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The Rise of Global Legalism

Eric A. Posner

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ERIC A. POSNER

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Abstract

Global legalism is the view that world government is not a practicable approach to global collective action problems but that these problems are nonetheless susceptible to legal solutions. This position is paradoxical: within nation states, government is normally thought to be a precondition of law. This paper argues that global legalism rests on an incorrect understanding of how international law functions, and implicitly relies on a false analogy to domestic legalism, a form of legalism that flourishes in states that have legalistic cultures. Because the conditions for legalism do not exist at the international level, global legalism provides false hope and poor guidance for international law.

The Rise of Global Legalism

Eric A. Posner*

Global Collective Action Problems

Economists call the various essential goods and services that cannot be supplied privately—including defense against external aggression, law enforcement, a currency, a social safety net, enforcement of property rights and contracts, environmental protection, a transportation infrastructure, basic education, and so forth—public or collective goods.¹ These goods are those that are most efficiently supplied at a scale beyond that available to individuals or corporations: they are solutions to collective action problems. Yet governments fail to supply their populations with public goods that exist at a scale that transcends national borders—what I will call global public goods. Global collective action problems pose the most significant challenges of our time.²

War. Two states go to war. Not all wars have spillover effects—many remain the affair of just two belligerents—but most do. The war produces refugees who seek shelter in neighboring states, causing turmoil there, too. Meanwhile, the belligerents make trouble with their neighbors, trying to enlist others in their cause. Trade is disrupted, and war and destruction spread as previously neutral states are drawn in. It would have been much better if war had been prevented from starting in the first place, or could have been confined to the initial belligerents. An internationally enforced rule

* Kirkland & Ellis Professor of Law, The University of Chicago. This paper was presented as the Max Weber Lecture at the European University Institute. My thanks to Jacob Gersen, participants at a seminar at Northwestern University Law School, and participants at the European University Institute for their helpful comments.

¹ The idea goes back many centuries, but received essential clarification from Paul Samuelson. See Paul Samuelson, *The Pure Theory of Public Expenditure*, 26 *Rev. Econ. & Statistics* 387 (1954). There have been countless elaborations since then, including many discussions of the global version. See, e.g., Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (1965); Russell Hardin, *Collective Action* (1982); Todd Sandler, *Global Collective Action* (2004); Scott Barnett, *Why Cooperate?: The Incentive to Supply Global Collective Goods* (2007).

² Not all global problems are collective action problems; some are coordination problems, which can be challenging but are solvable. See Barrett, *supra*; Jack L. Goldsmith & Eric A. Posner, *The Limits of International Law* (2005).

that prohibited war and required states to resolve their disputes peacefully would be an enormous benefit to humanity. But such a system is not in place. Rules against war exist, but states often ignore them, and interstate war remains as much a problem today as in the past.

Pollution. Pollution does not stop at national boundaries, and states have long struggled to resolve disputes where a polluting state harms the people in another state. By and large, states could resolve these disputes through negotiations and ad hoc agreements. In recent years, however, technological changes have made interstate pollution problems more severe. Chlorofluorocarbons and other emissions have created a hole in the ozone layer over Antarctica. This hole has spread over populated areas, where individuals are at heightened risk of skin cancer. The Chernobyl nuclear disaster of 1986 spread radioactive debris not only over the Soviet Union, where the accident occurred, but over much of Europe. The burning of forests to clear land for farming in Indonesia creates smog over China and other countries in that region. Most important, industrial activity has created the problem of global warming. Yet there is no international environmental law to speak of. A single treaty regime, the Montreal Protocol, has to date effectively addressed the problem of the ozone hole, but for every such success, dozens of other problems only get worse.³

Overfishing. The oceans' fish stocks have been seriously depleted, with some scientific studies claiming that if current practices are not modified, many fisheries could eventually be destroyed. Fisheries are classic public goods. If they are overfished, they will disappear. Thus, it is in everyone's collective interest to maintain fishing levels at sustainable levels. However, this is not in any individual's personal interest, because most of the harm one inflicts by pursuing one's own personal interest will be absorbed by others. Within their jurisdictions, governments can solve this collective action problem, but states have a hard time cooperating to preserve ocean fish, or whales, outside their own territorial waters. Many treaties and other agreements attest to the importance of the issue: everyone sees that states have to cooperate to preserve fisheries. But states nonetheless cooperate very poorly, which has led to the depletion of the world's fish and whales.

Disease. Disease has always crossed borders. Just as the great plagues of the past spread via merchants and other travelers, today many experts fear the rapid transmission of a virulent strain of avian influenza over the modern transportation network might soon cause a worldwide pandemic. The SARS outbreak of 2002-2003 killed several hundred, and severely disrupted travel. Quick detection and quarantine in a state of origin would benefit victim states—but an originating state has few incentives to be vigilant on behalf of other states, since it does not bear the epidemic's full costs. States of origin may in fact have an incentive to hide the outbreak, so as not to scare away tourism, until the disease becomes uncontrollable and can no longer be hidden in any event. During the SARS outbreak, the originating state, China, covered up at first. Sharing of early evidence of an outbreak would clearly be collectively beneficial, but individual state interests are in conflict.

³ For an excellent overview, see Richard H. Steinberg, *Power and Cooperation in International Environmental Law*, in *Research Handbook in International Economic Law* (Andrew T. Guzman & Alan O. Sykes ed. 2007).

Terror. Because much of it is domestic, before 9/11 states dealt with terrorism mostly as a crime problem. International terrorists often aim to draw other states into their struggles, adding this external pressure upon their enemy. Palestinian terrorists, for example, disrupted international travel in order to isolate Israel and deprive it of tourism, hoping that foreign states would pressure it to make concessions to the Palestinians. Today, Osama bin Laden believes that by attacking the U.S. and other western countries, he can force the West to exit the middle east, thereby causing apostate governments to crumble. International terrorists seek support and shelter everywhere, and combating them is an immensely difficult cooperative endeavor. The U.S. understands this. It has put great pressure on other nations to combat terror and tried to coordinate counterterrorism efforts by treaties. But many states have been reluctant to ratify these treaties, and enforcement is difficult.

Others. Other international collective action problems include macroeconomic shocks in one country spreading rapidly to other countries, causing regional or even global economic downturns; uncontrolled migration, including refugee flows, which disrupts communities, spreads crime, and leads to political backlashes or even war. Ordinary transnational crime, as opposed to terrorism, remains an entrenched problem. Only international cooperation can address drug smuggling, money laundering, the sex trade, and piracy of intellectual property, such as films, books, computer programs, and video games—the list of problems that require greater international cooperation is long. Yet international cooperation in all these areas has been rudimentary.

To say that cooperation is limited or rudimentary is not to say that it does not exist. And, of course, it is difficult to quantify the amount of cooperative activity, so optimists can point to successes even while pessimists point to the failures. But one thing is clear. Most states, and certainly all developed states, can solve the domestic versions of these collective action problem, or at least deal with them far more effectively than states as a group can handle global collective action problems. Most developed states can keep crime at an acceptable level; repress violent challenges to government authority; maintain renewable resources by regulating users; keep pollution at an acceptable level; and so forth. The question is, if states can do this domestically, why can't they do the same thing as effectively at the international level?

