The Constitution and Globalization

Articles

Peter Berkowitz on **Taming Globalization: International Law, the U.S. Constitution, and the New World Order** *by* Julian Ku and John Yoo

Wednesday, August 1, 2012 7 min read By: Peter Berkowitz

Julian Ku and John Yoo. Taming Globalization: International Law, the U.S. Constitution, and the New World Order. Oxford University Press. 272 Pages. $35.00.

One spectacular achievement of post–World War II conservatism in America has been to renew the debate about the moral and political significance of enduring constitutional principles. Conservatives did this by recovering the understanding of those principles held by those who enshrined them in the Constitution in the summer of 1787; clarified them in the Federalist and the writings of the Anti-Federalists and elsewhere during the ratifying debates of 1787 and 1788; and interpreted their scope and translated them into practice while serving in high office in the early years of the republic.

The American political tradition is in part constituted by a continuing debate about constitutional principles. But with the consolidation of the New Deal in the 1940s and 1950s and the entrenchment of left-liberalism in the universities and the press in the 1970s and 1980s, it seemed to many — particularly in the universities and in the press — that the debate had come to an end. Progressivism had triumphed, and anything in the Constitution contrary to its tenets deserved to be scorned or disregarded. Scorn there still is, but the conservative return to the Constitution — including Buckley and National Review, Goldwater and Reagan, the Public Interest and Commentary, the Wall Street Journal opinion pages and scholars of the political thought of the founding, the Federalist Society and the Tea Party, to name a few individuals, publications, and organizations — has made it increasingly difficult for progressives to disregard the case for the continuing salience of constitutional principles.

To be sure, holdouts, some in high places, remain. Former Speaker of the House Nancy Pelosi could still respond in October 2009 to a question about specific constitutional authority for enacting an individual mandate to purchase health insurance with an incredulous, “Are you serious? Are you serious?” And only a few months ago online at the New York Times, University of Texas law professor Sanford Levinson could denounce the Constitution as “imbecilic” and blame it — rather than, say, reasoned opposition to his policy preferences or failure of his party to form a strong and enduring majority — for the failure to enact a more progressive agenda.

But increasingly common over the last fifteen years or so is the work of prominent progressive thinkers such as New York University professor of law Ronald Dworkin, Supreme Court Justice Stephen Breyer, and Yale Law School professor Jack Balkin. They seek to show in various ways that the Constitution embodies progressive values, and in hard cases — concerning, for example, abortion, affirmative action, same-sex marriage, regulation of political speech, and health care — dictates progressive outcomes. In fact, they read much more into the Constitution than they take from it. Yet the obligation they recognize to show that their political and legal doctrines are grounded in the Constitution — notwithstanding, or even more so because of, the twisting and stretching, the additions and omissions, the devaluations and revaluations that they are forced to perform — is testimony to the success of the conservative countermovement in making fidelity to the Constitution a touchstone of legal and political legitimacy.

The impact of the post-World War II conservative countermovement has largely been felt in the realm of domestic affairs. Certainly the scope of presidential power in foreign affairs and war has been an abiding concern for conservatives over the last 60 years. Nevertheless, American conservatives have most effectively invoked constitutional principles — particularly the principles of limited government and individual liberty — to oppose the steady growth of the welfare and regulatory state.

The September 11 attacks compelled conservatives to grapple with the implications of constitutional principles in regard to the interpretation and enforcement of the international laws of war. The detention, interrogation, and prosecution of al Qaeda fighters and affiliates raised novel and difficult legal questions connected to the international laws of war because the terrorists were not lawful combatants entitled to all the protections conferred on pows by the Geneva Conventions; at the same time, unlike criminals, who receive distinctive rights under domestic criminal law, the terrorists had demonstrated the intention and capacity to undertake armed attacks on the United States and inflict massive loss of life and enormous damage to civilian and military infrastructure. Progressives charged that the legal policies for the detention, interrogation, and prosecution of terrorists put in place by the Bush administration violated international law and shredded the Constitution. In fact, both Bush administration legal advisers who argued for extremely broad conceptions of presidential power and conservative critics of the Bush administration who argued for a larger role for Congress in crafting a legal regime to govern terrorist detainees drew on founding-era understandings of fundamental constitutional principles for legal guidance.

