University of Chicago Law School

Chicago Unbound

Journal Articles

Faculty Scholarship

2007

Not Just Doctrine: The True Motivation for Federal Incorporation and International Human Rights Litigation

Daniel Abebe

Follow this and additional works at: https://chicagounbound.uchicago.edu/journal_articles

Part of the [Law Commons](#)

Recommended Citation

Daniel Abebe, "Not Just Doctrine: The True Motivation for Federal Incorporation and International Human Rights Litigation," 29 Michigan Journal of International Law 1 (2007).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

NOT JUST DOCTRINE: THE TRUE MOTIVATION FOR FEDERAL INCORPORATION AND INTERNATIONAL HUMAN RIGHTS LITIGATION

Daniel Abebe*

*The legal status of international human rights litigation under the Alien Tort Statute (ATS) has been the subject of much debate, culminating in the Supreme Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). The debate has been almost exclusively doctrinal and has focused on the Judiciary Act of 1789, the historical treatment of the law of nations as general or federal common law, the evolution of the Supreme Court's international law jurisprudence, and the integration of customary international law (CIL) into the domestic legal system.*

This Article argues that the focus on doctrine masks underlying international relations theory assumptions that are the true motivations of the federal incorporation of CIL and international human rights litigation under the ATS. One cannot evaluate the desirability of the federal incorporation of CIL and international human rights litigation in U.S. courts without having a theory of the operation of the international system, the motivation for state behavior in international politics, and the efficacy of international law as a coercive instrument. Proponents of the federal incorporation of CIL and international human rights litigation implicitly rely on social constructivism, democratic peace theory, and institutionalism—international relations theories that motivate a universalist theory of international law.

The universalist theory holds that international law has an independent, exogenous affect on state behavior. Since States obey international law out of legal obligation, universalists tend to encourage the greater integration of CIL into domestic legal regimes and the use of CIL to improve human rights practices

* Bigelow Fellow and Lecturer in Law, University of Chicago Law School. I would like to thank Shyam Balganesh, Douglas Baird, Josh Bowers, Robin Effron, David Fagundes, Tom Ginsburg, Todd Henderson, Irina Manta, Jonathan Masur, Jonathan Mitchell, Nuno Monteiro, Ariel Porat, Eric Posner, Jamelle Sharpe, Paul Stephan, Lior Strahilevitz, and the participants of the University of Chicago Law School Work-in-Progress Workshop for comments and suggestions. I would also like to thank the law faculties at Miami, Drexel, Arizona, Illinois, Washington University of St. Louis, Virginia, University of Pennsylvania, and the University of Chicago for the opportunity to present this Article. Finally, I thank Teshome Abebe, Assege Hailemariam, and Rupal Patel for support and encouragement.

around the world. Therefore, the desirability and efficacy of the federal incorporation of CIL and international human rights litigation under the ATS depends on the explanatory power of specific international relations theories and the strength of the universalist theory as the appropriate conception of international law.

This Article directly engages the universalist theory of international law and the underlying international relations assumptions upon which proponents of federal incorporation and international human rights litigation under the ATS rely. The Article examines a competing international relations theory and alternative conception of international law that views compliance as a function of state interests rather than of legal obligation. Working from this perspective, the Article provides a framework to evaluate the desirability of the federal incorporation of CIL and international human rights litigation in U.S. courts.

The Article concludes that international human rights litigation under the current legal regime would likely complicate the achievement of the United States' normative and strategic foreign policy goals. Given the executive's institutional competencies, constitutional prerogatives and resource advantages, it is the branch best-placed to determine whether international human rights litigation will assist or hinder the United States' foreign policy objectives. Therefore, the Article suggests that a modest shift along the continuum of existing judicial deference to the executive branch—perhaps in the form of judicial review of executive determinations on specific litigation under an arbitrary and capricious abuse of discretion or reasonableness standard—is warranted for international human rights litigation under the ATS.

INTRODUCTION	3
I. STATE OF THE DOCTRINE: FEDERAL INCORPORATION AND INTERNATIONAL HUMAN RIGHTS LITIGATION.....	6
A. <i>The Modern Position</i>	7
B. <i>The Revisionists</i>	8
C. <i>The Effect of Sosa on the Incorporation Debate</i>	9
II. INTERNATIONAL RELATIONS THEORY AND THE UNIVERSALIST CONCEPTION OF INTERNATIONAL LAW	11

A. <i>Social Constructivism</i>	11
B. <i>Democratic Peace Theory</i>	12
C. <i>Institutionalism</i>	13
D. <i>The Universalist Theory of International Law</i>	14
III. A NEW FRAMEWORK TO EVALUATE FEDERAL INCORPORATION AND INTERNATIONAL HUMAN RIGHTS LITIGATION.....	16
A. <i>Realism</i>	16
B. <i>International Law and State Interests</i>	17
C. <i>The Wisdom of Federal Incorporation and International Human Rights Litigation</i>	19
1. Sovereignty	19
2. Power in International Politics.....	20
3. Methodology and Content of Customary International Law	22
4. Trends in International Politics.....	27
5. Complementarity with American Foreign Policy	28
IV. NATIONALISM AND INTERNATIONAL HUMAN RIGHTS LITIGATION	35
A. <i>Nationalism</i>	36
B. <i>Nationalism and China</i>	37
V. OBJECTIONS AND COUNTERARGUMENTS.....	39
A. <i>Conception of International Politics</i>	39
1. Wrong IR Theory?	39
2. The Universalist Theory Reflected in American Foreign Policy?	41
B. <i>International Human Rights Litigation and Foreign Policy</i>	44
1. Is the Existing Regime Sufficient?.....	44
2. Litigation Encourages Positive Human Rights Practices?.....	45
CONCLUSION	47

INTRODUCTION

The logic of federal incorporation of customary international law (CIL) and international human rights litigation in United States courts under the Alien Tort Statute (ATS) implicitly relies on a universalist theory of international law. According to this view, international law has an exogenous effect on state behavior. States do not comply with international law out of pure self-interest; rather, States comply with international law out of legal or moral obligation. Based on this assumption, universalists naturally promote the development of a global judicial system, the greater integration of international law into domestic legal

regimes, and the use of international law to improve human rights practices around the world. The federal incorporation of CIL and international human rights litigation in U.S. courts are extensions of the universalist project.

This Article challenges the universalist theory of international law upon which federal incorporation of CIL and international human rights litigation rely. It unpacks the international relations (IR) theory paradigms that support the universalist theory, and discusses a competing theory that views state compliance with international law as a function of national self-interest. Working from this perspective, it proposes a framework to evaluate the wisdom of federal incorporation of CIL and the wisdom of international human rights litigation. The framework suggests that federal incorporation of CIL generates sovereignty costs for the United States, and that international human rights litigation complicates the achievement of the United States' normative and strategic foreign policy interests. The Article also shows that the universalist theory of international law is often in tension with actual state behavior in international politics.

The universalist theory draws from IR theories that focus on the role of regime type, institutions, and social norms in understanding international politics. Democratic peace theory, institutionalism, and social constructivism each implicitly assume that international law has the capacity to affect state behavior. According to these IR theories, international law can encourage respect for legal norms, limit the return to material power in international politics, and operate as an instrument of progressive change. The wisdom of federal incorporation of CIL and international human rights litigation depends on the explanatory power of IR theories and the strength of the universalist theory as the appropriate conception of international law.

Despite the clear attraction of these normative goals, the universalist theory relies on IR theories that often fail to recognize some of the constraints under which the United States operates in international politics. For example, although democratic peace theory and social constructivism may explain some state behavior in international politics, the United States also pursues its foreign policy goals in an international system constituted by States sensitive to the distribution of material power, concerned with issues of national security, suspicious of international law, and often motivated by national self-interest. In other words, realism also explains some state behavior in international politics. This reality naturally produces a tension between the assumptions motivating the universalist theory and the actual behavior of States. By viewing federal incorporation of CIL and international human rights litigation in U.S.

courts solely through a universalist lens, one misses their potential costs for the United States.

Examining federal incorporation of CIL and international human rights litigation from a non-universalist perspective contributes to the discussion about the proper role of international law in the American legal system. The United States' relationship with international law is largely based on national self-interest, evolving with the United States' relative position and strategic goals in international politics. Working from a non-universalist perspective, this Article connects a plausible IR theory of state behavior in international politics with a theory of state compliance with international law to evaluate the consequences of federal incorporation of CIL and international human rights litigation under the ATS.¹

Perhaps most important, this approach engages the first principles that motivate arguments in support of federal incorporation of CIL and continued international human rights litigation in U.S. courts. One's view of the appropriate treatment of CIL within the American legal system is linked to IR assumptions about the operation of the international system, the role of international law in international politics, and the efficacy of international law as a coercive instrument. From a universalist perspective, these assumptions militate in favor of the greater integration of CIL, continued international human rights litigation under the ATS, and a preference for the judiciary over the executive in determining the optimal relationship between international law and the American legal system. These assumptions, however, are often unchallenged in international law scholarship. This Article directly engages the implicit IR assumptions that underlie the doctrinal debate.

Finally, this argument does not constitute a rejection of the broader universalist project to fight human rights violations around the world. The improvement of the human condition is of the highest importance. Understanding the operation of the international system and the nature of state compliance with international law will only help in creating the proper institutional arrangements to increase respect for international law in the world community.

1. Curtis Bradley addresses the potential for increased friction with American foreign policy as one of the costs of expanded international human rights litigation. See Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457 (2001). However, Bradley does not directly engage the underlying assumptions about state behavior and international law that provide the theoretical foundation for federal incorporation of CIL and international human rights litigation under the ATS. Phillip Trimble focuses on the rise of international institutions and increasing globalization to evaluate effects on American democracy. See Phillip R. Trimble, *Globalization, International Institutions, and the Erosion of National Sovereignty and Democracy*, 95 MICH. L. REV. 1944 (1997).

The argument proceeds in five parts. Part I very briefly outlines the doctrinal discussion regarding the federal incorporation of CIL and international human rights litigation in U.S. courts. Part II explores the IR theories that motivate the universalist theory, and connects them to arguments supporting federal incorporation of CIL and international human rights litigation under the ATS. Part III develops the argument by (1) providing a competing theory of state compliance with international law based on national self-interest, and (2) presenting a framework to evaluate the potential consequences of federal incorporation of CIL and international human rights litigation. Part IV discusses the possibility of international human rights litigation producing a nationalist backlash in targeted States. Part V addresses counter-arguments. I conclude with a brief discussion of my argument's implications for the allocation of decisionmaking authority among the branches of government.

I. STATE OF THE DOCTRINE: FEDERAL INCORPORATION AND INTERNATIONAL HUMAN RIGHTS LITIGATION

The appropriate treatment of CIL in the American legal system and the legitimacy of international human rights litigation through the Alien Tort Statute (ATS) have produced a voluminous literature.² By way of background, the ATS states that: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."³ CIL is the contemporary equivalent of the law of nations and includes international human rights law. If CIL possesses domestic legal status as federal common law through the ATS, an alien would have a cognizable claim in a U.S. court for a tort committed in violation of international human rights law.

2. For an overview of the debate before the Supreme Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), see, e.g., JORDAN J. PAUST, *INTERNATIONAL LAW AS LAW OF THE UNITED STATES* (2d ed. 2003); Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463 (1997); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393 (1997); Ernest A. Young, *Sorting out the Debate over Customary International Law*, 42 VA. J. INT'L L. 365 (2002). For an earlier statement of the "modern position," see Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295 (1994); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853 (1987); Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984).

3. 28 U.S.C. § 1350 (2000).

Debate on the propriety of federal incorporation of CIL and international human rights litigation can be divided into two camps: adherents to the modern position and revisionist scholars. Though this bifurcation does not capture alternative positions that purport to find a middle ground between the two perspectives,⁴ it helps frame the dominant themes in the debate.

A. The Modern Position

Proponents of the modern position argue that CIL has domestic legal status as self-executing federal common law and provides a basis for international human rights litigation in U.S. courts. "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending on it are duly presented for their determination."⁵ Drawing from this statement in the Supreme Court's decision in *The Paquete Habana*, CIL is properly incorporated as U.S. law and interpreted by the judiciary.

As "part of our law," all CIL has domestic status as federal common law. The shift from the *Swift*⁶ to *Erie*⁷ regimes—requiring federal common law to have a basis in the Constitution or Congressional action—does not apply to CIL. Application of *Erie* to CIL would create the possibility of multiple inconsistent interpretations of CIL by the states.⁸ "Any question of applying [CIL] in our courts involves the foreign relations of the United States and can thus be brought within a federal power . . . [and] would be as unsound as it would be unwise to make our state courts our ultimate authority for pronouncing the rules of international law."⁹ Therefore, CIL has domestic legal status as federal common law without federal political branch authorization.

