

BOOK ANNOTATIONS

BLUSTEIN, PAUL, MISADVENTURES OF THE MOST FAVORED NATIONS: CLASHING EGOS, INFLATED AMBITIONS, AND THE GREAT SHAMBLES OF THE WORLD TRADE SYSTEM (New York, New York: PublicAffairs, 2009).

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Misadventures of the Most Favored Nations: Clashing Egos, Inflated Ambitions, and the Great Shambles of the World Trade System. By Paul Blustein. New York, New York: PublicAffairs, 2009. Pp. vii, 344. \$27.95 (hardcover).

REVIEWED BY AARON SAUNDERS

International trade is a subject that typically elicits deeply rooted and sharply polarized ideological arguments. The World Trade Organization (WTO), as the institution responsible for the promotion of international trade, is thus reviled by some and lauded by others. The controversy surrounding the WTO and its mission was displayed most prominently at the infamous ministerial meeting in Seattle in 1999, when masses of students, environmentalists, labor unions, anarchists, human rights activists, and myriad other groups demonstrated their discontent on an unprecedented scale with tactics ranging from peaceful protest to vandalism and violence.

But while many hold strong opinions about the WTO, few can claim the level of familiarity with its inner workings that Paul Blustein conveys in his latest work, *Misadventures of the Most Favored Nations*. Blustein provides the reader with an intricately detailed behind the scenes account of all the fevered interactions, humorous anecdotes, and political brinkmanship that takes place in the meeting rooms of the WTO. The most commendable aspect of Blustein's work is its high degree of readability, as he manages to chronicle the recent history of the WTO in a manner that is both engaging and informative. The book is thus more of a journalistic account than a scholarly argument, and the fine line that Blustein attempts to walk between the two leads to a somewhat unsatisfying conclusion.

The book's central message is a wake up call that the world trade system is stuck in a rut, and that failure to overcome the current impasse will lead to worldwide economic disaster. While Blustein ostensibly gives equal recognition to the

WTO's critics and its supporters, it is clear early on where the author himself stands. His argument is based on the axioms that liberalization of trade has been an overall force for good in modern history, reversion to a more protectionist world economy would be disastrous, and a multilateral system of governance is the best way to ensure the continued openness of trade. Although there are those who might question the accuracy of these axioms, including but not limited to the aforementioned protesters in Seattle, most modern economists would presumably agree with them. From there, however, Blustein jumps to the somewhat more controversial assertion that the WTO is a "crucial linchpin of stability in the world economy." That assertion is made in Chapter One, and is followed by thirteen chapters that recount the WTO's descent into futility and ineffectiveness, characterized by the inability to make progress in the current Doha trade negotiation round.

There is more than one way of reacting to that descent. As Blustein points out early on, relatively substantial international trade liberalization has already been achieved, and the WTO's current mire may be overly accentuated due to the fact that the "low hanging fruit" has already been grabbed. If that is the case, however, then perhaps the current lack of progress is not worthy of too much concern; perhaps liberalization of trade is right where it needs to be. Blustein acknowledges this position but argues that reviving the WTO is still imperative—not necessarily for continuing the process of opening markets, but for assuring that multilateral mechanisms are in place to prevent any relapse into protectionism. The continued failure to conclude the Doha round may erode confidence in the WTO to the point where member countries may flout its authority and reinstall the trade barriers of old.

Blustein's argument seems tantamount to proclaiming that the seemingly futile pursuit of admittedly minimal gains is a worthwhile endeavor solely for the purpose of maintaining the appearance of legitimacy. However, it is not at all clear that a failed Doha round would lead to a reversion of the kind of which he warns. It may be that the continued vitality of the world trade system would be better served by admitting that the WTO's traditional paradigm of liberalization through extensive trade rounds is antiquated, and letting Doha die. Crises precipitate change; maybe the WTO in its current form

ought not to be saved, so as to make way for a WTO with a different *modus operandi*.

Another point worth questioning is whether the type of “stability” that the WTO promotes is necessarily worth preserving. Many of the WTO’s most vehement critics believe that it proliferates inequality between the world’s richest countries and its poorest, in part by creating the false impression that the WTO allows such countries to stand shoulder to shoulder and make their voices heard. Blustein does mention these types of arguments in passing but makes clear his belief that the collapse of the WTO would harm the poorest countries most of all by depriving them of such a voice. At one climactic moment in the book’s storyline, former U.S. Trade Representative Bob Zoellick, a central figure in the book, is confronted by a group of developing nations calling itself the G20, which banded together in an effort to stand up to the WTO’s dominant members. After listening to the G20’s demands, Zoellick coolly blows them off by pointing out that they had not offered anything in return, an attitude that Blustein describes as “Zoellick at his most supremely confident—or arrogant, depending on one’s point of view.” Those who would criticize the “stability” proliferated by the WTO by claiming that its less developed member countries do not truly have a voice might point to this anecdote in support of their argument.

While Blustein believes that the least developed countries benefit the most from the WTO’s existence, he does acknowledge that there is no definitive answer as to the extent to which those countries will benefit from increased liberalization of trade, which is the WTO’s primary mission. Economic studies have produced widely disparate predictions as to the amount of benefit that would flow to less developed countries from a complete elimination of trade barriers. Furthermore, certain potential breakthroughs in WTO negotiations that could produce enormous long term benefits for some less developed countries could also produce massive devastation for others. One of the most contentious issues in WTO negotiations is the movement towards lowering or eliminating farm subsidies in the world’s economic powerhouses, namely the United States and the European Union. Those subsidies artificially lower the price of agricultural production to the point where vast surpluses are produced, lowering global prices and diminishing the income of farmers from poor countries who

export their goods. Yet there is another side to that coin: in many poor countries whose terrain is not fit for agriculture, the scarcity of food has led to a dependence on that surplus of cheap food coming from subsidized farmers. Thus, if WTO negotiations were to succeed in eliminating farm subsidies, the gain in exports realized in some poor countries might be overshadowed by famine in others. Along these lines, recent food crises around the world have led many economists to suggest that the WTO should focus less on eliminating the subsidies that cause overproduction and more on eliminating the export tariffs that make food more expensive in developing countries. This complex economic push and pull is a problem not easily solved, but Blustein's analysis of the issue leaves the reader somewhat skeptical regarding his conclusion that a free market for food is really best for the world's poor.

One of the central tenets of the WTO is the necessity of consensus by all members before any plans are adopted. On the one hand, this lends a high degree of legitimacy to its actions, as WTO advocates point out that the consensus requirement makes it impossible for powerful countries to impose their will upon the others. Some critics question whether the participation of less influential countries in WTO decision making is as consensual as it is purported to be. Others criticize the consensus requirement itself for another reason: it is arguably the primary reason why WTO trade talks are such a torturous and belabored process, since any one member country has the power to hold up the entire show.

Blustein does not favor any outright elimination of the consensus requirement, since he sensibly concludes that doing so would lead to a high likelihood of disobedience by individual countries of WTO agreements to which they had not consented. He does, however, endorse a similar strategy by which "coalitions of the willing" would agree to accept obligations with respect to a particular issue, and the unwillingness of other member countries to accept those obligations would not prevent the agreement from being made. As long as the "major players" concerning each issue can reach agreement, it is unimportant that the other countries decline to join in. This "plurilateralism" strikes a balance between the proliferation of bilateral trade accords, which Blustein asserts are damaging to the world trade system as a whole, and the extreme difficulty of achieving full multilateral accords.

That solution to the WTO's impasse, while elegant in its simplicity, may be overly optimistic. It assumes not only that the ease of reaching agreements would be significantly greater if consensus was required only among the "major players," but that those players would be willing to extend the benefits of those agreements to other countries that do not take on the burdens, as would be required by the Most Favored Nation principle. Such assumptions may not be warranted, given the history of the WTO to date.

As a journalistic investigation, *Misadventures of the Most Favored Nations* excels. The extensive interviews that Blustein conducted, as well as his access to personal notes from WTO meetings, lead to a scintillating inside view of the WTO's happenings that is both entertaining and valuable for the average reader. As a call to arms, however, the book is not entirely convincing. While many of his arguments are sound, his solutions do not appear much different than others that have been tried unsuccessfully, and the question remains of whether realigning the WTO down its traditional path is the correct way to avert an impending crisis, assuming such a crisis is impending at all.

International Financial Institutions and International Law. Edited by Daniel D. Bradlow and David B. Hunter. Frederick, Maryland: Kwuler Law International, 2010. Pp. vi, 404. \$155.00 (hardcover).

REVIEWED BY BEN SAPER

To whom are the World Bank and the International Monetary Fund (IMF) accountable? These global organizations, as well as regional development banks, play enormous roles in the international monetary and development finance systems. Their activities have significant impacts on local, national, and international economic development, as well as on the welfare of communities and the environment in host/recipient countries. Due to these organizations' ability to provide long and short-term loans to the governments of developing countries and to finance large-scale development projects, normally with conditions attached to the loans, they wield a great amount of power and influence, often more than their client states. With such power, it is important that the World Bank, the IMF, and

regional development banks—collectively referred to as International Finance Institutions (IFIs)—are held accountable for their actions. But beyond the obvious principle of holding those with power accountable, the questions of to whom IFIs are accountable and by what mechanisms, remain unclear.

Editors David Bradlow and David Hunter seek to answer these questions through a diverse collection of eleven essays in *International Financial Institutions and International Law*. The editors break the book into general and specific discussions of the legal issues of IFIs. The first five essays search for principles of international law that are applicable to the IFIs and suggest ways of developing a better defined legal regime to govern the activities of IFIs. The six essays that follow focus in on specific aspects of IFI operations, such as their relationships and impacts on indigenous peoples, human rights law, environmental law, and workers. The structure of the book, while not arbitrary, makes it difficult for the reader to keep track of the big picture. A more natural organization would have begun with the chapters illustrating the failures of the current legal regime surrounding IFIs, and concluding with the materials on accountability mechanisms and immunity of IFIs as potential answers to the normative question raised in the earlier chapters.

The introduction and Chapter One by Bradlow present necessary baseline information for understanding the issues that follow. Although it gives scarce attention to the details of international financial organizations besides the IMF and the public sector-lending division of the World Bank Group, this introduction provides enough information for a lay person to understand the complicated issues discussed in subsequent chapters. Like other international organizations, such as the United Nations, IFIs are inter-governmental organizations created by treaties and are subjects of international law. As subjects of international law, their constitutive treaties, other treaties the organization has signed, and any customary principles of international law or general principles of law determine their rights and obligations. Customary principles of international law, such as respecting state sovereignty, as well as general principles of law, such as good faith and non-discrimination, can be said to apply to IFIs. But, as Bradlow explains, going further than vague norms to identify specific legal obli-

gations and enforcement mechanisms that apply to IFIs brings a great deal of uncertainty.

