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Volume 37  
Number 2 *Symposium: The Emerging  
Transnational Constitution*

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Article 3

11-1-2003

### Transnational/Domestic Constitutional Law

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#### Recommended Citation

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# TRANSNATIONAL/DOMESTIC CONSTITUTIONAL LAW

Mark Tushnet\*

## I. A PERSONAL INTRODUCTION

My training was in U.S. constitutional law, but constitutional developments around the world led me to take an interest in the domestic constitutional law of other nations.<sup>2</sup> One cannot study that subject without noticing that some of the world's constitutional courts pay attention to U.S. constitutional law.<sup>3</sup> For awhile, U.S. constitutionalists could treat this phenomenon under the heading, "the influence of the United States Constitution abroad."<sup>4</sup> A broader historical perspective would have yielded the insight that, at least in the past, the U.S. Supreme Court paid attention to at least some aspects of foreign constitutional law, sometimes referring to the traditions of the Anglo-Saxon people in a way that would seem rather ethnocentric today.<sup>5</sup>

Even a scholar who focuses on contemporary U.S. constitutional law must now think about the constitutional law of other nations, as the U.S. Supreme Court has begun to refer to constitutional (or para-

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2. See, e.g., *COMPARATIVE CONSTITUTIONAL FEDERALISM: EUROPE AND AMERICA* (Mark Tushnet ed., 1990); VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* (1999).

3. For a discussion of some of the relevant cases, see Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models*, 1 INT'L J. CONST. L. 296, 304-07 (2003).

4. See, e.g., *CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD* (Louis Henkin & Albert J. Rosenthal eds., 1990).

5. For a discussion, see Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on "Proportionality," Rights and Federalism*, 1 U. PA. J. CONST. L. 583 (1999).

constitutional) developments elsewhere.<sup>6</sup> But, as I have discovered, the discourse about some aspects of such developments can strike a domestic U.S. constitutional lawyer as quite strange. I understand—sometimes with some work, of course—the concepts and approaches in some of the constitutional systems I have started to explore. For example, I could see constitutionalists in France and Germany struggling over how to accommodate the formalism they brought from their study of non-constitutional law to the realism that they deemed necessary to understand constitutional law. They did not use the terms I would have used, but at least I could translate these discussions into categories that made sense to me from my own domestic U.S. constitutional perspective.

However, some of what I read by the international lawyers (or the domestic constitutional lawyers who had completely assimilated the discourse of international law) left me quite baffled. If learning the domestic constitutional law of other nations was like learning a foreign language, learning what the international lawyers were talking about seemed to me like trying to learn what space-alien were saying. Their concerns appear completely unconnected to the things I worry about as a domestic U.S. constitutionalist, and yet they seemed to think that these concerns mattered a lot for domestic constitutional law.

This Essay is my effort to make sense—to myself, if to no one else—of my experience with the discourse of international lawyers. Part II describes recent references in U.S. Supreme Court opinions to constitutional developments in other jurisdictions, and the critiques of those references from within the Court. I also offer my comments as a domestic U.S. constitutionalist on the disagreements among the justices. Part III broadens the focus to outline areas in which U.S. law clearly incorporates non-U.S. law as a rule of decision, or in which a significant group of scholars argues that U.S. law should be interpreted to do so. I sketch some of the challenges scholars have made to these decisions and arguments, focusing primarily on what I

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6. See *infra* Part II. By para-constitutional law, I mean the human rights jurisprudence of transnational bodies that have themselves influenced domestic constitutional law, both in the nations directly involved in the creation of those bodies and in other nations. For a discussion, see Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863, 1873–80 (2003).

call "discrete" constitutional challenges to particular ways in which non-U.S. law might become a rule of decision.

Part IV broadens the focus further. There I try to get a handle on the concerns underlying the specific challenges described in Part III. These are what I call *sovereignty-based* concerns, that is, suggestions that making non-U.S. law a rule of decision somehow impairs U.S. sovereignty. It is at this point that I find myself lost, and the discourses of international law and domestic constitutional law seem to get disconnected. My conclusion is that the people raising challenges to references to, and incorporation of, non-U.S. law in U.S. constitutional law are worried about something, but not about what they say they are. The important analytical concerns are not about sovereignty but are rather about the substance of domestic constitutional law, and about the separation of powers question of who gets to determine that substance. And, the animating concern is that the people who would determine the substance of constitutional law, should non-U.S. law become routinely incorporated into U.S. law, are "domestic" elites with views that differ from the critics'.

## II. THE U.S. SUPREME COURT AND THE CONSTITUTIONAL LAW OF OTHER NATIONS: RECENT OPINIONS

Prior to *Lawrence v. Texas*,<sup>7</sup> no recent Supreme Court decision relied on non-U.S. constitutional or para-constitutional law to support a proposition that was material to the majority's analysis. In *Printz v. United States*,<sup>8</sup> Justice Breyer argued that the German system of federalism, which requires that the national government administer its law by using state-level officials, demonstrated that federalism as such did not necessitate the majority's anti-commandeering principle.<sup>9</sup> Justice Scalia responded for the majority that the considerations Justice Breyer mentioned might be relevant to designing a constitution's arrangements but were irrelevant to interpreting the actual Constitution of the United States.<sup>10</sup> As I have argued elsewhere, the real disagreement between Justice Breyer and Justice Scalia was not about the relevance of non-U.S. law to constitutional interpretation in general, as Justice Scalia's response

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7. 123 S. Ct. 2472 (2003).

8. 521 U.S. 898 (1997).

9. *Id.* at 976–77 (Breyer, J., dissenting) (citations omitted).

10. *Id.* at 921 n.11.

suggested, but was rather about the proper approach to interpreting the U.S. Constitution.<sup>11</sup> Justice Scalia, pursuing an originalist approach, finds non-U.S. law relevant only when—as he thinks rare—the Framers knew that the terms they were using were understood to refer to non-U.S. law.<sup>12</sup> Justice Breyer, pursuing a functionalist interpretation, believes that non-U.S. law is relevant when it can inform the Court's assessment of the practical workings of alternative institutional arrangements.<sup>13</sup>

Justice Breyer has referred to non-U.S. constitutional law for another purpose, although still within a generally functionalist framework. Dissenting from the denial of review in a case raising the question of whether it becomes unconstitutional to execute a person if his detention prior to execution is so extended as to itself constitute cruel and unusual punishment, Justice Breyer pointed to decisions from non-U.S. tribunals finding that this so-called "death row phenomenon" is indeed an impermissible form of punishment.<sup>14</sup> Justice Breyer indicated that these judgments should inform the U.S. Supreme Court's interpretation of the Eighth Amendment.<sup>15</sup> There is, however, an additional consideration. *Soering v. United Kingdom*<sup>16</sup> holds that it violates the European Convention on Human Rights to extradite a person charged with a crime to a nation where the death row phenomenon occurs.<sup>17</sup> The U.S. Supreme Court's unwillingness to find the death row phenomenon unconstitutional thus may interfere with the smooth administration of justice *within the United States*.<sup>18</sup>

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11. Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1232–33 (1999).

12. An example would be U.S. CONST. art. I, § 8, cl. 10 (referring to the "Law of Nations").

13. *Printz*, 521 U.S. at 976–78.

14. *Foster v. Florida*, 537 U.S. 990, 992–93 (2002) (Breyer, J., dissenting); see also *Elledge v. Florida*, 525 U.S. 944, 944–45 (1998) (Breyer, J., dissenting from denial of certiorari, discussing how foreign courts refuse to extradite capital defendants to America for fear of undue delay in execution).

15. *Elledge*, 525 U.S. at 944–45.

16. 11 Eur. Ct. H.R. (ser. A) at 439 (1989).

