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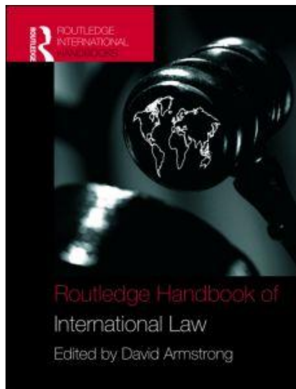

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Fidelity to Constitutional Democracy and to the Rule of International Law

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Section IV

Key issues in international law

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Fidelity to constitutional democracy and to the rule of international law

Russell Powell and Allen Buchanan

Until recently, international law was almost exclusively concerned to regulate the behaviour of states toward one another. In contrast, what may be called robust international law (RIL) claims the authority to regulate matters within states and even to prescribe how the state is to treat its own citizens within its own territory. International human rights law is RIL par excellence, but international criminal law and some international environmental and trade law also regulate conduct previously thought to be reserved for state control. In this chapter, we focus on a fundamental question: Is the commitment to (domestic) constitutional democracy compatible with the commitment to robust international law? In the first section, we examine the question of whether RIL is compatible with democracy, examining claims that a state's recognition of the supremacy of RIL is inconsistent with democratic principles. We then go on to ask the same question about constitutionalism that we asked in the first section about democracy: Is recognition of the supremacy of RIL consistent with the principles that comprise the political ideal of constitutional government?

Over and above its astonishing proliferation, perhaps the most remarkable development in international law in the last few decades has been the emergence of what might be called robust international law (RIL). Until recently, international law was almost exclusively concerned to regulate the behaviour of states toward one another. In contrast, RIL claims the authority to regulate matters within states and even to prescribe how the state is to treat its own citizens within its own territory. International human rights law is RIL par excellence, but international criminal law and some international environmental and trade law also purport to regulate conduct previously thought to be reserved for state[1] control.

International law, like all law, claims authority. Yet international law does not recognize domestic[2] law, even domestic constitutional law, as limiting its authority. It claims supreme authority on those matters it addresses.[3] Such a claim is remarkable, given that the constitutions of most states either explicitly claim unlimited legal supremacy or are implicitly regarded as enjoying it.[4] How can domestic constitutional law and international law both be supreme with regard to the same domains of control?

That question has become urgent with the development of effective RIL – law that not only claims the authority to regulate matters hitherto regarded as the prerogative of the state, but that is also increasingly backed by significant sanctions, including, in some cases, a credible threat of coercion. In

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brief, both the reach and the grasp of international law have been augmented, even if the former still exceeds the latter. The question of compatibility is no longer a curiosity of abstract jurisprudential theory; it is a pressing practical matter.

RIL has emerged in an environment in which those who advocate the rule of international law generally also endorse constitutional democracy at the level of the state. But some who claim to be friends of domestic constitutional democracy now raise serious doubts about its compatibility with RIL. These worries about incompatibility, as we shall show, extend far beyond the question of how to make international law's unlimited claim to supremacy consistent with the claims of supremacy that domestic constitutions make. Some of the more serious worries would remain even if every state constitution explicitly recognized the supremacy of international law or of certain types of international law, such as human rights law. The problem of compatibility does not admit of a purely formal solution.

Conflicting claims of legitimacy

Concerns about the relationship between RIL and domestic constitutions can be formulated as issues of competing claims to legitimacy, where legitimacy is understood as the right to rule. International law claims legitimacy and does not qualify this claim by acknowledging any superior legal authority, even where it purports to regulate the internal affairs of states. Domestic constitutions typically make a similarly unlimited claim regarding internal affairs. Thus there are conflicting claims of legitimacy. So far as their plausibility is concerned, however, there seems to be a stark asymmetry. The dominant view is now that democracy is a requirement of legitimate government. But RIL is not the product of democratic institutions. In the form of treaty law, it is the product of a process of negotiation among states some of which are not democratic, and in which enormous inequalities of power among states can call the voluntariness of state consent into question. In the form of customary international law, RIL is also a far cry from law made by representative legislatures: whether a norm becomes customary international law depends upon whether it gains sufficient support from powerful states (some of which are not democratic), from unelected judges in international tribunals, and from prominent legal scholars. The norms promulgated by global governance institutions, such as the WTO, the Security Council, and various international environmental and regulatory regimes also lack the legitimacy that democratic law-making processes are thought to confer at the domestic level; these institutions are not democratic in anything like the way that legitimate states are expected to be. From this perspective, RIL's claim to unlimited authority is especially problematic because it amounts to the assertion that institutions of dubious legitimacy have the authority to override the norms of institutions that have a much stronger claim to legitimacy – namely, democratic states.

The scholarly debate about the compatibility of RIL and constitutional democracy has chiefly taken place in two venues: the rich literature on the expanding authority of European Union (EU) institutions and the much less developed literature that revolves around the critique of RIL advanced by a group of American constitutional and international law scholars sometimes referred to as the "new sovereigntists". The American side of the debate has been hobbled by three self-imposed limitations: (1) an unwillingness to learn from the EU literature, (2) a failure to distinguish clearly between the question of whether RIL is compatible with constitutional democracy and whether it is compatible with the current American constitution or American-style democracy and (3) a refusal to consider the possibility that when there are tensions between RIL and a state's constitution, one option worth considering is

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whether the tension could be relieved by constitutional amendment. The first and third self-imposed limitations, we will argue, are related: If the new sovereigntists paid more attention to the EU literature, they would find it more difficult to ignore the option of constitutional amendment to accommodate RIL, because several EU countries have in fact made such an adjustment. It is perfectly appropriate, of course, for scholars to focus on the impact of RIL on the US Constitution or on American democracy, but it is wrong to slide from claims about what is incompatible with that constitution or detrimental to that form of democracy to more grandiose assertions about what is incompatible with constitutionalism or with democracy themselves.

In this chapter, we focus on the most fundamental question: "Are the commitments to (domestic) constitutional democracy and to robust international law compatible?", while trying to avoid the limitations of the American side of the debate. In the first section, we consider whether RIL is compatible with democracy, examining claims that a state's recognition of the supremacy of RIL is inconsistent with democratic principles. Here we argue that the charge of inconsistency relies on implausible assumptions about democracy. We also argue, however, that the expansion of RIL poses a fundamental problem for democratic states, a problem that democratic principles, including the principle of subsidiarity, which has figured so prominently in the EU literature, cannot answer: How much self-government should a democratic people relinquish to international institutions? In the second section, we ask the same question about constitutionalism that we asked in the first about democracy: Is recognition of the supremacy of RIL consistent with the principles that comprise the political ideal of constitutional government? In this section, we argue for two conclusions: First, although RIL and constitutionalism are formally consistent in the sense that a constitution can consistently acknowledge a superior legal authority, there are circumstances in which acknowledging the supremacy of RIL can impair the functioning of a state's constitution; and, second, that when the acceptance of RIL involves either serious impairment of a state's constitution or a significant loss of self-determination for the people whose constitution it is, then principles of democratic constitutionalism require a special form of democratic authorization – either a new constitution, constitutional amendment, or a special super-majoritarian legislative act.