IFIs are clearly legally bound by the terms of their foundational treaties, despite the often-vague language of those documents. IFIs are accountable to and controlled by their member states, which have voting power based on calculations of the economic and political importance of the state. In Chapter Two, B.S. Chimini demonstrates that this arrangement has led to an imbalance of power. The states with the most decision-making power in IFIs are advanced capitalist states, led by the United States. The member states with the smallest shares of voting power are those countries that are most directly affected by IFI action—such as decisions to finance projects in these countries or to get involved in financial emergencies. Chimini's chapter identifies an important criticism that has been made of the IMF and the World Bank for decades, but which may be less of a concern as the BRIC countries increase their share of power within IFIs in proportion to their growing economic importance. Also, even the smallest member states have at least some power to affect IFI actions through voting.

The most important subject of the book is the accountability gap of IFIs to non-state parties who lack a contractual relationship with the IFI but are affected by IFI activity. Bradlow explains in Chapter One that international law does not provide a clear answer regarding the relationships between IFIs and non-state actors who are directly affected by them and are often the intended beneficiaries. While all the authors in the book discuss this issue, Chapter Nine by Fergus MacKay specifically highlights the accountability gap by looking at the particular non-state category of affected indigenous peoples. He explains that, although a consensus on the rights of indigenous people has emerged from UN and International Labor Organization declarations and conventions, indigenous people still struggle to assert those rights against IFIs. Although MacKay's essay is illuminating, his conclusion that IFIs should respect indigenous rights does not, on its own, shed much light on promising ways to ensure that outcome.

Several of the chapters do take on this normative question by pointing to the relatively new Independent Accountability Mechanisms that have sprung up at IFIs. These mechanisms, such as the Inspection Panel at the World Bank, are intended to resolve conflicts between project affected people and IFIs or

their clients, as well as to monitor IFI compliance with internal social and environmental policies. In Chapter Three, Eisuke Suzuki identifies independent accountability mechanisms as the most promising way to ensure accountability. The problem is that these mechanisms, as they have been set up, have no power to issue binding decisions finding fault with the IFI or their clients and award compensation to adversely affected parties. Suzuki suggests adding to the accountability mechanisms by expanding administrative tribunals, which currently issue binding rulings on employment issues at IFIs, to allow them to rule on social and environmental issues. While it is true that accountability mechanisms need some power to hold IFIs responsible, Suzuki avoids the complexities of his proposal of essentially creating an appeals court system internal to each IFI. Issues such as maintaining the independence of review mechanisms that ultimately fall under the management of the IFI and the difficulties of balancing problem solving functions with fault-finding functions are not thoroughly addressed. In reality, independent accountability mechanisms have most promise as problem solving tools, which can facilitate dialogue, participation, and mediation between affected people, the IFI, and IFI clients. Because these mechanisms are internal to IFIs, they should not be the sole option for holding IFIs accountable.

The best chapter in the book suggests a solution to the accountability problem that turns out to be relatively simple. In Chapter Five, Steven Herz looks critically at the organizational immunity of IFIs. IFIs are creatures of their member states and have been granted organizational immunity from suit in national courts. While immunity is, in theory, limited to actions that are functionally necessary for IFIs to meet their delegated responsibilities and achieve objectives of the member states, it has come to be honored as absolute immunity by national courts. Because of this immunity, people adversely affected by an IFI's actions cannot simply sue the IFI in their local court. As non-state entities, IFIs are also not subject to suit in any international tribunal.

Rather than deal with the slow process of developing an international legal regime to hold IFIs accountable (or until such a process takes place), Herz urges domestic courts to limit the immunity given to IFIs to situations where it is necessary to allow IFIs to carry out their mandates of stabilization

and development. Courts should take into account equity considerations like the fact that non-state parties affected by IFIs generally have no other available forum for resolving their complaints. Herz's suggestion is based on the intuition that it does not make sense for someone adversely affected by a large-scale development project to have a remedy in local courts if the project is privately funded but not have a remedy if the project is funded by an IFI. While Herz fails to dive into the practical political issues of convincing national courts to waive IFI immunity, his chapter does the best job of focusing the reader on the primary issue of immunity.

In the end, the best way for IFIs to avoid the problem of disregarding non-state parties affected by their actions is through a combination of independent accountability mechanisms which increase transparency and solve basic disputes and national courts being less reluctant to grant IFIs immunity in cases where the complainants have no other option for accountability. Bradlow and Hunter fail to highlight this, or any other single best path forward for increasing the accountability of IFIs. Instead, they are satisfied to lay out the many legal issues raised by IFIs and to suggest a variety of different proposals. The book ends up raising more questions than definitive answers, but nevertheless does an excellent job of providing a detailed and critical overview of IFIs in the international legal system. The book is sure to stimulate thought, debate, and further research on the topic, but it would have been a more powerful work if it had connected the dots and identified waiving immunity as the best path forward.

Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World. Edited by Varun Gauri & Daniel M. Brinks. New York: Cambridge University Press, 2008. Pp. xix, 363. \$95.00 (hardcover).

REVIEWED BY PAUL D. MIGNANO

"Human rights are meaningless if they cannot be claimed," wrote former U.N. High Commissioner for Human Rights, Louise Arbour. How does one enforce a right to health care? With the emergence of positive rights, particularly in the area of social and economic rights, many states are now obligated to take positive steps to provide affordable ac-

cess to health care and education to their citizens. These rights have become enshrined in constitutions throughout the developing world, but when the state fails to provide these rights, how can a private citizen compel the state to comply with its constitutional obligations? Varun Gauri and Daniel M. Brinks seek to answer these questions in *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*.

Contributors from around the world have provided a very ambitious, and largely successful, five-country survey of the approaches different developing countries have taken towards enforcing their constitutionally-mandated obligations to provide access to health care and education.

Gauri and Brinks eschew the traditional definition of legalization that focuses on policymaking and discussion, in favor of an open-ended, non-zero-sum approach to respect of human rights. Courts are one actor in this legalization paradigm, but their decisions incorporate a wider set of concerns and strategies than the traditional policy discussions assume. Gauri and Brinks incorporate a *triangular* relationship in the production and distribution of social goods and services: the state, providers and clients (or citizens or recipients). The justiciability of relationships between these three actors is key to the multi-national survey of human rights litigation examined in the bulk of the book.

Perhaps the most impressive of these country surveys is in Jonathan Berger's chapter on litigating health and education rights in South Africa. Berger examined dozens of cases dealing with respecting rights of access to health and education, as well as housing, courts, and social assistance. Through this examination, Berger identifies a number of trends: one such trend is that litigation only occurs when rights are *threatened*, not *unrealized*. Another is that the cases, no matter the legal scope and content of the rights being litigated, have ultimately been decided on the basis of their own facts. When the post-apartheid constitution was submitted to the South African Constitutional Court for certification, the Court stated that social and economic ("SE") rights would be justiciable under the Constitution. This simple declaration has provided a recognition and guarantee to South Africans who struggle to achieve fulfilment of their SE rights. This "mainstreaming" of SE

rights blurs the line with more traditional civil and political rights, generally known as negative rights.

Florian F. Hoffmann and Fernando R.N.M. Bentes examine the origins and impact of litigation for health and education rights in Brazil. While litigation has had an impact on the realization of these rights, several trends have emerged with respect to the limits on this impact. Most health care cases have been litigated by individuals, while education cases tend to be collective actions. The courts have been more open to individual claims than to collective ones, with the result that the exponential growth in SE rights litigation in Brazil has dealt disproportionately with the right to access to healthcare rather than the right to education. This stems from the preference of courts to grant claims that look more like the forms of action traditional to the North American and European legal traditions, of which the Brazilian justice system is a hybrid. Additionally, health policy is administered by a complex network spanning all levels of government, whereas education policy is comparatively simpler. Access to providers such as attorneys or other public interests groups is also a problem; public interest litigation groups are relatively underdeveloped, and tend to be located in the main cities, such as Rio de Janeiro.

The Supreme Court of India is often considered the most powerful in the world, and the public interest litigation (PIL) system provides liberal access to the courts to enforce SE rights. Contrary to popular belief, the courts of India are not activist in enforcing the social and economic rights contained in the Indian Constitution, argue Shylshri Shankar and Pratap Bhanu Mehta in their survey of the role of courts and the extent of legalization of health and education rights in India. However, the cases they discuss may suggest the contrary: more than eighty percent of cases dealing with health and education rights were decided in favor of the citizen, and many of those greatly expanded constitutional mandates. Although, in deciding cases on health rights, the courts have avoided core issues of poor public health management by the government and their decisions have unquestioningly led to a substantial expansion of social goods to beneficiaries who would not have otherwise received them. In deciding cases on rights to education, the courts have focused on institutions of secondary education rather than access to primary schools for children. However, resulting decisions have provided some tem-

porary solutions to complex social and economic problems, especially in less developed areas of the country. This would seem to demonstrate the tendency of the court towards respecting SE rights rather than the hesitant approach taken by the last two countries to be surveyed.

The surveys of judicial enforcement of SE rights in Nigeria and Indonesia are relatively disappointing due to the lack of progress made in those two countries rather than because of fault of the authors. In his survey of SE litigation in Nigeria, Chidi Anselm Odinkalu shows that a population that is largely poor and undereducated has led to a lack of enforcement of SE rights in Nigerian courts. Failures on three levels have contributed to this lack of enforcement: deficiencies in credibility, a function of the government's legitimacy; accountability, which allows the people to participate in their government; and capacity, both institutionally and financially, to enforce the rights enshrined in the constitution. In Nigeria, the rights to education and health care are derived from the African Charter on Human and Peoples' Rights, which has been adopted as domestic law subject only to the requirements of the Constitution. However, rights litigation often falls into contests over jurisdiction and standing that can last for many years before a verdict is reached; it is not unusual for the judicial process to take five to ten years before the preliminary issue of jurisdiction is resolved, let alone the question of rights. Even if there is a final judgment, there is no guarantee of enforcement, because court orders against the assets of the government can only be enforced with the consent of the Attorney General, and this consent is routinely withheld.

Bivitri Susanti's survey on implementation of educational and health care rights in Indonesia stresses the lack of trust of the citizenry in the country's judiciary. This lack of trust has led to an utter inability of citizens to enforce their SE rights in the national courts. A 2001 survey by the Asia Foundation showed that 62 percent of Indonesians would avoid going to the courts at all costs. It is not surprising that as a result, between 1995 and 2005, only seven cases on the right to health care, and five cases on the right to education, were decided and reported by Indonesian courts. Similar to Nigeria, an intriguing alternative to judicial enforcement of SE rights may lie in the Indonesian Human Rights Commission, an agency with members appointed by the president. Their primary

roles are to educate the government and public on human rights, to establish a network of human rights defenders and to receive complaints concerning human rights violations. While their successes to date have been very limited, a stronger Commissioner may be able to channel the Commission into a powerful mechanism for the enforcement of SE rights. In recent years, the Jakarta Legal Aid Bureau has also provided invaluable support for SE rights litigation, primarily by using a citizen lawsuit in tandem with a public campaign to put pressure on the government to enforce SE rights.

