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Debate Topic: *Is International Law a Threat to Democracy?*

Participants/Speakers/Guests:

Jeb Rubinfeld, the Robert R. Slaughter professor of law at Yale Law School, on the campus of Yale University

Anne-Marie Slaughter, Dean of the Woodrow Wilson School of Public and International Affairs at Princeton University **Presider:** Fareed Zakaria, Editor of Newsweek International

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FAREED ZAKARIA: We'd like to start things here. Well, this is quite a turnout for what seemed like a dry topic, but I guess not. Any time you put the words international law and democracy – and I see it's too hot to handle. I thought I'd just begin this discussion by just framing the issue as I see it, and then see how the two speakers would like to get at it.

I should tell you that the debate we are having today is a live enactment of an in-print debate that has taken place in *Prospect* magazine of England, a very fine magazine. We have the editor, David Goodhart, here. And if you want to get fuller versions of these arguments, I think you can go to *Prospect* dot-org¹, is that right? David is about to wave his magazine. It's not quite the "Phil Donahue Show," but we are trying to sell some magazines here – a very fine magazine like *Foreign Affairs*, my old magazine.

When you look at what is going on around the world these days, it does seem as though there is some kind of a need for some global rules of the road. Things that happen in one country do seem to spill over in ways that are unpredictable in others. You know, you have over the last 10 years had everything from ethnic cleansing in the Balkans, which seemed to be something which Western powers wished to wish away and persisted, and grew greater and greater as a problem and had to be dealt with. You had a banking crisis in Russia², that almost produced a global financial panic with a long-term capital debacle. You had health crises in China, relating to poor hygiene because of urbanization, and so you have the SARS³ epidemic spread throughout Asia. You have repeatedly economic problems that are in some sense very much local and national in origin, that have much wider implications.

I heard the United States Trade Representative, Robert Zoellick, two nights ago give a talk, in which he said if China does not far more vigilantly enforce intellectual property rights, it will destroy the business model of a very large segment of Western industry. So here's China not adhering to certain domestic rules having an enormous spillover internationally.

And so as I say you'd think there's some kind of need for rules-of-the-road global agreements – God forbid, international law – to govern all this. But whenever you say that – international law – it gets people quite upset. And in order to explore that topic, we are going to have this debate between Anne-Marie Slaughter and Jed Rubinfeld. I'm going to introduce the speakers very briefly, because neither of them need much introduction. Anne-Marie Slaughter is the dean of the Woodrow Wilson School at Princeton. Jed Rubinfeld is a professor of law at the Yale Law School. Both of them are published, talented, famous international law experts. They also know each other well. I suppose I should point out Anne-Marie and Jed went to college together. Anne-Marie and I were at graduate school together. And Jed is the Slaughter professor of law at Yale Law School. Now since only one of us is Jewish, Jed, this does not count as a neoconservative conspiracy. [Laughter.] But, nevertheless, it might provide for a slightly civil debate.

So the way we're going to do this, is, who wants to go first? Jed, I think you should go first because you are in

¹See www.prospect-magazine.co.uk for more information

²The Russian financial crisis impacted banks in 1998

³Severe Acute Respiratory Syndrome, a health outbreak which speak in eastern Asia in 2002-2003.

effect outlining the thesis, antithesis [refers to Anne-Marie Slaughter], and then of course I will provide the synthesis.

JED RUBENFELD: Thank you, Fareed. Can you hear me OK? Anne-Marie assures me that the Slaughter professor that I am named after has no connection to her family, and I don't know why I've been getting threatening phone calls at night saying that my professorship is going to be pulled if I don't stop disagreeing with her.

But last year in Venice I was present at the following conversation between a European and an American. The European said, "Let me just understand something. You think that if the entire rest of the world decides that the death penalty violates international human rights, and if the appropriate international court so rules, that you can just ignore this law, that it doesn't apply to you?" And the American said, "Well, yeah, that's what we think." And then the American said: "Well, let me understand something. You think that if the rest of the world decides against the death penalty and an international court rules against it, that that can apply to us, that that can bind us, even though our courts haven't ruled against it and our legislature decided against it?" And the European said, "Well, yes, that's what we think."

And all I'm trying to do is to explain how such a conversation, how such an exchange, is possible, and what it means, and its meaning is this: that Europeans are increasingly drawn to, and have been since 1945, what I'll call **international constitutionalism**, whereas Americans are still more drawn to what I'll call **democratic constitutionalism**. International constitutionalism is the view that essentially is animated by the idea that there are universal rights, universal principles that ought in principle to be above politics, above nations, that ought to be binding on all states and uniform throughout the world. Democratic constitutionalism holds that constitutional law, fundamental law, is still political and should be democratically self-given, and people should give themselves their own fundamental law, even their own constitutional law, and that peoples can differ even on matters of fundamental rights.

Let me try to make this a little bit more concrete. At the Council of Europe, where I'm a United States observer, one of the first tasks I had [was to sit] on a committee a couple of years ago that was charged with drawing up a constitution for Kosovo. There were 12 members on this committee. We sat in Paris, in Venice, palatial settings. I noticed one thing: that there were no Kosovar members of this committee. I asked whether this was deliberate. The answer was yes, it was. Having Kosovars on a committee to draw up a constitution for Kosovo was quite unnecessary, I was told. And, besides, inviting Kosovars would have mired the committee in political infighting. Well, wasn't it important for the Kosovar constitution to respond to, to be responsive to local Kosovar society? Oh, yes, local conditions were important, I was told, but I shouldn't worry – the committee had taken a three-day fact-finding mission to [Kosovo's capital city] Pristina, and so there was nothing to worry about. This is international constitutionalism, and it's a problem that runs through international law.

