

Deliberative Jurisprudence and Transnational Common Law
as a Strategy for Earth System Governance

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A few authors, notably Dryzek, have noted in passing that deliberative democratic theory ought to be highly applicable to international politics where consensus is the default decision rule. Few have explored this potential systematically, nor have many developed specific proposals for global processes and institutions to harness the potential for addressing the existing democratic deficiency in international environmental law and policies. This paper explores the necessary characteristics of a meaningful global jurisprudence that could underpin truly effective international environmental law, a jurisprudence with theoretical foundations in realism, pragmatism, and deliberative democracy. Building on this analysis, we suggest a conceptual framework for international politics and law that offers the prospect of workable, democratic, and environmental-friendly rule-governed behavior within a system of global politics that is likely to remain (and perhaps ought to remain) anarchic in important respects. Specifically, the development of a global environmental jurisprudence must be based on democratically generated norms. We analyze establishment of a concrete process for identifying and generating global environmental norms and for translating those norms into international law that, unlike current international law, will be universally recognized as both fact and norm (Habermas) because of its inherent democratic legitimacy. This paper will propose a new and democratic method for creating, interpreting, and implementing international environmental norms that would in the initial stages bypass states. We demonstrate that it is possible to develop a transnational environmental consensus through a system of juristic democracy that could generate and legitimate international environmental norms. A kind of transnational common law for the environment would thus be developed on a foundation of norms and principles derived from the consideration by innumerable policy juries of carefully cast hypothetical cases. Juristic democracy would link the legitimacy-imparting value of a practically realizable, catholic, deliberative democracy and the possibility of legislating through common law jurisprudence, deliberate adjudication, and the development of transnational common law. As such, it would constitute a rule-making system for earth system management that could be fully complementary to many other possible strategies.

The Problematic Character of International Law

International law, it seems, is constantly in search of legitimacy. In fact, invoking the very concept of legitimacy serves to problematize law at any level of governance. For example, Jurgen Habermas has argued that the legitimacy of law depends upon the ability of those to whom it is addressed to regard it as both a fact and a norm (Habermas 1996). By this he means that citizens must be able to see that law establishes behavioral requirements that are backed up by appropriate and effective mechanisms of enforcement *and* that those requirements reflect a value or set of values that have been freely subscribed to in an act of collective will formation that is fundamentally democratic. Moreover, the act of will formation that produced the law must be broadly participatory and free of any coercion other than the force of the better argument. This stringent standard of legitimacy is well understood by students of contemporary democratic theory and it forms the conceptual basis of a theory of deliberative democracy that has emerged from the rich debate between Habermas and John Rawls (Habermas 1995; Rawls 1995). Exploring the implication of this theory of legitimacy in the area of international environmental law is the objective of this essay.

As a first step, we will explore the implications of deliberative democratic theory for the practice of environmental politics at the level of the nation-state. This we have done at considerable length elsewhere (Baber 2004; Baber and Bartlett 2005). Here we limit ourselves to recounting the general contours of environmental democracy at the level of the state. At the national level, a deliberative environmental politics is grounded on the fundamental assumption that no regime of environmental protection achieves the goal of ecological sustainability if it does not also satisfy the basic requirements of democratic legitimacy. Indeed, democracy is a constitutive element of ecological rationality. This argument suggests that a consensus criteria for decision-making is essential both as a regulative norm of democracy and as a practical foundation for overcoming the network of mutual vetoes that has come to characterize the relationship in which stake-holders in environmental politics find themselves. It also leads to the conclusion that this consensus must be achieved among those who are most closely affected by the ecological issues at hand under circumstances of deliberative equality sufficient to assure that the resulting agreement results from persuasion rather than coercion.

This account of environmental democracy at the level of the nation-state poses a number of challenges for adapting the conceptual demands of deliberative democracy to the circumstances of collective will formation at the international level. At the outset it is worth noting that not all of the news is bad. Deliberative democracy's commitment to decision-making by consensus would seem to fit well in a decision framework that contains the idea of sovereignty as a central (some might say defining) characteristic of the parties involved. There are, however, three additional problems.

First, international environmental governance is plagued by a democratic deficit. To the extent that international environmental decisions contain any democratic content, it is a happy coincidence that can be traced to the existence of democratic processes within the countries that are parties to those agreements. In this sense, international democracy, where it occurs, is always derivative rather than direct and participatory. This is especially troubling in the area of environmental decision-making if one has already accepted the premise that democracy is a constitutive element of ecological sustainability.

Second, international environmental agreements are not self-executing. The interpretation and enforcement of their provisions cannot simply be delegated to an executive or regulatory agency as we would do at the domestic level. This problem casts doubt on the existence of international environmental law as a fact of the real world. Without the ability to effectively alter the behavior of the parties to whom it is addressed, it is arguable whether international law generally deserves to be called law at all. And this point is more than a semantic quibble. It draws attention to the fact that the parties to international environmental agreements are states but the actors ultimately targeted by those agreements are generally private corporations and individuals. One might go so far as to argue that the incapacity of environmental law to impose its requirements on legal individuals is just as well because that law is not the result of any unforced agreement among those individuals in the first instance.

Third, international tribunals would seem to lack both the jurisdiction and the jurisprudence that would be necessary to adjudicate the claims and counter claims that might arise under international environmental law. This problem can be seen as both cause and effect. It contributes to the inability of international environmental law to pose

a social fact to those actors whose behavior it seeks to modify. And it is a result of the incapacity of international negotiations to incorporate normative commitments that are genuinely representative of the values held by those whom the resulting agreements address. International environmental agreements provide international tribunals with no ground upon which to erect the structure of a decision and no rationale for determining its content, leaving international law diminished to mere international rhetoric (Goldsmith & Posner, 2005).

A fuller analysis of these three problems and a discussion of possible solutions is the objective of the remainder of this paper. Part I discusses in more detail the problem of the alleged democratic deficit in international environmental law and suggests a “juristic” approach to collective will formation that might bring a more direct and participatory form of democracy to bear on the problem of collective will formation in this critical policy arena. Parts II and III take up the problems of interpretation and enforcement that scholars of international environmental law have long discussed. Based upon the approach to collective will formation outlined in Part I, an approach will be suggested that might allow general commitments to abstract principles of environmental protection to be developed into more concrete and specific obligations that would allow organizations and individuals to assert and answer claims in more coherent ways. Finally, in Part IV, we speculate about what kind of results (what international environmental regimes) might be produced by the juristic approach described in the preceding three parts.

Part I – Legislation as Will Formation

Viewed as legislation, international environmental agreements, and international agreements in general, leave much to be desired (Baber and Bartlett 2009). Most of these shortcomings fall into one of two broad categories, corresponding generally to Habermas’s distinction between law as fact and law as norm. First, it can be argued that international environmental agreements are (for a variety of reasons) ineffective in practical terms. A second failing is that international environmental agreements do not capture any normative consensus among the organizations and individuals whose behavior those agreements seek to regulate. These two general problems are obviously

interrelated. But it will be useful for analytical purposes to discuss them separately before suggesting a means of dealing with their consequences.

Effectiveness

Lynton Caldwell identifies three fundamental questions that will inevitably arise with respect to any international environmental agreement (Caldwell 1991). First, we will want to know whether the *coverage* is adequate. Are all of the necessary parties and all of the essential issues included? Second, are the provisions of the agreement *compatible* with the corresponding elements of the domestic law of the signatories? Third, are the provisions structured in such a way as to produce a sufficient level of *compliance* on the part of the parties to the agreement?

1. Coverage. The problem of inadequate coverage in international environmental agreements can be traced to several underlying causes. First, the general structure of environmental issues tends to make adequate coverage difficult to achieve. The ecological axiom that all things are ultimately interrelated is hardly compatible with the categorizing logic of Western-style law (Caldwell 1991). Moreover, even in countries where environmental awareness and commitment are relatively high, there is a growing problem of “green fatigue.” And the inability of international law to stop various forms of environmental degradation has undermined the ability of domestic leadership to translate general support for environmental protection into a mandate of for stringent multilateral environmental accords (VanDeveer 2003). The ultimate success of international environmental agreements is heavily dependant on the ability of domestic leadership to generate popular political support for them (Hierlmeier 2002).

The difficulty in creating political support for environmental accords can be traced to more than simple fatigue or a sense of futility. The inherent elitism of the international political process certainly discourages citizen participation. As an example, success in controlling the use of ozone depleting chemicals proved to be illusive until a leading role was assumed by the chemical companies whose behavior was at the root of the problem (Falkner 2005). Their economic and technological power gave corporations the edge over other actors in shaping the regulatory discourse that unfolded as development and implementation of the ozone regime got underway. The observation that the power of these corporations was moderated only by the agency of states and

international organizations in no way changes the fact that the process was one of elite bargaining rather than popular will formation. While we may feel some satisfaction with the outcome, it is simply not possible to argue that the process was democratic in any meaningful sense.

A final obstacle to adequate coverage in international environmental agreements is the tenacity of the idea of state sovereignty as the primary organizing principle in international law. The nation-state, as natural and inevitable as it may seem to us today, is a relatively recent and historically contingent development (Brooks 2005). There are a number of reasons to believe that nations as a form of organization are not well adapted to the challenges of environmental protection in the age of globalization. Despite the large number of multilateral environmental agreements that have been negotiated and the high rate of compliance with their requirements, there is a growing concern that the state of the global environment continues to deteriorate (Crossen 2004). One reason for this pattern is that asymmetries between interest groups in the cost of lobbying are greater at the national level than they are globally. This results in a disadvantage for environmentalists in national capitals (Johal and Ulph 2002). Moreover, the globalizing forces of scientific advancement, mass communication, economic integration, population growth and mobility are all conspiring to create pressure for a universalizing of basic ecological responsibilities irrespective of national boundaries (Caldwell 1999). It is becoming increasingly clear that, even from the domestic perspective, the populations of many failed or failing states would benefit from living under the norms of a non-state international society instead of the dysfunctional regimes within their own countries (Brooks 2005).

