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## International Law and the Constitution: Terms of Engagement, Foreword

Catherine Powell

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## International Law and the Constitution: Terms of Engagement, Foreword

### Cover Page Footnote

Associate Professor of Law, Fordham University School of Law; Founding Director, International Law and the Constitution Initiative, Leitner Center for International Law and Justice. I am grateful for the support and guidance of my colleagues, Professor Martin Flaherty, who cohosted the International Law and the Constitution: Terms of Engagement Symposium, and Tracey Higgins. Professors Flaherty and Higgins cofounded Fordham Law School's Leitner Center for International Law and Justice in the fall of 2007 as well as its earlier incarnation, the Crowley Human Rights Program, established ten years earlier. I am also thankful for the support of the Proteus Fund and especially Tanya Coke and Dorothy Thomas, whose support and encouragement for the Symposium were invaluable, as well as the Fordham Law Review, for its publication of the scholarship generated as a result of the Symposium. Finally, I would like to thank Carmela Huang and Alexandra Scuro for their superb research assistance.

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## CONTENTS

### SYMPOSIUM INTERNATIONAL LAW AND THE CONSTITUTION: TERMS OF ENGAGEMENT

FOREWORD..... *Catherine Powell* 399

#### PANEL I: THE CONTEMPORARY RELEVANCE OF INTERNATIONAL HUMAN RIGHTS FOR CONSTITUTIONAL LAW AND SOCIAL JUSTICE: CASE STUDIES AND LIMITATIONS

UPSTAIRS, DOWNSTAIRS: SUBNATIONAL  
INCORPORATION OF INTERNATIONAL HUMAN  
RIGHTS LAW AT THE END OF AN ERA ..... *Martha F. Davis* 411

AMERICAN IDEALS & HUMAN RIGHTS:  
FINDINGS FROM NEW PUBLIC OPINION  
RESEARCH BY THE OPPORTUNITY AGENDA ..... *Alan Jenkins* 439  
*& Kevin Shawn Hsu*

BRINGING THEORIES OF HUMAN RIGHTS  
CHANGE HOME ..... *Cynthia Soohoo* 459  
*& Suzanne Stolz*

#### PANEL II: THE ROLE OF INTERNATIONAL BODIES IN INFLUENCING U.S. POLICY

“FEDERALIZING” IMMIGRATION LAW:  
INTERNATIONAL LAW AS A LIMITATION  
ON CONGRESS’S POWER TO LEGISLATE  
IN THE FIELD OF IMMIGRATION ..... *Shayana Kadidal* 501

THE ROLE OF INTERNATIONAL BODIES  
IN INFLUENCING U.S. POLICY TO END  
VIOLENCE AGAINST WOMEN..... *Lenora M. Lapidus* 529

#### PANEL III: THE APPLICATION OF INTERNATIONAL LAW TO THE TREATMENT OF DETAINEES IN THE PRESIDENT’S “WAR ON TERROR”

THE FOUR FREEDOMS: GOOD NEIGHBORS  
MAKE GOOD LAW AND GOOD POLICY  
IN A TIME OF INSECURITY..... *Mark R. Shulman* 555

**PANEL IV: KEYNOTE ADDRESS**

A COMMUNITY OF REASON AND RIGHTS .. *Harold Hongju Koh* 583

**PANEL V: THE LEGITIMACY OF DELEGATING LAWMAKING TO INTERNATIONAL INSTITUTIONS: THE INTERNATIONAL COURT OF JUSTICE AND FOREIGN NATIONALS ON DEATH ROW IN THE U.S.**

MEDELLÍN'S CLEAR STATEMENT RULE: A SOLUTION FOR INTERNATIONAL DELEGATIONS..... *Julian G. Ku* 609

DOES MEDELLÍN MATTER? ..... *Janet Koven Levit* 617

GETTING BEYOND THE CROSSFIRE PHENOMENON: A MILITANT MODERATE'S TAKE ON THE ROLE OF FOREIGN AUTHORITY IN CONSTITUTIONAL INTERPRETATION .....

*Melissa A. Waters* 635

**PANEL VI: INTERNATIONAL AND FOREIGN LAW SOURCES IN INTERPRETING THE CONSTITUTION**

LOWER COURTS AND CONSTITUTIONAL COMPARATIVISM ..... *Roger P. Alford* 647

HUMANITY LAW: A NEW INTERPRETIVE LENS ON THE INTERNATIONAL SPHERE ..... *Ruti Teitel* 667

**ARTICLES**

THE CORPORATE GOVERNANCE AND PUBLIC POLICY IMPLICATIONS OF ACTIVIST DISTRESSED DEBT INVESTING ..... *Michelle M. Harner* 703

MISINTERPRETING "SOUNDS OF SILENCE": WHY COURTS SHOULD NOT "IMPLY" CONGRESSIONAL PRECLUSION OF § 1983 CONSTITUTIONAL CLAIMS.....*Rosalie Berger Levinson* 775