Now, I want to be serious about this. Americans have been running around the world writing up constitutions for other countries for a long time. This is not an [assertion that] Americans are pure democrats and Europeans are closet monarchists. I'm not making any kind of argument like that. What I'm saying is that international law – well, everybody knows about the democratic deficit and little problems of accountability. What I'm saying is, it's not by accident. In its design, in its institutional institution and in the ideology that surrounds it, international law is anti-democratic. And the United States as a matter of our history, as a matter of our interests, as a matter of the best understanding of our own constitutionalism, and as a matter of our commitment to self-government, has strong reasons to be skeptical about joining onto international law and international governance regimes.

Because we only have three minutes to start, I'm going to stop there. But I'll just mention three caveats, and then I'll stop. One, the argument I'm making for United States unilateralism is not an argument for militarism or imperialism. I won't be tarred with that brush. Two, I'm not saying that international law should be torn down, that there are no uses for it. There are plenty of good uses for international law, plenty of value for it, and I hope I can talk more about that later.

And, third, this is not some right-wing crusade against human rights law. The argument I'm making obviously applies just as much, and takes very sympathetically the claim that international economic, multilateral economic organizations, like the IMF⁴, present a very serious challenge to and threat to democracy in developing countries all over the world, as people from those countries will tell you all the time when their socioeconomic policies are dictated to them by the IMF in return for loans. So the point is simply this is neither left nor right.

⁴International Monetary Fund

You might think that economic stability and property rights are the priority higher than democracy. You might think that human rights are the priority higher than democracy. At this particular time in particular countries, fine. Just acknowledge that the price is paid in the coin of democracy every time you push that view, and this price is paid just as much, whether it's a question of world economic order or world human rights order.

ZAKARIA: Thank you, Jed. Anne-Marie?

ANNE-MARIE SLAUGHTER: Thank you. These are absolutely wonderful arguments. The problem is they have no connection to the facts. They are not connected to the facts in Europe, and they are certainly not connected to the facts in international law.

I will not begin to deny that this conversation took place in Venice, and I don't deny that the Kosovar commission may not have had Kosovars on it. Whatever Jed's interlocutor told him in Venice about what we, the Europeans, think, it's certainly not what European governments think, it's not what citizens in Europe think, and it bears absolutely no relation to what European international lawyers think about international law. Similarly, with Kosovo, I strongly suspect that the reason no Kosovars were on the commission is because Kosovars want a separate country, and we do not want them to have a separate country, and that was a starting point that could not have gotten over. Otherwise I'm certain there would have been.

But the larger point is that the idea that there is a higher law and that it can overturn legislative enactments, which Jed talks about as the linchpin of international constitutionalism, actually sounds remarkably like the United States Constitution. He says this is really the European vision of constitutionalism, that judges, unelected judges, can overturn legislative enactments. And at this point any Britons in the room must be really wondering, because didn't we invent judicial review, and do they not have judicial review? They have parliamentary systems where judges cannot overturn legislative enactments. Indeed, the only European country that does have judicial review is Germany. And, guess what? They got it from us.

Jed says, "No, no, no, in our case it's from our constitution and our judges are just applying our constitution, and that's why it's all right to overturn legislative enactments. The European Union has actually applied a treaty to overcome national law in Europe. Well, yes, but the treaty was democratically ratified repeatedly by every single member of the European Union. They are still strongly disputing the shape of their constitution, precisely because they insist on safeguarding national power at the local level. Their vision of a union is far more democratic than our federal arrangements, and indeed if you think about it even for a minute, you will say that even we recognize treaties as a supreme law of the land, and their recognition of the European treaty is the same.

But the reason all this is important is because of the leap that Jed makes to say this runs through all of international law and international law is anti-democratic. No, it's not coming from the right. That's why I'm so worried. It's coming from the left. If John Bolton⁵ were saying this, I'd say yes, and I've heard it before, and I've debated him at this very podium. But Jed, as a liberal⁶ constitutional lawyer from Yale, is saying we Americans should be skeptical of international agreements because the rest of the world is trying to impose its opinion on us. Those are fighting words, those are dangerous words, those are irresponsible words at a time when the United States needs to comply with international law to advance its interests.

ZAKARIA: Thank you, Anne-Marie. Jed, what do you have to say? [Laughter.]

RUBENFELD: I knew I was invited here for the ritual slaughter, but – [laughter] –

SLAUGHTER: You get one of those.

RUBENFELD: But, well, I mean it's nice to say it has nothing to do with the facts, but it would be helpful to make an argument that went along with the assertion. Let me give you some facts.

Let's talk about what really happened in 1945, when the international law world as we know it got started. The international law world, as we know it, had a different meaning in Europe than what it meant to Americans at the time. And this is because the Second World War had a different meaning in Europe. In Europe, the Second World War stood for two fundamental things: one, the horrors of nationalism; and, two, the potential horrors of democracy. [Adolf] Hitler was elected. [Benito] Mussolini was very popular. These are facts. We tend to forget

⁵Then the United States Undersecretary of State for Arms Control and International Security Affairs. We would later be the United States Ambassador to the United Nations

⁶Please note that her usage of the word Liberal in this context is not in terms of Jed's political persuasion/leanings, but rather to denote his international perspective as belonging to the Liberal school of thought, as opposed to Realist, NeoRealist, Idealist, and so on. Liberal should not be confused with the polarized Democrat-Republican distinctions in this usage.

them. The European states embraced the new internationalism deliberately and expressly, and you can find this in the history of the time—one, to check nationalism and, two, to check democracy, because as the French delegates in 1949 said at a Council of Europe convention on the International Covenant of Human Rights, “European popular will is tainted by fascists. All right, now Americans experienced the Second World War very differently. For us it was a victory for nationalism, a victory for democracy, for our nationalism, our democracy—all right? But that’s not how the Europeans saw it.

So in its design and objectives it had an anti-democratic purpose. And today if you want to say, “Well, that’s history—it’s not history. The European Union—everybody knows about the democratic deficit. It’s not—the idea that this has nothing to do with the facts—the facts are that the European Union has vested tremendous economic authority in a highly non-democratic way. It has made transformations in the basic structure of political power of a constitutional level that would not be accepted in America without much more democratic legitimacy.

