoning was unnecessary and left open the question whether the withdrawal was prompted because the reasoning was wrong or because it was not necessary for the purpose of the original opinion.”¹⁸⁷

ii. *The Yoo Opinion*

Like the Bybee Opinion, the Yoo Opinion of January 9, 2002 asserts the thin majoritarian view of democracy; this time, the focus is on the Geneva Conventions and War Crimes Act. The Yoo Opinion concludes that the pertinent provisions concerning interrogation techniques in the Third and Fourth Geneva Conventions do not apply to Al Qaeda or Taliban detainees as a matter of law and that the President’s interpretation of the applicability of treaties is decisive.¹⁸⁸ As scholars have noted of Yoo’s determination that the Geneva Conventions do not apply:

[T]hese overbroad determinations ignore the differences between regular and irregular forces under Article 4 (A) (1) and (2) of Geneva III, the plain meaning of Common Article 3, and the Article 5 requirement in Geneva III that in cases of doubt, determinations of Prisoner of War (“POW”) status

184. *Id.*

185. *Id.*

186. Memorandum from Daniel Levin, Acting Ass’t Att’y Gen., U.S. Dep’t of Justice, Office of Legal Counsel, to James B. Comey, Deputy Att’y Gen., Regarding Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A, at 2 (Dec. 30, 2004), available at http://www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/levin-memo-123004.pdf.

187. Koh, *Torturer-in-Chief*, *supra* note 163, at 1151.

188. Yoo Opinion, *supra* note 161, at 39-59.

need to be made by a competent tribunal and not by the President acting alone.¹⁸⁹

Even in cases in which the Geneva Conventions do apply to detainees, the Yoo Opinion claims that broad-based executive authority prevent their application where it would constrain the President. Similar to the Bybee Opinion, the Yoo Opinion denigrates the role of Congress in this process, asserting:

[The President's] foreign affairs power is independent of Congress: it is 'the very delicate, plenary and exclusive power of the President as an organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an Act of Congress. . . . Part of the President's plenary power over the conduct of the nation's foreign relations is the interpretation of treaties and of international law.¹⁹⁰

Yoo expands on this view in a recent book in which he argues that because foreign policy is an executive prerogative, the President has the unilateral power to interpret (and reinterpret) treaties.¹⁹¹ In a review of Yoo's book, David Cole persuasively maintains:

[W]hile the Constitution plainly envisions the President as the principal negotiator of treaties, it also gave clear responsibilities for treaties to the other branches; all treaties must be approved by two-thirds of the Senate, and once ratified, treaties become "law" enforceable by the courts. The President must certainly be able to interpret treaties in order to "execute" the laws, just as he must be able to interpret

189. Alvarez, *supra* note 163, at 180 (summarizing criticism of the Yoo Opinion).

190. Yoo Opinion, *supra* note 161, at 52; *see also* YOO, THE POWERS OF WAR AND PEACE, *supra* note 120, at 225; JOHN C. YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR (2006) (arguing that the Constitution grants the President the lead role in foreign affairs and that other branches should defer to the executive in wartime); John Yoo, Op-Ed., *How the Presidency Regained Its Balance*, N.Y. TIMES, Sept. 17, 2006, at A4, available at <http://www.nytimes.com/2006/09/17/opinion/17yoo.html> (claiming that "the inescapable fact is that war shifts power to the branch most responsible for its waging: the executive").

191. YOO, THE POWERS OF WAR AND PEACE, *supra* note 120, at 190-214.

statutes for that purpose. But there is no reason why his interpretations of treaty should be any more binding on courts or the legislature than his interpretations of statutes.¹⁹²

The Yoo Opinion likewise makes extravagant claims regarding customary international law, which also prohibits torture. Relying on the scholarship of Curtis Bradley and Jack Goldsmith, the Opinion describes the mainstream view—that customary international law has the status of federal law—as “seriously mistaken.”¹⁹³ This claim is made despite acknowledgment of the Supreme Court’s famous passage in the *Paquete Habana* case that “international law is our law.”¹⁹⁴ At the same time, the Yoo Opinion ignores the fact that regardless of the status of customary international law, Congress *has* implemented the customary international law prohibition on torture through a variety of federal statutes.¹⁹⁵ While the Yoo opinion acknowledges in passing that the Constitution gives Congress the power to “define and punish . . . offenses against the Law of Nations,” he incorrectly uses this constitutional hook to argue that customary international law is not federal law until Congress acts.¹⁹⁶

Moreover, the Yoo Opinion advances the controversial position that “any presidential decision in the current conflict concerning the detention and trial of Al Qaeda or Taliban militia prisoners would constitute a ‘controlling’ executive act that would immediately and completely override any custom-

192. Cole, *What Bush Wants to Hear*, *supra* note 127, at 10.

193. Yoo Opinion, *supra* note 161, at 71 n.108 (relying on Bradley & Goldsmith, *Customary International Law*, *supra* note 132, along with other revisionist scholars). *But see id.* (citing to the mainstream literature rebutting the Bradley and Goldsmith argument); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 cmt. 3 (1987) (“[T]he modern view is that customary international law in the United States is federal law.”); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 752 (2004) (affirming that customary international law has some standing as federal law). *See also infra* Part III.A.3.

194. *The Paquete Habana*, 175 U.S. 677, 700 (1900) (referring to customary international law as federal law).

195. Besides the Federal Torture Statute and War Crimes Act (discussed *supra*), Congress has also passed the Torture Victim Protection Act, which provides a right of action in U.S. courts to sue individuals that, under authority of a foreign nation, violate the prohibition on torture. Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (2006).

196. Yoo Opinion, *supra* note 161, at 71.

ary international norms.”¹⁹⁷ Other scholars have shown this claim to be contestable in light of Supreme Court precedent and historical practice.¹⁹⁸ The notion that a controlling executive act can supersede customary international law seems most problematic and undemocratic (reflecting at best the thin majoritarian democratic idea) when Congress has acted to implement the customary norm, as it has done with prohibition on torture.

b. *Presidential Signing Statements*

In this Subsection, I examine President Bush’s well-known practice of issuing signing statements.¹⁹⁹ Several signing state-

197. *Id.* at 74.

198. Alvarez argues that this proposition is at odds with the *Paquete Habana* case, noting:

[T]he famous passage in that judgment “where there is no treaty, and no controlling executive or legislative act or judicial decision,” has been interpreted either as stating that customary international law necessarily gives way to a “controlling executive act,” or is merely stating that customary international law exists as U.S. Federal law *even when* no controlling executive or legislative act or judicial decision has previously recognized the custom in question.