**NOTES**

GIVINGS AND THE NEXT COPYRIGHT DEFERMENT.....*Lindsay Warren Bowen, Jr.* 809

THE NEW ANTIFRAUD RULE: IS SEC ENFORCEMENT THE MOST EFFECTIVE WAY TO PROTECT INVESTORS FROM HEDGE FUND FRAUD? ..... *Kathleen E. Lange* 851

ASSESSING FOURTH AMENDMENT CHALLENGES TO DNA EXTRACTION STATUTES AFTER SAMSON V. CALIFORNIA..... *Charles J. Nerko* 917

## SYMPOSIUM

# INTERNATIONAL LAW AND THE CONSTITUTION: TERMS OF ENGAGEMENT

## FOREWORD

*Catherine Powell\**

As one of its launch events, Fordham Law School's Leitner Center for International Law and Justice hosted the *International Law and the Constitution: Terms of Engagement* Symposium on October 4–5, 2007.<sup>1</sup> The Symposium was the first of four symposia on human rights in the United States. The subsequent three symposia were hosted by Georgetown University Law Center, Howard University School of Law, and New York University School of Law. In kicking off the symposia series, the Fordham conference grappled with key debates concerning the relationship between the international law of human rights and the domestic law of constitutional rights.

As an indication of the significance of these sweeping concerns, the lead Symposium attracted a number of cosponsors, which, along with Fordham's Leitner Center for International Law and Justice, included the American Civil Liberties Union, the American Constitution Society for Law and Policy, the American Society for International Law, the Association of the

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\* Associate Professor of Law, Fordham University School of Law; Founding Director, International Law and the Constitution Initiative, Leitner Center for International Law and Justice. I am grateful for the support and guidance of my colleagues, Professor Martin Flaherty, who cohosted the *International Law and the Constitution: Terms of Engagement* Symposium, and Tracy Higgins. Professors Flaherty and Higgins cofounded Fordham Law School's Leitner Center for International Law and Justice in the fall of 2007 as well as its earlier incarnation, the Crowley Human Rights Program, established ten years earlier. I am also thankful for the support of the Proteus Fund and especially Tanya Coke and Dorothy Thomas, whose support and encouragement for the Symposium were invaluable, as well as the *Fordham Law Review*, for its publication of the scholarship generated as a result of the Symposium. Finally, I would like to thank Carmela Huang and Alexandra Scuro for their superb research assistance.

1. The Leitner Center for International Law and Justice was officially launched in September 2007, shortly before this two-day Symposium was held. The International Law and the Constitution Initiative, which spearheaded the Symposium, was founded as part of the Leitner Center's launch. Through public events, applied research, and policy work, the Initiative provides a way for scholars, students, policy makers, and policy advocates to explore the tensions inherent in the dynamic relationship between international law and the U.S. Constitution. Fall 2007 also marked the ten-year anniversary of Fordham Law School's Crowley Human Rights Program, which now falls under the Leitner Center umbrella.

Bar of the City of New York, the Center for American Progress, and the *Fordham Law Review*. Speakers included leading scholars and practitioners offering a range of diverse perspectives and ideologies. The subsequent symposia, which also attracted widespread interest, focused on more specific concerns, including the rights of immigrants post-9/11 (at Georgetown), civil rights (at Howard), and economic rights (at NYU).<sup>2</sup>

Domestic incorporation of international law goes back to the founding of the nation. Before the contemporary advent of the international law of human rights, many important figures in American history—such as Thomas Paine, Frederick Douglass, Franklin D. and Eleanor Roosevelt, and Martin Luther King—framed social justice issues in human rights terms.<sup>3</sup> In fact, a strong bipartisan commitment to promoting human rights developed over the last several decades, because human rights reflect Americans' deeply held values as well as United States national interests.<sup>4</sup> Indeed, the United States was founded on the human rights idea—that is, the idea that, as the U.S. Declaration of Independence states, we all have certain basic, unalienable rights simply by virtue of our humanity.<sup>5</sup> In the aftermath of the Holocaust and World War II, the United States again played a leadership role in promoting human rights. This proud tradition

2. These symposia were organized by leading scholars in their respective fields: David Cole (Georgetown University Law Center), Lisa Crooms (Howard University School of Law), and Philip Alston (New York University School of Law).