Proponents of federal incorporation of CIL read the Supreme Court's examination of CIL in *Sabbatino*¹⁰ as further evidence of CIL's status of federal common law. In *Sabbatino*, "the Court construed customary international law to determine that international law neither compelled nor required application of the act of state doctrine,"¹¹ thus explicitly treating

4. See T. Alexander Aleinikoff, *International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate*, 98 AM. J. INT'L L. 91 (2004) (outlining an alternative perspective in the debate).

5. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

6. *Swift v. Tyson*, 41 U.S. 1 (1842).

7. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (holding that there is no federal general common law).

8. See Koh, *supra* note 2, at 1830–34.

9. Philip C. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT'L L. 740, 743 (1939).

10. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

11. Koh, *supra* note 2, at 1833 (emphasis added).

CIL as federal common law for purposes of constitutional interpretation. The federal incorporation of CIL is consistent with the federal prerogative in foreign affairs and maintains the supremacy and uniformity of federal common law.¹² For proponents of the modern position, the historical evolution of the “law of nations” doctrine,¹³ the Supreme Court’s international law jurisprudence in the *Paquete Habana* and *Sabbatino*; and the Second Circuit’s holding in *Filartiga v. Pena-Irala*¹⁴ demonstrate that CIL has been appropriately treated as self-executing federal common law.

B. The Revisionists

Revisionist scholars counter that CIL does not have federal common law status without *ex ante* federal political branch approval.¹⁵ They assert that the modern position reflects “a combination of troubling developments, including mistaken interpretations of history, doctrinal bootstrapping by the Restatement (Third) of Foreign Relations Law and academic fiat.”¹⁶

The law of nations was historically treated as non-federal or “general law” that U.S. courts applied “in the absence of any particular domestic authorization unless and until state or federal legislation specified otherwise.”¹⁷ However, after *Erie*, new federal common law must derive from either the U.S. Constitution or Congressional action through a federal statute.¹⁸ Since incorporation of CIL as federal common law has not been authorized by either method, both “the modern position’s envisioned application of CIL by the federal judiciary”¹⁹ and international human rights litigation, which relies “on the existence of an

12. *Id.* at 1826.

13. *See generally id.* at 1830–44.

14. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (holding that federal courts do not need *ex ante* Congressional authorization to enforce universally recognized and accepted CIL rights under the ATS).

15. *See* Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260 (1998) [hereinafter Bradley & Goldsmith, *Federal Courts*]; Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) [hereinafter Bradley & Goldsmith, *Customary International Law*].

16. Bradley & Goldsmith, *Customary International Law*, *supra* note 15, at 821. For earlier critiques of the modern position, see, e.g., Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665 (1986); A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT’L L. 1 (1995).

17. Curtis A. Bradley & Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 323 (1997) [hereinafter Bradley & Goldsmith, *Current Illegitimacy*].

18. *See id.* at 324.

19. *Id.* at 325.

independently-derived federal common law of international human rights law,”²⁰ are unconstitutional.

The revisionists also worry about the broader implications of the modern position. If CIL has domestic legal status as federal common law, it could presumably “preempt[] inconsistent state law pursuant to the Supremacy Clause . . . bind the President under the “Take Care” Clause of Article II of the Constitution . . . [and] supersede[] inconsistent federal legislation.”²¹ They conclude that the modern position conflicts with the Supreme Court’s federalism jurisprudence,²² traditions of American representative democracy, and the foreign affairs prerogatives of the legislative and executive branches of government.

C. *The Effect of Sosa on the Incorporation Debate*

The Supreme Court entered the federal incorporation debate in *Sosa v. Alvarez-Machain*.²³ In 1985, a Mexican drug cartel organized the kidnapping, torture and murder of an agent of the U.S. Drug Enforcement Agency. The DEA believed Dr. Alvarez-Machain provided the agent with medical treatment to prolong the torture.²⁴ A U.S. grand jury indicted Alvarez-Machain, but the Mexican government refused to transfer him to U.S. custody. The DEA then hired defendant Jose Francisco Sosa—a bounty hunter—to capture Alvarez-Machain and deliver him to U.S. officials. Sosa abducted Alvarez-Machain and he was eventually brought to trial.²⁵

After a federal district court granted Alvarez-Machain’s motion for acquittal, he successfully filed suit under the ATS alleging that his abduction constituted an arbitrary arrest and a violation of CIL. On appeal, the Ninth Circuit held that Alvarez-Machain’s arbitrary arrest constituted a violation of CIL and was grounds for a cause of action under the ATS.²⁶

The Supreme Court addressed the ATS’s meaning and scope and concluded that the ATS permitted U.S. courts to hear federal common law claims based on a small number of CIL violations under specified conditions.

Although the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical

20. *Id.* at 357.

21. *Id.* at 322–23.

22. For greater discussion of their federalism concerns, see Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617 (1997).

23. 542 U.S. 692 (2004).

24. *Id.* at 697.

25. *Id.* at 698.

26. *Id.* at 698–99.

materials is that the statute was intended to have practical effect the moment it became law. The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.²⁷

The Court concluded that the substantive evolution of CIL could lead to new causes of action under the ATS as long as they were sufficiently specific, universal, and obligatory CIL norms.²⁸ Alvarez-Machain's arbitrary arrest claim—a detention of one day—did not constitute a specific, universal, and obligatory CIL norm cognizable under the ATS.

Proponents of the modern position read *Sosa*'s authorization of federal common law claims based on CIL as confirmation that all CIL possesses domestic legal status as federal common law; that the ATS itself both creates federal causes of action for CIL violations and permits federal courts to develop new causes of action from evolving CIL norms; and that federal courts can consider myriad sources of law to determine the existence of specific, universal, and obligatory CIL norms.²⁹ For many scholars, *Sosa* stands for the triumph of the modern position over the revisionist critique.³⁰

Though this doctrinal debate is important, it ignores more powerful underlying IR assumptions about the operation of the international system, the efficacy of international law, and the possibility of an international judicial system, that both produce the universalist theory and motivate advocates of federal incorporation of CIL and international human rights litigation under the ATS. However, these IR assumptions and the universalist theory remain unexplored. The following section engages the IR assumptions and the universalist theory

27. *Id.* at 724.

28. *Id.* at 732.

29. For a critical summary of the modern position on *Sosa*, see Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *Sosa*, *Customary International Law and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869 (2007). For a more general discussion, see, e.g., Harold Hongju Koh, *The 2004 Term: The Supreme Court Meets International Law*, John W. Hager Lecture at the University of Tulsa College of Law (Oct. 28, 2004), in 12 TULSA J. COMP. & INT'L L. 1 (2004); Ralph G. Steinhardt, *Laying One Bankrupt Critique to Rest: Sosa v. Alvarez-Machain and the Future of International Human Rights Litigation in U.S. Courts*, 57 VAND. L. REV. 2241 (2004).

30. See William S. Dodge, *Bridging Erie: Customary International Law in the U.S. Legal System After Sosa v. Alvarez-Machain*, 12 TULSA J. COMP. & INT'L L. 87 (2004); Beth Stephens, *Sosa v. Alvarez-Machain: "The Door is Still Ajar" for Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV. 533 (2004). For an alternative position, see Bradley, Goldsmith & Moore, *supra* note 29; Donald J. Kochan, *No Longer Little Known but Now a Door Ajar: An Overview of the Evolving and Dangerous Role of the Alien Tort Statute in Human Rights and International Law Jurisprudence*, 8 CHAP. L. REV. 103 (2005).

that encourage the creation of an international system based on the rule of law and the use of international law as an instrument of progressive change.

II. INTERNATIONAL RELATIONS THEORY AND THE UNIVERSALIST CONCEPTION OF INTERNATIONAL LAW

Over the past 20 years, the disciplines of IR and international law have grown closer.³¹ IR is the study of foreign affairs, specifically focusing on the behavior of States in international politics, the role of international institutions, and the broader operation of the international system. Social constructivism, democratic peace theory, and institutionalism are IR paradigms common in international law scholarship.³² They underlie the constitutive, identity, and rational choice theories of state compliance with international law, respectively, and provide the foundational assumptions that promote the universalist theory.³³

A. Social Constructivism

Social constructivism³⁴ is an approach to IR with two central assumptions: (1) shared ideas form the structure of human organization and (2) the content of those shared ideas constructs the interests and

31. See generally Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335 (1989) (arguing that lawyers should consider research methods from political science); Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205 (1993) (advocating a closer relationship between international relations theory and international law).

32. A full analysis of the IR paradigms—each possessing a breadth, richness, and variety that warrants extensive discussion—are well beyond the scope of this Article. Similarly, a comprehensive evaluation of the several theories of state compliance with international law is a bridge too far. My goal is to provide a sketch of the underlying logic of the IR paradigms to demonstrate their prominence in international law scholarship and influence on the federal incorporation and international human rights litigation debates. I necessarily focus on a limited number of scholars that reflect the contemporary discourse in both IR and international law scholarship. Although this may simplify the discussion, it permits an analysis of the IR paradigms and their assumptions about international law.

33. This Article neither formally critiques the internal coherence of the various IR theories nor tests empirically the capacity of these IR theories to explain state behavior in international politics. Rather, the Article demonstrates how some IR theories are framed to produce the universalist theory.

34. Although my discussion centers on the work of Alexander Wendt—one of the most prominent constructivists in IR theory—there is variance in constructivist theory. For a brief introduction to social constructivism, see HEDLEY BULL, *THE ANARCHICAL SOCIETY* (1977); MARTHA FINNEMORE, *NATIONAL INTERESTS IN INTERNATIONAL SOCIETY* (1996); FRIEDRICH V. KRATOCHWIL, *RULES, NORMS AND DECISIONS* (1989).

identities of States in the international system.³⁵ Shared ideas shape state interests and identities that, in turn, shape state action. The content of social practices, discourse, and shared ideas motivate state behavior in the international politics.

The social constructivist paradigm provides the theoretical basis for transnational legal process theory, a *constitutive* theory of state compliance with international law. States comply with international law through the “*interaction, interpretation, and internalization* of international norms into domestic legal structures.”³⁶ Transnational litigation encourages the internalization of international legal norms into domestic legal and political processes and “drive[s] how *national governments conduct their international relations*.”³⁷ International law is the mechanism through which international norms are diffused in the world community. The judiciary is the government organ through which the norms are embedded into state practice.

B. Democratic Peace Theory

Democratic peace theory³⁸ posits that the absence of war between democracies results from two factors unique to democratic governance. First, democracies possess institutional attributes³⁹—responsiveness to public opinion, separation of powers, and a system of checks and balances—that constrain decisionmakers and encourage foreign policy transparency. Second, the norms, values, and culture produced through democratic governance generate a “democratic” commitment to the peaceful resolution of political conflicts. Among democracies, regime type and individual preferences motivate state behavior in international politics.

35. See ALEXANDER WENDT, *SOCIAL THEORY OF INTERNATIONAL POLITICS* (1999); Alexander Wendt, *Anarchy Is What States Make of It: The Social Construction of Power Politics*, 46 INT’L ORG. 391 (1992); but see Dale C. Copeland, *The Constructivist Challenge to Structural Realism: A Review Essay*, 25 INT’L SEC. 187 (2000).

36. See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2649 (1997) (emphasis added).

37. Harold Hongju Koh, *Transnational Legal Process*, Roscoe Pound Lecture at the University of Nebraska College of Law (Oct. 28, 1994), *The 1994 Roscoe Pound Lecture: Transnational Legal Process*, in 75 NEB. L. REV. 181, 199 (1996) (emphasis added).

38. For a discussion on the various strands of democratic peace theory, see, e.g., Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs*, 12 PHIL. & PUB. AFF. 205 (1983); John R. O’Neal & Bruce M. Russett, *The Kantian Peace: The Pacific Benefits of Democracy, Interdependence, and International Organizations, 1885–1992*, 52 WORLD POL. 1 (1994); John M. Owen, *How Liberalism Produces Democratic Peace*, 19 INT’L SEC. 87 (1994); but see Christopher Layne, *Kant or Can’t: The Myth of the Democratic Peace*, 19 INT’L SEC. 5 (1994); David E. Spiro, *The Insignificance of the Liberal Peace*, 19 INT’L SEC. 50 (1994).

39. See Michael W. Doyle, *Liberalism and World Politics*, 80 AM. POL. SCI. REV. 1151, 1151–63 (1986).

Democratic peace theory animates *identity* theories of state compliance with international law. Regime type—a State's identity as liberal or nonliberal—determines whether a State will comply with international law. Within the zone of liberal States, States have a similar commitment to representative government, separation of powers, equality of all citizens under law, and basic human rights guarantees.⁴⁰ These institutional attributes predispose liberal States—democracies—to comply with international law.

