

**INCORPORATING GLOBAL JUSTICE  
INTO THE U.S. CONSTITUTION**

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## INTRODUCTION

In *Hamdan v. Rumsfeld*, the Supreme Court ruled that the military commissions that the President had organized to try detainees in Guantanamo Bay for war crimes were invalid. In the Court's view, the military commissions were so lacking in due process protections that they violated the fundamental principle set forth in Common Article 3 of the Geneva Conventions that any criminal sentences against detainees be "pronounced by a regularly constituted court affording all the judicial guarantees which are *recognized as indispensable by civilized peoples*." In response, Congress adopted the Military Commissions Act of 2006, which effectively gave its imprimatur to the approach the President had followed before the *Hamdan* decision. Does Congress really have constitutional authority to do that? Is the U.S. Constitution indifferent to whether the government meets the standards "recognized as indispensable by civilized peoples"?

Not only the Military Commissions Act, but much conduct by the United States government over the past six years has raised a question that previously seemed unimportant or at least not terribly urgent to most people. What is the relationship between global justice and the Constitution? It goes without saying that the Constitution defines and enforces as fundamental law some of the core demands of domestic justice. The same is not the case with respect to the core demands of global justice. It is neither obvious, nor widely agreed, that the Constitution defines or enforces any of the demands of global justice, even the most urgent.

Of course, the Constitution contains many provisions that concern international relations. Indeed, it was the deficiencies of the Articles of Confederation in this area that provided a principal motivation for the adoption of the Constitution. Most of the pertinent provisions, however, can be, and usually are, understood to be focused not on ensuring that the United States discharges its duties of global justice but, rather, on organizing the institutions of the state in a way that most effectively promotes U.S. national interests in the international arena. The war powers, for

example, are designed to enable the United States when necessary to advance its interests by the use of force and to marshal its military power in a manner that is maximally effective in achieving U.S. war aims. The treaty power is designed to enable the United States to advance its national interests through the conclusion of international contracts. The principle that guides constitutional interpretation as to the scope and nature of these powers, and the limitations to which they are subject, is most often thought to be the national interest of the United States, not the demands of global justice. Only to the extent that citizens are affected by the exercise of these powers does the concept of constitutional rights appear, at least on most contemporary accounts, to be relevant.

As a matter of historical practice, this understanding is actually too one-sided. In fact, the relationship between global justice and the Constitution has been an unresolved issue since the earliest days of the Republic. The Declaration of Independence itself acknowledged the need to show a “decent respect to the opinions of mankind,” and, more importantly, in its triumphant concluding passage, it claimed for the former colonies only the power to do those “Acts and Things” that all “Free and Independent States . . . *may of right do.*” Among these were “full Power to levy War, conclude Peace, contract Alliances, establish Commerce.” Certainly, however, free and independent states could, as a matter of right, levy only just wars, not unjust wars, and the Declaration was claiming no more. But, this point still begs the ultimate question: To be sure, the United States has no claim in justice to act unjustly with respect to foreign states and individuals. That is fundamental and perhaps even tautological. The question, however, remains whether any limitation rooted in global justice is, or rather ought to be, acknowledged, and in any respect incorporated into and enforced by, the Constitution.

There is much interesting history on this point too. During the American Revolution, for example, many of the states (acting in the assumed capacity of independent sovereigns) adopted laws confiscating the property of British nationals, including their debts, as enemy property.

Virginia, in particular, passed a series of laws confiscating the debts. After the War, the issue became a subject of heated controversy. The whole question of the wartime confiscation of private property had for a century been the subject of extended theoretical controversy in the writings of the great publicists on the law of nations. By the late 18<sup>th</sup> century, it was widely perceived to be among the preeminent “human rights” questions of the day. Virginia, however, would not budge, and so provoked one of the great decisions of the early Supreme Court, *Ware v. Hylton*.

The case is especially interesting for the difference of views that it engendered. Chief Justice Jay and Justice Wilson held that the “mere legislative powers” of Virginia – even considering the state as an independent sovereign – did not include the authority to pass laws in violation of the law of nations, “for however extensively their constitution had authorized them to legislate for and over their own citizens, it could not give them authority to legislate for and over the subject of foreign powers residing out of their jurisdiction in foreign parts.” Or, as Wilson explained: “When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement.” In contrast, Justices Iredell and Chase reached the opposite conclusion. Although Iredell acknowledged that his opinion “differ[ed] from a very high authority,” he believed that

the acts of the Legislature of the State, in regard to the subject in question, so far as they were conformable to the Constitution of the State . . . were absolutely binding de facto, and that if, in respect to foreign nations, or any individual belonging to them, they were not strictly warranted by the law of nations, which ought to have been their guide, the acts were not for that reason void, but the State was answerable . . . for a violation of the law of nations, which the nation injured might complain of. . .”

It was left to John Marshall, in his first appearance in the Supreme Court (only this time as a lawyer representing the Virginia debtors), to find a middle ground, recognizing at least some fundamental moral limits on the constitutional power of the state. Thus, while Marshall largely agreed with Iredell and Chase – understandably, given his clients’ interests – he acknowledged the

limits of this view: “It is not necessary to inquire,” he observed, “how the judicial authority should act, if the Legislature were evidently to violate any of the laws of God.”

The dispute in *Ware v. Hylton* was hardly the end of the matter, and, indeed, there was a definite theme in public debates thereafter embracing constitutional limits on the war powers based on the concept of just or civilized conduct. In *Fleming v. Page*, decided in the aftermath of the Mexican-American War of 1846, Chief Justice Taney, reflecting views widely expressed in Congress during this period, observed that

the genius and character of our institutions are peaceful, and the power to declare war was not conferred upon Congress for the purposes of aggression or aggrandizement, but to enable the general government to vindicate by arms, if it should become necessary, its own rights and the rights of its citizens . . . . A war, therefore, declared by Congress, can never be presumed to be waged for the purpose of conquest or the acquisition of territory.

He would later make a similar point, ironically, in his opinion in *Dred Scott*. “There is certainly no power given by the Constitution to the Federal Government,” he declared, “to establish or maintain colonies bordering on the United States or at a distance to be ruled and governed at its own pleasure, nor to enlarge its territorial limits in any way except by the admission of new States.”

As late as 1871, Justice Field could declare:

The war powers of the government have no express limitation in the Constitution, and the only limitation to which their exercise is subject is the law of nations. That limitation necessarily exists. When the United States became an independent nation, they became, to use the language of Chancellor Kent, “subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.” And it is in the light of that law that the war powers of the government must be considered. The power to prosecute war granted by the Constitution, as is well said by counsel, is a power to prosecute war according to the law of nations, and not in violation of that law. The power to make rules concerning captures on land and water is a power to make such rules as Congress may prescribe, subject to the condition that they are within the law of nations. There is a limit to the means of destruction which government, in the prosecution of war, may use, and there is a limit to the subjects of capture and confiscation, which government may authorize, imposed by the law of nations, and is no less binding upon Congress than if the limitation were written in the Constitution. The plain reason of this is, that the rules and limitation prescribed by that law were in the contemplation of the parties who framed and the people who adopted the Constitution.

Whatever any independent civilized nation may do in the prosecution of war,

according to the law of nations, Congress, under the Constitution, may authorize to be done, and nothing more.<sup>1</sup>

After making some preliminary remarks to situate the inquiry I undertake in this paper, I argue in Part I that at least some of the principles of global justice should be incorporated into the Constitution. In Part II, I take the argument a step further and claim that the most attractive approach to incorporation is not to turn to the Bill of Rights and to domestic precedents construing their scope but, rather, to a principle of limited powers with a corresponding standard of just or civilized conduct and to the precedents of international law.

### **PRELIMINARY REMARKS**

I begin with some preliminary observations to clarify the argument that follows.

First, I assume throughout that there are principles of global justice that bind, in a moral sense, states and their citizens. Of course, there may be extreme Hobbesian views that deny that justice can apply in the international realm. I simply put these views aside. There is also great disagreement about the scope and content of the principles of global justice. In particular, there are some who deny that the principles of distributive justice (in the economic sense) are applicable outside the confines of the state; whereas, other more cosmopolitan views recognize the force of at least some distributive requirements, although they differ widely in the stringency of the principles they endorse.<sup>2</sup> Be that as it may, I take it as given that any plausible liberal view must admit the existence of at least some principles of global justice and, indeed, recognize that some such

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<sup>1</sup> *Miller v. United States*, 78 U.S. (11 Wall.) 268 (1870). Justice Field was writing in dissent but not on this point.

<sup>2</sup> For prominent accounts, see John Rawls, *The Law of Peoples* (1999); Thomas Nagel, *The Problem of Global Justice*, 33 *Phil. & Pub. Aff.* 113 (2005); Thomas Pogge, *Realizing Rawls* (2d ed. 1991).

principles are as fundamental and urgent as any of the principles of domestic justice. The prohibitions on genocide and aggressive war are obvious examples. Given this assumption, I say nothing further about the difficult philosophical questions that concern the scope and content of global justice and instead refer throughout, and without additional argument, to some of the most intuitive and familiar of those principles in order to illustrate various points.

A consequence of this first preliminary remark is a second point about methodology. This paper focuses not on first order philosophical questions but on second order reasons we have for adopting particular institutional mechanisms for upholding our first order duties. No matter how disposed we are to view the Constitution as a crucial instrument for realizing justice, it is nevertheless just an instrument. There are, I believe, no first order principles that require states even to have a constitution, let alone a Bill of Rights. A constitution is just a particular legal/institutional mechanism for achieving certain important purposes, among them obviously justice, which nevertheless can be achieved in more than one way. Thus, although justice ought to be done, it is not necessarily the case that it ought to be done through a constitution. That depends on a host of other considerations, including many empirical facts about a particular political community, such as the nature of its existing political culture, the structure of its political and social institutions, and the like. Now, the question I pursue here is the extent to which, if any, a whole category of important principles of justice – (some subset of) the principles of global justice – ought to be seen as part of the U.S. Constitution. Although a full argument in favor of that claim will depend, at least to some extent, on empirical facts, it is my supposition that some progress can be made in reaching tentative conclusions through the pursuit of second order philosophical reasoning.