Following this remarkable multi-country survey of SE rights litigation, Helen Hershkoff analyzes these results in the context of legal theory. Hershkoff finds that the positive rights contained within the countries' constitutions are expressed through a horizontal application (that is, between citizens, rather than between citizens and government) of constitutional rights, reordering legal relationships between private actors. This fascinating analysis challenges some basic assumptions of the preceding surveys regarding the binding legal status of the norms codified in national constitutions. Hershkoff identifies cases in which each of four models of rights applications are to be found. It may be characterized as a shift from rights and duties owed to private citizens by the state to power and liability shared amidst legal relationships in all three branches of the triangular relationship stated by Brinks and Gauri. In realigning constitutional responsibilities of private actors with public goals, courts have opened an intriguing set of possibilities for the future enforcement of SE rights, in public and private law. Hershkoff's chapter allows the reader to place the individual country surveys in a broader context, allowing better understanding of how developments in one state may affect the international legal landscape.

Brinks and Gauri conclude the book by looking at the emerging policy landscape. They note the variation between and within nations. In several of the countries examined, SE rights litigants tend to be middle class urban residents. Differing patterns and per capita measures of SE rights litigation also emerge. Brinks and Gauri focus on three sets of duties: provision, the imposition of a duty on the state; regulation, imposing state-enforced duties on providers of rights; and obligation, imposing a duty on the provider for the recipient himself to enforce. Various matters of supply and demand may

hold the answer to the questions of the origins of these differences. The impact of SE rights litigation, upon both direct and indirect beneficiaries, is also measured within and between the countries involved in the study. Finally, normative considerations of justiciability are examined, particularly the differences and similarities between the justiciability of “first generation” civil and political rights and the justiciability of SE rights.

Brinks and Gauri’s book is ambitious and successful in its cross-regional examination of the enforcement of SE rights in several developing countries. While a more thorough examination of alternative dispute resolution mechanisms for the provision of SE rights was outside the precise scope of the book, it seems that in some instances, they may be the best (or only) means of achieving fulfilment of SE rights. Whether the authors’ prediction that SE rights adjudication will ultimately more closely resemble than differ from judicial review of civil and political rights is a question that can only be answered in the cases yet to be decided by courts around the world.

The Fog of Law: Pragmatism, Security, and International Law. By Michael J. Glennon. Washington, D.C.: Woodrow Wilson Center Press, 2010. Pp. xiii, 253. \$40.00 (hardcover).

REVIEWED BY VICTORIA HA

The Fog of Law is a pragmatist’s attempt to overthrow the naturalist and positivist views that have traditionally dominated international law. Instead of taking a prescriptive approach to crafting international law, Michael J. Glennon advocates a purely descriptive method, rooted in an understanding of law as it is and not as it should be.

According to Glennon, international law is the creation of the states. The international legal system is voluntarist in that its rules are only binding upon a state if it consents to be bound. Because the obligation to comply with a rule comes from the states themselves, the entire international legal system is premised upon the self-restraint of states. Unlike the domestic legal system, there is no overarching institutional authority that can force states to consent. In deciding whether to consent to a rule, Glennon argues that states rarely, if ever, act for a single, simple reason; rather, state conduct “flows from a

tangled web of multiple motives.” At the heart of *The Fog of Law* is a detailed exploration of these motives in the context of contemporary security issues to better understand why some international legal rules are binding while others are not.

So, why are international legal rules binding? In exploring this question, Glennon argues that the naturalist and positivist responses are ultimately unsatisfying. The naturalist argues that states are morally obliged to observe their treaties, and that it is therefore from external “neutral principles” that the law derives its binding force. This, Glennon argues, is unpersuasive because international law, as a voluntarist system, does not contain neutral principles unless they are adopted by consent, and neutral principles themselves are merely social constructs and not something external to be discovered. As social constructs, neutral principles cannot provide the *a priori* moral obligation relied upon by naturalists. In contrast, the positivist argues that, because they are state creations, international rules are only binding if states consent to them, and that among these rules is the one that requires state compliance with their consented-to obligations. But ultimately, Glennon points out, the positivist rationale reduces to a naturalist one, as it presupposes an *a priori* obligation to consent to the rule requiring compliance! Additionally, if the system is truly consent-based, states should be able to withdraw their consent from rules whenever they like, and thus rules would only be temporarily binding. Like the naturalist, the positivist cannot explain why international rules are binding.

Despite the failure of naturalism and positivism to adequately explain the binding nature of international law, Glennon asserts that a “practical sense” of obligation still exists. This obligation, however, is contingent. Simply put, we are sometimes obliged to do one thing because we have chosen to do another. For example, if I choose to drive from New York to California, I am obliged to stop and buy gasoline at some point during my trip. Although the trip is voluntary, purchasing gasoline is nevertheless obligatory. On a domestic level, people assume obligations contingent upon living in society, such as the obligation not to murder. Similarly, state compliance with at least some international legal rules is obligatory, given international ties and trade between states. International law, then, consists of rules that states are legally obliged to obey. This obligation is what makes the rule law. While this

definition works conceptually, its practical use is unclear. How do we determine which rules are law, given that states do not consent to all of the same rules? Glennon skirts the issue of what threshold applies.

Perhaps Glennon's most powerful and convincing argument is the one for multi-causality of state conduct. International law scholars often hold one of two views: that an applicable international legal rule is determinative of state conduct or that no international legal rule has any bearing upon state conduct because pure self-interest is the real cause. Neither criticism, however, acknowledges the reality of multi-causality: that multiple factors almost always affect state conduct. States comply with rules—even those with which they do not want to comply—for a number of reasons, including the need for money and aid, technical assistance, and even the desire to participate in the international community. In crafting international legal rules, pragmatism calls upon lawmakers to turn to social science research and the expertise of “policymakers and diplomats who know the difference between wishful thinking and real-world possibility.” In so doing, international lawmakers can better understand the multi-causality of state conduct and therefore better craft international legal rules.

When states have violated a rule of international law many times over an extended period, the rule ceases to be binding and thus ceases to be law. According to Glennon, the rule has fallen into desuetude. In a case study of this phenomenon, Glennon analyzes the United Nations and its use of force rules. Article 2(4) of the UN Charter provides that all members shall refrain from the use of force against other member states, and Article 51 of the UN Charter stipulates that use of force is justified as self-defense against an armed attack. Yet, many member states, including the United States, frequently consider preemptive measures in blatant disregard of these rules.

Why is this so? The inherent failure of these rules to consider common sense behavior is their fatal flaw; few states would simply sit back and wait to be attacked before launching defensive measures. Accordingly, because few states follow these rules, the rules have fallen into desuetude and are no longer part of international law. Pragmatically, international rules about security issues must focus on what “experience tells us will work, not on what morality tells us must work.” There-

fore, international lawmakers must consider, from the perspective of the state, the costs and benefits of compliance and non-compliance with an international legal rule.

While eloquent and cogent, Glennon's argument for pragmatism is incomplete. Noticeably missing is a concrete example of what a rule based on empiricism would look like or, more generally, what the international legal order would look like. For example, how would a pragmatist have drafted the UN's use of force rules? Is it possible that because of divergent state interests, there are some international issues, such as use of force, that cannot be distilled into legal rules? While Glennon calls for pragmatism to guide international lawmaking, he does not provide a practical sense of how this will work beyond the inclusion of social science research and an attitude adjustment toward real-world problem solving.

Furthermore, pragmatism seems to imply that international law will primarily be in the position of responding to state conduct rather than influencing it. Assuming that the costs and benefits of non-compliance versus compliance are in perpetual flux, international legal rules themselves will also be in flux, as they must respond accordingly to changes in state decision-making within different geopolitical contexts. If this is the case, international law will always lag one step behind the international legal community. This picture of international law does not inspire confidence. While Glennon responds to conceptual criticisms of pragmatism in *The Fog of Law*, he fails to consider any practical problems of pragmatism in depth. Doing so would have made his argument for pragmatism stronger and more concrete.

In conclusion, while incomplete in its analysis, *The Fog of Law* is a compelling read and an eloquent wake-up call to the international lawmaking community. By exploring contemporary security issues, such as the UN's use of force rules, nuclear proliferation, and the ICC-proposed crime of aggression, Glennon demonstrates the extent to which international law is dangerously out of touch with how states actually operate. Similar to Oliver Wendell Holmes' "bad man" theory, Glennon insists that we must approach international law from the perspective of a "bad state" by comparing the costs of non-compliance with the benefits of compliance. As it stands now, international law's mismatch with reality creates instability and uncertainty in international legal agreements and, as the state

party to the most treaties, the United States has a particular interest in protecting the stability of these agreements in the wider context of international relations.

Beyond Constitutionalism: The Pluralist Structure of Postnational Law. By Nico Krisch. Oxford: Oxford University Press, 2010. Pp. xxiv, 384. \$100.00 (hardcover).

REVIEWED BY INGO VENZKE

Nation states were once understood as rather exclusive sites of governance where a collectivity could mount a categorical claim to self-government, dealing with its affairs in matters only of its concern. International law was then concerned only with the relations between states. Such an understanding has always been rather shaky and at present it seems that its predominance is already waning. The notion of the postnational constellation refers precisely to the decoupling of political processes from the nation state, and it draws attention to the intricate dissonance between those having a meaningful say in decision-making and those affected.¹ It places emphasis on the fact that more elements of our life are shaped by political processes that transcend national boundaries while, at the same time, decisions taken at the domestic level alone increasingly affect others on the outside. Unsurprisingly, actual transformations in the structure of governance have come with crucial challenges for political theory and for accounts on how to frame political processes. When political processes transcend national borders and move away from individual states towards international institutions, how should law and legal scholarship respond?

This is a patently foundational question that dives deep into political and legal theory, troubling many minds and producing a wealth of literature in all disciplines. Nico Krisch has written one of the most lucid and circumspect contributions, which is likely to show significant repercussions in the field. This is a book that stands out. In *Beyond Constitutionalism: The*

1. JÜRGEN HABERMAS, *THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS* (2001); Stephan Leibfried & Michael Zürn, *Reconfiguring the National Constellation, in TRANSFORMATIONS OF THE STATE? 1* (Stephan Leibfried & Michael Zürn eds., 2005).

Pluralist Structure of Postnational Law, Krisch argues that we should not look for a new overall legal framework for political processes across levels of governance which all too easily runs the risk of stifling valuable and legitimate competition between actors on different levels of governance. Instead, we should develop a better understanding of such competition in a pluralist structure in which legal orders stand in a heterarchical, not hierarchical, relationship and where their interaction is not legally constituted but political. More precisely, actors on different levels of governance do not share a common, overarching point of reference.