C. Institutionalism

Institutionalist⁴¹ or regime⁴² theory argues that institutions can facilitate rational, self-interested cooperation among States with common political and economic interests. Institutions reduce the two main obstacles to cooperation—information asymmetries and uncertainty—through increased information and transparency, lower transaction costs, and behavior standards to evaluate reputation.⁴³

By facilitating cooperation among rational actors, institutionalism produces rational choice theories of state compliance with institutional rules and international law. States are pushed to comply because they fear reciprocal noncompliance, high reputation costs to defecting from accepted legal norms, and the prospect of retaliation by other States.⁴⁴ Therefore, States can pursue their rational self-interests and international law can exert an exogenous effect on state behavior.

The rise of social constructivism, institutionalism, and democratic peace theory within IR generally coincides with political and structural changes in the international system. For many, the collapse of the Soviet Union; the rise of democratic governments in Eastern Europe, Latin America, and East Asia; and the emergence of U.S. unipolar dominance of international politics suggest that the Kantian world of liberal States is

40. See generally Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503 (1995).

41. See ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (1984); Robert O. Keohane & Lisa L. Martin, *The Promise of Institutional Theory*, 20 INT'L SEC. 39 (1995); but see John J. Mearsheimer, *The False Promise of International Institutions*, 19 INT'L SEC. 5 (1994). For an extended discussion of institutionalist or regime theory, see, e.g., *COOPERATION UNDER ANARCHY* (Kenneth A. Oye ed., 1986); *INTERNATIONAL REGIMES* (Stephen Krasner ed., 1983).

42. Institutions or regimes are considered "sets of implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations." See KEOHANE, *AFTER HEGEMONY*, *supra* note 41, at 57 (internal quotation omitted).

43. *Id.* at 94.

44. See ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* (2008).

increasingly possible.⁴⁵ These changes provide an opportunity for the United States to change fundamentally the nature of international politics and to use its influence to promote democracy, universal human rights, and multilateralism, resulting in an international system based on the rule of law.

D. *The Universalist Theory of International Law*

Embedded in this broader international political context and influenced by specific IR theories, modern scholars have developed a general universalist theory of state compliance with international law. The universalist theory relies on the IR assumptions of social constructivism, institutionalism, and democratic peace theory. These IR theories share two attributes. First, the theories reject the role of power and self-interest as causal variables to explain state behavior and, in the case of institutionalism, suggest that institutions can minimize the pernicious effects of the pursuit of national self-interests and encourage cooperation. Second, each theory produces similar conclusions about the capacity of international law to affect state behavior. *Constitutive*, *rational choice*, and *identity* theories of state compliance lead to the proposition that international law has an independent, exogenous effect on state behavior.⁴⁶

Through the development of an international judicial system,⁴⁷ international law can create a constitutional order in international politics and operate as an instrument of progressive change. State compliance with international law invites greater coordination among judicial bodies, harmonization of international legal rules, and integration of international law into the American legal system—the federal incorporation of CIL.

Table 1 illustrates the connection between IR theories about the operation of international politics and the universalist theory of international law:

45. See FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).

46. See Koh, *supra* note 36. Although there are many theories to explain why states obey international law, scholars agree that international law constrains state action.

47. See, e.g., Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899 (2005); Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429 (2003); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000).

TABLE I
UNIVERSALIST THEORY AND IR

IR Theory	Social Constructivism	Democratic Peace Theory	Institutionalism
Motivation for State Behavior	Norms, Ideas, Discourse	Regime Type (among Democracies)	Interests (checked by Information, Reputation Costs & Reduction of Uncertainty)
State Compliance with International Law out of Moral or Legal Obligation	Yes, through Norm Internalization	Yes, among Democracies because of Institutional Attributes and Liberal Culture	Yes, through Self-Interest within Institutional Framework
International Law Constrains States and has Independent Effect on State Behavior	Yes, depending on Dominant Norm	Yes, among Democracies	Yes, within Institutional Framework

Given state compliance with international law, scholars envisage it as an instrument to regulate domestic affairs. Traditionally, international law has regulated state-to-state relations to maintain international order. The Concert of Nations, the League of Nations, and the United Nations were all conceived as institutions to regulate the political and security affairs of their respective Member States. In the mid-twentieth century, States began to use international law more aggressively to regulate State-to-citizen relations through international human rights law.⁴⁸

For many scholars, international human rights litigation vindicates the rights of individuals, exposes egregious human rights practices, and punishes violators of international human rights law. It contributes to the socialization of States and acculturation of individuals, leading to the adoption of shared values throughout the international community.⁴⁹ The universalist theory produces a normative project to judicialize international politics, integrate international law into domestic legal systems, and promote progressive change. The federal incorporation of CIL and international human rights litigation are necessary for the realization of these goals.

48. See generally Isabelle R. Gunning, *Modernizing Customary International Law: The Challenge of Human Rights*, 31 VA. J. INT'L L. 211 (1991); Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1 (1982).

49. See Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 626 (2004).

III. A NEW FRAMEWORK TO EVALUATE FEDERAL INCORPORATION AND INTERNATIONAL HUMAN RIGHTS LITIGATION

Suppose that the operation of the international system does not always reflect the assumptions of social constructivism, democratic peace theory, and institutionalism. Suppose further that the United States' compliance with international law does not always reflect legal or moral obligation. If these suppositions are accurate, evaluating the federal incorporation of CIL and international human rights litigation solely through the lens of a universalist theory of international law will produce an inaccurate understanding of their consequences for the United States.

This section develops my framework for evaluating federal incorporation of CIL and international human rights litigation by examining the role of power and self-interest in international politics. If these factors play a role in motivating state behavior in international politics, they might contribute to our understanding of state behavior in international politics and state compliance with international law.

A. Realism

Realism focuses on the balance of power among States and the pursuit of economic and military strength to ensure security in international politics. Although there are variants of realist thought, realism relies on three core assumptions.⁵⁰ First, realism assumes that States operate in an international system without a central enforcement mechanism to regulate state behavior—an international system in which there is no global policeman to restrain powerful States from coercing weaker States. Second, security is the primary state goal. Since States desire “to maintain their territorial integrity and the autonomy of their domestic political order,”⁵¹ they focus on developing military strength and economic resources relative to other States.⁵² Third, realism assumes that States are

50. There is significant variation in realist theories. See JOHN J. MEARSHEIMER, *THE TRAGEDY OF GREAT POWER POLITICS* (2001); HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* (1985); KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* (1979). To introduce realism as a paradigm, I focus on the three bedrock assumptions that are most instructive. For challenges to realism, see ROBERT O. KEOHANE, *NEOREALISM AND ITS CRITICS* (1986); Robert Jervis, *Realism, Neoliberalism, and Cooperation*, 24 INT'L SEC. 42 (1999); Jeffrey W. Legro & Andrew Moravcsik, *Is Anybody Still a Realist?*, 24 INT'L SEC. 5 (1999) (questioning the coherence of realist thought, noting the analytical difficulties that some neorealists have encountered in trying to explain recent phenomena in international politics); Richard Rosecrance, *Has Realism Become Cost-Benefit Analysis?*, 26 INT'L SEC. 132 (2001).

51. MEARSHEIMER, *supra* note 50, at 31.

52. See *id.* at 55; WALTZ, *supra* note 50, at 131.

rational actors. Norms, institutions, and regime type have little effect on state behavior.

Given these assumptions, realists do not develop a theory of state compliance with international law. For them, the content of international law reflects the underlying distribution of power in international politics and represents the interests of the powerful States. "Most international law is obeyed most of the time, but strong States bend or break law when they choose to."⁵³

B. *International Law and State Interests*

In an international system focused on power, state compliance with CIL is a "function of national self-interest."⁵⁴ "International law emerges from States' pursuit of self-interested policies on the international stage. [It] is . . . endogenous to state interests. It is not a check on state self-interest; it is a product of state self-interest."⁵⁵

State behavior consistent with CIL reflects four "behavioral logics": cooperation, coordination, coincidence of interest, and coercion. Cooperation derives from bilateral repeat prisoner's dilemma interactions based on four conditions: (1) States have low discount rates; (2) indefinite duration of interactions; (3) the payoff from defection must not dramatically exceed the payoff from cooperation; and (4) cooperative moves are clearly defined.⁵⁶ For coordination, "each State's best move depends on the move of the other State."⁵⁷

However, in repeat prisoner's dilemma interactions, the necessary conditions for cooperation and coordination are hard to maintain. As additional States participate, the cost of monitoring and the possibilities of erroneous punishment and potential free-riding increase.⁵⁸ Cooperation and coordination are unlikely to produce state action consistent with CIL.

State "compliance" with CIL is actually a product of coercion or coincidence of interest. Coincidence of interest represents behavior in which each State "obtains private advantages from a particular action . . . irrespective of the action of the other."⁵⁹ Both actors gain through the

53. Kenneth N. Waltz, *Structural Realism after the Cold War*, in AMERICA UNRIVALED: THE FUTURE OF THE BALANCE OF POWER 29, 51 (G. John Ikenberry ed., 2002).

54. See Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 CHI. L. REV. 1113, 1120 (1999).

55. See JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 13 (2005).

56. See *id.* at 36.

57. *Id.*

58. *Id.*

59. GOLDSMITH & POSNER, *supra* note 54, at 1122.

pursuit of their respective self-interest. Coercion occurs when a State or group of States with common interests “forces other States to engage in actions that serve the interest[s] of the first State or [group of] States.”⁶⁰ In both cases, state behavior consistent with CIL would be a product of national self-interest, not legal obligation.

A more prominent role for power and national self-interest in international politics leads to two conclusions about the efficacy of international law as a coercive instrument. First, since compliance with international law reflects coercion or coincidence of interest, it is unlikely that international law independently affects state behavior. Second, since international law has little independent effect on state behavior, an international judicial system to regulate international political affairs will be ineffective, by itself, to constrain States. These two conclusions challenge the universalist theory. Table 2 compares realism with the IR theories that motivate the universalist theory:

TABLE 2
IR THEORIES COMPARED

IR Theory	Social Constructivism	Democratic Peace Theory	Institutionalism	Realism
Motivation for State Behavior	Norms, Ideas, & Discourse	Regime Type (among Democracies)	Interests (checked by Information, Reputation Costs & Reduction of Uncertainty)	Security
Possible State Compliance with International Law out of Moral or Legal Obligation	Yes, through Norm Internalization	Yes, among Democracies because of Institutional Attributes and Liberal Culture	Yes, within Institutional Framework	No. State Behavior Consistent with International Law reflects State Self-Interest
International Law Constrains States and has Independent Effect on State Behavior	Yes, depending on Dominant Norm	Yes, among Democracies	Yes, through Reputation Costs, Fear of Retaliation and Reciprocal Non-compliance	No.

60. *Id.* at 1123.

C. The Wisdom of Federal Incorporation and International Human Rights Litigation

Arguments in support of federal incorporation of CIL and international human rights litigation reflect the universalist theory and the assumptions of social constructivism, democratic peace theory, and institutionalism. In contrast, this section provides a framework for evaluating federal incorporation of CIL and international human rights litigation that takes into account factors that the universalist theory fails to consider: the value of sovereignty; the distribution of power in the international system; the methodology and content of international law; the structural trends in international politics; and complementarity with the normative and strategic goals of American foreign policy. This framework produces a set of conclusions about the proper relationship between international law and the American legal system and the consequences of federal incorporation of CIL and international human rights litigation.

1. Sovereignty

The framework starts with the assumption that States value sovereignty: the autonomy of the political order premised on “the exclusion of external actors from domestic authority structures”⁶¹ within its recognized territory. This Westphalian conception of sovereignty coexists with international legal sovereignty, “the practices associated with mutual recognition, usually between territorial entities that have formal juridical independence.”⁶² Clearly, the concept of sovereignty is malleable, as history is replete with instances of powerful States violating the sovereignty of weaker States—colonialism, for example—and imposing external political orders. I do not claim that States have always respected Westphalian or international legal sovereignty. I do not deny that States often cede aspects of their sovereignty for instrumental reasons. My claim is much more limited and uncontroversial: States value their capacity to exclude external actors from their recognized territory, maintain an autonomous domestic political order, and pursue their interests unencumbered by external political constraints. Working from this assumption, it is unlikely that self-interested States sensitive to the distribution of power in the international system would cede sovereignty over a particular aspect of their domestic political order for non-instrumental reasons.

61. STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY*, 20 (1999).

62. *Id.* at 3.