3. See, e.g., FREDERICK DOUGLASS, *MY BONDAGE AND MY FREEDOM* 263–64 (Miller, Orton & Co. 1857) (1855) (contemplating the relationship between slavery and the rights of man, and noting that “[y]ou may hurl a man so low, beneath the level of his kind, that he loses all just ideas of his natural position; but elevate him a little, and the clear conception of rights rises to life and power, and leads him onward”); MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001) (describing Eleanor Roosevelt’s role as chair of the drafting commission for the Universal Declaration of Human Rights); THOMAS PAINE, *THE RIGHTS OF MAN* 27 (Watts & Co. 1906) (1791) (reflecting an early American understanding that rights are inherent in humanity, and noting that “[n]atural rights are those which appertain to man in right of his existence. . . . [while] civil rights are those which appertain to man in right of his being a member of society”); President of the U.S., Franklin D. Roosevelt, Annual Message to Congress (Jan. 6, 1941), in 9 *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT* 663 (Samuel I. Rosenman ed., 1950) (famously embracing the “four freedoms” that paved the way for critical concepts in the Universal Declaration of Human Rights); Frederick Douglass, *What the Black Man Wants*, Speech at the Annual Meeting of the Massachusetts Anti-Slavery Society (Apr. 1865) (“No class of men can, without insulting their own nature, be content with any deprivation of their rights.”); Martin Luther King, Jr., *I’ve Been to the Mountaintop* (Apr. 3, 1968), in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.* (James M. Washington ed., 1991) (“Something is happening in our world. The masses of people are rising up. And wherever they are assembled today, whether they are in Johannesburg, South Africa; Nairobi, Kenya; Accra, Ghana; New York City; Atlanta, Georgia; Jackson, Mississippi; or Memphis, Tennessee—the cry is always the same: ‘We want to be free.’ . . . In the human rights revolution, if something isn’t done, and done in a hurry, to bring the colored peoples of the world out of their long years of poverty, their long years of hurt and neglect, the whole world is doomed.”).

4. See, e.g., HUMAN RIGHTS FIRST, IN THE NATIONAL INTEREST: HUMAN RIGHTS POLICIES FOR THE BUSH ADMINISTRATION (2001).

5. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

includes serving as the primary moving force behind the development of the United Nations and a range of other international institutions and regimes,<sup>6</sup> including the Universal Declaration of Human Rights sixty years ago, inspired in part by Franklin D. Roosevelt's "Four Freedoms" speech and drafted in part by Eleanor Roosevelt.<sup>7</sup> Just as the New Deal redefined domestic economic security for Americans, these post-war international regimes redefined the notion of "security" internationally to include human security.<sup>8</sup> For Americans, a recognition that gross human rights violations were intertwined with the Nazi threat to international peace and security underscored the marriage between American values and interests.

At the same time, Americans have been engaged in several fundamental debates concerning the relationship between international law and the U.S. Constitution and the implications of this relationship for human rights. For example, in one arena—namely the courts—scholars, litigators, and judges have sparred over the constitutional legitimacy of domestic courts resorting to international and comparative foreign legal sources in the context of interpreting U.S. law, especially the Constitution.<sup>9</sup> In another arena—the executive branch—participants and observers have argued over whether or not international law constrains President George W. Bush in waging his "War on Terror."<sup>10</sup> These debates invite us to consider the multiple ports of entry through which international human rights law is incorporated into

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6. Catherine Powell, *Tinkering with Torture in the Aftermath of Hamdan: Testing the Relationship Between Internationalism and Constitutionalism*, 40 N.Y.U. J. INT'L L. & POL. 723, 734 n.28 (2008).

7. See generally GLENDON, *supra* note 3; Roosevelt, Annual Message to Congress, *supra* note 3.

8. ELIZABETH BORGWARDT, *A NEW DEAL FOR THE WORLD: AMERICA'S VISION FOR HUMAN RIGHTS* 8 (2005).

9. Compare Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 102 (2006) (arguing in favor of legitimacy), with John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175, 1177 (2007) (arguing against legitimacy).

10. For a helpful collection of essays representing different perspectives on presidential power and President George W. Bush's "War on Terror," see Symposium, *War, Terrorism and Torture: Limits on Presidential Power in the 21st Century*, 81 IND. L.J. 1139 (2006). Compare Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2048–56 (2005) (contending that Congress's September 18, 2001, Authorization of Military Force sufficiently authorized the Bush administration's "War on Terror" and generally supersedes possible conflicts with international laws of war), with Ryan Goodman & Derek Jinks, *International Law, U.S. War Powers, and the Global War on Terrorism*, 118 HARV. L. REV. 2653, 2654 (2005) (arguing that Bradley and Goldsmith's article overemphasizes the ambiguity of the laws of armed conflict and misidentifies the scope of the conditions of the power to detain and prosecute); compare Martin S. Flaherty, *More Real than Apparent: Separation of Powers, the Rule of Law, and Comparative Executive "Creativity" in Hamdan v. Rumsfeld*, 2006 CATO SUP. CT. REV. 51, 51–52 (agreeing with the *Hamdan* Court's embrace of separation of powers limits on the President), with John Yoo, *An Imperial Judiciary at War: Hamdan v. Rumsfeld*, 2006 CATO SUP. CT. REV. 83, 83 (asserting that "the *Hamdan* decision ignores the basic workings of the American separation of powers and will hamper the ability of future presidents to respond to emergencies and war with the forcefulness and vision of a Lincoln or an FDR").

domestic law, whether through courts, executive orders, or legislatures at the federal, state, or local level.<sup>11</sup>

The first debate has centered on questions concerning the enforceability, weight, and value of resort to international and foreign legal sources by domestic courts in the context of civil rights, civil liberties, and social and economic justice issues that have long predated the attacks of September 11, 2001. These questions have taken on new significance as they have reached the U.S. Supreme Court in recent cases in which the Court has prominently resorted to international and foreign law in opinions concerning the death penalty,<sup>12</sup> affirmative action,<sup>13</sup> the rights of gays and lesbians,<sup>14</sup> and school desegregation.<sup>15</sup> The second debate—concerning the President’s “War on Terror”—turns on the extent to which the September 11 attacks should fundamentally alter the way we make decisions about enforcement of international law, the location for making these decisions, and the extent to which international law binds the President.

