

2013

## Sovereignism's Twilight

Peter J. Spiro

---

### Recommended Citation

Peter J. Spiro, *Sovereignism's Twilight*, 31 BERKELEY J. INT'L LAW. 308 (2013).  
Available at: <http://scholarship.law.berkeley.edu/bjil/vol31/iss1/9>

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of International Law by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact [jcera@law.berkeley.edu](mailto:jcera@law.berkeley.edu).

# Sovereignism's Twilight\*

Peter J. Spiro\*\*

## INTRODUCTION

Sovereignism is ascendant among foreign relations law scholars. Skeptical of the “new” international law, sovereignists have worked to fortify various constitutional doctrines as breakfronts against rising international waters.<sup>1</sup> At one level, they have been hugely successful. From a first volley launched fifteen years ago in the *Harvard Law Review*,<sup>2</sup> an intellectually energetic and academically entrepreneurial group of legal scholars has vanquished the former conventional wisdom of the Restatement (Third) of Foreign Relations Law,<sup>3</sup> a conventional wisdom that was receptive to the incorporation of international law. The sovereignist view has been elaborated on the pages of prestigious law reviews. On key issues, sovereignism is also carrying the day in the federal courts, with further major victories likely just over the horizon.

At another level, however, the sovereignist cause is lost. Massive material changes in the nature of global interaction—captured under the necessarily capacious umbrella of “globalization”—will inevitably overwhelm sovereignist defenses, which, notwithstanding their constitutional pedigree and apparent gravity, are in the end incapable of stemming the tide. International law is insinuating itself into U.S. law through multiple channels. The Constitution will not be able to plug the gaps. It will inevitably and radically adapt to the changed international context.

---

\* This paper was originally presented at a symposium held at the American Enterprise Institute in Washington, D.C., on June 4, 2012. The symposium was entitled “I Pledge Allegiance to the United . . . Nations? Global Governance and the Challenge to the American Constitution.”

\*\* Charles Weiner Professor of Law, Temple University Law School. This essay is based on panel remarks made at a conference on Global Governance and the Challenge to the American Constitution, American Enterprise Institute, June 4, 2012.

1. For an introductory use of the term, see Peter J. Spiro, *The New Sovereignists*, FOREIGN AFF., Nov.-Dec. 2000, 9.

2. See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).

3. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987).

Julian Ku and John Yoo's *Taming Globalization* fits comfortably into the growing sovereigntist literature.<sup>4</sup> However much the authors attempt to distinguish their approach as "accommodating" globalization, they too are international law skeptics. Ku and Yoo's constitutional tactics aim to impede the incorporation of international law, albeit more subtly than some of their sovereigntist fellow travelers. They are confident, moreover, that constitutional doctrine will be effective at defeating the imposition of international law on the United States. Call it constitutional hubris. *Taming Globalization* takes constitutional precepts established in the old world and carries them forward to the new. The resulting analysis has surface plausibility but fails to grasp how changes on the ground will ultimately undo these constitutional understandings.

This essay uses *Taming Globalization* as a window into the current state of foreign relations law on the ground and in the scholarship. Part I questions whether Ku and Yoo's ostensibly neutral institutional analysis is rigged against results favoring the incorporation of international law. This section highlights the omission of tough cases that would appear under their analysis to favor incorporation, including through the exercise of presidential power, the Treaty Power, and the Offenses Clause. Part II examines four clusters of cases that appear to evidence sovereigntism's continued ascendancy, relating to self-execution, the Alien Tort Statute, the detention of terror suspects, and the use of international law in constitutional interpretation. These clusters appear to vindicate sovereigntist perspectives, but short-term victories are likely to be reversed by material forces of globalization. In the end, globalization is not a quantity to be rejected, accommodated, or accepted as a policy option. Globalization has become a fact of human organization, and the Constitution will bend to it.

## I.

### SOVEREIGNTISM UNDERCOVER

For those first scholars critically addressing the Restatement positions (John Yoo among them),<sup>5</sup> there was a lot of low hanging fruit. The Restatement had overreached on various elements of the foreign relations law canon; the Restatement itself was the putative canon, but in many respects it was an academic one unsupported by practice.<sup>6</sup> It landed amidst a generation of

---

4. JULIAN KU & JOHN YOO, *TAMING GLOBALIZATION: INTERNATIONAL LAW, THE U.S. CONSTITUTION, AND THE NEW WORLD ORDER* (2012).

5. See, e.g., John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999) (critiquing Restatement position on self-execution of treaties); John C. Yoo, *Law As Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757 (2001) (attacking Restatement position on status of congressional-executive agreements).

6. See Bradley & Goldsmith, *supra* note 2, at 821 (critiquing the Restatement for its "doctrinal bootstrapping" on the question of whether customary international law qualifies as federal

constitutional law scholars who matured during the Vietnam era and who were receptive both to international law and to congressional power.<sup>7</sup> Internationalist and congressional power positions were largely unchallenged in the academy, creating a kind of pent-up demand for critical scholarly perspectives. The end of the Cold War magnified the possibilities for revision, making the intersection of domestic and international law a topical one. These background factors combined to put the whole field of foreign relations law up for grabs. The constitutional law of foreign relations presented multiple opportunities for conservative scholars to make novel arguments on interesting subjects.<sup>8</sup>

But the low hanging fruit has been devoured. More difficult, second-generation questions—ones on which not all sovereignists agree—are on the table. Some have been prompted by post-9/11 issues. The George W. Bush Administration took sovereignism into the inner circles of power, with results (in a “be careful what you wish for” sort of way) that created divisions among sovereignist scholars.<sup>9</sup>

There were also continuing, complicating shifts in the international context. Among those shifts is the fact that international law and institutions are here to stay and that they are consequential. In 1997, international law still suffered a somewhat deserved reputation as aspirational and untethered to empirics, especially in the context of human rights.<sup>10</sup> It has gotten harder to be dismissive of international law.<sup>11</sup> Perhaps that best explains why Ku and Yoo frame their

---

common law).

