

The American Challenge to International Law: A Tentative Framework for Debate*

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I. INTRODUCTION

A small squib buried at the bottom of the front-page of the April 12 *New York Times* announced the creation of the International Criminal Court (ICC): "More than 50 years after it was proposed, the world's first permanent court for the prosecution of war criminals and dictators became a reality, over strong American opposition."¹ The full article, which apparently did not merit front-page placement, appeared on page A3 and detailed American opposition to the court.²

The establishment of the court has been broadly welcomed by most democratic nations, American lawyers' associations and human rights groups. But it has an implacable foe in

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1. *Birth of a War Crimes Court*, N.Y. TIMES, Apr. 12, 2002, at A1 (directing reader to full article, Barbara Crossette, *War Crimes Tribunal Becomes Reality, Without U.S. Role*, N.Y. TIMES, Apr. 12, 2002, at A3).

2. Crossette, *supra* note 1.

the Bush administration, which argues that the court will open American officials and military personnel in operations abroad to unjustified, frivolous or politically motivated suits.³

Ten days earlier, the *New York Times* ran another article with a decidedly opposite theme. In “Yugoslavia to Cooperate With War Tribunal,” Ian Fischer reported that “[w]ith tens of millions of dollars in American financial aid frozen, the Yugoslav government pledged today to cooperate ‘fully’ with the international war crimes tribunal.”⁴ By freezing aid to Yugoslavia, the United States had apparently succeeded in pressuring the Yugoslav government to cooperate with the International Criminal Tribunal for the Former Yugoslavia and to submit to its authority.⁵

This apparent contradiction in American policy did not elude the editors of *The Economist*. In its article on the establishment of the ICC, *The Economist* noted, “America has opposed the court ever since the idea was first approved by 120 other countries in 1998 at a United Nations treaty conference in Rome.”⁶ However, “[t]his attitude is unwise and unnecessary,” noted *The Economist*.⁷

A successful court . . . would embody values of international law and the protection of civilians championed by successive American governments since the second world war. America has been the chief instigator and biggest financial backer of the Hague tribunals. In fact, it was America’s success in winning support for the creation of those tribunals that persuaded its allies that a permanent criminal court was feasible. Slobodan Milosevic, Serbia’s former dictator, is now on trial in The Hague only because America first provided the evidence needed to indict him, and then threatened to withhold aid to Serbia if it did not surrender him.⁸

How can one possibly explain this apparent contradiction? The United States is often at the forefront of efforts to redress human rights abuses and to bring the world under the power of international law. Yet the United States has been equally careful to remain outside such legal schemes, defending American “state sovereignty” against attempts to bring the United States and its citizens under the governance of the same international rules. This trend is hardly new; the United States was pivotal in the creation of the Nuremberg war crimes trials following World War II.⁹ It was the United States that insisted that the Nazis be held accountable for war crimes and crimes against humanity. Nonetheless, the United States refused to sign the 1948 Genocide Convention—inspired by the Nuremberg trials—until 1986.¹⁰ The United States helped found the United Nations, yet remains incredibly skeptical of

3. *Id.*

4. Ian Fischer, *Yugoslavia To Cooperate with War Tribunal*, N.Y. TIMES, Apr. 2, 2002, at A6.

5. *See id.*

6. *A World Criminal Court: Give it a Welcome*, ECONOMIST, Apr. 13, 2002, at 14.

7. *Id.*

8. *Id.*

9. *See* GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* 150 (2000) (“Nuremberg was largely an American creation.”).

10. Convention on Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (entered into force for the United States Feb. 23, 1989); Laura Secor, *Turning a Blind Eye*, N.Y. TIMES, Apr. 14, 2002, § 7, at 9 (reviewing SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* (2002)).

it.¹¹ Can these inconsistent policies be explained as mere hypocrisy, as the pragmatic application of hegemonic power?

Perhaps. It is certainly tempting to see these contradictions as hypocritical and self-serving. Pragmatic assessments of American self-interest undoubtedly played a role in each of the policy decisions mentioned above (as well as many other similar ones). But such an answer seems empty. Observers have long noticed the power of ideas¹² in American foreign policy, and it has become commonplace to discuss how American foreign policy history reflects various intellectual trends¹³—some dating to the founding of the Republic.¹⁴ It seems strange to discuss American perceptions of international law as somehow divorced from these intellectual trends. Ideas have long shaped

11. See A.M. Rosenthal, *On My Mind: The Carpet of Contempt*, N.Y. TIMES, Jan. 8, 1999, at A19. See also JOHN LEWIS GADDIS, *WE NOW KNOW: RETHINKING COLD WAR HISTORY* 196 (1997) (“The opportunity to redesign the international system was, in [the minds of American and British planners], a ‘second chance,’ and both the United Nations and Bretton Woods reflected their determination to seize it.”).

