GLOBAL LEGALISM:
THE ILLUSION OF EFFECTIVE INTERNATIONAL LAW

*Reviewed by Christopher J. Eby**

ERIC A. POSNER, THE PERILS OF GLOBAL LEGALISM (UNIVERSITY OF CHICAGO PRESS, 2009).

I. INTRODUCTION

In our increasingly complex and interconnected world, problems emerge that cannot be solved by the actions of one nation. For those problems that exceed the scope and capability of individual governments, international law and international government become the only possible solution. If international law aligns with state interests, compliance is both expected and easy to explain. However, when a state is confronted with international law antithetical to their self-interest, nothing prevents the state from simply violating or withdrawing from the international law.

Global legalists believe that international law will solve complex global problems and that states will comply because a legalistic culture will establish faith in international law. American global legalists generally believe that "the very high value of international law creates a presumption against violating it that is so strong that, for all practical purposes, it may never be violated."[1] European global legalists argue that "international law has value for its own sake . . . and therefore it is wrong for states to evaluate potentially illegal conduct with a cost-benefit analysis that uses national interests as a metric."[2]

Nevertheless, states *do* use self-interest as their standard when contemplating compliance. These interests are result of a nation fulfilling its obligations to its citizens. "A state's interest is fixed - the product of the domestic political process, reflecting the values and preferences of the public in a democracy, and those of a narrower elite in an authoritarian system. In short, the state's interest comes from within, and mainly concerns the security and prosperity of the state's citizens."[3] While campaigning, President Obama declared, "[p]romoting—and respecting—clear rules *that are consistent with our values* allows us to hold all nations to a high standard of behavior, and to mobilize friends and allies against those nations that

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1. ERIC A. POSNER, THE PERILS OF GLOBAL LEGALISM xii (2009).

2. *Id.*

3. Eric A. Posner, *Transnational Legal Process and the Supreme Court's 2003-2003 Term: Some Skeptical Observations*, 12 TULSA J. COMP. & INT'L L. 23, 24 (2004).

break the rules. Promoting strong international norms *helps us advance many interests* . . . ."[4] Recommendations from the United Nations Association of the United States of America in an occasional paper titled "Renewing America's Commitment to International Law" framed many of the recommendations in terms of American self-interest. "To secure agreement and cooperation on *issues central to American security*, the US needs to lead by example and ratify and implement existing arms control and environmental treaties."[5] "US adherence to the international treaty regime is essential *to America's ability to induce other nations* to join in the cooperative action necessary to address the great many global problems that are far beyond our ability to solve alone."[6]

Global legalism creates an illusion of order that loses its luster when removed from the vacuum of theory and exposed to the harsh light of global reality. In *The Perils of Global Legalism*, Professor Posner critically examines the arguments set forth by leading global legalists, addressing the fundamental flaws in their logic. He categorizes global legalism as "an excessive faith in the efficacy of international law" and cautions against adopting this mistaken view of the world.[7]

In this book review, I analyze Professor Posner's arguments by answering the following questions: (1) What is global legalism? (2) What are the flaws of global legalism? and (3) What impact does the presence of a large network of international courts have when considering the validity of global legalism?

II. DEFINING GLOBAL LEGALISM

A. Collective Action Problems

Nationally, goods services exist that private organizations cannot routinely provide for citizens. Classic examples of these public goods include transportation and national defense. Globally, the same types of problems exist; private organizations and national governments cannot solve them on their own. Professor Posner categorizes these as "collective action problems."[8] Examples of these problems are war, pollution, overfishing, disease, terror, global macroeconomic shocks, and transnational crime.[9] The efforts of any one nation are simply insufficient to combat such problems. However, they have serious ramifications and the potential to impact the quality of life for every citizen of every nation.

Unfortunately, resolving these collective problems on a global level is a far more challenging task than identifying them. Exceeding any single nation's authority or capability, collective action problems require just that: collective action. This cooperation is hard to come by for several reasons. First, states are

4. The American Society of International Law, International Law 2008 – Barack Obama, http://www.asil.org/obamasurvey.cfm (quoting then-Senator and Presidential Candidate Barack Obama) (emphasis added) (last visited Apr. 19, 2010).

