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**IILJ International Legal Theory Colloquium Spring 2009:  
Virtues, Vices, Human Behavior and Democracy in International Law**

Benedict Kingsbury and Joseph Weiler  
NYU Law School

Pollack Colloquium Room, Furman Hall 9th Floor, 245 Sullivan Street  
Thursdays 4pm-5.50pm

[student seminar also meets separately, Tuesdays 4pm-5.50pm]

*Note: speakers' topics listed are indicative of areas, not final titles, and may change*

- January 15** - Derek Jinks, University of Texas Law School  
Topic: *Humanization and Individualization in the Enforcement of International Humanitarian Law*
- January 22** - Anne van Aaken, University of St Gallen Law School, Switzerland  
Topic: *International Investment Law and Rationalist Contract Theory*
- January 29** - Craig Calhoun, NYU Institute for Public Knowledge & President, SSRC  
Topic: *The Idea of Emergency: Humanitarian Action and Global (Dis)Order*
- February 5** - **Paolo Carozza, Notre Dame Law School and Chair, IACmHR**  
**Topic: *Global Values, Local Virtues – Human Rights, Democratic Self-Governance and International Justice***
- February 12** - Leigh Payne, Oxford University Sociology (Latin American Societies)  
Topic: *Neither Truth Nor Reconciliation in Confessions of State Violence: Unsettling Accounts and Colombia's Justice and Peace Law*
- February 26** - William Miller, University of Michigan Law School  
Topic: *Messengers and Intermediaries: Insights from Ancient Law*
- March 5** - Moshe Halbertal, NYU Law School and Hebrew University  
Topic: *Pre-Conditions for Forgiveness*
- March 12** - Joseph Weiler, NYU Law School  
Topic: *Europe Against Itself: On the Distinction between Values and Virtues (and Vices) in the Construction and Development of European Integration*
- March 26** - Armin von Bogdandy, NYU Law School, Director MPI Heidelberg  
Topic: *Problems of International Public Authority*
- April 2** - Pierre Rosanvallon, Collège de France  
Topic: *The Metamorphoses of Democratic Legitimacy*
- Tuesday, April 7**- (SPECIAL SESSION, 4:00 pm to 5:50 pm)  
Faculty Club, D'Agostino Hall, 110 West 3<sup>rd</sup> Street  
Alexander Somek, University of Iowa  
Topic: *Democracy-Enhancing International Law: The Argument for Transnational Effect*
- April 16** - Conference in Honor of Professor Andreas Lowenfeld  
(For more information, go to [www.iilj.org](http://www.iilj.org) – all welcome!)
- April 23** - tbc  
Topic: *Virtues, Vices, Human Behavior and Democracy in International Law*

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**Global Values, Local Virtues:  
Human Rights, Democratic Self-Governance,  
and International Justice**

Paolo G. Carozza<sup>1</sup>

*The idea of rights is nothing but the conception of virtue applied to politics.<sup>2</sup>*

To inquire seriously about the relationship between human rights, local communities, and international standards of law and justice presupposes at least an implicit assumption about an underlying threshold question: where do human rights come from? I do not mean that in a philosophical or metaphysical sense – as in, “what are the intellectual foundations of the idea of human rights?” – but rather at the level of human experience: where do the commitments and virtues, both personal and civic, that generate and sustain human rights, arise? As Eleanor Roosevelt famously commented in connection with her work on the creation and adoption of the Universal Declaration of Human Rights, “Where, after all, do universal human rights begin? In small places, close to home—so close and so small that they

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<sup>1</sup> Associate Professor of Law, Notre Dame Law School; Visiting Associate Professor of Law and John Harvey Gregory Lecturer on World Organization, Harvard Law School; Chairman, Inter-American Commission on Human Rights (IACHR). © Paolo G. Carozza. Parts of this paper have been presented at colloquia at George Washington University Law School and at Georgetown Law School, and at the Nova Universitas consortium’s seminar in Milan, Italy on the Sustainability of Democracy in the 21<sup>st</sup> Century, and I am grateful for the helpful comments and critiques made in those discussions. None of my reflections and observations here on the law of the Inter-American human rights system can be ascribed to the IACHR institutionally.

<sup>2</sup> Alexis de Tocqueville, *Democracy in America* 238 (J.P. Meyer ed. 1969).

cannot be seen on any map of the world. ... Unless these rights have meaning there, they have little meaning anywhere.”<sup>3</sup>

Or, consider how the question is explored through the fascinating novella by the 20<sup>th</sup> century German poet Reinhold Schneider.<sup>4</sup> In it, Schneider tells the story of Bartolomé de las Casas, the 16<sup>th</sup> century missionary and later bishop of Chiapas who championed the cause of justice for the indigenous peoples of the Americas. It is a narrative about conscience, power, and justice, told principally through the intersection of the lives of Las Casas and the Emperor Charles V, before whom Las Casas pleads his case against enslavement and exploitation. It is also the story of an old soldier, Bernardino, whom Las Casas meets on the transatlantic voyage and who is sorrowful and repentant for his role in the abuse of the Indians. Of particular poignancy is Bernardino’s description of the way that he first came to realize how deeply he had betrayed the native people. He began to see and understand the world through the eyes of a young girl, Lucaya, whom he had taken as a slave. The definitive turn of conscience comes when Bernardino observes her (she, unaware of his presence) praying in the company of the other slaves. He remarks, “From that day on, I was no longer able to look upon Lucaya merely as a woman I had brought to live with me as was then customary with my compatriots. I understood that there was something in her that I could never possess and that I had to respect. ... My deepest shame – a burning shame I will never be able to extinguish – is that I acquired this girl as if she had been a

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<sup>3</sup> Eleanor Roosevelt, In Your Hands, Address at the United Nations (Mar. 27, 1958), at <<http://www.udhr.org/history/inyour.htm>>.

<sup>4</sup> REINHOLD SCHNEIDER, IMPERIAL MISSION (trans. Walter Oden, 1948). A more literal translation of the German title would be *Las Casas before Charles V*.

mere object.”<sup>5</sup> This was his realization, in a human encounter of personal impact, of the meaning and inviolability of another’s human dignity and his own responsibility for an other; both his own “I” and Lucaya’s “You” emerge from this event.

What makes Schneider’s book significant to the further inquiries in this paper is not its status as a great work of literature (though it is a good read),<sup>6</sup> but rather Schneider’s affirmation on several levels of the experiences that move our consciences and lead us to recognize, respect, and take responsibility for the human dignity and rights of others. Bernardino’s conversion from soldier-slaveowner, through understanding Lucaya to be a person with a destiny and identity irreducible to his will and desire to possess and control her, is the premise for Las Casas’s own transformation from a collaborator in conquest to a fierce advocate of human rights and the law before the emperor. Even closer to us in time and reality is the unstated but very obvious parallel between the book’s historical narrative and Schneider’s own experience of Nazi Germany. The book was written in 1938, and it is clearly meant as a reflection on and severe critique of what Schneider saw happening around him, and a plea for human rights. Shortly thereafter, the Nazi regime charged Schneider with high treason and prohibited him from writing or publishing, though he

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<sup>5</sup> Id. at 83-84.

