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National and Transnational Constitutionalism, and the Protection of Fundamental Human Rights

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In this paper I would like to explore the complicated and ambiguous relationship between the idea of universal human rights and the idea of a nation state with its own particular identity, history, and culture. I will do so from the disciplinary perspective of law, in particular comparative constitutional law and international human rights law, by examining the basis of claims of what I will call “national constitutionalism”, focusing on the constitutional tradition of the United States, and comparing that perspective with what I will identify as a more “transnational constitutionalism”.

Historically, the emergence of human rights as a coherent and powerful political idea was strongly associated with the formation, independence, and self-rule of nation states. Whether in terms of the guarantees of the “rights of Englishmen”, or in the liberal unification of nations like Italy in the 19th century, or in the push for widespread national self-determination in the global politics of the early 20th century, or even in the movements of decolonization after the Second World War,[1] one consistent and deeply rooted strand of political practice and political theory has seen the realization of human rights as best served by attending precisely to the idea of autonomous and self-governing nations, each one providing its people with the capacity to chart their own course, frame their own values and priorities, and affirm their own collective identity. Constitutionalism (including its implicit requirement of democracy) has been the principal vehicle for effectively realizing in tandem *both* national aspirations to establish collective identity and *also* the rule of law and the protection of rights.

Yet, at the same time, from the beginning the modern idea of human rights, and its claims framed in terms of abstract universal values, has also been infused with a universalism that transcends the specific and contingent cultural or historical contexts and the particularities of national identity. Human rights, from this perspective, claim to stand outside of, and at times even against, the nation and the state. While this was already clearly true in the thought of the 18th century proponents of the rights of man, it became the dominant mode of conceptualizing human rights in the latter half of the 20th century, with the advent of the global project of universal human rights. Precisely in order to advance that aspiration of global acceptance, human rights in the post-1945 world order were articulated and instantiated in law in forms that separated them from the distinctiveness of any particular national identities or traditions of law and constitutionalism.[2] The historical reasons for that emphasis are fairly obvious, and center on an interpretation of Germany’s aggression and genocide as being the products of a virulent strain of nationalism rooted in an ideology of racial supremacy. Human rights in the post-war era were supposed to serve as the checks on those impulses, by fixing certain universal principles on the inviolable dignity of the human person. Once human rights in this form were situated in the constellation of areas of international concern, in consequence they became pitted against the nation-state in other ways as well. By raising each state’s internal affairs to a common level of international concern, the global recognition of universal human rights disrupted and conditioned state sovereignty, diminishing it from the near-absolute status it had in the 19th century positivist vision of the state. “Universality” in this vision consistently tends to be seen as a requirement of “uniformity” with respect to the protection of rights, thus flattening the differences between nations across the many areas touching on fundamental values and principles.

The need for strong and effective *states* in the post-1945 order has remained clear and obvious notwithstanding those developments. The international human rights system depends on them in many ways for the implementation and protection of rights. At a theoretical level, this has been recognized in different ways by various philosophers of law and politics. For example Hannah Arendt argued that the “right to have rights” entailed the necessity of an individual belonging to a specific political community in order to have her rights recognized and protected.[3] Jurgen Habermas, theorizing from very different premises and arguing for a full constitutionalization of the global community, nevertheless coincides in his judgment about the necessity of states as the constituent units of that order.[4] In this he strongly echoes Kant, whose Perpetual Peace, although understood today as a manifesto of cosmopolitanism, is based on the idea of a federation of independent republican states.[5] Beyond theory, in practice weak and distant international human rights institutions rely on

states as the primary guarantors of the human rights of individuals and local communities.[6] In short, universal human rights legitimate and justify states even while relativizing their national sovereignty.

The *national* state, however, is a different and more problematic matter. Insofar as it implies an affirmation of the particularity of the nation and its identity, the nation state seems to be inevitably in tension with the dominant vision of human rights in the post-1945. Yet the triumph of abstract formulations of universal human rights as the common currency of global ethical discourse has not eliminated the persistence of claims of national identity. Indeed, arguably the hegemony of the ideology of human rights has sometimes provoked more reactions from a wide variety of nations seeking to affirm the particularity of their identities and traditions in the face of, sometimes even against, global human rights norms. We saw this in the 1980s and 1990s, for example, in the debates over so-called "Asian values" and international human rights.[7] African nations have periodically insisted on the recognition of their unique cultural "fingerprint" with respect to human rights and have resisted, for example, the demands of the International Criminal Court in part by affirming their preference for national approaches to criminal justice, peace, and reconciliation.[8] Most recently, we increasingly see examples of political leaders and even domestic legal institutions, from Buenos Aires to Brunei, resisting the demands of the global human rights regime and giving priority to national constitutional particularity over global standards, often invoking the distinctiveness of national characteristics and identity. One could even speculate reasonably that as the pressure of universal human rights increases, it proportionately provokes a certain opposite reaction of nationalism.

