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Human Rights and Constitutional Democracy

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In his wonderful new book, The Promise of Human Rights,[1] Professor Jamie Mayerfeld advances a bold thesis. He contends that "international human rights law is a necessary extension of domestic checks and balances, and therefore necessary for constitutional government itself." Moreover, he adds, "constitutional democracy is incomplete unless domestic human rights institutions are bolted into a system of international guarantees."[2]

In defending these claims, Mayerfeld is challenging two different beliefs held by many U.S. legal scholars. Call these the "majoritarian view" and the "sovereigntist view." Majoritarians, like Justice Scalia, tend to see rights-based judicial review as a threat to democratic governance because judges engaged in rights-based judicial review substitute their own views for the will of the majority.[3] Mayerfeld's response to the majoritarian objection is rooted in a conception of "Madisonian democracy" that he defends at length in Chapter 2. In brief, Mayerfeld contends that James Madison endorsed "a nonvoluntarist conception of democracy."[4] According to the nonvoluntarist conception, "[t]he point of popular government is not to realize the people's will . . . but instead to foster just and wise policy. . . . Justice and the common good, not self-interest or group interest, should determine the political choices of citizens and officials alike."[5] Mayerfeld believes that implementation of international human rights norms promotes justice and the common good. Therefore, based on his theory of Madisonian democracy, Mayerfeld argues that judicial application of international human rights law "is not antidemocratic [because] . . . [t]he policies it bars are policies that governments should not consider anyway, so their removal from legislative consideration represents no loss for democracy."[6]

In contrast to majoritarians, sovereigntists accept the need for rights-based judicial review to check the excesses of majoritarian democracy. However, they challenge the democratic legitimacy of international human rights law, and of supranational judicial review, because they believe that democracy requires self-governance, and self-governance means that decisions about protection of individual rights must be made at the national level.[7] Responding to the sovereigntists, Mayerfeld quotes the Declaration of Independence to support his view that "all human beings are endowed with certain unalienable rights" and that "governments exist to secure these rights."[8] In the eighteenth century, Madison recognized that majoritarian democracy in state governments posed a threat to the unalienable rights of minorities. Madison addressed this problem by designing a constitutional system that transferred authority from state governments to the national government to provide an external check on majoritarian tyranny at the state level.[9] Mayerfeld argues that, in the twenty-first century, protection of unalienable rights necessitates a transfer of authority from the national to the supranational level to provide an external check on majoritarian tyranny in nation-states. In his words: "The conditions that in Madison's time threatened justice in direct democracies and small republics are today reproduced and exacerbated at the national level. . . . In our own time, Madisonian constitutionalism calls for international oversight of national policy—in other words, the creation of a strong international human rights regime."[10]

In sum, the rights codified in international human rights treaties are the "inalienable rights of all members of the human family."[11] The central purpose of democratic government is to protect those inalienable rights. If legislators do their jobs well, they will enact laws to promote effective implementation of human rights norms. However, judicial review is necessary to ensure that legislators do not sacrifice inalienable human rights on the altar of majoritarian preferences. Moreover, effective protection of human rights requires an external check on national decision-makers. Mayerfeld devotes two chapters of his book to a detailed analysis of the war on terror to show that—even in the United States, a nation founded on a commitment to inalienable rights—the national government has an unfortunate tendency to violate fundamental human rights when perceived national security interests are at stake.[12] Since the United States government has demonstrated its willingness to sacrifice human rights in the name of national security, and since domestic judicial review, by itself, is not sufficient to protect those rights, international oversight is needed to provide additional protection.

I am sympathetic to the broad contours of Professor Mayerfeld's argument. Nevertheless, this review essay will challenge portions of his account. The remainder of this essay is divided into two parts. Part One addresses the topic of international oversight. Mayerfeld makes a powerful theoretical argument in support of his claim that increased international oversight could help strengthen human rights protections in the United States. Here, though, I think his account omits some important information and gives insufficient weight to current political realities. First, the United States is already subject to various forms of "weak" international oversight. Mayerfeld's account understates the value of those weak oversight mechanisms. Instead, he urges adoption of "strong" international oversight mechanisms. For better or worse, though, the constitutional requirement to secure a two-thirds Senate majority to adopt any of the strong mechanisms that he favors makes it politically impossible for the United States to subject itself to strong international oversight in the foreseeable future. Therefore, those who favor international oversight should consider options for bolstering the weak mechanisms that already apply to the United States.

Part Two focuses on what Mayerfeld calls the United States' "self-exemption policy."[13] In brief, this is the U.S. policy of refusing to ratify most human rights treaties and of ratifying other treaties subject to "reservations, understandings, and declarations" (RUDs) that limit the domestic effect of ratified treaties in the United States. I agree with much of his critique of the self-exemption policy.[14] Even so, Part Two contends that there is a significant tension between the self-exemption policy and Mayerfeld's defense of the democratic legitimacy of international human rights law. Specifically, Part Two shows that—despite the self-exemption policy—the United States has actually incorporated many important international human rights norms into U.S. domestic law by means of "silent incorporation" and "indirect application."[15] However, the self-exemption policy severely restricts "direct application" of international human rights treaties. By restricting direct application, and channeling the domestic application of international human rights norms into silent incorporation and indirect application, the self-exemption policy exacerbates the tension between majoritarian democratic principles and the domestic enforcement of international human rights norms. In conclusion, I suggest that Congress could partially reverse

the self-exemption policy by authorizing direct judicial application of human rights treaties in U.S. courts. Compared to silent incorporation and indirect application, direct application of human rights treaties would be much more consistent with majoritarian democratic principles.

