To Tame and to Frame

*Comment by Stephan Leibfried**

A. Moving the Hidden Agenda to Center Stage
B. Internal versus External
C. Origins of Power
D. International Taming by Domestic Framing
E. Transnational Private Governance Left Out in the Cold
F. Global Limitations to Western Legal Thought?
G. Intra-Western Contradictions
H. Staring Down the Beast

I have a marked sympathy for the Heidelberg group's efforts, in recent years, to conceive and construct a more encompassing rule-bound international sphere and to unite concepts from European public law with those from political and social science. I am pleased to be able to offer my comments on their paper, "Developing the Publicness of Public International Law," though I am something of an outsider, not formally trained in international law or well-versed in the current debates and literature, and I run the risk of occasionally missing the mark. As a scholar with a general background in law, economics, sociology, social history, and political science, I have, for a number of years, been heading an interdisciplinary institute whose mission is to track the post-1970s development of OECD nation states and gauge the extent and consequences of the privatization and internationalization of responsibilities.[1] My remarks here, which focus on seven of the nine topics I

* I would like to thank Professor Gerd Winter from the Bremen University Law School for educating me on several key points discussed here, though he may well not be in agreement on some of my comments and should in no way be held responsible. Thanks also to Susan Gaines for helping me to clarify my thoughts and put them in intelligible English for this written commentary.

A. von Bogdandy et al. (eds.), *The Exercise of Public Authority by International Institutions*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 210,
DOI 10.1007/978-3-642-04531-8_3, © Springer-Verlag Berlin Heidelberg 2010

covered at the workshop,[2] are thus concerned with the basic tenants of analytically taming and legally framing international politics, rather than with the legal nuts and bolts.

A. Moving the Hidden Agenda to Center Stage

The Heidelberg group's article is presented as a synthesis of three ways of viewing global governance phenomena – constitutionalization, global administrative law, and international institutional law[3] – but there appears to be a more ambitious hidden agenda. Their "public authority" approach comprises a new way of "understanding, framing and taming"[4] the growing jungle of international law and global governance – not a simple fusion of existing methods, but an alternative system that is firmly rooted in European public domestic law.[5] Not until late in the Heidelberg group's paper does their critique of the global administrative law approach that Benedict Kingsbury and colleagues at New York University have introduced come to the fore. And then we learn only that it is "too global," based on an impossible "fusion of domestic ad-

[1] For an overview *see* TRANSFORMATIONS OF THE STATE? (Stephan Leibfried & Michael Zürn eds., 2005); TRANSFORMING THE GOLDEN-AGE NATION STATE (Achim Hurrelmann, Stephan Leibfried, Kerstin Martens & Peter Mayer eds., 2007). For a summary of the theoretical approach *see* Philipp Genschel & Bernhard Zangl, *Transformations of the State: From Monopolist to Manager of Political Authority*, Bremen University TranState Working Paper 2008, in print, available at: http://www.state.uni-bremen.de.

[2] My original comments also include: "How is Public 'Public'", "The conclusiveness of the three delimiting characterizations of public authority (determining, conditioning and influencing)", and, as an aside, a note on the principles guiding the case selection strategy for the Heidelberg project.

[3] Armin von Bogdandy, Philipp Dann & Matthias Goldmann, *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, in this volume, Parts A and C.II.

[4] *Id.*, Part C.III.

[5] Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW AND CONTEMPORARY PROBLEMS 15 (2005); Benedict Kingsbury & Nico Krisch, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 THE EUROPEAN JOURNAL OF INTERNATIONAL LAW 1 (2006).

ministrative and international law," and ignores the "categorically different 'input legitimacy'" of the different actors.[6]

I wonder if the group does not miss the mark by focusing their criticism on the global administrative law approach. The central polarizing question for all three schools of thought discussed in their paper may well be: Are all international legal phenomena generated by state entities, or is there an emergent global legal arena, a new source of law that somehow lies "beyond the state sphere" but naturally affects it? This question reaches far beyond public law into private international law and, especially at the WTO level, economic law. While I have sympathies with the state-centered approach, I would like to see this question addressed directly: What is the evidence for or against an emerging global legal arena? If it exists, what is its extent and what are its consequences? What is its relationship to state-based international law? Are the two mutually exclusive, or overlapping, or interdependent …? Should an effort be made to block its development, and if so why? Precisely what are the advantages and disadvantages to state-generated versus global law?