In an era of new and resurgent nationalisms around the world in general, it would be useful to understand better the relationship between the protection of human rights as universal values and the idea of nation states as the locus of expression of national distinctiveness and particularity. Is there in fact an irreducible conflict between them, or is there a way to reconcile and harmonize the two?

Given that aim, I will not here treat the many examples of states whose resistance to international human rights norms, processes, and institutions is obviously a pretext merely for evading accountability and for justifying authoritarian rule. Nor am I concerned with "sham constitutionalism" – a recently coined label for the very old phenomenon of constitutions enshrining rights (and other constitutionalist traits like a separation of powers) without any actual attempt to make them effective in legal and political reality.[9] Nationalist authoritarianism and sham constitutionalism are certainly serious problems, but they are different problems than the one I am trying to examine here. For this purpose, the cases of more importance are those where a sincere (however inconsistent and imperfect) commitment to the protection of fundamental rights seems to coexist with a relatively strong affirmation of national identity and distinctiveness. I will unsystematically call this "national constitutionalism", because of the importance and priority that it accords to national history, political culture, legal norms, and institutional structures in determining and legitimating claims of fundamental rights. We can distinguish this national constitutionalism from a different emphasis that I will call "transnational constitutionalism" because it accords higher priority and legitimacy to global norms and institutions of human rights than to the national ones

The constitutional tradition of the United States has been one of the most enduring examples of democracy in the world, and a constitutional order founded on the idea of individual (natural) rights. And yet, for the last 70 years it has also been one of the most paradigmatic examples of a constitutional tradition that to a certain and consistent degree prioritizes national constitutionalism and resists some of the core premises of transnational constitutionalism.[10] Can we, by delving a little more deeply into the US example, begin to arrive at an understanding of both universal human rights and nation states that is more nuanced and constructive rather than only oppositional and reactive? Is there something useful that we can learn more generally from the US example for how to reconcile the competing goods of the universal recognition of human dignity and human rights, on the one hand, and nationalist claims of self-determination, self-government, and identity in a nation state, on the other?

Before proceeding further, allow me first to make very clear the scope and limits of my focus on the U.S. constitutional tradition in order to try to avoid misunderstanding. In focusing on the United States, in no way do I intend to suggest that its constitutional system is categorically exemplary or superior, or that it does not in some ways merit serious reproach and criticism. On the contrary, as I hope will be clear, there are various aspects of the U.S. approach that I believe can be quite problematic. And it is common knowledge that in its historical practice the United States, like many complex and dynamic political communities, has had a constitutional identity that is full of contradictions and failures to abide by its own ideals. None of that, however, prevents us from asking whether we can nevertheless extract from this example of an enduring, generally rights-protecting, constitutional democracy some insight into the relationship between national identity and human rights to help us navigate contemporary forms of constitutionalism.

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). This is not at all something new introduced by the Trump era's "America First" style of nationalism, but has in fact been more or less consistently true across the entire 70-year history of the global human rights project, and with a core continuity across the various U.S. Presidential administrations. The United States has ratified very few of the international human rights treaties, and refused to accept the jurisdiction of the one available regional tribunal (the Inter-American Court of Human Rights) that could otherwise have authority to supervise U.S. human rights obligations. When it does ratify human rights treaties, the United States has typically done so with various reservations designed to immunize its constitutional system from any major substantive changes. And in those bodies where it does participate (like the Human Rights Committee or the Inter-American Commission on Human Rights), the United States frequently enters discussions over human rights controversies with a restrictive view of the scope of authority of these bodies and with vigorous defenses of its home-grown, national law and practice.

