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### Book Review (reviewing *International Law in the US. Supreme Court: Continuity and Change* (David L. Sloss, Michael D. Ramsey, and WilliamS. Dodge eds., 2011)).

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*Channel* litigation,<sup>11</sup> as to whether to defend the blanket refusal of the British Navy to provide certain documents to the ICJ that might have thrown new light on the legality of the passage of British warships through the Corfu Channel, events that underlay the adjudicated incident. The mixed loyalties of international lawyers to their national legal systems and to the international legal system, as well as the bureaucratization of public life, may complicate the task of creating a just world order. Yet, Reisman stipulates that the individual decision maker must operate under difficult conditions to make a significant difference in this regard. Thus, according to Reisman, the normative theory explaining the structures of international law serves as a backdrop against which the legality and morality of specific decisions should be evaluated. In his view, the individual is situated at the epicenter of our legal universe: international law norms are designed to protect human dignity, and their application depends on the ethical convictions of the individual decision maker.

In sum, *The Quest for World Order* is an excellent introduction to international legal theory, offering a comprehensive understanding of the building blocks of the international legal system and the fundamental tensions and dialectics informing its lawmaking and law-applying processes. By immersing the reader in one of the most influential approaches to international law—policy-oriented jurisprudence—by defending its continued relevance and by developing a typology facilitating a critical, up-to-date, and value-based analysis of legal norms and institutions, Reisman presents students of international law with a rich vocabulary for investigating the promise and limits of international law. While Reisman's own quest for world order is at times open to criticism for diluting some of the qualities that provide law with the very ability to create order, the functional perspective that he offers is always intellectually stimulating. Moreover, while his quest for human dignity may at times downplay the importance of legal texts and mechanisms that do not serve an immediately apparent functional purpose (such as unenforceable international judgments), Reisman's

determination to explain international law as a legal system applied by individuals for the sake of individuals is compelling. Ultimately, it is the combination of the two quests that Reisman pursues that renders his contribution to international legal theory so important. His functionalism is not a value-neutral description of a world order, but rather a multifaceted process for promoting human dignity.

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*International Law in the U.S. Supreme Court: Continuity and Change.* Edited by David L. Sloss, Michael D. Ramsey, and William S. Dodge. Cambridge, New York: Cambridge University Press, 2011. Pp. xxxvi, 681. Index. \$166, £103, cloth; \$62, £39.99, paper.

*International Law in the U.S. Supreme Court: Continuity and Change* explores the doctrinal history of international law in the Supreme Court from the Founding to the present day. Edited by David Sloss of Santa Clara University School of Law, Michael Ramsey of the University of San Diego Law School, and Bill Dodge of the University of California Hastings College of the Law, it seeks "to cover all cases or lines of cases [in the Supreme Court] in which international law has played a material role, showing how the Court's treatment of international law has developed throughout the Court's history" (p. 2). Simply put, it is a terrific work, whether read as a treatise or an original piece of scholarship.

For an edited volume, the book shows impressive cohesion. It is organized first by time, with groups of chapters addressing the four periods ranging from the Founding to the Civil War, and from then to the year 1900, to World War II, and to the year 2000. Within each time period, the chapters are further divided along three main themes: the Supreme Court's treatment of treaties, customary international law, and international law as an interpretive tool. The last part of the book contains point-and-counterpoint opinion pieces about recent Supreme Court cases.

The decision to look at all Supreme Court cases dealing with international law leads to fresh perspectives and new insights. This approach puts

<sup>11</sup> *Corfu Channel (UK v. Alb.)*, 1949 ICJ REP. 4 (Apr. 9).

well-known cases in their context and brings new ones to light. Thus, Michael Van Alstine's chapter covering treaties from 1901 to 1945 convincingly shows that *Missouri v. Holland* "actually plowed very little new constitutional ground," (p. 199) with its canonic status resting instead on its synthesis and expression of existing doctrines. That chapter also highlights largely forgotten cases like *Fok Young Yo v. United States*, which held that a treaty can delegate regulatory authority to the executive branch. Paul Stephan's chapter on treaties from 1946 to 2000 makes the interesting observation that, though during this period the Court noted the principle that deference is owed to the views of the executive branch when interpreting treaties, the Court often did not, in practice, state or apply this principle, especially on issues of privatelaw. These are only a few examples of the fine-grained insights that come out of the book's methodological approach.