2. Power in International Politics.

States operate in an international system with national security as their primary objective.⁶³ Although States may have a number of interests—the promotion of rule of law, universal human rights or democracy—States tend to prioritize security concerns. To achieve some level of security, States pursue material power: military strength and economic development.⁶⁴ This does not mean that the pursuit of a State's normative interests could not, at times, help achieve security or strategic goals. It simply means that States are sensitive to shifts in their relative power positions.⁶⁵

A State's material power influences its relationship with international law. The international system lacks a central enforcement mechanism to enforce international law. In this environment, States can comply with international law when it is in their interests to do so. But what does that tell us about the enforcement of international law? Few States have the material power act as a global policeman, enforcing international law and coercing state compliance. Those States that do—the great powers—are rational, self-interested actors that also enforce international law according to their self-interests.

Similarly, great powers are the only States that have the capacity to comply selectively or resist international law. In both instances, the State's relative power is the key variable; it allows a powerful State both to enforce international law on weak States and to resist the imposition of international law by others.⁶⁶

For a weak State, the sovereignty cost⁶⁷ of incorporation is low. If the great powers choose to impose their conception of international law, weak States lack the material capacity to resist. The forced integration of international law into its domestic legal structure is more likely.

As a State's power increases, the sovereignty costs of incorporation increase proportionally. At the same time, powerful States have the capacity to enforce and comply selectively with international law. In a world with no central enforcement mechanism, powerful States have a

63. See generally MEARSHEIMER, *supra* note 50; WALTZ, *supra* note 50.

64. See generally MEARSHEIMER, *supra* note 50; WALTZ, *supra* note 50.

65. See Joseph M. Grieco, *Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism*, 42 INT'L ORG. 485 (1988); but see Duncan A. Snidal, *Relative Gains and the Pattern of International Cooperation*, 85 AM. POL. SCI. REV. 3 (1991).

66. See Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT'L L. 3 (2005).

67. I am focused on the sovereignty costs of incorporation of international law when, given a particular distribution of power, a State has the capacity to comply selectively with international law. For a discussion of the sovereignty costs of delegation to an international authority or to an international judge, see Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217 (2000).

greater capacity to resist international law that is contrary to their interests. Since States generally value sovereignty, it makes little sense for a powerful State to impose on itself—or to incorporate—a body of law that potentially contravenes that State's normative or strategic interests when there is no external actor capable of doing so. Unless international law consistently reflects the content of a powerful State's domestic law,⁶⁸ that State incurs a high sovereignty cost to incorporation.

This cost is increased for the United States. The United States' political, economic,⁶⁹ and military⁷⁰ dominance of international politics; the unipolar structure of the international system;⁷¹ and the United States' capacity to comply with and enforce international law consistent with its interests suggests that the sovereignty cost of incorporating international law will be higher than the cost to any other State in the international system. On these grounds alone, the United States should be most circumspect about incorporating international law. In many ways, the United States has a greater capacity to act unilaterally and deviate from norms of international law that are in opposition to U.S. interests.⁷²

To this point, I have discussed the role of power in terms of enforcement and compliance with international law. The role of power also plays a significant role in the creation of international law. If a powerful State can shape the content of international law *ex ante*, it is much more likely to reflect that particular State's interests, lowering the sovereignty cost of incorporation. This places considerable importance on the methodology underlying the creation of international law.

68. It is unlikely that international law will always represent the interests of a specific State over a long period of time. The dynamic nature of international politics, the shifts in the distribution of power in the international system, and political and military conflict all suggest that powerful States will rise and fall, with new powers emerging. Therefore, the content of international law will necessarily evolve to reflect the emergence of new powers and possibly conflict with the interests of any one state.

69. "For the past century, the U.S. share of gross world product was often double (or more) the share of any other state: 32 percent in 1913, 31 percent in 1938, 26 percent in 1960, 22 percent in 1980, and 27 percent in 2000." Robert A. Pape, *Soft Balancing against the United States*, 30 INT'L SEC. 7, 18 (2005).

70. For a discussion of the United States' material dominance of the international system, see Barry R. Posen, *Command of the Commons: The Military Foundation of U.S. Hegemony*, 28 INT'L SEC. 5 (2003).

71. See, e.g., Michael Mastaduno, *Preserving the Unipolar Moment: Realist Theories and U.S. Grand Strategy after the Cold War*, 21 INT'L SEC. 49 (1997); William C. Wohlforth, *The Stability of a Unipolar World*, 24 INT'L SEC. 5 (1999).

72. This is a descriptive point only. Although the United States may have this capacity, there are certainly situations in which cooperation is preferable. My only point is to show that the United States, like other strong states, has a greater capacity to develop its own path and pursue national interests than weak states.

3. Methodology and Content of Customary International Law

a. CIL

International law is composed of treaties and CIL. Treaties are agreements between and among States on particular issues. CIL represents the norms of international law. The critical elements in determining the content of CIL are state practice and *opinio juris*. State practice refers to the widespread and consistent practice of States, slowly crystallizing over time into custom. *Opinio juris* refers to the belief that the norm determined by state practice should be obeyed as a matter of law. Traditionally, CIL's content regulated the state-to-state relationships of internationally recognized sovereign nations and, although there are some exceptions, ignored the internal domestic relationship between the sovereign and the citizen. CIL governed interstate relations, focusing on the relationships between sovereign States for the maintenance of international order.

CIL's methodology has been criticized on several grounds. There is no universal, common understanding on what constitutes state practice or even evidence of state practice. Most States, including the United States, do not publish information on their respective state practices.⁷³ Although the registry of the International Court of Justice publishes a list of documents that constitute evidence of state practice,⁷⁴ it does not formally investigate state attitudes on a purported customary international law norm or empirically measure state practices to determine widespread or consistent practice.⁷⁵ Finally, there is no agreed-upon interpretive method to evaluate evidence of state practice or define widespread and consistent practice.⁷⁶

Scholars also focus on the analytical problem in distinguishing state compliance with CIL based on legal obligation—*opinio juris*—from state compliance based on coercion or self-interest. The test is circular; state practice evidences *opinio juris*, while the legal obligation inherent in

73. See Michael Byers, *Custom, Power, and the Power of Rules: Customary International Law from an Interdisciplinary Perspective*, 17 MICH. J. INT'L L. 109, 144 (1995).

74. See International Court of Justice, <http://www.icj-cij.org/> (last visited May 13, 2008).

75. See Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529 (1993).

76. Compare *Anglo-Norwegian Fisheries* (U.K. v. Nor.), 1951 I.C.J. 116 (Dec. 18) (stating that in determining state practice, a few inconsistencies in understanding a given rule should not affect determinations of widespread and consistent state practice), with *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) (stating that while absolute or perfect consistency with a rule is not required, state behavior inconsistent with a particular rule of international law should generally be considered as a breach of that rule).

opinio juris is reflected by state practice. In an international system without a central enforcement mechanism, it is exceedingly difficult to distinguish between compliance based on *opinio juris* and compliance based on coercion, presumed consent or acquiescence. Even if this were possible, how does one measure a State's legal obligation? By what States say? By what States actually do?⁷⁷

CIL's reliance on state practice as an indicator of custom and *opinio juris* does not explain its evolution in content over time. Despite the legal obligation inherent in CIL, States must violate CIL to develop new CIL norms. Thus, it is difficult to distinguish between state violations of existing CIL—failure to comply—from state violations of existing CIL for the purpose of creating new CIL norms.

These critiques demonstrate CIL's methodological inconsistencies and manipulable content. Given the doctrinal subjectivity inherent in the CIL's methodology, it generally represents the state practice, customs, and strategic interests of the only actors in the international system capable of developing and enforcing CIL: the great powers. As I discussed earlier, since the United States and other great powers are the only States that possess the material power to enforce CIL, they have clear incentives to engage in self-interested enforcement. They can coerce compliance with CIL from weak States and, since there is no central enforcement mechanism, engage in low cost violations of CIL.

If the powerful States determine the content of CIL and they are the only States capable of enforcing it, they should not fear federal incorporation of CIL. Presumably, CIL will generally reflect their interests and complement their domestic laws. To evaluate this claim, I discuss the shift in methodology and content of CIL.

b. The New CIL

The modern, or “new,” CIL⁷⁸ challenges the “traditional” CIL paradigm in methodology, reach, and content.⁷⁹ It does not mark the

77. I bracket the question about whether States have an overarching moral obligation to comply. For a discussion of this question, see Eric A. Posner, *Do States Have a Moral Obligation to Obey International Law?*, 55 STAN. L. REV. 1901 (2003).

78. This term was coined by Curtis A. Bradley and Jack L. Goldsmith to refer to the change in reach and content of customary international law. See Bradley & Goldsmith, *Customary International Law*, *supra* note 15; Bradley & Goldsmith, *Federal Courts*, *supra* note 15.

79. I do not think there are any scholars who suggest that there is a coherent theory behind the new CIL that justifies its “methodology.” Those who support it think that it is good because human rights norms can be created more quickly. Those scholars are cited throughout this section. For criticisms of the new CIL's methodology, see, e.g., Jack L. Goldsmith & Eric A. Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. INT'L L. 639 (2000); Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115 (2005); J. Patrick Kelly, *The Twilight of*

emergence of a new body of law; rather the new CIL refers to the evolution in CIL's content and its new focus on human rights. In contrast to traditional CIL—a slowly developing body of law governing state-to-state relations—the new CIL develops rapidly⁸⁰ and regulates the relationship between the State and its citizens. The new CIL is a vehicle for the promotion of human rights and the basis of international human rights litigation under the ATS.

While the new CIL is more invasive in reach and content, it lacks a coherent methodology⁸¹ to explain the emergence of new human rights norms. It moves away from the traditional methodological foundations of custom and widespread, consistent state practice as sources of CIL norms. The new CIL “has been established largely by treaty—the U.N. Charter and international human rights covenants and conventions—but without any foundation or context of custom.”⁸²

Evidence of new CIL's universal norms is derived from the declarations of various international organizations and conferences,⁸³ national constitutions,⁸⁴ the non-binding resolutions of the United Nations, the writings of academics,⁸⁵ and the terms of non-ratified multilateral treaties that purportedly reflect moral obligation.⁸⁶ “[U]nanimous and near-unanimous declarations of the U.N. General Assembly and other international fora constitute a consensus on legal norms providing clear evidence of the *opinio juris* of nations.”⁸⁷ With respect to the new CIL, “States really never make international law on the subject of human rights. It is made by people that care; the professors, the writers of text-

Customary International Law, 40 VA. J. INT'L L. 449 (2000); Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757 (2001); Edward T. Swaine, *Rational Custom*, 52 DUKE L.J. 559 (2002); Trimble, *supra* note 16.

80. “We cannot wait any longer for the ratification by all states because it takes too long.” Louis B. Sohn, *Sources of International Law*, 25 GA. J. INT'L & COMP. L. 399, 406 (1996).

81. For an introduction to the methodology of the new CIL, see THEODOR MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* 79–135 (1989).

82. Louis Henkin, *Sibley Lecture, March 1994: Human Rights and “State Sovereignty”*, 25 GA. J. INT'L & COMP. L. 31, 36 (1996).

83. See Louis B. Sohn, “Generally Accepted” *International Rules*, 61 WASH. L. REV. 1073 (1986).

84. See Henkin, *supra* note 82, at 40.

85. As Louis Sohn suggests, “This is the way international law is made, not by states, but by ‘silly’ professors writing books, and by knowing where there is a good book on the subject.” Sohn, *supra* note 80, at 401.

86. Proponents look to the terms of unsigned, non-ratified, and agreed treaties, often ignoring the reservations and opt-outs that states include before signing. See Kelly, *supra* note 79 (citing Louis B. Sohn, *supra* note 48).

87. Kelly, *supra* note 79, at 484.

books and casebooks, and the authors of articles in leading international law journals.’’⁸⁸

The new CIL differs from the traditional CIL paradigm in ways that question the wisdom of federal incorporation of CIL. First, the new CIL is both methodologically indeterminate and develops rapidly. Although traditional CIL relied on the subjective legal fiction of state practice, its norms generally reflected the state practices of great powers. Second, the new CIL is, paradoxically, also more elite-driven. It is not “elite-driven” by the few great powers that influenced the traditional CIL framework; rather, it is elite-driven by international legal scholars, epistemic communities, transgovernmental advocacy networks, and human rights advocates. By avoiding a connection with state practice, focusing on elite preferences, and using the ATS as a vehicle to disseminate CIL human rights norms, the sovereignty costs on receptive States increases—particularly in democracies—as the imposition of these norms appears divorced from democratic processes. Although some may find this change normatively attractive, as a purely descriptive matter the new CIL is may become less reflective of state interests.

c. The United States and the New CIL

This critique of the new CIL’s methodology and content does not constitute a rejection of the content of international human rights law. The improvement of human rights practices in the United States and the international community is an important goal. However, in light of the sovereignty costs for the United States, the critique simply questions the logic of federal incorporation of CIL and international human rights litigation as the mechanisms to achieve them.

