AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS

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Chapter 11

American Exceptionalism, Exemptionalism, and Global Governance

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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 balance-of-power 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 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, countering the Soviet threat reinforced the mission and in many respects made it easier to achieve. This first form of American exceptionalism—pursuing an international order that resonated with values the American people saw as their own—became the basis for a global transformational agenda whose effects are unfolding still.[1]

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[1] 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:

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 has typically 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 United States 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."[2] Reacting sharply 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—which, in effect, would have eviscerated the president's formal treaty-making powers.[3] 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

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Columbia University Press, 1996). The vision drew on Woodrow Wilson but was tempered by a pragmatic understanding of both domestic and international politics.

[2] 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.

[3] It was so called for the Ohio Republican who first introduced it in 1951. In addition to the existing ratification requirement of a two-thirds Senate supermajority, the amendment would have required 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.

exemptionalist impulse, especially in relation to civil rights, often acting through executive agreements or other such means.[4] Starting in the 1990s, however, the escalating wave of globalization and the international "soft law" it has generated, coupled with the end of the external disciplining effects imposed by the Cold War, have produced a broader and more unrestrained exemptionalist opposition to global governance. 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.[5] A "new sovereigntist" movement has shaped corresponding Beltway policy debates.[6] The Senate rejected the Comprehensive Test Ban Treaty and made it clear that it would not ratify the international inspections provisions of the biological weapons convention—in the latter case raising the constitutional specter of unreasonable searches. A straw poll in that chamber made it clear that the Kyoto Protocol would face a similar fate, even before President George W. Bush rejected it altogether. President Bill 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, was dead on arrival. But what may be the politically most significant shift, the Bush administration has been far more hospitable to the exemptionalist agenda than any of its predecessors. Indeed, in its vigorous opposition to the ICC it may end up sabotaging what most American allies consider the crowning achievement of the postwar move toward global governance.[7]

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

[5] 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).

[6] See, for example, Jeremy Rabkin, *Why Sovereignty Matters* (Washington, DC: American Enterprise Institute, 1998).

[7] Under the threat of cutting off military and economic assistance the United States has negotiated bilateral "non-surrender agreements" (pledges not to turn U.S. citizens over to the ICC) with more than seventy countries, mostly in the developing world and Eastern Europe. And under the threat of blocking UN peacekeeping missions, the United States has also demanded that the Security Council grant it permanent exemption from the ICC; the council twice agreed to one-year exemptions, but in 2004 the United States failed to get the necessary nine votes and withdrew its request. Congress 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—and 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

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 United States truly was the world's political Archimedean point, global governance in the twenty-first 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 nonstate 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. Therefore, enacting a strict exemptionalism posture, I contend, has become much harder than it seems. Second, although some of the issues raised by the recent upsurge of U.S. resistance to global governance involve highly technical questions of constitutional law, I argue that the exemptionalist position also reflects a distinctive set of doctrinal preferences and feeds into a specific ideological agenda. Indeed, by privileging doctrine over practical considerations, not only do many of the solutions proposed by the exemptionalists turn out to be unnecessary in policy terms, but they would also impose a greater burden on us than the problems they purport to solve. In the conclusion I spell out some implications for the future relationship between U.S. power and 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 so in getting to where we are today.

A New Global Public Domain

Global governance has been defined as govern*ance* in the absence of formal govern*ment*.[8] 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.

Justice and the International Criminal Court," Remarks at the American Enterprise Institute, Washington, DC, November 3, 2003, available online at http://www.state.gov/t/us/rm/25818.htm.

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

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 by having its boundaries stretched in two directions. Today, the global governance 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 territoriality is not the cardinal organizing principle or national interests the core driver. These developments, in short, are producing what I have elsewhere called a reconstituted global public domain.[9]

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 any more than its domestic counterpart does at the national level, but it introduces opportunities for and constraints upon global governance that did not exist in the past. 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 interstate organizations, and the workings of global political processes that these changes entail.

New Agendas

The number and diversity of issues on the global governance agenda continue to grow. The traditional system was concerned mainly with inter-

[9] I elaborate on this concept in John Gerard Ruggie, "Reconstituting the Global Public Domain: Issues, Actors and Practices," *European Journal of International Relations* 10 (December 2004).

state diplomacy, war, and commerce, and, from the mid–nineteenth century on, also 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.[10]

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;[11] by the 1990s a General Agreement on Trade in Services was 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. 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 individuals who are nationals of signatory states, but also those of nonsignatory states if the alleged crime is committed in the territory of a state that has ratified the ICC statute. Thus it represents a step toward universal jurisdiction.[12]

[10] See full listing at http://www.un.org/events/conferences.htm.

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

[12] Actual universal jurisdiction requires no territorial connection whatever between the entity exercising it and either the victim or the accused. Belgium adopted such a law for certain crimes against humanity in 1993, giving Belgian courts the power to try suspects regardless of their nationality or where the alleged acts were 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. For a careful discussion of the theory and practice of universal jurisdiction, see M. Cherif Bassiouni, "The History of Universal Jurisdiction and Its Place

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. 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, toward *any* policy, no matter what the instrument or where it was applied, that had an "important" impact on international trade flows.[13] 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.[14] 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."[15] 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—especially when they impose egregious violations of human rights or acts of genocide. The results on the ground have been mixed at best.[16] But it is noteworthy that Article 2.7 objections to such involvement have played a progressively diminishing role.

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in International Law," in *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law*, ed. Stephen Macedo (Philadelphia: University of Pennsylvania Press, 2004).

[13] Richard Blackhurst, "The Twilight of Domestic Economies," *The World Economy* 4 (December 1981).

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

[15] 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), 13–14.