I.
Human Rights and International Oversight

In The Promise of Human Rights, Professor Mayerfeld extols the virtues of international oversight. For example, he claims that "[t]ransnational institutions form part of the necessary architecture of human rights."[16] He endorses "international institutions that constrain national policy in the interest of justice and the common good."[17] He contends that "Madisonian constitutionalism calls for international oversight of national policy."[18] He argues that "countries committed to the principles of constitutional democracy should . . . accept international oversight" because such oversight helps "prevent the misuse and abuse of political power by extending and reinforcing domestic checks and balances and by enlisting external as well as internal guardians against state misconduct."[19]

To evaluate the case for international oversight, it is helpful to distinguish between "weak" and "strong" forms of oversight. There are two primary forms of strong oversight: judicial review by supranational courts that have the power to issue binding judgments,[20] and on-site inspections of national detention facilities by international inspectors to detect and prevent torture and other forms of cruel treatment.[21] Mayerfeld's account of international oversight focuses primarily on these two types of strong oversight.[22] He notes correctly that the United States is not subject to either type of strong international oversight. However, his account largely ignores the numerous weak forms of international oversight that do apply to the United States. This section describes the various weak oversight mechanisms that apply to the United States. I contend that these weak oversight mechanisms, in the aggregate, have a meaningful impact in achieving the objectives that Mayerfeld wants international oversight to accomplish. Finally, this section explains why Mayerfeld's prescription—that the United States should subject itself to strong international oversight—is not politically realistic.

Mayerfeld's account understates the degree to which the United States is already subject to oversight by international human rights bodies. The United States is subject to the jurisdiction of the Human Rights Committee because it is a party to the International Covenant on Civil and Political Rights. In April 2014, the Committee issued a set of "concluding observations" that identified a lengthy list of concerns about human rights practices in the United States and presented a detailed set of recommendations for improving the U.S. human rights record.[23] As a party to the Race Convention, the United States is subject to the jurisdiction of the Committee on the Elimination of Racial Discrimination (CERD). The CERD published its concluding observations in September 2014. Like the Human Rights Committee, the CERD identified a lengthy list of concerns about human rights practices and presented a detailed set of recommendations for improvements.[24] The United States is subject to oversight by the Committee Against Torture because it is a party to the Torture Convention. That Committee published its concluding

observations in December 2014. Like the other two committees, the Committee Against Torture highlighted a wide range of problems and presented a detailed list of recommendations for rectifying those problems.[25]

In addition to treaty-based human rights bodies, the United States is also subject to oversight by various UN "special procedure" mechanisms. Between 2010 and 2016, the U.S. hosted eleven separate visits by UN working groups and special rapporteurs. These include: a January 2010 visit from the Working Group of experts on people of African descent;[26] an October 2010 visit from the Special Rapporteur on the sale of children, child prostitution and child pornography;[27] a visit in January and February 2011 from the Special Rapporteur on violence against women, its causes and consequences;[28] a visit in February and March 2011 from the Special Rapporteur on the human right to safe drinking water and sanitation;[29] a March-April 2012 visit from the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes;[30] an April-May 2012 visit from the Special Rapporteur on the rights of indigenous peoples;[31] an April-May 2013 visit from the Working Group on the issue of human rights and transnational corporations and other business enterprises;[32] a visit in November and December 2015 from the Working Group on the issue of discrimination against women in law and in practice;[33] a January 2016 visit from the Working Group of experts on people of African descent;[34] a July 2016 visit from the Special Rapporteur on the rights to freedom of peaceful assembly and of association; and a December 2016 visit from the Special Rapporteur on trafficking in persons, especially women and children.[35] Additionally, the Special Rapporteur on the right to privacy is scheduled to visit the United States in June 2017 and the Special Rapporteur on extreme poverty and human rights is scheduled to visit in December 2017.[36]

The UN Human Rights Council scrutinizes the United States' human rights record every four years under the Universal Periodic Review (UPR) procedure. Most recently, the UPR working group published a report on the United States in July 2015.[37] That report included 343 specific recommendations for measures that the United States could take to improve its human rights record. The United States submitted its response in September 2015.[38] The U.S. response expressed full or partial support for most of those recommendations. It identified eighty-three recommendations that the U.S. government did not support, thirty of which relate to abolition of the death penalty.

