

**AMERICAN EXCEPTIONALISM, EXEMPTIONALISM  
AND GLOBAL GOVERNANCE**

by  
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in  
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**AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS**  
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More than any other country, the United States was responsible for creating the post-World War II system of global governance. But from the start, that historic mission exhibited the conflicting effects of two very different forms of American exceptionalism. For Franklin Roosevelt, the key challenge was to overcome the isolationist legacy of the 1930s and to ensure sustained U.S. engagement in achieving and maintaining a stable international order. Old world power-political reasoning in support of that mission held little allure for the American people – protected by two oceans, with friendly and weaker neighbors to the North and South, and pulled unwillingly into two costly world wars by that system’s breakdown. So Roosevelt framed his plans for winning the peace in a broader vision that tapped into America’s own sense of self as a nation: the promise of an international order based on rules and institutions promoting human betterment through free trade and American-led collective security, human rights and decolonization, as well as active international involvement by the private and voluntary sectors. For Roosevelt’s successors, prevailing against the Soviet threat reinforced the mission and in many respects made it easier to achieve. This first form of American exceptionalism – the need for an animating vision beyond the dictates of balance-of-power politics – became the basis for an international transformational agenda whose effects are unfolding still.<sup>1</sup>

Yet from the outset the United States also sought to insulate itself from the domestic blowback of certain of these developments. This, too, has been justified on the grounds of American exceptionalism: a perceived need to safeguard the special features and protections of the U.S. constitution from external interference. And it also taps into a core element of American identity: ours is a civic nationalism, defined by the institutions and practices that bind us, not by blood and soil, and none is more foundational than the

constitution itself. While the executive branch traditionally drove the international transformational agenda, the “exemptionalist” resistance has been anchored in Congress. It has been most pronounced and consequential in the area of human rights and related social issues, where it typically has been framed in terms of protecting states rights against federal treaty-based incursions. In drafting the United Nations charter, for example, the U.S. delegation introduced language “reaffirming faith” in fundamental human rights. But because the support of Southern Democrats was critical to the charter’s ratification by the Senate, keeping Jim Crow laws beyond international scrutiny obliged the U.S. to balance that reaffirmation by adding what became Article 2.7: that “nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.”<sup>2</sup> Reacting strongly against U.S.-initiated negotiations of several UN human rights instruments, beginning with the genocide convention, the Senate nearly adopted a constitutional amendment in 1954 – the Bricker amendment – that would have eviscerated the president’s formal treaty-making powers.<sup>3</sup> That same political constituency historically has resisted all forms of international jurisdiction and has led Congressional opposition to the UN.

During the cold war, presidents from Harry Truman to Ronald Reagan sought to minimize the international embarrassment resulting from the exemptionalist impulse, especially in relation to civil rights, often acting through executive agreements or other such means.<sup>4</sup> Starting in the 1990s, the escalating wave of globalization and the end of the cold war’s disciplining effects have produced a broader resurgence of opposition to global governance among parts of the American political elite. Scholarship on the role of international law in domestic courts has been consumed by what Harold Koh calls the

transnationalist vs. nationalist debate, in which the latter appears to have seized the intellectual offensive.<sup>5</sup> A “new sovereigntist” movement has shaped corresponding Beltway policy debates.<sup>6</sup> The Senate rejected the Comprehensive Test Ban Treaty and robust international inspections of chemical and biological weapons production – in the latter two cases raising the constitutional specter of unreasonable searches. A straw poll in that chamber made it abundantly clear that the Kyoto protocol would be dead on arrival. President Clinton did not dare submit the statute of the International Criminal Court (ICC) for ratification knowing that it stood accused of giving away Americans’ constitutional due process protections and, therefore, faced a similar fate. But what may be politically most significant, the current U.S. administration has been far more hospitable to the exemptionalist agenda than its predecessors. Indeed, in its vigorous opposition to the ICC it may end up sabotaging what most American allies consider a crowning achievement of the postwar move towards global governance.<sup>7</sup>

What does this augur for the future? Are America and global governance on a collision course? And if so, with what consequences? I make two arguments in this chapter. First, unlike the situation in 1945, when the U.S. truly was the world’s political Archimedean point, global governance in the 21<sup>st</sup> century is being stitched together by a multiplicity of actors and interests – in considerable measure reflecting the success of America’s own postwar transformational agenda. Indeed, the very system of states is becoming embedded within an increasingly mobilized and institutionalized global public domain that includes not only states but also non-state actors involved in the promotion and production of global public goods. While the American state remains by far the most powerful force among them, platforms and channels for transnational action that it does

not directly control have proliferated – and are deeply entwined with American society itself. Enacting a strict exemptionalism posture, therefore, has become much harder than it seems. Second, although the debate fueled by the recent upsurge of U.S. resistance to global governance involves highly technical questions of constitutional law, on which I, a non-specialist, touch only lightly, it is also fundamentally a political debate, requiring us to make political choices. For on close inspection, many of the solutions proposed by the exemptionalists not only are unnecessary, but also impose a greater burden on us than the problems they seek to solve. In the conclusion I spell out some implications for the future of global governance of the continuing dialectic, if you will, between the two forms of American exceptionalism, acknowledging that the path ahead does not promise to be smooth, but noting that neither has it been getting to where we are today.

### **A NEW GLOBAL PUBLIC DOMAIN**

Global governance has been defined as *governance* in the absence of formal *government*.<sup>8</sup> And governance, at whatever level of social organization it may take place, refers to conducting the public's business: to the constellation of authoritative rules, institutions and practices by means of which any collectivity manages its affairs.

Once upon a time, governance at the global level was entirely a statist affair. It was a system made by and for states, and it concerned relations among them. States constituted the international “public” – as in public international law and public international unions, the name given to nineteenth century international organizations. Whether the instruments of governance were alliances, regimes, law or organizations, states monopolized its conduct, and they were the subjects of their joint decisions and actions. Rules, institutions and practices were authoritative to the extent they were so

recognized by states. In key respects, this traditional system of global governance still characterized the international institutional order constructed after World War II.

Over the course of the past generation, the traditional system has evolved in significant ways, not by replacing states but having its boundaries stretched in two directions. Today, the global agenda includes a host of issues that go well beyond the traditional subjects of interstate relations, and many reach deeply into what had been exclusively domestic spheres. Moreover, the public involved in the business of global governance now routinely includes not only states but also social actors for which territory is not the cardinal organizing principle or national interests the core driver. In short, these developments are producing a reconstituted global public domain.<sup>9</sup>

The new global public domain is intertwined with and exists alongside the traditional interstate and domestic public domains. It does not itself determine global governance outcomes, but introduces opportunities for and constraints upon global governance that did not exist in the past. And although the new global public domain is hardly uncontested, its emergence, like globalization, to which it is closely linked, is part and parcel of a gradually broadening and deepening sociality at the global level.

Below, I present a stylized overview of these changes, emphasizing the emergence of new issues that have been placed on the global agenda, the new actors that now play a significant role alongside states and inter-state organizations, and changes in global political processes that are entailed by these changes.

### *New Agendas*

The number and diversity of issues on the global governance agenda continue to grow. The traditional system was concerned mainly with interstate diplomacy, war and

commerce; and from the mid-nineteenth century on, technical rules of the road to facilitate the flow of international transactions. Contrast this with the subject matter of the UN global conferences convened since the 1970s, each of which generated new action plans and means of implementation: the environment, population, human rights, women, children, social development, human settlements, food security, racism and HIV/AIDS.<sup>10</sup>

In addition, traditional issues have been expanded in scope to encompass entirely new elements. In the area of trade, for example, services had not generally been regarded as being “traded” before 1972, when they were first so construed in an Organization for Economic Cooperation and Development (OECD) experts’ report;<sup>11</sup> by the 1990s a General Agreement on Trade in Services was put in place. Intellectual property rights had never been viewed as falling within the purview of the international trade regime; the Uruguay Round of negotiations (1986-94) made them so. And the current Doha Round is divided over the inclusion of rules protecting investment, among other matters. A similar expansion has occurred in many other issue areas on the global governance agenda.

But the number and diversity of issues tell only part of the story. More significant is a shift in the locus of some of these issues along a set of axes depicting the “external,” “internal,” and “universal” dimensions of policy space. Providing collective assistance to a state that has fallen victim to military aggression deals with matters that are “external” to the states involved: reconfiguring the military balance of power or imposing other sanctions on the offending party. Human rights provisions, in contrast, concern the most intimate of “internal” political relations: that between a state and its citizens. And the ICC may prosecute individuals, if their own state fails to act despite good cause, who are accused of genocide, crimes against humanity and war crimes, not only if they are

nationals of signatory states, but also of non-signatory states if the alleged crime is committed in the territory of a state that has ratified the ICC statute. Thus, its effects begin to approximate “universal jurisdiction.”<sup>12</sup>

Shifts in the locus of issues on the global governance agenda away from the traditional “external” realm have occurred in a variety of other issue areas as well, not only in human rights and crimes against humanity. In the global trade regime, Richard Blackhurst, then a highly regarded GATT economist, noted more than twenty years ago that international trade negotiations had begun to migrate away from concern with border measures, towards *any* policy, no matter what the instrument or where it was applied, which had an “important” impact on international trade flows.<sup>13</sup> Indeed, the United States fought low-intensity trade wars with Japan during the latter’s economic boom in the 1980s and into the 1990s precisely on the grounds that Japan’s internal economic structures and even cultural practices gave it “unfair” trade advantages.<sup>14</sup> The reason for this migration – apart from protectionist pressures by adversely affected industries or workers – is simple: as point-of-entry barriers were progressively dismantled, and as trade continued to intensify, the significance of “internal” factors inevitably increased.

There has been a corresponding shift in the area of international peace and security, resulting from the steady decline of interstate wars relative to various types of “internal” armed conflicts, which became particularly pronounced in the 1990s. According to one standard source, “over one-third of the world’s countries (54 of 158) were directly affected by serious societal warfare at some time during the 1990s and, of these states, nearly two-thirds (34) experienced armed conflicts for seven or more years during the decade.”<sup>15</sup> It is hardly surprising, therefore, that the United Nations and its

member states have been drawn into trying to come to grips with these internal conflicts – or to rationalize their avoiding getting involved.<sup>16</sup> The results on the ground have been mixed at best, but it is noteworthy that Article 2.7 objections to involvement have played a steadily diminishing role.