17. *Id.*

18. One response to Justice Breyer's concern about punishing criminals is that the U.S. Supreme Court's position protects federalism without interfering with the administration of justice. The Court's position leaves it up to the states where the death row phenomenon occurs to choose whether they would rather forgo punishment altogether, or obtain control of the defendant by

Another death penalty case suggests how reference to non-U.S. law might be consistent even with originalist premises. *Atkins v. Virginia*<sup>19</sup> held that it was unconstitutional to subject persons with mental retardation to the risk of capital punishment.<sup>20</sup> In a footnote, the Court observed that, "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."<sup>21</sup> This simple factual observation provoked one of Justice Scalia's most sarcastic responses, although he did not deny its factual accuracy. Scalia awarded "the Prize for the Court's Most Feeble Effort to fabricate 'national consensus' . . . to its appeal (deservedly relegated to a footnote) to the views of . . . the so-called 'world community.'"<sup>22</sup> The sarcasm was plainly out of place; the majority did not in any way rely on the world community's views to show a domestic consensus about the question at issue, but merely noted a fact about the prevalence of a particular judgment in other nations.<sup>23</sup>

Justice Scalia was responding to arguments urged to the Court by advocates, and sometimes in dissenting opinions, rather than to any argument the *Atkins* majority actually made. In response to the argument that international law condemned subjecting juvenile offenders to the risk of capital punishment, the Court, speaking through Justice Scalia, rejected the relevance of non-U.S. law to interpreting the Constitution's ban on cruel and unusual punishment.<sup>24</sup> Even if that ban were to be interpreted in light of contemporary notions of decent treatment, Justice Scalia wrote, the relevant notions were those of the people of the United States.<sup>25</sup>

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promising not to seek the death penalty in his case (as occurred in the aftermath of *Soering*). See *Elledge*, 525 U.S. at 944. Yet, the decision is not *entirely* the state's. The state must call upon the national government, through the Secretary of State, to provide the guarantee that the person for whom extradition is sought will not be subject to the possibility of capital punishment. The U.S. Supreme Court's position, seen in federalist terms, complicates the national government's foreign relations.

19. 536 U.S. 304 (2002).

20. *Id.* at 321.

21. *Id.* at 317 n.21 (citing Brief for European Union as amicus curiae 4).

22. *Id.* at 347 (Scalia, J., dissenting).

23. *Id.* at 317 n.21.

24. *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989).

25. *Id.*

One might question that conclusion even on originalist premises, although I personally would not do so and have not done the research to support the suggestion that follows. The argument would begin with the Declaration of Independence, which stated that “a decent Respect to the Opinions of Mankind”<sup>26</sup> required the Declaration’s signers to explain the reasons for their action.<sup>27</sup> The audience for the Declaration was international as well as domestic. Of course, the Declaration’s authors *needed* to gain the world’s sympathy if the revolution was to succeed. Nonetheless, the assumption that foundational documents had audiences beyond the domestic ones may well have pervaded the intellectual universe of the late eighteenth century and may have been made by the Constitution’s framers. It seems to be accepted that the Framers understood that the term *cruel* in the Eighth Amendment would shift with the changing notions of cruelty and that the Amendment would ban cruel punishments as *cruelty* was understood when the punishments were sought to be administered. To the extent that *today’s* Americans continue to have a decent respect for the opinions of mankind, reference to non-U.S. law to inform the interpretation of the Eighth Amendment might be justified on originalist grounds.

The current Court’s first use of non-U.S. law to support a position relevant to its disposition came in *Lawrence v. Texas*,<sup>28</sup> the 2003 decision invalidating laws making consensual sodomy a crime.<sup>29</sup> *Lawrence* overruled *Bowers v. Hardwick*,<sup>30</sup> the 1986 decision where Chief Justice Burger contended that governments had regulated homosexual conduct “throughout the history of Western civilization,” and that “[c]ondemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards.”<sup>31</sup>

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26. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

27. *But see* JEREMY RABKIN, WHY SOVEREIGNTY MATTERS 10 (1998) (mentioning this phrase but observing that its authors did not “seek international permission for American independence”).

28. 123 S. Ct. 2472 (2003).

29. *Id.* at 2484. *But see* *Washington v. Glucksberg*, 521 U.S. 702, 734 (1997) (relying on experience in the Netherlands with the administration of a law authorizing assisted suicide to illustrate difficulties in ensuring that practices of euthanasia do not develop under such statutes).

30. 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 123 S. Ct. 2472, 2484 (2003).

31. *Id.* at 196 (Burger, C.J., concurring).

Echoes of Justice Burger's position could be heard in the majority opinion as well.<sup>32</sup> Rebutting these claims, Justice Kennedy's opinion in *Lawrence* referred to a major decision of the European Court of Human Rights, rendered in 1981, holding that bans on consensual homosexual conduct were violations of the fundamental rights guaranteed by the European Convention on Human Rights.<sup>33</sup> Justice Kennedy used that decision to show that the claim made by the defendants in *Lawrence* was hardly "insubstantial in our Western civilization."<sup>34</sup>

These cases show that references to non-U.S. constitutional law have become more frequent in recent years than they had been in decades from 1960 to 1990.<sup>35</sup> They also show that there is some controversy over the relevance of such references to the interpretation of the U.S. Constitution. It is important not to exaggerate the degree of controversy manifested on the Supreme Court. Four Justices—Stevens, Kennedy, Ginsburg, and Breyer—have adverted to non-U.S. law in their opinions, while three—Rehnquist, Scalia, and Thomas—have written opinions expressly criticizing references to non-U.S. law.<sup>36</sup> The next step toward understanding the sources of the controversy involves expanding the

32. See *id.* at 192–96.

33. *Lawrence*, 123 S. Ct. at 2481 (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981)).

34. *Id.* Scalia called this discussion "meaningless dicta," *id.* at 2495, but that seems wrong. Kennedy invoked non-U.S. law to rebut one of the contentions made in defense of the proposition that the U.S. Constitution did not bar states from making consensual sodomy a crime. *Id.* at 2481.

35. In addition to the cases described in the text, there is Justice Ginsburg's concurring opinion in *Grutter v. Bollinger*, 123 S. Ct. 2325, 2347–48 (2003). There, the majority stated that affirmative action programs had to have a foreseeable termination point and suggested that there would be no need for them in twenty-five years. *Id.* at 2346–47. Justice Ginsburg noted that these suggestions "accord[] with the international understanding of the office of affirmative action," citing the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women. *Id.* at 2347 (Ginsburg, J., concurring).

36. Two of Scalia's opinions, in *Stanford* and *Printz*, were for the Court, so to some extent his criticisms can be attributed to the other Justices who joined those opinions. Yet, two of the opinions referring to non-U.S. constitutional law, *Lawrence* and *Atkins*, were also for the Court. Under these circumstances, I think it best to attribute the references to the individual Justices who wrote the opinions rather than to the Court as a corporate entity.



scope of our view to examine other areas in which non-U.S. law is incorporated into U.S. law as a rule of decision (or in which respected commentators urge that it should be so incorporated). I will then outline the challenges that have been raised to these developments, aiming to dispel my sense that there is something quite odd about what seems to drive the challenges.

### III. NON-U.S. LAW AS A RULE OF DECISION

The question of using non-U.S. law as a rule of decision under domestic U.S. law has arisen in three important areas.<sup>37</sup>

The first involves the Alien Tort Claims Act ("ATCA").<sup>38</sup> The ATCA provides that the federal district courts "shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."<sup>39</sup> For several decades, since the decision of the Court of Appeals for the Second Circuit in *Filartiga v. Pena-Irala*,<sup>40</sup> the lower federal courts have routinely relied on non-U.S. law to determine whether an alleged tort violates the law of nations.<sup>41</sup> The courts construed the ATCA to create a cause of action for torts that violated evolving understandings of international law.<sup>42</sup>

The earliest cases involved torture and similar gross violations of human rights.<sup>43</sup> That remains true today of most of the relatively small number of cases invoking the ATCA, but representatives of the anti-globalization movement have begun to file claims under the

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37. I put aside as entirely uncontroversial the traditional use of non-U.S. law as a rule of decision in cases where choice of law principles direct a U.S. court to rely on non-U.S. law as a rule of decision (although I will suggest later that the reason for the lack of controversy over such consequences of choice of law principles helps explain why the controversy over the areas I do discuss is badly framed).