Third, I distinguish two respects in which the Constitution might take account of, and seek

to promote, compliance by the state with the demands of global justice. The first is through principles of institutional design that establish procedural rules for the exercise of state power. For example, it might be thought that the power to declare war ought to be construed to provide Congress with exclusive power over whether the United States will initiate military hostilities, not only to protect the lives and treasure of U.S. citizens – as is commonly argued – but as well to discourage glory-seeking executives from launching unjust wars against innocent nations. On the other hand, it might be argued that because global justice requires states to act to halt aggression and to uphold human rights against gross abuses, the executive ought to have a freer hand to use force, at least in connection with international action on a multilateral basis. Indeed, this was precisely Roosevelt’s position with respect to collective action under the authority of the United Nations Security Council, although, admittedly, he rarely focused solely on global justice concerns but, instead, emphasized the interdependence between global justice and U.S. national interests, which had both been endangered by the traditional isolationist sentiment that, during the Interwar period, dominated Congress.

The second way in which the Constitution might incorporate principles of global justice is more direct, and it is the subject I pursue here. Some subset of those principles – take, for example, the prohibition on torture – might itself be part of the substantive content of the Constitution. Under this approach, it would be not only wrong but also unconstitutional to use torture even against non-nationals outside the territory of the state. Of course, if global justice concerns ought, all things considered, to be incorporated as substantive principles into the Constitution, it may well be the case that similar global justice considerations ought to influence the interpretation of the structural provisions of the Constitution as well, but I do not pursue that line of argument here. A further question arises to the extent that we conclude that some principles of global justice should

be incorporated into the substantive provisions of the Constitution. Where ought they to fit and what methods ought constitutional interpreters, including judges, use to interpret them? These questions I address in Part II of the paper.

Finally, this paper pursues only the normative ought question, not the positive law question whether it is even plausible to claim that global justice principles are, in fact, part of the Constitution. To put the point in Dworkinian terms, this paper explores the “best light” half of the interpretive enterprise, not the assessment of “fit,” which I have, in fact, explored elsewhere. For what it is worth, and as I elaborate on at various points below, I do believe that the conclusions I argue for find sufficient support in “fit” to provide at least a minimal foundation for the more purely normative theorizing indulged in here.

## I.

### **SHOULD THE CONSTITUTION INCORPORATE PRINCIPLES OF GLOBAL JUSTICE?**

In this Part, I argue that the Constitution ought to be construed to incorporate at least some subset of the principles of global justice. At the outset, it is necessary to draw a distinction between justice and the rule of law. The domain of domestic justice, as I use the term here, includes those substantive principles designed to protect the fundamental rights of citizens. Correspondingly, the domain of global justice includes those principles that protect the fundamental rights of non-citizens.<sup>3</sup> In contrast, the rule of law, as I use the term here, focuses on

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<sup>3</sup> I address below the special case of resident aliens, who are generally treated as sufficiently part of the national political community to be accorded the rights of citizens. As I shall explain, they are a hybrid case. *See infra* notes –, and accompanying text. In practice, the fundamental distinction is between citizens and resident aliens, who are the subject of domestic justice, and non-citizens located outside of the territory of the state, who are the subject of global justice. With regard to the latter, we sometimes speak as though the duties of global justice are owed by one state

compliance by the state with the body of existing laws. It may be that a state has an across-the-board duty to uphold international law. That would be similar to the duty of the government to uphold all of the internal laws of the state, common law and statutory alike. In neither case, however, do I include the duty of compliance, as such, as part of the domain of justice.

It is worth noting that in the domestic context, the Constitution obliges the government as a general rule to comply with the laws.<sup>4</sup> By a parity of reasoning, it might be argued that the Constitution ought to impose a comparable requirement on the United States generally to comply with the rules of international law. However, there is an important disanalogy between the two cases. In the domestic context, the executive is bound by the Constitution to uphold the laws, but the legislature is, of course, free to modify and repeal those laws should it determine that they are no longer justified as a matter of policy. That is, the rule of law, at least in this narrow sense, is a principle of the separation of powers that applies only to executive, not to legislative action. In the context of international law, however, the situation is different. The rule of international law depends not only on executive but also legislative compliance, since the legislature has no greater power than the executive to modify or repeal a rule of international law. That is to say, in the international law context, the issue is not – or, rather, is not only – a matter of the separation of powers but of the substantive duties of the state as a whole. This difference may well argue in

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to another. I assume that the employment of this language is best explained as a convenience used to express the idea that the duties of global justice are, in the main, discharged by citizens through the instrumentality of their states. States, as such, cannot have rights or duties in a fundamental moral sense. In any case, there are increasingly many direct interactions between states and foreign individuals that raise important questions of global justice, rendering the common terminology even more potentially misleading.

<sup>4</sup> That is the core of the executive’s duty to “take Care that the Laws be faithfully executed.” U.S. Const., Art. II, Cl. 3. There is a nice question whether every violation of existing law committed by an executive official should be conceived of as a violation of the Constitution. Clearly, though, deliberate decisions by the President to violate the law must be violations of the duty to execute the laws. In any case, the point is not worth pursuing here.

favor of a constitutional rule requiring compliance with international law, even though the comparable rule with respect to domestic law binds only the executive. On the other hand, there may be reasons to be skeptical of imposing on the state such a strong constitutional duty to comply with international law. Some of these reasons are internal to the logic of international law itself, which embraces to a greater degree than does domestic law the notion that the process of legal change is properly initiated through violations of existing rules.<sup>5</sup> It may also be that the international legal system is deficient in respects that justify a less rigid adherence to the international rule of law.<sup>6</sup> In any case, I do not pursue these matters further here.<sup>7</sup>

Before offering an affirmative argument in favor of incorporation of global justice into the Constitution, I consider four arguments against incorporation. Although I reject each of these arguments, they do require some refinement of the general claim, and some suggest reasons for adopting a distinctive doctrinal and interpretive approach to applying the principles of global justice as part of the U.S. Constitution. I explore this latter point in Part II.

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<sup>5</sup> This is most obviously the case with respect to customary international law, which is based on the practice of states. It is well established that changes in customary international law are initiated by state acts in violation of existing rules that over time become accepted by states generally as establishing new rules. In the context of treaties, there may be room – though the point is still highly contested – for a notion of efficient breach. If so, however, that principle, it would seem, would have to be supplemented with a duty to make compensation.

<sup>6</sup> On a formal level, the difficulty of changing existing rules of international law in the face of changed circumstances is often identified as particularly problematic. Ordinarily changes require consensus and thus enable a single state (especially an influential state) or at least a small group of states to veto new rules. On a less formal level, much concern has been expressed about the lack of accountability of international bureaucrats who are engaged in the process of making international law. Some have also claimed that international institutions are more subject to capture than are comparable domestic institution, like executive agencies. I do not pursue these complex issues here.

<sup>7</sup> It is a measure of how far we have moved away from international law that the conventional view today is that the President acting solely on his own independent authority can disregard international law.

## **A. The Argument from Popular Sovereignty**

One ground for rejecting incorporation rests on the principle of popular sovereignty. The argument might go something like this: The Constitution receives its authority from an exercise of popular sovereignty by the people of the United States. The people were entitled to constitute their government on whatever principles they chose and to grant it powers subject only to those limitations that they specified. Although global justice ought to be a concern of the government in conducting foreign affairs under its delegated powers, the powers of the national government specified in the Constitution are given in general terms and are not subject to any limitations derived from global justice or the law of nations. That is and ought to be the end of the matter.

Something like this view was expressed early on by Justice Chase in his separate opinion in *Ware v. Hylton*. Chase reasoned:

It is worthy of remembrance, that Delegates and Representatives were elected, by the people of the several counties and corporations of Virginia, to meet in general convention, for the purpose of framing a NEW government, by the authority of the people only; and that the said Convention met on the 6th of May, and continued in session until the 5th of July 1776; and, in virtue of their delegated power, established a constitution, or form of government, to regulate and determine by whom, and in what manner, the authority of the people of Virginia was thereafter to be executed. As the people of that country were the genuine source and fountain of all power, that could be rightfully exercised within its limits; they had therefore an unquestionable right to grant it to whom they pleased, and under what restrictions or limitations they thought proper. The people of Virginia, by their Constitution or fundamental law, granted and delegated all their Supreme civil power to a Legislature, an Executive, and a Judiciary; the first to make; the second to execute; and the last to declare or expound, the laws of the Commonwealth. This abolition of the Old Government, and this establishment of a new one was the highest act of power, that any people can exercise. . . . I hold it as unquestionable, that the Legislature of Virginia established as I have stated by the authority of the people, was for ever thereafter invested with the supreme and sovereign power of the state, and with authority to make any Laws in their discretion, to affect the lives, liberties, and property of all the citizens of that Commonwealth, with this exception only, that such laws should not be repugnant to the Constitution, or fundamental law, which could be subject only to the controul of the body of the nation, in cases not to be defined, and which will always provide for themselves. The legislative power of every nation can only be restrained by its own constitution: and it is the duty of its courts of justice not to question the validity of any law made in pursuance of the constitution. There is no question but the act of the Virginia Legislature (of the 20th of October 1777) was within the authority granted to them by the people of that country; and

this being admitted, it is a necessary result, that the law is obligatory on the courts of Virginia, and, in my opinion, on the courts of the United States. If Virginia as a sovereign State, violated the ancient or modern law of nations, in making the law of the 20th of October 1777, she was answerable in her political capacity to the British nation, whose subjects have been injured in consequence of that law.

Positive law support for this argument may be found in the well-settled doctrine that Congress is not bound, as a matter of domestic constitutional law, by treaties or the law of nations and may simply supplant any international law obligations of the United States by passing conflicting legislation. It is commonly believed that the basis for this doctrine is the principle of popular sovereignty, which demands that the last act of legislation, as between international and domestic law, controls for purposes of U.S. law.<sup>8</sup>

There are, however, at least two fundamental, and I suspect fairly obvious, flaws in the popular sovereignty argument. First, granting the premise that the people have unlimited authority to establish their government on any basis they choose and to grant it powers limited only by the restrictions they specify, the popular sovereignty argument does not entail that the Constitution fails to incorporate the principles of global justice. That depends on what limits the people intended to impose on their government, and it is at least not outside the realm of plausibility to suggest that the people would have wished their government to remain within the bounds of “civilized conduct” in its interactions with foreign states and their nationals. Indeed, the fact that many of the terms used in the Constitution invoke concepts that are derived from the law of nations – like “declaration of war,” “captures,” “letters of marque and reprisal,” “commander-in-chief,” “offenses against the law of nations,” and the like – may imply, consistent with the Declaration of Independence, that the people intended only to grant their government the power to do those “Acts and Things” that independent states “may of right do.” If so, then the principle of popular

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<sup>8</sup> It is admitted on all sides that such an act of legislation does not alter international law but, rather, violates it.

sovereignty would support incorporation, not stand in its way. In any case, we are thrown back on the interpretive question – what did the people do when they adopted the Constitution? – a question that the principle of popular sovereignty cannot answer.