Most observers, activist and political as well as scholarly, tend to ascribe this resistance (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.[11] 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 (which would have prohibited the ratification of international human rights treaties)[12] or certain hyperbolic public statements about the illegitimacy of international human rights bodies today, stronger forms of American hostility toward the international have undeniably been 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" and the decisive role that the United States played in the creation of the post-war international human rights framework.

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,[13] 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 U.S. federal legislation is deliberately made substantially more difficult to adopt in the United States, compared to national legislation in many other constitutional systems (especially those with parliamentary systems), as a way of helping to control and limit the power of the federal government. 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).[14] Moreover, these structural features of the U.S. constitutional system are not mere historical or proceduralist curiosities, but reflect a serious set of normative ideals and aspirations.

Aside from such structural questions, one could point to the many examples in which comparative study has revealed distinctively American approaches to a broad range of specific fundamental rights, including freedom of speech,[15] freedom of religion,[16] privacy,[17] and criminal process and punishment,[18] to name just a few. Such substantive differences in understandings of rights are not themselves the focus of my interest here, but they begin to approach the underlying factor that I seek to isolate and explore. 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 in some particular area or other of positive law – 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 exactly *because* they originate distinctively in American historical, cultural, political, and social sources – that is, in the traditions, practices, and identity of the American people as a self-governing democratic nation. 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. 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. Intermingled with that universalist Enlightenment sentiment, however, there has always been also the notion championed by Edmund Burke (in reaction to the ideology of the French Revolution) that rights are "real rights" only when, like "the ancient rights of Englishmen", they are concretely grounded in and emerge from a distinctive national history and social fabric.

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 a nation and its rights, its democracy, and its national identity.[19]

One influential American tradition of law and politics, at least, is more likely to regard “rights” as acquiring their significance (in both senses: meaning and importance) in the crucible of the national 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 merely from the fact of their “transnationality”. For many players in the international milieu, and particularly among human rights activists and scholars, 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 thought to be more authoritative and more legitimate, and they are less likely to be contested. This difference represents distinct ways of conceptualizing the relationship between rights, nation, and communal identity. It captures a little more concretely what I tried to indicate earlier as the basic difference between national and transnational constitutionalism. But we need to take still another step to identify more clearly what sources and commitments underlie these different postures.

A Tocquevillian perspective

This attitude about the relationship between nation and rights that I am trying 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 the idea of rights to the fledgling American nation, and its connection to American democracy. “No man can be great without virtue, nor any nation great without respect for rights”, he wrote.[20] 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”.[21] 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, 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*”.[22] 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 the decentralization of social ordering in the young American democracy, which is indeed one of the main themes of his entire study. As John McGinnis has commented:

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.[23]

Tocqueville’s reference to America’s “unusual” combination of rights and local freedom connotes a tension between this dynamic 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 from his narrative: rights suggest fixity against the instabilities and volatility of the love of local freedom; they are points of ordering not subject to the vagaries and vicissitudes of norms and practices that “bubble up from below”. So, they provide stable coordinates of a social-political space within which freedom can be exercised, thus simultaneously making freedom both constrained and possible. In the tension between rights and self-government, in short, we face the paradox of what US Supreme Court Justice Benjamin Cardozo referred to as the rights that form “the very essence of a scheme of ordered liberty” in the U.S. constitutional system.[24]

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 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*).[25] 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*.

Drawing inspiration from Tocqueville, then, we might put it this way: national democratic political life in this vision is the practical art of mediating between the social freedom of the local and the order of rights, and between concrete particularity and abstract universals. Taking this enduring point beyond the distinctive idiom

of Tocqueville and his time, we might say that the value of democracy rests on the interrelationship between the importance of self-government, on the one hand, and the need for an objective order of values, on the other.

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 contestable and contested premises. But from the perspective of many of the different theories of democracy,[26] it is common to observe that fundamental rights can often 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.[27] 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 oriented toward objective values, toward the recognition and protection of basic human goods, and are often said to be “dignitarian” in orientation. [28] 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 – ensuring self-government and providing the objective value orientations of the body politic – can sometimes be in tension with one another.[29] Where rights are used to circumscribe the boundaries of legitimate political choices by reference to objective values, by definition they constitute a certain limitation on the freedom of self-government (of the majority, to be sure) – using Dworkin’s terms, they are “trumps” against societal choices that don’t accord adequate respect for the moral worth of every individual.[30] 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 majoritarian democracy to be oriented in substance toward basic principles of justice and the common good – but in some degree it is even anti-*political*.[31] It 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 majorities within nation states. 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.[32]

One problem with that dichotomy, 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’ language; [33] or more recognizably in the rhetoric of Enlightenment liberal revolutionary politics, the right to the “pursuit of happiness”.[34]

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”.[35] 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”.[36] 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 otherwise constrained political environment, bringing dynamism to public discourse and the mobilization of interests, and enhancing the political participation of a broader range of members of the political community in decisions that may be captured and controlled by narrower factions.