38. 28 U.S.C. § 1350 (2000). I have discovered that there is a bizarre—and to me totally pointless—controversy over how to refer to this statute. Apparently, human rights advocates call it the Alien Tort Claims Act, while their opponents call it the Alien Tort Act. That people actually think anything turns on the label shows how odd these discussions are.

39. *Id.*

40. 630 F.2d 876 (2d Cir. 1980).

41. *See, e.g.,* Galo-Garcia v. I.N.S., 86 F.3d 916, 918 (9th Cir. 1996).

42. *See, e.g.,* Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995); Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996).

43. *See, e.g.,* Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987).

ATCA challenging the routine employment practices of transnational corporations.<sup>44</sup> This new use of the ATCA has in turn made it controversial.<sup>45</sup>

Critics of the expanded use of the ATCA would construe it more narrowly than has become settled. They suggest that the ATCA should at most be treated as creating a cause of action for torts that were violations of international law as of the late eighteenth century when the statute was enacted.<sup>46</sup> With respect to other torts that are violations of modern international law, the ATCA is merely jurisdictional and does not create a cause of action.<sup>47</sup> Rather, the cause of action must be found in some other law. That other law could be federal law found elsewhere in the United States Code, but the primary candidate for the source of the cause of action is state law.<sup>48</sup>

This bifurcated construction has the advantage of preserving the ATCA as it has been invoked in the least controversial cases, those involving torture. It has the disadvantage, for me at least, of generating arguments that seem metaphysical. Consider a claim alleging a tort that violates "modern" international law. Presumably a federal court faced with such a claim would first have to identify some specific state with which the litigation has contact.<sup>49</sup> It would then have to ask whether that state's law makes it a tort to violate international law in the way alleged. Of course, that question almost

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44. See, e.g., *Doe I v. Unocal Corp.*, Nos. 00-56603, 00-57197, 00-56628, 00-57195 2002 U.S. App. LEXIS 19263 (9th Cir. Sept. 18, 2002), *reh'g en banc granted*, 2003 U.S. App. LEXIS 2716 (9th Cir. Feb. 14, 2003).

45. The Bush Administration urged the Ninth Circuit to restrict the interpretation of the ATCA to cases involving violations of diplomatic immunity. See Stephen L. Kass & Jean M. McCarroll, *Alien Tort Claims Act*, 230 N.Y. L.J. 3 (2003).

46. Cf. RABKIN, *supra* note 27, at 24, 50–56 (describing the limited scope of traditional customary international law and its recent expansion).

47. See Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 591 (2002) (arguing that the statute should be interpreted as implementing the alienage diversity jurisdiction).

48. Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 816, 870 (1997). *Bivens v. Six Unknown Named Agents* allowed a cause of action based on the U.S. Constitution to proceed where the only applicable statute was one simply conferring jurisdiction on the federal courts. 403 U.S. 388 (1971).

49. This is to ensure the satisfaction of due process concerns.

certainly has never arisen in the state courts, in part because of the prevailing interpretation of the ATCA. Accordingly, the federal court would have to ask itself the *Erie*-analog: Would the state courts, if asked, find that state law creates a cause of action for torts that violate international law?<sup>50</sup> My guess is that any federal court inclined to impose liability under the ATCA would find that the state courts would do so as well. In the end, the difference between the prevailing interpretation of the ATCA and the proffered alternative is that under the prevailing interpretation, Congress can displace the cause of action while under the alternative state legislatures could.

The phrase "tempest in a teapot" seems to me to have been invented for controversies like this.<sup>51</sup> Something else *must* be going on. The real concern, I think, is that under both the prevailing and the alternative understanding, federal *judges'* decisions will control the outcome in practice.<sup>52</sup> The apparent concern for federalism conceals the real concern for judicial power.

I have the same reaction to the second area of controversy, which involves whether customary international law is part of the "Laws of the United States" under the Supremacy Clause.<sup>53</sup> Many early Supreme Court opinions say that it is, although ordinarily as dictum. And, of course, treaties are supreme under the Supremacy Clause.<sup>54</sup> International law does not distinguish between customary international law and treaty-based law on the question of whether each is *law*; both are. So, if as a matter of international law, treaty-based law and customary international law are equally law, why should they not be equally law for purposes of the Supremacy Clause?<sup>55</sup>

Critics of the view that customary international law is law for purposes of the Supremacy Clause do not deny that it is law. Rather,

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50. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

51. See Bradley & Goldsmith, *supra* note 48, at 870 (observing that the consequences of adopting their view would not be dire). The effects would be in the handful of cases—none reaching a contested judgment on the merits—in which claims of human rights violations have been made.

52. See *id.* at 856 (directing inquiry at the existence of authorization to the federal courts); *id.* at 869 (seeking "inquiry into political branch intent").

53. U.S. CONST. art. VI, cl. 2.

54. *Id.*

55. One possibility is that the Supremacy Clause specifically mentions treaties but does not refer directly to customary international law.

they assert, it is law, just not law of the United States.<sup>56</sup> Customary international law is the law of New York, Iowa, and Texas.<sup>57</sup> To anyone outside the discourse (and apparently to many inside it),<sup>58</sup> this is so odd as to be nearly unintelligible.

But, again, there is something else going on. If customary international law is the law of New York, Iowa, and Texas, law-makers in New York, Iowa, and Texas can decide what the content of that law is. If customary international law is the law of the United States, in contrast, national law-makers define its content.<sup>59</sup> Customary international law is made—in the first instance—by the practice of nations whose decision-makers believe they are under some legal obligation to behave as they do, supported by the judgments of international lawyers who confirm that the obligation exists (*opinio juris*, as I have come to know).<sup>60</sup> However, nations can relieve themselves of the obligation to comply with customary international law by objecting to it, at least if the objection is “persistent,” to use the doctrinal term.<sup>61</sup> The final piece of the picture is that domestic law-making institutions retain the power to override nearly all international obligations.<sup>62</sup> They can withdraw from a treaty, violate a treaty for purposes of domestic law while

56. Bradley & Goldsmith, *supra* note 48, at 870.

57. *See id.*

58. *See, e.g.,* Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1861 (1998) (arguing against customary international law as state law).

59. The point would be clear if Congress were to enact a statute making all customary international law domestically enforceable. Of course, Congress can make a particular rule of customary international law domestically enforceable, but that is not what the controversy is about.

60. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987).

61. There is a narrow exception, for rules that are so-called *jus cogens*, which are defined as “non-derogable” rules, that is, rules to which every nation is bound no matter how persistently it has objected. The actual number of *jus cogens* rules appears to be quite small, and none of the rules seem to me at all controversial within U.S. domestic discussions, although advocates urge the expansion of the *jus cogens* set to include rules that *would be* controversial. But, precisely because of the controversy, the likelihood of the expansion seems to me—within the terms of international law discourse—quite small at present.

62. The exception is *jus cogens*, although even then some domestic institution—typically a court—has to determine that the *jus cogens* norm applies and has legal consequences.

accepting the consequences of the violation on the international level, and—most relevant to customary international law but applicable as well to treaty obligations—can enact a statute inconsistent with international law that, prior to the statute, was domestically applicable, thereby displacing the international rule with a domestic one under the “last in time” principle.<sup>63</sup>

Given all this, when would it matter that a norm of customary international law was federal law or state law? It seems to me that the following conditions would have to be: (1) the judge (probably a federal judge, acting under the alienage, diversity, or federal question jurisdiction) would not find the conduct at issue to violate purely domestic law;<sup>64</sup> (2) the judge *would* find the conduct to violate customary international law; and (3) if customary international law is federal law, Congress would not displace the judge’s holding whereas some state legislatures would. The real-world cases satisfying these conditions appear to be a nearly empty set.<sup>65</sup> Of course, one could always respond that the set is empty *now*, but might begin to get filled in the future. To which the response is, I think, that it is generally not a good idea to make law out of concern that pigs might fly.