All of these problems contribute to a pattern in which multilateral environmental agreements fail to protect the environment, not because their signatories fail to comply, but because the terms of the agreement contained weak obligations to begin with (Crossen 2004). The states that negotiate these agreements are so preoccupied with protecting their sovereign rights they overlook the fact that the soundest basis for protection of the environment is the affirmation of responsibilities (Caldwell 1991). This is the reason that assumptions regarding the autonomy of national law and sovereignty

are beginning to change *in fact* even though traditional doctrines persist in political and judicial rhetoric (Caldwell 1999).

2. Compatibility. Given what has been said regarding the status of the nation-state, one might argue that the issue of whether or not international environmental regimes are compatible with domestic law is not particularly important. This argument would be persuasive only if sufficient resources to implement international agreements existed at the supranational level. At the present time, and for the foreseeable future, this simply is not the case. As outmoded as institutions of national government may have become, the global system is still fundamentally anarchic in the sense that it lacks an authoritative government that can enact and enforce rules of behavior (Keohane 2005). Moreover, the complexities of ecological preservation require the use of policy networks consisting of actors who represent both national and supranational in an environment characterized by disaggregated government (Slaughter 2004). For both of these reasons, the compatibility of national and international environmental law will continue to be of concern.

The problem of reconciling international and domestic law arises in part from the fact that their modes of origin, administration, and enforcement are distinctly different. International law developed as the law of relations among states during the consolidation of modern nations as the primary institutions for governing the behavior of individuals and organizations (Caldwell 1991). This renders the very idea of environmental law among nations problematic. The direct object of environmental regulation is not countries, nor wildlife, water quality, erosion, deforestation or even global climate change. The object of environmental regulation is people, the only entities whose behavior has direct ecological consequences and the only actors over whom law has any real bearing (Caldwell 1999). To this extent, law among nations is of no direct environmental significance. What matters is what national governments are willing to do with respect to the regulation of their own citizens in pursuit of environmental protection.

Our understanding of these matters is often obscured as a consequence of the fact that both domestic and international regulatory structures are too often simplistically characterized merely as compromises among stakeholders when they are, in fact, far more complex efforts to develop hegemonic formations of governance in specific

markets or policy arenas (Andree 2005). Moreover, governments, international organizations, and non-governmental groups typically focus on particular issues and developments with little regard to their broader contexts and implications. This ignores the fact that through a significantly anthropogenic and additive process, specific decisions cumulate to change the environment as a whole. (Caldwell 1999). As an example, global coordination of environmental protection is threatened by strategic policy competition among states in search of investment capital which threatens to weaken environmental commitments (Johal and Ulph 2002). This has led to the development of the idea of “common but differentiated responsibility,” which yields ground on environmental standards in the face of a dubious argument that uniform and binding requirements would necessarily cripple the economies of developing nations (Weisslite 2002). Thus, in order to incorporate the necessary parties and issues in any given international environmental accord, there is often a strong pressure to establish differential levels of obligation that ultimately undermine the legitimacy of the accord itself and further erode the global commitment to stringent standards of ecological behavior.

3. Compliance. The signatories to any multilateral environmental agreement will fail to comply with its provisions (when they fail) for one of two reasons. Some could comply but will not, and others would comply but cannot (Caldwell 1991). These circumstances present two distinct compliance challenges. In the case of willful non-compliance, both the systemic failings of international law and the inadequacy of its underlying political consensus are evident. In the early 1990s, it was possible to argue that while international law had failed to adequately address global environmental issues, some progress was being made (Brunnee 1993). More recently, however, it has been observed that the field of international environmental law has gone rather quickly from maturation to an infirm old age. International environmental problems have become more daunting, but the law has not responded to these problems with any growth in vigor (Driesen 2003). A number of factors are involved in this failure.

First, the general structure and formal characteristics of international norms of behavior are often problematic. For example, it is often difficult to state these norms with sufficient precision. Decision makers encounter different types of challenges using scientific information to judge the health and environmental risks involved in various

types of disputes or decision scenarios. Where substantive standards of risk must be established, decision makers will face questions of how much emphasis to place on scientific assessments and how much on nonscientific (i.e., political) factors in assessing risk (Raustiala, Bodansky et al. 2004) Second, traditional international law based entirely upon interstate relations is incapable of addressing emerging global and cross-border issues. International justice based on state interest, state sovereignty, state equality and state responsibility is largely irrelevant in resolving transboundary environmental problems such as global warming. Addressing such issues requires that different rights and duties be assigned to different countries with different levels of economic and technological development. Further, it requires that we take into account not only interstate and interpersonal justice, but also intergenerational justice (Yokota 1999). Finally, international norms are often easy enough to identify but they are difficult to elevate to the level of enforceable law. As an example, the general idea of sustainable development is a well understood principle that could be a very effective legal concept. But it falls short of being a principle of customary international law even though it enjoys significant support in international legal instruments and is endorsed by a wide variety of international actors (Marong 2003). These problems help explain both a pattern of multilateral environmental agreements that achieve high levels of compliance because they require only shallow levels of cooperation (Crossen 2004) and a situation in which a norm of international behavior like the precautionary principle fails to develop into an effective system of prevention and remediation of international harms in the way that America's system of tort law evolved (Garrett 2005).

Turning our attention to nations that would comply with international environmental norms if they were able, a different set of problems emerges. Many developing states can make compelling arguments that, if they were held to the same environmental standards as First World nations, their economic development would be severely curtailed. They further argue, therefore, that to impose uniform environmental standards would work a serious injustice upon sectors of the world's population that are least able to assert themselves in international political debates (Weisslite 2002). Moreover, some states appear to be entirely failed enterprises. Some nations are so dysfunctional in so many ways that we simply cannot expect them to even attempt to

meet international environmental standards. They are often characterized by minimal domestic environmental requirements or systems that might be adequate at a formal level but underfunded to such a degree that the black-letter law on their books is irrelevant. The state-centric approach of our existing international legal system is to “restore” these failed states to a more successful level of performance. But many of these states never were successful and are unlikely ever to be. To continue to focus on the state in these circumstances is a misguided approach that is likely to do as much harm as good (Brooks 2005). In the case of these nations, common but differentiated responsibility is destined to fail as an equitable principle of law. Substituting differential contribution norms for differential compliance norms as some have suggested (Weisslite 2002) would merely result in the transfer of resources to failed states with predictable results. But the long-term non-state alternatives that might be appropriate would require international institutions much stronger, in terms of both political and analytical resources, than those that currently exist (Bodansky 1999). Of these resources, the political are arguably the most important.

Institutional change is, ultimately, dependent on political will and can be sustained only with popular political support (Hierlmeier 2002). Any system of transnational environmental enforcement would require nations to concede a right of international inspection, a right of performance audit and public reporting, and a common interpretive, meditative and adjudicatory authority. In the final analysis, it would seem to be necessary for nations to subscribe to some institution capable of applying sanctions as a last resort (Caldwell 1991). The largest stumbling block is obviously the issue of coercive sanctions. Standards of national conduct and acceptable methods of mutual coercion, captured in legal principles enforceable as world law, would be necessary attributes of global environmental governance (Caldwell 1999). Of course, mutual coercion would be less necessary if mutual values and goals were more universal. This brings us to the second major failing of international law, its inability to capture a normative consensus through the practice of global democracy.

Normative Consensus

Law is shaped both by the persistence of custom and the perception of change. Law is inherently conservative. Its continuity and predictability is presumed to protect

the stability and survival of the society it serves. But contemporary legal doctrines (at both the national and international level) are being overtaken by unprecedented developments that pose the dilemma of whether serving their conservative function involves adhering to conventional arrangements or adapting to meet new and evolving circumstances (Caldwell 1999). The dilemma is all the more daunting if we add the requirement, derived from deliberative democratic theory, that law should embody a normative consensus that results from the unforced agreement of those whose its behavior seeks to govern. Having turned this corner in our discussion of international law, we are confronted immediately with a problem widely known as the democratic deficit.

The democratic deficit is not unique to international law or to the arena of environmental policy. It has been argued that a democratic deficit is at the heart of America's slide into the anomic form of democracy that most citizens find so unsatisfying (Durant 1995). The discussion of the democratic deficit has expanded to include the deficit of jobs, equality and justice that suggest a deficit in the democratic system itself in the world's most developed nations (Gindin 1994). Our present concern, however, is limited to the democratic deficit in relations among nations. Broad as even that subject is, we shall focus on the problem of a democratic deficit as it manifests itself in the most fully developed example of international cooperation available to us - the European Union.

Political scientists generally agree that the European Union is undemocratic, but they do not agree about how undemocratic it is or even about how serious a criticism the democratic deficit charge really is (Neunreither 1994). Part of the difficulty is that we lack a generally accepted method for assessing democracy in a political system such that there would be agreement on what would constitute adequately democratic institutions (Lord 2001). And as a more general matter, there is considerable evidence that perceptions of EU democracy vary with perceptions of the economic costs and benefits of membership (Karp, Banducci et al. 2003), suggesting that among mere mortals the normative *value* assigned to democracy will depend to some extent on its relative *costs*.