Before turning to the question of compatibility, it is important to be clear about why it matters. The possibility that the commitment to RIL is incompatible with the commitment to constitutional democracy is disturbing because both seem morally compelling. Since the case for constitutional democracy is better known, here we will only sketch, in broad strokes, the chief reasons for acknowledging the authority of RIL.[5] Our purpose is not to make the case for RIL but simply to indicate the costs of abandoning the development of RIL in the name of protecting constitutional democracy.

There are two types of reason for the citizens of constitutional democracies to urge their leaders to acknowledge the authority of RIL. The first may be called self-regarding: These are reasons that apply independently of any cosmopolitan commitments on the part of the citizenry. By "cosmopolitan commitments" here we mean commitments grounded in a direct concern for the well-being or protecting the interests of persons who are not members of one's own polity.

Self-regarding reasons

Acknowledging the authority of RIL can improve the functioning of constitutional democracies in at least four ways, independently of whether it happens to fulfil cosmopolitan commitments. First, by acknowledging the authority of RIL, governments can provide benefits that their citizens have

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demanded, but which cannot be provided by unilateral action or by traditional-style bilateral international agreements that do not commit states to RIL. Robust international legal regimes help solve coordination problems, provide global public goods, and avoid or reduce negative externalities.[6]

Second, even the best constitutional democracies sometimes fail to provide equal protection of the rights of some of their citizens. Furthermore, every constitutional democracy is at risk for unjustifiably infringing civil rights generally, not just those of minorities or women, when there is a perceived national emergency, such as war or terrorist attacks. If a state acknowledges the authority of international human rights law, this can help mobilize political support, both within the country and from without, for the protection of domestic constitutional civil and political rights. In some cases, types of international law that are not typically categorized as human rights law, including law affecting economic development, can also have a significant positive impact on the security of citizens' civil and political rights, to the extent that states acknowledge their authority in the domestic sphere.

Third, all constitutional democracies include various institutional mechanisms for reducing the persisting risk that policy will unduly reflect the preferences of powerful special interests; but when such interests are concentrated and the opposition to them is diffuse, these domestic mechanisms may be insufficient. When this is the case, participation in international institutions that claim robust legal authority may help counter the power of special interests. For example, the binding rules of the WTO that prohibit trade discrimination have helped the US Congress resist pressure from domestic protectionist groups.

Fourth, by participating in robust international legal regimes, states can improve public deliberation in domestic policymaking across a wide range of domestic policy areas: they can more effectively draw on more extensive pools of experts and can identify and learn from "best practices" developed elsewhere. In some cases, acknowledging the authority of RIL is a necessary condition of reaping these epistemic gains.

The foregoing four reasons to accept RIL should appeal to citizens of constitutional democracies because of their positive effects on domestic politics. Their force does not depend on the assumption that the citizens of a constitutional democracy are or ought to be influenced by cosmopolitan commitments; it does not presuppose a non-instrumental concern for the rights and interests of foreigners. In addition to these self-regarding reasons, there are reasons for acknowledging the authority of RIL that carry considerable weight from a cosmopolitan point of view.

Cosmopolitan reasons

First, a commitment to robust international human rights law and to the emerging institutions of international criminal law can enhance the effectiveness of the efforts of the citizens and leaders of a constitutional democracy in promoting the protection of the basic interests of all persons. By promoting human rights through participation in international institutions, as opposed to acting unilaterally, a state can also assure others that its efforts are sincere and not a guise for the pursuit of narrow national interest. The perception of legitimacy can increase cooperation and to that extent can make it more likely that the goal of better protection for all will be achieved.

Second, participation in robust international legal regimes can help to counter the parochial bias of democratic politics. Constitutional democracies are typically structured to ensure that legislators and government officials are accountable to – and only to – their own fellow citizens. Foreigners have no votes and in some cases domestic law is explicitly intended to prevent "foreign influences" on the policymaking process.[7]

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Thus constitutional democracies systematically exclude from proper consideration the legitimate interests of others that are affected by their actions. Acknowledging the authority of RIL can help correct this bias by requiring state policy that affects the basic interests of foreigners to take those interests into account. In the next section, we will argue that it is a misunderstanding of democracy to hold that the government of a democracy must be accountable exclusively to its own citizens.

Third, acknowledging the authority of RIL can be an expression of the commitment to the ideal of the rule of law. One of the chief moral attractions of the rule of law is that it embodies a commitment to not settling conflicts of interests and preferences by recourse to sheer power. This commitment does not rule out the resolution of conflicts by force, of course, but it does require that force not be the first resort and that when it is employed it is justified by publicly available reasons of the right sort, what might be called principled reasons, as distinct from mere threats or appeals to the interests of those who happen to be the stronger. In international relations, where disparities of power are great, the moral case for the rule of law is correspondingly strong.

There are several reasons to repudiate the rule of sheer power. The need to protect the vulnerable and to avoid unfairness are among the most obvious, but there is also the idea that respect for persons requires an appeal to their capacity to act on the basis of principled reasons rather than relying solely or primarily on their capacity to respond to threats. All of these reasons qualify as cosmopolitan, because they all assume the fundamental equal moral status of persons: all are to be treated fairly; vulnerable persons generally, not just the vulnerable who are one's fellow citizens, are to be protected; all are to be respected by appealing to their capacity for being moved by principled reasons.

These basic moral attractions of the rule of law have always been one chief element in the case for having international law (the other being the realist idea that the system of restraint that international law provides is in the interest of every state because no state can reasonably expect to maintain a position of domination). The question at hand, however, is not whether the ideal of the rule of law supports a commitment to international law as it was traditionally conceived, but whether it supports a commitment to robust international law. More precisely, do the basic moral values that ground the commitment to the rule of law give the citizens and political leaders of a constitutional democracy reason to acknowledge the authority of international law even within domains that were previously thought to be protected by the veil of sovereignty?