5. LAWRENCE C. MOSS, RENEWING AMERICA'S COMMITMENT TO INTERNATIONAL LAW 3 (2010) (emphasis added).

6. *Id*. at 9 (emphasis added).

7. POSNER, *supra* note 1, at xii.

8. *Id.* at 3.

9. *Id.* at 3-6.

motivated by their self-interest. "International law emerges from states' pursuit of self-interested policies on the international stage."[10] Additionally, the tremendous heterogeneity of the global population brings countless values and needs to the bargaining table.[11] The divide is particularly wide between developing and industrial nations. Industrial nations have the ability to address long-term problems like environmental protection.[12] "For the developing world, the pressing environmental problem is not over-development, but rather the absence of economic development. The horrors of poverty, war, disease, malnutrition, and starvation are immediate evils in themselves, and they contribute directly to environmental devastation in the developing world."[13] This heterogeneity is unavoidable and complicates the development of international law. States acting to further their conflicting self-interests frustrates the goal of a well-defined, well-functioning international law.

These challenges are so great that some, including Professor Posner, argue that the resolution of global problems is unlikely.

> It seems plausible that global collective action problems cannot be solved—or not very well. If it is true that national governments are needed to solve national collective action problems, then it seems that it would follow that a world government would be needed to solve global collective action problems. If a world government is not possible, then solving global collective action problems is also not possible.[14]

B. Global Legalism

Global legalism has been offered as a solution to these collective problems. "[L]egalism defined broadly is the view that law and legal institutions can keep order and solve policy disputes. It manifests itself in powerful courts, a dominant class of lawyers, and reliance on legalistic procedures in policymaking bodies."[15] Strong legal institutions and ideology support legalistic societies. The codification of rules, thorough procedural safeguards during the trial process, the adversarial system, and the central role of detached judges increase the faith citizens have in the law.[16] Global legalism applies these factors on an international level. Global legalism "is most easily understood as an alternative to the other approaches to solving global collective action problems. According to global legalism, international law will solve these problems. Global legalism is the world government approach except without the government."[17] In spite of the severe limitations of world government, global legalists believe that international law can

10. JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 13 (2005).

11. POSNER, *supra* note 1, at 7.

12. John S. Applegate & Alfred C. Aman, Jr., *Introduction: Syncopated Sustainable Development*, 9 IND. J. GLOBAL LEGAL STUD. 1, 1 (2001).

13. *Id.*

14. POSNER, *supra* note 1, at 7-8.

15. *Id.* at 21.

16. *Id.* at 19-21.

17. *Id.* at 24.

solve global problems.[18] However, "global legalism is not a doctrine or theory. It is akin to an attitude or posture—a set of beliefs about how the world works, one that, in various forms, dominates the thinking of academic international lawyers, as well as practicing government officials."[19]

Global legalists believe "that law without government can nonetheless solve global problems."[20] International disputes should be resolved through international law. For example, "[w]ars should not be fought without the approval of the United Nations; disputes should be submitted to international courts."[21] States must bolster international institutions to increase the efficacy of international law; increasing the importance of treaties and establishing effective international courts are fundamental to an effective international law. "[T]hough global legalists acknowledge that a full-fledged world government is not possible in the near term" international institutions "should be promoted to the extent possible."[22] Global legalists also "believe that domestic political institutions should be bound by international legal obligations."[23] The combination of effective global government institutions and compulsory laws would strengthen international law's ability to solve global problems.