B. Internal versus External

The Heidelberg group initially insisted on what they called an "internal approach" wherein the legal framework for global governance is viewed strictly according to the application and development of the law, and the analysis of the social, historical and philosophical ramifications of the law, or "external approaches," take a back seat. Here the group has shifted to a more balanced treatment, with internal approaches providing the operative infrastructure and external approaches serving as a reality check on the wider effects. But precisely how internal and external interconnect is opaque: Is it a Siamese twin relationship where neither approach can function without the other?[7] Is it a hermeneutic circle of lawyers that only overlap here and there with the normative and explanatory circles of the social scientists? Or is it a relationship of con-

---

[6] von Bogdandy, Dann & Goldmann (note 3), Part C.III.

[7] *Id.*, Parts C.I and C.II. To talk about "complements" (Part C) might suggest a twin relationship.

centric circles,[8] where black-letter law comprises a solid inner circle, surrounded by court interpretations and precedents, and then by ever wider and more distant social ramifications? A proviso maintains that internal and external arguments might intersect "to the point that they become difficult to distinguish" and implies the Siamese twin relationship, whereas the legal tradition described for the United States reflects more of a concentric circle situation.[9]

One notes an innate distrust of the social sciences,[10] however, even in this current rendition of the public authority approach: the "firm disciplinary basis"[11] for "the analysis of the exercise of international public authority" that they are seeking remains, in the view of this political scientist, elusive. Interestingly, the Heidelberg group focuses much of its energy on the legitimacy concerns that lurk behind the legal-illegal divide.[12] They point out that this emphasis on constructing legitimation via legal procedure is also a concern at the micro-level of sociology,[13] and I would add that it is also a major focus of inquiry in political science, both at the national and international levels. Perhaps, rather than internal and external, we would do better to think in terms of *integrating* social sciences and law for the purpose of interpreting the affairs of global governance, with the law maintaining sole responsibility for the "craft component" of designing and interpreting norms – the "framing". Maybe we are simply too worried about disciplinary purity and would be more productive if we just muddled through with some experimental liaisons. In this sense, at least, we might take a lesson from the American Ivy League law schools which integrate International Relations, Philosophy, Sociology etc. into their faculties whenever they see fit.

---

[8] Concentric circles are also suggested by the use of "broader" versus "narrower" (*id*., B.III).

[9] *Id*., Part C.

[10] "…, the lack of adequate legal concepts as well as the limited use of the legal-illegal dimension dichotomy for judgements about legitimacy puts legal scholarship at the risk of being marginalized by other disciplines, in particular by economics and political science, on how to understand and frame the world order." (von Bogdandy, Dann & Goldmann [note 3], Part C.II).

[11] *Id*., Part C.III.

[12] *Id*., Part C.II.

[13] *Id*., Part C.II.

C. Origins of Power

We need to know a lot more about the actual origins – as opposed to the legal sources – of international public authority. State theory holds that state power, *Staatsgewalt*, is a normative construct with a factual base: in occupations, beliefs, legitimacy-chains, secularized religious traditions, and organizational might, as well as revolutions, transformations, and so forth. The Heidelberg group maintains that international public authority is presumably bestowed by state entities and thus somehow stands on this same base, but they are hard-put to identify enough specific legal empowerments to account for the observed range of international authority and must turn to miscellaneous "functional equivalents"[14] and "informal entities"[15] instead.

Their strictly legal assessment fails, however, to explain how this broad unaccounted-for international authority came into being. If it is divorced from state entities and international treaties, then it cannot claim the state's steadfast empirical base. How did it come into being? What, then, is its base in reality? Self-empowerment by transnational networks of public officials? The effective seizure of structures by multinational corporations or NGOs? Some hegemonic entity to be identified? All or some of the above? What is the best theoretical model to explain such emergent processes? Systems theory? Autopoiesis? Or?

D. International Taming by Domestic Framing

The use of domestic analogy[16] in the treatment of international politics remains embedded in the Heidelberg group's approach, despite an attempt to accommodate my workshop critique of its use. They have, to

---

[14] *Id.*, Part B.III.

[15] *Id.*, Part B.III.