Krisch tries his argument in three case studies, each showing how legal orders and levels of governance are entangled and engaged with one other. The European Court of Human Rights (ECtHR) interacts with the highest courts on the domestic level; the United Nations Security Council, as well, runs against resistance and meets resilience by domestic courts with regard to the implementation of its sanctions against terror suspects; and, finally, risk regulation at the World Trade Organization (WTO) competes with the forum of the Biosafety Convention and struggles for domestic enforcement. Against this background of concrete legal practice, Krisch concludes that, contrary to prevailing conviction, appreciating the pluralist structure of law in the postnational constellation will provide better mechanisms for accommodating and stabilizing competing claims than any overarching blueprint.

Krisch suggests in Part I that there are three broad responses to the challenge that new forms of governance pose for law and legal scholarship. First, there is *containment* (Chapter One). In view of disorder and diffusion of power, a return to what has been lost might come as a straightforward answer. The role of states could be reinforced, political processes could be directed back towards states' inner boundaries and their place in international decision-making could be strengthened. Such an answer might not be without good reasons because, after all, the quality of domestic democratic processes remains unmatched beyond the state. But ultimately, such an approach would be out of sync with actual developments, placing doubt on what it can achieve normatively. Still more fundamentally, it belittles the democratic deficit that arises from the effect that decisions taken within one state have on outsiders. It also neglects that sometimes strong international ac-

tion, not always immediately responsive to the input of any single state, may be needed to effectively achieve global goals. At this point it already becomes clear that Krisch embraces a nuanced understanding of democracy that is emphatic, in the sense that it relates to all those affected, and that balances the quality of democratic processes with the effectiveness of decision-making processes.

Containment is not a convincing response to the postnational constellation. The remainder of the book then plays off *transfer* and *constitutionalism* against *break* and *pluralism*. As the title already indicates, the latter will emerge victorious. The second response to the mounting authority of international institutions, *transfer*, looks to the domestic context and finds traditions of constitutionalisms as exercises that seek to frame and tame political processes. Chapter Two thus asks about the promise and perils of postnational constitutionalism. Of course there are different constitutionalisms at the European level and distinct nuances at the global level. The real task would be to find a conception of constitutionalism that is thin enough to be adapted to the conditions of the postnational constellation and still thick enough to be in some way meaningful. While Krisch readily sees that the term is polymorphic and has different conceptions, he contends, rightly so, that the dominant heritage and tradition is one of *foundational* constitutionalism—a constitutionalism that not only checks power and structures processes, but one that also constitutes legitimate authority. Recognizing that there are other conceptions, he continues to employ such a dominant understanding of constitutionalism.

Convincingly warding off a number of attacks on the principal impossibility of such constitutionalism beyond the state, Krisch maintains that, at the very least, constitutionalism would have to achieve a definite relationship between levels of governance. According to the author, constitutionalism ultimately does not achieve this aim. At this juncture, Krisch's focus on the relationship between legal orders directs him away from considering other approaches in legal scholarship that respond to the authority of international institutions—ap-

proaches that pursue similar aims but are not constitutionalist as he uses the term.²

The reasons for constitutionalism's ultimate failure beyond the state are set out in the case for pluralism, the third response to the postnational constellation that *breaks* with past traditions (Chapter Three). Krisch's case is convincing, no doubt. But the definition of constitutionalism and its minimal task may be the least compelling part of his argument. It is not necessary to tie constitutionalism to its strong foundational tradition at the domestic level and, as the author is well aware, more recent contributions under this heading have in fact come very close to what he unfolds as pluralism. Such constitutionalisms have also broken with past traditions and some are very explicit about the absence of hierarchy. The only charge might really be that they have chosen the wrong label for their enterprise. That only holds for some, however, and indeed most constitutionalisms beyond the state are marked by vices that pluralism turns into virtues.

Among other things, Krisch points out how constitutionalism may have the symbolic effect of bestowing an air of legitimacy while pluralism contributes to the possibilities for critique and contestation. Constitutionalism might prematurely and authoritatively settle issues that are still contentious while pluralism leaves them open. Constitutionalism is prone to entrench present power relations while pluralism may help to work against them. Overall, constitutionalism suggests that the highest, international level of governance and law has the ultimate say, subordinating all other levels and actors within its hierarchy, while pluralism leaves this relationship undetermined, recognizing that different actors in different legal orders may sensibly compete with claims to ultimate authority.

Would not chaos and instability be the result of a pluralist structure, only privileging the powerful? Part II of *Beyond Constitutionalism* approaches these questions by way of three case studies (Chapters Four to Six). There is little to critique or add with regard to any of the individual studies other than that they do indeed give persuasive evidence for the suggestion

2. See, e.g., THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS: ADVANCING INTERNATIONAL INSTITUTIONAL LAW (Armin von Bogdandy et al. eds., 2010); Jan Klabbers, *Constitutionalism Lite*, 1 INT'L ORG. L. REV. 31 (2004).

that pluralism has a strong claim as a best fit with practice. While these chapters do at times plunge into a number of protracted debates—the reception of the ECtHR’s *Görgülü* judgment (Chapter Four), the treatment of the ECJ’s *Kadi* decision (Chapter Five), the saga of adjudication on hormone-treated beef in the WTO (Chapter Six)—they still offer fresh, well-articulated and balanced views under the prism of pluralism. Alone, the treatment of horizontal regulatory competition between the WTO Agreement on Sanitary and Phytosanitary Measures and the Biosafety Protocol sits slightly oddly in the middle of other instances of vertical pluralism. It might be questioned whether it fits with the proposition that pluralism is characterized by the fact that actors and legal orders compete without a common point of reference. The Vienna Convention on the Law of Treaties, with deficiencies and well-known problems, might after all perform such a function.

The three case studies then serve as a background against which Part III is dedicated to the discussion of pluralism’s normative appeal. Pluralism’s relationship with power and its impact on possibilities of cooperation are first on the author’s agenda (Chapter Seven). Pluralism scores well in both respects. Krisch picks up the argument that where constitutionalism would tend to cement questionable power relationships, pluralism can and does provide disenfranchised actors with opportunities for contestation. He does not see the multiplication of sites of governance as a critical problem but as an opportunity. Furthermore, constitutionalism would tend to lead actors to make more confrontational claims while pluralism may work more smoothly, accommodating different claims to public authority where plausible. The theme of normative and societal change is pervasive here. Constitutionalism suggests a settlement that is categorical and difficult to change whereas pluralism works interstitially, more easily reacting to shifts in society and politics, the author suggests.

Democratic accountability and considerations of the rule of law are two yet more fundamental points of discussion that bear on pluralism’s normative appeal (Chapter Eight). Briefly and with great force, Krisch justifies principles of democracy as normative yardsticks in the postnational constellation. But democratic accountability seems to remain slightly too unspecified to be useful in the competition between constitutionalism and pluralism. The parameters that should speak on the issue

suggest a thicker understanding of democratic legitimation that is not entirely explicit. More generally, even if the author is duly aware of the limitations of his empirical basis and careful in his judgement, the use of the case studies is sometimes rather anecdotal. Some normative conclusions are rather shaky and call for more analysis. The example of risk regulation seems to offer only weak evidence for the assertion that dynamism and a multiplicity of sites of governance work for the better. Another point of critique is that legal formalism may be given up too quickly here as a counter-hegemonic strategy.

Krisch ends with a discussion of the construction of interface norms that smooth interaction, basically highlighting how actors increasingly 'take into account' respective others. Embedded within practice, such norms are shaped by actors involved in the contestation and accommodation of different spheres of authority. They even work to take normative considerations into account, such as respect for human rights or the democratic quality of political processes.³ Krisch reiterates that these interactions will fundamentally be political and not legal, the main reason being that actors do not share a common framework of reference. With regard to interface *norms*, even if shaped in the political interactions, one might wonder if they will not end up structuring those same interactions. Maybe there will be no shared overarching framework, but actors at the frontiers of legal orders could still contribute to a legal vocabulary that becomes thick enough to channel their practice.

Nico Krisch has found a very clear articulation of the challenge that law and legal scholarship face when responding to transformations in the structure of governance that mark the postnational constellation. The author shows how the multiplicity and *mélange* of different allegiances supports a pluralist vision for global governance in which neither the domestic

3. See Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and Beyond the State*, in *RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE* 258 (Jeffrey L. Dunff and Joel P. Trachtman eds. 2009); Robert Howse, *A New Device for Creating International Legal Normativity: The WTO Technical Barriers to Trade Agreement and 'International Standards'*, in *CONSTITUTIONALISM, MULTILEVEL TRADE GOVERNANCE AND SOCIAL REGULATION* 383 (Christian Joerges & Ernst-Ulrich Petersmann eds., 2006).

nor the international level can categorically claim superiority. It is one of the book's great advantages that it does not develop an argument for an ideal world but for the world as we have it. It remains slightly unclear, however, what exactly *postnational law* is, especially since the distinctions between legal orders are upheld and their relationship is not legally regulated. This concept does not, however, play a leading role after all. In sum, Nico Krisch has written a truly wonderful book.

Europe as the Would-be World Power: The EU at Fifty. By Giandomenico Majone. New York: Cambridge University Press, 2009. Pp. vi, 259. \$99.99 (paperback).

REVIEWED BY MARCUS ODA

The European Union traces its origins to the European Coal and Steel Community (ECSC) and the European Economic Community, two early European supranational organizations established in the 1950s. Fifty years after the formation of the ECSC and the EEC, the EU has become a twenty-seven-state economic and political union stretching from Portugal to Finland to Cyprus. A number of supranational institutions, including the European Commission, the Court of Justice of the European Union, the European Central Bank, and the European Parliament, make decisions that affect the lives of over half a billion Europeans. The EU has been lauded as an overwhelming success, thanks to the establishment of a common currency, the removal of border controls, and the development of a single European market. Has the European Union become a new economic and political superpower to rival the United States?

Giandomenico Majone, Emeritus Professor of Public Policy at the European University Institute in Florence, suggests in *Europe as the Would-be World Power: The EU at Fifty* that the European Union is actually facing a time of crisis, as the legitimacy of the EU itself is threatened, in large part due to the growing alienation of citizens from European institutions. Majone cites the rejection of the Constitutional Treaty and the Treaty of Lisbon by French, Dutch, and Irish voters in 2005 and 2008 as evidence of popular discontent with the continued integration of EU member states. The division between the European political elite, who largely support the EU and

further integration, and the general populace, which has experienced many of the negative effects of European economic and political integration, is telling of the growing disconnect between Europe's leaders and its citizens.

Majone contends that the current problems the European Union is facing stem, in large part, from the implicit operational principles that have shaped the political culture of the Union. He identifies three tenets that must be discussed in order to address the current predicament of the EU. The first dictates that integration has priority over all other competing values, including democracy. The second promotes the use of the *fait accompli* strategy, or the "accomplished fact," which effectively limits democratic participation within the Union. The last operational principle rests on the idea that ultimate ends are irrelevant. What *is* important are the movement, procedures, and the expansion of European competences. Majone argues that promoting integration over democratic representation and effective policies has eroded the legitimacy of the Union.

