

Are We Teaching International Law or US Foreign Relations Law?

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Mark Wojcik: Our subject comes at the 35th anniversary of Lou Henkin's book on *Foreign Affairs and United States Constitution*. It established foreign relations law as a distinct area of scholarly study and it has developed over the years into something that we now recognize more or less as a body of law with established rules. There are differences that people might recognize between foreign relations law and other types of law. Phillip Trimble pointed out three of them in his book called *International Law, United States Foreign Relations Law*, a confusing title for purposes of this panel. At first the legal disputes in foreign relations law are usually decided between political actors rather than private parties, so we'll see the Senate or the Congress or a congressional committee going against the president. And we've seen, even in the last weeks, talks of a constitutional crisis, when we know that there's no constitutional basis for the text that is giving rise to the crisis. A second is that the disputes are resolved in a political forum rather than in a court. The president might veto legislation, he might sign legislation, or he might do something in between like coming up with a signing statement that says "Yes, I'll sign this but come up with my own interpretation of it." Which leads to the third distinction: that parties who are making these laws are also reserving the right to interpret them and denying that others have the right to do so.

We have four panelists and a good sized audience for an interactive discussion, so this is going to work out really well. Our speakers are Craig Jackson, from Thurgood Marshall School of Law, Margorie Cohn from Thomas Jefferson, Mary Ellen O'Connell from Notre Dame, and Ved Nanda from the University of Denver. Our four speakers will make brief comments of about five minutes each, and after that we'll have some initial questions, roundtable format, and after that we'll invite your questions. Then we'll allow each of the panelists to have a concluding comment at the end.

Our first speaker is Craig L. Jackson and he is a professor at Thurgood Marshall School of Law at Texas Southern University, where he's co-director of the Institute for International and Immigration Law. He teaches a number of courses including first amendment law, contracts, and international trade regulation, international insolvency, constitutional law, and teaches both public international law and foreign affairs and the constitution. He was previously the assistant city attorney for the city of Houston, until he left that job to take a position as a research assistant with the American Society of International Law. He has also been the former attorney advisor for the Office of Import Administration in the U.S. Department of Commerce.

Craig Jackson: I don't think we're teaching U.S. foreign policy law as international law, but I'm not uncritical of the way we teach it. At times I think the lines get blurred in the minds of students new to international law. Some casebooks do have a chapter in them called 'U.S. courts and international law' or 'international law and the constitution.' And to an international law scholar, to us, we can tell the difference. The difference is readily apparent between those chapters and the rest of the casebook. But I

wonder if in the mind of a law student the difference is quite so easy to discern. Let me attempt to define U.S. foreign relations law, U.S. foreign policy law, U.S. foreign policy and the constitution law. Various names, but I would divide it into two parts. One is foreign relations from a structural constitutional perspective. Who has the power? How is the power delegated or shared between the legislature and the executive? And the proper role of the courts in ruling on actions by the other two branches or between the other two branches. Then there is that part of the subject matter that focuses on U.S. approaches to international law questions, and how those positions are articulated as official positions, as law, as analyzed by the courts, or as articulated by congressional statute.

Now, Henken's and Lori Damrosch's text focuses her on the big public international law matters such as treaties and international law organizations. Of course, within particular specialty courses on international law, other areas of U.S. international relations law can be explored. Now, our discussion today no doubt addresses the second part of the subject matter, that is, US approaches to international law questions. And, I suppose, an emphasis on official positions. Several points are useful in this discussion, and I have little doubt that the United States position on, say, expropriation and compensation—the so-called Cordell Hull position of prompt, adequate, and effective compensation, meaning market-value—is believed by many law students to be the end-rule in international law. It probably does not so qualify, in fact or in perception, as the end rule in international law, especially in the minds and positions of developing countries, especially Latin America, though Mexico does seem to have capitulated on this issue by their membership in NAFTA. This perception persists despite the fact that there's disagreement on the issue that was acknowledged forty years ago in the *Sabbatino* case. Perhaps the reason for this is that U.S. law school train students to work in U.S. law firms, our government, and our government enters into BITs, which do in fact apply the Hull standard. As a result, the emphasis on training would logically be on that standard.

