

# MARK JANIS AND THE AMERICAN TRADITION OF INTERNATIONAL LAW

*Harold Hongju Koh\**

I come here today to celebrate Mark Janis and his new and important book on the American tradition of international law,<sup>1</sup> which represents only the latest of his many, wonderful contributions to international legal scholarship. I first met Mark twenty-seven years ago, in the fall of 1978, when I was interviewing for a job as a summer associate at Sullivan and Cromwell, where he was then a young associate. Mark took me out to lunch, and over the course of our lunchtime discussion, I learned of his remarkable background: that in addition to working at one of the world's great international law firms, he had won a Rhodes scholarship, had graduated from Princeton, had served in the Navy, and had been, along with Bill Alford, who is also here today, an editor of and intellectual force behind the *Harvard International Law Journal*.<sup>2</sup>

Since we both went into law teaching, Mark and I have worked together regularly to further what he calls in his book the "universalist tradition" of international law in America. We have lectured in each other's courses, we have appeared together in many scholarly colloquia, and we have often sat next to one another at panels of the American Society of International Law and the International Law Section of the American Association of Law Schools. Even when I do not see Mark, I engage with his writings by using his books and articles on international law, European human rights law, and the influence of religion on international law.<sup>3</sup> I often recommend to students his reader,<sup>4</sup> the successor to

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\* Dean and Gerard C. and Bernice Latrobe Smith Professor of International Law, Yale Law School, Assistant Secretary of State for Democracy, Human Rights and Labor, 1998–2001. This article is a lightly edited and footnoted version of remarks delivered at the University of Connecticut Law School in the fall of 2005 at the celebration of the publication of Mark Janis' monograph on the American Tradition of International Law.

1. MARK WESTON JANIS, *THE AMERICAN TRADITION OF INTERNATIONAL LAW: GREAT EXPECTATIONS 1789-1914* (2004).

2. A profile of Professor Janis's career can be found at <http://www.law.uconn.edu/faculty/mjanis/> (last visited Mar. 27, 2006).

3. Among his many other books and articles, Professor Janis has recently produced: MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* (4th ed. 2003); CAREERS IN INTERNATIONAL LAW (Mark W. Janis & Salli A. Swartz eds., 2d ed. 2001); MARK W. JANIS & JOHN E. NOYES, *INTERNATIONAL LAW: CASES AND COMMENTARY* (3d ed. 2006); RELIGION AND INTERNATIONAL LAW (Mark W. Janis & Carolyn Evans eds., 2004); Mark W. Janis, *Dred Scott and International Law*, 43 COLUM. J. TRANSNAT'L L. 763 (2005); Mark W. Janis, *A Sampler of Religious Experience in International Law*, 32 MISS. C.L. REV. 233 (2004); and Mark W. Janis, *International Law as Fundamental Justice*, 46 ST. LOUIS U. L.J. 345 (2002).

4. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW*, *supra* note 3.

Brierly's classic text on Public International Law,<sup>5</sup> which has long been the leading reader on the subject in American Law Schools.

Finally, I should say that Mark, his wife Jan, and their sons showed us extraordinary generosity a few years ago when my family and I went on sabbatical to Oxford. At the time Mark was serving as a distinguished Reader of Law and Fellow at Exeter College, Oxford. When we arrived, it would have been easy for them simply to let us fend for ourselves. Instead, they always showed us the utmost hospitality. I remember especially one day when I was going to tea with Mark. Suddenly, it started pouring down rain. Without hesitation, Mark pulled out an umbrella and said, "I have one of these in every one of my bags. Please take this one." And off he went. I still have that umbrella, and whenever I look at it, I am reminded again of Mark and the incredible qualities of courtesy and generosity that he has shown me for almost thirty years, qualities rare not just in our profession—but in any profession.

For the last thirty years, Mark has also been one of the handful of American scholars engaged in examining the intellectual history of international law, and particularly in studying how a distinctly American tradition of international law has evolved, in contrast to the European tradition (on which he is also an expert from his work on European human rights law). What Mark has produced in this volume is an intellectual history of an enormous present significance. When he speaks about the American Tradition of International Law, he is really asking a question: How universal is international law, and how universal is America's distinctive conception of international law? What emerges from his book is that there is not just one, but three, traditions of international law in America, one of which Mark favors over the others. So, in the first part of his two-volume set, he talks about the universalist, or naturalist, tradition, which developed during the period running from 1749-1914. He calls that period one of "Great Expectations," which makes the reader fear that volume two will be called "Bleak House." But, during the course of his exposition, he offers us a way in which this American universalist tradition can be saved.