The continuing controversy over the international laws of war has been a particularly prominent and urgent instance of the host of legal issues generated by globalization, or the process by which the affairs — political, economic, social, and cultural — of all states have increasingly become dependent on developments beyond their borders. In their excellent book, Julian Ku, professor of law at Hofstra University School of Law, and John Yoo, professor of law at the University of California-Berkeley's Boalt Hall School of Law, maintain that just as the New Deal nationalization of regulatory and welfare responsibilities created

severe tensions with and within constitutional law, so too has the internationalization of power. In the spirit of the conservative countermovement, the authors contend the United States can best respect the claims of democracy and liberty in responding to the variety of daunting challenges to American constitutional government presented by globalization by recurring to fundamental constitutional principles.

Ku and Yoo begin from common observations about globalization's reach and impact:

> As never before, the U.S. economy depends on international trade, the free flow of capital, and integration into the world financial system. International events affect domestic markets and institutions more than ever. Roughly one-third of all American economic activity is related to either imports or exports. Advances in communications, transportation, and the Internet have brought great benefits to the United States. The attacks of Sept. 11, 2001, however, revealed the negative effects of globalization. Counterterrorism, immigration, the environment, drugs, crime, and even mundane issues such as traffic flow depend on the same channels of globalization as the world economy.

And they promptly proceed to an uncommon observation: Despite the abundant interest in globalization among scholars from many different fields and angles, few have examined its impact on the American constitutional order, or given much thought to the guidance that reflection on constitutional principle can yield in dealing with globalization's impact.

The authors write neither as critics of nor cheerleaders for globalization, but as sober observers who appreciate its inevitability and the need to design laws to reduce costs and increase benefits from the new forms of international cooperation and global governance that globalization has spawned. They recognize that we are not living through the first revolution in communications and transportation to have made the world smaller and to have knitted the international order together more tightly. But because globalization has to an unprecedented degree accelerated the pace of integration and mutual dependence among states, it "demands unprecedented levels of international cooperation" and in many areas, including protection of the environment, regulation of the flow of capital, and prevention of the trafficking of drugs and other criminal activities.

The intensified demands for international cooperation give rise in the United States to hard constitutional questions about the distribution of political authority among branches of the federal government and between the federal government and the states:

> To what extent do international court judgments have force in American law, invalidating otherwise valid judgments by domestic courts? Can the President and the Senate together sign an international treaty that binds the United States to either legalize or criminalize abortion, or are issues of family law reserved as a matter of American law for the states? Should international and foreign laws be used to interpret the U.S. Constitution? May Congress and the President delegate federal authority to international organizations to regulate domestic conduct, for instance, in arms control or carbon emissions?

It is to answering these hard questions that Ku and Yoo devote the bulk of their book.

But first they lay out the most pertinent constitutional principles, beginning with the idea of popular sovereignty, which inspired the American Revolution, was resoundingly affirmed in the Declaration of Independence, and was crystalized in the Constitution. It holds that all legitimate political power is derived from the consent of the governed and so views the people as the ultimate sovereign authority. Accordingly, political institutions and office holders in America are agents of the people whose powers are delegated to them by the people through the Constitution.

Ku and Yoo also stress two critical structural principles embodied in the Constitution: the separation of powers and federalism. The separation of powers refers to the division of the federal government into the legislative, executive, and judicial branches and the system of checks and balances that allows the branches to cooperate with and constrain each other. Federalism involves the distribution of power and responsibilities between the federal government and the many state governments.

In stressing the importance of respecting popular sovereignty, the separation of powers, and federalism in responding to the opportunities and pressures of globalization, Ku and Yoo oppose the scholarly consensus. The question of how to harmonize international law and foreign affairs with the American political and legal system has largely been neglected by professors of constitutional law, and even more so by professors of political science specializing in American politics. Instead, it has been mainly pursued by international law scholars.

