Paul Stephan's academic interests lie in two normally separate fields, tax and international law. That unusual combination, together with Stephan's analytical, institutional approach, have made him not only an incisive and influential scholar but a valued advisor to foreign governments, the United States Treasury, and multilateral organizations.

Much of Stephan's early work applied economic insights to tax law. In "Human Capital and the Federal Income Tax," 70 Virginia Law Review 1357 (1984), he noted that some features of tax law that were traditionally viewed as departures from taxation of economic income—such as medical expense deductions and the exclusion of personal injury compensation—can actually be understood as rough adjustments for gains and losses in human capital, and therefore are consistent with taxation of income. His article "Nontaxpayer Litigation of Income Tax Disputes," 3 Yale Law & Policy Review 73 (1985), analyzed the costs and benefits of standing rules in the tax
area. Courts have been very reluctant to give standing to an individual to challenge a decision to impose, or not impose, a tax on someone else. This contrasts with more capacious standing rules in other regulatory contexts, and the distinction has drawn criticism. Stephan argues, however, that the complexities and ubiquity of the tax context makes such standing rules particularly costly and the distinction therefore makes sense.

While dealing with the intricacies of tax law, Stephan never abandoned his first academic interest—Soviet politics. He is a particularly astute observer of the internal conflicts that central planning creates. Mixing this interest with law, he became one of this country’s foremost experts on Soviet law. During the 1980s and early 1990s, his teaching partnership with Herbert Hausmaninger, University of Vienna professor of Roman law, legal history, and comparative law, made Virginia one of the few U.S. law schools to offer a course on Soviet law and institutions.

This teaching and research interest necessarily drew Stephan into international law, which was one of many battlegrounds between the West and the Soviet Union during the cold war. The Soviets developed a distinctive approach to international law that emphasized state consent as a prerequisite to the development or enforcement of norms. Meanwhile, part of the Western critique of the Soviet system was the claim that Soviet suppression of free expression and denial of public participation in political life amounted to violations of international law. The Soviets developed their own set of responses to these charges. Together with a Russian academic, Boris Klimenko, Stephan edited a collection of essays in 1991 on these conflicting visions of international law. The book, *International Law and International Security—A U.S.-Soviet Dialogue on the Military and Political Dimensions* (M.E. Sharpe, 1991), was published in English and Russian in both the West and the Soviet Union.

Approaching international law from a non-traditional background, Stephan was able to bring a fresh perspective to bear on what can be an insular field. In particular, he found the dominant themes in the literature insufficient to shed much light on the realities of the cold war world order. International law scholars discussed norms that supposedly governed state behavior with minimal attention to where the norms came from and without apparent concern for the fact that actual state behavior routinely failed to conform to those norms. Thus, Stephan’s relationship with international law changed from that of a consumer to that of a reformer. He came to be in the forefront of a movement in international law scholarship that applies the tools of political economy, in particular the theory of public choice, or interest-group politics, to the creation and maintenance of international law.

An early article in this vein, “International Law in the Supreme Court,” 1990 *Supreme Court Review* 133, staked out a position at odds with the dominant theme of public international law scholarship. The point of departure was a trilogy of much-disparaged Supreme Court cases with an international law component: *Argentine Republic v. Amerada Hess Shipping Corp.*, *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, and *United States v. Verduzo-Urquides*. Each case rejected a claim of the primacy of an international norm to a question of domestic statutory or constitutional law, and each was accordingly criticized by public international law scholars.

Stephan notes that the real significance of these cases lies not in their holdings but in the conception of international law that they appear to adopt. Much of the international law community regards international law in largely normative terms. Under that view international law is, as Stephan puts it, “a species of natural law—a morally unified body of precepts emanating from a basic conception of justice.” Stephan argues that the Court’s recent cases advance a different, and more realistic, view. International law is an outgrowth of bargaining and cooperation between governments, not an exogenous body of normative principles.