The American universalist tradition represents a commitment to fundamental justice, international legal process, transnationalism, and human rights. It can be contrasted to two other traditions that have emerged. The first is positivism, which views international law not as natural law, but as a construct of manmade law. Positivism flowed from thinkers such as Thomas Hobbes, Richard Zouche, and Samuel Rachel, all of whom rejected natural law reasoning and saw international law as being entirely a function of contract and consent.<sup>6</sup> The other tradition is the American tradition of political realism, which again starts with Hobbes but is reflected in the work of those like George Kennan, Hans Morgenthau, and Henry

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5. J. L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* (1966).

6. The early positivists, such as Thomas Hobbes (1588-1679), Richard Zouche (1590-1661), and Samuel Rachel (1628-1691), rejected natural law reasoning, instead asserting that the law of nations is a law among nations, which consists of customs and treaties." See ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 112-25 (1947) (discussing early positivists).

Kissinger, who see international law as having little or no independent content, and serving primarily as a mask for power politics.<sup>7</sup> Janis's book helpfully locates the origin of both forms of thinking in a particular year, 1789. That was the year that Jeremy Bentham, the utilitarian philosopher, denoted the term "international law" as part of a "dualist tradition"—one in which treaties are made by consent and the public law of nations is viewed as operating on a separate plane reserved for states only.<sup>8</sup> At the same time, Janis points out, that same year witnessed the birth of the United States Constitution, the French Revolution, and the French Declaration of the Rights and Duties of Man, all of which came to reflect a universalist human rights tradition.<sup>9</sup> Another signal event of that era was the development of the Kantian ideal, captured in Immanuel Kant's 1795 essay "To Perpetual Peace," which urges governments to follow international law as a route to perpetual peace.<sup>10</sup> What is most striking about this universalist, human rights, process-based, transnationalist, Kantian tradition is that it views the world neither through the lens of anarchy, nor through the lens of world government. Rather, it envisions an international society created among cooperating sovereign states, an international society governed by law, in which ties among individuals that cross national lines are as important as the ties that are created between the states themselves.

These two strands, the positivistic strand and the universalist strand of American international law, run down separate courses and have evolved into what might be thought of as the "Jekyll and Hyde" tradition in American international law. These two faces of American tradition in international law have been constantly at war. In fact, Janis' book acquires considerable contemporary significance precisely because these two strands are at war right now during the modern age of terror, in which some political leaders, including our current president, adhere very much to a positivistic *realpolitik* tradition, while others respond in the universalist tradition. Janis' book shows that the universalist tradition ran strongly through the eighteenth, nineteenth, and early twentieth centuries, not just with jurists, but also with lawyers, judges, diplomats, scientists such as David Dudley Field, and activists such as Elihu Burritt of Connecticut, who were pressing for the creation of international dispute resolution mechanisms.<sup>11</sup> Janis unearths a very powerful cross-professional tradition that found deep roots in the work of common law judges.<sup>12</sup> For example, Blackstone's Commentaries, as carried forward through the work of Kent and Wheaton and brought to America, describe what Blackstone called "a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world . .

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7. See, e.g., GEORGE F. KENNAN, AMERICAN DIPLOMACY 1900-1950 (1984); H.J. MORGENTHAU, POLITICS AMONG NATIONS (5th ed. 1978); HENRY A. KISSINGER, THE NECESSITY FOR CHOICE: PROSPECTS OF AMERICAN FOREIGN POLICY (1961).

8. JANIS, *supra* note 1, at 11-15 (citing JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 296-300 (J.H. Burns & H.L.A. Hart eds., 1970)).

9. *Id.* at 1.

10. See IMMANUEL KANT, TO PERPETUAL PEACE: A PHILOSOPHICAL SKETCH (Ted Humphrey ed., 2003) (1795).

11. See generally JANIS, *supra* note 1, chs. 3-5.

12. See *id.* at 53-61.

. to insure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each.”<sup>13</sup> Underlying this notion is the idea that international law constitutes part of English common law, which passed to the American colonies as part of our American judicial tradition, and that judges are entitled, by interpreting customary law and common law, to internalize international norms into United States domestic law. Through litigation, cases are brought to American courts, whose judges go on to make these internalization decisions, as for example, in the famous case of *Respublica v. Longchamps* of 1784.<sup>14</sup> And so it was not difficult in 1900 for the Supreme Court to say unanimously in an opinion by Justice Horace Gray: “International law is part of our law and must be ascertained and administered by courts of justice of appropriate jurisdiction, as often as questions of right depending on it are duly presented for their determination.”<sup>15</sup>