<sup>6</sup> Nor is it even a particularly accurate history of Las Casas – it is somewhat imprecise and jumbled in its facts and chronology, and is rather anachronistic in some of the ways that Schneider has his characters speak (for example, he has Las Casas referring to the difference between “natural rights” and “the rights of the State”).

continued to do so illegally as part of the underground resistance movement.<sup>7</sup>

My broadest aim in this paper is to explore the relationship between law and that locus of personal, local, and contextual rights-generating experience described by Roosevelt and Schneider. How can human rights law, and especially distant and abstract principles of international human rights, correspond to the real necessity and fact that the virtues of justice and solidarity, among others necessary to a culture of human dignity and rights, are either lived locally and communally or they remain mere abstractions (and thus in an important sense, unreal, an unfulfilled promise)? More immediately, I try to approach that ultimate problem by connecting two disparate issues in comparative constitutional law and international human rights that are seldom, if at all, engaged with one another. The first part is an exploration of the contrast between U.S. and European constitutional cultures regarding fundamental rights and democracy, in order to understand more fully the possible range of relationships between human rights, international law and justice, and local self-government. In it, I try to employ a reading of American constitutional traditions and distinctiveness to identify and rescue for international law a Tocquevillian appreciation for the importance of the freedom of local law-generating and rights-generating (jurisgenerative<sup>8</sup>) communities. The second part seeks

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<sup>7</sup> See HANS URS VON BALTHASAR, *TRAGEDY UNDER GRACE: REINHOLD SCHNEIDER ON THE EXPERIENCE OF THE WEST* (1997).

<sup>8</sup> The term is borrowed from Seyla Benhabib, *Another Cosmopolitanism* (2006), although she uses it not to refer to the communities but to political dynamics, “jurisgenerative politics”. More generally, the underlying idea goes back, in my own reading of American legal and constitutional thinking at least, to Robert Cover, *Nomos and Narrative*, 97 *Harv. L. Rev.* 4 (1983)

instead to apply the insights gained through the comparative constitutional analysis to international human rights law, illustrating the argument by focusing specifically on the current problem of punishment, amnesty, and democracy in Latin America and in human rights law. Concretely, I show how some of the regional human rights law in the Americas, by tending toward a rigid and dogmatic approach to the criminal sanction of human rights violations, has had an atrophied regard for the relationship between universal human rights and the local communities in which the meaning of rights, including as virtues of justice and reconciliation are generated and sustained. By bringing these different legal experiences<sup>9</sup> into relationship with one another, I argue overall that the flourishing of human rights is best served by maintaining a fruitful balance, or tension, between the freedom of local communities to determine their own course and to cultivate their own public virtues and practices of law and politics, on the one hand, and the affirmation of objective principles of international justice, on the other. Somewhat more tangibly, in today's practical context of human rights law and practice, this implies calling for the institutions and actors of international human rights law to be more attentive to the ways in which they can pursue their mandate to supervise and promote global values by fostering structures and processes of self-government and broad social and political participation in the generation of human rights, rather than by seeking to impose and enforce uniform but distant and abstract norms of international justice.

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<sup>9</sup> I am relying in part on the category of "legal experience" in the sense presented by the 20<sup>th</sup> century Italian legal philosopher Giuseppe Capograssi. See G. CAPOGRASSI, *STUDI SULL'ESPERIENZA GIURIDICA* (1932).

## **Part I. Fundamental rights as safeguards of self-government and as universal standards of justice**

### *A. Transnationality and the American difference*

It is a commonplace to note that the United States is one of the most persistently resistant countries to the subjection of its laws and practices to the supervision and control of international human rights treaties and institutions (at least in any strong sense). Most observers, activist and political as well as scholarly, tend to ascribe it (either explicitly or tacitly) more or less entirely to the long American history of exceptionalism and isolationism with respect to the world, sometimes suggesting also arrogance, self-righteousness, and even a substantive opposition to human rights as such.<sup>10</sup> I do not wish to contest that the charge of insularity and even hostility is true in certain important ways, and that its sources are multiple. Whether in the form of the proposed Bricker amendments in earlier decades<sup>11</sup> or certain hyperbolic public statements about the illegitimacy of international human rights today, demonstrations of American closure toward the

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<sup>10</sup> Among innumerable other examples, see, e.g., Johan D. Van der Vyver, *American Exceptionalism : Human Rights, International Criminal justice, and National self-Righteousness*, 50 Emory L.J. 775 (2001); Cherie Booth and Max DuPlessis, *Home Alone? The U.S. Supreme Court and International and Transnational Judicial Learning*, 2 Eur. Hum. Rts. L. Rev. 127 (2005); Steven G. Calabresi, "A Shining City On a Hill": American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law, 86 B.U. L. Rev. 1335 (2006). This is not to say that there are not also observers of American difference who take sophisticated and contextually-informed (whether by history, institutional arrangements, constitutional culture, or other factors) views of the sources of that distinctiveness. For instance, probably the best collection of essays on American exceptionalism, all of them worth reading and many of them extremely insightful, is found in MICHAEL IGNATIEFF, ED., *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* (2005).

<sup>11</sup> Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 Am. J. Int'l L. 341 (1995).

international are (lamentably) present. But pointing to that alone begs further questions about the sources and scope of American difference, and it fails to take into account other factors that make the picture more complex, from the structural characteristics of the United States constitutional system to the centuries-old and pervasive American obsession with “rights talk”.

For instance, a fuller account of American postures with regard to international human rights would need to factor in the difficulty of ratifying treaties in the United States, relative to many other countries,<sup>12</sup> as well as the near-impossibility of amending the U.S. Constitution, which some other countries do more easily in order to conform to internationally-developed standards. It would recognize that federal legislation is deliberately made substantially more difficult to adopt in the United States, compared to national legislation in many other constitutional systems. Perhaps most importantly, it would have to grapple with the peculiar but central dynamics of federalism in the United States, which has a massive bearing on this question (as it does with almost any matter of comparative public law between the U.S. and other jurisdictions).<sup>13</sup> Moreover, these structural features of the U.S. constitutional system are not mere historical or proceduralist curiosities, but reflect and sustain a deep set of normative justifications and aspirations.

Aside from such structural questions, one could point to the many examples in which comparative study has revealed

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<sup>12</sup> See generally MONROE LEIGH AND MERRITT R. BLAKESLEE, EDS., NATIONAL TREATY LAW AND PRACTICE 1-41 (1995)

<sup>13</sup> See the very interesting and illuminating exploration of federalism’s complex relationship to the migration of human rights in Judith Resnick, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 Yale L.J. 1564 (2006).

distinctively American approaches to a broad range of specific fundamental rights, including freedom of speech,<sup>14</sup> freedom of religion,<sup>15</sup> privacy,<sup>16</sup> and criminal process and punishment,<sup>17</sup> to name just a few. Such substantive differences in understandings of rights are not themselves the focus of the present essay, but they begin to approach the underlying factor that I seek to isolate and explore here. The observation that different understandings of the content and scope of human rights norms are one of the important factors in explaining the divergent American attitude toward international human rights is interesting not only in a direct way – that is, because of the substance of the difference – but also because it implies to at least a degree the conviction that American understandings should be (in general, as a default, at least) preferred because they originate in distinctively American historical, cultural, political, and social sources. The understandings of international bodies or the “international community” as such are seen to be less important, less authoritative, than those understandings of rights that are “American”, precisely by virtue of their being “international” and “American”, respectively.<sup>18</sup> This is not to deny the presence and importance in the American tradition of the idea of “self-evident” rights, in the sense that Jefferson and Paine trumpeted them.<sup>19</sup> Intermingled with that universalist Enlightenment sentiment,

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<sup>14</sup> Frederick Schauer, *The Exceptional First Amendment, in American Exceptionalism and Human Rights*, supra note \_\_, at 29.

