

## The End of History? Reflections on Some International Legal Theses

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Democracy used to be a word that international legal commentators preferred to avoid. At least by the second half of the present century, this was not because too few governments identified themselves as democratic. It was rather because too many did so. The world's most repressive regimes joined their more representative counterparts in claiming a title that had become synonymous with praiseworthy and justified politics. In some cases modifying adjectives were used ('one-party democracy', 'people's democracy', etc.); in other cases the appropriation was unmodified. Either way, observers found normative inferences difficult to draw, for democracy appeared to mean everything, and therefore nothing.

What put an end to the commentators' reticence was, of course, the demise of communism and the turn in all regions of the world to multi-party electoral politics. For many, these events confirmed both that democracy was the foundation of political legitimacy, and that repressive regimes, whatever they chose to call themselves, lacked that legitimacy. Influential international legal scholars felt able to declare that a 'right of democratic governance' was now 'emerging',<sup>1</sup> and that international law was, or at any rate should now be, beginning to take in the lessons of 'liberal internationalism'.<sup>2</sup>

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1 The leading exponent of this is Thomas Franck. See, esp., 'United Nations Based Prospects for a New Global Order', 22 *NYUJ. Int'l L. & Pol.* (1990) 601; 'The Emerging Right to Democratic Governance', 86 *AJIL* (1992) 46 (hereinafter Franck 1992); 'Democracy as a Human Right', in L. Henkin and J. Hargrove (eds.), *Human Rights: An Agenda for the Next Century* (1994) 73 (hereinafter Franck 1994); and *Fairness in International Law and Institutions* (1995) (hereinafter Franck 1995), Ch. 4 (largely reproducing Franck 1992).

2 See esp. Slaughter (Burley), 'Revolution of the Spirit', 3 *Harv. Hum. Rts J.* (1990) 1 (hereinafter Slaughter 1990); 'Towards an Age of Liberal Nations', 33 *Harv. Int'l L.J.* (1992) 393 (hereinafter Slaughter 1992a); 'Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine', 92 *Columbia L.R.* (1992) 1907 (hereinafter Slaughter 1992b); 'Law and the Liberal Paradigm in International Relations Theory', *Proc. ASIL* (1993) 180 (hereinafter Slaughter 1993); and 'International Law in a World of Liberal States', 6 *EJIL* (1995) 503 (hereinafter Slaughter 1995). For a related theme, see Tesón, 'The Kantian Theory of International Law', 92 *Columbia L.R.* (1992) 53 (hereinafter Tesón 1992).

This article examines these claims.<sup>3</sup> The concern here is not to affirm or deny that state practice and *opinio juris* square with an emerging right of democratic governance. The evidence relevant to deciding that doctrinal question will not be presented, and no conclusion will be offered with respect to it. Nor does this article seek to maintain that democracy is a Western artefact, with limited relevance outside the West. On the contrary, the premise of what follows is that, *provided* it is understood to refer to a general concept or ideal of self-rule on a footing of equality among citizens,<sup>4</sup> rather than to particular conceptions of democratic politics and their institutional manifestations, democracy is an idea of potentially universal pertinence. Its historical roots may be localized. But the worldwide struggles being waged in democracy's name leave little room for doubt that democracy has today become globalized.

The previous paragraph's proviso is, however, a very large one, and points to the central question addressed in this article. What is the understanding of democracy that informs the claims concerning the right of democratic governance and liberal internationalism? The argument advanced here is that the international legal scholars who put forward these claims precisely *do not* identify democracy with a concept or ideal of self-rule on a footing of equality among citizens. Rather, they, along with many of their critics, for the most part elide democracy with certain liberal institutions. This serves, in ways to be highlighted, to attenuate the emancipatory and critical force that democracy might have. In doing so, it limits the contribution that international law (should it develop along the lines the scholars suggest) might make with respect to anti-authoritarian politics, whether in countries yet to embrace democracy, in countries newly embracing democracy, in countries of long-standing democratic commitment, or indeed in the innumerable other non-national settings of contemporary political life.

The elision of democracy with certain liberal institutions can be linked to a more general perspective evinced in the claims concerning the norm of democratic governance and liberal internationalism. This perspective will be referred to as 'liberal millenarianism' (an expression which hopefully makes up in salience for what it

3 For elaboration of these claims, see also Fox, 'The Right to Political Participation in International Law', 17 *Yale Int'l L.J.* (1992) 539; Fox and Nolte, 'Intolerant Democracies', 36 *Harv. Int'l L.J.* (1995) 1; and Cerna, 'Universal Democracy: An International Legal Right or a Pipe Dream of the West?', 27 *N.Y.U. J. Int'l L. & Pol.* (1995) 289. For arguments refuting the claims, see Carothers, 'Empirical Perspectives on the Emerging Norm of Democratic Governance', *Proc. ASIL* (1992) 261; Koskenniemi, "'Intolerant Democracies': A Reaction", 37 *Harv. Int'l L. J.* (1996) 231; and Roth, 'Democratic Intolerance: Observations on Fox and Nolte', 37 *Harv. Int'l L.J.* (1996) 235. For discussion of the claims, see Panel 'National Sovereignty Revisited: Perspectives on the Emerging Norm of Democracy in International Law', *Proc. ASIL* (1992) 249-71.

4 Amongst the vast literature on the subject of democracy, D. Held, *Models of Democracy* (2nd ed., 1996) and J. Dunn (ed.), *Democracy: The Unfinished Journey 508 BC to AD 1993* (1992) provide exceptionally valuable overviews of the roots and vicissitudes of this ideal. In evoking the ideal, this article seeks not to define democracy (the contestability of which resists definition), but rather to associate itself with a venerable and powerful strand of democratic thought. For an exemplary distillation of that strand, see Beetham, 'Key Principles and Indices for a Democratic Audit', in D. Beetham (ed.), *Defining and Measuring Democracy* (1994) 25.

lacks in euphony). Liberal millenarianism is the analytical framework adopted in this article, and the first section sketches the key features that are here associated with it. The second section then reviews the international legal scholarship in which the claims under discussion are elaborated. The final section considers to what extent, and with what consequences, that scholarship exhibits a liberal millenarian perspective. This article's conclusion is that, if international law is to lend its support to ongoing efforts to extend and deepen democracy's purchase, the emerging norm of democratic governance and liberal internationalism offer, at best, a partial agenda.

## I. Liberal Millenarianism

Liberal millenarianism finds its most extreme, and certainly its best known, expression in the work of Francis Fukuyama in the late 1980s and early 1990s.<sup>5</sup> Fukuyama undoubtedly set out to provoke, and this he very effectively did. His work of this period attracted many critics and few unqualified supporters.<sup>6</sup> One is tempted to dismiss him as isolated, a passing gadfly not to be taken too seriously. To do that would, however, be to ignore his many qualified supporters. It would be to overlook that his premises and argument found resonance – and continue to find resonance – in the work of a broad spectrum of commentators, including many whose outlooks are considerably more moderate than his. Liberal millenarianism refers to this whole spectrum. That said, precisely because he articulates in bold, telegraphic fashion, and even at times rhetorically overstates, that which others more delicately bury or hedge, Fukuyama's work offers an excellent vantage point for surveying the shared terrain.

### A. Fukuyama and the End of History

Fukuyama's central thesis is that the end of the Cold War confirms a worldwide consensus in favour of liberalism, including not just capitalism but liberal democracy as well. As he sees it, liberalism has conquered all rival ideologies, most recently communism, and liberal democracy is now the sole legitimate system of gov-

5 Fukuyama's thesis, discussed below, was first advanced in an article published in 1989, and then elaborated in a further article and in a book published three years later. See Fukuyama, 'The End of History', *The National Interest* (Summer 1989) 16 (hereinafter Fukuyama 1989); 'A Reply to My Critics', *The National Interest* (Winter, 1989/90) 18; and *The End of History and the Last Man* (1992) (hereinafter Fukuyama 1992).

6 For a sampling of critiques, see Huntington, 'No Exit: The Errors of Endism', *The National Interest* (Fall, 1989) 3; Holmes, 'The Scowl of Minerva', *New Republic* (March 23, 1992) 27; Macey and Miller, 'The End of History and the New World Order: The Triumph of Capitalism and the Competition between Liberalism and Democracy', 25 *Cornell Int'l L.J.* (1992) 277; and Held, 'Liberalism, Marxism and Democracy', 22 *Theory and Society* (1993) 249 and 'Anything But A Dog's Life? Further Comments on Fukuyama, Callinicos and Giddens', 22 *Theory and Society* (1993) 293.

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ernment. This marks the 'triumph of the West'.<sup>7</sup> More than that, it heralds – he proposes – the 'end of history'.

What we may be witnessing is not just the end of the Cold War, or the passing of a particular period of postwar history, but the end of history as such; that is, the end point of mankind's ideological evolution and the universalisation of Western liberal democracy as the final form of human government.<sup>8</sup>

This claim obviously relies on a distinctive notion of 'history'. If most scholars today conceive history as without grand design, Fukuyama considers this an understandable response to the abominations of the first half of the twentieth century. But he holds that this conception now requires rethinking. In the events of the century's closing decades he finds warrant for returning to the teleological notion of history that can be found in the work of Hegel and Marx, their secular reworkings of the pre-modern deterministic understanding. According to this perspective, history is purposive, directional, progressive, and oriented towards a particular goal. Fukuyama endorses the view, which he identifies especially with Hegel,<sup>9</sup> that the goal towards which history is oriented is rationality and freedom, and that human societies progress towards it dialectically, through the clash of ideologies. The culmination – or 'end' – of history is eventually reached when perfect freedom and rationality are attained, and the clash of ideologies is resolved. This is what Fukuyama argues may now have occurred. Ideological competition appears to be over. Whereas Marx thought democracy in the shape of communism was our final destiny, it turns out – so Fukuyama holds – to be liberal democracy that has emerged from the fray, to await us at the end of history. It turns out to be liberal democracy that overcomes all the defects, irrationalities and contradictions of earlier forms of government, and promises to bring the historical dialectic to a close.