There is no clear answer to this question, but a few observations are familiar. States have governments, which have a monopoly on force and the loyalty of most citizens or subjects. Governments are complex institutions that obtain information about the interests, values, and concerns of citizens; enact rules that restrain people's behavior; monitor people's behavior for violations of the rules; and impose sanctions. Crucially, governments have institutional mechanisms, such as majority rule, that enable them to implement policy that benefits most people, and prevents individuals or small groups from blocking needed reform. As long as governments perform their functions adequately, people will for the most part obey the rules, participate in government (as voters, as employees), and in other ways maintain their loyalty. Governments are often unable to exercise authority over people who see themselves as a distinct group within a larger society, a group separated by ethnic, linguistic, cultural, historical, or geographic peculiarities. At the extreme, "failed states" are states where

the government cannot exert control over a large portion of the population that nonetheless is unable, or refuses, to separate itself into an independent state.

At the international level, no world government exists, and so no entity has the power to tax and regulate states, or the individuals who live in them, in order to ensure that collective goods are produced. The problem seems to be the extraordinary diversity of the world population as well as the extremely difficult problems of scale. When people are sufficiently diverse, there are few or no public goods that benefit most people or nearly everyone; instead, government policies can only have highly unequal effects. Arranging transfers so as to mollify the losers is also highly difficult, because it is so hard to determine the real effect of policies on highly diverse people. And when the scale of government is large enough, it becomes difficult for it to monitor people, and for the people to monitor the government.

One can thus draw a crisp analytic distinction between within-state cooperation, which is capable of solving major nation-level collective action problems, and between-state cooperation, which is itself subject to collective action problems and thus cannot solve them, except in a very rudimentary fashion. Within states, governments overcome collective action problems by applying force to individuals. Between states, governments must cooperate with each other—government to government—and, with occasional exceptions, the cooperation takes the form of agreements that are enforced with bribes or threats of retaliation. This type of “spontaneous cooperation,” as it is sometimes called, is certainly possible, but it is very difficult, and it becomes more and more difficult as the number of participants increases, their time horizons shorten, and information asymmetries increase. If spontaneous cooperation were really effective, there would be no reason for states to have governments in the first place, as citizens could simply cooperate directly with each other in order to produce national or sub-national collective goods.

This analytic distinction does not perfectly describe the real world, of course. Political scientists distinguish “international” or “intergovernmental” cooperation, and “supranational” cooperation, in which individuals owe loyalty to multiple levels of government authority. The European Union is the supreme example of supranational cooperation, today, but there are other examples as well.

It seems plausible that global collective action problems cannot be solved, or solved very well. If it is true that national governments are needed to solve national collective action problems, then it would seem to follow that a world government would be needed to solve global collective action problems. If a world government is not possible, then solving global collective action problems is also not possible. Or so one would think.

However, there is currently a project to escape this dilemma—a project that I will call “global legalism,” one that can be summarized with the slogan, “law without government.” To understand this project, we must first back up and see why the more traditional methods of escaping this dilemma—including that of creating a world government—no longer have any serious adherents.

Political, Economic, and Ideological Integration

History does not so much repeat itself as play variations on a theme. The theme is the likely or inevitable solution of the world's problems—what I have called global collective action problems—through institutional or ideological development. The three main variations have been: political integration, or the creation of a world government; economic integration, or the creation of a world market in which collective action problems melt away; and ideological integration, or the universal adoption of a set of beliefs that define collective action problems out of existence. I will also say a few words about a variant of political integration—hegemony.

Political integration

One solution to global collective action problems would be to integrate the existing 200 or so states into a single world state. The world government would use its powers to tax and regulate in order to solve collective action problems just as state governments do today. The oceans would be like in-land lakes, and the world government could maintain fisheries with the type of licensing systems that states use to maintain fisheries that fall within their jurisdictions. War and terrorism would be internal crime problems (or perhaps civil war), and the world government would use law enforcement and the criminal justice system to address them. Global warming and other pollution problems would similarly be treated as internal problems that could be solved in the same way that acid rain is dealt with in the United States.

A world government is an old dream, and it is no nearer to realization today than it was hundreds of years ago. Indeed, the trend over the past one hundred years has been in the opposite direction: states have been proliferating rather than merging. The problem with a world government is that the global population is far too heterogeneous to govern. People living in different parts of the world have different values, interests, loyalties, and ideas about governance. Heterogeneity frustrates world governance, and the plausibility of world government is receding with the passage of time.

A few people still imagine that a world government is possible. Some philosophers imagine that a federation of some sort might come into existence, but they fail to provide a plausible account of how this might happen.⁴ The political scientist Alexander Wendt does supply a mechanism: he argues that the struggle among individuals for recognition must inevitably lead to a world state in, he thinks, one or two hundred years.⁵ Wendt thinks that individuals have an inbred psychological desire to be recognized as subjects, and this leads them to demand such recognition from others. As long as the battle for recognition leads to hierarchical relations like the master/slave relationship, the social system will be unstable because the hierarchical inferiors will, unless temporarily paralyzed by false consciousness, eventually demand a greater degree of recognition, as autonomous human beings. Within the state, the struggle leads to liberal democracy, which is the only system in which all individuals are recognized as equals. But the struggle for recognition persists at the international level, as weak

⁴ See my discussion in Eric A. Posner, *International Law: A Welfarist Approach*, 73 U. Chi. L. Rev. 487 (2006).

⁵ Alexander Wendt, *Why a World State Is Inevitable*, 9 Eur. J. Inter'l Relations 491 (2003).

states demand greater recognition from stronger states, and citizens within weaker states demand greater recognition from the citizens of stronger states. Wendt insists that a stable world system cannot exist as long as people are divided among states, because even if the states take relatively peaceful attitudes toward each other, there is always the possibility that disputes will lead strong states to fall back on their greater power, resulting in the use of force. Such instability must eventually give way to a world state, where all individuals enjoy legal equality and liberal rights—the point at which they will finally stop struggling for recognition.

Wendt's argument depends on some highly contentious empirical assumptions. Although at times he seems to acknowledge that he must make strong empirical assumptions, the tenor of his argument, with the notion of the inevitability of the world state, is either that, in fact, such assumptions are unnecessary and his argument is analytic, or that they are obviously correct. Clearly the first cannot be true. Wendt himself admits that the people's desire for recognition must be stronger than their desire for security, for his story to be correct. He points out that people do, from time to time, take risks and even voluntarily die for the sake of recognition of themselves or their group, but this hardly settles the matter. If enough people care more about security than recognition, then his contraption cannot get started. He also acknowledges that nationalism and other urges to form collectivities below the global level are in tension with evolution toward the world state. Although he takes nationalism as evidence for his theory—proof of the power of struggle for recognition—and enthusiastically notes that nationalisms will enjoy stability only when they themselves embrace reciprocal recognition, he ignores the plausible possibility that nationalism is simply a stronger force—again, an empirical question. Other moving parts in his theory—the destructiveness of technology has made war more unattractive, the role of collective memories of past bloodlettings spurs integration—are also empirical conjectures that are not particularly plausible and indeed could have been made with equal force one hundred years ago.