In a sense, these two debates—which the Symposium used as a springboard—are interrelated.<sup>16</sup> For example, the American military’s budgeted defense spending has soared with the President’s “War on Terror,” and in this sense we live in an era of big government and government interference with the rights of individuals.<sup>17</sup> At the same time, federal funding supporting a range of domestic programs has withered and the federal government’s response to Hurricane Katrina signals a more impoverished role for government in ensuring rights in these other areas.<sup>18</sup> Moreover, even as U.S. government officials have said they are pursuing a policy of spreading democracy, freedom, and human rights through the administration’s “War on Terror,” these very same values are not adequately protected at home.<sup>19</sup> Another connection is the fact that forms of discrimination that have been used to target historically disfavored

11. See generally Judith Resnik, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 YALE L.J. 1564 (2006) (analyzing the multiple ports of entry through which international human rights law is incorporated into domestic law).

12. *Medellin v. Texas*, 128 S. Ct. 1346 (2008); *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002).

13. *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

14. *Lawrence v. Texas*, 539 U.S. 558 (2003); *Bowers v. Hardwick*, 478 U.S. 186 (1986).

15. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 127 S. Ct. 2738 (2007).

16. For a more detailed discussion of the relationship between these debates, see Powell, *supra* note 6, at 724–32, 754–91.

17. Thom Shanker, *Proposed Military Spending Is Highest Since WWII*, N.Y. TIMES, Feb. 4, 2008, at A10.

18. David E. Sanger, *The President’s Budget: The Overview; Bush Budget Plan for \$2.77 Trillion Stresses Security*, N.Y. TIMES, Feb. 7, 2006, at A1 (indicating “substantial cuts in domestic programs as disparate as education, farm subsidies, and the national parks”).

19. See, e.g., Catherine Powell, *Lifting Our Veil of Ignorance: Culture, Constitutionalism, and Women’s Human Rights in Post-September 11 America*, 57 HASTINGS L.J. 331, 335–37 (2005) (asserting that, while the U.S. invasion of Afghanistan was in part justified to “liberate” Muslim women, the United States has yet to ratify the Convention on the Elimination of All Forms of Discrimination Against Women or adequately protect women’s rights more generally, for example, in the area of equal pay).

groups in the United States, such as the racial profiling of African American men, have, since the September 11 attacks, been used to target men who appear to be of Middle Eastern, South Asian, or Arab decent.<sup>20</sup>

This Symposium issue includes thirteen articles written by Symposium speakers who address various applications of these concerns. It is a sequel of sorts to a symposium issue published by the *Fordham Law Review* ten years ago concerning human rights at the dawn of the twenty-first century.<sup>21</sup> That oft-cited issue was published at a moment of rapid expansion of the international machinery for the protection of human rights.<sup>22</sup> That earlier symposium issue set the stage for significant debates concerning, for example, the status of customary international law as U.S. law.<sup>23</sup> This current Symposium issue questions whether the events of September 11, 2001, and other developments over the last ten years should fundamentally alter the obligation and will of the United States to comply with human rights laws. The Symposium itself explored different dimensions of this question through seven panels and two keynote lectures (one of which is published in this volume).

The first panel, *The Contemporary Relevance of International Human Rights for Constitutional Law and Social Justice: Case Studies and Limitations*, was set against the backdrop of retrenchment of constitutional

20. See generally Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002).

21. See Symposium, *Human Rights on the Eve of the Next Century*, 66 FORDHAM L. REV. 249 (1997).

22. With the fall of the Berlin Wall paving the way for greater international cooperation within the U.N. Security Council, the 1990s witnessed the establishment of the International Criminal Tribunals for the Former Yugoslavia and Rwanda; the adoption of the treaty to ban landmines; negotiations concerning the creation of the International Criminal Court; the arrest of Augusto Pinochet in London and greater acceptance of the principle of universal jurisdiction for international crimes; and the dynamism of Mary Robinson, the former president of Ireland, as U.N. High Commissioner for Human Rights. With enthusiasm for human rights near its apex, the 1990s also provided fertile ground for the United States to finally embrace a number of foundational human rights treaties, including the International Covenant on Civil and Political Rights (in 1992); the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (in 1994); and the International Convention on the Elimination of All Forms of Racial Discrimination (in 1994). These developments are discussed in more detail in Sarah Cleveland & Catherine Powell, *Foreword*, 40 COLUM. HUM. RTS. L. REV. (forthcoming Fall 2008) (symposium volume commemorating the ten-year anniversary of Columbia Law School's Human Rights Institute).