12. I purposely use the colloquial “ideas” in order to capture a wide swath of scholarship dealing either consciously or unconsciously with the impact of ideas, intellectual trends, culture, religion, social assumptions, fears, ideology, etc., on foreign policy decisionmaking. Any attempt to define these terms too specifically will unduly limit the scope and argument of this Essay and focus far too much attention on the meaning of the terms rather than overall argument. Cf. Jonathan Zasloff, *Law and the Shaping of American Foreign Policy: From the Gilded Age to the New Era*, 78 N.Y.U. L. REV. (forthcoming 2003) (“‘Ideology’ is a notoriously treacherous concept.”). To the extent that these terms carry different connotations, I have used them interchangeably in different parts of this Essay. Nonetheless, the definition of ideology provided by David Brion Davis may be helpful:

I have used ‘ideology’ to mean an integrated system of beliefs, assumptions, and values, not necessarily true or false, which reflects the needs and interests of a group or class at a particular time in history Because ideologies are modes of consciousness, containing the criteria for interpreting social reality, they help to define as well as to legitimate collective needs and interests.

DAVID BRION DAVIS, *THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770-1823* at 14 (1975). For a short discussion of “ideology” and how various historians and thinkers have defined it, see Zasloff, *supra*, at n.34-39.

13. See, e.g., GADDIS, *supra* note 11 (demonstrating how democratic ideals influenced the structure and success of the NATO alliance); MARC TRACHTENBERG, *A CONSTRUCTED PEACE: THE MAKING OF THE EUROPEAN SETTLEMENT, 1945-1963* (1999) (same); WILLIAM APPLEMAN WILLIAMS, *THE TRAGEDY OF AMERICAN DIPLOMACY* (1959) (describing three guiding principles for American foreign policy as elaborated further at *infra* note 34 and accompanying text); Michael H. Hunt, *Ideology of National Greatness and Liberty*, in *MAJOR PROBLEMS IN AMERICAN FOREIGN POLICY* 7 (Thomas G. Patterson ed., 1989) [hereinafter *MAJOR PROBLEMS*] (describing an idea of “national greatness”); Walter Russell Mead, *The Jacksonian Tradition and American Foreign Policy*, 58 NAT’L INTEREST 5-29 (Winter 1999/2000) (outlining a Jacksonian, as opposed to Jeffersonian, Wilsonian, or Hamiltonian, foreign policy idea). Even Thucydides, perhaps the first diplomatic historian, looked at the impact of ideas on foreign policy—according to Thucydides, democracies were innovative and fast yet warlike and fickle, whereas oligarchies tended to be slower and more conservative both domestically and abroad. See generally THUCYDIDES, *HISTORY OF THE PELOPONNESIAN WAR* (Richard Crawley trans., J.M. Dent & Sons, Ltd. 1920).

Nonetheless, many have noted that the discussion of American diplomatic history continues to be too exclusively power-political. “Despite an impressive historical pedigree, however, the cultural zone of foreign policy has always remained a fringe area of diplomatic activity and historians have been satisfied by and large to concentrate on the political, economic, and military aspects of foreign policy.” FRANK A. NINKOVICH, *THE DIPLOMACY OF IDEAS: U.S. FOREIGN POLICY AND CULTURAL RELATIONS, 1938-1950 I* (1981). See also Walter Russell Mead, *The American Foreign Policy Legacy*, FOREIGN AFF., Jan./Feb. 2002, at 163, 163-65 (“[O]ne of the most remarkable features of contemporary U.S. foreign policy is the ignorance of and contempt for the country’s own foreign policy tradition—a perspective shared by many otherwise thoughtful people . . . [who] are responsible for developing, studying, and carrying out the foreign policy of the United States.”). These criticisms can be extended to the study of international law.

14. See *infra* Part III.

American perceptions of the outside world and the United States' relation to it; it seems logical that those same ideas would play a role in defining the tools of American international relations—the possible, the useful, the dangerous.

International law is often discussed in terms of “pure” concepts. Either you are a Hobbesian or a Grotian or a Kantian. A binary opposition is set up between an international law based on states (Positivist) and an international law based on people (Cosmopolitan).¹⁵ As long as it is assumed that the United States must conform to that picture, its actions will seem contradictory, if not hypocritical. But much as describing American foreign policy as “Realist,” or “Neo-liberal,” or “Constructivist”¹⁶ misses much of the real story, so too does this binary analysis of international law. All of these concepts provide useful analytical tools, but when the facts seem to conflict with the concepts—as they do in the case of American perceptions of international law—it behooves us to look beyond the conceptual framework to see what explanations might be lying beyond the conceptual boundaries.¹⁷

This essay attempts to re-explain the American¹⁸ perception of international law as an extension of intellectual trends in American foreign

15. For a discussion and explanation of the Positivist and Cosmopolitan schools of thought, see *infra* Part III.A.

The Grotian position arguably attempts to reconcile the opposition between Positivists (loosely associated with “Hobbesians”) and Cosmopolitans (“Kantians”) by advocating some mixture of the two. Even within the Grotian picture, however, there seems to be a tendency to re-divide along those same doctrinal lines. Either the law should be more about people—Solidarist—or more about states—Pluralist. Moreover, even to the extent that the Grotian position does accept the pragmatic application of either cosmopolitan or positivistic elements, it still sets the two up as oppositional choices. See Hedley Bull, *The Grotian Conception of International Society*, in *DIPLOMATIC INVESTIGATIONS* (Herbert Butterfield & Martin Wight eds., 1966), reprinted in *HEDLEY BULL ON INTERNATIONAL SOCIETY* 95 (Kai Alderson & Andrew Hurrell eds., 2000); Benedict Kingsbury, *A Grotian Tradition of Theory and Practice?: Grotius, Law, and Moral Skepticism in the Thought of Hedley Bull*, 17 *QUINNIPIAC L. REV.* 3 (1997).