One cannot disprove Wendt's style of utopianism but it provides a flimsy foundation for policy. More parsimonious and plausible accounts of recent world history are available. At least for the next one hundred to two hundred years, we cannot depend on a world government to solve the global collective action problems.

Economic Integration

On the eve of World War I, the British intellectual Norman Angell published *The Great Illusion*, an instantly famous book that made arguments that were both ingenious and (with hindsight) wrong.⁶ Although Angell has been misinterpreted as saying that war was no longer possible, in fact his argument was that war was no longer in the interest of any state. A state that went to war would end up injuring itself because it would merely disrupt its own economic relationships, from which it benefited far more than it could benefit from conquest. He acknowledged that many people believed that war could be advantageous for a state, and for that reason war remained possible

⁶ Norman Angell, *The Great Illusion* (G.P. Putnam's Sons, 3rd rev. & enlarged ed. 1912).

and Britain should not discard its military; but he also believed that with time everyone would see that this belief was erroneous, and so eventually war would no longer occur.

Angell argued that the then-modern economic integration of different countries made war a losing proposition even for the winner. Suppose, for example, that Germany defeated Great Britain in a war. Then what would happen? The German army could cart off all British valuables from the homeland and enslave the population. It could seize Britain's colonies and claim them as its own. But Britain's valuables were not worth all that much. Much more important would be the disruption of Germany's financial and trade relationships with Britain. German-owned factories in Britain would lose their workers, and German firms in Germany would lose a source of inputs and a market for their goods. British debtors would be unable to repay their loans to German creditors, which would fold, and British creditors would call in their loans. The subjects of Britain's colonies would still need to be mollified, and Germany would quickly realize that it had to treat those subjects as well as Britain did (which Angell thought was quite well). In short, a country like Germany does much better by maintaining friendly economic relations with Britain than by invading it and reducing it to a colony or wasteland. This can be interpreted as a claim that even if a world government is not possible, the kinds of problems that we would hope the world government could solve—chiefly, war—can nonetheless be solved in a decentralized fashion, as states voluntarily, without being forced by a world government, refrain from going to war simply because they have no interest in doing so.

Although badly timed, Angell's argument was insightful. It anticipated America's policies toward West Germany and Japan after World War II, and the whole decolonization movement of the 1950s and 1960s. The U.S. realized that it was better off if Germany and Japan were wealthy and democratic, than if they were not, and invested a great deal of resources into ensuring that this would happen. No major figure believed that they should be turned into colonies, and those, like Secretary of State Henry Morgenthau, who believed that Germany would always remain dangerous unless converted into an agrarian society were proved wrong. Later, Britain, France, and the other imperial powers would realize that, quite apart from the difficulty of maintaining control over restless populations, decolonization was not necessarily an economically unsatisfactory policy. The newly independent states would remain economic partners in much the same way as they had prior to colonization, supplying raw materials to the former imperial master, receiving manufactured goods in return, and more or less willing to maintain friendly political relations.

But Angell was excessively optimistic. States can prosper by cooperating with other states, but they can also gain advantages by preying on other states. Predation need not take the form of conquest and devastation or looting; the modern form could simply be insistence on advantageous economic relations which do not eliminate the weaker state's incentive to cooperate economically but ensure that the stronger state receives the larger share of the surplus. In modern terms, the fact that states would all benefit in the aggregate if they could resolve their disputes peacefully does not mean that states will resolve their disputes peacefully. Peaceful settlement of disputes is, except in narrow cases, a global public good, and states have an incentive to free ride

rather than contribute to its production, which in many instances would mean refraining from engaging in an advantageous war.

The problem with Angell's view is even more apparent as we turn our focus from war to the other collective action problems. Consider global warming. Nearly all states recognize global warming as a problem, but states are unable to cooperate in order to solve this problem, even though the eventual losses to states may well exceed those that would be caused by any war. The increasing economic integration of the world does not solve global collective action problems; it simply creates a new set of them. To be sure, neither Angell nor his modern-day followers believe that economic integration would solve all the world's problems. The point, for present purposes, is that even if some global problems can be solved with little or no cooperation, others cannot.

Ideological Integration

The theory of economic integration does not purport to solve global collective action problems; it is instead a theory that at least some such problems do not really exist, because they, or some of them, will disappear as long as states act in their self-interest. By contrast, the theory of political integration recognizes that global action problems exist as long as the state system exists, and thus advocates or predicts the development of a world state, for which the collective action problems would be merely domestic problems, resolvable with taxation and regulation and the other instruments of government. The third approach combines elements of the first two. Ideological integration means that states develop similar or identical beliefs, commitments, and institutions, and as a result, the global collective action problems can be solved or simply melt away.

The most important modern advocate of this view is Francis Fukuyama, whose famous 1989 essay, "The End of History?", argued that history had ended because all ideological conflict had been resolved.⁷ Fukuyama, like Wendt, is inspired by Hegel, and his theory is similarly motivated by the assumption that the struggle for recognition is central to human existence, and that technological advance favors equality, but where Wendt foresees a world state, Fukuyama foresees a continuation of the state system, but with the crucial qualification that all states, in the future, will be liberal democracies. Fukuyama believes that the collapse of the Soviet Union ended the last major ideological battle, between communism, on the one hand, and market-based liberal democracy, on the other. Everyone now, more or less, recognizes that the only viable organization of a state is along liberal, democratic, and market-based lines.

Fukuyama's theory is too optimistic. There will always be people with grievances, real or imagined, and these people will turn to ideologies that make sense of their grievances and provide a basis for action. In the past, such ideologies included anarchism, fascism, nationalism, communism, and—liberalism. Today, certain strains of Islam have taken on this role for many people. But, whether Fukuyama is right or

⁷ See Francis Fukuyama, *The End of History?*, *The Nat'l Interest* (Summer 1989). The essay was later expanded into a book. See Francis Fukuyama, *The End of History and the Last Man* (1992).

wrong in his diagnosis, the question of interest here is whether ideological integration could solve global collective action problems.

The affirmative answer draws on the democratic peace literature, which argues that democracies do not go to war with other democracies. The literature rests on an undeniable factual pattern: for the last two hundred years, there are many examples of democracies fighting nondemocracies and nondemocracies fighting nondemocracies, but few examples of democracies fighting democracies, and these are generally ambiguous anyway.⁸ The most plausible explanation for why democracies do not go to war with each other is that democracies, being relatively open, cannot keep secrets, and so can more credibly commit to war during a crisis—with less likelihood of bluffing leading to war.⁹ War occurs most often when states misjudge the capacities and interests of other states; when this does not happen, states appease or settle rather than incur the costs and risks of war.

But greater information does not solve collective action problems: the problems exist even with perfect information. Nor does the capacity to make credible commitments. It may be that, on the margin, democracies can solve global collective action problems more effectively than nondemocracies can. Because their interests and capacities are more visible, bargaining costs are lower, and thus negotiations are less likely to fail. But the advantages of democracies are limited. They remain independent actors, and so they will have trouble cooperating with each other. This means that they cannot solve global collective action problems, though they may make more progress than authoritarian states do.

Hegemony

A fourth solution to global collective action should be mentioned, although it does not have the supporters that the first three do. This solution involves the hegemony of a single state or, in some versions, a system of cooperation among a small number of dominant states—“regional hegemons”—which in turn enforce order among the small states within their respective spheres of influence.