Finally, and closely linked to our preceding reflections on certain strands of constitutional thought, at least in the context of the founding of the United States, rights protecting rights and enhancing self-government were deemed inseparable because the "rights of the people" were considered (in Lockean fashion) to be prepolitical, grounded in the history, practice, and material social life of the community. This means that rights that serve 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.

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 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 the jurisgenerative[37] politics and communities which can give life to the virtues that sustain liberty, equality, the rule of law, and democracy.

Given these multifaceted relationships between a distinctively *national* politics and fundamental rights, it is to be expected that specific constitutional systems can take quite divergent forms in seeking to realize both the stable protection of certain objective universal values and also the virtues of self-government. While the U.S. constitutional tradition has tended frequently to privilege the latter, in the post-1945 era most continental European constitutional systems have balanced the equation more in favor of the objective order of values that remove fundamental questions from political self-rule and from the expression of national identity. Indeed, it may be reasonable to interpret one (among others, to be sure) of the causes of the backlash against European regional institutions in places like the United Kingdom to be a perception that the "Europe of rights" has excessively intruded upon and displaced the vital importance of national self-determination. This observation highlights the link between self-government and the political expression of the idea of nation more generally. The self-rule orientation of rights represents the means by which a people will deliberate, choose, and express their fundamental value orientations and priorities, and their collective identity as a nation. So it will tend to be more aligned with a nationalist reading and implementation of constitutional order. Conversely the objective order of values that are to be fixed and removed from political vicissitudes will often be perceived as constraints – legitimate constraints, perhaps, but constraints nevertheless – on the ability to make those same value choices expressive of national identity. They will therefore tend to be in greater tension with the idea of national constitutionalism and more consonant with a transnational constitutionalism more abstracted from and less expressive of national particularity and identity.

All of this in turn suggests a further working hypothesis about rights and the nation state: a disproportionate or unbalanced emphasis on objective universal values at the expense of self-government may pose a problem for the full realization of human rights and for the resolution of certain problems of law and justice. To see how this might be so, we can turn now from the comparative constitutional context to that of the contemporary law and practice of international law of human rights.

Subsidiarity vs. dis-integration of the idea of human rights

I have argued at length elsewhere that the principle of subsidiarity should be understood to be a structural principle of contemporary international law of human rights. It is deeply consonant with the idea of human rights represented by the Universal Declaration of Human Rights and other foundational instruments, and corresponds well with the understanding of the requirements of dignity, justice and freedom of socially-situated human beings that those documents express. Subsidiarity also describes remarkably well many of the structural and doctrinal features of human rights law and institutions, providing a helpful analytical tool to understand why it bears some of the peculiar features that characterize it, and how it works in practice. Most importantly, however, I have argued that 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 the way that it unites a concern for the universal common good with a profound attention to the freedom of local 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". I will not rehearse again the arguments behind those conclusions. Here, I wish only to point out that to the extent that such a reading and analysis of the relationship between the principle of subsidiarity and human rights is correct, a subsidiarity-oriented approach to human rights law will seek to integrate both dimensions of rights that we have been exploring: the guarantee of structures of self-governance and the protection of objective values 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 self-governance aspects of human

rights. That is not to say that the idea of 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, or 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 some cases as reinforcing self-governance (although arguably the Strasbourg Court's endorsement of "militant democracy" is really a decision applying objective values limiting self-governance).[38]