7. See, e.g., HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION* (1990); JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993); MICHAEL GLENNON, *CONSTITUTIONAL DIPLOMACY* (1991); LOUIS HENKIN, *CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS* (1990) (all arguing for a robust congressional role in foreign relations).

8. The corpus of this work is large, much of it produced by Bradley, Goldsmith, and Yoo. Other conservative scholars contributing to the first wave of revisionist scholarship (not all of it congruent with sovereignism) included John McGinnis, Eric Posner, Michael Ramsey, and Ernest Young. See also JEREMY RABKIN, *WHY SOVEREIGNTY MATTERS* (1998); JOHN FONTE, *SOVEREIGNTY OR SUBMISSION* (2011); John R. Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT'L L. 205 (2000).

9. For instance, between Jack Goldsmith and John Yoo on presidential powers, see JACK GOLDSMITH, *THE TERROR PRESIDENCY* 167-72 (2005) (describing disagreements between Yoo and Goldsmith on presidential power issues).

10. See, e.g., Curtis Bradley, *Breard, Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529 (1999); Jack L. Goldsmith, *Sovereignty, International Relations Theory, and International Law*, 52 STAN. L. REV. 959, 981-82 (2000).

11. See JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2006), which provoked a vigorous response from a range of international law scholars: see, e.g., Symposium, *The Limits of International Law*, 34 GA. J. INT'L & COMP. L. 253 (2005); Oona A. Hathaway & Ariel N. Lavinbruk, *Rationalism and Revisionism in International Law*, 119 HARV. L. REV. 1404 (2006); Paul Berman, *Seeing Beyond the Limits of International Law*, 84 TEX. L. REV. 1265 (2005). Eric Posner's more recent solo effort along the same lines, ERIC POSNER, *THE PERILS OF GLOBAL LEGALISM* (2011), attracted much less attention, perhaps demonstrating that the debate has been fought and won.

approach as “accommodationist.”<sup>12</sup> It seems more credible today to accept (or at least stand agnostic towards<sup>13</sup>) the efficacy of international law.

But that does not mean that Ku and Yoo are accommodating of international law in any concretely apparent way. Most of the argument is framed in terms of institutional capacities.<sup>14</sup> Above all, Ku and Yoo favor the political branches over the courts.<sup>15</sup> They also see room for the states in the context of their traditional areas of regulation, at least relative to the federal judiciary.<sup>16</sup> This is an ostensibly neutral comparative institutional analysis. The doctrinal upshot is to condemn the self-execution of treaties, the Alien Tort Statute, the use of foreign law in constitutional interpretation, and the putative rule of exclusive federal power over foreign relations—anything that enables the courts to act on international law without specific direction from the political branches.

But the approach suspiciously favors results rebuffing international law. Functional capacities aside, Ku and Yoo see danger in the courts as international law first-adopters.<sup>17</sup> Doctrinal prescriptions subordinating the courts to the political branches and to the states have the unstated practical consequence of obstructing the incorporation of international law into domestic law. So much for accommodation. Although Ku and Yoo try to distinguish themselves from other sovereigntists,<sup>18</sup> the anti-internationalist destination is pretty much the same. The tone might annoy those who are ideologically opposed to international institutions (Jeremy Rabkin, for example<sup>19</sup>); chalk that up to the narcissism of small differences. There does not appear to be a single context in which the theory produces a result friendly to international law, at least not on any issue of public policy prominence.<sup>20</sup>

---

12. KU & YOO, *supra* note 4, at 16.

13. *Id.* at 8 (“For our purposes, it is unnecessary to take a position on whether international law can legitimately make claim to a universality that binds all nations and persons in the world.”).

14. *See id.* at 162-4 (matrix summarizing relative institutional strengths of Congress, the President, courts, and the states).

15. *Id.* at 11.

16. *Id.* at 154-65.

17. *Id.* at 4-6.

18. *See id.* at 7-10 (distinguishing “accommodationist” approach from the “revisionist”).

19. *Taming Globalization: International Law, the US Constitution and the New World Order*, AMERICAN ENTERPRISE INSTITUTE (Apr. 19, 2012), video available at <http://aei.org/events/2012/04/19/taming-globalization-international-law-the-us-constitution-and-the-new-world-order/> (while sympathetic to many of Ku and Yoo’s prescriptions, critiquing their acceptance of globalization and international human rights law).

20. The sole context in which Ku and Yoo appear to validate the incorporation of international law is with respect to state adoption of such obscure international conventions as the Great Lakes Charter and the Convention on the Form of an International Will. *See* KU & YOO, *supra* note 4, at 165-72.

But there are real cases at hand with which to test their analytical neutrality. The *Medellín* case gets a lot of play in *Taming Globalization*.<sup>21</sup> *Medellín* involved two questions: first, whether a decision by the International Court of Justice interpreting the Vienna Convention on Consular Relations (VCCR) was self-executing—that is (for these purposes), whether the courts could give effect to the decision in the absence of implementing legislation from Congress;<sup>22</sup> second, assuming it not to be self-executing, whether the President could impose the decision on state courts through his independent powers.<sup>23</sup> It is hardly surprising that Ku and Yoo highlight the Court's self-execution ruling, which effectively imposed a clear statement threshold to judicial cognizance of treaty terms. Ku and Yoo's central doctrinal prescription is the adoption of non-self-execution as a default rule in the context of treaty application,<sup>24</sup> a path the *Medellín* decision appears to take.