All of the human rights oversight mechanisms noted in the preceding paragraphs provide opportunities for civil society organizations in the United States to mobilize. Human rights NGOs take advantage of those opportunities by submitting reports to international human rights bodies that highlight areas where U.S. policies and practices fall short of international standards.[39] Moreover, as Professor Rebecca Ingber has explained, reporting to human rights treaty bodies provides a catalyst for the federal government to modify existing policies to narrow the gap between international norms and U.S. practices.[40] Similarly, visits of Special Rapporteurs and the Universal Periodic Review process also provide catalysts for federal, state and local governments

to review existing policies and practices with an eye toward making changes that will yield more positive evaluations from international monitors.

In addition to the various UN human rights mechansims, the United States is subject to the jurisdiction of the Inter-American Commission on Human Rights. The Commission is the only international human rights body authorized to receive petitions from individuals who claim to be victims of human rights violations committed by the United States. Published statistics indicate that the Commission received 112 petitions from the United States in 2016.[41] One such petition warrants special attention: a petition filed in 2008 by the American Civil Liberties Union on behalf of Khaled El-Masri. Professor Mayerfeld devotes several pages of his book to the El-Masri case. Mr. El-Masri is a German citizen who was detained at "a CIA black site in Afghanistan where he was subjected to four months of abuse."[42] Like other victims of the War on Terror, he was "completely shut out of the U.S. legal system."[43] Mayerfeld notes that El-Masri did obtain a remedy from the European Court of Human Rights; he cites this fact to illustrate the benefits of supranational judicial review.[44] However, Mayerfeld does not mention the El-Masri case against the United States in the Inter-American Commission. In April 2016, the Commission declared El-Masri's petition admissible.[45] Having declared the case admissible, the Commission will likely determine that the United States violated El-Masri's human rights. In contrast to the European Court of Human Rights, the Commission lacks the authority to issue legally binding judgments. Moroever, the long delay since El-Masri filed his petition in 2008 was undoubtedly frustrating for him. Even so, a decision from the Commission may provide greater moral satisfaction for El-Masri than the prior decision from the European Court, because the Court held only that *Macedonia* violated his rights, whereas the Commission will likely hold that the *United States* violated his human rights.

Professor Mayerfeld devotes more than ten pages of his book to a discussion of the European anti-torture regime.[46] He highlights the role of the Committee for the Prevention of Torture, which has "the power to inspect any detention center of its choosing."[47] He notes that the United States, unlike the Europeans, has refused to accept "an international inspection regime to monitor compliance with the international prohibition of torture."[48] I agree with Professor Mayerfeld's suggestion that it would be a positive step for the United States to accept such international inspections. In theory, the United States could do so by ratifying the Optional Protocol to the Torture Convention.[49] However, under the U.S. Constitution, ratification of the Optional Protocol would require a two-thirds majority vote in the Senate.[50] Given the Obama Administration's inability to persuade the required Senate majority to approve the Disability Convention,[51] a far less controversial human rights treaty, U.S. ratification of the Optional Protocol will probably not be politically feasible for the foreseeable future.

Professor Mayerfeld also argues that the United States compares unfavorably to Europe because European states have "established judicial oversight of [their] international human rights commitments at both the international and domestic levels."[52] The key phrase here is "judicial oversight." In contrast to the various weak forms of oversight that apply to the United States, the European Court of Human Rights has the power to issue legally binding judgments. In theory, the

United States could subject itself to a similar regime of supranational judicial review by ratifying the American Convention on Human Rights and accepting the jurisdiction of the Inter-American Court of Human Rights.[53] However, ratification of the American Convention would require a two-thirds majority vote in the Senate. From a political standpoint, securing a two-thirds majority to accept the jurisdiction of the Inter-American Court is even less realistic than obtaining the requisite Senate majority to accept international inspections under the Optional Protocol to the Torture Convention. Moreover, although supranational judicial review by the Inter-American Court could potentially offer significant human rights benefits, it also presents real risks. When the United States government is forced to defend itself in litigation, it tends to adopt the least restrictive possible interpretation of its human rights obligations. In contrast, the U.S. government has been willing to accept more restrictive interpretations of those obligations when it interacts with the various weak international oversight mechanisms summarized above.[54] Therefore, in the long run, weak international oversight may produce better human rights outcomes than supranational judicial review.

II.
Popular Sovereignty and the Self-Exemption Policy

Chapters 4 and 5 of The Promise of Human Rights present a detailed analysis of the United States' "self-exemption policy." Mayerfeld argues, quite correctly, that the United States made a deliberate policy decision "to loosen the constraints of international human rights law on its own laws and policies."[55] He sometimes uses the term "American exceptionalism" to characterize this policy decision, but I will refer to it as the "self-exemption policy" (a term that Mayerfeld also uses). He describes several different mechanisms that the United States has utilized to implement its self-exemption policy.[56] For present purposes, the key mechanisms are the refusal to ratify most human rights treaties and the decision to adopt a set of RUDs that constrain the domestic effects of the human rights treaties we have ratified. Chapters 4 and 5 analyze the relationship between the self-exemption policy and the Bush administration's legal justification for using torture as an instrument of policy in the war on terror.[57] Specifically, he contends, "U.S. marginalization of international human rights law is far from being the sole cause of the torture policy, but it is a significant contributing factor."[58] In this respect, Mayerfeld's analysis is wholly persuasive.