The book's most important contribution is in its identification of broader doctrinal themes. The authors of the separate chapters provide a clear doctrinal narrative, and a final chapter by Sloss, Ramsey, and Dodge ties these narratives together. They find that the Supreme Court's approach to treaties was largely continuous from the Founding through World War II, but that the Court has subsequently displayed "newfound reluctance to use treaties as a tool to constrain government power" (p. 592)—in particular, by changing the canons of interpretation that it relies upon and by increasing the barriers to judicial enforcement of treaties. For customary international law, they deem the story "more cyclical" (p. 594), with direct application of customary international law strong until the early twentieth century but then limited until the revival of the Alien Tort Statute.<sup>1</sup> They conclude that the Court has frequently used international

law in both constitutional and statutory interpretation across all four time periods, but with variations in how much it is used and in whether it furthers or constrains governmental power. By drawing these overall conclusions, the editors map the continuity and change that they have documented—and do so in a way that will help scholars put new developments in Supreme Court practice in perspective.

The analysis in the book is especially useful because it comes with powerful markers of credibility. If ever there was a book with built-in checks and balances, this is it. To begin with, prior work by the editors and authors demonstrates that they are a widely mixed group in terms of their normative and interpretive approaches. But the book does not simply depend on these differences to smooth out its content. Instead, it affirmatively seeks out self-criticism by including a number of chapters that are effectively book reviews of the book itself (with each review targeted at, and contained in, a particular section of the book). John Fabian Witt, Edward Purcell, and Martin Flaherty contribute chapters assessing the contributions for particular time periods. Witt, in particular, does not hesitate to dish out criticism. The final section of the book relies even more strongly on back-and-forth, with lead essays on recent Supreme Court cases immediately followed by response essays critiquing those essays. All this internal engagement signals that, in keeping with the best scholarly tradition, the authors have "kept [their] mind[s] open to criticism" and followed the practice of "listen[ing] to all that could be said against [them]."<sup>2</sup>

With the book's focus on providing excellent doctrinal history, however, comes an inevitable insularity. It conveys a good sense of what the Supreme Court has done in cases involving international law, but there is little overall account of *why*. Is the Court acting out of fidelity to doctrinal and interpretive traditions? Is it responding to historical context, to perceived functional needs, to developments in the political branches? Do theories from international relations explain—or fail to explain—aspects of the continuity and change documented here? Witt's chapter raises many

<sup>1</sup> This book was published before the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), which has reduced the prospects for litigation under the Alien Tort Statute. *Kiobel* was the subject of an International Decision in the July 2013 issue of AJIL; the Agora "Reflections on *Kiobel*" was published in the October 2013 issue; and the Agora was extended in January 2014 with the online publication of AJIL UNBOUND. The entire set of articles is available at <http://www.asil.org/resources/american-journal-international-law>.

<sup>2</sup> JOHN STUART MILL, ON LIBERTY 12 (1859) (1921 ed.).

of these questions (and emphasizes the book's absence of social history), but the book as a whole does not attempt to answer them.<sup>3</sup>

We do get tantalizing hints of cause and effect in some of the individual chapters. Writing about treaty cases between the Civil War and 1900, for example, Duncan Hollis observes that during this period there developed "a more nuanced—and some might say less respectful—vision of treaties' place in the U.S. constitutional system" (p. 56) than had been present earlier. Hollis offers some possible lines of explanation, and observes that many of the treaties adjudicated during this period were between the United States and Indian tribes or non-European nations with whom "the United States frequently held the upper hand" (p. 59) and might harbor racial bias against—unlike earlier treaty cases involving European nations. Other essays in the book also explore how power dynamics may influence the Court's jurisprudence, such as an elegant opinion piece by Ralf Michaels on *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.* (a 2004 extraterritoriality decision), but it is a theme left to individual authors to pursue or not, and thus is only intermittently present in the book.

It is true that this book is primarily about doctrinal history and that a broader narrative is beyond its scope. Indeed, the editors say just that in their introduction to the book. Yet the book plainly seeks to link up the past with the present, as shown by the decision to include a final section of opinion essays on recent Supreme Court cases. Without a broader narrative, however, the book provides little basis for projecting into the future—for example, what Supreme Court jurisprudence in relation to international law is likely to be in 2050 or even 2020. The book will be especially valuable, however, as an aid in constructing arguments rooted in doctrinal precedent and in understanding how those precedents apply to contemporary legal problems.

<sup>3</sup> See also Mary L. Dudziak, *Toward a Geopolitics of the History of International Law in the Supreme Court*, 105 ASIL PROC. 532, 534–37 (2011) (critiquing the book as failing to engage adequately with the relationship between the Cold War and the Supreme Court's jurisprudence).