The more fundamental flaw in the argument, however, is in its foundational premise. There is no plausible version of the principle of popular sovereignty that can justify a right in the people to do injustice. Unless the only principle of justice is the principle of popular sovereignty, it cannot be the case that the mere fact that the people have chosen to do an act makes that act just. This is a straightforward Lockean point. Indeed, Locke makes the point explicitly in the *Second Treatise* in his discussion of just war. Because the powers of the state derive from the citizens, he argues, the state cannot have powers that exceed those that the citizens themselves may rightly claim. As a consequence, he denies the view that the state has any power to engage in an unjust war because, as he puts it, “the people hav[e] given to their governors no power to do an unjust thing, such as is to make an unjust war (for they never had such a power in themselves).” Indeed, Locke thereafter proceeds to offer an extended argument about the principles of justice that apply to the state when it engages in foreign conquests. Hence, any constitution that affirmatively licenses the government to disregard the principles of global justice is itself an unjust constitution.

There is, however, a more defensible version of the argument. The problem is that the argument in this more defensible form is inconclusive in its implications for incorporation. On this alternative approach, it is not that the people granted Congress the power to disregard the principles of global justice. Rather, what they delegated was conclusive authority to interpret and apply the principles of global justice as part of the power to conduct war and make foreign policy. Now, this claim can be interpreted in two different ways. Under the first, it is an implicit recognition that the Constitution requires Congress to uphold the principles of international justice, but a denial that the judiciary has any power to interpret or apply those principles in assessing the constitutionality of

legislation. In contemporary legal terminology, compliance with the principles of global justice presents a “political question.” Indeed, it is possible that this point is all that Justices Chase and Iredell had in mind in their opinions in *Ware*. Under the second interpretation, the argument is more far-reaching. Although it acknowledges, as it must, that the state ought to comply with the duties of international justice, it attributes to the people the judgment that this duty ought to be discharged through other institutional mechanisms than the Constitution. The difficulty is that this argument gives us no *a priori* reason to interpret the Constitution in this particular fashion. It depends, again, upon whether its account of what the people did is conclusive, which, for the reasons already mentioned, seems dubious. So long as more than one plausible interpretation of the Constitution is available, therefore, the argument begs the question of which interpretation we ought to embrace.

### **B. The Argument from Sociology and Associative Communities**

Another argument against incorporation of principles of global justice into the Constitution is based on a conception of the role the Constitution should play in the larger democratic political order that it helps to constitute. On this view, the Constitution serves a crucial function in upholding the legitimacy of the state. This function includes both sociological and normative elements. On the sociological level, in a pluralistic society like the United States, the Constitution is a critical focal point for patriotic sentiment. The loyalty of citizens, which is essential to the stability and perceived legitimacy of the state, is supported by their attachment to the Constitution and their commitment to the principles it expresses. Moreover, this form of loyalty is preferable to other possible forms that might take its place and that are likely to be more particularistic, raising the prospect of exclusionary and discriminatory practices. On a normative level, the Constitution manifests, in Dworkin’s terms, the political community’s embrace of obligations that are special,

“holding distinctly within the group, rather than as general duties its members owe equally to persons outside it.”<sup>9</sup> It likewise expresses, in its substantive commitments, the ideals of “equal concern and respect” for members.<sup>10</sup> In so doing, it provides the essential underpinnings for the (philosophical) legitimacy of the state and the foundation for the moral obligation to obey the law.

Now, on either of these views, it would be a mistake, it might be argued, to incorporate principles of global justice into the Constitution.<sup>11</sup> Recognition that non-members residing outside the state may claim constitutional protections will tend to dilute the sense of citizens that the Constitution is a focal point for patriotic sentiment. Instead, the Constitution will appear to them to be a universalistic project granting rights extravagantly to all persons without regard to their membership in the political community, a kind of domestic version of the Universal Declaration of Human Rights. However morally necessary it may be to respect the rights even of those with no connection to the state, the Constitution should not be the mechanism employed for realizing that aspiration. Otherwise, it will lose its capacity to command the loyalty of citizens, and the bonds of communal loyalty, that support the stability of the democratic order, will weaken.

Equally troublesome, it might be argued, is the normative dimension of the problem. If the principles of global justice are part of the Constitution, citizens will be correct in thinking that the Constitution does not represent the legal expression of the special obligations they owe one another. Rather, it will embody the obligations that humans owe one another wholly apart from any communal relations. Moreover, the Constitution’s rights-protecting provisions will not be

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<sup>9</sup> Ronald Dworkin, *Law’s Empire* 199 (1986).

<sup>10</sup> *See id.* at 200-01.

<sup>11</sup> Please note that by borrowing Dworkin’s account of associative obligations I do not mean to suggest that he would embrace the argument I make in the text hereafter. I only mean to articulate a line of argument that, on one interpretation of his account, might seem plausible. Indeed, as I explain, I reject the argument.

founded on the principle of equal concern and respect for members, but on the principle of equal concern and respect for all humans. This cosmopolitanism, however attractive in the abstract, threatens to undermine the role of the Constitution in establishing the foundations for associative obligations that give rise to the legitimacy of the state.

I do not believe that these arguments are persuasive. Even if we accept the underlying premises of the sociological and associative obligation accounts, they provide little support for the claim that the Constitution must focus exclusively on domestic justice. Indeed, the force of the argument, such as it is, trades heavily on an implicit assumption that incorporating principles of global justice will render the Constitution indistinguishable in its application to citizens and non-citizens outside the territory of the state, eviscerating the special character of membership. That assumption, however, seems doubtful. Although I have not offered an account of the content of the principles of global justice (nor the subset of those principles that might be appropriately incorporated into the Constitution), under most plausible views the rights accorded to members will differ dramatically from those that must be accorded to non-members. In any case, the Constitution safeguards a mix of rights, some having strongly universalistic content applying to humans in virtue of being human and others having more particularistic foundations and reflecting a unique political tradition, history, and social/political order. The latter are unlikely to be among the principles of global justice that the Constitution would incorporate. Likewise, it seems likely that political rights may be denied non-members without offending the demands of global justice. To the extent that strongly cosmopolitan accounts of global justice would tend to assimilate the rights owed to members and non-members, moreover, the sociological and associative obligation arguments would presumably have to be rejected on more fundamental grounds.

The sociological claim rests at bottom on large empirical suppositions about the necessary preconditions for a flourishing democratic political order. Although there has been much debate

about these matters in connection with the idea of “constitutional patriotism,” I do not see how these questions can be resolved as a matter of purely theoretical speculation. It is enough for present purposes to suggest that the sociological foundation of the loyalty of U.S. citizens to the Constitution seems hardly so fragile as the argument assumes. We ought to be especially wary of accepting any such claims in view of the danger that conceiving of the Constitution as solely concerned with the rights of members may encourage nationalistic excesses and other negative social phenomena. Much the same applies to the argument based on associative obligations. The incorporation in the Constitution of principles of global justice need not undermine the constitutional commitment to the idea of special duties owed to citizens. Indeed, the associative obligations account seems to cut the other way. An unattractive feature of the associative ideal is precisely the danger that the embrace of communal identity may promote exclusionary politics and injustice and oppression towards outsiders. What the Constitution needs to combat this tendency, at least arguably, is a visible commitment to act justly not only towards citizens but towards all human beings wherever located. Without some such commitment, we may think it best to reject the idea of associative obligations altogether.

At the same time, it is easy to underestimate the difficulties that extending the Constitution to incorporate principles of global justice may actually engender. The Bill of Rights does not distinguish between citizens and non-citizens or between the territory of the United States and non-U.S. territory, and there is virtually no precedent to go on in attempting to determine which parts or aspects of the various rights found in the Bill of Rights might apply to non-citizens outside the United States. Moreover, the sociological and associative obligations arguments may have more bite when we look closely at what at least sometimes will be involved in framing global justice concerns in the language of constitutional rights. Certainly the most pressing global justice concerns of the present era focus on the treatment of alien enemies of the United States captured

and detained outside U.S. territory. It is not only uncharted waters but also a matter of some delicacy to extend constitutional rights to persons in these circumstances. Doing so demands that citizens conceive of constitutional rights in an especially encompassing manner that may conflict with their considered sense about what their Constitution is for and how membership in the political community is special. Yet, it is precisely in these circumstances that the problem of global justice seems most urgent. I do not believe that this problem is insurmountable, but, as I explore in Part II, it does argue for a special way of conceiving of how the Constitution ought to apply in this context.

### **C. The Distinctions between Political Justice, Constitutional Justice, and Judicial Review**

Yet another argument against incorporation has a more institutional flavor. It is not that the principles of global justice are any less important or worthy of protection than the principles of domestic justice. Rather, it is just that they cannot be formulated in a way that is appropriate for inclusion in the Constitution. As Larry Sager has usefully observed, we should distinguish between three categories or domains of justice-based principles. The first and most inclusive is the domain of political justice, which, in Sager's formulation, includes the principles of domestic justice but which is easily expandable to include the principles of global justice as well. The second is the domain of constitutional justice, which includes a subset of principles from the domain of justice but not the entire set; whereas, the third, the domain of judicially enforced principles, includes only a subset of those principles that fall within the domain of constitutional justice. Thus, for example, Sager argues that the full requirements of distributive justice fall within the domain of political justice, but only a more modest set of distributive principles fall within the

domain of constitutional justice. An even smaller subset are subject to judicial enforcement.<sup>12</sup>

On this view, although the principles of global justice necessarily fall within the category of political justice, they are not suitable for inclusion in the domain of constitutional justice or of judicial review. Now, what distinguishes the domain of constitutional justice from the domain of political justice? Sager offers an explanation that is complex and multi-faceted, but is clear enough in its basic thrust. Constitutional principles, in order to be efficacious, should include only those aspects of political justice that can be reduced to principles that are “durable, spare, and capable of reasonably clear application and judgment” and that focus on “extreme and rather clear breaches of political justice.” This is especially true of principles that will not be judicially enforced. Otherwise, they will fail to serve the purpose which the Constitution is primarily designed to achieve, to constrain political choice:

the point is that to be effective, a constitution must be more focused and more insistent than general principles of justice which by their nature are radically open to contest, offset, and temporizing. A constitution can significantly enhance political judgment over the concerns of justice only if it restricts itself to demands so basic and so durable that they can generally and reasonably function as dominant and nonnegotiable. This, if anything, is the more true of constitutional precepts that elude judicial enforcement.