16. Much of modern International Relations scholarship is divided into these three schools. For a Realist account of International Relations, see KENNETH WALTZ, *MAN, THE STATE, AND WAR: A THEORETICAL ANALYSIS* (1959). For a Neo-liberal account, see DAVID HALLORAN LUMSDAINE, *MORAL VISION IN INTERNATIONAL POLITICS: THE FOREIGN AID REGIME, 1949-1989* (1993). For a Constructivist account, see ALEXANDER WENDT, *SOCIAL THEORY OF INTERNATIONAL POLITICS* (1999). Each school of thought is too complex to define here, but for a good discussion of each school and how they might explain American perceptions of neutral rights, see Mlada Bukovansky, *American Identity and Neutral Rights from Independence to the War of 1812*, 51 *INT'L ORG.* 209 (1997).

17. In 1989, Kenneth Abbott, noticing “the estrangement between [international law] and the most closely related social science discipline, international relations (‘IR’),” argued that “the pursuit of modern IR theory would have a profound effect on [international law] scholarship.” Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 *YALE J. INT'L L.* 335, 337, 410 (1989). Since then international law and international relations scholars have begun to tear down the walls between their respective disciplines. See Anne-Marie Slaughter et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 *AM. J. INT'L L.* 367 (1998) (mapping interdisciplinary international law-international relations work (including bibliography) and setting an agenda for future collaborative research). This Essay seeks to widen this discussion further by bringing American foreign policy history and popular American understandings of the American role in the world to bear upon international law scholarship. See *supra* text accompanying note 13.

18. I am being purposely vague concerning the relevant actors in this Essay. American, the United States, and statesmen, are all used here relatively interchangeably. Very likely, interesting work could be done to show how foreign policy ideas differed depending on the relevant group—Presidents, Congress, farmers, urbanites, the wealthy, the poor, etc.—or the relevant time—the early Republic, the Gilded Age, the Cold War, etc. The framework described in this Essay is necessarily tentative and seeks

policy. This project is a potentially enormous one. Therefore, this essay will look merely at one long-recognized set of ideas in American foreign policy history—liberal constitutionalism as a utopian world vision.¹⁹ By turning the lens of these ideas upon American perceptions of international law, a new, uniquely American understanding of international law emerges. Viewed within this framework, American choices between human rights and state sovereignty take on new meaning. By understanding American liberal constitutionalism as a utopian world vision, it becomes possible to see how the United States can endorse human rights for the world and state sovereignty for itself as a matter of principle rather than pragmatism.

This framework is not meant to exhaust the explanations of American actions and choices; no brute causal relationship is asserted.²⁰ Nor does this essay argue that all Americans believe in this ideological framework at all times.²¹ Rather, this essay endeavors to show that such a framework—at least

to paint with as broad strokes as possible. To the extent that the ideas here resonate, this author encourages and invites others to examine better these differences.

19. I use “liberal constitutionalism” to denote a particular mix of democracy, free-market capitalism, and constitutional protection of human rights that is often wrongly described as “democracy,” and which is captured well in the following passage:

It refers to the tradition, deep in Western history, that seeks to protect an individual’s autonomy and dignity against coercion, whatever the source—state, church, or society. The term marries two closely connected ideas. It is *liberal* because it draws on the philosophical strain, beginning with the Greeks, that emphasizes individual liberty. It is *constitutional* because it rests on the tradition, beginning with the Romans, of the rule of law. Constitutional liberalism developed in Western Europe and the United States as a defense of the individual’s right to life and property, and freedom of religion and speech. To secure these rights, it emphasized checks on the power of each branch of government, equality under the law, impartial courts and tribunals, and separation of church and state. Its canonical figures include the poet John Milton, the jurist William Blackstone, statesmen such as Thomas Jefferson and James Madison, and philosophers such as Thomas Hobbes, John Locke, Adam Smith, Baron de Montesquieu, John Stuart Mill, and Isaiah Berlin. In almost all of its variants, constitutional liberalism argues that human beings have certain natural (or “inalienable”) rights and that governments must accept a basic law, limiting its own powers, that secures them. Thus in 1215 at Runnymede, England’s barons forced the king to abide by the settled and customary law of the land. In the American colonies these laws were made explicit, and in 1638 the town of Hartford adopted the first written constitution in modern history. In the 1970s, Western nations codified standards of behavior for regimes across the globe. The Magna Carta, the Fundamental Orders of Connecticut, the American Constitution, and the Helsinki Final Act are all expressions of constitutional liberalism.