This is an exceptionally lively era of Supreme Court engagement with international law. Between 2000 and the publication of this book in 2011, the Supreme Court decided *Medellin v. Texas*, *Sosa v. Alvarez-Machain*, *Roper v. Simmons*, *F. Hoffmann La Roche Ltd. v. Empagran S.A.*, and *Hamdan v. Rumsfeld*—all of which, among others from the same period, are discussed in the book's final section. And since 2011, the Supreme Court has continued its busy streak, with the last few years bringing *Kiobel v. Royal Dutch Petroleum Co.*, more cases from the war on terror, and the pending *Bond v. United States*. Overall, the Court's decisions have reflected a new assertiveness, marked by its willingness to go against the positions taken by the executive branch and to revisit its precedents.

One way to evaluate the import of the doctrinal history presented in *International Law in the U.S. Supreme Court* is to ask whether and how that history informs the book's final section, with its five separate exchanges—each having a lead essay and two essays in response—on recent Supreme Court cases. The answer is mixed, as these exchanges showcase both the benefits and the limits of that history.

Consider the essay by Mark Tushnet and the responses by Roger Alford and Melissa Waters, all dealing with *Roper v. Simmons* and other recent Supreme Court cases using non-U.S. sources in constitutional interpretation—an issue of ongoing academic debate. Tushnet argues that this practice "was entirely routine throughout U.S. constitutional history" and that "[w]hat has changed is that . . . [it] became controversial at the turn of the twenty-first century" (p. 511). He attributes this controversy to the rise of originalism and, more hesitantly, to "anxieties about the nation's position in the international community" (p. 516). Alford challenges the use of non-U.S. sources as inherently problematic because of the risks of cherry-picking. He considers Tushnet's argument about current anxieties to be "novel but unconvincing," considering that if "the debate is really about national identity, we should have been having this argument long ago" (p. 521). Waters observes that, though the Supreme Court has used non-U.S. sources in constitutional interpretation in the past, what is unique about *Roper*

and other recent cases is that they belong to an “emerging transnational judicial dialogue among the world’s constitutional courts on human rights issues” (p. 523).

The doctrinal history revealed earlier in this book establishes that the Supreme Court has used international law in constitutional interpretation for centuries before *Roper*. As Sarah Cleveland wrote in an article engaging in a similar historical analysis, this precedent “answers the legitimacy objection that international law is ‘foreign’ to the American constitutional tradition.”<sup>4</sup> Tushnet and Waters build upon this established fact, and Alford does not challenge it. Indeed, the doctrinal history set forth in this book goes further by establishing that the use of international human rights law in U.S. constitutional interpretation goes back well before the current controversies. Independent of whether prior use of international law in interpreting constitutional issues like war and sovereignty supports its use in the human rights context, the practice has been around in relation to human rights for over half a century. *Trop v. Dulles* and *Kennedy v. Mendoza-Martinez* are the leading examples from the 1950s and 1960s.

Yet even from a doctrinal perspective, the history covered in this book is not perfectly suited for grounding the current debate. In some ways it is too broad. The coverage of every Supreme Court case dealing materially with the use of international law in constitutional interpretation is of great interest from a scholarly perspective, but it does not lend itself all that readily to how public debate is conducted. That is, both opinion pieces and advocacy positions are likely to rely upon the cases that, for whatever reason, are already known and conceptualized as part of the canon. This is perhaps a fault of advocacy, but it is one that scholarship must contend with in order to have an impact. For example (one taken from the book itself), in choosing historical examples to illustrate his argument, Mark Tushnet relies on the “Brandeis Brief” (in *Muller v. Oregon*), Justice Jackson’s *Youngstown* concurrence, and *Kennedy v. Mendoza-Martinez* for their use of comparative or international law. All of these examples are cov-

ered previously in *International Law in the U.S. Supreme Court*, but they have also featured previously in scholarly debate. The first two, in particular, have already gained positions of prominence in our constitutional narrative. It remains to be seen whether some of the less notable cases covered in this book will influence the present debate.

In other ways, the doctrinal history covered in this book leaves the story of international law’s place in constitutional interpretation incomplete. It does not, for example, cover the use of international law in constitutional interpretation by the political branches of government.<sup>5</sup> Nor does it cover historical debates over the use of non-U.S. sources by domestic courts other than the Supreme Court. Drawing on the doctrinal history set forth in this book, Tushnet finds the backlash against the use of non-U.S. sources in constitutional interpretation to be a novel development. And so it is, based upon this doctrinal history, but a broader perspective on the role of non-U.S. sources in domestic courts—one going outside the context of the Supreme Court and constitutional interpretation—may offer more analogies. If anything, today’s backlash brings to mind the resistance by state legislatures and some state courts to citing English case law in the early nineteenth century—a backlash occasioned in part by anti-English and pro-French sentiment. At that time, “[u]nder the influence of such ideas, New Jersey, Pennsylvania and Kentucky legislated against citation of English decisions in the courts. . . . [A]nd more than one judge elsewhere had his fling at the English authorities cited before him.”<sup>6</sup>

In short, the doctrinal history in this book provides valuable guidance on the issue of using international law in constitutional interpretation. But because the book is limited to Supreme Court cases and avoids broader social-science and historical narratives, its account provides neither a full doctrinal picture nor an underlying explanation of

<sup>4</sup> Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT’L L. 1, 7 (2006).