Turning to the environment, such issues as transborder pollution have been on the global agenda for decades. They are classic cases of externalities and have triggered an array of responses including international monitoring and regulatory regimes, lawsuits, as well as side payments to get offenders to change their ways.<sup>17</sup> But a new type of global environmental problem has emerged in the past generation wherein the offending activity has “universal” impact from which no state can exclude itself, no matter where it is located or how powerful it may be. Unlike traditional global commons issues, including fisheries and marine pollution on the high seas, they are inextricably part of the “internal” space of states. Ozone depletion in the upper atmosphere was one such instance. It could be dealt with relatively expeditiously because it turned out to have one main cause: the emission of chlorofluorocarbons used in refrigeration, for which a substitute could be readily developed. The Montreal Protocol was adopted to regulate their phase-out.<sup>18</sup> In the case of global climate change, however, the sources of so-called greenhouse gas emissions are more diffuse, more deeply embedded in the production and transportation practices of modern economies, and also far more costly to change in the short-to-medium term. Because of U.S. opposition the Kyoto Protocol, cutting the rate of increase in emissions, has not yet come into force.<sup>19</sup> Nevertheless, the environmental area, like others, exhibits a migration in the locus of the global governance agenda beyond standard transborder issues.

In sum, the global governance agenda not only has become more crowded and diverse but also projects more deeply into the domestic policy sphere of states, while some issues on it pull in the direction of greater universality of impact and even jurisdiction. Several of these developments are closely related to the emergence of new actors, to which we now turn.

### *New Actors*

Surely the most consequential institutional development in governance beyond the confines of the territorial state has been the creation and evolution of the European Union. Formal institutional innovation has been more limited at the global level, as one would expect given the vastly larger numbers, greater heterogeneity and fewer common interests among states there. Nevertheless, the present web of global treaties and intergovernmental organizations is without historical parallel. The United States led or actively facilitated many of these developments.<sup>20</sup>

In recent decades, actors other than territorial states and intergovernmental organizations have also steadily expanded their role in global politics. They may be driven by universal values or factional greed, by profit and efficiency considerations or the search for salvation. They include transnational corporations (TNCs), civil society organizations, private military contractors that are beginning to resemble the mercenaries of yore, and such illicit entities as transnational terrorist and criminal networks. While the mere existence and proliferation of non-state actors is no longer news, below I describe briefly how two of the most prominent such actors – civil society organizations and transnational corporations, both with deep roots in American society – relate to the evolution in global governance sketched out in the previous section.

National governments and international agencies have come to recognize the involvement of civil society organizations (CSOs) in several areas related to global governance today – where by “recognize” I mean that they regard CSOs’ participation to be more or less legitimate, and in varying degrees actually count on them to play those roles.<sup>21</sup> In other words, their roles have become institutionalized – much as, for example, the environmental movement did within the industrialized countries a generation ago.<sup>22</sup>

To begin with, civil society organizations have become the main international dispensers of direct assistance to people in developing countries, through foreign aid, humanitarian relief and a variety of other internationally supported services. We might call this social out-sourcing.<sup>23</sup> Governmental entities, such as the United States Agency for International Development, largely have become contracting agencies while CSOs deliver the goods. The rationale is that assistance is delivered more effectively through non-governmental channels, bypassing top-heavy (and sometimes corrupt) bureaucracies, better targeting the intended recipients, and leveraging community-based skills and experience that might not otherwise be tapped.

The role of CSOs is even more consequential in certain areas of norm creation and implementation. The global agenda in human rights, the environment and anti-corruption, for example, would look very different today were it not for their influence. CSOs exercise that influence through their own global campaigns, and also by direct involvement in official forums like periodic UN conferences or the ongoing UN human rights machinery, where the documentation provided by an Amnesty International carries weight precisely because it is detached from national interests.<sup>24</sup>

Coalitions of domestic and transnational civil society actors have played significant roles in promoting human and labor rights, environmental standards and other social concerns within countries where political institutions limit or even repress activities in support of those aims. Human Rights Watch, for example, originated in the effort to monitor the implementation of the human rights provisions of the 1975 Helsinki accords within the Soviet bloc.<sup>25</sup> Daniel Thomas traces the impact of those norms, through the people and groups they inspired, to the subsequent collapse of communist rule itself.<sup>26</sup> Margaret Keck and Kathryn Sikkink have documented the impact of transnational human rights and environmental activist networks on several authoritarian or corrupt regimes in developing countries, by forming alliances with similar groups elsewhere as well as with supportive states and international agencies.<sup>27</sup> In the United States and Western Europe the courts have featured prominently in these strategies – in the U.S. through the so-called practice of “transnational public law litigation,” typically initiated by human rights organizations and often supported by law school clinics, under the U.S. Alien Tort Claims Act or the Torture Victims Protection Act.<sup>28</sup>

CSO coalitions have become a significant if episodic force in blocking and promoting international agreements. Two exemplars have acquired iconic status. The most celebrated blockage was of the Multilateral Agreement on Investment, negotiated at the OECD, which would have been the high water mark of global neoliberalism in the 1990s. A coalition of more than 600 organizations in 70 countries sprang into “virtual existence” on the World Wide Web almost overnight to oppose it.<sup>29</sup> They made the case that certain of the MAI’s provisions on investment protection would enable TNCs to challenge domestic environmental and labor standards on the grounds that they had an

effect equivalent to expropriation, as a result of which companies adversely affected by them could claim compensation.<sup>30</sup> The world press did the rest.

The most dramatic instance of civil society organizations successfully promoting a new agreement – and even participating in its negotiation and drafting – is the land-mines ban, which was begun, literally, by two people with a fax machine and ended up helping to produce an international treaty over the opposition of the most powerful bureaucracy in the world’s most powerful state: the U.S. Pentagon.<sup>31</sup> Nongovernmental groups of legal experts assisted in the drafting of the ICC statute, and the pioneering work of Transparency International – started by a former World Bank official with his personal retirement savings – paved the way for the anti-corruption convention recently adopted by the UN.<sup>32</sup> Finally, CSOs are a significant source of pressure for reform of the Bretton Woods institutions and the WTO.<sup>33</sup>

None of these roles is uncontroversial, especially among those who are adversely affected by the success of CSOs. But in some respects even trickier for both sides is the dynamic interplay between CSOs and transnational corporations over the issue of global corporate social responsibility.

The rights enjoyed by transnational corporations have increased manifold over the past two decades, as a result of multilateral trade agreements, bilateral investment pacts and domestic liberalization – often urged by external actors, including states and the international financial institutions. Moreover, corporate influence on global rule making is well documented, including the pharmaceutical and entertainment industries pushing the WTO intellectual property rights agenda, or Motorola managing to write many of its own patents into International Telecommunication Union standards.<sup>34</sup>

Along with expanded rights, however, have come demands, led by civil society actors, that corporations accept commensurate obligations. To oversimplify only slightly, while governments and intergovernmental agencies were creating the space for TNCs to operate globally, other social actors have attempted to infuse that space with greater corporate social responsibilities.<sup>35</sup>

The imbalance between global corporate rights and obligations remains a key source of CSO pressure. But two more proximate factors also drive their desire to engage the global corporate sector. The first is that individual companies make themselves and in some instances their entire industries targets by doing “bad” things: think of Shell in Nigeria, Nike in Indonesia, the Exxon Valdez spill and others like it, unsafe practices in the chemical industry as symbolized by Union Carbide’s Bhopal disaster, upscale apparel retailers purchasing from sweatshop suppliers, unsustainable forestry practices by the timber industry, and so on. Even where companies are breaking no local laws they may stand in violation of their own self-proclaimed standards, or be accused of breaching international community norms in such areas as human rights, labor practices and environmental sustainability.

CSOs have pushed for companies and industries to adopt verifiable measures to help reduce such missteps. A new reporting industry is slowly emerging as a result. It comprises voluntary codes of conduct (company-based or sectoral; unilateral or multi-stakeholder); the growing interest of commercial firms (PricewaterhouseCooper, for one) and non-profits (Social Accountability8000) in auditing such codes; a Global Reporting Initiative, established as a Dutch NGO, which aspires to provide standardized social and environmental reporting systems and to make this as routine as financial reporting; and

so-called certification institutions, which verify that an entire production and distribution cycle – be it of forest products, coffee beans or diamonds – meets prescribed standards.<sup>36</sup>

The number of these arrangements has grown rapidly, though their reach remains limited and thus far they involve mainly large and brand-sensitive firms.<sup>37</sup> At the same time, they are becoming mainstreamed, no longer dependent entirely on pressure from civil society. Moreover, governments are slowly entering the fray. Several OECD countries – the UK, France, Netherlands, Sweden and Belgium among them – have begun to encourage or require companies to engage in one form or another of social reporting, and the EU is also developing policy on the subject.<sup>38</sup>

In the past few years, a very different rationale for engaging the corporate sector has emerged: the sheer fact that it has global reach and capacity, and that it is capable of making and implementing decisions at a rapid pace – whereas the formal international governance system tends to operate on the basis of the lowest and slowest common denominator. The universe of transnational corporations consists roughly of 63,000 firms, with more than 800,000 subsidiaries and millions of suppliers and distributors connected through global value chains.<sup>39</sup> Other social actors increasingly are looking for ways to leverage this global platform in order to advance broader social objectives within and among countries – in other words, to help fill governance gaps and compensate for governance failures. Many CSOs that had mastered the art of running campaigns against transnationals now also have to learn how to forge partnerships with them. Few major issue areas have been left entirely untouched.