Chapter 6 of The Promise of Human Rights defends the democratic legitimacy of international human rights law.[59] Here, Mayerfeld distinguishes between "constitutional democracy" and "political constitutionalism." He describes constitutional democracy as a system "in which popular government is limited by human rights" and "[t]he constitutionalization of human rights . . . [is] backed by judicial review."[60] In contrast, he describes political constitutionalism as a system in which disagreements "about the meaning of human rights . . . [are] settled by the people, through the procedures that define popular government."[61] Mayerfeld recognizes that popular sovereignty and human rights are both important values. He favors constitutional democracy because constitutional democracy privileges human rights over popular sovereignty, whereas political constitutionalism privileges popular sovereignty over human rights.

In his words, "political constitutionalism endangers human rights" because it eliminates "judicial oversight of human rights obligations enshrined in constitutional and international law."[62]

Part II challenges Mayerfeld's account on both descriptive and normative grounds. Descriptively, Mayerfeld's argument tacitly assumes that the self-exemption policy has contributed to a system of political constitutionalism in the United States. In contrast, Part II shows that, despite the self-exemption policy, the U.S. legal system is much closer to what Mayerfeld calls "constitutional democracy" than to what he calls "political constitutionalism." Normatively, Mayerfeld defends constitutional democracy on the grounds that robust judicial review is necessary to protect human rights. In my view, though, his account gives insufficient weight to the value of popular sovereignty. Part II explains how a partial reversal of the self-exemption policy could help create a system that combines the virtues of popular sovereignty with robust judicial protection of human rights.

A. The Current U.S. System of Constitutional Democracy

The key feature that distinguishes the U.S. legal system from Mayerfeld's vision of constitutional democracy is that U.S. courts routinely exercise judicial oversight of human rights obligations enshrined in constitutional law, but they rarely exercise judicial review based on international human rights norms that are not codified in federal constitutional or statutory law.[63] Here, it bears emphasis that *many, many* international human rights norms are enshrined in U.S. constitutional law. Consider three examples. Article 9 of the Universal Declaration of Human Rights stipulates that "no one shall be subjected to arbitrary arrest." Similarly, the Fourth Amendment prohibits "unreasonable searches and seizures." Article 10 of the Universal Declaration provides that "everyone is entitled . . . to a fair and public hearing by an independent and impartial tribunal." Similarly, the Sixth Amendment provides that all criminal defendants "shall enjoy the right to a speedy and public trial, by an impartial jury." Article 5 of the Universal Declaration states that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Similarly, the Eighth Amendment prohibits "cruel and unusual punishments."

The Fourth, Sixth, and Eighth Amendments are all included in the Bill of Rights. When the Bill of Rights was initially ratified in 1791 it constrained the federal government, but it did not bind the states. Indeed, as of 1948, when the United Nations adopted the Universal Declaration, most Bill of Rights provisions applied only to the federal government, not the states.[64] The U.S. Supreme Court did not apply the Fourth Amendment to the states until it decided *Wolf v. Colorado* in 1949.[65] The Court did not apply the Sixth Amendment jury trial right to the states until it decided *In re Oliver* (1948)[66] and *Klopfer v. North Carolina* (1967).[67] The Court did not apply the Eighth Amendment cruel and unusual punishments clause to the states until it decided *Robinson v. California* (1962).[68] Between 1948 and 1971, the Supreme Court decided thirteen cases in which it held explicitly that particular Bill of Rights provisions are binding on the states.[69] These cases are known as "incorporation cases" because the Court made those Bill of Rights provisions binding on the states by "incorporating" them into the Fourteenth Amendment Due Process Clause.

One little-known feature of the incorporation cases is that the Court effectively used those cases to incorporate international human rights norms into federal constitutional law. Of course, as a formal matter, every provision of the Bill of Rights has been part of U.S. constitutional law since 1791. However, most of the rights protected by the Bill of Rights were not conceived as "fundamental rights" until much later. Since the early twentieth century, the Court has said that the only Bill of Rights clauses that bind the states under the Fourteenth Amendment are those clauses that protect "fundamental rights."[70] As of 1948, most Bill of Rights provisions did not qualify as "fundamental," according to the Supreme Court, and therefore did not bind the states under the Fourteenth Amendment.[71] Moreover, as of 1948, most of the rights enumerated in the Universal Declaration did not qualify as fundamental under then-current Supreme Court jurisprudence.

However, between 1948 and 1971 the Court dramatically expanded the class of rights that qualify as "fundamental." In the process, the Court expressly overruled several older decisions by holding that rights previously classified as "not fundamental" would thereafter be considered fundamental rights that bind the states under the Fourteenth Amendment.[72] By 1971, every clause in the Bill of Rights that protects a right enumerated in the Universal Declaration was binding on the states under the Fourteenth Amendment. In contrast, as of 1971, only five Bill of Rights provisions were not binding on the states under the Fourteenth Amendment; all five protect rights that are not enumerated in the Universal Declaration.[73] In sum, between 1948 and 1971, the Court expanded its concept of fundamental rights to encompass rights enumerated in the Universal Declaration, while excluding rights that are not so enumerated.[74] In the process, the Court incorporated virtually all of the civil and political rights codified in the Universal Declaration into a body of constitutional law that binds federal, state and local governments. I refer to the Court's approach as "silent incorporation" because the Court incorporated international human rights norms into federal constitutional law without explicitly citing international human rights instruments.