Fareed Zakaria, *The Rise of Illiberal Democracy*, FOREIGN AFF., Nov./Dec. 1997, at 25-26. Zakaria’s “Constitutional Liberalism” is separate from democracy. By liberal constitutionalism, this Essay means to include democracy along with other rights.

20. This does not mean that such ideas do not exert real force on foreign policymaking. One example of such ideas actually shaping foreign policy might be visible in the aftermath of the Spanish-American War. Having framed American action as supportive of Cuban independence from Spain, the United States could not take Cuba as its own colony following its victory over Spain. Similar concerns led to difficult debates over the acquisition of the Philippines. See, e.g., MATTHEW FRYE JACOBSON, SPECIAL SORROWS: THE DIASPORIC IMAGINATION OF IRISH, POLISH, AND JEWISH IMMIGRANTS IN THE UNITED STATES (1995). It would be hard to imagine a late nineteenth-century European state acting with similar restraint.

21. Any attempt at intellectual history is open to the skepticism of “Did people really believe that?” or “Did the people in question really believe that?” Even more so, some may question whether the people in question would agree with the intellectual history outlined. While such a concern is relevant, it does not make such a study pointless. The intellectual trends described may not completely explain any individual’s actions or a particular policy, but, to the extent that such an intellectual trend existed, it may help to illuminate how policies were shaped, what assumptions undergird an individual’s choices, or how those choices might have been perceived by others. One need merely look at the rhetoric of

partially founded in American history—has the ability to explain certain features of American perceptions and of international law itself that may have been obscured by the rigid classification of the typical debate. Moreover, this essay seeks to show that the American international law that emerges from this analysis poses real, practical problems for the traditional Positivist and Cosmopolitan conceptions of international law. Finally, this essay will attempt, very tentatively, to propose an alternative vision of international law—an alternative vision of the international lawyer's role that might more effectively take the American experience into account. Any "universal" international law will have to take the threat posed by ideas and ideology seriously and will have to do much of its work at this level.

This essay will proceed in two parts. Part II attempts to reinterpret seemingly hypocritical American positions on international law through the lens of ideas in American foreign policy history. Part II argues that while such apparent hypocrisy might be explained by mere pragmatism, ideas in American foreign policy history seem to point in a more dangerous direction—i.e., that such divergent actions may actually be informed by a coherent, specifically American conception of international law. In order to demonstrate this proposition, Part II.A first lays out one such idea—American liberal constitutionalism as a utopian worldview, and its relationship to two other ideas in American foreign policy history, Wilsonianism and Isolationism. Part II.B then refracts international law through liberal constitutionalism's ideological lens and discovers what appears to be a specifically American understanding of international law, legality, and legitimacy—an understanding that seems to unify seemingly divergent American positions. The casual reader may want to end there. But for those interested in following this discussion one step further, Part III looks at the impact such an American international law might have on traditional international law scholarship and practice. Part III.A argues that such a conception of international law poses real challenges for traditional Positivist and Cosmopolitan conceptions of international law. Part III.B tentatively argues that to meet such challenges, international law must be reconceived as a dynamic process of institution building rather than the neutral application of static principles.

II. AMERICAN HISTORY, IDEAS, AND INTERNATIONAL LAW

A. *America's Mission*

Any account of American foreign policy must take account of ideas and intellectual trends in American history.

[M]any common themes . . . run from America's foreign policy past into the present. Ever since George Washington's administration, Americans have debated the following questions: Should the national government cooperate with business to build the economy through trade and tariffs? Should the extension of democracy, the defense of human

American statesmen described below in Parts II.A and II.B to see, at the very least, that American statesmen recognize the resonance of certain ideas with the American public.

rights, and the construction of a world order based on international law stand at the center of U.S. foreign policy? Is the hope of a peaceful world order a beguiling illusion, and should the United States therefore build up a strong defense system to protect itself? Should Americans seek to minimize foreign entanglements and shun foreign quarrels to concentrate on strengthening democracy at home? To ignore the history of these debates is shortsighted, for a thorough understanding of how these issues have shaped U.S. foreign policy in the past can help shape the present—both for policymakers and for the American public.²²

The role of ideas, culture, and religion has been particularly stark in the history of the United States. The nature of the American Revolution, the practical need to create a new polity, and the unusual intermeshing of religious and Enlightenment ideas seemingly necessitated the debate and formulation of a foundational ideology.

One ideological strain that began to emerge even before the founding of the Republic was a belief in a special American mission.²³ Originally a religious idea, this mission was at least partially secularized by the American Revolution.