Several factors explain the rise and prevalence of global legalism. "[P]roblems of global collective action have multiplied and increased in seriousness, and alternative mechanisms for solving them, such as world government, are no more plausible today than they ever have been in the past."[24] Unlike a global government, international law as a solution to world problems has not concretely failed.[25] Meanwhile, the success of legalism on a national level in countries like the United States has spread to other countries.[26] Encouraged by the success and spread of domestic legalism, faith in international law, at first glance, appears appealing. In the face of global collective action problems beyond state's control it is reasonable to attempt to emulate the most successful nations' approach to resolving their own great problems. Finally, legalism thrives in heterogeneous cultures. "When people cannot resolve their differences by appealing to common religious beliefs, or common ethnic norms, or common historic memories, or tribal elders, they can at least appeal to the law."[27] With an immensely diverse global population, values and beliefs do not translate across all borders, and detached and neutral judges can resolve conflicts without imposing ethnic or historic biases.

18. *Id.* at xiii.
19. *Id.* at 16.
20. POSNER, *supra* note 1, at 24.
21. *Id.* at 25.
22. *Id.*
23. *Id.*
24. *Id.* at 38.
25. *Id.* at 26.
26. POSNER, *supra* note 1, at 23.
27. *Id.* at 18-19.

III. THE FLAWS OF GLOBAL LEGALISM

A. International Law Lacks Institutional Support

Legalists believe in "law without government."[28] They reject the notion that international government is necessary to ensure compliance with international law. Nevertheless, international law "does not have the capacity to command respect as domestic law (in some countries) does, because it is not backed by a world government that has the support of a global community."[29] Two institutions are noticeably absent from the international stage: an effective legislature, and effective enforcement institutions.

In most states, law is made through legislative process. Formal legislative structures provide legitimacy and ensure that the law reflects the will of the people. Internationally, this is not the case.[30] "The United Nations General Assembly lacks the power to enact legally binding rules. The Security Council does have the power to issue legally binging orders, but its power is limited. It does not have the power to issue legislation."[31] As a result, international law is made through treaties. There are several problems with this approach. First, "[a] state can be bound by a treaty only if it consents to it; thus, a treaty that will solve a global collective action problem requires the consent of all states, or all states that contribute to that problem."[32] Requiring this unanimity imposes a heavier burden on international lawmakers and the resulting treaties "usually end up imposing weak obligations."[33] Finally, treaties are difficult to amend. States are wary about entering into long-term irrevocable agreements, resulting in fewer and weaker treaties.[34]

Additionally, international law lacks capable enforcement mechanisms. Domestically, states have organized institutions that enforce their law. Police make arrests, subject to the limitations of the law.[35] Courts often require institutional support to impose their final judgments. The functions of enforcement agencies are vital not just for the administration of any legal system, but also the economic health of the nation. "Economies can function only if contract and property rights are respected."[36] Moreover, enforcement agencies maintaining order and prevent violations of citizens' rights. In the absence of strong enforcement agencies, "it would be too easy for the state to abuse its citizens, and for some citizens to use the state to abuse other citizens."[37] The UN Security

28. *Id.* at xiii.
29. *Id.* at 39.
30. *Id.* at 29.
31. *Id*.
32. POSNER, *supra* note 1, at 29.
33. *Id.* at 30.
34. *Id.*
35. *Id.* at 31.
36. *Id.*
37. *Id.* at 32.

Council is the sole global enforcement agency, and its power is severely limited.[38] According to Posner,

> Even when the Security Council can agree to approve some action, it cannot call upon an army or police force to carry out its will. It can only authorize or order states to call upon *their* armies to carry out the Security Council's will, but the states have ample reason not to participate, and few do.[39]

The lack of an international enforcement agency threatens the global legalist contention that states will comply with international law when it contradicts their self-interest. In the absence of a compelling inducement to follow international law, such as the threat of a powerful enforcement agency, total compliance with international law is unexpected.

