

Spring 2010

Plural Vision: International Law Seen through the Varied Lenses of Domestic Implementation

D.A. Jeremy Telman

Recommended Citation

D.A. Jeremy Telman, *Plural Vision: International Law Seen through the Varied Lenses of Domestic Implementation*, 44 Val. U. L. Rev. 759 (2010).

Available at: <http://scholar.valpo.edu/vulr/vol44/iss3/1>

This Article is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.



Articles

PLURAL VISION: INTERNATIONAL LAW SEEN THROUGH THE VARIED LENSES OF DOMESTIC IMPLEMENTATION

D. A. Jeremy Telman*

The essays collected in this Issue of the Valparaiso University Law Review evolved from papers presented at a conference on “International Law in the Domestic Context” held at the Valparaiso University School of Law in April 2009. To some extent, the conference was a response to the questions raised by the United States Supreme Court’s decision in *Medellín v. Texas*¹ and our collective curiosity about how other states deal with tensions between international obligations and overlapping regimes of national law.

In *Medellín*, the Supreme Court found that Texas was entitled to ignore a ruling of the International Court of Justice (hereinafter “ICJ”) in the *Avena* case.² The Court thus permitted Texas to proceed with the execution of a Mexican national who had not been given timely notice of his right to consular notification and consultation in violation of the United States’s obligations under the Vienna Convention on Consular Relations.³ This ruling seemed to be in tension with two iconic documents setting out the relationship of international law and domestic law in the United States. First, the *Medellín* decision is hard to square with the U.S. Constitution’s Supremacy Clause, which provides that treaties shall be “supreme Law of the Land; and the Judges in every State

* Professor, Valparaiso University School of Law. The Author is grateful to: Professor Penelope Andrews for her assistance in organizing the conference at which the papers collected here were originally presented; to the Law School for its institutional support and to its staff for their invaluable logistical and organizational support; and to the Law Review editors both for their willingness to see the papers through to publication and for their efforts in achieving that goal.

¹ 128 S. Ct. 1346 (2008).

² *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31).

³ Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. no. 6820. See *id.* Art. 36(1)(b) (providing that, at the request of a foreign national criminal defendant, “the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner”). The ICJ found that the U.S. had violated its Article 36 obligations with respect to *Avena* and other Mexican nationals, including *Medellín*. See *Avena*, 2004 I.C.J. at 71–72, ¶ 153 (finding, by a vote of fourteen to one, that the United States had violated its obligations under Article 36(1) of the Vienna Convention on Consular Relations (hereinafter “VCCR”).

shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”⁴ In addition, *Medellín* seems at odds with the famous dictum from *The Paquete Habana*: “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.”⁵

Although it is tempting to conclude that *Medellín* was wrongly decided, the reality is that our constitutional tradition speaks with many voices on the subject of the relationship between domestic and international law. In order to gain a broader perspective on that relationship, we invited experts on foreign law to introduce us to the way other states attempt to reconcile international commitments and the domestic constitutional order.

Hans Kelsen’s monism offers a nifty solution to the problem of the status of international law as domestic law. Kelsen believed that there must be only one law if there is to be law at all and thus that domestic law and international law must be part of one normative system. As Kelsen explained in 1934, his “pure theory” of law recognized “that a continuous sequence of legal structures, gradually merging into one another, leads from the universal legal community of international law, encompassing all states, to the legal communities incorporated into the state.”⁶

Kelsen’s approach to the relation of international law and domestic law makes sense. If domestic law were not subordinated to international law but could trump it, states would routinely demand to be excused from their international obligations based on superior domestic law. Moreover, from Kelsen’s perspective, as a factual matter, international law is higher law than domestic law, because it is only by virtue of the recognition of state governments, as a matter of international law, that domestic law preserves its monopoly on the domestic use of force.⁷ The internationally recognized legitimacy of state government is what gives that government’s regulations the force of law rather than of naked power.

There is, however, a practical impediment to Kelsen’s monism. Even in a monist world, there must be a legal process whereby international law is operationalized as a part of domestic law. Even if we accept that

⁴ U.S. CONST. art. VI, cl. 2.

⁵ 175 U.S. 677, 700 (1900).

⁶ HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY 124 (Bonnie Litschewski Paulson & Stanley L. Paulson, trans. 1992).

⁷ See *id.* at 120 (contending that a state only has lawmaking authority because international law empowers states to make law).

international law is supreme law and should take precedence over any contrary domestic law, there must still be a mechanism assuring that supremacy. As Kelsen acknowledges, state law does not cease to be valid law just because it contradicts international law until some adjudicatory body strikes down or refuses to enforce the state law to the extent of its inconsistency with the state's international obligations.⁸ And so, even from a monist perspective, we need a mechanism for securing the orderly implementation of international law in the domestic order.

But the monist perspective is not the only perspective. In Commonwealth countries, for example, the dualist approach prevails.⁹ International law is not a part of the domestic legal order unless implemented through national legislation. It is clear from the Supremacy Clause of the U.S. Constitution that the Framers intended to break with the Commonwealth approach. Having experienced the inconveniences and embarrassments associated with having the governments of the Colonies ignore the international obligations of the national government under the Articles of Confederation, the Framers made treaties Supreme Law of the Land and specified that treaty law would trump state law and that state courts must give effect to U.S. treaty commitments.¹⁰ Customary international law has likewise been regarded as "a part of our law" since at least *The Paquete Habana*, but in the post-*Erie* world, as Gwynne Skinner explores in her contribution to this Issue,¹¹ it is very difficult to identify exactly what part of our law it is.¹²

⁸ See *id.* at 118 (noting that even an unconstitutional statute remains a valid statute until overturned by a legal act).

⁹ See Dianne Otto, *Protecting Human Rights and Countering Terrorism: Australia's Contradictory Approaches to Implementing Its International Legal Obligations*, 44 VAL. U. L. REV. 911 (2010) (noting that that Australia has adopted a dualist approach); Gib van Ert, *Dubious Dualism: The Reception of International Law in Canada*, 44 VAL. U. L. REV. 927 (2010) (noting that because English law does not repose law-making authority in the King, treaties can only become domestic law through a legislative act).