In the course of providing an insightful critique of the Court’s treatment of international law, Stephan set out a vision of what one might call the “Virginia School” of international law—international law as a system of self-enforcing restraints on sovereign decision making that exists because it is in the best interests of states to recognize those restraints. This view is also prevalent in the work of Virginia international law scholars Curtis Bradley and John Setear, as well as former Virginia professor Jack Goldsmith, who now teaches at the University of Chicago.

While pondering the nature of public international law, Stephan began teaching International Business Transactions, a course that led him to think more deeply
about private international law and those institutions—the GATT/World Trade Organization, the World Bank, the International Monetary Fund, and the Organization for Economic Cooperation and Development, just to name a few—that support the global economy. This led him to recognize that the nature of international law itself was undergoing rapid change. Where international law had once been a set of norms governing state-to-state interactions, international institutions today create regulatory and commercial law that directly affects citizens as they transact.

Stephan commented on this phenomenon in “The New International Law—Legitimacy, Accountability, Authority, and Freedom in the New Global Order,” 70 *University of Colorado Law Review* 1555 (1999). The article points out that as international law begins to resemble domestic economic regulation, it is all the more important that we employ the same tools of analysis that we apply to domestic regulation.

Thus one of Stephan’s current research interests is providing a careful political economy of international organizations. While applauding the accomplishments of these institutions, Stephan also explores their shortcomings, their tendency toward self-interested bureaucratic behavior, and the opportunities they present to well-organized interest groups to further their agendas on a global stage.

Stephan argues, in “Barbarians Inside the Gates: Public Choice Theory and International Law,” 10 *American University Journal of International Law & Policy* 745 (1995), that public choice theory provides a useful methodology for analyzing international law. Although, as he puts it, a theory that puts self-interest at the heart of lawmaking seems excessively pessimistic or wrongheaded to many critics, it has proven its usefulness as a positive account of what lawmakers do.

Having defended his methodological commitments, Stephan’s subsequent work applies them to particular international law problems and institutions. In “The Futility of Unification and Harmonization in International Commercial Law,” 39 *Virginia Journal of International Law* 743 (1999), for example, Stephan analyzes the popular arguments contending that nations should conform their systems of commercial law to a uniform standard. There is a substantial literature on international harmonization, almost all of it describing the issue as the benefits or detriments of competition among regulators. Stephan takes a novel approach to the issue by looking at the institutional details of international lawmaking rather than trying to refine further the theoretical arguments about regulatory competition.

The article draws on work done by Robert Scott, Law
School dean, Lewis F. Powell, Jr., Professor of Law, and Arnold H. Leon Professor of Law; and Professor Alan Schwartz, Sterling Professor of Law at Yale Law School on the political economy of private lawmaking bodies (a classic example in the domestic context is the American Law Institute). A standard feature of such bodies is the existence of a long-lived body to which governmental actors look for legislative drafting, which in turn deleges specific projects to working groups of academic or technical experts. The set-up is intended to eliminate political pressures from the process, but instead creates an opening for well-organized interest groups to exert substantial influence. This is so because the experts on working groups tend to be self-selected critics of the status quo who wish to see reform.

The larger group, by contrast, recognizes this tendency and wishes to counteract it, but lacks the technical expertise of the working group. The result is that interested industries provide countervailing expertise and arguments to the larger group, and their interests are often furthered in the final product. Stephan looks at several international commercial conventions and demonstrates that the process and results are consistent with the predictions of this model of private lawmaking.

The collapse of the Soviet Union provided another field for analysis to which Stephan’s multifaceted interests and expertise are perfectly suited. He has had a front-row seat from which to study legal reform in transitional economies, acting as advisor to former Soviet republics through the auspices of U.S. and multilateral agencies.

In an extraordinary pair of articles, “The Fall—Understanding the Collapse of the Soviet System,” 29 Suffolk University Law Review 17 (1995), and “Toward a Positive Theory of Privatization—Lessons from Soviet-Type Economics,” 16 International Review of Law & Economics 173 (1996), Stephan began the process of a micro-level explanation of the collapse of the Soviet system. In the first article, he argues that broad ideological accounts of the collapse of communism give too much credence to the concept of a genuine struggle between ideas that, in practice, had little bearing on how Soviet society was organized. As in all of his work, Stephan argues that attention to institutional detail provides a more secure base for analysis.