AIDS activists picked Coca Cola for special embarrassment at the 2002 Barcelona AIDS conference not because Coke causes HIV/AIDS, but because the company has a

highly visible global brand and one of the largest distribution networks in Africa, the world's most heavily affected region.<sup>40</sup> Coke subsequently agreed to provide anti-retroviral treatment not only to its own staff, but also to the employees of its independent bottlers throughout Africa, in partnership with PharmAccess, a Dutch NGO.<sup>41</sup> Numerous other companies, driven by varying motivations, have done the same, usually in collaboration with CSOs, and often with UNAIDS as well as bilateral and multilateral donors. For some firms, such as AngloAmerican Mining, a pioneer in providing workplace treatment in Africa, the fact that one third of its (heavily migrant) labor force was HIV positive made it an economic necessity, but neither activist pressure nor economics alone account for DaimlerChrysler or Heineken, the Dutch brewery, being early movers in Africa.<sup>42</sup> Along similar lines, one of the success stories at the UN World Summit on Sustainable Development in 2002 was the large number of private-public partnerships initiated, in areas including clean water and sanitation as well as equity investment in the least developed countries.<sup>43</sup>

The UN Global Compact engages the corporate sector to help promote principles drawn from the Universal Declaration on Human Rights, the International Labor Organization's Fundamental Principles on Rights at Work and the Rio Principles on Environment and Development.<sup>44</sup> Some 1,200 firms worldwide now participate, along with two-dozen transnational NGOs and international labor federations representing 150 million workers. Going beyond the Compact's minimum commitments, the International Federation of Chemical, Energy, Mine and General Workers' Unions negotiated an agreement with Statoil of Norway to extend the same labor rights as well as health and

safety standards to all its overseas operations that it applies in Norway – including Vietnam, Venezuela, Angola, and Azerbaijan.<sup>45</sup> It is being replicated in other sectors.

The role of companies in third world conflict zones has drawn increased attention. At issue is not only how to reduce the (inadvertent or deliberate) contribution that firms make to fueling internal conflicts, which are often related to factional competition for the control of natural resource extraction, but also their potential role in conflict prevention.<sup>46</sup> An activist campaign against diamond giant DeBeers led to the adoption of a company-based UN certification scheme prohibiting trade in so-called blood diamonds; President Bush recently signed an executive order bringing the U.S. into compliance.<sup>47</sup> The Chad-Cameroon Pipeline may be the most ambitious partnership yet in this context, involving several oil companies including ExxonMobil, the World Bank, numerous NGOs and the respective governments. Its aim is to maximize the funds devoted directly to poverty reduction under international safeguards.<sup>48</sup>

These examples show how the reluctance or inability of governments to act collectively at the global level, or individually within their own societies, can get firms drawn into assuming roles that traditionally would have been more strictly confined to the sphere of governance. That phenomenon is not limited to the developing countries, however, as the case of climate change in the United States strikingly illustrates. After President Bush rejected the Kyoto protocol, several major oil companies lobbied the U.S. Congress for some form of greenhouse-gas limits. They included Shell and BP, both of which have carefully cultivated “green” images, have instituted company-wide emissions reductions programs and feared suffering a competitive disadvantage.<sup>49</sup> European activist groups organized a boycott of Esso, whose parent company, ExxonMobil, has been one

of Kyoto's most determined opponents.<sup>50</sup> The number of shareholder resolutions demanding climate change risk management policies from firms doubled in just one year, while lawsuits have been filed against the federal government and loom against firms.<sup>51</sup> Swiss Re, one of the world's largest insurers, is requesting information from energy-intensive firms for which it provides directors and officers liability coverage whether they have a carbon accounting or reporting system in place, and how their company intends to meet its obligations under Kyoto or any similar such instrument. The clear implication is that future rates and possibly even coverage could be affected by the response.<sup>52</sup> Finally, a group of U.S. state and municipal treasurers, as fiduciaries of public sector pension funds worth nearly \$750 billion, convened an Institutional Investors Summit at the United Nations in November 2003 with the aim of promoting the adoption of climate change policies by firms in their funds' portfolios.<sup>53</sup>

Meanwhile, in the U.S. governmental arena, in 2003 fully half of all states introduced so-called "son-of-Kyoto bills," aiming to build frameworks for regulating carbon dioxide emissions – with environmental groups hoping that these will generate industry demands for uniform federal standards.<sup>54</sup>

These actions are interconnected only by being driven by a common concern with climate change; no central mechanism coordinates them. But with U.S. federal policy changes effectively blocked for the moment, other social actors have found different channels to advance their aims. None of them are substitutes for a viable treaty. But disclosure often leads to benchmarking and codification of best practices. Moreover, if Kyoto comes into force – it requires only Russian ratification to do so – a substantial global market in emissions trading will emerge from which U.S. firms will be excluded

until the U.S. comes into compliance, giving them yet additional incentives to support a different policy. Sooner or later, therefore, any U.S. administration will have to come to grips with climate change.

Needless to say, this dynamic has generated pushback by firms and many manage to resist being drawn into it. Enough others are engaged, however, for it to have become an institutionalized feature of the global governance scene. Once engaged, however, corporate leaders at the frontier of corporate social responsibility issues have begun to realize that the concept is quite elastic: the more they do, the more they will be asked to do. As a result, they have begun to ask, “*Where* is the public sector?” Companies providing AIDS treatment programs in southern Africa, for example, are looking for ways to engage governments in helping to build up broader social capacity to respond to the pandemic.<sup>55</sup> And at the global level, the World Economic Forum, the single most influential gathering of business leaders, recently launched a global governance initiative, not to *curtail* the public sector but to help clarify where private sector responsibility ends and public responsibility must begin.<sup>56</sup>

Finally, it is worth noting that national governmental agencies, especially in the European and trans-Atlantic context, increasingly address and even manage day-to-day routine issues that affect them all through networks of peers across states. By now, such transgovernmental networks are exist in virtually all areas of national policy that have any international dimension, including banking, defense, environment, health, and even judiciaries. In several areas of policy, UN conference diplomacy has extended such networks to the rest of the world.<sup>57</sup>

Let us bring this discussion to a close. In the previous section, we saw how some of the issues on the global governance agenda have migrated away from traditional transborder concerns towards more inclusive global issue spaces. The present section has shown that the existence of these issue spaces has pulled into the global governance arena actors for which the territorial state is not the cardinal organizing principle, or the national interest the primary animating force. By intent or by default, they have become involved in the promotion and production of global public goods. And they constitute platforms and channels for transnational action that are increasingly institutionalized and capable of operating in real time.

In short, the traditional interstate system of global governance is becoming embedded in a broader global public domain – an arena of discourse, contestation and action organized around global rule making, and affecting the capacity to make and enact global rules. This is akin to the situation domestically where the state is similarly embedded, though the global variant, of course, is much thinner and considerably more fragile, and it remains far from being universal.

These developments should not be romanticized. The world of global governance is not necessarily more “democratic” as a result, though it has become more pluralistic.<sup>58</sup> Moreover, vast asymmetries of power remain in place – among states, between states and the new actors, and between the corporate sector and civil society. But nor should this new global public domain be viewed as existing only somewhere “out there,” as an adversary of or substitute for states. With respect specifically to the United States, its own social and political institutions – not only civil society and the corporate sector, but also the courts and governmental agencies – are intimately involved in its propagation and

every day functioning. That is why the pursuit of American strict exemptionalism – while easy enough to grasp as an ideological desire – is increasingly difficult to imagine in practical terms.

### **THE NEW EXEMPTIONALISM**

Advocates of the Bricker amendment framed their arguments entirely in constitutional terms, consistently asserting that the UN human rights conventions then being negotiated would violate states rights, undermine the separation of powers and diminish the basic rights of Americans by lowering them to international standards. Moreover, it was claimed, they would infringe on domestic jurisdiction, subject citizens to trials abroad and promote world government. The constitutional objections, Natalie Kaufman observes, obscured “the highly political nature of the opposition and the essential congruence between the treaties and the United States constitution.”<sup>59</sup>

The actual cause of that opposition, as already noted, was race. During debates on the UN human rights covenant, Eleanor Roosevelt, the Godmother of the Universal Declaration, was sent to reassure Southern Senators that it would not interfere in “murder cases” – that is, states’ lynch laws – or the “right to education” – at the time still governed by the *Plessy* ruling of “separate but equal.”<sup>60</sup> During debates on the genocide convention, Ralph Lemkin, who invented the term and was the intellectual force behind the convention, found himself in the unenviable position of testifying that genocide occurred only when intent existed to exterminate an entire group, whereas “those who committed lynchings lacked this requisite motivation.”<sup>61</sup>

President Eisenhower just barely defeated the Bricker amendment. But in return, his administration was obliged to withdraw from further negotiations on the genocide

convention and the UN covenants, and subsequent administrations have had to agree to an ever-escalating series of reservations and non-self-enforcing declarations limiting such treaties' direct domestic legal effects.<sup>62</sup> Even so, the U.S. ratified the Genocide Convention only in 1989, the International Covenant on Civil and Political Rights in 1992, and the Convention Against Torture as well as the Convention on the Elimination of All Forms of Racial Discrimination in 1994. Similarly, it took the Senate thirty-four years to adopt a 1957 ILO convention banning forced labor, codifying an issue that one would have thought had been settled by the Civil War.<sup>63</sup> Needless to say, non- or late ratification did not equate with noncompliance. U.S. authorities did not commit genocide or torture in the interval, and the Supreme Court declared Jim Crow laws unconstitutional while related political practices were redressed by the civil rights legislation of the 1960s.

A half-century after the Bricker amendment, race is no longer the political driver of the exemptionalist quest that it once was. Its constituency base today is animated by a more diffuse set of issues including capital punishment, abortion, gun control, unfettered property rights and the public role of religion – coupled with distrust of government and, therefore, even more so of international entities. But the form of the elite arguments employed remains remarkably similar.<sup>64</sup>

A main source of the recent resurgence of exemptionalism in the policy arena is the growing influence of neoconservative think tanks from the 1980s on, in particular the American Enterprise Institute (AEI) and the Heritage Foundation. As John Bolton wrote not long before he left AEI to join the current administration as the State Department's number three official: "the harm and costs to the United States of [globalists] belittling our popular sovereignty and constitutionalism, and restricting both our domestic and our

international policy flexibility and power are finally receiving attention.”<sup>65</sup> The UN has been a leading target of this attention, for pronouncing on such questions as when the use of force may or may not be legitimate, and transnational civil society actors are criticized for being too influential and lacking democratic accountability. The EU also is seen to pose a danger, not only because it has, according to Jeremy Rabkin, “many practical ramifications for U.S. policy. But it also presents a clear ideological alternative” – by which he means that its members often pool aspects of their sovereignty to achieve their every-day policy objectives.<sup>66</sup> In response to these perceived threats, neoconservatives have constructed a “new sovereigntist” defense around American institutions against international encroachment.<sup>67</sup> Writes Rabkin, in a somewhat circular fashion: “Because the United States is fully sovereign, it can determine for itself what its Constitution will require. And the Constitution necessarily requires that sovereignty be safeguarded so that the Constitution itself can be secure.”<sup>68</sup> Put simply, the new sovereigntists propose to defend America against the world of global governance it helped to create.