[16] Good discussions may be found in J. L. Holzgrefe and Robert O. Keohane, eds., *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (New York: Cambridge University Press, 2003).

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.[17] 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 indivisibly part of the "internal" space of states. Ozone depletion in the upper atmosphere was one such instance. It was dealt with relatively expeditiously because one of its main causes was the emission of chlorofluorocarbons, used in refrigeration among other things, for which a substitute could readily be developed. The Montreal Protocol was adopted to regulate their phaseout.[18] In the case of climate change, the sources of greenhouse gas emissions are far more diffuse, more deeply woven into the production and transportation systems of modern economies, and also far more costly to change in the short-to-medium term. Although the Kyoto Protocol is now in force, the United States continues to reject it.[19]

In sum, not only has the global governance agenda become more crowded and diverse, but it 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 I 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 comparatively fewer common

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

[18] Edward Parson, "Protecting the Ozone Layer," in *Institutions for the Earth*, ed. Peter M. Haas, Marc A. Levy, and Robert O. Keohane (Cambridge: MIT Press, 1993).

[19] The Bush administration is also impeding UN discussions on follow-up steps. See Larry Rohter, "U.S. Waters Down Global Commitment to Curb Greenhouse Gases," *New York Times*, December 19, 2004.

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.[20]

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 nonstate 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—affect 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.[21] In other words, their roles have become institutionalized—much as, for example, the environmental movement did within the industrialized countries a generation ago.[22]

[20] For its global role, see Ruggie, *Winning the Peace*. The United States 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 United States 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).

[21] I use the term CSO here rather than NGO because it also includes transnational social movements, coalitions, and activist campaigns as well as nongovernmental 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 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; see Georg Kell and John Gerard Ruggie, "Global Markets and Social Legitimacy: The Case of the 'Global Compact,' " in *The Market or the Public Domain?*, ed. Daniel Drache (London: Routledge, 2001).

[22] See Kal Raustiala, "States, NGOs, and International Environmental Institutions," *International Studies Quarterly* 41 (December 1997). A good comparable discussion of the

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 outsourcing.[23] Governmental entities, such as the United States Agency for International Development, have largely become contractors while CSOs deliver the goods. The rationale is that assistance is delivered more effectively through nongovernmental 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 anticorruption, for example, would not be nearly as advanced 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, for example, carries weight precisely because it is detached from national interests.[24]

Coalitions of domestic and transnational civil society actors play significant roles in promoting human and labor rights, environmental standards, and other social concerns within countries where political institutions limit or 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.[25] Daniel Thomas traces the impact of those norms, through the people and groups they inspired, to the subsequent collapse of communist rule itself.[26] Margaret Keck and Kathryn Sikkink have doc-

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U.S. domestic level 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).

[23] Obviously this trend does not encompass 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.

[24] On human rights, see Thomas 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: Yale School of Forestry and Environmental Studies, 2003); and on anticorruption, Fredrik Galtung, "A Global Network to Curb Corruption: The Experience of Transparency International," in Florini, *The Third Force*.

[25] Aryeh Neier, *Taking Liberties: Four Decades in the Struggle for Rights* (New York: Public Affairs, 2003).

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

umented the impact of transnational human rights and environmental activist networks on several authoritarian or corrupt regimes in developing countries, through these networks' formation of alliances with similar groups elsewhere as well as with supportive states and international agencies.[27] In the United States and Western Europe the courts have featured prominently in these strategies—in the United States through the practice of what is called "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.[28]

CSO coalitions have also 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 six hundred organizations in seventy countries sprang into "virtual existence" on the World Wide Web almost overnight to oppose it. 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.[29] 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

[27] Margaret E. Keck and Kathryn Sikkink, *Activists beyond Borders* (Ithaca: Cornell University Press, 1998).

[28] Harold Hongju Koh, "Transnational Public Law Litigation," *Yale Law Journal* 100 (June 1991). President Bush's Justice Department urged the Supreme Court to restrict, if not gut, the Alien Tort Claims Act in *Sosa v. Alvarez-Machain*. In an extremely complicated but unanimous decision, the Court seems to have upheld the first wave of ATCA cases without signaling how it might rule on its more expansive interpretations in the future. Supreme Court of the United States, *Sosa v. Alvarez-Machain et al.*, No. 03–339, Decided June 29, 2004.

[29] 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.

the world's most powerful state: the U.S. Pentagon.[30] Nongovernmental groups of legal experts assisted in the drafting of the ICC statute, and the pioneering work of Transparency International (TI)—started by a former World Bank official with his personal retirement savings—paved the way for the anticorruption convention recently adopted by the UN.[31]

Lastly, CSOs are a major source of pressure for the reform of other international entities, including the WTO, World Bank, and IMF,[32] as well as the global corporate sector. From the vantage point of the present discussion, the most significant point of intersection between CSOs and transnational corporations is the domain of 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 the leading states and the international financial institutions. Moreover, corporate influence on global rule making is well documented, including such instances as 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.[33]

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.[34]

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 indus-

[30] 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).

[31] On TI, see Galtung, "A Global Network to Curb Corruption," in Florini, *The Third Force*.

[32] Robert O'Brien, Jan Aart Scholte, Marc Williams, and Anne Marie Goetz, *Contesting Global Governance* (New York: Cambridge University Press, 2000).

[33] See, respectively, John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000); and William J. Drake, "Communications," in *Managing Global Issues*, ed. P. J. Simmons and Chantal de Jonge Oudraat (Washington, DC: Carnegie Endowment for International Peace, 2001).