[16] *See* HEDLEY BULL, THE ANARCHICAL SOCIETY. A STUDY OF ORDER IN WORLD POLITICS 44 (3rd ed., 2002), with Forewords by Andrew Hurrell & Stanley Hoffmann, (1st ed., 1977). Specifically on the domestic analogy *see* HIDEMI SUGANAMI, THE DOMESTIC ANALOGY AND WORLD ORDER PROPOSALS (1989).

some extent, disavowed its use[17] and have removed explicit reference to the historical basis for it – that just as the emergence of the industrial state gave rise to the formation of national administrative law, globalization now gives rise to international institutional/administrative law – but they have neither excised it from their approach nor taken on the burden of proof that I challenged them with.[18]

The group admits that there are fundamental differences between domestic and international institutions,[19] but their public authority approach to international politics is not built on that distinction. Instead, defining international public authority as "legitimate international coercion" mimics the nation state's legitimate monopoly of force.[20] International public law is assigned the same functions as domestic public law.[21] Legal concepts derived from domestic administrative law comprise the sole basis for a purely *intra*disciplinary development of international administrative law.[22] I found the emphasis on instruments of domestic administrative law by all three internal methods[23] particularly surprising. There is no mention of the oft-discussed *supra*national-*inter*national learning curve. After all, EU law grew from the same domestic analogy and one would think international law could learn much from the EU experience.

---

17 von Bogdandy, Dann & Goldmann (note 3), *inter alia*, Part B.III. In this part, they say half-heartedly they do "not advocate all too simple 'domestic analogies'".

18 I argued that before any treatment of international politics can make unconditional use of the domestic analogy one must prove that:

1. international politics can, *in general*, be "domesticated" – and not just in some areas, say trade and environment, and for some times, say in the 1960s;
2. the "rule of law" approach is the *best fit* for such domestication;
3. the experience of taming Leviathan at the *nation state level* in the 19th and 20th century is the best model for *framing the anarchical society* in the 21st (I use anarchical society in the sense of Hedley Bull).

This would seem to be part of an international lawyer's task and should not simply be externalized to the social scientists.

19 von Bogdandy, Dann & Goldmann (note 3), Part C.III.

20 *Id.*, Part B.III.

21 *Id.*, Part B.III.

22 *Id.*, Part C.III.

23 *Id.*, Part C.III.

From the Heidelberg group's internal perspective, legal structuring of the international sphere could, if pursued energetically, provide legitimacy in the same way that it did for the domestic sphere, through ever-more-refined rule-making – a process that, in the latter case, took several hundred years to complete. Political and social means of legitimation are not considered here.[24] This legalization strategy is presented as a crucial and hitherto unappreciated component in the emergent global governance paradigm. There is, however, little evidence that the international sphere would be consistently responsive to the sort of legalization that is applied to individual, uniform and coherent nation states. The Heidelberg group has acknowledged in very general terms that the international sphere is, despite globalization, an extremely heterogeneous cultural, political, social and geographic sphere,[25] but they do not explore or address the actual consequences of that heterogeneity and instead apply legalization generically across the entire sphere. At this stage of the public authority project, even the traditional legal delimitations of the domestic sphere, where different legal approaches involving varying degrees of legal constraint are applied to high politics, administration and the courts, are lacking – in this paper – or have yet to be formulated.

In his 1977 treatise *The Anarchical Society: A Study of Order in World Politics*,[26] Hedley Bull (1932-1985) viewed international relations as an uneasy blend[27] of anarchism (Hobbesian realism), cosmopolitanism (Kantian universalism), and a society of states (Grotian solidarist institutionalism).[28] The relative importance of these three characteristics and their respective manifestations – conflict among states, trans-national social bonds, and common rules and institutions for containing conflict

---

[24] *Id.*, Part C.II: "The understanding of domestic institutions rests largely on legal terminology based on doctrinal constructions."

[25] Such heterogeneity is cited as an obstacle to the evolution of "an overarching layer of common legal arguments" (*see* Armin von Bogdandy, *General Principles of International Public Authority: Sketching a Research Field*, Part D.I.2, in this volume) but is not itself analyzed in depth. It may well be that such an analysis would clarify the reasons for limiting legalization to "the development of principles in the process of internal constitutionalization of the various international institutions" (*id.*, Part E.II; emphasis mine), to a "thin", a "foot-in-the-door" mode of legalization.

[26] *See* BULL (note 16).

[27] BULL (note 16), 39.

[28] *Id.*, 24.

– changes from epoch to epoch and issue to issue. Unlike domestic politics, international politics is a moody triple-faced beast whose character is in constant flux, shifting with every change in the weather. The Heidelberg group's definition of public authority might accommodate Grotian solidarism with a touch of Kantian zeal, but the beast's anarchic temper tantrums seem to go untended, if not unremarked. The other two internal approaches described are perhaps even more lopsided in their treatments.