The clearest modern precedent of a hegemon is the British Empire, which maintained order on the high seas during much of the nineteenth century, and which also controlled many smaller states by virtue of its financial and economic dominance. All or nearly all states benefited from a freedom of the seas, which Britain protected by defeating pirates and deterring states that sought to exert greater control over the seas. Britain could also prevent some small states from starting regional wars, and took the leading role in the abolition of the slave trade.

But Britain could not prevent war between great powers, and it could not solve numerous other global problems. Today, the most powerful state, the United States, is far too weak to be a global hegemon. The U.S. could not, for example, solve the problem of global warming by simply threatening other states with a military

⁸ See, e.g., Bruce Russett, *Grasping the Democratic Peace* (1994).

⁹ See James D. Fearon, *Domestic Political Audiences and the Escalation of International Disputes*, 88 *Amer. Pol. Sci. Rev.* 57 (1994).

intervention unless they reduce greenhouse gas emissions. The U.S. has had some success in deterring inter-state wars, reversing aggression (the first Gulf War), and settling regional conflicts (the Yugoslavia civil war). It helps maintain freedom of the seas, and it takes the lead in many kinds of international cooperation. But the U.S. does not have enough power to resolve global pollution problems, save fisheries, suppress many conflicts around the world, and solve the various other global collective action problems.

Even if the U.S. could serve as a hegemon, and therefore had the means and the incentives to solve global collective action problems, many people would find troubling the distributional implications of such a system. The reason that the hegemon has an incentive to solve global collective action problems is that it can capture the value of the public good—and will, if it is self-interested. Consider, for example, the problem of global warming. As a hegemon, the United States could solve this problem by threatening to bomb states that exceed their share of the globally optimal level of greenhouse gas emissions. As a result, the United States would reap the benefits from climate change mitigation without having to pay any costs, aside from those of maintaining the credible military threat, which may well be a fixed cost—a cost that would be incurred in any event because of security needs. U.S. industry would not be restricted, or not as much; and, in addition, the U.S. could demand (or extort) monetary compensation from the world. Indeed, it is hard to see why the U.S. would not extract all the rents that the rest of the world would obtain from American-enforced peace and prosperity.

To be sure, the hegemon does not always have the power to extract rents. During the cold war, the United States frequently complained that western Europe did not pay its fair share of the cost of the nuclear umbrella because the United States could not credibly threaten to close that umbrella for nonpayment.¹⁰ But the possibility of this type of strategic behavior also weakens the incentive of the hegemon to supply global public goods in the first place. Either a state is so powerful that it can capture the gains from solving a global action problem or it does not. In the first case, it has the incentive to solve the collective action problem but no incentive to share the gains. In the second case, it has no incentive to solve the collective action problem.

Nor does a system of regional hegemons hold out much hope. In the nineteenth century, the major western powers—Britain, Russia, France, Prussia/Germany, the Austro-Hungarian Empire—would sometimes cooperate in useful ways. They could settle disputes among each other, and suppress violence in smaller states. But cooperation did not go much beyond preventing war, and did not always succeed at that. Today, one sees a similar configuration, with the U.S., Japan, China, Russia, the EU (or its major members), and other states taking the main roles. But these countries do not seem capable of solving the global collective action problems except in special circumstances.

¹⁰ Todd Sandler & Keith Hartley, *Economics of Alliances: The Lessons for Collective Action*, 39 *J. Econ. Lit.* 869 (2001).

Legalism

The last approach to solving the problem of global collective action can be called “global legalism.” Global legalists believe that a world government is not possible in the foreseeable future, but believe that international law, without a world government, can nonetheless solve or greatly ameliorate global collective action problems. International law, normally thought to be an object of government interest, becomes a subject: it develops, it expands, it constrains. And it develops in a certain way, enveloping states within its embrace, compelling them to act outside their interests, pushing them to greater and greater levels of cooperation, and hence to solving the global collective action problems.

Global legalism is not a doctrine or theory. It is akin to an ideology or attitude or posture—a set of beliefs about how the world works, one that, in various forms, dominates the thinking of academic international lawyers, as well as practicing international lawyers and many government officials.¹¹ Global legalism has popular appeal and it affects government policies: many international institutions bear its imprint. Rather than defining it immediately, let me begin by describing “legalism” in general—as opposed to its global variant.

Legalism in America

Legalism is an ideology or, more precisely, a set of assumptions about how the world works. It places great faith in the power of law and legal institutions to solve problems. The dominance of legalistic thinking in the United States is an old theme,

¹¹ Probably the two greatest influences on the development of global legalism among American academics are Louis Henkin and Harold Koh. See Louis Henkin, *How Nations Behave* (2d ed. 1979); Harold Koh, *Why Do Nations Obey International Law?*, 106 *Yale L.J.* 2599 (1997). However, I do not claim that either scholar would defend every element of global legalism as I describe it. Global legalism is not a precise set of doctrines or methodological commitments; it is better described as a general attitude about the nature of international law, and global legalists frequently disagree about particulars. One can find this attitude in virtually any article or book written by an American international law scholar, where the standard assumption is that if a global problem exists, the solution is more law, and little or no attention is given to whether states have an interest in creating and supporting the proposed legal solution. For a discussion of other examples, see Eric A. Posner, *International Law and the Disaggregated State*, 32 *Fla. St. U. L. Rev.* 797 (2005). To be sure, there are some critics and dissenters but they are in a small minority. For a historical discussion of the tension between “formalist” (that is, legalist) and “realist” (that is, skeptical) scholars in the United States, see Marti Koskenniemi, *The Gentle Civilizers of Nations: The Rise and Fall of International Law 1870-1960* ch. 6 (Cambridge, 2001). Koskenniemi seems to think that American legal scholars tend to be “realists.” However, in my view the legalists have, today, the upper hand.

As for political scientists who write about international relations, I do not believe that any major scholar is a global legalist. See, for example, *Legalization and World Politics* (Judith Goldstein et al., eds. 2001), which lays down a descriptive research agenda that rejects the common assumptions of legalists (e.g., p. 4). This research has its roots in international relations scholarship that uses the rational choice methodology; see, e.g., Robert Keohane, *After Hegemony* (1984); Oran R. Young, *Governance in World Affairs* (1999). Global legalism is mostly confined to law schools, the media, and politics. A few philosophers, however, might be called legalists because they assume that legal institutions can solve international problems without trying to explain how they would do so. See, e.g., Brian Barry, *Statism and Nationalism: A Cosmopolitan Critique*, in Ian Shapiro and Lea Brilmayer, eds, *NOMOS XLI: Global Justice* 12, 39 (1999); Jonathan Glover, *State Terrorism*, in R.G. Frey and Christopher W. Morris, eds, *Violence, Terrorism, and Justice* 256, 272 (Cambridge 1991).

first discussed by Alexis de Tocqueville in *Democracy in America*.¹² Tocqueville was not concerned about the role of legalism in international relations; his discussion of legalism was focused on its domestic variant. About this version of legalism, and as it then existed in the United States, he famously said: “There is almost no political question in the United States that is not resolved sooner or later into a judicial question.”¹³ He meant that Americans expected law and legal institutions to resolve moral and policy disagreements that in other countries would be resolved by political, religious, or communal institutions. Tocqueville captured an important truth and seems to have uncannily predicted the future.

