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REPUBLICAN PRINCIPLES IN INTERNATIONAL LAW

by Mortimer Sellers*

Two hundred years ago, in the wake of the modern world's first great republican revolutions in France and the United States, Immanuel Kant endorsed a federation of independent republics as the only valid basis of international law.¹ Kant's federation echoed the new federal Constitution of the United States, which guaranteed a "republican form of government" to every state in the Union.² Enlightenment scholars supposed that if ever some powerful people could form a republic, republican principles would become the basis of a just world order.³ So republican ideas permeated and inspired the developing *jus gentium*,⁴ and several

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1. IMMANUEL KANT, ZUM EWIGEN FRIEDEN 10 (Stuttgart ed., 1993). "Die bürgerliche Verfassung in jedem Staate soll republikanisch sein." *Id.* at 10. "Das Völkerrecht soll auf einen Föderalismus freier Staaten gegründet sein." *Id.* at 16.

2. U.S. CONST. art. IV, § 4.

3. *E.g.*, KANT, *supra* note 1, at 19: "Denn wenn das Glück es so fügt: dass ein mächtiges und aufgeklärtes Volk sich zu einer Republik (die ihrer Natur nach zum ewigen Frieden geneigt sein muss) bilden kann, so gibt diese einen Mittelpunkt der föderativen Vereinigung für andere Staaten ab, um sich an sie anzuschliessen und so den Freiheitszustand der Staaten gemäss der Idee des Völkerrechts zu sichern und sich durch mehrere Verbindungen dieser Art nach und nach immer weiter auszubreiten."

4. *See also*, HENRY S. MAINE, ANCIENT LAW 55-58 (1983); Pages 73-96 contain discussion on *jus gentium*; *cf.* CICERO, DE OFFICIIS II.viii, III.v-vi, III.xvii, 69 (C. Atzert ed., 1949). *See also* Nicholas G. Onuf, *Civitas Maxima: Wolff, Vattel and the Fate of Republicanism*, 88 AM. J. INT'L

new states emerged to embrace the republican form of government. This paper argues that international law still depends on republican principles for its content and moral validity, and that purportedly international laws and institutions bind and should influence republican governments only to the extent that they reflect republican procedures of politics and legislation.⁵

The argument has ten parts. Part I defines republicanism as service to the common good. Part II endorses the republican tradition of finding the common good through popular sovereignty and the self-determination of peoples. Part III shows the influence of popular sovereignty and republican doctrine on the development of international law. Part IV reconciles popular sovereignty with regional federalism and international institutions. Part V defends the national basis of traditional international law. Part VI recognizes fundamental human rights as necessarily universal and international in application. Part VII endorses "peoples" as the basis of nations and international law. Part VIII explains the position of minorities within nations. Part IX identifies republican principles as the basis of international law. Part X proposes republicanism as the test of all international organizations and legal institutions. All ten sections support the conclusion that republican doctrines have driven the law of nations from the beginning and should continue to do so if international law is to have any moral influence or actual impact on the world's structures of legal and political power.

I. REPUBLICANISM

Kant's famous essay on perpetual peace proposes three basic principles of republican government: the equal *freedom* of all members of society, their equal *subjection* to the legal system, and their *equality* before the law.⁶ Kant's conception of "freedom" implies popular sovereignty to

L. 280 (1994).

5. There is a vast recent literature applying Kant's theories to modern international law: writings which usually do not enquire too closely into the meaning of the word "republican." See, e.g., Cecilia Lynch, *Kant, the Republican Peace, and Moral Guidance in International Law*, 8 ETHICS & INT'L AFF. 39 (1994); Fernando R. Teson, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53 (1992); Michael Doyle, *Kant, Liberal Legacies and Foreign Affairs*, 12 PHIL. & PUB. AFF. 205, 323 (1993). On the "Kantian Tradition" in international law, see David R. Mapel and Terry Nardin, *Convergence and Divergence in International Ethics*, in TRADITIONS OF INTERNATIONAL ETHICS 297-322 (Nardin and Mapel eds., 1992). For a non-Kantian discussion of republicanism in international law, see Onuf, *supra* note 4.

6. "Die erstlich nach Prinzipien der Freiheit der Glieder einer Gesellschaft (als Menschen), zweitens nach Grundsätzen der Abhängigkeit aller von einer einzigen gemeinsamen Gesetzgebung (als

approve all legislation, but not what he referred to as unfettered “democracy.”⁷ Kantian republics employ representation⁸ and the separation of powers⁹ to prevent what Kant saw as pure democracy’s natural descent into despotism and injustice.¹⁰ So Kant’s republican “freedom” and “justice” both require equal subjection to laws made and executed with the people’s consent, for the common good, rather than the lawless license of “wild” and unregulated peoples.¹¹

Kant’s views reflect an ancient tradition of republicanism that proposes one simple test for legal and political legitimacy: service to the *res publica*, or common good of the people.¹² To support the validity of their legal regimes, most governments claim to serve justice and the common good.¹³ But republicanism also proposes a universal technique for finding the common good through popular sovereignty: the “*imperium populi*” of Livy, Cicero, and Rome.¹⁴ Republicans maintain that the best test of the common good of the people is the public deliberation of elected representatives through institutions designed to protect justice and reason against factions, corruption, and the private self-interest of individuals or any single section of society.¹⁵

Untertanen) und drittens die nach dem Gesetz der Gleichheit derselben (als Staatsbürger) gestiftete Verfassung — die einzige, welche aus der Idee des ursprünglichen Vertrags hervorgeht, auf der alle rechtliche Gesetzgebung eines Volks gegründet sein muss — ist die republikanische.” KANT, *supra* note 1, at 10-11.

7. *Id.* at 13.

8. “Zu jener aber, wenn sie dem Rechts begriffe gemäss sein soll, gehört das repräsentative system, in welchem allein eine republikanische Regierungsart möglich, ohne welches sie (die Verfassung mag sein, welche sie wolle) despotisch und gewalttätig ist.” *Id.* at 15.

9. “Der Republikanism ist das Staatsprinzip der Absonderung der ausführenden Gewalt (der Regierung) von der gesetzgebenden . . .” *Id.* at 14.

10. *Id.*

11. *Id.* at 16.

12. For a broad overview of the republican legal tradition, see Mortimer N.S. Sellers, *Republican Liberty*, available in THE JURISPRUDENCE OF LIBERTY 14 (Gabriël Moens and Suri Ratnapala eds., 1996) [hereinafter “*Republican Liberty*”]; MORTIMER N.S. SELLERS, AMERICAN REPUBLICANISM: ROMAN IDEOLOGY IN THE UNITED STATES CONSTITUTION (1994) [hereinafter “AMERICAN REPUBLICANISM”]. For bibliographies and (somewhat jaundiced) discussions of recent republican scholarship, see Daniel T. Rodgers, *Republicanism: The Career of a Concept*, 79 J. AM. HIST. 11 (1992); G. Edward White, *Reflections on the ‘Republican Revival’: Interdisciplinary Scholarship in the Legal Academy*, 6 YALE J.L. & HUMAN. 1 (1994).

13. See Mortimer N.S. Sellers, *The Actual Validity of Law*, 1992 AM. J. JURIS. 283 (1992) [hereinafter “*The Actual Validity of Law*”].

14. Mortimer N.S. Sellers, *Republican Impartiality*, 11 OXFORD J. OF LEGAL STUD. 273 (1991). For the *imperium* and *maiestas* of the people, see MARCUS TULLIUS CICERO, PHILIPPICAE IV.4.8; T. LIVIUS, AB URBE CONDITA II.7.7.

15. See, e.g., THE FEDERALIST NO. 10, at 126 (James Madison) (Isaac Kramnick ed., 1987): “A republic . . . [is] a government in which a scheme of representation takes place,” so that

The republican identification of justice as the common good requires some explanation in light of recent neo-“liberal” theories that would separate the two — theories that assume an “irreducible” pluralism of “comprehensive” conceptions of moral value.¹⁶ The problem may be largely semantic.¹⁷ Republicanism identifies the purpose of law and society as the harmonization of diverse talents and interests so that everyone may live a worthwhile life.¹⁸ Some suppose that speaking of a “common good” in this context makes harmony harder to achieve.¹⁹ The republican premise that justice requires all laws to serve the common good rests on a conviction that human perceptions of the good can be harmonized through deliberation, humility, and the careful collective reflection of well-intentioned citizens.²⁰

This view of human nature leads to the doctrine of popular sovereignty and the republican arguments that support it. People have different talents and life plans, embracing different perceptions of justice and the common good. Private interests color human attitudes. Decent humility requires that citizens defer to a reasonable system for resolving conflicting perceptions of the truth. Republicanism proposes that everyone is capable of perceiving moral truths. This makes popular sovereignty the best source of justice. If justice and the common good exist and all people have the capacity to perceive them, then the best route to a just society will be through public deliberation. To exclude any voices from the

“the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves.” Cf. Montesquieu, who also considered the structure of the suffrage as fundamental in a republic. CHARLES DE SECONDAT, BARON DE LA BRÈDE ET DE MONTESQUIEU, *DE L'ÉSPRIT DES LOIS*, 12-17 (Gonzague Truc ed., 1949).

