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Book Review

Alfred C. Aman, Jr., The Democracy Deficit: Taming Globalization Through Law Reform. New York: New York University Press, 2004. xii-253.

Review by Kal Raustiala

The study of globalization is burgeoning across the academy. One can—and many do—contest the definition of globalization, but it is often understood to mean something like "the shrinkage of distance on a world scale through the emergence and thickening of networks of connections—environmental and social as well as economic."[1] Contemporary globalization is a unique but not unprecedented phenomenon. As economic historians never tire of asserting, at the height of the *Lochner* era the world was highly globalized—in some respects, more economically globalized than it is today.[2] But of course the world of a century ago was radically different than our world. International institutions of the sort exemplified by the World Trade Organization (WTO) were rare. Today, they are ubiquitous, and in the view of many are increasingly powerful and even threatening. Domestic society was also very different. In 1905 we lacked a regulatory state remotely as pervasive and powerful as those we observe today. Governments were not, as a rule, held politically responsible for economic conditions, and indeed the Gold Standard of the time often forced painful economic contraction on unwilling societies.

This first wave of globalization came to a crashing halt in 1914. The ensuing "Twenty Years' Crisis" cemented its death,[3] and only well in the wake of the Second World War did the process of knitting the world's economies together begin anew. That process has accelerated in recent decades and, despite some

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I thank Jose Alvarez, Jody Freeman, and Anne-Marie Slaughter for comments on this review essay. In the interests of full disclosure: Fred Aman and I were fellows in the Law and Public Affairs Program at Princeton University in 2002-2003, at which Fred formulated some of the ideas discussed in this review.

Citations to *The Democracy Deficit* appear as parenthetical references in the text.

1. Robert O. Keohane, Governance in a Partially Globalized World, 95 Am.Pol. Sci. Rev. 1 (March 2001).
2. Harold James, The End of Globalization: Lessons From the Great Depression (Cambridge, Mass., 2002).
3. Edward Hallet Carr, The Twenty Years' Crisis, 1919-1939 (London, 1939).

dropped stitches and significant regional variation, it shows little sign of abating. The regulatory state took firm hold in the interim between the pre-World War I era of globalization and the current version. Lochnerian principles were cast aside; new agencies were formed; and the role of government in society and economy profoundly changed. During the 1970s, as the wave of globalization was gaining strength, administrative law was, as Richard Stewart famously argued, transformed.[4] Through procedural and substantive change aimed at enhancing public participation the regulatory process became a microcosm of the legislative process. The resurgence of globalization in the postwar era thus occurs against a backdrop of administrative law and regulation that remains deeply embedded in the industrialized democracies.

While critiques and defenses of contemporary globalization are myriad, the theme most commonly propounded in legal circles is that of a "democratic deficit." Democratic decisionmaking, it is said, is threatened by globalization. Critics charge that through various mechanisms globalization is undermining many of the gains of the last century in regulating and channelling economic activity, and is forcing governments to adopt deregulatory initiatives and privatize formerly public functions. It is the juxtaposition of globalization and the administrative state, in short, that drives much of the contemporary critique of globalization within political and legal circles. (This is especially true on the left. On the right, the concern veers more toward the effect of globalization and global governance on sovereignty.)[5]

The connection between putative democratic deficits and globalization is by no means straightforward. Some analysts deny that democratic deficits, properly understood, exist at the international level, or assert that those that do are in any event rectifiable.[6] For others democratic deficits are primarily an effect not of globalization but of global governance: the result of a shift in decisionmaking on traditionally domestic policy matters upwards to international institutions. The number of such institutions rose dramatically in the postwar era, and their ambit is wide.[7] Global governance in this sense is not at all the same as globalization, though international institutions may foster and accelerate globalization—and globalization itself may give states incentives to create new, more powerful international institutions.

4. Richard Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1667 (1975).

5. See e.g., Jeremy Rabkin, The Case for Sovereignty: Why the World Should Welcome American Independence (Washington, D.C., 2004).