Fukuyama recognizes, of course, that not all countries of the world have embraced liberal democracy, and that those which have done so face continuing challenges. His point, he insists, is that history may have ended in the sense that the *ideology* of liberal democracy represents the final stage of political evolution. By this he means that the idea of liberal democracy cannot be improved upon. Ideology and ideas are one thing; practice is quite another, and in this case lags far behind. Thus, the end of history does not entail that there may, or will, be no further events and no further conflict. Nationalism and religion, in particular, appear to Fukuyama likely to remain sources of violence. Many societies have not yet begun, or have scarcely begun, to realize liberal democracy, and will face turbulent times before they do. In particular, he remarks, 'the vast bulk of the Third World remains very much mired in history'.<sup>10</sup> Even 'post-historical', Western societies have incom-

7 Fukuyama 1989, at 3.

8 Fukuyama 1989, at 4.

9 A consideration of whether this is accurate is beyond the scope of this article. Fukuyama acknowledges, in any event, that his understanding of Hegel is strongly influenced by the interpretation of French philosopher Alexandre Kojève (himself introduced in English translation by Allan Bloom).

10 Fukuyama 1989, at 15.

pletely implemented liberal democratic principles. For this reason they are likely to experience continuing internal strife. In their relations with one another, however, war has – so Fukuyama holds – become ‘unthinkable’.<sup>11</sup> In this connection, he argues that the post-historical West should actively defend its gains through a ‘league of democratic nations’, ‘capable of forceful action to protect its collective security from threats arising from the non-democratic part of the world’, and ‘inclined also to expand the sphere of democracy, where possible and prudent’.<sup>12</sup>

Why is it that liberal democracy has achieved such a victory, at least at the level of ideas or consciousness? On what basis does Fukuyama claim that liberal democracy embodies perfect rationality and freedom? He takes the view that the main engine of progress in the modern world is what he terms the ‘logic of modern natural science’.<sup>13</sup> By this he means instrumental rationality, especially calculations of economic cost and benefit. According to Fukuyama the logic of modern natural science accounts for the triumph of capitalism and the establishment of a ‘universal consumer culture’. It also accounts for the decline of traditional forms of social organization and the profound worldwide impact of technological innovation. But of itself this logic cannot account for liberal democracy’s privileged place in history. While liberal democratic countries generally fare best economically, and while economic modernization may help create the material conditions for liberal democracy, such as urbanization and education, economic efficiency may in some contexts militate in favour of authoritarian-bureaucratic government, rather than liberal democracy. Economics alone cannot explain liberal democracy’s consummate status. In his words, the logic of modern natural science ‘gets us to the gates of the Promised Land of liberal democracy, but does not quite deliver us to the other side’.<sup>14</sup>

Fukuyama believes that liberal democracy may represent the ultimate form of government because it satisfies certain fundamental human psychological needs. These he refers to (drawing again on Hegel) as the desire for ‘recognition’, a desire he takes to be manifested in such feelings as self-respect, self-esteem, dignity, ambition, pride and concern for prestige. For Fukuyama ‘the problem of human history can be seen ... as the search for a way to satisfy the desire of both masters and slaves for recognition on a mutual and equal basis; history ends with the victory of a societal order that accomplishes that goal’.<sup>15</sup> As he sees it, liberal democracy is that order; it offers a framework for mutual and equal recognition of all citizens.

11 Fukuyama 1992, at 283.

12 Fukuyama links this idea with Kant and the tradition of liberal internationalism, as to which see *infra*, sections II and III. He considers that the league of democratic nations he recommends – a ‘Kantian liberal international order’ (Fukuyama 1992, at 283) – already exists to an degree under the umbrella of organizations such as NATO, EC, OECD, Group of Seven and GATT. He contrasts such a league with other organizations and alliances, such as the UN, which are not limited to liberal democratic nations. See Fukuyama 1992, at 276–284 (quotations are at 283 and 280 respectively).

13 This is explained further in Fukuyama 1992, ch. 6.

14 Fukuyama 1992, at 134.

15 Fukuyama 1992, at 152.

And yet, if liberal democracy awaits us at history's end, there is another sense in which, according to Fukuyama, the human desire for recognition will be left profoundly unfulfilled, even debilitated. There is an aspect of that desire that can only find fulfilment in the context of ideological competition. Whereas those – he refers to them as the 'first men' – who began the struggle for liberal democracy had to exhibit courage, take risks, and aim high, the 'last men' at the end of history will have no further need of heroism.<sup>16</sup> Indeed, they will be encouraged not to stand out. Fukuyama worries about the mediocrity, ignobility and materialism of liberal democracy's 'last men'. Following in the tradition of Tocqueville and others,<sup>17</sup> his enthusiasm for democracy is tinged with regret for the decline of aristocracy, and a belief that too much equality, rather than too little, may pose liberal democracy's greatest challenge.

### B. Liberal Millenarianism

This thesis was widely interpreted – and Fukuyama himself confirms that it was intended – as an attempt to provide an antidote to the prevailing 'declinist' mood of American political analysis in the 1980s.<sup>18</sup> Those 'pessimists' who were continuing to assert that the power and influence of the United States were in decline had failed to notice the 'good news'<sup>19</sup> that a 'liberal revolution' was underway worldwide. Those 'intellectuals who believe they grasp the world in all its complexity and tragedy'<sup>20</sup> had failed to see that history has a pattern, and that, posturing aside, '[t]oday ... we have trouble imagining a world that is radically better than our own'.<sup>21</sup>

Patently, Fukuyama's antidote was strong stuff. Though not without ambivalences, his work makes few concessions to those who do not share his outlook, and is almost ostentatious in its disdain for those he takes to be left-liberal or, perhaps, un-American. And yet, his themes are not confined to what has been called the New Right. Rather, they appear, as noted at the outset, to exemplify a more widely held perspective. It is this perspective to which liberal millenarianism refers. Its key features may be summarized as follows.

In the first place there is the notion that history has a *telos*. This involves a view of historical change as directional, linear and evolutionary, with identifiable developmental stages and an end-point that can be known, and potentially reached. Secondly, there is the supposition that history's *telos* is liberalism, or at any rate liberal

16 Concerning the 'last man', see F. Nietzsche (R. Hollingdale, trans.), *Thus Spoke Zarathustra* (1969) 45–47.

17 See A. de Tocqueville (G. Lawrence trans.; J. Mayer, ed.), 2 *Democracy in America* (1994) 690–95. Fukuyama's contemporary influences are conservative-elitist thinkers, Leo Strauss and Allan Bloom.

18 See, e.g., R. Keohane, *After Hegemony* (1984) and P. Kennedy, *The Rise and Fall of Great Powers* (1988).

19 Fukuyama 1992, at xiii.

20 Fukuyama 1992, at 69.

21 Fukuyama 1992, at 46.

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democracy in association with a market-oriented economy. This is based both on an empirical assertion that all alternatives to liberalism have been eliminated, and on a normative assertion that liberalism is superior to all alternatives. A third feature is a distinctive voice, a 'we' who (fine tuning aside) *have* liberal democracy and experience no serious – or, at any rate, no intractable – problems, in contradistinction to a non-liberal 'they' (in the Third World and elsewhere) for whom things will necessarily remain more complicated and more unpleasant. Finally, there is a distinctive tone, a call to celebrate the present, tempered perhaps by nostalgia for the past, but nonetheless optimistic, confident and flushed with a sense of victory over the forces of regression.

Millenarianism refers in Christian doctrine to the belief that Christ will return to reign on earth for a thousand years. More generally, it is applied to premonitions of global futures of diverse kinds, but especially redemptive ones.<sup>22</sup> Liberal millenarianism's *millenarianism* thus consists in its perception that the world may stand on the brink of an unprecedented era of peace and good government, a perception which is millenarian also in the more literal sense that it pertains to the millennium about to begin.<sup>23</sup> Reinforcing the millenarian character of this vision in Fukuyama's work is the annunciatory, exalted, sometimes even ecstatic, language in which it is expressed, and the evocation of eschatological, especially evangelical,<sup>24</sup> themes. The *liberal* character of liberal millenarianism derives obviously from the fact that this is presented as a vision of a liberal world. But what sort of liberal world? To pursue this question, and also to explore further liberal millenarianism's implications for the meaning of democracy, it is helpful to draw into the discussion some of Fukuyama's critics.<sup>25</sup>

22 Fredric Jameson contrasts this with 'inverse millenarianism' – claims about 'the end of this or that' – which he associates with postmodernism. See F. Jameson, *Postmodernism, or The Cultural Logic of Late Capitalism* (1991), at 1. The difference between millenarianism and 'inverse millenarianism' appears to be principally one of emphasis, however, for both look at once backwards and forwards. Liberal millenarianism, in any event, has this ambivalence.

23 James Crawford refers to 'the facile millenarianism that was an immediate product of 1989'. See J. Crawford, *Democracy and International Law: Inaugural Lecture* (1994) 25.

24 Jacques Derrida finds a specifically Christian resonance in Fukuyama's work, thus buttressing the present characterization of Fukuyama as 'millenarian'. When Fukuyama says that economics takes us 'to the gates of the promised land but does not quite deliver us to the other side', and when he finds a spiritual basis for his 'good news' concerning liberal democracy in the human desire for recognition, Derrida suggests that Fukuyama is not only choosing Hegel in preference to Marx, but is also (in so doing) choosing a Christian account in place of a Jewish one. The other great religion of the 'promised land', Islam, does not feature in Fukuyama's allusive repertoire; he observes that the Islamic world falls outside the consensus he finds in favour of liberalism. See J. Derrida (P. Kamuf, trans.), *Specters of Marx* (1994), at 59–61 and 66.