Recognizing the rapid enlargement of the EU, from a largely homogenous entity of member states with more or less similar interests, to the twenty-seven-state union of today, Majone contends that the traditional, unilinear approach to European integration is no longer feasible. In the final chapter of the book, Majone suggests that there is "unity in diversity" and proffers his solution to the growing resistance to further European integration. Rather than granting opt-outs to encourage treaty ratification, Majone advocates a multilinear evolution approach. "Differentiated integration" would allow variations in the application of European policies and variations in the level and intensity of participation in European policy regimes, allowing member states to implement European directives and regulations in a way that is specific to their different situations.

Majone, however, glosses over the fact that "differentiated integration" is already happening at different levels within the integration process. One obvious area where such integration is operating is in the introduction of the common currency. Countries with strong economies, such as France, Germany, and the Netherlands adopted the euro early on. The member states that joined the EU during the 2004 and 2007 enlargements are scheduled to adopt the euro when it is economically

feasible. Thus, countries like Slovakia and Slovenia have recently switched out their domestic currencies for the euro, while countries like Hungary or Bulgaria have a much later target date for joining the Eurozone. The concept of differentiated integration that Majone proposes seems like a natural and necessary part of the integration process, particularly with regard to something like Eurozone membership, which is heavily contingent on country-specific situations. At the same time, differentiated integration may prove more problematic when applied to competition law, for instance, which requires a heightened level of uniformity or harmonization in order to properly realize the goals of such legislation.

Coupled with differentiated integration, Majone also advocates for the concept of enhanced cooperation and the theory of clubs. Enhanced cooperation is explicitly provided for within the EU framework. The Amsterdam Treaty of 1997 dictates that some member states may choose to move to more advanced stages of integration by setting up closer patterns of cooperation. This provision demonstrates the recognition by EU representatives of the growing diversity and need for an alternative approach to integration. Majone, however, criticizes the provision for creating conditions too strict to make enhanced cooperation a viable alternative in practice. And rightly so, since, to date, no member states have engaged in enhanced cooperation.

The theory of clubs, a theory that Majone relies on to support his contention of unity in diversity, is closely linked to enhanced cooperation. The theory of clubs shows that the creation of voluntary associations, like the ones provided for in the Amsterdam Treaty's provision on enhanced cooperation, tend to be welfare enhancing. They facilitate the creation of rules that are tailored to the resources and preferences of club members. The theory also contends that innovation, regulatory competition, and policy learning are more likely to occur in a system that is decentralized. Majone hypothesizes that the application of the theory of clubs to the European Union will allow beneficial innovations to take place rather than compromise solutions that no one finds appealing. He posits that this would allow "pioneering states" to try out new policies, an experience from which other member states could draw upon later.

The nature of the European Union is quite particular, creating a difficult situation with regard to further integration. On the one hand, the continued enlargement of the union and growing diversity of member states has, in many ways, made it impossible for integration to continue following the traditional, unilinear model, as Majone points out. His proposal to provide enhanced cooperation and differentiated integration to allow integration to continue, while still accounting for the diversity of EU member states, is both a practical and effective solution to the current predicament of the European Union. On the other hand, it fails to take into consideration one of the European Union's most defining characteristics.

Unlike other federations, such as the United States or Brazil, for instance, the European Union is a union in law only. Unlike the United States, there is no common culture, no common history, no common language, and no truly independent federal government. What binds the member states of the European Union is the issuing of directives and the harmonization of laws that allows for an interconnected, European economy. Even Majone notes that European symbols, such as the EU flag or anthem, have had little success in uniting the diverse group of 500 million Europeans that are citizens of the EU. Due to the lack of cultural, linguistic, and political integration, any attempt at dismantling or slowing the process of legal integration of the European Union by way of enhanced cooperation or differentiated integration may have the opposite effect that Majone foresees. When all that is holding the union together is its legal framework, what will happen when member states are no longer expected to implement EU directives along with other member states, especially given the widespread popular sentiment against integration in Europe?

Majone paints an accurate picture of the current state of the European Union. His commentary is both insightful and provocative, especially given that many academics and political elite are wary of criticizing EU policies. Furthermore, his discussion of the unintended consequences of integration projects and of the alternatives to the traditional unilinear approach is significant, as the topic has been largely ignored by academics in the past. Majone's support of new approaches to European integration is well thought-out and addresses many of the European Union's current problems. Whatever your

view on European integration and the present state of the European Union, Majone's book certainly offers a thought-provoking and eye-opening critique of EU policies and the ideologies behind them.

The Law of the Olympic Games. By Alexandre Miguel Mestre. The Hague, The Netherlands: T.M.C. Asser Press, 2009. Pp. xii, 242. \$69.96 (hardcover).

REVIEWED BY JESSICA BOROWICK

In *The Law of the Olympic Games*, Alexandre Miguel Mestre explores Olympic Law, which he traces from the Olympic Games of Antiquity to the modern Olympic Movement. Mestre provides a comprehensive introduction to the sources and applications of Olympic Law and, in doing so, makes a valuable contribution to a relatively meager body of legal academia on the subject. Mestre takes significant steps towards achieving the three goals he sets for his inquiry, namely to answer the "questions of when, how and why [Olympic] law is to apply to the Games," to "clarify how the rules and institutions enmeshed in the relationship between the Law and the Games are articulated and reconciled, and to stimulate the development of legal doctrine and case law in [the area of Olympic Law]." His view is balanced and the book includes fascinating examples to illustrate his points. Mestre's legal analysis, however, is limited. He includes several observations and characterizations that some might find controversial, but makes few, if any, bold arguments outright.

The substance of the book is divided into three parts, the first of which is "Law and the Olympic Games." The chapter begins with a short discussion of the strict, legalistic character of the ancient Games, celebrated in Greece between 776 BC and 393 AD. Mestre seems to include this discussion for two reasons: first, to highlight the importance of law and legal institutions in any study of sports or the Olympics, and second, to set the stage for a later argument drawing parallels between legal problems that existed in antiquity and those that exist today. When the argument reappears, it is roughly sketched and somewhat superfluous, but the discussion of antiquity is quite interesting nonetheless.

Mestre moves on quickly from ancient Greece, skipping nearly 1500 years (during which there were no Games) to the “Modern Era,” beginning in 1896. The focus of much of “Law and the Olympic Games” is on the Olympic Charter, which is by its own description the “codification of the Fundamental Principles of Olympism, Rules and Bye-Laws adopted by the International Olympic Committee.” After carefully describing its evolution, Mestre takes pains to avoid pigeonholing the Charter, observing the ways in which it is like a constitution, a contract, and an international treaty.

The most provocative aspect of Mestre’s discussion of the Charter is his exploration of the Charter’s apparent dominance over the laws and regulations of an Olympic Host City and that City’s national government. Mestre highlights the counter-intuitive reality that national governments willingly relinquish their sovereignty when they host the Games, and points to the compelling fact that “even Adolf Hitler was forced to submit to this primacy at the time of the 1936 Berlin Olympic Games.” Unfortunately, Mestre provides more description than analysis in this area, and readers are left wanting to know more about the ways in which this incredible primacy has been implemented. Mestre also raises, but declines to answer, perhaps the most important question of all: “whether such unilateral acts of states. . . [do] in fact have any legal effects.”

The second part of the book discusses the “Legal and Institutional Aspects of the Olympic Movement.” Mestre uses this portion primarily to introduce readers to the key stakeholders in the Olympic Movement, which he points out encompasses far more than the Games themselves. The International Olympic Committee (IOC) is arguably the most important stakeholder and the Olympic Movement is no less than its *raison d’être*. Accordingly, Mestre examines the Charter and historical documents to present a picture of the organization’s legal personality, governance and membership structures. Mestre also describes how the IOC exercises its power through the Executive Board, which runs day-to-day operations and meets several times per year, as well as at the annual Session. Although Mestre analogizes the Session to a parliament, he makes clear that the IOC members, and therefore also the Session membership, are not chosen democratically, and are not representative in the usual democratic sense. Instead, power

at the IOC is concentrated at the top levels, and the members (most of whom are hand-picked by the existing IOC members) are “representatives *of* and not *at* the IOC.” The Charter provides legal justification for this power structure, and Mestre suggests the policies are indeed faithful to the founding visions of the IOC and Olympic Movement. It is unclear from Mestre’s descriptions whether and how these bases of legitimacy might be challenged or eroded over time.

Mestre also introduces “satellite organizations,” including stakeholders in the Olympic Movement which are, to varying degrees, independent from the IOC. The independence of the Court of Arbitration for Sport (CAS) is an important issue in Mestre’s account, not least because the Charter designates the CAS as the exclusive body entitled to resolve Olympic Games-related disputes, including cases where the IOC is a party to the dispute. Mestre notes the close, historical organizational and financial relationships between the IOC and the CAS, and considers several high profile cases that apparently led to meaningful reform of the CAS, including its links to the IOC. Mestre’s account, however, appears incomplete: he suggests the reform was precipitated by what seems to be mere dicta in a Swiss Federal Court case. Furthermore, Mestre’s characterization of the CAS as *sufficiently independent* from the IOC does little to justify his observation that, following a 2002 ruling, “everybody finally [recognized CAS’s] impartiality, the quality of its decisions and its equivalence to a court of law.” Such a happy ending simply seems too good to be true.

Buried in Mestre’s later discussion of the eligibility problems arising out of competitors’ nationality, Mestre writes that a CAS Panel noted, in interpreting the Olympic Charter, “one should always and without hesitation opt for the [interpretation] more favorable to the athlete.” It is unfortunate, given the importance of the CAS in creating Olympic Law, that Mestre doesn’t pay more attention to this apparent canon of construction. It is unclear whether this preference for the athlete’s interest is valid beyond the eligibility interpretations; however, it would be interesting and valuable to readers for Mestre to discuss such a revelation further.

At the conclusion of his inquiry, in the third part of the book, Mestre raises various “Legal Problems of the Contemporary the Olympic Movement.” Consistent with the preceding chapters, Mestre presents the problems evenhandedly and re-

frains from taking strong positions on the issues themselves. Mestre's treatment of the problems related to eligibility is thorough, and he describes not only existing problems but also the numerous ways in which various earlier legal problems in this area have been resolved. For example, the Olympic Charter was amended in 1991 to allow professional athletes to participate in the Games (as opposed to just amateur athletes) and, contrary to the wishes of the founders of the modern Games, female athletes are now allowed to compete.