<sup>15</sup> E.g., Cole Durham’s work

<sup>16</sup> James Q. Whitman, *The Two Western Cultures of Privacy: Dignity versus Liberty*, 113 Yale L.J. \_\_ (2004).

<sup>17</sup> JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003); Carol S. Steiker, *Capital Punishment and American Exceptionalism*, 81 Or. L. Rev. 97 (2002).

<sup>18</sup> Note SCOTUS rhetoric, on both sides.

<sup>19</sup> Thomas Paine, *The Rights of Man*

however, there has always been also the Burkean notion that rights are “real rights” because, like “the ancient rights of Englishmen,” they are concretely grounded in and emerge from our distinctive history and social fabric.<sup>20</sup>

This finally brings into focus the main object of this section. We can say that a critical part of what is at issue, when we examine American attitudes and policies regarding international human rights, is a particular understanding of the relationship between rights, democracy and identity.<sup>21</sup> One influential American tradition of law and politics, at least, is more likely to regard “rights” as acquiring their significance (both in the sense of meaning and importance) in the crucible of the domestic legal and political sphere, than through supranational processes or transnational consensus. Accordingly, international or foreign understandings of rights are less likely to carry weight, especially any weight that rests on the authority putatively derived from their “transnationality”. Although one rarely sees it argued in a direct way, I think it is uncontroversial to note that for many players in the international milieu, and particularly among human rights

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<sup>20</sup> Edmund Burke, *Reflections on the Revolution in France*.

<sup>21</sup> The “constitutional culture” or “rights culture” argument that I am presenting in the following paragraphs should not be misunderstood to imply that I regard it as an exhaustive or even the primary explanation of American exceptionalism. I agree with Andrew Moravcsik that discussions of exceptionalism that rely exclusively on differences of legal and political culture are too vague and empirically suspect to provide comprehensive explanations of the phenomenon. Cf. Andrew Moravcsik, *The Paradox of U.S. Human Rights Policy*, in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* 147, *supra* note \_\_. That does not mean that they are not present, however, or that identifying their presence and contours cannot be helpful in articulating what we can learn from differences in legal traditions. More importantly, my goal here is not really to provide an explanation or justification for American exceptionalism at all, but to identify one important thread of ideas within the American tradition of difference that I believe to be important and helpful for a better understanding of the meaning and flourishing of human rights in general.

activists and scholars (the distinction being less clear in the human rights arena than elsewhere), the exact opposite is true. That is, insofar as rights are drafted, determined, defined, and developed at a transnational level or through supranational institutions, they are by virtue of the fact of transnationality alone more authoritative, more legitimate, and less likely to be contested. This difference represents distinct ways of conceptualizing the relationship between rights, society, and communal identity.

B. *Comparative gastronomy and human rights: a Tocquevillian starting point*

The attitude about democracy and human rights that I would like to tease out of the knot of the American tradition of law and society goes back to the earliest days of the republic, and so it is not surprising Alexis de Tocqueville should have perceived it with his unparalleled acuity of observation about democracy in America. Tocqueville was rather clear about the centrality of an idea of rights to the fledgling American nation, and its connection to democracy. “No man can be great without virtue, nor any nation great without respect for rights,” he wrote.<sup>22</sup> In a democracy, the virtue of the individual and respect for rights go together, because “Democratic government makes the idea of political rights penetrate right down to the least of citizens.”<sup>23</sup> There is nothing remarkable about these affirmations, especially given Tocqueville’s preoccupation with the passage from aristocracy to democracy and his attentiveness for those qualities that keep the vices of democracy in check. More interesting,

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<sup>22</sup> Democracy in America, supra note \_\_\_, at p. 238.

<sup>23</sup> Id. at p. 239.

however, are two other little nuggets that Tocqueville drops into his exposition almost casually.

First, Tocqueville uses an evocative phrase in describing the Americans' commitment to rights: he remarks that "The American destiny is unusual" insofar as it has succeeded in maintaining both "the idea of individual rights and a *taste for local freedom*."<sup>24</sup> The latter, the "taste" – the word itself is redolent with a particular sort of pleasure, very human, very elemental, and highly variable among persons and cultures – for local freedom, indicates Tocqueville's fascination with and praise for the decentralization of social ordering in the young American democracy, which is indeed one of the main themes of his entire study. John McGinnis has synthesized the basic outlines of this Tocquevillian perspective well:

In contrast to the centralization of France's ancient regime and the French Revolution's democratic centralism, Tocqueville observed that the vibrancy, innovation, and beneficence of American society did not come from its rulers but bubbled up from below. The secular associations of public-spirited citizens and churches and synagogues of spiritually oriented citizens were the underlying reason for the self-regulating order of our society. Tocqueville believed that while political factions try to use government coercion for their own ends, civil associations organize to meet the common goals of their members. Civil associations promote reciprocity among their members and create social norms from which other individuals can voluntarily choose. In this way they generate what modern sociologists would call social capital: the glue that binds society together through a group of interlocking networks. These civil associations have influence at the local level, making local government more responsive and contributory to a more public-

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<sup>24</sup> Id. at p. 676.

spirited citizenry. Local governments also compete and thus are, in this sense, more similar to voluntary associations than the national government. Thus, in Tocqueville's conception, localism and mediating institutions are related social goods, because mediating institutions improve local government and local government has some of the virtues of mediating institutions.<sup>25</sup>

Tocqueville's phrase cited earlier, referring to America's "unusual" combination of rights and local freedom, connotes a tension between this spontaneous social ordering from below, and the idea of individual rights. The idea is not fully developed in Tocqueville, but the outlines of the problem are not hard to identify: rights suggest fixity against the instabilities and dynamism of the love of local freedom; they are points of ordering not subject to the vagaries and vicissitudes of norms that "bubble up from below". In the tension between rights and self-government we face the paradox of "ordered liberty".<sup>26</sup>

How then is that internal tension of ordered liberty maintained? Tocqueville's whole work is largely an extended examination of that question. Here we can introduce one small part of it, through a second suggestive term that Tocqueville uses. His general discussion of rights is situated in the context of an overall examination of the question of "how, then, do the American republics maintain themselves"? The maintenance and success of democracy, its viability over time and the tempering of its vices, is in Tocqueville's vision not a science or a technique but an "art." It is not a "science", as in something that can be intellectually

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<sup>25</sup> John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 Cal. L.R. 485, 491 (2002).

<sup>26</sup> Cf. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)

systematized or reduced to a set of abstractions through speculative rationality; nor is it a “technique”, as in a mechanical exercise that can be implemented without the need for creativity and distinctiveness, through merely an instrumental sort of rationality (*techne*).<sup>27</sup> As an “art” it is a matter also of the indeterminate exercise of human freedom, and the particularities of preference – one might even say again, of *taste*.

So, democracy in this vision is the practical art of mediating between the social freedom of the local and the order of rights, between concrete particularity and abstract universals.