US statutory law also pushes legal training in the direction of U.S. foreign relations law. Because of our dualist system, it is fair to say that much of what is taught is statutory, and much of what is taught in US court decisions is statutory. You can't teach a course in international trade, for example, without some or a lot of focus on US international trade law. We teach the WTO for good measure, but for students to get employment in the field, a solid grounding in US trade statutes is a must. Now I used to practice international trade law for the government, and I know that there are significant differences. What does a law student know about this? What did I know about it when I first started practicing international trade law? It was fairly little. Also because of our dualist system, our courts tend to focus on United States foreign relations law, as opposed to unadulterated international law, or, as coined in a forthcoming article in the *Stanford Law Review* by professors McGinnis and Somin, "Raw" international law. For reasons having to do with everything from deference to the executive to a fundamental, philosophical, Scalia-esque disapproval of the incorporation of international law in U.S. court decisions, U.S. courts, when confronted with international law, do not provide a satisfactory analysis of international law in general. There are exceptions. And many of the notable cases find their way into U.S. international law textbooks. What message does this send to students?

Citations to the Restatement of Foreign Relations Law in texts can also be an issue. Though not totally a compendium of official US foreign relations positions, it does reflect an American view of international law that is usually consistent with the State Department's position. And I have seen references to it as affirming positions of international law. I have never seen it referred to as the end position of international law, to be fair. However, can international law students not get the impression that the positions and the Restatement, like the other restatements that they're inundated with in common law courses, provide the definitive, at least default position, on international law? And would one expect to find a reference to the US Restatement in a British international law book or an Indian international law book? Of course not. But I see students use the Restatement in papers and Jessup oral arguments, the latter frequently without interruption of the judges, typically at the regionals. This is not scientific, but I do not think that the students are fully appreciating the lines of demarcation that I believe the texts try to make and certainly the professors are making in lectures. So essentially I do think that there are lines of demarcation that are made, professors are trying to be clear on this, but I do think the integration of US foreign policy issues in the basic public international law texts, are perhaps a reason for some confusion, not to mention some of the emphases that we see in teaching international law. Those emphases being on certain aspects of US foreign policy. I think, structurally, our system being dualist, I believe that because of a lot of what students are seeing is statutory and that turns out to be US foreign policy law.

MW: Thank you professor Jackson for reminding us that the United States has had an influence on the creation of international norms—and you specifically mentioned the BITs—that the influence of the Restatement of US Foreign Relations Law has appeared in foreign court decisions and academic scholarship and advocacy training, and that the need to function in the international world often depends on a close understanding of US statutes.

Our next speaker is Professor Marjorie Cohn who teaches evidence, criminal law, criminal procedure, and international human rights law at the Thomas Jefferson School of Law in San Diego. She's presently in the middle of a three-year term as president of the National Lawyers Guild, an organization with more than six thousand members. She's the author of *Cameras in the Courtroom: Television and the Pursuit of Justice*. Her latest book will come out in July, it's called *Cowboy Republic: Six Ways the Bush Gang Has Defied the Law*. You can get more information about that and her other writings at marjoriecohen.com.

Marjorie Cohen: Last year when I was at the AALS conference—the American Association of Law Schools conference in January—I had occasion to ask Justice Breyer a question during a roundtable at Georgetown Law School with the Dean. And I asked him about why the Supreme Court doesn't use treaties ratified by the United States, which are part of US law, in its decisions. And he answered my questions by talking about foreign law. He talked about the law of Canada and the law of the countries of Europe, and he really didn't get it. And he has even cited treaties on occasion in some of his opinions. Let me give you an example of why this is so prevalent at the highest level of our judicial system.