The claim that the principles of global justice *en bloc* do not meet these criteria seems hard to justify. It is arguable that some principles of global justice are so dependent upon the conduct of other states and the ongoing and complex interactions among them that their incorporation into the Constitution, let alone their enforcement by the judiciary, would be inappropriate for the reasons that Sager suggests. I come back to this point later on. In other cases, compliance with the principles of global justice may require political judgments that are highly contestable or that involve, given non-ideal circumstances, the making of difficult trade-offs among competing

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<sup>12</sup> See Lawrence G. Sager, *Justice in Plainclothes: a Theory of American Constitutional Practice* (2004).

demands. Judgments of these kinds are appropriately made through democratic processes. Indeed, Sager specifically asserts that “decisions about . . . the waging of morally contestable wars may be properly understood as judgment-driven, but they belong to the people, not to the Constitution.”

It is not entirely clear why Sager reaches this particular conclusion. In fact, for at least a century, international law has actively sought to impose strict limits on the rights of states to wage war, suggesting the possibility that the subject is amenable to clear legal proscription. Perhaps, though, the international law project in this respect has been a failure, and we may assume for present purposes that Sager’s instinct is correct. Even accepting that contestable judgment, however, the point is that there are many principles of global justice that have been incorporated into positive international law that do not have this character and seem clearly to meet Sager’s criteria. Indeed, some of these have been applied by the courts in major litigated cases, the Supreme Court’s decision in the *Hamdan* case being only the most dramatic recent example. It is true that the courts have applied these principles as principles of international law, not as constitutional principles, but why that should make a difference is unclear. Sager himself insists that for principles falling within the domain of constitutional justice, even if not the domain of judicial enforcement, “the judiciary [should] be able to police such rights at their substantive, procedural, and institutional margins.” That is clearly the case for some of the most urgent principles of global justice. The argument therefore fails as a general ground for rejecting incorporation. Although some or even much of global justice may be unsuitable for inclusion in the domain of constitutional justice, at least some important and urgent principles are perfectly suitable and are even appropriate for judicial enforcement.

#### **D. The Argument from the Division of Labor**

I now come to what I take to be the most compelling argument against incorporation, the

argument from, what I will call, the division of labor. The argument begins with the observation that constitutional law and international law are two old and well developed bodies of law that deal respectively with the subjects of domestic and global justice. On this view, there is an appropriate division of labor between them that permits states to discharge their duties of justice by upholding constitutional law in the domestic case and upholding international law in the global case.<sup>13</sup> Each of these bodies of law is reasonably well suited to achieving the realization of the domain of justice to which it is directed, and there is neither need nor good reason to confuse matters by incorporating the concerns of the one into the other. To develop this argument, let me begin by offering a somewhat oversimplified and stylized account of how the problem would have appeared in the late 18<sup>th</sup> century, at the time of the adoption of the U.S. Constitution.

The Constitution, and especially the Bill of Rights, was then widely understood to be an enactment into positive law of fundamental principles of natural law. Likewise, the law of nations was understood to be derived, at least in part, from the principles of the natural law. Following Vattel, that part was often referred to as the “necessary law of nations.”<sup>14</sup> Moreover, both the Constitution and the law of nations were species of public law, that is law that purports to regulate the activities of the state. Constitutional law was the law that the “the people” employed to control the actions of their government; whereas, the law of nations was the law that the community of

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<sup>13</sup> To the extent that either the Constitution or international law or both fail to incorporate some principles of justice – for the reasons discussed in Part IC – then other measures would of course be necessary to discharge fully the demands of justice.

<sup>14</sup> *See* Emerich de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns Preliminaries*, § 7 (1758)(Joseph Chitty translation 1883)(“We call that the Necessary Law of Nations which consists in the application of the law of nature to Nations. It is Necessary because nations are absolutely bound to observe it. This law contains the precepts prescribed by the law of nature to states, on whom that law is not less obligatory than on individuals, since states are composed of men, their resolutions are taken by men, and the law of nature is binding on all men, under whatever relation they act”).

states employed to regulate the actions of individual sovereign member states.

That constitutional law and the law of nations shared these two fundamental features – they were rooted in natural law and were species of public law – entailed two further conclusions. First, both constitutional law and at least the necessary law of nations were equally fundamental from a moral perspective. That they were treated as two separate bodies of law merely reflected the fact that they dealt with very different subjects – domestic justice and global justice – not that one was morally more urgent or more fundamental than the other. Second, as different species of public law, both shared the same overarching structural dilemma of how to enforce law against those who, short of civil or international war, hold a monopoly on the use of force.

Now, in view of these commonalities, why would it have been reasonable to believe that the contexts of domestic justice and global justice were sufficiently dissimilar to justify embracing the division of labor between them or at least to render the question of incorporation of global justice into the Constitution a matter of relative indifference? Providing an answer to this question requires a careful analysis of the different settings in which questions of domestic and global justice arose and of the implications of these differences for the basic features, both substantive and procedural, of an appropriate legal regime for implementing their requirements.

The most fundamental difference was structural, and, indeed, most of the other distinctions flowed from this basic structural point. In the context of domestic justice, the state and the citizen stand in an unmediated hierarchical relationship, in which the state holds a monopoly on coercive means and the citizen is radically vulnerable to the exercise of its will. In contrast, in the setting of global justice, the relationship between the state and a non-citizen is mediated by another state – the state of which the non-citizen is a national and to which he owes a duty of allegiance that in turn is matched by a corresponding duty of protection on its part. When a state enforces its will against a citizen, the citizen can resort to no other sovereign power to defend his rights or interests.

He stands, as it were, naked before the state. But when the state confronts a non-citizen, the latter may appeal to his own state for protection, which, at least in principle, it is bound to extend to him.

Now, bearing this structural point in mind, we apprehend a perhaps counterintuitive implication. The problem of enforcement appears to be more, not less severe in the case of domestic than in the case of global justice. Of course, there are other features of the domestic constitutional order that may ultimately lead us to the opposite conclusion.<sup>15</sup> For now, it is worth noticing how federalism fit into the larger political theory James Madison developed in *The Federalist Papers*. As Larry Kramer has demonstrated, the Founders did not have great faith in the capacity of judiciary – the “least dangerous” branch<sup>16</sup> – to enforce the principles of the Constitution through the exercise of judicial review.<sup>17</sup> Rather, they believed that structural design offered more robust prospects for ensuring compliance with the Constitution, and, in particular, they introduced the idea of federalism as a principal mechanism for upholding constitutional rights. Madison’s point in *Federalist 51*, albeit not formulated in these terms, was that federalism created structural relationships that would make the system of enforcement at the domestic level similar to the system that existed at the international level: In a federal system, the citizen would not face the overweening power of the federal government naked but, rather, clothed in his status as a citizen of one of the states and thus with the potential to appeal to his state government to oppose the violation of his rights.<sup>18</sup>

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<sup>15</sup> Among the more obvious are that the citizen has political rights to representation and can call upon affective ties in his own community. These features of the domestic order guard against governmental violations of the rights of citizens. Non-citizens, of course, are excluded from both.

<sup>16</sup> *Federalist No. 78*.

<sup>17</sup> See Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004).

<sup>18</sup> *Federalist No. 51*.

In any case, a whole series of implications followed from this structural point, both as to substantive differences between domestic and global justice and procedural differences in their enforcement regimes. With respect to domestic justice, the Constitution itself fixed, in positive law, a list of absolute principles of justice.<sup>19</sup> It then embedded these substantive principles in a set of familiar mechanisms devised to ensure governmental compliance. First, the Constitution itself was made fundamental law, superior to all other forms of domestic law, thereby rendering any governmental action in violation of the principles enunciated in the text, including the passage of ordinary laws, void. Second, it introduced the separation of powers and federalism that, in combination, created a “double security” against violations of the Constitution, by creating powerful incentives for public officials to uphold the rights specified in the text.<sup>20</sup> Third, citizens were accorded political rights to representation in a democratic process that would tie political officials to the community and encourage respect for the rights of citizens. Finally, the courts were empowered to exercise judicial review.<sup>21</sup>

In contrast, the international legal system followed a different approach that was more suited to its context. International law too claimed the status of fundamental and superior law. Neither the law of nations nor treaties could be altered by the unilateral act of any state or, as John Jay put it speaking of treaties, “as the consent of both [states] was essential to their formation at first, so must it ever afterwards be to alter or cancel them.”<sup>22</sup> But the system of enforcement in which the substantive requirements of international law were embedded was quite different from

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<sup>19</sup> The sense in which I use the term “absolute” will become clear below.

<sup>20</sup> *Federalist No. 51*.

<sup>21</sup> Of course, this brief summary hardly does justice to the richness of the political theory expounded in *The Federalist Papers*.

<sup>22</sup> *Federalist No. 64*.

that found in the domestic constitutional system. In the first place, it depended largely on the balance of power within the global order. It was the balance of power that enabled states to insist on respect for their just rights and for those of their citizens.<sup>23</sup> Moreover, reciprocity played a key systemic role by permitting states to withhold compliance in response to violations by other states. Tit for tat was a basic feature of the overall enforcement scheme.