The Heidelberg group does at least note that legality in international politics at present fails to confer legitimacy, and they join with Martti Koskenniemi in assigning blame to deformalization, fragmentation, and the hegemonic traits of the current world order[29] … all institutional features of an anarchic international society. Hobbesian reality is, unfortunately, painfully apparent in international politics from Africa to the Balkans to the Mid-East, from warfare and terrorism to international financial markets. I am afraid that trying to frame it by domestic analogy is like trying to fit a large wild wolf into a small sheep's clothing – the wolf and everyone else is likely to be the worse for it.

E. Transnational Private Governance Left Out in the Cold

The Heidelberg scheme defines international public authority in narrow structural terms, as empowered by states,[30] rather than using a broader outcome-based definition that would include action in the public interest or stewardship of common goods. Private structures that perform public functions cannot meet the specified "functional equivalence" test for legitimacy,[31] and require explicit state-based empowerment.

Here, the group does not resort to domestic analogy, but they might well have attempted one from German public law – and highlighted a major weakness in their approach. Within the nation state, private par-

---

[29] von Bogdandy, Dann & Goldmann (note 3), footnote 49 and accompanying text.

[30] *Id.*, Part B.III: "We consider as *international* public authority any authority exercised on the basis of a competence instituted by a common international act of public authorities, mostly states, to further a goal which they define, and are authorized to define, as public interest."

[31] *Id.*, Part B.III.

ties ranging from rabbit breeders to large corporations form associations and assign them wide regulatory powers. Historically, such bottom-up structures comprise one of the original ways of creating public authority. In the international sphere, this would mean acknowledging institutions that are comprised of private actors as stand-alone public authorities, *if they serve a public function*, i.e., organizations like the International Standardisation Organisation (ISO) or the Forest Stewardship Council (FSC).[32] According to the Heidelberg group's use of domestic analogy, we would then require some international state-based legal anchor for those private structures, insomuch as they affect individual rights in the pursuit of public interests – basically, an international version of the German constitutional doctrine that self-administration needs a legal foundation if it is to be entrusted with certain legally binding decisions.[33] But again, we run into problems, because there is, of course, no overarching world state to delegate such power, nor does there appear to be much hope of a state treaty that would do so.

The Heidelberg group might thus be well-advised to broaden their definition of "functional equivalence" and include certain types of transnational private governance among the activities they deem worthy of normative justification. Indeed, the use of a "topical catalogue"[34] of special cases and exceptions to a very narrow definition of "publicness" may turn out to be the Achilles heel of the Heidelberg approach as presented to date. Why does the catalogue include "governance activity that directly affects public goods," the management of "global infrastructures" (like ICANN), and governance activity dealing with "col-

---

[32] One might use Lorenz von Stein's term *freie Verwaltung* to characterize these phenomena; he would have labeled public authority in the Heidelberg sense *Regierung: see* LORENZ VON STEIN, VERWALTUNGSLEHRE (1st and 2nd ed., 1866-1884), 8 parts in 10 volumes (reprinted 1962 *et seq*.). The notion of *freie Verwaltung* is developed in Part I, 7: Von Stein distinguished between (public) self government and free associations, and later folded both into one notion of "self government" (*see* JOCHEN TAUPITZ, DIE STANDESORDNUNGEN DER FREIEN BERUFE: GESCHICHTLICHE ENTWICKLUNG, FUNKTIONEN, STELLUNG IM RECHTSSYSTEM 258 (1991), note 294). Von Stein's interest was focused on conjoining "free associations" with state development through "self government".

[33] *See inter alia* the *Facharzt*–decision of the *Bundesverfassungsgericht* of 9 May 1972 (BVerfGE 33, 125, especially 156-60) that requires a legal mandate for "status-affecting" decisions.

[34] von Bogdandy, Dann & Goldmann (note 3), Part B.III.

liding fundamental interests of different social groups"? Why these particular three and only them? At the very least, we need some more explicit general criteria for admission to the catalogue, some modest theory to guide our attention to all "those activities that require normative justification."[35]

F. Global Limitations to Western Legal Thought?

This paper might leave one with the impression that the reticence of large global powers like the United States, China, and Russia to embrace the mandates of the public authority approach is the main hurdle to bringing order and legitimacy to global governance. The problem here would appear to be one of small powers versus large powers and, conceivably, resolvable.[36] But there are more fundamental disparities that may lurk behind resistance to the approach in certain regions, categorically different concepts of the common good and different traditions of statehood that could, in fact, block or limit the whole enterprise.