The incorporation cases are not the only cases in which the Court has utilized silent incorporation to incorporate international human rights norms into federal constitutional law. In *Brown v. Board of Education*[75]—one of the most important Supreme Court decisions of the twentieth century—the Court re-interpreted the Equal Protection Clause and overruled entrenched Supreme Court precedent to align its equal protection jurisprudence with the international norm prohibiting racial discrimination. *Brown* differs from the incorporation cases in that the plaintiffs in *Brown*—and in its companion case *Bolling v. Sharpe*[76]—relied heavily on the human rights provisions of the UN Charter to support their argument for invalidating racial segregation in public schools.[77] Despite the plaintiffs' emphasis on the UN Charter, though, the Court's opinion did not explicitly cite the Charter. Instead, the Court chose to rely on the Fifth and Fourteenth Amendments to support its ruling that racial segregation in public schools is unlawful.

In the past two decades, the Supreme Court has sometimes applied the technique of "indirect application," rather than silent incorporation, to incorporate international human rights norms into federal constitutional and statutory law. In indirect application cases, the Court

expressly cites international human rights authorities to support its interpretation of the Constitution and/or federal statutes. For example, in *Lawrence v. Texas* the Court cited four decisions from the European Court of Human Rights to support its holding that state laws prohibiting private, consensual homosexual conduct violate the Fourteenth Amendment Due Process Clause.[78] In *Roper v. Simmons*, the Court cited four different international human rights treaties to support its conclusion that the Eighth Amendment bars capital punishment for juvenile offenders.[79] And in *Hamdan v. Rumsfeld*, the Court cited the Geneva Conventions to support its holding that proposed procedures for military commissions violated federal statutory rights codified in the Uniform Code of Military Justice.[80]

One could cite numerous other cases where U.S. courts have applied international human rights norms by means of silent incorporation or indirect application. However, the examples discussed in the preceding paragraphs illustrate the central point. The United States currently has a system of "constitutional democracy," which Mayerfeld describes as a system "in which popular government is limited by human rights" and "[t]he constitutionalization of human rights . . . [is] backed by judicial review."[81] The key difference between the current U.S. system and Mayerfeld's ideal is that U.S. courts do not apply international human rights treaties directly as rules of decision. Instead, they apply international human rights norms through silent incorporation and indirect application. Even without direct application of treaties, though, the courts protect human rights and constrain majoritarian democracy by engaging in judicial review.

B. Self-Exemption, Direct Application and Democratic Legitimacy

Direct application occurs when a court applies a treaty directly as a rule of decision, instead of applying international law indirectly as a guide to constitutional or statutory interpretation. In many of the cases cited in the previous section, the Court could have reached substantially similar results through direct application of treaties. For example, the Court could have directly applied Articles 55 and 56 of the UN Charter in *Brown* to support its holding that state laws requiring racial segregation in public schools violate federal law.[82] Similarly, the Court could have directly applied Article 17 of the ICCPR in *Lawrence* to support its holding that state laws prohibiting private, consensual homosexual conduct violate federal law.[83]

During the nineteenth and early twentieth centuries, U.S. courts often applied treaties directly to resolve disputes about protection of individual rights.[84] The modern trend of applying international human rights norms through silent incorporation and indirect application—instead of direct application—is a consequence of the self-exemption policy. The self-exemption policy has its origins in debates about the Bricker Amendment in the early 1950s.[85] The proposed Bricker Amendment was a response to judicial decisions in which courts applied the UN Charter's human rights provisions directly to invalidate discriminatory state laws—in particular, the California Court of Appeals' decision in *Fujii v. California*.[86] The *Fujii* decision was emotionally jarring for many Americans because the court held that a California law that discriminated against Japanese nationals *did violate* the UN Charter's human rights provisions but *did not violate* the Fourteenth Amendment. Most Americans, then and now, were not psychologically prepared to accept the idea

that international law provides more robust protection for fundamental human rights than does our own Constitution. As one influential commentator noted at the time: "It would seem, indeed, a reproach to our constitutional system to confess that the values it establishes fall below any requirement of the Charter. One should think very seriously before admitting such a deficiency."[87]

Since the 1950s, American pride in the (presumed) superiority of the US Constitution has prevented most Americans from acknowledging that human rights protections under the Constitution sometimes fall short of international standards. A central goal of the Bricker Amendment was to ensure that no U.S. court would ever again challenge the American faith in the normative superiority of our Constitution by holding that a state law that is lawful under the Fourteenth Amendment violates U.S. treaty obligations under an international human rights treaty. Although the Bricker Amendment never passed, the United States adopted two related strategies to accomplish that goal. First, we have consistently adhered to the self-exemption policy. Under that policy, the United States has refused to ratify most human rights treaties and it has adopted RUDs that severely restrict direct application of the treaties it does ratify. Second, through a combination of silent incorporation and indirect application, the Supreme Court has substantially expanded the human rights protections available under the Fourteenth Amendment and related constitutional provisions to help align federal constitutional law with international human rights norms.[88]