There is also disagreement about the source of the democratic deficit. One view is that the essence of the problem is that Europeans lack a party system that offers a

meaningful choice to voters with respect to pan-European issues and that this failing is reflected in the unrepresentative qualities of the European Parliament (Andeweg 1995). The diagnosis would lead one to advocate the creation of genuine pan-European elections and parties. This, in turn, would require that the EU be transformed into a classic parliamentary system with a parliament vested with genuine legislative power and control of the executive selection process (Hix 1998). Others have argued, however, that it is simplistic to suggest that the democratic deficit can be solved simply by the direct election of the European Parliament. The issue is more complex and multifaceted. Democratic legitimacy in the EU is contested and divided between the supranational and national levels of government. It is conditional and evolutionary. It is expressed through the dispute over the balance of power among the key supranational decision-making institutions and the argument over decision-making efficiency, transparency and accountability (Lodge 1995). As for the unrepresentative qualities of the existing EU Parliament, there is an argument to be made that the EU is already a highly open and accessible system which is actually burdened with a high level of interest representation (Greenwood 2002). On this view, the EU suffers more from a democratic overload than a democratic deficit.

This ambiguity about the sources of and solutions for the democratic deficit lead to further questions about the scope of the deficit. For instance, we might legitimately question whether introduction of a common currency puts a negative entry into the democratic ledger, quite apart from any advantage it may confer in the area of economic growth (Martin and Ross 1999). Likewise, the development of immigration policies in the EU seems to emphasize tighter control of the numbers of immigrants and asylum-seekers rather than the development of measures to combat racism and xenophobia. The consequence of this approach may have been an aggravation of both institutional and participatory aspects of the democratic deficit (Geddes 1995). But notice, these two observations, when taken together, could be viewed as evidence that the EU is damned if it does and damned if it doesn't. The complaint that a common currency is undemocratic would appear to rest on the idea that, at least in the area of monetary policy, too high a level of centralization has been reached. On the other hand, criticism of the immigration

policies of EU members would seem to involve a claim that the Union fails to exert sufficient pressure toward uniformity in this policy arena.

In light of all this, it is little wonder that there is a lack of consensus about the EU's lack of consensus. Some argue that the democratic deficit is designed right into the EU's basic structure. The process of European integration, so the story goes, was marked from the beginning by a form of technocratic elitism that made a backlash against the Maastricht Treaty virtually inevitable. According to this view, the EU needs to achieve the same executive-legislative model found among existing European states (Featherstone 1994). A contrasting view is that concern about the democratic deficit in the EU is misplaced. Judged against existing industrial democracies, rather than against an ideal plebiscitary or parliamentary democracy, the EU can be regarded as entirely legitimate. Its institutions are tightly constrained by constitutional checks and balances, narrow mandates, fiscal limits, super-majoritarian and concurrent voting requirements, and a system of separation of powers (Moravcsik 2002). If comparing the EU favorably to existing democracies is regarded as damning with faint praise, additional reassurance is available in the form of an argument that democratic legitimacy for the EU actually becomes problematic only if it is seen as a future nation-state. If instead the EU is regarded as a regional polity with shared sovereignty, variable boundaries, a composite identity, a compound form of governance, and a fragmented democracy, the problem of a democratic deficit diminishes considerably (Schmidt 2004).

This more affirmative view of the European Union allows us to imagine further improvements in the democratic quality of international law. The recent history of EU political development is characterized by a heightened concern for inclusivity and transparency in institution building (Fossum and Menendez 2005). For nearly a decade academicians and political actors have advocated new modes of governance in the EU. Many have limited their proposals to mechanisms that are mere extensions of existing participatory practices, restricted to so-called stakeholders and underpinned by the same elitist and functionalist philosophy that has animated the EU from its inception (Magnette 2003). This approach might be justified if we accepted the argument that the European public space is unavoidably dominated by an instrumental form of rationality that makes any form of democracy other than interest group liberalism impractical (Meadowcroft

2002). Indeed, reproducing interest-group liberalism at the regional level would be an historic accomplishment if nothing more was ever achieved. It is doubtful, however, that European publics will be satisfied with that in the long-run. This conclusion seems all the more likely when we consider that other regional agreements, far less ambitious than the EU, have been forced by public opinion to include features allowing for direct citizen participation. As an example, the North American Free Trade Agreement carried with it a side agreement officially entitled the North American Agreement on Environmental Cooperation (NAAEC). This agreement established the Commission for Environmental Cooperation, which has developed an innovative citizen submission process that provides a promising template for future multilateral environmental agreements (Markell 2000). And the continuing demands for a larger role for citizens in the international system following protests at the World Trade Organization meeting in Seattle in 1999 suggest that the pressure for greater public participation in global policy-making is unlikely to subside (Strauss, Falk et al. 2001).

It is against this backdrop that current efforts to further democratize the EU must be understood. Efforts to adapt forms of representative democracy familiar from the domestic experience for use by the EU are destined to confront two fundamental challenges: the relatively stronger emphasis on executive government at the regional level and the multilevel character of the polity itself (Crum 2005). The relative weakness of the European Parliament is a major reason that democratic legitimacy in the EU has conventionally been discussed as a problem of direct election of legislators at the regional level (Lodge 1995). However, since a European demos does not currently exist, and does not appear to be in the offing, the introduction of elements of direct democracy would seem to be a more promising approach (Feld 2005). Opportunities for direct participation are important both as a source of democratic legitimacy and as a matter of political acceptability (Giorgi and Pohoryles 2005). The disaggregated character of the European polity suggests that a conception of civil society based on contestation and communication within and across multiple public spheres is not only good for ecological democracy but also more consistent with imaginable political scenarios (Hunold 2005).

By way of summary, the next iteration of international environmental law will have to satisfy a dual imperative that is conceptually consistent with the jurisprudential

theories of Jurgen Habermas (1995). As social fact, international environmental law will have to achieve *coverage* all the essential parties and issues. It will have to demonstrate its *compatibility* with existing environmental regimes at the national level. And it will have to present nations with political imperatives that encourage a significant level of *compliance* with international obligations. As an expression of international norms, environmental law will have to capture an international consensus regarding the obligations of those individuals to whom the law is addressed. That level of consensus can only be produced by methods of collective will formation that are both open and participatory and that generate the uncoerced agreement of a representative sample of the population to be governed. The approach to be suggested in the remainder of this article will be referred to as a “juristic” alternative.

Juristic Democracy

Deliberative democrats have not always paid enough attention to matters of practice. For anyone who has followed the development of the field, this observation will seem entirely unremarkable. An excuse that might be offered for this shortcoming is that political practice is derivative of preexisting communities. In other words, the contours of our political practice are so dependent on antecedent social constraints that it is pointless to include them in our efforts to theorize democracy. This defense is of little use, however, in excusing us from discussing the practical issues involved in globalizing environmental democracy. The social and economic variables that might be thought to determine political practice at the national level vary so widely at the global level, and the bonds of community at that level are so weak, that every institutional possibility would seem to be in play. Moreover, we find ourselves in a time of rapid social and political change, when constitutional issues are in play in virtually every nation. In these circumstances it can be argued persuasively that communities do not pre-date politics but, rather, that politics leads to the formation of new communities (Hajer and Wagenaar 2003).

It is incumbent on deliberative democrats, therefore, to at least suggest institutional designs and political processes that might capture some of the theoretical ether that they have generated. Few of these theorists have been as active in this practical endeavor as James Fishkin. Fishkin’s experiments with a procedure that he refers to as

deliberative polling comprise one of the most creative approaches to deliberative politics of the last decade. Deliberative polling assembles a stratified random sample of citizens to discuss the policy positions of competing candidates or parties (Fishkin 1995). This group of citizens is brought together, at the investigator's expense, to participate in a weekend of small group discussions and larger plenary sessions that allow them to assimilate extensive and well-balanced information about their subject, exchange competing points of view, and come to considered judgments that represent a consensus of the group. In other words, deliberative polling is a procedure that explores what public opinion would be like if the public were motivated to behave more like deliberative democrats (Ackerman and Fishkin 2003).

Citizen juries, as Fishkin's small group discussions are sometimes called, engage in a very particular form of reasoning. As with juries in civil and criminal courts, they work to arrive at deliberative judgments through a collective, interactive discourse. This process is easily distinguished from the kind of systematic, principled reasoning that is typical of traditional moral philosophy. It is an effort to find workable definitions of a problem that yield solutions that can command the unforced assent of the deliberators. These concrete situations are characterized by what Hilary Putnam has called the "interpenetration" of fact, value and theory, an interdependence of elements that often cannot be distinguished even notionally (Putnam 1995). Experience with citizen juries in the United States, Britain and Australia suggest that the approach enjoys a number of significant advantages over other policy processes.

First, while allowing for a significant level of direct democratic participation on the part of average citizens, service on a citizen jury is no more intrusive than ordinary jury duty and far more educative than are ordinary political campaigns (Gutmann and Thompson 2004). Second, citizen juries tend to produce consensus rather than polarization (Fishkin and Luskin 1999). This can be traced to the fact that citizen juries do not begin their deliberations with votes but, rather, with discussion. Moreover, the plenary groups within which citizen juries operate are large enough to contain representative samples of public opinion and they are led by moderators who ensure that all perspectives receive a fair hearing, that experts are available to clarify questions of fact, and that all participants receive extensive information on the subject in advance

(Gutmann and Thompson 2004). Third, unlike mechanisms of political representation that are closely identified with the particular experiences of national populations, the citizen jury is a broadly deployable approach that will resonate in the widest variety of cultures. In fact, the use of citizen juries is one of the few techniques that allow us to imagine a form of world assembly in which citizens could deliberate as members of the whole order of humans rather than as representatives of particular nation-states (Laslett 2003) Finally, the deliberative form of rationality that citizen juries promote is more than just talk. It is an accomplishment in itself, forged by the direct efforts of citizens to deal with concrete, ambiguous, tenacious, practical problems (Fischer and Forester 1993). In short, the judgments of citizen juries transcend the forms of interest aggregation that are typical of interest-group liberalism. For this reason, the deliberative process exemplified by citizen juries has come to be regarded as an especially appropriate response to the environmental problematique, in the face of which existing political institutions (both domestic and international) have been judged to be obsolescent (Laslett 2003).