But Ku and Yoo hardly mention the Court's holding on the second question, in which the Court rejected President Bush's attempt (via memorandum) to impose the ICJ's decision in the *Avena* case on state courts.<sup>25</sup> Applying Ku and Yoo's institutional framework, one can make a good case that the Court reached the wrong result on that point. Ku and Yoo stress the president's comparative advantage in deciding whether and how international law should be incorporated into U.S. law.<sup>26</sup> President Bush had made that decision, with respect to the limited number of defendants directly covered by the ICJ's ruling (at the same time that he withdrew from the compulsory jurisdiction of the ICJ over VCCR claims).<sup>27</sup> He had good foreign policy reasons for doing so: the *Medellín* case was an irritant in relations with our important southern neighbor,<sup>28</sup> and U.S. interests in the reciprocal extension of

---

21. *Id.* at 197-208.

22. *Medellín v. Texas*, 552 U.S. 491, 498 (2008). On self-execution, *see generally* Carlos Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995).

23. *Medellín*, 552 U.S. at 498.

24. *See* KU & YOO, *supra* note 4, at 87-112. To the same effect, *see also* Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1157 (2003).

25. Memorandum from President George W. Bush for Attorney Gen. Alberto Gonzalez, Compliance with the Decision of the International Court of Justice in *Avena* (Feb. 28, 2005). The *Avena* decision had ordered the United States to "review and reconsider" the convictions and sentences of certain Mexican nationals whose rights to consular notification under the VCCR the United States was deemed to have violated. *See Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31).

26. KU & YOO, *supra* note 4, at 136-41.

27. Letter from Condoleezza Rice, U.S. Secretary of State, to Kofi Annan, U.N. Secretary General (Mar. 7, 2005), *available at* <http://www.state.gov/documents/organization/87288.pdf>. *See also* Adam Liptak, *U.S. Says It Has Withdrawn from World Judicial Body*, N.Y. TIMES, Mar. 10, 2005, at A14.

28. *See* Brief of Former United States Diplomats as Amici Curiae in Support of Petitioner, *Medellín v. Texas*, 522 U.S. 491 (2008) (No. 06-984), 2007 WL 1886206 (US), at 21-23 (describing damage to U.S. foreign relations caused by failure to comply with ICJ rulings relating to VCCR

VCCR rights to Americans abroad were potentially compromised.<sup>29</sup> George W. Bush was hardly enamored with international law as a general matter; he was acting against type in attempting to comply with the *Avena* judgment, supplying further indirect evidence that compliance implicated a nontrivial foreign policy interest. In the Ku and Yoo analysis, the courts are ill-equipped to undertake the sort of sensitive balancing that goes into such decision-making.<sup>30</sup> It is thus odd, at least, that they do not push back on this element of the *Medellin* decision. Or perhaps not odd at all, given that the argument would point to facilitating the incorporation of international law.

The same holds true for the federalism aspect of *Medellin*. Ku and Yoo argue for greater state discretion in matters implicating foreign relations and international law, at least with respect to areas of traditional state concern.<sup>31</sup> Here, they target the maximal holding in *Zschernig v. Miller*, in which the Supreme Court barred the states from activities having an indirect or incidental effect on foreign relations, even in the absence of any relevant policy or objection from the federal political branches.<sup>32</sup> But Ku and Yoo are careful to couch their preference for state incorporation in the context of federal primacy, especially presidential primacy.<sup>33</sup> In other words, state incorporation is acceptable so long as the president (not the judiciary) has the power to trump state action detrimental to the national interest. But nor does this element of the Ku-Yoo approach map out onto the Supreme Court's ruling in *Medellin* part two. Though the state was acting in an area of traditional state concern—criminal law enforcement—the President himself had stepped in to overcome the state action. The Court refused to recognize the president's decision, in effect denying presidential primacy. Ku and Yoo fail to critique this aspect of the decision, one might suspect because it serves sovereigntist ends. In other words, Ku and Yoo favor presidential power except when exercised to advance the incorporation of international law.

Two other federalism controversies, which would similarly test the authenticity of Ku and Yoo's ostensibly neutral institutional approach, lie just over the horizon. Ku and Yoo's book is surprisingly light on the historically longstanding, newly salient scope of the Treaty Power. Likewise, it mostly ignores the more novel but intriguing place of the Offenses Clause. These are

---

obligations).

29. See Letter from Madeleine K. Albright, U.S. Secretary of State, to James S. Gilmore III, Governor of Virginia (Apr. 13, 1998), *quoted in* Jonathan I. Charney & W. Michael Reisman, *Agora: Breard*, 92 AM. J. INT'L L. 666, 671-72 (1998).

30. See generally KU & YOO, *supra* note 4.

31. See *id.* at 154-65.

32. *Zschernig v. Miller*, 389 U.S. 429, 441 (1968).

33. See, e.g., KU & YOO, *supra* note 4, at 176 ("state autonomy is permissible as long as the federal government's political branches can override or unify inconsistent policies pursuant to a treaty, statute, or executive declaration").

potentially capacious entry points for international law, the interpretation of which thus poses key points of contest.