Ironically, the combination of the self-exemption policy (which restricts direct application of human rights treaties) with silent incorporation and indirect application has exacerbated the tension between popular sovereignty and judicial enforcement of human rights norms in the United States.[89] To clarify this point, it is helpful to draw upon Professor Jack Balkin's analysis of democratic legitimacy. Balkin identifies three distinct kinds of legitimacy: moral legitimacy, procedural legitimacy and sociological legitimacy.[90] A legal system "is morally legitimate to the extent that the system is just or morally admirable."[91] A legal system is procedurally legitimate "to the extent that people clothed with state power . . . make decisions according to official legal rules and procedures." It is "sociologically legitimate to the extent that people accept the system as having the right and the authority to rule them."[92] Mayerfeld's defense of the democratic legitimacy of international human rights law focuses primarily on moral legitimacy.[93] He gives short shrift to considerations of procedural and sociological legitimacy. Consequently, in my view, Mayerfeld gives insufficient weight to the value of popular sovereignty.

Our current system—in which courts engage in "stealth" application of human rights norms through silent incorporation and indirect application—lacks procedural legitimacy because unelected judges effectively exercise legislative power whenever they re-interpret constitutional provisions to align federal constitutional jurisprudence with international human rights norms. In contrast, Congress could guarantee the procedural legitimacy of judicial decisions applying international human rights law by enacting federal legislation to authorize direct judicial application of human rights treaties. I have proposed this type of legislation previously.[94] Such legislation would partially reverse the self-exemption policy because it would ensure that the non-self-executing declarations attached to human rights treaties do not bar direct judicial application

of those treaties. Moreover, this type of legislation would alleviate the tension between popular sovereignty and the judicial enforcement of international human rights norms by granting procedural legitimacy to such judicial enforcement.

Any proposal for federal legislation along these lines invites at least two potential objections. First, one might argue that such legislation would lack sociological legitimacy because the American people do not accept the legitimacy of international human rights law. Given current popular attitudes about international human rights, this objection has merit. However, American attitudes about international human rights law are changing, as evidenced by the degree to which the United States government has been willing to cooperate with the various weak international oversight mechanisms discussed in Part One of this essay.[95] Moreover, federal legislation to authorize direct application of human rights treaties would require a majority vote in both Houses of Congress. Inasmuch as Senators and Congressmen are elected to represent their constituents, a majority vote in both Houses of Congress would itself be compelling evidence that international human rights law has finally achieved sociological legitimacy in the United States.

Others may object that it is politically unrealistic to think that Congress would enact legislation to authorize direct judicial application of human rights treaties. I have two responses to this objection. First, it is easier to secure a simple majority in both Houses of Congress than it is to secure a two-thirds majority in the Senate. Hence, human rights advocates are more likely to make progress on human rights through bicameral legislation than through treaty ratification. Second, if human rights advocates cannot shift the terms of political debate to the point where it becomes politically feasible for Congress to enact the type of legislation I am suggesting, then judicial application of international human rights law in U.S. courts will continue to lack procedural and sociological legitimacy.

[1] Jamie Mayerfeld, The Promise of Human Rights: Constitutional Government, Democratic Legitimacy, and International Law (Penn 2016).
[2] *Id.*, at 1.
[3] *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 608, 616 (2005) (Scalia, J., dissenting) (criticizing the majority for "proclaim[ing] itself sole arbiter of our Nation's moral standards," and emphasizing that "in a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people").
[4] Mayerfeld, *supra* note 1, at 61.
[5] *Id.*
[6] *Id.*, at 187.
[7] *See, e.g.*, Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. Rev. 1971 (2004).
[8] Mayerfeld, *supra* note 1, at 17.
[9] *See id.*, at 67-68.
[10] *Id.* at 69.
[11] Universal Declaration of Human Rights, Preamble.
[12] *See* Mayerfeld, *supra* note 1, Chs. 4 and 5.
[13] *See id.*, at 148-51.
[14] For my own critique of the self-exemption policy, see David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 Yale J. Int'l L. 129 (1999).
[15] *See* David L. Sloss and Michael P. Van Alstine, *International Law in Domestic Courts*, pp. 104-05, in Handbook on the Politics of International Law (Wayne Sandholtz and Christopher Whytock, eds. 2017) (discussing silent incorporation); David Sloss, *Using International Law to Enhance Democracy*, 47 Va. J. Int'l L. 1, 8-15 (2006) (discussing indirect application).
[16] Mayerfeld, *supra* note 1, at 17.
[17] *Id.*, at 65.
[18] *Id.*, at 69.
[19] *Id.*, at 217.
[20] *See* Laurence R. Helfer and Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 Yale L. J. 273 (1997).
[21] *See* Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 18, 2002, A/RES/57/199 (entered into force June 22, 2006).
[22] *See* Mayerfeld, *supra* note 1, at 82-105. Mayerfeld also emphasizes a third type of strong oversight: the International Criminal Court. The ICC differs from both international inspection and supranational adjudication in that the ICC focuses on individual accountability, whereas the other two mechanisms address state accountability. I focus here on state accountability.
[23] Human Rights Committee, Concluding Observations on the Fourth Periodic Report of the United States of America, CCPR/C/USA/CO/4.
[24] Committee on the Elimination of Racial Discrimination, Concluding Observations on the combined seventh to ninth Periodic Reports of the United States of America, CERD/C/USA/CO/7-9.
[25] Committee Against Torture, Concluding Observations on the combined third to fifth Periodic Reports of the United States of America, CAT/C/USA/CO/3-5.
[26] *See* UN General Assembly, A/HRC/15/18 (Aug. 2010).
[27] *See* UN General Assembly, A/HRC/16/57/Add.5 (Feb. 2011).
[28] *See* UN General Assembly, A/HRC/17/26/Add.5 (June 2011).
[29] *See* UN General Assembly, A/HRC/18/33/Add.4 (Aug. 2011).
[30] *See* UN General Assembly, A/HRC/21/48/Add.1 (Sept. 2012).
[31] *See* UN General Assembly, A/HRC/21/47/Add.1 (Aug. 2012).