[34] This section in part draws on John Gerard Ruggie, "Taking Embedded Liberalism Global: The Corporate Connection," in *Taming Globalization: Frontiers of Governance*, ed. David Held and Mathias Koenig-Archibugi (Cambridge, UK: Polity Press, 2003).

tries 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 the incidence of such behavior. Firms not directly involved have taken steps to avoid similar problems, or to turn their own good behavior into a brand advantage. A voluntary reporting industry is emerging as a result. It consists of corporate statements of principles and codes of conduct (company-based or sectoral; unilateral or multistakeholder); social and environmental performance reports by companies; the growing interest of nonprofits and commercial firms in auditing company codes or certifying reports; a Global Reporting Initiative, established as a Dutch NGO, which provides standardized social and environmental reporting systems; 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 conditions.[35]

The number of these arrangements has grown rapidly, though their reach remains limited and thus far they involve mainly large and brand-sensitive firms.[36] At the same time, they are becoming mainstreamed within firms, no longer dependent entirely on CSO pressure. Moreover, governments are slowly entering the fray. Several OECD countries—the UK, France, the Netherlands, Sweden, and Belgium among them—have begun to encourage or require companies to engage in one form or another of social reporting. A new British company statute may be the most far-reaching of these measures, both in stipulating heightened social expectations about the public role of private enterprise, and in the requirement that companies issue an annual directors' report of social and environmental information relevant to an understanding of the entire business.[37]

[35] 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; and for certification institutions, see Gary Gereffi, Ronie Garcia-Johnson, and Erika Sasser, "The NGO-Industrial Complex," *Foreign Policy* 125 (July/August 2001).

[36] On this social potential of corporate branding, see Simon Anholt, *Brand New Justice: The Upside of Global Branding* (Oxford: Butterworth-Heinemann, 2003).

[37] United Kingdom, Department of Trade and Industry, "Company Law: Draft Regulations on the Operating and Financial Review and Directors' Report—A Consultative Document" (May 2004), available online at http://www.dti.gov.uk/cld/condocs.htm.

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 traditional international governance system tends to operate on the basis of the lowest and slowest common denominator. The universe of transnational corporations consists of roughly 65,000 firms, with more than 800,000 subsidiaries and millions of suppliers and distributors connected through global value chains.[38] Other social actors are increasingly 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 are now also having 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 universally recognized brand and one of the largest distribution networks in Africa.[39] "If we can get cold Coca-Cola and beer to every remote corner of Africa," Dr. Joep Lange, president of the International AIDS Society, told reporters, "it should not be impossible to do the same with drugs."[40] Coke subsequently committed to providing antiretroviral treatment, in partnership with PharmAccess, the Dutch NGO led by Dr. Lange, not only to its own immediate staff, but also to its independent bottlers throughout Africa.[41] The motivations of other firms differ. The transnational mining company, Anglo American, offers the most comprehensive workplace coverage in southern Africa.[42] The fact that more than 25 percent of its labor force—heavily male, migrant,

[38] 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 twelve hundred (personal communication from Nike executive).

[39] "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 twenty-five-foot inflatable Coke bottle bearing the slogan "Coke's Neglect = Death for Workers in Africa." Available online at www.actupny.org/reports/bcn?BCNcoke.html.

[40] Quoted in Lawrence T. Altman, "Former Presidents Urge Leadership on AIDS," *New York Times*, July 13, 2002, 5.

[41] 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 online at www.ksg.harvard.edu/cbg/hiv-aids/workshop_ksg.htm/.

[42] Anglo American, "Anglo American plc Supporting HIV and AIDS Awareness," available online at http://www.angloamerican.co.uk/hivaids/ourresponse/policy.asp.

and living in dormitories separated from their families—are HIV positive makes its active involvement an economic necessity and also posed a moral dilemma for the company. Merck, the giant pharmaceutical company, faced a public relations debacle over AIDS drugs pricing but also had a long-standing reputation for medical philanthropy to protect; they have partnered with the Gates Foundation and the government of Botswana to provide a comprehensive national HIV/AIDS program in that country.[43]

None of these factors, however, played a role in the decisions of Heineken, the Dutch brewery, or DaimlerChrysler, the automotive firm, both of which were also early movers in providing workplace treatment in Africa. Indeed, a net-present-value analysis commissioned by Heineken showed that the costs at the margin would exceed direct and immediate monetary benefits, yet the board proceeded to adopt the policy as a longer-term business proposition, in light of the inability or unwillingness of governments to act.[44] Illustrating yet another driver, Novartis, the Swiss pharmaceutical firm, became the first company to provide antiretroviral treatment for its employees in China—on the grounds that, as a global company, it made the strategic determination to move toward greater uniformity in its global human resources policy.[45]

At a more macro level, the UN Global Compact engages the corporate sector to help implement principles drawn from the Universal Declaration on Human Rights, the International Labor Organization's Fundamental Principles on Rights at Work, the Rio Principles on Environment and Development, and the recently adopted UN convention against corruption.[46]

[43] Linda Distlerath, "African Comprehensive HIV/AIDS Partnership," available online at www.ksg.harvard.edu/cbg/hiv-aids/ksg/Distlerath_presentation.pdf.

[44] Diana Barrett and Daniella Ballou, "Heineken International: Workplace HIV/AIDS Programs in Africa," Harvard Business School Case # 9–303–063, 2003. Other brief cases, including DaimlerChrysler, are available online at World Economic Forum, http://www.weforum.org/site/homepublic.nsf/Content/Global+Health+Initiative%5CGHI+Business+Tools%5CGHI+Case+Studies+and+Supporting+Documents.

[45] This policy was announced at a Workshop on HIV/AIDS as a Business Challenge, convened in Beijing by the Center for Business and Government, Harvard University, together with the World Economic Forum and UNAIDS (see Center for Business and Government, 2003).