The question is still insufficiently precise, because the answer may depend on what sort of international law is involved. Consider the case of international human rights law. It is appropriate to focus on human rights law because it is perhaps the type of RIL that has been viewed with the greatest suspicion by those who say that fidelity to constitutional democracy and to RIL are incompatible. Disputes arise as to the meaning, scope and institutional implications of particular human rights norms. Presumably the principle that conflicts should not be settled by sheer power applies to this sort of dispute; to exclude it seems arbitrary. If this is the case, then the idea of repudiating the rule of sheer power, which as we have seen lies at the heart of the commitment to the rule of law, provides a reason in favour of a powerful state such as the US not claiming the unqualified right to determine how human rights norms will be interpreted and applied to its own actions or the conduct of its citizens or officials. When a powerful state claims the right to do this, it is in effect asserting that it is permissible for it to be a judge in its own case, to decide whether complaints that it has failed to protect human rights are valid. Because it is a powerful state, its vulnerability to sanctions by other states or international organizations or world public opinion will be

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relatively inconsequential, at least in cases in which it has a strong interest in the outcome, and this means that effective checks on its acting in a self-serving, biased fashion will be absent. There will be a significant risk that the conflict will be settled by sheer power – that is, in accordance with the interest of the powerful simply because they are powerful – rather than in a principled, publicly justifiable way. At the very least, such a state bears a burden of argument to explain why the usual rule of law considerations that speak in favour of not being a judge in one's own case are not dispositive in case of disputes over the interpretation and application of human rights norms.[8]

One could, of course, argue that at present the burden of explaining why the principle that one shouldn't be a judge in one's own case cannot be met in some areas of international law that most significantly challenge state sovereignty. For example, some have argued that the defects of the current International Criminal Court process are so great as to outweigh the rule of law reasons for acknowledging the authority of the Court. Our aim here, however, is not to show that the commitment to the rule of law supplies a conclusive reason to support any particular area of RIL, but only to show that it can provide a reason to support RIL, depending on the circumstances. Moreover, when it does, the reason it supplies is one that should carry significant weight with those committed to constitutional democracy, so far as the idea of constitutional democracy subsumes or presupposes that of the rule of law.

Taken together, the four self-regarding and the three cosmopolitan reasons show that there is a strong case for acknowledging the authority of RIL when certain conditions are satisfied. These reasons do not purport to provide a blanket endorsement for all international law that claims robust authority. Rather, whether any of the reasons apply and the weight they carry may vary depending on what sort of law is involved and on whether the benefits that acknowledging the authority of the law brings can be gained in some other way. Nonetheless, we hope that this brief discussion makes clear the attractions of having an international legal system that includes mechanisms for creating RIL. Keeping the potential benefits of RIL in mind, we will now consider whether a commitment to RIL is incompatible, with either democracy or constitutionalism.

Are fidelity to constitutional democracy and fidelity to robust international law compatible?

Whether these two commitments are compatible depends, of course, on what democracy is. Remarkably, the new sovereigntists who deny compatibility offer no explicit conception of democracy and tend to assert, rather than to argue, that acknowledging the supremacy of robust international law offends democratic principles. Even more frustrating, they are sometimes unclear as to whether the alleged incompatibility is with democracy or with constitutional democracy or with some particular constitutional democracies or with only one constitutional democracy (namely, the United States). To begin to assess charges of incompatibility we must first settle on a serviceable conception of democracy. In doing so, we must avoid controversial conceptions of democracy in order not to prejudice the issue of compatibility.

Democracy, in the most general and least controversial sense, is a process for making decisions that will be binding on all members of a group, each of which has an equal say at some important stage or level of the process.[9] When applied to modern, large-scale states, the term usually connotes as well the requirement that important government officials, or at least legislators, are held accountable through periodic elections in which citizens have equal votes. We will refer to this core idea of democracy as equal popular electoral accountability or popular accountability for short.

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It is crucial to note that this definition does not assume that all of the laws to which the citizens of a democracy are subject must be made by their elected representatives (or voted on directly by the citizens themselves, as in referendum). So it is compatible with some domestic law being created through judicial decisions and/or administrative processes. This seems unexceptionable, if the goal is to settle on a moderately realistic conception of democracy, one that can at least be approximated, under reasonably favourable circumstances, by the clearest examples of actual states that are generally regarded as democratic.

With this broad and relatively uncontroversial conception of democracy in mind, let us now consider four arguments – or in some cases, reconstructions of intimations of arguments – that purport to show that the commitment to democracy at the domestic level and the commitment to RIL are incompatible. It should be emphasized that our purpose here is analytical, not exegetical. In each case we will reference work by new sovereigntists that at least suggests a given argument, but we make no effort to document conclusively who advances which argument. One reason for this approach is that some of the theorists in question are unclear as to which arguments for incompatibility they are advancing in a given context. Another reason is that each scholar who is sceptical of delegations to international institutions has her own nuanced view of the constitutionally appropriate scope of delegation, and consequently it is difficult to bring all of these authors under a single, uniform conceptual umbrella.

The exclusive accountability argument

This is the claim that democracy requires that every official who exercises political authority over the citizens of a state must be accountable solely to those citizens. The concern here is primarily with the delegation of legal authority over the domestic citizenry to officials of global governance institutions or to judges of international tribunals. For example, John Yoo (2000: 1715) appeals to broader, normative principles of constitutionalism to justify the priority of the Appointments Clause of Article II of the US Constitution in its conflict with the new international law, stating that:

> The Framers . . . centralized the appointments power because they feared the vesting of power in officeholders who were not accountable to the electorate, as had occurred during the colonial period . . . A centralized appointments process prevents the national government, as a whole, from concealing or confusing the lines of governmental authority and responsibility so that the people may hold the actions of the government accountable. Allowing the transfer of command authority to non-U.S. officers threatens this basic principle of government accountability. International or foreign officials have no obligation to pursue American policy, they do not take an oath to uphold the Constitution, nor can any American official hold them responsible for their deeds.[10]

If this first objection is understood to apply only to the US Constitution, the claim is that acknowledging the authority of RIL, or some instances of RIL, violates the constraints on delegation of executive authority set out in the Appointments Clause of the US Constitution. As we have already emphasized, however, our focus in this chapter is not on whether RIL is compatible with distinctive features that particular democratic constitutions may or may not have, but on the more basic question of whether it is compatible with constitutional democracy itself. In this section, we are sorting out incompatibilist objections that pertain to the democracy part of constitutional democracy. So the question is whether democracy requires that all political authority exercised over citizens of a democracy must be accountable exclusively to those citizens.

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According to the broad and relatively uncontroversial definition of democracy adduced earlier, the answer is clearly "no". Democracy, on this definition, requires that any official who wields political authority over the citizens of a democracy must be accountable to those citizens and it also imposes a requirement of equality among citizens – all citizens are to have an equal say, at important stages or levels of group decision making – but it does not rule out the possibility that such officials may also be accountable to non-citizens.[11] At most the non-controversial definition implies that those exercising authority over citizens of a particular state be accountable equally to all of them and to whomever else they are accountable, but it does not require accountability only to those citizens.

It is worth noting that even when the Exclusive Accountability Argument is restricted to the US case, it is implausible. The US Constitution authorizes the president, with concurrence of two-thirds of the Senate, to enter into and ratify treaties. In some cases, treaties set up mechanisms for dispute resolution through arbitration by third parties who are not exclusively accountable to the citizens of the contending states (if they can be said to be accountable to them at all). The clause of the Constitution that authorizes treaty making includes no suggestion that such treaties are prohibited. Moreover, not only the United States, but also other states that are commonly regarded as democratic, routinely enter into such treaties. So if exclusive accountability is a necessary condition for democracy, then there are few, if any, democracies in the world. A more reasonable conclusion is that exclusive accountability is not a requirement of democracy. This conclusion is reinforced by the realization that neither the idea of equal electoral accountability nor other notions usually associated with democracy (such as the idea that government has no rights on its own account, but instead only has the authority that is conferred on it by those whose interests it is supposed to serve) require exclusive accountability.