Now, this idea that U.S. constitutionalism is just as anti-democratic as the international constitutionalism that I’m talking about is just—is a misunderstanding of the fundamental point here. There have always been two ways to understand the superior authority of constitutional law. One is the idea that there are universal laws above politics and above democracy. That’s what gives it its authority. That’s the international human rights idea, that’s the international constitutionalism idea.

There’s a different idea, which is that constitutions should be self-given. This was the world historical innovation of American constitutionalism. The U.S. Constitution was democratically made. No constitution had ever been democratically made before. And that’s a fact. OK? And so there is a history in the U.S. of supporting democratic constitutionalism. But after 1945, when Europe begins to accept judicial review—and of course, Anne-Marie, it’s not just Germany—France has judicial review. Many European states have judicial review. It looks like it’s accepting U.S. constitutionalism, but it’s not. It’s accepting a different idea—international constitutionalism. And the basic difference is simply this: that in the international constitutionalist world view, the fundamental rules of the road, the fundamental laws, the fundamental principles, should be articulated, enforced, enacted and interpreted by international actors that are at a remove from democratic politics—deliberately so.

In the United States the idea is still a little different. Our judges are appointed through a democratic process, and they’re subject to our amendment possibilities and politicalization of judicial appointment strikes horror in the European legal mind. But we have it for a reason, and the reason is to keep constitutional law close to, imbedded in, a democratic political process. And when you internationalize it, it no longer is.

ZAKARIA: Anne-Marie, are you an anti-democrat?

SLAUGHTER: Yeah, I am an anti-democrat. I am the same kind of anti-democrat James Madison was. Last I checked, the people who had horrors of democracy, as you put it, were our own Founding Fathers who were very concerned about democracy *per se*, and spent most of their time putting in checks and balances to guarantee liberal democracy, which of course ensures protection of minority rights, exactly because we have principles that cannot be trumped. To that extent, the EU and we both agree that you need liberal democracy. And the notion that the EU is built—is designed to avoid fascism—the EU is designed to avoid war between France and Germany in part. That war had happened plenty of times before you had fascism and Nazism. And it was an economic means to peace. It was not designed as a check on democracy, and to the extent there are checks, it’s—as I said, let’s start with Madison.

But then let’s stick to some facts of the current EU, because I think this is really quite important. The first point is that the entire EU bureaucracy is the size of the government of a good-sized American city. That’s the commission. The real power in Brussels lies with the Council of Ministers, [which is made up of] all their national ministers. And indeed the real struggle in Europe is persistently between those who want a more federal vision and those who insist on keeping the power among the nation-states. You will have noticed, those of you from the financial community, that the European Central Bank does not seem to be able to keep Germany within the guidelines. Well, that’s remarkable for this anti-democratic powerful institution. The European Court of Justice, unlike our own Supreme Court, has 12-year terms—not for life. Why do they have 12-year terms? So that judges who get too activist can be dismissed and then new ones appointed. And that’s exactly what happened when Germany and England decided the European Court of Justice was a little too activist for its taste, unlike our own system where judicial activism is up to the Supreme Court and they are there for life.

Finally, on universal principles, we are the ones that preach universal principles, founded in the Declaration of Independence. We preach them worldwide. We insist that countries all over adopt those principles as part of the liberal democratic heritage. And we may allow them in the room when we draw up their constitutions, but the

constitutions are still recognizing the same bill of rights we have.

Finally, and back to international law, the great irony of this is that the European tradition of international law is completely grounded in state consent. For those of you who are not lawyers, this is what is called the positivist tradition. It says no natural law, no law founded in a higher reason, [but instead] law grounded on the consent of states. It's American international lawyers who insist on universal human rights, led by Jed's dean, Harold Koh at Yale. It is American international lawyers who insist that international law is shot through with politics, and in the end we should simply recognize what is right for the protection of human dignity, and to advance that.

So there are critiques to be made here. But there's no connection to the EU, to European countries themselves, or to international law.

ZAKARIA: All right, now we mix it up a little bit more. Jed, I guess let's stick with this point, because it was the part that surprised me the most in your recounting, which is—as a non-lawyer looking at what seemed to be the two streams of law, you do get the sense that you have it somewhat topsy-turvy. That is to say, American law has always had constitutionalism as its hallmark, which has always been anti-democratic, and [the] whole idea of the Bill of Rights is—this is what majorities can't do. European law by contrast has allowed parliaments and legislatures to do whatever the hell they wanted without recourse to a higher law. That's why you've generally seen [that] when European law has been moved in the other direction, in the constitutional direction, people often criticize it for being Americanized.

I was in Britain when it went through its most recent constitutional reorganization, and every critic of the reorganization, which is essentially along, as far as I can tell, along American lines, because it allows for judicial review. This is a terrible thing because we're doing exactly what the United States has. You're giving unelected judges too much power. And, if you look at it from the other side, the point Anne-Marie was making is striking. Who other than Anglo-American liberals for the last 100 years have been making the case for international law, international free trade, international committees, and conventions? You start with [former British Prime Minister William] Gladstone, you end with [President] George W. Bush, and I think it's very hard to find a German, Japanese, [or] Italian making any of these cases. This is the idea that international law, which is of course inherently undemocratic in the way that constitutional law is, should be a template for world governance is essentially an Anglo-American idea, is it not?

RUBENFELD: Those are great questions, Fareed.

ZAKARIA: You've got two minutes. [Laughter.]

RUBENFELD: How long does he get to ask them? We finally get to—[Laughter.]

ZAKARIA: I'm paying for this microphone. [Laughter.]

RUBENFELD: Well, this is just—I just reject this idea that constitutional law is fundamentally anti-democratic. This just is the anti-democratic conception of fundamental law that both Anne-Marie and now Fareed, I'm sorry to say, are speaking on behalf of. And if you accept that—if you say, “Look, the fundamental law has got to be anti-democratic, it's inherently anti-democratic, therefore, let's find institutions that are appropriate to achieve its ends, which will not be democratic—[then] you'd want to have it be diplomatic, technocratic, and juritocratic. You'd want it to be anything but democratic, and that's the way international law goes, because of this idea that constitutional law is inherently anti-democratic.