The second article exploits that base. Stephan looks at the basic organizational tool of Soviet society—the nomenklatura system—and argues that it broke down beyond repair in the 1980s. A command economy is set up, Stephan argues, to serve the interests of the governing group. In order to keep rents flowing to the top of the pyramid, those at the top must be able to control the activities of actors lower in the hierarchy. Those on the lower rungs, however, have a strong incentive to divert rents to themselves. Over the course of the Soviet experiment, two forms of control were used to minimize rent diversion. The first and most effective was terror. In the 1950s, however, Soviet leaders ceased using the routine threat of violent death to reinforce their commands. A feudal system of patronage and protection accordingly grew to serve the same purpose. The latter, however, offered too many opportunities for low-level actors to cheat. By the 1980s, the system had eroded to the point where most of the fruits of productive activity were enjoyed directly at lower levels of the nomenklatura rather than flowing to the top to be distributed on the basis of loyalty to the leadership.

Stephan thus paints the end of the Soviet system not as a triumph of free-market ideas, but as a gradual and uncoordinated coup carried out by actors who used their physical control over productive assets to divert most of the value produced before it could make its way up to the governing group. As a consequence, membership in the governing group (and by extension, maintenance of central planning) was no longer worth the effort. Privatization, by contrast, was a means by which the lower echelon could seize assets outright and circumvent the increasingly feeble attempts by the center to extract some of their value.

Both of Stephan’s ongoing projects, then, involve a focus on legal, political, and economic institutions. The methodology has proven fruitful in tasks as disparate as understanding corruption as a rational response to institutional change (“Rationality and Corruption in the Post-Socialist World,” 14 Connecticut Journal of International Law 533 (1999)), and determining the extent to which U.S. domestic policy shapes, and is shaped by, the World Trade Organization (“Sheriff or Prisoner? The United States and the World Trade Organization,” 1 Chicago Journal of International Law 49 (2000)). It will undoubtedly offer future insights into the rapid institutional changes that characterize the world of the immediate past and foreseeable future.
The Scholar as Reformer

Paul Stephan '77 did not plan to be in Moscow when the Soviet Union crumbled. No stranger to the city, he had visited frequently since the early 1980s, helping to plan a series of annual conferences featuring U.S. experts and reform-minded Soviets. December of 1991 found Stephan in Moscow taking part in a conference on federalism. While he was there, the leaders of the component republics effectively ended the central government.
"What I believe I contribute is a sensitivity to the past, and a desire to make reforms responsive to the needs that have evolved out of a country's history."

“We were meeting with officials in the central government who told us they were cleaning out their desks and would turn out the lights and depart as soon as we left,” he said. “One official commented wryly that at least he was leaving office by the stairs, rather than being flung out the window, as had some others in the Kremlin’s past.”

Stephan and his colleagues managed to organize their meeting. They did so in a land where the central government had been declared inoperative but a replacement had not yet emerged, and in a city where the mayor had resigned but not left office. Describing the mood in Moscow at the time as “alternately elegiac and anxious,” Stephan notes that upheavals of this sort were really nothing new. “Muscovites had been experiencing changes like this since Gorbachev came to power and began to overturn the bedrock of the old order.”

In the weeks and months that followed the end of the Soviet Union, the old order collapsed, a commonwealth of states rose to take its place, and change became a daily occurrence. Stephan, long respected for his expertise in tax law and his knowledge of Soviet affairs, was called to play a role in the resulting reform efforts. He returned to Moscow in 1992 to help the American Bar Association expand its Central and East European Law Initiative (CEELI) into the fledgling republics, serving on CEELI’s advisory board from 1992 to 1995. In 1993 he started serving as a consultant and employee of the U.S. Department of Treasury in its efforts to promote tax law reform. In 1994 he began to work for the International Monetary Fund (IMF) as well. He advised Russia, Azerbaijan, and other former Soviet states “ready to commit to change” on the development of workable taxation structures.