The democratic deficit argument

One theme common to the EU literature and the American literature is the idea that international legal regimes suffer a "democratic deficit", although this term seems to be more commonly used in the EU context. As we shall understand it here, the phrase "democratic deficit" refers to the international (or, in the EU case, regional) version of a problem that has preoccupied democratic theorists for some time: the problem of bureaucratic distance. In the domestic case, the complaint is that officials of the modern administrative state make important decisions and in some cases even make laws, yet are not subject to electoral accountability. In the supranational context, the charge is that chains of authority stretching from democratic publics to officials of international or EU institutions are too attenuated to warrant the title of democratic accountability.[12]

It is crucial to distinguish between the charge that robust international legal institutions lack exclusive accountability to particular domestic publics and the charge that bureaucratic distance undercuts adequate accountability, because adequate accountability need not be exclusive. If it were the case – contrary to what we have argued already – that democracy requires exclusive accountability, then fidelity to RIL and to democracy would be incompatible in principle, because legitimate international institutions could not be accountable solely to the people of any particular country.[13] The bureaucratic distance problem, in contrast, is remediable, so long as adequate accountability mechanisms can be developed. In that sense, the democratic deficit argument is not capable of showing that there is any inherent incompatibility between RIL and constitutional democracy.

Moreover, incompatibilists who wield the democratic deficit argument must tread a razor-thin line: They must make the case that the problem of bureaucratic distance is so severe and intractable in the international

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case that democratic states should deny the authority of RIL, but, at the same time, they must provide reasons to believe that the same problem in the domestic case is not so severe as to undermine domestic legal authority. That is a tough order to fill, because it requires either (1) a principled identification of a point along the continuum of bureaucratic distance that undercuts authority, along with convincing reasons for concluding that domestic bureaucratic distance falls below it and international bureaucratic distance above it or (2) good evidence for thinking that the problem of bureaucratic distance can be adequately ameliorated in the domestic case but not in the international case.[14]

At any rate, the key point is that the democratic deficit or bureaucratic distance argument is incapable of showing that domestic democracy and RIL are incompatible in principle. Just as important, those who advance this argument fail to consider the possibility that its shelf life may be rather short; they do not even entertain the possibility that better accountability mechanisms for international agencies and officials can be and ought to be developed.[15]

None of this is to deny that the problem of bureaucratic distance is serious at the supranational level or that it should be especially troubling to those who endorse democracy at the domestic level. To a large extent the case for democracy at the domestic level rests on the idea that democratic institutions provide popular accountability, where this includes accountability of officials to all those they govern. So those who endorse democracy at the domestic level should be very disturbed when governing officials, domestic or supranational, are not adequately accountable to those they govern.

Rather than saying that the commitment to domestic democracy and the commitment to RIL law are presently incompatible due to the relatively underdeveloped popular accountability of those international legal institutions that assert robust authority, it would be more accurate to say that in these circumstances there is a tension between the two commitments. This language better conveys the possibility that trade-offs between the two commitments may be in order. The possibility of trade-off should not be dismissed; after all, as we have already argued, there are a number of reasons why democracies should find the availability of institutions for creating RIL attractive. More specifically, if such institutions are to develop greater popular accountability, it may be necessary, especially for more powerful and influential democratic states, to participate actively in them and to that extent acknowledge their authority *pro tanto* – that is, provisionally on the expectation that they can be improved and conditionally on their actually showing promise of improvement. Temporary toleration of an international institutional democracy deficit may be a reasonable price to pay in order to reap the benefits of RIL while working for better accountability.

The unacceptable loss of self-government argument

The self-governance of a democratic people can be diminished in several ways. One way we have just discussed: To the extent that officials, whether domestic or international, govern citizens without being adequately accountable to them, there is a loss of self-government, because self-government requires popular accountability. A democratic people also experiences a diminution of self-government if important decisions previously made by officials exclusively accountable to them are now made by officials who are accountable to other constituencies as well, as occurs when international institutions exert robust legal authority. When this second sort of diminution of self-government occurs, the problem is not that something has transpired that is inherently incompatible with democracy at the domestic level; as we have seen, democracy

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is not incompatible with a people being subject to authority that is not exclusively accountable with them. Rather, the worry is that if increasingly more authority is transferred to officials who are not exclusively accountable to a particular people, then a point will eventually be reached at which it is no longer meaningful to say that the polity is self-governing. To put the same point in a slightly different way, democracy does not require that all authority over a democratic people be exclusively accountable to them, but it does require a significant domain of authority that is characterized by exclusive accountability to them. If a state transferred virtually all important governing functions to some other political entity, so that its people had no exclusive control over any area of policy, we would no longer regard it as self-governing, or, hence, as a democracy. Clearly those who value democracy at the state level have a right to be concerned about the extent of the transfer of authority to supranational institutions, even though they can and should acknowledge that it is not the case that a people can only be subject to the authority of officials that are exclusively accountable to them.

The loss of self-government worry is not to be confused with the democratic deficit argument noted earlier. Even if all international institutions exhibited better popular accountability than any existing democratic states, the question would still remain: Is their exercise of power compatible with meaningful domestic self-government? International institutions with a great deal of popular accountability – accountability to the citizens of all states – could be described as providing global self-government, but depending on the scope of its powers this might come at the price of an unacceptable loss of self-government at the level of individual states.

The critical issue, then, is this: At what point does the diminution of self-determination in a state become so great as to be incompatible with it warranting the title of a democracy, a territory whose inhabitants are in some meaningful sense self-governing?[16] The answer to that question depends upon an account of what makes political self-determination valuable. Political self-determination is valuable for a number of reasons, which need not be rehearsed here. Because it is valuable for a number of different reasons, reasons that will have greater weight for members of various groups, and because self-determination is not an all or nothing matter, but rather comes in many forms and degrees, there is no single or easy answer to the question: How much self-determination is enough for a constitutional democracy?

An intuitively plausible response to this quandary is to appeal to the value of self-determination itself and simply say that the citizens of democracies should decide how much self-governance they will relinquish to global governance institutions.[17] But even if we grant that the decision to relinquish some dimensions of self-determination to a robust international legal order ought itself to be viewed as a matter of rightful self-determination, we still need to know how this choice is to be made. For even if it is permissible or even obligatory to relinquish a great deal of self-governance to the international legal order – for example, to promote peace or to achieve better protection of human rights or to safeguard the environment – it would not follow that just any way of transferring political power is appropriate. More precisely, we need to ask whether the same values that undergird the commitment to democracy also place constraints on how powers of self-government can be transferred to international institutions.