Legalism in the United States is due to several factors.

The common law tradition. American judges, like British judges, have the authority to develop the common law, which is essentially a kind of constrained policymaking. The common law governs chiefly disputes between individuals—property disputes, breach of contract, accidents, and so forth—and in the course of developing the common law in the United States judges have resolved numerous policy questions concerning these subjects. By and large, Americans have been satisfied with common law development, and judges’ authority to make law in this domain is unquestioned. It is also subject to correction by state legislatures, and this has ensured that the common law has not deviated too far from the values and interests of the people.

The constitution. American judges claimed early on the power to nullify state laws that violate state constitutions, and state and federal laws that violate the federal constitution. Judicial review is more controversial than common law development, but it is just as entrenched. Because the U.S. Constitution is a short and ambiguous document, judges have been able to use it to advance policy goals, which they have done very aggressively. As a result, in the U.S. all kinds of policy choices—regarding slavery, abortion, contraception, the minimum wage, taxation, voting districts, and much else—have been made, or heavily influenced, by judges.

Legal institutions and the legal profession. Tocqueville noted the dominant role of lawyers in American society and politics, likening them to aristocrats in Europe. Lawyers constituted a kind of ruling class. Aside from arguing cases and serving as judges, they also dominated political institutions such as legislatures. Lawyers share certain interests and ways of seeing the world—one that emphasizes the ever-present possibility of resolving conflicting interests rather than the inevitable struggle of entrenched classes or ideologies. This made them highly useful to everyone who has a problem—businesses, unions, repressed minorities and religious groups, anyone with a grievance—and possibly enabled them to be the glue that held together a society that lacked a common religion or religious establishment and was highly individualistic and disinclined to defer to authority. In exchange for their aristocratic position, lawyers must practice *noblesse oblige*.¹⁴ As professionals, lawyers see themselves as serving the

¹² Alexis de Tocqueville, *Democracy in America* 251-58 (Harvey C. Mansfield & Delba Winthrop trans. and eds. 1992).

¹³ *Id.* at 257.

¹⁴ Cf. David Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 *Vand. L. Rev.* 717 (1988).

public interest, and so, at least in principle, they recognize that certain kinds of behavior are off limits because they exacerbate rather than resolve conflict.

The love of order. Tocqueville argued that lawyers love order more than liberty, a claim that would raise hackles in law schools today, but it remains as true today as it did in the nineteenth century. A few exceptions aside,¹⁵ lawyers distrust democracy, fearing that it will either lead to chaos or (more commonly, today) the domination of either unjust majorities, who abuse racial and other minorities, or the domination of the wealthy, who use their money to influence elections. For American lawyers, *Brown v. Board of Education* is an unshakeable testament to the heroic judiciary facing down popular passions. For European lawyers, democracy is associated with the excesses of nationalism; by contrast, supranational legal structures, protected by bureaucrats and judges, are Europe's highest post-war achievement.

The heterogeneity of American society. The United States has always been a heterogeneous society. The earliest citizens came mainly from British stock, but there were also Germans, Dutch, and others, not to mention Indians, who had to be dealt with in one way or another, and Africans, who were mostly slaves. Even among the British, there were great and sometimes violently divisive religious differences, and people who traced their ancestry from different parts of Britain had highly different cultures.¹⁶ Sectional differences were also significant, and indeed in the greatest failure of legalism in U.S. history, led to the Civil War. Meanwhile, additional migrants came from China, Japan, Italy, Ireland, and many other countries, and by the early twentieth century, the U.S. had become the highly multiracial society that we know today. The importance of this development for legalism cannot be exaggerated. When people cannot resolve their differences by appealing to common religious beliefs, or common ethnic norms, or common historic memories, or tribal elders, they can at least appeal to the law—to constitutional law, which they implicitly accepted when they migrated, to the common law which had continually proved its worth, and to statutes which had been passed by officials who had been elected by them.

And so Americans argue about policy by appealing to the law. They say that the Constitution, rightly understood, endorses this or that policy choice. They bring lawsuits whenever they disagree with elected officials' policy choices. And thus judges continue to play a dominant role in setting policy. This development has not been smooth and uniform, to be sure. The rise of the administrative state of the twentieth century can be described as a repudiation of legalistic thinking, which had failed America during the Great Depression, when legalistic Supreme Court justices prevented the implementation of New Deal reforms. But America's regulatory agencies are themselves highly legalistic, and although courts defer to their decisions in many settings, this is largely because the agencies themselves have adopted legalistic procedures.

¹⁵ See, e.g., Mark Tushnet, *Taking the Constitution Away from the Courts* (1999); Jeremy Waldron, *Law and Disagreement* (1999); Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004).

¹⁶ David Hackett Fisher, *Albion's Seed: Four British Folkways in America* (1989).

What Is Legalism?

As should be clear from the previous discussion, legalism is a complicated and ambiguous concept, and any attempt to reduce it to a definition is hazardous. Still, one can identify several common elements.¹⁷

Rules. Laws are rules that are issued in advance of the behavior they regulate. They are not always precise but legalism favors precision over vague standards. But the key point is that the rules are set out in advance, so that people have notice. The rules prevail over power. Thus, for the legalistic mind abortion rights are settled by the U.S. Constitution, and are not to be determined by religious and political forces slugging it out in the political arena. Smoking policy, similarly, is better determined by courts applying common law tort principles than by legislative horse trading.

Judges. One could imagine a rule-bound society that was not legalistic; for example, the rules could come from a religious text. A crucial element of legalism is the powerful role of the judge. Judges, by ideological reputation, lie outside politics; they resolve cases impartially, by appealing to the rules. The legalistic mentality implicitly assumes that existing rules can resolve every problem. Actual judges know better. Like priests in an ancient society, who know that their magic is just an illusion, judges purport to find law—that is, apply the rules—even as they make it. They make law by appealing to vague or conflicting rules that do not indicate a determinate outcome while making a policy choice on the sly. The trick works because like the ancient priests judges use common sense, and share the dominant values of society, and so can usually make cases work out in a manner that seems broadly fair. When judges dominate policymaking, a society become litigious: people seek to affect policy by bringing lawsuits.¹⁸

Procedures and the adversarial system. Legalism loves procedures. In the ideal, a case is resolved fairly because neither side has a procedural advantage—thus, the substance of the law determines the outcome, and not the wealth of one party or the skill of his lawyer. Procedures ensure that both sides have access to all the evidence, have time to prepare their cases, are not surprised by revelations, are not disadvantaged by the judge or jury's prejudices, predilections, or interests. Of special importance is the institution of review. The judge reviews the jury's verdict, and an appellate panel reviews the judge's decisions, and a high court may review the appellate panel's views. Along the way, there are many opportunities for rehearings by the same judge or by a larger or different panel, and there may be additional opportunities for collateral challenges—in criminal cases especially, where defendants may get a second chance by filing a habeas petition in state court and a third chance by filing a habeas petition in federal court, and each time with additional layers of review.