¹⁰ See D. A. Jeremy Telman, *Medellín & Originalism*, 68 MD. L. REV. 377, 414-16 (2009) (reviewing statements of the Framers regarding the purpose of the Supremacy Clause).

¹¹ See Gwynne Skinner, *Customary International Law, Federal Common Law and Federal Court Jurisdiction*, 44 VAL. U. L. REV. 825, 835 (2010).

¹² See Curtis Bradley, *et al.*, *Sosa, Customary International Law and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 874 (2007) (arguing that after *Erie*, courts can implement rules of customary international law "only in accordance with the requirements and limitations of post-*Erie* federal common law"); Curtis Bradley & Jack Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 821 (1997) (criticizing what they characterize as the "recent ascendancy" of customary international law as federal common law). The Supreme Court of the United States refused to adopt this critique of the modern position. See *Sosa v. Alvarez-Machain*, 542 U.S. 692,

762 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 44]

While our constitutional design looks remarkably monist, that design is counterbalanced by the judicially-created doctrine of self-execution, according to which treaties are only automatically a part of domestic law when they do not contemplate the need for legislative enactment.¹³ The Supreme Court's decision in *Medellín* clearly rejects any presumption that treaties are self-executing. On one reading of *Medellín*, treaties that have domestic ramifications require congressional implementing legislation, unless they make clear on their face the parties' intentions that they be non-self-executing.¹⁴

This doctrine of non-self-executing treaties may well be inconsistent with the plain, textual meaning of the Supremacy Clause, and with the express views of the Framers regarding the purpose of the Supremacy Clause. However, the monist view may be inconsistent with other aspects of the constitutional design. As others have pointed out, our Constitution reposes the legislative power in Congress.¹⁵ Permitting legislation by treaty would bypass the House of Representatives, which seems inconsistent with the constitutional design.¹⁶ Moreover, since bills that raise revenue must originate in the House of Representatives,¹⁷ it is

729 (ruling that *Erie* does not prevent federal courts from recognizing substantive rules arising out of customary international law). Justice Scalia, joined by Justice Thomas, dissented, endorsing Bradley and Goldsmith's position. See *id.* at 744 (Scalia, J., dissenting) (maintaining that federal courts have no power to recognize causes of action arising under customary international law).

¹³ See *United States v. Perchemen*, 32 U.S. 51, 88–89 (1833) (finding a treaty self-executing where it did not stipulate to the need for some future legislative act).

¹⁴ See *Medellín v. Texas*, 128 S. Ct. 1346, 1357 (2008) (requiring stipulations in the treaty itself that its provisions require no legislative enactment). See also David J. Bederman, *Medellín's New Paradigm for Treaty Interpretation*, 102 AM. J. INT'L L. 529, 529 (2008) (noting that scholarly attention regarding the *Medellín* opinion had focused on "the Court's supposed ruling as to the presumptive non-self-execution of international agreements entered into by the United States"); Julian G. Ku, *Medellín's Clear Statement Rule: A Solution for International Delegations*, 77 FORDHAM L. REV. 609, 615 (2008) (acknowledging that *Medellín* might well be criticized for "departing from existing understandings of the non-self-execution doctrine and imposing a new clear statement requirement"); Carlos Manuel Vázquez, *Less Than Zero?*, 102 AM. J. INT'L L. 563, 570 (2008) (noting several statements in the majority opinion suggesting that treaties are presumptively non-self-executing). But see Curtis A. Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 AM. J. INT'L L. 540, 541 (2008) (suggesting that *Medellín* is best understood as requiring a treaty-by-treaty approach to the question of self-execution without resort to a general presumption).

¹⁵ See U.S. CONST., art. I, § 1 (vesting all legislative powers "in a Congress of the United States").

¹⁶ See JOHN YOO, *POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* 215–49 (2005) (arguing that the constitutional design calls for the President to take the lead in formulating foreign policy, but vests domestic lawmaking power in Congress).

¹⁷ See U.S. CONST., art. I, § 7, cl. 1.

hard to see how a self-executing treaty that required expenditures could in fact be implemented without the support of both Houses of Congress. Similarly, if the United States were to sign on to an international agreement that created new international crimes, given the post-*Erie* absence of general federal common law, such crimes could not become part of our domestic law without some sort of legislative enactment.

Despite the monist overtones of the Supremacy Clause, as a product of our constitutional history, the United States has a strong dualist tradition as well. This tradition has recently been embodied in a school of thought that I will call “sovereigntist,” because its proponents regard state sovereignty as the fountainhead from which all law must derive.¹⁸ Sovereigntism, of very different types, is represented in this Issue, in the contributions of Robert Blomquist¹⁹ and Richard Stith.²⁰ For Professor Blomquist, international law poses a threat to the exercise of executive authority to conduct U.S. foreign affairs, an authority that he believes resides uniquely in the President.²¹ Professor Stith is an unusual type of sovereigntist, in that he is not particularly interested in the protection of U.S. sovereignty. His sympathies lie more with weaker states whose unique and diverse legal, social, and cultural norms are in danger of

¹⁸ See Judith Resnik, *The Internationalism of American Federalism: Missouri and Holland*, 73 MO. L. REV. 1105, 1113–14 (2008) (defining sovereigntism as “a position insistent on a nation’s right to define and delineate its own lawmaking”); Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 654 & n.16 (2002) (characterizing sovereigntism as “grounded in a general skepticism of international law and international lawmaking processes”). Leading sovereigntists include academics such as Jeremy Rabkin, Curtis Bradley, and Julian Ku, government officials such as John Bolton, and people who have served as both scholars and government officials, such as John Yoo and Jack Goldsmith. Examples of scholarship espousing a sovereigntist position include JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005); JEREMY RABKIN, *LAW WITHOUT NATIONS?* (2005); JEREMY RABKIN, *THE CASE FOR SOVEREIGNTY* (2004); JEREMY RABKIN, *WHY SOVEREIGNTY MATTERS* (1998); YOO, *supra* note 16; Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557 (2003); John R. Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT’L L. 205 (2000); Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71 (2000). As Julian Ku points out, at least some sovereigntists object to the label. See Julian Ku, *Treaties as Laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes*, 80 IND. L. J. 319, 342 n. 121 (2005) (contending that people characterized as “[s]overeigntists” are more interested in a critique of the “internationalist” conception of international law than in developing a pro-sovereignty ideology).