16. Most influentially see John Rawls, *The Law of Peoples*, in *ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 1993*, 41 (Stephen Shute and Susan Hurley eds., 1993) [hereinafter “*The Law of Peoples*”]. Cf. JOHN RAWLS, *POLITICAL LIBERALISM* (1993) [hereinafter “*POLITICAL REPUBLICANISM*”].

17. Rawls, for example, now endorses “a common good conception of justice” in *The Law of Peoples*, *supra* note 16.

18. See, e.g., MARCUS TULLIUS CICERO, *DE RE PUBLICA*, (Harv. Univ. Press eds., 1988). “res publica res populi, populus autem non omnis hominum coetus quoquo modo congregatus, sed coetus multitudinis iuris consensu et utilitatis communione sociatus.” CICERO, *DE RE PUBLICA*, *supra* note 18, I.xxv.39. “Ergo unum debet esse omnibus propositum, ut eadem sit utilitas unius cuiusque et universorum; quam si ad se quisque rapiet, dissolvetur omnis humana consortio.” CICERO, *DE OFFICIIS*, *supra* note 4, III.vi.26.

19. This would seem to be the worry of John Rawls when he refuses to speak of “truth” about justice. See, e.g., JOHN RAWLS, *POLITICAL LIBERALISM*, *supra* note 16; John Rawls, *Reply to Habermas*, XCII J. OF PHIL. 132, 150 (1995) [hereinafter “*Reply to Habermas*”].

20. See, e.g., Sellers, *Republican Impartiality*, *supra* note 14. Consensus and compromise will be more easily achieved in search of the common good than in pursuit of even “rational” self-interest.

public debate would deprive society of their insights and subject some private interests to the domination of others. Deference to a balanced system of public deliberation in search of the common good helps citizens to test private perceptions of justice, which may be wrong, and to obtain public cooperation when their perceptions are correct.²¹

Kant's three basic republican constitutional principles repeat the standard desiderata of republican political liberty as listed in John Adams's *Defence of the Constitutions of Government of the United States of America*, which required subjection to "equal laws by common consent" for the "general interest, or the public good" of the people.²² But Kant also suggests that this republican constitution should serve as the basis of international law and world peace.²³ Similar republican principles have driven the development of the law of nations, at least since the late eighteenth century, and should continue to do so, with greater openness, now that the Soviet and other empires have receded as threats to international peace and justice.

II. SELF-DETERMINATION

The republican principle of popular sovereignty is implicit in the widely-recognized right to the "self-determination of peoples."²⁴ This principle gained international prominence in 1776 with the United States Declaration of Independence, asserting the right of peoples to "alter or abolish" forms of government that deny fundamental human rights. To remedy the "abuses and usurpations" of George III, the United States claimed their "separate and equal" station among nations.²⁵ Woodrow Wilson renewed this republican conception of popular self-determination during World War I with his assertion that "every people has a right to choose the sovereignty under which they shall live," and that "no peace can last, or ought to last, which does not recognize and accept the principle that governments derive all their just powers from the consent of the

21. *Id.*

22. JOHN ADAMS, 1 A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 23 (London, 1787).

23. KANT, *supra* note 1, at 16-20.

24. For the origins of the concept of self-determination, see ALFRED COBBAN, THE NATION STATE AND NATIONAL SELF-DETERMINATION (1969); MICHLA POMERANCE, SELF-DETERMINATION IN LAW AND PRACTICE (1982); DOV RONEN, THE QUEST FOR SELF-DETERMINATION (1979) [hereinafter "SELF DETERMINATION IN LA AND PRACTICE"]; A. RIGO SUREDA, THE EVOLUTION OF THE RIGHT OF SELF-DETERMINATION (1973).

25. THE UNANIMOUS DECLARATION OF THE THIRTEEN UNITED STATES OF AMERICA, July 4, 1776.

governed."²⁶ Finally, the "self-determination of peoples" achieved widespread formal recognition in Articles 1 and 55 of the United Nations Charter.²⁷

The concept of self-determination rested from the beginning on two related assumptions: first, that all people are free and equal individuals without whose consent no legitimate national legal system can exist; and second, that all peoples should constitute free and independent states without consent of which no legitimate international legal system can exist. When Emmerich de Vattel first delineated the modern law of nations in 1758, he began with these twin assumptions, which supported his assertion that nations, being composed of free and independent individuals, should likewise be free and independent from each other except to the extent that they consent to mutual restrictions.²⁸ International law has always drawn strength and recognition from this powerful analogy between individual liberty and the liberty of states.²⁹ When citizens lose their freedom, this rationale loses its force.

Because of the support that republican principles give to their freedom of action and commercial well-being, non-republican governments have accepted republican doctrine in international instruments. Kant observed that mutual self-interest eventually creates republican institutions even among tyrants, who seek controls against their common depravity.³⁰ Conquest and consolidation are the greatest enemies of international justice because they destroy the balance of power between states and lead to universal monarchy.³¹ This explains Kant's fifth preliminary article of perpetual peace — that no state should forcibly interfere in the constitution and government of another state.³² Even despots can agree to this

26. Woodrow Wilson, quoted in Michla Pomerance, *The United States and Self-Determination: Perspectives of the Wilsonian Conception*, 70 AM. J. INT'L L. 1, 2 (1976) [hereinafter "*Perspectives of the Wilsonian Conception*"].

27. "[The Purposes of the United Nations are] to develop friendly relations among nations based on respect for the principles of equal rights and the self-determination of peoples." U.N. CHARTER art. 1, para. 2. Art. 55 of the U.N. Charter further states: "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and the self-determination of peoples."

28. EMMERICH DE VATTEL, *LE DROITS DES GENS, OU, PRINCIPES DE LA LOI NATURELLE, APPLIQUES A LA CONDUITE & AUX AFFAIRES DES NATIONS & DES SOUVERAINS*, Preliminaries, § 4 (Londres, 1758).

29. See, e.g., *The Law of Peoples*, *supra* note 16.

30. "Die Natur will unwiderstehlich dass das Recht zuletzt die Obergewalt erhalte." KANT, *supra* note 1, at 32. "durch den wechselseitigen Eigennutz. . ." *Id.* at 33.

31. "Universal Monarchie." *Id.* at 32.

32. "Kein Staat soll sich in die Verfassung und Regierung eines andern Staats gewalttätig einmischen." *Id.* at 6.

provision, which protects them against each other, although not against republican revolution when their peoples are ripe for rebellion.³³ Kant also insisted that the individual rights of humanity must be held sacred, however great a sacrifice this may require of the ruling elite.³⁴

Most states now recognize the right to self-determination through two international covenants. The International Covenant on Economic, Social and Cultural Rights confirms the right of "all peoples" to "self-determination" and "freely" to "determine their political status."³⁵ The International Covenant on Civil and Political Rights begins with exactly the same words,³⁶ but goes on to assert individual "liberty" and "security of person."³⁷ Both Covenants reflect the United Nations General Assembly's earlier Universal Declaration of Human Rights, which endorses the right of every person "to take part in the government of his country" and to vote in "periodic and genuine elections" by "equal suffrage" and "free voting procedures."³⁸ Numerous non-republics have endorsed these republican principles, giving republics and republican scholars a powerful rhetorical advantage against tyrants and despotic elites.³⁹ Arbi-

33. "Dahin würde nicht zu ziehen sein, wenn ein Staat sich durch innere Veruneinigung in Zwei Teile spaltete, deren jeder für sich einen besondern Staat vorstellt, der auf das Ganze Anspruch macht; wo einen derselben Beistand zu leisten einem äussern Staat nicht für Einmischung in die Verfassung des andern (denn es ist alsdahn Anarchie) angerechnet werden Könnte." *Id.* at 7.

34. "Das Recht der Menschen muss heilig gehalten werden, der herrschenden Gewalt mag es auch noch so grosse Aufopferung Kosten." *Id.* at 49. Cf. Eugene Kamenka, *Human Rights, Peoples Rights, in THE RIGHTS OF PEOPLES* 129 (Crawford ed., 1988) for the republican sources of modern rights discourse in Commonwealth England, France, and the United States of America. Kamenka rightly notes that all "liberal democracy" grew out of republican tradition.

35. *International Covenant on Economic, Social and Cultural Rights*, Dec. 16, 1966, Part 1, art. I.1, 993 U.N.T.S. 3, 6 I.L.M. 360 (1967) [hereinafter "ICESCR"].

36. "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." *International Covenant on Civil and Political Rights*, Dec. 16, 1966, Part 1, art. I.1, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967) [hereinafter "ICCPR"].