The United States’ material power and dominance of international politics gives it the capacity to influence the development of CIL under the “traditional” paradigm. However, the new CIL’s rejection of custom and state practice suggests that the new CIL is less likely to represent U.S. interests, challenging the desirability of federal incorporation of CIL. Though the United States has a role in the formation of CIL, the United States seems to recognize the costs of the new CIL phenomenon. The United States attaches reservations or modifications, or fails to ratify⁸⁹ many of the international conventions and treaties upon which some

88. Sohn, *supra* note 83, at 399.

89. See Peter J. Spiro, *The States and International Human Rights*, 66 *FORDHAM L. REV.* 567, 567 (1997).

CIL norms rely and ignores many social and cultural rights⁹⁰ listed in the Restatement.⁹¹

[The United States] has proven to be a serious laggard in acceding to near universally-adopted international human rights conventions; where the United States has signed on to such accords, it has included conditions methodically limiting the scope of ratification to existing U.S. practice, rendering acceptance a largely hollow, falsely symbolic act.⁹²

Despite the attraction of these new rights, it is unclear that federal incorporation of the new CIL by the judiciary is preferable to their adoption through the political process, particularly if one assumes that there will be greater compliance with human rights norms if they are representative of the will of the people as opposed to imposed by an unelected judiciary.

The rapid development and breadth of the new CIL also militates against federal incorporation. The new CIL “now operates with respect to such matters as free speech and conscience; the practice of religion; health care; education, and shelter; social and cultural rights; criminal law, procedure, and the conditions of incarceration.”⁹³ This is not the limit of new CIL norms: “The Restatement comments that there may be non-conventional human rights law in addition to that which it was prepared to recognize and restate at the time, and more such law would doubtless come.”⁹⁴ While many may find these aspirational norms attractive, the new CIL’s methodology reduces the United States’ influence on its development and content, and increases the likelihood that the new CIL will conflict with American law and circumvents the American political process, suggesting that the United States and its citizens should be increasingly skeptical about the wisdom of federal incorporation of the new CIL.

90. See Henkin, *supra* note 82, at 40 (noting that economic and social rights are on the same plane as civil and political rights under the Universal Declaration of Human Rights).

91. See Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 *AUSTL. Y.B. INT’L L.* 82 (1992).

92. Spiro, *supra* note 89, at 567.

93. *Id.* at 569.

94. Henkin, *supra* note 82, at 37–38. The new CIL “is being made, purposefully, knowingly, wilfully [sic], and concern for human rights has provided a principal impetus to its growth, and the law of human rights is a principal impetus to its growth . . .” *Id.* at 37.

4. Trends in International Politics

Recent trends⁹⁵ suggest that other powerful States will emerge over the medium-to-long term, influencing the content of the new CIL and perhaps moving it away from the traditional European and American foundations upon which it previously relied. Part of the attraction of international law in the United States grows from its tradition of representing the interests of the powerful States in the international system—States that, over at least the last three hundred years, have almost exclusively consisted of the United States and western European nations. However, the new CIL will not always embody the cultural, moral, normative, and strategic preferences of Western great powers and political elites. The new CIL's indeterminate methodology may actually serve to accelerate this change. It may not be in the United States' strategic or normative interests to incorporate the new CIL, a body of law that, over time, may not reflect American values.

Structural changes in the international system further challenge the wisdom of federal incorporation.⁹⁶ The collapse of the Soviet Union, the diminished threat of catastrophic nuclear war, and the decreased importance of U.S.-European solidarity suggest that the United States and European powers will increasingly differ on the content of the new CIL. The Soviet Union's implosion removed the existential threat that bound the United States and Europe during the Cold War, facilitated the creation of the European Union, and suppressed security competition on the continent.⁹⁷ Despite the continued presence of U.S. troops in Europe and the expansion of the North Atlantic Treaty Organization, the United States and the EU are developing different conceptions on the appropriate use of force in international politics, the salience of international institutions, the importance of multinational treaties and the role of international law.⁹⁸ China's "peaceful rise" is also relevant to understanding the future content of CIL. Some argue that China's rise does not threaten the United States and could result in peaceful relations based on shared economic benefits from trade liberalization and globalization.⁹⁹ China's need to maintain economic growth to ensure domestic stability, recent willingness to operate within international institutions,

95. See generally Daniel Drenzer, *The New New World Order*, 86 FOREIGN AFF. 13 (2007).

96. See generally Azar Gat, *The Return of Authoritarian Great Powers*, 86 FOREIGN AFF. 59 (2007).

97. See Josef Joffe, *Europe's American Pacifier*, 54 FOREIGN POL'Y 64 (1984).

98. See ROBERT KAGAN, *OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER* (2004).

99. See David M. Lampton, *China's Rise in Asia Need Not Be at America's Expense*, in *POWER SHIFT: CHINA AND ASIA'S NEW DYNAMICS* 306 (David Shambaugh ed., 2005).

and decision to temper anti-United States rhetoric evidence a change in China's foreign policy goals and suggest that China's rise will be generally non-threatening and consistent with the current international order.¹⁰⁰

Others suggest that while China's rise may be peaceful over the short term, Chinese economic growth, military development, and strategic interests will represent a challenge to U.S. interests and regional dominance in East Asia.¹⁰¹ China has no incentive to challenge the United States over the short term, while its stellar economic growth continues and domestic issues—income inequality, environmental degradation, and rural underdevelopment—require more immediate attention. However, at current growth rates, China will have the world's largest economy by 2050, giving it the economic and military capacity to challenge the United States in East Asia over their fundamentally opposed strategic interests: China wants to limit the United States' influence and develop as the dominant power in the region, while the United States wants to prevent Chinese hegemony in East Asia.¹⁰² As Chinese power grows, "the US needs to be prepared to renegotiate a host of important multilateral treaties that a powerful China will not be willing to obey—including, perhaps, human rights treaties"¹⁰³ or, as I argue, the content of the new CIL.

5. Complementarity with American Foreign Policy

The wisdom of international human rights litigation in U.S. courts also depends on its relationship with American foreign policy. If the United States always prioritizes human rights and respect for international law as primary objectives—the universalist theory—international human rights litigation is consistent with and complementary to American foreign policy. However, if the United States pursues its foreign policy goals in an international system sensitive to power and driven by national self-interest, international human rights litigation may complicate the achievement of both normative and strategic foreign policy objectives.

100. See Yong Deng, *Better than Power: "International Status" in Chinese Foreign Policy*, in CHINA RISING: POWER AND MOTIVATION IN CHINESE FOREIGN POLICY 51 (Yong Deng & Fei Ling Wang eds., 2005); Lampton, *supra* note 99; Fei-Ling Wang, *Beijing's Incentive Structure: The Pursuit of Prosperity, Preservation and Power*, in CHINA RISING: POWER AND MOTIVATION IN CHINESE FOREIGN POLICY, *supra* note 100, at 10.

101. See MEARSHEIMER, *supra* note 50; ROBERT G. SUTTER, CHINA'S RISE IN ASIA: PROMISES AND PERILS (2005).

102. See MEARSHEIMER, *supra* note 50; SUTTER, *supra* note 101.

103. Eric A. Posner & John Yoo, *International Law and the Rise of China*, 7 CHI. J. INT'L L. 1, 9 (2006).

a. Potential for Conflict

The strategic interests of the United States and the normative interests of human rights advocates will not always converge. When they converge, the pursuit of normative goals through international human rights litigation complements the pursuit of strategic interests. For example, the United States' attempts to contain the Soviet Union through the development of military and economic resources (security interests) and its opposition to the lack of democracy and basic human rights under communism (normative interests) satisfied both goals. In other cases, however, the normative preferences of the litigants and their advocates, while laudable, may conflict with the United States' strategic interests and the foreign policy necessary to achieve them.

For example, it is highly questionable that international human rights litigation or the promotion of democracy in Jordan, Egypt, or Saudi Arabia will result in regimes that will embrace normative human rights practices. In fact, it may actually worsen the situation and will likely produce anti-U.S. regimes— Hamas's victory in the Palestinian elections, for example— that challenge both the United States' strategic and normative interests. The key is to recognize that there are costs to binding the United States to a normative position when, at times, national security or strategic interests may require expediency.

Consider the complicated situation in Pakistan. The military government of Pervez Musharraf was, for the most part, an ally of the United States during the War on Terror.¹⁰⁴ At the same time, Pakistan engaged in a number of practices that violate human rights law. Human Rights Watch notes:

President Pervez Musharraf's military-backed government did little in 2006 to address a rapidly deteriorating human rights situation. Ongoing concerns include arbitrary detention, lack of due process, and the mistreatment, torture, and "disappearance" of terrorism suspects and political opponents; harassment and intimidation of the media; and legal discrimination against and mistreatment of women and religious minorities.¹⁰⁵

Arbitrary detention and the disappearance of individuals, for example, are violations of CIL and would likely be actionable claims under the post-*Sosa* international human rights litigation regime. While no person would condone these practices, the United States has to weigh the benefits of encouraging democracy and normative human rights

104. I take no position on the wisdom or overall efficacy of the so-called War on Terror.

105. Human Rights Watch, *Pakistan*, WORLD REP. 2007 (Jan. 11, 2007), <http://hrw.org/englishwr2k7/docs/2007/01/11/pakist14756.htm>.

practices against the costs of failing to achieve national security and strategic interests in determining the appropriate policies toward Pakistan.

First, Pakistan assists the United States in achieving national security goals: the elimination of terrorist training camps in Afghanistan and the destruction of Al-Qaeda and its affiliated groups. Second, Pakistan is a nuclear power with a divided security apparatus and unclear command and control procedures over its nuclear arsenal. Destabilizing the regime may threaten to jeopardize control of Pakistani nuclear weapons and materiel. Third, and most important, the United States wants stability in Pakistan. For many American policymakers, a democracy led by the late Benazir Bhutto would have been preferable; however, a pro-U.S. government is the priority. To the extent that strategic interests reinforce normative and strategic goals, policy decisions are easier. But, given the complex political situation within Pakistan, the results of recent elections, and the United States' strategic interests, it is still unclear if regime change will produce a government that will support the United States' strategic interests and embrace its normative human rights concerns.¹⁰⁶

The same difficult balance applies to other countries. For example, the United States' interest in promoting democracy and human rights in Egypt, Saudi Arabia,¹⁰⁷ or the Central Asian Republics, among many others, has been subordinated to the United States' strategic interest in maintaining pro-U.S. regimes in these States. Focusing on Egypt:

In 2006 [the United States] provided approximately US\$1.3 billion in military aid and US\$490 million in economic assistance [to Egypt]. In June 2006, the US Congress defeated a proposed amendment that would have cut \$100 million from the US aid package in response to Egypt's poor human rights record.¹⁰⁸

During various Republican and Democratic administrations, the United States has weighed the normative importance of improving human rights practices in Egypt against the cost of compromising strategic or national security interests. Most recently, the United States determined that "fac-

106. This discussion is based on the United States' relationship with Pakistan since late 2001. Events that occurred between December 2007 and February 2008, including Bhutto's return from exile and assassination and former Prime Minister Nawaz Sharif's return to political life, as well as continuing developments, complicate any analysis.

107. According to Human Rights Watch, "[a]rbitrary detention, mistreatment and torture of detainees, restrictions on freedom of movement, and lack of official accountability remain serious concerns." Human Rights Watch, *Saudi Arabia*, WORLD REP. 2007 (Jan. 11, 2007), <http://hrw.org/englishwr2k7/docs/2007/01/11/saudia14717.htm>.

108. Human Rights Watch, *Egypt*, WORLD REP. 2007 (Jan. 11, 2007), <http://hrw.org/englishwr2k7/docs/2007/01/11/egypt14701.htm>.

ing chaos in Iraq, rising Iranian influence and the destabilizing Israeli-Palestinian conflict . . . stability, not democracy, was its priority.”¹⁰⁹

Some may respond that the very goal of international human rights litigation is to restrain the United States, modify American foreign policy, and encourage compliance with international human rights law. During the twentieth century, the United States adopted policies that supported autocratic dictators around the world and ignored clear human rights violations by allies. During the Cold War, the United States allied with anti-Soviet right-wing dictatorships regardless of their human rights abuses, respect for international law, or commitment to democracy. American “policymakers adopted a pragmatic rationale for defending dictatorships they favored, and moral judgments were invoked only when the [United States] opposed a regime rather than to provide a consistent principle to guide policy and base decisions.”¹¹⁰ The United States provided economic and military aid to right-wing dictators in Chile,¹¹¹ Greece,¹¹² Indonesia,¹¹³ the Philippines,¹¹⁴ the Congo,¹¹⁵ Nicaragua,¹¹⁶ and Iran.¹¹⁷

The United States was also apprehensive about twentieth century pro-democracy, pro-human rights, and national liberation movements in Latin America, Africa, and Southeast Asia. Despite the rhetoric, “[t]here was little room for moral arguments against right-wing dictators [for the United States]. They would be wedged into the free world, no matter what their record of abuses”¹¹⁸ For many, international human rights

109. Michael Slackman, *Rice Speaks Softly in Egypt*, N.Y. TIMES, Jan. 16, 2007, at A1.

110. DAVID F. SCHMITZ, THE UNITED STATES AND RIGHT-WING DICTATORSHIPS 2 (2006).

111. “It was important [the U.S. Ambassador to Chile] continued, that the United States reject the position that it should follow a policy of noncooperation with [Pinochet] and pressure [him] on human rights.” *Id.* at 104.