*C. Of self-government and an objective order of values*

What one determines to be the meaning and purposes of rights in a democratic polity depends in large degree on certain antecedent premises. These are all contestable and contested in the multitude of theories of democracy.<sup>28</sup> It is not my purpose here to dive into those foundational questions of political theory. I offer merely a few affirmations which form part of the necessary substratum of the argument in this paper, undefended and instead only posited in very general ways as the boundaries within which the subsequent discussion is situated:

1. democracy is a means to facilitate the flourishing of human persons by making them participants in self-government and thus in the realization of their own and one another’s good;

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<sup>27</sup> See the very interesting discussion of these differences in modes of reasoning in Joseph Dunne, *BACK TO THE ROUGH GROUND: PRACTICAL JUDGMENT AND THE LURE OF TECHNIQUE* (1997).

<sup>28</sup> A good overview of many of these theories’ relationships to human rights can be found in CAROL C. GOULD, *GLOBALIZING DEMOCRACY AND HUMAN RIGHTS* (2004).

2. democracy is not self-legitimizing, but instead is justified (following the previous premise) insofar as it is in fact oriented toward the common good (understood in turn as the good of all of the members of that community); and
3. thus, the legitimacy of democracy is conditional both upon its realization of the value of self-government and upon its orientation toward certain fundamental principles of justice as part of the common good of its members.

Fundamental rights, in this understanding of democracy, therefore serve two distinct purposes. On the one hand, they are substantive principles specifying (partially, at least) the content of basic requirements of justice and the common good.<sup>29</sup> In this sense they serve as restraints on the exercise of the authority of the majority, without which democracy can become majoritarian tyranny. On the other hand, rights serve as mechanisms to protect the capacity of the people to govern themselves; they enhance self-government through the protection of liberties necessary to genuine representation and participation in the determination of the good of the community. The first purpose leads to a conception of rights that is more substantive, thicker, and more expressive of basic and objective values.<sup>30</sup> They get held out as the principles defining the identity and the *telos* of the community, and are often said to be “dignitarian” in orientation.

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<sup>29</sup> Cf. Finnis, *supra* note \_\_\_\_.

<sup>30</sup> I intend to use the word “objective” here in the way it is used in German constitutional law. In Michel Rosenfeld’s articulation of the idea, “Objective order’ ... refers to the obligation imposed on those responsible for the development of the legal order to shape it according to constitutional values and to orient it in such a way as to extend and complement constitutional rights and obligations.” Michel Rosenfeld, *Constitutional Adjudication in Europe and the United States*, 4 Int’l J. Const’l L. 633, 640 n. 25 (2004). See also Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* \_\_\_\_ (3<sup>rd</sup> ed. \_\_\_\_).

The second tend to be more process-oriented, thinner in their expression of basic human goods, but constitutive of the participatory and deliberative aspects of democracy. They guarantee freedom and the rule of law, and are commonly thought of as more “libertarian” in orientation.

It is apparent that these two purposes of rights in a democracy – ensuring self-government and providing the objective value orientations (and thus a thicker expression of justice and communal identity) of the body politic – can sometimes be in tension with one another as well.<sup>31</sup> Where rights are used to define the boundaries of legitimate choices, by definition they constitute a certain limitation on the freedom of self-government (of the majority, to be sure) – they are “trumps” against societal choices that don’t accord adequate respect for the moral worth of every individual.<sup>32</sup> There is nothing particularly new or insightful in making such an observation, but it is interesting to note how this countermajoritarian thrust of appeals to fundamental rights is not just anti-*democratic* – after all, that is exactly what fundamental rights are supposed to be, in recognition of the need for democracy to be oriented in substance toward basic principles of justice and the common good – but in some degree it is even anti-*political*.<sup>33</sup> It

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<sup>31</sup> See the taxonomy of different relationships between, problems of, and structural approaches to, majoritarianism and individual rights, in Jon Elster, *Majority Rule and Individual Rights*, in OBRAD SAVIĆ, ED., *THE POLITICS OF HUMAN RIGHTS* 120 (1999).

<sup>32</sup> This is Ronald Dworkin’s characterization, e.g., Ronald Dworkin, *Constitutionalism and Democracy*, 3 *Eur. J. Phil.* 2 (1995), but in distinction to Dworkin it is helpful in this discussion to note that this is not just a conflict between rights and democratic majoritarianism but between two different roles and functions of rights in a democratic polity; they are in an important sense *both* rights-based arguments. See Jeremy Waldron, *A Rights-Based Critique of Constitutional Rights*, 13 *Oxford J. Leg. Stud.* 18 (1993).

<sup>33</sup> One of the most interesting observers and sharp critics of this phenomenon of depoliticization is Pierre Manent. See e.g., *A WORLD BEYOND POLITICS* (2006). See

is premised on the perceived need to remove the basic values represented by rights from the sphere of politics altogether. In other words, from this perspective the protection of human rights, entails the withdrawal of certain basic questions of social life from the potential dilution and corruption of values by political actors, including but not limited to legislative majorities. This is one of the principal driving forces behind the judicialization of rights: the removal of those areas of common life staked out by rights that are deemed to be fundamental to the (supposedly) apolitical, principled institutions of the courts of law.<sup>34</sup>

One problem with that view, however, is that it ignores certain ways in which the two dimensions of rights in modern democracy are not entirely distinct and divisible. They are interconnected in at least four different ways. First, political participation is not a merely procedural or instrumental good but can have intrinsic value and thus is not necessarily distinguishable from the substantive, dignity-oriented human goods. On the contrary, an integral part of the substance of a flourishing human life is to participate in the determination of one's own and the community's basic decisions about the goods of their lives, both as individuals and as members of the community – practical reasonableness as itself a basic good, to use John Finnis' formulation<sup>35</sup>; or more recognizably in the rhetoric of Enlightenment liberal revolutionary politics (and even today in, for

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also Daniel J. Mahoney, *Humanitarian Democracy and the Postpolitical Temptation*, [cite].

<sup>34</sup> See RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004). Of course, as Hirschl himself shows convincingly, this is often a deeply political move as well, in the sense that it corresponds to the self-interest of certain segments of the society in question.

<sup>35</sup> John Finnis, *Natural Law and Natural Rights* (1980)

example, Obamanian rhetoric<sup>36</sup>), the right to the “pursuit of happiness”.<sup>37</sup>

The two dimensions are also connected in a more functional way, where each is necessary to the realization of the other. As Habermas has put it, in his discussion of the legitimacy of popular sovereignty: “The desired internal relation between human rights and popular sovereignty consists in this: human rights institutionalize the communicative conditions for a reasonable political will formation. Rights, which make the exercise of popular sovereignty *possible*, cannot be imposed on this practice like external constraints.”<sup>38</sup> Amartya Sen has made a similar point in a more specific context and without the freighted philosophical categories, in his discussion of the relationship between political rights and economic needs: “our conceptualization of economic needs [and, one could add, other requirements of human dignity] depends on open public debates and discussions, and the guaranteeing of those debates and those discussions requires insistence on political rights.”<sup>39</sup> But the converse is also true: , how one exercises one’s rights to self-government – whom we vote for, what proposals of law and policy we support, etc. will obviously be shaped in significant degree by the recognition and acceptance of other substantive, dignity-rights, for oneself and others in community with us.