25 The following discussion draws mainly on Held, *supra* note 6; Macey and Miller, *supra* note 6; Huntington, *supra* note 6; and Derrida, *supra* note 24. These critiques proceed, it should be noted, from widely divergent standpoints and reach widely divergent conclusions from their analysis of Fukuyama.

### C. Liberal Millenarianism and Democracy

One striking feature of Fukuyama's argument is that it largely proceeds as if there is, and can be, only one liberalism, one democracy and one liberal democracy. While recognizing a certain diversity of institutional arrangements, Fukuyama fails to consider the diversity of values and beliefs that contributes to producing divergent understandings of the meaning of liberalism and democracy, and of their interrelation. Liberal democracy cannot spell the end of ideological struggle because it is itself the subject of ideological contestation, and will continue to be so.

What, then, of Fukuyama's own understanding of liberalism, democracy and liberal democracy? A number of critics highlight Fukuyama's failure to address the tension between liberalism and democracy. The liberal preoccupation with rights and freedom from government control, and the democratic preoccupation with equal participation in, and accountability of, public power, may point in different directions. Rights and freedoms justified by reference to liberalism may compromise the extent to which all citizens are equally enabled to participate in politics; political decisions justified by reference to democracy may compromise individuals' rights and freedoms. On this point David Held observes that Fukuyama endorses economic liberalism, without examining the extent to which the 'free market' constrains democratic processes, by generating and sustaining systematic inequalities of wealth that involve systematic inequalities of power.<sup>26</sup> Thus, without addressing the implications of doing so, Fukuyama effectively resolves the tension between liberalism and democracy in favour of liberalism (especially in its neo-liberal economic aspect). This leads him, Jonathan Macey and Geoffrey Miller remark, to proclaim a victory for liberal democracy wherever he sees economic liberalism.<sup>27</sup>

Also of concern is Fukuyama's 'uncritical affirmation'<sup>28</sup> of liberal democracy. He neglects to investigate alternatives to prevailing liberal democratic practices, and gives little sign of grasping the limitations of those practices. Indeed he leaves largely unexplained the basis on which an evaluation might be made. His celebration of liberal democracy, thus ungrounded, overlooks the obvious failures of liberal democracy, its omissions with respect to the historic promise of self-rule on the basis of equality among citizens. These omissions find reflection in the pervasiveness of unaccountable power and the persistence of asymmetrical life chances between sexes, ethnic groups and classes.<sup>29</sup> At the same time, Fukuyama's celebration

26 Held, *supra* note 6, at 257–58.

27 Macey and Miller, *supra* note 6, at 282. This comment finds support in Fukuyama's inclusion, in a list of countries he characterizes as liberal democratic, of Singapore, South Korea, Honduras and Mexico. See Fukuyama 1992, at 49–50. (But see also his later discussion of, e.g., Singapore's authoritarianism, Fukuyama 1992, at 241.)

28 Held, *supra* note 6, at 295.

29 An illustrative summary of democracy's 'broken promises' and 'unforeseen obstacles' can be found in N. Bobbio (R. Griffin, trans.; R. Bellamy, ed.), *The Future of Democracy* (1987), at 27–39. (The conclusions Bobbio draws are, however, at variance with the position adopted in the present article.)



also overlooks that liberal democracy has never been under so much strain. He considers the challenges posed to liberal democracy by nationalist and religious movements. But, as Held and others observe, he fails to address the far-reaching challenges posed by the diffusion of decision-making power and political activity in the contemporary world.<sup>30</sup> This arises from a wide range of developments, among them innovations in the media and communications and information technology, economic globalization, and the rising importance of social movements (the environmental and women's movements, etc.).<sup>31</sup> In profound and diverse ways, these developments put in doubt the tenability of an account of liberal democratic politics that focuses solely on national governments, and treats periodic elections, the rule of law and civil and political rights as not just necessary but largely sufficient. Yet this is the account that informs Fukuyama's claims.

Fukuyama's uncritical approach to liberal democracy is accompanied by a portrayal of the world that is hard to locate in actuality. Like Voltaire's Pangloss, he insists on an account of this 'best of all possible worlds' that defies, rather than attends to, contemporary realities. Jacques Derrida puts this point starkly:

[N]ever have violence, inequality, exclusion, famine, and thus economic oppression affected as many human beings in the history of the earth and humanity. Instead of singing the advent of the ideal of liberal democracy and of the capitalist market in the euphoria of the end of history, ... let us never neglect this macroscopic fact, made up of innumerable singular sites of suffering: no degree of progress allows one to ignore that never before, in absolute figures, have so many men, women and children been subjugated, starved or exterminated.<sup>32</sup>

These sites of suffering, of course, cross-cut the distinction Fukuyama draws between 'historical' and 'post-historical' states, and serve to assure the continuance of ideological divergences in both categories of countries.

A further problematic element in Fukuyama's argument is his premise that a 'liberal revolution' is underway. He acknowledges that the Islamic world stands outside the consensus that he takes to be forming concerning liberal democracy, but discounts the significance of resistance there and elsewhere. Commentators have countered that, while few profess to reject the basic ideas associated with democracy and while some form of capitalism characterizes most economies, there is little evidence of support in many countries for liberal values more generally. Fukuyama exaggerates the scope of the consensus by finding liberal democracy almost – though not invariably – wherever he locates some variant of capitalism.

Fukuyama's defence is that his thesis about the end of history posits the end of *ideological* contestation, and is not an empirical claim. Thus it is not falsified by the

30 For a wide-ranging and instructive discussion of the implications of globalization for democracy, see D. Held, *Democracy and the Global Order* (1995).

31 Amongst the many accounts of globalization and associated developments, from diverse perspectives, M. Waters, *Globalization* (1995) is especially instructive. A valuable corrective to over-enthusiastic accounts of globalization, especially economic globalization, can be found in P. Hirst and G. Thompson, *Globalization in Question* (1996).

32 Derrida, *supra* note 24, at 85.

obvious fact that not all societies have embraced liberal democracy. But does this thesis not presuppose compelling evidence as regards aspirations, even if not as regards political practices and institutions? What precisely is Fukuyama's 'good news'? Derrida calls attention to the way Fukuyama characterizes liberal democracy both as an ideal and as an occurrence, alternating between the two to suit his argument.<sup>33</sup> On the one hand, Fukuyama refutes evidence that contradicts his thesis, insisting that he is speaking of an ideal that transcends events. On the other hand, he maintains that events have occurred – the death of communism, the establishment of liberal democracy and capitalism as ideologies of near-universal choice, the recognition accorded by Western liberal democracies to their citizens – which represent the realization of this ideal. Fukuyama's 'good news' thus intends to refer, Derrida shows, both to an accomplished fact and to a vision of the future.

This leads to a final observation. Inasmuch as Fukuyama's linear conception of history admits of only one future, it reduces and oversimplifies the processes of historical change. While Fukuyama acknowledges that reversals are possible, he assumes that the trends he identifies will broadly continue. In this, Samuel Huntington observes, Fukuyama overstates the predictability of history and the permanence of the moment. Current trends may continue, but experience suggests that they may well not.<sup>34</sup> The historical record to date offers little support for Fukuyama's notion of progress. Held too finds that Fukuyama has failed to appreciate the contingency of events and the complexity of social processes. Held highlights that Fukuyama's essentialized conception of 'man' and his two master engines of modernity (instrumental rationality and the desire for recognition) cannot adequately explain such central historical phenomena as classes, gender inequalities and the international division of labour.<sup>35</sup> If this is the case, then the predictive value of his conceptual framework must likewise be open to question.

To summarize, it can be argued that the thesis of the end of history – as the ideological triumph of capitalist economics and liberal democracy – attaches insufficient importance to a number of matters which render ideological divergences inescapable and, indeed, vital. These include the following points: the meaning ascribed to the terms involved is itself at least partly a matter of ideology; the enduring tension between liberalism and democracy invites continuing contestation concerning liberal democracy; liberal democracy is subject to profound – increasingly profound – challenge; at the end of the twentieth century progress is far from obvious; the scope of support for any version of liberal democracy, even at the level of ideas, is not clear; history follows not a single path but multiple and diverse trajectories that proceed and interact in complex and imponderable ways.

Critics draw diverse conclusions from their analyses of Fukuyama's thesis, though almost all find in it a dangerous inducement to complacency. Huntington's worry is that it may encourage Americans to underestimate the contemporary sources of

33 *Ibid.*, at 62–63.

34 Huntington, *supra* note 6, at 10.

35 Held, *supra* note 6, at 296–97.

political instability, and on this basis to relax their vigilance in foreign relations. Declinism, in Huntington's view, was, in contrast, a useful warning and goad to action.<sup>36</sup> Held has a different concern. Only fifty years after nazism, fascism and Stalinism almost eclipsed liberal democracy, Fukuyama prematurely pronounces a secure future for liberal democracy, and glosses over the most serious challenges that currently confront it.<sup>37</sup> Derrida shares this anxiety that Fukuyama masks the fragility of liberal democracy, and thus reduces the possibilities for strengthening and improving it. In this regard Derrida expresses particular disquiet at the way Fukuyama seeks to deny (while himself, however, in key respects exemplifying)<sup>38</sup> the continuing relevance of ideas and critical practices that draw inspiration from Marx.<sup>39</sup> Like a number of other scholars,<sup>40</sup> Derrida takes the view that these ideas and practices are rendered more, not less, pertinent by liberalism's gains.

