Book Reviews

Taming Globalization: International Law, the U.S. Constitution, and the New World Order

By Julian Ku and John Yoo

*Reviewed by Jeremy Rabkin**

Taming Globalization has two great merits. First, it acknowledges that the explosive growth of international law in recent decades poses a threat to our traditional scheme of constitutional government in the United States. If more and more law is made for us in international negotiations, then less and less of our law will be made under our own constitutional system. Second, to cope with this challenge, the book proposes a set of relatively clear and direct constitutional barriers, designed to ensure that the law governing Americans will at least have passed through appropriate constitutional filters.

The main proposals are easy to summarize. First, Julian Ku and John Yoo propose that treaties should be presumed to be non-self-executing except when the text of the treaty itself (or the instrument of ratification approved by the Senate) clearly indicates otherwise. That means that while we may commit to other signatories in a treaty, the law enforced by American courts will be unaffected until Congress enacts separate implementing legislation. We will still be bound by the law enacted by our own representatives. To prevent treaties from altering our federal balance at home, however, they also insist that Congress can only enact such implementing statutes where it already has authority to legislate under its enumerated powers in Article I, Section 8. Where Congress lacks such constitutional power, treaty implementation will have to be left to the states.

For related reasons, the authors argue that states ought to have authority to implement customary international law standards through their own legislation or their own courts. Federal courts should be bound by state adaptations, except where Congress has legislated to the contrary (within its own jurisdictional limits) or the President has proclaimed a contrary national position on a particular customary law standard. Finally, Ku and Yoo insist that federal courts must not interpret the U.S. Constitution on the basis of foreign or international precedents, since that would amount to delegating U.S. judicial authority to foreign bodies.

Each of these proposals has much to commend it. But they also illustrate the larger thrust of the book. Proponents of "global governance" have looked to courts to play a leading role in stitching together a transnational network of legal standards, committing national legal systems to a kind of global constitutional structure—largely judge-made. Among the more prominent advocates of this approach are Harold Koh and Anne-Marie Slaughter, both of whom took leave from academic posts to serve in the Obama State Department in the last few years. Ku and Yoo urge the opposite: their proposals limit the authority of federal courts at every turn, relying instead on the President or Congress or state legislatures and state courts. When it comes to international commitments, Ku and Yoo prefer to rely on political bargaining or executive energy more than legal reasoning. They look to structural constraints ("checks and balances") more than legal doctrine to establish the proper balance between international obligations and domestic accountability.

There is much to be said for this strategy. The book certainly deserves serious consideration. Some of the remedies proffered by Ku and Yoo will arouse skepticism, however, even among readers who share their underlying concerns. Those who are less clear about the underlying challenge of globalization aren't likely to feel they have gained a firmer grip on the real-world issues from the rather schematic way they are set out here.

The problems come into focus in the book's account of how states can implement international commitments. The Founders seem to have assumed that the federal government would have all necessary authority to implement international commitments. As an early paper of *The Federalist* put it:

> Under the national government, treaties and articles of treaties, as well as the laws of nations, will always be expounded in one sense and executed in the same manner—whereas adjudications on the same points and questions in thirteen states . . . will not always accord or be consistent . . . from the variety of independent courts and judges appointed by different and independent governments as from the different local laws and interests which may affect and influence them.[1]

The Federalist insisted that such uniformity was crucial to maintaining amicable relations with foreign nations.

It thus seems quite odd to insist that where treaties require implementing legislation, Congress might still lack the authority to enact such legislation because such authority is not within its enumerated powers. Why not rely on the last clause in Art. I, Sec. 8—power to "make all Laws which shall be necessary and proper for carrying into Execution . . . all other powers vested by this Constitution in the Government of the United States"? Certainly the Constitution vests the power to make treaties in the Government of the United States. The idea that Congress therefore had authority to make laws to implement treaties—"to carry them into execution"—was certainly embraced by many statesmen of the Founding era. To say now that we must rely on the states to implement various treaties seems to be falling back on the Articles of Confederation—the scheme the Constitution was designed to supplant.

The difficulty is that treaties today seem to cover a vast range of issues, so the power to implement treaties would give Congress almost unlimited power to preempt the legislative authority of the states. As Ku and Yoo note, human rights treaties now concern a great many issues (including ordinary

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enforcement of criminal law) which have traditionally been regarded as state concerns. *The Federalist* worried that failing to honor international obligations might provoke other nations to hostile acts, even to war. It is implausible that other nations will be provoked to attack the United States because we fail to conform to some disputed provision in the Covenant on Civil and Political Rights. It is not even plausible to claim that other countries will withdraw human rights protection from their own citizens in their own countries to protest American failures to heed what they embrace as human rights obligations.