[46] The ten principles are as follows: support and respect for the protection of internationally proclaimed human rights; noncomplicity 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; encouragement of the development and diffusion of environmentally friendly technologies; and working against all forms of corruption, including extortion and bribery. For full texts and other relevant information see http://www.unglobalcompact.org. The first book-length study is Malcolm McIn-

Nearly two thousand firms worldwide participate, up from a mere fifty in 2000 when the initiative began, 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 that it applies in Norway to its overseas operations—including Vietnam, Angola, Venezuela, and Azerbaijan. This type of agreement is being replicated in other industries, including mining.[47]

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.[48] 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 has signed an executive order bringing the United States into compliance.[49] 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.[50]

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 pulled into assuming roles that were traditionally more strictly confined to the sphere of public governance. Civil society

tosh, Sandra Waddock, and Georg Kell, eds., *Learning to Talk: Corporate Citizenship and the Development of the UN Global Compact* (Sheffield, UK: Greenleaf Publishing, 2004).

[47] "Statoil Signs Agreement with ICEM," *Europe Energy*, March 30, 2001; and "Historic First for Mining in Africa—Anglo Gold Signs Global Labour Agreement," available online at http://www.icem.org/update/upd2002/upd02–36.html.

[48] Jane Nelson, *The Business of Peace: The Private Sector as a Partner in Conflict Prevention and Resolution* (London: Prince of Wales International Business Leaders Forum, 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.

[49] The text is available online at http://www.whitehouse.gov/news/releases/2003/07/20030729–20.html.

[50] 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 dedicated to priority spending in social sectors, vetted by an oversight group.

organizations typically do the initial pulling. This phenomenon is not limited to the developing countries, however, as the contested issue 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, in collaboration with civil society organizations, have carefully cultivated "green" images, instituted companywide emissions reductions programs, and feared suffering a competitive disadvantage.[51] European activist groups organized a boycott of Esso, whose parent company, ExxonMobil, has been one of Kyoto's most determined opponents.[52] The number of shareholder resolutions demanding that firms adopt climate change risk management policies doubled in just one year, while lawsuits have been filed against the federal government and firms.[53] Swiss Re, one of the world's largest insurers, began to request information from energy-intensive companies for which it provides directors and officers liability coverage concerning whether those companies have a carbon accounting or reporting system in place, and how they intend to meet their obligations under Kyoto or any similar such instrument—the clear implication being that future rates and possibly coverage itself could be affected by the response.[54] Even Wall Street bankers and analysts are increasingly concerned.[55]

Meanwhile, in the U.S. governmental arena, a group of state and municipal treasurers, as fiduciaries of public sector pension funds worth

[51] "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.

[52] Information available online at http://www.stopesso.com.

[53] Amy Cortese, "As the Earth Warms, Will Companies Pay," *New York Times*, August 18, 2002; 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; Danny Hakim, "States Plan Suit to Prod U.S. on Global Warming," *New York Times*, October 4, 2003; and "A Novel Tactic on Warming" (editorial), *New York Times*, July 28, 2004, A18.

[54] Mark Nicholls, "Executives Could Lose Climate Change Insurance Coverage," *Environmental Finance* 4 (November 2002): 8.

[55] Demetrios Sevastopulo and Vanessa Houlder, " 'Greening' of Financial Sector Gaining Speed," *Financial Times*, June 4, 2004, 6. American auto manufacturers are deemed particularly vulnerable; see Danny Hakim, "Catching Up to the Cost of Global Warming," *New York Times*, July 25, 2004, sec. 3, p. 5. At the June 2004 Global Compact Leaders Summit, Goldman Sachs, on behalf of twenty major investment firms, presented a report entitled "Who Cares Wins," endorsing the idea that social and environmental performance should become a core element in the assessment of investment risks. The report is available online at http://www.unglobalcompact.org.

nearly $1 trillion, held an Institutional Investors Summit in November 2003. Its aim was to devise a strategy for promoting the adoption of climate change policies by firms in their funds' portfolios. As if to demonstrate the blurring of roles between different social sectors, the event was organized by an NGO, coconvened by a Harvard University research center, and held in the chamber of the UN Economic and Social Council.[56] Also in 2003, fully half of all U.S. states introduced so-called son-of-Kyoto bills, aiming to build frameworks for regulating carbon dioxide emissions—with the support of environmental groups hoping that these initiatives at the state level will generate industry demands for uniform federal standards.[57]

No central mechanism coordinates these actions; they are interconnected only by a common concern with climate change. With U.S. federal policy changes effectively blocked for the moment, other social actors have found different channels to advance their aims. None substitutes for a viable treaty, but they do change the political equation. Moreover, disclosure often leads to benchmarking and codification of best practices. And now that Kyoto has entered into force, a global market in emissions trading will emerge from which U.S. firms will be excluded until the United States 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 fixture on the global governance stage. 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 beginning to work with governments to help build broader social capacity to respond to the pandemic.[58] At the global level, the World

[56] The NGO in question is the Coalition for Environmentally Responsible Economies (Ceres), whichalso created the Global Reporting Initiative. Harvard's Center for Business and Government, which I direct, was a coconvener. The Better World Fund, an offshoot of Ted Turner's United Nations Foundation, financed the event.

[57] Jennifer Lee, "The Warming Is Global but the Legislating, in the U.S., Is All Local," *New York Times*, October 29, 2003.

[58] This observation is based on interaction with some forty companies active in Africa, at a series of workshops under the rubric 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 online at http://www.ksg.harvard.edu/cbg/hiv-aids/home.htm.