¹⁷ See Judith Shklar, *Legalism: Law, Morals, and Political Trials* (2d ed. 1986). For a related definition of “judicialization,” see C. Neal Tate, *Why the Expansion of Judicial Powers?*, in *The Global Expansion of Judicial Power* 28 (C. Neal Tate & Torbjörn Vallinder eds. 1995), who emphasizes (1) the extent to which policymaking occurs in courts; and (2) the extent to which quasi-judicial rules and procedures dominate decision-making in policymaking bodies other than courts.

¹⁸ See, e.g., Walter K. Olson, *The Litigation Explosion: What Happened When American Unleashed the Lawsuit* (1991); Robert A. Kagan, *Adversarial Legalism* (2001); Thomas F. Burke, *Lawyers, Lawsuits, and Legal Rights: The Battle Over Litigation in American Society* (2002).

Liberal legalism. There are other elements of legalism but the discussion so far should suffice to give its flavor. But one should recognize one other aspect of legalism which is important, and that is its longtime association with liberalism—in the classical sense that emphasizes individual freedom. The rule of law, for example, is thought to be a liberal virtue as well as a legalist virtue: it refers to the idea that people should not be subject to the whims of rulers, as this is inconsistent with freedom and autonomy. Although it is true that legalism bans arbitrary governance, it does not literally ban illiberal laws—such as laws against freedom of conscience and speech. But in practice legalists tend to be liberals and, at least in the United States, liberals tend to be legalists. Legalists do not believe that laws issued by dictators are truly consistent with legalism, and so they generally insist on democratic institutions, and for democratic institutions to work, there must also be open debate, freedom of speech, and so forth. Liberals could possibly endorse an unconstrained direct democracy, where everything would be determined by politics, as long as the public was itself liberal in thinking. But in practice liberals insist that judges must guard the liberal order on the basis of a largely liberal constitution, at least as those judges have interpreted it. So legalism tends to be liberal, but it need not necessarily be so.

In sum, legalism defined broadly is the view that law and legal institutions can keep order and solve policy disputes. It manifests itself in powerful courts, a dominant class of lawyers, and reliance on legalistic procedures in policymaking bodies.

Why Legalism?

To understand the appeal of legalism, one needs to understand the appeal of the judge. Why would people place so much confidence in judges to resolve their disputes, rather than looking to traditional authorities such as religious figures, or to political authorities such as legislatures and executives?

Several answers suggest themselves.¹⁹ When a population is highly diverse, different groups will appeal to different traditional authorities—different religious figures, or charismatic figures, or tribal leaders, or what have you. Thus, the authorities cannot resolve disputes involving people from different groups, at least not without the difficult process of bargaining over differences. We might attribute the early growth of legalism in the United States to the diversity of the population. Many (but not all) empires with diverse populations—the Roman Empire, the Austro-Hungarian Empire, the British Empire—have also been legalistic.

But why not rely on political authorities? The answer may be that legalism becomes more attractive when regular government is weak, fragmented, unpopular, or otherwise incapacitated, while the courts themselves are effective and enjoy a good reputation.²⁰ As noted above, American courts inherited power and authority from the British system, and their appeal in the nineteenth century must have been enhanced by the weakness and remoteness of the national government; state legislatures were also widely distrusted. In Europe today, a legalistic mentality has taken hold in part because of the success of the European Court of Justice in knitting together sovereign states that

¹⁹ For a general discussion, see Tate, *supra* at 28-33.

²⁰ John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 *Law & Contemp. Probs.* 41 (2002).

had otherwise refused (until recently) to give much power to Europe's major political institutions, which were hampered by strict voting rules and featured other weaknesses.

Further, it may be that elites and the power-holders fear mass democracy, and see judges, who are by training and temperament more likely to identify with the elites than with the masses, as a bulwark against the people.²¹ This is similar to Tocqueville's argument that the legal profession serves as a governing aristocracy, although where Tocqueville saw the legal profession as relatively benign, and crucial for maintaining order, one might also see a class defending its interests.

Finally, one needs to explain why judges would be willing to take on the burden of policymaking, when they might believe that doing so would undermine their reputation for impartiality and weaken public support for the judiciary. One possible answer is that individual judges have policy preferences and, all else equal, would like to impose those preferences on others.²² And because the public seeks policy guidance from judges, *failure* to engage in policymaking might weaken public support for the judiciary.

Legalism is not just faith in the judges; it also involves faith in the law—for example, the belief that a vague document written in another era, like the U.S. Constitution, can provide guidance for policy today, or that the common law provides a basis from which one can derive right answers, or that statutes have inherent meanings. These views have been under furious assault in the legal academy for almost a century, but the public seems to hold them as strongly as ever. It may be that people have internalized the self-conception of the legal profession—illustrated by such mantras as the one that “judges discover law rather than make it”—perhaps because legalistic nations have been relatively free and prosperous. It may be that legalistic thinking appeals to ordinary habits of mind. Or it may be that people prefer the rule of judges to that of politicians, but have been unable to reconcile this preference with the ideological appeal of democracy. Whatever the case, legalism is a powerful force.

Legalism Spreads Across the World

The legalism I have described is the specifically American version with which I am most familiar, and the American version seems to be its purest manifestation anywhere in the world.²³ But legalism has spread, and plays an increasing role in other countries, especially the western democracies.

²¹ See Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (2004).

²² See Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* (1993).

²³ In an interesting article, Jonathan Zasloff makes a related argument that what he calls “classical legal thought” played an important role in American foreign policy during the first half of the twentieth century, thanks in large part to the influential role of lawyers such as Elihu Root in the development of foreign policy. Zasloff blames classical legal thinking for America's disastrous turn from realism during the interwar period, which resulted in excessive faith in international law, a faith that itself was due to central tenets of classical legal thought: the importance of public sentiment rather than the state for enforcing the law; the power of spontaneous legal evolution; and emphasis on legal expertise rather than politics for resolving social disagreements. See Jonathan Zasloff, *Law and the Shaping of American Foreign Policy*, 78 N.Y.U. L. Rev. 239 (2003).

There are many reasons for the spread of legalism. As I noted before, legalism has existed in other countries aside from America though usually in a more diluted form. Britain's traditions of judicial independence influenced all of its former colonies, not just the United States. Fascism and communism subordinated the courts to party rule; the collapse of those systems in major states from the end of World War II to 1991 gave a boost to liberal democracy and judicial independence. And the institutions of the United States are widely admired and imitated. In recent years, legalism has made further gains. Governments grant new powers to judges, judicially enforceable bills of rights become more popular, the number of lawyers increases around the world, and issues of politics increasingly move to the courts.²⁴ As noted above, Europe presents an important case. The European Court of Justice has played an important role in entrenching European law by persuading the national courts of European countries to defer, in many instances, to the European Court's judgments and interpretations.²⁵ The spreading appeal of legalism worldwide can be attributed to the same factors that explain the appeal of legalism in the United States: increasing effort at cross-border governance of highly diverse populations, the weakness and fragmentation of national governments, and efforts by political elites to entrench themselves or their values or interests against their own populations.²⁶ That the United States and, increasingly other legalistic western democracies, are prosperous, powerful, and free, must suggest to foreign observers that, in fact, legalism has some merit: governance by judges may be superior to plausible alternatives.