112. “[A]ll remaining concerns for constitutional government were subordinated to the desire for stability, American security interests, and anticommunism, as the junta met all the criteria for American support.” *Id.* at 69.

113. “Suharto’s bloody elimination of the Communist Party, enforced stability, and pro-Western economic and foreign policies earned him American praise and support.” *Id.* at 55.

114. Ferdinand Marcos was “an authoritarian ruler who was anticommunist, protected American economic interests, and promised stability in a crucial area of the world.” *Id.* at 231.

115. “The Congo was stable, and led by an anticommunist, pro-Western dictator who supported American policies in the Cold War and promised to protect Western trade and investments.” *Id.* at 34.

116. Nicaragua, through the Somoza dictatorship, “need[s] a firm hand to maintain order, prevent communism, and protect American investments and trade in their nation.” *Id.* at 182.

117. “It was widely known that the Iranian secret police, SAVAK, which had been created and trained by the CIA, routinely used torture on political opponents, spied on and harassed Iranian dissidents who lived overseas, and arrested people who were held in jail without charges or trial.” *Id.* at 172.

118. *Id.* at 3.

litigation in U.S. courts will draw attention to these policies and force the United States, particularly the executive branch, to adopt a more human rights friendly foreign policy. Since victims of human rights abuses often have little legal recourse in their home countries, international human rights litigation provides an opportunity for foreign nationals to vindicate their rights.

This position is normatively attractive. It could be argued that some of the United States' policies did not further the United States' normative or strategic interests and, in some cases, were counterproductive. My aim is not to defend American foreign policy. Rather, I argue that given the practical realities of international politics, the international system does not always operate in a manner that reflects the universalist theory of international law or the IR theories that underlie it. The United States simply cannot always privilege international human rights concerns over more immediate national security or strategic interests. International human rights litigation can both complicate the achievement of national security goals and the improvement of human rights practices. It creates a cost that, in some cases, outweighs the potential benefits of the litigation.

b. Costs of International Human Rights Litigation

Some may challenge the contention that international human rights litigation creates costs for American foreign policy. In some cases, the United States, through the executive branch, has taken the position that international human rights litigation under the ATS does not conflict with American foreign policy goals.¹¹⁹ For example, in *Filartiga v. Pena-Irala*¹²⁰ and *Kadic v. Karadzic*,¹²¹ among other cases, the United States filed briefs in support of the plaintiffs, demonstrating that such litigation would not complicate American foreign policy.¹²² "[T]he executive branch took a hands-off position throughout the 1990s, apparently maintaining the view, formally expressed in the *Filartiga* litigation, that private litigation to vindicate international human rights does not harm U.S. foreign policy or other national interests."¹²³ During the 1990s, the United States often concluded that international human rights litigation

119. For a survey of major ATS cases and an examination of the Bush Administration's position on international human rights litigation under the ATS, see Beth Stephens, *Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169 (2004).

120. 630 F.2d 876 (2d Cir. 1980).

121. 70 F.3d 232 (2d Cir. 1995).

122. Stephens, *supra* note 119, at 185.

123. *Id.* at 177-78.

facilitated the achievement of the United States' strategic and normative interests.

However, the executive branch's support of international human rights litigation in specific cases does not suggest that all such litigation complements American foreign policy; rather, it suggests that the executive determined that, in some cases, the litigation complements the United States' normative and strategic interests. It is unsurprising that the executive branch did not object to international human rights litigation during the 1990s, the beginning of U.S. unipolar dominance of international politics. The Soviet Union had disappeared, its satellite States in Eastern Europe had moved toward democracy, and China was in the early stages of its economic growth. The threat of terrorism and nuclear proliferation were important but not primary foreign policy concerns. During this period, the cases that survived motions to dismiss "almost exclusively involved abuses committed under regimes that were defunct and repudiated by their successors, nearly universally shunned by other governments, possessed of, at best, uncertain claims to statehood or legitimate state power, *lacking in geopolitical significance, politically unimportant to Washington, or clearly condemned by the United States.*"¹²⁴ In other words, the executive branch's support of international human rights litigation appeared to coincide with an assessment that the litigation against insignificant, pariah States would generate minimal costs for American foreign policy and might have some positive effect on human rights practices.

This will not always be the case. The filing of international human rights litigation directly implicates the executive branch's foreign affairs prerogatives. First, the majority of ATS cases are dismissed on various procedural grounds.¹²⁵ Despite this fact, the mere filing of litigation engages American foreign policy without producing any tangible benefit for the victims of human rights abuses. Second, even if international human rights litigation were more successful, there is little evidence that such litigation, by itself, results in an improvement of human rights practices in the targeted States.¹²⁶ In fact, as I argue below, it may even

124. See Jacques deLisle, *Human Rights, Civil Wrongs and Foreign Relations: A "Sini-cal" Look at the Use of U.S. Litigation to Address Human Rights Abuses Abroad*, 52 DEPAUL L. REV. 473, 477-78 (2002) (emphasis added).

125. Stephens, *supra* note 119.

126. For a discussion of the efficacy of human rights treaties, see Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002). Although empirical evidence of the extraterritorial effects of international human rights litigation under the ATS on state human rights practices is wanting, there is a growing literature about the positive effects of human rights trials in transitional States. See generally NAOMI ROHT-ARRIAZA, *IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE* (1995); NAOMI ROHT-ARRIAZA, *THE PINOCHET EFFECT: TRANSNATIONAL JUSTICE IN THE AGE OF HUMAN*

produce a backlash against the United States and the human rights norms that the litigation promotes.

Finally, the threat of international human rights litigation against American and foreign corporations may also provide States that prioritize strategic interests—and do not try to impose human rights norms and values on other States—with opportunities to challenge U.S. strategic interests. For example, China builds relationships with States to achieve its strategic interests regardless of their human rights record. China has signed oil and natural gas deals with Iran, the Sudan, Angola, Chad, Venezuela, and other States. China hosted a “China-Africa Summit” in late 2006 to build relationships with African leaders with the goal of gaining access to natural resources. “China is picking up natural resources—oil, precious minerals—to feed its expanding economy and new markets for its burgeoning enterprises. The African countries get investment and both parties are building political alliances in a world they often see as overly dominated by the United States and other Western powers.”¹²⁷

Although human rights groups have heavily criticized China for its human rights violations and support of autocratic regimes, “Chinese officials, however, insist that their country’s involvement has improved the lives of ordinary Africans without meddling in political affairs—strict adherence to *China’s diplomatic policy of noninterference*.”¹²⁸ Since States value sovereignty and the autonomy of their political order, they may consider international human rights litigation in U.S. courts to be an unreasonable interference into their domestic affairs, nudging them toward the United States’ strategic competitors for economic, political, and military support.

The promotion of human rights, democracy, and basic civil liberties is an integral part of American foreign policy. However, the legal mechanisms to help achieve these goals should complement, not complicate, the realization of both American national security and normative interests. The current legal regime gives decisionmaking authority on the consequences of international human rights litigation for the United States to the branch with a minimal foreign affairs prerogative and institutional competency vis-à-vis the executive and legislative branches.

RIGHTS (2006); Juan E. Mendez, *In Defense of Transitional Justice*, in TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES 1, (A. James McAdams ed., 1997). For a contrary view, see Jack L. Goldsmith & Stephen D. Krasner, *The Limits of Idealism*, 132 DAEDALUS 47 (2003); Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 WASH. U. L. Q. 777 (2007).

127. Audra Ang, *China Defends Dealings with Africa*, WASH. POST, Oct. 31, 2006 (emphasis added).

128. *Id.*

Over the long run, it is unwise to have international human rights litigation in U.S. courts commit the executive branch to a specific normative vision of international politics when the executive branch has to pursue U.S. national interests in a world sensitive to power. The international system does not always operate according to the predictions of social constructivism, democratic peace theory, and institutionalism. Without some level of deference to the executive, international human rights litigation might limit the United States' flexibility and increase the cost of achieving normative and strategic interests.

IV. NATIONALISM AND INTERNATIONAL HUMAN RIGHTS LITIGATION

Part of the logic of international human rights litigation relies on the capacity of shared norms and social practices to encourage States and individuals to internalize normative human rights practices. The values embodied in international human rights law are universal and transcend state, national, and cultural divisions. All people want to live free from genocide and torture. International human rights litigation helps disseminate and internalize universal, aspirational human rights norms.

While no reasonable person can quarrel with the normative desire to rid the world of human rights violations, attempts to extraterritorially impose universal values on weaker States with different cultural traditions may generate a backlash. Some States might view human rights litigation in U.S. courts as yet another attempt by the United States to impose its values on the international community. International human rights litigation does not occur in a vacuum, divorced from the past widespread and repeated use of international law to legitimate European and American colonialism and imperialism, and violate the sovereignty of weak States in Latin America, Africa and Asia. For centuries, western great powers used international law to distinguish between "Christian and barbaric" States and "civilized and uncivilized" nations to justify the territorial occupation and colonial subjugation of many of the world's non-European people.¹²⁹

International law was used as a tool to legitimate violations of sovereignty—colonialism—and protect the military and economic interests of powerful States. During the nineteenth century, "when sovereignty was generally accepted as fixed, stable and monolithic [for Western European nations], colonial jurists self-consciously grasped the usefulness of

129. See generally ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2004).

keeping sovereignty undefined in order that it be extended or withdrawn according to the requirements of [European] interests.”¹³⁰ In the late nineteenth and early twentieth centuries, “the nations of Europe competed in the largest land grab in history (Africa) during the same period that the United States was attempting to impose an international minimum standard of compensation for expropriation on Latin America.”¹³¹ Since international law represented the interests of colonial powers, more often than not international law has been the enemy of weaker, non-Western States. For many of the targets of international human rights litigation, the United States’ attempts to impose “universal” values through litigation could be viewed as the evolution of nineteenth century territorial imperialism to a twenty-first century moral imperialism. Given this history, international human rights litigation may generate a backlash and encourage the rejection of the very values that the litigation promotes.

A. Nationalism

Nationalism is a highly contested term with no agreed definition or shared conception of its development. For primordialists, nationalism is tied to primordial ethnies or historical communities of people with common identities, ideologies, and sentiments.¹³² For constructivists, it is the belief in an imagined political community, produced through the confluence of specific cultural and historical forces in eighteenth century Europe and replicated throughout the world.¹³³

Others focus on the nation and nationalism as a social discourse, constantly being framed and reframed through shared social practices, common histories, and myth-making.¹³⁴ Still others argue that nationalism is no longer relevant in the modern world.¹³⁵ Regardless of its source, nationalism appears to create a strong feeling of affective belonging that results in an intense loyalty to the nation and State.

130. *Id.* at 89.

131. Kelly, *supra* note 79, at 540 n.358 (citing THOMAS PAKENHAM, *THE SCRAMBLE FOR AFRICA: 1876–1912* (1991)).

132. See ANTHONY D. SMITH, *NATIONS AND NATIONALISM IN A GLOBAL ERA* (1995).

133. See, e.g., BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGINS AND SPREAD OF NATIONALISM* (1991); ERNEST GELLNER, *NATIONS AND NATIONALISM* (1983).

134. See, e.g., ROGERS BRUBAKER, *NATIONALISM REFRAMED: NATIONHOOD AND THE NATIONAL QUESTION IN THE NEW EUROPE* (1996); NADIA ABU EL-HAJ, *FACTS ON THE GROUND: ARCHAEOLOGICAL PRACTICE AND TERRITORIAL SELF-FASHIONING IN ISRAELI SOCIETY* (2001); *INTELLECTUALS AND THE ARTICULATION OF THE NATION* (Ronald Grigor Suny & Michael Kennedy eds., 1999).