Mestre also introduces readers to several major, ongoing problems in other areas of Olympic Law. His most comprehensive analysis is of the challenges faced by the IOC in protecting its intellectual property. It is curious that he chooses to discuss advertising separately from the interlaced ring logo, mascots and other "Olympic properties;" however, the overall impact of both sections together will provide readers with a practical understanding of Olympic Law's approach to the Olympic Movement's most important source of revenue.

Sandwiched between Mestre's analysis of Olympic properties and advertising is a peculiar section on protection of the environment. Mestre attaches great importance to this issue, pronouncing that "alongside sport and culture," environmental protection is now "considered the 'third pillar' of Olympism." The legal source of this priority is the Olympic Charter, which imposes a duty on the IOC to "encourage and support a responsible concern for environmental issues, to promote sustainable development in sport and to require that the Olympic Games are held accordingly." Mestre warns that "the IOC cannot fail to appreciate the legal consequences of this rule," but the reader might notice that the legal duties imposed by the rule are extremely vague. Although the IOC's concern for environmental issues appears sincere, Mestre's enthusiasm for the Olympic Movement's efforts in this area seems overly optimistic.

Law of the Olympic Games includes a useful appendix in addition to the three main sections discussed. The appendix incorporates important legal documents, including the Olympic Charter, as well as a relevant law review article (which, notably, was first published in the Fall 1982 New York University *Journal of International Law and Politics*), and detailed indices to the book's contents.

Overall, *Law of the Olympic Games* provides a useful, general overview of the subject. As promised, Mestre raises and clarifies issues of the application of Olympic Law to the Games, presents a comprehensive introduction to Olympic legal institutions, and piques readers' interest in a wide range of additional topics. A reader looking for a deep analysis and critique of the current state of Olympic law may find the book disappointing; however, Mestre provides many interesting examples, illustrations and citations which such a reader might explore further to satiate her interest. This book therefore makes a significant contribution to existing legal scholarship, and is a worthwhile investment for any person interested in the topic.

Future Perspectives on International Criminal Justice. Edited by Carsten Stahn and Larissa van den Herik. The Hague, The Netherlands: T.M.C Asser Press, 2010. Pp. V, 693. \$195.00 (hardcover).

REVIEWED BY JULIA GENEUSS

International criminal justice is a work-in-progress. The international community's *ex post* reaction to various mass atrocities has led to the establishment of an increasing number of international or hybrid courts and tribunals. These real-life events have set a speedy pace for the development of international criminal justice over the last few decades. As a consequence, international criminal law began without a solid theoretical baseline. In other words, in international criminal justice, theory follows practice. Not least, the lack of a well-founded and coherent theory has caused tensions, both internally within the international criminal law regime itself, as well as externally between the international criminal justice regime and other law regimes. In this regard, two trends are apparent in academic writing: first, one that looks back and undertakes to explain the theoretical underpinning of the development that was so rapidly pushed forward, and, second, one that looks ahead, wanting to push the development even further and to broaden the concept of international criminal law.

In *Future Perspectives on International Criminal Justice*—a collection of twenty-eight essays written by well-renowned scholars as well as young researchers within the framework of the Marie

Curie Project of the Grotius Center for International Legal Studies of the University of Leiden—representatives of both factions present their views. The editors embark on an ambitious project aiming to critically question and conceptualize what has so far been tested in reality, to view international criminal law in its broader context, to reflect on and revisit its origins, and to explore the different “identities” of international criminal justice.

The collection is organized into seven parts, each of which addresses an overarching theme. In Part I, the volume takes a creative approach towards international criminal justice. The essays, which are insightful and well worth reading, portray key figures of international criminal justice—Hanna Arendt, Antonio Cassese, and Mirjan Damaška—and their concept of and influence on the development of international criminal law. Part II aims at theorizing international criminal justice.

Here, Darryl Robinson’s piece, “The Two Liberalisms of International Criminal Law,” deserves special mention. Robinson points out the tensions between fundamental principles of (liberal) criminal law that mainly aim to safeguard the offender’s rights in the criminal process on the one hand and conflicting, victim-centred human rights or humanitarian law concepts on the other, and offers a powerful and persuasive warning not to disregard of the former. The remaining parts of the volume deal with the timely and currently widely discussed topic of privatization of war and corporate liability (Part IV), undertake a critical reassessment of the definition of international crimes (Part V) and the modes of criminal liability under international law (Part VI), and, finally, turns to the very important question of the development of one unified international criminal procedure (Part VII).

This overall conception of the volume is very effective. All seven parts of the collection grapple with issues of significant weight in contemporary debates regarding international criminal justice. Of course, as with every collection of essays, some are good, some are better. The main problem with *Future Perspectives on International Criminal Justice*, however, is that it promises a more fundamental analysis of international criminal justice—viewed from a broader, contextual, sociological background—than it, at least in parts, actually delivers. The articles oscillate between addressing broad and fundamental

questions about the system of international criminal law on the one hand, and very specific issues, such as the interpretation of the war crime of recruiting child soldiers, on the other. While thoroughly discussing interesting questions, several essays do not really contribute to the theorization and conceptualization of international criminal law but stay at the surface, without addressing the wider context and the future of international criminal justice.

This more superficial analysis is exemplified by the articles that examine the relationship between national and international jurisdictions. Part III of the volume is dedicated to “Re-Assessing the Balance Between International and Domestic Jurisdictions.” It starts with Kevin John Heller’s piece on the situational-gravity-test under Article 53(1)(b) of the ICC Statute. Heller argues that the Prosecutor of the ICC should base his decision regarding which situations to investigate on three qualitative criteria, namely systematicity, social alarm, and state involvement. His argument reveals the inflexibility and incoherence of the Prosecutor’s pure quantitative approach.

Heller’s own proposal, however, is not without shortcomings, as is pointed out by Mark Osiel in his lucid comment on Heller’s paper that was included as a follow-up (and, unfortunately, repeats Heller’s arguments at some length). After playing Heller’s criteria through, Osiel particularly highlights the risk of political manipulation. In addition, Heller’s allegation of selectivity—that seems to result in a willingness to use the ICC and maybe international criminal law terms of pure symbolism—is based on a very narrow and exclusively ICC-centered view. What is missing is the broader picture, the interplay between the actors in the whole system of international criminal justice and the idea of division of labor. This would not only have matched the Part’s heading, but might have also softened his allegation of selectivity.

In contrast, Dawn Sedman’s piece titled “Should the Prosecution of Ordinary Crimes in Domestic Jurisdictions Satisfy the Complementarity Principle?” addresses the issue of re-assessing the relationship between the international and the domestic level. Unfortunately, however, in the course of the text the author strays from her promising and simple question turning it into an issue of *ne bis in idem*. Consequently, the issue of why ordinary crimes should or should not be capable

of dealing with international crimes, i.e. whether they grasp these crime's "specific wrong," is not analyzed in depth. Sedman addresses this question only at the very end of her essay and comes to the conclusion that a criminal conviction for an ordinary rather than international crime is not enough to satisfy the complementarity principle, since, so it seems, this does not constitute an "effective prosecution."

Like Sedman, Marta Valiñas, in her paper on "Interpreting Complementarity and Interests of Justice in the Presence of Restorative-Based Alternative Forms of Justice," also raises the question whether states should have a certain leeway in their decision of how to address international crimes. In contrast to Sedman's view, Valiñas argues that certain forms of states' non-criminal justice mechanisms should be taken into account in the interpretation of the complementarity test, even though they result in reduced or even symbolic sanctions.

Valiñas' reasoning is thorough and convincing. Yet, she, too, misses the opportunity to frame her analysis with a theory of international criminal justice. While she explicitly raises the questions that directly go to the foundations of international criminal law, namely, whose interests the reaction mechanisms to mass atrocities are supposed to serve, those of the international community or those of the affected local population, she does not explicitly answer them. In the end, her implicit result seems to be that the interests of the local population shall prevail.

The last essay in Part III is Elisabeth Santalla's "Universal Jurisdiction and the Prosecution of Excluded Asylum Seekers." Like Heller's piece, this article does not deal with the vertical relationship between international and domestic jurisdictions. Instead, Santalla addresses the tensions between two different international law regimes and analyzes the conflict between the international criminal law obligation for third-party states to prosecute according to the *aut dedere aut judicare principle*, and the obligation of non-refoulement originating from international refugee law. In her view, the international obligation of non-refoulement trumps the subsidiarity of universal jurisdiction. Her main concern, however, is the respect of the fair trial standard in international criminal justice, in particular the *nemo tenetur* principle and the confidential character of the determination process. In this regard, her piece—while also not "re-assessing the balance between international and do-

mestic jurisdictions”—can be seen as in line with Darryl Robinson’s call for adhering to the fundamental principles of criminal law mentioned above. Even in the shadows of mass atrocities and the understandable wish especially of victims not to let perpetrators of international crimes go unpunished, international criminal law should stick to the fundamental principles of the liberal criminal justice system.

Even though Part III is specifically dedicated to the relationship between the international and the national jurisdictions, the question is also addressed by several other authors. In particular, Frédéric Mégret’s essay on the functional, positivistic, and teleological “verticality” of the international vis-à-vis the domestic level addresses questions about the identity and nature of international criminal law. Mégret’s thorough analysis indicates that international criminal law is still caught between the traditional “horizontal” state-to-state concept of international law and the novel “vertical” concept that centers on the international community—and whose precursor international criminal law itself seems to be.

While the essays do not always fulfill the editors’ goal of touching upon the theoretical or conceptual foundations of international criminal law, *Future Perspectives on International Criminal Justice* addresses highly interesting and important questions in the area of international criminal justice and therefore is a helpful addition to the ongoing debate. Despite its ambivalence and oscillation between the general and the specific, the volume offers valuable food for thought.

Critical Issues in International Refugee Law: Strategies Toward Interpretative Harmony. Edited by James C. Simeon. New York, New York: Cambridge University Press, 2010. Pp. xv, 217. \$75.00 (hardcover).

REVIEWED BY SUSANNA PARK KIM

In May 2008, a number of judges, academics, senior government officials and other refugee law decision-makers convened at a research workshop in Toronto, Canada, to identify and discuss salient issues in international refugee law. *Critical Issues in International Refugee Law: Strategies Toward Interpretive Harmony* is a result of the discussions and academic papers presented at that workshop. Editor James C. Simeon begins by

identifying the four “critical” issues addressed at the workshop: the role of national courts in the interpretation and application of international refugee law, with special focus on the *1951 Convention Relating to the Status of Refugees* and the *1967 Protocol*; the importance of common evidentiary burdens in subsidiary protection cases; heightened requirements for asylum seekers following the events of 9/11 with respect to Articles 1F and 33.2 of the EU Qualification Directive; and the need to clarify what constitutes economic harm as a basis for refugee protection.