The Treaty Power omission is the more surprising. The arrival of human rights and other more intrusive forms of international law have revived a debate vigorously fought more than a century ago (not coincidentally, at another juncture at which international law at least appeared to have developed more muscle).<sup>34</sup> The question: whether the Treaty Clause of the Constitution is limited by the Tenth Amendment (otherwise stated: whether the federal government's power under the Treaty Power augments other federal authorities or is coextensive with them). The earlier debate was settled, at least for doctrinal purposes, by the Supreme Court's 1920 decision in *Missouri v. Holland*, in which Justice Holmes found an expansive Treaty Power not clearly subject to any Tenth Amendment limitation.<sup>35</sup> But the question remained unsettled through the mid-twentieth century. The Bricker Amendment would have reversed the *Holland* ruling by expressly confining the Treaty Power to the extent of other federal powers. The Amendment was defeated, but only barely and on the understanding that the political branches would respect its terms.<sup>36</sup> The debate was mothballed by the evolution of the Commerce Clause, which during the second half of the twentieth century ousted the Tenth Amendment. So long as the Commerce Clause supplied a catch-all basis for the exercise of federal authority, the Treaty Power was surplusage.

That, of course, has changed, as the Rehnquist and Roberts Courts have scaled back the Commerce Clause. The Treaty Power is back on stage. In *Bond v. United States*, the Supreme Court extended standing to a woman to press a Tenth Amendment challenge against her conviction under a federal criminal statute enacted pursuant to the Chemical Weapons Convention.<sup>37</sup> As applied in the *Bond* case—to small-time, localized criminal conduct—the statute has no constitutional basis other than in the Treaty Power. The case squarely presents an opportunity to revisit *Missouri v. Holland*, and it is now headed back to the Court.<sup>38</sup>

The logic of *Taming Globalization* points to sustaining the statute in *Bond*. True, the statute involves an area of traditional state concern, namely, criminal law. However, the statute is the product of the combined action of the federal political branches, who (according to Ku and Yoo) are better equipped to make

---

34. See Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 421-22 (1998). See also KU & YOO, *supra* note 4, at 37-40 (describing the changed nature of international law and institutions, focusing on human rights).

35. *Missouri v. Holland*, 252 U.S. 416, 434-35 (1920).

36. See Peter J. Spiro, *Resurrecting Missouri v. Holland*, 73 MO. L. REV. 1029 (2008).

37. *Bond v. United States*, 131 S.Ct. 2355 (2011).

38. See *United States v. Bond*, 681 F.3d 149 (3d Cir. 2012) (upholding the statute as an appropriate exercise of the Treaty Power), *cert. granted*, 81 USLW 3092 (Jan. 18, 2013) (No. 12-158).



foreign policy. The combined action was not just in the making of the treaty—two-thirds of the Senate consented to ratification by the President—but in its execution. The criminal statute was enacted through the ordinary legislative process, thus enjoying bicameral support. It would be the judiciary—in Ku and Yoo’s view, the least competent actor in this context<sup>39</sup>—who would be doing the second-guessing. I suspect that when the case gets argued to the Court, Ku and Yoo will find some reason to situate the law beyond federal power.<sup>40</sup> In the meantime, however, they omit an important flash point in the incorporation debate.

The Offenses Clause lies further beyond the horizon, but it, too, would pit the combined power of the political branches against the states and the federal courts. The Offenses Clause supplies a solid textualist basis for empowering Congress to transport international law into federal law, delegating to Congress the power “to define and punish . . . Offences against the Law of Nations.”<sup>41</sup> An exam question: could Congress enact a ban on the death penalty under this power? This presents the same kind of question as the Treaty Power challenge (minus a *Missouri v. Holland*-type precedent), and it is no clearer how Ku and Yoo would resolve it. There is also the question of the extent to which Congress’ determination of international law under the Offenses Clause is judicially reviewable. Ku and Yoo are none too sanguine about the judiciary’s capacity to undertake international law determinations.<sup>42</sup> Once again, however, one might expect reluctance on their part to accept even the legislative incorporation of international law. The death penalty hypothetical obviously remains a thought experiment against the current political landscape. But as conservatives see some utility in international human rights on other fronts,<sup>43</sup> it

---

39. See KU & YOO, *supra* note 4, at 11 (“courts should maintain their traditional deference to the executive and legislative branches in affairs of state, in political questions, in foreign relations, and in war”).

40. See John Yoo, *The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 CONST. COMMENT. 87 (1998) (questioning the constitutionality of the Chemical Weapons Convention, albeit on other grounds); KU & YOO, *supra* note 4, 157-60 (suggesting that anti-commandeering principles constrain exercise of the Treaty Power). The interposition of a formalist doctrine of federalism is methodologically incompatible with the metric of institutional competence and compounds the suspicion that Ku and Yoo will ultimately argue against the incorporation of international law through any and all available tools.

41. U.S. CONST., art. 1, § 8, cl. 10. The clause has also come to be known in recent writing as the “Law of Nations Clause”. See, e.g., Andrew Kent, *Congress’s Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843, 847 (2007).

42. See KU & YOO, *supra* note 4, at 129-30. For a recent decision finding a federal criminal measure to exceed congressional power under the Offenses Clause, see *United States v. Bellaizac-Hurtado*, 700 F.3d 1245 (11th Cir. 2012) (striking down Maritime Drug Law Enforcement Act as not reflecting customary international law).