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63. The international lawyers who worry about domestic law do not like the “last in time” rule. See, e.g., Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 878 (1987). Even the critics of “Globalists” do not assert, however, that there has been any movement in domestic law away from the “last in time” rule. See, e.g., *Breard v. Greene*, 523 U.S. 371, 376 (1998) (invoking the “last in time” rule to explain why the Antiterrorism and Effective Death Penalty Act of 1996 barred *Breard* from insisting on a federal fact-finding hearing that would allow him to establish an alleged prejudicial violation of the Vienna Convention).

64. In making that decision the judge would not be barred from treating customary international law as a datum that might inform his or her interpretation of domestic law.

65. The usual examples involve capital punishment for juvenile offenders and the “death row phenomenon.” My judgment is that the examples satisfy *none* of the conditions: neither practice violates a norm of customary international law (although advocates assert that each does), any judge who would find that one of the practices *does* violate such a norm would have no difficulty finding that the practice violates the U.S. Constitution, and Congress would rapidly override a judicial decision invoking only customary international law as a ground for invalidating either practice.

An even more important point is that the decision-makers who determine what customary international law requires are national judges unless the United States, through the executive or legislative branches, has objected to the claimed custom.<sup>66</sup> This contrasts with treaty-based law, or so it is said, because judges merely interpret but do not make treaties.<sup>67</sup> The challenge to treating customary international law as law for purposes of the Supremacy Clause is framed with the peculiar implication that the specific content of customary international law should be determined by state-level decision-makers.

A final area of seeming controversy is the creation of treaty-based institutions that have the power to determine domestic law. The examples are the International Court of Justice's interpretation of the Vienna Convention on Consular Relations, the World Trade Organization (WTO), and the sanctioning mechanism under the North American Free Trade Agreement (NAFTA).

The Vienna Convention requires that people arrested by the authorities of a nation other than their own be informed of their right to consult a member of their own nation's consulate.<sup>68</sup> For many years local police officials did not know of, and therefore did not honor, their obligations under the Vienna Convention.<sup>69</sup> Anti-death penalty activists in the United States and abroad seized on the undisputed fact that state police officers did not comply with the Vienna Convention in several capital cases involving citizens of Paraguay, Germany, and Mexico.<sup>70</sup> They sought to use the non-compliance as a basis for overturning the convictions and death

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66. See Bradley & Goldsmith, *supra* note 48, at 820, 842.

67. The formalism of this assertion is apparent. Just as judges must specify the content of customary international law in particular circumstances, so too must they specify what the treaty means in particular applications. In any interesting case under either customary international law or treaty-based law, I would think, there is no material difference in the judges' role.

68. Vienna Convention on Consular Relations and Optional Protocol on Disputes, Apr. 24, 1963, art. 36, para. 1(b), 21 U.S.T. 77 (entered into force with respect to the United States of America December 24, 1969).

69. See Anthony N. Bishop, *The Death Penalty in the United States: An International Human Rights Perspective*, 43 S. TEX. L. REV. 1115, 1213-14 (2003).

70. Jehanne E. Henry, *Overcoming Federalism in Internationalized Death Penalty Cases*, 35 TEX. INT'L L.J. 459, 459-60 (2000).

sentences.<sup>71</sup> The U.S. courts held that the Vienna Convention did not confer rights on individuals, and that, even if it did, failure to assert those rights in a timely manner precluded the federal courts from granting habeas corpus on the basis of the treaty violations.<sup>72</sup> I need not describe the complex course of litigation here. At its conclusion, the International Court of Justice held that the Vienna Convention required its signatories to provide effective remedies for violations of the relevant duty, that those remedies had to include relief from convictions, and specifically that invoking ordinary rules about when objections had to be made would make the remedy ineffective.<sup>73</sup>

The WTO's dispute resolution mechanism can determine that U.S. laws—state or federal—violate the general treaty requirements to which the United States agreed, and can authorize other nations to impose otherwise impermissible trade restrictions to compensate the other nations for the U.S. treaty violations. Formally speaking, the dispute resolution mechanism does not in itself make the WTO's treaty interpretations controlling in domestic disputes. However, the retaliatory sanctions, coupled with the reputational costs of being labeled a violator of treaty obligations, are supposed to have the effect of “coercing” the United States to adopt the WTO's interpretations.<sup>74</sup>

NAFTA creates a cause of action, enforceable in NAFTA institutions, against the United States for violations of NAFTA's obligations, whether by the states or the national government.<sup>75</sup> In such a situation, a determination by a NAFTA panel that some state law violates the treaty is very likely to generate a response by Congress preempting the state law.<sup>76</sup> Mississippi may or may not

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71. *Breard v. Greene*, 523 U.S. 371, 373 (1998).

72. *See e.g., id.* at 375.

73. *La Grand Case (Germany v. U.S.)*, June 27, 2001, 40 I.L.M. 1069, 1100 (I.C.J. June 27, 2001).

74. *See, e.g., Julian G. Ku, The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 96 (2000) (arguing that “an interpretation adopted by three-fourths of the WTO membership could *effectively* create a new obligation on a member state against the will of that member state”) (emphasis added).

75. *See Ernest A. Young, The Trouble with Global Constitutionalism*, 38 TEX. INT'L L.J. 527, 536 (2003).

76. *Id.*

have violated the treaty, but people in other states are going to wonder why they have to pay for Mississippi's actions.<sup>77</sup>

It is harder than one might think to formulate the precise constitutional objection to these institutions. After all, the Constitution says that treaties are the law of the land, supreme over state law.<sup>78</sup> There could be no constitutional objection to a treaty that in its terms overrides Mississippi law on some ordinary commercial subject of the sort affected by NAFTA, or even the laws of all the states on such a subject. Similarly, there could be no constitutional objection if the terms of the Vienna Convention required its signatories to provide individuals with effective remedies.<sup>79</sup>

The problems with the WTO and NAFTA institutions, and with the International Court of Justice, are said to derive from the fact that the treaties use general terms and then create decision-making bodies that give those terms content in specific cases.<sup>80</sup> This is said to place the content of the law at one remove from the terms to which the Senate agreed.<sup>81</sup> Still, it is hard to see why domestic treaty makers should be precluded from concluding that the nation's interests are advanced by acceding to a treaty with general terms whose content is to be fleshed out later.

The best objection is that such treaties impermissibly delegate the power to make domestic law to decision makers who lie outside the law-making institutions of the United States.<sup>82</sup> For example,

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77. I use Mississippi as my example because its law was placed in question in the Loewen Group litigation, although in the end the panel declined to find that the United States was liable for Mississippi's violation of NAFTA obligations. *In re Loewen Group and United States*, Case No. ARB(AF)/98/3, June 26, 2003.

78. U.S. CONST. art. VI, cl. 2.

79. See Young, *supra* note 75, at 540–41 (observing that such a treaty provision would disrupt the careful compromises between national and state interests worked out in the federal habeas corpus statute). This would be a policy-based argument against agreeing to a treaty with a provision of the sort described in the text, but it is not, at least in Young's formulation, a constitutional objection to such a provision. (Young's article is an extremely good short compendium of the concerns expressed in the critical literature.).

80. *Id.* at 537 (observing that the WTO and NAFTA "constitute institutions rather than simply establish binding commitments").