When we come to the matter of using deliberative democratic procedures like the citizen jury to address problems of environmental protection at the international level, however, we face a daunting challenge. It is difficult to imagine a more convoluted set of policy issues, more thoroughly entangled with concrete economic and political interests, than that involved in preserving the global environment. When one compares this policy arena with those in which domestic issues are addressed, it is hard not to be discouraged by its complexities. Even at the national level, the difficulties involved in legislating for a modern industrialized society have created a pattern of decision making that states legal obligations at relatively high levels of generality and relies upon members of executive and regulatory agencies to fill in the details in the exercise of what Kenneth C. Davis has referred to as discretionary justice (Davis 1969). This trend in interest-group liberalism has been criticized most trenchantly by Theodore Lowi, who has called for a juridical form of democracy. Lowi's approach would require legislatures to adopt far more concrete and specific rules of behavior that both constrain the exercise of administrative discretion and put citizens on notice as to the particulars of their legal obligations (Lowi 1979). Lowi's proposal is one response to the growing concern that modern regulatory regimes are insufficiently grounded in law and that, as William Pitt warned, where law

ends tyranny begins. So the complexities of environmental regulation at the international level are more than practical problems. They pose a challenge to our theoretical account of the legitimacy of international law in the same way that the vagaries of domestic legislation challenge the legitimacy of the democratic nation-state.

Attempting to negotiate international environmental agreements that spell out in detail the legal obligations of the parties has been discussed quite thoroughly, both in this essay and elsewhere. It has produced a body of generally unenforceable law with which the parties comply because it requires little of them that they were not already willing to do. In that respect, international environmental law is less a body of law as it is a collection of contracts. Bringing to this collection of agreements the questions of legitimacy involved in democratic politics would seem to be literally senseless. But even in the world of contracts, there must be a background of law that is obligatory. In thinking about the law of contract, it has long been recognized that the law “does not enforce every promise which a man may make” (Holmes 1991). It is the collective genius of generations captured in the tradition of the common law that it allows us to decide, on the basis of literally thousands of practical judgments, which promises we should be held to and which we should not. The vast majority of those rulings were arrived at by judges rather than juries. But the work of citizen juries suggests that the effectiveness of judges can be approximated by the rest of us if we are provided with sufficient information and an adequately structured decision environment. And what, after all, are our rules of civil and criminal procedure if they are not systems that provide judicial decision makers with appropriate information and rules of choice?

It is important to point out that the law of contract is similar to all other areas of common law in that it developed as a series of quite limited responses to particular problems encountered by real parties to actual legal disputes. The work of either judges or juries in resolving those disputes was rarely done with the idea that over the course of centuries a coherent body of general legal propositions would result. The coherence and legitimacy of the common law were hard won, but not by tackling big issues with big ideas. The common law was a bottom-up enterprise, much as empirical science tends to be. It involved repeated “observations” of what our senses (particularly our sense of justice) implied about a particular set of circumstances. Are we not confronted with a

similar challenge when we consider the practical impossibility of grappling with problems of environmental policy in their imponderably complicated entirety? And do we not also encounter, once again, Lowi's argument that to be legitimate law must be specific? The common law, after all, tended to be quite specific for centuries before it aspired to become general. So how are we to approach the need to create environmental law at the international level that is grounded in our shared understanding of reality and, yet, comprehensive enough to actually protect the environment?

A possible solution may be found in an idea advanced by Kenneth Davis that he intended to assist administrative law judges in their efforts to deal with the complexities of regulation through rule-making. Davis suggested that it would be possible to capture something of the practicality of the common law by using hypothetical cases in administrative rule-making. These cases would be designed to pose important, but limited, problems of regulatory policy. They would allow administrative law judges to rule on narrow and well defined questions. Those rulings, if accumulated properly, would provide the precedents that regulators could rely on in exercising their administrative discretion (Davis 1969). They would have an advantage over rule-making in that they would be concrete rulings that would neither leave regulated parties wondering what specific obligations they imposed (the "Lowi problem") nor require decision makers to bite off more of the subject than they could chew (the problem with the Lowi solution).

We suggest that the process of rule-making through hypothetical adjudication can be married to the use of citizen juries. Rather than ask citizen juries to choose between competing solutions to big policy problems (like global climate change) it is possible to frame hypothetical disputes that would arise under a variety of regulatory approaches and then ask the world's citizens to apply the same common sense of justice that they already use when serving jury duty at their local town hall. The citizens would enjoy both the educative and expressive advantages associated with direct political participation. If a sufficient number of properly selected juries ruled on the same case across the globe, the international community would be provided with the results of a process of collective will formation unmediated by any elected elite. It remains at this point to describe the adjudicatory function that would be appropriate to carry out this sort of collective will.

How we answer that difficult questions will, ultimately, determine whether a fully democratic international environmental law capable of independently affecting the behavior of nations can be developed. But the fact that doctrines of common law form the foundation of some of the world's most durable democracies should provide us with all the encouragement we need to explore these issues further.

Part II – Regulation as Interpretation

Developing a contemporary international equivalent to the common law would require us, of course, to deviate from the haphazard pattern of development that characterizes historical systems of law if we are to produce useful results over an acceptable frame of time. We have argued, therefore, in favor of a procedure familiar to deliberative democratic theorists as the 'policy jury'. As we have imagined it, the use of policy juries to adjudicate concrete (but hypothetical) cases of international environmental disputes can provide a substantial collection of decisions that can be aggregated to form a system of legal doctrine in the same way that the resolution of actual cases were first restated and then later codified.

It is not hard to imagine how the policy specialists working in existing international organizations could develop and administer such an adjudicatory procedure. In the area of environmental protection, the United Nations Environmental Programme has the technical capacity to prepare hypothetical cases touching on any of the major issues of the day and the Commission on Sustainable Development could oversee the deliberations in any of the hundred countries where it supports local organizations. The more challenging question is how the resulting decisions could be aggregated into a coherent body of legal doctrine and how that doctrine could be related to the continuing problem of constraining nation-state behavior. To shed some light on those questions is our next objective. We begin by discussing both the present practice and political potential of the International Law Commission (ILC). We then conclude by addressing

the challenges of bringing the global system of state sovereignty within an emerging framework of international norms that aspires to be more than merely hortatory.

The ILC and Global Environmental Democracy

The International Law Commission consists of thirty-four individual members. They represent each of the world's major regions and serve for staggered terms of five years. They are elected by the United Nations General Assembly from lists of distinguished jurists and legal scholars submitted by national governments, but they serve in their private capacities rather than as the representatives of their nations of origin. Created in the aftermath of World War II, the Commission is charged with the codification and progressive development of international law. This dual competency relates the Commission's work to the two major sources of international law. First, international law has originated in treaties and conventions negotiated directly between nations. Each individual treaty may be clear enough on its face, but the historical accumulation of agreements on related and overlapping legal topics can produce a thicket of confusing, often directly contradictory, rules of state obligation. Second, customary patterns of interaction between sovereign states have evolved over time into recognizable standards which, although unwritten, guide the interpretations of judges and arbitrators as well as states themselves. The ILC is charged both with distilling systematic treaty law from the multiplicity of existing treaties and with codifying customary principles of international law (Morton, 2000).

Scholarship on the ILC can be divided into two general categories. First, there are a number of studies of the Commission's organization and operation (Graefrath, 1991; Hafner, 1996; Morton, 2000; Sucharitkul, 1990). Some of this research has examined the expansion of the ILC. The Commission has grown from a membership of fifteen at its establishment in 1949 to its current size of thirty-four. This growth in membership, and the concomitant growth of the Commission's professional staff, has allowed for an increase both in the diversity of the ILC's membership and an expansion of its work. This growth has also complicated the task of achieving consensus within the Commission (Sucharitkul, 1990). In the 1990s, the ability of the Commission to resolve matters that had spilled over from the previous decade and to undertake new projects suggests that it has adjusted to its new size and the complexity of its working environment. Turnover in

Commission membership is also declining, suggesting that a greater level of stability and efficiency is in the offing (Morton, 2000).

The Commission membership itself is another focus of attention. In principle, at least, members of the Commission are independent of their national governments and serve uninstructed based upon their personal expertise in international law. There have been, nevertheless, many members who were foreign ministry personnel in their home countries at the time of their election. This arrangement is obviously a mixed bag. The closer the connection between Commission members and their respective governments, the greater the likelihood of self-serving behavior of the sort that has plagued the development of the international criminal court (Best, 1997). On the other hand, it is probably the case that some influence over members by their national governments has a salutary effect on the efficacy of Commission work, as it is likely that states are more inclined to respect rules they have some role in developing (Morton, 2000). Another critique of Commission membership is that it possesses little of the expertise required to deal with any but the most general matters of international regulation (Hafner, 1996). This critique suggests the need for further increases in both the size and independence of ILC membership, notions that would exacerbate many of the problems discussed so far.