So why does this seem remarkable today? Because, today, Members of Congress have introduced the so-called Feeney Resolution, which purports to state the Sense of Congress that judicial decisions should not be based on any foreign laws, court decisions, or pronouncements of foreign governments unless they are expressly approved by Congress.<sup>16</sup> This topic was recently the subject of a fascinating public debate between Justice Breyer and Justice Scalia,<sup>17</sup> who said explicitly that when judges construe the Eighth Amendment, they should not be allowed to look to universalist conceptions of decency, but only at American conceptions of decency.<sup>18</sup> Finally, the intellectual struggle between universalism and positivism has been the subject of debate within the Supreme Court in four recent decisions: *Lawrence v. Texas*,<sup>19</sup> which held that the states could not constitutionally criminalize same-sex sodomy; *Atkins v. Virginia*,<sup>20</sup> which held that the Eighth Amendment’s cruel and unusual punishment clause bars the execution of persons with mental retardation; *Roper v. Simmons*,<sup>21</sup> which similarly declared the unconstitutionality of the juvenile death penalty; and finally, *Sosa v. Alvarez-Machain*,<sup>22</sup> which reaffirmed that United States courts may apply the Alien Tort Claims Act to redress the violations of norms of international character that have been defined with specificity and accepted by the civilized world.

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13. See WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*66 (W. Morrison ed. 2001).

14. 1 U.S. (1 Dall.) 111, 116 (O. & T. Pa. 1784) (attacks upon ambassador), discussed in JANIS, *supra* note 1, at 54-56.

15. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

16. See Press Release, U.S. Rep. Tom Feeney, 24th Dist. of Fla., Feeney Authors Resolution on Courts (March 2, 2004), [http://www.house.gov/apps/list/press/fl24\\_feeney/courts2.html](http://www.house.gov/apps/list/press/fl24_feeney/courts2.html).

17. See, e.g., Stephen Breyer & Antonin Scalia, A Conversation on the Relevance of Foreign Law (Jan. 13, 2005) (transcript available at <http://www.wcl.american.edu/secle/founders/2005/050113.cfm>).

18. *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989) (practices of foreign countries are irrelevant to U.S. constitutional interpretation, because, in construing provisions of the Bill of Rights, “it is American conceptions of decency that are dispositive.”) (emphasis in original).

19. 539 U.S. 558 (2003).

20. 536 U.S. 304 (2002).

21. 543 U.S. 551 (2005).

22. 542 U.S. 692 (2004).

The universalist tradition that Janis identifies gains particular importance through its close linkage with the international human rights movement. The globalization of human rights began during the period that Mark discusses, in good measure through the work of actors he colorfully describes: such as the human rights activist William Ladd and the British anti-slavery leader William Wilberforce, as well as those transnational norm entrepreneurs who brought about the League of Nations and the Permanent Court of International Justice, and who began the global humanitarian movements, such as the anti-piracy, slave trade and white slavery movements.<sup>23</sup> So what we learn by the end of Janis's book is that a great intellectual debate has been framed *within* the American tradition of international law: a continuing debate between natural law and positivism, utilitarianism and Kantianism, and universal application of human rights versus efforts to exempt the United States from the core tenet that international human rights binds all nations, everywhere, as a fundamental form of universal justice.<sup>24</sup>

Janis ends his book in 1914, when World War I begins, with the simple but profound observation that the enemy of this universalist vision is war. And so it was, that this tradition shattered during World War I. Were we now to substitute for "World War I" "the Global War on Terror," we would see again that war also brought the latest episode of universalism to an end and created yet another new era of American exceptionalism, the one that we are living through today. In the late twentieth century, I would argue, our international policy was characterized by four elements: a focus on diplomacy, backed by force in the very last resort; a human rights policy based on universalism; a democracy policy based on building democracy from the ground up; and a diplomatic approach, based on strategic multilateralism, leavened with tactical unilateralism.<sup>25</sup> What is striking about American foreign policy during the last four years since September 11, 2001 is that each of these four ideas has been increasingly turned on its head. A commitment to diplomacy backed by force as a last resort has been replaced by a policy of force first. Universalism in human rights has been replaced by a human rights policy that tolerates the creation of law-free zones (Guantanamo), law-free people (enemy combatants), law-free courts (military commissions), and extra-legal practices (extraordinary rendition)—all done not by judges, but by executive branch officials who strive to keep their conduct free from judicial review; i.e., exempt from the judicial tradition that represents so much of the American tradition in international law. Third, the bottom-up democracy-promotion policy has shifted to one of top-down, militarily-imposed democracy promotion in places like Afghanistan and Iraq, with a new diplomatic focus on strategic unilateralism, with multilateralist diplomacy being invoked only in the last resort.