Because reciprocity was so essential for purposes of enforcement, it had wider ramifications, affecting the substantive content of global justice in a way that pushed global justice along a path that diverged sharply from the one followed by domestic justice. At least in a loose sense, domestic justice recognizes the principle of reciprocity by permitting the state to impose criminal punishment on an individual who disregards the rights of another. In the domestic context, however, it is fundamental that punishment may only be imposed upon the offending individual. In contrast, in the global context, the principle of reciprocity had a crucial collective element. Tit for tat does not entail, or only entail, punishment of an individual who has committed an offense, but, rather, permits the taking of reprisals on individuals whose only connection to the offense is that they are members of the same political community as the offender. For example, even reprisals against the person in response to violations of the laws of war – if you kill my soldiers when in captivity, I will kill yours – were traditionally recognized as fully consistent with global justice. Thus, in a manner entirely alien to domestic justice within the constitutional order, the concept of mutuality at the state-to-state level pervasively affected the content of global justice within the international legal system. Constitutional rights of the individual were absolutely binding on the state; whereas international law rights of individuals bound the state only

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<sup>23</sup> To be sure, there was an analogy to the balance of power at play in the domestic setting as well. Thus, as we have seen, the separation of powers and federalism were designed precisely to create and harness a kind of domestic balance of powers as a mechanism of enforcement.

contingently.<sup>24</sup>

The distinction between individual and collective responsibility described a deep fault line dividing the domains of domestic and global justice. In the domestic constitutional order, a core function of the state was to enforce the mutual rights of citizens. It did so by punishing individuals for their infractions of the rights of others. One of the central purposes of domestic justice was precisely to ensure that the state, in executing this function, only punished those who were personally responsible for the violations. The various provisions of the Constitution guaranteeing due process were designed to insist rigorously upon the individuation of guilt. In contrast, the system of global justice rests fundamentally on the principle of collective sanctions. Collective sanctions were necessary either because the offending action had been taken by another state and hence was an action taken putatively on behalf of all of its citizens or because an individual had committed an offense and the victim state, after complaint to that individual's government, had not received satisfaction. In either case, whatever sanctions the victim state imposed, up to and including war, were unavoidably collective in nature. In such a regime, there was little or no place for due process and the other mechanisms used in the domestic constitutional order for ensuring the individuation of guilt.

Global justice was pushed even further from domestic justice for yet another reason. At least in cases of cooperative, non-coercive relations, a state's interaction with a non-citizen in the territory of another state was necessarily mediated through the government of that state, ordinarily the non-citizen's state of nationality. That was an entailment of a system of sovereign states, each exercising exclusive authority within its own territory. Thus, for example, if a state wished to

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<sup>24</sup> I speak of individual rights in international law somewhat loosely. Technically, the rights of individuals were always derivative of the rights of states, which were the only legally recognized subjects of international law.

obtain evidence from a non-cooperative individual residing in the territory of another state, it could act only through the auspices of the latter. The consequence was that a state had little capacity to influence the standards that would be applied by the territorial state in carrying out a request for coercive action against a non-citizen. Instead, it was required to respect the internal legal order of the territorial state, which would apply its own standards of conduct.<sup>25</sup> This system of mutual respect for differing standards, of course, contrasted sharply with the domestic context where the government's relationship to the citizen was unmediated, and it was accordingly required to apply its own constitutional standards in all cases.

So, the different settings in which questions of domestic and global justice arose meant that the legal regimes implementing them would be quite different. They would require entirely different institutional mechanisms of enforcement, and their substantive content would have a sharply different structure: The rights a state was required by the principles of domestic justice to accord to citizens were absolute and were fixed by the Constitution. The rights a state was required by the principles of global justice to accord to non-citizens were contingent on mutual compliance by states and were sometimes determined exclusively by the internal law of the non-citizen's own nation.<sup>26</sup>

Now, the point of this extended excursus has been to demonstrate why, at least from a late 18<sup>th</sup> century perspective, it was sensible to treat questions of domestic justice and global justice as properly the subject of separate legal regimes and, further, to suggest why, from that same vantage

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<sup>25</sup> In fact, this legal structure applied even on the high seas, as international law assimilated vessels to the territory of the state whose flag the vessel was flying.

<sup>26</sup> The factual contexts in which justice questions arose were also quite different. Domestic justice focused primarily on government conduct during times of peace; whereas, global justice questions more often, although not exclusively, arose in times of war and international conflict. These differences inevitably meant that the two legal systems would appear to embrace quite different principles.

point, it would be a matter of relative indifference whether or not the Constitution incorporated the principles of global justice. As to the former, we can now see that the structure and content of the legal principles that implemented these domains of justice were sufficiently dissimilar to justify conceiving of them as categorically different. As to the latter, the two systems of law were both rooted in natural law principles that commanded compliance on fundamental moral grounds. Moreover, each had its own internal system of enforcement that, in combination with the pull of moral duty, rendered it of little moment whether the Constitution did or did not reinforce the duty to comply with the necessary law of nations.<sup>27</sup> Of course, as I indicated earlier, the picture I have drawn of the 18<sup>th</sup> century perspective of the Founders is stylized, and, in fact, as the quotations offered at the beginning of this essay suggest, some members of the Founding generation, and some of their successors in the following century and beyond, were, in fact, concerned about the question and even embraced the idea of incorporation. However, I do not pursue these historical matters further here.

One final point before moving to the affirmative argument in favor of incorporation. The constitutional treatment of resident aliens today poses a serious challenge to the division of labor argument, a point I come back to shortly. For present purposes, however, if we once again indulge an historical perspective, we can see the division of labor approach at work in earlier eras. There was, in fact, much uncertainty about the question of the constitutional rights of resident aliens during the late 18<sup>th</sup> and 19<sup>th</sup> centuries, and for much of the period, their status was actually quite

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<sup>27</sup> The Founders may have anticipated as well that the enforcement mechanisms of the domestic constitutional order would have been relatively ineffective in enforcing the principles of global justice. Federalism might well have pulled in the opposite direction, as the states were likely to bring parochial perspectives to national politics. The lack of representation of non-citizens in the electoral process might also have been expected to render the political process relatively non-responsive to concerns about the rights of foreign states and their nationals, except insofar as balance of powers pressures could be brought to bear. Finally, judicial review was not yet seen as having the authority that it is widely recognized to have today.

tenuous. Constitutional rights were sometimes extended to them, but, at other times, they were treated as subject only to the requirements of the law of nations. Perhaps, most infamously, the Alien Friends Act of the late 1790s (of Alien and Sedition Act fame) refused to recognize their claims to ordinary constitutional protections. Of course, that was a major ground of criticism against the Alien Friends Act, but no such criticism was made against the so-called Alien Enemies Act, which was passed contemporaneously and actually still remains on the books. That Act permitted the President, in time of war, to detain all nationals of an enemy state in the United States and to deport them if he should so choose, without paying regard to the niceties of due process. Likewise, it was accepted that, in time of war, Congress could pass laws confiscating the property of resident enemy nationals located in the United States. On the other hand, international law itself was much concerned about the rights of resident aliens and developed an extensive body of doctrine concerning state responsibility for the treatment of aliens, so-called denials of justice, and the practice of diplomatic protection. Moreover, much of the treaty practice of the United States focused on providing reciprocal legal protections for resident aliens. This was among the core purposes of the so-called FCN (Friendship, Navigation, and Commerce) treaties that were fixtures of the era and that nicely fit the model of global justice embraced by the division of labor argument. To the extent that constitutional rights were accorded resident aliens, moreover, an adherent of the division of labor approach would interpret this development as an exception to the general rule that was prompted by the idiosyncratic policy concerns of the United States. Throughout this era, the United States energetically sought to attract large scale immigration to the country. Extension of constitutional rights was, on this view, just a means of encouraging immigration by assuring potential immigrants that they would be well treated in the period before they earned citizenship.

## **E. The Affirmative Argument for Incorporation**

I turn finally to the argument in favor of incorporation, which doubles as a response to the division of labor argument. My claim is not that the division of labor argument is logically unsound but, rather, that its underlying premises – to the extent they ever reflected the actual state of international relations – no longer obtain in the early part of the 21<sup>st</sup> century. Given contemporary conditions, I argue, we ought to harness the Constitution for the purpose of more fully realizing global justice.

It is worth noting that skepticism about the division of labor argument – and its assumption of the adequacy of the two bodies of law working independently to achieve justice – goes in both directions. My argument casts doubt on the capacity of the international legal system fully to achieve global justice and looks to the Constitution for additional support. For more than a half century, the international legal system has expressed a similar though opposite concern about the ability of national constitutional systems to achieve domestic justice. That is the animating impulse, I take it, behind the development of international human rights law, which serves both as a model for the development of more effective and more just constitutional regimes and as a supplementary mechanism at the international level for ensuring that governments respect the demands of domestic justice. What I advocate here is that constitutional law return the favor. The two legal systems can achieve their ends more effectively if they recognize their work as mutually supportive rather than as separate and independent.

I claim that the model of international relations that underlies the division of labor argument is no longer persuasive. Why is that so? In what ways is the world of the 21<sup>st</sup> century different from the world that I described as underlying the division of labor approach?

### *1. The Erosion of Natural Law*

Large changes in the development of jurisprudential ideas long ago eroded the natural law

foundations of both the Constitution and the law of nations. Because those changes affected both bodies of law equally, they did not necessarily cut in one direction or the other with respect to incorporation. The triumph of legal positivism, however, may have helped set in motion the development of increasingly different attitudes about the status of constitutional and international law. As a matter of social fact, the Constitution remains in the view of most Americans the legal embodiment of the principles of domestic justice, and a strong moral duty attaches to government officials to act in compliance with its demands. In contrast, attitudes towards international law have moved in a sharply different direction. There is no consensus in the United States today that international law can make a strong claim to embody the principles of global justice, and, consequently, government officials no longer feel as powerful a moral duty to uphold the nation's international legal obligations as they once did. The pull of moral duty with respect to global justice has therefore become increasingly untethered from any existing legal regime and has been left more and more to the free play of the political process relatively unguided by legal standards. Unsurprisingly, this development degrades public discourse and enables sophistry to masquerade more convincingly in the language of justice.