37. *ICCPR* art. 9, para. 1.

38. *Universal Declaration on Human Rights*, G.A. Res. 217A (III), U.N. Doc. A/810 (1948).

39. For discussions of the modern concept of self-determination, see HURST HANNUM, *AUTONOMY, SOVEREIGNTY AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS* (1990); POMERANCE, *SELF-DETERMINATION IN LAW AND PRACTICE*, *supra* note 24; Pomerance, *Perspectives of the Wilsonian Conception*, *supra* note 26, at 1; Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992) [hereinafter "*Emerging Right to Democratic Governance*"]; Thomas M. Franck, *Postmodern Tribalism and the Right to Secession, in PEOPLES AND MINORITIES IN INTERNATIONAL LAW* (Broelmann et al. eds., (1992) [hereinafter "*Postmodern Tribalism*"]; Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177 (1991); Frederic L. Kirgis, Jr., *The Degrees of Self-Determination in the United Nations Era*, 88 AM. J. INT'L L. 304, 304-310 (1994).

trary regimes accept such Covenants because of the support they hope to draw from the United Nations' corresponding endorsement of the "sovereign equality of all its members,"⁴⁰ and their "political independence."⁴¹ The United Nations Charter expressly refuses to authorize intervention in matters that are essentially within the sovereign "domestic" jurisdiction of any independent state.⁴²

III. SOVEREIGNTY

The sovereign independence and equality of states received its most influential endorsement and elaboration from Emmerich de Vattel, who based his argument on republican principles of freedom and equality.⁴³ Since all men are naturally equal, with equal rights and obligations proceeding from nature, Vattel argued, so must nations comprised of men be equal also, and inherit from nature the same obligations and rights. The relative power or weakness of states makes no difference. "A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom."⁴⁴ Vattel added that the natural "liberty and independence of nations" gives all peoples the right to be governed as they see fit, and that no state may legitimately interfere in another state's government. "Of all the rights that can belong to a nation, sovereignty is, doubtless, the most precious and that which other nations ought most scrupulously to respect."⁴⁵

Vattel's national sovereignty belonged originally and essentially to the people collectively. Nations could subsequently cede sovereignty to a senate or to a single person,⁴⁶ but only to promote the common good of all citizens.⁴⁷ When the nation's chosen sovereign exceeds or abuses this authority, the nation may reclaim his power, as the Netherlands withdrew sovereignty from Philip II of Spain.⁴⁸ Other states justly support such revolutions, in which nations take up arms against their oppressors. Vattel praised William of Orange and the Dutch for intervening to support the English revolution against James II. It was "an act of justice and gener-

40. U.N. CHARTER art. 2, para. 1.

41. *Id.* art. 2, para. 4.

42. *Id.* art. 2, para. 7.

43. VATTEL, *supra* note 28, Preliminaries, § 4.

44. *Id.*, Preliminaries, § 18, as translated in the Fourth Edition (London, 1811).

45. *Id.* at II.vi.54.

46. *Id.* at I.iv.38.

47. *Id.* at I.iv.39.

48. *Id.* at I.iv.51.

osity" to defend foreign liberty.⁴⁹

Jean Bodin had earlier made the often repeated argument that sovereignty should be the absolute, indivisible and perpetual power of kings.⁵⁰ Monarchs have tended to promote this doctrine, which left its residue in Hugo Grotius's curious defense of slavery and a nation's power to bind itself in perpetual servitude.⁵¹ (Since some peoples are unfit to be free.)⁵² Grotius denied the republican doctrine of popular sovereignty, observing that no nation had ever allowed women, minors, or paupers to join in public debate.⁵³ As husbands govern wives,⁵⁴ and masters rule slaves,⁵⁵ so kings may own nations, to avoid the turbulence of uncertain jurisdiction.⁵⁶ These proto-Hobbesian arguments and assumptions would not be made openly today.⁵⁷ But they survive in the modern doctrine of non-intervention in the domestic jurisdiction of "sovereign" governments,⁵⁸ as interpreted by some contemporary commentators on international law.⁵⁹ Yet even Bodin admitted the right of intervention in a state's formerly internal affairs, when the state's sovereign oppresses his subjects,⁶⁰ and Grotius fully recognized the equivalence between slavery and regal sovereignty while nevertheless excusing both.⁶¹

49. "But we ought not to abuse this maxim, and make a handle of it to authorize odious machinations against the internal tranquillity of states." *Id.* at II.iv.56.

50. JEAN BODIN, *SIX LIVRES DE LA REPUBLIQUE*, I.8-II.5 (1586).

51. "Atque hoc loco primum rejicienda est eorum opinio, qui ubique & sine exceptione summam potestatem esse volunt populi, ita ut ei reges, quoties imperio suo male utuntur, & coercere & punire liceat: quae sententia quot malis causam dederit, & dare etiamnum possit, penitus animis recepta, nemo sapiens non videt. Nos his [sic] argumentis eam refutamur. Licet homini cuique se in privatem servitutem cui velit addicere, ut & ex lege Hebraea & Romana apparet. [Quidni ergo populo sui juris liceat se uni cuiquam, aut pluribus ita addicere, ut regendi sui jus in eum plane transcribat, nulla ejus juris parte retenta?]" HUGO GROTIUS, *De Jure Belli ac Pacis Libritres*, in 1 THE CLASSICS OF INTERNATIONAL LAW, 52-53 (James Brown Scott ed. 1913).

52. *Id.* at 53 (citing Aristotle).

53. *Id.* at 53.

54. *Id.* at 55-56.

55. *Id.* at 56.

56. *Id.* at 57.

57. Cf. Mortimer N.S. Sellers, *Republican Authority*, V THE CANADIAN J.L. & JURIS. 257, 259-60. "And therefore, they that are subjects to a Monarch, cannot without his leave cast off Monarchy, and return to the confusion of a disunited Multitude; nor transferre their person from him that beareth it, to another Man, or other Assembly of men." THOMAS HOBBS, *LEVIATHAN*, II.18.1 (Dutton, 1973).

58. E.g., *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of The United Nations*, G.A. Res. 2625, U.N.GAOR, 1883rd plenary mtg, U.N. Doc. A/RES/2625 (1970).

59. E.g., IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, Ch. 13 "Sovereignty and Equality of States." (3d ed. 1979).

60. BODIN, *supra* note 50, II.5 at 609.

61. In addition to the passage quoted above, see GROTIUS, *supra* note 51, at 490-94, in

The concept of "sovereignty" entered the lexicon of international law through the obvious analogy between free men and free states. Some nations, as Grotius observed, are subject to others: they have no freedom or sovereignty.⁶² "Sovereignty," in this sense, means independence from any other human will,⁶³ just as "liberty," in its original republican sense, meant independence from the will of another.⁶⁴ People are not free when subject to any power but the common good. Nations are not sovereign when subject to the will of any other person or state.

Vattel's argument for strict national sovereignty and the rigorous independence of states rested on this analogy between personal and national freedom. When Vattel was writing in the mid-eighteenth century, personal freedom hardly existed outside Switzerland and the Netherlands. At that time, it made sense for enlightened and well-meaning authors to establish an absolute principle of non-intervention in the internal affairs of sovereign states. The most likely interventions of Vattel's era would have curbed emerging popular sovereignty. Similarly, even after the French and American revolutions, preponderant power remained in the hands of European despots. Relatively progressive states, such as Britain, promoted non-intervention in defense of nascent continental liberty, as in Naples and Spain, against reactionary European monarchs.⁶⁵ The United States also embraced non-intervention to protect itself and other recently liberated American republics against the reimposition of European autocracy in the New World.⁶⁶ But the emergence of the United States as a world power altered this equation, and many republics now have the strength to protect foreign liberty, without endangering their own democratic institutions or national independence.

The fundamental republican principle of popular sovereignty ("*imperium populi*") has been at the core of the developing law of nations from

which Grotius admits that slavery violates the law of nature, and the barbarity of inherited servitude.

62. Grotius, *supra* note 51, at 54.

63. "[S]umma [potestas] autem illa dicitur, cujus actus alterius juri non subsunt, ita ut alterius voluntatis humanae arbitrio irriti possint reddi." *Id.* at 52.

64. *E.g.*, ALGERNON SIDNEY, DISCOURSES CONCERNING GOVERNMENT 1.5 (London, 1698): "For as liberty solely consists in an independency upon the will of another, and by the name of slave we understand a man, who can neither dispose of his person nor goods, but enjoys all at the will of his master; there is no such thing in nature as a slave, if those men and nations are not slaves, who have no other title to what they enjoy, than the grace of a prince, which he may revoke whensoever he pleaseth." *See, e.g.*, Sellers, *Republican Liberty*, *supra* note 12.

65. HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW, Part II, §§ 65-66 (Legal Classics Library ed., 1991).

66. *See, e.g.*, President Monroe's message to Congress of December 2, 1823, the so-called "Monroe Doctrine."

the beginning. Freedom and equality are the two best rules of human relations and such obvious sources of just and stable political institutions, that even tyrants have recognized liberty and independence among themselves while denying both to their terrified subjects. "Sovereignty" denotes the freedom and equality of governments. Just as legitimate national governments derive their authority from the consent of the governed, so legitimate international institutions derive their validity from the consent of the governments involved. If rational debate among citizens produces just national laws, so too should rational discussion among governments produce a just global order. But this supposes that governments speak for the nations they rule. The very rationale that supports the sovereign equality of states implies the sovereign equality of citizens, too. Republican principles would deny despotic governments the right to speak for the peoples they control. Every state's claim to a national voice depends on its being, in fact, the voice of the nation.

IV. FEDERALISM

Why divide the world into nations at all? Kant proposed to build international law around a "*federation* of free states."⁶⁷ But he opposed creating a world republic, despite the value of size and diversity in preventing local injustice. Why not create a cosmopolitan republic and abolish the need for a separate law of nations? Kant explained that laws lose influence as governments increase in territory, producing anarchy or despotism.⁶⁸ This repeats a standard criticism of large republics. In small republics, the common good is better known and closer to each citizen.⁶⁹ Throughout the world, geographic, linguistic, and religious differences divide people into natural units. Federal institutions allow each community to control the others' excesses in the interests of all. Kant praised this balance as nature's own design for creating and protecting a just law of nations.⁷⁰

67. "Das Völkerrecht soll auf einen Föderalismus freier Staaten gegründet sein." KANT, *supra* note 1, at 16. (emphasis added).

68. *Id.* at 32.

69. "Il est de la nature d'une république qu'elle n'ait qu'un petit territoire . . . Dans une grande république, le bien commun est sacrifié à mille considérations; il est subordonné à des exceptions; il dépend des accidents. Dans une petite, le bien public est mieux senti, mieux connu, plus près de chaque citoyen. . ." DE SECONDAT, *supra* note 15, VIII.16. Cf. JEAN-JACQUES ROUSSEAU, *DU CONTRAT SOCIAL*, II.9 & III.6 (Henrie Guillemin, ed. 1973).

70. "So wie die Natur weislich die Völker trennt, welche der Wille jedes Staats und zwar selbst nach Gründen des Völkerrechts gern unter sich durch List oder Gewalt . . ." KANT, *supra* note 1, at 33.

Federal institutions replicate the benefits of free republican government on an international scale. James Madison emphasized this point for North America in endorsing the ancient republican technique of balancing competing factions to counteract local self-interest.⁷¹ John Adams claimed that a well-balanced republic could exist even "among highwaymen" by setting each rogue to watch the others.⁷² Kant envisioned a successful republic of devils.⁷³ The United States Constitution first applied this same reasoning to sovereign states, using each state to control the others, and to provide "a republican remedy for the diseases most incident to republican government."⁷⁴

Even if it were attainable, a world republic would not be desirable for two important reasons. First, excessively unified international institutions create the risk that one bold usurpation could tyrannize the world, as happened in imperial Rome, turning the first republic into a universal empire. Second, peoples facing varied geographical and historical circumstances create different local values from the fabric of local experience. These values enrich their own lives, but also the cultural and political capital of their republican neighbors. Each nation provides a model for the others, and each regional innovation supplies a possible new model for justice and world peace.

V. NATIONALISM

The obvious existence and possible benefits of national diversity have encouraged some scholars to embrace a "multinational" conception of justice, a conception that recognizes no rights or justice beyond each particular society's inherited traditions and political discourse.⁷⁵ Somewhat less coherently, within nations, this becomes a "multicultural" conception of justice, encouraging the disaggregation of peoples into an overlapping mosaic of ethnic, religious and cultural viewpoints.⁷⁶ Some crit-

71. THE FEDERALIST NO. 51 (James Madison) (Isaac Kramnick ed., 1987): "Ambition must be made to counteract ambition . . . And happily for the republican cause, the practicable sphere may be carried to a very great extent by a judicious modification and mixture of the federal principle". *Id.* at 319, 322. Cf. THE FEDERALIST NO. 10 (James Madison).

72. ADAMS, *supra* note 22, at III.505.

73. KANT, *supra* note 1, at 31.

74. "And according to the degree of pleasure and pride we feel in being republicans ought to be our zeal in cherishing the spirit and supporting the character of federalists." THE FEDERALIST NO. 10 (James Madison), at 128.

75. See, e.g., F. Von Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (1814); RICHARD RORTY, *CONTINGENCY, IRONY AND SOLIDARITY* (1989).

76. See, e.g., *MULTICULTURALISM* (Amy Gutmann ed., 2d ed., 1994); WILL KYMLICKA,

ics of nationalism consider this progression inevitable, concluding that each recognition of national community breeds new claims by smaller sub-groups, leaving no principled basis for restricting fragmentation, or eliminating the self-indulgent excesses of tiny local majorities.⁷⁷ Proponents of the nation as a viable category must offer a rationale for dividing jurisdiction, not only between nations, but between national and international law.

Some scholars have opposed the republican principle of popular sovereignty to a "liberal" principle of human rights.⁷⁸ This misreads the basis of the republican *imperium populi*, which exists to serve justice and the common good, not private inclinations. Human rights are best discovered through public deliberation — not created, but found. Republicans do not deny the existence of universal human rights. They offer a technique for finding them — through representation, the rule of law, the separation of powers, and the ultimate sovereignty of the people.⁷⁹ Republicans hold that there can be no liberty without popular sovereignty, while recognizing that popular sovereignty alone does not guarantee justice.⁸⁰

Scholars create a dangerous confusion when they oppose republican popular sovereignty to liberal human rights. Democracy may threaten liberty, but liberty and republicanism begin and must end together.⁸¹ The value of popular sovereignty in republican theory lies in finding the common good. Liberty is the product of this search. So Benjamin Constant made a fatal innovation in opposing the "liberty of the ancients," which he identified with democracy, to the "liberty of the moderns," individual human rights.⁸² Neither is possible without the other. Popular sovereignty discovers liberty. Human rights protect the search for justice.

LIBERALISM, COMMUNITY AND CULTURE (1989).

77. See, e.g., DANIEL PATRICK MOYNIHAN, *PANDAEMONIUM: ETHNICITY IN INTERNATIONAL POLITICS* (1993).

78. See, e.g., Jürgen Habermas, *Human Rights and Popular Sovereignty: The Liberal and Republican Versions*, 7 *RATIO JURIS* 1 (1994); Frank Michelman, *Law's Republic* 97 *YALE L.J.* 1493 (1988).

79. See SELLERS, *AMERICAN REPUBLICANISM*, *supra* note 12, at 244 *et passim* for the traditional desiderata of republican government.

80. Republicans have always been very careful to distinguish their constitution from democracy. E.g., CICERO, *DE RE PUBLICA*, *supra* note 18, at II.xiii.41; SIDNEY, *supra* note 64, at II.16.30; *THE FEDERALIST*, NOS.10 and 14; KANT, *supra* note 1, at 13.

81. LIVIUS, *AB URBE CONDITA*, *supra* note 14, II.1; see Sellers, *Republican Liberty*, *supra* note 12.

82. BENJAMIN CONSTANT, *DE LA LIBERTÉ DES ANCIENS COMPARÉE À CELLE DES MODERNES* (1819).

Self-governing nations provide a locus for establishing individual human rights. But too much emphasis on universal human rights may obscure the primary value of the nation, which lies in the continuity and large common projects that nations make possible over generations in the lives of their citizens. Human rights could be protected in a world republic, but collective identity could not. Human nature thrives best in an atmosphere of common endeavor and shared purpose among neighbors. Republican nations exist to serve this basic human need, which individual human rights alone leave unfulfilled. Shared devotion to human rights and constitutional procedures preserve neither internal peace, nor a stable national identity. There must be common culture too, developed to embrace all members of society.⁸³

Peoples respect each other's sovereignty and domestic jurisdiction for two important reasons, republican and prudential, both of which have contributed to the privileged position of nations in international law. The republican reason depends on popular sovereignty within nations, which requires the deference of outsiders towards a people's own determinations of its cultural and political future. The prudential reason encourages republics to assert independence and equality against non-republican states, so that they may protect their own internal liberties against outside intervention. Sometimes this requires establishing a *modus vivendi* with despotic regimes in order to preserve the republic intact. Prudence may tolerate tyranny, but does not justify it. Republics properly protect the liberty and human rights of other nations when they have the power to do so.