A final area of discussion of the Commission itself has to do with its methods of work. The Commission's program of work is largely determined by a long-term plan that dates back to 1949. The topics included in that plan (state responsibility, jurisdictional immunity, and so forth) were thought to involve primarily the codification of existing rules of customary law which were had in common their importance to the maintenance of the continuing system or relations among the sovereign states (Graefrath, 1991). The Commission's agenda has been supplemented since its initial work plan largely by the addition of topics by the Sixth Committee of the United Nations General Assembly. The work pattern of the Commission is easily described. It proceeds through four stages: issue development, general debate, drafting, and final adoption.

When the Commission takes up an issue, it normally begins by appointing one of its members as a special rapporteur. The rapporteur is responsible for assembling the research necessary to begin formulating the individual elements of eventual articles of a final report. This process includes circulating preliminary drafts for comment by states.

In its general debate, the Commission plenary takes up the reports submitted by its special rapporteurs, including comments made by states on questionnaires concerning earlier drafts. At the conclusion of debate, the Commission will normally forward proposed draft articles to a drafting committee, even if there is significant division over the articles among Commission members. The drafting committee (normally composed of fifteen or more members) is the primary forum for negotiation over the content of any eventual report. Its time is used to debate the relevant articles and to develop compromise wording that will reconcile the divergent points of view held by Commission members. The committee produces a report to the Commission plenary, which eventually adopts the final text of the articles that have been developed. This is more than a pro forma matter. Final adoption of articles to be included in the Commission's annual report to the General Assembly involves an examination of the commentaries attached to each draft article (Morton, 2000).

As one might imagine, every stage in this work process has come in for criticism and has been the subject of proposals for improving the Commission's work. At the very outset, the establishment of the Commission's agenda is problematic in a variety of ways. Early in its history, the Commission discovered that maintaining a clear distinction between its dual responsibilities of codification and progressive development of law was virtually impossible. The realization that "development" played a role in nearly all of the Commission's efforts revealed the inherently political and "legislative" character of its mandate. An instructive illustration is the effort by the United States to narrow the reach of the Commission's codification of the rules of state responsibility by denying standing to complain of a breach of those rule to only those states that are "specially affected" by the breach (Murphey, 2001). Clearly, much time and effort is necessary to ensure that the Commission is not charged with a task so characterized by political disagreement that its subsequent work on the topic is wasted. Moreover, the politically neutral expertise that would allow for the creation of a more reasonable issue agenda is present to a much greater degree in the Commission than in the Sixth Committee where the actual responsibility lies (Graefrath, 1991).

The work of the Commission's special rapporteurs is also problematic in a variety of ways. For one thing, it is far from clear that the members of the Commission possess

either the technical expertise or the research support necessary to address any but the most general issues of law. As the global system of politics and economics becomes increasingly complex and integrated, it becomes more doubtful that any collection of international lawyers, however distinguished, can be masters of the technical information generated by that system (Hafner, 1996). Moreover, special rapporteurs (like all Commission members) are part-time employees. The time available to them to accomplish their tasks is generally quite short. Converting the Commission membership to full-time status has been suggested. But such a step would, it is feared, reduce the willingness of international lawyers to fill those positions (appointment to which is for a fixed term of only five years). And the ability of rapporteurs to produce quality work is further limited by the availability of resources in their home countries, a problem which obviously has a disproportionate impact on Commission members from the developing world (Graefrath, 1991). To illustrate this point, consider the recent work of the Commission in the area of ground water protection. The Commission has a long-standing interest in surface waters, particularly as they often constitute international borders. Surface waters, therefore, have long been a concern for the states that establish the issue agendas of international organizations. Ground water, however, is an integral component of life for a majority of the world's population and has become humankind's most extracted natural resource. To adequately address this emerging issue will require both enormous technical capacity in hydrology and other natural sciences and the careful extrapolation of existing surface water law to the special requirements of groundwater protection (Eckstein, 2005). The analytical challenges in both areas would seem to confront developing states with insurmountable obstacles to the effective representation of the interests of their citizens. How ILC rapporteurs are to address this challenge within the limits of their own capacity is far from clear.

The general debate of the ILC can be subjected to a variety of criticisms as well. The sessions are frequently characterized by inadequate preparation and insufficient allotments of debate time. Rapporteur drafts often reach Commission members at the beginning, or even in the midst of, debate sessions. As a result, members often limit themselves to "preliminary remarks." In effect, they reserve the right to lodge serious and substantive objections later in the process. The potential for wasted time in the

drafting committees is clear. In addition to this, drafting committees conduct their work in circumstances of both information deficit and information overload. Commission staff is so limited as to make it difficult for the Commission to track developments of law at the national level. And the research on topics of international law and the social processes with which is concerned is conducted by so dispersed a network of university, government, and non-governmental organizations that it is virtually impossible for the Commission to track, let alone use, the torrent of material issuing from those diverse sources (Graefrath, 1991). As an example, there has been significant support in the ILC and the Sixth Committee for protecting the interests of developing nations under the evolving rules governing international liability for harms resulting from acts not prohibited by international law. The trend has been to eschew express benefits for developing nations in favor of criteria for assessing damages that tend to reduce the amount of reparations required of developing nations in the event that activities within their boundaries cause transboundary harms. As appealing as this approach may be, it requires a very close analysis of the potentially detrimental effects of those criteria on aggrieved states that may be just as vulnerable as their offending neighbors (Magraw, 1986). The inherently contingent quality of this kind of analysis suggests just how politically and ethically sensitive the challenges facing the Commission really are.

The overwhelming impression one takes away from this discussion of the ILC and the challenges it faces is one of growing consensus on the existence of problems and persistent disagreement as to their solutions. Sometimes the disagreement arises from an inability to recognize (or agree upon) the relevant issues of law presented by a particular set of circumstances. The world rarely provides us with clean points of legal decision, stripped of the complexities and vagaries that law professors love using to distract their students from the main issues of a case. On other occasions, the inability (or unwillingness) of states to look past what they perceive to be their own interests leads to behavior that others regard as unreasonable and prevents the adoption of measures that enjoy wide support and promise shared benefits. In still other instances, the issues at hand are clear and parties are both able and willing to look for shared ground. But even under such propitious circumstances, states can fail to reach an accord because of a genuine and well-intentioned difference about how to balance the equities of a given set

of circumstances – often resulting from an underlying disagreement about fundamental principles of right.

In the domestic arena, deliberative democratic approaches have addressed each of these challenges. The need to agree on the basic facts of a political or legal question (and, among those facts, which are the functionally significant ones) is the foundation for what has been called the epistemological justification for participatory democracy (Westbrook, 2005). The necessity for moving beyond naked self-interest to levels of political discourse in which political actors offer each other reasons in support of their positions that all can regard as reasonable is often cited as an essential element of any form of government that is genuinely democratic (Barber, 2003). And the ability of citizens to agree upon norms of behavior that express their consensus on fundamental matters of mutual recognition and obligation is taken by many to be the defining quality of a politics that is democratic in a fully inclusive and deliberative (rather than merely aggregative) sense (Habermas, 1996). So it would appear that deliberative democracy might be good medicine for at least some of what ails the ILC. The remaining question, therefore, is not whether deliberative democracy might be helpful at the international level but, rather, how states could be persuaded to allow themselves to be bypassed by their own citizens on their way to the global commons.

Part III – Implementation as Enforcement

Environmental Democracy in World of Sovereigns

A favorite tactic of defense attorneys is to argue both that what the plaintiff seeks is impractical *and* that the plaintiff wouldn't really want what he was asking for if he just knew his own interests better. Among the defenders of state sovereignty, the first prong of this tactic takes the form of argument that the "legalization" of international politics (in the form of commitments that actually bind sovereign states in the same way that municipal law binds individual citizens) can never be effective. The second element of the defense of sovereignty is that sovereign states protect important democratic values in ways that international regimes cannot and, therefore, democrats should not actually want to develop such regimes. Most critics of international law at least touch upon both of

these themes. But to appreciate them, and do them justice, we shall concentrate on arguments for each of these ideas that have been advanced by theorists who concentrate closely on only one.

A recent and forceful argument that international law does not have an independent effect on state behavior is offered by Jack Goldsmith and Eric Posner (Goldsmith & Posner, 2005). They contend that international law is nothing more than a codification of behavior regularities that arise as a result of states maximizing their own interests. This occurs in four ways. First, states often behave in similar ways “simply because each state obtains private advantages from a particular action (which happens to be the same action taken by another state) irrespective of the action of the other” (27). Where this occurs, the states involved may appear to be following a rule, but no such obedience is involved. Second, a state will sometimes find itself subjected to the coercion of another state. The coerced state might appear to be serving the interests of the stronger state, which may even offer a rule in excusing its coercion. But no rule is at work other than the rule of the jungle. Both the coercing state and the coerced state are merely acting rationally “to further their interests based upon the perceived interests and strengths of the other state” (29). Third, states sometimes find themselves in a “bilateral repeated prisoner’s dilemma (42). Under such circumstances, states refrain from cheating one another over a significant period of time, not out of any sense of obligation, but simply because the continuing cooperation that they would forfeit by cheating is worth more than the temporary gain that cheating would yield. Finally, circumstances in which states coordinate their behavior over an extended period of time, each for their own advantage, can be mistaken for the kind of rule-following behavior we normally describe as obedience to law. The claim made by Goldsmith and Posner is that these four patterns of state behavior can account for all instances that other might cite as respect for international law and that they can do so without positing any “exogenous influence” on state behavior resulting from law conceived of as a normative obligation (43).