¹⁹ Robert Blomquist, *The Jurisprudence of American National Security Precedence*, 44 VAL. U. L. REV. 881 (2010).

²⁰ Richard Stith, *If Dorothy Hadn’t Had Toto to Pull Back the Wizard’s Curtain: The Fabrication of Human Rights as a World Religion*, 44 VAL. U. L. REV. 847 (2010).

²¹ See Blomquist, *supra* note 19, at 888 (arguing that courts should grant the President “wide latitude” in reconciling national security and liberty).

being subsumed within the homogeneity of the new “world religion,” international human rights law.²²

Initially it seems, supporters of national sovereignty and independence should have no strong objection to the supremacy of international law, since international law is based on consent, at least in theory.²³ In reality, there are elements of international law that do not conform to the theory, including *jus cogens* norms,²⁴ customary norms when applied to new states that did not exist at the time of the norms’ formation,²⁵ and new international criminal tribunals that could exercise jurisdiction over the nationals of states that have not consented to such jurisdiction.²⁶ As Professor Stith’s paper highlights, international norms and institutions sometimes purport to be law whether or not they are endowed with the indicia of legitimacy identified by Thomas Franck—right process and substantive fairness.²⁷ Moreover, they might exercise an imbalanced compliance pull²⁸ on states powerless to resist the powerful states that stand behind international legal norms (and international economic assistance programs) while permitting themselves to ignore such norms when they prove inconvenient.²⁹

Given the tensions in our constitutional design, it is not surprising that the domestic implementation of international obligations gives rise to certain difficulties. However, as the papers in this Issue indicate, in its

²² See Stith, *supra* note 20, at 850 (characterizing international human rights law as a new world religion in which forces of international domination are met on the domestic side—at least in weaker states only by forces of surrender); *id.* (sympathetically citing a newspaper ad denouncing the World Trade Organization for working to “undermine the constitutional rights of sovereign nations”).

²³ See Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT’L L. 115, 141 (2005) (“It is commonly observed that international law cannot bind states without their consent, and notions of consent are often said to be the basis for [customary international law].”).

²⁴ See Laurence R. Hilfer, *Nonconsensual International Lawmaking*, 2008 U. ILL. L. REV. 71, 89 (2008) (noting that when international adjudicatory bodies recognize the peremptory status of legal norms, they do not require evidence of state consent before finding states bound).

²⁵ Guzman, *supra* note 23, at 172–74 (offering a rational choice model to permit new states to object to customary international law rules at the time of the states’ formation).

²⁶ Rome Statute of the International Criminal Court, art. 12 (1998), 37 ILM 999.

²⁷ See THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 7–8 (1996) (arguing that the legitimacy of legal rules turns on the processes through which they are adopted and on the rules’ substantive fairness from the perspective of distributive justice).

²⁸ “[C]ompliance pull” is Thomas Franck’s name for the “inherent pull power” toward compliance that legal norms exercise and which Franck views as an “index of legitimacy.” Thomas M. Franck, *Legitimacy in the International System*, 72 AM. J. INT’L L. 705, 712 (1998).

²⁹ See Stith, *supra* note 20, at 847–48 (contrasting U.S. dualism and superpower status that preserves a democratic choice that is unavailable in countries such as Argentina and Mexico where international law is directly effective and supreme).

struggles with this particular legal and conceptual difficulty, the United States is, for once, anything but exceptional. Nonetheless, there are aspects of the law of the United States that are at least idiosyncratic. This Issue sheds new light on those idiosyncrasies while also exploring the difficulties of reconciling international obligations and the domestic legal order.

The essays collected here were presented in three separate panels during the conference. The organization of the volume follows the same organizational principle. The first three papers thus focus on questions relating to the implementation of international human rights as domestic law. The two papers that follow address issues relating to international obligations and national security law. The final section, which comprises four papers, provides a comparative perspective on how international law is introduced into the domestic legal systems of Australia, Canada, China, and the United Kingdom.

*
* *
*

The first three papers address the difficulties that the United States and other countries face in the implementation of human rights law as domestic law. One hurdle to U.S. participation in international legal regimes is our federalism, because as *Medellín* illustrates, the federal government cannot always compel the states to abide by international obligations taken on by the federal government.³⁰ Paul Finkelman's paper reminds us that in the ante-bellum period, "American states treated each other as 'foreign entities'" and "often refused to recognize and give comity to the laws of other states."³¹ Moreover, Professor Finkelman cites to both the Alien Tort Statute³² and to the frequent citation to foreign law in early U.S. cases as evidence that international and foreign law have always been a part of our law.³³

But Professor Finkelman's more surprising argument is that in the ante-bellum period, the several states regarded the laws of other U.S. states no differently from the way they regarded the law of foreign

³⁰ See *Medellín v. Texas*, 128 S.Ct. 1346, 1356 (2008) (finding that because none of the treaties at issue in *Medellín* create binding federal law in the absence of implementing legislation and that no such legislation exists and that decisions by the International Court of Justice do not create binding federal law that could overcome the state bar to successive habeas petitions, Texas may proceed with the execution of *Medellín* notwithstanding the fact that such an execution would place the United States in violation of its international obligations).

³¹ Paul Finkelman, *When International Law Was a Domestic Problem*, 44 VAL. U. L. REV. 779 (2010).

³² 28 U.S.C. § 1350 (2006).