135. See E.J. HOBBSAWM, *NATIONS AND NATIONALISM SINCE 1780: PROGRAMME, MYTH, REALITY* (1990).

The creation and development of colonial nationalisms is most relevant for understanding the connection between international human rights litigation and the possible arousal of nationalistic sentiment. In the colonial world, nationalist leaders had to develop narratives, histories, and common resistance while subordinate to a colonial power.¹³⁶ The governmental institutions and administrative policies of the colonial powers clearly differentiated between the native and the foreign sovereign, creating the intellectual space to develop a nationalist consciousness. Arab, Turkish, Chinese, and Indian nationalisms, along with the various nationalisms that resulted in African independence movements and contributed to the collapse of the Soviet Empire, were born under colonial subjugation.¹³⁷

The intensity of these nationalisms is constantly reinforced by the contemporary European and American domination of the international system, the perceived promotion of Western values as “universal,” and the perceived denigration of non-Western societies. It is not a specious argument about the existence of authoritarian “Asian” values or intolerant “Islamic” fundamentalism; rather, some regimes win favor with their citizens and legitimate their rule by tapping into a nationalist discourse of resistance against the former colonial occupiers. States may manipulate the mere existence of international human rights litigation to strengthen their political position. Unfortunately, this may result in citizens rejecting the substance of normative human rights practices because of the form of their introduction—litigation in the distant court of a self-interested foreign power perceived to be imposing its values on the international community.

B. Nationalism and China

China provides an excellent example of the potential of international human rights litigation to generate strong nationalistic fervor and affect Sino-American relations. With the demise of Maoist communism as a governing ideology, the Chinese Communist Party (CCP) has turned to nationalism to legitimate its rule.¹³⁸ Through a combination of

136. See PARTHA CHATTERJEE, *NATIONALIST THOUGHT AND THE COLONIAL WORLD: A DERIVATIVE DISCOURSE* (1986).

137. See, e.g., PARTHA CHATTERJEE, *THE NATION AND ITS FRAGMENTS: COLONIAL AND POSTCOLONIAL HISTORIES* (1993); PETER HAYS GRIES, *CHINA'S NEW NATIONALISM: PRIDE, POLITICS, AND DIPLOMACY* (2005); SUISHENG ZHAO, *A NATION-STATE BY CONSTRUCTION: DYNAMICS OF MODERN CHINESE NATIONALISM* (2004); *THE ORIGINS OF ARAB NATIONALISM* (Rashid Khalidi ed., 1993).

138. See Yongnian Zheng, *Nationalism, Globalism, and China's International Relations*, in *CHINA'S INTERNATIONAL RELATIONS IN THE 21ST CENTURY: DYNAMICS OF PARADIGM SHIFTS* 93 (Weixing Hu, Gerald Chan & Daojiong Zha eds., 2000); Suisheng Zhao, *A*

victimization, humiliation, and insecurity, Chinese nationalism serves as a reminder of past struggles, a memory of Western domination, and a unifying force for national aspirations of greatness.¹³⁹ The CCP has “played up a history of painful Chinese weakness in the face of Western imperialism, territorial division, unequal treaties, invasion, anti-Chinese racism, and social chaos, because the regime has to claim legitimization based on its ability to defend China’s territorial integrity and to build a modern Chinese nation-state.”¹⁴⁰

The CCP has also introduced patriotic “education” campaigns to encourage nationalism. Since “Chinese national identity . . . evolves in part through China’s interactions with the [United States] . . . [it] is both limited and enabled by evolving Chinese narratives about past Sino-American encounters.”¹⁴¹ The need for confidence in national self image and China’s international status creates a particular sensitivity to intentional or perceived insults by the United States. Opposition to China’s initial bid for the 2000 Olympics, the bombing of the Chinese Embassy in Belgrade, and the EP-3 spy plane incident represent a continuation of humiliations against China and diminish China’s desired international status. International human rights litigation against former Premier Li Peng¹⁴² and former Beijing Mayor Liu Qi, among others, only contributes to this feeling.¹⁴³

For China and States in Africa and the volatile and strategically important Middle East, international human rights litigation may exacerbate nationalism and entrench existing human rights practices as a symbolic rejection of the United States and its perceived moral imperialism. The States that are likely to be targeted for human rights violations—almost all of the Middle East and many States in Africa—are often those with a long history of subjugation under colonialism. International human rights litigation in U.S. courts may resemble yet another attempt by a self-interested powerful State to impose its values

State-Led Nationalism: The Patriotic Education Campaign in Post-Tiananmen China, 31 COMMUNIST & POST-COMMUNIST STUD. 287 (1998).

139. See generally GRIES, *supra* note 137.

140. ZHAO, *supra* note 137, at 35.

141. See GRIES, *supra* note 137, at 55.

142. *Bao Ge v. Li Peng*, 201 F. Supp. 2d 14 (D.D.C. 2000).

143. For an examination of Chinese responses to international human rights litigation, see deLisle, *supra* note 124. Jacques deLisle recognizes the strong reaction of the Chinese government to U.S. interference in its domestic affairs through international human rights litigation, but suggests that the Chinese understand that judicial opinions are not equivalent to executive determinations of policy. Assuming, *arguendo*, that this is accurate, it does not vitiate the argument that the Chinese government can manipulate the litigation internally to encourage anti-U.S. sentiment and diminish the litigation’s efficacy in diffusing human rights norms.

on foreign societies, weakening the limited efficacy of the litigation, and encouraging nationalistic sentiments.

V. OBJECTIONS AND COUNTERARGUMENTS

The principal objections to this Article will likely focus on my description of international politics and the possibility of international human rights litigation complicating American foreign policy. Though they are related objections, the former relates to IR theory and the latter concerns the extant legal regime for international human rights litigation. This section addresses these and other counterarguments.

A. *Conception of International Politics*

1. Wrong IR Theory?

I do not argue that a particular conception of IR is always correct; rather, I suggest that social constructivism, democratic peace theory, and institutionalism do not explain all state behavior. Using a framework more sensitive to the role of power and national self-interest in international politics, I conclude that federal incorporation of CIL generates sovereignty costs and international human rights litigation complicates American foreign policy. However, this conclusion relies on the view that there is some role for power and self-interest in explaining state behavior in international politics. If power and self-interest have little explanatory value, my concern about federal incorporation of CIL and international human rights litigation may be misplaced.

Some may argue that the changes in the structure of the international system, the rise of democratic governments, and the growing discourse about shared norms, human rights, and the rule of law demonstrate that power and self-interest no longer explain state behavior in international politics. Economic interdependence,¹⁴⁴ globalization, and the specter of nuclear annihilation make a great power war both extremely expensive and potentially catastrophic. Human trafficking, environmental degradation, the rise of non-state actors, nuclear proliferation, economic integration—issues relevant in the post-Cold War world—all require coordinated, multinational efforts to resolve. The World Trade Organization, the World Bank, the International Monetary Fund, and the United Nations—along with other public and private actors—intrude on

144. But see E.H. CARR, *THE TWENTY YEARS' CRISIS 1919–1939* (1939); MEARSHEIMER, *supra* note 50, at 371; WALTZ, *supra* note 50 (arguing that economic interdependence by itself has not prevented security competition or military conflict between states with shared economic interests but conflicting security concerns).

state sovereignty and play an increasingly prominent role in international politics. These developments portend an era of multilateralism, institutions, and international law to resolve the international community's most pressing issues. Consequently, we see the establishment of more than fifty international judicial bodies, the majority of which emerged over the past 30 years,¹⁴⁵ and the judicialization of international institutions through arbitration and international dispute resolution mechanisms.¹⁴⁶

The main problem with this argument is that these developments are still consistent with a vision of international politics that allows a role for power and self-interest. Powerful States often create international institutions to reflect the underlying distribution of power in international politics and lower the cost of managing international order. Institutions operate in the interests of their creators and, if they fail to do so, the institutions are sometimes ignored. In the security context, the United States' decisions to ignore or circumvent the United Nations Security Council in Kosovo (President Clinton) and more recently in Iraq (President George W. Bush) are consistent with self-interested state behavior. Similarly, multilateral efforts to address environmental pollution and terrorism also reflect national self-interest.

The United States engages international law in a similar manner. The United States routinely withdraws from multilateral treaties or attaches reservations to prevent their application within the American legal system.¹⁴⁷ Despite the proliferation of international judicial bodies, the United States also circumvents the power of international courts by refusing to join—the International Criminal Court,¹⁴⁸ for example—or by signing bilateral agreements with States to exempt American citizens from their respective jurisdictions. These policies reflect the United States' power advantage in international politics and national self-interest in compliance with international law. The new challenges that States face in the post-Cold War world and the mechanisms that powerful States use to manage international order do not reflect a fundamental change in international politics; power considerations and national self-interest still have a role to play.

145. See Roger P. Alford, *The Proliferation of International Courts and Tribunals: International Adjudication in Ascendancy*, 94 AM. SOC'Y. INT'L L. PROC. 160 (2000).

146. *Id.*

147. See generally Spiro, *supra* note 89.

148. See Jack L. Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89 (2003)

2. The Universalist Theory Reflected in American Foreign Policy?

Some may argue that the United States has always prioritized democracy, human rights, and rule of law as the most important elements of American foreign policy. The United States was the driving force behind the creation of international institutions to manage world affairs and encourage multilateralism: the League of Nations, the United Nations, the International Monetary Fund, the World Bank, and the World Trade Organization. As the leader of the free world, the United States confronted the Soviet Union, assisted the former Warsaw Pact countries in their transitions to democracy, and encouraged democratic governance in Latin America. Through the State Department, the United States regularly criticizes states for failing to improve poor human rights practices or ensure basic civil liberties for their citizens. More than any other country, the United States works to spread democracy, normative human rights practices, and respect for the rule of law. American foreign policy, at its core, reflects the universalist theory and the IR theories that underlie it. Federal incorporation of CIL and international human rights litigation are consistent with this vision.

Despite this evidence, the universalist theory fails to show a connection between its foundational IR assumptions about international politics and the prioritization of security and strategic interests present in American foreign policy. For at least the majority of the twentieth century,¹⁴⁹ realism¹⁵⁰ has been the dominant paradigm for understanding state behavior in international politics.¹⁵¹ With some exceptions, it was the

149. Many scholars argue that realism also explains U.S. behavior in the international system in the eighteenth and nineteenth centuries. For an extended discussion of the realist basis of U.S. foreign policy in the nineteenth century, see, e.g., CHRISTOPHER LAYNE, *THE PEACE OF ILLUSIONS: AMERICAN GRAND STRATEGY FROM 1940 TO THE PRESENT* 27–38 (2006); MEARSHEIMER, *supra* note 50, at 146, 238–250; FAREED ZAKARIA, *FROM WEALTH TO POWER: THE UNUSUAL ORIGINS OF AMERICA'S WORLD ROLE* (1998). For alternative explanations of the United States' expansionist foreign policy in the late nineteenth century, see Colin Dueck, *The Sources of American Expansion*, 11 SEC. STUD. 171 (2001).

150. I take no position on whether realism should have been the dominant paradigm. It is important to note that realism is not a theory of foreign policy; it explains outcomes in international politics. Realism does not explain particular policy positions, for example the United States' support of a right-wing dictatorship in Pakistan over a democratic India during the Cold War, but can explain broader trends like prioritization of U.S. material power and strategic interests over humanitarian and moral concerns.

151. However, realism has a long history in political and philosophical thought. Kautilya's *ARTHASHASTRA*, Machiavelli's *THE PRINCE*, Thucydides's *THE PELOPONNESIAN WAR*, Hobbes's *LEVIATHAN*, Sun Tzu's *THE ART OF WAR*, and the writings of Han Fei articulate normative theories and descriptive accounts of the optimal use of power to achieve political ends in both domestic and "international" politics. Although these theorists do not use the language of contemporary IR theory, their assumptions about the role of power and state behavior are instructive. For them, states pursue their self-interest through the accumulation, preservation, and maximization of power.

dominant theory in the American foreign policy establishment¹⁵² during the Cold War.¹⁵³ From 1945 to 1989, the United States operated in a manner generally consistent with realism, focusing on the development of American economic and military strength (material power to achieve security) and support of anticommunist regimes to balance and contain the Soviet Union in a bipolar international system.

American foreign policy has reflected the difficult tension between competing normative and strategic goals. In a number of circumstances, Republican and Democratic administrations have made the difficult decision to prioritize the United States' security interests over promoting human rights. Although in a perfect world the pursuit of normative interests would always be preferable, the United States sometimes has immediate security and strategic concerns that require difficult compromises. The absence of a central enforcement mechanism forces States to ensure their security before pursuing normative goals. This painful compromise is likely to continue.