B. Considerations of Legitimacy

International law must be perceived as legitimate in order to effectively govern the nations that consent to its authority. Professor Posner notes, "[i]nternational law has force because (or to the extent that) it is legitimate."[40] National governments acting contrary to the interests of their citizens are perceived as illegitimate and individuals challenge the authority of those governments.[41] On the global level, national governments, rather than individuals become the constituents. "[V]irtually everyone around the world owes his or her primary loyalty to a state, which delivers goods such as security that promote local values and interests."[42] As a result, international government lacks a direct connection to the individuals governed. Professor Posner explains the implications:

> The problem with global legalism is that because international law reflects the interests of governments, it will not always be consistent with the moral sense or legitimate interests of populations, so it will lack the authority that law needs to command general assent among individuals. This is not to say that populations will reject all international law; many people will benefit from specific treaties and support them accordingly. Rather, it is to say that international law will always be more appealing in theory than in practice.[43]

In contrast to domestic law, "[i]nternational law is a series of compromises between somewhat better governments, mediocre governments, and bad governments. It is not a reflection of the will or interests of a political community in the way that law created by democratic governments may be."[44] However, ignoring the will of the people ultimately governed by the law reduces the perception of legitimacy. "[N]o system of law will be perceived as legitimate

38. POSNER, *supra* note 1, at 32.
39. *Id.*
40. *Id.* at 35.
41. *Id.*
42. *Id.* at xii.
43. *Id.* at 37.
44. POSNER, *supra* note 1, at 51.

unless those governed by that law believe that the law does good—serves their interests or respects and enforces their values."[45] With both state and individual constituents, international law must maintain accountability to both parties in order to preserve its legitimacy and effectively govern the globe.

C. Problems of Sovereign Equality

International law also faces the challenge of sovereign equality. Because international law requires state consent, effective international law requires all states that participate in the creation of a problem to consent to law governing their behavior. "What this means is that if nearly everyone in the world agrees that some global legal instrument would be beneficial (a climate treaty, the UN charter), it can be blocked by a tiny country like Iceland (population 300,000) or a dictatorship like North Korea."[46] This mandate of unanimity is a far higher threshold for a law to pass than the majority rule required by most legislatures. This impedes the establishment of strong international laws because "international law cannot be created unless all agree."[47] A proposed international law will either be defeated by the absolute veto power possessed by every nation, or will survive in a diluted form. In either case, sovereign equality sharply contradicts global legalists' reliance on strong international law.

D. Global Fragmentation

Global legalists point to the increase in treaties as an indication of the increased importance and efficacy of international law. They argue that "the lawmaking and institution-building activities of the last sixty years show that ordinary people and elites have thrown their lot with international law."[48] Professor Posner attributes this increase to the fragmentation of states, rather than the value of international law, noting: "the greater-than-threefold increase in states since World War II surely accounts for much of the international legal activity—the treaty making, the institution building—that we continue to observe today."[49] The larger number of states increases the necessity and possibility of interstate agreements to govern a nation's interactions with another. "When only 50 states existed, the number of possible state pairs was 1,225. With 190 states, the number of state pairs is 17,995."[50] The fragmentation of single states like Yugoslavia leads to the creation of other countries. These countries in turn establish treaties with one another. However, the creation of these diplomatic ties do not signify "that international law is stronger or more reliable, or entitled to more respect, than before."[51]

Moreover, the heavy increase of treaties reflects the diminishing ability of states to provide public goods for their citizens. "International law becomes more

45. *Id.* at 35.
46. *Id.*
47. *Id.*
48. *Id.* at 98.
49. *Id.* at 95.
50. POSNER, *supra* note 1, at 95.
51. *Id.*

necessary and important as states crumble into smaller and smaller bits, but only because states can accomplish less for their populations when they are small than when they are large."[52] While "[d]emand [for international law] will increase because as states shrink, they can no longer supply public goods above a certain scale without cooperating with other states . . . . supply will fail because international law depends on states for those same structures of institutional support."[53]

The tremendous fragmentation of the globe has undeniably increased the number of international laws and treaties that govern states. However, global legalists' assertion that this trend strengthens the efficacy of international law is dangerously misguided. "[W]e do not know how much states comply with international law, and until we do, it is hazardous to draw conclusions about the prospects of global legalism in a world of fragmenting states."[54] International laws may be more common, but it does not necessarily follow that it is more effective or that states are more willing to comply with it.