81. See Ku, *supra* note 74, at 98.

82. See *id.*; Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1558 (2003).



members of dispute resolution panels do not have the guarantees of tenure provided by Article III, and they certainly are not nominated by the president and confirmed by the Senate.<sup>83</sup> The same is true of the judges of the International Court of Justice.

There are a number of difficulties with this argument. First, it is not entirely clear why institutions that give the United States incentives, even very strong ones, to displace domestic law with a rule developed in some non-U.S. institution, are actually *making* domestic law. It would be *Congress* that overrides Mississippi's law after a NAFTA panel determination, not the NAFTA panel itself. Ernest Young suggests that the existence of the international obligation as articulated by the supranational institution may "profoundly change the political dynamics" of domestic response.<sup>84</sup> When Congress considers what to do, Young argues, it must ask "not just 'Is money more important than trees?,' but *rather* 'Do you want the United States to be an international lawbreaker and pariah?'"<sup>85</sup> Actually, though, the issue is not *rather* but *also*. That is, the supranational interpretation supplements, but does not completely displace, the domestic policy discussion. Young is certainly correct in asserting that "[i]f international law means anything, then the element of international legal obligation *must* change the character of Congress's decision"<sup>86</sup>—*must*, that is, as a normative matter. But, it takes some substantive *political* analysis of how things actually work in Congress to establish that the existence of the supranational interpretation will actually change the political dynamics (in a way different from what would happen if some interest group asserted, in the absence of the supranational interpretation, that international good citizenship means that the United States ought to follow the interest group's interpretation of the international obligation). There might be some differences, but I think that saying that they are "profound" is a rather obvious overstatement.

Second, David Golove suggests that early practice, which can be taken to indicate the original understanding of the scope of the treaty

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83. See Ku, *supra* note 74, at 95.

84. Young, *supra* note 75, at 534.

85. *Id.* at 535 (emphasis added).

86. *Id.*

power, involved some delegations to mixed decision-making bodies.<sup>87</sup>

Finally, and I think most important, as my framing of Golove's response suggests, the actual constitutional objection is not to the delegation of law-making power in a treaty, but to the treaty itself. That is, the objection is that the President and Senate lack power under the Constitution to make treaties that delegate law-making power. Of course, it is true that the treaty power, like all of Congress's (or, in this instance, the President's and Senate's) powers, is subject to restraints imposed elsewhere in the Constitution. But, as Justice Holmes wrote in *Missouri v. Holland*,<sup>88</sup> at least with respect to some constitutional restrictions, the content of those restrictions must be determined with reference to the purposes of the treaty power and the restrictions.<sup>89</sup> Whether federalism restricts the treaty power in precisely the same way that it restricts the power to regulate interstate commerce has become mildly controversial.<sup>90</sup> In my view there is very little to support the proposition that the President and the Senate should be disabled from advancing the nation's interests by precluding them from trading off some intrusions on the states for other advantages they regard as more important.<sup>91</sup>

The objections to the treaty-makers' ability to authorize non-U.S. decision-makers to make domestically effective law are not a sound separation of powers argument. They seem to be even weaker than the federalism-based objections to some treaties. To the extent that separation of powers restrictions are designed to prevent one domestic branch from aggrandizing itself at the expense of another,

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87. David Golove, *The New Confederalism: Treaty Delegations of Legislative, Executive, and Judicial Authority*, 55 STAN. L. REV. 1697, 1702 (2003).

88. 252 U.S. 416 (1920).

89. *Id.* at 433.

90. Compare Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 392-93 (1998) (arguing that treaty power should not be limited by subject matter due to federalism limitations but that if a treaty encompasses subject matter beyond Congress's regulatory authority it should not be binding on the states), with David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1083-87 (2000) (asserting that federalism should not limit treaty power at all).

91. For my analysis, see MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* 148-52 (2003).

the difficulty cannot arise directly when the decision-making body is not domestic.<sup>92</sup> To the extent that such restrictions are designed to structure decision-making in ways that promote the long-term interests of the people of the United States without endangering our liberties, it is hard to understand why the people should be disabled from concluding that our long-term interests would be better advanced by the kinds of treaty arrangements at issue. Perhaps there are some cognitive questions about our over-valuing short term benefits over long term costs that might be relevant to this issue. But, the existing literature hardly begins to frame the questions in the right way.

Several threads run through all these areas in which objections have been raised to making non-U.S. law a rule of decision for U.S. law. First, the areas where problems have actually arisen are quite few and narrow. The concerns are far more about what *might* happen in the future than they are about what has already happened.<sup>93</sup> Second, the objections are constitutionally creative. It is not that they are frivolous in some strong sense. Instead, they are at odds with rather long-standing understandings of constitutional law and working them out in detail can create some pretty peculiar doctrinal structures. There is nothing wrong in principle with creative arguments with such consequences, but the creativity and

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92. The difficulty might arise indirectly if the Senate, by a two-thirds majority, ratified a treaty negotiated by the President giving a non-domestic decision-making power to create law with domestic legal effects. This would cut the House of Representatives out of the process that makes law with domestic effects. The scenario seems to me so unrealistic as not to warrant developing law around. And, even here, the aggrandizement is not of the sort the Supreme Court has worried about in the domestic context: The House may be cut out of the law-making process, but the Senate and the President do not get any more power over domestic law-making; rather, the international body does.

93. An indication of this is that the literature typically includes a discussion of the International Criminal Court. See, e.g., Young, *supra* note 72, at 538-39; John R. Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT'L L. 205, 210 (2000). The United States has not ratified, and is extremely unlikely to ratify, the treaty creating that court. Discussing the constitutional problems that might arise if the United States did ratify it seems to me another tempest in a teapot. There are, of course, circumstances under which the International Criminal Court could assert jurisdiction over U.S. citizens even though the United States is not a party to the treaty. Whether the treaty violates domestic U.S. law has nothing to do with that problem, if it is one.

the consequences ought to signal that perhaps something else is at stake. Finally, non-U.S. institutions have not made any domestically effective law in any area of law. Rather, U.S. courts have to decide what constitutes customary international law, and then apply it domestically; U.S. institutions have to decide how to respond to the incentives created by the WTO and NAFTA institutions.

#### IV. REAL CONCERNS ABOUT MAKING NON-U.S. LAW A RULE OF DECISION

I believe that underneath all the technicalities lie two concerns that should be the focus of attention: (1) a concern that making non-U.S. law a rule of decision would generate bad law; and (2) a concern that doing so somehow could impair U.S. sovereignty and the democratic self-governance of the people of the United States. In my view, the first is a genuine concern, albeit often oversimplified, while the second is not. The concern for sovereignty and democracy, I believe, is a concern that federal judges will impose a particular elite's view of good law on a public that might disagree if it understood what was at stake.

Criticizing the Court's mention of the view of the world community in *Atkins*, Justice Scalia said that that community's "notions of justice are (thankfully) not always those of our people."<sup>94</sup> What exactly is the "thankfully" doing there? Pretty clearly, I think, Justice Scalia is alluding to the fact—as he sees it—that U.S. notions of justice are better than those prevailing in (some) other nations.

Surely that is true, although why one should be concerned is another question. The notions of justice prevailing in Saudi Arabia regarding the proper roles of men and women are not worth emulating in the United States. But, I have not run across much scholarship advocating that the United States adopt as a constitutional rule Saudi Arabian ideas of gender inequality.<sup>95</sup> The standard image is of floors and sometimes ceilings. Advocates of

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94. *Atkins v. Virginia*, 536 U.S. 304, 348 (2002).

95. There is literature on the question of whether U.S. scholars *should* take a critical stance towards the Saudi Arabian notions of gender inequality. My sense of the literature is that proponents of a tolerant multiculturalism are in the minority on this question, and the proponents of universal standards of gender equality are in the majority—which makes Justice Scalia's concerns pretty clearly misplaced on this issue at least.

taking non-U.S. principles of justice into account begin with the proposition that existing U.S. law sets a floor *for the United States*. Where principles of justice elsewhere are lower than that floor, they should be ignored. But, the advocates contend, U.S. decision-makers should be willing to raise the U.S. floor—to provide more protection for interests already recognized in U.S. law—in response to higher standards elsewhere.