³³ Finkelman, *supra* note 31, at 779-80.

states. In that context, the Supreme Court of the United States often resorted to international law concepts to settle conflicts among states or between citizens of separate states.³⁴ Professor Finkelman's contribution also illustrates how race was often at the center of the development of U.S. doctrines relating to inter-state comity and choice of law.

The United States' unique Alien Tort Statute is another ingredient of U.S. law that renders idiosyncratic the U.S. approach to the problem of international law as a part of the domestic order. The Alien Tort Statute has been at the center of litigation that has attempted—through the disorderly and *ad hoc* process that is the stuff of common law adjudication—to specify the status of customary international law within our domestic legal order.³⁵ As Professor Skinner points out, scholars are divided into two camps—the modernist and revisionist positions—on the issue.³⁶

Professor Skinner intervenes forcefully in this debate with an essay that consults eighteenth and nineteenth century sources of law. Pinpointing the status of customary international law turns out to be a difficult task because, although the Supreme Court has stated that U.S. law “recognized” what then was called the “law of nations” at the time of the Founding,³⁷ it was not recognized as part of general federal common law at the time because that body of law did not emerge until later in the nineteenth century.³⁸ While Professor Skinner notes that there are strong arguments on both sides of the academic debate regarding whether customary international law was part of the law of the United States for the purposes of Article III of the Constitution, she concludes that the contemporary disagreement reflects similar disagreements that raged throughout the eighteenth and nineteenth centuries. In fact, she argues that the debate over the status of customary international law was a product of larger debates regarding the

³⁴ *Id.* at 783–84.

³⁵ *See, e.g.,* *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (addressing Alien Tort Statute claim brought by a Mexican national alleging unlawful detention in Mexico by a Mexican national); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (rejecting an Alien Tort Statute claim by survivors of a terror attack perpetrated by foreign nationals in Israel); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (recognizing Alien Tort Statute claim brought by a Paraguayan national whose brother had been tortured and killed by Paraguayan police).

³⁶ *See* Skinner, *supra* note 11, at 829–30 (identifying modernists as those who believe that federal law incorporates customary international law either in whole or in part and revisionists as those who believe that, post-*Erie*, federal incorporation of custom requires a legislative act).

³⁷ *Sosa*, 542 U.S. at 725.

³⁸ Skinner, *supra* note 11, at 832.

relationship of the federal government and the states within our federal system.³⁹

Professor Skinner nonetheless argues that customary international law, or at least some aspects of it, is included in the “‘laws of the United States’” for the purposes of creating federal jurisdiction under Article III of the U.S. Constitution and that 28 U.S.C. § 1331 also grants federal courts jurisdiction over federal common law doctrines that incorporate or recognize customary international law.⁴⁰ She thus navigates a middle ground between the modern and revisionist positions on the status of customary international law as “part of our law,” arguing that only customary rules “recognized” under general federal common law can give rise to claims in federal courts.⁴¹

While these first two contributions focus on the domestic mechanisms, such as constitutional principles, comity, or the Alien Tort Statute, for recognizing international human rights law or humanitarian principles as part of our law, Professor Stith’s paper introduces a stirring antidote to what might be described as international human rights law triumphalism. Compared with developing nations forced to surrender to the new prophets of the new world religion, as Professor Stith describes them, the United States is rather well-defended when it comes to resisting the universalizing impulses of international law. Hence, the original panel’s concern with how best to implement international human rights law in the domestic context evidences an “American parochialism.”⁴² Professor Stith suggests that resistance to universal human rights may be a necessary means of preserving a fruitful and blessed diversity, not only in the U.S., but globally.

Professor Stith problematizes the international human rights movement on a number of levels, but his most sweeping argument is that rights are, by their very nature, anti-democratic.⁴³ But Professor Stith’s real concern is with positive rights; that is, rights that the state has a positive duty to protect, as opposed to negative rights, which require only that the state leave us alone.⁴⁴ The problems that Professor Stith identifies are best represented in General Comment 15 on the right to water, which the Committee on Economic, Social, and Cultural Rights promulgated in 2002.⁴⁵ Professor Stith characterizes the Committee as a

³⁹ *Id.* at 833.

⁴⁰ *Id.* at 839–41.

⁴¹ *Id.* at 844–46.

⁴² Stith, *supra* note 20, at 847.

⁴³ *Id.* at 850.

⁴⁴ *Id.* at 856–57.

⁴⁵ EC.12/2002/11, 20 Jan. 2003, available at [http://www.unhcr.ch/tbs/doc.nsf/0/a5458d1d1bbd713fc1256cc400389e94/\\$FILE/G0340229.pdf](http://www.unhcr.ch/tbs/doc.nsf/0/a5458d1d1bbd713fc1256cc400389e94/$FILE/G0340229.pdf) (last visited Oct. 1, 2009).

non-representative body of non-lawyers that has promulgated a document that seeks through legal language to bind states to protect a positive right to water that is not expressly mentioned in any international agreement. The Committee's Comment is effective, says Professor Stith, not because it is backed up by the threat of force but because it is "backed up with guilt and shame for those who refuse to comply."⁴⁶ For Professor Stith, the oracular quality of the pronouncements of international bodies creates dynamics more akin to religious than to legal discourse.⁴⁷

Professor Stith raises significant and familiar objections relating to international law's notorious "democracy deficit."⁴⁸ In considering how to address those objections, it is important to note, especially in the context of a volume on the domestic implementation of international law that those who decry the democracy deficit in international law greatly exaggerate the extent to which international law is distinct from domestic law in this respect.

At least within the United States, people regard international law with suspicion for the same reason they are wary of (or think they are wary of) activist judges. They think of courts and of international law as elite (or at least non-populist), unaccountable because unelected (although state courts now are largely elected by people who have no idea who they are voting for), and alien. International law is alien for obvious reasons; courts are alien because they use a technical jargon and decide cases on grounds other than the merits that are completely opaque to the non-lawyer.