That's not the only possible idea of constitutional law. America has in its history, it's not always this way, plenty of Americans have thought differently. A different idea of constitutional law which is applied democratic constitutionalism, that's another point I'm making. Democratic constitutionalism holds that even constitutional law has to be democratically legitimate, and has to be made by the people whom it's going to govern. That's what we did or tried to do in this country. So, that's not the same principle that animates either of the two speakers here. And it's just a fundamental difference.

Now, you say, “Well, haven't Americans been pressing for universal law all the time; isn't it in our Declaration of Independence? It is in our Declaration of Independence. But universal law cannot govern, not all by itself. It has to be made into real law by real people. Real people are going to differ on what the right law is—right fundamental law, how it's going to be applied, how it's going to be interpreted, who is going to adjudicate these disputes, who is going to have the power to interpret, articulate and enforce [that law]. The American idea, as I'm espousing, although there are plenty of Americans who have taken a different view, is that you have to resolve that democratically.

ZAKARIA: OK. Can I just interrupt you for a second?

RUBENFELD: Not quite yet, I have to say one more thing. Now, it's quite true that Americans are going around promulgating universal law, but Americans are also going around insisting on unilateralism, and that's—I am just trying to make sense of what's going on in this conversation, trying to explain the two different world views that are animating it. Rather than saying, one is just completely crazy and wrong, and the other one is the only way. Sorry.

ZAKARIA: All right. First of all, I want to point out, I'm not a speaker. I'm going to be an impartial moderator, as you will see in a second. But, let me ask, explain to me how the American Constitution is written by a bunch of people in a closed room, and then ratified by each state, and that makes it democratic, but European conventions when they are ratified by each country are not democratically made, why is that? The ratification procedure seems to me pretty similar in both cases.

RUBENFELD: I don't think so. I think you're kind of minimizing an event that was really of world historical importance. I can only repeat the point I made before, never in the world—there had been democratic societies before the United States, in 1789, to the extent we were democratic. There had been other societies that recognized the idea of fundamental rights. The English law had lots of the Bill of Rights' rights. [But] no society had ever tried to lay down its own constitution through a democratic process. It had never been done. And the democratic process of debate, deliberation and ratification are genuinely of world historical importance, and we shouldn't forget about that. Now, when it comes to treaties—no, treaty law doesn't have anywhere near the same kind of democratic legitimacy. On the contrary, treaty law is famously made by much more prominent roles given to the executive in making a treaty. And in our country the senate has to confirm [the treaty], but once it's done, once it's confirmed, it's outside of the democratic process. That is, it can't be amended, not by a state, whereas all non-constitutional law can be [amended], and—that is, a statute can be amended by a subsequent majority. Constitutional law cannot be; that's its distinct feature. It is made through a heightened, mobilized, special, democratic process of ratification that doesn't have the existing representative or one branch of them put it into place.

ZAKARIA: And the reality is, whatever the technical legal issues, the reality is there is a raging debate in Europe about the democratic deficit. And by and large there is a significant segment of opinion that would argue the EU is removed, anti-democratic, [and] lacks legitimacy because of this, so there is something there. And presumably you would feel that this is something to be addressed. Or do you feel, tough, that's how it goes?

SLAUGHTER: I think the fact that there is a debate about the democratic deficit is evidence that Europeans are every bit as concerned about the democratic legitimation of the rules that govern them as Americans are. So I don't deny that Europeans are worried about a democratic deficit. That is also why they are insisting that this new constitution that has been drafted, although not yet voted [on], precisely because different countries are still disputing. [It] must be then ratified in different countries and the voters themselves must be reassured that they have some control over the bureaucrats in Brussels. That is the debate. But that's the same debate that we would expect here, precisely because they, like us, believe in liberal constitutionalism, which does mean—I completely agree with Jed—that whatever rules govern must be ratified, or legitimated by the people.

But let's just again compare what governs Europe [to] what governs us. European human rights law is a combination of the European Convention on Human Rights which was ratified by all countries and has been amended—repeatedly actually—and a compendium of national constitutional law. And it's the national constitutional courts of Europe who have insisted that the European Court of Justice take their national traditions into account. That is no different than our own Supreme Court, if it had to elaborate a code of human rights, rather than having it in the Bill of Rights, taking account of the rights in each state's constitution. That is the same understanding that there is the importance of democratic legitimacy and then the importance of fundamental rights. And then you have to strike a balance between them.

Treaties can be amended much more easily than constitutions. The Treaty on European Union has been amended repeatedly, precisely again to be consistent with the views of the popular voters in Europe—and their view of international law is no different. There are individual Europeans who say, “We don't want the death penalty; you guys shouldn't have the death penalty. But in fact, they would be the first to recognize that a majority of world's nations, including every single Islamic nation, wants the death penalty and that until you can get consensus worldwide, you don't have a binding treaty. They may not like it, but they recognize that as a matter of their own values of democratic legitimacy and their view of international law.

ZAKARIA: But isn't Jed right when he says that there is a different tradition in the last 40 or 50 years here between the two countries where the United States is essentially unconcerned about issues of democratic populism in quite the same way that the European Union—the European project has been somewhat suspicious

of popular will? When they want to enlarge, it's clear that you couldn't really get majorities in most countries if you were to subject [the issue of enlargement] to the kind of rigorous political debate Jed is suggesting, so you kind of go through it top down and push these things on people. There does seem to be a tendency to have belief compromises which are then pushed down on the public will, or at least that is certainly the perception people have. Is that wrong?