Americans assumed a posture of moral and ideological superiority at an early date. Despite the persistence of the Puritan tradition, however, this assertiveness took predominantly secular forms. Supernatural authority was invoked to explain and account for the steady enlargement of the United States, but the justifications for expansion were generally based on standards derived from the world. The phrase “Manifest Destiny,” for example, symbolized the assertion that God was on America’s side rather than the more modest claim that the country had joined the legions of the Lord. As the logic implied, the argument was that America was the “most progressive” society whose citizens made “proper use of the soil.”²⁴

Americans proclaimed their separation from the old ways of Europe. “Europe has a set of primary interests which to us have none or a very remote relation.”²⁵ There was a new type of polity. “In our civil constitutions, those impediments are removed which obstruct the progress of society towards perfections.”²⁶ Moreover, the American “experiment” was not merely for the benefit of Americans; rather, “Americans would set relations between nations on a new basis.”²⁷ As Thomas Paine wrote in 1776, “We [Americans] have it in our power to begin the world over again.”²⁸ “Secure in their faith in liberty,” historian Michael Hunt writes, “Americans would set about remaking others in their image while the world watched in awe.”²⁹

22. Mead, *The American Foreign Policy Legacy*, *supra* note 13, at 164-65.

23. See, e.g., Ezra Stiles, *The United States Elevated to Glory and Honour* (1783), reprinted in MAJOR PROBLEMS, *supra* note 13, at 39 (“Should this prove a future fact, how applicable would be the text, when the Lord shall have made his American Israel ‘high above all nations which he hath made,’ in numbers, ‘and in praise, and in name, and in honour!’”); John Winthrop, *City Upon a Hill* (1630), reprinted in MAJOR PROBLEMS, *supra* note 13, at 7.

24. WILLIAMS, *supra* note 13, at 49-50. See also Hunt, *supra* note 13, at 7 (“The capstone idea defined the American future in terms of an active quest for national greatness closely coupled to the promotion of liberty.”).

25. George Washington, *Farewell Address* (1796), reprinted in MAJOR PROBLEMS, *supra* note 13, at 76.

26. Stiles, *supra* note 23, at 35.

27. Hunt, *supra* note 13, at 8.

28. Thomas Paine, *Common Sense* (1776), reprinted in MAJOR PROBLEMS, *supra* note 13, at

32.

29. Hunt, *supra* note 13, at 10.

This foundational ideology—"liberal constitutionalism as a utopian vision" (i.e., the whole world will be happier and more peaceful if it looks more like the United States)—is often wrongly associated with an "internationalist" or "Wilsonian" school of American thought as opposed to an "Isolationist" or at least "non-interventionist" one. The conflict between Wilsonianism and Isolationism has been long-documented and debated. In the current Bush Administration it is loosely associated with a supposed divide between the "Bushies"³⁰—e.g., Secretary of State Colin Powell and National Security Advisor Condoleezza Rice³¹—who favor caution³² and the "Reaganites"—Vice President Dick Cheney, Secretary of Defense Donald Rumsfeld, and Deputy Secretary of Defense Paul Wolfowitz—who favor action.³³ This divide, as the Bush Administration demonstrates, has never been as stable or binary as it appears, but a tension between isolationist and internationalist—or more accurately, interventionist and non-interventionist—values can be seen in American foreign policy history.

The ideology of American mission, however, is often an animating characteristic of both sides of the Wilsonian-Isolationist debate. William Appleman Williams argued that American foreign policy has been guided by three basic ideas:

In the realm of ideas and ideals, American policy is guided by three conceptions. One is the warm, generous, humanitarian impulse to help other people solve their problems. A second is the principle of self-determination applied at the international level, which asserts the right of every society to establish its own goals or objectives, and to realize them internally through the means it decides are appropriate. . . . [T]he third idea entertained by many Americans is one which insists that other people cannot *really* solve their problems and improve their lives unless they go about it in the same way as the United States.³⁴

Arguably, Williams' third idea, which might be associated with "liberal constitutionalism as a utopian worldview" is the pivot around which the other

30. Referring to the current President's father.

31. Rice actually remains something of a cipher, difficult to place in either camp.

32. "The Powell doctrine's most fundamental tenets are that the United States needs to define its political goals; that once it has decided to use force, it needs to do so in an overwhelming manner; and that it needs an exit strategy. America's hawks, such as Weekly Standard editor William Kristol, have always hated both Powell and his doctrine, which they see as a synonym for isolationism and passivity." Jacob Heilbrunn, *The Powell Doctrine: Pinpricks Still Won't Work*, L.A. TIMES, Nov. 4, 2001, at M2. And as Michael Kinsley writes, "The trouble with the Powell Doctrine is that if you take it seriously, it rules out just about any conceivable use of force except to repel direct threats to America's own safety. It amounts to virtual isolationism again, via the great circle route." Michael Kinsley, *Is There a Doctrine in the House?*, WASH. POST, Aug. 9, 2000, at A25.

33. This categorization oversimplifies these officials' views. One should note, however, that this apparent divide itself demonstrates the instability of the isolationist-Wilsonian divide. According to the conventional wisdom, the Bushies, insofar as they favor caution, are less eager to get involved abroad (isolationist?) but are, in turn, more multilateral (Wilsonian?). The Reaganites are supposedly more aggressive and interventionist in protecting American interests (Wilsonian?) but are also more vehemently unilateralist (isolationist?). Although the apparent divisions on George W. Bush's foreign policy team have been glossed over in the course of the U.S. war on terrorism, a good example of such a conflict can still be seen in America's policy on Iraq. See, e.g., Jane Perlez, *Capitol Hawks Seek Tougher Line on Iraq*, N.Y. TIMES, Mar. 7, 2001, at A10. See generally Bill Keller, *The Sunshine Warrior*, N.Y. TIMES, Sept. 22, 2002, § 6 (Magazine), at 48 (discussing such divisions within Bush Administration).