It is important to be clear about the argument Goldsmith and Posner are making. They do not deny the existence of international law. They merely argue that “international law scholars exaggerate its power and significance” (225). More important to our present purpose, they also aver that they “know of no global democracy approach

that spells out how or why states, especially powerful states like the United States (or, for that matter the EU), would submit to a broader form of genuine global governance” (223). Even granting for the sake of argument that Goldsmith and Posner have not overlooked some especially promising approach that would answer their concern, their quandary may tell us far more about the state of democratic theory than it does the importance of international law. To think of law as nothing more than rules backed by coercive force is a habit of long standing. But there is no reason why the entity that pronounces legal judgments must necessarily be responsible for the enforcement of judgments. Recall that “a number of societies that we would not call stateless, including those of ancient Greece and Rome and Anglo-Saxon England, left prosecution of criminal cases to private individuals” and that in yet other societies “all judicial decrees were enforced, if at all, privately (Posner, 1995) 313. In fact, all that any form of law enforcement ever does is raise the costs of non-compliance. In governing the behavior of individuals “coercive law overlays normative expectations with threats of sanctions in such a way that addressees may restrict themselves to the prudential calculation of consequences” (Habermas, 1996)116. Likewise, the “enforcement” mechanisms of international law combine dispute settlement processes with the existence of “countermeasures” (Schachter, 1994) that allow aggrieved states to pursue private enforcement under color of official adjudication. So it might be fair to say that if Goldsmith and Posner have erred in any respect it is not in underestimating the robustness of international law but, rather, overestimating the essential differences between international and municipal law (to municipal law’s undeserved advantage).

In assessing the argument that friends of democracy around the world would be advocates of state sovereignty if only they saw the question more clearly, we take as our point of departure the work of Jeremy Rabkin (2005). Rabkin’s analysis, unlike that of Goldsmith and Posner, is unabashedly American in perspective. One regrettable consequence is his tendency to generalize about other national cultures in ways that are as unhelpful as they are uncharitable and unfortunate. Nevertheless, Rabkin forcefully presses an argument that no committed democrat can afford to ignore. It is Rabkin’s view that the contemporary movement for global governance is a direct threat to the existence of the sovereign state. Moreover, that threat to sovereignty involves an

unavoidable threat to democracy. This is the case because democracy is a function of constitutional government and “a world that is equipped to sustain global governance is a world that does not need constitutional government – and probably cannot tolerate it” (38). The obvious and immediate threat is, of course, to democracy of the American sort. Rabkin assumes, perhaps correctly, that the movement for global governance has as its primary target the recalcitrance of the United States. But the long-term threat is, in his view, a threat to every person who values liberty and security. This is because, in the absence of a sovereign to guarantee that law is made and enforced in an orderly manner, the citizen’s obligation to obey is forfeit and our remaining choice is between anarchy and arbitrary coercion (with some combination of the two being most likely). In this way, according to Rabkin, international law tends toward lawlessness that is as much a threat to citizens of the developing nations as it is to privileged Americans.

It is difficult to know where to begin discussing Rabkin’s views because, in comparison with those of Goldsmith and Posner, his claims are broader and his arguments more strident. But it would appear that, like Goldsmith and Posner, Rabkin exaggerates the difference between international and municipal systems of law because he also emphasizes coercion and its legitimacy (as functions of state sovereignty) rather than the more subtle effects of law as a system of behavioral incentives. A useful contrast in this regard is the theory of law in primitive societies advanced by Richard Posner (1983).

Posner’s discussion of “primitive” societies and the systems of law they live by is illuminating for our purposes precisely because these systems develop in the absence of a sovereign state or any of the institutions normally associated with them. As an example, Posner describes the legal traditions of the Yurok tribe of California. When a legal claim arose among the Yurok, each of the principals would retain the services of two to four men (neither his relatives nor residents of his village) who would pass back and forth between the litigants collecting evidence and hearing arguments. These private jurors would then render a judgment. A losing party who refused to abide by the judgment was condemned to be the wage slave of the prevailing litigant. Continued refusal to submit rendered the recalcitrant an outlaw who could be killed by anyone without incurring liability for the deed (Posner, 1983). Informal institutions of this sort have allowed

stateless societies to develop sophisticated systems of property, contract, and family law – even tort law that recognizes the modern doctrine of strict liability.

Even more intriguing is Posner’s observations regarding the emergence of criminal law. Stateless societies tend to have well developed systems of private law but limited or non-existent criminal law. The development of criminal law, as a system of official violence, replaces (or supplements) pecuniary compensation for personal injuries where there arises a sovereign who comes to view “an act of violence directed at a private citizen to be an offense against him” in his sovereign capacity. Dismissing the notion that protection from harm is part of the bargain between sovereign and subject¹, Posner’s explanation for this development is that the sovereign “owns” an interest in his subjects which is impaired by acts that reduce their productive capacity. This economic interest is not accounted for in the private system of compensation for injury, so the sovereign establishes criminal sanctions that serve as “a method of internalizing this externality” (204). This view suggests that an abrogation of sovereignty at the level of the nation-state is not necessarily a corollary of global governance. If extended to regulate the transboundary relationships between individuals, international law could be considered to be an evolving system of quasi-private law meant to acquit limited and specific rights through mechanisms of collective but private action.

Residua Imperium: Or “yes, but what’s in it for us?”

It should be clear by this point that the primary advantages of introducing forms of participatory democracy into international law making would be likely to accrue to states that operate at a political disadvantage under the current system of nationalist power politics. In particular, weaker states that seek to impose a regime of environmental protection on global economic and political powers are likely to enjoy significant public relations advantages from deliberative democratic experiments that lend scope and substance to general public sentiments in favor of environmental protection. These states may even be able to introduce environmental norms that are produced through such processes into proceedings that currently exist to adjudicate disagreements in other areas such as trade and human rights. But this begs the question, why would a powerful state,

¹ Posner notes this would not explain the bargain between sovereign and subject because criminal law is no more effective (generally speaking) than primitive systems of private law when it comes to protecting individuals.

particularly one that is an environmental recalcitrant, subject itself to such processes, or even tolerate their continuation? It is our argument that even nations with something to lose in a thoroughly democratized global politics have still more to gain. Those potential gains are analytical, political, and (ultimately) environmental.

No discussion of deliberative institutional alternatives could be considered adequate if it omits any comparative or international perspective. To believe that deliberative democracy can be analyzed solely on the basis of domestic experience is simply irrational. How could it be that the comparison of citizen juries in Great Britain and deliberative polling in the United States (Laslett, 2003) would fail to yield useful insights? Also, the concept of reciprocity that is central to deliberative democracy knows no logical limit. It "extends to all individuals, not just to citizens of a single society" (Gutmann, 1999, p.309). Moreover, environmental problems (among many others) depend for their resolution on far more "cross-national deliberation" than can be accomplished within any single set of domestic political institutions (Gutmann & Thompson, 2004, p. 61). This imperative reflects back on the ability of individual states to achieve their domestic environmental objectives. Environmental ends can be assured to a national population only if its government "negotiates and consistently maintains agreements with other governments for the purpose" (Laslett, 2003, p. 217).

Comparative analysis of deliberative democratic experience can serve at least two important goals. First, it can provide a body of analytical comparisons that will aid both theorists and government officials as they try to work out the institutional details of a more fully democratic society. As an example, the state of Oregon established a Health Care Services Commission to set priorities for health care services under Medicaid. Meanwhile, halfway around the world, the British government created the National Institute for Clinical Excellence to provide assessment and treatment guidelines for that country's National Health Service. Both of these bodies sought to incorporate expert and lay opinion into a system of rational priorities for husbanding limited health care resources. They were intended to be deliberative institutions in that they were supposed to provide an "analytical filter" (Gutmann & Thompson, 2004, p.14) for public opinion that would justify policy outcomes through the imposition of a form of procedural rationality. The public outcry that resulted in both cases required each group to engage in

significant participatory back-filling and ultimately resulted in legislative intervention in both instances. Certainly a careful comparison of these cases would be of interest to public health planners in the future who wish to avoid making the same mistakes thrice.

A second use to which comparative analysis of deliberative institutions can be put is somewhat more theoretical, even normative. A comparison of the Canadian and American experience has allowed DeWitt John (1994) to conclude that institutions for applying the notion of sustainable development are relatively underdeveloped in the United States. On the basis of this evaluation, he suggests that the American states follow the example of the Canadian provinces in establishing environmental roundtables to bring together environmentalists, corporations and government officials to discuss how economic and environmental values might be integrated. Such parallel development might encourage greater transnational environmental cooperation. A pertinent example would be the International Joint Commission which operates as part of a bi-national and multi-institutional system of regional governance incorporating more than 650 stakeholders in the Great Lakes Basin (Rabe, 1999).

The South African Truth and Reconciliation Commission represent a form of deliberative institution with even greater normative potential. Unlike a trial court, the Commission achieves an "economy of moral disagreement" by eschewing definite binary choices between guilt and innocence in favor of accommodations of conflicting views that fall within the range of "reasonable disagreement" (Gutmann & Thompson, 2004, p. 185). Truth commissions of this sort are not entirely rare. An examination of this form of deliberative institution may provide the model for a normative stance that international environmental monitoring groups might adopt in support of deliberative bodies, like the Green Parliament in the Czech Republic, when they find themselves at odds with their own national governments (Axelrod, 2005). It might also lead deliberative democrats in the direction of transferring the insights into democratization at the domestic level to the international arena.

Deliberative democracy's emphasis on justifying collective decisions to the people who must live with the consequences of those choices would seem to argue for extending the requirements of democratic deliberation to the international arena. Yet "most theorists of deliberative democracy apply its principles exclusively to domestic systems

of government" (Gutmann & Thompson, 2004, p. 36). This is, to say the least, ironic. While the aggregation of interests across boundaries is hard to conceptualize, "deliberation across boundaries is relatively "straightforward" and deliberative theory would seem to be more useful in the international system precisely because it lacks "alternative sources of order" (Dryzek, 2000, p.116). If we can set aside, (for our purposes at least) the fact that introducing democratic principles abroad can be used to legitimate dubious military adventures (Solo, 1997), there would still seem to be two fundamental reasons for limiting deliberative democracy to the national stage.