The structural format of the research workshop was designed to blend the divide between practitioners and jurists. Academics would present a paper on a specific legal issue, followed by judicial commentary, a round-table discussion, and finally an academic legal commentator’s remarks on the entire exchange. Although the details of each panel session tend to veer on the dry and overly descriptive side, Simeon successfully highlights the common themes from the panel sessions—most notably, the need for interpretative harmony and consistency in the application of the *1951 Convention* and its *1967 Protocol*. He attributes existing fragmentations to variations in evidentiary burdens and definitions of who qualifies as a refugee, and if not, who can seek subsidiary protection.

Following the introductions are six contributions by various academic leaders and judges in international refugee law. Chapter One provides an interesting look into the experiences of Justice Albie Sachs, a South African political refugee who once sought asylum in the UK after surviving a car bomb. Sachs describes later adjudicating a case brought by the Union of Refugee Women regarding the treatment of refugees in South Africa with respect to employment. While taking a strong stance on member states’ obligations to ensure basic legal rights, he clarifies that this does not mean refugees are entitled to be free of restrictions. In fact, he warns against such an all-or-nothing approach as a potentially dangerous principle that could lead to an unintended result, with administrators choosing to do nothing than to be overly generous. By infusing personal anecdotes with legal arguments, Sachs is able to provide readers with a unique and compelling perspective on systemic problems in refugee law.

Next is an analysis of problems arising from inconsistent evidentiary burdens for subsidiary protection. Professor Jane

McAdam examines inconsistent interpretations of the EU's Qualification Directive with specific focus on Article 15(c), which extends protection to individuals facing a "serious and individual threat to their life or person by reason of indiscriminate violence in situations of international or internal armed conflict." She attributes the problem to a lack of common definitions with respect to what constitutes a "serious and individual threat" or an "international or internal armed conflict." For example, Austria requires a showing that the applicant has been *personally targeted*, while Germany only requires applicants to show they are at *greater risk* than the general population. McAdam argues that it is principally wrong to limit protection to civilians who are subject to direct and individual persecution if they are part of a large group affected by uncontrolled communal violence. The European Court of Justice (ECJ) takes a similar stance, clarifying that the Article 15(c) inquiry should focus not on the individual, but instead on the individual's situation. Adding another layer of inconsistency are the variations of what is considered "substantial grounds" for requiring subsidiary protection. The Committee Against Torture has defined "substantial grounds" as "foreseeable, real, and personal risk of torture," while the UK uses the "reasonable degree of likelihood" standard and Germany imposes a very high threshold of "certain death or severest injuries." These evidentiary obstacles, McAdams opines, undermine international harmonization for providing subsidiary protection. While the author's observations and analyses are well-examined and clearly underline the importance of common evidentiary standards, the reader is left wondering what safeguards she would suggest to move towards that goal.

The third critical issue of the workshop, examined by Professor Geoff Gilbert, addresses the effect of post-9/11 security restrictions on interpreting the Convention's article 1F exclusion clause and its Article 33.2 withdrawal of the non-refoulement guarantee. Gilbert leaves no stone unturned as he explores the effects of domestic and international responses to 9/11. For example, the United States broadened the definition of terrorist activities and expanded Border Patrol Officer powers to expedite removal of undocumented persons. Furthermore, the UN Security Council enacted Resolution 1373 calling upon states to screen for terrorists feigning as refugees, despite the fact that Articles 1F and 33.2 already excluded

those who committed such crimes in the past. In particular, Gilbert takes issue with the UNHCR 2003 Guidelines on Exclusion, which propose a proportionality test to determine whether exclusion is warranted, arguing that it gives member states more room to justify limiting refugee rights by “hiding behind a smokescreen.” On a positive note, Gilbert appears hopeful that human rights treaty bodies will play an active role in protecting individuals who otherwise may be excluded from refugee status. He suggests that an international refugee court would advance the *1951 Convention*, but aptly acknowledges that there is no simple solution to the problem.

Economic persecution, a protected subset under the *1951 Convention*, is the fourth critical issue discussed at the research workshop. Refugee judges today often face the challenge of distinguishing between a “genuine” refugee and an “economic migrant.” With no consensus on what economic, social, or cultural rights are encompassed in the *Convention*, judges must look to domestic laws for guidance, some of which prescribe the same test for political and civil refugees, while others require a more rigorous “life-threatening” test. In the United States, for example, the Board of Immigration Appeals in 2007 adopted a “threat to life” standard for economic persecution, while the UK relies on traditional standards for persecution. Kate Jastram’s survey of recent cases finds that most applicants were assessed under the more rigorous test, and that those granted refugee status had to show other non-economic harms to obtain protection. She goes on to discuss the possibility of using human rights law as a framework for refugee law, ultimately advising against it as being impractical and likely to lead to further fragmentation. The reader will appreciate the author’s balanced, honest and thoughtful approach to the subject, as well as the normative suggestions she makes toward specifying socio-economic rights.

In addition to the critical issues discussed at the research workshop, Professor Elspeth Guild explores the impact of asymmetrical sovereignty on refugees in light of two post-9/11 cases: *Agiza v. Sweden* and *Alzery v. Sweden*. In both cases, Egyptian refugees were denied protection in Sweden upon assurances from Egypt that they would not be tortured, but nevertheless were subjected to inhuman and degrading treatment by U.S. and Egyptian agents on Swedish territory. Guild raises these cases to demonstrate an asymmetry of sovereignty, specif-

ically as illustrated by Sweden's assent to U.S. demands on the latter's own territory and inversely, Egypt's refusal to relinquish sovereignty to Sweden. Guild makes the astute observation that such asymmetry will negatively impact refugees, but only skims the surface of the issue. Furthermore, in another chapter, Nergis Canefe studies the fragmented applications of the *1951 Convention* and its *1967 Protocol* in the context of Guinea, Turkey and China. An examination of the inconsistencies illustrate the failures of the Convention in establishing a universal jurisprudence—a problem Canefe submits may be rectified by a system of accountability regimes, but is unclear about how such a system would actually work.

Overall, *Critical Issues in International Refugee Law: Strategies Toward Interpretative Harmony* is an insightful and engaging review of timely issues confronting refugees and practitioners. While the book clearly calls for harmonization of jurisprudence with respect to applications of the Convention, there are many moments when the reader is left wondering what can actually be done to move forward. Nevertheless, it successfully weaves various perspectives and serves as a strong foundation for academics, judges, and practitioners to tackle ways to move toward the Convention's goal of universal jurisprudence.

Irrational Security. By Daniel Wirls. Baltimore, Maryland: The Johns Hopkins University Press, 2010. Pp. xi, 239. \$30.00 (paperback).

REVIEWED BY SAMANTHA SCHOTT

“National security” is one of the most prized maxims in American politics, asserted and defended by military personnel, politicians, and regular civilians alike—but at what cost? In an era in which debates over the legitimacy of drone strikes, civilian casualties, and the moral costs of conflict dominate the front pages, Daniel Wirls takes a novel approach to examining the price Americans pay for their national security policies. In *Irrational Security*, Wirls scrutinizes the evolution (or lack thereof) of military expenditures over the two decades since the end of the Cold War and decries the “war politics” attached to them. Defense buildups, when they have been packaged as such, have been enormous, and drawdowns have not been nearly as extensive as promised, thereby creating an un-

sustainable and unreasonable “four percent” of GDP benchmark against which defense spending will be evaluated into the future.

The end of the Cold War left the U.S. in what appeared to be a state of relative stability. The Reagan Administration policy of deterrence resulted in the largest peacetime military buildup in history, and the threat from the Soviet Union and its allies was diminishing by the second. While the stage seemed to be set for a reduction in arms and a relative peace realized in U.S. foreign policy, Wirls documents how government officials in the post-Cold War period were still looking to find a threat toward which they could direct their energy and animosity—and money. In analyzing the trajectory of the defense buildup, Wirls attacks conservatives, in particular, for not only maintaining but actually amplifying their hawkish tendencies, despite lacking an enemy with corporal form. Under their direction—or under their coercion, during Democratic presidencies—spending cuts were made, but they were not necessarily substantial in nature. The United States took on the role of “the world’s SWAT team,” capable of acting unilaterally, without UN or allied moral or physical support. Cold War success was attributed to the massive military buildup, because the Soviet Union could not keep up, and attempting to do so led to its collapse. Moreover, rapid demobilization would invariably undermine the economy, bolstered by private defense contractors, and so an economic rationale was developed to justify military spending—a rationale that would attach to military spending through the 1990s and beyond.

After the Gulf War, the first Bush Administration ended its reign with a national security strategy that valued collective responses and international engagement while still ensuring that the U.S. remained the sole global superpower. The Clinton Administration seemed prepared to reap the peace dividend and institute a drawdown, but the 1993 Bottom-Up Review, predecessor to the Quadrennial Defense Review, asserted the need for the United States to be able to fight two “major regional conflicts” at the same time, presumably on the scale of the Gulf War, without allied support. Wirls admits that cuts were implemented, but they were not necessarily as substantial as may have been expected, and these minimal cuts were heavily criticized by conservative members of Congress. And even while Clinton was reducing the weapons cache and the floor of

the Base Force, he was benefitting from Reagan-era contracts that were just then being fulfilled. Moreover, once the economy began to improve, Clinton was able to combat the critics of the drawdown by increasing military spending. The Cold War may have ended, but the American military remained unusually—and rather aimlessly—strong and well-funded.

National security strategy ostensibly changed significantly under President George W. Bush, resulting in massive additions to the already sizable U.S. military apparatus. Wirls relates how even before September 11, 2001, the administration had instituted an eleven percent increase in defense spending over the previous year. The buildup was justified by the novel strategy of “dissuasion,” or making the American military so large and advanced that it was pointless for any other country to attempt to compete with it in terms of size or weaponry. This was followed by a strategy of “preemption,” which required capacity to respond to any and all threats, present or future, no matter how undefined they may currently be, which ostensibly led to the invasion of Iraq in 2003.

Even though the wars in Iraq and Afghanistan were funded primarily through supplemental appropriations, defense appropriations rose to unprecedented levels from 2001-2008, such that the Army’s budget in 2008 was seventy-three percent higher than it had been in 2000. The Democratic shift after the midterm elections of 2006 did not turn the tide of massive military expenditures: despite occasional criticism, all appropriations were approved throughout the Bush Presidency. This legacy of massive spending tied President Obama’s hands. Even though Secretary Gates promised “massive changes” in Pentagon spending, such changes included both cuts and additions. And even in the face of modest cuts, Obama was harshly criticized for “disarming America.” Wirls closes with a pessimistic assessment of the state of American defense spending: overfunded, overextended, and unfounded.

In attempting to emphasize the continuity in (and the struggle to cut back) spending between the presidential regimes, Wirls ends up repeatedly restating his key points, almost to the point of redundancy. But this structural dynamic does not harm his argument as much as does his incredibly partisan outlook on defense spending. In Wirls’ world, conservatives are hawkish and hypocritical to the point of irrationality. They scheme against an ignorant American public and

manipulate sensitive emergency situations for their own political gain. Liberals are meek and naïve but they played less of a part in the accumulation of the deficit and the institutionalization of heightened defense spending. Liberals expected the end of the Cold War to result in a “new world order” of peace and international cooperation but did nothing to market that vision or bring about its formation. Instead, they waited and, in the interim, conservatives made sure that military spending never dipped below what it deemed to be an acceptable level—eventually landing at approximately four percent of GDP.