But the resurgence of exemptionalism is not limited to neoconservative activists and political commentators. What Koh describes as the “nationalist” school is flourishing in legal scholarship on the role of international law in domestic courts, best represented by Curtis Bradley and Jack Goldsmith.<sup>69</sup> Among many other issues, they raise the concern that judges might “make law” by incorporating rules and norms of customary international law into the domestic sphere through the courts, and that this practice could have adverse consequences for core features of the U.S. constitution. Moreover, even though customary international law traditionally has been considered binding on states, the nationalists argue that in recent years large areas of it lack legitimacy for two reasons:

they deal with subjects, like human rights, that are not “international” but fall within domestic domains; and they are not “customary” because in many instances they fail to reflect actual state practice but result from various forms of international agreements. As we have seen, these developments are part and parcel of the recent evolution of global governance, but Bradley and Goldsmith propose a number of new constitutional rules intended to insulate the United States from them.

But are the “new sovereigntist” and “nationalist” defenses really necessary? And what costs would they entail? I begin my assessment with some of the more technical constitutional questions, and then take up their more overtly political dimensions.

Bradley and Goldsmith direct most of their attention to debates among legal scholars themselves. But the ascendancy of their own position demonstrates that these debates tend to be self-correcting. The nationalist position itself was a reaction against previous over-reaching by internationalist lawyers. For example, the *Restatement (Third) of the Foreign Relations Law of the United States*, a semi-authoritative source used not only by academics but also practitioners, including judges, which was produced by three prominent internationalists, exaggerated how widely U.S. courts had accepted the principle that international law is part of federal law. In due course the nationalists challenged those claims.<sup>70</sup> They have similarly challenged internationalist claims that countries are bound by customary international law even though they might have expressly rejected the same norms when contained in treaties and conventions; that attaching reservations, understandings and declarations (RUDs) to treaties – a routine practice by the U.S. – does not entirely exempt countries from those obligations; and that the legality of RUDs themselves is in doubt.<sup>71</sup> Lastly, it is apparent that the category of

*jus cogens* – peremptory norms originally limited to fundamental crimes against humanity, such as slavery, genocide and torture – has seemed to expand inexorably in liberal internationalist writings, without solid legal bases.<sup>72</sup> But none of those claims any longer enjoys the authority it once did, so the core of the problem to be solved cannot lie here – even if courts and political actors hung on every last word in these debates.

Nor can the problem reside in any failure of the existing ratification process to limit U.S. commitments. Recall that the Bricker debacle was followed by near-total non-ratification of human rights treaties until 1989. From 1993 to 2000, according to David Sloss’s calculation, the President transmitted to the Senate a total of 184 treaties on all subjects combined.<sup>73</sup> Of those, 40 were global. As of the end of 2002, the Senate had approved 31 of them, rejecting nearly one-fourth outright. Furthermore, the Senate attached conditions to 24 of the 31 that it approved, ratifying a mere 7 without conditions. Sloss also notes that the U.S. is party to only 12 of 27 treaties the UN Secretary-General has identified as “most central to the spirit and goals of the Charter,” every one of them subject to conditions.<sup>74</sup> Equally striking, as of June 2003 the ILO had concluded 7,147 legal conventions on labor practices, of which 1,205 are deemed “fundamental.” The Senate had ratified a mere 14, of which just *two* fell into the “fundamental” category.<sup>75</sup> In short, the Senate can hardly be accused of inundating the domestic legal system with large numbers of unconditionally ratified international treaty instruments.

How much of a problem, then, are the courts? A systematic response requires greater expertise on this subject than I possess. But I am struck by several impressions. First, there is no consensus in this literature that any actual case has ever adversely skewed constitutional arrangements or practices as a result of a bad call by a court over

the domestic incorporation of international norms. The alleged dangers discussed appear to be entirely hypothetical – and have been for the past half-century.<sup>76</sup> Problems might yet emerge, of course.<sup>77</sup> But is an under specified and indeterminate future risk adequate warrant for introducing new constitutional rules today? Next, a constant hypothetical refrain has been how far judges might yet stretch previously novel rulings. The *Filartigo* decision is as important as any in this context, permitting individuals and corporations, including foreign, to be tried in U.S. courts under the Alien Tort Claims Act for certain human rights crimes committed abroad. So it is of great interest that the 2<sup>nd</sup> U.S. Circuit Court of Appeals, which broke new ground in deciding the original case in 1980, recently ruled in *Flores v. Southern Peru Copper* that the Act did not extend to environmental claims even when they involved loss of life – suggesting that at least this pioneering court is quite capable of drawing lines.<sup>78</sup> Lastly, as Frank Michelman documents in his chapter, the current Supreme Court would be an unlikely perpetrator. A mere reference to a 1981 ruling by the European Court of Human Rights in the recent case declaring Texas’ anti-sodomy law unconstitutional drew this stinging rebuke from Justice Antonin Scalia: “The Court’s discussion of...foreign views is meaningless [and] dangerous dicta.”<sup>79</sup>

In short, whatever the doctrinal merits may be of the nationalist’s position, it is not at all clear what compelling public policy problem they would have us solve. And yet acting on their proposed solutions would impose significant policy-related costs. Take just one of several new constitutional rules advocated by Bradley and Goldsmith. They recommend that customary international law be incorporated into the domestic legal system only upon case-by-case political branch approval. That would have the effect of reducing the constitutional status of this body of law, and has been criticized on those

grounds.<sup>80</sup> But it is also highly problematic on policy grounds. As Lawrence Lessig notes: “In their strictly positivistic view, the only law is domestic law, and the only domestic law is statute or constitution based.”<sup>81</sup> This narrow and formalistic position, however, would turn back the clock on the recent evolution of international law altogether. In addition, many real world social actors would find it untenable because it would force them to sacrifice the value of justice to a particular normative preference of how law should be made, one for which there is no basis in the constitution itself.

Much the same can be said about the nationalist critique of the “delegation” of authority to international agencies and officials, which is also a core plank in the new sovereigntist campaign against global governance. It concerns the fact that, as the agenda of global governance has expanded, international actors are doing more things than in the past. And some are quite sensitive, whether resolving international trade disputes through the WTO or exercising operational command and control over UN peacekeeping missions. This task expansion raises many practical challenges of accountability, which require creative thinking and innovative practices.<sup>82</sup> But the nationalists/sovereigntists are not interested in devising effective practical solutions. Their response, as David Golove observes, is simply to argue that it is unconstitutional for the federal government to delegate any governmental authority affecting U.S. citizens to officials that are not accountable, directly or indirectly, “*exclusively* to the American electorate.”<sup>83</sup> Golove finds no such provision in the constitution, or in the views of the Founders. But even leaving that aside, think of the policy implications if we were to adopt this nationalist/sovereigntists stricture: apart from the United States, the United Nations has another 190 member states, and each one could make a perfectly legitimate claim that

any delegation of authority *also* would need to be held exclusively accountable to *their* electorates. Obviously, it is humanly impossible to design such a governance structure, so that the only alternative would be to roll back the system of global governance – which may well be the point of the exercise.

Furthermore, the argument misconstrues the nature of international authority in the first place. It externalizes and objectifies the very concept, as though this authority were embodied in some *one* or some *thing* other than states. With rare exceptions, authority in global governance involves no formal relations of super- and sub-ordination, but remains largely horizontal in character. And enforcement is not a specialized function performed by specialized actors, akin to a branch or division of domestic government.<sup>84</sup> Thus, the WTO dispute resolution procedure cannot force any state to comply even if it is found to be in the wrong; only states have troops that they may – or may not – make available for UN peacekeeping operations; and even the much stigmatized ICC requires the cooperation of states to function. International officials or entities may be endowed with normative authority that comes from legitimacy, persuasion, expertise or simple utility; but they lack the basis and means to compel.

In sum, there are good reasons to challenge the nationalist school, and to be deeply concerned about the adverse impact of its recommendations on key aspects of policymaking, domestic as well as international. Needless to say, however, its doctrinal positions do have their political uses.

For the new sovereigntists, the nationalists – Bolton calls them the “Americanists” – provide legalistic cover for a direct assault on the institutions and practices of global governance. But unlike Bradley and Goldsmith, who acknowledge that they are dealing

largely with issues of doctrine, for Bolton and Rabkin the danger to the Republic is clear and present. Writes Bolton: “In substantive field after field – human rights, labor, health, the environment, political-military affairs, and international organizations – the Globalists have been advancing while Americanists have slept. Recent clashes in and around the United States Senate indicate that the Americanist party has awakened.”<sup>85</sup> Rabkin seems gloomy rather than feisty, decrying “the demise of our constitutional traditions” at the hands of global civil society and international bureaucrats.<sup>86</sup>

Yet despite the alarmist language, examples of actual threats are few and feeble. For example, Bolton on several occasions has excoriated remarks by UN Secretary-General Kofi Annan that “only the UN Charter provides a universally legal basis for the use of force” – calling this “the Annan doctrine,” describing it as “unlimited in its purported reach” and “greatly inhibit[ing] America’s ability...to use force to protect and advance its vital national interests.”<sup>87</sup> But Annan’s claim seems beyond dispute. The charter contains and reaffirms the pre-existing bedrock right of self-defense (Article 51), a fact Bolton conveniently ignores.<sup>88</sup> Apart from self-defense and the additional charter provisions, what other universally legal bases are there for the use of force?