6. See e.g., Andrew Moravcsik, Is There a Democratic Deficit in World Politics? 39 Gov't & Opposition 1 (2004).

7. David Held and his colleagues note that "in the middle of the nineteenth century there were two or three conferences or congresses per annum sponsored by [international organizations]; today the number totals close to 4000 annually." David Held, Anthony G. McGrew, David Goldblatt, Jonathan Perraton, Global Transformations: Politics, Economics, and Culture 55 (Stanford, Cal., 1999).

Into this thicket of concepts and debates comes Alfred Aman's *The Democracy Deficit*. The book is subtitled "Taming Globalization through Law Reform," and its focus is very much on addressing the ills Aman perceives in the ongoing process of globalization. The author is a well-known administrative lawyer with a long-standing interest in globalization and regulation. The book's topic could not be more important: how do we adapt contemporary democratic governance—and contemporary administrative law—to the challenge of a globalizing world?

The central claim of *The Democracy Deficit* is that globalization encourages unwelcome policy harmonization and privileges market outcomes, and that the time-honored principles of the Administrative Procedure Act (APA) ought to be deployed to bring democracy (and other non-market values) back into contemporary governance. Policy homogenization is the product, Aman argues, both of a shift in decisionmaking upwards to organizations like the WTO—which constrain the sorts of rules states may have—and of the creation of incentives for races to the bottom at the national and local level, which likewise constrain rulemaking by leading to lowest-common-denominator policies. These are not uncontroversial claims.[8] But they are not uncommon claims either. The leading British theorist of globalization David Held and his colleagues have noted that "for many, globalization is…associated with a sense of political fatalism and chronic insecurity in that the sheer scale of contemporary social and economic change appears to outstrip the capacity of national governments or citizens to control, contest, or resist that change. The limits to national politics, in other words, are forcefully suggested by globalization."[9] This belief in the policy-limiting effects of globalization is captured by colorful, and now commonplace, catchphrases such as "McWorld" and "the golden straitjacket."[10]

Globalization-as-straitjacket is not the only worry for Aman. Running through the pages of *The Democracy Deficit* is also a deep concern with executive power. A long-established aim of American administrative law has been to cabin executive discretion. Procedural overlays on the policymaking process and, of course, judicial review of agency action, have traditionally been a core part of this enterprise. Yet globalization, Aman argues, has expansive effects on executive power. At the domestic level we may have a well-functioning rulemaking system with abundant and robust political participation (a debatable proposition, to be sure). But at the international level the governance process is quite different. It is generally dominated by the executive branch and takes place in an atmosphere of secrecy and diplomacy that is antithetical to partici-

8. See e.g. Geoffrey Garrett, Capital Mobility, Trade, and Economic Policy, 49 Int'l Org. 4 (1995).

9. Held, Global Transformations, *supra* note 7, at 1.

10. Benjamin R. Barber, Jihad vs. McWorld, 269 The Atlantic Monthly 53 (1992); Thomas L Friedman, The Lexus and the Olive Tree: Understanding Globalization 101 (New York, 2000).

patory democracy. Unsurprisingly, this deeply disturbs administrative lawyers like Aman.

International treatymaking exemplifies this globalization-driven enhancement of executive power. The executive controls this ever more important process. Though a constitutional procedure for approving American treaty commitments exists, for Aman it has "a rubber stamp quality" because the president fundamentally sets the agenda (81).[11] Aman's point is strengthened further when one considers that the vast majority of American international agreements are now sole executive agreements—agreements not submitted to the Senate or the House of Representatives for approval at all, but rather solely negotiated and approved by the president.[12] In Aman's view—and in many others'—the rapid move to global governance and the intensifying accompanying web of agreements exacerbates the problem of cabining and controlling executive power. In short, *The Democracy Deficit* argues, we need to think creatively about how to adapt administrative law to this new, interdependent, and globalizing world, lest we lose the gains of the last fifty years of administrative law.