He co-chaired an international working group to develop model commercial and business laws for the supreme court of the Republic of Georgia, and he observed the Georgian parliamentary elections. Stephan organized workshops on tax dispute resolution in Central and East European governments for the Organization for Economic Cooperation and Development. In addition to lecturing to the CIA and the FBI on matters relating to Soviet politics, international law issues, and international organized and white-collar crime, he served as a consultant on Russian law to a number of American and international law firms. Most recently, he was an “armchair advisor” to the World Bank on the drafting of a tax code in Turkmenistan.

Stephan’s knowledge of the former Soviet institutional environment has been an important asset in his role as consultant. “The specific competence of lawyers often lies in their respect for institutions,” he said. “What I believe I contribute is a sensitivity to the past, and a desire to make reforms responsive to the needs that have evolved out of a country’s history.”

For example, Stephan believes that trying to import tax systems from other nations into the ex-socialist republics is a mistake. “Many of the economists who have tried to implement a tax policy assume that any rules they introduce will be obeyed.
In fact, individuals in Central and Eastern Europe have long been deeply suspicious of their legal institutions and law enforcement agencies because they are often corrupt," he explained. "I leave it to my colleagues to draft the tax codes, while I devote more of my energy to determining what the enforcement policies should be, working with judges so that the tax programs that are ultimately introduced are both comprehensible to citizens and legally enforceable."

In addition to publishing extensively on Soviet legal issues, Stephan carries his familiarity with Soviet institutions and operations into his Law School classroom. "I want to be sure that my students understand how complicated it is to translate a rule into human behavior," he said. "It's important for them to see the relationship between the legislative process and how a statute is actually interpreted by the courts."

Stephan has had many years to hone his craft as a teacher. Since joining the Virginia faculty in 1979, he has taught International Business, Taxation, Contracts, and Property Law to a generation of Law School students. Since 1993 he has teamed with his longtime colleague and friend Richard Dean '80, a partner with Coudert Brothers, to teach Emerging Markets: Principles and Practice. This popular seminar course explores the legal and regulatory structures affecting foreign investors seeking to participate in developing emerging markets and re- structuring formerly socialist economies.

Paul Stephan's real-life experiences have helped shape the emerging post-Soviet nations as they have informed his scholarship and teaching. The result is a richly nuanced, reality-based approach to the law and how it works that will no doubt continue to be of benefit to those interested in tax and international law—as students, practitioners, or policymakers—for years to come.
International Governance and American Democracy

by Paul B. Stephan III

Does international governance threaten to crowd out American democracy? Many public figures and scholars think so. The street theater in Seattle last fall and Senator Dole’s effort to establish a national tribunal to review World Trade Organization (WTO) dispute resolution decisions both attest to the extent of the concern. As international institutions burgeon in number and significance, the residuum of authority left in our national government seems an ever diminishing domain. Extrapolating into the future, one can envision a time when the United States retains only as much sovereignty as, say, the members of the European Union or the several States in our own federal system. The diminution of sovereignty brings with it a loss in democracy, as the distance between our citizens and the institutions that make the most meaningful decisions grows greater.
I take this concern seriously but believe its popular formulation is too simplistic and somewhat misplaced. International governance entails not only the formal institutions and explicit agreements that generate what I have called the “new international law.” It also embraces a system of formulating and imposing norms on state and individual behavior that operates outside of any publicly accountable institution. A debate recently has arisen in the United States over the legitimacy of customary international law, with fierce arguments on each side. One dimension of this debate is the tension between American democracy and the adoption of customary norms through the courts.

Both kinds of international law—the rules derived by courts in response to perceptions of international custom and foreign affairs complications, and the rules generated by international institutions such as the WTO, NAFTA and the IMF—pose problems for a democracy. Each involves the imposition of a legal outcome without the direct participation of the national lawmakers bodies in the law’s formation. The distance between lawmaking and law enforcement presents a difficulty for a society that presumes the consent of the governed. Because it comes from the outside, international law does not go through the normal filters that a democratic system uses to thwart undesirable or harmful, as well as unwanted, laws.