Alvarez, *supra* note 163, at 186 n.43 (emphasis in original). For a historical account strongly supporting the second interpretation, see William Dodge, *The Story of the Paquete Habana: Customary International Law as Part of Our Law*, in *INTERNATIONAL LAW STORIES* (John E. Noyes, Mark Janis, & Laura Dickinson eds., 2007).

199. As veteran *Boston Globe* reporter Charlie Savage points out, “President Bush has quietly claimed the authority to disobey more than 750 laws enacted since he took office, asserting that he has the power to set aside any statute passed by Congress when it conflicts with his interpretation of the Constitution.” Charlie Savage, *Bush Challenges Hundreds of Laws*, *BOSTON GLOBE*, Apr. 30, 2006, at A1, available at http://www.boston.com/news/nation/Washington/articles/2006/04/30/bush_challenges_hundreds_of_laws/. In fact, the bipartisan American Bar Association Task Force on Presidential Signing Statements and the Separation of Powers Doctrine cautions that “the Bush Administration has used signing statements to claim the authority or state the intention to disregard or decline to enforce all or part of a law he signed more than all of his predecessors combined.” AMERICAN BAR ASS’N, TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE, RECOMMENDATION 6 (2006), available at http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf. The Task Force also noted that the issue has deep historical roots, with Parliament condemning King James II for non-enforcement of certain laws as early as the 17th century. *Id.* at 19; see also Christopher S. Kelley, *A Comparative Look at the Constitutional Signing*

ments have been issued in the context of the War on Terror.²⁰⁰ This subsection focuses specifically on a prominent example, that is, the signing statement Bush issued for the Detainee Treatment Act,²⁰¹ legislation regulating the treatment of detainees.

I argue that the Bush Administration has used signing statements as another vehicle to shift power from the legislative to the executive branch in ways that deeply undermine democracy and the democratic incorporation of international law.²⁰² As with the torture memos, these signing statements reflect a thin majoritarian conception of democracy that works against greater democracy in international law rather than for it.

i. *Signing Statement for the Detainee Treatment Act*

The signing statement President Bush issued upon signing the Detainee Treatment Act reflects the ways in which this practice undermines Congressional efforts to deepen the democratic basis of international law. The Detainee Treatment Act, enacted as part of the Defense Authorization Act, includes two important provisions. First, the part of the legislation popularly known as the McCain Amendment categorically pro-

Statement: The Case of Bush and Clinton, at 19 (presented at the 61st Annual Meeting of the Midwest Political Science Association) (April 3-6, 2003), available at <http://mpsa.indiana.edu/conf2003papers/1031858822.pdf>.

200. Savage provides that the details of many signing statements, including several that have been issued in the context of the War on Terror. Savage, *supra* note 199, at A1.

201. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680, 2739-44 (codified at 10 U.S.C. § 801, 42 U.S.C. §§ 2000dd-2000dd-1) (2006).

202. As Savage notes, President Bush “agrees to a compromise with members of Congress, and all of them are there for a public bill-signing ceremony, but then he takes back those compromises—and more often than not, without the Congress or the press or the public knowing what has happened.” Savage, *supra* note 199, at A2. Savage reports that:

In his signing statements, Bush has repeatedly asserted that the Constitution gives him the right to ignore numerous sections of the bills—sometimes including provisions that were the subject of negotiations with Congress in order to get lawmakers to pass the bill. He has appended such statements to more than one of every 10 bills he has signed.

Id.; see also NEIL KINKOPF, AM. CONST. SOC’Y, ISSUE BRIEF, SIGNING STATEMENTS AND THE PRESIDENT’S AUTHORITY TO REFUSE TO ENFORCE THE LAW 2 (2006), available at <http://www.acslaw.org/node/2965>.

hibits cruel, inhuman, or degrading treatment of detainees by all U.S. personnel anywhere in the world.²⁰³ Second, the part of the legislation popularly known as the Graham-Levin amendment strips habeas jurisdiction for detainees, though the legislative history is unclear on whether this provision was intended to apply retroactively.²⁰⁴

By clarifying that even detainees in U.S. custody *overseas* are entitled to be free not only of torture, but also of other cruel, inhuman, or degrading treatment, the McCain Amendment was intended to close a loophole in U.S. implementation of the Torture Convention. The Convention prohibits torture as well as cruel, inhuman, or degrading treatment or punishment.²⁰⁵ However, while the Torture Convention explicitly requires states party to criminalize torture by government officials occurring anywhere in the world, including extraterritorially, it does not include an explicit obligation to criminalize cruel, inhuman, and degrading treatment occurring extraterritorially. Even though several international bodies take the view that international human rights obligations apply extraterritorially as long as the conduct is subject to the contacting party's jurisdiction or control,²⁰⁶ the U.S. government has frequently taken the position that its international law obligations do not apply "beyond the water's edge," other than in a few

203. Pub. L. No. 109-148, tit. X, § 1003, 119 Stat. 2680, 2739-40. The McCain Amendment was, of course, sponsored by Senator John McCain, a former POW in Vietnam.

204. See Pub. L. No. 109-148, tit. X, § 1005, 119 Stat. 2680, 2740-44. In *Hamdan*, the Court found that the habeas-stripping provisions of the Detainee Treatment Act did not apply retroactively to Hamdan's case, which was pending before the legislation went into effect. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2769 (2006).

205. Convention Against Torture, *supra* note 149, pmb., art. 2.

206. See *Committee Against Torture*, *supra* note 51, ¶ 15 (noting that "a number of the Convention's provisions are expressed as applying to 'territory under the State party's jurisdiction'" including article 16's prohibition on cruel, inhuman, or to degrading treatment or punishment) (citations omitted); cf. Report of the Human Rights Committee, GAOR, 46th Sess., Supp. No. 40, at 150-58, U.N. Doc. A/46/40 (1991) (stating that Iraq had a clear responsibility under international law for the observance of human rights during its occupation of Kuwait); *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) (1995) (stating the same with regard to the European Convention on Human Rights in case involving the area of Cyprus under Turkish occupation).

exceptional cases, such as with the torture prohibition.²⁰⁷ This was an underlying assumption in the Bybee Opinion, which tried to limit torture to the worst forms of conduct; since, according to the government's position, only the prohibition on torture applies overseas, it was important to then limit the *scope* of that prohibition.

The McCain Amendment was included as part of the Detainee Treatment Act in response to allegations of abuse of detainees held overseas, including in Iraq, Afghanistan, and Guantanamo. Some of the abuses that occurred in the Abu Ghraib and other detention centers might not have constituted torture, particularly the high threshold for torture advanced by the Bybee Opinion, but were nonetheless cruel, inhuman, or degrading treatment or punishment within the meaning of the Torture Convention. Since the reasoning in the Bybee Opinion sought to immunize from criminal prosecution coercive techniques falling short of torture (including conduct that was *merely* cruel, inhuman, or degrading treatment), the McCain Amendment in particular was seen as a challenge to the Administration's "enhanced interrogation" program.