The points discussed here arise in relation to Fukuyama's writings. But most apply with equal force to liberal millenarianism generally. This is because most stem from the features of Fukuyama's work that have been characterized as, more broadly, liberal millenarian: the progressivist notion of history; the identification of liberal democracy as history's *telos*; the distinctive 'post-historical' voice; the celebratory tone. Indeed, the critical perspectives just reviewed highlight the extent to which these features are interrelated and mutually reinforcing. With respect to the progressivist conception of history that is a central pillar of liberal millenarianism, Fukuyama's critics echo insights that can be found in the work of many other scholars. Among these, Michel Foucault's well-known account of history and genealogy is worth briefly recalling at this point.<sup>41</sup> Foucault shows how progressivist history

36 Huntington, *supra* note 6, at 4.

37 Held, *supra* note 6, at 296.

38 A number of commentators make this argument on the basis, e.g., of Fukuyama's teleological notion of history and his turn to 'grand theory'. See, e.g., Huntington, *supra* note 6, at 9-10. Others, however, disagree. See, e.g., A. Callinicos, *Theories and Narratives* (1995), ch. 1.

39 Derrida, *supra* note 24, at 68-69 and 86-94. Derrida has an intriguing explanation for why Fukuyama does this. He proposes that, in advancing the thesis of the end of history, Fukuyama is engaging in a kind of 'mourning work' following the death of 'actually existing socialism'. Out of fear and 'bereavement' as Marx's unacknowledged heir (for, Derrida insists, we are all Marx's heirs, whether we wish it or not), Fukuyama is denying the continued relevance of socialist critique. As Derrida puts it, adapting Marx and Engels' own immortal image, Fukuyama is attempting to 'conjure away' the 'spectre of Marx' that has long haunted liberalism. Yet, Derrida maintains, this work of mourning cannot succeed. It can displace, but it cannot efface, the spectre of Marx, for that spectre is liberalism's necessary accompaniment. In this regard Derrida refers not only to Marx and Marxian thought. He evokes the spectre - or, as he prefers to say, spectres (for he stresses the extent to which Marx's legacy is plural and diverse) - of Marx *metonymically* to stand for *all* the forms of critique that can help to evaluate ideals, grasp realities, and reduce the gap between them. In view of the importance of these forms of critique, Derrida urges instead a 'counter-conjuration', a strategy of active engagement, rather than disavowal. In this, he contends, scholars have a particular role. Quoting (at 176) a line in connection with another famous ghost, Derrida recalls Hamlet's injunction: 'Thou art a scholar; speak to it, Horatio.' See Derrida, *supra* note 24, at 61 and 68-75.

40 See, e.g., the essays in R. Blackburn (ed.), *After the Fall* (1991).

41 M. Foucault (P. Rabinow, ed.), 'Nietzsche, Genealogy, History', in *The Foucault Reader* (1984) 76. I am grateful to Professor Gerald Frug, Harvard Law School, for calling my attention to this text, and for an illuminating discussion of it.

confirms rather than unsettles established power relations. It represses dissension, struggle, and domination, rather than articulating and addressing them. It presents the world comfortingly, as simple, coherent and ordered, rather than challengingly, as complex, heterogeneous and contingent. In seeking to hold onto things as they are, it asserts blithely, but also impotently, that things must be as they are. What this puts in relief is the sense in which liberal millenarianism, for all its professed optimism, is ultimately pessimistic, not – as Fukuyama suggests – because it envisions a world of excessive equality, but because it evokes a world of enduring and immutable inequalities.

## II. The ‘Norm of Democratic Governance’ and Other Theses

Insofar as the thesis of the emerging norm of democratic governance and related claims share the liberal millenarianism of Fukuyama’s end of history narrative, the foregoing discussion is rich in implications. Before addressing the issue of these theses’ liberal millenarianism, however, it is necessary to set out the arguments involved. For this purpose a distinction may be drawn between those which discuss democracy primarily as a right and those which discuss democracy primarily in more instrumental liberal internationalist terms.

### A. Democracy as a Right

The right-oriented theses involve the claim – first advanced by Thomas Franck,<sup>42</sup> but subsequently taken up and developed by others as well<sup>43</sup> – that international law is beginning to embrace a ‘norm of democratic governance’ or ‘global democratic entitlement’. Such a norm or entitlement would mean three things. First, it would entail that the legitimacy of governments is judged by international, rather than purely national, rules and processes. Second, it would connote that those international rules and processes stipulate democracy; that is to say, only democratic governments are legitimate. And third, it would establish that democracy is an internationally guaranteed human right, in respect of which international procedures of monitoring and enforcement are justified and, indeed, required.

How has this norm or right come to ‘emerge’? Franck offers the fullest explanation. He traces the normative and customary evolution of the global democratic entitlement by reference to three overlapping phases or ‘generations’<sup>44</sup> of international rule-making and implementation. The first generation, born after the First

42 See the references cited at note 1. The thesis has earlier roots, which can be found, e.g., in Steiner, ‘Political Participation as a Human Right’, 1 *Harv. Hum. Rts Ybk* (1988) 77.

43 See *supra* note 3.

44 Franck 1992, at 52. Franck is not referring to the three-generational scheme used (and debated) in human rights commentary, according to which civil and political rights are the first generation; economic, social and cultural rights are the second; and peoples’ rights are the third.

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World War (but with older antecedents), is the right of self-determination. The plebiscites, popular consultations and commissions of inquiry that were mandated at the Versailles Peace Conference in connection with the redrawing of European boundaries gave rise to the idea that 'a people organised in established territory [has the right] to determine its collective political destiny in a democratic fashion'.<sup>45</sup> At the same time, a body of practice concerning plebiscite-holding and international supervision was initiated. This was further developed when self-determination was applied outside Europe in the context of decolonization.

The second generation, born after the Second World War, is the international legal recognition of human rights. With this the idea was established that all human beings have the right to freedoms of expression, thought, assembly and association (among other rights). Procedures for holding governments to their obligations in this regard, and for clarifying the scope of the rights and correlative obligations, were also elaborated. The third generation, still in its infancy, is the right to free and open elections. This was effectively born with the transformations of the late 1980s. While the right to vote and stand for election had been recognized in key human rights instruments decades before, it was not until those transformations occurred that this right began to be taken seriously as a norm of universal application. It was not until those transformations occurred, in other words, that it became possible to consider this right an emerging norm of customary international law. That it has begun to be taken seriously is reflected in the fact that a substantial majority of states now actually practise 'a reasonably credible version of electoral democracy'.<sup>46</sup> This is also reflected in international efforts to establish and define the 'principle of genuine and periodic elections'; in the increasingly common provision of 'technical assistance' by the UN and other organizations and agencies to governments holding democratic elections for the first time; and in the expanding practice of international and regional election monitoring. Varying his metaphor so as to emphasize the way that the right to free and open elections extends, and depends on, international legal developments with respect to self-determination and human rights, Franck sometimes refers to these as three 'building stones'<sup>47</sup> in the edifice that is the global democratic entitlement.

Other scholars likewise hold that, while the global democratic entitlement has had a basis for decades in international human rights instruments, and before that in the principle of self-determination of peoples, it has only recently begun to be respected, monitored and enforced to a significant extent.<sup>48</sup> Thus, it has only recently begun to acquire the status of a norm of customary international law. In addition to the evidence of this to which Franck calls attention, Christina Cerna notes the procedures elaborated in the 1990s within the framework of the Council of Europe and the Or-

45 Franck 1992, at 52.

46 Franck 1992, at 64.

47 Franck 1992; Franck 1995, ch. 4; and Franck 1994, *passim*.

48 See, e.g., Fox, *supra* note 3 and Cerna, *supra* note 3.

ganisation of American States for conditioning admission or continued participation on democratic government.<sup>49</sup>

As this suggests, these scholars take free and fair elections to be the decisive criterion of democracy, though they in no way underestimate the extent to which the right to such elections presupposes other rights, especially freedoms of expression, thought, assembly and association. Elections are in this perspective decisive because they legitimate governance. Thus, the expressions 'democratic entitlement', 'right to democracy', 'norm of democratic governance', 'entitlement to a participatory electoral process', 'right to political participation', 'electoral rights', and the 'right to free and open elections' are employed with relative interchangeability. Franck explains:

The term 'democracy', as used in international rights parlance, is intended to connote the kind of governance that is legitimated by the consent of the governed. Essential to the legitimacy of governance is evidence of *consent to the process by which a populace is consulted* by its government.<sup>50</sup>

Franck acknowledges that this is a limited conception of democracy. 'This definition', he observes, 'is not ambitious, it is not necessarily unambiguous, and it is almost certainly not the one Americans would prefer'.<sup>51</sup> But given the diversity of politics and traditions in the world, and given the inbuilt resistance of the states system to the international regulation of national affairs, he considers that this conception or something like it 'probably represents the limit of what the still frail global system of states can be expected to accept and promote as a right of peoples assertable against their own, and other, governments'.<sup>52</sup>

Gregory Fox and Georg Nolte, while sharing the view that elections are the central issue in a norm of democratic governance, have highlighted that holding regular elections which are free and fair may not always be sufficient to protect the democratic entitlement.<sup>53</sup> Where candidates are opposed to liberal democracy, and are committed to the establishment in its place of, for instance, a theocratic political order, the question arises whether those candidates should be allowed to stand.

49 Cerna, *supra* note 3. In connection with applications for membership from Central and Eastern European States, the Council of Europe has begun to require evidence of commitment to democracy. See, e.g., 'Report on the Legal Order of the Russian Federation', Council of Europe Doc. AS/Bur/Russia 7 (1994), reprinted at 15 *Hum. Rts L. J.* (1994) 249. The Organisation of American States has long had this as a formal – though, for much of the OAS's life, unenforced – requirement for OAS member states. See the Declaration of Santiago, adopted at the Fifth Meeting of Consultation of Ministers of Foreign Affairs, August 1959, reprinted in T. Buergenthal and R. Norris (eds.), *Human Rights: The Inter-American System* (hereinafter Buergenthal and Norris), Binder 1, Booklet 6, 134. More recently, the OAS has sanctioned the further step of engaging in collective action to secure the installation, or reinstatement, of democratic government in the event that a coup occurs. See OAS General Assembly Resolution 1080 (adopted 5 June 1991) reprinted in Buergenthal and Norris, Binder 2, Booklet 7.6, 43; and Protocol of Amendments to the Charter of the OAS ('Protocol of Washington') (adopted 14 December 1992), OAS AG/DOC.11 (XVI-E/92).