The Democracy Deficit can be read as a first cut at a very hard series of problems that will challenge administrative lawyers for the next several decades. As Richard Stewart writes, "the challenge posed to administrative law by regulatory governance is significantly greater in the international context than in the domestic context."[13] Aman argues that globalization fundamentally changes the relationship between states and markets. He is largely right, even if more clarity in analysis and prescription would be welcome. Almost no question of administrative law and governance can be understood today without some consideration of the effects of an increasingly globalized economy, and an increasingly thick network of international institutions, on the state. That is not going to change anytime soon, and behooves legal scholars to take globalization, and the attendant issue of global governance, seriously. For this argument, Aman deserves great praise, for he, like Stewart, is at the forefront of these debates.[14]

11. The rubber stamp claim is a common one, but recent research in political science questions it. See e.g., David Auerswald and Forrest Maltzman, Policymaking through Advice and Consent: Treaty Consideration by the United States Senate, 65 J. Pol. 4, 1097 (2003).

12. Congressional Research Service, Treaties and Other International Agreements: The Role of the U.S. Senate (Washington, D.C., 1993). Whether the president uses such agreements to evade Congressional approval is debated; see e.g., Lisa Martin, U.S. Military Commitments: Multilateral and International Treaties (draft, Harvard Government Department, April 2005).

13. Richard Stewart, Administrative Law in the 21st Century, 78 N.Y.U. L. Rev. 437, 459 (2003).

14. See also Benedict Kingsbury, Nico Krisch, and Richard B. Stewart, The Emergence of Global Administrative Law, IILJ Working Paper,2004/1 (Global Administrative Law Series) (New York, 2004), available at <http://www.iilj.org/papers/2004/documents/2004.1KingsburyKrischStewart.pdf> (last visited Sept. 22, 2005).

The fundamental premise of *The Democracy Deficit*—that legal rules are increasingly shaped, formulated, and adjudicated at the international level, and yet administrative law has not kept pace—is undeniable. What is far less clear, however, is what to do about these shifts. Take the problem of increased policy formulation via international agreements, which are less open to affected interests than rulemaking at the domestic level. (There are some 50,000 of these agreements in existence.) The negotiation of substantive policies embodied in international treaties may be a key point of entry for administrative reforms aimed at enhancing participation and accountability in global governance. A chief proposal of *The Democracy Deficit* is the extension of some variant of notice and comment rulemaking to the international level—introducing, in Aman's words, "the values of the APA to the WTO context" (161). This idea, in its broadest terms, has merit and indeed I have elsewhere endorsed a version of it.[15] Yet, particularly in the trade context where Aman focuses much attention it is worth asking whether the point of closed-door international negotiations is precisely to keep out all the rent-seeking interests—the sugar lobby, the steel lobby—so that a package deal can be struck that is broadly beneficial to the entire society. Would not more access and participation simply unravel many beneficial liberalizing arrangements, to the detriment of the majority? Aman is not unaware of this public choice critique, but it deserves more serious consideration in a book of this scope.

A more fundamental issue is whether the most important democratic deficit is that created by formal delegations of power of the sort exemplified by the WTO. These delegations receive significant attention, and rightfully so. But the problem of democratic deficits in global governance is more complicated than first meets the eye.

First, consider the rise of what is sometimes called transgovernmentalism. That term, and others such as "transgovernmental cooperation" and "government networks," refer to cooperation among state officials below the state level—in other words, cooperation that occurs not "state to state" but rather "agency to agency" or "regulator to regulator." As the problems policymakers address have gone global, so have the policymakers. Domestic agencies are increasingly networking with their counterparts abroad, and in the process they are sharing information, ideas, resources, and policies. I and others have argued that transgovernmental cooperation is highly significant, intensively expanding, and little understood.[16]

15. Kal Raustiala, Sovereignty and Multilateralism, 1 Chi. J. Int'l L (2000) *in* Symposium: AEI Conference Trends in Global Governance: Do They Threaten American Sovereignty (Los Angeles, 2000). See also, Kal Raustiala, The "Participatory Revolution" *in* International Environmental Law, Harv. Envt L. Rev. (1997) (arguing that existing rules of participation for nonstate actors mimic aspects of APA-style notice and comment).