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 protection was born out of the original sin of failed and criminal domestic political institutions. What tenuous interest there has been in the ideal of self-governance has weakened even further with the passing of time. For instance, 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.[39] 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 internal control over domestic politics and institutions.[40] Even the substantive law has tended to diminish the importance of the value of self-government. For instance, international human rights law is essentially incapable of distinguishing between the illegitimacy of a military regime's self-amnesty for grave violations of human rights and a negotiated, democratically accepted amnesty which in some cases allows societies to move away from conflict and toward reconciliation. Overall this shift increasingly away from the value of national self-determination is supported very strongly by the dominant mentality of activists and institutional actors (this I can say purely from my personal experience in the field as a member of the Inter-American Commission on Human Rights in the past, and a member of the European Commission for Democracy Through Law, a.k.a. the Venice Commission, at present), who often seem untroubled by the systematic transfer of domestic politics and law to international levels. And finally, much of the most influential scholarly work on international human rights has set aside any real interest in or engagement with the value of self-governance. Even those theories that have been on their surface oriented toward the strengthening of domestic democracy seem in the end to focus more either on the thick normative content of that democratic order (for instance, Carlos Nino's deeply influential and important *Constitution of Deliberative Democracy*)[41] or on a systematic effort to enhance domestic institutions' capacity to do simply what international law mandates that they do (for instance, Anne-Marie Slaughter's proposals for adopting what she revealingly calls "The European Way of Law").[42] They are hardly concerned with structures of self-government that begin in the capillaries of society, the starting points for Tocqueville's appreciation of democracy and rights.

The consequence of an atrophied attention to structures of self-government is a correspondingly stronger focus only on the objective order of values that human rights norms represent. In the international sphere, above all, this can have some highly problematic consequences in the long run.

To understand why, we need to begin by restating two familiar premises of the international human rights project. First, at a conceptual level, "human rights" is not a single coherent idea, but represents the intersection of a variety of different traditions of thought, many of which in various degrees have mutually incompatible premises – especially premises about the nature of the human person and the source of his or her rights. This was recognized to be true from the first stirrings of the effort to articulate common standards of human rights at the international level.[43] Second, in order to circumvent the obstacle of this theoretical pluralism, those who set out to forge the first global declaration of rights based their effort on a deliberate abstention from debate, let alone agreement, about the theoretical foundations of human rights. The focus of their agreement was on practical principles alone.[44] To this day, it remains a pervasive and persistent characteristic of international human rights that its fundamental principles are based on a very thin, if any, consensus about where they come from. These two premises together ensure that principles of fundamental rights in law are inherently underdetermined, and necessarily subject to further specification through interpretation and legislation.

To compensate for this precarious state, human rights lawyers and political actors have spent decades dedicating themselves to building up the positive law of international human rights through multiple treaties, institutions and processes designed to "translate" the soft underlying principles into hard norms of positive law with widespread global acceptance. Once "constitutionalized" in this way, the hope is that the validity of the norms becomes separated from their social or philosophical basis, like Hart's rule of recognition or Kelsen's *grundnorm*, thus obviating the need (and perhaps even the possibility) to inquire into, or shore up, their originally multivalent ethical starting point.

We should not minimize the tremendous successes that this effort has achieved in the last 70 years. It is a noble and valuable labor on behalf of justice and the universal common good of the peoples of the world. Nevertheless, it would be unrealistic and disingenuous to ignore the limitations, and even dangers, of building the edifice of global human rights law merely on a positive law that has nothing but a very thin practical consensus beneath it.

Let me highlight four interrelated clusters of difficulties with such an arrangement. First, generally speaking there is often a widespread gap between international norms and instruments of human rights law and the local social, political and cultural contexts in which they are supposed to be operative in practice. Someone trained primarily as a comparatist like myself cannot help noticing the structural similarity between this aspect of international human rights law and patterns of law in colonial societies or pluralistic legal systems. To put it another way, law that is constructed without attentiveness to the underlying cultural context tends toward abstraction that separates it from the society that it purports to regulate. It thus often becomes a bare and unobserved formality. Or, alternatively, the formal and abstract law would have to be maintained through the use of considerable coercive force, which with respect to human rights law would indeed be an intolerable self-contradiction.

That the first problem is not as evident in the European constitutional space (although it certainly is in some of the newer member states of the Council of Europe) is certainly not due to the "positivization" of the principles, but rather to the fact that the underlying social and cultural commitments and values necessary to sustain the positive law are in fact present, unlike in many other regions of the world. But that observation actually leads us to the second problem area. The thinness of the cultural basis of human rights law becomes even more of a difficulty insofar as we recognize that law and rights do not by themselves *generate* the conditions and commitments necessary to sustain the prepolitical values needed to make the law effective. Even Habermas – he of "constitutional patriotism" and the self-sufficiency of the liberal legal state – has acknowledged that "An abstract solidarity, mediated by the law, arises among citizens only when the principles of justice have penetrated more deeply into the complex of ethical orientations in a given culture".[45] In short, the thin practical consensus of human rights alone is not self-sustaining; it depends on other extra-legal sources of value and commitment.