SLAUGHTER: That's very wrong. Indeed, if you all remember the [EU's 1993] Maastricht Treaty, the Danes voted no [when] they put it to the Danes. Now [French President Jacques] Chirac has said he's going to put the constitution to the French population. They're angry that it will be voted down, but [it's] no different than [when] the U.S. administration worried that the WTO [World Trade Organization] treaty was going to be voted down, as you recall. NAFTA [North American Free Trade Agreement] might be voted down. Similarly, those are treaties negotiated in back rooms often, but at some point they have to come before the legislature, and the WTO treaty went before both houses of Congress. It passed. It must pass. There is always the tension between what you negotiate in the interests of the nation long-term, and what democratically-elected legislators are going to think it's possible to vote for. But there's really no difference in the way that it's evolved, except that if anything, again, the EU is more democratic than the U.S. If you look at this [in terms of when] the U.S. became a federal state and had a federal constitution binding on the states, what you're seeing now in the EU is a group of liberal democracies who want to be a larger entity, but absolutely refuse to have a federal government that dictates to them. They want to maintain their national identity as separate countries while still benefiting from a larger union. If anything, they are insisting that power remain more at the level of the national voters than we did in 1776.

ZAKARIA: But aren't you robbing the EU of its historical achievement, which is that it is true that these countries have given up more sovereignty than any societies ever in human history? So, you can't have it both ways, you can't say this is a world historical achievement to have given up all this sovereignty, but actually it has not really given [it] up at all.

SLAUGHTER: The 13 colonies gave up their sovereignty, too, initially, but I think it is true that it is a world historical achievement to have a group of liberal democracies decide we can [not only] maintain our national identities, but we can also come together and agree on binding rules that will make us all better off. We will have a common market. We will have freedom of movement. The United States has done the same thing in the World Trade Organization. We have surrendered quite a bit of our sovereignty and handed it off to arbitrators who decide whether the EU or the U.S. wins in cases ranging from bananas to steel. But we think we're going to surrender our sovereignty to that degree because it will make us better off, because we will get free trade. What you're seeing in Europe is a situation, in which the countries have had great incentive to do that, but they're doing it carefully, and they're doing it absolutely with concern for democratic legitimacy. Otherwise it will go under.

ZAKARIA: Jed, the last question from me. Just take this issue of trade—trade law, trade policy, treaties, the WTO—that work effectively precisely because they are somewhat sheltered from popular pressure, precisely because farmers are not able to organize, and dying industries are not able to get their unions to organize. In other words, there is some attempt to create some kind of long-term policy. Remember, you're at the Council on Foreign Relations. Are you saying this is all terrible, we should return to a kind of national protectionist series of policies that local industry groups dictate, or do you think the WTO, somehow, is not anti-democratic? It strikes me of all the examples one can think of in the world, including the EU, the WTO is, without question, the most anti-democratic, because you essentially have no recourse.

RUBENFELD: I think that's true. And in a way, in a strange way, there is actually much less disagreement between us than I thought there would be, because of the—if you take the view that the good thing about the WTO, or constitutional law, is that it's anti-democratic and insulated from democratic political movement, that's all I'm saying. That's the view that we could all walk away and agree. I'm saying that these bodies of law are anti-democratic. They're agreeing, but they think they serve good purposes, and perhaps they do.

NAFTA includes a provision that allows businesses to sue the United States in an international tribunal to seek compensation for regulatory laws that cause damage to them that the international tribunal has said violate free trade—it could be an environmental law, it could be a safety law, [or] it could be a consumer protection law. That's a protection that goes way beyond the American Constitution. Most people didn't know this was in NAFTA. [Columbia University economics professor] Joseph Stiglitz just wrote about this in a *New York Times* op-ed page. This changes our law in a fundamental way, and does so in a way that's insulated from democratic modification—not foolproof against it, but insulated. Now, you might think that's a good thing. I personally don't happen to think that one's a good thing at all.

But, I do say one thing for sure. It's anti-democratic, and that's an important cost to be aware of in any discussion about it. And I just honestly don't think, Anne-Marie, that you can have it both ways. I mean, we have a fundamental contradiction here. You say on the one hand, "I think constitutional law is anti-democratic. Yes, I'm an anti-democrat. But you say it should be democratically legitimate."

SLAUGHTER: Can I ask you a question?

RUBENFELD: Well, let me just finish. I don't think you can say both of those things. If it's fundamentally anti-democratic, why—what does it mean to say, "But it must be democratically legitimate? To say it should be democratically legitimate, except that constitutional law should be made by different states so that they can differ—and there's a lot of—there are good reasons for one state not to involve itself in an international governance regime that imposes anti-democratic constitutional law on it. But, if you say, "Well, but it has to be democratically legitimate, you're just trying to have your cake and eat it, too."

ZAKARIA: All right. Don't ask a question. Ask a rhetorical question, because then we'll go to —

SLAUGHTER: Well, I want to—OK, we'll, you're beginning to sound like a Californian: "We're going to be ruled by plebiscite. I'm saying I'm a liberal democrat. The question I want to ask—I assume you think the Bill of Rights is anti-democratic. I mean, it's something that's democratically legitimated, but then it precisely guarantees that the will of the majority will be thwarted when it trespasses on the rights of minorities. So is that democratic or anti-democratic, in your view?"

RUBENFELD: It sounds like you're just equating democracy with present majority will. I don't do that. I mean, I think that would be a pretty thin and unsatisfactory account of democracy. You know, we could have a long political theory discussion of what democracy should be understood to be, but the point is this: In Europe today, it's perfectly common for diplomats and lawyers to stand up and say, "The United States should be expelled from international organizations because of the death penalty, which violates international human rights." America has a freedom of speech that is not observed in other countries. In Germany you could be thrown in jail for making pro-Nazi utterances that you'd be protected for here. We have an anti-establishment clause [that is a] fundamental bedrock of U.S. constitutional law. Half of Europe has established churches by—[inaudible]—but we don't stand up and say, you should be thrown out of international organizations because you violate fundamental rights. From the American view, there's more room for difference on fundamental rights.

ZAKARIA: OK, on that issue, let's get Anne-Marie's comeback. OK.

SLAUGHTER: No, I actually think it would be better to go.