The precise scope of this advocacy is unclear. The usual example is the death penalty, and in particular the tolerance in the United States of administering capital punishment to people who were juveniles when they committed their crimes.<sup>96</sup> That practice is denounced in every society reasonably comparable to the United States.<sup>97</sup> The real question is whether there is any other issue on which U.S. principles of justice are below those accepted elsewhere. If not, we could forego talking about principles of justice prevailing elsewhere and discuss directly the justice of the juvenile death penalty, with our moral or constitutional judgments informed by the reasons offered in support of the judgments made elsewhere, but not by the mere fact of those judgments.

As far as I can tell, the only other area in which there has been substantial advocacy of relying on non-U.S. standards of justice involves freedom of expression. Early defenses of hate speech regulation pointed out that international norms not only supported the proposition that hate speech regulations were permissible national policies but went farther to *require* the adoption of hate speech regulations as a means of combating discrimination.<sup>98</sup> More recently, U.S. concerns about freedom of expression produced an international regulation of tobacco advertising that described stringent regulations of such advertising, then relaxed those regulations to the extent they were precluded by national constitutional norms.<sup>99</sup> And, it is fairly easy to locate regulations of

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96. See Nora V. Demelitner, *The Death Penalty in the United States: Following the European Lead?*, 81 OR. L. REV. 131, 140–41 (2002).

97. *Id.*

98. See Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2341–48 (1989).

99. For a discussion, see Allyn L. Taylor, *An International Regulatory Strategy for Global Tobacco Control*, 21 YALE J. INT'L L. 257, 268–86 (1996).

commercial expression elsewhere that seem quite at odds with U.S. understandings of free speech.<sup>100</sup>

What I find interesting about *these* examples—and, I stress, they are the only ones with any traction in policy-making—is that it is quite unclear *as a matter of domestic U.S. constitutional law* where the floor is. Of course we know what the positive domestic constitutional law is: the First Amendment places significant limits on a government's ability to adopt hate speech regulations,<sup>101</sup> and substantial limits on its ability to regulate tobacco advertising.<sup>102</sup> But, unlike the question of gender equality, the positive law is highly contested within U.S. constitutional discourse. Put another way, advocates of hate speech regulation and regulation of tobacco advertising use arguments available within U.S. constitutional discourse to support the conclusion that the Supreme Court has placed the floor too high. There would be nothing regrettable, from their point of view, in lowering the floor.

Obviously, the advocates of hate speech regulation and tobacco advertising regulation might be wrong. My personal view, for example, is that differences in the structure of the administration of justice in Canada and the United States make it less dangerous for Canada to enforce hate speech regulations than for U.S. prosecutors.<sup>103</sup> So, whereas a lower floor is acceptable *for Canada*, it is not acceptable for the United States. However, this is an

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100. My favorite examples are regulations barring professionals from "advertising" by means of allowing themselves to be the subjects of approving stories published in ordinary newspapers. Compare *B. v. Canton of Bern Law Society* (Fed. Ct. Switz., Feb. 11, 1999) (holding that the publication of an interview-based profile of a lawyer in a newspaper can be treated as prohibited indirect advertising), with *Barthold v. Federal Republic of Germany*, 90 Eur. Ct. H.R. (ser. A) (1985) (finding that an injunction against a veterinary physician barring him from giving interviews violated the European Convention on Human Rights). I am quite sure that none of these regulations would be regarded as commercial advertising (and so, on views the current Supreme Court has rejected as too tolerant of regulation, subject to only minimal scrutiny) under even the most generous standards in U.S. law. They would be treated as ordinary expression by newspapers, and subjected to rather stringent review.

101. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391–92 (1992).

102. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 571 (2001).

103. The basic idea is that the administration of justice in Canada is substantially more centralized than it is in the United States, making abusive prosecutions less likely (though not impossible).

argument framed within a discourse that takes seriously the notions of justice that prevail elsewhere, and then asks whether there are reasons applicable to the United States for refusing to adopt those notions here. Or, to put the point another way, a parenthetical “thankfully” is not a serious way of addressing the issues raised by those who advocate taking notions of justice seriously. It is a way of avoiding thinking about the merits of those notions and their suitability given the specific institutions and distinctive histories of the United States and the nations in which those notions prevail.<sup>104</sup>

Justice Scalia “thankfully” suggests that there is some general objection to considering notions of justice prevailing elsewhere in interpreting the U.S. Constitution, and obscures the fact that the real arguments should be about particular claims—such as the suitability of other nations’ notions of gender equality, capital punishment, or free speech for the United States with its own institutions and history.<sup>105</sup> There is another set of objections to using non-U.S. law

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104. The oral argument in *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003), contained an exchange between Justice Ginsburg and Solicitor General Olson in which the Solicitor General addressed the questions in the right way, alluding to differences between the United States and other nations that reduce the relevance of those other nations’ experience with affirmative action, rather than dismissing the reference to other nations’ experience entirely:

QUESTION (Justice Ginsburg): General—we’re part of a world, and this problem is a global problem. Other countries operating under the same equality norm have confronted it. Our neighbor to the north, Canada, has, the European Union, South Africa, and they have all approved this kind of, they call it positive discrimination. Do we—they have rejected what you recited as the ills that follow from this. Should we shut that from our view at all or should we consider what judges in other places have said on this subject?

GENERAL OLSON: I submit, Justice Ginsburg that none of those countries has our history, none of those countries has the Fourteenth Amendment, none of those histories has the history of the statements by this Court which has examined the question over and over again that the ultimate damage that is done by racial preferences is such that if there ever is a situation in which such factors must be used that they must be—race neutral means must be used to accomplish those objective, narrow tailoring must be applied, and this—this—these programs fail all of those tests.

Transcript of Oral Argument, *Gratz*, 123 S. Ct. 2411 (No. 02-516), 2003 U.S. Trans LEXIS 27, at \*23 (April 1, 2003).

105. For a similar observation, see Neuman, *supra* note 6, at 1899 (“[T]o the extent that constitutional adjudication in the United States has any suprapositive component, and does not consist simply in replicating

as a rule of decision that similarly offers a general objection to obscure the real issue. These are objections that making non-U.S. law a rule of decision surrenders U.S. sovereignty to non-U.S. decision-makers who are not responsive to control by the people of the United States.

The term "sovereignty" recurs in criticisms of the use of non-U.S. law as a rule of decision for U.S. problems.<sup>106</sup> The language of sovereignty is misleading in two ways. First, it overlooks the fact that a sovereign nation can decide that its sovereign interests are advanced overall by making agreements with other nations that limit what it can otherwise do. Consider again the Vienna Convention's requirement that a nation's citizens arrested abroad be advised of their right to confer with a consular official. The Convention's signatories surrendered some of their domestic sovereignty because they believed that their citizens will benefit from the availability of consular advice when they are arrested abroad.<sup>107</sup> Even more, a sovereign nation can decide that its sovereign interests are advanced overall by agreeing with other nations to delegate interpretive authority over treaties to some supranational body. Again, the Vienna Convention provides an example. As with all legal texts, the Convention's terms are not self-defining. Nations might believe it desirable to create a system of consular notification, but be unable to agree on some important details, such as the remedy for failing to inform arrested non-nationals of their rights under the Convention. Given the choice between no agreement at all and an agreement with the basics specified and details left to be filled in by some

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governmental usages of the eighteenth century, the normative arguments of international human rights tribunals are at least potentially relevant. Such arguments should be examined with care and discernment, and they should not be dismissed categorically.").