Therefore, while signing the Act, the President issued a signing statement including the following buried reference to McCain's handiwork in the eighth paragraph:

The executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President, evidenced in Title X,

207. See, e.g., *Sale v. Haitian Ctr. Council, Inc.*, 509 U.S. 155, 175-76 (1993) (accepting the government's argument that extraterritorial application of the Refugee Convention to the forced return of Haitian refugees by U.S. Coast Guard cutters outside of United States borders on the high seas would be inappropriate and would negate the very purpose of terms such as "deportation" and "return"); *United States v. Duarte-Acero*, 296 F.3d 1277, 1283 (11th Cir. 2002) (relying on the executive branch's argument that the ICCPR does not regulate the extraterritorial conduct of U.S. government agents).

of protecting the American people from further terrorist attacks.²⁰⁸

Essentially, through the signing statement, “the President signaled his intention to reserve his authority, as Commander-in-Chief, to ignore statutory mandates.”²⁰⁹ Martin Lederman translates this to mean: “I reserve the constitutional right to waterboard when it will ‘assist’ in protecting the American people from terrorist attacks.”²¹⁰ Or, as Matthew Franck at the *National Review* puts it: “[T]he signing statement . . . conveys the good news that the president is not taking the McCain amendment lying down.”²¹¹ In rebuffing Congressional authority to regulate the executive branch’s treatment of detainees, the signing statement asserts the thin majoritarian approach to democracy.

In resisting judicial oversight, other aspects of the signing statement further reflect the thin majoritarian conception. For example, the signing statement goes on to say that the legislation creates no private right of action.²¹² As regards the Graham-Levin Amendment, the signing statement says that the jurisdiction-stripping “shall apply to past, present, and future actions, including applications for writs of habeas corpus” and “does not confer any constitutional right upon an alien detained abroad as an enemy combatant.”²¹³ A constitutional conception of democracy, on the other hand, would keep the courthouse doors open to noncitizen detainees and would embrace a private right of action as democracy-enhancing.

Responding in particular to the signing statement’s resistance to Congressional regulation of the treatment of detainees—signaled in its reference to the “constitutional authority of the President to supervise the unitary executive branch”²¹⁴—the Bill’s three principal Senate sponsors, Repub-

208. President’s Statement on Signing of H.R. 2863, 2005 U.S.C.C.A.N. S50, S51 (Dec. 30, 2005).

209. Posting of Martin Lederman, *So Much for the President’s Assent to the McCain Amendment*, to Balkinization, <http://balkin.blogspot.com/2006/01/so-much-for-presidents-assent-to.html> (Jan. 2, 2006).

210. *Id.*

211. *Id.* (quoting Franck).

212. President’s Statement on Signing of H.R. 2863, *supra* note 208, at S51.

213. *Id.*

214. *Id.*

licans John McCain of Arizona, John W. Warner of Virginia, and Lindsey O. Graham of South Carolina, all publicly rebuked the President's contention that he could disobey the torture ban. Graham noted: "I do not believe that any political figure in the country has the ability to set aside any . . . law of armed conflict that we have adopted or treaties that we have ratified."²¹⁵ The President's signing statement thus neatly reflects the contradictions at issue in this Article: insisting on less democratic process in an area where enforcing international law would be democracy-enhancing rather than democracy-diminishing.

3. *The Judicial Response: Hamdan as a Democracy-(Rein)forcing Decision*

The *Hamdan* Court rejected the claim that the War on Terror justifies executive unilateralism and the flouting of Congressional limits. In rejecting broad claims of executive unilateralism, *Hamdan* calls on the President to consult Congress as a true partner in developing standards governing wartime detainees. In this sense, *Hamdan* is a democracy-(rein)forcing decision.²¹⁶ It reflects a thicker majoritarian perspective on democracy than the Administration has been prepared to accept and leaves the door open to the constitutional conception of democracy outlined in Part III.

While the *Hamdan* decision concerns the validity of the military commission the White House established to try Salim Ahmed Hamdan, Osama bin Laden's former driver, the sweep of the decision is necessarily broader and has multiple implications for the treatment of detainees. First, not only does *Hamdan* embrace the continuing relevance of the Geneva Conventions, it also holds that Common Article 3 of the Geneva Conventions applies to the conflict between the United States and Al Qaeda.²¹⁷ Second, *Hamdan* validates the demo-

215. *Id.*

216. For the reasons described below, I am describing the *Hamdan* decision as democracy-reinforcing, as opposed to merely democracy-forcing as described by Jack Balkin. Balkin, *supra* note 8.

217. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2795-96. In contrast to Common Article 2, which only applies to an armed conflict between "two or more of the High Contracting Parties," Common Article 3 contains baseline standards concerning the treatment of those detained in a "conflict not of an international character." Third Geneva Convention, *supra* note 6, arts. 2, 3.

cratic process as vital to determining the relationship between domestic and international law. Third, the *Hamdan* decision vindicates the separation of powers and rebuffs the President's wartime claims of executive unilateralism (pursuant to his Commander-in-Chief powers) over the treatment of detainees.

On the first point, *Hamdan's* holding that Common Article 3 applies to the conflict between the United States and Al Qaeda is significant for the issue of torture. While the *Hamdan* case itself involves the question of whether the military tribunal at issue was a "regularly constituted court" under Common Article 3,²¹⁸ other provisions of Common Article 3 prohibit inhumane treatment,²¹⁹ "cruel treatment and torture,"²²⁰ and "outrages upon personal dignity, in particular humiliating and degrading treatment."²²¹ Because the Court momentarily declared that at least Common Article 3 applies to the conflict with Al Qaeda as a matter of treaty interpretation, the decision essentially rejects the claim made by Bush Administration officials that the standards found in Common Article 3 do not apply to the 9/11 detainees.²²²

With the prevalence of civil wars, conflicts involving nonstate actors, and other unconventional forms of warfare, conflicts envisioned by Common Article 3 have become much more widespread than the more conventional forms of warfare envisioned by Common Article 2.

218. Article 3 prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." Third Geneva Convention, *supra* note 6, art. 3(1)(d).

219. *Id.* art. 3(1).

220. *Id.* art. 3(1)(a).

221. *Id.* art. 3(1)(c).