Without the nourishment of a genuine connection between the abstract human rights norms and the cultures that can sustain them and that are subject to them, a third set of problems arises. The mediation between the law and the social basis from which it arises and toward which it is directed would, in the focal case of a law-governed community, normally occur through the political life of the community, by the practical "art" of reasoning together and persuading one another about the goods of the community and how to realize them. Instead, the vacuum existing between positive law and the meaning-bearing contexts in which people actually live their lives tends to get filled with an exaggerated role of bureaucratic institutions and political elites. As Philip Allot memorably put it, human rights in the international legal order have been "swept up into the maw of an international bureaucracy. The reality of human rights has been degraded. . . [T]hey were turned into bureaucratic small-change [and] became a plaything of governments and lawyers".[46] Accompanying this reality is an emphasis on procedures; endless process is the fog that fills the abyss of substantive discord. In short, the risk is of a reduction of political life and its substitution by a weak legalism and formalism. It should be no wonder that most international adjudicative bodies in the human rights sector are notorious for their weak legal reasoning and loose conceptualization of the requirements of human rights in their jurisprudence.

Finally, the thinness of the foundations of human rights and the resultant bureaucratic proceduralism only masks the deeper differences among cultures that in fact persist. The arrangement merely defers disagreement on fundamental questions. Under the veneer of authoritative process, there continues to be controversy over the interpretation and application of even the most basic of rights, like life, and over the relationship between fundamental rights and the most elemental forms of social life, like the family. The divergent understandings are even more pronounced as one gets further away from the protection of the "hard" core of human rights like life and physical integrity, and more into the difficult weighing of competing goods characteristic of constitutional claims generally. This will only be more true as we continue to see deeply contested moral questions all become processed as juridified human rights claims, and as the challenges of new technologies and new threats to human existence continue to make themselves felt.

Someone will undoubtedly object that I have overstated the vices of contemporary human rights here, so I will stress again that this is an isolated description of certain risks and tendencies, all of which I see present in various degrees in the reality of contemporary human rights practice, even if none of it describes the totality of the human rights field. As I already emphasized, the positive achievements have also been great. Fixing a slightly more nationalist gaze for a few moments only on the potential problems that arise out of transnational constitutionalism's de-emphasis on national self-government, however, allows us to see why an attentiveness

to the local communities in which human rights acquire meaning and have force, and the protection of structures of self-government which allow those communities to pursue their good, is so vital to fulfilling the promise of the human rights ideal in its integrated whole.

Conclusion

In conclusion I can finally try to pull together the disparate threads of argument here and link them to the broad themes of nation and nation-state. First, drawing on the historical example of the United States I have tried to demonstrate that one important factor in explaining a greater emphasis on national constitutionalism, and the corresponding resistance to the transnational constitutionalism of international human rights law, is the persistence of concern for the importance of self-government, for the art of democracy as a mediator between a commitment to universal individual rights and the taste for local freedom. Next I offered a critical assessment of the international sphere of human rights to highlight the dangers of an atrophied attentiveness to those same questions of local freedom and national self-governance. Can we then draw some conclusions that may be useful for thinking constructively about the nation state and human rights in this era of rising nationalism globally?

First, this line of thought suggests that we have to take seriously the desire of national communities to retain meaningful degrees of self-governance. If not, it is only likely that more extreme and exclusionary forms of nationalism will be fed by their rhetorical and political opposition to the idea of human rights as recognized and protected by international norms, and they will provoke hostile reactions to the idea of universal human rights as a whole.

But at the same time I do not suggest that we seek to replace the currently skewed way of thinking about and using rights in more transnationally-oriented constitutional systems with an equally reductive concern only for national self-government and localism. Indeed, if this were a paper about the limitations of the American constitutional disposition, I would be critical of the excessively exclusive emphasis there on self-governance with respect to fundamental rights and international law. Instead, therefore, 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, one that would open up a greater degree of pluralism in the nationally-specific definition and application of the rights while it would at the same time recognize their status as part of the universal common good.