In fact, however, our supposedly democratically accountable branches of government are not much more so than are courts. As far as our House of Representatives is concerned (the so-called "People's House"), because of gerrymandering, it is far more accurate to say that our politicians choose their constituents than the other way 'round.⁴⁹

⁴⁶ Stith, *supra* note 20, at 857.

⁴⁷ Dianne Otto points out that, at least in Australia, international attempts at shaming the government into adopting human rights protections through domestic measures have fallen on deaf ears. Otto, *supra* note 9, at 916.

⁴⁸ Stith, *supra* note 20, at 851 n.10.

⁴⁹ See Reelection Rates of Incumbents in the U. S. House By Congress and by State, <http://www.thirty-thousand.org/documents/QHA-08.pdf> (last visited March 20, 2009) (finding that rates of return in the House of Representatives easily exceed 90% for members who seek re-election); Richard L. Hall, *Equalizing Expenditures in Congressional Campaigns: A Proposal*, 6 ELECTION L.J. 145, 148 (2007) (noting that even in 2006, a year of dramatic party reversal, 94% of Senators and House Members who sought re-election won). On the use of political gerrymandering to protect incumbents or to deprive incumbents of their safe seats, see generally Jeffrey Toobin, *The Great Election Grab: When does gerrymandering become a threat to democracy?*, THE NEW YORKER (Dec. 8, 2003).

And once they have chosen their districts, members of the House have to devote much of their two-year terms to securing re-election rather than to legislating.⁵⁰ Things are better in the Senate, but only by degree, not by an order of magnitude, and their six-year terms render Senators only slightly more accountable than judges.⁵¹ Presidents may of course be turned out of office, but they are never turned out of office for one bad decision in particular, while judges are often vilified for upholding laws that passed unnoticed when enacted by a legislature.⁵² In any case, the real power is not in passing legislation but in drafting it, and for the most part the people who do so are either unelected and unaccountable specialists within the executive branch, unelected and unaccountable legislative aids, or unelected and unaccountable lobbyists.

There is no doubt that international law faces challenges not only of democracy deficit but also of transparency. But here again, international institutions are not qualitatively different from national institutions. Because of the well-documented tendency of the executive branch to expand the scope of classified documents, there has been a huge increase in the portion of our executive branch that is completely inaccessible to the voting public.⁵³ A much larger portion of it is technically accessible but in reality just as hidden because keeping tabs on specialized executive agencies is more than a full-time job. Legislatures are no better of course, as they routinely pass important legislation without reading

⁵⁰ See Peter Francia & Paul Herrnson, *The Impact of Public Finance Laws on Fundraising in State Legislative Elections*, 31 AM. POL. RES. 520, 531 (2003) (finding that Members of Congress spend on average 34% of their time in office raising funds for re-election). STEVEN S. SMITH, *ET AL.*, THE AMERICAN CONGRESS 7 (4th ed. 2005) (estimating that the average Representative raises \$10,000 per week over a two-year term and that the average Senator raises \$22,000 per week over a six-year term); Thomas M. Susman, *Lobbying in the 21st Century—Reciprocity and the Need for Reform*, 58 ADMIN. L. REV. 737, 744 (2006) (observing that most Members of Congress therefore spend most of their time raising money).

⁵¹ Compare Judith Resnik, *So Long*, LEGAL AFFAIRS 20, 21 (July/August 2005) (finding that the average tenure in office for federal judges who have retired in the last two decades has been about twenty-four years), with ROGER H. DAVIDSON, *ET AL.*, CONGRESS AND ITS MEMBERS (2008) (finding that the average tenure in office for Senators is approaching sixteen years).

⁵² E.g., *Kelo v. City of New London*, 545 U.S. 469 (2005) (upholding a law that had passed unnoticed when enacted by the legislature).

⁵³ According to the National Archives' Information Security Oversight Office, which is empowered pursuant to 32 C.F.R. § 2001 (2010) to collect yearly statistics on classification and declassification of materials from any agency "that creates or handles classified information," the number of classified documents increased from 8.65 million in 2001 to 23.1 million in 2007. See Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 133–34 (2006) (noting that government officials frequently admit that far more material is declared "classified" than is really necessary for national security purposes).

it.⁵⁴ This is inevitably true because of the sheer length of omnibus legislation and because of the byzantine amendment process that inevitably causes bills to morph and grow on their way to adoption.

Compared with our domestic political institutions international bodies may have a tremendous discursive advantage. Their deliberations may be private, at least in part, but there is always significant opportunity for public comment and criticism, and the reasoning underlying statements of international adjudicatory or treaty bodies, warts and all, is presented in public documents that are subject to criticism and resistance.

Thus, expanding on Professor Stith's critique of rights and of international human rights, we might pose the same sorts of questions with respect to the domestic legal order. Domestic courts might very well view the Alien Tort Statute, that "legal Lohengrin"⁵⁵ with the same sort of suspicion which we ordinarily reserve for foreign and international law. While we are at it, we can look at other domestic institutions that touch on human rights and that are neither constitutional nor democratic in nature, such as: Presidential signing statements, which can gut legislation seeking to force the executive to abide by international human rights instruments; the *Totten* doctrine and the state secrets privilege, which can shield the executive from liability even for constitutional violations provable through publicly-available evidence; sole executive and legislative-executive agreements, which account for over 90% of the United States' international agreements and skirt the Senate's constitutional treaty powers; and the reservations, understandings, and declarations that the Senate attaches to the rare treaty submitted for its advice and consent.

*

* * *

Our second set of essays address foreign affairs and national security concerns, and there we begin with a return to the subject of federalism, as explored in Michael Granne's essay.⁵⁶ One of the interesting oddities of the *Medellin* case, to which I alluded earlier, is that it could be read as requiring the acquiescence of the federal government, represented strenuously by the executive branch, in a foreign policy decision made

⁵⁴ See Ittai Bar-Siman Tov, *Legislative Supremacy in the United States?: Rethinking the 'Enrolled Bill' Doctrine*, 97 GEO. L.J. 323, 338-39 (2009) (reporting that omnibus legislation is "often passed by Congress via all-night sessions under tight deadlines, without any notice or time for members to read or understand them").