[32] *See* UN General Assembly, A/HRC/26/25/Add.4 (May 2014).
[33] *See* UN General Assembly, A/HRC/32/44/Add.2 (Aug. 2016).
[34] *See* UN General Assembly, A/HRC/33/61/Add.2 (Aug. 2016).
[35] As of this writing, the reports for the two most recent visits have not yet been published.
[36] *See* http://spinternet.ohchr.org/_Layouts/SpecialProceduresInternet/Forthcomingcountryvisits.aspx (visited May 9, 2017).
[37] Report of the Working Group on the Universal Periodic Review, United States of America, A/HRC/30/12 (July 2015).
[38] Addendum of the United States of America to the report of the Working Group on its Universal Periodic Review, A/HRC/30/12/Add.1 (Sept. 2015).
[39] *See, e.g.*, New Call from National and International Rights Groups on the Need to Ensure Accountability for the U.S. CIA Torture Program, A/HRC/29/NGO 11 (submitted to the Human Rights Council in June 2015 as part of the Universal Periodic Review procedure).
[40] *See* Rebecca Ingber, *Interpretation Catalysts and Executive Branch Legal Decisionmaking*, 38 Yale J. Int'l L. 359 (2013).
[41] *See* http://www.oas.org/en/iachr/multimedia/statistics/statistics.html (visited May 9, 2017).
[42] *See* Mayerfeld, *supra* note 1, at 102.
[43] *Id.*, at 168.
[44] *See id.*, at 102, 182-83.
[45] Inter-American Commission on Human Rights, Report No. 21/16, Petition 419-08, Report on Admissibility, available at http://www.oas.org/en/iachr/decisions/admissibilities.asp (visited May 18, 2017).
[46] Mayerfeld, *supra* note 1, at 93-105.
[47] *Id.*, at 98.
[48] *Id.*, at 181.
[49] *See* Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 18, 2002, A/RES/57/199 (entered into force June 22, 2006).
[50] U.S. Const. art. II, sec. 2. In recent years, roughly ninety percent of the international agreements concluded by the United States have been handled domestically as "executive agreements," not "treaties." *See* Congressional Research Service, Treaties and Other International Agreements: The Role of the United States Senate, S. Prt. 106-71, pp. 38-41 (Jan. 2001), available at http://www.au.af.mil/au/awc/awcgate/congress/treaties_senate_role.pdf (visited May 18, 2017). Unlike treaties, executive agreements do not require a two-thirds Senate vote. Constitutional custom determines which international agreements are treaties and which ones are approved as executive agreements. In accordance with constitutional custom, all human rights treaties require a two-thirds Senate majority.
[51] In December 2012, the Senate voted 61-38 in favor of ratifying the UN Convention on the Rights of Persons with Disabilities, five votes short of the required two-thirds majority. *See* "Senate Rejects United Nations treaty for disabled rights," available at http://thehill.com/policy/international/270831-senate-rejects-un-treaty-for-disabled-rights-in-vote (visited May 19, 2017).
[52] Mayerfeld, *supra* note 1, at 181.
[53] American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978). States parties to the Convention who choose to accept the jurisdiction of the Inter-American Court may do so by issuing an appropriate declaration in accordance with Article 62 of the Convention.
[54] *See* Ingber, *supra* note 40, at 377-97.
[55] Mayerfeld, *supra* note 1, at 113
[56] *See id.*, at 147-180.
[57] *See especially* pp. 120-46.
[58] *Id.*, at 115.
[59] *See id.*, at 186-216.
[60] *Id.*, at 187, 188.