There is a limit to the autonomy popular sovereignty accords to self-governing republics. Each nation is a community unto itself, but only for the old republican purposes of creating a "common sense of justice" and a "partnership for the common good."⁸⁴ Other republics, or, better still, a federation of republics, may legitimately intervene when governments or majorities exceed the scope of their national authority. Total deference to the popular will would subvert the fundamental republican principle of

83. Most critics of the nation-state fear its unifying force in the hands of tyrants. Even Jürgen Habermas, who sees the importance of nationalism in Europe's emerging republican sensibility and the value of common identity in protecting universal human rights, does not understand how weak civic bonds will be without a national identity to support them. See Jürgen Habermas, *The European Nation State—Its Achievement and Its Limits: On the Past and Future of Sovereignty and Citizenship*, in CHALLENGES TO LAW AT THE END OF THE 20TH CENTURY. Papers and Abstracts of the 17th IVR World Congress Bologna 27 (1995).

84. "Respublica res est populi. Populus autem non omnis hominum coetus quoquo modo congregatus, sed coetus multitudinis juris consensu, et utilitatis communione sociatus." CICERO, DE RE PUBLICA, *supra* note 18, at I.XXV.39.

liberty. Democracy may violate the common good as well as any other system. Thus, the United States Constitution guarantees each constituent commonwealth not only a "republican form of government,"⁸⁵ but also "liberty" (and certain named liberties) against popular intemperance.⁸⁶ Public deliberation is the best test of the common good, and a nation's voice is best expressed by the vote of its people. But international laws and institutions exist in part to extend popular sovereignty and public deliberation to a broader arena, and so to prevent national governments from abusing their power.

Kant observed that history divides humanity into natural republics⁸⁷ and agreed with Montesquieu, Rousseau, and many others that republics should remain small to keep the common good within reach of all citizens.⁸⁸ As nations become smaller, their homogeneity increases. This makes it easier to build a common culture, adapted to regional history or geography, and to develop the collective social projects that enrich communal life.⁸⁹ But it also makes it easier for local majorities and factions to control the state and oppress their fellow citizens.⁹⁰ National republics are the natural locus of positive liberty, cultural continuity, and communal solidarity. National republics enrich their citizens' lives and defend them against outside attacks. But republics may not always adequately protect their people's negative liberties against the state.

VI. HUMAN RIGHTS

Many governments now recognize fundamental human rights as one essential basis of a just world order, as affirmed by the Charter of the United Nations,⁹¹ whose members have agreed to promote "universal

85. U.S. CONST. art. I, § 4.

86. *Id.* art. I, § 10; U.S. CONST. amend. XIV.

87. KANT, *supra* note 1, Erster Zusatz: Von der Garantie des eigen Friedens.

88. "Il est de la nature d'une république qu'elle n'ait qu'un petit territoire. . ." DE SECONDAT, *supra* note 15, at 11; "plus l'État s'agrandit, plus la liberté diminue." ROUSSEAU, *supra* note 69, at II.9, III.1.

89. CHARLES TAYLOR, *THE ETHICS OF AUTHENTICITY* (1991); MACINTYRE, *AFTER VIRTUE: WHOSE JUSTICE? WHICH RATIONALITY?* (1988).

90. "The smaller the society, the fewer probably will be the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression." *See* THE FEDERALIST NO. 10, *supra* note 15.

91. The Preamble to the United Nations Charter states: ". . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small."

respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."⁹² The United Nations General Assembly specified some of these rights in its 1948 Universal Declaration of Human Rights,⁹³ and many governments have ratified the 1966 International Covenants on Economic, Social, and Cultural Rights, and Civil and Political Rights.⁹⁴ Along with popular sovereignty and the self-determination of peoples (both endorsed in the Declaration and Covenants), non-republican governments have accepted the universality of other human rights, perhaps assuming perpetual non-enforcement and governmental impunity.⁹⁵ Tyrannies buy respectability by recognizing the obvious rights of humanity.

The international human rights covenants make a useful distinction between economic, social, and cultural rights, which states undertake to "take steps" toward "achieving progressively,"⁹⁶ and civil and political rights (including some rights from which there may be "no derogation," even if the life of the nation is at stake),⁹⁷ which states undertake to "respect and ensure" immediately.⁹⁸ Civil and political rights are the rights without which nations cannot deliberate, self-determination cannot occur, and popular sovereignty does not exist. They embrace fundamental republican guarantees, including rights to life,⁹⁹ liberty,¹⁰⁰ equality before the law,¹⁰¹ and to vote and take part in public affairs.¹⁰² Economic, social, and cultural rights are the rights through which nations express their individuality and cultural traditions. Civil and political rights are the rights without which no such expressions may authentically be made.

The specific lists of rights established in United Nations documents lose some authority due to the participation of non-republics in their compilation, participation which may have compromised the content of the lists.¹⁰³ But prominent republics such as France and the United States subsequently ratified the Covenants through accredited representatives of

92. U.N. CHARTER art. 55(c).

93. *Universal Declaration of Human Rights*, *supra* note 38.

94. *See, e.g., ICESCR*, *supra* note 35, and *ICCPR*, *supra* note 36.

95. *ICCPR*, *supra* note 36.

96. *ICESCR*, Part II, art. 2, para. 1.

97. *ICCPR*, art. 4, para. 2.

98. *Id.* Part II, art. 2, para. 1.

99. *Id.* art. 6.

100. *Id.* arts. 8, 9.

101. *Id.* arts. 14, 26.

102. *Id.* art. 25.

103. *Cf. Kamenka*, *supra* note 34, at 127, 135.

the respective nations.¹⁰⁴ All the world's leading republics have composed similar lists, including the United States Bill of Rights, and the French *Déclaration des droits de l'homme et du citoyen*, both of which were formally ratified after comprehensive public deliberation. Such lists mark the rational limits of governmental power, even in republican states, against a nation's own citizens. Broad public deliberations and planning in the abstract against future unknown circumstances sought to control the people and their governments in defense of individual rights while empowering the nation to pursue its collective social and cultural goals with a minimum of foreign intervention.

International law earns whatever validity it has by protecting justice and the common good of humanity. To remain a useful concept, the law of nations must demonstrate both the value of nations as a category, and the reasons why nations should sometimes be subject to the law. Nations derive their usefulness and domestic jurisdiction first from their actual existence and second from their value in mediating the popular sovereignty of geographically distinct peoples. International law becomes useful in policing the boundaries of this authority. Thus international law has three main purposes: first, to protect each nation's sovereignty and self-determination against external and internal threats; second, to protect the human rights of all citizens against their own people's excessive social unity or democratic enthusiasm; and finally, to advance the common good of all nations, where collective action is necessary.

VII. PEOPLES

Republican governments exist to advance the common good of the people,¹⁰⁵ and republican institutions rest on the *imperium populi*, or sovereignty of the people;¹⁰⁶ therefore, applying republican principles to international law requires identifying the relevant "peoples" and jurisdictions involved. Which groups deserve "equal rights" and "self-determination" as peoples¹⁰⁷ who may "freely determine their political status" and

104. The United States signed the International Covenant on Economic, Social and Cultural Rights on October 5, 1977. The International Covenant on Civil and Political Rights was also signed on October 5, 1977 and ratified on April 2, 1992. CCH Cong. Index vol. I, Senate 102 Cong., Sess. 1991-1992. France signed both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights on January 29, 1981. 1981 J. Republique Francais 405.

105. See above and the famous quote from Cicero, "Respublica est res populi" quoted in JOHN ADAMS, *supra* note 22, vol. I, xxi.

106. See CICERO, PHILIPPICAE, *supra* note 14 and accompanying text.

107. E.g., U.N. CHARTER art. 55 and art. 1, para.2.

"freely pursue their economic social and cultural development?"¹⁰⁸ State practice and public debates often assume that "peoples" are "nations" and that "nations" are "states."¹⁰⁹ Leading scholars have deplored this "confusion" of peoples with nations as improperly going over the heads of states to their subordinate populations.¹¹⁰ But republican principles, etymology, political history, and the use of the term "peoples" in the Preamble to the Charter of the United Nations¹¹¹ all imply that the relevant "peoples" in international law are the citizens of a given state¹¹² and that these citizens ought to constitute a nation, which should control the state (*imperium populi*). "People," "nation," and "state" will not be separated in any just and stable system of international law.

The term "people" or "*populus*" properly refers to the citizens, or subjects, of a given state. The people's state becomes a republic when citizens come together to create a common sense of justice in pursuit of the common good.¹¹³ This also makes them a nation, when the republic persists over time. Republics, therefore, are states in which citizens have created a nation by establishing a common culture under the sovereignty of the people. But not all states are republics, and not all nations are states. In the absence of republican government and shared civil rights, individuals properly develop communal identities around contingent ethnic, racial, religious, and linguistic attributes, which determine justice and the common good among their own members. People need society, and when the state will not provide it, they find their nations where they can.

The Roman term "*natio*" originally referred to those persons sharing a common "*natus*," or birth.¹¹⁴ Like the *gentes* of the original "*jus gentium*" or "law of nations," "*natio*" first indicated groups not yet integrated into the political form of a state, held together by common customs and

108. *E.g.*, JCCPR, art. 1, para. 1.