The invasion of Iraq in the spring of 2003, without Security Council approval, starkly posed the related question of how far the justification of self-defense can be stretched, and it pitted the U.S. against much of the international community including some of its closest allies. The right of *preemption* is well established in customary international law: it permits the potential target of an unprovoked attack to strike first in self-defense – as Israel did in the 1967 six-day war. The threat must be imminent and the response proportionate to it. The Bush administration, however, had signaled a new

*preventive* use-of-force policy in its 2002 National Security Strategy.<sup>89</sup> But preventive strikes have no such legal pedigree or standing. In 1981 Israel claimed that it was acting in self-defense when it bombed Iraq’s Osirak nuclear reactors. The Security Council, including Ambassador Jeane Kirkpatrick representing the Reagan administration, criticized Israel on the grounds that it faced no imminent threat. In other words, preventing a potential future threat from ever materializing has not, historically, qualified as self-defense. And Henry Kissinger made it clear why when he expressed concern that the Bush strategy not become “a universal principle available to every nation.”<sup>90</sup> After the Iraq war, the administration shifted its rhetoric onto the normatively safer preemptive grounds – but it continues to have a difficult time establishing that the threat the U.S. faced from Iraq was imminent. Finally, there simply is no legal doctrine to justify the policy of “democratic imperialism” advocated by some neoconservatives – transforming political systems abroad by means of U.S. force. But this is not a problem invented by Kofi Annan, or the UN charter.

Rabkin has a special interest in property rights and the environment. But he is similarly challenged to come up with concrete instances where the U.S. constitution needs new sovereigntists protections from the instruments of global governance. In several publications he has cited the case of UNESCO threatening to delist an Australian national park from its World Heritage registry because the government permitted a uranium mine to open nearby. Activist groups protested the potential environmental and health effects, and for some reason the European Parliament pronounced itself on the subject. As trivial as this case is, for Rabkin it has all the makings of a globalist incursion into sovereign property rights: an international agency, civil society actors, a European

Union entity and environmentalism. And if left to stand, he contends, “then it is reasonable to say that what the U.S. Park Service does in Yellowstone National Park [is also] properly subject to international inspection.”<sup>91</sup>

Andrew Moravcsik has studied the new sovereigntists’ political agenda closely, and he concludes that it isn’t global governance *per se* that they oppose, “just multilateral cooperation around certain emerging policies.”<sup>92</sup> They include, as we saw in Bolton’s list above, such issues as environmental sustainability, human rights and labor standards. Trade treaties arouse no concern, as long as they don’t touch on these “social” issues. The global power of transnational corporations is never mentioned yet NGOs get a drubbing. But the political agenda reaches deeper still. Moravcsik notes that Rabkin doesn’t so much want to defend the *current* U.S. constitutional order as to *restore* an earlier one. Writes Rabkin, nostalgically: “Before the political upheavals wrought by the New Deal in the 1930s, established constitutional doctrine sought to limit the reach of federal power to matters of *genuinely* national concern.”<sup>93</sup> Thus, Rabkin desires a rollback not only of certain forms of global governance, but also central elements of the entire post-New Deal domestic political order – the “upheavals” that he believes overturned some earlier idyllic state of affairs, and the legitimacy of which he rejects. Nothing in recent electoral results or public opinion polls suggests that the American public shares Rabkin’s radical agenda.

Where the new sovereigntists have had their greatest success is in utterly deligitimizing the International Criminal Court in the American mainstream.<sup>94</sup> Bolton “unsigned” the ICC statute on behalf of the Bush administration – an act for which the UN legal counsel could find no precedent. And the American public never learned that the ICC is a court of last resort, not first; that most U.S. allies, including the United

Kingdom, are satisfied with the built-in safeguards for their troops and officials; and that the only realistic alternative to some version of an ICC in the long run is a decentralized system of universal jurisdiction, uncoordinated if not chaotic, because the idea of ending impunity for the most heinous crimes against humanity has taken root in too many places for it to be eradicated.<sup>95</sup>

In the heat of the Bricker amendment battle the *Washington Post* accused Senator John Bricker of trying to “erect a sort of voodoo wall” around the United States on the basis of “fear” and an “aura of illusions.”<sup>96</sup> The “new sovereigntists” have tried to do much the same in recent years, with some success. It would be folly to underestimate their influence: they are ensconced in well-funded conservative think tanks, effective inside the Beltway and present at senior levels in the current administration.<sup>97</sup> But neither should one exaggerate their significance. For one thing, neoconservative influence as a whole may have reached its apogee with the war against Iraq. If so, its subsidiary doctrines, including on global governance, also may suffer a loss of credibility. For another, the evolution of global governance is shaped not only by state power but also, as we have seen, by social power. And that fact, in turn, has certain countervailing effects on U.S. policy in the long run, which I briefly address in concluding this chapter.

## CONCLUSION

Harold Koh wisely cautions against over-interpreting American exemptionalism in human rights, for three reasons.<sup>98</sup> First, the United States does have a distinctive rights culture, most notably in first amendment protections, as discussed by Frederick Schauer in his chapter, which differs from but is hardly incompatible with universal human rights values. Second, in many cases the U.S. uses different terms to describe similar realities –

“police brutality” or “cruel and unusual punishment” instead of “torture,” for example. But different labels, Koh stresses, do not necessarily mean different rules, and while the unwillingness to change labels may be quirky it is not fatal to the rights in question. Third, despite its embarrassing record of late and partial ratifications in the human rights area, the U.S. has a strong record of compliance with the underlying norms even of non-ratified treaties: “Many countries adopt a strategy of ratification without compliance; in contrast, the United States has adopted the perverse practice of human rights *compliance without ratification*.”<sup>99</sup>

So the truly problematic challenges arise, Koh concludes, when “the United States actually uses its exceptional power and wealth to promote a double standard”<sup>100</sup> – one for itself, and another for the rest of the world.

The power asymmetries between the U.S. and the rest of the world, especially in the military sphere, in some measure inevitably produce divergent approaches to global governance, though how pronounced they are surely also reflects the policy preferences of different administrations. For example, relative power cannot explain the substantial shifts in attitudes towards international treaties and institutions between the Clinton and Bush presidencies, because it did not change appreciably.<sup>101</sup>

Moreover, as Andrew Moravcsik shows in his contribution to this volume, the poor prospects for U.S. ratification of pending international human rights treaties are a direct function of domestic political cleavages over various “social” issues as well as continued concern with states rights, coupled with a 2/3 Senate super-majority requirement that makes it relatively easy to generate veto groups. The obvious implication is that only a different political alignment would produce different results.

However, and holding those factors constant, how might various expression of global governance, in turn, effect countervailing pressures on the United States?

The use of force may be the hardest case because it most directly reflects American military predominance. Yet, despite strong resistance, the Bush administration found it impossible to avoid seeking a UN Security Council resolution in the build-up to its campaign against Iraq, once senior Republican foreign policy leaders urged that course of action and domestic public opinion swung behind it; and then to propose a second resolution that would have been construed as authorizing the use of military force because public opinion in Great Britain, America's only major ally in the campaign, required it. In the end, the U.S. proceeded to fight an "elective" war without UN approval, causing a major rift within the international community. But the consequences of doing so also imposed considerable costs on the United States, thereby demonstrating that ignoring certain norms imposes a price even on the most powerful.<sup>102</sup> And just four months into the postwar occupation, the U.S. was back at the UN asking for assistance with an increasingly unsustainable burden – assistance it did not get. Thus, Iraq may yet demonstrate not only the norm of power but also the power of norms, to adapt Thomas Risse's clever phrase.<sup>103</sup> And the U.S. is pursuing a very different strategy towards the other two countries on President Bush's original "axis of evil" list, North Korea and Iran.

In other areas, various forms of social power have come to overshadow U.S. state power. In the 1990s, direct foreign investment in emerging markets exceeded official development assistance (ODA) by a factor of six-to-one, though the ratio has since declined somewhat. In 2000, U.S. non-commercial private transfers to developing countries were more than three times the size of ODA if remittances are included, or

twice ODA if not.<sup>104</sup> The relevant names here are Gates, Soros, Turner, hundreds of NGOs, numerous foundations and religious organizations – not USAID. These actors have their own policy priorities, often more closely aligned with the broader global governance agenda than is the case with official U.S. policy or overseas spending.

Moreover, significant divergence by the U.S. government from widely shared international norms imposes costs on the global corporate community, which at some point it can be expected to resist. During the Iraq war, the *Financial Times* reported that “big American consumer brands such as Coca-Cola, McDonald’s and Marlboro are paying a price as boycotts spread from the Middle East to the rest of the world, especially Europe.”<sup>105</sup> More recently, Control Risks Group, a leading international business risk consultancy, described U.S. foreign policy as “the most important single factor driving the development of global risk. By using US power unilaterally and aggressively in pursuit of global stability, the Bush administration is in fact creating precisely the opposite effect.”<sup>106</sup> Finally, the ever-expanding scope of corporate social responsibility, as described in this chapter, is bound to produce increased corporate demands for more conventional governance solutions, including at the global level.

In sum, I would venture the following concluding proposition: the drive towards globalization, the spread of democratic governance and the international rule of law, coupled with increasingly dense transnational networks – public and private – involved in the promotion and production of global public goods, embody an historical momentum that only a major calamity could reverse. In this respect, the consequences of American exceptionalism continue to hold their own vis-à-vis its exemptionalist counterpart.

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## NOTES

<sup>1</sup>I have discussed Roosevelt's strategy of engagement and its legacy at length in John Gerard Ruggie, *Winning the Peace: America and World Order in the New Era* (New York: Columbia University Press, 1996). The vision drew on Woodrow Wilson but was tempered by a pragmatic understanding of both domestic and international politics.

<sup>2</sup>Carol Anderson, *Eyes Off the Prize: The United Nations and the African American Struggle for Human Rights, 1944-1955* (New York: Cambridge University Press, 2003), chap. 1; and Ruth B. Russell, *A History of the United Nations Charter* (Washington, DC: Brookings, 1958), chap. 39. The Soviets and many others were happy to have the provision included.

<sup>3</sup>It was so called for the Ohio Republican who first introduced it in 1951. In addition to the existing ratification requirement of a 2/3 Senate super-majority, the amendment called for subsequent implementing legislation by both houses of Congress and approval by *all* state legislatures. A weakened substitute fell one vote short of the required two-thirds. Natalie Hevener Kaufman, *Human Rights Treaties and the Senate: A History of Opposition* (Chapel Hill: university of North Carolina Press, 1990), chap. 4. The amendment would not have affected executive agreements or congressional-executive agreements.