222. Writing for the plurality, Justice Stevens rejects the Administration's narrow reading of Common Article 3's scope. The Administration had argued that the scope of Common Article 3 was limited to civil wars and that, in any event, the war on terrorism had an international character. *Hamdan*, 126 S. Ct. at 2795-96. In contrast, the Court opined that Common Article 3 extends to any conflict not covered under Common Article 2, which applies to international conflicts (traditionally between two state parties to the Geneva Convention). *Id.* at 2796. Therefore, Common Article 3 applies in the case of "[armed] conflict not of an international character." *Hamdan*, 126 S. Ct. at 2795. Reversing the D.C. Circuit's contrary holding on this issue, the Court embraced the view that Common Article 3 applies baseline, minimum standards to detainees who are not otherwise eligible for protected status under the Geneva Convention as, for example, prisoners of war (POWs). *Id.* While four other justices joined this part of Stevens's opinion and three dis-

A second way in which *Hamdan* has relevance for the torture question is in its validation of the democratic process in negotiating the relationship between domestic and international law. According to the Court, if the President no longer wants domestic law to track the international protections found in the Geneva Conventions, he must achieve this outcome with the support of Congress, renegotiating the relationship between domestic law and the Geneva Conventions by engaging in the democratic process to revise the relevant statutes.²²³ *Hamdan* itself addresses the domestic incorporation of the Geneva Conventions through the UCMJ²²⁴ provisions on military commissions.²²⁵ Because the military tribunal in question failed to comply with the Common Article 3 requirement of providing a “regularly constituted court” to try *Hamdan*, the Court found that it violated the UCMJ and also, therefore,

sented, Chief Justice John Roberts recused himself from the case because, prior to his nomination to the Supreme Court, he had been a judge on the D.C. Circuit panel that had decided the case below.

223. *Hamdan*, 126 S. Ct. at 2773 (“Exigency alone, of course, will not justify the establishment and use of penal tribunals not contemplated by Article I, section 8 and Article III, section 1 of the Constitution unless some other part of that document authorizes a response to the felt need. And that authority, if it exists, can derive only from the powers granted jointly to the President and Congress in time of war.” (citations omitted)); *id.* at 2808 (Kennedy, J., concurring) (“In sum, as presently structured, *Hamdan*’s military commission exceeds the bounds Congress has placed on the President’s authority in sections 836 and 821 of the UCMJ. Because Congress has prescribed these limits, Congress can change them, requiring a new analysis consistent with the Constitution and other governing laws. At this time, however, we must apply the standards Congress has provided. By those standards the military commission is deficient.”); *id.* at 2799 (Breyer, J., concurring) (“The Court’s conclusion ultimately rests upon a single ground: Congress has not issued the Executive a ‘blank check.’ Indeed, Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary.” (citations omitted)).

224. Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 801-946 (2006).

225. In the military commissions context, Congress had implemented international standards through the UCMJ by requiring that military commissions comport with the laws of war. In other words, Congress limited the President’s authority by specifying that compliance with the Geneva Conventions is a condition for exercising the authority to establish military commissions.

Common Article 3.²²⁶ Accordingly, if the President wants to loosen this requirement, he must convince Congress to amend the UCMJ, although any changes in domestic law would still need to be consistent with our international legal obligations.²²⁷ Similarly, regarding the prohibition on torture, if the President does not agree with the Federal Torture Statute, the War Crimes Act, and the international obligations implemented through these statutes, he must consult with Congress to override these laws. Justice Breyer's concurrence in *Hamdan* provides a window into the plurality's analysis on this point:

Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine—through democratic means—how best to do so. The Constitution places its faith in those democratic means. Our Court today simply does the same.²²⁸

226. *Hamdan*, 126 S. Ct. at 2759 (“[W]e conclude that the military commission convened to try Hamdan lacks power to proceed because its structure and procedures violate both the UCMJ and the Geneva Conventions.”); *id.* at 2796 (“Common Article 3, then, is applicable here and, as indicated above, requires that Hamdan be tried by a ‘regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.’”).

In addition to finding that the military tribunal violated the UCMJ and, by extension, Common Article 3, the Court also held that the President had no authority to constitute the military tribunal in the first place. *Id.* at 2786 (“Whether or not the Government has charged Hamdan with an offense against the law of war cognizable by military commission, the commission lacks power to proceed.”).

227. For example, the Third Geneva Convention requires that “High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention” including “willfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.” Third Geneva Convention, *supra* note 6, arts. 129-30; *see also* Fourth Geneva Convention, *supra* note 6, arts. 146-47 (requiring that “High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention,” including “willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention”).

228. *Hamdan*, 126 S. Ct. 2749, 2799 (Breyer, J., concurring).

A third and related way in which the *Hamdan* decision is important for the torture debate is in its vindication of the separation of powers and its rejection of the President's wartime claims of executive unilateralism over the treatment of detainees. Again, this is reflected perhaps most clearly in Justice Breyer's concurrence, in which he writes to highlight the fact that "[t]he Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a 'blank check.'"²²⁹

In effect, *Hamdan* laid to rest the Administration's argument that international law protections implemented by Congress unconstitutionally interfere with the President's power as Commander-in-Chief.²³⁰ It therefore fundamentally influences the contours of the debate on separation of powers, the requirements of democracy, international law, and the War on Terror. Given this, scholars note that we have not seen such a persuasive or historic vindication of Congressional law over executive power since *Youngstown*,²³¹ and that *Hamdan* may even be "the most important decision on Presidential power ever."²³²

The various opinions in the *Hamdan* decision can be seen as wrestling with the challenge of figuring out where the President's policies relating to the treatment of detainees fit within the three-part framework outlined in Justice Jackson's *Youngstown* concurrence, and, relatedly, the extent to which the President was required to seek democratic approval of his policies

229. *Id.* (quoting Justice O'Connor's majority opinion in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)). In addition to requiring under UCMJ article 21 that military commissions comport with the laws of war, Congress had also required under UCMJ article 36 that the rules for military commissions be the same, "so far as [the President] considers practicable," as those "in the trial of criminal cases in the United States district courts." See UCMJ, 10 U.S.C. §§ 821, 836 (2006).

230. The Court also spurned the Administration's arguments that the Court had no jurisdiction over the case under the jurisdiction-stripping provisions of the Detainment Treatment Act or under comity considerations that would have favored abstention. *Hamdan*, 126 S. Ct. at 2769-71.

231. Flaherty, *More Real than Apparent*, *supra* note 3, at 1, 51 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)).