The dominant school of international law scholarship is internationalism. Internationalists typically accord great authority to international law and international organizations; believe that treaties (signed by the president and approved by two-thirds of the Senate) are self-executing, or not in need of implementing legislation (passed by Congress and signed into law by the president) to be enforceable in courts; contend that international law, including treaties and the judgments of international courts, may automatically supersede state law in many areas in which states have been traditionally responsible, such as crime, the family, and education; consider domestic courts “the sole arbiter of the legal effect of treaties and

international institutions"; and maintain that domestic courts face no particular obstacles in incorporating customary international law and the laws of other nations into domestic American law.

Transnationalists — including the Obama administration's former head of the State Department's Policy Planning Staff, Princeton professor Anne-Marie Slaughter, and the Obama administration's legal adviser to the State Department, Yale Law School professor Harold Koh — go further. They maintain that globalization has accelerated the "disaggregation" of the nation-state, creating informal and independent but legitimate sources of international authority and lawmaking, such as international organizations, networks of ngos, and the worldwide community of judges. Law emanating from these sources, the transnationalists argue, may supersede or determine domestic law.

A few revisionists have emerged in recent years including University of Chicago law professor Eric Posner, Northwestern University law professor John McGinnis, and George Mason University law professors Ilya Somin and Jeremy Rabkin. The revisionists argue that the views espoused by the internationalists and the transnationalists warp moral and political problems between states; instead of allowing them to be dealt with by politicians and diplomats, the transnationlists turn them into legal problems to be solved by international lawyers. The revisionists also contend that the internationalists and transnationalists attribute a domestic force to international law that lacks democratic legitimacy and erodes national sovereignty.

In significant measure, and by design, Ku and Yoo avoid the controversies in which the revisionists are enmeshed. Rather than focus on theoretical questions about the status of international law, their inquiry is a practical one that explores "how the United States should incorporate into domestic law the international law standards that it chooses to follow."

Ku and Yoo, moreover, do not proceed on the so-called "originalist" grounds that characterize much conservative jurisprudence. That is, they do not contend that the Framers' intentions concerning, say, the scope of international law or how treaties should be handled resolve today's controversies. Rather, acknowledging that globalization presents many stubborn dilemmas the Constitution's framers could not have foreseen, the authors maintain that we should be guided today by the whole American constitutional tradition, which accords high importance to constitutional principles but also embraces the development of American politics and law, with careful attention given to Supreme Court decisions. Fidelity to the underlying principles of this tradition, they believe, can tame globalization by rendering the process by which international law and obligations acquire the force of law in the United States more transparent, more responsive to the will of the people, and more consistent with the requirements of individual liberty.

The authors offer three doctrines grounded in the idea of popular sovereignty and reflecting the imperatives of the separation of powers and federalism to harmonize the demands of globalization with constitutional law and guide the incorporation of international law into domestic law. First, treaties should be presumed non-self-executing: Once a treaty has been signed by the president and approved by the Senate, it should require implementing legislation passed by Congress and signed by the president to give it the force of law in domestic affairs. Second, the president rather than the courts should take the lead role in the interpretation of customary international law, or that part of international law that arises through the longstanding practice of states. This division of labor is appropriate because a heavy admixture of policy considerations goes into the determination and application of customary international law, and the executive branch is designed to handle and possesses greater competence in foreign affairs. As a corollary, the authors would require congressional legislation to give any particular aspect of customary international law the force of binding domestic law. And, third, an independent, if limited role, should be carved out for states in matters of international law and foreign affairs that touch on traditional areas of state law, and particularly in trade, culture, and education. This, Ku and Yoo maintain, would better respect state sovereignty and take fuller advantage of state governments' knowledge of local conditions.

Through detailed examination of a variety of constitutional cases and controversies, the authors show the United States should adopt these three doctrines because they are prudent, making it more likely that the country will benefit from international cooperation, in war and peace, while preserving democratic accountability and individual liberty.

Ku and Yoo have written a scholarly book that deserves to be read widely and debated vigorously. In a domain where the Constitution has continued to be scorned and disregarded, they have demonstrated that constitutional principles form a sturdy and flexible framework within which to deal with the challenges of a globalized 21st century world.

Peter Berkowitz is the Tad and Dianne Taube Senior Fellow at the Hoover Institution, Stanford University, where he chairs the task force on national security and law. His writings are posted at www.PeterBerkowitz.com.