

PREFACE

Yale's Global Constitutionalism Seminar began in 1996. We thus continue the discussions and traditions launched under the leadership of Paul Gewirtz, Anthony Kronman, Robert Post, Bruce Ackerman, and Jed Rubenfeld and through the administrative abilities of Pascale Mathieu.

This year, we move from New Haven, Connecticut, to The Hague. We do so to honor the one hundredth anniversary of the founding of Carnegie Corporation of New York and to celebrate its sibling institution, the Carnegie Foundation, and its superintendence of the Peace Palace. Thus our travel recognizes the global aspirations of Andrew Carnegie who, in the early part of the twentieth century, supported the construction of an international institution in the hopes that its name would forecast the trajectory of the decades to come.

Our topic, *Law's Borders*, fits our venue. Our first subject is the relationship between the law of war and the law of crime, in a session co-chaired by John Fabian Witt and Aharon Barak. The readings raise fundamental questions about what roles courts play in affecting the contours and the content of war. The issues range from what law does or might say about practices such as "targeting" (killing) individuals that a country perceives to be its enemies, to whether rules governing the detention of opponents and the punishment of actions during war ought to resemble the legal regime governing the detention and the prosecution of criminals. Underlying is the question of whether war and crime are the only models or whether other models can be developed to respond to aggression and violence.

Thereafter, we turn to another set of boundaries, those that during times of peace delineate one jurisdiction from another, both within federations and unions and beyond. The chapters that follow engage the role played by the law of one polity in the courts of another. Given that we meet in Europe, we have excerpted both the April 2012 "Brighton Declaration," issued by the member states of Europe and addressing the relationships among member states, their courts, and the European Court for Human Rights (ECtHR), and the response by that court's president, Sir Nicolas Bratza. These discussions provide the backdrop for the chapters that follow.

We then take up specific examples of conflicts, tensions, redundancies, and coordination among courts, in part through debates about who has the authority to determine the voting rights of prisoners and access to abortions, examined in the chapter that Reva Siegel and I co-authored on *(Dis)uniformity of*

Rights in Federations and Unions. Questions of authority are likewise addressed in the chapter *Constitutional Pluralism and Constitutional Conflicts* by Alec Stone Sweet and Miguel Maduro.

Both segments examine ways in which federated legal orders authorize or prohibit variation in the recognition of rights. Courts have developed methods ranging from inquiries into consensus, efforts to categorize certain kinds of rules about human activity as belonging to a particular level of authority (described as competencies, subsidiarity, or federalism), and doctrines such as the margin of appreciation and proportionality. Questions emerge about the degree to which such methods guide or explain the judgments made. Constitutional pluralism takes up these questions in the context of direct conflicts of legal rules within affiliated jurisdictions and offers examples of one court concluding that another's judgment is not binding upon it. Both chapters explore the functions that such doctrines serve and the arguments (such as sovereignty, democratic self-creation, constitutional fidelity, and fundamental rights) made for their use. Central to these discussions are the values served by the redundancy and multiplicity of normative authorities, the utilities of dialogue, and the role of judges in shaping the boundaries of authority.

The next segment reflects on the diverse institutions that have emerged during the twentieth century to generate transnational norms, regulate transnational actors, and mediate conflicts. The Permanent Court of Arbitration is seated at the Peace Palace. The 1903 donative transfer for that building explained, "the establishment of a Permanent Court of Arbitration by the treaty of 29th of July, 1899, is the most important step forward of a worldwide humanitarian character which has ever been taken by the joint Powers, as it must ultimately banish war, and further . . . that the cause of the Peace Conference will greatly benefit by the erection of a Court-House and Library for the Permanent Court of Arbitration." The readings on arbitration, provided by Michael Reisman, bring the modern institution of international arbitration to the fore.

Institutionalism is also a central motif in the closing session, on *Law's Future(s): The Sustainability and Viability of Transnational, International, and National Courts*. These materials continue the critical examination of transnational institutions, as they explore the plausibility and desirability of international law. Once again, we return to the complexity of inter-jurisdictional judicial authority and the functions of sovereignty in and beyond nation-states. Discussants—Robert Badinter, Stephen Breyer, Sabino Cassese, Dieter Grimm, Brenda Hale, joined by Sam Muller—offer diverse vantage points from which to view the present and consider the options in the decades to come.

As editor, I take special pleasure in being able to thank those who made this volume possible. The readings for each of the sessions were selected and edited by the colleagues mentioned above, who gave generously of their time. As in the past, we have all received great help from other Seminar participants, who sent us suggestions of cases and materials. Moreover, our librarians, and especially Camilla Tubbs, enabled us to identify and gather sources that would otherwise be unavailable. As is our custom, the materials in this volume have been relentlessly pruned, and most footnotes and citations have been omitted. In somewhat of a departure from custom, we have included a few relevant photographs.

An important “but for” is that, without our student editors, the volume would not exist. We are the beneficiaries of the work of remarkably able students, including the Executive Editor, Travis Pantin; the Senior Editors, Blake Emerson and Andrea Scoseria Katz, and those joining the group this year, Julia Brower, Kevin Lamb, and Clare Ryan. These student-colleagues have been tireless in shepherding the volume to completion. In addition to their thorough research, editing, attention to detail, and management, we received thoughtful and insightful guidance from them.

A discussion of the content of this volume would not be complete without additional words about the context that brought us to The Hague. Yale’s Global Constitutionalism Seminar is enriched because, with the encouragement of Vartan Gregorian and Stephen Breyer, we are joining in the program sponsored by colleagues at Carnegie Corporation to mark and explore the legacy of Andrew Carnegie and the twenty-first century implications of the aspirations for peace to which Andrew Carnegie devoted his life. Moreover, given Andrew Carnegie’s insistence that the Peace Palace house both an open library and a court, we understand our work as continuing his insistence of the interdependence of knowledge and justice. Further, the invitation to The Hague has brought us into collaboration with The Hague Institute for the Internationalisation of Law (HiiL).

Our host, Steven van Hoogstraten, General Director of the Carnegie Foundation, has generously made space and time for us to join him at The Hague during a time of year that is not otherwise ideal. Stephen Del Rosso, Program Director for International Peace & Security at Carnegie Corporation, and Jeanne D’Onofrio, Chief of Staff and Operations of Carnegie, worked with us in coupling Carnegie’s conference plans and ours, to make the interlocking events possible. Sam Muller, Director of HiiL, has likewise been indefatigable in guiding the melding of our seminar and the Carnegie conference. Miguel Maduro helped in the planning, and we are grateful that President José Manuel Barroso of the European Commission joins us to discuss Europe’s challenges.

The person meriting yet additional thanks is Renee DeMatteo, who is Yale Law School's Senior Conference and Events Services Manager and whose insights, attention, and kindness guided each stage of the planning. Renee is the other "but for"; without her work, we would not be able to meet together at The Hague.

Finally, ideas, actions, commitments, and concerns make their way into the world because they are shared and because they are supported. We have the pleasure of thanking Carnegie Corporation of New York for its partnership this year, as well as thanking Peter and Patricia Gruber for their continuing sponsorship of Yale's Global Constitutionalism Seminar, which is a part of the Gruber Program for Global Justice and Women's Rights at Yale Law School. Peter and Patricia Gruber, like Andrew Carnegie before them, have a vision for the globe that aspires to a world more fair, humane, and just than that which we currently inhabit.

Judith Resnik
Arthur Liman Professor of Law, Yale Law School
June, 2012