Economic Forum, the single most influential global gathering of business leaders, recently launched a global governance initiative, seeking not to *curtail* the public sector but to help clarify where private sector responsibility ends and public responsibility must begin.[59]

Finally, national governmental agencies themselves, especially in the European and transatlantic context, increasingly manage day-to-day routine issues that affect them all through networks of peers across states. By now, such transgovernmental networks exist in virtually all areas of national policy that have any international dimension, including banking, defense, environment, health, and even the courts. In several areas of policy, UN conference diplomacy has extended such networks to the rest of the world.[60]

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 toward more inclusive global issue spaces. The present section has shown that the existence of these issue spaces has pulled into the global governance arena new actors, above all civil society organizations and the transnational firms. 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. Thus 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.[61] It 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 must not be romanticized. The world of global governance is not necessarily more "democratic" as a result, though it has become more pluralistic.[62] Moreover, vast asymmetries of power re-

[59] The World Economic Forum publishes an annual Global Governance Report, which assesses 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.

[60] 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 conference role, see Peter M. Haas, "UN Conferences and Constructivist Governance of the Environment," *Global Governance* 8 (March 2002).

[61] Ruggie, "Reconstituting the Global Public Domain."

[62] 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* 8:1 (2002).

main in place—among states, between states and the new actors, and between the corporate sector and civil society. But equally, this new global public domain should not be viewed as existing only somewhere "out there," 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 everyday functioning. That is why the pursuit of American exemptionalism—easy enough to conjure up as an ideological desire—is increasingly difficult to achieve in practice.

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 U.S. citizens to trials abroad, and promote world government. These 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."[63]

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."[64] During debates on the Genocide Convention, Raphael Lemkin, who invented the very 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."[65]

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

[63] Kaufman, *Human Rights Treaties and the Senate*, 2.
[64] Anderson, *Eyes off the Prize*, p. 4.
[65] Ibid., p. 228.

reservations and non-self-executing declarations limiting such treaties' domestic legal effects.[66] Even so, the United States ratified the Genocide Convention only in 1988, 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.[67] 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 social issues including capital punishment, abortion, gun control, unfettered property rights, and the role of religion in politics and policy—coupled with distrust of government and, therefore, even greater distrust of international entities. But the form of the exemptionalist arguments, as Kaufman observes, has remained remarkably similar over time.[68]

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 Bush administration as a senior State Department 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."[69] 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 nongovernmental organizations are criticized for being too influential and lacking democratic accountability. The EU is also seen to pose a danger, not only because it has, according to Jeremy Rabkin,

[66] Louis Henkin, "U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker," *American Journal of International Law* 89 (April 1995).

[67] Edward C. Lorenz, *Defining Global Justice: The History of U.S. International Labor Standards Policy* (Notre Dame, IN: University of Notre Dame Press, 2001), 206.

[68] 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*, 194.

[69] John R. Bolton, "Should We Take Global Governance Seriously?" *Chicago Journal of International Law* 1 (Fall 2000): 206. In March 2005 Bolton was nominated by President Bush to become U.S. permanent representative to the UN.

"many practical ramifications for U.S. policy. But it also presents a clear ideological alternative"—above all, by its members' agreeing to pool aspects of their sovereignty to achieve everyday policy aims.[70] In response to these perceived threats, neoconservatives have constructed a "new sovereigntist" defense around American institutions against international encroachment.[71] 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."[72] Put simply, the new sovereigntists propose to defend America against the world of global governance that the United States itself 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.[73] 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 has traditionally 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 are the products of various forms of international agreements. As we have seen, these developments are part and parcel of the recent evolution of global governance,

[70] Jeremy Rabkin, "Is EU Policy Eroding the Sovereignty of Non-Member States?" *Chicago Journal of International Law* 1 (Fall 2000): 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?" 221).

[71] Peter J. Spiro seems to have coined the term in his critique "The New Sovereigntists: American Exceptionalism and Its False Prophets," *Foreign Affairs* 79 (November/December 2000).

[72] Rabkin, *Why Sovereignty Matters*, 9.

[73] 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).

and 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 overreaching by liberal internationalists. A major case in point is the *Restatement (Third) of the Foreign Relations Law of the United States*, a semiauthoritative source used not only by academics but also by practitioners, including judges, which exaggerated how widely U.S. courts had accepted the principle that international law is part of federal law. In due course the nationalists successfully challenged those claims.[74] 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 these were contained in treaties and conventions; that attaching reservations, understandings, and declarations (RUDs) to treaties—a routine U.S. practice—does not entirely exempt countries from those obligations; and that the legality of RUDs themselves is in doubt.[75] 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.[76] But none of those claims any longer enjoys the authority it once did, so the core of the alleged problem cannot lie here—even if courts and political actors hung on every legal scholar's 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 nonratification of human rights treaties until 1988.

[74] 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).

[75] 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 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): 2270.

[76] Anthony D'Amato, "It's a Bird, It's a Plane, It's Jus Cogens!" *Connecticut Journal of International Law* 6 (Fall 1990).

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.[77] 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. In addition, the Senate has declared that human rights treaties are not self-executing in any event. Sloss also notes that the United States 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.[78] 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.[79] In short, the U.S. Senate can hardly be accused of inundating the domestic legal system with large numbers of unconditionally ratified or self-executing international treaty instruments.

How much of a problem, then, are the courts? A systematic response would require a more detailed analysis of court decisions than is possible here. 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 involving the domestic incorporation of international norms. The alleged dangers appear to be entirely hypothetical—and have been so for the past half century.[80] Problems might yet emerge, of course.[81] But is an under-

[77] David Sloss, "International Agreements and the Political Safeguards of Federalism," *Stanford Law Review* 55 (May 2003): 1984–85.

[78] Ibid., 1986.

[79] Available online at http://webfusion.ilo.org/public/db/standards/normes/index.cfm?lang=EN.