⁵⁵ See *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (calling the Alien Tort Statute a legal Lohengrin because nobody knows "whence it came").

⁵⁶ Michael Aaron Granne, *Two-Dimensional Federalism and Foreign Affairs Preemption*, 44 VAL. U. L. REV. 863 (2010).

by a state court in Texas.⁵⁷ Professor Granne notes that *Medellín* is just one in a long line of cases in which the courts have wrestled with the question of foreign affairs preemption. In Professor Granne's view, the courts have not articulated a principled approach to preemption in this area and the resulting case law does not appear to be internally consistent.

Professor Granne argues that courts' approaches have seemed incoherent because courts fail to adequately appreciate that conflicts between state and federal interests in foreign affairs can be understood as inhabiting three different paradigms, each of which requires a different approach to the weighing of the state and federal interests implicated. The first paradigm, for which *Zschernig v. Miller*⁵⁸ is emblematic, is often called "dormant foreign affairs preemption," in which federal law automatically displaces any state law that interferes with foreign affairs powers entrusted to the federal government alone.⁵⁹ Second, we have what Professor Granne calls "obstacle preemption." This arises when state action presents an obstacle to the accomplishment of congressional goals. The emblematic cases illustrating this paradigm are *Crosby v. National Foreign Trade Council*,⁶⁰ in which the Supreme Court struck down a Massachusetts law that was at odds with congressional sanctions against the state of Burma (Myanmar), and *American Insurance Association v. Garamendi*,⁶¹ in which the Supreme Court struck down California's Holocaust Victim Insurance Relief Act.⁶² Finally, there may be cases where a congressional statement of intent to preempt state law could be required.⁶³

Professor Granne applies recent scholarship differentiating between vertical and horizontal federalism in order to provide a more coherent basis for foreign affairs preemption. Vertical federalism describes situations when federal uniformity concerns justify permitting federal law to trump state law. Horizontal federalism describes situations in which there is a need to coordinate state activities, as in the area of environmental protection. While foreign affairs might seem like a classic case for vertical federalism, Professor Granne argues that elements of

⁵⁷ Telman, *supra* note 10, at 385 (noting that the *Medellín* majority permitted a state court in Texas to determine U.S. foreign policy over the strong objections of the executive branch).

⁵⁸ 389 U.S. 429 (1968).

⁵⁹ Granne, *supra* note 56, at 866.

⁶⁰ 530 U.S. 363 (2000).

⁶¹ 537 U.S. 1100 (2003).

⁶² Granne, *supra* note 56, at 868.

⁶³ *Id.* at 868-69.

horizontal federalism also ought to inform our foreign affairs preemption doctrine.⁶⁴

Some state actions implicate foreign affairs but do not create any significant tensions with federal control of foreign affairs. Examples of such state actions include cultural and educational exchanges and trade agreements between individual states and foreign nations. With respect to this category, Professor Granne's model would require federal preemption only when specifically called for by federal statute or treaty.⁶⁵ The second category is state policies, such as "Buy American Statutes," which give rise to non-trivial interference with federal uniformity concerns in the area of free trade. Here, Professor Granne argues, the obstacle preemption approach is appropriate.⁶⁶ Finally, there are state statutes that single out some foreign government for sanction. These statutes implicate both the uniformity concerns associated with vertical federalism and the coordination problems associated with horizontal federalism. To such cases, Professor Granne argues, the dormant foreign affairs preemption approach is best suited.⁶⁷ Professor Granne's paper thus offers an elegant solution that makes sense of a confusing tangle of related cases.

The thread that unites our two papers that address national security issues is the question of the role of courts in adjudicating disputes relating to foreign affairs. While Professor Granne develops a nuanced preemption doctrine that recognizes the competing interests of the several states and the branches of the federal government, Professor Blomquist focuses on the institutional competence of the executive branch and thus argues for judicial deference to the foreign affairs powers of the President, whom he characterizes as "the national security sentinel with vast, but not unlimited, powers to protect the Nation from hostile, potentially catastrophic, threats."⁶⁸ Because of the President's vastly superior store of knowledge and expertise, Professor Blomquist argues that courts should not question executive national security decisions "unless clearly necessary to counterbalance an indubitable violation of the text of the Constitution."⁶⁹ Professor Blomquist also stakes out a position against the use of foreign law as legal precedent, especially when a U.S. court is reviewing the executive's determinations

⁶⁴ *Id.* at 869.

⁶⁵ *Id.* at 876-80.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Blomquist, *supra* note 19, at 885.

⁶⁹ *Id.*

relating to national security, a field for which Professor Blomquist has created a handy term, “presiprudence.”⁷⁰

Professor Blomquist’s position, opposing the use of foreign law, is uncontroversial, and in fact Professor Blomquist cites to no case in which a U.S. court has ever relied on foreign law as precedent.⁷¹ The consequences of his position on presiprudence with respect to international law are, by contrast, potentially explosive. For example, Professor Blomquist follows Eric Posner and Adrian Vermeule, who argue that the United States should only abide by its international obligations under the laws of war when the U.S. benefits from such compliance, taking into account the possible reputational costs of non-compliance.⁷² This position clearly informed the Department of Justice during the George W. Bush administration, but it was rejected by that administration’s Department of State.⁷³ This conflict between two agencies within the same executive branch complicates the logic of presiprudence and also, as I have argued elsewhere,⁷⁴ renders dubious the executive branch’s claims to superior expertise in matters of foreign affairs. If the President chooses the opinions of his highly politicized and in part non-expert Office of Legal Counsel over those of his highly professionalized legal advisors within the Department of State on matters of international law, the executive branch must abandon its argument that courts should defer to the executive branch’s superior expertise.