232. Walter Dellinger, *A Supreme Court Conversation*, SLATE, June 29, 2006, <http://www.slate.com/id/2144476/entry/2144825>.

through Congress.²³³ The plurality in *Hamdan*, per Justice Stevens, sees the case as fitting squarely within Justice Jackson's third category,²³⁴ where the President takes measures inconsistent with the democratic will of Congress and, thus, his authority is at its lowest ebb. After all, Congress expressly provided in the UCMJ that military commissions comport with the laws of war and that the rules for the commissions be the same, to the extent "practicable," as those for courts martial. In dissent, however, Justice Clarence Thomas argues that because Congress had previously authorized the President "to use all necessary and appropriate force" against suspected terrorists in passing the Authorization for Use of Military Force, Congress had in effect granted the President discretion to establish military commissions as an incident of war.²³⁵ Therefore, Justice Thomas views the case as fitting within Justice Jackson's first category,²³⁶ where executive authority—exercised pursuant to congressional authorization—is at its zenith.

Where the plurality and dissent find agreement is in affirming the continuing vitality of the *Youngstown* framework, which, by acknowledging a role for Congress, disfavors the thin majoritarian approach to democracy.²³⁷ By requiring the

233. See *Youngstown*, 343 U.S. at 634 (Jackson, J., concurring). Recall that Justice Jackson opined, first, that "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Id.* at 635. Second, "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." *Id.* at 637. And third, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb." *Id.*

234. *Hamdan*, 126 S. Ct. at 2774 n.23.

235. *Id.* at 2824 (Thomas, J., dissenting) (quoting from the Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (codified in note following 50 U.S.C. § 1541 (2000, Supp. III)) (emphasis added), and noting also that Congress implicitly authorized the President to establish military commissions in the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (codified at 10 U.S.C. § 801, 42 U.S.C. §§ 2000dd-2000dd-1 (2006))).

236. See *id.* (quoting *Youngstown*, 343 U.S. at 635).

237. Interestingly, a recent study of restrictions on civil liberties during times of war reflects that even before *Youngstown*, the Court was more likely to uphold executive authority where there had been bicameral endorsement through Congressional approval. See Samuel Issacharoff & Richard H.

President to go through the democratic process if he wants to depart, in the course of the War on Terror, from legislation implementing international law, *Hamdan* and the *Youngstown* framework demonstrate that “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.”²³⁸

Importantly, in finding the President constrained by legislation deepening the democratic basis of international law, “[w]hat the [*Hamdan*] Court has done is not so much counter-majoritarian as *democracy forcing*. It has limited the President by forcing him to go back to Congress to ask for more authority than he already has”²³⁹ Beyond forcing democracy by requiring the President to return to Congress to ask for additional authority, the *Hamdan* decision also *reinforces* democracy by reaffirming past Congressional action and by validating the democratic basis of international law that has already been implemented through these Congressional efforts. The Court in *Hamdan* thus embraces a thicker majoritarian perspective on democracy than that advanced by the Bush Administration, leaving the door ajar to a broader constitutional conception of democracy.

V. REINFORCING DEMOCRACY IN THE AFTERMATH OF *HAMDAN*: TORTURE AND THE MILITARY COMMISSIONS ACT

According to conventional wisdom, democratic consideration of international law will not always favor the adoption of the international legal norms at issue, particularly in the areas of human rights and humanitarian law, where counter-majoritarian values are implicated. The intuition, then, is to assume that democratic deliberation—especially in the narrow majoritarian or electoral sense of democratic deliberation—will not favor adoption of international law standards that protect minorities or otherwise shift power away from the majority’s status quo. As I develop further in this Part of my Article,

Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES IN L. 1 (2004) (surveying the Court’s response to restrictions on civil liberties during times of conflict, including in the Civil War, World War II, the Korean War, and the Iranian hostage crisis).

238. *Youngstown*, 343 U.S. at 637.

239. Posting of Jack Balkin, *supra* note 8.

the torture debate indicates that while a purely electoral approach to the question of torture places such standards in jeopardy, a richer understanding of democracy would help secure them.

Responding to the challenge posed by critics on their own terms, this Part asks what happens if we allow for broader forms of democratic deliberation not masked in terms of presidential power over an international norm such as the torture prohibition. Section A explores one form of deliberation: Congressional consideration of legislation, such as the Military Commissions Act, through which Congress maintained torture as a war crime but eliminated judicial remedies for detainees to challenge torture and other abusive conduct. Section B explores another form of deliberation: courts, which provide additional avenues for democratic deliberation.

As this Part of the Article describes in further detail, by restricting court access for detainees, the Military Commissions Act cuts off the democratic function of courts and therefore falls far short of the constitutional conception of democracy advanced here. A constitutional conception of democracy would maintain judicial remedies either as a means to ensure equal treatment of citizens and noncitizens or as a means to ensure substantive rights—such as the torture prohibition—essential to maintaining human dignity.

A. *Torture and the Majoritarian Conception of Democracy*

1. *Torture and the Military Commissions Act*

Reflecting the majoritarian conception of democracy, the Military Commissions Act fails to recognize the important democratic function of the judiciary and thus does not meet the requirements of the constitutional conception of democracy outlined in Part III. After weeks of political stalemate, Congress passed the MCA and the President signed it into law on October 17, 2006. Two aspects of the MCA are particularly important for the issue of torture. One is the impact of the legislation on the substantive law of torture. The other is its impact on the structure of judicial and other remedies available to challenge violations of the prohibition on torture.

In terms of the substance, the White House had originally proposed a bill that would have redefined U.S. obligations under the Geneva Conventions and the 1996 War Crimes Act

implementing the Geneva Conventions. The proposed bill would have allowed abusive interrogation of detainees to continue. Congress refused. Largely because of the leadership of three Republicans—Senators John McCain, Lindsay Graham, and John Warner—the compromise legislation that ultimately emerged maintained both torture and cruel and inhuman treatment as war crimes (as had the original War Crimes Act).²⁴⁰ Thus, anyone engaging in—or authorizing—this prohibited conduct is subject to prosecution as a war criminal.

The remedial structure of the statute, however, is deeply troubling. Of greatest concern is the fact that the statute strips habeas jurisdiction from federal courts over challenges brought by detainees.²⁴¹ This deeply undermines the constitutional conception of democracy advanced in this Article. Another disturbing aspect of the statute's remedial structure is that while the legislation does not modify the substantive law of torture, it redefines the category of war crimes that can be criminally prosecuted under the War Crimes Act. Specifically, the MCA amends the War Crimes Act so that only grave breaches of Common Article 3 of the Geneva Conventions can be prosecuted as war crimes.²⁴² By decriminalizing other violations of Common Article 3, the legislation suggests that so-called “non-grave” breaches are not worthy of prosecutorial resources. This includes “outrages upon personal dignity, in particular humiliating and degrading treatment.”²⁴³ In other words, this includes the abusive conduct falling just short of torture that the detainees at the Abu Ghraib facility experienced at the hands of U.S. guards.