Efforts to integrate commitments to universal rights with stronger orientations toward national identity, self-government, and localism could help us to reach a more adequate equilibrium regarding fundamental rights and democracy in both international and in national constitutional systems. Such an integration would, 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. 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 jurisgenerative communities (including religious ones) that are capable of giving rise to the democratic values and commitments to freedom necessary to justify and sustain pluralistic democracies. Democratic politics itself then becomes the vehicle for mediating between what the political philosopher Michael Walzer calls “thin” and “thick” moral arguments,[47] between purely abstract expressions of universal values and the articulated, plural, substantive form that those values acquire through the strong forms of belonging that we experience, such as the nation. 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, because there is a continuous need to debate, discuss, and decide how to reconcile the diverse aspects of the good of the community. 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 aim, I believe, is not to aim exclusively at a form of either “nationalist constitutionalism” or “transnational constitutionalism,” but rather to conceive of the relationship between the nation state and fundamental rights as constituting a locus of dialogue. I do not mean “dialogue” in a weak sense, a merely procedural form of discourse and deliberation, but a commitment to truth and to charity – that is, to a reasonable adherence to reality on the one hand, and an acceptance of the good of another as one’s own, on the other. In such a dialogue, the good of the “taste for local freedom” and self-determination that is at the heart of national constitutionalism, and the commitment to the recognition of human dignity and the protection of human rights as universal values that underlies transnational constitutionalism, are not in contradiction, but become necessary complements of one another.

END NOTES

[1] See Steven L.B. Jensen, *The Making of International Human Rights: The 1960s, Decolonization, and the Reconstruction of Global Values* (Cambridge University Press, 2017).

[2] See Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House, 2002).

[3] Hannah Arendt, *The Origins of Totalitarianism*, Chapter 9 (Harcourt, Brace, and Co., 1951). See also Alastair Hunt, *The Right to Have Rights* (Verso, 2018).

[4] Jurgen Habermas, "The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society", *Constellations*, Vol. 15, No. 4 (2008).

[5] Kant, I., "Toward Perpetual Peace: A philosophical sketch", *in* Kleingeld, P., *Toward perpetual peace and other writings on politics, peace, and history* (Yale University Press, 2006).

[6] Paolo G. Carozza, "Subsidiarity as a Structural Principle of International Human Rights Law", *American Journal of International Law*, Vol. 97, p. 38 (2003).

[7] See, e.g., Damien Kingsbury and Leena Avonius, eds., *Human Rights in Asia: A Reassessment of the Asian Values Debate* (Palgrave Macmillan, 2008).

[8] See e.g., Seth D. Kaplan, Chapter 9: *Human Rights in Thick and Thin Societies: Universality without Uniformity* (Cambridge University Press 2018).

[9] David S. Law and Mila Versteeg, "Sham Constitutions", *California Law Review* Vol. 101, p. 863 (2013).

[10] The charge of the U.S. State Department's recently created Commission on Unalienable Rights (of which the author is a member) is paradigmatic of both the historical commitment to rights in the United States and also of its prioritization of national constitutionalism. See https://www.state.gov/commission-on-unalienable-rights

[11] Among innumerable other examples, see, e.g., Johan D. Van der Vyver, "American Exceptionalism: Human Rights, International Criminal Justice, and National Self-Righteousness", *Emory Law Journal* Vol. 50, p. 775 (2001); Cherie Booth and Max DuPlessis, "Home Alone? The U.S. Supreme Court and International and Transnational Judicial Learning", *European Human Rights Law Review* Vol. 2, p. 127 (2005); Steven G. Calabresi, "'A Shining City On a Hill': American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law", *Boston University Law Review* Vol 86, p. 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, one 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* (Princeton University Press, 2005).

[12] Louis Henkin, "U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker", *American Journal of International Law* Vol. 89, p. 341 (1995).

[13] See generally Monroe Leigh and Merritt R. Blakeslee, eds., *National Treaty Law and Practice: France, Germany, India, Switzerland, Thailand, United Kingdom*, pp. 1-41 (American Society of International Law, 1995).

[14] 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 Law Journal* Vol. 115, p. 1564 (2006).

[15] Frederick Schauer, "The Exceptional First Amendment", in *American Exceptionalism and Human Rights*, supra note 11, at p. 29.