23. Compare Curtis A. Bradley & Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319 (1997) (disputing the status of customary international law as federal U.S. law), with Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463 (1997) (arguing in favor of the status of customary international law as federal U.S. law), Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997) (same), and Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393 (1997) (same).

rights protection in a variety of areas.<sup>24</sup> This panel explored the extent to which international human rights can provide a new paradigm for legal reform efforts by social justice advocates, and the limitations of this paradigm. In this session, a variety of human rights practitioners offered snapshots of their experience in using international human rights to support constitutional litigation and related social justice advocacy. Through presenting case studies, panelists addressed how using the human rights framework assists their work substantively as well as methodologically, especially as this framework envisions combining traditional legal strategies with other forms of advocacy and involves collaboration across sectors, disciplines, and borders.

In *Bringing Theories of Human Rights Change Home*, Cynthia Soohoo and Suzanne Stolz discuss the recent, renewed interest by domestic activists in “bringing home” international human rights law.<sup>25</sup> Focusing on sex equality in the United States, Soohoo and Stolz also look at how international relations, international law, and constitutional law theories of political change apply to domestic debates about reproductive rights. From these insights, the authors draw lessons for strategies concerning sex equality and domestic social justice advocacy more broadly.

In a shift from theory to empiricism, Alan Jenkins and Kevin Shawn Hsu share insights drawn from a 2007 public opinion study commissioned by their organization, The Opportunity Agenda, which investigated Americans’ views on human rights.<sup>26</sup> With an eye toward helping domestic human rights advocates develop more effective communications strategies, Jenkins and Hsu examine empirical data obtained through consultations with leaders in the domestic human rights movement; focus groups in Atlanta, Chicago, Minneapolis-St. Paul, and New York City; and a nationwide, random telephone survey. They reflect on the study’s conclusions regarding the American public’s general view of the relevance of human rights in framing social justice issues and the role of the government in upholding human rights. Their study is particularly valuable

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24. Even while the 1990s was a period of expansion and optimism for international human rights law, see *supra* note 22, it was a period of retrenchment in U.S. constitutional rights protection. For a discussion of the retrenchment of rights in a variety of areas of constitutional law, see 1 BRINGING HUMAN RIGHTS HOME: A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES, at x (Cynthia Soohoo, Catherine Albisa & Martha F. Davis eds., 2008); and Denise C. Morgan, Rachel D. Godsil & Joy Moses, *Introduction to AWAKENING FROM THE DREAM: CIVIL RIGHTS UNDER SIEGE AND THE NEW STRUGGLE FOR EQUAL JUSTICE*, at xv, xviii (Denise C. Morgan, Rachel D. Godsil & Joy Moses eds., 2008). For a more specific discussion of retrenchment in the area of civil rights specifically, see Lee Cokorinos & Alfred F. Ross, *Lessons from the Right: Fighting the Civil Rights Rollback*, in AWAKENING FROM THE DREAM, *supra*, at 267, 271–72; and Wade Henderson & Janell Byrd-Chichester, *The National Campaign to Restore Civil Rights Conference Introduction: Reversing the Retreat on Civil Rights*, in AWAKENING FROM THE DREAM, *supra*, at 25, 30–33.

25. Cynthia Soohoo & Suzanne Stolz, *Bringing Theories of Human Rights Change Home*, 77 FORDHAM L. REV. 459 (2008).

26. Alan Jenkins & Kevin Shawn Hsu, *American Ideals & Human Rights: Findings from New Public Opinion Research by The Opportunity Agenda*, 77 FORDHAM L. REV. 439 (2008).

because it provides a resource for scholars and practitioners alike who are interested in uncovering the challenges involved in communicating to the general public about the status and applicability of international human rights treaties.

In *Upstairs, Downstairs: Subnational Incorporation of International Human Rights Law at the End of an Era*, Martha F. Davis discusses the evolving hierarchy of federal and subnational entities involved in the implementation of international human rights norms.<sup>27</sup> As the involvement of subnational entities in implementing human rights becomes more visible, she argues that they should not be prevented from promoting these norms—absent legislation, executive action, or judicial decision to the contrary.

The next two panels explored the United States' relationship with international institutions. *Ensuring U.S. Compliance with Human Rights Through the U.N. Treaty Body System*, which is not published in this issue, focused in particular on the role that U.N. treaty bodies play in overseeing human rights compliance in the United States, as well as the role of activists, lawyers, and scholars in that process. The session was timely, since the United States had recently submitted compliance reports to the U.N. Human Rights Committee,<sup>28</sup> the U.N. Committee against Torture,<sup>29</sup> and the U.N. Committee on the Elimination of Racial Discrimination.<sup>30</sup> Panelists reflected on lessons learned from U.S. compliance hearings before these bodies.