240. Military Commissions Act of 2006, Pub. L. No. 109-366, § 6, 120 Stat. 2600, 2632-35. For the original version of the War Crimes Act, see 18 U.S.C. § 2441(c)(3) (1997) (current version at *id.* (2006)).

241. Military Commissions Act, § 7, 120 Stat. at 2635-36. The legality of this aspect of the legislation is an issue currently before the Supreme Court. *Boumediene v. Bush*, 476 F.3d 981, 994 (D.C. Cir. 2007) (upholding habeas-stripping provisions of the MCA), *cert. granted*, 127 S. Ct. 3078 (2007); *see also Hamdan v. Rumsfeld*, 464 F. Supp. 2d 9, 19 (D.D.C. 2006) (on remand) (upholding habeas stripping provisions of the MCA).

242. *See* Military Commissions Act, § 6(b), 120 Stat. at 2633-35. *Compare* War Crimes Act, 18 U.S.C. § 2441(c)(3) (1997) (defining as a war crime any conduct “which constitutes a violation of common Article 3”), *with* 18 U.S.C. § 2441(c)(3) (2006) (lacking that provision).

243. Third Geneva Convention, *supra* note 6, art. 3(1)(c).

By focusing obsessively on the degree or severity of the abuse, the legislation sends the message that it is only the degree of suffering imposed that is important, as opposed to the horrible and political nature of the act.²⁴⁴ In other words, the legislation focuses our attention on the *degree*, not the *kind* of act in question.²⁴⁵ As Abu Ghraib made clear, even abuse falling short of what the current Administration deems to constitute torture can still be humiliating and degrading treatment that violates the human dignity and bodily integrity of individuals in such a fundamentally cruel and subordinating way as to place human beings “outside the ambit of being human.”²⁴⁶ It is therefore not only a physical act but also a profoundly political one.²⁴⁷ Whether the abuse involves technical torture or other forms of humiliating and degrading treatment, state infliction of this kind of abuse marks those targeted as less than human.²⁴⁸ By focusing on degree rather than the kind of act in question, the Military Commissions Act normalizes the kind of conduct that occurred in Abu Ghraib. What is particularly disturbing, then—both in the torture memos preceding *Hamdan* and in the Military Commissions Act that followed it—is that “far from operating extralegally,” abusive interrogation of detainees “has been painstakingly defined,”²⁴⁹ albeit under the cover of secret memos and signing statements is-

244. Dorothy Roberts, Noreen E. McNamara Lecture, Fordham Law School: Race and Politics of Torture (Mar. 1, 2007).

245. *Id.* Referring to the abuse of detainees in Abu Ghraib, Roberts notes: “The degree doesn’t matter; it’s the kind of thing you’re doing to them.”

246. *Id.* (tracing the political nature of torture to race, slavery, and subordination from the public torture of slaves and prostitutes in ancient Greece through colonialism, lynching in the American South, police brutality, and Abu Ghraib).

247. *Id.*

248. *Id.*

249. *Id.* As Jose Alvarez says of the torture memos:

This is not torture outside the law but, ostensibly, under it. Graduates of Harvard or Yale Law Schools and former clerks of the U.S. Supreme Court usually do not themselves strap people down on the water boards, attach electric wires to their appendages, handcuff them in “stress” positions that cause them to suffocate, withhold vital medical treatment, or threaten naked detainees with attack dogs. Their positions in society give them the luxury to write legal memoranda that authorize or permit other people to do these things.

Alvarez, *supra* note 163, at 177.

sued without much fanfare. While the White House claimed that the “outrages upon personal dignity” language was vague and that it needed to get rid of criminal penalties for this crime in order to “clarify” the law,²⁵⁰ the impact of, and perhaps the intent behind, the legislation was actually to mask and obscure the Administration’s objections to the substantive law of torture.

The bottom line is that while the substantive right to be free from torture is preserved in the MCA, the law strips habeas access to courts and limits the category of crimes that can be prosecuted under the War Crimes Act. Moreover, the executive branch controls the decision over whether to prosecute grave breaches of the Geneva Conventions as war crimes and whether to promulgate regulations for other (“non-grave”) violations.²⁵¹ Additionally, detainees are restricted to bringing appeals in the D.C. Circuit and only in order to review final determinations of the Combatant Status Review Tribunals or military commissions.²⁵² The question of remedies (or lack thereof) is of course critical to truly defending the substantive rights at stake.²⁵³ At this writing, efforts are

250. See, e.g., *Legislation in Response to Hamdan v. Rumsfeld: Hearing Before the S. Comm. on Armed Services*, 109th Cong. 8, 10 (2006) (statement of Alberto Gonzales, Att’y Gen. of the United States); *Hamdan v. Rumsfeld: Establishing a Constitutional Process: Hearing Before the S. Comm. On the Judiciary*, 109th Cong. (2006) (statement of Steve Bradbury, Ass’t Att’y Gen., U.S. Dep’t of Justice, Office of Legal Counsel).

251. Under the legislation, the “President has the authority to interpret the meaning and application of the Geneva Conventions and to promulgate higher standards and administrative regulations for violations of treaty obligations which are *not* grave breaches of the Geneva Conventions.” Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(a)(3), 120 Stat. 2600, 2632 (emphasis added). The President is to issue such interpretations by Executive Order published in the Federal Register. *Id.*

252. See *id.* at 2622.

253. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (“The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.”). Marshall also quoted Blackstone’s better-known formulation that “it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded.” *Id.* (quoting William Blackstone, 3 COMMENTARIES *23); see also John C. Jeffrey, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999); David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 UNIV. ILL. L. REV. 1202 (2005).

underway in Congress to repeal the habeas stripping provisions of the legislation. But as it stands, the MCA is inconsistent with the constitutional conception of democracy in its failure to recognize the important democratic function of court access for the politically unrepresented detainees.

2. *Torture and Public Opinion*

As further evidence that the majoritarian, electoral approach to democracy does not adequately safeguard fundamental rights and protect noncitizens, consider the surveys conducted by the Pew Research Center in 2005. These surveys indicate that the American public was more open than opinion leaders to abandoning the substantive prohibition on torture.²⁵⁴

254. THE PEW RESEARCH CENTER, BEYOND RED VS. BLUE: REPUBLICANS DIVIDED ABOUT ROLE OF GOVERNMENT—DEMOCRATS BY SOCIAL AND PERSONAL VALUES 49-50 (2005), available at <http://people-press.org/reports/pdf/242.pdf> (“Overall, the public is divided over using torture against suspected terrorists when such tactics may yield important information. Roughly half (51%) of people surveyed said torture was never or rarely justified, but 45% believed it was at least sometimes justified.”); THE PEW RESEARCH CENTER, AMERICA’S PLACE IN THE WORLD 2005: AN INVESTIGATION OF THE ATTITUDES OF AMERICAN OPINION LEADERS AND THE AMERICAN PUBLIC ABOUT INTERNATIONAL AFFAIRS 24 (2005), available at <http://people-press.org/reports/pdf/263.pdf> [hereinafter PEW, AMERICA’S PLACE IN THE WORLD 2005] (“The American public is far more open than opinion leaders to the use of torture against suspected terrorists in order to gain important information. Nearly half the public (46%) says this can either [] often (15%) or sometimes (31%) be justified.”). I would like to thank David Luban for bringing these survey results to my attention.