ZAKARIA: OK. All right. Now, Ben Barber. I should point out, just before we begin, you have to introduce yourself, your name, and your affiliation. And I should point out that this meeting is on the record. You know, most council meetings are supposed to be off the record, though, you know, intellectuals and academics spend most of their lives trying to get quoted—[laughter]—so I'm glad that we are making *de jure* what is *de facto*. So feel free to mention as many times as you can in print or in person these comments. [Laughter.] Ben?

QUESTIONER: Benjamin Barber, University of Maryland. The discussion here has been at an almost entirely theoretical and foundational level, and I think it's created a fundamentally false dichotomy between rights and democracy, which in fact, historically have served each other. Generally speaking, rights have been vital to the founding and establishment of democratic nations, which is to say rights rhetoric, as in the *DAA©©claration des droits de l'homme et du Citoyen* [Declaration of the Rights of Man and of the Citizen], the Declaration of Independence, [or] the Declaration of Human Rights, have all preceded French democracy, American democracy, and the democracy of the United Nations [respectively].

By the same token, it's clear that democracy is absolutely essential to grounding the rights which are used theoretically to help establish democratic nations. And here I have to dispute about James Madison, because, in fact, it was Madison who opposed the Bill of Rights, and said that bills of rights are but paper parapets from which no rights can ever be defended in the absence of competent engaged citizens. And that's why [President Thomas] Jefferson and Madison and others thought universal citizen education was indispensable to making rights work—something we can recall as all too true from the fact that Rwanda was a signatory to our Genocide Convention [approved in 1948 and currently ratified by 135 nations] but, obviously, didn't have much in the way of a democratic regime that would allow it to sustain it.

Rights without democracy, it seems to me, are always abstract and unrealizable, but democracy without rights is often tyrannical and dangerous. So we've seen them in real regimes and combinations which suggests to me that your issue is more tactical than foundational or historical or philosophical. The question is, right now is a rights

approach or a democracy approach more likely to realize the sorts of democratic constitutionalism, which I think both of you ultimately agree should be the goal?

It is my view here that Jed is right and that you are wrong in the sense that the democratic deficit in Europe, the absence of any democratic organizations around the world, the prevalence over the last 50 or 75 years of rights rhetoric that has not established democracy despite the historical precedent that would suggest it might have done so to me indicates there is a greater need to emphasize the call for more democracy in order to give rights meaning [rather] than to continue to harp on rights, which everybody talks about but seems nowhere—certainly not in Europe, and less so even there than in the international realm—to have established anything like democratic institutions that would sustain that dialectical relationship, which I think historically is the real paradigm for us.

Thank you.

ZAKARIA: Anne-Marie, do you want to take that—the professor from California?

SLAUGHTER: So I want to agree with you that I think we are debating a theory that does not get at the real issues. That much I think is right. But I disagree as to what the real issues here are. The real issues here are not about whether rights or democracies should come first. I'm insisting that both we and the Europeans believe in liberal democracy, which needs both—rights and democracy, and it is very important to have the combination of both in every country in the world.

The real issues to me are that there is a claim that the Europeans and we are fundamentally different, that we are divergent in our most basic approach to government, and that, indeed, the Europeans are trying to impose international law on us and we should resist and, even more, we are right to be skeptical of the rest of the world and thus right to be unilateralist. To me, these are very dangerous arguments at a time when we, and the Europeans, need to be on the same side against those who don't believe in rights or democracy or decency, for that matter. And it is a time when we need to be together building international institutions that have served all of our interests as they have since 1945.

So the reason I am exercised is not because it's an academic debate about “isms.” The law reviews are full of those, and I have contributed my share to advancing various “isms.” The reason I am exercised is because politically, this is the kind of argument that can do further damage to our relations with Europe and much greater damage to what should be a collective effort to get the United States working together with its closest allies to rebuild and reform international institutions.

ZAKARIA: All right. Sir, at the back there.

QUESTIONER: Jeff Laurenti with the United Nations Foundation. I must be missing something in this debate, because while we've heard allusions to it, clearly the fact that international law—instruments of international law, treaties, conventions—have to be ratified by the national parliaments or congresses, suggests that you have the democratic control, the democratic input before a national subjects itself to the requirements of that instrument of international law. That is, the United States—Americans are not bound in our domestic life by any international instruments or requirements unless we have ratified that treaty or that convention.

And I think the debate in this country is more about whether we adhere to the international law that we have democratically ratified; whether we're going to notify the councils of foreigners who are accused of crimes here before we fry them with the death penalty; whether we adhere to the U.N. charter's restrictions, restraints on use of force; and perhaps whether we bug offices of high-level diplomats. And if the Europeans don't want the United States, because it has promiscuous application of the death penalty, to be a representative of Western countries on the Human Rights Commission, which, I guess, is what Jed must be referring to, [then] they have a right not to vote for it and to vote for another country if it's more in line with their view of human rights. That's a democratic option as well. And even the International Criminal Court doesn't create new crimes, it creates a mechanism for assuring accountability for what we have already ratified as crimes—genocide, the Geneva Convention's war crimes.

So let me pose the question, which is, to what extent do you think—and let me direct this question more to Jed, obviously—to what extent do you believe that we are bound by the international laws that we have ratified democratically? And to what extent do we have the right, through our congressional enactments and such, to attempt to impose requirements on others, requiring that they do X, Y, or Z or various penalties will be imposed in terms of their own domestic law, which our Congress does very promiscuously?

RUBENFELD: What you have said is something like this—that the fact that treaties are made ensures that we

can't be dealing with anything anti-democratic, because treaties have to be made and then ratified through some kind of political process that was hopefully—you know, involved democratic elections. I just don't understand quite this claim. Are we to say that the European concern with the democratic deficit is just wrong?—that they are—I mean, the EU is completely made by treaties, but they just shouldn't be concerned about it all because it was made by treaty, and therefore you have democratic legitimacy, there is no problem? Or are we supposed to say that, no, the concern for democratic legitimacy shows how interested in democracy they are and, granted, the EU is anti-democratic, but it doesn't show any difference between them and us because they talk about the democratic deficit? Which one is it? And I don't think that they're wrong about it. Treaties are no guarantee of democratic legitimacy, and that's for a variety of reasons, some of which I have mentioned already.