<sup>5</sup> See Jean Galbraith, *International Law and the Domestic Separation of Powers*, 99 VA. L. REV. 987, 1008–32 (2013) (exploring how international law has influenced how the political branches have interpreted the separation of foreign affairs powers).

<sup>6</sup> Roscoe Pound, *The Pioneers and the Common Law*, 27 W. VA. L.Q. 1, 7 (1921).

this picture. Nor does it answer the first-order question of the extent to which prior doctrine and practice should shape contemporary constitutional interpretation. The editors are explicitly aware of these limits, but their significance becomes most apparent when thinking about the final section of essays in relation to the earlier portions of the book.

It will thus be interesting to see how practitioners use this book going forward. Regardless, Sloss, Ramsey, Dodge, and the other authors have provided an invaluable contribution to the scholarship on the Supreme Court and international law.

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*Green Governance: Ecological Survival, Human Rights, and the Law of the Commons.* By Burns H. Weston and David Bollier. Cambridge, MA: Cambridge University Press, 2013. Pp. xxvi, 363. Index. \$99.

From the beginning of the modern environmental movement in the 1960s, some activists and scholars have argued that the environmental challenges we face are too large to be solved within our existing legal and political framework, and that we can meet them only by fundamentally changing the way that we think about and act towards natural resources. Sometimes called neo-Malthusians, they have argued not only, as Malthus did,<sup>1</sup> that a growing population will run short of food, but also that we will exhaust non-renewable resources.<sup>2</sup> That global population growth has greatly slowed in recent decades does not solve the problem, in their view, because consumption continues to rise at unsustainable rates. In the last twenty years, climate change has become the clearest example to many neo-Malthusians that

the world has natural, non-negotiable limits to economic growth, which we cannot exceed without causing catastrophic damage to the environment and to ourselves.

The idea that our current trajectory may lead to environmental disaster has become part of popular culture,<sup>3</sup> but it has yet to convince us to change course. No alternative to our growth-oriented economic system has achieved widespread support, perhaps because none has seemed both environmentally satisfactory and politically viable. With their new book, Burns Weston and David Bollier aim to change that. They put forward a proposal that they hope will lead to a revolution in environmental governance.

They begin by citing the apocalyptic projections of writers such as James Lovelock, who predicts that unchecked climate change may cause the global population to drop below one billion by the year 2100 (p. xvii).<sup>4</sup> Weston and Bollier blame our situation on the failures of “the neoliberal State and Market alliance that has shown itself, despite impressive success in boosting material output, incapable of meeting human needs in ecologically responsible, socially equitable ways” (p. 3). Their criticism of the Market is the familiar one that it does not internalize environmental costs; their criticism of the State is that it is unwilling or unable to protect natural resources from the Market. They point to many reasons for this failure, including that “there is a cultural consensus that the mission of government is . . . to promote development through constant economic growth,” (p. 10) and that “the State is too indentured to Market interests and too institutionally incompetent to deal with the magnitude of so many distributed ecological problems” (p. 20).

Having briefly sketched the picture of a rapidly deteriorating environment, plundered by a rapacious Market that the State is helpless to regulate, the authors spend the rest of the book presenting an alternative to the current political/legal system.

<sup>1</sup> THOMAS MALTHUS, AN ESSAY ON THE PRINCIPLE OF POPULATION (1798).

<sup>2</sup> See, e.g., LESTER R. BROWN, PLAN B: RESCUING A PLANET UNDER STRESS AND A CIVILIZATION IN TROUBLE (2003); PAUL R. EHRLICH, THE POPULATION BOMB (1968); GARRETT HARDIN, THE OSTRICH FACTOR: OUR POPULATION MYOPIA (1999); DONELLA H. MEADOWS ET AL., THE LIMITS TO GROWTH (1972).

<sup>3</sup> Recent films depicting a future environmental dystopia include A.I. Artificial Intelligence (2001); The Day After Tomorrow (2004); Wall-E (2008); Metropia (2009); and Elysium (2013).

<sup>4</sup> See JEFF GOODELL, HOW TO COOL THE PLANET: GEOENGINEERING AND THE AUDACIOUS QUEST TO FIX EARTH'S CLIMATE 89–90 (2010).