Thirdly, sometimes public arguments for substantive, dignity-based rights can serve to unsettle and open up an

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<sup>36</sup> See Obama’s inaugural address.

<sup>37</sup> Declaration of Independence

<sup>38</sup> Jürgen Habermas, *Remarks on Legitimation Through Human Rights*, 24 *Phil. & Social Criticism* 160 (1998).

<sup>39</sup> Sen

otherwise constrained political reality, enhancing the political participation of a broader range of members of the political community in decisions that may be dominated and controlled by narrower interests. This has sometimes been the case with respect to amnesty laws in Latin America, for example, as we will see more clearly in the second part of this paper.

Finally, and closely linked to our preceding and subsequent reflections on certain strands of American constitutional thought, at least in the context of the founding of the United States rights protecting and enhancing self-government were deemed indispensable because the “rights of the people” were considered (in Lockean fashion) to be prepolitical, grounded in the traditions and material social life of the community. In other words, rights that served to guarantee self-government are necessary means to ensure the protection of the full range of substantive rights of the people that existed outside of, and prior to, the Constitution.<sup>40</sup>

In these multiple connections between the two dimensions of rights, we can hear again the echo of Tocqueville, emphasizing that the rich social life that he observed at local levels generates those virtues, commitments, and mores that sustain democracy. In the art of democracy, the political and the social are as deeply intertwined as the idea of individual rights and the taste for local freedom. The idea of “self-government” as related to rights, therefore, is not merely the affirmation of a substantively empty, or purely procedural, political autonomy. It represents the respect, protection, and promotion of what we can call the *jurisgenerative communities* which give life to the virtues that sustain liberty, equality, the rule of law, and democracy.

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<sup>40</sup> See discussion *infra*, next section.

#### D. *Two constitutionalisms?*

Given these multifaceted relationships between democracy and fundamental rights, it is to be expected that specific constitutional systems can take quite divergent form in seeking to realize both. Inspired by the nineteenth century French encounter with the United States elaborated in *Democracy in America*, we can usefully enter into a twenty-first century comparison between America and Europe.

Yale law professor Jed Rubenfeld has written of “two world orders” or “two constitutionalisms”, which he dubs “international constitutionalism” and “democratic national constitutionalism”, arguing that the former characterizes European approaches while the latter is typical of American understandings.<sup>41</sup> I disagree with much of Rubenfeld’s description and conclusions, and I share Professor Armin von Bogdandy’s skepticism regarding Rubenfeld’s reductive dismissal of European politics and democracy and his correlative romanticism regarding the U.S. constitutional order.<sup>42</sup> Nevertheless, at one level Rubenfeld’s basic intuition contains an important truth, when he perceives that predominant ways of thinking about the relationship between constitutions and rights, especially international human rights, are different on the two shores of the Atlantic. Rather than stating the matter, as he does, tendentiously in terms of “democratic” constitutionalism versus “international” (and by implication anti-democratic) constitutionalism, I would say as I did earlier in this essay that in the United States one is more likely to find attitudes toward the

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<sup>41</sup> Different versions published in several places. See, e.g., Jed Rubenfeld, *The Two World Orders*, in *European and US Constitutionalism* 233 (Council of Europe 2005).

<sup>42</sup> Armin Von Bogdandy, *Comment*, in *EUROPEAN AND US CONSTITUTIONALISM* 247.

constitution and international human rights shaped by a Tocquevillian “taste for local freedom” and by its implicit emphasis on self-government and locally-generated principles of common life, rather than on human rights as expressing a universal objective order of values abstracted from politics and local culture. Also in contrast to Rubinfeld, I do not minimize the complexity and pluralism of either American or European attitudes and ideas regarding constitutionalism and international human rights.<sup>43</sup> I would not want to state the differences too categorically or starkly; one finds competing conceptions of rights and constitutions on both sides of the ocean. Still, there *are* differences in emphasis and weight worth identifying, and we can draw out from the fabric of the legal and political life on both sides of the Atlantic a few discrete strands of thought that are carried forward through ongoing institutional and social practices in the respective legal traditions.<sup>44</sup>

The differences that I would like to highlight fall into three categories. The first can be traced back to divergences in the founding ideas of constitutionalism and rights in the 18<sup>th</sup> Century. Obviously much has changed since then in constitutional thought, especially in Europe but even in the United States where we have our 1789 constitutional text still in place. Yet, it is still possible to see the lingering imprints of two different influences, two different

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<sup>43</sup> Cf. Anne-Marie Slaughter, *A Brave New Judicial World*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS.

<sup>44</sup> This is not an exercise in essentializing The American Position or The European Position or reducing them to a simplistic dualism. Nevertheless, for heuristic purposes it may be necessary at times to present those lines of thinking as more monolithic than in fact they are in the messiness and variety of human experience – among other complexities that will be set aside are the internal divergences among European constitutional systems. I refer in this section to constitutionalism generically in the style of Western European countries belonging to the Romano-Germanic legal tradition.)

genetic antecedents to current thought. In Europe, especially seen from an American outsider's perspective, the influence of Rousseau is still palpable. The function of the social contract in a Rousseauian world is to bring isolated individuals out of their otherwise primitive state of nature.<sup>45</sup> Man attains greater liberty and equality, and the possibility of culture and civilization, through this "constitution" of the body politic. It "silences the passions" of the individual and makes one freer through subjection to the general will. Exactly what that *volonté générale* entails is something that has vexed political theorists ever since, but for my limited purpose here it is safe to say that for Rousseau it is by incorporation into the *volonté générale* that a man acquires and secures the rights that were not only insecure but even impossible without the social contract, prior to the constitution. One of the consequences of this vision is that it gives the constitution, and the general will as embodied in the Legislator, an exalted status as the origin and source not only of rights but of culture and civilization. While such a view does not adequately describe the complex contemporary conceptions of constitutions in Europe, the not infrequent pretensions of European law to constitute and embody the basic civilizational values of the society still echo that tradition of thought and, for an American, are striking.

Striking, because our own genetic line still carries forward the very different traits of Lockean and Madisonian constitutionalism, along with distinct traces of Anti-Federalist thought and politics. In contrast to Rousseauian understanding of

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<sup>45</sup> The following extremely synthetic Summary of Rousseau's constitutionalism is supported by, and more elaborated in, Guy Lafrance, *Montesquieu and Rousseau on Constitutional Theory*, in Alan S. Rosenbaum ed., *Constitutionalism: The Philosophical Dimension* 54, 61-66 (1988).

primitive prepolitical life transformed and civilized by constitutionalization, Locke's vision is of a thicker prepolitical civil society, with natural rights arising and existing prior to any constitution or social contract, and of a correspondingly more limited role for constitutional government.<sup>46</sup> To use the words of the Declaration of Independence so familiar to Americans:<sup>47</sup> "to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed."<sup>48</sup> To put it another way, it is not the case that constitutionalization generates the possibility of fundamental rights that otherwise could not exist except through the establishment of law, but rather the opposite. The legacy of the Anti-Federalists reinforced that Lockean idea of rights as arising out of the prepolitical civil society. In their thought, the Bill of Rights was necessary only in order to avoid losing the liberty and the rights of the people that preexisted the new Constitution; it was a moral and civic reminder of the principles by which government is limited so that the people's rights would be preserved.<sup>49</sup> Madison provided the third leg of the stool, envisioning a constitution that primarily offered a guarantee of the exercise of popular sovereignty, by providing a framework in which citizens remain free to discuss, debate, and decide how they are to live their common life.<sup>50</sup>

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<sup>46</sup> See John Locke, *The Second Treatise of Government*, ss. 4, 6, 44, 123.