Hedley Bull pointed out that the historical roots of the international law enterprise are eminently Christian:[37] "That modern international society includes international law as one of its institutions is a consequence of the historical accident that it evolved out of a previous unitary system, Western Christendom, and that in this system notions of law – embodied in Roman Law, divine law, canon law, and natural law – were pre-eminent."[38] This is perhaps why it is so difficult, in today's world, to form and maintain global treaties and agreements, and some-

---

[35] *Id.*, Part B.III. The full quote is: "In sum, we choose the focus on the exercise of international public authority in order to guide the attention to those activities that require normative justification."

[36] In this paper, the group notes, without elaboration, that the constitutionalization approach is hindered by "the reticence of American, Chinese or Russian governments," leading one to suppose the same is true for the public authority project, which is purportedly inspired by constitutionalization (*id.*, Part C.III). The possibility that this reticence may actually be a deep-seated resistance on the part of these countries is not discussed here, though, in a general way, other Heidelberg sources (*see, infra,* note 42 and von Bogdandy (note 25)) do take note of such resistance.

[37] BULL (note 16), *inter alia*, 26.

[38] *Id.*, 137.

times even OECD-wide treaties: it is not just an issue of size and power, but also one of cultures and traditions that simply are not receptive to western legal doctrines. As we set our sights on the goal of global integration through law[39] – on tying "the various institutions into one legal universe"[40] – what is at the heart of the public authority approach, shouldn't we be wondering how the origins of that law might limit its globalization?[41] Can, or has, western legal doctrine finally detached from its roots enough to acquire universal applicability in a global sphere that, despite recent economic globalization, includes regions that millennia of history have set on vastly different trajectories?

G. Intra-Western Contradictions

Even in the west, we may find that differing concepts of sovereignty and the value of multilateral action may stand in the way of the public authority approach to global governance. In this paper, the Heidelberg group seems to make light of the battle between the sovereigntists, anchored in the United States, and the internationalists, anchored in western continental Europe,[42] and one might get the impression that it is

---

[39] "Integration through law", after all, was first a slogan behind which European integration forces in academia did unite in the 1980s. *See* INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE (Mauro Cappelletti ed., 1985-1987).

[40] von Bogdandy (note 25), Part A.

[41] A similar argument is made in ELMAR RIEGER and STEPHAN LEIBFRIED, LIMITS TO GLOBALIZATION: WELFARE STATES AND THE WORLD ECONOMY 241 (2003), chapter 5: *The Welfare State and Social Policy in East Asia: Religion and Globalization*. This is essentially an argument about a secularized Christian legal culture being at the root of Western welfare-state building.

[42] In yet another paper, they characterize these battling factions as elements of two opposing paradigms, of "particularism" and "universalism" and their view of the deep disparity between the two positions is more apparent. Here they refer to "strong resistance" to international legalization on the part of some large states, as well as to the North-South disparity in the effectiveness of international law. But they find Martti Koskenniemi's critique that their project feeds into this disparity or has, as they say a "hegemonic nature" unjustified. Perhaps if they were to address both the fundamental struggle between multilateralists and hegemonic forces within the United States and the ways in which their universal approach will affect the deep global inequalities – and vice versa – both the reasons for and the answers to such criticism would be apparent.

only a matter of time, education and experience, before the sovereign-tists see the error in their ways and join the international team. I am certainly sympathetic to the goal of finding a European antidote for United States hegemony in legal thought and in international institution-building. But I do wonder if one can cure the world of what is in essence "imperialism with good manners"[43] by simply instilling more and better manners, or if it might be time to hunt down some alternative form of medicine.

In order to better understand the significance of the sovereigntist-internationalist division, we need to step back and take a look at state development in general. In the OECD world in the past thirty years, we have seen both convergence and divergence in state development. On the public-private axis there has been a net convergence since the 1950s. Nationalization and increased regulation began in the 1950s in the United States, for example, but stopped and was to some extent reversed in the late 1970s. The net result was a small shift toward the continental European position. And many European states began privatizing – with regulation – in the late 1970s, moving Europe somewhat more dramatically toward the United States position. The corridor of difference[44] between the two has thus narrowed, while its center has shifted slightly closer to the United States position.[45] Recently, in the 21st century, privatization has generally come to a halt, and now the financial crisis may actually reverse the trend with some OECD-wide nationalization, and shift the center back toward the historical European position.