There is a case decided by the Supreme Court in May of 2003, it was called *Chavez vs. Martinez*, and in that case the US Supreme Court was presented with a golden opportunity to discuss the issue of torture and mention the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, which is a treaty that has been ratified by the United States. It was a 14 USC 1983 claim against the police. The facts were egregious, as I'm going to tell you very briefly. Oliverio Martinez was riding his bike to his girlfriend's house when he ended up in the wrong place at the wrong time. Two police officers who were investigating a burglary in the area ordered him to dismount, spread his legs, place his hands behind his head. They frisked him, they found a knife, and altercation ensued. Mr. Martinez was shot five times, leaving him paralyzed and blind. On the way to the hospital and in the emergency room, Officer Ben Chavez repeatedly interrogated Martinez, and in response to Chavez's questions about what had occurred in the altercation with the officers, Martinez said several times, "I am dying, I am choking." At one point Martinez told Chavez, "I want them to treat me." And later he asked, "Are you going to treat me, or what?" The district court found that Martinez had been shot in the face, both eyes were injured, he was screaming in pain, coming in and out of consciousness while being repeatedly questioned about the details of the encounter with the police. Martinez admitted taking the officer's gun and pointing at the police and admitted he used heroin. At no time did Chavez Mirandize Martinez, who was never charged with a crime. The 9th Circuit Court of Appeals sustained both of Martinez's arguments—in order to sustain a 1983 claim he had to show some constitutional violation—that his Miranda rights privilege against self-incrimination and his due process rights had been violated.

The Supreme Court was so fractured it produced six separate opinions. Six justices agreed that Martinez couldn't recover against Chavez for a Miranda violation because he was never charged with a crime, and five punted the issue of the due process violation back down to the lower courts. Three justices—Stevens, Kennedy, and Ginsburg—discussed the case with reference to torture, and even Thomas mentioned torture. Stevens felt so strongly that Chavez's conduct rose to the level of torture, that he began his separate opinion with these words: "As a matter of fact, the interrogation or respondent was the functional equivalent of attempting to obtain an involuntary confession from a prisoner by torturous methods." None of the justices mentioned the Convention against Torture.

In spelling out the fundamental law of the United States, the US Constitution three times emphasizes international law. Article 1, Section 8, clause 10 says Congress shall have the power to define and punish offenses against the law of nations. Article 6, clause 2 explicitly says that a treaty is the supreme law of the land, to be enforced by federal and state courts. And in article 3, clause 2, it says the judicial power shall extend to all cases arising under treaties made and to be made. We have to begin with the Supremacy Clause. The Supremacy Clause says that treaties are US law, and the way I actually got myself on this panel totally unwittingly is that I was in the audience at the last AALS conference, and made this statement quite clearly. And then, of course, Mark passed me a note and asked me if I wanted to be on this panel. When we talk about treaties ratified by the US—when we talk about customary international law—we are talking about US law. We are talking about domestic law. We're not talking about international law. And that's the most important thing to keep in mind. Our

administration has utter disdain, not just for international law, but for US law as well, in every facet, every statute. Don't get me started on that. But that trickles down and it trickles up. And certainly if you look at Justice Breyers response to my question—total misunderstanding of my question; I even did a follow-up, he still didn't get it—that view, that international law really does not relate to our law, and Justice Scalia is one of the prime culprits in this. It trickles down into the courts, into the lower courts, into lawyers, and also trickles up to the Supreme Court.

When the US ratifies a treaty, it undertakes an obligation not just to abide by the requirements of the treaty, but also to publicize the obligations of that treaty among the population, at the federal, at the state, at the local level. When I come into my international human rights course, or my criminal procedure course—in both courses I mention treaties—I talk about treaties in criminal procedure when we start talking about confessions; I say there are four different attacks on confessions: there's Miranda, due process, right to counsel, and the Convention against Torture—I ask how many people have heard of the International Covenant on Civil and Political Rights, and the overwhelming majority have never heard of it. They don't know that when we ratify a treaty we undertake an obligation to report to the treaty body—that's explicitly in the treaty—about our compliance or noncompliance with that treaty. And so we're not just talking—and it's not just a *just*—about how we're torturing prisoners in Guantanamo or in the CIA black sites or committing war crimes with torture in Iraq, but we're also talking about prison in the United States, where incredible torture takes place. We need to educate our students about what parts of international law, including customary international law, are US law, so that they can use these laws in the courts and thereby educate judges, and eventually the Supreme Court will take heed as well.