The lack of democratic authorization argument

It should not be assumed that the ways in which RIL is actually being created satisfy reasonable constraints on the relinquishing of self-determination. Consider an analogy. There is much to be said for the idea that when existing political units come together to form a

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federal state, as occurred in what became the US, or when a centralized state devolves into a federal state, these are such significant constitutional changes as to require some form of democratic authorization that is more robust than the ordinary legislative process. In brief, for such major changes in the character of a polity, public constitutional deliberation and popular choice seem to be required.[18] Similarly, if the development of RIL continues to reduce the domain of self-determination for a democracy, the point may be reached at which proper appreciation of the value of self-determination requires public deliberation and popular choice, or at least some sort of authorization that is more directly democratic than an ordinary legislative act or the ratification of a treaty.

The argument thus far can now be summarized. When a democracy transfers authority to supranational institutions, it thereby relinquishes the right to exclusive accountability for its exercise and this constitutes a diminution of self-determination. But there is no inherent incompatibility here between democracy and RIL, because it is not part of the idea of democracy that the scope of self-determination must be unlimited. However, if a democracy either (a) transfers so much authority to supranational institutions that it can no longer be said to be self-governing or (b) relinquishes significant dimensions of its self-determination without doing so by a process of authorization that is consonant with the core ideas of democracy, then its citizens thereby compromise their commitment to their democracy.

The idea that some processes for relinquishing self-government may be compatible with democratic principles while others may not be warrants elaboration. Consider three quite different types of process by which a democracy might subject itself to international legal regimes that significantly limit the scope of its self-government. The first, to which we have already alluded, is through public constitutional deliberation and popular choice, by processes that give more weight to the popular will than ordinary legislative processes and which are preceded by special public deliberations designed to reflect the fact that issues of significance for the fundamental character of governance are at stake. Here the mechanisms for accepting RIL that entails a significant diminution of self-government would be a new constitutional convention, constitutional amendment, or perhaps some form of referendum in which all citizens could vote. The second alternative is some form of special supermajority legislation: recognition of the supremacy of international law that qualifies as constitutional change would require approval from the national legislature by considerably more than a bare majority. Variants of the first and second processes have in fact been utilized by states joining the EU or acceding to its evolving structures of authority. The third alternative is a process of accretion in which no public constitutional deliberation or popular choice occurs and no special legislative approval is required – a process that might be characterized rather uncharitably as a democracy's slow death by a thousand cuts. The accretion can occur through a combination of:

- executive agreements
- automatic incorporation of ratified treaties into the law of the land (so-called self-execution)
- recognition of international law as federal common law
- judicial borrowing from international law
- the development of more robust global governance institutions that increasingly create policies through their own bureaucracies without the "specific" consent of states.

The process of accretion is deeply problematic from the standpoint of democracy: there are significant losses of self-determination, but without deliberation by the people as to whether to incur them and there is no special process of authorization that reflects the fact

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that changes of this sort require robust popular support. There is not even any special national legislative act to signal that this is not just law making or treaty making as usual.

The processes by which European Union governance has developed have included, at several critical junctures, something approaching the first model for accepting international law that is sufficiently robust to result in significant diminutions of self-government – the public constitutional deliberation and popular choice model. But in the case of most states outside Europe, including the US, the process of accepting RIL has been one of accretion: public constitutional deliberation and popular choice have been conspicuously absent. To accept the process of accretion, when other, more democratic processes for acknowledging the authority of RIL are available, is to indulge in an unjustified departure from the commitment to domestic democracy.

The principle of subsidiarity and its limitations

The principle of subsidiarity has played a prominent role in the EU debate about the compatibility of constitutional democracy with RIL, but is largely absent in the American debate. Our aim here is not to do justice to the sophisticated literature on subsidiarity in the context of EU politics and legal development, but rather to try to determine whether an appeal to subsidiarity can answer the question posed in the previous subsection: At what point does the relinquishment of authority by a state to international legal regimes violate the commitment to domestic democracy?

The basic idea of subsidiarity is that political authority should be exercised at the "local" level except when it is "better" exercised at a higher level. Subsidiarity is perhaps more accurately described as a mode of practical reasoning for decisions about the allocation of political authority rather than as a principle of jurisdiction. Where the allocation of authority is between a state and a supranational entity, the idea is that the default allocation is to the state and that proponents of an allocation to a supranational entity bear a burden of justification. Matthias Kumm notes that subsidiarity is a central principle of European constitutionalism, and he characterizes the process of reasoning that subsidiarity entails as follows:

> [S]ubsidiarity analysis . . . requires a two-step test. First reasons relating to the existence of a collective action problem have to be identified. Second the weight of these reasons has to be assessed in light of countervailing concerns in the specific circumstances.
>
> (Kumm 2004: 921)

The reference to collective action problems suggests what might be called the narrow understanding of subsidiarity, namely, that it is a principle of efficiency. Collective action problems arise when two or more agents who prefer some outcome, *O*, that can only be attained by their joint action are barred from achieving it because the structure of incentives is such that if each acts so as to optimize, the result is suboptimal from the standpoint of achieving *O*. On the narrow understanding, subsidiarity is a principle of efficiency because following the process it prescribes simply allows agents to better achieve outcomes they (all) prefer. As such, subsidiarity has nothing to say about cases in which groups with different preferences must decide how to allocate authority. It cannot provide guidance, for example, when the people of a state value self-governance in some area of life so highly that they are willing to sacrifice some efficiency to preserve it, while others prefer more robust international authority.

Kumm makes it clear that he does not construe subsidiarity in this narrow way as a principle of efficiency. He says that it is compatible with there being exceptions to the rule that authority should be allocated to the higher level political entity only if doing

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so is necessary for solving collective action problems. This suggests that, on a broad understanding of the principle, subsidiarity gives considerable but not exclusive weight to efficiency but also permits other values to be taken into account. The only other value Kumm mentions is "the protection of minimal standards of human rights" (2004: 921). However, to limit departures from an exclusive concern with efficiency in this way seems arbitrary. Why consider only the protection of minimal standards of human rights (given that human rights typically are themselves thought of as minimal moral requirements) and not other values as well, such as self-determination?

Those who would invoke subsidiarity to determine what sorts of relinquishments of self-determination are compatible with a commitment to domestic democracy confront a dilemma. They can either construe subsidiarity narrowly as a principle of efficiency, in which case it is silent on the question at issue; or they can construe it broadly, so as to accommodate values other than efficiency, in which case they must either provide a principled account of why only certain other values (such as the protection of human rights, but not self-determination) are relevant or acknowledge that the "principle" of subsidiarity is the unhelpful truism that we are to allocate authority to the local entity, except when not doing so is better all things considered.

Our conclusion is not that subsidiarity is useless as a constitutional principle, but rather that it provides little or no guidance for answering the question "How much authority should those committed to their own democracy be willing to give up for the sake of acknowledging the authority of robust international law?"[19] Even more clearly, the notion of subsidiarity sheds no light on the other major concern about the impact of RIL on self-government at the level of states; it is silent on the question "Which processes for relinquishing powers of self-government to supranational entities are most consonant with the commitment to democracy?"