16. David Zaring, Informal Procedures, Hard and Soft, in International Administration, 5 Chi. J. Int'l L. 547 (2005); Anne-Marie Slaughter, A New World Order (Princeton, N.J., 2004); Kal Raustiala, The Architecture of International Cooperation, 43 Va. J. Int'l L. 1 (2002); Robert Keohane and Joseph Nye, Transgovernmental Relations and International Organizations, 27 World Pol. 1 (1974).

Transgovernmental cooperation poses some problems, but also some opportunities, for a prescription based on traditional administrative law tools.[17] On the one hand, if much international cooperation is occurring through informal and often non-legalized policy coordination, harmonization, and technical assistance, then where is the entry point for the procedural tools of administrative law? It may be possible and desirable to transplant "the values of the APA to the WTO," but what about to a loose, informal networks of regulators that operate on a non-legalized, informal, "soft law" basis? On the other hand, the agencies most involved in such regulatory networks—the Securities and Exchange Commission, the Department of Justice Antitrust Division, the Environmental Protection Agency, and others—are executive agencies or departments already subject to a wide array of domestic procedural protections—and, unlike the State Department, to the APA. This may make it easier to control them, since familiar tools, well entrenched, already exist to control their actions. In short, if cooperation progressively takes the form of informal government networks, the challenges posed for critics like Aman are likely to be more complex, though not necessarily more nettlesome, than those posed by more traditional forms of cooperation such as WTO or the World Health Organization (WHO).

Second, the democracy deficit Aman and others identify may not be the most important such deficit. The greater one may actually flow from the fact that in a globalizing world individuals are increasingly subject to and influenced by decisions made by other states, decisions that they have no say in. One result of globalization is that the scope of economic and social activity is not coterminous with the scope of political authority. While the world is not yet borderless—far from it—many important economic, social, and environmental features behave as if borders matter little. Actions taken in the United States, for example—tax cuts, farm subsidy decisions, or interest rate adjustments by the Federal Reserve—reverberate abroad. And many foreign actors have little or no ability to influence those actions—except through international agreements. International agreements and institutions are a means by which governments develop ground rules on issues of shared concern. These obligations often reflect compromise, and they constrain government behavior. In so doing, they permit outsiders to influence, however meagerly, the decisions of other states. Consequently, international organizations and treaties might be viewed from a broadly cosmopolitan stance as *promoting* democracy rather than simply creating a democratic deficit. For example, treaties in fact empower others to shape policies that affect them by permitting others to play a role in the negotiation of constraints on our actions.[18] This argument is not necessarily in tension with *The Democracy Deficit*'s critique of the closed and secret nature of international rulemaking. But it does suggest that if opening the

17. See e.g., Eleanor Kinney, The Emerging Field of International Administrative Law, 54 Admin. L. Rev. 415 (2002).

18. A similar claim is made in Peter Gerhart and Michael Baron, Understanding National Treatment: The Participatory Vision of the WTO, 14 Ind. Int'l & Comp. L. Rev. 3 (2004).

international process to wider participation along a traditional administrative law model has costs in that it may reduce at the margin the depth or number of such agreements, than we may simply enhance some forms of democracy and accountability at the expense of others.[19]

The democratic shortcomings of international institutions are not the sole focus of the book. *The Democracy Deficit* is also centrally concerned with the privatization of traditionally governmental services and the tension, or conflict, between "law" and "the market." Aman is clearly troubled by the deregulation and privatization wave of recent years. Privatization occurs for many reasons, but he argues that one is the competitive pressures of globalization. Indeed, Aman goes so far as to call privatization "a principal effect of globalization in the United States" (89).[20] Perhaps this is true, but the hypothesis remains largely untested. And it is worth noting in this regard that whatever privatization push globalization provides, the state remains enormous by historical standards. In the United States, federal government expenditures as a percentage of gross domestic product (GDP) have risen steadily during the twentieth century and are still at around 20 percent—compared to less than 5 percent at the dawn of the New Deal.[21]