MW: Thank you professor Cohen for your insights on Justice Breyer and other jurists who may confuse international law and foreign law. I had the opportunity to spend a weekend with Justice Breyer in London and Paris on an ABA briefing trip where he had to answer the question that he answered for you about 40 times at different venues—and the answer, in English and French—it's good to have jurists who can speak other languages. You have reminded us that judges do not take the time to cite treaties when they have the chance to do so. I believe it's probably a function of lawyers and academics to remember our own duty to cite these treaties in our briefs, even if it only happens to be an amicus situation, and to remind judges that when they take their oath of office, they swear to uphold the Constitution, including Article 6. It's also probably the rare teacher who would bring up the IC CPR in a criminal law class, so I congratulate you for that, as well.

Our next speaker is Mary Ellen O'Connell. She is the Robert and Marion Short Professor of Law at Notre Dame Law School. She was previously the William B. Saxbe Designated Professor of Law at Ohio State University. She is the author of three casebooks, four edited collections, and sixty articles. That's what we call, at the American Society of International Law, the Ved Nanda starter kit. She is active in ASIL and the German Society of International Law and the International Law Association. Her research and teaching focuses on the use of force and peaceful settlement of disputes.

Mary Ellen O'Connell: First I want to congratulate our audience for coming to this panel and anyone who is listening to the tape we are making because I know you had other options, but I think it is at this panel where we are truly dealing with the future of international law, the theme of this conference. The future of international law is tied up with what we teach to our students today. They will take what we teach now into the future as practitioners and as the guardians of international law. So if we can figure out how we can do a better job of teaching international law maybe our students will be writing the implementing legislation for the Kyoto Protocol. Or be the ones drafting indictments of persons involved in an extraordinary rendition, torture, and cruel and abusive methods of interrogation. Or even, as Judge Cançado Trindade mentioned last night, be the ones to renew the U.S. commitment to compulsory jurisdiction of the International Court of Justice. Everything I just mentioned sounds extraordinary, doesn't it, like some impossible future. Yet each of these possibilities has been a recent commitment of the United States. The fact they sound extraordinary means we need to do our job as international law teachers better.

Mark's question implies that we may be spending too much time in our public international law courses on U.S. foreign relations law to the detriment of international law—that we could do a better job by focusing more on public international law. Marjorie and Craig just spoke on why it is important that our students understand the place of international law in the U.S. legal system. I agree with that, but I do suspect we are spending too much time in the public international law course on what is really another subject—U.S. law, or U.S. constitutional law. Right now, according to David Bederman's 2004 survey of the leading casebooks, we are teaching a lot of U.S. foreign relations law in our public international law courses. This is especially true if you use the Carter and Trimble book, which probably has more on this topic than any other leading book. I think there are at least two downsides to devoting so much time in the introductory public international law course to U.S. foreign relations law. First, as Oscar Schachter said, and as is seen in the Damrosch, Henkin casebook, international law is a full curriculum of law. It is a full legal system that we try to teach in one three hour course—what we do with U.S. law over three years, we do in one course: the complete law-making apparatus, the complete law application system, and the complete law enforcement process. Not to mention that this is not the law the students had introduced to them in their first year, so we also have to explain to them why international law has power, why it has authority as law. I think we also have to explain what its purpose is, something about the international system, and what we can accomplish through international law. We have to do all of this in the public international law introductory course.

The second and probably more important downside to spending a lot of time on U.S. foreign relations law in the introductory public international law course is that we risk skewing our students' understanding of international law toward one where the U.S. has predominance in the system, something I think some of us really try to avoid in teaching international law. If we are spending so much time in the course on one country's law—the United States—it may give students the sense that the U.S. is more important than the other 191 members of the UN, which under international law, have equal status with the U.S. All states are equal before the law. If we were teaching foreign relations law in an ideal way we would spend time on each country's place in

international law system; or at least a good amount of time on representative systems, but we tend not to do that. So we may in fact be adding to the impression that the U.S. is more sovereign than others, has a special status, because in our public international law course, which is supposed to be looking at the world's legal system, we spend so much time looking at the U.S.'s legal system.