43. See, e.g., CLIFFORD BOB, *THE GLOBAL RIGHT WING AND THE CLASH OF WORLD POLITICS* (2012) (describing contexts in which conservatives are using international law as a tool, including with respect to the right to bear arms). See also John O. McGinnis, *A New Agenda for International Human Rights: Economic Freedom*, 48 CATH. U. L. REV. 1029, 1030 (1999); Robert McMahon,

is not implausible that the Offenses Clause would be put to work in some other, less headline-grabbing way.<sup>44</sup>

*Taming Globalization* may skirt these issues precisely because they present the hard cases, and because Ku and Yoo's institutional orientation would open constitutional doors to the incorporation of international law. In the meantime, their accommodation of globalization looks like window dressing.

## II.

### UNSTOPPABLE INTERNATIONAL LAW

Ultimately, it does not matter how Ku, Yoo, and other sovereigntists process these issues. In the long run, even the Supreme Court's decisions will not matter much. International law will make its way into U.S. law and practice through one channel or another. The Constitution will not stop the imposition of international law on the United States. The proposition can be demonstrated with a closer look at four clusters of cases that feature prominently in *Taming Globalization*: *Medellín*; *Hamdan* and *Boumediene*; *Sosa*; and *Roper*. The stories of these cases are all at some level consistent with Ku and Yoo's miserly "accommodation," but in fact they evidence the probability of a much broader assault. These cases demonstrate in turn the possibilities for sub-federal incorporation of international law, corporate incorporation of international law, adoption of international law by the political branches, and *sub rosa* adoption by courts increasingly socialized to international law. Sovereigntists may be winning battles on the doctrine, but the balance is tipping against them on other fronts.

#### A. *Medellín and the Sub-federal Incorporation of International Law*

As a doctrinal matter, *Medellín* was a major victory for international law skeptics of Ku and Yoo's description. Self-execution presented an open question, one that the Court had not engaged in the modern era. The Court adopted an exacting standard under which treaties will become effective as U.S. law—in most cases, only upon the enactment of subsequent "implementing" legislation. While ostensibly falling short of a clear statement requirement, the majority set a high bar for evidence that treaty-makers intended treaty obligations to be self-executing, a bar that many international agreements

---

*Christian Evangelicals and U.S. Foreign Policy*, COUNCIL ON FOREIGN RELATIONS (Aug. 23, 2006) (noting influence of evangelicals on foreign policy, including policies relating to human rights), available at <http://www.cfr.org/religion-and-politics/christian-evangelicals-us-foreign-policy/p11341>.

44. See Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 YALE L.J. 1762, 1810 (2009) ("the Law of Nations Clause confers on Congress a very broad range of interpretive judgment to say what international law is, and a corresponding national and international lawmaking power").

(including the VCCR) would be unable to satisfy.<sup>45</sup> By setting down a two-step process (first the adoption and approval of the international agreement, then the enactment of implementing legislation), *Medellin* puts a brake on the incorporation of international law, as demonstrated by Congress' failure to adopt implementing legislation for the VCCR in the wake of the decision.<sup>46</sup>

In practice, however, there will be other points of entry. In the *Medellin* context, the key actors are state and local law enforcement who will be subject to consular notification requirements in the vast majority of cases. *Medellin* refused to enforce a VCCR requirement against the state of Texas, where Texas had violated VCCR rights as interpreted by the International Court of Justice. But *Medellin* and other VCCR cases present a backward-looking optic, mapping the treaty onto a time during which the VCCR was unknown to front-line law enforcement.<sup>47</sup> Even so, two states backed down from executions that would have violated the *Avena* ruling.<sup>48</sup> Texas itself has promised to respect *Avena*'s terms in future cases.<sup>49</sup> Today, the Convention's requirements are a part of state and local police training.<sup>50</sup> In some jurisdictions, detainees are informed of rights to consular notification along with Miranda warnings.<sup>51</sup> On the ground, in

---

45. See generally *Medellin v. Texas*, 552 U.S. 491 (2008) (Breyer, J., dissenting) (citing treaties that would not satisfy threshold for self-execution set in the majority opinion).

46. See *Avena Case Implementation Act of 2008*, H.R. 6481, 110th Cong. (2008). See also Steve Charnovitz, *Correcting America's Continuing Failure to Comply with the Avena Judgment*, 106 AM. J. INT'L L. 572, 576-78 (2012) (describing political difficulties in securing enactment of VCCR implementing legislation in *Avena*'s wake).

47. See Margaret E. McGuinness, *Medellin, Norm Portals, and the Horizontal Integration of International Human Rights*, 82 NOTRE DAME L. REV. 755 (2006).

48. See Janet Levit, *A Tale of International Law in the Heartland: Torres and the Role of State Courts in Transnational Legal Conversation*, 12 TULSA J. COMP. & INT'L L. 163 (2004) (describing compliance of Oklahoma with the *Avena* Decision); Duncan Hollis, *Avena Lives! Supreme Court of Nevada Cites ICJ in Granting Gutierrez Evidentiary Hearing*, OPINIO JURIS (Oct. 5, 2012, 9:16 PM), [opiniojuris.org](http://opiniojuris.org).

49. See Brief for the State of Texas in Opposition to Certiorari at 17-18, *Medellin v. Texas*, 552 U.S. 491 (2008) (agreeing to undertake VCCR review in future cases "as an act of comity"), available at <http://www.scotusblog.com/wp-content/uploads/2008/08/texas-bio-05-5573.pdf>.