<sup>4</sup>Mary L. Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (Princeton: Princeton University Press, 2000).

<sup>5</sup>Harold Hongju Koh, "On American Exceptionalism," *Stanford Law Review*, 55 (May 2003). The most influential statement setting out the nationalist position is Curtis A. Bradley and Jack L. Goldsmith, "Customary International Law as Federal Common Law: A Critique of the Modern Position," *Harvard Law Review*, 110 (February 1997).

<sup>6</sup>See, for example, Jeremy Rabkin, *Why Sovereignty Matters* (Washington, DC: American Enterprise Institute, 1998).

<sup>7</sup>Under the threat of cutting off military and economic assistance the U.S. has negotiated bilateral "non-surrender agreements" (pledges not to turn U.S. citizens over to the ICC) with nearly seventy countries, mostly in the developing world Eastern Europe. And under the threat of blocking UN peacekeeping missions, the U.S. has demanded that the Security Council grant it permanent exemption from the ICC; the Council has twice agreed to one-year exemptions. Congress also initiated the "American Service-Members' Protection Act," which among other things authorizes the President "to use all necessary and appropriate means" to free any member of the U.S. armed services detained by or in connection with the International Criminal Court – which critics promptly called "The Hague invasion act" because, in principle, it includes that possibility. For the administration's case in support of these policies, see John R. Bolton, Under Secretary for Arms Control and International Security, United States Department of State, "American Justice and the International Criminal Court," Remarks at the American Enterprise Institute, Washington, DC, November 3, 2003, available online at: [www.state.gov/t/us/rm/25818.htm](http://www.state.gov/t/us/rm/25818.htm).

<sup>8</sup>James N. Rosenau and Ernst-Otto Czempiel, eds., *Governance without Government: Order and Change in World Politics* (New York: Cambridge University Press, 1992).

<sup>9</sup>Useful discussions of this concept, albeit largely at the domestic level, may be found in Daniel Drache, ed., *The Market or the Public Domain?* (London: Routledge, 2001), especially the chapters by Harry Arthurs, "The re-constitution of the public domain," and Robin Hodess, "The contested competence of NGOs and business in public life."

<sup>10</sup>See full listing at [www.un.org/events/conferences.htm](http://www.un.org/events/conferences.htm)

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<sup>11</sup>William Drake and Kalypso Nicolaidis, "Ideas, Interests, and Institutionalization: 'Trade in Services' and the Uruguay Round," *International Organization*, 46 (Winter 1992), p. 42.

<sup>12</sup>A global institution is not a necessary condition for universal jurisdiction to be exercised, though the proliferation of national courts claiming such jurisdiction generally is regarded a less desirable route. Belgium adopted a law in 1993 giving Belgian courts the power to try suspects for war crimes and the like regardless of their nationality or where the alleged crime was committed. Under U.S. pressure, including threats by Defense Secretary Donald Rumsfeld to move NATO headquarters elsewhere, the law was recently amended to cover only cases in which either the victim or the suspect is Belgian. "Belgium Scales Back its War Crimes Law Under U.S. Pressure," *New York Times*, August 2, 2003.

<sup>13</sup>Richard Blackhurst, "The Twilight of Domestic Economies," *The World Economy*, 4 (December 1981).

<sup>14</sup>John Gerard Ruggie, "Unraveling Trade: Global Institutional Change and the Pacific Economy," in Richard Higott, Richard Leaver and John Ravenhill, eds., *Pacific Economic Relations in the 1990s: Cooperation or Conflict* (Boulder, CO: Lynne Rienner, 1993).

<sup>15</sup>Monty G. Marshall and Ted Robert Gurr, *Peace and Conflict 2003: A Global Survey of Armed Conflicts, Self-Determination Movements, and Democracy* (College Park: University of Maryland, Center for International Development & Conflict Management, 2003), pp. 13-14. Also see "The global menace of local strife," *The Economist*, May 24, 2003.

<sup>16</sup>For excellent scholarly treatments of the cross-currents affecting the question of humanitarian intervention see J. L. Holzgrefe and Robert O. Keohane, eds., *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (New York: Cambridge University Press, 2003). The most consequential case of non-involvement remains Rwanda; see Michael Barnett, *Eyewitness to a Genocide: The United Nations and Rwanda* (Ithaca, NY: Cornell University Press, 2002), and Samantha Power, "A Problem from Hell": *America and the Age of Genocide* (New York: Basic Books, 2002), chap. 10.

<sup>17</sup>Lynton Keith Caldwell and Paul Stanley Weiland, *International Environmental Policy*, 3<sup>rd</sup> Edition (Durham: Duke University Press, 1997), provides a useful overview of the main issues and arrangements.

<sup>18</sup>Edward Parson, "Protecting the Ozone Layer," in Peter M. Haas, Marc A. Levy and Robert O. Keohane, eds., *Institutions for the Earth* (Cambridge, MA: MIT Press, 1993).

<sup>19</sup>Most justifications and denunciations of Kyoto have become ritualistic; for a dispassionate yet critical assessment by the State Department's Climate Change Coordinator in the Clinton administration, see Daniel Bodansky, "Bonn Voyage: Kyoto's Uncertain Revival," *The National Interest*, 65 (Fall 2001).

<sup>20</sup>The U.S. not only supported European economic integration from the Marshall Plan on, but in the early 1950s it was well out in front of the Europeans themselves in promoting defense integration – to the point where Secretary of State John Foster Dulles told the North Atlantic Council in 1953 that if Europe failed to ratify the European Defense Community "grave doubts" would arise in the U.S. concerning the future of European security, and America would be obliged to undertake an "agonizing reappraisal" of its European role. Brian Duchin, "The 'Agonizing Reappraisal': Eisenhower, Dulles, and the European Defense Community," *Diplomatic History*, 16 (Spring 1992).

<sup>21</sup>I use the term CSO rather than NGO because it also includes transnational social movements, coalitions and activist campaigns as well as non-governmental organizations. For useful introductions, see Sanjeev Khagram, James V. Riker and Kathryn Sikkink, eds., *Restructuring World Politics: Transnational Social Movements, Networks and Norms* (Minneapolis: University of Minnesota Press, 2002), and Ann M. Florini, ed., *The Third Force: The Rise of Transnational Civil Society* (Washington, DC: Carnegie

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Endowment for International Peace, 2000). In writing this section, I also draw on personal experience in establishing the UN Global Compact, which was carefully positioned in relation to the universe of different CSOs, transnational corporations and business associations. Georg Kell and John Gerard Ruggie, "Global markets and social legitimacy: the case of the 'global compact'," in Daniel Drache, ed., *The Market or the Public Domain?* (London: Routledge, 2001).

<sup>22</sup>See Kal Raustiala, "States, NGOs, and International Environmental Institutions," *International Studies Quarterly*, 41 (December 1997). A good comparable domestic discussion may be found in Cary Coglianese, "Social Movements, Law, and Society: The Institutionalization of the Environmental Movement," *University of Pennsylvania Law Review*, 150 (November 2001).

<sup>23</sup>Obviously this trend does not include IMF stabilization loans, but virtually any World Bank loan these days requires extensive consultations with civil society groups even when they are not the main implementers.

<sup>24</sup>On human rights, see Risse, "The Power of Norms versus the Norms of Power," in Florini, *The Third Force*; on the environment, Daniel C. Esty and Maria H. Ivanova, eds., *Global Environmental Governance* (New Haven, CT: Yale School of Forestry and Environmental Studies, 2003); and on anti-corruption, Fredrik Galtung, "A Global Network to Curb Corruption: The Experience of Transparency International," in Florini, *The Third Force*.

<sup>25</sup>Aryeh Neier, *Taking Liberties: Four Decades in the Struggle for Rights* (New York: Public Affairs, 2003).

<sup>26</sup>Daniel C. Thomas, *The Helsinki Effect: International Norms, Human Rights, and the Demise of Communism* (Princeton: Princeton University Press, 2001).

<sup>27</sup>Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders* (Ithaca, N.Y.: Cornell University Press, 1998). Also see

<sup>28</sup>Harold Hongju Koh, "Transnational Public Law Litigation," *Yale Law Journal*, 100 (June 1991).

<sup>29</sup>For a fascinating impressionistic account of how the newest generation of communication technologies makes possible new forms of spontaneous social connectivity, see Howard Rheingold, *Smart Mobs: The Next Social Revolution* (Cambridge, MA: Perseus Books, 2003).

<sup>30</sup>Supporting that fear was a 1996 case involving the Ethyl Corporation, which successfully sued the Canadian government under a similar provision of the North American Free Trade Agreement when Canada banned a gasoline additive Ethyl produced, with Canada agreeing to an out-of-court settlement of \$13 million. Andrew Walter, "NGOs, Business, and International Investment: The Multilateral Agreement on Investment, Seattle, and Beyond," *Global Governance*, 7 (January-March 2001); and Stephen J. Kobrin, "The MAI and the Clash of Globalizations," *Foreign Policy*, 112 (Fall 1998). Both authors stress that factors other than activist pressure also contributed to the MAI's demise.

<sup>31</sup>Motoko Mekata, "Building Partnerships toward a Common Goal: Experiences of the International Campaign to Ban Landmines," in Florini, *The Third Force*; and Ramesh Thakur and William Malley, "The Ottawa Convention on Landmines: A Landmark Humanitarian Treaty in Arms Control?" *Global Governance*, 5 (July-September 1999).

<sup>32</sup>On TI, see Fredrik Galtung, "A Global Network to Curb Corruption: The Experience of Transparency International," in Florini, *The Third Force*.

<sup>33</sup>Robert O'Brien, Jan Aart Scholte, Marc Williams and Anne Marie Goetz, *Contesting Global Governance* (New York: Cambridge University Press, 2000).

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<sup>34</sup>See John Braithwaite and Peter Drahos, *Global Business Regulation* (New York: Cambridge University Press, 2000), and P. J. Simmons and Chantal de Jonge Oudraat, eds., *Managing Global Issues* (Washington, DC: Carnegie Endowment for International Peace, 2001).