Of course there is a problem in saying to our colleagues teaching constitutional law, civil procedure, or even conflicts of law, "Please, you should really be explaining to our students the place of international law in the U.S. system. It is part of our law," and handing them the *Paquete Habana* case and the Constitution with Article 6 underscored. The problem in doing this—and you can survey your colleagues—is that while they might be willing, our colleagues, like our judges in this country, just have not had an education in international law. It is stunning to me how many times I get the question that Marjorie posed to Justice Breyer. Colleagues ask me, "Oh, can you tell me about French law on this point?" French law? I do public international law. It is part of US law. I can understand that you do not know what the French law on point is, but neither do I. I do not teach French law. So we have a problem, and even if our colleagues were to go to the law reviews to try to educate themselves on what international law is in the United States, what its role is, and so forth (except for a wonderful new article I can recommend by Ingrid Brunk Wuerth in the *Michigan Law Review*) there is a lot of wrong-headed stuff in the literature. There are many articles written by folks with an agenda to ensure that international law is not a law of decision in our courts or by our policymakers. These writers are making, I believe, erroneous and detrimental arguments about what international law is and its place in US law. Do you know that there are some law professors out there who think that there are virtually no self-executing treaties? It is very odd, but that view is out there.

I am not exactly sure at this point what we should do. I don't think that those of us with a good grounding in public international law can leave U.S. foreign relations law completely out of our public international law courses. But I am personally going to look at cutting back on how much I am teaching in my course. I'm going to try to add more theory to give my students a better foundation to explain to judges, partners in their law firm, and others why international law is authoritative; why it is binding, what it shares with domestic law. International law, in fact, has the same foundation as domestic law if we look at Kelsen or any of the other great theorists.

I also hope to add a unit on ethics. I have been influenced by a wonderful recent article by Richard Bilder. He writes, "International law is a calling, not merely a profession. The international lawyer has the unique privilege and responsibility of sharing in the enterprise of helping to bring the rule of law to relations among nations." And Martti Koskenniemi's recent and highly perceptive article says this: "If, for Kant, the transition from the realm of nature to the realm of freedom in a kingdom of ends takes place through law, this transition depends less on the inner force of external legislation than on the moral rectitude of those whose task it is to apply it. In this perception jurists, rather than positive rules, become law's nucleus, as educators and enlighteners." So who our students are, their moral stance vis-à-vis international law, is what is going to determine international law's future more than any new rules, any new treaties, I think that is something we need to start paying attention to in our courses.

MW: Thank you Mary Ellen for refocusing our attention on the future of international law as resting in our students, that we have an obligation to train the future lawyers that will be called to implement and advance the rule of international law, and that we cannot look at the law of just any one country. It's interesting to look at how many of our colleagues have had a course in international law, and how equally few judges have had any training in international law. I recently saw an ASIL publication on international law for judges, and I believe it's for sale outside in the book display, and I'm sure that Rick would like us all to purchase copies of that, but you can probably work out some deal—if you become a silver patron that you get a free copy. Foreign relations law is either a necessary evil or a necessary good—we don't know which—and you've suggested some changes that you anticipate making. But hold off for another hour when we finish the panel and see if you still have the same ideas, because we're going to continue the discussion.

Our next speaker is Ved P. Nanda. He's the Vice Provost for Internationalization, the Thompson G. Marsh Professor of Law, the John G. Evans Professor, and the Director of the International Legal Studies Program at the University of Denver's Sturm College of Law. He's taught at the University of Denver for more than forty years, he's a former honorary vice president for the American Society of International Law, an honorary president of the World Jurist Association, and an elected member of the American Law Institute. He serves with me on the section counsel of the American Bar Association's section on international law. Last year he was honored by a one million dollar gift by alumni of his law school who began the Ved Nanda Center for International and Comparative law. So he is our own one million dollar man. He has authored or co-authored 22 books and 180 book chapters and a lot of other stuff.

Ved Nanda: Thank you very much Mark. The nicest thing is that the million dollars is almost matched, and that is by former students. And that is overwhelming. It's not the law school, it's not the university that put in that money, but former students. And I'm very, very delighted and proud and overwhelmed.