Global Legalism in International Relations

Whether legalism can take hold and do well for people in countries without legalistic traditions remains to be seen. If one confines one's attention to the vast developing world, there is perhaps nothing as impressive as the distance between their legalistic ideals and the behavior of governments. Many countries have ambitious, generous constitutions that grant significant rights—to education, to health care—that are simply not enforced. Judges may write well and impressively about the importance of these rights and the government's obligation to respect them, but they cannot enforce their judgments. More often, the judiciary is corrupt or incompetent or controlled by the government; people can queue up to the courts but not expect a judgment for a decade or more.

Even in the west, legalism has always had its critics. In the United States, critics argue that legalism and especially an obsession with rights has corrupted national debate,²⁷ interfered with democratic self-governance,²⁸ and led to excessive litigiousness.²⁹ In Europe, justified pride in the development of effective supranational institutions has been accompanied with deep uneasiness about the so-called “democratic

²⁴ Hirschl, *supra*; The Global Expansion of Judicial Power (C. Neal Tate & Torbjörn Vallinder eds. 1995).

²⁵ See Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (2000).

²⁶ See Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 *Int'l Org.* 217 (2000), for such an interpretation of the human rights regime.

²⁷ See Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (1991).

²⁸ See Waldron, *supra*.

²⁹ See Olson, *supra*; Kagan, *supra*.

deficit”—the evident lack of interest of European publics in European politics, and a distrust for the supranational institutions over which they have little control.³⁰

Meanwhile, however, legalism seeks to conquer new realms. Having infiltrated many national polities, and one regional polity, it now seeks to govern the world.

Global legalism is the extension of legalism to international relations. It is most easily understood as an alternative to the other approaches to solving global collective action problems. According to global legalism, international law will solve these problems. Global legalism is the world government approach except without the government. Legalists recognize that a world government is not likely in the near future, but they believe that law-without-government can nonetheless solve global problems. Like economic integrationists, global legalists believe that states will solve global collective action problems because it is in their interest to do so, but global legalists, as we will see, do not put as much faith in decentralized action: global legalism is an odd mixture of top-down and bottom-up institutionalization, with states both creating international law and finding themselves caught in its snares against their will. Like ideological integrationists, global legalists believe that states are converging toward ideological agreement, but the ideological agreement is not so much about liberal democracy as about the value of legalism. Global legalists also emphasize institutions to a greater extent than ideological integrationists do.

First, at a general level global legalists believe that international political disputes should, as much as possible, be resolved according to law, and by legal institutions. Wars should not be fought without the approval of the United Nations; disputes should be submitted to international courts. Increasingly, people argue that customary international law binds states that object to it, and thus political and moral disagreements—for example, over the use of the death penalty—can be resolved by appeal to the law, even when the law cannot be traced to state consent.

Second, states should enter more treaties, especially multilateral treaties, and treaties should be as specific, detailed, and comprehensive as possible. As noted, global legalists also believe that customary international law—international law that evolves outside of treaty-making—should be interpreted robustly. *Jus cogens* norms should evolve and expand.

Third, international courts should have jurisdiction over a broad array of disputes, jurisdiction should be compulsory, and judges should be independent of the governments of states. Judges should not be the pawns of powerful states; they should be highly qualified, and selected through a fair procedure.

Fourth, other types of international legal institutions should be promoted—legislative and executive, to the extent possible, though global legalists acknowledge that a full-fledged world government is not possible in the near term.

³⁰ See Ernst-Joachim Mestmäcker, *On the Legitimacy of European Law*, 58 *RabelsZ* 615 (1994).

Fifth, global legalists believe that domestic political institutions should be bound by international legal obligations. In the United States, legalists believe that courts should use customary international law and treaties as sources of law, even without the approval of the political branches.

Sixth, many global legalists see the growth of international law as inevitable, a byproduct of larger historical forces that no state can control. In some work, international law takes on a life of its own—expanding, ramifying, weaving itself among the states and their institutions. Sometimes, this type of thinking comes across as a Whig-history style conviction that international law has always advanced (to be sure, with temporary disruptions) and will always continue to advance.

Global legalism should be distinguished from the views of political scientists and lawyers who believe that international law can serve the interests of states, and that the extent to which an area of international relations is subject to international legal regulation should (in normative scholarship) or does (in positive scholarship) reflect cost-benefit tradeoffs. In the political science literature, for example, a group of scholars has been debating the advantages and disadvantages of legal forms in international relations, focusing on the precision of rules, the existence of legal as opposed to political obligation, reliance on third-party dispute resolution mechanisms, the availability of standing for individuals as opposed to states, and so on.³¹ With its emphasis on the specific (and changeable) interests of states, on considering the costs as well as the benefits of law, and on empirical verification, this research program diverges from the assumptions underlying global legalism.

The difference between these scholars (with whom I agree) and the global legalist can sometimes be obscure. Many international legal regimes—such as those that solve coordination problems involving communication and transportation—are robust and desirable from the perspective both of the rational choice theorist and the global legalist.³² The camps diverge with respect to the question of whether such “law without government” can solve more significant global problems, such as global collective action problems. The rational choice theorist is skeptical. The global legalist is not, or less so. These differences stem from a methodological choice as well as a general view of the world. Rational choice theorists believe that compliance with international law must be in the rational self-interest of governments, or of the individuals and groups that compel governments to act. Global legalists have no such methodological commitment. Most American international law scholarship simply takes compliance for granted; only a few scholars have tried to explain why states would comply with international law.³³

What explains the rise of global legalism? The simple demand-side explanation is that the implausibility of the world government, economic integration, ideological integration, and hegemony approaches to global collective action problems has left a gap that global legalism has filled. The world needs institutions that will solve global

³¹ E.g., Goldstein, *supra*.

³² Goldsmith & Posner, *supra*.

³³ See Koh, *supra*.

collective action problems and, if these other approaches have failed, international law itself has not been directly refuted.

Moreover, the view that law-without-government can solve global collective action problems can point to some successes. It received a boost from the Nuremberg trials, which demonstrated—however imperfectly—that international trials could take place and result in convictions that seemed less arbitrary and more legitimate than traditional alternatives such as summary execution or immunity.³⁴ International tribunals are proliferating. The international trade system has worked well. The United Nations has not fulfilled the ambitions of its founders but it has earned a measure of respect. Other ambitious legal regimes, such as the Law of the Sea Convention, have come into effect. If world government seems as distant as ever, international law offers some real hope.

The Problems with Global Legalism

Most global legalists acknowledge that international law is created and enforced by states. They believe that states are willing to expand international law along legalistic lines because states' long-term interests lie in solving global collective action problems. In the absence of a world government or other forms of integration, international law seems like the only way for states to solve these problems. The great problem for the global legalist is explaining why, if states create and maintain international law, they will also not break it when they prefer to free ride. In the absence of an enforcement mechanism, what ensures that states that create law and legal institutions that are supposed to solve global collective action problems will not ignore them?

For the rational choice theorist, the answer is plain. States cannot solve global collective action problems by creating institutions that themselves depend on global collective action. This is not to say that international law is not possible at all. Certainly, states can cooperate by threatening to retaliate against cheaters, and where international problems are matters of coordination rather than conflict, international law can go far, indeed.³⁵ But if states (or the individuals who control states) cannot create a global government or quasi-government institutions, then it seems unlikely that they can solve, in spontaneous fashion, the types of problems that, at the national level, require the action of governments.