34. WILLIAMS, *supra* note 13, at 9.

two ideas, roughly intervention and non-intervention, rotate. Both Isolationists and Wilsonians agree that the United States has achieved a “more perfect Union”³⁵ and that the world would be better off if it looked more like the United States. What the two “schools” disagree on is the means to achieve that utopian end. Caricatured,³⁶ Wilsonians want the United States to actively encourage liberal constitutionalism abroad, while Isolationists want the United States to serve as model and example for the world. Wilsonians believe it is the duty of a strong United States to spread the revolution abroad, while Isolationists believe the achievements of the revolution must be protected “[a]gainst the insidious wiles of foreign influence.”³⁷

Whereas such Wilsonian values might be identified in Thomas Jefferson’s support of the French Revolution,³⁸ a more isolationist vision of American mission emerges from George Washington’s Farewell Address, where Washington famously warned of the dangers posed by entangling alliances:

As avenues to foreign influence in innumerable ways, such attachments [foreign alliances] are particularly alarming to the truly enlightened and independent patriot. How many opportunities do they afford to tamper with domestic factions, to mislead public opinion, to influence or awe the public councils! . . . Against the insidious wiles of foreign influence . . . the jealousy of a free people ought to be *constantly* awake, since history and experience prove that foreign influence is one of the most baneful foes of republican government.³⁹

Yet even the Farewell Address, the supposed gospel of American isolationism, presupposes an American mission. “It will be worthy of a free, enlightened, and at no distant period a great nation to give to mankind the magnanimous and too novel example of a people always guided by an exalted justice and benevolence.”⁴⁰

Understood this way, “liberal constitutionalism as a utopian vision” becomes a noticeable trend running through much of American foreign policy history. Andrew Jackson spoke of “extending the area of freedom.”⁴¹ Manifest Destiny stressed the American historical duty to civilize the Native Americans and develop the land.⁴² During and after the Mexican-American war, leaders spoke of “America’s responsibility to extend its authority over ‘semi-barbarous people.’”⁴³ “By thus taking up the duty of ‘regeneration and civilization,’ America could perform the noble work of teaching inferiors to

35. U.S. CONST. pmbl.

36. I am very uncomfortable reifying supposed Wilsonian and Isolationist schools of American foreign policy. It would be very difficult to find historical figures who could be accurately described as one or the other (including Woodrow Wilson himself). It would be far better to talk of Wilsonian values and Isolationist values. For the sake of simplicity, however, I have conformed to the colloquial discourse of “Wilsonians” and “Isolationists.”

37. Washington, *supra* note 25, at 76. It is important to note that despite arguing for political neutrality, Washington still advocated the spread of American commerce abroad. *Id.* (“Harmony, liberal intercourse [commerce] with all nations are recommended by policy, humanity, and interest.”).

38. Again, this is complicated by Jefferson’s own tendencies toward isolationism.

39. *Id.* at 76.

40. Washington, *supra* note 25, at 75.

41. WILLIAMS, *supra* note 13, at 50.

42. See *supra* text accompanying note 24.

43. *Id.*

appreciate the blessings they already enjoyed but were inclined to overlook.”⁴⁴ The Spanish-American War, as well as the resulting administration of the Philippines, drew from the belief in American utopianism.⁴⁵ Taft’s design for a “League of Nations to Enforce the Peace” looked suspiciously like the American federal republic.⁴⁶ Wilson demanded transparency and democracy in foreign policy.⁴⁷ Liberal-constitutionalist utopianism provided a foundation for the Cold War policy of Containment.⁴⁸ And the Clinton Administration turned to economic diplomacy to forward the utopian vision—capitalism and globalization would eventually breed democracy and, in turn, peace and stability.⁴⁹

Notably, this notion of American mission has now been enshrined in the most recent National Security Strategy of the United States. “In time,” writes the Bush Administration,

[other states] will find that social and political freedom is the only source of national greatness. America will encourage the advancement of democracy and economic openness in . . . nations, because these are the best foundations for domestic stability and international order. We will strongly resist aggression from other great powers—even as we welcome their peaceful pursuit of prosperity, trade, and cultural advancement.⁵⁰

Further, the Bush Administration announces, “The United States welcomes our responsibility to lead in this great mission.”⁵¹

44. *Id.*

45. *See supra* note 20.

46. *See* William Howard Taft, *Plan for a League of Nations To Enforce Peace*, PRESIDENTIAL PAPERS OF WILLIAM H. TAFT, Series 9A: 36-9 (May 12, 1915).