Such results may turn, in part, on how the question was framed and presented. The question posed to those taking the survey was: “Do you think the use of torture against suspected terrorists in order to gain important information can often be justified, sometimes be justified, rarely be justified, or never be justified?” PEW, AMERICA’S PLACE IN THE WORLD 2005, *supra*, at 73 (Q.33 of the survey).

Note that the underlying assumption that torture yields reliable information was never questioned in the Pew Survey. By contrast, in discussing his experience of being tortured as a prisoner of war during the Vietnam War, John McCain has explained how he revealed false information just to get the torture to stop:

Obviously, to defeat our enemies we need intelligence, but intelligence that is reliable. We should not torture or treat inhumanely terrorists we have captured. The abuse of prisoners harms, not helps, our war effort. In my experience, abuse of prisoners often produces bad intelligence because under torture a person will say

thing anything he thinks his captors want to hear—whether it is true or false—if he believes it will relieve his suffering. I was once physically coerced to provide my enemies with the names of the members of my flight squadron. . . . Instead, I gave them the names of the Green Bay Packers’ offensive line, knowing that providing them false information was sufficient to suspend the abuse. It seems probable to me that the terrorists we interrogate under less than humane standards of treatment are also likely to resort to deceptive answers that are perhaps less provably false than that which I once offered.

John McCain, *Torture’s Terrible Toll*, NEWSWEEK, Nov. 21, 2005, at 34, *available at* <http://www.newsweek.com/id/51200>. McCain also tries to address the concern that application of the Geneva Conventions places limits on questioning of POWs by noting that when he was a POW, “I did not refuse (questioning), or repeat my insistence that I was required under the Geneva Conventions to provide my captors only with my name, rank and serial number.” *Id.* Instead, he gave his captors false information to put an end to the abuse he received.

Likewise, on the same day in October 2006 that the President admitted to the existence of secret prisons, the senior intelligence officer in the U.S. Army, General Jeff Kimmons, told a Pentagon briefing:

No good intelligence is going to come from abusive practices. I think history tells us that. I think the empirical evidence of the last five years, hard years, tell us that.

Moreover, any piece of intelligence which is obtained under duress, through the use of abusive techniques, would be of questionable credibility, and additionally it would do more harm than good when it inevitably became known that abusive practices were used. And we can’t afford to go there.

Some of our most significant successes on the battlefield have been—in fact, I would say all of them, almost categorically all of them, have accrued from expert interrogators using mixtures of authorized humane interrogation practices in clever ways. . . . We don’t need abusive practices in there. Nothing good will come from them.

Lt. Gen. Jeff Kimmons, Army Deputy Chief of Staff for Intelligence, Def. Dep’t News Briefing on Detainee Policy (Sept. 6, 2006), *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/06/AR2006090601442.html>.

At the same briefing, Deputy Assistant Secretary of Defense for Detainee Affairs Cully Stimson added:

[W]hen I spend time in Guantanamo talking to the interrogators there, they’ll tell you that the intelligence they get from detainees is best derived through a period of rapport-building, long-term rapport-building; an interrogation plan that is proper, vetted, worked through all the channels that General Kimmons is talking about, and then building rapport with that particular detainee.

So it’s not like [a] TV show where they take them in the back room. You’re not going to get trustworthy information, as I under [sic] it,

The fact that Congress chose not to abandon the substantive prohibition on torture in the MCA bears out the Pew Survey findings that opinion leaders were less inclined than the general public to breach U.S. treaty commitments banning torture. But the question remains whether a majoritarian conception of democracy—even a thick majoritarian perspective allowing Congress to check the President—is a sufficiently robust view of democracy if it puts the question of a fundamental right such the right to be free from torture up for a vote and permits restrictions on judicial relief.

B. *Torture and the Constitutional Conception of Democracy*

The question of whether to leave questions of fundamental rights to the electorate is particularly stark for those who agree, as I do, with Jeremy Waldron's assessment that the prohibition on torture "is not just one rule among others, but is a legal archetype—a provision which is emblematic of our larger commitment to nonbrutality in the legal system."²⁵⁵ As a legal archetype, the rule against torture "has significance not just in

from detainees. It's through a methodical, comprehensive, vetted, legal and now transparent, in terms of techniques, set of laydown that allows the interrogator to get the type of information that they need.

Cully Stimson, Deputy Ass't Sec'y of Def. for Detainee Affairs, News Briefing on Detainee Policy (Sept. 6, 2006), *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/06/AR2006090601442.html>.

Similarly, Rear Admiral (ret.) John Hutson, former Judge Advocate General for the Navy, points out:

All the literature, all the experts say that torture doesn't work as a technique to get good, valuable intelligence. . . . People don't like to hear it, but the best way to get information is to befriend them, to break down the barriers. You want them to forget that you are enemies. You tend to their wounds, you see how they are, and then they start to talk.

But when you do just the opposite and remind them in the most brutal ways that you are on opposite sides, they resist. The literature says that people can resist for a couple of days, but then everybody talks, just to make you stop the pain. But there is no reliability to what they're saying. They are only talking to get you to stop the torture.

Rear Admiral (Ret.) John Hutson, *Ending Torture and Secret Detention in America's Name* (May 12, 2005), *available at* <http://www.cceia.org/resources/transcripts/5165.html>; *see also* O'Connell, *supra* note 42, at 1264 (quoting experienced interrogators).

255. Waldron, *supra* note 13, at 1681.

and of itself, but also as the embodiment of a pervasive principle.”²⁵⁶ In other words, this norm does double-duty: It not only does its own normative work, but it also holds up the normative weight of other, related norms, such as the prohibition of cruel and unusual punishment, the requirement of due process, and the privilege against self-incrimination.²⁵⁷

A rule performing such important normative work and so fundamental to human dignity as the torture prohibition should not be open for debate through the electoral system, subject as it is to the whims and tyranny of the majority. Fundamental rights and the role of courts in vindicating these rights must be preserved. Court access to vindicate such basic rights performs an important democratic function of its own by offering individuals—particularly minorities and other outsiders—a critical means through which they can participate in and correct government decisionmaking. For these reasons and those discussed in Part III, a constitutional conception is preferable to a majoritarian conception of democracy.