E. Disaggregation Theory

Global legalists argue that legalism will succeed on an international level because of the success of legalism domestically. By disaggregating the internal factors within a state and determining what aspects enhance legalism, it is possible to understand what is necessary for legalism to function on a global level. Posner argues "the two kinds of legalism are fundamentally different: domestic legalism flourishes because governments support it; global legalism has no government to turn to."[55] Former Yale Law School Dean Harold Koh[56], a global legalist, asserts that "states comply with international law because internal actors—including bureaucrats, citizens, politicians, and businesses—and external actors—including other states, NGOs (nongovernmental organizations), and international legal institutions—pressure them to comply with international law."[57] Professor Posner rejects this argument, responding that "Koh never explains systematically why these various entities expend resources to force states to comply with international law. Sometimes, he seems to think that interest alone provides them with an incentive; often, it is ideology or 'habit' or sympathy."[58] By examining the various state and nonstate actors, including courts, government officials, interest groups, NGOs, and citizens, Professor Posner concludes that the disaggregation theory fails to account for the purported efficacy of international law.[59]

52. *Id.* at 98.

53. *Id.* at 99.

54. *Id.* at 97.

55. *Id.* at xiv.

56. Professor Koh served as Yale Law School Dean from 2004 until 2009. Yale Law School, Faculty, Harold Hongju Koh, http://www.law.yale.edu/faculty/HKoh.htm (last visited Apr. 19, 2009). On June 25, 2009, Professor Koh was confirmed by the U.S. Senate as Legal Adviser to the United States Department of State. *Id.*

57. POSNER, *supra* note 1, at 41.

58. *Id.*

59. *Id.* at 45-48.

The first problem with the disaggregation theory is that "[t]here are many intrastate actors, and it is not clear which ones will matter for the decision of whether to comply with international law."[60] Second, many of the actors that global legalists argue compel states to comply with international law have little or no effect on states. For example, domestic courts in the United States "cannot force the American government to comply with a treaty for the simple reason that the government has constitutional authority to withdraw from or violate treaties either through the unilateral action of the president or the joint action of president and Congress."[61] Global legalists also argue interest groups will compel states to comply with international law. However, because there are often interests groups on both sides of a single issue, "in theory interest groups can both enhance the probability of compliance with a treaty and reduce the probability of compliance."[62] If these competing interest groups cancel each other out, their net effect on compliance with international law will be minimal.

Finally, global legalists falsely attribute apparent "compliance" with international law to situations where states are merely acting in their own self-interest. Claiming this success for global legalism, in situations where there is no causal connection to compliance, amounts to an artificial victory. Simplifying Professor Posner's hypothetical, imagine two bordering nations: Big State and Small State.[63] Big State has never invaded Small State. The global legalist would point to this example as a sign of strong international law; Big State complied because it was illegal to invade Small State. However, self-interest may also have played a role. Among other factors, potential international backlash, the cost of invasion, and economic ties would also account for Big State's failure to invade Small State. Simply not violating international law, especially through an act of omission, fails to prove that international law is effective or that states routinely comply with it.

IV. INTERNATIONAL COURTS

Despite the apparent flaws of global legalism, a complex network of international courts exists. "International adjudication, unlike international legislation and enforcement, is an accepted part of international relations."[64] The growth of these courts "is the most distinctive and lasting contribution of global legalism, as well as a phenomenon to which global legalists point with pride."[65] Though the international community lacks established legislative and enforcement institutions, dozens of adjudicative agencies exist on the international level as well as nearly thirty proposed or existing judicial bodies.[66] Additionally, legalism places great importance on the judiciary. Therefore, any critique of global legalism must account for, or discredit, the well-established system of international

60. *Id.* at 41.
61. *Id.* at 45.
62. *Id.* at 54.
63. POSNER, *supra* note 1, at 43.
64. *Id.* at 33.
65. *Id.* at 130.
66. *Id.* at 167.

adjudication. Professor Posner does both, arguing that the success of domestic judiciaries cannot be replicated on an international plane; "courts, like plants, flourish only in the right environment."[67]