On the question of whether we should obey treaties—of course. I believe that, by and large, we should. Of course, I think so. The U.N. charter —

ZAKARIA: By and large? [Laughter.]

RUBENFELD: Yeah, that's right. The bombing of Kosovo violated the U.N. charter, which is a treaty, OK? Now, I supported the bombing of Kosovo. I think Anne-Marie did, too. In fact, Anne-Marie has said that the United States might—should have an authority to do things that violate international law but are nonetheless legitimate. That was the distinction she used in other writings. And you cannot have these things both ways.

Now, if you think that the U.S. should not have stopped that genocide—and this is one of the problems you mentioned earlier—what are we to do with these problems? Was international law offering a solution to genocide in the former Yugoslavia? It wasn't. A U.S.—NATO-sponsored, to be sure—but U.S.-led bombing, which violated international law was, I think, what stopped the slaughter. And, yes, I support that.

SLAUGHTER: Can I respond?

RUBENFELD: Sure.

SLAUGHTER: So just because I don't think international law is not anti-democratic does not mean I think international law is perfect, by any means. And, indeed, I have spent a year arguing that we have a situation of old rules and new threats, and we need to adapt and reform those rules to be able to meet the threats we face today, and Kosovo was a case that even the secretary general of the U.N. recognized was in accord with the public opinion of the world. It violated the rules as we had them. That meant we had to change the rules.

I have argued in many situations that we need to be working with other nations to make sure that our rules are sufficiently congruent with our needs and with majority opinion, just as I would argue with domestic law, to make it in our interest to obey them, because that's why we typically obey the law.

I just have to say, though, that the point about a democracy deficit and treaties—this is no different than domestic law. When a treaty is too far out-of-step with popular opinion as, indeed, the European Union treaties have become at various points or, indeed, NAFTA may be becoming now for exactly the reasons that Jed mentioned, then what you have is popular outcry, and you send signals to your elected representatives, and they either amend the treaty or they bring—they pass laws that are sometimes in violation of the treaty but then cause a process of international legal change. So this is a process that works at the international level just as it works at the domestic level.

ZAKARIA: All right, more questions. Ed—oh, sorry.

QUESTIONER: [Inaudible]—from the United Nations. Fareed, you're famous for having invented the term, ““illiberal democracy.”” [Laughter.] I feel you're being too Olympian in your chairmanship of this debate. [Laughter.]

ZAKARIA: You see, I'm not biased.

QUESTIONER: I'd like to hear more about where that conflict fits in? Does it make you an anti-democratic international lawyer or a democratic anti-liberal or what? [Laughter.]

ZAKARIA: Gosh, I mean, it's a difficult question because I think the hub of this disagreement is that, on the one hand, you are discussing events taking place within a nation and, on the other hand, multilateral agreements among nations. And so, there is, to a certain extent, a feeling of sovereignty, a feeling of national sovereignty going on in Europe that is incomprehensible in the American case, because the sovereignty, very substantial sovereignty that has been ceded, has been ceded by states. Now, it's worth pointing out American states were as sovereign as most nations 100 years ago in many ways. I mean, when the president wanted to send an army abroad, he had to raise it from the state national guards, much the way a medieval king would have gone around

to his earls and barons, and said, you know, ““Could you give me a few troops, and I’ll turn this earl into a duke,”” or is it the other way around?

So I think that that’s, in some ways, at the heart of this. But I think, in principle—you know, I suppose I shouldn’t do this, Jed, but I agree with Anne-Marie that it seems to me that constitutionalism, by its very nature, is anti-democratic. Of course, it is ratified and legitimated by democratic processes, and that is what makes it good constitutionalism. I mean, [former Iraqi President] Saddam [Hussein] had a constitution. The Soviet Union had a constitution. Constitutions aren’t sacrosanct. They have derived their legitimacy from the consent of the governed, but they are fundamentally restraints on democratic authority. And so to suddenly wake up and say, ““My God, international law, which has this constitutional nature, has restraints on the majority,”” doesn’t strike me as quite getting at this.

But I do feel that the Europeans don’t recognize the degree to which their pooling of national sovereignty is historically conditioned and unique, and that it’s going to take a long time before the rest of the world gets there. So I sort of agree with Anne-Marie, but I think I gave—I’d state sufficiently Olympian that I can’t be accused of being too biased.

QUESTIONER: Ian—Ian Buruma. I have a question for Mr. Rubinfeld about European history. You stated that the EU came out of the European—[inaudible]—and distrust of democracy, which struck me a little strange, because we’re really talking about Germany and France here, and they’ve been more democratic since 1945 than they ever were before. So there is a contradiction there. When you say it was against nationalism, yes. Fascism certainly came from distrust of democracy. Couldn’t the difference between the United States and Europe not be something else, which is a different concept of populism—that in Europe populism was indeed tainted by Fascism and still has a sort of right-wing tradition in grabbing power to exclude minorities, whereas, in America, populism is much less tainted and has much more of a connotation of sort of God-fearing, gun-carrying individuals who want to get the state off their backs? [Laughter.]

ZAKARIA: Gun-carrying, God-fearing being good things. [Laughter.]

RUBENFELD: Well, I think we would agree that a movement toward European integration is anti-nationalist, for sure. Your question is, is it also to be viewed as anti-democratic? I assure you that, in the wake of the Second World War, the fear of popular will and government by popular will was incredibly strong, and the precursor institutions of the European Union were, in part, motivated by that concern. I mean, if you want to re-phrase that and say, ““Oh, it’s a matter of being worried about populism,”” that’s fine. I don’t understand that to be a disagreement. I think that’s just using a different word for it. So I think I would just agree with that.