109. Deploring this fact, see Peter Falk, *The Rights of Peoples (In Particular Indigenous Peoples)*, in THE RIGHTS OF PEOPLES 26 (James Crawford ed., 1988).

110. *E.g.*, Ian Brownlie, *The Rights of Peoples in Modern International Law*, in THE RIGHTS OF PEOPLES 11 (James Crawford ed., 1988).

111. U.N. CHARTER, Preamble: "WE THE PEOPLES OF THE UNITED NATIONS . . ." The language consciously echoes the Preamble to the Constitution on the United States of America: "We the People of the United States . . .," and implies all *citizens* of the republic.

112. The *populus*, or population.

113. "Respublica res est populi. Populus autem non omnis hominum coetus quoquo modo congregatus, sed coetus multitudinis juris consensu, et utilitatis communione sociatus." CICERO, DE RE PUBLICA, *supra* note 18, at I.XXV.39.

114. Charlton T. Lewis and Charles Short, A LATIN DICTIONARY s.v. "*natio*" 1189 (1879).

traditions.¹¹⁵ When Rome conquered the Western world, these “*nationes*” offered the obvious boundaries for the new Roman provinces and remained the basis of local identity in European Christendom, where medieval universities divided students into “nations” according to the regions they represented.¹¹⁶ Nations conceived in this way are prepolitical entities, but they provide the natural outlines of new states and republics when old tyrannical, multinational empires break down.¹¹⁷ People who share a common language and experience offer better foundations for republican cooperation than those who do not. Longstanding political boundaries provide a better basis for future associations than newly invented divisions.

The doctrine *uti possidetis juris* reflects the obvious desirability of preserving existing political boundaries whenever it is possible to do so.¹¹⁸ But the vagaries of war and empire have created many peoples that embrace several different ethnic or “national” cultures. For example, in Africa, the very short history of European empires united disparate groups without developing strong common identities to support new colonies and provinces. In Europe and Asia, the British, Austro-Hungarian, and Soviet Empires often shifted large populations between regions to preserve imperial hegemony. Such circumstances make republican unity difficult to achieve in many post-imperial successor states. The very colonies that most successfully claimed the “self-determination of peoples” to advance their autonomy¹¹⁹ must now maintain “national unity and territorial integrity”¹²⁰ against their own subjugated minority populations.¹²¹ The African (“Banjul”) Charter on Human and Peoples’ Rights affirms that “all peoples” have the “unquestionable and inalienable right to self-determination”¹²² on a continent that also absolutely affirms the

115. See Habermas, *supra* note 83, at 28.

116. *Id.*

117. *Id.* at 31-32.

118. On *uti possidetis juris*, with bibliography, see BROWNLIE, *supra* note 59, at 137-38.

119. See, e.g., the *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514 (1960) para. 1: “the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights”.

120. See *Declaration on the Granting of Independence to Colonial Countries and Peoples*, *supra* note 119, para. 6.

121. Some claim that there is a logical inconsistency inherent in this behavior. See, e.g., David Makinson, *Rights of Peoples: Point of View of a Logician*, in *THE RIGHTS OF PEOPLES* 75-77 (James Crawford ed., 1988). This need not be the case if all ethnically or otherwise distinct populations do not rise to the level of “peoples.” Everything hinges on how boundaries will be drawn between “peoples.”

122. THE AFRICAN (“BANJUL”) CHARTER ON HUMAN AND PEOPLES RIGHTS, art. 20, para. 1

inviolability of its inherited colonial boundaries.¹²³

Geographic divisions form the nature and future identity of the nations and peoples governed by international law. Republics respect the self-determination of the nation through popular sovereignty, and their search for justice and the common good creates national identity over time, drawing on the cultural capital of all elements among each state's population, or peoples. States that maintain republican institutions deserve stable borders to deepen their unity and common purpose through shared traditions and a common future. Non-republics deny their subjects self-determination; this makes the identity of the "people" much more problematic. Geographic features offer obvious boundaries, but subjugated nations may constitute several possible peoples. Without popular sovereignty to create national consciousness, the "people" lose their common identity and must define themselves around non-political institutions, such as race, religion, language, literature, and other sources of ethnicity.¹²⁴

The republican principle of *imperium populi* requires that all peoples enjoy self-determination and the rights to vote and be elected in genuine periodic elections by universal equal suffrage.¹²⁵ Governments that deny these rights are not republican and have no legitimate claim either to the loyalty of their subjects or to recognition by other states or nations. People subject to such governments are not fully "peoples" until they can express their identity politically. But they may constitute one or more pre-political nations whose voices would enrich international law, and whose rights are violated by their usurping masters. The voices of peoples discover the law of nations when "peoples" are the citizens of republican states, or the suffering subjects of non-republics, crying out against their oppressors.

(1981).

123. OAU RESOLUTION 16(1) of July, 1964 declared that "all member states pledge themselves to respect the frontiers existing on their achievement of national independence."

124. Jürgen Habermas deplors the natural cultural unity of republican peoples in the name of "pluralism" and multicultural diversity. Habermas, *supra* note 83, at 31-36. Habermas's view overestimates the tenacity of tribal affinities and the dangers of cultural union. Republics naturally and properly develop a common sense of identity that includes and builds on all the constituent elements of the population. Habermas and many others have been misled by the recent fluidity of European borders. Immigrants naturally assimilate over time to republican cultures, while contributing aspects of their own previous heritage to the common patrimony. Only strong legal encouragement of differences will preserve significant cultural diversity under free and equal republican governments.

125. This principle is reflected in Articles 1 and 25 of the ICCPR (1966).

VIII. MINORITIES

The equivalence between the world's "peoples" and the citizens of its various states raises the issue of minority rights. History, warfare, and migrations have divided the world into cultural units that do not always directly correspond with existing political boundaries. Even the peoples of republican states, particularly young states, may find themselves internally divided with several ethnically or culturally distinct "minority" populations. Minorities are groups within a nation's people who view themselves as in some way separated from the rest of society. Republican principles of liberty and equality require that such citizens be included in the "common good" and never denied their natural human rights on the basis of distinctions such as race, religion, or any other status.¹²⁶

Minorities may develop sub-cultures of their own, and should be allowed to enjoy them without interference by the government or majority of the people of their state.¹²⁷ This has led some politicians and scholars to equate "minorities" with "peoples." On this theory "nationalities," "peoples," "minorities," and "indigenous populations" are all essentially the same.¹²⁸ This equivalence would undermine the principle of self-determination. If every self-defined group in a society constitutes a "people" with a separate right to self-determination, then "self-determination" becomes an incoherent and ultimately unrealizable ambition. A citizen may belong to several different cultural minorities, but to only one people. Minorities may be geographically scattered across several states, but each people should have a territorial state of its own. Minorities may exclude their fellow citizens and neighbors, but the "people" of a given state must embrace every citizen. Every people has an imprescriptible and unalienable separate right to self-determination. Minorities do not.¹²⁹

Individual members of minority groups in republican states enjoy self-determination by virtue of their membership in the larger nation and participation in its political processes. But what of minorities in non-republics? Such minorities may offer the best foundation for liberating new

126. This principle is recognized by Article 2, para. 1 of the *ICCPR* (1966).

127. This right has been recognized by Article 27 of the *ICCPR* (1966).

128. See, e.g., Brownlie, *supra* note 110, at 5-6.

129. For an interesting attempt to define the Rights of Peoples, see *The Universal (Algiers) Declaration of the Rights of Peoples (1976)* in *International Lelio Basso Foundation for the Rights and Liberties of Peoples, Universal Declaration of the Rights of Peoples* (Paris, 1977), art. 5, partially reprinted in *THE RIGHTS OF PEOPLES* 187-89 (James Crawford ed., 1988). See also note 134 below. For documents on autonomy and minority rights, see *DOCUMENTS ON AUTONOMY AND MINORITY RIGHTS* (Hurst Hannum ed., 1993).

republican peoples out of existing tyrannies and empires. This is the only sense in which minorities may properly be seen as equivalent to nations and peoples in international law. They provide the seeds of nations and possible origins of peoples when constructing new states out of the ruins of empire. Their status hinges on the existence (or non-existence) and protection of fundamental human rights, including civil and political rights, without distinction as to race, language, or religion.¹³⁰ Minorities denied their civil rights by existing governments properly move toward secession under customary international law.¹³¹

All subjects of a state have the right to take part in governing their country. The deliberation and judgment of the people is the only legitimate basis of governmental authority. The people's voice may only be expressed through universal and equal suffrage in periodic and genuine elections. These republican truths have all been recognized, even by non-republics, in the Universal Declaration of Human Rights¹³² and United Nations Covenants.¹³³ Together they imply the right of minority groups to secede from the larger political entity when their republican rights are denied.¹³⁴ The rights of minorities should generally be exercised with respect for the interests of the community as a whole. These rights cannot authorize impairing the territorial integrity or political unity of a state unless the state violates its obligations to democratic government or fails to maintain adequate respect for the human rights and fundamental freedoms of all.¹³⁵

A manifest and continued abuse of governmental power, to the detriment of any section of the population of a state, implicitly recognizes the victim group as a separate nation.¹³⁶ As early as 1920, a Commission of Rapporteurs reporting to the League of Nations distinguished the case of

130. The central importance of human rights and fundamental freedoms to the equal rights and self-determination of peoples is reflected in article 55 of the United Nations Charter.