A. Success, Failure, and Fragmentation

The large number of international courts is a poor gauge of their efficacy. "[A]n increase in supranational institutions should not be mistaken for a world law. Rather, they are simply creating courts with universal jurisdiction to hear certain limited types of cases."[68] Professor Posner examines several of these courts and concludes that issues of compliance, infrequent use, and enforcement render international courts ineffective. The Inter-American Court on Human Rights (IACHR), adjudication through GATT or the WTO, and the European Court on Human Rights (ECHR) all face monumental problems of compliance.[69] Each of these courts has non-compulsory methods of ensuring compliance, resulting from a lack of enforcement measures.[70]

The only adjudicatory body that can be deemed successful is the European Court of Justice (ECJ). EU member states appear to comply with ECJ decisions frequently.[71] Admittedly, "it is reasonable to conclude that the ECJ has been an effective tribunal—in some periods, a vital institution that spurred integration when the efforts of national governments flagged."[72] However, the success of the ECJ is the result of Europe's unique geopolitical climate. The European Union is an example of "'supranational' cooperation in which individuals owe loyalty to multiple levels of government authority."[73] Unlike other international courts,

> [t]he ECJ is just one of a number of European institutions—including the European Parliament, the Council of the European Union, and the Commission—and it works with these institutions to ensure that European law develops properly and flexibly in response to changing circumstances and the needs and interests of the populations of the member states.[74]

However, the ECJ has the vast institutional support of the EU. Additionally, other international adjudicatory bodies lack the loyalty of member states the EU enjoys. As a result, compliance and use of those international courts is understandably lower.

Although an increasing number of international courts exist, Professor Posner argues "the proliferation of international courts is a sign of the weakness of the

67. *Id.*

68. Russell Menyhart, *Changing Identities and Changing Law: Possibilities for a Global Legal Culture*, 10 IND. J. GLOBAL LEGAL STUD. 157, 184 (2003).

69. POSNER, *supra* note 1, at 151-159.

70. *Id.* at 157-158.

71. *Id.* at 160.

72. *Id.* at 161.

73. *Id.* at 7.

74. *Id.* at 162-163.

international system, not its strength."[75] While international courts appear at first to be expanding, they are, in fact, dividing and becoming increasingly fragmented. "[T]he fragmentary tribunals are the result of a collision between the ambitions of global legalism and the realities of politics."[76] As states lose control over existing courts, they quickly establish more to retain authority.[77] There are numerous consequences to this fragmentation. First, international courts are stripped of their power, and the number and types of cases before a specific court are limited. In turn, the power of international judges is diminished. Professor Posner notes, "global legalism has lead to a system of judges without (or with greatly limited) power."[78] Considering the importance legalism accords to the role of judges, fragmentation defeats any legalist benefit a large international court system provides. Finally, this division of international courts poses institutional problems including "conflicting law, jurisprudential overlap, and forum shopping."[79] Global legalists hail the growing number international courts as the surest sign of their accuracy. Nevertheless, it reflects an actual decline in the power of international law.

B. Lack of Compulsory Jurisdiction and Adequate Enforcement Procedures

Perhaps the largest barrier to effective global adjudication is the lack of compulsory jurisdiction. "International adjudication, however impressive in outward appearance, lacks an essential feature of adjudication that occurs *within* states: the absence of mandatory jurisdiction."[80] The root of this problem is simple—jurisdiction requires state consent. Therefore, state-interest influences the jurisdiction of an international court. However, "disputing states, whose interest and passions *are* engaged, need not consent to a panel's jurisdiction."[81] The solution to the problem, in Professor Posner's view, is to grant compulsory jurisdiction to international courts.[82] Unless and until international courts have the ability to bring unwilling states before them, international adjudication will remain an ineffective and diluted defense for international law.