50 Franck 1994, at 75.

51 Franck 1994, at 75.

52 Franck 1994, at 75.

53 Fox and Nolte, *supra* note 3. They have in mind particularly the case of Algeria.

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Based on a survey of constitutional laws and traditions of diverse democratic states, Fox and Nolte contend that in customary international law the exclusion of such candidates is warranted, and perhaps even required. This reflects, they observe, a conception of democracy as not simply a set of procedures for ascertaining majority preferences, but rather as a means by which citizens are enabled to enjoy basic rights. Thus, Fox and Nolte find support in customary international law for an account of democracy that tolerates only the tolerant, and that in this respect insists on the value of 'political liberalism'.<sup>54</sup> More generally, they find support for an account of democracy that rests on the liberal notion that government is legitimated not just procedurally but also to the extent that it fulfils its side of the social contract and protects citizens' rights.

Those who advance the thesis of the emerging norm of democratic governance give close attention to the question of how compliance might be monitored and enforced. As noted, existing election-monitoring efforts and innovations with respect to participation in regional organizations are among the developments which persuaded the scholars that the norm was emerging in the first place. They consider a number of possible ways of strengthening enforcement. Franck proposes that the 'older democracies' might volunteer to have their elections monitored, so as to encourage a custom of election-observation that might eventually evolve into an obligation.<sup>55</sup> In the longer term, he proposes that democratic government might be set as a precondition to participation in all international organizations, including the United Nations, a proposal also developed by Fox.<sup>56</sup> Franck suggests additionally that democratic government might be made a precondition for fiscal, trade and development benefits, and for the protection of UN and regional collective security measures. He strongly rejects as a means of enforcement unilateral intervention to install or reinstate elected governments, though he finds acceptable collective action at UN or regional level, even, in extreme cases, involving the use of force. Franck considers that, while the question of the scope and incidents of the norm of democratic governance is likely to remain on the international law agenda, the more pressing problem is the monitoring and enforcement of compliance. He urges that the future emphasis of international efforts should be laid accordingly.<sup>57</sup>

### B. International Law and the 'Liberal Peace'

The writers so far considered base their case for the emerging democratic entitlement on, above all, developments with respect to the holding of elections, international and regional election monitoring, and democratic conditionality in regional organizations. Those whose work will now be reviewed are also impressed with these developments. What strikes them as even more significant, however, is the

54 See J. Rawls, *Political Liberalism* (1993).

55 Concerning this and the other proposals considered here, see Franck 1992.

56 Fox, *supra* note 3.

57 Franck 1994.

correlation between liberal democracy and peace.<sup>58</sup> This forms the basis of an argument that there should be a norm of democratic governance, and that the signs that it is emerging confirm this. The theorists of the right to democratic governance also draw support from the correlation between liberal democracy and peace to help explain and vindicate the right.<sup>59</sup> Thus, the difference between the two sets of theses is largely one of emphasis. Both sets are at once empirically-based claims that a norm is emerging, speculations concerning its future as *lex lata*, explanations of why it is emerging, and justifications for its recognition in international law. And in both sets the so-called 'liberal' or 'democratic' 'peace' plays a part.

Among the leading proponents of theses of this second type are Fernando Tesón<sup>60</sup> and Anne-Marie Slaughter.<sup>61</sup> In presenting the correlation between liberal democracy and peace, they take account of both speculative and empirical literature. With respect to the former, the key figure is Kant. These scholars, like the international relations analysts on whose work they draw, look to Kant for the insight that liberal states are likely to maintain peaceful relations with one another. As is well known, Kant held that 'perpetual peace' would depend on three things: every state having a 'republican' constitution; a 'pacific federation' being established among states, in the shape of an agreement to refrain from war against one another; and extensive international commerce, underpinned by 'cosmopolitan law'. Republican government would discourage warfare, he believed, because, if government was accountable to citizens, the fact that citizens would suffer the consequences of war – as soldiers, bereaved civilians, taxpayers, etc. – would serve to engender caution in waging it.<sup>62</sup>

Internationalists have long attended to the points about the pacific federation and extensive international commerce. Particularly compelling in the aftermath of the twentieth century's two World Wars, these ideas are reflected in the League of Nations, the Kellogg-Briand Pact, the United Nations, and the General Agreement on Tariffs and Trade. Indeed, they inform the whole enterprise of modern international law and institution-building. But what, according to Tesón, Slaughter and the international relations analysts, has *not* received sufficient attention is Kant's insight about republican government. For these scholars the sort of 'republican' state Kant had in mind corresponds in contemporary terms to a liberal democratic state.<sup>63</sup> The

58 The scope of the correlation that is claimed to exist will be discussed below.

59 See, e.g., Franck 1995, at 134–137, and Fox and Nolte, *supra* note 3, at 61–63.

60 See esp. Tesón 1992.

61 See the references to Slaughter's work cited at note 2. Slaughter 1995 develops a more general 'Liberal model' of international law. 'Liberalism' is presented as an account of how some – liberal – states 'do behave rather than how they should behave' (at 508). But 'Liberal' theory appears to be envisaged as serving a normative function as well, inasmuch as Slaughter evokes the possibility that this theory might become 'normatively applicable to all States even if positively descriptive of only some' (at 538). See further *infra*, section III.

62 See I. Kant (H. Nisbet, trans.), 'Perpetual Peace: A Philosophical Sketch' (1795), in H. Reiss (ed.), *Kant: Political Writings* (1991), at 93 *et seq.*

63 If Kant himself drew a sharp distinction between a republican constitution and a democratic one, this was because his conception of democracy was a pre-modern one. His frequently quoted definition of a 'republican' constitution entails three principles: 'firstly, the principle of *freedom* for all



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Second World War, along with the bitter ideological rivalries of the Cold War, fuelled a realist outlook which got in the way of a proper appreciation of Kant's idea. Now that many countries of the world have embraced this liberal model, a fresh appraisal is called for. The notion that the prospects for peace may be greatest among liberal states should, these scholars maintain, no longer be ignored.

Slaughter and Tesón observe that international relations scholars have presented evidence which appears to back up this notion. Based on analysis of international wars since 1817, Michael Doyle, among others, has argued that a separate 'zone of peace' does indeed exist among liberal states.<sup>64</sup> This zone has steadily expanded as the number of liberal states has increased. Doyle has reported that throughout this period liberal states, while they have engaged in wars with non-liberal states, have remained at peace with one another. From this he has drawn the inference that liberal states are likely to be more pacific than non-liberal ones, not in general, but at least in their relations with other liberal states. The scope of this claim, the precise character of the link it posits, and the reasons for that link, remain the subject of debate. In its broad lines, however, the 'democratic' or 'liberal' 'peace' is spoken of as a 'fact'<sup>65</sup> and 'as close as anything we have to an empirical law in international relations'.<sup>66</sup> It is an empirical law that, according to Slaughter and Tesón, has profound implications for international law.

The first implication is that international law should place the question of the legitimacy of governments on its agenda. It should abandon the idea that this is an exclusively national issue. The second implication is that international law should accept as legitimate only liberal democratic governments. It should stipulate that a legitimate government – one that has a right to exercise sovereign authority – is not just any government that wields factual power; it is a liberal democratic one. Tesón calls this a 'Kantian theory of international law'. Slaughter employs the name given by international relations scholars, 'liberal internationalism'.<sup>67</sup> *Internationalism* evokes the second and third dimensions of Kant's formula for perpetual peace noted above, those that find reflection in international cooperation; *liberal* internationalism includes also the first dimension, 'republican government'. Against an international law that is in thrall to realism and power politics, Slaughter counterposes a vision of an international law that takes seriously the connection between national political

members of society (as men); secondly, the principle of *dependence* of everyone upon a single common legislation (as subjects); and thirdly, the principle of legal *equality* for everyone (as citizens). He wrote that 'republicanism [is] that political principle whereby the executive power . . . is separated from the legislative power', and that 'republican' government is, in principle, 'representative'. *Ibid.*, at 99–102.

64 Doyle, 'Kant, Liberal Legacies and Foreign Affairs', 12 *Philosophy & Public Affairs* (1983) 205 (Part 1) and 323 (Part 2). For a survey of relevant empirical literature, see B. Russett, *Grasping the Democratic Peace* (1993), ch. 1.