But the two types differ in how they become law, and these differences have distinct implications for democracy. Court-created international law relies fundamentally on a principle of authority that leaves no room for popular decisionmaking. Neither voice nor exit play a role in its development or application. Institutional international law, at least for the United States, entails both. The Executive, and to a limited extent Congress, has a voice in developing the content of the international agreement that an institution will administer, each has a role in deciding how to implement the mandate of international institutions in domestic law, and both can agree to withdraw the United States from a commitment that has become unacceptable. These checks may not be enough, but they are greater than what applies to court-created law.

Court-made international law. Most advocacy of customary international law depicts it as a body of norms that are “out there,” already formed and waiting for enforcement, much like the common law of the late nineteenth century. Even the more finely grained accounts of how a norm gets to become customary international law tend to glide over certain important distinctions. One factor that is said to play a crucial role in determining international custom is “state practice.” This assertion makes sense: It is hard to conceive of custom as anything other than commonly exhibited behavioral norms. But specialists then assert that state practice entails not the observable behavior of states, which is messy and often lawless, but rather what states assert as norms. By practice, in other words, they mean not what states and their agents do, but rather what they say. Practice becomes a matter of rhetorical style, not of preferences revealed by conduct.

This move is critical, because it shifts the authority to
decipher state practice from those who observe state behavior to those who interpret statements of intent. In practice this means that the academic community’s hermeneutic monopoly comes into play. To know what constitutes customary law, we need to know what states believe their obligations to be. But because states tend to speak in open-ended, if not vacuous terms, someone has to explain what those statements really mean. We look to scholars to perform this task. So even though, as a formal matter, authorities such as the Statute of the Permanent Court of Justice rate academic opinion last in a list of sources of international law, in reality international jurists play the primary role in determining the content of customary international law.

In what way is the process by which the community of international law scholars forms a consensus undemocratic? To join this community, a person must pass two hurdles. First, he or she must obtain an academic position of some distinction, in law or international relations. Second, the other members of the community must accept that person as a genuine contributor to the conversation, rather than as an uninformed outsider. Both processes involve cooption by a group that faces little or any outside pressure or accountability and tends toward insularity. Limiting decisionmaking to such a group seems the antithesis of democracy.

But this observation may prove too much. Any realistic conception of a flourishing democracy must save room for institutions that do not respond readily to the popular will. One of the foundations of American democracy is a conviction that popular sovereignty expressed through public institutions must coexist with structures that constrain what the popular will can do. Our judiciary, exercising both the august power of judicial review and the more mundane but critical function of constructing common law rules that fill in where the legislature has not spoken, checks popular excesses and keeps the system in good operating order. Our First Amendment, which recognizes specific spheres of civil society that operate independently of the state (the press, religion, and other expressive communities) implies a further constraint on popular decisionmaking. These limitations are not so much antidemocratic as definitional. Isn’t the lawmaking power of the international law scholarly community simply an extension of the academic freedom that bolsters and defines the peculiarly American form of democracy?

What I will call the civil society argument reflects confusion about the role of academic freedom in democratic lawmaking. The academic community, as well as other elements of a civil society such as human rights activists, contributes to a flourishing public space through shaping the debate. It produces research, arguments and values that inform discussion and mold views on issues of the day, including fundamental conceptions of decency and humane treatment. But giving such a group lawmaking power both displaces public discussion with a form of raw authority, and may have a corrupting influence on the group’s civic function. The displacement occurs when academic judgments about the content of particular norms substitute for the normal process of promulgating norms. The risk of corruption follows from the power implicit in the groups authority to declare binding rules. Knowing that their conclusions will have direct effect on people’s lives, a strain of self-consciousness and self-censorship may enter into the community’s discourse, distorting its arguments and judgments.

If the principle equating customary international law with federal common law presents democratic problems, what is the solution? A modest proposal would direct the judiciary to look to international custom and practice for potential sources or models in cases where Congress, by mandate or inference, has indicated that the courts should come up with a rule, but not to do anything more. Courts do not have to regard customary international law as something that independently determines federal common law, and, if democratic values matter, they should not. Courts can listen respectfully to the scholarly community when they have a need to search for international law, but do not have to regard the sentiments of that community as binding on them.


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