[80] 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 Treaties and the Senate*, 9.

[81] 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.

specified and indeterminate future risk adequate warrant for introducing new constitutional rules today? Next, one constant hypothetical refrain has been that judges might further stretch previously novel rulings. Often cited in this context is the *Filartiga* decision, permitting U.S. as well as foreign individuals and corporations to be tried in U.S. courts under the Alien Tort Claims Act for certain human rights crimes committed abroad. It is of great interest, therefore, that the Second 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.[82] Lastly, as Frank Michelman documents in his chapter, the current Supreme Court is an unlikely perpetrator of expansive views in this direction. A mere reference to a 1981 ruling by the European Court of Human Rights in the recent decision declaring Texas's antisodomy law unconstitutional drew this stinging rebuke from Justice Antonin Scalia: "The Court's discussion of . . . foreign views is meaningless [and] dangerous dicta."[83]

Whatever the legal doctrinal merits of the nationalists' position, then, it is not at all clear what compelling public policy problem they would have us solve. From a policy perspective, therefore, its proposed solutions seem unnecessary. What is worse, however, acting on them 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.[84] But it is also highly problematic on

[82] 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; also see n. 28 above.

[83] Supreme Court of the United States, *Lawrence v. Texas*, Decided June 26, 2003, Scalia, J., dissenting (Preliminary print of the United States reports), 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 Jonathan Ringel, "O'Connor Speech Puts Foreign Law Center Stage," *Fulton Country Daily Report*, October 31, 2003.

[84] Harold Hongju Koh, "Is International Law Really State Law?" *Harvard Law Review* 111 (May 1998). In *Sosa v. Alvarez-Machain* (see n. 28 above), the Supreme Court stipulated

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."[85] This narrow and formalistic position would require us to sacrifice the value of justice to a particular normative preference as to how law should be made—one for which there is no basis in the Constitution itself.

Much the same can be said about the nationalists' 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 they did 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.[86] 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 who are not accountable, directly or indirectly, "*exclusively* to the American electorate."[87] Golove finds no such provision in the Constitution, or in the views of the founders. But even leaving that aside, think of the monumental policy implications of adopting this stricture: apart from the United States, the United Nations has an additional 190 member states, and each one could make a perfectly legitimate claim that any delegation of authority would *also* 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

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that U.S. law recognizes the law of nations, though it also acknowledged deference to the aims and statements of the political branches. This would appear to reject any categorical position that international law must first be domesticated by legislative action to become part of the law of the United States. I am grateful to Kal Raustiala for pointing this out to me.

[85] Lawrence Lessig, "Erie Effects: An Essay on Context in Interpretive Theory," *Harvard Law Review* 110 (June 1997): 1810.

[86] For an excellent discussion, see Robert O. Keohane and Joseph S. Nye, Jr., "Redefining Accountability for Global Governance," in *Governance in a Global Economy: Political Authority in Transition*, ed. Miles Kahler and David A. Lake (Princeton: Princeton University Press, 2003).

[87] 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"; and for the new sovereigntist argument, see Bolton, "Should We Take Global Governance Seriously?" as well as Rabkin, *Why Sovereignty Matters*.

to roll back the system of global governance—which may well be the point of the nationalist/sovereigntist exercise.

Furthermore, their 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 subordination, 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.[88] 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.

Finally, it is worth noting that leading nationalist scholars contributed to developing the Bush administration's categorization and treatment of detainees in "the war on terrorism"—including foreign nationals held in Guantánamo and Iraq as well as American citizens in this country—"exempting" the United States from certain provisions of the Geneva Conventions and even domestic law, and imputing highly expansive "commander in chief" powers to the president. These legal opinions, on their face, seemed anything but concerned with preserving constitutional guarantees and balances, while they gravely damaged America's reputation; indeed, several have been rejected by the Supreme Court.[89]

In sum, there are good reasons to challenge the nationalist school, and to be deeply troubled by the adverse impact its proposals would have on

[88] Golove addresses these issues in the context of self-executing treaties; strictly speaking, he notes, there is no such thing (ibid., 1734–41). For a broader discussion of international authority, see John Gerard Ruggie, *Constructing the World Polity* (London: Routledge, 1998), especially 59–61.

[89] On June 28, 2004, the Court ruled on two cases involving American citizens who were detained in the United States (*Hamdi et al. v. Rumsfeld, Secretary of Defense, et al.*, No. 03–6696; and *Rumsfeld, Secretary of Defense v. Padilla et al.*, No. 03–1027), and a third case involving some six hundred Guantánamo prisoners of various nationalities (*Rasul et al. v. Bush, President of the United States, et al.*, No. 03–334). Broadly speaking, all three decisions affirmed the detainees' right to challenge their detentions in American courts, which Bush administration rules had prohibited. However, when fourteen detainees who were involved in the *Rasul* case sought to file petitions challenging their detentions, the Justice Department maintained that they were not entitled to access to their lawyers to do so: "As aliens detained by the military outside the sovereign territory of the United States and lacking a sufficient connection to the country," its brief said, "petitioners have no cognizable constitutional rights." Neil A. Lewis, "New Fight on Guantánamo Rights," *New York Times*, July 31, 2004, A28.

key aspects of policy making, domestic as well as international. Needless to say, however, its doctrinal positions do have their political uses.

For the more overtly political new sovereigntists, the nationalists—Bolton calls them the "Americanists"—provide legal 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."[90] Rabkin seems gloomy rather than feisty, decrying "the demise of our constitutional traditions" at the hands of global civil society and international bureaucrats.[91]

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."[92] But Annan's claim seems beyond dispute. Apart from the Charter—which includes and reaffirms the preexisting right of self-defense (Article 51), a fact that Bolton conveniently ignores—what *universally* legal bases are there for the use of force?