47. *See* Woodrow Wilson, Fourteen Points Speech (Jan. 8, 1918), *reprinted in* 1 WAR AND PEACE 155, 159-61 (Ray Stannard Baker & William E. Dodd eds., 1927) (proposing “I. Open covenants of peace, openly arrived at” and “XIV. A general association of nations”).

48. *See* GEORGE F. KENNAN, AMERICAN DIPLOMACY 1900-1950 (1951) [hereinafter KENNAN]. Kennan explained that the United States could adopt a policy of containment against the Soviet Union because Communism carried “the seeds of its own destruction,” and over time internal pressure as well as the external model of the United States would bring Soviet society closer and closer to the American model. “For these reasons, the most important influence that the United States can bring to bear upon internal developments in Russia will continue to be the influence of example: the influence of what it is, and not only what it is to others but what it is to itself.” George F. Kennan, *America and the Russian Future*, FOREIGN AFF., Apr. 1951, at 351, *reprinted in* KENNAN, *supra*, at 153.

49. This policy is echoed in the Bush Administration’s National Security Strategy:

A strong world economy enhances our national security by advancing prosperity and freedom in the rest of the world. Economic growth supported by free trade and free markets creates new jobs and higher incomes. It allows people to lift their lives out of poverty, spurs economic and legal reform, and the fight against corruption, and it reinforces the habits of liberty.

THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 17 (Sept. 2002), *available at* <http://www.whitehouse.gov/nsc/nss.pdf> [hereinafter NATIONAL SECURITY STRATEGY]. The 2002 National Security Strategy paper was released pursuant to the Goldwater-Nichols Department of Defense Reorganization Act of 1986 (P.L. 99-433), which requires the White House to report to Congress and the public regularly on national security strategy.

50. *Id.* at *Introduction*. It is ironic that although rejecting the Cold War strategy of Containment (“With the collapse of the Soviet Union and the end of the Cold War, our security environment has undergone profound transformation”), the Bush Administration’s national security strategy reaffirms the same basic assumption undergirding the Cold War strategy: that all nations will eventually have to accept the clear superiority of liberal constitutionalism (“History has not been kind to those nations which ignored or flouted the rights and aspirations of their people.”). *Id.* at 3.

51. *Id.*

B. An "American" International Law

American understandings of international law—its role, its force—must be seen through the lens of this ideology.⁵² The American utopian ideology discussed above asserts that life, liberty, and property are inalienable and universal rights.⁵³ It also assumes that the American experiment in liberal constitutionalism—a special mix of democracy, free-market capitalism, and constitutional constraints—is, though flawed, the best available means of achieving those rights. Finally, it assumes that if all other societies organized themselves along the American model, the world would be a happier, safer, and possibly even more peaceful place.⁵⁴

Basic to this ideology is the role that law plays in constraining government action and protecting human rights. Law provides a conservative shield against the infringement of basic rights by government, as well as a progressive sword to extend those rights to others. It is sensible that such assumptions should extend to the role of international law.

Liberal constitutionalism as a utopian world vision complicates the traditional international law dichotomy of "states" and "people." The American worldview believes in the inalienability and universality of human rights; it also believes that state sovereignty is only truly legitimate where it is based on the will of the people.⁵⁵ To that extent, "people" *must* be the fundamental unit of international law. This explains American backing of the Nuremberg, Yugoslavia, and Rwanda war crimes tribunals.⁵⁶ It also explains

52. See, e.g., Nathaniel Berman, *Internationalism in a Divided World: The Problem of Legitimacy* 5 (May 16, 2002) (unpublished manuscript, on file with author). Berman explains:

Indeed, the long decade seems to have forced us to frankly confront the relationship between international law's two famously contradictory talents: making the world safe for the exercise of power and making the world safe for the highest ideals of humanity. At least after Kosovo, no one engaged in international legal theory or practice could deny that power and idealism were thoroughly intertwined, that pure idealism and pure *realpolitik* had become equally quixotic aspirations.

Id.

53. DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). See also NATIONAL SECURITY STRATEGY, *supra* note 49, at 3 ("America must stand firmly for the nonnegotiable demands of human dignity: the rule of law; limits on the absolute power of the state; free speech; freedom of worship; equal justice; respect for women; religious and ethnic tolerance; and respect for private property."); *id.* at *Introduction* ("These values of freedom are right and true for every person, in every society—and the duty of protecting these values against their enemies is the common calling of freedom-loving people across the globe and across the ages.").

54. See NATIONAL SECURITY STRATEGY, *supra* note 49, at 1 (describing the U.S. national security strategy as being "based on a distinctly American internationalism that reflects the union of our values and our national interests. The aim of this strategy is to help make the world not just safer but better."). This idea seems to have migrated to international law scholarship. See Anne-Marie Slaughter, *A Liberal Theory of International Law*, 94 AM. SOC'Y INT'L L. PROC. 240, 249 (2000) (arguing that liberal states may be more likely to abide by human-rights treaties).

55. "That to secure these [inalienable] rights, Governments are instituted among Men . . ." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). See also U.S. CONST. pmbl ("We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.").