I have about nine, ten students from the college of law at this conference, and I thought that they were all smart, because nobody came here, but there is one here, so he can testify to what I'll say. Mark has asked many critical questions. He focused on foreign relations law, but also we'll look at international law and what we teach and what we ought to be doing. I have, as many of you have, and many other schools do, we have about forty courses in the international law area. The public international law is the one basic foundation course that I jealously guard and I want to teach it. We teach it about four or five sections in a year, and one section that is probably the biggest section I do teach. We had more than a hundred students in it. So the problem that I find is that the three hour course, which is the only foundation course—what should we cover in that basic international law course? When we think about public international law, I think that the public and private distinction that was fuzzy before is practically at the present time gone. And if that public and private distinction is not very clear, not very bright, and a student who is going to take a course in international law is simply going to take one course—some of them will probably take many—but if there is a person who's going to take a single course, what should I be teaching him or her? In my class, out of those

hundred-plus people, most of them are Americans. They are going to practice here or they are going to work in this country, and maybe very few will practice. But they need to be exposed to international law issues, and here I think I agree with all of my colleagues that those of us teaching international law cannot afford not to teach the foreign relations law of the US. The question is, how much and in what way. Because as I think about the audience, that I mentioned is mostly American, and my desire to decide what in three hours should I teach, then I think that I have a problem. What about some parts, or at least an introduction, to international economic law? What about the law of the sea? What about international human rights law? There are plenty of other areas that I could mention, but for example, in our own concentration, I do want people to have basic international law course, but then I would like for them to have either international trade or international business law. I would like to have them have comparative law. But in that basic international law, how can I teach the course without introducing them to the Act of State Doctrine? Without introducing them to the Foreign Sovereign Immunities Act? As the public/private distinction is kind of passé—no longer clear and sharp—similarly, because of globalization, which is a juggernaut, and cross-border activity that has grown considerably, and our students are going to be dealing with those issues, I can't avoid delving into extra-territorial application of United States law. I have to tell them what the US does in anti-trust, in securities, in many other areas. How can I not introduce them to some international norms that are international relations kind of norms and international relations rules? And international comity, as I mentioned, act of state, foreign sovereign immunity. I have to begin with them and not simply ask my colleagues to do that, but talk about *Paqueta Habana*, talk about *Charming Betsy*, talk about these canons, that extra-territoriality is not to be presumed, and that statutes ought to be interpreted so as to avoid conflicts with international law. That legislative enactments are to be construed as consistent with international law. I think the point simply that I wanted to make is that US foreign relations law is an integral part of the public international law that I would teach. I would very much agree with Mary Ellen O'Connell. Prof. O'Connell always has very wise and insightful comments—how much I teach is an issue that I need to look at. Because underpinning all these doctrines that are going to be introduced dealing with international human rights norms, but with Act of State, Foreign Sovereignty Immunities Act, *Charming Betsy* and all the kind of international norms. Whether it's *Sosa* or other Supreme Court cases, I think underpinning these cases are principles that we need to bring to their attention. We need to convey the message that the United States—which may be a country which at the present time wields power disproportionate to any other sovereign entity on this planet—needs to show a certain deference to other sovereigns, so as not to cause or exacerbate international tensions with foreign others, or to look at least at the cost-benefit analysis of all that. Even if it's not formally done, our courses need to do that. I think I need to introduce them in my basic international law course and to show how legislative, judicial, executive power in this country is exercised in conformity with international law.

MW: Thank you Prof. Nanda for reminding us of the blurring of public and private international law, especially as private actors are more important players in public international fields, and for admonishing us all that we can't afford to ignore foreign relations law in an international law elective, it's just a matter of how much we have to

devote to that. I have a series of questions that I've circulated previously to the panel, and I'm inclined to go toward the more difficult ones right away, and we'll also get the audience involved at an early stage, but let's start with—why should this question of foreign relations law fall on international law professors? Why should this not be something that's taught in constitutional law courses instead of international law courses?