<sup>35</sup>This section draws on John Gerard Ruggie, "Taking Embedded Liberalism Global: The Corporate Connection," in David Held and Mathias Koenig-Archibugi, eds., *Taming Globalization: Frontiers of Governance* (Cambridge, UK: Polity Press, 2003).

<sup>36</sup>The most comprehensive survey of company codes is *Corporate Responsibility: Private Initiatives and Public Goals* (Paris: OECD, 2001). On the GRI, consult [www.globalreporting.org](http://www.globalreporting.org), and for certification institutions see Gary Gereffi, Ronie Garcia-Johnson and Erika Sasser, "The NGO-Industrial Complex," *Foreign Policy*, 125 (July/August 2001).

<sup>37</sup>On this social potential of corporate branding, see Simon Anholt, *Brand New Justice: The Upside of Global Branding* (Oxford: Butterworth-Heinemann, 2003).

<sup>38</sup>Commission of the European Communities, "Promoting a European framework for Corporate Social Responsibility" (Brussels: COM [2001] 366 final, 18 July 2001).

<sup>39</sup>The number of multinationals and their subsidiaries are reported in the *World Investment Report* (Geneva: United Nations Conference on Trade and Development, 2001). It is impossible to calculate the actual number of suppliers; Nike, for example, has approximately 750, and it is at the lower end among comparable firms in the number of factories as a fraction of its revenue base (personal communication from Nike executive).

<sup>40</sup>"AIDS Activists Protest Coke's Deadly Neglect of Workers with AIDS in Developing Countries," press release, dated July 10, 2002, which was widely distributed along with a 25-foot inflatable Coke bottle bearing the slogan "Coke's Neglect = Death for Workers in Africa." Available at [www.actupny.org/reports/bcn?BCNcoke.html](http://www.actupny.org/reports/bcn?BCNcoke.html). Dr. Joep Lange, President of the International AIDS Society said to reporters: "If we can get cold Coca-Cola and beer to every remote corner of Africa, it should not be impossible to do the same with drugs." Quoted in Lawrence T. Altman, "Former Presidents Urge Leadership on AIDS," *New York Times*, July 13, 2002, p. 5.

<sup>41</sup>PharmAccess is led by the same Dr. Joep Lang who was quoted in the previous footnote. For a subsequent presentation of Coke's program, see Robert Ahomka Lindsay, "The Coca-Cola Africa Foundation/Coca-Cola Bottlers in Africa HIV/AIDS Program," *Workshop on HIV/AIDS and Business in Africa and Asia: Building Sustainable Partnerships* (Center for Business and Government, Kennedy School of Government, Harvard University, February 20-21, 2003), available at [www.ksg.harvard.edu/cbg/hiv-aids/home.htm](http://www.ksg.harvard.edu/cbg/hiv-aids/home.htm).

<sup>42</sup>Heineken's decision making is carefully documented in Diana Barrett and Daniella Ballou, "Heineken International: Workplace HIV/AIDS Programs in Africa," Harvard Business School Case N9-303-063 (January 10, 2003). Brief case studies of other examples are available online at [www.weforum.org/site/homepublic.nsf/Content/Global+Health+Initiative%5CGHI+Business+Tools%5CGHI+Case+Studies+and+Supporting+Documents](http://www.weforum.org/site/homepublic.nsf/Content/Global+Health+Initiative%5CGHI+Business+Tools%5CGHI+Case+Studies+and+Supporting+Documents).

<sup>43</sup>"Highlights of Commitments and Implementation Initiatives," Johannesburg Summit, 26 August-4 September 2002 (United Nations, Department of Public Information, 12 September 2002). The "sustainable investment" initiative was orchestrated by the UN Global Compact.

<sup>44</sup>The nine principles are: support and respect for the protection of internationally proclaimed human rights; non-complicity in human rights abuses; freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced and compulsory labor; the effective abolition of child labor; the elimination of discrimination in respect of employment and occupation; a precautionary approach to environmental challenges; greater environmental responsibility;

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and encouragement of the development and diffusion of environmentally friendly technologies. For a brief summary, see John Gerard Ruggie, "The Theory and Practice of Learning Networks: Corporate Social Responsibility and the Global Compact," *Journal of Corporate Citizenship*, 5 (Spring 2002); and the Compact website: [www.unglobalcompact.org](http://www.unglobalcompact.org).

<sup>45</sup>"Statoil Signs Agreement with ICEM," *Europe Energy*, March 30, 2001.

<sup>46</sup>See Prince of Wales International Business Leaders Forum, *The Business of Peace: the private sector as a partner in conflict prevention and resolution* (London: IBLF, 2000). Even large and highly visible companies continue to pay no attention to these issues, but some of those have been sued in U.S. courts under the Alien Tort Claims Act. Others, like Canadian oil company Talisman, which had a major concession in Sudan, withdrew its operations after activist campaigns caused its stock prices to plunge, as a result of which the largest foreign stakeholders in Sudan became Chinese, Malaysian and Indian firms, over which CSOs exercise little leverage.

<sup>47</sup>"Bush bans imports of 'blood diamonds'," [www.CNN.com](http://www.CNN.com), July 29, 2003.

<sup>48</sup>[www.worldbank.org/afr/ccproj](http://www.worldbank.org/afr/ccproj), and David White, "Chad starts scheme to track oil cash," *Financial Times*, October 6, 2003. Revenues from royalties and dividends will go into an escrow account in London. After loan service payments, 10 percent is earmarked for a "future generations fund," 5 percent for the producing region and the remainder is dedicated to priority spending in social sectors, vetted by an oversight group.

<sup>49</sup>"These companies have concluded that limits on carbon dioxide and other greenhouse, or heat-trapping, gases are inevitable. ...And to plan long-term investments, they want the predictability that comes from quick adoption of clear rules." Andrew C. Revkin and Neela Banerjee, "Energy Executives Urge Voluntary Greenhouse-Gas Limits," *New York Times*, August 1, 2001.

<sup>50</sup>Information available online at: [www.stopesso.com](http://www.stopesso.com).

<sup>51</sup>Jeffrey Ball, "Global Warming Threatens Health of Companies," *Wall Street Journal*, April 16, 2003; Vanessa Houlder, "Climate change could be next legal battlefield," *Financial Times*, July 14, 2003; Amy Cortese, "As the Earth Warms, Will Companies Pay," *New York Times*, August 18, 2002; and Danny Hakim, "States Plan Suit to Prod U.S. on Global Warming," *New York Times*, October 4, 2003.

<sup>52</sup>Mark Nicholls, "Executives Could Lose Climate Change Insurance Coverage," *Environmental Finance*, November 2002.

<sup>53</sup>The idea of the summit was initiated by the Coalition for Environmentally Responsible Economies (CERES), which was also responsible for the creation of the Global Reporting Initiative: [www.ceres.org](http://www.ceres.org). The event was co-sponsored by the Better World Fund, an offshoot of the Ted Turner financed United Nations Foundation.

<sup>54</sup>Jennifer Lee, "The Warming Is Global but the Legislating, in the U.S., Is All Local," *New York Times*, October 29, 2003.

<sup>55</sup>This observation is based on interaction with some forty companies active in Africa, at a series of workshops on *HIV/AIDS and Business in Africa and Asia: Building Sustainable Partnerships* (Center for Business and Government, Kennedy School of Government, Harvard University); presentations are available at [www.ksg.harvard.edu/cbg/hiv-aids/home.htm](http://www.ksg.harvard.edu/cbg/hiv-aids/home.htm).

<sup>56</sup>The World Economic Forum plans to publish an annual Global Governance Report, which will assess the respective contributions that various sectors of society are making to solving global problems; <http://www.weforum.org/site/homepublic.nsf/Content/Global+Governance+Task+Force>.

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<sup>57</sup>Anne-Marie Slaughter, “The Real New World Order,” *Foreign Affairs*, 76 (September/October 1997); also, Slaughter, “Judicial Globalization,” *Virginia Journal of International Law*, 40 (Summer 2000). On the UN role, see Peter M. Haas, “UN Conferences and Constructivist Governance of the Environment,” *Global Governance*, 8 (March 2002).

<sup>58</sup>The major work in the cosmopolitan democracy genre is David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Stanford: Stanford University Press, 1995); and, more recently, David Held, “Law of States, Law of Peoples: Three Models of Sovereignty,” *Legal Theory*, 8 (No. 1, 2002).

<sup>59</sup>Kaufman, *Human Rights Treaties and the Senate*, p. 2.

<sup>60</sup>Anderson, *Eyes Off the Prize*, p. 4.

<sup>61</sup>*Ibid.*, p. 228.

<sup>62</sup>Louis Henkin, “U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker,” *American Journal of International Law*, 89 (April 1995).

<sup>63</sup>Edward C. Lorenz, *Defining Global Justice: The History of U.S. International Labor Standards Policy* (Notre Dame: University of Notre Dame Press, 2001), p. 206.

<sup>64</sup>Kaufman notes of Senate debates in the 1980s “that the arguments against human rights treaties developed in the early 1950s have survived the decades with little modification.” *Human Rights Treaties and the Senate*, p. 194.

<sup>65</sup>John R. Bolton, “Should We Take Global Governance Seriously?” *Chicago Journal of International Law*, 1 (Fall 2000), p. 206. Bolton was Senior Vice President at AEI and is now Under Secretary of State for Arms Control and International Security Affairs.

<sup>66</sup>Jeremy Rabkin, “Is EU Policy Eroding the Sovereignty of Non-Member States?” *Chicago Journal of International Law*, 1 (Fall 2000), p. 273. Bolton adds – presumably referring to the ICC: “Not content alone with transferring their own national sovereignty to Brussels, [the EU has] also decided, in effect, to transfer some of ours to worldwide institutions and norms” (“Should We Take Global Governance Seriously,” p. 221).

<sup>67</sup>Peter J. Spiro seems to have coined the term in his critique, “The New Sovereignists: American Exceptionalism and its False Prophets,” *Foreign Affairs*, 79 (November/December 2000).

<sup>68</sup>Rabkin, *Why Sovereignty Matters*, p. 9.