On the national-international axis, on the other hand, we have seen pronounced divergence between Europe and the United States, beginning in the 1970s and picking up pace in the 1990s. Under the guise and guidance of the EU, continental European states have internationalized

---

Armin von Bogdandy and Sergio Dellavalle, *Universalism and Particularism as Paradigms of International Law*, Institute for International Law and Justice Working Papers 3 (2008), 58, available at: http://www.iilj.org/publications/2008-3Bogdandy-Dellavalle.asp. *See also, supra*, note 36.

[43] BULL (note 16), 209.

[44] On the concept of corridors *see* Heinz Rothgang, Stephan Leibfried & Herbert Obinger, *The State and its Welfare State: How do Welfare State Changes Affect the Make-Up of the Nation-State?* 40 SOCIAL POLICY & ADMINISTRATION 250 (2006).

[45] *See* Reimut Zohlnhöfer & Herbert Obinger, *Selling-Off the Family Silver. The Politics of Privatization*, 2 WORLD POLITICAL SCIENCE REVIEW 30 (2006).

rapidly and in a systematically multilateral fashion, in both a European and a global context. Though we still occasionally decry the end of sovereignty – as demonstrated by conflicts between the German *Bundesverfassungsgericht* (Federal Constitutional Court) and the ECJ – the fact is that sovereignty for EU member states came to an end in the 1990s. The United States has also internationalized during this period, but at a much slower pace, with more caveats, and in a decidedly unilateral fashion.[46] The result is that in the realms of law, the use of force, and legitimacy, the corridor of difference between continental Europe and the United States has widened dramatically. The "great 1994 sovereignty debate" about joining the WTO[47] in the United States had no counterpart in Europe, where joining was simply a matter of politics as usual and the effect on sovereignty was hardly mentioned in parliaments or public discourse.[48]

In my field of research, welfare state studies, what was first perceived in the United States as a developmental gap or time lag is now typically viewed as a substantive difference: From the Great Depression until the 1960s, American-European differences were seen as a developmental gap, but since then they have been viewed as differing visions, as different worlds of welfare.[49] I wonder if we may be seeing a similar phenomenon when it comes to international politics, a shift in perceptions from a mere developmental gap to a substantive structural gap. Getting the United States on the public authority bandwagon is not just a matter of developing a strict dogma of international public law there. Certainly, as they point out, there are factions in the United States that are lobbying for more internationalism and multilateral engagement. But, except with respect to trade – where the economic interests of the

---

[46] *See* EDWARD C. LUCK, MIXED MESSAGES: AMERICAN POLITICS AND INTERNATIONAL ORGANIZATION 1919-1999 (1999). Naturally it also helps if you are the only actor in town who can afford to act unilaterally – Europe certainly cannot, so its actions fit its potential.

[47] John Howard Jackson, *The Great 1994 Sovereignty Debate. United States Acceptance and Implementation of the Uruguay Round Results*, 36 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 157 (1997).

[48] *See* Christoph Bellmann & Richard Gerster, *Accountability in the World Trade Organization*, 30 JOURNAL OF WORLD TRADE 31 (1996).

[49] *See* Stephan Leibfried & Steffen Mau, *Introduction: Welfare States: Construction, Deconstruction, Reconstruction*, *in* WELFARE STATES: CONSTRUCTION, DECONSTRUCTION, RECONSTRUCTION, vol. 1, ANALYTICAL APPROACHES, xi, xii (*Id*. eds., 2008).

United States have led from protectionism to an open world economy that is sturdily legally protected – the United States has been entirely unreliable when it comes to multilateral international policy-making. Indeed, we should consider if what we are seeing is not just a developmental lag, or even a shift in perception, but again, a phenomenon with deeper historical roots, something that is built into the American nation-state's structure.