This change in attitudes is nicely illustrated, at least in the context of the contemporary legal mind, by Chief Justice Rehnquist's opinion in the case, *United States v. Verdugo-Urquidez*,<sup>28</sup> in which the Supreme Court held that the 4<sup>th</sup> Amendment does not apply to searches of non-citizens conducted by U.S. officials outside the territory of the United States. *Verdugo*, indeed, is the leading modern case against incorporation. In support of this ruling, the Chief Justice pointed to early practice in the 1790s with respect to the seizure of enemy vessels on the high seas as prize of war. When U.S. ships seized the vessels of non-nationals in those circumstances, he observed, no

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<sup>28</sup> 494 U.S. 259 (1990).

one suggested that the 4<sup>th</sup> Amendment applied. That is certainly correct so far as it goes. What he failed to appreciate, however, was the significance of the fact that the United States, in common with all other maritime powers, had established prize courts that applied the law of nations as their rules of decision and had power to, and did, award restitution of captured vessels in cases of unlawful seizures and damages in cases where there was no probable cause for a seizure. This remedy – which was required by the law of nations and nicely parallels the modern 4<sup>th</sup> Amendment – was certainly at least as effective as any that would have been available under the 4<sup>th</sup> Amendment. Yet, for Rehnquist, the late 18<sup>th</sup> century approach – rooted in precisely the division of labor commitments I have described – supported the conclusion that no remedy at all need be offered to the victim of an unreasonable search, so long as the search was conducted abroad against a non-citizen. This conclusion is especially ironic because the law of neutrality that the prize courts applied – which was a branch of the law of nations and specifically the laws of war – was viewed by Americans during this period as protecting the most vital natural law rights. Indeed, it was the perceived violation of precisely those rights that led the United States first into the Quasi-War with France in the late 1790s and then into full scale war with Great Britain in 1812.

## *2. The Erosion of the Balance of Powers*

It would be naive, of course, to view changing attitudes in the United States towards the moral authority of international law as entirely unconnected to changes in the position of the United States in the global order. The global status of the United States has been in a long, slow process of transformation, from its original position as a fledgling state surrounded by great imperial powers to its emergence at the end of the Cold War as a global hegemon. This changed status has undoubtedly reduced the overall effectiveness of balance of power pressures on the United States as compared to the past. However, it would be a mistake to overstate this point, since the United States is still embedded in a complex global order and is by no means immune from

incurring costs when it chooses to disregard the claims of other states and even of an emerging global civil society. Indeed, an overestimation of U.S. unilateral power probably accounts for some of the more disastrous decisions that the U.S. government has made during the course of the Bush Administration. Nevertheless, the U.S. government has demonstrated impressive resilience in resisting international pressure with respect to precisely those kinds of actions that most implicate the concerns of global justice, and that resilience is directly connected to its preeminent global status.

There are a number of manifestations of this change in status that implicate global justice concerns. For example, the United States has become increasingly willing to exercise its power in the territory of other friendly states without the consent of those states and in a manner that is inconsistent with their laws, even their constitutions. A high-profile example was the kidnaping of a Muslim cleric in Italy by CIA agents and his “rendition” to a Middle Eastern country where he was allegedly tortured. In response to these actions, Italy instituted criminal proceedings against the CIA agents but could only try them *in absentia*, since the United States refused to cooperate with Italian prosecutors. In undertaking actions of this kind, the United States violates a foundational principle of traditional international law and eviscerates the safeguard to individual rights that deference to the exclusive jurisdiction of the territorial state provides.

Even when the United States does nominally show respect for the exclusive jurisdiction of other states, moreover, it has frequently been able to obtain the consent of their governmental officials to permit the United States to engage in actions that are clearly illegal under their laws. In some cases, the United States has collaborated with officials in less developed states who themselves frequently engage in human rights violations in their own countries. In other cases, however, the United States has obtained high level, though top secret, collaboration from officials of democratic regimes. It appears, for example, that the Polish government secretly agreed to

permit U.S. officials to operate covert detention facilities (“black sites”) in Polish territory, to which detainees were brought for interrogations that violated fundamental rules of Polish and European law. In these kinds of cases, although there is no technical violation of the third state’s exclusive jurisdiction, the result is the same as if there had been. The United States need not defer to the local standards of justice and thus acts without regard to the kind of legal limits that existed under the division of labor model.

Finally, the United States now controls certain offshore zones that are outside of its *de jure* sovereign territory but over which it exercises complete *de facto* sovereignty. In these cases, it has completely ousted the territorial jurisdiction of the state to which the territory concededly belongs. The most obvious example is Guantanamo Bay, Cuba, which has been under “lease” to the United States for over a century and over which Cuba has no authority of any kind, although it does retain *de jure* sovereignty. The United States famously uses Guantanamo as a long term detention and interrogation facility for non-citizens captured outside the United States. In cases of this kind, the United States again acts entirely free of any legal restraints imposed by the local sovereign. Indeed, it does not even recognize the *de jure* authority of the local sovereign to apply its constitution or laws to the affected territory. In this sense, the zone is only nominally outside the sovereign territory of the United States.

### 3. *Erosion of the Duty of Protection*

The emergence of transnational terrorism since the September 11 attacks has raised the specter of a further change in the traditional global order: the erosion of the duty of protection. Recall that the state’s duty of protection is the flipside of the citizen’s duty of allegiance. As we have seen, it is an essential predicate to the operation of the balance of power system as a means of enforcing the rights of non-citizens. If an individual’s own government does not extend protection, then the state that seeks to violate his rights will not have to answer to his only, or at least his most

effective, defender.

How far the erosion of the duty of protection has actually advanced is difficult to assess. However, there is an important category of cases of particular concern from the perspective of global justice for which there are reasonable grounds for pessimism. The whole phenomenon of transnational terrorism is a challenge to traditional territorial conceptions of the state.

Transnational terrorists operate freely across international boundaries and express open contempt for the existing order of nation states. Because they profoundly threaten the existing order, including (and sometimes especially) the position of their own governments, the usual incentives of states to defend their own nationals seem likely to be substantially diminished. Even if this is the case, it may be counter-balanced to some extent by the emergence of a global human rights culture and global civil society groups that may pick up some of the slack. Still, there remains serious concern that persons caught up in the Global War on Terror will fall through the cracks of the traditional global justice model.

#### 4. *Changes in the Structure of Individual Rights Protected by the Principles of Global Justice*

As we have seen, under the traditional model, there was a fundamental difference in the structure of rights protected by the principles of domestic and global justice, which was reflected in the corresponding systems of constitutional and international law. The rights protected by the Constitution were absolute; whereas the rights protected by international law were contingent on reciprocal compliance by other states. Developments in international law at least since World War II have importantly revised the traditional approach and have recognized to an increasing extent that the most fundamental rights of the person ought not to be contingent on reciprocal compliance. This notion is now deeply embedded in the international law of state responsibility, human rights

law, and international humanitarian law.<sup>29</sup> For present purposes, I assume that this development is supported by – indeed, required by – the principles of global justice. The consequence is that the structure of rights recognized in both systems of law is now far more similar than it was in the past and is so precisely in those cases that raise the most urgent justice based concerns.

This development means that incorporation of at least some global justice principles into the Constitution should raise far fewer complications than it would have in the past. Under the old regime, it was at least plausible to suggest that because the existence of rights was contingent on reciprocal compliance, incorporation posed unworkable problems of administration, particularly for courts. Whether any particular action in conflict with existing standards was actually a violation of international law depended upon an assessment of what might often be complicated and contestable facts about an ongoing series of interactions among states across multiple issue areas. The need for secrecy only compounded the difficulties. For these sorts of reasons, principles of justice that required the making of such judgments might, in Professor Sager’s terms, have been unsuitable for judicial review or even for inclusion into the domain of constitutional justice. Be that as it may, the elimination of the contingency renders these considerations moot, and substantially enhances the case for incorporation and for judicial review.

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The changes I have identified in public attitudes towards international law, the global status of the United States, the impact of transnational terrorism on the duty of protection, and the

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<sup>29</sup> *See, e.g.*, Art. 50, International Law Commission, Draft Articles on State Responsibility (2001). On a broader level, the regime of collective sanctions has itself come under moral pressure. Hence, the emergence of the concept of “targeted sanctions,” which seeks to avoid punishing innocents by focusing, to the extent possible, on those responsible for international defaults, usually governmental officials.

increasingly parallel structure of rights in constitutional and international law, strongly suggest that the model of global order that may have justified the division of labor approach in the past can no longer do so today. It still remains, however, to make explicit the affirmative case for incorporation. Let me offer the following eight propositions, which summarize the claims I have already made and set forth in logical fashion the foundation for my argument:

1. The demands of global justice, like the requirements of domestic justice, ought to be observed by all states, including the United States.

2. The principle of popular sovereignty, properly understood, is not inconsistent with incorporation of principles of global justice into the Constitution.

3. Incorporation would not undermine the Constitution as a focal point for patriotic sentiment in the United States; nor would it undermine the capacity of the Constitution to constitute the political community as an associative community of the kind that gives rise to the moral obligation to obey the law.

4. At least some principles of global justice can be cast in a form that is appropriate for inclusion within the domain of constitutional justice (and some are appropriately made subject to judicial enforcement).

5. The traditional enforcement system of international law is no longer, if it ever was, adequate to ensure U.S. compliance with global justice in an important range of cases raising urgent moral concerns.

6. In the absence of incorporation, there are substantial grounds for doubting that the internal political process in the United States will adequately discharge the United States' duty of global justice in an important range of cases raising urgent moral concerns. This claim is supported empirically by contemporary experience, but also by structural features of the political process in democratic states. Non-citizens are not represented in the political process; nor do they,

particularly those outside the territory, generally have affective or other ties to substantial citizen groups. They are therefore vulnerable to the unjustified exercise of coercion. This vulnerability is heightened, moreover, during national security crises when public fears and nationalist sentiment may undermine public concern about the rights of non-nationals.

7. Incorporation is likely to increase the probability that the rights of non-citizens will be observed. To the extent that judicial review would be available to enforce the principles of global justice, this conclusion seems relatively straightforward (although there are important reasons, rooted in institutional logic, for doubting the ability or willingness of judges to challenge national policy in these kinds of cases). Moreover, the courts have, in the past several years, been willing to exercise jurisdiction in War on Terrorism cases to a far greater extent than they were willing to exercise jurisdiction in similar cases in the past. Even if judicial review is not available, political officials in the United States are pulled to compliance to a greater degree when they believe themselves to be under a constitutional duty so to act.

8. Since the demands of global justice, like those of domestic justice, are urgent; since there are both empirical and theoretical reasons for believing that the United States will fail to fulfill them in a range of important cases; since incorporating them into the Constitution would increase the probability that they will be more fully realized; and since there are no compelling arguments against incorporation – it follows that incorporation ought to be adopted.