The traditional answer to this challenge would be to challenge the permissible scope of the treaty power. Jefferson thought treaties could only cover a narrow range of subjects and certainly could not be extended to "the rights reserved to the states; for surely the President and Senate cannot do by treaty what the whole government is interdicted from doing in any way"[2]—implying that treaties could not extend beyond the enumerated powers of Congress. But Jefferson also thought the Constitution afforded no power to acquire new territory—until his own supporters insisted that he must swallow his constitutional scruples and go ahead with the Louisiana Purchase. If there are limits on the treaty power, it is not easy to say what they are.

Instead of engaging this question, *Taming Globalization* shrugs it off. The authors appear to think the United States can engage the treaty power for any sort of commitment on any subject, and it is then just a matter of domestic constitutional structure how we implement treaties. But if foreign commitments are important, it is questionable that we would leave the nation's good faith hostage to fifty jurisdictions. Ku and Yoo themselves seem to have some doubts, acknowledging at one point that Congress might ensure state adherence by providing a private right of action for enforcement in federal courts or by making federal grants contingent on federal compliance. If unlimited in their reach, such concessions threaten to swallow up the initial promise of state independence. If they are still limited by some other (unstated) restrictions on congressional power, they threaten to leave disturbing gaps in U.S. implementation of foreign commitments.

To reassure readers, the authors report that states have actually done much to implement foreign commitments, sometimes acting on treaties that the United States itself has not ratified—as with the Kyoto Protocol on reducing greenhouse gases or (less sensationally) a convention on probate procedures. They do not explain how such initiatives can be reconciled with clear indications in the Constitution that the Founders sought to keep states out of foreign policy—notably the prohibition in Article I, Section 10 against states making treaties with foreign nations without congressional consent. The authors are so indifferent to national authority that they don't explain which (if any) of the state compacts they discuss have actually received congressional consent. Nor do they analyze the legal status of state compacts with foreign governments that have not received that consent.

If, as they argue, states can have their own role in developing international norms, it makes sense that states can participate in the development of customary international law—even though (on their theory) federal courts cannot. It is some check on the states that the President, in their view, can impose exceptions and corrections (and Congress, too, where it has a relevant enumerated power to legislate). But as it is odd to have fifty implementing statutes for international commitments, it is odd to have fifty different initiatives in customary law. The potential for mischief seems much greater in this area, since we may not have control over what foreign courts and foreign governments make of these state gestures.

As Ku and Yoo acknowledge, federal courts do now police exclusion of states from interfering in interstate commerce. They offer rather vague, general arguments about why courts are not as well-situated to police exclusion from interfering in foreign policy. Not all readers will find their claims compelling. Readers also might wonder whether the President is best-suited to carry this responsibility alone, if he can exercise an entirely unstructured, ad hoc intervention, perhaps winking at some state initiatives while denouncing similar ones.

Ultimately, the book would be more convincing if it gave more attention to its premises. In an initial chapter, the authors claim to be defending "popular sovereignty" as against "Westphalian sovereignty." They associate the former with the will of the people, in our case the will of the people to act through the Constitution. They associate the latter with unlimited power. But the 1648 treaties establishing the Peace of Westphalia actually committed signatories to respecting some rights of religious minorities in their own territories. It was left to 20th-century totalitarians to imagine that "sovereign" power had no limits at all. Conversely, if we think America stands for "popular sovereignty," why can't elected majorities always get their way under our Constitution? Why can't they delegate law-making authority to foreign bodies (as Europeans have done), if that is the popular will? If, on the other hand, we are bound by the will of the 18th- century ratifying conventions, what justifies the various changes Ku and Yoo now urge? Certainly, their proposal to exclude federal courts from ruling on customary international law is a change from the practice (and professed expectations) of the Founding generation and from common practice through the 19th and 20th centuries.

By declining to give more plausible or convincing accounts of sovereignty, *Taming Globalization* implies that the world could well give itself any sort of law on anything at all, so the only serious issues for lawyers are what procedures should be followed in implementing such laws within each nation. Even lawyers should try to grapple more directly with the substantive implications of sovereignty. How can we retain respect for our national Constitution if we don't retain a firm grip on what it means to be an independent nation?

Endnotes

1 The Federalist No. 3 (John Jay).

2 Thomas Jefferson, Manual of Parliamentary Practice (1800).