First, it could be argued that the justification of preferences through public reason demanded by deliberative democracy is owed only to those who share with us the burdens of a common citizenship. Second, the absence of sovereignty at the international level might be thought to deprive deliberative democracy of the background conditions for its success that a stable legal order provides. We agree with Gutmann and Thompson (2004), however, that these objections are largely unpersuasive. The differences between domestic and international society are often exaggerated, particularly with respect to the reliability of legal institutions. And the argument from shared citizenship, while it may apply to matters such as taxation, is far less convincing with respect to issues such as war, trade, immigration, economic development and (most especially) the environment. After all, environmental damage can occur virtually anywhere and "environmental liability affects every single citizen of every single state in the world, along with other humans who do not belong to nation-states at all" (Laslett, 2003, p. 217).

Fortunately, there are abundant examples of deliberative democracy's various institutional elements that can be identified on the international environmental stage. Much of the recent progress in international environmental governance (as well as issues like children rights, population control, and social development) has been due to the involvement in collective decision-making of non-governmental organizations (Camilleri, Malhota & Tehranian, 2000). Moreover, this activity has evolved from its earlier reactive form to seize the policy initiative in a number of areas (Snidal & Thompson, 2003). For instance, throughout the 1970s the International Whaling Commission was plagued by environmental protesters who would drench its members in faux whale blood at every opportunity. But by 1981, the Commission's meeting offered representation to 52 non-

governmental organizations ranging from species preservation and animal rights groups to religious organizations and groups representing indigenous peoples. In this more open and democratic environment, the Commission agreed to a zero quota for the 1985-6 season (Birnie, 1985). In fact, in this area it is the state actors that are the weak links. Setbacks in whaling regulation after the 1985 moratorium can be attributed to a lack of state follow-through in enforcement and accommodationist backsliding among state members (Volger, 1995).

Our experience with whaling suggests not that deliberative participation in international civil society is futile but, rather, that it must penetrate international governance more deeply to be fully effective. Environmental NGOs now routinely enjoy observer status in international organizations and conferences, sometimes even serving as members of state delegations. Some deploy a level of environmental expertise matched only by the largest and most developed states. Many are able to mobilize consumer boycotts that make them key policy actors (Thomas, C. 1992). This provision of observer status and the increase in NGO participation is one of the most significant trends in international environmental law (Volger, 1995). But environmental interests in international civil society have not been satisfied with this.

By the time of the Earth Summit in 1992, international environmental NGOs had mobilized and coordinated sufficiently to stage a parallel Citizens' Forum that was, in many ways, more promising than the official meeting itself (Susskind, 1994). In the absence of central monitoring agencies, much of the international environmental work is likely to fall to NGOs. As an example, the Arctic Treaty System has had to substantially modify its "working rule" of secrecy in response to pressure brought by NGOs. NGO pressure seems to have been the determining factor in recent changes in the London Convention outlawing the disposal of low level radioactive waste at sea (Volger, 1995). These experiences have led to the call for a full-fledged advisory and monitoring role for non-governmental interests in the environmental treaty process (Susskind, 1994). A model for civil societies role in global environmental governance already exists in the EU's European Environmental Bureau, an umbrella organization for over 140 environmental organizations in both EU countries and neighboring states that monitors the performance of the EU's Environmental Directorate (Axelrod, Viq & Schreurs, 2005).

Whatever we may think about the relative merits of (or actual necessity for) some form of international sovereignty, relying on the spontaneous collaboration of individual nation states seems inadvisable if we wish to move environmental matters in the right direction in the flawed world we now inhabit (Laslett, 2003). From the environmental perspective, waiting for the creation of an ideal world order is allowing the perfect to become the enemy of the good. The main hope for democratizing global governance, across a wide range of issues, lies in a partnership between government, industry, and the popular forces of civil society (Camilleri, Malhota& Tehranian, 2000). We concur with Dryzek that institutions of deliberative democracy should be more at home at the international level than liberal aggregative models of democracy precisely because "there are no constitutions worth speaking of in the international system" (2000, pp. 115-6). Dryzek proposes the development of a "network" form of international discursive organization (p. 133), based on exactly the existing institutional models we have been discussing. But whatever particular form they take, deliberative democratic institutions offer an approach to environmental challenges that, if applied internationally, offer an escape from "the trap of nationalism and crystallized community aggressiveness" that seems to both dominate world affairs and threaten the global ecology (Laslett, 2003, p. 220).

Part IV -- WWJD (What Would Juries Do?)

In early 2009, we began conducting a series of adjudicatory simulations in the United States and Italy. Participants were asked to decide a hypothetical dispute between three imaginary neighboring countries over the use of a river that constituted part of their shared boundary. One country had a large land mass, a large and well educated population, and a well developed economy. For many years, it had exploited geothermal resources for electrical power generation and discharged runoff water into the river. This raised the temperature of the river water, driving a species of fish from its spawning grounds. Another of the three countries, in an effort to expand its economy, had recently begun generating electricity in the same way. This country was smaller and its economy was weaker. But it had experienced economic growth recently by creating a tourist

industry in its large coastal region. The third country was landlocked, had a largely illiterate population, and an almost entirely agrarian economy. It had an annual income far below that of other countries in the region and its citizens depended on the river's rapidly disappearing fish species as one of their major sources of protein.

The agrarian nation petitioned an international court (our policy juries) to order both the developing and the developed countries to reduce their warm water emissions to a level that scientists agreed would return the threatened fish species to its prior range and population. It also requested that the court order further reductions of its neighbors' emissions if the agrarian nation began to develop its own geothermal resources.

The developing nation countered with its own petition. It requested the court to allow its geothermal production to increase until it reached the same level (per capita) as its fully developed neighbor, which would have to achieve even greater reductions in its emissions to compensate for that continued growth. It also opposed the agrarian nation's request that the court impose higher reduction requirements to allow it to enter the geothermal industry if it chose to do so.

Finally, the fully developed nation petitioned the court to order only those reductions necessary to save the fish population and to mandate the reductions as equal percentages of the current geothermal production in the two countries then exploiting the resource. It further opposed the request that the court impose higher reductions to allow the agrarian nation to begin geothermal production if it chose to.

The results of these experiments provide no basis for global generalizations. But three results are particularly intriguing. *First*, no jury adopted the agrarian request that the court allow it to begin geothermal production. A number substituted some form of international technical or financial assistance. But using the regulatory regime for redistributive purposes was rejected. *Second*, every jury in both nations adopted some regulatory arrangement that allowed the developing nation to increase its geothermal production, with compensating increases in the reductions required of the developed country. But no jury mandated that the developing nation be allowed to achieve full parity with its developed neighbor. *Third*, a significant number of individual participants in Italy (and one of the three Italian juries) mentioned the dietary needs of citizens in the

agrarian nation as a significant issue – positing something approximately a human right to adequate nutrition. No American participant or jury framed the issue in those terms.

What are we to make of results like these, preliminary as they are? One clear implication is that American deliberators, when their own national interests are not obviously implicated, readily embrace the regulatory concept of “common but differentiated responsibility” that underlies the Kyoto Protocol. Were these results to be widely replicated within the United States, it would suggest that the resistance of that country to adoption of the Protocol was a failure of democratic representation. This conclusion would also be supported by evidence of wide support for “Kyoto-like” green house gas controls at the state and local level (Hovi and Skodvin, 2008).

Also worthy of note was the broad agreement, both within and between the American and Italian juries, that regulatory regimes may legitimately embody economic development objectives but that redistributive policies should be pursued in other ways. Programs of international scientific, technical, and financial assistance were often proposed. While these strike those on the political left as anemic substitutes for real international justice, they fit quite well with the differential between the requirements of domestic and international justice advocated by theorists like John Rawls (1999). That concept was widely accepted in both the politically diverse Italian environment and the relatively more conservative American context.

Finally, the Italian participants who advanced the idea of a human right to adequate nutrition provide an additional argument in favor of a deliberative approach to international regulatory regimes. That notion appeared nowhere in the American conversations, which tended to view the dispute as an entirely technical and economic problem. The clear implication is that increased diversity in a deliberating population brings forth new arguments and additional information that have the potential to improve collective will formation. This is consistent with existing research on small group decision making that emphasizes the risks associated with homogeneity and the value of diversity (Sunstein, 2006). It also suggests that regulatory decision making in the international arena, where diversity is at a maximum and the power to coerce is at a minimum, has the potential to produce results of a quality superior to that which could be expected at the national level.