*The Role of International Bodies in Influencing U.S. Policy* panel examined the increasingly active role played by other international and regional bodies and tribunals in criticizing human rights violations in the United States. Even where the views of these bodies and the U.N.'s network of special rapporteurs are less enforceable, they have helped to mobilize shame. For example, we have seen how the U.N. High Commissioner for Human Rights and various U.N. special rapporteurs were early critics of U.S. detention policies at Guantánamo and helped lead the international call for the detention camp to be shut down.<sup>31</sup>

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27. Martha F. Davis, *Upstairs, Downstairs: Subnational Incorporation of International Human Rights Law at the End of an Era*, 77 *FORDHAM L. REV.* 411 (2008).

28. U.S. DEP'T OF STATE, SECOND AND THIRD PERIODIC REPORT OF THE UNITED STATES TO THE U.N. COMMITTEE ON HUMAN RIGHTS CONCERNING THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (2005), available at <http://www.state.gov/g/drl/rls/55504.htm>.

29. U.N. Comm. Against Torture, *Second Periodic Reports of States Parties Due in 1999*, U.N. Doc. CAT/C/48/Add.3 (June 29, 2005), available at <http://www.state.gov/documents/organization/62175.pdf> (due in 1999 and submitted six years late).

30. PERIODIC REPORT OF THE UNITED STATES TO THE U.N. COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION CONCERNING THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (2007), available at <http://www.state.gov/documents/organization/83517.pdf>.

31. Press Release, United Nations Office at Geneva, U.N. Rights Experts Ask International Community to Aid with Expedient Closure of Guantanamo Detention Centre

Moreover, as Lenora M. Lapidus notes in her piece, *The Role of International Bodies in Influencing U.S. Policy to End Violence Against Women*, the United States has argued vigorously before the Inter-American Human Rights Commission to defend its domestic violence practices, even while contesting the Commission's jurisdiction and authority.<sup>32</sup> Lapidus reflects on the case of one of her clients, Jessica Gonzales, whose quest for justice led her to international and regional human rights mechanisms after the Supreme Court ruled against her. In a landmark ruling,<sup>33</sup> the Supreme Court held that the failure of the Colorado police to enforce Gonzales's domestic violence order of protection—which resulted in the murder of her three, young daughters—did not violate her constitutional due process rights.<sup>34</sup>

In his essay, "*Federalizing*" *Immigration Law: International Law as a Limitation on Congress's Power to Legislate in the Field of Immigration*, Shayana Kadidal examines how international law and institutions may place important limitations on the ability of the federal government to enforce oppressive immigration legislation against aliens.<sup>35</sup> In particular, he argues how the right to family integrity may help to prevent states from separating families through the operation of immigration laws.

The following panel, *The Application of International Law to the Treatment of Detainees in the President's "War on Terror,"* examined to what extent international law can or should constrain United States action in the President's "War on Terror." In particular, this session considered human rights and humanitarian law restrictions on presidential power. Invoking his Article II power to wage war as Commander-in-Chief, President Bush has claimed broad authority in the designation of detainees as enemy combatants, in using "enhanced" interrogation techniques, in limiting lawyers' access to clients detained at Guantánamo, in developing procedures for detainees to be tried, and in holding detainees indefinitely. While one senior Bush administration official has called aspects of the Geneva Conventions "quaint" and "obsolete" for this new kind of war,<sup>36</sup>

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(July 6, 2006), available at [http://www.unog.ch/80256EDD006B9C2E/\(httpNewsByYear\\_en\)/4BB88D24B7A045FEC12571A30056E42A?OpenDocument](http://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/4BB88D24B7A045FEC12571A30056E42A?OpenDocument).

32. Lenora M. Lapidus, *The Role of International Bodies in Influencing U.S. Policy to End Violence Against Women*, 77 FORDHAM L. REV. 529 (2008).

33. *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005).

34. *Id.* at 768.

35. Shayana Kadidal, "*Federalizing*" *Immigration Law: International Law as a Limitation on Congress's Power to Legislate in the Field of Immigration*, 77 FORDHAM L. REV. 501 (2008).

36. Memorandum from Alberto R. Gonzales to President George W. Bush, on Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban (Jan. 25, 2002), in MARK DANNER, TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR 83, 84 (2004) ("In my judgment, this new paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions requiring that captured enemy be afforded such things as commissary privileges, scrip (i.e., advances of monthly pay), athletic uniforms, and scientific instruments.").

many supporters of the Conventions have defended the existing framework lock-stock-and-barrel.<sup>37</sup>

In his essay, *The Four Freedoms: Good Neighbors Make Good Law and Good Policy in a Time of Insecurity*, Mark R. Shulman draws inspiration from Roosevelt's "Four Freedoms" State of the Union Address in 1941, arguing that, as FDR intended, the Four Freedoms present an effective paradigm for securing peace and a compelling alternative to "President Bush's 'War on Terror.'"<sup>38</sup>