VI. CONCLUSION

My objective in this Article is to reclaim democracy rather than allow critics of international law to monopolize it. I have juxtaposed the positions taken by these critics in the context of constitutional analysis on the one hand, and the War on Terror on the other, to demonstrate that these two positions reflect different strands of democracy theory—thick and thin majoritarian approaches, respectively. Additionally, I have sought to show that the claims made are wrong in both accounts. One may reasonably ask whether the opposite is also true. In other words, is there a tension between arguing, as I have done, that courts need not require additional democratic review of binding international law such as ratified treaties and customary international law before resorting to it in constitutional interpretation, while the President must seek additional democratic process in the War on Terror if he wants to depart from international obligations implemented through legislation?

256. *Id.* at 1687.

257. *Id.* at 1730-34.

The answer is no. On the one hand, in justifying resort to international law for constitutional interpretation, I have shown that binding international law (i.e. ratified treaties and customary international law) does not actually suffer from the democratic deficits that critics claim. While I have noted elsewhere that additional democratic review of ratified treaties and customary international law could be useful under particular circumstances, it is not required as a matter of law.²⁵⁸ On the other hand, *Hamdan* and *Youngstown* require the President to seek additional democratic process and the consent of Congress if he wants to *depart* from legislation that implements international law in the course of the War on Terror. By affirming the role of all three branches in negotiating the relationship between domestic and international law, the positions I have taken in Parts IV.A and B are consistent because they consistently advance a thick constitutional conception of democracy.

While the critics' analysis of international law is flawed in both accounts, their views help highlight the value of democratic deliberation as a mechanism for negotiating the relationship between internationalism and constitutionalism. While democratic deliberation is merely one vehicle for influencing states to comply with international law,²⁵⁹ it is nonetheless an important and oft-overlooked one.²⁶⁰ Ultimately, there are multiple ports of entry for internalization of international law that scholars should closely examine.²⁶¹

258. See, e.g., Powell, *Dialogic Federalism*, *supra* note 23, at 251-52.

259. Other avenues for influencing state behavior include a variety of mechanisms involving legal enforcement and collateral consequences (as responses to non-compliance) which operate both domestically and transnationally. For a discussion of these mechanisms, see Oona Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 497-511 (2005). Hathaway discusses these mechanisms within a broader overview of theories that explain why states comply with international law. *Id.* For other helpful overviews of compliance theory, see generally Koh, *Transnational Legal Process*, *supra* note 100; Goodman & Jinks, *How to Influence States*, *supra* note 36.

260. On this point, see also my earlier work in Powell, *Dialogic Federalism*, *supra* note 23, at 255-62; Powell, *Lifting the Veil*, *supra* note 23, at 363-83; Catherine Powell, *The Role of Transnational Norm Entrepreneurs in the U.S. "War on Terrorism,"* 5 THEORETICAL INQUIRIES IN LAW 47, 50-51 (2004).

261. See generally Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564 (2006).

Certainly one function of international law is to mediate between a state's interest in its own sovereignty and the sovereignty interests of other states—including those states' citizens living or detained abroad. Such interactions with other states often re-create a state's conception of its own interests. It is no coincidence, then, that early developments in the field of international human rights law were geared toward protecting linguistic, national, and ethnic minorities as well as foreign nationals living abroad.²⁶²

A constitutional conception of democracy should be applied to fundamental rights issues such as the question of torture and to the treatment of minorities and other outsiders.²⁶³ The constitutional conception offers two possible alternatives described by this Article.

Reluctant to “freeze a particular substantive conception of law and to place,” a thin constitutional conception of democracy merely insists on judicial oversight where the political branches have failed to respect equal treatment between citizens and noncitizens.²⁶⁴ By bootstrapping the rights of noncitizens to citizens in this way, noncitizens would be “‘virtually’ represented by citizens and the political process.”²⁶⁵ Instead of focusing on the proper substantive standards to be applied—for example, whether torture should be allowed in the interrogation of terrorism suspects—this approach instead focuses on the decisionmaking process to ensure “that the interest of those that do not have a voice in the legislature are effectively represented by those that do.”²⁶⁶ On this view, if the same rule applies to citizens and noncitizens, it is unlikely that citizens would vote for torture.

By contrast, the thick constitutional conception of democracy which this Article embraces takes a more substantive approach and is premised on the view that judicial intervention is warranted to remedy violations of fundamental rights above and beyond the basic right to equality. A thick constitutional conception sees preservation of fundamental rights inherent

262. See HENKIN ET AL., *HUMAN RIGHTS*, *supra* note 98, at 276-78.

263. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938).

264. Katyal, *supra* note 8, at 1365-66.

265. *Id.* at 1369.

266. *Id.* at 1382.

in human dignity as a democratic condition that ensures basic forms of individual autonomy, personal liberty, and bodily integrity as necessary for the functioning of true democracy. On this view, certain rights are so inherent in human dignity that they may not be taken away through the political process. The concept of *jus cogens* in international law reflects this view. A *jus cogens* norm such as the prohibition on torture is a peremptory norm that can only be replaced by another norm of comparable character. Since such norms cannot be undone by domestic legislation, they are countermajoritarian, but may be justified and protected from the political process on grounds that they entrench rights essential to preserving basic human dignity. Moreover, *jus cogens* norms are themselves democracy-enhancing in that they help minorities guard against majoritarian oppression. Adapting John Hart Ely's famous defense of judicial protection of minorities to the international law context, we can view *jus cogens* as "resources with which minorities [and vulnerable individuals] can protect themselves from majoritarian oppression."²⁶⁷

Under either the thin or the thick constitutional conception of democracy, detainees would have court access and the political branches would be more accountable to noncitizen detainees in exercising power over them. As this Article goes to press, a new round of previously secret legal memos by Justice Department lawyers has come to light.²⁶⁸ Further, Attorney General Michael Mukasey has testified during his confirmation hearings that the President's authority as Commander-in-Chief may allow him to ignore laws written by Congress.²⁶⁹ The exercise of such unbridled power over detainees who have no voice in a political process that has removed judicial remedies to vindicate basic rights is very much at odds with any conception of democracy worth its salt.

267. Chander, *supra* note 19, at 1203 (adapting Ely).

268. See, e.g., Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, at A1, available at <http://www.nytimes.com/2007/10/04/washington/04interrogate.html> (detailing abusive tactics authorized in secret Justice Department memos); Mazzetti, *supra* note 160, at A1 (relating the discovery of a new memo and its contents).

269. For example, in the context of warrantless wiretapping, Mukasey testified: "The President is not putting someone above the law; the president is putting somebody within the law." Shenon, *supra* note 38.