*

* *

Our final set of papers introduces us to the dynamic regarding the implementation of international law as domestic law in Australia, the United Kingdom, Canada, and China. In those countries, as here, the

⁷⁰ Robert F. Blomquist, *American National Security Presiprudence*, 26 QUINNIPIAC L. REV. 439 (2008).

⁷¹ See Blomquist, *supra* note 19, at 892 n.55 (citing only a hypothetical reliance by federal judges on foreign law as precedent).

⁷² *Id.* at 889.

⁷³ Compare John C. Yoo & Robert J. Delahunty, Memorandum for William J. Haynes II, 11-42 (Jan. 9, 2002) (arguing that the President is not bound either by treaty law or by customary international law with respect to the conduct of the War on Terror in Afghanistan), available at <http://www.torturingdemocracy.org/documents/20020109.pdf> (last visited Oct. 3, 2009), with William H. Taft IV, Memorandum to John C. Yoo, 1 (Jan. 11, 2002) (arguing that “[i]nternal law does not support key conclusions” in the Yoo/Delahunty memorandum).

⁷⁴ See D. A. Jeremy Telman, *The Foreign Affairs Power: Does the Constitution Matter?* 80 TEMP. L. REV. 245, 277-78 (2007) (pointing out that the same argument, made by John Yoo, is hard to square with Yoo’s career in the Justice Department, in which he frequently and successfully persuaded the White House to ignore expert advice coming from the Department of State).

picture is more complicated than the simple choice of monism or dualism might suggest. But these cases contain insights into foreign practices that provide useful perspectives on our own. For example, the first contribution in this final set of four, from Jim Kennan,⁷⁵ includes a discussion of judicial views of deference to the executive branch in national security cases, that provides a startling contrast to the position set out in Professor Blomquist's essay.

Mr. Kennan's discussion of the case law from the United Kingdom culminates with some excerpts on the subject of deference to executive authority from the *Belmarsh* case, which was decided in the House of Lords in 2004.⁷⁶ In rejecting sweeping claims to executive expertise in national security matters, the Law Lords referenced the skepticism "which has attached to intelligence assessments since the fiasco over Iraqi weapons of mass destruction," and suggested that such faulty assessments were to blame for the participation of the military forces of the United Kingdom in Iraq.⁷⁷ They also declared that terrorism, while "hideous" and "serious," does not pose an existential threat. Rather, the threat arises from our own responses to terror.⁷⁸ Indian courts echo this view that courts must protect human rights even in times of national crisis.⁷⁹ The Kantian dictum, *fiat justitia ruat caelum*, seems to have retained much of its original force.

Turning to his native Australia, Jim Kennan notes that Australia has no constitutional protections of individual rights akin to our Bill of Rights, nor does it automatically incorporate international human rights obligations into domestic law. Rather, Australia seems to have a canon of interpretation much like our own, that statutes should be construed to be consistent with international obligations absent a clear statement to the contrary.⁸⁰ But unlike the United Kingdom, Australia is reluctant to address human rights concerns on any basis other than the common law.⁸¹ Mr. Kennan's conclusion is clear: the English approach is preferable.⁸² But his essay holds out hope for human rights in Australia. It is to be found not in the common law, nor in the customary law of

⁷⁵ Jim Kennan, *The Role of International Human Rights Law in Australian Law*, 44 VAL. U. L. REV. 895 (2010).

⁷⁶ *Id.* at 903-07.

⁷⁷ *Id.* at 906.

⁷⁸ *Id.*

⁷⁹ *Id.* at 907.

⁸⁰ *Id.* at 895-96; see also *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . .").

⁸¹ Kennan, *supra* note 75, at 896-903.

⁸² *Id.* at 908-09.

nations but in the common sense of Australian jurors willing “to stand back from the war on terror rhetoric which has so dominated public discussion since 2001.”⁸³

Dianne Otto’s piece picks up where Jim Kennan’s left off, acknowledging Australia’s insistence on protecting human rights only through domestic enactments. But she then picks up on some of the themes of Richard Stith’s paper, although in a completely different register, expressing concern that Security Council resolutions aimed at countering international terrorism might give rise to a new hegemonic international law.⁸⁴ Professor Otto tells what for U.S. lawyers is a fairly familiar narrative in which national pride in one’s own domestic protections of civil rights, coupled with distrust of judicial processes forms the basis for opposition to the implementation of international treaty obligations.⁸⁵ In fact, Professor Otto suggests that the response of the conservative Howard government to criticisms of its human rights record was “reminiscent of the United States’ exceptionalist claims.”⁸⁶

However, Professor Otto notes the contrast between Australia’s reluctance to implement international human rights protections and its “eagerness to implement its international legal obligations” relating to post-9/11 Security Council resolutions, especially Resolution 1373.⁸⁷ This resolution was remarkable for the swiftness with which it was adopted and for its sweeping nature. Unlike previous Security Council resolutions, Resolution 1373 does not call for temporary measures addressing a specific threat to international peace and security. Unfortunately, despite its legislative quality, Resolution 1373 bears “the opaqueness and exclusivity” that are the hallmark of executive enactments and of the Security Council’s protocols more generally.⁸⁸ Pursuant to Resolution 1373, Australia enacted legislation creating enhanced police and surveillance powers modeled on the USA Patriot Act of 2001.⁸⁹ This is international law-making at its most muscular, and it is undertaken by a body that Professor Otto describes as “patently unrepresentative, un-consultative, and lacking in transparency and accountability.”⁹⁰

Despite her disappointment with Australia’s record on human rights and its willingness to toe the line when it comes to Security Council

⁸³ *Id.* at 909.

⁸⁴ Otto, *supra* note 9, at 911-12.

⁸⁵ *Id.* at 912-13.

⁸⁶ *Id.* at 916.

⁸⁷ *Id.* at 919.

⁸⁸ *Id.* at 920.

⁸⁹ *Id.* at 923.