50. DEPARTMENT OF STATE OFFICE OF THE LEGAL ADVISER AND BUREAU OF CONSULAR AFFAIRS, CONSULAR NOTIFICATION AND ACCESS (3d ed. 2010). See also OUTREACH BY THE STATE DEPARTMENT: STATE DEPARTMENT ACTIVITIES TO ADVANCE CONSULAR NOTIFICATION AND ACCESS AWARENESS AND COMPLIANCE, available at [http://www.travel.state.gov/law/consular/consular\\_2244.html](http://www.travel.state.gov/law/consular/consular_2244.html) (describing extensive State Department training and other forms of outreach relating to consular notification regime).

51. See, e.g., CAL. PENAL CODE § 834c(a)(1) (mandating that "[i]n accordance with federal law and the provisions of this section, every peace officer, upon arrest and booking or detention for more than two hours of a known or suspected foreign national, shall advise the foreign national that he or she has a right to communicate with an official from the consulate of his or her country . . ."). See also Final Report and Recommendations of the Study Committee on the Advisability of a Uniform or Model Act to Implement Consular Notification Requirements of Article 36 of the Vienna Convention on Consular Relations and Related Bi-Lateral Agreements, June 9, 2011 (recommending adoption of state laws requiring consular notification), available at <http://www.uniformlaws.org/shared/docs/vccr/Vienna%20Consular%20Convention,%20Report%20t>

other words, relevant authorities are being socialized to VCCR obligations; compliance with consular notification requirements has vastly improved since the VCCR made its first appearances in capital cases fifteen years ago.<sup>52</sup> Moreover, the extension of such notification rights may be consequential where, for instance, consular authorities help to secure legal services. The Supreme Court may have stiff-armed the VCCR and international law in *Medellin*, but international obligations such as these can secure compliance through other institutional channels.

### B. *The ATS and Corporate Compliance with Human Rights Norms*

Alien Tort Statute litigation ostensibly looks to be an even more promising front for the sovereignists. *Sosa* was a clean-slate consideration of the ATS and its modern incarnation as a vehicle for human rights claims.<sup>53</sup> The sovereignists there enjoyed a partial win; though the Court left the door open to ATS claims, it found the statute to be jurisdictional only, enabling claims only for core violations of international law. But a probable, more sweeping victory lies just over the horizon in *Kiobel v. Royal Dutch Petroleum*.<sup>54</sup> Taken by the Court to consider the important question left open in *Sosa* of whether corporations are subject to ATS claims, the Court had the case reargued on the broader question of the statute's extraterritorial application. The Obama Administration itself appears to have retreated on the question.<sup>55</sup> If, as expected, the Court in *Kiobel* finds the ATS inapplicable to conduct occurring outside the United States, the ATS will be gutted, at least in so-called "foreign-cubed" cases.<sup>56</sup> The prospects for congressional action reversing the decision are nil.<sup>57</sup> The decision would

---

o%20Scope,%20June%202011.pdf.

52. See Janet Koven Levit, *The Legitimacy of Delegating Lawmaking to International Institutions: The International Court of Justice and Foreign Nationals on Death Row in the U.S.*, 77 *FORDHAM L. REV.* 617, 630 (2008) (describing "bottom up" process through which VCCR compliance has improved at the state and local level).

53. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

54. 621 F.3d 111 (2d Cir.), *cert. granted*, 132 S. Ct. 472 (2011), *argued* Feb. 28, 2012, and *restored to calendar for reargument*, 132 S. Ct. 1738 (2012). The Court is expected to decide *Kiobel* in the 2013 Term.

55. See John Bellinger, *Kiobel: Obama Administration Supports Shell, Argues ATS Should Not Apply to Aiding-and-Abetting Suits Against Foreign Corporations, Leaves Open Possibility of Suits Against U.S. Corporations*, *LAWFARE* (June 13, 2012, 9:29 PM), lawfareblog.com. See also Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance, *Kiobel v. Royal Dutch Petroleum*. In the brief, the Obama Administration argues the inapplicability of the ATS for claims against foreign corporations for extraterritorial action, leaving open the question of claims against U.S. corporations. However, the Court could well find the ATS inapplicable to both. *Cf.* *EOC v. Arab American Oil Co.*, 499 U.S. 244 (1991) (finding Title VII inapplicable to foreign operations of U.S. corporation).

56. That is, cases in which foreign plaintiffs sue foreign defendants for conduct occurring outside of the United States.

57. This is demonstrated by the fact that a key Democrat senator at one point introduced legislation that would have insulated corporations from ATS liability. See Alien Tort Statute Reform

deprive human rights advocates of a major tool for expanding accountability to international law.<sup>58</sup>

Once again, however, there may be less to the decision than meets the eye. First, the decision on extraterritoriality by its terms will relate to conduct outside the United States. The ATS no doubt presents an incorporation issue, insofar as it enables the courts to use international law as a rule of decision. But in many applications the ATS will have only tenuous connection to the United States (which, of course, is part of the argument on extraterritoriality). That said, as applied to U.S. corporations and their subsidiaries abroad, the ATS impacted U.S. actors (in this respect, a rejection of corporate liability would have been almost as damaging). But it is not as if, spared ATS exposure, corporations will feel free to turn their backs on international human rights. On the contrary, human rights are now a core component of corporate social responsibility, which, at least among major transnational corporations, is no longer optional.<sup>59</sup> The United Nations is moving to bring human rights directly to bear on corporations through such initiatives as the U.N. Global Compact and the Guiding Principles on Business and Human Rights.<sup>60</sup> The ATS helped police and facilitate corporate compliance with international law, but other forms of discipline will work to help fill the gap created by its eclipse.