<sup>69</sup>Koh, “On American Exceptionalism.” See Bradley and Goldsmith, “Customary International Law as Federal Common Law;” Bradley and Goldsmith, “U.N. Human Rights Standards and U.S. Law: The Current Illegitimacy of International Human Rights Litigation,” *Fordham Law Review*, 66 (November 1997); Goldsmith, “Should International Human Rights Law Trump U.S. Domestic Law,” *Chicago Journal of International Law*, 1 (Fall 2000); and Bradley, “International Delegations, the Structural Constitution, and Non-Self-Execution,” *Stanford Law Review*, 55 (May 2003).

<sup>70</sup>Louis Henkin, Andreas F. Lowenfeld, Louis B. Sohn, and Detlev F. Vagts, eds., *Restatement (Third) of the Foreign Relations Law of the United States* (Philadelphia: American Law Institute, 1987).

<sup>71</sup>There are complex legal arguments, pro and con, on each of these, and I can pass no independent judgment on them. But on policy grounds Bradley and Goldsmith’s contention seems compelling: “When the political branches cannot plausibly be viewed as having authorized the incorporation of CIL [customary

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international law], and especially when they have explicitly precluded incorporation, federal courts cannot legitimately federalize CIL.” Curtis A. Bradley and Jack L. Goldsmith, “Federal Courts and the Incorporation of International Law,” *Harvard Law Review*, 111 (June 1998), p. 2270.

<sup>72</sup>Anthony D’Amato, “It’s a Bird, It’s a Plane, It’s Jus Cogens!” *Connecticut Journal of International Law*, 6 (Fall 1990).

<sup>73</sup>David Sloss, “International Agreements and the Political Safeguards of Federalism,” *Stanford Law Review*, 55 (May 2003), pp. 1984-1985.

<sup>74</sup>*Ibid.*, p. 1986.

<sup>75</sup>Available online at <http://webfusion.ilo.org/public/db/standards/normes/index.cfm?lang=EN>.

<sup>76</sup>In 1950, Frank Holman, a former president of the American Bar Association and an intellectual force behind the Bricker amendment, wrote: “By and through treaty law-making the federal government can be transformed into a completely socialistic and centralized state. It only requires that the present provisions of the Declaration on Human Rights be incorporated into a treaty...to change the relationship between the states and the federal government and to change even our Constitution and our form of government. ...It is not an overstatement to say that the republic is threatened to its very foundations.” Cited in Kaufman, *Human Rights and the Senate*, p. 9.

<sup>77</sup>One case the nationalists have their eyes on and would like to see overturned because they fear its potential as a precedent is *Missouri v. Holland* (252 U.S. 416 (1920)). It concerned a 1918 treaty with the United Kingdom (Canada) protecting endangered migratory birds, with the State of Missouri claiming its unconstitutionality because it infringed on states rights (Holland being a U.S. game warden). Justice Holmes delivered the opinion of the Supreme Court, finding that “the subject matter is only transitorily within the State and has no permanent habitat therein,” and that “but for the treaty and the statute there soon might be no birds for any powers to deal with.” The Court ruled that the treaty represented a proper exercise of constitutional authority and did not violate the Tenth Amendment.

<sup>78</sup>The plaintiffs, residents of Ilo, Peru and representatives of deceased residents, asserted that the company’s “shockingly egregious” acts of pollution violated an internationally recognized “right to life” and “right to health,” but the court said that these are “insufficiently definite” to constitute customary international law. Mark Hamblett, *New York Law Journal*, September 9, 2003. The use of American courts to try international human rights violations has become increasingly controversial, thanks to various strands of conservative/nationalist criticism, but recently found a strong supporter in Republican Senator Arlen Specter, “The Court of Last Resort,” *New York Times*, August 7, 2003.

<sup>79</sup>Supreme Court of the United States, “*Lawrence v. Texas*,” Decided June 26, 2003, Scalia, J., dissenting. (Preliminary print of the United States reports), p. 14. On the other hand, Justice Sandra Day O’Connor, a frequent swing vote on the Court, recently said in a speech: “I suspect that over time, we will rely increasingly – or take notice at least increasingly – on international and foreign law in resolving domestic issues.” Quoted in Johnathan Ringel, “O’Connor Speech Puts Foreign Law Center Stage,” *Fulton County Daily Report*, October 31, 2003.

<sup>80</sup>Harold Hongju Koh, “Is International Law Really State Law?” *Harvard Law Review*, 111 (May 1998).

<sup>81</sup>Lawrence Lessig, “Erie Effects: An Essay on Context in Interpretive Theory,” *Harvard Law Review*, 110 (June 1997), p. 1810.

<sup>82</sup>For an excellent discussion, see Robert O. Keohane and Joseph S. Nye, Jr., “Redefining Accountability for Global Governance,” in Miles Kahler and David A. Lake, eds., *Governance in a Global Economy: Political Authority in Transition* (Princeton: Princeton University Press, 2003).

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<sup>83</sup>David Golove, “The New Confederalism: Treaty Delegations of Legislative, Executive, and Judicial Authority,” *Stanford Law Review*, 55 (May 2003). For Bradley on this point, see “International Delegations, the Structural Constitution, and Non-Self-Execution;” see Bolton, “Should We Take Global Governance Seriously?” and Rabkin, *Why Sovereignty Matters*, for the new sovereigntist argument.

<sup>84</sup>Golove addresses these issues in the context of self-executing treaties; strictly speaking, he notes, there is no such thing (*ibid.*, pp. 1734-1741). For a broader discussion of international authority, see John Gerard Ruggie, *Constructing the World Polity* (London: Routledge, 1998), especially pp. 59-61.

<sup>85</sup>Bolton, “Should We Take Global Governance Seriously?,” p. 206.

<sup>86</sup>Jeremy Rabkin, “International Law vs. the American Constitution – Something’s Got to Give,” *The National Interest*, 55 (Spring 1999).

<sup>87</sup>John Bolton, “Kofi Annan’s Power Grab,” *The Weekly Standard*, October 4, 1999, p. 13; Bolton, “Should We Take Global Governance Seriously?” Also, Bolton, “The UN Secretary General Versus the United States,” *Human Events*, November 5, 1999.

<sup>88</sup>I worked in Annan’s executive office at the time and sent Bolton a highlighted copy of the UN Charter, to which he responded that no one pays attention to it.

<sup>89</sup>For excellent discussions of its international political and legal implications, see Francois Heisbourg, “A Work in Progress: The Bush Doctrine and its Consequences,” *Washington Quarterly*, 26 (Spring 2003), and Anthony Clark Arend, “International Law and the Preemptive Use of Military Force,” *Washington Quarterly*, 26 (Spring 2003).

<sup>90</sup>Henry Kissinger, “The War Option,” *San Diego Union-Tribune*, 11 August 2002.

<sup>91</sup>Rabkin, “International Law vs. the American Constitution,” p. 39.

<sup>92</sup>Andrew Moravcsik, “Conservative Idealism and International Institutions,” *Chicago Journal of International Law*, 1 (Fall 2000), p.298.

<sup>93</sup>Rabkin, *Why Sovereignty Matters*, p. 7, emphasis added.

<sup>94</sup>For an excellent analysis of the rhetorical strategies that have been employed in doing so, see Mariano-Florentino Cuellar, “The International Criminal Court and the Political Economy of Antitreaty Discourse,” *Stanford Law Review*, 55 (May 2003).

<sup>95</sup>For a glimpse of the decentralized system at work, see the profile of Spanish Justice Baltasar Garzon, who indicted Chile’s former military dictator, Augusto Pinochet – and more recently Osama bin Laden – by Craig Smith, “Aiming at Judicial Targets All Over the World,” *New York Times*, October 18, 2003. The nationalists and new sovereigntists, of course, oppose the decentralized model as well. But Jack Goldsmith and Stephen D. Krasner, for example, fail to address any need to make trade-offs on practical grounds in their dismissal of the ICC as representing but the latest wave of woolly-headed idealism, in “The limits of idealism,” *Daedalus*, 132 (Winter 2003).

<sup>96</sup>Quoted in Anderson, *Eyes Off the Prize*, p. 232.

<sup>97</sup>According to the *Economist*, some twenty self-identified neoconservatives occupy senior positions foreign policy and defense positions: “The shadow men,” 26 April 2003, p. 21.

<sup>98</sup>“On American Exceptionalism,” especially pp. 1483-1487.

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<sup>99</sup>Ibid., p. 1484, emphasis in original.

<sup>100</sup>Ibid., p. 1485.

<sup>101</sup>Post-9/11 security threats also are often cited to explain these differences, although there is no logical reason why they should have led in one direction or another. It is interesting to recall that the Clinton administration took its Defense Counterproliferation Initiative to NATO, which adopted it as alliance policy and established a Defense Group on Proliferation co-chaired by the United States – and France. I thank my colleague Ashton Carter for this point.

<sup>102</sup>Among the former senior foreign policy officials urging the administration to seek a UN resolution were Brent Scowcroft, James A. Baker and Lawrence Eagleburger – respectively, National Security Adviser and Secretaries of State in the first Bush administration, with direct experience at successfully organizing the 1991 anti-Saddam coalition. Thanks to financial contributions from its allies, that war is reported to have yielded the United States a net profit. For the second Gulf war, Lael Brainard and Michael O’Hanlon have estimated the cost differential to the United States of proceeding without a UN authorization, for the war and the occupation, at roughly \$100 billion: “The heavy price of America’s going it alone,” *Financial Times*, August 6, 2003.

<sup>103</sup>Risse, “The Power of Norms versus the Norms of Power.”

<sup>104</sup>Carol A. Adelman, “The Privatization of Foreign Aid,” *Foreign Affairs*, 82 (November/December 2003). The Bush administration’s Millennium Challenge Account and HIV/AIDS initiative will alter this picture only somewhat, and neither is yet funded at significant levels.

<sup>105</sup>Richard Tomkins, “Anti-war sentiment is likely to give fresh impetus to the waning supremacy of US brands,” *Financial Times*, March 27, 2003.

<sup>106</sup>Quoted and summarized in Stephen Fidler and Mark Husband, “Bush foreign policy ‘is creating risks for US companies’,” *Financial Times*, November 11, 2003, p. 11.