- Ackerman, B. and J. Fishkin (2003). *Deliberation day. Debating deliberative democracy.* J. Fishkin and P. Laslett. Malden, MA, Blackwell: 7-30.
- Andeweg, R. (1995). "The reshaping of national party systems." West European Politics **18**(3): 58-.
- Andree, P. (2005). The genetic engineering revolution in agriculture and foods: strategies of the biotech bloc. The business of global environmental governance. D. Levy and P. Newell. Cambridge, MA, MIT Press: 135-166.
- Axelrod, Regina (2005) "Democracy and nuclear power in the czech republic." In Regina Axelrod, David Downie & Norman Vig (eds.) *The global environment.* Washington, D.C.: Congressional Quarterly, pp. 261-283.
- Baber, W. F. (2004). "Ecology and democratic governance: toward a deliberative model of environmental politics." Social Science Journal **41**: 331-346.
- Baber, W. F. and R. V. Bartlett (2005). Deliberative Environmental Politics: Democracy and Ecological Rationality. Cambridge, MA, MIT Press.
- Baber, W. F. and R.V. Bartlett (2009) Global Democracy and Sustainable Jurisprudence: Deliberative Environmental Law. Cambridge, MA: MIT Press.
- Birnie, 1985
- Bodansky, D. (1999). "The legitimacy of international governance: A coming challenge for international environmental law?" The American Journal of International Law **93**(3): 596-624.
- Brooks, R. E. (2005). "Failed States, or the State as Failure?" The University of Chicago Law Review **72**(4): 1159-1196.
- Brunnee, J. (1993). "Beyond Rio? The evolution of international environmental law." Alternatives **20**(1): 16-23.
- Caldwell, L. K. (1991). "Law and environment in an era of transition; reconciling domestic and international law." Colorado Journal of International Environmental Law and Policy **2**(1): 1-24.
- Caldwell, L. K. (1999). "Is world law an emerging reality? Environmental law in a transnational world." Case Western Reserve Journal of International Law **10**(2): 227-243.
- Camilleri, Joseph, Kamal Malhota & Majed Tehranian (2000) *Reimagining the future: towards global governance.* Victoria, Australia: Global Governance Reform Project.
- Crossen, T. (2004). "Multilateral Environmental Agreements and the Compliance Continuum." Georgetown International Environmental Law Review **16**(3): 473-500.
- Crum, B. (2005). "Tailoring Representative Democracy to the European Union: Does the European Constitution Reduce the Democratic Deficit?" European Law Journal **11**(4): 452-467.
- Dewitt John, 1994
- Davis, K. C. (1969). Discretionary justice: a preliminary inquiry. Baton Rouge, LA, Louisiana State University Press.
- Driesen, D. M. (2003). "Thirty years of international environmental law: A retrospective and plea for reinvigoration." Syracuse Journal of International Law and Commerce **30**(2): 353-368.

- Durant, R. F. (1995). "The democratic deficit in America." Political Science Quarterly **110**(1): 25-48.
- Dryzek, 2000
- Falkner, R. (2005). The business of ozone layer protection: corporate power in regime evolution. The business of global environmental governance. D. Levy and P. Newell. Cambridge, MA, MIT Press: 103-134.
- Featherstone, K. (1994). "Jean Monnet and the "democratic deficit" in the European Union." Journal of Common Market Studies **32**(2): 149-171.
- Feld. Lars, P. (2005). "The European constitution project from the perspective of constitutional political economy." Public Choice **122**(3-4): 417-.
- Fischer, F. and J. Forester (1993). The argumentative turn. Durham, NC, Duke University Press.
- Fishkin, J. (1995). The voice of the people: public opinion and democracy. New Haven, CN, Yale University Press.
- Fishkin, J. and R. Luskin (1999). Bringing deliberation to the democratic dialogue: the NIC and beyond. A poll with a human face: the national issues convention experiment in political communication. M. McCombs and A. Reynolds. New York, NY, Erlbaum.
- Fossum, J. E. and A. J. Menendez (2005). "The Constitution's Gift? A Deliberative Democratic Analysis of Constitution Making in the European Union." European Law Journal **11**(4): 380-440.
- Garrett, N. (2005). ""Life is the Risk We Cannot Refuse:"* A Precautionary Approach to the Toxic Risks We Can*." Georgetown International Environmental Law Review **17**(3): 517-562.
- Geddes, A. (1995). "Immigrant and ethnic minorities and the EU's "democratic deficit"." Journal of Common Market Studies **33**(2): 197-218.
- Gindin, S. (1994). "The democratic deficit." Canadian Forum **72**(827): 5-6.
- Giorgi, L. and R. Pohoryles, J. (2005). "CHALLENGES TO EU POLITICAL INTEGRATION AND THE ROLE OF DEMOCRATIZATION." Innovation **18**(4): 407-418.
- Goldsmith, J. and E. Posner (2005). The limits of international law. New York:NY, Oxford University Press.
- Greenwood (2002). "EU public affairs and the White Paper on Governance." Journal of Public Affairs **1/2**(4/1): 423-435.
- Gutmann, 1999
- Gutmann, A. and D. Thompson (2004). Why deliberative democracy? Princeton, NJ, Princeton University Press.
- Habermas, J. (1995). "Reconciliation through the public use of reason: remarks on john rawls's political liberalism." Journal of Philosophy **92**(3): 109-131.
- Habermas, J. (1996). Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy. Cambridge, MA, MIT Press.
- Hajer, M. and H. Wagenaar, Eds. (2003). Deliberative policy analysis: understanding governance in the network society. Theories of institutional design. New York, NY, Cambridge University Press.
- Harvey, A. (2004). "Monarchy and Democracy: A Progressive Agenda." The Political Quarterly **75**(1): 34-44.

- Hierlmeier, J. (2002). "UNEP: Retrospect and prospect--options for reforming the Global Environmental Governance Regime." Georgetown International Environmental Law Review **14**(4): 767-805.
- Hix, S. (1998). "Elections, parties and institutional design: A comparative perspective on European Union democracy." West European Politics **21**(3): 19-52.
- Holmes, O. W. (1991). The common law. New York, NY, Dover.
- Hovi, J. and T. Skodivn (2008). "Which way to U.S. climate cooperation? Issue linkage versus a U.S.-based agreement." Review of Policy Research **25**(2):129-148.
- Hunold, C. (2005). "Geen Political Theory and the European Union: The Case for a Non-integrated Civil Society." Environmental Politics **14**(3): 324-343.
- Johal, S. and A. Ulph (2002). "Globalization, lobbying, and international environmental governance." Review of International Economics **10**(3): 387-403.
- Karp, J., A, S. Banducci, A, et al. (2003). "To know it is to love it? Satisfaction with democracy in the European Union." Comparative Political Studies **36**(3): 271-292.
- Keohane, R. (2005). After hegemony: cooperation and discord in the world political economy. Princeton, NJ, Princeton University Press.
- Laslett, P. (2003). Environmental ethics and the obsolescence of existing political institutions. Debating deliberative democracy. J. Fishkin and P. Laslett. Malden, MA, Blackwell: 212-224.
- Lodge, J. (1995). "Democratic legitimacy and the EC: Crossing the rubicon." International Journal of Public Administration **18**(10): 1595-1638.
- Lord, C. (2001). "Assessing democracy in a contested polity." Journal of Common Market Studies **39**(4): 641-661.
- Lowi, T. (1979). The end of liberalism: the second republic of the united states. New York, NY, Norton.
- Magnette, P. (2003). "European governance and civic participation: Beyond elitist citizenship?" Political Studies **51**(1): 144-161.
- Markell, D. L. (2000). "The commission for environmental cooperations's citizen submission process." Georgetown International Environmental Law Review **12**(3): 545-574.
- Marong, A. B. M. (2003). "From Rio to Johannesburg: Reflections on the Role of International Legal Norms in Sustainable Development." Georgetown International Environmental Law Review **16**(1): 21-76.
- Martin, A. and G. Ross (1999). "Europe's monetary union: Creating a democratic deficit?" Current History **98**(627): 171175.
- Meadowcroft, J. (2002). "The European democratic deficit, the market and the public space: A classical liberal critique." Innovation **15**(3): 181-192.
- Moravcsik, A. (2002). "Reassessing legitimacy in the European Union." Journal of Common Market Studies **40**(4): 603-624.
- Neunreither, K. (1994). "The democratic deficit of the European Union: Towards closer cooperation between the European Parliament and the national parliaments." Government and Opposition **29**(3): 299-.
- Posner, R. (1983). *The economics of justice*. Cambridge, MA: Harvard University Press.
- Posner, R. (1995). *Overcoming law*. Cambridge, MA: Harvard University Press.
- Putnam, H. (1995). Pragmatism: an open question. Cambridge, MA, Blackwell.

- Rabe, 1999
- Rabkin, 2005
- Raustiala, K., D. Bodansky, et al. (2004). "NEW DIRECTIONS IN INTERNATIONAL ENVIRONMENTAL LAW." American Society of International Law. Proceedings of the Annual Meeting: 275-287.
- Rawls, J. (1999) *The law of peoples*. Cambridge, MA: Harvard University Press.
- Rawls, J. (1995). "Reply to habermas." Journal of Philosophy **93**(3): 132-180.
- Schachter, O. (1994). Dispute settlement and countermeasures in the international law commission. *American journal of international law*, *88*, 471-477.
- Schmidt, V., A (2004). "The European Union: Democratic Legitimacy in a Regional State?" Journal of Common Market Studies **42**(5): 975-997.
- Slaughter, A.-M. (2004). A new world order. Princeton, NJ, Princeton University Press.
- Snidal, 2003
- Strauss, A., R. Falk, et al. (2001). "Citizens in the international realm: The new participatory demands." American Society of International Law. Proceedings of the Annual Meeting: 162-172.
- Sunstein, C. (2006). *Infotopia: How many minds produce knowledge*. New York: NY: Oxford University Press.
- Susskind, 1994
- Thomas, 1992
- VanDeveer, S. D. (2003). "Green fatigue." The Wilson Quarterly **27**(4): 55-59.
- Weisslite, M. (2002). "Rethinking the equitabe principle of common but differentiated responsibility: differential versus absolute norms of compliance and contribution in the global climate change context." Colorado Journal of International Environmental Law and Policy **13**(2): 473-509.
- Volger, John (1995) *The global commons: a regime analysis*. NY: John Wiley & Sons.
- Yokota, Y. (1999). "International justice and the global environment." Journal of International Affairs **52**(2): 583-598.