### C. *Anti-Terror Practices and the Incorporation of International Law by the Political Branches*

The anti-terror cases are less consistent with a sovereigntist orientation. *Hamdan* put international law to work in blocking the military commissions process, although, by its terms, only because the political branches had already incorporated international law.<sup>61</sup> International law skeptics themselves had an institutional backstop to *Hamdan*, however, as Congress expressly moved to authorize the military commissions process as well as the detentions at Guantanamo.<sup>62</sup> Meanwhile, the Court's ostensibly constraining decision in

---

Act, S. 1874, 109th Cong. (2005).

58. The ATS has been a centerpiece in some academic work pointing to expanded incorporation of international law by the United States. *See, e.g.*, Harold Hongju Koh, *Why Nations Obey*, 106 YALE L.J. 2599 (1997) (centering ATS as tool for incorporation of international law into U.S. law).

59. *See, e.g.*, Janelle M. Diller, *Private Standardization in Public International Lawmaking*, 33 MICH. J. INT'L L. 481 (2012). *See also* Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS L.J. 293, 319-320 (2002) (calling for "the frank recognition that business profits can no longer stand on a separate balance sheet from human costs in terms of human rights, labor standards and environmental issues").

60. *See, e.g.*, John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT'L L. 819 (2007).

61. *Hamdan v. Rumsfeld*, 548 U.S. 557, 602 (2006).

62. Military Commissions Act of 2009, H.R. 2647-391, 111th Cong. (2009). Even Congress would not abide by torture or cruel, inhuman and degrading treatment, however. *See* Military Commissions Act of 2009, 10 U.S.C. § 948r(a) (2009) ("No statement obtained by the use of torture

*Boumediene* has been gutted by the courts below, a result the Supreme Court has now condoned.<sup>63</sup> As a formal matter, U.S. anti-terror policy appears largely insulated from international law, as the courts will not constrain policymakers on that basis.

But international law is nonetheless imposed on executive branch decision-making. Insofar as other international actors care about human rights in the anti-terror context and insofar as they have leverage over the United States, nonconformity with international law creates a foreign policy cost. With the end of the short era of U.S. hegemony, international actors have been able to make the United States pay for perceived human rights violation in the anti-terror context. If nothing else, other countries can withhold cooperation in anti-terror efforts in response to U.S. non-compliance.<sup>64</sup> As led by prominent human rights NGOs, international publics (especially in Europe) have pressed governments to center the issue in their relations with the United States.<sup>65</sup> Courts, both national and supranational, have added their condemnation of U.S. practices and in some cases constrained governmental decision making.<sup>66</sup> Other bodies condemned Guantanamo, black sites, and renditions.<sup>67</sup> The impact of these efforts was evident in the second Bush Administration. Notwithstanding its hostility to international law, the administration relented on these issues by shutting down black sites, ending renditions where there was a risk that transferred detainees

---

or by cruel, inhuman, or degrading, whether or not under color of law, shall be admissible in a military commission under this chapter . . .”).

63. See *Latif v. Obama*, 666 F.3d 746 (D.C. Cir. 2011) (affording “presumption of authenticity” to intelligence reports used to justify Guantanamo detentions), *cert. denied*, 132 S.Ct. 2741 (2012). See also Linda Greenhouse, *Goodbye to Gitmo*, OPINIONATOR—NYTIMES.COM (MAY 16, 2012, 9:00 PM), [opinionator.blogs.nytimes.com](http://opinionator.blogs.nytimes.com).

64. See Mary Crane, *U.S. Treatment of Terror Suspects and U.S.-EU Relations*, COUNCIL ON FOREIGN RELATIONS (Dec. 6 2005), available at <http://www.cfr.org/terrorism-and-the-law/us-treatment-terror-suspects-us-eu-relations/p9350#p6> (describing effect of opposition to U.S. terror policies on intelligence-sharing operations).

65. See, e.g., James P. Rubin, *Building a New Atlantic Alliance*, FOREIGN AFFAIRS, July-Aug. 2008 (describing emergence of a “values gap” between the United States and Europe relating to anti-terror practices).

66. See, e.g., C.R.G. Murray, *The Ripple Effect: Guantanamo Bay in the United Kingdom's Courts*, PACE INT'L L. REV. ONLINE COMPANION at 15 (Apr. 2010). It is clear that rendition and black sites are off the table as far as European governments are now concerned. See, e.g., European Parliament [EP] Resolution on Presumed Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, P6\_TA(2005)0529, OJ C 286 E (Nov. 23, 2006); Ian Fisher, *Italians Indict C.I.A. Operatives in '03 Abduction*, N.Y. TIMES, Feb. 17, 2007 at A1.

67. See, e.g., European Parliamentary Assembly Resolution 1539 (Mar. 16, 2007) (“The United States and International Law”) (“especially since the events of 11 September 2001, and in pursuit of its so-called ‘war on terror’, the American Administration has inappropriately and unilaterally disregarded certain key human rights and humanitarian legal norms”); European Commission for Democracy Through Law (Venice Commission) Opinion on the International Legal Obligations of COE Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners, No. 363/2005, CDL-AD(2006)009, (Mar. 17, 2006).

would be tortured, and ramping down Guantanamo.<sup>68</sup> However much the Obama Administration has disappointed its progressive supporters, it has been careful to situate its anti-terror policies in an international law frame.<sup>69</sup>

*D. Constitutional Interpretation and Judicial Socialization to International Law*

Finally, there is the troublesome—from a sovereigntist perspective—use of international law as a tool of domestic constitutional interpretation. Here too, the sovereigntists suffered a judicial setback: a trilogy of cases referencing international practice on the way to rights-expanding rulings.<sup>70</sup> In *Roper v. Simmons*, the Supreme Court expounded at length on the near-universality of a norm against the execution of juvenile offenders on the way to banning the practice under the Eighth Amendment. Although the Court was careful to cite foreign and international practice as merely “confirmatory” of a parallel domestic consensus,<sup>71</sup> others saw international law doing heavier lifting.<sup>72</sup> The case appeared to send an important cue to lower courts with respect to international law in domestic constitutional interpretation.