One might respond that the post-Cold War era is an opportunity for the United States to turn away from its history of self-interested power politics. Social constructivism,¹⁵⁴ institutionalism,¹⁵⁵ and democratic peace theory¹⁵⁶ began to challenge realism's dominance in IR theory and in the foreign policy establishment after the end of the Cold War. American foreign policy seemed to focus on human rights and the rule of law as primary concerns. As President Clinton stated:

We can then say to the people of the world, whether you live in Africa, or Central Europe, or any other place, if somebody comes after innocent civilians and tries to kill them en masse because of their race, their ethnic background or their religion, and it is within our power to stop it, we will stop it.¹⁵⁷

However, American foreign policy did not conform completely with its rhetoric. While the U.S. military acted in Somalia and Haiti, humanitarian interventions that "reflected no traditional notion of American

152. George P. Kennan, Paul T. Nitze, Henry F. Kissinger, and Brent Scowcroft, among others, were all realists. Scholars Nicholas Spykman, Reinhold Niebuhr, Hans J. Morgenthau, and Kenneth Waltz provided some of the theoretical underpinnings for realism as an IR theory.

153. For a detailed analyses of U.S. foreign policy's realist foundations and the history of the Cold War, see, e.g., JOHN LEWIS GADDIS, *STRATEGIES OF CONTAINMENT: A CRITICAL APPRAISAL OF AMERICAN SECURITY POLICY DURING THE COLD WAR* (2005); JOHN LEWIS GADDIS, *THE UNITED STATES AND THE END OF THE COLD WAR* (1992); LAYNE, *supra* note 149.

154. See sources cited *supra* note 34 and accompanying text.

155. See sources cited *supra* note 41.

156. See sources cited *supra* note 38.

157. HENRY KISSINGER, *DOES AMERICA NEED A FOREIGN POLICY: TOWARD A DIPLOMACY FOR THE 21ST CENTURY* 253–54 (2001) (internal citation omitted).

national interest in the sense that their outcome could in no way affect any historic definition of American security,"¹⁵⁸ the United States also ignored the Russian crackdown in Chechnya, the atrocities in Rwanda,¹⁵⁹ Sierra Leone, the Sudan, and the Caucasus—all conflicts that generated large numbers of civilian deaths and casualties and gross human rights violations. This tension in American foreign policy begs the question:

If the Clinton Doctrine required aiding the victims of brutality in Kosovo, why did it not in Rwanda, Chechnya, Tibet, Iraq, the Sudan or Sierre Leone? The application of universal principles on so selective a basis could help but raise questions about what the standards for selection were to be and whether *expediency as much as morality determined them*.¹⁶⁰

Again, this is a description rather than an indictment or a defense of the United States or its foreign policy. In an international system without a central enforcement mechanism that is sensitive to the role of power, the United States has made the difficult decision of privileging strategic interests over human rights concerns to achieve national interests.

Finally, after the terrible events of September 11, 2001, the United States has allied itself with dictatorships that share the United States' strategic interests—in this case, a common opposition to Al-Qaeda and affiliated terrorist groups—but reject democracy and engage in human rights violations. As I noted earlier, the United States courted the Musharraf dictatorship in Pakistan and the repressive Central Asian Republics as allies against Al-Qaeda in the War on Terror. The United States supports autocratic regimes in Algeria, Saudi Arabia, Jordan, and Egypt. With some exceptions, it has been relatively silent about Russian human right violations in Chechnya, Chinese human rights violations in Tibet, and Turkish human rights violations against the Kurds.

Expressions of concern from embattled Chechens and Tibetans virtually disappeared. The old Cold War habit of determining allies solely by their effectiveness in fighting a common threat

158. *Id.* at 255.

159. For a discussion of the U.S. attempts to avoid involvement in Rwanda and other genocides, see SAMANTHA POWER, "A PROBLEM FROM HELL": AMERICA AND THE AGE OF GENOCIDE (2002).

160. John L. Gaddis, *Order versus Justice: An American Foreign Policy Dilemma*, in ORDER AND JUSTICE IN INTERNATIONAL RELATIONS 155, 167 (Rosemary Foot, John Gaddis & Andrew Hurrell eds., 2003) (emphasis added).

[returned] and, as a consequence, the demands of stability appeared, once again, to have trumped those of equity.¹⁶¹

The U.S. occupation of Iraq and Afghanistan, the broader War on Terror, the likelihood of a continued U.S. presence in the Middle East, the increasing prominence of non-state actors, the United States' security commitments in East Asia, the long-term prospect of new rising powers in the international system (China), and the exigencies of international politics suggest that the United States will be forced, at times, to privilege strategic interests over human rights concerns. My framework incorporates these considerations in providing a more nuanced evaluation of federal incorporation of CIL and international human rights litigation. In contrast, the universalist theory relies on an aspirational conception of international politics.

B. *International Human Rights Litigation and Foreign Policy*

Perhaps concerns about federal incorporation of CIL and international human rights litigation are overblown. It could be that federal judges are capable of making similar determinations about the consequences of international human rights litigation in U.S. courts. They have dismissed claims that were not based on specific, binding, or obligatory CIL norms and have only allowed claims for gross violation of human rights to proceed.¹⁶² Judicial procedural safeguards, including *forum non conveniens*¹⁶³ and foreign sovereign immunity,¹⁶⁴ protect potential defendants.¹⁶⁵ Moreover, the executive branch can intervene if litigation threatens or compromises the United States' security or strategic interests. Thus, it could be argued that the current regime is sufficient.

1. Is the Existing Regime Sufficient?

Given the new CIL's unclear methodology and content, it is difficult to limit¹⁶⁶ the types of cases and the opportunities for disruption that international human rights litigation may produce. Despite *Sosa* and its specific, universal, and obligatory standard, the next wave of interna-

161. *Id.* at 170.

162. See Stephens, *supra* note 119.

163. See Kathryn Lee Boyd, *The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation*, 39 VA. J. INT'L L. 41 (1998).

164. For a discussion of sovereign immunity and its implications for ATS litigation, see Roger P. Alford, *Arbitrating Human Rights*, 83 NOTRE DAME L. REV. 505 (2008).

165. For a discussion of the procedural obstacles for ATS litigation, see Kathryn L. Boyd, *Collective Rights Adjudication in U.S. Courts: Enforcing Human Rights at the Corporate Level*, BYU L. REV. 1139 (1999).

166. See Sohn, *supra* note 80, at 399.

tional human rights litigation under the ATS will likely focus on corporate activities and, according to some, challenge executive branch foreign policy decisions.¹⁶⁷ This could severely complicate the pursuit of the national interest, particularly when the United States makes the difficult decision to subordinate its normative goals to achieve more immediate national security or strategic interests.

As others have noted,¹⁶⁸ the federal judiciary is not best suited to determine amorphous, indeterminate new CIL norms on a case-by-case basis.¹⁶⁹ First, the new CIL's methodological incoherence and rapidly changing content are so contested that seasoned scholars of international law strongly disagree about how to identify or even determine the existence of many purportedly universal new CIL norms.¹⁷⁰ Second, federal judges "have, at most, a superficial familiarity with the theory of law creation in the international legal system and only the vaguest notion of how the system functions."¹⁷¹ Third, federal judges also lack appropriate guidance as "neither the Federal Rules of Evidence nor the Federal Rules of Civil Procedure make reference to methods or requirements for pleading or proving customary international law in United States courts."¹⁷² This is not a criticism of the capacity of U.S. federal judges; rather, it is a description of the new CIL's unclear methodology and the difficulties that federal judges face in adjudicating international human rights claims.

2. Litigation Encourages Positive Human Rights Practices?

Advocates of international human rights litigation concede that the enforcement of successful judgments under the ATS is difficult. However, international human rights litigation brings attention to violations of human rights law, provides victims with an opportunity to vindicate their rights in court, and encourages the creation of institutions to prevent future human rights violations. International human rights litigation encourages the adoption of normative human rights practices.

167. See Julian G. Ku, *The Third Wave: The Alien Tort Statute and the War on Terrorism*, 19 EMORY INT'L L. REV. 105, 105-06 (2005).

168. See Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153.

169. Harold G. Maier, *The Role of Experts in Proving International Human Rights Law in Domestic Courts: A Commentary*, 25 GA. J. INT'L & COMP. L. 205 (1996) (noting that federal judges sorely lack the requisite knowledge about the substance and formation of international law and advocating the use of expert witnesses in international law cases).

170. Kelly, *supra* note 79.

171. Maier, *supra* note 169, at 205.

172. *Id.* at 205.

Though empirical work on the effects of human rights treaties on state behavior exists,¹⁷³ there is little evidence of a specific causal relationship between international human rights litigation in U.S. courts and changes in the domestic legal regimes or the behavior of targeted States. International human rights litigation is unlikely to have more than a negligible effect, by itself, on actual state practices and may stunt the adoption of the normative practices that it promotes.

If successful, international human rights litigation provides judgments that are rarely enforced. While the opportunity to be heard may have a healing value for the plaintiffs, a decision by a U.S. court, far removed from the country in which the human rights violations occurred and the perpetrators reside, is only symbolic. Given the limited capacity of international human rights litigation to affect state practice, such hollow victories may actually expose some of the weaknesses of international law and an international judicial system without a central enforcement mechanism.

It is also unclear whether the citizens of target States have any independent knowledge of the litigation. Even if we assume that they do, it is unlikely that these unenforced, symbolic victories in U.S. courts penetrate deeply into the target States' populations, weakening social constructivist arguments that international human rights litigation, by itself, can socialize States, acculturate individuals, and encourage shared norms and practices.

Finally, international human rights litigation in U.S. courts may actually delay the acceptance of preferred human rights practices. As noted earlier, such litigation can be manipulated to generate a nationalistic response—framing it as yet another attempt by the United States to impose its “universal” values on the international community. Whatever their failings, the United Nations, human rights groups, international institutions, and non-governmental organizations have more legitimacy in the international community to encourage respect for human rights than a U.S. federal district court. Many have a presence within the borders of States where violations are likely to occur and have much better access to the populace. Since they do not necessarily appear as appendages of the United States, such groups are also less likely to generate a nationalistic backlash. International human rights litigation may very well complicate the efforts of the organizations best-placed to achieve concrete human rights improvements.

173. For a discussion of the efficacy of human rights treaties, see Hathaway, *supra* note 126.

CONCLUSION

Federal incorporation of CIL and international human rights litigation relies on a universalist theory of international law. The universalist theory is rooted in specific IR theories and drives a project to incorporate international law into the American legal system, develop a global legal architecture, and use U.S. courts to encourage progressive change. Federal incorporation of CIL and international human rights litigation are incremental steps toward that goal.

However, a broader consideration of IR and a competing theory of state compliance based on power and self-interest generates a framework that demonstrates that federal incorporation of CIL also creates sovereignty costs, and that international human rights litigation will complicate the realization of the United States' normative and strategic interests. The argument is not a rejection of universal human rights and the rule of law. It simply suggests that the universalist legal theory is driven by IR theories that minimize the role of power and national self-interest in international politics.

Beyond the Supreme Court's decision in *Sosa*, addressing these concerns may require congressional action to define the international law norms actionable under the ATS and provide guidance on the delicate balance between the pursuit of U.S. interests in a world sensitive to power and the concurrent commitment of the United States to international human rights litigation. One example of such action within foreign relations law is the shift from the Tate Letter regime on governing the executive's case-by-case determinations of sovereign immunity to the passage of the Foreign Sovereign Immunities Act, which codified the sovereign immunity standard for the judiciary.¹⁷⁴ Another is the Torture Victim Protection Act, which specifies the procedural and substantive rules for bringing torture claims under international law in U.S. federal courts.¹⁷⁵ However, in the absence of contemporary congressional action to address the concerns outlined here for international human rights litigation under the ATS, this Article implicitly endorses an incremental expansion of executive branch decision-making authority vis-à-vis the judiciary for international human rights litigation.

174. For a discussion of the background and motivations for the Foreign Sovereign Immunities Act, see Michael D. Murray, *Jurisdiction Under the Foreign Sovereign Immunities Act for Nazi Crimes of Plunder and Expropriation*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 223 (2004).

175. For an introduction to the Torture Victim Protection Act, see Robert F. Drinan, S.J. & Teresa T. Kuo, *Putting the World's Oppressors on Trial: The Torture Victim Protection Act*, 15 HUM. RTS. Q. 605 (1993).

For various reasons, the executive is institutionally best-suited to determine the United States' strategic and normative interests; develop the appropriate foreign policy to achieve those goals; and evaluate wisdom of federal incorporation of CIL and international human rights litigation under the ATS. The executive branch can best determine whether federal incorporation of CIL generates high sovereignty costs for the United States. It also has the institutional competence, prerogatives, and resources to determine whether international human rights litigation will negatively affect the executive branch in its pursuit of strategic interests, calibrate the United States' position on specific international human rights litigation with ongoing diplomatic overtures, and coordinate the collection and analysis of information to determine the best course of action. Finally, the executive, unlike the judiciary, is directly politically accountable. These factors suggest that a slight movement along the continuum of existing judicial deference toward the executive branch—perhaps in the form of judicial review of executive determinations on specific litigation under an arbitrary and capricious, abuse of discretion, or reasonableness standard—is warranted for international human rights litigation under the ATS.