131. LEE C. BUCHHEIT, *SECESSION: THE LEGITIMACY OF SELF-DETERMINATION* (1978).

132. *Universal Declaration of Human Rights*, *supra* note 38, art. 21.

133. *ICCPR* art. 25.

134. *Cf.* HANNUM, *supra* note 39, at 116.

135. For a lucid expression of these principles see *The Universal ("Algiers") Declaration of the Rights of Peoples* (1976), with text and commentary in Antonio Cassese, *Political Self-Determination—Old concepts and New Developments*, in *UN LAW/FUNDAMENTAL RIGHTS* 137 (Antonio Cassese ed., 1979).

136. This was implied by an international tribunal as early as 1920 in the Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion on the legal aspects of the Aaland Islands question, *League of Nations O.J. Spec. Supp.* 3 at 5 (1920), when it reserved the question of the rights of people under such circumstances.

Finland, which had been oppressed by Russia, from the Aaland Islands, which were not suffering persecution by the Finns.¹³⁷ The Commission denied minorities the right to withdraw from the wider communities to which they belonged, because to have done so would have been “incompatible with the very idea of the State as a territorial and political unity”.¹³⁸ The separation of minorities from the State of which they form a part is an exceptional solution, “a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees” of fundamental human rights.¹³⁹

IX. INTERNATIONAL LAW

International law is the law of nations, which is to say the law governing nations, and their political basis in states. It rests on the assumption that the peoples of the world’s various states deserve to develop their separate nations through their own internal self-determination, rather than collectively under the distant direction of a world-wide empire. The United Nations reflects this commitment to international federalism, as confirmed by the General Assembly in its 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States,¹⁴⁰ which repeats the principle of equal rights and self-determination of peoples enshrined in the United Nations Charter.

The Declaration endorses every state’s duty to promote the “universal” observance of human rights and fundamental freedoms through “joint and separate action,” and confirms all peoples’ right to “seek and receive support” in pursuit of their national self-determination.¹⁴¹ But the General Assembly reiterated that none of these endorsements should be construed “as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples,” and

137. The Aaland Islands Question, Report Presented to the Council of the League by the Commission of Rapporteurs, League of Nations Doc. B.7.21 (68) 106 (1921).

138. *Id.*

139. *Id.* For modern recognition of this fundamental aspect of the Law of Nations see e.g., HANNUM, *supra* note 39, at 470-74; BUCHHEIT, *supra* note 131, at 94 (1978); Ved P. Nanda, *Self-Determination Outside the Colonial Context: The Birth of Bangladesh in Retrospect*, in SELF-DETERMINATION: NATIONAL, REGIONAL, AND GLOBAL DIMENSIONS 204 (Yonah Alexander & Robert A. Friedlander eds., 1980); COBBAN, *supra* note 24, at 140.

140. G.A. Res. 2625 (XXV), 25 U.N. GAOR, Supp. No. 28, 121, U.N. Doc. A/8028 (1971).

141. *Id.*

"thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed, or colour."¹⁴²

Republican principles maintain that the only morally valid laws are laws that serve the common good,¹⁴³ and that the best technique for finding the common good requires popular sovereignty and public deliberation.¹⁴⁴ Law's authority, therefore, depends upon its democratic foundations.¹⁴⁵ Several nations, including the United States, have recognized this as the basis of their domestic legal institutions.¹⁴⁶ The doctrines of sovereign equality and independence among states arose by extension from the same republican principles that support popular sovereignty within states. External and internal self-determination recognize this fundamental republican truth. So even in the absence of republican governments, republican principles have dominated the development of international law.

International law derives whatever substance and validity it has from the democratic deliberation of sovereign nations. No law is valid or binding without republican endorsement. Republics recognize this in their own institutions. There is no authority greater than the deliberative voice of the people: *vox populi vox dei* — "the voice of the people is the voice of God;"¹⁴⁷ but only when the people speak through their democratically elected representatives — "*magistratus est lex loquens*."¹⁴⁸ Surprisingly, non-republican governments frequently recognize these principles in formal international instruments. Popular sovereignty and the self-determination of peoples not only support the law of nations, but they alone legitimately can, and have long been recognized to do so, even among non-republican states.

Republican states and republican statesmen should always apply republican principles in finding and interpreting international law, as should anyone seeking justice in international affairs. This method means disregarding deliberative processes tainted by the excessive participation

142. *Id.*

143. See Sellers, *Actual Validity of Law*, *supra* note 13, at 283-290.

144. See SELLERS, *AMERICAN REPUBLICANISM*, *supra* note 12; Sellers, *Republican Impartiality*, *supra* note 14, at 273-82.

145. Sellers, *Republican Authority*, *supra* note 57, at 257.

146. See U.S. CONST. Preamble, art. 1, art IV.4 and amend. XIV.

147. See NEAL WOOD, *CICERO'S SOCIAL AND POLITICAL THOUGHT* (1988) at 126-127, 137-146, 165-66, 169. Cf. A SELECTION OF LEGAL MAXIMS, CLASSIFIED AND ILLUSTRATED, (A. Maxwell & Son, eds. 1845), Maxim 1: "*Salus Populi Suprema Lex*," with citations to GROTIUS, *DE JURE BELLI PACIS*, III.20.7.1 and MONTESQUIEU, *ESPRIT DES LOIS*, L.xxvii.23.

148. MARCUS TULLIUS CICERO, *DE LEGIBUS* III.i.3 (Harv. Univ. Press., ed., 1988).

of non-republican actors. When federal institutions embrace non-republican participants, as in the American Union just before the Civil War, the federation's component republics and nations must deliberate within themselves to determine their proper international responsibilities. This leaves peoples open to self-deception and self-interest. Broader, international debate will always be desirable, but in the absence of a larger federation of republican states, republics must rely on the largest federation they can find. Even in the context of republican federations, each nation's cultural development remains its own internal affair.

Applying republican principles to existing international treaties reveals the best interpretation and the underlying validity of asserted international standards. For example, the Charter of the United Nations properly recognizes the ultimate sovereignty of peoples, and the equal rights of persons and peoples under the law of nations.¹⁴⁹ The Charter rightly emphasizes the settlement of disputes by standing rules of justice and international law,¹⁵⁰ with respect for human rights and fundamental freedoms,¹⁵¹ including the equal rights and self-determination of peoples.¹⁵² But the Charter also protects a private zone of "domestic jurisdiction", which the United Nations shall not reach.¹⁵³ Republican principles reveal the scope of this zone, which does not protect transgressions against the political rights of citizens or violations of the basic political rights to national self-determination and fundamental human dignity.¹⁵⁴

Too often lawyers and scholars see the "legalization" of international questions as requiring a withdrawal from justice toward supposedly "objective" considerations on the model of municipal legal systems influenced by theories of legal positivism. But neither international nor domestic legal systems deserve obedience unless they serve liberty and the common good. In the absence of any legitimate international legislature, persons and peoples must decide for themselves which standards to apply or enforce as "international law." Republican principles supply the basic test of international validity. Lawyers seeking objective standards in international law must look first to popular sovereignty: was the proposed law endorsed by democratic deliberation? Second, in the absence of deliberation, lawyers should look to fundamental principles: does the law serve

149. U.N. CHARTER Preamble.

150. U.N. CHARTER art. 1, para. 1.

151. *Id.* art. 1, para. 3.

152. *Id.* art. 1, para. 2.

153. *Id.* art. 2, para. 7.

154. *Id.* Preamble.

justice, common welfare, and basic universal human rights? Because they disregard popular sovereignty, the opinions of despots and non-republican governments never legitimately play a role in determining international law, and provide no valid insights into justice or the common good of humanity.

X. INTERNATIONAL INSTITUTIONS

International institutions deserve political legitimacy and obedience only to the extent that they conform to republican standards of popular sovereignty and pursuit of the common good. All proposed articulations of international law from Grotius and Vattel to the United Nations Charter have drawn on the republican principles of consent and self-determination to gain moral authority, while at the same time conceding a great deal to the interests and influence of military power. To give their systems protection, republican theorists accommodate despotic governments. Despotic governments accommodate, or insincerely recognize, some republican principles in order to give their power a veil of moral authority. But this remains a contingent *modus vivendi*, dependent on circumstances and the balance of military power. Non-republican powers will continue their abuses when they can. Republican governments should advance the interests of liberty and popular sovereignty whenever possible. The actual legitimacy and moral force of international institutions depend upon their republican foundations. Republics may defer to non-republican international institutions, but only when they judge it to be in the best interests of justice and liberty to do so.