106. Probably the most notable example is RABKIN, *supra* note 27. Rabkin concludes that "America's first duty must be to protect its own democracy and the rights and resources of its own people—by safeguarding its own sovereignty." *Id.* at 101. See also Bolton, *supra* note 89, at 221 (asserting that the costs of global governance to the United States include "impaired popular sovereignty"). For another example, by a more careful scholar, see Young, *supra* note 72, at 542–43 (discussing "[t]he [a]biding [i]mportance of [s]overeignty").

107. Cf. RABKIN, *supra* note 27, at 2 (noting the tension between the definition of "sovereignty" as *independence* and the fact that sovereign nations "undertake treaty commitments").



supranational interpreter, a sovereign nation might conclude that the second choice better advances its sovereign interests.<sup>108</sup> In general, the mere fact that some non-U.S. body determines the meaning of the law applicable within the United States does not itself show that the United States' sovereignty has been reduced.

Second, and I think more important, the language of sovereignty obscures the fact that it is *always* a domestic decision-maker who concludes that a non-U.S. rule should be a rule of decision within the United States. After all, who decides that a defendant in an ATCA case has violated a norm of customary international law? Not a law professor, and not foreign nations whose practices are taken as evidence of what the norm is, but a U.S. federal court. A U.S. court has to decide that the International Court of Justice's interpretation of the Vienna Convention should be followed. Alternatively, if it is suggested that the Constitution takes the choice out of the court's hands by saying that treaties are the law of the land, the U.S. treaty-makers have to have decided to sign the Vienna Convention, to accept the jurisdiction of the International Court of Justice in general and as an interpreter of the Vienna Convention, and so on down to the bottom. In brief, whenever a U.S. decision-maker invokes a non-U.S. rule of decision, the decision is as fully domestic as any other decision the decision-maker makes. There is, as far as I can tell, no surrender of sovereignty whatsoever.

This second argument is also a response to the somewhat more coherent objection to the use of non-U.S. rules of decision in U.S. cases, that doing so somehow undermines domestic democracy, the ability of the people of the United States to set the rules by which we are governed. So, for example, Ernest Young argues that "supranational lawmaking . . . risks undermining our Constitution's institutional strategy" because it "operates outside those systems of

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108. Stephen Krasner makes this point, in connection with the WTO: The "United States would not have secured the agreement of other countries on a wide range of issues . . . if it had not tied its own hands and constrained its own freedom of action. The dispute settlement mechanism provides a way of clearly identifying what constitutes reneging. . . . Other countries might have been very, very leery about entering into arrangements in which they would have remained vulnerable to unilateral action by the US that could not clearly be marked as violating the agreement." Stephen D. Krasner, *Power and Constraint*, 1 CHI. J. INT'L L. 231, 234 (2000).

checks and balances and accountability.”<sup>109</sup> In one sense that formulation is—by definition—accurate: Supranational lawmaking institutions necessarily operate outside the domestic system of checks and balances; that is why we call them *supranational*. But in another sense, Young’s formulation is misleading. The rules made by supranational institutions become domestic U.S. law only through the operation of U.S. domestic institutions subject to the checks-and-balances system. The International Court of Justice’s interpretation of the Vienna Convention is domestically effective, if at all, only because domestic courts make it so, or (on another view) because the domestic treaty-makers, themselves subject to the checks-and-balances system, have made it so.

This point is so obvious that I find it hard to believe that the opponents of so-called global governance have overlooked it. And, indeed, at some places it becomes pretty clear that they have not. Take John Bolton’s formulation: at one point he expresses concern that the “Globalists,” as he calls them, have a strategy of “creat[ing] a network of international agreements and customary international law that effectively take[s] critical political and legal decisions out of the hands of nation-states by operationally overriding their own internal decision-making processes.”<sup>110</sup> Putting aside for the moment the question of customary international law,<sup>111</sup> I think the problem with this formulation is transparent: The international obligations the “Globalists” want to create would be created *by means of* domestic decision-making processes, not by by-passing them.<sup>112</sup> Two sentences later, though, Bolton makes what he thinks is the same point, but it is not. He writes that accepting the “Globalists” claims would “judicialize key decisions, thus removing them from [our] common political processes, and, in effect to supersede national constitutional standards with international

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109. Young, *supra* note 72, at 529.

110. Bolton, *supra* note 89, at 212.

111. See discussion *infra* note 113.

112. One might take Bolton to be arguing that the scope of the treaty power ought to be limited so that the domestic decision-making process could not reach the “Globalists” ends. However, that does not seem to be his argument, and, as I have indicated, the argument itself raises quite difficult questions about distinguishing between the constraints on democratic governance imposed by constitutions and the constraints imposed by treaties made pursuant to broad constitutional treaty-making powers.

ones.”<sup>113</sup> Here, the objection is to decision-making, not by institutions entirely outside the domestic arena, but by domestic courts.<sup>114</sup>

At this point, though, the argument becomes a familiar—and rather tired—challenge to so-called judicial activism, and not even in a constitutional context but essentially a statutory one. I find it impossible to distinguish, in terms of democratic legitimacy, between a domestic court filling in the gaps of a statutory scheme and the same court determining what customary international law is and applying it, or interpreting a treaty to require the domestic courts to take as rules of decisions the statements made by supranational institutions.<sup>115</sup>

Now, it may be true that judges who pay attention to non-U.S. decision-makers may interpret treaty obligations differently, or interpret the scope of constitutional limitations on the treaty power differently, from judges who do not. The real argument, though, should be about the interpretive principles judges should use, which is the argument in the purely domestic context. The fact that the relevant texts are treaties and statutes having some *international* character should not change the nature of the discussion.

By noting two other themes in the critical literature, we can refine our understanding of the positions taken by critics of the possibility that U.S. courts might choose to take non-U.S. rules of law as rules of decision. The first theme is criticism of the role transnational non-governmental organizations (NGOs) play in the processes of concern to the critics; the second is concern about the

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113. Bolton, *supra* note 89, at 212. The question of customary international law is answered by observing once again that domestic courts determine the content of customary international law in the cases they decide pursuant to some authorization by domestic legislative bodies.

114. Robert Bork's attack on what he calls the emerging trend toward an "international constitutional common law" also focuses on the displacement of legislative bodies by courts. ROBERT H. BORK, *COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES* (2003). Note the subtitle.

115. Young, *supra* note 72, at 534, asserts that giving customary international law direct effect in U.S. courts "shifts . . . authority to courts, which exercise a great deal of discretion in interpreting the vague materials on which customary norms rest." I wonder whether this distinguishes the authority of courts in this setting from their authority in ordinary statutory interpretation.

asserted cosmopolitanism of the subset of judges who do take non-U.S. law seriously.

Bolton includes a section on “NGOs on Parade”<sup>116</sup> in his critique, and refers disparagingly to “members of self-styled human rights, environmental and humanitarian groups.”<sup>117</sup> No doubt NGOs play a role in the processes Bolton dislikes. My difficulty is figuring out why that role is different from that played by an ideologically oriented interest group like the NAACP on the liberal side and the Center for Individual Rights on the conservative side. Such groups articulate norms they believe *are* currently part of domestic U.S. law and seek to establish their claims through litigation and pressure on elected officials.<sup>118</sup> Transnational NGOs seem to be exactly the same. In Stephen Krasner’s terms, they take advantage of the “permeability of the American political process,”<sup>119</sup> and its openness to pressure from anywhere—transnational NGOs with some members in the United States, transnational corporations with some investors in the United States—to advance their interests.<sup>120</sup>

It seems that the argument against global governance and the “Globalists” reduces to dislike for the role liberal interest groups play in domestic U.S. litigation. This is coupled with a concern that somehow these interest groups will be more effective when they claim, for example, that some international document requires that U.S. courts follow their favored view of equality than when they claim that the Equal Protection Clause, properly interpreted,

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116. Bolton, *supra* note 89, at 215 (“NGOs on Parade”).