Global legalists are not enthusiasts for rational choice theory, and have grappled with this problem in other ways.³⁶ I have criticized their attempts elsewhere, mainly on the grounds that they rely on inconsistent assumptions about human behavior and misread the evidence.³⁷ Here I want to focus on one approach, which is to insist that just as individuals can be loyal to government, so can individuals (and their governments) be loyal to international law, and be willing to defer to its requirements

³⁴ On the relationship between Nuremberg and legalism, see Shklar, *supra*.

³⁵ See Goldsmith & Posner, *supra*.

³⁶ There are also rational-actor accounts that involve sub-state institutions or groups.

³⁷ See Posner, *International Law and the Disaggregated State*, *supra*.

even when self-interest does not strictly demand that they do so. International law has force because (or to the extent that) it is legitimate.³⁸

This view is interesting and illuminating, but mostly for what it shows about the snares of legalism. As noted by Judith Shklar decades ago, there is nothing attractive about legalism itself: it is best defended as a means to an end—some normative goal such as freedom or prosperity or security. Global legalism, like its domestic variant, tries to avoid taking a position on what its proper normative end is, for if it did not, it would just be another comprehensive world view in competition with so many others.

In classic international law, states enjoy sovereign equality, which means that international law cannot be created unless all agree, and that international law binds all states equally. What this means is that if nearly everyone in the world agrees that some global legal instrument would be beneficial (take your pick: a climate treaty, or the UN charter), it can be blocked by a tiny country like Iceland (population 300,000) or a dictatorship like North Korea. What is the attraction of a system that puts a tiny country like Iceland on equal footing with China? When then-Attorney General Robert Jackson tried to justify American aid for Britain at the onset of World War II on the ground that Nazi Germany was the aggressor, international lawyers complained that the United States could not claim neutrality while providing aid to a belligerent—there was no such thing as an aggressor in international law.³⁹ Nazi Germany had not agreed to such a rule of international law; therefore, such a rule could not exist. Only through the destruction of Nazi Germany could international law be changed; East and West Germany could reenter international society only on other people's terms. How could such a system be perceived to be legitimate?

There is, of course, a reason why international law works in this fashion. Because no world government can compel states to comply with international law, states will comply with international law only when doing so is in their interest. In this way, international law always depends on state consent. So international law must take states as they are, which means that little states, big states, good states, and bad states, all exist on a plane of equality.

Global legalists have tried to soften the sharp edges of the international system in two ways. First, they have emphasized human rights treaties as the moral center of the international system.⁴⁰ Why these treaties, which never have been taken very seriously by states, should be the center rather than the periphery of international law has never been explained. In terms of political attention and resources expended, international trade law is vastly more important than international human rights law. So are arms control agreements, extradition treaties, and treaties governing transportation and communication. Nevertheless, scholars have reserved for human rights treaties, almost alone among international legal instruments, a special status: the capacity to bind states, through the evolution of customary international law, that do not consent to them. Also much intellectual effort has gone into justifying *jus cogens* norms, which

³⁸ See, e.g., Thomas M. Franck, *The Power of Legitimacy Among Nations* (1990).

³⁹ See Edwin Brochard, *War, Neutrality and Non-Belligerency*, 35 *Amer. J. Int'l L.* 618 (1941).

⁴⁰ See, e.g., Ernst-Ulrich Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (1991).

supposedly bind authoritarian states that would otherwise reject them, but no one has a clear idea of what jus cogens norms are supposed to be, and how they can be reconciled with state sovereignty.

Second, international lawyers, especially in the United States, have tried to give international law a democratic pedigree.⁴¹ Some scholars have argued, for example, that democracies should have higher status in international law than authoritarian states should; for example, perhaps authoritarian states (but not democracies) should be subject to military intervention. But this approach of pretending that international law is something that it is not cannot succeed. International law can exist only as long as states cooperate in creating and enforcing it, and as long as authoritarian states make up a substantial portion of the globe, wishing them away can only weaken international law.

These tensions burst into the open from time to time, the most famous recent example being the military intervention in Kosovo by Nato forces in 1999. The military intervention violated the UN Charter and was clearly illegal. Yet the implication of this view was that the world had to sit by and watch a possible genocide unfold in Kosovo without doing anything about it. Many international lawyers cut the Gordian knot by declaring the war “illegal but legitimate.”⁴² But this is only to say that states can depart from international law when they have good reasons—a view that threatens to unravel international law and render it indistinguishable from international morality. It was predictable that the Kosovo precedent would be used in future wars, and indeed the Bush administration cited humanitarian concerns as one of the justifications for invading Iraq. Now the “illegal but legitimate” rationale looks less appealing, and international lawyers are backpedaling.⁴³

The problem cannot be avoided, however. The problem with global legalism is that because international law reflects the interests of governments, it will not always be consistent with the moral sense or legitimate interests of populations, so it will not have the authority that law needs to command general assent among individuals.

Why can't the same charge be made against the domestic version of legalism? The answer is that, in fact, the same charge can be made, and is made, against legalism, and that is why many people are uneasy with the increasing judicialization of politics, in the United States and in other countries. But there is an important difference between domestic legalism and global legalism. Domestic legalism involves a shift in power toward judges, or increasing reliance on legal formulas in non-judicial policymaking bodies such as legislatures—all of which occurs within a national community with a functioning government. Other political institutions are at the ready if judges go too far or make mistakes, and are, in any event, willing to ensure that judicial orders are

⁴¹ See, e.g., Thomas Franck, *The Emerging Right to Democratic Governance*, 86 *Amer. J. Int'l L.* 46 (1992).

⁴² Independent International Kosovo Commission, *The Kosovo Report* 186 (2000); W. Michael Reisman, *Kosovo's Antinomies*, 93 *Am. J. Int'l L.* 860, 862 (1999).

⁴³ Richard A. Falk, *What Future for the UN Charter System of War Prevention?* 97 *Amer. J. Int'l L.* 590 (2003).

obeyed. At the international level, no such institutions exist; the global population feels no particular loyalty to international judges and to other international legal bodies.

Conclusion

Global legalism has advanced in recent years because problems of global collective action have multiplied and increased in seriousness, and alternative mechanisms for solving them, such as world government, seem no more likely today than they ever have in the past. Creating international law to solve collective action problems makes good sense, as long as states can enforce the law, but the claim that the decentralized system of international law can do the things for which one would normally think a government would be necessary is puzzling. To be sure, states are able to cooperate, and legal forms can help cooperation and especially coordination, but theory suggests that cooperation to solve global collective action problems will be limited.

The optimism of the global legalist rests on an article of faith—that ordinary people or elites, including government officials, will cause governments to comply with international law beyond what is in the government's narrow self-interest. This faith feeds off the success of domestic legalism in some countries and the proven usefulness of international law in some contexts, but it stubbornly ignores evidence to the contrary. International law, as it currently exists, is a useful device for international cooperation but it does not have the capacity to command respect as domestic law (in some countries) does, because it is not backed by a world government that has the support of a global community; it rests on and confirms existing power imbalances and ugly political realities that exist in most states; and, lacking strong institutional support structures that can modify and interpret it as circumstances change, it is fragile.