On a final note, it may add to the plausibility of the argument to return briefly to the case of resident aliens. Recall how in the 18<sup>th</sup> and 19<sup>th</sup> centuries, the constitutional status of resident aliens was uncertain and legal protection for their rights was largely accomplished through international law mechanisms of treaty and customary international law. This status quo, predicted by the division of labor model, underwent a profound transformation during the late 19<sup>th</sup> and 20<sup>th</sup> centuries, when virtually the entire panoply of constitutional rights, other than political rights, were

extended to them. The argument for incorporation provides a ready explanation for this development: It came to be appreciated that the rights of resident aliens, insofar as they rested upon international law, were too insecure. Constitutional doctrine therefore developed to bolster their position and solidify respect in the United States for their rights. This, then, was an early example of incorporation driven by recognition of the inadequacy of international law enforcement mechanisms and provides a positive foundation for the more far reaching position I defend here.

## **II.**

### **WHERE GLOBAL JUSTICE FITS INTO THE CONSTITUTION, AND THE PROPER METHOD FOR ITS INTERPRETATION**

The argument thus far, if successful, has made the case for incorporating at least some of the fundamental principles of global justice into the Constitution. That conclusion, however, raises a new set of problems. First, where in the text of the Constitution ought we to locate these principles? Second, what are the appropriate legal materials that should constrain the interpretive process? With respect to the first, I argue that we ought, at least in the first instance, to turn not to the Bill of Rights but to a concept of limited powers that itself incorporates an ideal of just or civilized behavior. As to the second, I argue that the appropriate legal materials are to be found not, or not principally, in the precedents interpreting the constitutional rights of citizens but in authoritative global sources on the fundamental moral obligations recognized by international law.

#### **A. Limited Powers or the Bill of Rights?**

Whether it is more suitable to look to the concept of limited powers or to the Bill of Rights to ground the principles of global justice in the Constitution's text is obviously a technical legal question that cannot be answered through purely normative reasoning. The answer will depend to

a considerable extent on the legal materials that our constitutional tradition has to offer. Although I cannot pursue such an inquiry here, I begin by offering some summary remarks about the U.S. constitutional tradition that suggest, broadly speaking, that there is reasonable support for either of these two approaches. Consequently, normative considerations can legitimately play a role in resolving what history leaves open to debate.

Until the New Deal, the doctrine of limited powers was a vital feature of the constitutional landscape. Indeed, in maintaining the balance of the federal system and upholding fundamental values, the Supreme Court employed this form of constitutional analysis – which was rooted in Article I – far more frequently than it had recourse to the Bill of Rights. Moreover, the same approach was evident even in the area of foreign affairs and war, and engendered in the courts as well as among executive officials and legislators a just war tradition that embraced limits on the scope of the war powers based on the standard of civilized conduct. This notion was closely associated with the law of nations and the natural law tradition on which it was based, but it persisted to some extent until at least World War II. The war powers of the federal government, on this view, simply did not include the power to wage an unjust war or to wage a just war through means the civilized world condemned. In contrast, however uncertain the status of this internal limitation may have been, the notion that enemy aliens were entitled to the protections of the Bill of Rights was simply not accepted on any side.

The limited powers doctrine barely survived the New Deal constitutional crisis and was replaced by an approach that gave extraordinarily broad scope to Congress' powers but that employed rigorous scrutiny under the Bill of Rights to protect fundamental rights. The commerce power, for example, was now understood to be virtually without limits on its scope, but exercises of that power that trenched on fundamental rights would be scrutinized closely under one or another of the provisions of the Bill of Rights. This post-New Deal settlement remains largely

intact, although one of the distinctive accomplishments of the Rehnquist Court was the modest revival of the limited powers doctrine in the context of federal power under the Commerce Clause and § 5 of the 14<sup>th</sup> Amendment. One consequence of this pattern of historical development is that limited powers arguments are disfavored and that constitutional rights discourse provides the almost universally accepted mode of analysis. For purposes of global justice, this development creates a serious dilemma: There is virtually no historical support for extending constitutional rights to non-citizens outside the country, but the limited powers doctrine, which was once a potentially vital means for incorporating principles of global justice, has fallen into disuse if not disrepute. There is a real danger that global justice will simply fall through the doctrinal cracks.

Let me identify three potential approaches to the incorporation problem. First, the rights included in the Bill of Rights can be given global reach, applying to the actions of U.S. officials wherever, and against whomever, taken. Alternatively, instead of focusing broadly on the Bill of Rights, global justice might find its home more modestly in the 5<sup>th</sup> Amendment concept of substantive due process. Finally, the scope of the foreign affairs and war powers delegated to the government in Articles I and II of the Constitution can be construed to be limited by a concept, drawing on principles of global justice, of just or civilized or legitimate conduct. I consider each approach in turn.

The appeal of the Bill of Rights approach is that it ties the extension of constitutional rights directly to the taking of coercive action against a person by U.S. officials. The claim would not be that non-citizens outside the United States have constitutional rights under the U.S. Constitution as against the world, but only that they have constitutional rights when U.S. government officials coercively enforce U.S. law or policy against them. On this view – and perhaps in tension with common intuitions on the domestic side – constitutional duties follow government officials wherever they act; whereas constitutional rights arise only when needed to protect an individual

against governmental action.

One problem with this approach is the awkwardness inherent in applying the Bill of Rights, which was drafted with domestic justice concerns in mind, to the rather different context that provides the setting for problems of global justice. Many of the rights contained in the Bill of Rights are simply irrelevant in the global context (*e.g.*, grand jury indictment, the right to petition for grievances) and others would require at least a substantial makeover before they could be made to fit (*e.g.*, the 1<sup>st</sup> Amendment right to free expression or free exercise of religion). Justice Jackson made this point caustically but effectively in his opinion in *Johnson v. Eisentrager*:

If the Fifth Amendment confers its rights on all the world . . . the same must be true of the companion civil-rights Amendments, for none of them is limited by its express terms, territorially or as to persons. Such a construction would mean that during military occupation irreconcilable enemy elements, guerrilla fighters, and "werewolves" could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against "unreasonable" searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments.

Though daunting, these difficulties may not be insurmountable, since the rights guaranteed in the Bill of Rights have already been interpreted flexibly to take account of widely different contexts. The question would be whether applying them to non-citizens outside the United States would require them to be not only bent and stretched, but broken.

These worries are addressed by the second option, which limits the extension of rights to the category of 5<sup>th</sup> Amendment substantive due process. Unfortunately, this move comes with another kind of cost. Substantive due process is already a highly contested category of constitutional rights, and, reflecting that controversy, it comes with much baggage that may make it a rather weak foundation for the protection of global rights. The governing standard remains even today whether the conduct of the government "shocks the conscience" of the court (or presumably whoever else is charged with interpreting the scope of the right). On the other hand, to the extent

that there is any historical precedent for applying the Bill of Rights outside the United States, it supports just this sort of approach, finding implicit in due process the protection of at least some of the most fundamental moral principles.

For present purposes, however, the principal objection to both of these approaches draws on a version of the sociological and associative obligations argument that I alluded to earlier. On this view, the language of constitutional rights is a unique form of legal/political discourse in the United States that plays a crucial legitimating role in the overall political order. It is one thing to expect citizens to acknowledge that they owe duties of justice to non-citizens outside the United States, and even to give those duties high priority as against other interests and duties they may have. It is another thing to expect them to accept that non-citizens outside the state share *constitutional rights* with U.S. citizens, especially when constitutional rights are to be extended to enemies of the nation who seek its destruction. Such an encompassing conception of the scope of constitutional rights may challenge widely shared and deeply held ideas about the Constitution and what it is for.

Now, if there were no other plausible alternatives, these concerns might have to be put aside (on the assumption, at least, that incorporation could reasonably be expected to make realization of global justice more fully attainable). There is, however, another approach that seems to avoid these pitfalls to a greater degree. Having recourse to the limited powers doctrine, and embracing a “legitimate” or “civilized” conduct standard, has a deeper pedigree in U.S. constitutional history, comes with far less baggage than either the Bill of Rights or substantive due process approaches, and promotes an especially attractive form of constitutional/political discourse that tames nationalistic passions while it acknowledges the duties of global justice. Citizens are not asked to extend constitutional rights under the Bill of Rights to non-citizens everywhere in the world, and even to enemies. But neither does the Constitution leave them with the impression that global

justice is not a matter of fundamental moral and legal concern. Instead, citizens must acknowledge their obligation to ensure that their government conducts itself in a manner worthy of a civilized or just political community. That is precisely what people everywhere should acknowledge, and can acknowledge perfectly consistently with their patriotic attachment to their constitution and with the special duties they owe one another as members of an associative community.

### **B. Interpreting the Constitution: National v. Global Sources**

If all that was at stake was the proper form of legal/political discourse, some might be tempted to dismiss the question – at least in its normative aspects – as relatively inconsequential. In fact, however, there is also an important methodological question at stake, with potentially significant substantive implications: What are the appropriate set of legal materials that should inform the interpretive process? In posing this question, I make two assumptions. First, I assume that the process of constitutional interpretation – whether by judges or other interpreters – is a constrained process. Interpreters are not free to adopt the morally best rule, but must, in the first instance, focus on a body of legal materials that ordinarily will narrow the available interpretive options. Moral considerations become relevant only in choosing among these options. Second, I assume that the Bill of Rights/substantive due process approaches point in one direction with regard to the appropriate body of legal materials, and that the limited powers approach points in another. More specifically, to the extent that the Bill of Rights/substantive due process is the source of the incorporation of principles of global justice, constitutional interpreters should look principally to past interpretations of those provisions and, to the extent novel questions are raised by the international context, should invoke analogies from previous decisions construing the constitutional rights of citizens. In contrast, the limited powers approach points to a substantially different body of precedent, focusing instead on authoritative global sources concerning the

fundamental moral obligations recognized by international law. In my view, the latter is the preferable approach.

The argument in favor of the globalist approach is similar to but broader than Jeremy Waldron's argument in favor of the use of the *jus gentium* in constitutional interpretation. On analogy to the process of scientific inquiry, Waldron argues that constitutional interpreters seeking the correct answers to difficult moral/legal problems will improve their performance if they consult the work of other interpreters engaged in the same or a similar enterprise.<sup>30</sup> I entirely agree. My point here, however, is somewhat different. Constitutional interpreters ought to look to authoritative global sources not only to improve their reasoning capacities, but more importantly still because questions of global justice ought to be resolved through a global political process that is as inclusive of different viewpoints and experiences as possible. Just as it would be disrespectful to the citizenry for a Platonic Guardian to impose a morally perfect constitution upon their political community, so too it is disrespectful to humanity in general for a single nation to resolve questions of global justice without regard to the relevant political decisions taken by the global community as a whole.