QUESTIONER: [Inaudible.]

RUBENFELD: No, no, that is, if you say that, ““Well, the Europeans were concerned about populism and therefore adopted measures that would insulate their institutions from too much democratic mobilization and popular will,”” then it comes out the same way. Americans have not been as afraid of populism for the reasons you have said—and the English, too, I would say—about this. Because, for one reason or another, and these things go back very deep into historical and societal roots, American democracy miraculously has not been as drawn to the Fascist demagogues that we have seen in Latin America and some in Europe.

Now, so if that means that Europe, the continental European states had a good reason to be anti-democratic, I’m not quarreling with that. You know, I’m not quarreling with the idea that it might be—you know, Anne-Marie says that—and I take this very seriously. It’s irresponsible and it could be damaging, you know, but I’m just trying to call things by their names and, right now, I’m just concerned about whether the argument is true, not, you know, whether the consequences of the ones that certain people want or don’t want—

SLAUGHTER: Can I respond?

ZAKARIA: Let’s get one more question, and then—you know, you’ll both have closing statements. So—sir? If you could take the mike, that would be great.

QUESTIONER: George Sherry, formerly United Nations. I wonder whether our distinguished speakers could explain to us how their arguments relate to the current debate on unilateralism in American foreign policy?

ZAKARIA: I think that’s a good point to sum things up with, because I do agree with Ben Barber’s first comment, which is let’s try to relate this to the current debates taking place, and that’s why I was trying to push you, Jed, on the issue of are you really saying that you believe international economic trade and commercial law should be thrown out in favor of a much more populist democratic way of making it? And to you, Anne-Marie, that the democratic deficit in Europe is really something not to be concerned about and not to take some kind of

measures to bring the European Union closer to the people, which is the argument people would make. It seems to me those are the—and over-arching it all, of course, is the issue Anne-Marie has raised a number of times, which is: should the United States submit itself to things like the International Criminal Court? Are you saying, Jed, and I think—how does this work? No, you get to go first, Anne-Marie. But those are the—it seems to me those are the big issues we should be trying to hit at.

SLAUGHTER: So that was a perfect lead-in to my closing. I will say beforehand only that I actually think words or labels are getting in the way here. I would certainly agree that in the wake of World War II, the Europeans tied themselves to the European Convention on Human Rights as a safeguard against populist majorities overturning a democratic legitimate government, just as we hope today that fledgling governments, be they in Iraq or in Afghanistan or in Sierra Leone, or any places around the world, will be able to tie themselves to international human rights law to strengthen their own fledgling liberal democracy. So there I think we're agreed, that that was something international law did for the Europeans [and] can do for others. We don't need it to do that, and the British have never needed it, also.

But the real issue here, for me, is the question of how this relates to unilateralism, and I'd just like to quote one sentence from Jed's article in this wonderful magazine, *Prospect*, where he says "Unilateralism is consistent with international cooperation or coalition-building." So it's fine to have unilateralism with cooperation or coalition-building. The problem only arises with the shifts in international cooperation to international law. That is a fundamental and dangerous misunderstanding. The long-term success of international cooperation depends on international law. They are not antithetical. It depends on international law for the very simple reason that only by codifying your agreements with other nations in some kind of binding agreement are your commitments credible. I'm a dean. I spend half my time these days trying to recruit scholars from other faculties, and when they come in, I give them this great pitch about all the wonderful things that they can have if they come to Princeton. And they say, "That's really great, but I'd like to see a piece of paper, and I'd like to know that you are going to honor those commitments, because, otherwise, I'm not going to make that arrangement with you. I am not going to leave something that I have simply for promises. I need a credible commitment."

Without international law, without our willingness to engage in international agreements and to honor them, we cannot make the agreements that we need to fight terrorism, to fight disease, to make ourselves secure, prosperous, and to be the nation we want in the way we want to lead the world.

ZAKARIA: Jed?

RUBENFELD: Well, I said in the sentence that the problem only arises with the shift from international cooperation to international law. I didn't say that all international law was therefore to be thrown out. I said the problem arises. I am not making an argument against our international law at all. For failed states and in many other instances, I mean, if countries want to sign onto an anti-democratic international law, that's—there can be lots of reasons to do so. Should a country that is committed to democratic self-government sign onto international governance? Well, look, let's make an analogy to contract. If I enter into a contract with my car dealer to buy a car on an installment plan, no one is going to say I've threatened my self-government in any fundamental way. That's fine. I've achieved something I wanted to achieve through contract.

Now, if I married my car dealer, things get different. That is, I ally my interests with the car dealer in such a way that I say, for either legal or psychological or other reasons, I should take his interests into account at the same time as my own in making decisions—maybe he has control over some of my assets. And then finally, if, in this agreement, I create an international family court that will adjudicate all disputes between me and my car dealer to whom I'm married—[laughter]—then, at that point, self-government has been altered.

Now international law, to the extent that it is limited to narrow contractual relationships of the kind I mentioned, would not run afoul of what I have said. But international law, to the extent that it tries to merge, as the Europeans are trying to do through the European Union, and to the extent that it creates institutions of super-national governance that are not checked by our democratic processes, does alter the basic picture of self-government. It really does.

Now, if you say, "Oh, but it's OK, because we can violate it sometimes when the rules get old and if popular opinion here really calls for it, as in Kosovo, or we can pass a statute to our Congress that violates it if we really want to and, then international law will adapt," well then, fine, there's no argument. But you can't say that. You can't have things both ways. And I am just putting the point that there really is a cost paid in the coin of democracy when countries—not just the United States; any country—signs on to international governance regimes.

ZAKARIA: All right, well, I think that this has been a very healthy and worthwhile debate about a subject that isn't going to go away, because I feel that the next five to 10 years, we are going to see more of these problems spill over borders, whether they are diseases or economic crises or trade issues, and people will want to know what kind of rules of the road we can have, and I think we are agreed on one thing, which is that Jed can go out and buy a car. Thank you very much.

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