⁹⁰ *Id.*

directives on national security issues, Professor Otto concludes by stressing the need for all states to recognize the universality of human rights.⁹¹ The problem is not that international law is brought into the domestic process but that this occurs through hegemonic law rather than through what she calls the “participatory international law-making processes” involving both states and civil society.⁹²

Gib van Ert’s contribution to this Issue begins with a simple syllogism: under Canadian law, only the executive can make treaties and the executive cannot make law; therefore, treaties are not law.⁹³ In principle, Canadian law does not suffer from the ambiguities that led to the *Medellin* case: all treaties require legislative implementation in order to be part of the Canadian domestic legal order.⁹⁴ But Canada is not a pure dualist system; it too is a hybrid in which customary international law is directly incorporated into common law and in which judicial interpretation can give direct effect to treaties as well.⁹⁵ In addition, in developing and interpreting domestic human rights norms, Canadian attorneys and courts are free to refer to—and even to rely on—legal norms that arise in foreign and international contexts.⁹⁶ Moreover, Canadian courts would appear to be even less deferential to executive interpretations of international and treaty law than are their counterparts in the United Kingdom.⁹⁷

Mr. van Ert’s discussion of Canada’s incorporation doctrine, whereby rules of customary international law are directly incorporated into domestic law, is especially instructive. Based on the academic uproar about the modernist and revisionist positions discussed above,⁹⁸ one would think that opportunities to give direct effect to international custom arise all the time. As Mr. van Ert notes, they almost never arise, because: (1) customary rules generally govern state behavior and thus rarely have relevance to domestic legal issues; and (2) it is very difficult to prove that a rule of custom exists.⁹⁹ Were it not for the Alien Tort Statute, U.S. courts likely would have little reason to ponder the status of customary international law as part of our law.

Equally instructive is Mr. van Ert’s discussion of the Canadian approach to treaties. Because Canadian courts presume that legislation

⁹¹ *Id.* at 924.

⁹² *Id.* at 925.

⁹³ van Ert, *supra* note 9, at 927.

⁹⁴ *Id.* at 927–28.

⁹⁵ *Id.*

⁹⁶ *Id.* at 929.

⁹⁷ *Id.* at 930.

⁹⁸ See *supra* text accompanying notes 35–41.

⁹⁹ van Ert, *supra* note 9, at 931.

was intended to conform to Canada's international obligations, absent evidence of "unequivocal legislative intent to default," statutes are interpreted with the aid of treaty law.¹⁰⁰ As a result, despite its seemingly pure dualism, Canada arrives at a position not unlike that of the United States' "last in time" doctrine, in which subsequent legislation trumps treaty obligations only if the two cannot be reconciled. A statute is thus interpreted so as to place the United States in violation of its treaty obligations only if Congress, in enacting the statute, expressed its clear and unequivocal desire to do so.¹⁰¹

In the final essay in our collection, Zou Keyuan provides a sweeping history of the status of international law in China, the only non-common-law country addressed in this Issue.¹⁰² Of the countries surveyed, China seems to be closest to the monist model, since Chinese law provides that China's international obligations supersede any contrary domestic law.¹⁰³ However, Chinese scholars view the Chinese approach as a modified form of dualism, which acknowledges the separate existence of the two types of law and does not establish a hierarchical relationship between them.¹⁰⁴ Regardless how one characterizes the Chinese approach on a theoretical level, Chinese practice, as described by Professor Zou, is exemplary. When China takes on a new international obligation, it implements that obligation through legislation, and it alters existing laws and regulations to bring domestic law into conformity with the new international standard.¹⁰⁵ And, as do courts in the U.S. and Canada, Chinese courts interpret statutes wherever possible so as to reconcile domestic and international law.¹⁰⁶

However, when it comes to the implementation of human rights norms, China's practice is less exemplary. Professor Zou's extended discussion of the Chinese practice of re-education through labor (hereinafter "RTL") illustrates one area in which China's domestic policies are not in conformity with international standards. China's RTL policies do not place it in violation of any treaties that it has ratified, but they are inconsistent, says Professor Zou, with China's having signed

¹⁰⁰ van Ert, *supra* note 9, at 932.

¹⁰¹ See *United States v. Palestine Liberation Org.*, 695 F. Supp. 1456, 1465 (S.D.N.Y. 1988) (finding that courts are "under a duty to interpret statutes in a manner consonant with existing treaty obligations," unless Congress had "clearly and unequivocally exercised" its power to abrogate the United States's international obligations).

¹⁰² Zou Keyuan, *International Law in the Chinese Domestic Context*, 44 VAL. U. L. REV. 935 (2010).

¹⁰³ See *id.* at 938 (noting that under China's Civil Law, if China ratifies a treaty that is inconsistent with domestic law, the international legal rules govern).

¹⁰⁴ *Id.* at 937-38.

¹⁰⁵ *Id.* at 937-39.

¹⁰⁶ *Id.* at 938-40.

(but not yet ratified) the International Covenant on Civil and Political Rights and with non-binding human rights declarations to which China is a party.¹⁰⁷

The role of courts in implementing international law in the domestic context in China is equally unclear. Professor Zou reports that they have had occasion to do so only rarely and their practice has been inconsistent. While some courts have applied international law in certain commercial and maritime contexts, there is some authority for the position that international human rights treaties may not be given direct effect under Chinese law.¹⁰⁸

*
* *
*

I began this introductory essay with a discussion of the monist and dualist approaches to the question of the incorporation of international law as domestic law. In this area, as in so many areas, the Holmesian dictum applies: the life of the law has been not logic but experience.¹⁰⁹ Programmatic statements in founding documents or in law review articles will not determine the status of international law in the domestic context. It is to be worked out through the various legal histories of each state. As each state grapples to reconcile its national legal traditions with its international obligations, it is worthwhile to pause and consider the experiences of others. It is our hope that this Issue contributes to that process.

¹⁰⁷ *Id.* at 946–50.

¹⁰⁸ *Id.* at 950–56.

¹⁰⁹ See OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1881) (“The life of the law has not been logic: it has been experience.”).