Let me offer a hypothetical example to illustrate more concretely what I have in mind. *Chavez v. Martinez*<sup>31</sup> was a case in which the police shot a criminal suspect and gravely wounded him. He was rushed to a hospital, blind and close to death but still conscious. Anticipating his impending death, a police officer interrogated him while he was being treated by emergency medical personnel, refusing to desist even in the face of the suspect's anguished pleas and his evident and desperate belief that the interrogation was interfering with his treatment and would

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<sup>30</sup> See Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 Harv. L. Rev. 129 (2005).

<sup>31</sup> 538 U.S. 760 (2003).

hasten his death. The Supreme Court faced the question whether this grisly interrogation, which was admitted to be coercive on all sides, violated substantive due process. A divided Court remanded the case on this issue, but, for present purposes, what is significant is that all of the justices agreed, as one would expect, that the question should be resolved by reference to the Court's past interpretations of substantive due process and the "shocks the conscience" standard. Three of the justices believed that it was clear that the interrogation did not violate this test in large part because of the strict standard applicable to substantive due process claims.

Now, I do not mean to suggest that there was anything wrong with the way the Court proceeded, although I find it striking that five justices could not agree that the suspect's substantive due process rights were violated. Be that as it may, my point instead is to posit a case involving the interrogation of a suspected international terrorist in which U.S. officials wish to use similar techniques. In determining the constitutionality of such conduct, what are the relevant legal materials that a constitutional interpreter should consult? My claim is that it would be a moral mistake to focus exclusively, or even primarily, on the Supreme Court's past decisions on substantive due process, including *Chavez* itself. The global community has made authoritative judgments on the question of torture and cruel, inhuman, and degrading treatment, and it is to those decisions that the interpreter should principally look in determining whether such an interrogation would be "uncivilized" or "unjust."<sup>32</sup> Global justice is not within the exclusive interpretive domain of any one state but belongs to the global community as a whole.

Now, this claim has to be qualified in two important respects. First, there are plausible

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<sup>32</sup> The question has been addressed in so many foundational international legal instruments, it would be pointless to cite them here. Leading examples include the International Covenant on Civil and Political Rights, the Convention Against Torture (providing in Art. 2, § 2 that "No exceptional circumstances whatsoever, *whether a state of war or a threat of war, internal political instability or any other public emergency*, may be invoked as a justification of torture"), and the Geneva Conventions.

grounds for believing that what is called international law sometimes reflects aspirational goals more than legal commitments, and that sometimes even expressed aspirations are better described as hypocritical posturing than as genuine attempts at moral leadership. I will not try to assess this claim here. To the extent it is correct, however, it argues in favor of reserving to the state an ultimate right of dissent from an apparent global consensus reflected in international law, a right, however, that should be exercised only in the clearest and most compelling cases in view of the evident danger that it could be used to excuse otherwise unjust behavior. Conversely, because the kind of consensus that international law requires is so difficult to achieve, constitutional interpreters will also have to consider the possibility that international law falls short of protecting all of the rights that global justice demands or, in some cases, that it has failed to keep pace with changing circumstances. These qualifications may open up interpretive loopholes, but I see no alternative but to acknowledge the dilemma.

Second, my claim is not that the Constitution should incorporate all of the principles of international law, only those that reflect fundamental moral requirements of global justice. As a consequence, constitutional interpreters will have to separate out which rules of international law have that status, creating yet another interpretive complexity. Without pursuing the subject here, however, it is worth observing that contemporary international law has developed many resources that should make this task manageable. Among the relevant concepts are the principle of non-derogability in international human rights law, the concept of *jus cogens* principles, and the prohibition on reprisals against the person in international humanitarian law and in the law of state responsibility. Moreover, Common Article 3 of the Geneva Conventions, which featured prominently in the *Hamdan* case, is an obvious candidate as a starting point for determining what

fundamental moral requirements apply in the context of non-international war.<sup>33</sup>

Now, it might be thought that there is an internal tension in my overall argument. I have cited changes in public attitudes towards international law as one reason in favor of incorporating global justice into the Constitution, but then have urged that international law should provide an important source for the interpretation of what the Constitution requires. These two claims, it might be argued, point in different directions. However, I think that this concern is more apparent than real. First, as I have just explained, on the view I am defending, constitutional interpreters would not be bound by international law and would retain authority, where international law is flawed, to interpret the demands of global justice in a way that diverges from the former's strict rules. Moreover, only those principles of international law that reflect fundamental moral requirements could make a *prima facie* claim to constitutional status. These points ought to mitigate the concerns of international law skeptics. Most importantly, although public attitudes towards international law have indeed shifted, the changes have been neither universal nor uniformly in one direction. To some extent, this division appears to track larger divisions in public attitudes towards a range of important political issues, including constitutional matters, a complexity that should not be ignored but which cannot stymie the ongoing development of constitutional principle. Moreover, although the diversity of views extant in the public will inevitably be represented in the judiciary, judges, in comparison to citizens and elected politicians, are relatively well-placed to appreciate the systemic complexities entailed by a global community of independent sovereigns, and to eschew unduly parochial views about the global legal order. Recent empirical experience seems to bear out this observation. Although international law has

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<sup>33</sup> Notice how Art. 2, § 2 of the Convention Against Torture sought to make clear the fundamentality of the prohibition on torture by explicitly providing that no circumstance, even of war or national emergency, could excuse non-compliance.

been the subject of withering criticism in the political arena, the Supreme Court has resorted to it as the central ground of decision in its landmark opinions in the *Hamdi* and *Hamdan* cases. To be sure, the Court did not purport to constitutionalize the international rules upon which it relied, but its willingness to resort to international law on such critical occasions suggests the possibility that it might take the next step if pushed. Recall that one of the principal advantages of the limited powers approach is precisely that it helps mitigate nationalistic excesses by reminding the public of the importance of the duty of global justice. We should not be unduly pessimistic about the capacity of the Court to generate changes in public opinion through its constitutional decisions.

Before closing, let me briefly address one argument in favor of the Bill of Rights/national legal sources approach. The argument goes something like this: The state discharges its duties of global justice by extending to non-citizens, including those outside its territory, those rights that it accords its own citizens. Now, this claim has to be qualified in important respects. On this view, the domain of global justice is narrower than the domain of domestic justice. It presumably does not include political rights for non-citizens (at least those outside the state) and may not include duties of distributive justice. Even to the extent it does include the latter, they are, on most accounts, discharged on a collective basis, not owed as an individual right. Thus, the argument applies only to traditional negative rights against the state. To restate the claim, the state discharges its duties of global justice when it applies, with respect to such negative rights, the same standards to non-citizens as it would apply to its own citizens in comparable circumstances. The Bill of Rights and national legal precedents are therefore exactly the appropriate mechanisms to employ in upholding global justice.

Now, there are a variety of responses I would make to this argument. First, it ignores the point, derived from the sociological and associative obligations argument, that it may be problematic to extend the legal/political discourse of constitutional rights to non-citizens outside

the state. Second, it is premised on a theory of global justice that seems dubious in important respects. In particular, domestic conceptions of negative rights are apt, at least in some instances, to be both over- and under-protective when applied in the global context (to say nothing of the plethora of national standards that the argument would seem to embrace when applied systemically). Third, this approach ignores the complexities that arise because of the contingent nature of global principles of justice, which, though on the wane in some important respects as I have argued, is still an important structural characteristic of global justice, and likewise ignores the more deferential standard that may be appropriate in view of the exclusive jurisdiction of the territorial state that remains a basic feature of the global order.

Finally, there is another objection that seems to me to cut even more decisively against this approach. Its core claim is that global justice requires the state, at least as to negative rights, to treat non-citizens in accordance with the same standards it would apply to its own citizens in comparable circumstances. But this formulation assumes that there are adequate constitutional precedents in domestic constitutional matters to provide answers to the question how citizens would be treated in comparable circumstances, and I think that it is at least doubtful that this will actually be the case in regard to many questions of global justice. The contexts in which questions of domestic and global justice arise are mostly quite different. Domestic justice focuses primarily on governance during times of peace; whereas, many of the most important – although certainly not the only – questions of global justice arise in times of war and international conflict. Now, it has often been the case that when questions of justice arise as to citizens in times of large scale-conflict, domestic constitutional law has found itself embarrassed and has looked to international law to inform its judgments. Martial law, which applies to citizens in times of internal disorder and rebellion, provides a case in point. Indeed, martial law was historically understood to be a branch of the laws of war and was rooted in the same set of legal principles. Strikingly, the constitutional

law regime that applied to the South during the Civil War was precisely the international laws of war.<sup>34</sup> Could private property of persons residing in the South, including their slaves (*e.g.*, the Emancipation Proclamation), be confiscated? Could the Southern ports be blockaded? Could Southern cities be bombarded? Although the burden of all these measures fell on U.S. citizens of the South, the answer in each case depended not on constitutional standards derived from the Bill of Rights but on the laws of war. Constitutional law simply borrowed the rules of international law.<sup>35</sup> To the extent this is the case, then, the argument is circular. Domestic constitutional law being inadequate to answer the question how citizens would or should be treated in such circumstances, it looks to international law to provide the necessary body of principles and doctrine. Why not acknowledge this inadequacy and recognize that international, not domestic, precedents ought to provide the starting point for constitutional analysis?

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<sup>34</sup> *The Prize Cases*, – U.S. – (1863)(holding, in the context of the Union blockade of the Southern ports, that the President could impose on the Confederacy only those measures that were permitted by the international laws of war).

<sup>35</sup> We see the same pattern in the recent *Hamdi* decision, which dealt with the preventive detention of a U.S. citizen as an enemy combatant. The Supreme Court looked to international law for the standards to be applied with respect to most of the central questions, including as to the right to detain, the duration of detention, and the purposes of detention. To be sure, Justice O'Connor did invoke procedural due process and the classic *Mathews v. Eldridge* balancing test to determine the procedures that had to be accorded Hamdi to challenge his detention. This move, however, only underscores the larger point. There was something entirely unconvincing about Justice O'Connor's invocation of these domestic justice precedents, which leant her analysis on this point an inauthentic air. In any case, the conclusions she reached – that Hamdi should be permitted to challenge his status before a properly constituted military tribunal – were roughly those that the laws of war would, on any plausible interpretation, have required. It is difficult to avoid the conclusion that even this part of her analysis was based on international, not domestic precedents.