The U.S. invasion of Iraq in March 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 United States 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. The Bush administration, however, signaled a new *preventive* use-of-force policy in its 2002 National Security Strategy.[93] But preventive strikes have no such legal pedi-

[90] Bolton, "Should We Take Global Governance Seriously?" 206.

[91] Jeremy Rabkin, "International Law vs. the American Constitution—Something's Got to Give," *The National Interest* 55 (Spring 1999).

[92] John Bolton, "Kofi Annan's Power Grab," *Weekly Standard*, October 4, 1999, 13; Bolton, "Should We Take Global Governance Seriously?" Also, Bolton, "The UN Secretary General versus the United States," *Human Events*, November 5, 1999.

[93] For excellent discussions of its international political and legal implications, see François Heisbourg, "A Work in Progress: The Bush Doctrine and Its Consequences," *Washing-*

gree 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."[94] After the Iraq war, the administration shifted its rhetoric onto the normatively safer preemptive grounds—but it continued to have a difficult time establishing that the threat the United States faced from Iraq was imminent.[95] 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 created by Kofi Annan, or by 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 sovereigntist protections from the instruments of global governance. In several publications he has cited the case of UNESCO's 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. If this case is left to stand as precedent, 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."[96]

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ton Quarterly 26 (Spring 2003), and Anthony Clark Arend, "International Law and the Preemptive Use of Military Force," *Washington Quarterly* 26 (Spring 2003).

[94] Henry Kissinger, "The War Option," *San Diego Union-Tribune*, August 11, 2002.

[95] The Bush administration also used the auxiliary argument that it was enforcing previous UN Security Council resolutions, but presumably the council has the right to determine for itself when its resolutions should be enforced, and by whom. Quite apart from a threatened French veto, the United States failed to line up the necessary nine votes in support of military action and withdrew its last draft resolution before going to war. Nor was Kosovo a persuasive precedent. In that case, there was strong majority support for the United States and the sole impediment to council authorization was a threatened Russian veto. Moreover, Russia introduced a resolution condemning NATO air strikes after the fact that the council rejected by a vote of 12–3, which could be construed as a retroactive authorization.

[96] Rabkin, "International Law vs. the American Constitution," 39.

Andrew Moravcsik has studied the new sovereigntists' political agenda closely, and he concludes that it isn't global governance per se they oppose, "just multilateral cooperation around certain emerging policies."[97] They include, as we saw in Bolton's list, such issues as the environment, human rights, and labor standards. Trade treaties arouse no concern as long as they don't touch on these "social" issues. And the global power of transnational corporations is never mentioned, while NGOs get a drubbing. But the political agenda, in fact, reaches deeper still. Rabkin doesn't so much want to defend the *current* American constitutional order as to *restore* an earlier one. He writes, 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"[98]—and what he considers to be "genuinely" national does not reach far beyond protecting private property rights and providing national security. Thus Rabkin desires a rollback of not only 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, however, suggests that the American public shares this radical agenda.

Where the new sovereigntists have had their greatest success is in utterly delegitimizing the International Criminal Court in the American mainstream.[99] 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.[100]

[97] Andrew Moravcsik, "Conservative Idealism and International Institutions," *Chicago Journal of International Law* 1 (Fall 2000): 298.

[98] Rabkin, *Why Sovereignty Matters*, 7, emphasis added.

[99] For an excellent analysis of the rhetorical strategies that have been employed in this effort, see Mariano-Florentino Cuellar, "The International Criminal Court and the Political Economy of Antitreaty Discourse," *Stanford Law Review* 55 (May 2003).

[100] A central institution, of course, is not required for the practice of universal jurisdiction. 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

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."[101] 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 Bush administration.[102] 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 those on global governance, may also 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 overinterpreting American exemptionalism in human rights, for three reasons.[103] 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 United States 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 United States has a strong record of compliance with the underlying norms even of nonratified treaties: "Many countries

World," *New York Times*, October 18, 2003. Most observers believe that the proliferation of individual country claims to the exercise of universal jurisdiction would impose high transaction costs and would potentially result in a chaotic system. The nationalists, 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 between the two on practical grounds in their dismissal of the ICC as representing but the latest wave of woolly-headed idealism; see Goldsmith and Krasner, "The Limits of Idealism," *Daedalus* 132 (Winter 2003).

[101] Quoted in Anderson, *Eyes off the Prize*, 232.

[102] According to the *Economist*, some twenty self-identified neoconservatives occupy senior foreign policy and defense positions: "The Shadow Men," April 26, 2003, 21.

[103] "On American Exceptionalism," especially 1483–87.

adopt a strategy of ratification without compliance; in contrast, the United States has adopted the perverse practice of human rights *compliance without ratification*."[104]

So the truly problematic challenges arise, Koh concludes, when "the United States actually uses its exceptional power and wealth to promote a double standard"[105]—one for itself, and another for the rest of the world.

The power asymmetries between the United States and the rest of the world, especially in the military sphere, will in some measure inevitably produce divergent approaches to global governance.[106] But how pronounced these differences turn out to be surely also reflects other factors. For example, relative power cannot explain the substantial shifts in America's posture toward international treaties and institutions between the Clinton and Bush presidencies, for the simple reason that it did not change appreciably. Already in the 1990s, the American neoconservative commentator Charles Krauthammer heralded the advent of "the unipolar moment."[107] Secretary of State Madeleine Albright ceaselessly hectored the allies and the UN to the effect that the United States was "the world's indispensable nation."[108] And Hubert Védrine, French foreign minister at the time, coined the term *hyper-puissance* to express the unique extent of American hegemony.[109] Yet transatlantic grumbling was not appreciably worse than it had been in earlier times. And President Clinton successfully brought everyone on board for the U.S.-led Kosovo intervention—including the German Red-Green coalition government—even though it arguably had less legal justification going for it than did the war against Iraq.[110]

[104] Ibid., 1484, emphasis in original.