<sup>47</sup> For instance, 80,000 spectators hear them read solemnly over the loudspeakers as part of the opening ceremonies every time they go to watch a football game in the stadium at my university.

<sup>48</sup> United States Declaration of Independence.

<sup>49</sup> See HERBERT J. STORING, *WHAT THE ANTI-FEDERALISTS WERE FOR* (1981); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* 536-543 (\_\_\_).

See also ROBERT ALLEN RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS* (1991)

<sup>50</sup> See Arthur E. Wilmarth, Jr., *The Original Purpose of the Bill of Rights: James Madison and the Founders' Search for a Workable Balance Between Federal and State Power*, 26 AM. CRIM. L. REV. 1261 (1989).

A second, and related, category of difference has to do with the traditional conceptions of the roles of judges.<sup>51</sup> Historically in Europe there has been a strict conceptual and institutional separation of adjudication from politics, and formally that remains so even today (even though functionally the reality of the “official version” of judicial roles has changed significantly). Career judges are firmly instilled with an ideal of abstaining from lawmaking, from intrusion into the proper and exclusive realm of the political, legislating bodies. This tradition was part of the reason for Europe’s difficulty in accepting the idea of constitutional judicial review initially, and factored importantly into the Kelsenian model of judicial review that eventually developed there (i.e., a centralized and specialized tribunal, typically not part of the ordinary judiciary).<sup>52</sup> Somewhat paradoxically, after the mid-20<sup>th</sup> century constitutional rights became entrenched and subject to judicial protection, this conception of the proper roles of judges probably contributed to a *greater* tendency in Europe than in the U.S. to accept unproblematically the judicialization of constitutional rights, because it is seen as their transfer out of the precarious and partisan realm of politics, and into the categorically separate and theoretically apolitical judicial world of principle and law.<sup>53</sup> It is a hallmark of achievement and continued progress of the constitutional rule of law, in this view, to place an expanding realm of individual rights within the judicial sphere and beyond the

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<sup>51</sup> See generally the useful descriptions and analyses in CARLO GUARNIERI AND PATRIZIA PEDERZOLI, *THE POWER OF JUDGES: A COMPARATIVE STUDY OF COURTS AND DEMOCRACY* (2002); JOHN BELL, *JUDICIARIES WITHIN EUROPE: A COMPARATIVE REVIEW* (2006).

<sup>52</sup> See Brewer-Carias, *supra* note \_\_.

<sup>53</sup> Cf. ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* (2000); Rosenfeld, *supra* note \_\_.

dilution or damage of politics. In Rosenfeld's description of the German model of constitutional adjudication, for example, "constitutionalization of the political can be regarded as the triumph of rule according to fundamental values and high principles over rule informed by narrow and tainted interests."<sup>54</sup>

To many American legal observers, this way of seeing the roles of judges in constitutional rights adjudication shows comparatively little sensitivity to legal realist insights into the indeterminacy of rights and law and the politics of adjudication. It is uncontroversial to note that American judges at all levels tend to be much more openly politically engaged and popularly involved than European ones. This has do to not only with the fact of diffuse judicial review in the United States as opposed to the centralized European model,<sup>55</sup> but it can also can be seen in the methods of judges' selection and appointment and advancement,<sup>56</sup> in their background and training,<sup>57</sup> in the way that they write judicial opinions (more often clearly externalizing their arguments in order to appeal to a wider audience),<sup>58</sup> and in the intense public dialogue and debate that often surrounds their actions and decisions – one can simply observe the difference in political attention paid to the justices of the U.S. Supreme Court, compared to those of, for instance, the Italian Constitutional Court or French Constitutional Council. This is a natural corollary of the more

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<sup>54</sup> Rosenfeld, *supra* note \_\_, at 641. Rosenfeld also makes a similar observation about the French conception of the purposes of constitutionalization of politics. *Id.* at 642. For Italy, see also Zagrebelsky.

<sup>55</sup> See ALLEN R. BREWER-CARIAS, *JUDICIAL REVIEW IN COMPARATIVE LAW* (1989).

<sup>56</sup> Guarnieri and Pederzoli, *supra*; Bell, *supra*

<sup>57</sup> *Id.*

<sup>58</sup> Lani Guinier, *Demosprudence Through Dissent*, 122 *HARV. L. REV.* 4 (2008); John Ferejohn and Pasquale Pasquino, *Constitutional Adjudication: Lessons From Europe*, 82 *Tex. L.R.* 1671 (2004).

flexible American understanding of separation of powers between legislature and judiciary (in both directions).

As a result, it is not as frequently the case that the transfer of rights to the province of judges is exclusive and definitive, removing those questions from robust public debate and deliberation. It is in part for this reason that the countermajoritarian difficulty in judicial review remains perennially a much more intensely debated topic in the United States than in Europe,<sup>59</sup> and that court decisions on fundamental rights that serve to restrict or remove popular political engagement over rights debates often get criticized from both the political left and the right.<sup>60</sup> Tocqueville observed that “there is hardly a political question in the United States which does not sooner or later turn into a judicial one”;<sup>61</sup> he could have added equally well that when a serious political question becomes a judicial question it rarely ceases to remain an intensely political one at the same time – even (or perhaps especially) on matters of fundamental constitutional rights.<sup>62</sup> This web of connectedness of the judiciary to politics, in the Madisonian constitutional model, can be considered to enhance popular sovereignty and self-government. As one scholar has put it, “to the extent that the American constitutional experiment can be said to have succeeded, it has not done so because judges have stood outside and above politics,

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<sup>59</sup> Michel Rosenfeld, *supra* note \_\_.

<sup>60</sup> E.g., Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (1990); Mark Tushnet, *Taking the Constitution Away from the Courts* (1999).

<sup>61</sup> *Democracy in America*, *supra* note \_\_, at 270.