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23. See JANIS, *supra* note 1, at 103-14.

24. For further discussion of America's exceptionalist tendencies in human rights, see Harold Hongju Koh, *America's Jekyll-and-Hyde Exceptionalism*, in MICHAEL IGNATIEFF, *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* 111 (2005).

25. For elaboration, see generally Harold Hongju Koh, *On American Exceptionalism*, 55 *STAN. L. REV.* 1479 (2003).

Why is Mark Janis's work helpful in thinking about this upside-down shift? Because the return to what John Noyes called "old vinegar in new bottles"<sup>26</sup>—state-centric, consent-based, positivistic nonapplication of international law in domestic courts, based on undue deference to the executive branch—is fundamentally contrary to the American tradition of international law. What Mark Janis teaches us is that the way in which the United States Executive Branch has been behaving for the last four years with regard to international law is literally "un-American," in the sense of betraying a fundamental American historical tradition.

That brings me to the present time, a moment in which our Supreme Court is changing its composition. John Roberts has just become the Chief Justice. In my other work, I have argued that there was a clear divide within the Rehnquist Court between a Nationalist minority that consisted of Justices Scalia, Thomas and former Chief Justice Rehnquist; a transnationalist plurality, which comprised Justices Ginsburg, Breyer, Souter and Stevens, with Justices Kennedy and O'Connor swinging in the middle.<sup>27</sup> Yet through his opinions in *Lawrence* and *Roper*, Justice Kennedy has moved decidedly in a transnationalist, universalist direction in recent years, while in her last terms Justice O'Connor moved definitively in that direction as well. During his confirmation hearing, Chief Justice Roberts was asked a number of questions about the application of international and foreign law, and his answers suggested that he was clearly in the Rehnquist/Scalia camp; a few weeks later, Justice Samuel Alito followed suit.<sup>28</sup>

All this means that the Court is now divided between four Transnationalist Justices (Breyer, Ginsburg, Stevens and Souter) and four Nationalist Justices (Roberts, Scalia, Thomas, and Alito), with Justice Kennedy now left as the swing Justice. What this means is that the next Supreme Court nomination may well determine in which direction we will move. Once again, the question will be: will the United States Supreme Court take a universalist position or a nationalist position in framing America's conception of international law? In other words, will the Justices follow a Scalia approach, and adopt a state-centric, positivistic, *realpolitik* vision that looks solely at American interests, or will we follow the broader, more forward-looking vision expressed by Justice Blackmun in 1987 when he said that U.S. courts should look beyond the national interest to "the mutual interest of all nations in a smoothly functioning international legal

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26. John E. Noyes, *Universalism and the American Tradition of International Law*, 21 CONN. J. INT'L L. 199, 202 (2006).

27. See generally Harold Hongju Koh, *The Supreme Court Meets International Law*, 12 TULSA J. COMP. & INT'L L. 1 (2004) (9th John W. Hager Lecture).

28. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the Comm. on the Judiciary*, 109th Cong. 370 (2005). In his confirmation hearing, Justice Alito remarked in response to a question posed by Senator Tom Coburn about the Supreme Court's referencing and use of international and foreign law: "I don't think that it's appropriate or useful to look to foreign law in interpreting the provisions of our Constitution." *Confirmation Hearing on the Nomination of Samuel Alito to be Associate Justice of the United States: Hearing Before the Comm. on the Judiciary*, 109th Cong. (2006).

regime.”<sup>29</sup> Domestic courts should consider, Justice Blackmun wrote, whether “there is a course that furthers, rather than impedes, the development of an ordered, international system.”<sup>30</sup> Will we think of ourselves as bound solely by the needs of our own continent or will we think of ourselves as part of an emerging international system?

What Mark Janis’ book is telling us is to go “back to the future.” We should return to the American universalist tradition of international law as it existed in a time of great expectations, not create exceptionalist double standards, or rely solely on power-based internationalism—a national tendency that arose only after we had achieved a certain measure of global dominance after 1914. Instead, we should be looking at the kind of norm-based internationalism—with fidelity to process, humanity, principles of fundamental justice and human rights, and transnationalism-- that characterized the optimistic age about which Mark Janis has written.

To see whether we ultimately achieve this vision, we will all have to await the second volume of Professor Janis’ historical project, which promises to continue the tradition that this introductory work establishes. And so I look forward to that book—as well as our continuing friendship and lifelong collaboration-- with only the greatest of expectations.

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29. *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 555 (1987).

30. *Id.* at 567.