[16] W. Cole Durham, Jr. and David Kirkham, "États-Unis", in *Dictionnaire du droit des religions*, Francis Messner (Ed.), (Editions du CNRS, 2010).

[17] James Q. Whitman, "The Two Western Cultures of Privacy: Dignity versus Liberty", *Yale Law Journal* Vol. 13, p. 1151 (2004).

[18] James Q. Whitman, "Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe" (Oxford University Press, 2005); Carol S. Steiker, "Capital Punishment and American Exceptionalism", *Oregon Law Review*, Vol. 81, p. 97 (2002).

[19] 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*, supra note 11, p. 147. 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 as such, 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 of nationalism and the flourishing of human rights in general.

[20] Alexis de Tocqueville, *Democracy in America*, p. 238 (trans. George Lawrence, ed. J.P. Mayer, Anchor Books, 1969).

[21] Ibid. p. 239.

[22] Ibid. p. 676 (emphasis added).

[23] John O. McGinnis, "Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery", 90 *California Law Review*, Vol. 90, pp. 485, 491 (2002).

[24] Palko v. Connecticut, 302 U.S. 319, 325 (1937).

[25] 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* (University of Notre Dame Press, 1997).

[26] A good overview of many of these theories' relationships to human rights can be found in Carol C. Gould, *Globalizing Democracy and Human Rights* (Cambridge University Press, 2004).

[27] Cf. John Finnis, *Natural Law and Natural Rights* (2nd ed., Oxford University Press 2011).

[28] I intend the word "objective" here not in an epistemological sense but 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", *International Journal of Constitutional Law*, Vol. 4, pp. 633, 640 n. 25 (2004). See also Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press, 3rd ed. 2012).

[29] 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 Savi#, ed., *The Politics of Human Rights* p. 120 (Verso, 1999).

[30] E.g., Ronald Dworkin, "Constitutionalism and Democracy", *European Journal of Philosophy* Vol. 2, p. 2 (1995). 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 Journal of Legal Studies* Vol. 13, p. 18 (1993).

[31] One of the most interesting observers and sharp critics of this phenomenon of depoliticization is Pierre Manent. See e.g., *A World Beyond Politics: A Defense of the Nation-State* (Princeton University Press, 2006). See also Daniel J. Mahoney, "Humanitarian Democracy and the Postpolitical Temptation", Orbis, Vol. 48, pp. 609-624 (2004). However, it is worth emphasizing that the criticism of human rights as antipolitical is sometimes as strong or stronger on the intellectual left. See, e.g., David Kennedy, "The International Human Rights Regime: Still Part of the Problem?" in *Examining Critical Perspectives on Human Rights* p. 19-34 (Cambridge University Press 2012), as well as the various essays in that volume responding to Kennedy.

[32] See Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 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.

[33] John Finnis, *Natural Law and Natural Rights*, supra note 27.

[34] United States Declaration of Independence.

[35] Jürgen Habermas, "Remarks on Legitimation Through Human Rights", *Philosophy & Social Criticism* Vol. 24, p. 160 (1998).

[36] Amartya Sen, *Development as Freedom* p. 148 (Anchor Books, 2000).

[37] I borrow the term and concept from Seyla Benhabib. See, e.g., *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press, 2004).

[38] See, e.g., Refah Partisi v. Turkey, European Court of Human Rights (Grand Chamber), Judgment of 13 February 2003.

[39] See generally Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford University Press, 2012).

[40] See, e.g., Pablo González-Domínguez, *The Doctrine of Conventionality Control: Between Uniformity and Legal Pluralism in the Inter-American Human Rights System* (Intersentia Press, 2018).

[41] Carlos Santiago Nino, *The Constitution of Deliberative Democracy* (Yale University Press, 1996).

[42] Anne-Marie Slaughter and William Burke-White, "The Future of International Law Is Domestic (or, The European Way of Law)*", Harvard International Law Journal* Vol. 47, p. 327 (2006).

[43] Mary Ann Glendon, *A World Made New*, supra note 2.

[44] Idem.

[45] Jürgen Habermas, Pope Benedict XVI, and Florian Schuller, *Dialectics of Secularization: On Reason and Religion* p. 34 (Ignatius Press, 2006).

[46] Philip Allott, *Eunomia: New Order for a New World* p. 288 (Oxford University Press, 2001).

[47] Michael Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (University of Notre Dame Press, 1994).