65 Russett, *supra* note 64 (Ch. 1: 'The Fact of Democratic Peace').

66 Levy, 'Domestic Politics and War', 18 *J. Interdisciplinary History* (1988) 653, 662.

67 For her general 'model' of international law, developed in recent work, Slaughter prefers the term 'Liberal', and distinguishes a 'Liberal' theory of international relations from 'Wilsonian liberal internationalism'. See Slaughter 1995, at 508 *et seq.* for her definition of 'Liberal' in this context.

ideology and international relations, and in this way dedicates itself to (in the phrase of one international relations scholar) 'grasping the democratic peace'.<sup>68</sup>

In effect this is a vision of a norm of democratic governance along the lines proposed in the first category of theses considered, though without the same emphasis on the notion of democracy as a human right.<sup>69</sup> Slaughter thus finds signs that her vision is beginning to materialize in the developments to which Franck and others call attention. She also finds signs that the 'zone of peace' is accompanied and reinforced by a 'zone of law', in that transnational disputes involving only liberal states are more readily resolved through judicial procedures than is the case where non-liberal states are involved. She presents evidence that courts of liberal states cooperate with one another, and take into account each other's national interests, in a way that courts of non-liberal states do not, and in a way that courts of liberal states themselves do not where a dispute involving a non-liberal state is at issue.<sup>70</sup>

On the question of how this norm might be enforced, Tesón concurs with Franck and Fox that the UN and other international organizations might change their rules to admit only states with liberal democratic governments, and to allow only such governments to participate. In his view the unilateral use of force might even be justified in some circumstances, especially where violation of the norm is associated with gross abuses of human rights. Tesón also proposes that the law of treaties might be made to reflect the illegitimacy of non-liberal governments; such governments might, for instance, be deprived of the competence to create binding obligations in their own favour. Diplomatic law too might be changed so as to deny diplomatic status to representatives of non-liberal regimes.<sup>71</sup> Slaughter differs in rejecting the right of unilateral intervention, and generally distances herself from Tesón's professed anti-statism. Nonetheless, she shares the view that liberal democracies have a 'leadership' role to play in relation to liberal internationalist international law.<sup>72</sup>

As this discussion indicates, these claims revolve around a distinction between 'liberal' or 'liberal democratic' states and 'non-liberal' states. It is worth pausing at this point to note more fully how the theorists understand this distinction. Slaughter defines a liberal state as, in broad terms, a state with 'juridical equality, constitutional protections of individual rights, representative republican governments, and market economies based on private property rights'.<sup>73</sup> This uncontroversial defini-

68 Russett, *supra* note 64.

69 Tesón does, however, argue that international law should accord legitimacy only to liberal democratic states not just for prudential reasons but also because this is morally justified. His 'Kantian theory' includes the idea that governments should be required to respect liberal rights because this is the right thing to do. See Tesón 1992, esp. 81–84.

70 Slaughter 1992b. See Slaughter 1995 for further development of this argument. Slaughter claims, for instance, that interaction between the executive and legislative branches of government is also greater among liberal states than among non-liberal states or between liberal and non-liberal states.

71 Tesón 1992, at 100.

72 Slaughter 1992a, at 404 and 394. Doyle for this reason expresses concern at what he takes to be the decline of the United States from hegemonic status. See Doyle, *supra* note 64, at 233–235.

73 Slaughter, 1992b, at 1909. This is largely reiterated, though the need for market economies based on private property rights is separately stated, in Slaughter 1995, at 511–152.

tion corresponds closely to that used by Doyle and other international relations analysts in their work on the 'liberal peace'.<sup>74</sup> Tesón adopts a similar approach, variously referring to the legitimate state of his 'Kantian theory of international law' as a 'democratic state', 'free state', 'liberal democracy' and 'form of political organisation that provides full respect for human rights'.<sup>75</sup> For both scholars the key feature of a liberal state, which explains its irenic character (at least *vis-à-vis* other liberal states), is the fact that there are powerful checks on the exercise of public power – constraints that operate principally through the periodic recall of legislators, the separation of powers and the protection of civil and political rights.

### III. Liberal Millenarianism and International Law

It is now possible to return to the question of the relationship between these international legal theses and liberal millenarianism. In this context, the implications for the understanding of democracy that underpins these claims can be brought into view. It will be valuable at the end of this discussion to take stock of the fact that, if these international legal scholars are right, democracy has, will have, or at any rate ought to have, far-reaching significance in international law, as determinant of the legitimacy of governments.

#### A. Liberal Millenarian Perspectives

Most likely, all the international legal scholars discussed in this article would locate themselves at some considerable distance from Fukuyama on almost every issue. Certainly, none shares the narrow, elitist outlook that pervades his account of the 'end of history'. A number explicitly dissociate themselves from that account. Franck, for instance, states that he does not consider that '[exulting] in smug satisfaction at the "end of history"' is an appropriate response to the post-Cold War juncture, which he sees rather as an occasion for 'seizing the moment to rethink the basic structure and processes of the international system'.<sup>76</sup> Slaughter explains that liberal internationalism promises a result that is 'neither utopia nor the end of history, but holds out the hope of at least a small measure of progress toward individual rights and the global rule of law'.<sup>77</sup> There are some grounds for believing that liberal millenarianism may, nonetheless, be built into the form and structure of these scholars' arguments. As discussed earlier, liberal millenarianism includes, but extends beyond, Fukuyama. It is characterized by a progressivist notion of history, coupled with a conceptualization of history's *telos* in terms of liberalism, and a distinctive voice and tone. On what basis, and to what extent, can it be said that the international legal theses considered here exhibit these features?

74 See, e.g., Doyle, *supra* note 64, at 206.

75 Tesón 1992, *passim*.

76 Franck 1990, 601. See also Franck 1995, at 141.

77 Slaughter 1992a, at 405.

A progressivist view of historical change is evident in Franck's history of the development of the norm of democratic governance. His account is divided into developmental phases, beginning with the principle of self-determination and culminating in the right of free and open elections, now evolving from lip service into widely respected normative commitment. 'The transformation of the democratic entitlement from moral obligation to prescription has evolved gradually', he explains, but 'in the past decade the tendency has accelerated'.<sup>78</sup> Each phase pushes further along the course to eventual prescription. The fact that the phases overlap does not detract from, but rather reinforces, the impression of progress and directionality, as do the metaphors of generations and building blocks. The norm of democratic governance appears to be growing out of, or building on, earlier developments. This evolutionary logic also informs the work of scholars who put forward liberal internationalist and Kantian theses. Slaughter, for instance, in seeking to connect international law with developments in international relations, offers an unmistakably progressivist account of the history of international relations. This account starts with Wilsonian internationalism (or idealism, in the phraseology of those who later called themselves realists), passes through the stage of realism, and reaches its conclusion with liberal internationalism, which is said to combine the strengths, but also to overcome the shortcomings, of both its forerunners. Since these forerunners are presented as the only alternatives, liberal internationalism is made naturally to appear as an advance.<sup>79</sup> The notion of the 'liberal peace', liberal internationalism's central premise, likewise posits that historical change is incremental and directional. The image is one of an expanding zone of peace among liberal states that will reach the end of its expansion when all are included within it.

The second aspect of liberal millenarianism is that history's *telos* is taken to be liberal democracy, along with a market-oriented economy. It hardly needs restating that this is indeed the goal envisaged in the international legal theses examined here. That this should be so is believed, in the liberal millenarian perspective described earlier, to be supported empirically by the elimination of all ideological alternatives. And it is also believed to be supported normatively. That is to say, these ideological alternatives have been eliminated because they were flawed, as democracy and capitalism – at least in principle, if not in current practice – are not. Both points are alluded to in a memorable passage by Franck:

[T]he [global democratic] entitlement now aborning is widely enough understood to be almost universally celebrated. It is welcomed from Malagache to Mongolia, in the streets, the universities and the legislatures, not only because it portends a new, global political culture supported by common rules and communitarian implementing institutions, but also because it opens the stagnant political economies of states to economic, social and cultural, as well as political, development.<sup>80</sup>

78 Franck 1992, at 47.

79 See, e.g., Slaughter 1993. For a further narrowing of alternatives to 'Realism' and 'Liberalism', see Slaughter 1995.

80 Franck 1992, at 90.

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For Slaughter, 'the geopolitical framework for the millennium is ... liberal internationalism'.<sup>81</sup> An eventual 'world of liberal states' is the sole alternative to '[sacrificing] the values of universalism ... to the realism of recognising that States in the international system inhabit very different worlds'.<sup>82</sup> The choice, in her account, is either liberal universalism or realist difference, either grasping the liberal-democratic peace or living perpetually on the edge of war. The embrace of liberal democracy in every country thus appears as humanity's ultimate salvation.<sup>83</sup>

Liberal millenarianism involves, thirdly, a 'post-historical' voice or standpoint that figures the non-liberal world, still mired in 'history', as radically 'other'. Progress towards the full achievement of liberal democracy is taken to be more or less straightforward in liberal societies, while elsewhere the almost total transformation of prevailing realities will be required. This is, again, apparent in the thesis of the emerging norm of democratic governance. Such governance is portrayed as something some largely have, and the rest almost entirely lack. Thus, Franck writes that for the citizens of some states this norm will 'merely embellish rights already protected by their existing domestic constitutional order. For others it could be the realization of a cherished dream'.<sup>84</sup> A similar standpoint orients the liberal internationalist and neo-Kantian approaches. Slaughter envisions that her model of international law for a one-world order of liberal states might be 'normatively applicable to all States even if positively descriptive of only some'.<sup>85</sup> In practice, she observes, the distinction between liberal and non-liberal states may be difficult to apply, especially in the context of 'quasi-liberal' and 'transitional states'. Certainly, it cannot be treated as an 'absolute divide'.<sup>86</sup> But the point of the 'liberal peace', around which her argument turns, is that, as Doyle explains, liberal states are not just relatively but 'fundamentally different' from non-liberal states. Hence the 'separate peace' among them.<sup>87</sup> If this is the reason for the 'separate peace', it is, of course, also the consequence. In any event, the claim of liberal internationalism, as of the norm of democratic governance, is that this fundamental difference should, and is beginning to, be reflected in international law.

There is, finally, the issue of liberal millenarianism's distinctive tone, its momentous, celebratory, and apparently optimistic, key. Liberal millenarianism seeks

81 Slaughter 1992a, at 393. (emphasis omitted)

82 Slaughter 1995, at 538.

83 It also appears as *international law's* salvation, inasmuch as liberal universalism also represents an option in favour of law, rather than politics. Liberal internationalism thus seems to rescue international law from realist irrelevance. Fukuyama suggests this too, arguing that, while 'international law in general' (Fukuyama 1992, at 281) became discredited owing to the failure of the League of Nations and the United Nations, the 'states making ... up [the "league of democratic nations" which he proposes] would be able to live according to the rules of international law in their mutual dealings' (Fukuyama 1992, at 283).