VN: I think Mary Ellen answered you that at the present time many of our colleagues are not really sensitive enough and they haven't had the training in the international area. How many teachers, my colleagues, even in contracts, do not have any inkling of the UN International Sale of Goods Convention? How could you teach contracts without it? But even at this time, I bet you that there are plenty of them that are not familiar with it. And similarly, in area after area where you'd find international norms to be prevalent, they don't know them, and therefore at the present time I would not count on their being able to provide that kind of sensitivity that we do.

MEOC: I absolutely agree, we've gotten to the point—and some day I'd like to do a study of how we got to this point—where so few of our law faculties have this expertise in public international law. I think it's an interesting story; I have a few theories about it. But that is where we are. We have to cope now, and we have to get started on a solution.

MW: Share one of those theories if you would.

MEOC: I think it has to do with the move to interest in teaching civil rights law in the 1960s which was paired with certain theories in international relations, propounded in particular by Hans Morgenthau, that international law is not of interest to a superpower. As Morgenthau's students became policy advisors, international law was just an obstacle, a straight-jacket that kept us from pursuing power which Morgenthau said is man's destiny. So unfortunately we're the inheritors of these two trends. We're at a point where we have a dearth of public international law expertise in our faculties, and, then, as a result, in our students and in the wider legal community, but good things are happening. The University of Michigan really led the way with a required course. Hofstra and Harvard are also doing something along these lines. As this trend grows, our students will have more awareness, and we will be able to turn to our colleagues in the future and put this law where it belongs in the curriculum. The public international law curriculum will just grow and grow, so I think this needs to happen. I would love to hear from our audience on this, too. How much can we teach the teachers? Are your colleagues open to having some kind of in-house CLE to actually try to point them to what international law is and turn over the teaching of the Charming Betsy Doctrine—I mean, that should be in a federal courts class. But it is not. I would be curious to hear what you think. Many of our colleagues seem to not want to learn international law. There seems to be resistance. Even though—and this is one positive thing I can say about the current moment of crisis—international law is certainly in the headlines. Maybe this is the moment when more will say, look, we really do need to know international law because it is part of U.S. law. It might be the moment to start introductory courses on foreign relations law for our colleagues.

VP: At least they want to know about the Geneva Conventions.

MEOC: They sure do. But maybe not about the customary international law status of Additional Protocol 1 of 1977's Article 75 on fundamental guarantees owed to all?

MC: I think we're talking about two things. One that Mary-Ellen was talking about, which is educating our colleagues now. But two, if we actually start to make international law compulsory, and in fact the National Lawyers Guild has gone to the California State Bar Convention on occasion and asked to have international law tested on the bar, then it will also come up eventually, future colleagues will know about international law.

MW: What was their response, if you're able to share?

MEOC: None of them had a course in international law, so they are afraid they wouldn't pass the bar themselves.

MC: Exactly. So when we're talking about teaching international law, we're not just talking about in constitutional law and federal courts, although that's important. But we're talking about contracts, we're talking about conflicts of law, we're talking about criminal procedure and immigration and labor law and family law and death penalty law and environmental law. International law permeates almost every area that we teach, so this is really key, to try to get that into the curriculum, get that into the minds of our colleagues. I have many colleagues who teach international law, but I don't think that those colleagues, who maybe also teach civil procedure or another doctrinal course, see the connection, as far as I know. Some of them might, but I'm not aware of that. And I think that's what we have to move toward.

MW: You teach a course in international human rights law and not the public international law course. Are there students who will take just your course in international human rights without the foundational, larger—

MC: Yes, there are. And the book I use is Henkin, et al, and it's called *Human Rights*. It's not called International Human Rights, it's called Human Rights, and I actually thought about changing my course to be called Human Rights instead of International Human Rights. There's a lot more in that book than just international human rights.

MW: I have to say, when I taught the course using that book, I also included a section on our state human rights act and how to function with that.

MEOC: Can I ask Marjorie a question about that—do you think it might help if we move to specialized international law courses, for which students have an international law prerequisite? Would that not send the signal that international law is important and foundational, and then when you teach human rights law, you can expect the students to know what a treaty is, know what the Vienna Convention interpretation rules are, know what *jus cogens* means? You can go to a higher level. Have you thought of doing that?