Applying republican principles to the United Nations Organization and some of its dependent organs will illustrate the procedure by which republics should test international institutions and evaluate their actions. The Charter itself was approved in the United States, France, and several other republican governments through republican procedures. The Charter's approval, through international instruments, tends to give the organization a certain legitimacy. But this legitimacy does not exceed the scope of the commitments made, or the authority of the nation's representatives. For example, ratification of the United Nations Charter in the United States followed a vote by a greater than two-thirds majority in the United States Senate¹⁵⁵ pursuant to Article II, Section 2 of the United States Constitution.¹⁵⁶ Treaties and Laws made pursuant to the Constitu-

155. See 1945 Cong. Rec. Senate 8134.

156. "[The President] shall have Power, by and with the Advice and consent of the Senate,

tion; under the Authority of the United States, are the "supreme law of the land" under the Constitution's sixth Article.¹⁵⁷ But this does not give treaties the force to modify either constitutional guarantees or fundamental republican principles.

The principal organs of the United Nations include the General Assembly, the Security Council, an Economic and Social Council, a Trusteeship Council, the International Court of Justice, and the Organization Secretariat.¹⁵⁸ The General Assembly consists of all the Members of the United Nations,¹⁵⁹ which is to say a group including a great many non-republican states. Each state has one vote.¹⁶⁰ The General Assembly may make recommendations to the Members and Security Council of the United Nations,¹⁶¹ approved by a simple majority vote, or by a two-thirds majority in the case of "important questions."¹⁶² Such recommendations do not necessarily carry any weight, even under the terms of the United Nations Charter. From a republican perspective, such recommendations should have influence only to the extent that General Assembly votes reveal attitudes or provide a vehicle for deliberation among the world's republican states. The views of non-republican governments will sometimes provide useful insights into justice and the common good of humanity, but only when those views are subject to verification by the internal republican processes of republican nations.

The Security Council of the United Nations consists of fifteen members,¹⁶³ five of whom are "permanent members," who must concur in all substantive decisions of the Council.¹⁶⁴ France, Britain, and the United States all enjoy substantially republican governments and permanent seats on the Council, which give the Council's decisions considerable legitimate influence. But current distributions of power require that Council majorities must rely on non-republican support. All members of the United Nations have agreed to "accept and carry out" the decisions of the

to make Treaties, provided two thirds of the Senators present concur", U.S. CONST. art. II, § 2.

157. U.S. CONST., art. VI: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."

158. U.N. CHARTER art. 7.

159. *Id.* art. 9.

160. *Id.* art. 18, para. 1.

161. *Id.* art. 10.

162. *Id.* art. 18, para. 2.

163. *Id.* art. 23.

164. *Id.* art. 27, para. 3.

Security Council.¹⁶⁵ Republican members of the United Nations have made this commitment after democratic deliberation. Even so, republics that do not enjoy permanent membership on the Security Council may find their interests overruled to placate big powers. And even permanent members will sometimes face old Council resolutions which cannot be reversed or altered due to recalcitrance by non-republican states. Explicit commitments and the Council's structure give its decisions much more authority than recommendations of the General Assembly. But even Security Council decisions remain subject to republican confirmation, in the light of the composition and circumstances of Security Council majorities.

The Economic and Social Council of the United Nations consists of members elected by the General Assembly.¹⁶⁶ This makes the Council subject to the General Assembly's non-republican infirmities and very unlikely to be a representative body. In any case, the Charter subordinates the Council to the General Assembly,¹⁶⁷ and its draft conventions enter into force only after ratification by independent states.¹⁶⁸ Commissions established by the Economic and Social Council suffer from the same restrictions.¹⁶⁹ Thus, the Council may become a useful locus of discussion and has been valuable in proposing conventions, including the Convention on Civil and Political Rights. But like the United Nations General Assembly, the Economic and Social Council derives whatever authority it has from the republican nature of its membership. Without such authority, its proposals must stand or fall entirely upon their own merits. The same is true of the now substantially defunct Trusteeship Council, with the added complication that half the Council's members administer trust territories, creating obvious conflicts of interest.¹⁷⁰

The International Court of Justice is the principal judicial organ of the United Nations¹⁷¹ and each member state undertakes to comply with the Court's decisions to which it is a party.¹⁷² The Court may also issue advisory opinions, requested by other organs or specialized agencies of the United Nations.¹⁷³ Under its own statute, the Court's jurisdiction extends to cases that the parties refer to it, or to areas in which the parties

165. *Id.* art. 25.

166. *Id.* art. 61, para.

167. *Id.* art. 62, para. 1.

168. *Id.* art. 62, para. 3.

169. *Id.* art. 68.

170. *Id.* art. 86.

171. *Id.* art. 92.

172. *Id.* art. 94, para. 1.

173. *Id.* art. 96, para. 1.

recognize the court's compulsory jurisdiction by treaty or special declaration.¹⁷⁴ Republican judges in republican nations have traditionally enjoyed enormous authority concerning both their own jurisdiction and the content of the law. The rule of law is a fundamental principle of republican government,¹⁷⁵ and has long been seen to require both judicial independence and security in office.¹⁷⁶ Judges on the International Court of Justice, however, only serve for nine-year terms.¹⁷⁷ They are elected by the members of the Security Council and General Assembly,¹⁷⁸ by majority vote of each body, without a permanent member veto.¹⁷⁹ The subordination of the International Court of Justice to the General Assembly and the home nations of the Court's various non-republican judges vitiates its independent force as an authority on international law. Whatever authority the Court retains it derives by direct delegation from republican nations. Republics need not defer when they disagree with the Court, particularly on issues of jurisdiction.

Finally, the United Nations Secretariat is appointed by the Secretary-General under regulations established by the General Assembly.¹⁸⁰ The Secretary-General is appointed in turn by the General Assembly upon the recommendation of the Security Council.¹⁸¹ Both bodies are tainted by non-republican participation. This undermines the Secretariat's moral authority. Republics properly support the United Nations Secretariat only to the extent that it maintains high standards of efficiency, competence, integrity, and its own independence from external authority.¹⁸² The separate republican governments must themselves independently decide whether this is the case.

None of the United Nations organs or instruments rest fully on the legitimate republican basis of popular sovereignty. All organs submit in part to non-republican control to the detriment of their moral authority. The republican principles that support international law contradict certain aspects of the United Nations regime and leave room for the separate

174. *Id.* art. 36.

175. SELLERS, AMERICAN REPUBLICANISM, *supra* note 12, at 234-35 et *passim*; ADAMS, *supra* note 22, at I.viii, xxii, I.125-28, III.159-60.

176. SELLERS, AMERICAN REPUBLICANISM, *supra* note 12, at 234-35 et *passim*.

177. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 13, [hereinafter "STATUTE OF THE ICJ"].

178. *Id.* art. 4, para. 1.

179. *Id.* art. 10.

180. *Id.* art. 101.

181. *Id.* art. 97.

182. *Id.* arts. 100-01.

deliberation of republican nations or, better still, for final determination by a democratic federation of republican states.

XI. CONCLUSION

A short review of the history and moral basis of international law reveals its dependence from the beginning upon republican principles in developing and defending legal doctrines and shared structures of legal and political power. The task of international law, as of all law, is to serve the common good of humanity, or at least the good of the relevant political community. This implies popular sovereignty, the best known test of moral truth and justice. National sovereignty may obscure this, but only if one overlooks its own roots in the liberty and equality of nations. National self-determination involves personal self-determination. Arguments for national liberty support the personal liberties of the state's subjects.

Immanuel Kant proposed a federation of republican states as the best basis for a just law of nations, leading to perpetual peace. The dictates of cultural history, human nature, and geographical variety require a diversity of nations. International law rests on this obvious truth and has developed legal categories that reflect social reality. "Nations" are cultural units with a shared sense of justice and the common good. "States" are political units, controlling a determinate territory. "Peoples" are the inhabitants of the different states. Every state should be a nation, and self-determining peoples help to make this so. Basic human rights are the fundamental freedoms without which no people can exercise its self-determination.

International law depends on the self-determination of peoples. Denying citizens a voice in the state destroys the republic and divides the nation. Systematically repressed minorities deserve self-determination and the opportunity to create a new people and a separate nation in pursuit of the common good. Otherwise, international boundaries should be stable, to provide the political basis for international law and national deliberation.

The republican principles of popular sovereignty and pursuit of the common good created the underlying structure of international law. All international institutions, including the United Nations and the several sovereign states, deserve deference only to the extent that they respect the public interest. Without democracy there can be no security. Republics are the only safe and stable basis for a just law of nations. Without justice, there will be no peace.