The results of this section can now be summarized. There is no in principle incompatibility between fidelity to robust international law and fidelity to democracy at the domestic level. Those who have suggested that there is have apparently done so on the basis of a controversial and problematic, but unarticulated conception of democracy as either requiring that all those who exercise authority over the citizens of a democracy must be accountable exclusively to them or as permitting no diminution of self-government. Nonetheless, although fidelity to RIL and domestic democracy are in principle compatible, both the bureaucratic distance that characterizes international institutions and the undemocratic processes by which some states have relinquished self-government to these institutions raise serious concerns for those committed to democracy at the domestic level. Finally, the principle of subsidiarity sheds limited light on either the question of how much authority a democratic people ought to be willing to cede to international legal regimes and no light whatsoever on the question of how they should authorize whatever transfer of authority they are willing to make.

Are fidelity to constitutionalism and fidelity to robust international law compatible?

The second prong of our investigation of whether RIL and constitutional democracy are compatible focuses on the constitutionalism side of the issue, as the first focused on the democracy side. In the first section, we began with a relatively uncontroversial and moderately realistic conception of democracy; here we do the same for constitutionalism.

According to what may be the leanest plausible definition, constitutionalism is the view that if government is to be legitimate its powers must be subject to entrenched legal limitations. Entrenched legal limitations need not be irrevocable – they can be

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removed by constitutional amendment, for example. But removing them must be more difficult than changing ordinary laws and the validity of ordinary laws depends on their consistency with existing limitations. According to this view, the constitution of a polity is a public (although not necessarily written) specification of the entrenched legal limitations on government power.

A somewhat thicker, but still relatively uncontroversial definition includes everything in the narrowest definition but adds the idea that legitimate government requires a public specification of the basic structure of government, a specification that makes clear the entrenched legal limitations on government's power, while taking into account that government requires a plurality of distinct institutions. This additional element is most clearly expressed in written constitutions that distinguish legislative, executive, and judicial "branches of government" or "powers" and assign them each distinctive functions.

According to what might be called the liberal conception of constitutionalism, whatever else the specification of the structure of government encompasses, it must include the idea that the judiciary is "independent" of the executive. On most accounts, liberal constitutionalism adds to this the idea that among the entrenched limitations on government power, individual civil and political rights are prominent and that one function of the "independence" of the judiciary is to help uphold these rights. However, the liberal constitutionalist conception of an independent judiciary does not itself include a requirement of American-style robust judicial review of legislation.

In the case of federal states, constitutionalism also includes the idea that the public, entrenched specification of the structure of government and the limits on government power includes an allocation of powers among two or more distinct polities. Standard definitions of federalism include the idea that this allocation of power must recognize domains of supremacy for the distinct polities, in other words, that each has the "final say" on some matters (Karmis and Norman 2005; Waluchow 2007). (Without this added condition, it would not be possible to distinguish merely decentralized states from federations.)

Constitutionalism and the "supremacy" of constitutional law

At the outset of this chapter we noted that states' constitutions typically claim supremacy. Some would argue that the concept of constitutionalism itself grounds this claim, that constitutional law, by definition, is supreme. There are, however, two quite different ways in which to understand the claim that constitutionalism includes the idea that when governance is legitimate the constitution is supreme, that is, that it has the "final say" on legality. On the first construal, the supremacy of constitutional law is internal only: The constitution is the supreme legal authority within the polity of which it is the constitution. On the second construal, the supremacy of constitutional law is unbounded: The constitution is supreme not only with respect to other sources of law within the polity, but also with respect to all other sources of law.

The core idea of constitutionalism, the thesis that legitimate government requires entrenched limitations on government power, does not itself imply unbounded constitutional supremacy; at most it implies that it is supreme with respect to the ordinary law of the polity. In fact, none of the definitions of constitutionalism listed above includes the idea of unbounded constitutional supremacy. Yet at least the richer variants seem to capture what is essential to constitutionalism. So the assertion that constitutionalism is incompatible with a state's constitution recognizing the supremacy of supranational law is dubious at best.

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There is an inconsistency between constitutionalism and the supremacy of supranational law over domestic constitutional law, then, only if we add to the idea that legitimate government requires entrenched legal limitations on its power the further requirement that the entrenched legal limitations must not be subject to the supremacy of law from any other source. It may be the case that constitutionalism is often implicitly understood as including this stronger notion – that constitutionalism is thought to include the idea that the constitution of a polity is supreme in the strong, unbounded sense. But it bears emphasizing that this stronger notion adds something to standard definitions of constitutionalism that appear to be quite unexceptionable without it.

One final point about constitutional supremacy is worth noting. Even on the unbounded construal, there is an important sense in which constitutional supremacy allows for the subordination of the constitution to supranational law. A constitution can contain an explicit recognition of the supremacy of international law over its other provisions, as is the case with Austria and the Netherlands.[20] Of course, so long as this constitutional provision is itself subject to revocation by processes of constitutional amendment, there is a sense in which the constitution remains supreme with respect to supranational law. Nonetheless, this ultimate supremacy of the constitution is compatible, from the standpoint of constitutionalism, with an existing constitution recognizing the supremacy of international law even with respect to some of its most significant provisions, including its enunciation of civil and political rights. Such acknowledgement occurs when a state's constitution provides that in cases where international human rights law contains a broader scope for a particular right, that understanding trumps a narrower interpretation that has developed in domestic constitutional law.[21]

So far we have argued that even on the dubious assumption that constitutionalism includes unbounded constitutional supremacy, rather than merely internal supremacy of the constitution, there is no inconsistency between the commitment to constitutionalism and acknowledging the supremacy of supranational law over a state's constitutional law, if two conditions are satisfied: (1) the constitution provides for the supremacy of the RIL in question and (2) the constitution also provides for revoking that supremacy. We now want to argue that in spite of this in principle compatibility, in practice the acknowledgment of the supremacy of RIL can be highly problematic from the standpoint of the commitment to domestic constitutionalism, under certain circumstances.

Potential negative impact of RIL on constitutional structures[22]

Even if the supremacy of a certain area of RIL, such as international human rights law, is explicitly acknowledged in a state's constitution and that constitution provides for revoking the acknowledgement of supremacy, there is still the worry that RIL may have a negative impact on domestic constitutional structures. The potential damage is of two sorts: (1) the undermining of the constitutional allocation of power among the branches of the government and (2) the undermining of federalism, by encroaching on the authority that the constitution accords to federal units ((US) states, cantons, provinces, etc.). The general point is that constitutional acknowledgement of the supremacy of supranational law, whether it is revocable or not, does not itself guarantee practical compatibility.