The American insistence on absolute sovereignty and their penchant for unilateral approaches to international relations[50] go back to the founding of the federal republic – in an anti-imperial war. They are rooted in a heritage of isolationism and a huge, sparsely populated expanse of territory. As George Washington put it in 1796: "The great rule of conduct for us in regard to foreign nations is in extending our commercial relations, to have with them as little political connection as possible… . Europe has a set of primary interests which to us have none; or a very remote relation. Hence she must be engaged in frequent controversies, the causes of which are essentially foreign to our concerns… . Our detached and distant situation invites and enables us to pursue a different course."[51] They are inherent in a politically dependent, highly partisan

---

[50] For a first overview on the causes for this development *see* Thomas Giegerich, *The Impact of the USA on Regime Formation and Implementation*, *in* MULTILEVEL GOVERNANCE OF GLOBAL ENVIRONMENTAL CHANGE, 275-304, especially section I, 275-283 (G. Winter ed., 2006); Jed Rubenfeld, *Unilateralism und Constitutionalism*, 79 NEW YORK UNIVERSITY LAW REVIEW 1971 (2004) contrasts two types of democracy in an attempt to get to the roots of this problem: the United States bottom-up "democratic constitutionalism" and the European top-down "international constitutionalism" that forms the base for post World War II international charters and institutions. *See* first his: *The Two World Orders*, 27 WILSON QUARTERLY 22-36 (2003), also presented in EUROPEAN AND US CONSTITUTIONALISM 280 (George Nolte ed., 2005).

[51] From George Washington's Farewell Address in 1796: "The great rule of conduct for us in regard to foreign nations is in extending our commercial relations, to have with them as little political connection as possible. So far as we have already formed engagements, let them be fulfilled with perfect good faith. Here let us stop. Europe has a set of primary interests which to us have none; or a very remote relation. Hence she must be engaged in frequent controversies, the causes of which are essentially foreign to our concerns. Hence, therefore, it must be unwise in us to implicate ourselves by artificial ties in the ordinary vicissitudes of her politics, or the ordinary combinations and collisions of her friendships or enmities.

Our detached and distant situation invites and enables us to pursue a different course. If we remain one people under an efficient government, the period is

legal culture,[52] and built into an extreme form of federalism that pulls the foreign-policy powers of the President into the Congressional super-majoritarian-[53] and veto system. And they are an unavoidable consequence of an inherited British[54] monist legal tradition where any international law is immediately incorporated into national "municipal" law,[55] making the American state structurally vulnerable – and, also, overly protective against ever-growing international legal influences.[56]

The United States thus has a number of effective institutional constraints on any sharp turn toward internationalization, as well as a generally ingrown system that is at odds with the everyday routines of international policy-making. It is, in essence, structurally unfit to be consistently multilateral. Add to this a democracy that was built, like most democracies, on a *de jure* disenfranchisement of the bottom half of society – while proselytizing "a democracy made in heaven" –[57] which now finds itself *de facto* disenfranchised, while the other half is substantively under-informed, and a starring role as political hegemon since World War I, and one doubts if the United States is – or ever can be – a structurally open state of the sort we would like to imagine it to be when we discuss "post-national constellations" in Germany and Europe.

---

not far off when we may defy material injury from external annoyance; when we may take such an attitude as will cause the neutrality we may at any time resolve upon to be scrupulously respected; when belligerent nations, under the impossibility of making acquisitions upon us, will not lightly hazard the giving us provocation; when we may choose peace or war, as our interest, guided by justice, shall counsel." (http://avalon.law.yale.edu/18th_century/washing.asp)

[52] This legal culture can rely much less on a normative domain outside of politics. Its legal system, its "*rechtsdogmatische Durchbildung*" will always be less developed.

[53] A Presidential international treaty needs a two-thirds majority in the United States Senate.

[54] *See* HERSCH LAUTERPACHT, INTERNATIONAL LAW. A TREATISE, vol. 1: THE LAW OF PEACE 3 (6th ed., 1947), originally by LASSA FRANCIS LAWRENCE OPPENHEIM.

[55] *Id.*, 39-40.

[56] A dualist tradition would have been a better fit for the United States as it would have required a transformative act for each and every international law by Congress.

[57] *See* Rubenfeld, *The Two World Orders* (note 50).

H. Staring Down the Beast

In his musings on contemporary international law, Hedley Bull calls our attention to an observation by the philosopher Martin Wright: "[Wright] has pointed out that the periods in which the claims made for international law are most extravagant … are also the periods in which actual international practice is most marked by disorder." [58] As we make our, more or less, extravagant claims for the miracles of international law, perhaps we should be watching our backs and analyzing the growing chaos of contemporary international practice in depth – *semper apertus*! If one wants to tame a beast, after all, one must meet it head on.

[58] BULL (note 16), 145.