VN And I might just mention that we do have a requirement, but occasionally it's waived, but the requirement is basic foundational international law for those courses.

MC: To answer Mary Ellen's question, I think that's a good idea. We don't have that now. I actually give a lot of that introductory material when I start out, and if students already had that basis it would be helpful. It's something to consider.

MW: Professor Jackson, you teach International Law and US Foreign Relations Law. Are the students the same who take those classes? Do they take both? Do they pick one or the other? Why do they take one course versus the other course?

CJ: I'd say probably half in my foreign policy course have taken international law.

MW: Will they do that before or after, or is it just a matter of happenstance?

CJ: It's a new course that we're offering, and I've taught it two or three years now and I haven't really kept up with each of the students, but I know that we have a certificate program at Thurgood Marshall, and students who want to get the certificate have to take a basic course. It's not a prerequisite system, because not everybody is going for the certificate, but a good number of students are going for a certificate, and therefore have to take one of the basic courses. Ours is an international and immigration law program, so they have to take one of the two basic courses. But that does provide a little bit of continuity in the upper level courses. As far as foreign relations law is concerned—like I said earlier, there are two sets of issues. One is the role of government in the branches and how it deals with foreign relations and the role of treaties and what have you. In other words, the constitutional stuff that Professor Cohn was talking about. And then there is the US position on various international law issues. To critique that sort of thing, you have to be an international law specialist. I don't think, though, that you necessarily have to be an international law specialist to teach the constitutional dimensions of foreign relations law. One is basically talking about who has the power—we're talking Youngstown, to a large extent. And now Hamdan. Essentially, that can be taught, and the problem we have is the amount of time we have in American law schools to teach this stuff. We have three years and a three hour course and that's difficult. My bias—I teach constitutional law also—and between equal protection, which is heavily on our bar in Texas, commerce clause, and then the executive and the judiciary, I'm really strained. I will always do *Missouri v. Holland*, but I got to get off that pretty soon so I can get an equal protection course, because there's not a *Missouri vs. Holland* or a *Reed vs. Covert* case anywhere on the Texas bar, but a whole lot of equal protection. So that's the problem that we have in the American legal system—so much of what's needed in constitutional law doesn't give a lot of time for teaching the foreign relations materials. Then there is a course that not everybody's going to take. It would be nice if there were some way to get this in the constitutional law class so we can get all of our students learning about at least foreign relations law within the constitutional law class. If so, we could take it out of international law, leave it alone, put it aside, and focus on a pure international law class.

MW You do raise an interesting point about the possible incentive of a certificate, that law schools might adopt this as a program to encourage more students to take more international law courses—would you encourage other schools to start a separate class in foreign relations law?

CJ I would, most definitely. Because that's the only way you're going to get any decent treatment. Even though it's taught in the international law classes, the Trimble text—that has a lot of foreign relations law in it. Even though it's taught in some of the international law classes, I really think you can't get all the material, it's a huge course, a huge area of study that needs to be focused on independent of public international law.

MEOC: I am wondering, Craig, whether instead of using energy for developing certificate programs, if now is not the moment to begin persuading our colleagues to add some kind of requirement in the international area? Through that required course we can indicate to students how much more there is, what a rich and important area international law is. We have examples where this is happening and many of our colleagues are seriously concerned about the obvious and ugly breaches of international law that have occurred through the advice of lawyers to our government officials. We might be at a moment where we can really do some constructive and innovative curriculum development in our law schools. I think this is what the international law faculty at Notre Dame would like to try rather than a certificate program.

CJ: I think you're right that as a required course it would be great, that would solve a lot of my problems.

VN: I would say three things. One, a required course. Second, as Mary Ellen said, try to have other people also feel the importance of this particular subject. But also, a certificate—I don't think they're mutually exclusive. But the third part I consider very important is that our colleagues from property to family law to almost all areas of our domestic law, that they introduce some international components in them. We had a colleague who just came in, working on transnational part, and I think that is really important.