On that note, Wirls reserves his harshest criticism for the second Bush Administration, whom he accuses of misleading the public and taking advantage of the political cover offered by September 11 to engage in an unprecedented military buildup without cause. Wirls asserts that the Administration’s key members had wanted to invade Iraq since the late 1990s, and they had been planning to accomplish this goal well before September 11 made it a more acceptable and justifiable pursuit. Those members used September 11 to hide the massive military buildup they had been planning anyway, and in completely ignoring energy policy—indeed, in emphasizing defense spending at the expense of energy research—they in fact endangered the United States. But this assessment seems all too simple. In making such assertions, Wirls barely considers international concerns or public opinion, and he refrains from making any in-depth analysis of the war in Afghanistan, whose influence on the Iraq War and on national security strategy—especially during the current Presidency—has been, and continues to be, considerable.

Even though he makes valiant attempts at thoroughness, Wirls still cannot give us the full picture, and the reader is left scratching her head and wanting more: more analysis, more objectivity, and more solutions. Our government has been hamstrung by the pull of “irrational security.” Where to from here?

Detention and Denial: The Case for Candor after Guantánamo. By Benjamin Wittes. Washington, D.C.: Brookings Institution Press, 2011. Pp. x, 160. \$22.95 (hardcover).

REVIEWED BY DAVID BERAKA

Only two days after his inauguration, President Obama issued a symbolic and still unfulfilled executive order pledging to close the detention facility at U.S. Naval Station Guantánamo Bay. A year and a half earlier, the Supreme Court's landmark decision in *Boumediene v. Bush* held that detainees at the facility may challenge the grounds for their detention in federal court. Meanwhile, Congress has prohibited the Pentagon (by restricting appropriated funds for this purpose) from transferring detainees from Guantánamo Bay to U.S. territory, while placing additional limitations on their transfer elsewhere.

In *Detention and Denial*, Benjamin Wittes, a leading centrist commentator on national security law, and a contributor to the authoritative blog, "Lawfare," offers a manifesto of sorts attacking the hypocrisy and incoherence of post-9/11 U.S. detainee policy, while advocating for a comprehensive and predictable legislative framework. For the details of such a proposal, Wittes directs readers elsewhere. Indeed, in 2009, he co-authored a "Model Law of Terrorist Incapacitation," which generated much controversy after National Public Radio reported that senior Obama officials had reviewed and seriously considered his ideas. National security wonks are also likely familiar with the author's longer and more comprehensive 2008 work, *Law and the Long War: The Future of Justice in the Age of Terror*.

Unlike his prior writings, *Detention and Denial* is not aimed at the national security practitioner. Rather, it seeks to alert the general public to, what Wittes calls, the United States' collective denial regarding the state of its detention policy. The dwindling number of detainees at Guantánamo Bay, the President's stated policy to close the facility, and the Supreme Court's holding that those detainees retain the privilege of *habeas corpus* reflect neither the diminished importance of the subject nor the emergence of a coherent policy or body of law. Instead, the legal uncertainties arising out of that facility's controversial status obfuscate the United States' continued and

messy detention policy, which currently endures out of public view.

Now, for example, instead of sending newly captured detainees to the naval base in Cuba, the U.S. government increasingly sends them to Bagram Air Base in Afghanistan. Notably, the D.C. Circuit held, in May 2010, that no U.S. court had jurisdiction over detainees held at that facility. Not only could this judicial holding be overruled, as Wittes warns, but this arbitrary reality dramatically, and ironically, undermines the interests of the detainees. What facility other than Guantánamo is regularly toured by journalists, human rights organizations, and Congressional delegations? And at what other facility do detainees meet regularly with counsel?

Another example of the messy detention policy operating out of public view, and a consequence of all three branches of government taking ideological positions based on geography, is our increasing detention by proxy, a recurrent theme in Wittes' book. While the United States now has a legitimate option to turn over large numbers of detainees to the custody of the Iraqi and Afghan governments, Wittes warns that this was not always so, and may not always be so. Though written prior to the tumult in the Middle East that began in January 2011, the admonition that the United States should not rely on others to do its dirty work does not fall on deaf ears following the downfall of its most important Arab ally.

Who is to blame for the lack of a coherent detention policy or, in the author's words, the lack of candor? Without sparing Congress or the Obama and Bush administrations, Wittes attacks what he labels a civic mythology that preventive detention runs counter to the very core of a liberal and democratic society. This false meme—promulgated by human rights groups, civil libertarians, and some in legal academia—he argues, paralyzes political discourse.

Wittes responds by pointing to an abundance of instances in which the U.S. government regularly employs preventive detention; he argues that doing so is both legal and consistent with American tradition. For example, the government has broad authority to detain material witnesses, sex offenders who are beyond the expiration of their sentences, and even people infected with communicable diseases. However, these

examples seem like precisely the carved-out exceptions, with specific rationales, that his critics concede.

Wittes is more persuasive, for example, in pointing to the long history of the Alien Enemies Act, which confers broad legal authority to detain civilian nationals of countries with which the United States is at war. Indeed, President Roosevelt detained thousands of Germans, Italians, and Japanese nationals (as distinct from the infamous detention of U.S. citizens of Japanese origin), and the Supreme Court upheld the statute's constitutionality in 1948, while also extending its applicability beyond the cessation of hostilities. In contrast to this persuasive argument, by pointing to New York City's practice of forcibly transporting homeless persons to shelters when temperatures fall below 32 degrees Fahrenheit, Wittes increases only the technical accuracy of his reasoning instead of complementing his examples in the contexts of crime, war, and immigration.

Thus, although he successfully amasses historical and legal precedents for a contemporary preventive detention scheme, Wittes should also recognize that—especially because of the indefiniteness of the conflict with radical Islamists—there is greater opposition to broad executive power than in the instances to which he points. While the indefinite nature of the conflict actually necessitates the legislative overhaul Wittes seeks, it also perhaps better explains the fears of its opponents.

Detention and Denial also considers in detail that, in the absence of a legislative detention scheme and as a result of *Boumediene*, the substantive law of detention is now emerging through the litigation of habeas corpus petitions filed by the remaining detainees at Guantánamo. Wittes makes strong arguments that this status quo serves neither prospective detainees, nor the government itself. While an innocent detainee is best served by a speedy initial determination, the habeas cases move slowly through the court system. Moreover, detainees should be given regular review of their status as evidence and circumstances change. In particular, Saudi Arabia's sophisticated rehabilitation program has made the release of Saudi nationals, once unthinkable, now possible. Yet, this development would not help a Saudi whose adjudication took place prior to the program's inception.

Perversely, in *Boumediene's* wake, the U.S. government is simply more likely to send detainees to Bagram where their status is unreviewable. Perhaps Wittes goes too far in suggesting that "a system of full-blown habeas review for the more geographically fortunate must seem like the very definition of arbitrary government," but he nonetheless admirably brings into focus the illogical results of the political branches' failure to create a credible legislative detention scheme.

As Wittes effectively argues, the common law process of habeas litigation also disserves the government, which needs both predictability and certainty. Instead, currently even the most fundamental issues remain unclear. For example, while the district courts have unanimously held that the government bears the burden of proof by a preponderance of the evidence, the D.C. Circuit has not affirmed that rule. Even more fundamentally, the law is unclear with regard to what exactly must be proven. The nebulous and laconic 2001 Authorization for the Use of Military Force (AUMF), upon which the Obama administration continues to rely for most of its authority to fight terrorism, does not define (in addition to almost everything else of import in the war on terror) the standard for those accused of supporting the Taliban or al-Qaeda. The D.C. Circuit, in *Hamliby v. Obama*, expansively held that one who "purposely and materially support[s]" the enemy is subject to detention.

Because even this vague standard is certain to be further distinguished or overruled, it hardly provides guidance to military commanders in the field. Wittes argues that substantive interpretations of the AUMF by federal courts in the context of habeas litigation affect military actors in real time, facing for example, civilians who support but do not constitute the enemy. The collateral effects of our denial on in-theater operations permeate Wittes' thinking on the subject. Interested readers should note that Wittes blogs religiously as these decisions percolate.

Another corollary of denial, Wittes points out, is a continued increase in the targeted killing of suspected terrorists via Predator drones. While President Obama did not mention Guantánamo in his January 2010 State of the Union Address, he did boast of the number of high-value al-Qaeda leaders actually "killed or captured." Legitimate national security policy (including the value of intelligence) and operational realities

may dictate the decision of whether to kill or capture, but avoidance of uncertain legal hazards should not. Here, Wittes' warning regarding such an incentive structure rests on firm ground. Furthermore, in addition to human intelligence, we lose the strategic value of affording our enemies due process in a secular legal system. In ominous language, Wittes warns that it would be a "dubious victory for human rights if U.S. forces are now killing people that they used to capture."

Wittes does not outline his model law for a new legal detention system in this book; he has done so elsewhere in formal policy papers. Instead, he devotes one chapter to broadly sketch the foundational questions of his proposals. Critics should also take note that Wittes, more so than in some of his prior writings, recognizes the value of the criminal justice system and its successful adjudication of a significant number of terror suspects in civilian courts.

Overall, *Detention and Denial* successfully distills the partisan and superficial obsession with Guantánamo to highlight the lack of clear and predictable legal authority to guide military and law enforcement officials. Indeed, bipartisanship is a hallmark of Wittes' tenor, and *Detention and Denial* is no exception. He criticizes President Obama's demonization of a policy from which he has not substantially departed, while also calling Congressional Republicans out on their reactionary and sophomoric commitment to Guantánamo Bay. The lack of Congressional seriousness of purpose and the resulting over-litigation has confused this area of law.

As of this writing, President Obama had issued an executive order in March 2011 ordering interagency Periodic Review Boards to assess the continued detention of Guantánamo detainees, while simultaneously announcing he would resume the much-criticized military commissions. By formalizing the indefinite detention at Guantánamo, President Obama has vindicated Wittes' assertion that the new administration has brought little substantive change in detention policy. Importantly, however, the executive order does incorporate one of Wittes' core policy proposals: the periodic review of detainees as evidence and circumstances change.

In summary, *Detention and Denial* provides a valuable contribution to the literature on U.S. detention policy. While one may not accept all of Wittes' analyses or recommendations,

this book provides both policy-makers and the public-at-large with a starting place to craft a sufficient legal regime for detention policy in the age of terrorism. Indeed, Wittes seeks *candor* on the subject, a prerequisite to adopting his proposals or any other tough legislative choices and compromises, which surely will not satisfy everyone.