<sup>62</sup> E.g., free speech/flag burning; RFRA; abortion; constitutional criminal procedure... By contrast, consider what happened when the German Constitutional Court decided the Bavarian schools-crucifix case, and the judges made public pleas to stop debating the issue because the court had decided. See Kommers’ description.

defending rights against the machinations of self-interested majorities, but rather because they have been intimately enmeshed in the democratic political process.”<sup>63</sup>

The third category of difference is the 20<sup>th</sup> century history of the two regions. In Europe, the strong turn toward both constitutional protection of fundamental rights backed by judicial review and the supranational supervision of human rights after mid-century was irrevocably tied to the experience of the failure of democracy and the rise of genocidal totalitarian regimes. At a general level, that bred a wariness or lack of confidence in national democratic institutions.<sup>64</sup> More specifically, as Andrew Moravcsik has demonstrated, in Europe there was a strong correlation in the latter half of the 20<sup>th</sup> century between a country’s experience of the weakness of democratic governance at home, and its willingness to cede political and legal authority to supranational supervision.<sup>65</sup> According to Moravcsik, commitments to international human rights and supranationalism generally served as a way to “lock in” and consolidate democratic institutions which had undergone crisis and collapse, paving the way for illiberal elements to take hold.<sup>66</sup> The international commitment reinforced democracy against possibility of future reversion toward authoritarian rule. This contributed vitally to the contemporary European openness to international human rights, exactly as a *protection* and

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<sup>63</sup> Lisa Hilbink, *Law and Politics in a Madisonian Republic: Opportunities and Challenges for Judges and Citizens in the New Europe*, in LARS TRÅGÅRD, ED., *AFTER NATIONAL DEMOCRACY: RIGHTS, LAW AND POWER IN AMERICA AND THE NEW EUROPE* 121, 125 (2004)

<sup>64</sup> See, e.g., MARK MAZOWER, *DARK CONTINENT: EUROPE’S TWENTIETH CENTURY* 138-50 (2000)

<sup>65</sup> Andrew Moravcsik, *The Origins of International Human Rights Regimes: Democratic Delegation in Postwar Europe*, 53 *Int’l Org.* 267 (1999).

<sup>66</sup> *Id.*

*consolidation* of democracy. Thus it is not really adequate to say that it is an “anti-democratic” attitude (*pace*, Rubinfeld). However, it certainly does present acutely the paradox of restricting democratic self-governance in favor of the maintenance of objective values necessary for democratic legitimacy – it is “militant democracy” writ large.

If there is an American parallel to be drawn to this dynamic, it is perhaps in the history of the Civil War and the Reconstruction Amendments, which shifted measurably our constitutional order in fundamental ways toward a “trans-state” understanding of fundamental rights and the police power. But such a role for *international* law and institutions has not fit within the U.S. historical experience. Even the most grave 20<sup>th</sup> century crisis of human rights in the United States, the struggle against racial segregation, was not resolved through international intervention nor resulted in a collapse of democratic self-governance. In fact, arguably it resulted in a strengthening of the authority of domestic political and legal institutions (on the federal level), not their delegitimation. Thus, history does not incline Americans to see supranationalism as necessary to the protection of democracy and fundamental rights; and indeed any strong form of international supervision could be perceived as unnecessary or worse, because of its expressly embedded intention to enforce limits on the exercise of popular self-governance.<sup>67</sup>

There are certainly other differences that we could also invoke to reinforce the hypothesis of two constitutionalisms, some

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<sup>67</sup> It will remain to be seen whether the test that the American struggle against terrorists represents for human rights, and especially our experience of torture and other inhuman and degrading treatment, will be resolved through such self-governance-reinforcing paths as well.

going much deeper than constitutional law to the roots of civil law and common law *mentalités*.<sup>68</sup> (The former is more traditionally concerned with abstract and systematic thinking and “legal science”, the latter is more rooted to history, pragmatism and the concrete case; the former is naturally more statist and legislative in orientation; the latter more oriented toward law as a diffuse social practice; etc.) But even these few factors are sufficient to see how the overall constitutionalism of the American tradition, when compared to European ones, is comparatively less likely to be oriented toward understandings of rights as constituting an objective order of values expressing the fundamental substantive commitments of the democratic polity, and more toward understandings of rights as arising out of the social and political life of the people, with their constitutionalization as a reinforcement of self-governance and local freedom. Moreover, although that American orientation is substantially more diluted different today than it was before the different constitutional transformations of the United States in the last century and a half, is not simply a fading vestige of another era; if anything, it has been revived in recent years. An intellectual tour through some of the notable legal scholarship in American public law in the last decade or so suggests a continued attentiveness to the structures of self-government in, for example, an appreciation of the values and virtues of federalism, the exploration of how legal norms are generated and sustained through social norms at local levels, or the study of how rights like freedom of religion, freedom of speech, and the guarantee of the jury trial and other aspects of criminal

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<sup>68</sup> Pierre Legrand, *European Legal Systems Are Not Converging*, 45 INT’L & COMP. L.Q. 52 (1996).

process, and indeed the Bill of Rights as a whole, are designed to protect structures of self-governance.<sup>69</sup>

While Americans have in some significant degree been raising such questions, in Europe probably the most significant event regarding fundamental rights in the last ten years has been the advent of the Charter of Fundamental Rights of the European Union – a massively broad and centralized, one could even say “imperial”, enumeration of rights. Generated from on high, and designed as a way to instruct and educate the citizens of the EU and to constitute the expression of values of the new constitutional order, it is a paradigmatic exemplar of the detachment of rights from their social and political foundations, a Rousseauian effort to create and impose the rights of the people through the civilizing effect of the *volonté générale* acting through the Legislator.

A disproportionate or unbalanced emphasis on global values at the expense of self-government poses a problem for the full realization of human rights and for the resolution of certain problems of law and justice, as we can see by turning now from the comparative constitutional context to that of the contemporary law and practice of international law of human rights.

## **Part II. Local self-governance and global values in international human rights law**

I do not propose to apply the ideas of local ordering and rights developed up to this point to international human rights in a systematic analytical form, but simply to use these ideas as starting points for reflection, as inspiration and provocation. With

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<sup>69</sup> See generally Part I of AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998), and particularly the synthesis at pages 124-33.

a Tocquevillian frame of mind, I want to suggest that the discourse and practice of fundamental rights law, particularly at the supranational level, has tended more toward the more Continental European model of fundamental rights law described above, and away from an adequate appreciation of the value and necessity of local freedom, and away from the artistry of maintaining the tension between the stable ordering of rights and the spontaneous ordering of social life. To indulge in just one more serving of my earlier culinary metaphor, international human rights has eschewed the delights and dangers of comparative gastronomy in favor of the reliable and global (but more bland) fast-food chain.

If that is true, then it is also reasonable to hypothesize that the role of international human rights in the democracies of the 21<sup>st</sup> century depends on an appreciation for the relationship between local freedom and global values; between self-governance, practical reason, and the common good; between the specificity of belonging and unbounded openness to the good of others.

*A. Subsidiarity vs. the prevailing disinterest in self-government in human rights*

I have argued at length elsewhere that the principle of subsidiarity is one tool to both understand and promote just such relationships between local and universal, and for that reason should be understood to be a structural principle of contemporary international law of human rights.<sup>70</sup> Most importantly, for the discussion here, subsidiarity should be preferred as an evaluative principle of the human rights system (and especially as an alternative to the concept of sovereignty) in particular because of

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<sup>70</sup> *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AJIL 38 (2003).

the way that it unites a concern for a universal common good with a profound attention to the freedom of smaller communities to determine and realize their ends for themselves. “The principal advantage of subsidiarity as a structural principle of international human rights law is that it integrates international, domestic, and subnational levels of social order on the basis of a substantive vision of human dignity and freedom, while encouraging and protecting pluralism among them.”<sup>71</sup> In other words, a subsidiarity-oriented approach to human rights law will seek to integrate both dimensions of rights that I have been exploring here: the guarantee of structures of local self-governance and the protection of transnational principles of justice and human dignity.