84 Franck 1992, at 50.

85 Slaughter 1995, at 538.

86 Slaughter 1992b, at 1988–89.

87 Doyle, *supra* note 64, at 235. Slaughter takes up Doyle's phraseology, noting the 'fundamental difference in the nature of relations among liberal States as compared to relations between liberal and non-liberal States'. Slaughter 1995, at 537.

to call attention to events which augur that history's destination may finally be in sight. The discussion in the previous section gave only a slight indication of the tone of these international legal arguments. The quotation from Franck above is, however, typical of the terms in which his claims, and those of some of the other international legal scholars, are expressed.<sup>88</sup> Thus, for instance, Franck goes on to speak of a 'cosmic but unmysterious change' in which governments, 'no longer blinded by the totalitarian miasma' have come to recognize the advantages of democracy.<sup>89</sup> Slaughter likewise writes emphatically of revolutions that 'liberated millions. *Millions ...*', and occasioned a 'human rights victory on an unprecedented scale, a triumph of human dignity and the human spirit'.<sup>90</sup> On the basis of those events she proposes liberal internationalism as a new vision of peace and good government for a new age.

If the thesis of the emerging norm of democratic governance and related claims share key features of liberal millenarianism, they also give rise to a number of the concerns raised by Fukuyama's critics. In accounts of the norm of democratic governance and the order of liberal states envisioned by the liberal internationalist and Kantian theories, liberal democracy is presented largely as an identifiable, coherent and stable system. It is stressed that a great variety of practices and institutions is consistent with liberal democracy, but little attention is drawn to the diversity of the values, ideas and principles that might animate those practices and institutions. In particular, little attention is given to the enduring tensions within liberal democracy between liberal and democratic preoccupations, and to the implications for that tension of different models of liberal democracy. While the international legal theorists are less apt than Fukuyama to mistake capitalism for liberal democracy, their arguments nonetheless tend, like his, towards an attenuation of the democratic dimension.

The democratic component of liberal democracy comes to revolve, principally, around elections. That what is denoted is a particular method of producing governments is made particularly clear in the thesis of the emerging norm of democratic governance. Democracy's part there is adjectival; it is a procedure for securing the acquiescence of citizens in their governance by others.<sup>91</sup> The same holds, however, whether democracy is understood in these terms, or in terms of a social contract to protect citizens' rights (as by Fox and Nolte), a mechanism to ensure that government acts not just in its own interests but in the interests of society as a whole (as by Slaughter) or a system of government that is not just prudentially but also morally justified (as by Tesón). The shared assumption is that democracy refers to the 'process by which the people choose those they entrust with the exercise of power',<sup>92</sup> the

88 But not all express themselves in this way. Cf. the more cautious tone of, e.g., Fox and Nolte, *supra* note 3.

89 Franck 1995, at 85–86.

90 Slaughter 1990, at 1.

91 Franck 1992, at 51 and *passim*.

92 Franck 1992, at 50.

right 'to participate in the selection of one's own national government'.<sup>93</sup> Yet, according to some political theorists, democracy entails not just the right to participate in the selection of national governments, but also the right to participate directly in decision-making affecting one.<sup>94</sup> For other theorists, democracy involves not just the process of selecting governments, but also the process of connecting people with their governments through civil society.<sup>95</sup> Still other theorists emphasize that democracy requires not just the right to vote and stand for election and associated civil liberties, but also the whole range of further rights that actually enable participation in public life on a footing of equality.<sup>96</sup> While Franck, Fox and Nolte take their position to be dictated by that which customary international law will support,<sup>97</sup> what is being suggested here is that it is also embedded in the structure of their argument. Inasmuch as elections stand at the narrative's climax, democracy is made to appear to have nowhere further to go. Issues of citizenship, accountability and equality, and their respective significance and relative importance – along with other issues at the heart of democratic debate – are thus removed from view.

An additional, related concern is these theses' uncritical, affirmative approach towards liberal democracy. Franck's reference, cited above, to the embellishment of rights in existing liberal states suggests a perception that such states are already satisfactory; the rest is ornament. Depicting democratic political practice as entailing a 'genuine [openness] to meaningful political choice'<sup>98</sup> and a 'free market in ideas',<sup>99</sup> Franck puts to one side the many grounds for doubting the meaningfulness of political choice and the freedom of the market in ideas. Slaughter attaches much importance to what she refers to as the 'paradox of liberal states'. By this she intends that 'as a factual rather than a legal matter, liberal states are likely to have a lesser capacity for autonomous economic and political action than non-liberal states'.<sup>100</sup> But she too neglects to consider how well these constraints on power work, whether they work better for some social groups than others, and whether further constraints might be valuable. With liberal democracy the pinnacle of political development – and with dictatorship, communism and 'forced march modernization' the only alter-

93 Fox, *supra* note 3, at 542.

94 See, e.g., B. Barber, *Strong Democracy* (1984).

95 See, e.g., J. Cohen and A. Arato, *Civil Society and Political Theory* (1992).

96 Amongst the innumerable different ways and contexts in which this argument has been advanced, see, e.g., A. Phillips, *Engendering Democracy* (1991) and *Democracy and Difference* (1993).

97 Fox also emphasizes that his position is dictated by that which is feasible, elections being the most readily monitored dimension of democratic politics. See Fox, concluding comments in panel 'National Sovereignty Revisited: Perspectives on the Emerging Norm of Democracy in International Law', *Proc. ASIL* (1992) 249, 270–71, and *infra* text at note 121 for discussion of this point.

98 Franck 1995, at 86. Franck lists 130 states which as of late 1994 were 'legally committed to permit open, multiparty, secret-ballot elections with a universal franchise'. Of these he remarks that '[w]hile a few may arguably be democracies in form rather than substance, most are, or are in the process of becoming, genuinely open to meaningful political choice'. Franck 1995, at 85–6.

99 *Ibid.*, at 138.

100 Slaughter 1992a, at 395–96 (emphasis omitted). The sense in which this is a paradox is unclear. If the thought is that the freedom associated with liberal states entails in another sense greater constraint than is the case with non-liberal states, then the paradox remains obscure, inasmuch as the freedom is that of citizens and the constraint is that of the state.

natives ever mentioned<sup>101</sup> – questions concerning liberal democracy's limitations can scarcely arise, let alone be addressed. It is not only issues of the kind just noted that are left out of account, however. The whole matter of liberal democracy's tenability in a world of intensified globalization is largely passed over. While globalizing processes are certainly registered,<sup>102</sup> the ways in which they are putting democracy under strain receive limited attention.<sup>103</sup> These scholars evoke a liberal democracy that is triumphant, vigorous, redemptive.

They also evoke a liberal democracy that provides the key to expanded prospects for peace. In this respect too, however, limitations are glossed over. The 'peace', which some international relations analysts claim is now a 'fact', is a '*liberal peace*'; it is said to hold *among liberal states*. Relations between liberal and non-liberal states are not claimed to be especially pacific, and may, according to the analysts, even be especially aggressive.<sup>104</sup> In finding warrant in this for a norm of democratic governance, the international legal scholars give little attention to the implications of the fact that democratic governance does not appear to induce pacific relations with non-liberal states.

But there is also a much larger limitation of which these writers take insufficient cognizance. The '*peace*' that is postulated among liberal states is an absence of armed conflict between them. Yet the Clausewitzian paradigm of war between nation-states to which this refers today fits only a minority of violent conflicts, even large-scale ones. Mary Kaldor highlights that much contemporary conflict arises out of the break-up of states, and centres on issues of 'identity politics' (ranging from religious communalism, to ethnic nationalism, to 'tribalism').<sup>105</sup> Support frequently comes from overseas diasporas, along with foreign governments and 'experts'. State actors are often hard to distinguish from non-state actors. Fighting is commonly sporadic, scattered within and across borders, and focused to a large extent on civilian targets.<sup>106</sup> Is this peace or war? Civil war or international war? The boundaries between these categories – like those between violent crime and armed conflict, public aims and private aims, combatants and civilians – are becoming blurred. She concludes that

the prognosis is grim. The breakdown of the distinction between war and peace, the re-privatisation of violence, implies more or less continuous and geographically pervasive low-level violence, ranging from individual criminality to organised warfare.<sup>107</sup>

101 See, e.g., Franck 1995, at 86.

102 See, esp. Slaughter 1995.

103 A rare example of such attention can be found in the final eight pages of Franck's 484-page study of 'fairness' in international law and institutions. Franck 1995, at 477–484.

104 See Doyle, *supra* note 64, at 323 *et seq.*

105 Kaldor, 'Introduction', in M. Kaldor (ed.), *New Wars* (forthcoming).

106 For a similar account of war in the 1990s, see *Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations*, UN Doc. A/50/60; S/1995/1 (1995), esp. para. 10 *et seq.*

107 Kaldor, *supra* note 105.



Alongside these considerations concerning the character of war are further questions concerning the character of peace. There is, for instance, the question of whether peace can be held to prevail where certain forms of non-forcible coercion are occurring, arising (*inter alia*) from the exploitation of relations of dependency. There is also the broader issue of whether systemic inequalities of power, resources and opportunities, between and within nation-states, may in themselves constitute a type of ongoing 'structural violence'.<sup>108</sup> The identification of peace with an absence of armed conflict leaves out of account the possibility that peace may entail more than the failure to resort to arms.

It follows that the scope of the claims associated with the 'liberal peace' is highly circumscribed. Even assuming those claims are justified on their own terms, they miss important contemporary sources of violence, and important questions that arise in connection with that violence.

Moreover, Derrida's 'macroscopic fact, made up of innumerable singular sites of suffering' cited earlier finds scarcely greater resonance in these arguments than does Kaldor's 'grim prognosis'. These international lawyers are undoubtedly no Panglosses. Yet the progressivist premises of their claims, buttressed by the celebratory tone and 'post-historical' voice, do tend to shift attention away from the scale, character and sources of deprivation, oppression and conflict in the contemporary world. To read this international legal literature is to be filled with enthusiasm about the state of, or at any rate prospects for, human flourishing.