The first type of risk to constitutional structures can be illustrated briefly by reference to the US case, but the problem, with variations, applies much more broadly. RIL can become binding domestic law in the US chiefly in two ways: through the ratification of treaties and when international customary law is regarded as federal common law.

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Some US constitutional scholars charge that in either case the incorporation of RIL into domestic law diminishes the rightful authority of the legislative branch.[23]

According to the US Constitution, international law created through treaties automatically becomes the "law of the land": When the US ratifies a treaty, its provisions take precedence over both the law of the states (federal units) and prior federal law with which it is inconsistent, without the requirement of federal legislation (US Const. Art. VI). The executive's power to make treaties is not unlimited of course, because ratification requires Senate approval; but the latter is a much weaker form of legislative control than in the ordinary creation of federal law. Moreover, the US Constitutional provision that makes ratified treaties federal law without federal legislation was drafted in a world in which international treaties did not include RIL – law that extends to matters previously thought to lie at the core of the protected sphere of state sovereignty, as is the case with modern human rights law.

Nevertheless, given that the US Constitution unconditionally declares the supremacy of treaty law over states' laws and inconsistent prior federal law, and given the unqualified nature of its provisions for the creation and ratification of treaties, it is implausible to argue that RIL created by treaty is contrary to the US Constitution.[24] It might still be the case, however, that the acceptance of RIL through treaty ratification effects a reallocation of power away from the legislative branch that is suboptimal from the standpoint of constitutional design and perhaps contrary to the intentions of the framers of the constitution as well.

The second risk that RIL can pose to domestic constitutional structures applies to cases of federal states. It can be argued that treaty-created RIL, at least in the area of human rights, reallocates power from the state legislatures to the federal executive and the Senate, when human rights treaties are ratified and take precedence over the states' laws. The charge here is that the acceptance of RIL changes the constitutional structure of the federation by weakening self-government in the federal units. The same sort of change could be effected by according customary international human rights the status of federal common law. For example, acknowledging the authority of customary international human rights law could result in a diminution of federal units' control over the nature of punishments under their own criminal laws or could overturn provisions of marriage law, even though the federal constitution allocates the power to make laws in these areas to federal subunits.

The more general point is that for states whose constitutions were drafted prior to the era of RIL and which have not been carefully modified to accommodate this development, the possibility that domestic legal acknowledgement of the authority of RIL may damage the state's constitutional structures cannot be dismissed. The introduction of new legal norms from the outside – norms that regulate matters previously assigned by the constitution to various branches and levels of government or that allocate power between the federal government and federal subunits – may well be at odds with existing constitutional design. To assume that they will be harmonious would be unduly optimistic. A constitutional provision acknowledging the supremacy of RIL does not guarantee compatibility.

However, when the acceptance of RIL does impair existing constitutional structures, the proper conclusion to draw is not that constitutionalism is incompatible with RIL per se, but rather that the acceptance of the particular RIL in question is incompatible with the optimal functioning of those particular constitutional arrangements. Showing that this or that existing constitutional structure is impacted negatively by the acceptance of some type of RIL is a far cry from establishing that constitutionalism and RIL are incompatible, because there is a plurality of forms of constitutional democracy.

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Further, constitutional structures rarely if ever work either optimally or not at all; instead, they do the jobs they were designed to do with greater or lesser effectiveness. When the acceptance of RIL does have a negative impact on the constitutional structures of a particular state, the impact may be of greater or lesser seriousness. In cases where the impact is limited, accepting some detriment to the functioning of existing constitutional arrangements may be a reasonable trade-off, if this is the only way to secure the important benefits that RIL can bring. For example, some loss of legislative authority on the part of the subunits of a state might be a reasonable price to pay, under certain circumstances, if this is necessary for achieving better protection of basic human rights. Constitutionalism may require that where acknowledging the authority of RIL disrupts constitutional structures, either the constitution must be changed or the authority of RIL must be denied, but it cannot tell us which the proper course of action is. The answer to that question depends upon the resolution of contested issues in political philosophy.

Notes

1 Obviously, the word "state" can refer both to countries (e.g. Spain, Thailand, the UK) and to federal subunits (e.g. California, Maryland, etc., in the case of the United States, and Chiapas, Chihuaha, etc., in the case of Mexico). No differentiation is made in spelling here, however (i.e. State or state).

2 By "domestic law" we mean the law of particular countries. The term "national" law is unfortunate because it helps perpetuate the myth of the nation state, that is, the false belief that all countries are mononational, when in fact most include two or more nationalities.

3 For example, Article 46(1) of the Vienna Convention on the Law of Treaties (the "treaty of treaties"), provides that: "A state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance." Thus, even a manifest conflict with domestic law does not invalidate international treaty obligations, unless it amounts to the violation of a domestic law that is of fundamental importance. According to the constitutionalist tradition, if constitutional officers exceeded their competence or authority in concluding a treaty, the treaty is deemed to be invalid. The internationalist tradition, however, maintains that while treaty obligations may be invalid *within* a state if they conflict with domestic law, they remain unimpaired at the international level insofar as a treaty claims to supersede state law.

4 For example, one of the central dogmas of US constitutional jurisprudence is that the Constitution is the supreme law of the land, not to be superseded by any other law. See *Reid vs. Covert*, 354 US 1 (1957) (holding that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution"). Similarly, the German constitution is the paramount law of the land, claiming priority over any other government act. Emerging from the fall of the totalitarian Nazi regime, German constitutional supremacy was designed as a safeguard against dictatorship and human rights abuse (Limbach 2001).

5 We develop reasons for acknowledging the authority of RIL in more detail elsewhere (see Buchanan and Powell 2008). In the present paper, we focus more on examining the question of just which principles of constitutionalism or democracy are supposed by some to be incompatible with states acknowledging the supremacy of RIL.

6 See Keohane, et al. (unpublished paper). These authors cover the "self-regarding" reasons, but not the cosmopolitan ones.

7 For instance, federal election law in the US prohibits a foreign national, which includes foreign businesses and governments, from making election campaign contributions to any candidate (federal or state) for public office – and it prohibits public officials from accepting the same.

8 Kristen Hessler (2005) has argued that democracies have epistemic virtues – in particular, resources for public deliberation – that create a presumption that they should have the authority to interpret human rights norms in their domestic application. This is compatible with the claim that there are circumstances in which the authority of international human rights law should supercede the authority of the state.

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9 This definition is based on that offered by Thomas Christiano (2006).

10 See also Ku (2000) (following Yoo in arguing that insofar as treaties establish independent verification regimes (such as chemical weapons inspections), they violate basic constitutional principles of accountability in the enforcement of federal law).

11 Presumably, the equality element of this basic idea of democracy as equal electoral accountability would at the very least require that if some officials exercising political power over the citizens of a democracy are accountable not only to them but also to others, then the citizens must have at least an equal say in the processes of accountability, that is, that their ability to control the conduct of the officials must not be inferior to that exercised by the others to whom the officials are accountable. If this is so, the conclusion to draw is not that RIL is incompatible with democracy, but that those who make, apply, and execute international law ought to be equally accountable to the citizens of all states.