In fact, however, many of the predominant ways of thinking about international human rights and putting them into practice do not reflect that balance well, and instead undervalue the local - governance aspects of human rights. That is not to say that the idea of local self-governance is absent from international human rights law. On the contrary, it is present in a number of important ways. Generally, structural doctrines such as the requirement of exhaustion of local remedies and the margin of appreciation (in Europe) are good examples of self-government-reinforcing features of the international human rights system. Similarly, institutional relationships limiting international tribunals’ direct control over domestic legislation and judicial decisions, and requiring domestic actors to incorporate and execute the international norms and decisions, also can strengthen self-governance. Moreover, important parts of the substantive law of human rights do affirm the importance of democracy, which may be understood at least in

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<sup>71</sup> Id. at 40.

some cases as reinforcing self-governance (although arguably the Strasbourg Court's endorsement of "militant democracy", for example in the case of *Refah Partisi*, is really a decision applying objective values and limiting self-governance<sup>72</sup>).

Still, the appreciation for self-governance has never been the stronger partner in the development of human rights ideas, probably in significant part because the international system of human rights protection was born out of the original sin of failed and criminal domestic political institutions. The emphasis is typically, therefore, on the expansion and consolidation of the global values that human rights represents, and democracy has been largely understood in normative terms defined by those values rather than in terms of local self-governance.<sup>73</sup> Moreover, what tenuous interest there has been in the ideal of self-governance in international seems to have weakened further with the passing of time. For instance, the use of the doctrine of the margin of appreciation – never accepted outside of Europe in any event – has been in substantial decline at least since the great expansion of the Council of Europe to Eastern and Central Europe.<sup>74</sup> The supranational human rights courts in the Americas and in Europe have been experimenting more and more with remedies and forms of supervision that exercise much stronger

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<sup>72</sup> *Refah Partisi (Welfare Party) v. Turkey*, ECHR. See Patrick Macklem, *Militant Democracy, Legal Pluralism, and the Paradox of Self-Determination*, 4 Int'l J. Const'l L. 488 (2006).

<sup>73</sup> Carlos Nino's work has of course been enormously influential on this point, in many human rights circles. *The Constitution of Deliberative Democracy* (1996?)

<sup>74</sup> Cite my quantitative analysis. In addition, as Conor Gearty has pointed out, European Court of Human Rights "has not developed the margin of appreciation in a democratically sensitive way." Conor Gearty, *Democracy and Human Rights in the European Court of Human Rights: A Critical Appraisal*, 51 N. Ir. Legal Q. 381 (2000).

internal control over domestic politics and institutions.<sup>75</sup> One of the clearest recent illustrations of the neglect, and even hostility, of supranational institutions for local freedom in matters of human rights came in a January 2009 resolution of the European Parliament which called not only for the significant expansion of the strict supervision and control by the European Union over all aspects of fundamental rights in the EU Member States, but also and more ominously proposes to regulate what the European Parliament calls “closed institutions” (e.g., hospitals, families, civic and religious associations, and other mediating communities between the individual and the state) with respect to their compliance with the Charter of Fundamental Rights.<sup>76</sup>

*B. Punishment, amnesty, and democracy in the Americas*

[Sections omitted]

### **III. Conclusions**

We can now pull together the different threads of argument. First, I have tried to demonstrate that one important factor that emerges from the gap between international human rights law and United States law is due to the persistence in America of a Tocquevillian concern for the importance of self-government, for the art of democracy as a mediator between a commitment to individual rights and the taste for local freedom. These values are reinforced and carried forward by other characteristics of the

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<sup>75</sup> Eg, those described in Helfer, Shelton.

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American constitutional tradition which I have identified, especially as seen in contrast to certain aspects of Continental European constitutional traditions. Secondly, I have attempted to show how a greater attentiveness to the value of local virtues and democratic self-government are essential complements to the more dominant human rights emphasis on global values of international justice, and indispensable features of a full and flourishing human rights culture. By way of example, this is illustrated in the treatment of the specific legal problem posed by obligations to punish human rights violations, the practices of amnesty, and the virtue of reconciliation.

Although it should be clear from what has preceded this conclusion, because of the potential for a polemical reading of this argument, I would like to be very clear that I do not suggest that we seek to replace the current imbalances in thinking about and using rights in international and (some) constitutional systems as objective global values with an equally reductive concern only for self-government and localism. Instead, it is necessary to seek means to bring the two forms together in a way that takes both seriously, that keeps them in dialectical tension without either destroying the other. The ways of doing so could include, for example, a more comprehensive application of the principle of subsidiarity to human rights law, one that would open up a greater degree of pluralism in the definition and application of the rights while at the same time recognizing their supranational status. An interesting analogous effort to bring the two together is the proposal of Grainne de Búrca, who has tried to articulate a view of the relationship between domestic law and international human rights law in adjudication as a practice of “mutual justification,” by

which each partner seeks to persuade the other through rational argument. In this way she seeks a “future of international law [that] is not only ‘domestic’ but also societal and normative.”<sup>77</sup>

These and other efforts to integrate continued commitments to universal rights with stronger orientations toward self-government and localism could help us to reach a more adequate equilibrium regarding fundamental rights and democracy both in international and in constitutional systems. Such an integration could, to begin with, bring about a greater unity of the abstract idea of fundamental rights with concrete social life, a unity necessary if the common good is to be more a tangible reality than pious words. The vast and diffuse recent body of legal scholarship on social norms in a variety of areas, from criminology to urban planning, has shown us how vital that integration is to the realization of the humanistic ends of law.<sup>78</sup> Greater integration of local freedom and individual rights can also lead to a richer form of democracy, because it fosters and supports the mediating institutions of civil society, those jurigenerative communities that are capable of giving rise to the virtues of solidarity and commitments to freedom necessary to justify and sustain pluralistic democracies. Democracy itself then becomes the vehicle for mediating between what Michael Walzer called “thin” and “thick” moral arguments,<sup>79</sup> or between purely abstract expressions of universal values and the articulated, plural, substantive form

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<sup>77</sup> Grainne de Búrca and Oliver Gershenberg, *The Denationalization of Constitutional Law*, 47 Harv. Int'l L. J. 243 (2006).

<sup>78</sup> Cite the wealth of “social norms” literature

<sup>79</sup> Michael Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (1994). Cf. the interesting discussion in Yehudah Mirsky, *Human Rights, Democracy, and the Inescapability of Politics; Or, Human Dignity Thick and Thin*, 38 Isr. L. Rev. 358 (2005).

that those values acquire through the strong forms of belonging that we experience.<sup>80</sup> That vision of democracy creates a greater space for vibrant and pluralistic political life than can be realized in a constitutional order based exclusively on a conception of rights as expressing an objective order of values for the global community, because there is a continuous need to debate, discuss, and decide how to reconcile the diverse aspects of the good of the community – what Benhabib refers to as “democratic iterations”.<sup>81</sup> It therefore entails, ultimately, a broadening of the need to rely on reason in politics, on the prudence and persuasion that the “art” of democracy requires.

In sum, the resulting political community does not aim to be a form of either “democratic nationalism” nor “internationalism” – which are merely ideological categories in any event – but rather conceives of democracy as constituting a locus of encounter within which human experience generates and sustains the recognition of our responsibility for one another’s human dignity.

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<sup>80</sup> Cf. David Jacobson, *Cosmopolitan Promises: The Rising Struggle Over Human Rights and Democracy*, 3 J. Hum. Rts. 215 (2004)

<sup>81</sup> Benhabib, *supra* note \_\_.