[105] Ibid., 1485.

[106] Or, in the often-repeated phrase of Robert Kagan, Europe is from Venus, America from Mars. See Kagan, "Power and Weakness," *Policy Review* 113 (2002).

[107] Charles Krauthammer, "The Unipolar Moment," *Foreign Affairs* 70 (1990/1991): 23–32.

[108] As the *Toronto Star* put it shortly after her appointment as secretary of state: "It so happens that the phrase 'indispensable nation,' first minted by the new U.S. Secretary of State Madeleine Albright, is now used constantly by American officials and commentators to describe the overarching role of the United States in the contemporary world. [It] is triumphalist and irritating—which doesn't mean that it isn't apt. From Bosnia to Haiti, only the U.S. has the will and means to address major global problems." Richard Gwyn, "Annan Shows He's Much More Than 'the U.S. Choice,' " *Toronto Star*, December 27, 1996, A31.

[109] Hubert Védrine, *Face à l'hyper-puissance* (Paris: Fayard, 2003); the original essay by that title was published in 1995.

[110] Post-9/11 security threats are also 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 cochaired by the United States—and France. I thank my colleague Ashton Carter for this point.

Not raw power itself but the ends and means of its deployment account for the difference.

Domestic politics in the United States also plays a role. Moravcsik argues in his chapter that the poor prospects for U.S. ratification of pending international human rights treaties are a function of cleavages over various "social" issues as well as the strong tradition of states' rights, coupled with a two-thirds Senate supermajority requirement that makes it relatively easy to generate veto groups. Certainly, the differences in the Clinton and Bush administrations' policy postures toward international treaties and institutions also reflect their respective domestic political constituencies and electoral calculations.

But to spell out clearly the implications of our argument in this chapter, let us hold these other factors constant. How might various expressions of global governance themselves bring about countervailing pressures on the United States? Consider a few current cases in point.

The use of force may be the hardest test because it is so closely related to American military predominance. But, despite strong resistance, the Bush administration found it impossible to avoid seeking a UN Security Council resolution in the buildup 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, demanded it. Of course, in the end the United States proceeded to fight an "elective" war without UN approval. But the consequences of doing so imposed significant direct costs on the United States, while also causing a major rift within the international community.[111] Just four months into the postwar occupation, the Bush administration was back at the UN and in NATO asking for assistance with an increasingly unsustainable burden—assistance of which it has received little.[112] Thus

[111] 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 as of mid-2003: "The Heavy Price of America's Going It Alone," *Financial Times*, August 6, 2003.

[112] Christopher Marquis, "Bush Faces New Obstacles in Keeping Allies' Support," *New York Times*, July 31, 2004, A6. NATO has agreed to send fewer than forty officers to conduct some training of the Iraqi military; that could become the nucleus of a larger future involvement if the allies so chose.

Iraq may yet demonstrate not only the norm of power but also the power of norms, to adapt Thomas Risse's clever phrase.[113]

The more general point here is that as the number of democracies in the world continues to rise, so, too, does the demand for not only internal but also external accountability of states. American neoconservatives, who are among the most vigorous advocates of democracy promotion abroad, at the same time are also utterly disdainful of international public opinion. Their position entails an unsustainable contradiction. In the run-up to the Iraq war the United States had most "trouble" with other democracies, not authoritarian states or kleptocracies; and not only in "old Europe" France and Germany, but also Canada, Chile, Mexico, and Turkey. Neoconservative "democratic imperialists" or unilateralist members of Congress may not care what people elsewhere think of the United States. But leaders of other democracies do have to care what their own people think about them if they are to survive politically. Very few such leaders will risk siding with the United States when two-thirds or more voters in their countries oppose U.S. policy. Thus America's success at promoting democracy abroad will have the effect of constraining the United States from deviating too far from the norm if it desires or needs the help of others—or of imposing significant costs on the United States if it chooses to go it alone.[114]

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 twice ODA, even after private remittances are excluded.[115] 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, which are often more closely aligned with the broader global governance agenda than is the case with official U.S. policy or overseas spending.

Furthermore, significant divergence by the U.S. government from widely shared international norms also imposes costs on America's global corporate sector, costs which that sector can be expected at some point

[113] Risse, "The Power of Norms versus the Norms of Power."

[114] Robert Kagan, a leading neoconservative foreign policy analyst, of Mars and Venus fame, has come to realize, albeit grudgingly, that legitimacy matters; see his essay "America's Crisis of Legitimacy," *Foreign Affairs* 83 (March/April 2004).

[115] 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.

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."[116] More recently, Control Risks Group, a leading British 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."[117] Finally, the ever-expanding web of corporate social responsibility, as described earlier in this chapter, is bound to produce increased corporate demands for more conventional governance solutions, including those at the global level, if only to get the private sector off a steadily ascending corporate responsibility escalator.

In sum, I would venture the following concluding proposition: the drive toward 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 a historical momentum that only a major calamity could reverse. In this respect, then, the consequences of American exceptionalism continue to hold their own vis-á-vis its exemptionalist counterpart.

[116] Richard Tomkins, "Anti-war Sentiment Is Likely to Give Fresh Impetus to the Waning Supremacy of US Brands," *Financial Times*, March 27, 2003.

[117] Quoted and summarized in Stephen Fidler and Mark Husband, "Bush Foreign Policy 'Is Creating Risks for US Companies,' " *Financial Times*, November 11, 2003,11.