The subsequent panel, *What Does International Rule of Law Mean for the United States?: Competing Perspectives*, explored competing conceptions of what is meant by an international rule of law. The speakers engaged competing perspectives on the meaning, feasibility, legitimacy, desirability, and status of international law, as well as evaluated compliance with international law in light of its unique character. Here, panelists explored the status of international law as law. On the one hand, Louis Henkin famously proclaimed that nations obey international law "almost all of the time."<sup>39</sup> However, in their book, *The Limits of International Law*, Jack Goldsmith and Eric Posner dispute the force or weight of international law as a real constraint on state power.<sup>40</sup> This session explored such questions as: What exactly does rule by international law mean? Is such a regime really possible or even truly desirable? Who is to make the rules? Does the international lawmaking process assure that international law is good? Democratic? Enforceable? How should we measure compliance with international law?

In *Humanity Law: A New Interpretive Lens on the International Sphere*, Ruti Teitel points to the "growing density and extended reach of international law" as well as the overlap and interconnectedness of various regimes within the international legal order as touchstones for her essay.<sup>41</sup> She notes that the "emerging legal order addresses not merely states and state interests," but rather "[p]ersons and peoples are now at the core."<sup>42</sup> Thus, Teitel intuits an alternative normativity—"a non-sovereignty-based normativity[,] . . . which has an uneasy and uncertain relationship to the inherited discourse of sovereign equality."<sup>43</sup> She characterizes this new normativity as "humanity law," which "might be viewed as the dynamic 'unwritten constitution' of today's international legal order—the lens

37. See, e.g., Harold Hongju Koh, *Restoring America's Human Rights Reputation*, 40 CORNELL INT'L L.J. 635, 655 (2007) (arguing that the United States should "renounce the practices of torture and extraordinary renditions and, in the process, reaffirm our national commitment to adhere to the Geneva Conventions").

38. Mark R. Shulman, *The Four Freedoms: Good Neighbors Make Good Law and Good Policy in a Time of Insecurity*, 77 FORDHAM L. REV. 555 (2008)

39. LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 47 (2d ed. 1979).

40. See generally JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005).

41. Ruti Teitel, *Humanity Law: A New Interpretive Lens on the International Sphere*, 77 FORDHAM L. REV. 667, 667 (2008).

42. *Id.*

43. *Id.* at 667–68.

through which many of the key controversies in contemporary law and politics come into focus.”<sup>44</sup>

The next panel was structured as a debate on *The Legitimacy of Delegating Lawmaking to International Institutions—The International Court of Justice and Foreign Nationals on Death Row in the U.S.* Even though the United States frequently cooperates with international and regional bodies, U.S. reluctance to acknowledge the authority of international and regional bodies has manifested itself in a range of other contexts. Confrontations between the United States and the U.N. Human Rights Committee have set off a fracas concerning the authority of international bodies to interpret the international obligations of the United States. With regard to lawmaking by international bodies, critics have objected to the constitutional legitimacy of delegating lawmaking authority to international tribunals. Moreover, the United States has been at loggerheads with the International Court of Justice (ICJ) over the enforceability of ICJ opinions concerning what rights are due to foreign nationals on death row under the Vienna Convention on Consular Relations (VCCR). The panel focused in particular on this debate as a window into the broader controversy over enforceability of international tribunal decisions. In particular, the panelists focused on *Medellín v. Texas*,<sup>45</sup> in which the Supreme Court ultimately rejected the direct enforceability of an ICJ opinion that found the VCCR rights of fifty-one Mexican foreign nationals on death row to be violated.<sup>46</sup> The Supreme Court further held that a memorandum issued by President Bush directing states to comply with the ICJ decision was also not directly enforceable.<sup>47</sup>

In her essay, *Does Medellín Matter?*, Janet Koven Levit uses a “bottom-up” analysis to argue that the effect of *Medellín* is actually quite limited—despite the general consternation of legal scholars in the wake of the Supreme Court’s decision.<sup>48</sup> On the one hand, Levit points out that a top-down approach to the *Medellín* decision foregrounds “state elites who enact and interpret rules through formal legal mechanisms” and suggests that the Vienna Convention’s consular notification provisions no longer have effect in the United States.<sup>49</sup> On the other hand, Levit’s study of state, local, and private nonjudicial actors in Tulsa County, Oklahoma, demonstrates that, because of the educational effect of the litigation surrounding the case, processes institutionalizing consular notification procedures have “effectively cured Vienna Convention transgressions.”<sup>50</sup>

In his piece, *Medellín’s Clear Statement Rule: A Solution for International Delegations*, Julian G. Ku defends *Medellín*’s “clear

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44. *Id.* at 668.

45. 128 S. Ct. 1346, 1352 (2008). While the opinion was handed down after the Symposium, the publication deadline for this Symposium issue followed the ruling.

46. *Id.*

47. *Id.* at 1367, 1372.