The case provoked a significant backlash. *Roper* almost surely represents a high-water mark for the near future, at least with respect to this mechanism of incorporating international law. A resolution was introduced in Congress condemning the citation of foreign and international law materials, with hearings in the House Judiciary Committee.<sup>73</sup> More importantly, the controversy has become a staple of Supreme Court nominee confirmation hearings, with both Republican and Democratic nominees since *Roper* categorically eschewing the practice.<sup>74</sup> Since *Roper*, there has been only one significant deployment of

---

68. See Peter J. Spiro, *Wishing International Law Away*, 119 YALE L.J. ONLINE 23, 25-26 (2009).

69. See, e.g., Harold Hongju Koh, *The Obama Administration and International Law*, ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW (Mar. 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm>.

70. *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002); *Lawrence v. Texas*, 539 U.S. 558, 573-77 (2003); *Roper v. Simmons*, 543 U.S. 551, 575-78 (2005).

71. *Roper*, 543 U.S. at 575.

72. See *id.* at 604 (O'Connor, J., dissenting) (denying the existence of domestic consensus and thus the possibility of “confirmatory” role for an international one).

73. H.R. Res. 97, 109th Cong. (2005).

74. See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 201 (2005) (statement of Judge John G. Roberts, Jr.) (condemning the cherry-picking potential of foreign and international law); Confirmation Hearing on the Nomination of Samuel A. Alito to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 471 (2006) (statement of Judge Samuel A. Alito) (“I don’t think foreign law is helpful in interpreting the Constitution.”); Confirmation Hearing on the Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 111th Cong. (2010) (troubled by the suggestion that “you can turn to foreign law to get good ideas”);

international law in constitutional rights jurisprudence.<sup>75</sup> In other cases, the Court has almost pointedly ignored international law that would support right-expansive rulings.<sup>76</sup> Sovereignists would appear to have dislodged international law from a foothold in the Court's constitutional premises.

But U.S. courts will not be able to insulate themselves from international norms. To the extent that international norms and practices impact domestic norms and practices, when courts look to the latter, they will be indirectly drawing on the former. All U.S. actors are being socialized to international law. Eighth Amendment jurisprudence looks for domestic consensus;<sup>77</sup> if international pressures and international socialization have facilitated that consensus, then international law will have impacted constitutional interpretation. Sovereignism assumes that such influences can be walled off, that nation states are segmented from each other, and that globalization has had little effect on socio-cultural inter-penetration.<sup>78</sup> Supreme Court justices may also be influenced by international practice unreferenced in decisions. In part because of the *Roper* trilogy, amicus briefs highlighting international law are now routinely filed.<sup>79</sup> As American judges more closely identify as members of the international community of courts,<sup>80</sup> they too have been socialized in international norms. Individual justices may understand that explicit reference to international law risks domestic institutional standing, while results consistent with international norms will face a friendly reception abroad. To the sovereignist mindset, this possibility must be most galling, insofar as there is no way to police against it.

---

Confirmation Hearing on the Nomination of Sonia Sotomayor to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 111th Cong. ("American law does not permit the use of foreign law or international law to interpret the Constitution. That's a given . . .").

75. See *Graham v. Florida*, 230 S. Ct. 2011, 2033 (2010). In two other notable recent decisions involving Eighth Amendment rights, reference to international law authorities go missing, this notwithstanding the filing of amicus briefs bringing such authority to the Court's attention. See *Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

76. Including the *Boumediene* decision, which could have made ample use of international law on the way to extending the writ to detainees at Guantanamo. See *Boumediene v. Bush*, 553 U.S. 723 (2008).

77. See, e.g., *Roper*, 543 U.S. at 564.

78. See, e.g., KU & YOO, *supra* note 4, at 23-25 (playing up the economic aspects of globalization, but ignoring completely the transformation of cross-border social interaction).

79. See Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891, 985-87 (2008).

80. See Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003).



#### CONCLUSION

The sovereigntists appear to have made their mark in limiting the reach of international legal norms. A generation of conservative academic entrepreneurs (Julian Ku and John Yoo among them) are seeing the fruition of their work as the Supreme Court adopts a sovereigntist posture in such cases as *Medellin* and *Kiobel* and steps back from internationalist experiments in the context of anti-terror practices and constitutional interpretation. The congratulatory, confident tone of *Taming Globalization* is understandable.

But when the intellectual histories of sovereigntism are written (as surely they will), this may be marked as a high point of influence. The Supreme Court is often a lagging indicator of social and governmental change. The Court's resistance to the New Deal and the consolidation of federal power present an interesting parallel. *Taming Globalization* tells the New Deal story at length,<sup>81</sup> somewhat incongruously. Constitutional doctrine then proved no obstacle to the eventual rearrangement of governmental authorities in the face of social and economic transformation, a migration of identity, intercourse, and exchange from the state to the nation. A similar rearrangement is unfolding today. As globalization enables and entrenches the transborder identities, intercourse, and exchange, we will witness the inevitable transfer of authorities to the global level. Sovereigntism's splendid constitutional insulation is unsustainable over the long run, and the Supreme Court will not be able to do anything about it.

---

81. KU & YOO, *supra* note 4, at 61-70.