Also arguably overestimated is the extent to which there is evidence to support an emerging norm of democratic governance. For Franck and the other theorists of the emerging norm, this empirical issue – raised by some of Franck's critics<sup>109</sup> – has a different significance than it does for Fukuyama. While Fukuyama might shift between the empirical and the ideal, the international legal commentators cannot avoid confronting state practice if they are to make good their claim that the norm is emerging in international law. Or maybe Fukuyama's move, or something like it, is precisely what they intend. Perhaps characterizing the norm as 'emerging' allows it to remain poised between occurrence and prediction.

Finally, the international legal arguments are inclined to overstate the significance of the present moment, as an indication of the future. While the possibility of setbacks is certainly acknowledged, the evolutionary logic of the arguments tends to signal that contemporary trends will continue in a more or less linear fashion. As Fukuyama's critics highlight, the processes of historical change appear to be far more complex and contingent than this logic allows.

The observations made by Fukuyama's critics are also worth recalling as regards the consequences of these concerns. There is a danger of inducing complacency, and of prematurely pronouncing liberal democracy's future secure. In masking the limi-

108 The notion of 'structural violence' is elaborated in the work of Johan Galtung. See, e.g., 'Violence, Peace and Peace Research', 1 *Essays in Peace Research* (1975), ch. 4.

109 See, e.g., Carothers, *supra* note 3.

tations of liberal democracy, the prospects that those limitations might be addressed are correspondingly reduced. Inequalities may be made to seem, and to become, unalterable. And, to the extent that Kaldor's 'grim prognosis' is inadequately heeded, there is a danger of attaching insufficient importance and urgency to the medicine she prescribes. This entails re-establishing legitimate control of violence at a transnational level.<sup>110</sup>

To these points might be added further misgivings expressed by international legal commentators. Thomas Carothers argues that '[a]dvocacy of a democratic norm actually highlights [the] West versus non-West division and the tension in international law concerning the fact that it is at root a Western system that Western countries are seeking to apply to the whole world'.<sup>111</sup> He worries, furthermore, about the harm that might be done, via sanctions or armed intervention, in the 'implementation' of such a norm. Is the way opened up for the waging of 'just wars' or neo-colonial adventures? All the international legal scholars whose work is discussed here recognize the force of this concern.<sup>112</sup> With the exception of Tesón, none accepts unilateral intervention as a legitimate means of enforcing the norm, though each does appear to accept collective action by regional organizations and the United Nations.

Carothers here echoes a widely shared apprehension as regards the division of the world into liberal democratic and non-liberal democratic states. This is an apprehension that cannot forget all the other notorious divisions of history: between civilized and barbarian, Christian and heathen, European and oriental, developed and underdeveloped. Given the historical record, there is a case to be answered that a norm of democratic governance, like Fukuyama's 'league of democratic nations', would express a 'new ideology of imperialism'.<sup>113</sup> This article's premise is that democracy's universal relevance can indeed be defended.<sup>114</sup> The question is whether it is likely to be defensible within the framework of liberal millenarianism.

That it is not is highlighted in some observations by Martti Koskenniemi.<sup>115</sup> Like Carothers, Koskenniemi warns that a universal norm of democracy will 'always be suspect as a neocolonialist strategy'. 'The nation-State and its democratic forms may not be for export as pure form', he suggests. 'They may equally well constitute a specific product of Western history, culture and, especially, economy.'<sup>116</sup> What Koskenniemi appears to have in mind here is the sort of liberal world envisioned in liberal millenarianism. He seems to confirm this when he voices the further concern that a universal norm of democracy is 'too easily used against revolutionary politics

110 Kaldor, *supra* note 105.

111 Carothers, *supra* note 3, at 264. Derrida likewise discerns the outlines of a renewed European Christian alliance. Derrida, *supra* note 24, at 60–61.

112 See, e.g., Franck 1992, at 84.

113 F. Fűredi, *The New Ideology of Imperialism* (1994). Franck and others acknowledge the concern. See, e.g., Franck 1992, at 80, 82.

114 See text at *supra* note 4.

115 Koskenniemi, *supra* note 3.

116 *Ibid.*, at 234.

that aim at the roots of the existing distributional system and it domesticates cultural and political specificity in an overall (Western) culture of moral agnosticism and rule by the market'.<sup>117</sup>

If Koskenniemi's objections are informed by the same vision of democracy as that of the commentators he criticizes, then perhaps the source of his disquiet is not democracy *per se* but that particular (liberal millenarian) vision of it.<sup>118</sup> At any rate, his objections are unlikely to be refuted by arguments appealing to such a vision. However, from this it does not follow that those objections are unlikely to be refuted by *any* arguments. The simple point which this article has sought to recall is that the vision of democracy on which Koskenniemi (in common with Franck, Slaughter and others) relies is not the only one conceivable. Defenders of democracy's universal relevance have a wide range of *alternative* democratic possibilities upon which to draw. Among these are many that are substantially more congenial to redistribution and difference, and substantially less subordinate to the market and its managers, than is liberal millenarianism.

## B. Conclusion

The thesis of the emerging norm of democratic governance, and the liberal internationalist and neo-Kantian perspectives considered here, grapple with the significance for international law of profound transformations. They call attention to important normative and institutional developments, and connect subject matters more commonly treated in isolation from one another: international law and international relations; self-determination, human rights, and electoral assistance; political theory and international law. In doing so, however, they adopt a narrow understanding of democracy, largely equating it with certain liberal institutions. Franck expresses regret that this is all customary international law will currently support.<sup>119</sup> Fox recognizes that democracy entails much more than periodic national elections, but considers that elections, being easier for international organizations to monitor than other facets of democratic life, are international law's most appropriate starting point. 'It is much more difficult', he observes, 'to stay in a country after elections, for the long haul, to monitor all institutions of government and attempt to secure key elements of democracy ... Elections ... must not end the push to a democratic society, but they are an essential first step'.<sup>120</sup>

Yet it is not self-evident either that elections are democracy's first step or that ease of monitoring by international organisations should determine international

117 *Ibid.*

118 *Ibid.* Koskenniemi appears to recognize this, inasmuch as his 'most fundamental problem' is that these international legal commentators position themselves 'as possessing a transparent view of the essential meaning of democracy...'.  
119 This is what Franck appears to suggest when defending a conception which, he acknowledges, is 'not ambitious, not unambiguous, and ... almost certainly not the one Americans would prefer'. Franck 1994, at 75.

120 Fox, *supra* note 97, at 270-71.

law's priorities. Democracy involves no necessary order of events, and difficulties of monitoring have all too frequently served in international law to make chosen priorities seem unavoidable.<sup>121</sup> This is not to suggest that periodic elections and related institutions lack value.<sup>122</sup> It is just to highlight the way democracy's further dimensions may be eclipsed. This article has sought to show that, whatever may be the constraints of the international legal system, they are not the only constraints in operation here. The scholars' liberal millenarian standpoint also plays a part in shaping the account of democracy that informs their claims.

At the same time, the theses provide powerful reasons for being concerned about this. If a norm of democratic governance indeed 'emerges', this will entail – to reiterate earlier discussion – that international law lays down criteria of governmental legitimacy, and that those criteria require democracy. It may also entail that individuals can claim a human right to democracy. The international legal scholars suggest that the norm should be enforced by making admission to, and participation in, international organizations conditional on democratic government (as is currently the case with some regional organizations). Franck proposes that financial and trade benefits and development assistance, and even the protection of UN and regional collective security measures in the event of an invasion, might likewise be made conditional on democratic government. Tesón advocates modifications of treaty and diplomatic law that would place further pressure on governments which do not meet the criteria of liberal democracy. Though Tesón alone would be prepared to sanction unilateral intervention, the other scholars appear to support collective enforcement.

Dire consequences could thus follow where legitimacy is denied. From the perspective of citizens, dire – perhaps even direr – consequences could also follow where legitimacy is accorded. This latter danger is easy to overlook. Yet if, in line with the international legal scholarship discussed in this article, liberal millenarianism shapes the criteria used, international law may find itself according legitimacy for what may in some circumstances be the most cosmetic democracy. In so doing, the law may undercut efforts to deepen democracy's purchase in the countries concerned. To the objection that any step in the direction of democracy is better than unmitigated repression, it may be replied that this is not necessarily so if the conditions upon which power is exercised remain essentially unchanged. Where international law confers on a repressive regime a legitimacy that it formerly lacked, the regime is strengthened and counter-authoritarian forces correspondingly debilitated.

According to former United Nations Secretary-General Boutros Boutros-Ghali, democracy is today an 'ideal that belongs to all humanity'.<sup>123</sup> To characterize de-

121 An example is the case of economic, social and cultural rights, and the way their relative de-emphasis is routinely linked to undeniable, but exaggerated, difficulties of monitoring and enforcement.

122 However, for an intriguing critique of the 'reality' of elections, see J. Baudrillard (P. Foss *et al.*, trans.), *In the Shadow of Silent Majorities, or The End of the Social and Other Essays* (1983).

123 'Democracy: A Newly Recognized Imperative', 1 *Global Governance* (1995) 3, 4. See further B. Boutros-Ghali, *An Agenda for Democratization* (1996).

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mocracy as an ideal is to highlight that it is an engine of criticism and change, necessarily at odds with prevailing realities. To label it as the property of all humanity is to recall, amongst other things, that its institutional complements necessarily reflect the huge diversity of social circumstances to which it is applied. Should international law seek to vindicate efforts animated by such an ideal, then a framework of ideas that posits liberal institutions as history's end scarcely seems an adequate basis on which to proceed.