117. *Id.* at 205. See also RABKIN, *supra* note 27, at 41–42 (discussing “NGO Activism”).

118. See generally *NAACP @ Work*, at <http://www.naACP.org/work/index.html> (2003) (explaining the primary focus of the NAACP); *Fighting for Individual Rights*, at [http://www.cir-usa.org/mission\\_new.html](http://www.cir-usa.org/mission_new.html) (last revised Jan. 17, 2002) (explaining the mission of the organization).

119. Krasner, *supra* note 104, at 231. See also Judith Resnik & Julie Chihye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1926–27 (2003) (referring to “the very permeability of our legal system” and concluding that “U.S. law . . . cannot be secured against external forces.”).

120. See Krasner, *supra* note 104, at 236 (“It is not clear that there is any practical way to limit the activities of [transnational] NGOs, to distinguish them, for instance, from the lobbying efforts of multinational corporations including foreign corporations with subsidiaries in the United States.”).

embraces their favored view.<sup>121</sup> Why should that be so? Here the critics' concern about cosmopolitanism comes into play. Bork refers to a "cultural socialism" among these judges who, he argues, "piece together, case by case, a fabric of law" that reflects the values of cosmopolitan elites.<sup>122</sup> Bolton refers to "a diverse collection of people generally uneasy with the dominance of capitalism as an economic philosophy and individualism as a political philosophy."<sup>123</sup> This simply transfers the authors' conservative anti-elitism from domestic subject matters to the ones at issue here.<sup>124</sup> How, if at all, does the global context alter the discussion?

Anne-Marie Slaughter's work on the rise of transnational networks of judges may provide the answer.<sup>125</sup> Slaughter observes that from the 1980s on, judges from the constitutional courts of various nations began to attend conferences with each other, exchanging views about what their nations' constitutions said, about how they were interpreting similar clauses, and about what constitutionalism meant.<sup>126</sup> The crass materialist in me comes up with an explanation for why conservatives might be concerned about U.S. judges referring to international documents in interpreting the U.S. Constitution. Judges who do so are more likely than judges who do not to be invited to these conferences, which are sometimes held in attractive venues.<sup>127</sup>

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121. *See id.*

122. BORK, *supra* note 110.

123. Bolton, *supra* note 89, at 205.

124. Bork's rhetoric in his recent book on "[t]he [w]orldwide [r]ule of [j]udges," is indistinguishable from his rhetoric in his earlier works on domestic U.S. constitutional law. Compare BORK, *supra* note 110, with e.g. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW, (Touchstone 1991) (1989) (discussing the propriety and necessity of interpreting the Constitution according to the Framers' original intent).

125. Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1120-23 (2000).

126. *See id.*

127. Cf. Young, *supra* note 72, at 527 (observing that "you tend to get invited on better trips if you do comparative or international law."). Young's observation is consistent with comments one hears in conversations among law professors about the burgeoning interest in transnational law. It may not be entirely accurate. In 2003 the trips I took arising out of my comparative work were to Innsbruck, Austria, Dublin, Ireland, Wellington, New Zealand, London, Ontario, and the Faroe Islands—at best a mixed bag, with enough

Yet even this mechanism seems to be of limited force.<sup>128</sup> Conference conveners always like to have one or two dissenters from the agenda they want to advance. A judge who wanted to be invited to these conferences could make a name for himself or herself by articulately presenting the case *against* using non-U.S. law in U.S. decisions, and then wait for the invitations.<sup>129</sup>

In sum, as a domestic constitutional lawyer, I believe the arguments presented against making non-U.S. law a rule of decision in U.S. cases are no more than replays of arguments about statutory and constitutional interpretation in the purely domestic context. The transnational context has not—yet—added anything to the familiar arguments, except perhaps an unduly heightened rhetoric that seems strikingly out of proportion to what has actually happened on the ground.<sup>130</sup>

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time in airplanes and at airports to reduce significantly the “fun” aspects of the time (often relatively short) on the ground.

128. Elsewhere Slaughter points out that similar networks are developing among executive officials. Anne-Marie Slaughter, *Building Global Democracy*, 1 CHI. J. INT’L L. 223, 227–28 (2000). The democracy-based objections to the phenomena at issue would, I think, disappear completely if domestic law-making were to come under the influence of *legislators* who participate in such networks, as Slaughter suggests should happen soon. *Id.*

129. I suppose that the conservative critics might be concerned about a subtle psychological effect even on these dissenting judges. If they hang out with judges who *do* refer to international sources long enough, they may be seduced into abandoning their principled objections to the practice. I, myself, doubt the force of this mechanism too. Federal judges are strong-minded people in general, and know how to evaluate on the merits reasons for the positions presented to them, discounting for their friendship with the people who present the positions.

130. One sometimes hears claims that invoking transnational law *exacerbates* the so-called democratic deficit associated with the institutions that develop transnational law. But, precisely because domestic courts invoke transnational law, doing so reproduces—but does not, I believe—exacerbate the democratic deficit associated with domestic courts. David Fontana provided a useful example in his comments on a draft of this Essay. Fontana suggests that a New Yorker might have problems with someone from Connecticut telling him or her what to do, but would have more difficulty with someone from Alabama doing so, and even more difficulty with someone from Chile doing so. Yet, New Yorkers do accept rules imposed by people from Alabama (Supreme Court Justice Hugo Black) or Arizona (Justice Sandra Day O’Conner). Further, New Yorkers would be subject to rules articulated by someone from Chile only if some domestic decision-maker placed those rules in domestic law. E-mail from David Fontana, PhD student at Yale Law School, to Mark Tushnet (Sept. 9, 2003, 09:13:33, EST) (on file with author).

## V. CONCLUSION

The critical literature on the role of non-U.S. law in U.S. courts is filled with a striking trope, taking advocacy *as* law-making. Ernest Young provides a typical example, writing, “[t]o suggest that supranational rules should trump state sovereign immunity when a federal treaty is being enforced is to rather profoundly alter the constitutional constraints on enforcement of federal law.”<sup>131</sup> Not quite. To suggest that the law be interpreted in a particular way is, well, to suggest that it be interpreted in a particular way. It is most definitely not to alter the law. The law would be altered if domestic decision-makers, cognizant of constitutional constraints and subject to domestic political ones, concluded that the law, taken as a whole, is best interpreted to incorporate non-U.S. law as a rule of decision. The alteration, that is, comes about through the operation of entirely ordinary law-making processes on the domestic scene.

John Bolton’s catalogue of his adversaries includes “academics (largely, but not exclusively, law and international relations professors) and media professionals; members of self-styled human rights, environmental and humanitarian groups; [and] rarified circles within the ‘permanent government,’ and at present [in 2000] even in the White House.”<sup>132</sup> This invites the obvious *tu quoque* response. When he wrote, Bolton was a senior executive at the American Enterprise Institute, which one might call a “self-styled” public policy group, and in 2003 Undersecretary of State for Arms Control and International Security (“even in the White House,” or close enough). The scholarly critics, who provide better arguments than Bolton for the positions he takes, are academics, and the ones whose work with which I am familiar are largely law professors.

What seems to be happening is that interest groups dress up ordinary interest-group politics in the United States with arguments that their favored positions are required by the Constitution or, in this

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131. Young, *supra* note 72, at 541.

132. Bolton, *supra* note 89, at 205.

instance, by supranational law.<sup>133</sup> The space-alien's arguments, when translated, turn out to be nothing new.

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133. For an argument generally compatible with the one made here, see Peter J. Spiro, *The New Sovereignists: American Exceptionalism and Its False Prophets*, 79 *FOREIGN AFFAIRS* Nov.-Dec. 2000 at 9-10 (arguing both that "New Sovereignism," anti-internationalism is based on flawed premises, and that it risks "America's future global involvement" and "position of international leadership.")