Nonetheless, *The Democracy Deficit* makes an important point in this regard: whether or not globalization in fact promotes privatization, privatization may enhance the domestic impact of globalization, because many private market actors are increasingly exposed to the global economy. As that exposure accelerates, and as privatization intensifies, the pressures of the global economy will increasingly be felt. Aman further connects the debate over privatization to that over international institutions by noting that "outsourcing public functions to the private sector are planned delegations to the market" (87). Like delegations to international institutions, these delegations create democracy deficits because they sidestep the panoply of APA-driven procedural protections that traditionally check and channel decisionmaking. So the participation problem, or democracy deficit, is ultimately two-fold: international policymaking is closed, nontransparent, and executive-dominated, and globalization itself—a phenomenon distinct from, but related to, the growth of international insti-

19. The democracy-enhancing feature of international agreements can easily be overstated; given contemporary politics, many if not most international accords strongly reflect U.S. power and interests. Indeed, some have noted the rise of "hegemonic international law." Detlev F. Vagts, Hegemonic International Law, 95 Am . J. Int'l L. 843 (2001); Jose E. Alvarez, Hegemonic Law Revisited, 97 Am. J. Int'l L. 873 (2003). Nonetheless, a multilateral agreement that reflects even a modicum of compromise on the part of great powers provides some check on the international externalities of domestic action—a check that is lacking when action is wholly unilateral.

20. For other countries, the claim may carry more truth, particularly if one folds into the definition of globalization the actions of international economic institutions such as the International Monetary Fund.

21. US Dept of Commerce, Bureau of Economic Analysis, at http://www.bea.gov/bea/dn/nipaweb/SelectTable.asp.

tutions—encourages privatization, which further compounds the democratic deficit and reduces accountability.

This grim causal logic rests on two empirical claims. The first is that globalization in fact drives much of the privatization we see today. The second is that privatization means less participation, more "privileging of the market," in Aman's words, and less "public governance" (132). Neither claim is well-defended here and, indeed, given our current understanding neither could be especially well-defended. But they are essential pediments for the argument of the claims of *The Democracy Deficit*, and as such need much more consideration.

The Democracy Deficit is in many respects a *cri de coeur* from a longtime administrative lawyer with a deep respect for the values embedded in the APA and its progeny. The problems the book raises are real, and they demand greater attention from legal scholars. For recognizing this, Aman deserves praise. But given that the book's avowed focus is globalization, and its implicit scope limited to American law, it is essential to underscore that structural elements of our legal system limit the problems he identifies, especially in comparison to other liberal democracies. Take the supposed threat to democracy posed by global governance.[22] In the United States treaties are the law of the land, supreme over state law, but they are considered on par with statutes. A later-in-time statute will generally trump a treaty obligation.[23] By contrast, many European states accord international treaties a higher status than domestic statutes, exacerbating the democracy deficit problem significantly.[24] Some states, such as the Netherlands, even give the resolutions of international institutions a higher status than domestic laws—no matter the often total lack of transparency and participation in international organizations and their decision-making bodies. For these countries, the threats to democracy are greater, for they treat international law and international organizations far more reverentially.

Likewise, the United Sates is the hegemon in world politics; it possesses *hyperpuissance* and enjoys what the Pentagon likes to call "full spectrum dominance."[25] It is also the chief economic driver of globalization and the world's largest economy. More than any other country the United States determines the shape and trend of the globalization (and, as well, the shape of the international legal institutions that organize global economic and political interactions). As a result Americans have far greater input into the core decisions that shape and structure the global economy than do citizens of other states. These decisions range from what the structure of free trade agreements will be to what the price of key commodities such as oil will be. While it may be true that

22. See Global Governance symposium, *supra* note 15.

23. Whitney v. Robertson, 124 U.S. 180 (1888)

24. Monroe Leigh et. al, eds, National Treaty Law and Practice (3 volumes, Washington, D.C., 1995-2003).

25. The phrase is from the Pentagon's Joint Vision 2020; see the press release available at <http://www.defenselink.mil/news/Jun2000/n06022000_20006025.html> (last visited Sept. 22, 2005).

more such decisions are driven by market logic and made in nontransparent ways than ever before, the situation for Americans is, generally, much better than for anyone else. This by no means blunts the arguments in *The Democracy Deficit*. But it certainly places in them in a global context.