48. Janet Koven Levit, *Does Medellín Matter?*, 77 FORDHAM L. REV. 617 (2008).

49. *Id.* at 618–19.

50. *Id.* at 631.

statement” rule.<sup>51</sup> Alluding to the larger debate over international delegation, Ku argues that the *Medellín* Court’s application of the non-self-execution doctrine provides a principled approach to limiting and controlling the transfer of U.S. sovereign power to international institutions or organizations.<sup>52</sup>

The final session was *International and Foreign Law Sources in Interpreting the Constitution*. Since the founding, the Supreme Court has resorted to international and comparative foreign law in interpreting provisions of the Constitution. This use of foreign and international law in domestic constitutional interpretation raises important questions. When and how are foreign and international law valid sources of constitutional interpretation? When is resort to these sources consistent with originalism? What are the various possible uses of these sources? To what extent is the practice of “importing” foreign law democratically legitimate?

In his keynote address, *A Community of Reason and Rights*, Harold Koh weighs in on the debate regarding these questions.<sup>53</sup> Koh exposes the flaws in prevailing “nationalist” arguments against the use of international and foreign law in U.S. constitutional interpretation and proposes a “transnationalist” counterargument. Koh’s proposal—which he describes as a modern *jus gentium*—calls on judges faced with questions of interpretation to look to a “global community of reason and rights.”<sup>54</sup> He notes that an analysis of international principles and empirical data can be helpful in particular instances, for example, in interpreting constitutional clauses that require comparison by their very nature. Thus, he encourages the American judiciary to look to international law for “respected and significant confirmation for our own conclusions,”<sup>55</sup> yet notes that doing so should never mean ignoring U.S. constitutional bounds or constitutional standards.

By contrast, in his essay, *Lower Courts and Constitutional Comparativism*, Roger P. Alford examines what he refers to as the Supreme Court’s “quixotic and haphazard approach” to comparativism in *Roper v. Simmons* and *Lawrence v. Texas*, and the unwillingness of lower courts to adopt its methodology.<sup>56</sup> After contemplating reasons why lower courts have not followed the lead of the Supreme Court, he concludes that lower courts—whether consciously or unconsciously—have rightly decided that

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51. Julian G. Ku, *Medellín’s Clear Statement Rule: A Solution for International Delegations*, 77 *FORDHAM L. REV.* 609 (2008).

52. *Id.* at 614–15.

53. Harold Hongju Koh, Dean, Yale Law Sch., *A Community of Reason and Rights*, Keynote Address at the Fordham University School of Law Symposium: International Law and the Constitution: Terms of Engagement (Oct. 4, 2007), in 77 *FORDHAM L. REV.* 583 (2008).

54. *Id.* at 586.

55. *Id.* at 594 (citing *Roper v. Simmons*, 543 U.S. 551, 578 (2005)).

56. Roger P. Alford, *Lower Courts and Constitutional Comparativism*, 77 *FORDHAM L. REV.* 647 (2008); see *Lawrence v. Texas*, 539 U.S. 558 (2003); *Roper v. Simmons*, 543 U.S. 551 (2005).

“comparativism works best when undertaken by legislative or executive branch officials.”<sup>57</sup>

In *Getting Beyond the Crossfire Phenomenon: A Militant Moderate's Take on the Role of Foreign Authority in Constitutional Interpretation*, Melissa A. Waters sketches the position of “militant moderates”—scholars sitting in the middle of the current legal debate on the role of foreign authority in constitutional interpretation.<sup>58</sup> Waters describes limitations in the positions of both the “nationalists,” who fear that foreign authority may erode the foundations of American democracy, as well as the “internationalists,” who embrace the recognition of foreign authority. She then describes a moderate third path that focuses on methodology as the measure for determining the legitimacy of “transnational judicial dialogue” in U.S. constitutional interpretation.<sup>59</sup>

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In reviewing the essays in this issue, consider the fact that the United States must exercise its military, economic, and political power within a global normative framework, despite its current status as the world hegemon. “Even while the United States helps to construct and reinforce this framework, it is constrained by it.”<sup>60</sup> After all, if the United States chooses not to play by the rules of the game, other states will flout the rules as well. Thus, the United States should continue its bipartisan commitment to the rule of law (including international law), international institutions, and human rights. This is the principled course of action. It is also a path that is in the nation’s self-interest.

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57. Alford, *supra* note 56, at 665.

58. Melissa A. Waters, *Getting Beyond the Crossfire Phenomenon: A Militant Moderate's Take on the Role of Foreign Authority in Constitutional Interpretation*, 77 FORDHAM L. REV. 635 (2008).

59. *Id.* at 637–39.

60. See Catherine Powell, *A Tale of Two Traditions: International Cooperation and American Exceptionalism in U.S. Human Rights Policy*, in THE FUTURE OF HUMAN RIGHTS: U.S. POLICY FOR A NEW ERA 119 (William F. Schulz ed., 2008).