12 Thus American constitutional scholar Curtis Bradley (2003: 1558) complains that: "By transferring legal authority from US actors to international actors – actors that are physically and culturally more distant from, and not directly responsible to, the US electorate – these delegations [of authority under RIL] may entail a dilution of domestic political accountability." This concern may be heightened by a lack of transparency in supranational decision-making. Notice that Bradley does *not* assert that those exercising authority over Americans must be *exclusively* accountable to them, but only expresses a concern that those officials may not be *sufficiently* accountable to them. However, in the passage by John Yoo (2000) quoted earlier (see note 10 and accompanying text), there is a slip from the idea that international officials are not sufficiently accountable to American citizens to the idea that they must be exclusively accountable to them, when Yoo remarks that such officials "have no obligation to pursue American policy". If international officials are accountable to the citizens of other states as well as to those of the US, then *of course* they cannot have an obligation to pursue American policy as such. Yoo does not offer an argument to show why those who exercise authority over the citizens of a particular state must be accountable solely to them. If his remarks are supposed to show that RIL is incompatible with constitutional democracy, they simply beg the question by assuming exclusive accountability, a condition which, as we have already argued, has been routinely violated by the US and virtually all other states in the practice of treaty making and which in no way contradicts the core ideas of democracy.

13 See for example, John Yoo's (2000: 1715) apparent indignation at the fact that officials of international institutions "have no obligation to pursue American policy, they do not take an oath to uphold the Constitution, nor can any American official hold them responsible for their deeds".

14 For an attempt to articulate a conception of accountability suitable for international legal regimes that assert robust legal authority, see Buchanan and Keohane (2006).

15 A distinct objection to acknowledging the authority of RIL relates to the so-called "sovereign source" requirement, and is rooted in the Madisonian idea that the Constitution is a document of power granted by liberty, rather than a doctrine of liberty granted by power. This was the essence of the US Supreme Court's reasoning in the seminal case of *Erie R.R. vs. Tompkins* (1938), which famously held that federal judge-made law is illegitimate insofar as it is not grounded in a sovereign source. The sovereign source argument assumes a similar form in the context of the subordination of domestic to international law. The new sovereigntists assume that international law must be grounded in sovereignty, since all law depends on sovereignty for its legitimacy. See e.g. Rabkin (1998, 2005). They perceive a lack of sovereignty vis-à-vis the authority of RIL in numerous contexts, such as judicial decision making that involves appeals to international human rights norms, self-executing treaties that govern traditionally domestic affairs, and the incorporation of customary international law into federal law sans legislative mediation. The sovereign source problem takes on an added dimension when the people of a democratic state are subjected to laws created not by them or their representatives, but by agent delegatees conferred with legislative, executive, or judicial authority. This is the problem of sub-delegation, which entails that the powers delegated by "the people" to a particular component of government are then subdelegated to another government body without direct participation or authorization of the original sovereign source, severing the link between the exercise of power and the constituency which authorized its exercise.

The new sovereigntist appeal to the sovereign source argument is ambiguous on many

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fronts – it is unclear about the nature and conditions of sovereignty itself, and its relation to the exclusive accountability and democratic deficit arguments addressed earlier. We will consider the sovereign source argument in more detail in the third section, where we take up the question of whether RIL is compatible with constitutionalism and (more specifically) the idea that all sources of political authority must be identified in the domestic constitution.

16 The remainder of this subsection draws on Section II of Buchanan and Powell (forthcoming).

17 On reflection, this intuition may not stand scrutiny, because, at least in principle, it seems that the citizens of a democracy could mistakenly cede authority beyond the point at which it could be said that they are self-governing.

18 In order to ratify treaties of major importance, such as those which establish or pave the way for accession to robust supranational organizations, many nations require special majority legislation (e.g. Austria, Croatia, Finland, Greece, *inter alia*) or constitutional revision (e.g. France), while others hold referendum (e.g. Denmark, Sweden and Switzerland) (Vereshchet 1996).

19 It is important to note that Kumm does not think that subsidiarity is to be employed in isolation from other considerations. He thinks that the legitimacy of international legal regimes depends on three other principles: the presumptive bindingness of international law, a procedural principle of adequate participation and accountability and a substantive principle according to which outcomes must not violate fundamental rights and must be "reasonable". Although space precludes pursuing this matter here, we believe that even the combination of these principles does not provide an answer to the question of how much authority a democratic people ought to cede to supranational institutions or the question of which modes of ceding authority are consonant with democratic values.

20 For instance, under Article 91(3) of the Netherlands' Constitution adopted in 1983, treaties that conflict with the Constitution may be approved by the chambers of parliament by a 2/3 vote; as per Article 94, statutes that are inconsistent with treaties are not applicable. Similarly, Articles 9, 44, and 50 of the Austrian Constitution allow international law to modify constitutional law by 2/3 majority vote in the house. Likewise, Article 17 of the Russian Constitution declares that: "[I]n the Russian Federation rights and freedoms of person and citizen are recognized and guaranteed pursuant to the generally recognized principles and norms of international law and in accordance with this Constitution" and Article 46(3) provides the right to appeal to interstate bodies for the protection of human rights if all domestic means have been exhausted. (See Vereshchet 1996 for a comparative constitutional review.)

21 For example, Article 11 of the Slovak Constitution (1992) provides that international instruments on human rights and freedoms ratified by the Slovak Republic and promulgated under statutory requirements "shall take precedence over national law provided that the international treaties and agreements guarantee greater constitutional rights and freedoms". Similar provisions are contained in the Czech Constitution (1992, Article 10) and the Moldova Constitution (1994, Article 4(2)). See ibid.

22 Some new sovereigntists also worry about domestic court judges "borrowing" from international law, especially human rights law. The concerns here are of two sorts. First, there is the worry that judicial borrowing will be unprincipled "cherry picking". We regard this as a worry about the rule of law, not about the compatibility of RIL with constitutionalism or democracy, so we do not discuss it here, though we do so at length in Buchanan and Powell (forthcoming). Second, there is the claim that "borrowing" from international law may disrupt the normative coherence of domestic law, because international law may express values that are alien to the domestic society. We address this issue in the same article.

23 The tripartite separation of powers is allegedly vitiated by the federal incorporation of international law in several ways. The judicial branch is said to exceed its constitutional mandates by incorporating customary international law into federal common law and by invoking foreign precedent as persuasive authority in US constitutional jurisprudence. The executive is claimed to exceed its constitutionally enumerated powers by entering into "self-executing" treaties which regulate subject matter reserved to the Congress and or to the several states. Finally, the entire federal government is held to exceed its legitimate authority by incorporating into US law international norms which regulate content constitutionally reserved for state regulation (see Bradley and Goldsmith 1997).

24 This case is persuasively made by David M. Golove (2000, 2002).

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