Equally damaging is the lack of sufficient enforcement procedures. Even if an international court can clear the difficult hurdle of establishing mandatory jurisdiction, any judgment they order will be opposed during enforcement. Domestic courts garner support from powerful executive and enforcement bodies. On a global level "there is no such international enforcement agency on which courts can depend, with the limited exception of the Security Council, which has never shown any inclination to enforce a judgment of the International Court of

75. POSNER, *supra* note 1, at 173-174.
76. *Id.* at 151.
77. *Id.* at 174.
78. *Id.*
79. *Id.* at 167.
80. *Id.* at 33.
81. POSNER, *supra* note 1, at 133.
82. *Id.*

Justice."[83] The consequence is that only wealthy and powerful countries can receive the full measure of the decision of an international court. Posner stipulates,

> While formally a weak country can bring a case against a powerful country, the remedy available is limited to authorization to use self-help. But small countries cannot harm big countries by closing their markets to them; they can only hurt themselves by doing this. The remedy thus has value only for powerful countries, both with respect to their relations with each other and with small countries.[84]

Acting without the benefit of legitimate and powerful institutional support, international courts simply cannot achieve one of their major goals: compliance with their decisions.

C. Lack of Institutional Safeguards

Domestic courts, particularly in the United States, benefit from institutional safeguards that protect the legitimacy of the law and the courts. According to Posner,

> [N]umerous institutional safety valves ensure that bad judges have limited influence on people's behavior. When judges misinterpret laws, legislatures can amend the laws so as to eliminate the misleading ambiguities; executive officials can also intervene in court to argue against bad interpretations and soften their impact by modifying enforcement priorities. Multiple layers of review by appellate courts, the possibility of collateral challenges, redundant civil/criminal claims, presidential and gubernatorial pardons, paneling, and so forth, ensure that incompetent or biased judges have limited impact. The ultimate check on judicial abuse is the political system. The government can investigate and impeach judges; it can strip the judiciary of jurisdiction; it can defund the judiciary and harass it in other ways. In most American states, state judges are disciplined by electoral pressures or the threat of nonrenewal by the governor or legislature. In the United States, the balance of power between the judiciary and the other branches has worked over two hundred years.[85]

Such safeguards are noticeably absent from international courts. "No analogous world legislature can modify the law in question; instead, states must convene an international convention which must operate by consensus."[86] As a result, international judges have dramatically reduced power to make important and necessary policy decisions. While "domestic courts can make policy and assert their power . . . because of government safety valves," international courts lack the

83. *Id.* at 34.
84. *Id.* at 156.
85. *Id.* at 165-166.
86. *Id.* at 166.

institutional support necessary. Moreover, this tension leaves the international community with "no hierarchical structure to ensure uniformity in the law."[87]

V. CONCLUSION

At first glance, global legalism is an appealing solution to complex global problems. However, it does not withstand the challenges of global reality. Legalist ideals are not easily translated to international law. The tremendous heterogeneity of the global population, and lack of international institutions to define and enforce international law prevent legalism from working on a global scale.

Absent strong enforcement institutions that have the capability to ensure compliance, countries will only comply with international law when it aligns with their self-interest. In *The Perils of Global Legalism*, Professor Posner forcefully rejects the notion that compliance can simply be presumed. He notes from the beginning, "[i]f this book has a single theme, it is that politics, idealism, and careless thinking conspire to produce a picture of international law that bears little resemblance to reality."[88]

The collective action problems our world faces are very real. They have the potential to impact the lives of citizens in all corners of the globe. Though optimistic, global legalism is poorly matched for strong rebuttal of Professor Posner. He concludes *The Perils of Global Legalism* arguing that states will continue to act in their self-interest. "Only those who have lost sight of the geopolitical interests of nations and have mistaken the legalistic rhetoric of Europe and the United States for reality can be surprised by those events. Those people will continue to be unprepared to address such events as they occur."[89] Global legalism's hopeful and optimistic approach to solving global problems is laudable. However, failing to acknowledge the practical impediments to global legalism ignores the pernicious consequences that surely follow.

87. POSNER, *supra* note 1, at 150.

88. *Id.* at xv-xvi.

89. *Id.* at 228.