[61] *Id.*, at 188.
[62] *Id.*, at 189.
[63] Some international human rights norms have been incorporated at the state level, not the federal level. For example, Article 25 of the Universal Declaration of Human Rights stipulates that "[e]veryone has the right" to adequate housing. In the 1960s and 1970s, state courts and state legislatures in the United States implemented this international human rights norm by codifying the "implied warranty of habitability" as a part of landlord-tenant law. *See* David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 Cal. L. Rev. 389 (2011).
[64] *See generally* David Sloss, *Incorporation, Federalism, and International Human Rights*, *in* HUMAN RIGHTS AND LEGAL JUDGMENTS: THE AMERICAN STORY (Austin Sarat, ed. 2017).
[65] 338 U.S. 25 (1949).
[66] 333 U.S. 257 (1948).
[67] 386 U.S. 213 (1967). *Oliver* involved the right to a public trial; *Klopfer* involved the right to a speedy trial. Between 1963 and 1968, the Court decided four other cases in which it held that other aspects of the Sixth Amendment bind the states. *See* Sloss, *Incorporation, supra* note 64, at xxx. The Court had previously decided that the Sixth Amendment right to counsel was binding on the states. Powell v. Alabama, 287 U.S. 45 (1932).
[68] 370 U.S. 660 (1962).
[69] *See* Sloss, *Incorporation, supra* note 64, at xxx.
[70] *See, e.g.*, Palko v. Connecticut, 302 U.S. 319, 325-26 (1937) (stating that the Fourteenth Amendment Due Process Clause protects against state infringement only those fundamental rights that are "implicit in the concept of ordered liberty" because "neither liberty nor justice would exist if they were sacrificed") (citing Twining v. New Jersey, 211 U.S. 78 (1908)).
[71] I provide detailed support for the claims made in this and the next paragraph in Sloss, *Incorporation, supra* note 64.
[72] *See, e.g.*, Benton v. Maryland, 395 U.S. 784 (1969) (overruling Palko v. Connecticut, 302 U.S. 319 (1937)); Pointer v. Texas, 380 U.S. 400 (1965) (overruling West v. Louisiana, 194 U.S. 258 (1904)); Gideon v. Wainwright, 372 U.S. 335 (1963) (overruling Betts v. Brady, 316 U.S. 455 (1942)).
[73] Those five are the Second Amendment right to bear arms, the Third Amendment prohibition on quartering of soldiers, the Fifth Amendment grand jury clause, the Seventh Amendment right to a jury trial in civil cases, and the Eighth Amendment excessive fines clause. *See* Sloss, *Incorporation, supra* note 64, at xxx.
[74] During this period, the Court decided only two cases in which it incorporated rights that are not codified in international human rights instruments. *See* Duncan v. Louisiana, 391 U.S. 145 (1968) (making the Sixth Amendment right to a jury trial in criminal cases binding on the states), and Mapp v. Ohio, 367 U.S. 643 (1961) (making the Fourth Amendment exclusionary rule binding on the states).
[75] 347 U.S. 483 (1954).
[76] 347 U.S. 497 (1954).
[77] *See* David L. Sloss, The Death of Treaty Supremacy: An Invisible Constitutional Change 240-48 (2016); David Sloss, *How International Human Rights Transformed the US Constitution*, 38 Human Rights Quarterly 426, 440-48 (2016).
[78] 539 U.S. 558, 573-77 (2003).
[79] 543 U.S. 551, 576 (2005) (citing the Convention on the Rights of the Child, the ICCPR, the American Convention on Human Rights, and the African Charter on the Rights and Welfare of the Child).
[80] 548 U.S. 557, 613-35 (2006).
[81] Mayerfeld, *supra* note 1, at 187, 188.
[82] *See* Sloss, Treaty Supremacy, *supra* note 77, at 240-48.
[83] *See* Sloss, *Using International Law to Enhance Democracy, supra* note 15, at 17-20.
[84] *See* David Sloss, *Polymorphous Public Law Litigation: The Forgotten History of Nineteenth Century Public Law Litigation*, 71 Wash. & Lee L. Rev. 1757 (2014).
[85] *See* Sloss, Treaty Supremacy, *supra* note 77, at 201-56.
[86] Fujii v. California, 217 P.2d 481 (Cal.App.2nd 1950).

[87] Charles Fairman, *Finis to Fujii*, 46 Am. J. Int'l L. 682, 689 (1952).
[88] Congress also helped expand the scope of human rights protections available in the United States by enacting civil rights legislation. Professor Bruce Ackerman has argued persuasively that we should view the major civil rights statutes enacted in the 1960s as part of our contemporary "constitutional canon." *See* Bruce Ackerman, The Civil Rights Revolution (We The People: Vol. 3) (2014).
[89] I elaborate this argument in greater detail in Sloss, *Using International Law to Enhance Democracy, supra* note 15.
[90] *See* Jack M. Balkin, Living Originalism 64-69 (2011).
[91] *Id.*, at 64.
[92] *Id.*
[93] *See* Mayerfeld, *supra* note 1, at 197-216.
[94] *See* David Sloss, *Legislating Human Rights: The Case for Federal Legislation to Facilitate Domestic Judicial Application of International Human Rights Treaties*, 35 Fordham Int'l L.J. 445 (2012).
[95] *See supra* notes 23-45 and accompanying text.