56. See *supra* text accompanying notes 1-10.

both active and tacit American support for democratization, privatization, and open markets abroad.⁵⁷

However, Americans are also deeply suspicious of other peoples—other states—that have not experienced the American liberal revolution and have not yet achieved the level of historical progress that the United States has.⁵⁸ “[H]istory and experience prove that foreign influence is one of the most baneful foes of republican government.”⁵⁹ The American historic achievement must be protected against such outside, “insidious”⁶⁰ influences. The same international law that acts as the crusader’s sword for human rights becomes a fortress to protect the rights already attained. The United States wields “state sovereignty” to protect its citizens from foreign influence (or worse, foreign government),⁶¹ even where the world seems to be calling for the protection, within American borders, of the same rights as those proclaimed by the United States. A proponent of this view might ask, “How could Americans submit to the potential authority of Monarchists (Great Britain) and Socialists (e.g., Sweden), let alone Communists (China), Rogues (Syria, North Korea, Iran), and petty dictators (take your pick)?” The people of the world need the protection of the United States, but so too (and above all) do the American people.

This is not contradictory. The United States can advocate human rights for the world and state sovereignty for itself because its foundational ideology presupposes that it is the only truly legitimate state.⁶² In its self-perception, it is not a state like those of the old world; a mere extension of the American people, its legitimacy is not predicated on old world ideas of ethnicity, monarchy, or language. It is “government of the people, by the people, for the people”;⁶³ it is truly government by consent.⁶⁴ The United States’ unique legitimacy thus serves as an important element of self-identification. The rest of the world is defined by its very illegitimacy. Other states are placed on a sliding scale of both legitimacy and respect, with those most similar to the

57. Examples include the “Open Door Policy” for China, the Marshall Plan, World Trade Organization membership for China, as well as the activities of the National Endowment for Democracy and the U.S. Agency for International Development’s support for independent judiciaries. See Zakaria, *supra* note 19.

58. “Americans have particular reasons to despair of Europe. As Americans strive to spread their free-market gospel of prosperity and individualistic freedom around the world and to fight the scourge of global terrorism, Europeans often seem singularly unappreciative of those well-intentioned aspirations.” *How Sick is Europe?*, *ECONOMIST*, May 11, 2002, at 11.

59. Washington, *supra* note 25, at 76.

60. *Id.*

61. One might argue that “state sovereignty” is actually used to protect American hegemony, but it is important to take those like Senator Jesse Helms and the “black helicopter” global skeptics (what Walter Russell Mead calls “Jacksonians”) seriously. For them, American hegemony is valuable only insofar as it protects Americans—and global dominance is actually dangerous due to the pathways it creates for moral corruption.

62. See generally Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 *YALE L.J.* 1935 (2002).

63. Abraham Lincoln, Address at the Dedication of the Gettysburg National Cemetery (Nov. 19, 1863), available at <http://www.ourdocuments.gov/content.php?page=transcript&doc=36>.

64. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 404-05 (1819) (“The government of the Union, then, (whatever may be the influence of this fact on the case,) is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.”).

United States on one side—e.g., Great Britain⁶⁵—and those least similar on the other—e.g., Iraq.

This understanding is best analogized to the worldview of the old Soviet Union. Built upon Marxist ideology, the international unit of concern for the Soviet Union was the “worker.” All bourgeois states were illegitimate; the Soviet Union had a duty to spread the communist revolution around the world. Through Comintern and Cominform it actively plotted the downfall of its capitalist neighbors. However, the Soviet Union also had to be defended from foreign attack—both military and ideological. The Soviet Union would thus resort to the language and customs of positivist international law—treaties, the United Nations, the language of state sovereignty—in order to protect “socialism in one country.”⁶⁶

For the United States, liberal constitutionalism is similarly an historical imperative.⁶⁷ According to this ideology, the American utopian vision is in itself the most true international law. As Philip Allott aptly notes,

The notorious totalitarianisms of Stalin, Hitler, Mussolini, Mao, and the rest are classed as *malevolent* totalitarianisms because of their practical excesses. But their structural significance has been no different in kind from that of the *benevolent* totalitarianism which is democracy—capitalism—scitechcracy. It is simply that, in benevolent totalitarianism, we, the people, believe in the benevolence of the system; or, at least, we suspend our disbelief for everyday practical purposes. We believe, or try not to disbelieve, that the social system is the best in the best possible human world, that the ideal possibility of the Good Life is to be equated with the potentiality of actual social life.⁶⁸

Liberal constitutionalism becomes a higher law, much like the religious ideals from which it once emerged (“[a] free-market gospel of prosperity and individualistic freedom”⁶⁹). “Our godless world is full of gods But as Max Weber noted, the old gods, with their magic taken away (disenchanted), rise up from their graves, in the form of impersonal forces [democracy and liberalism].”⁷⁰ Democracy is God and John Locke is his Prophet.

Under this paradigm, the verbal acrobatics used to justify American actions in Kosovo make perfect sense. American international law scholars have argued that the NATO bombing of Yugoslavia was illegal yet

65. Americans are suspicious of even their fellow legal democracies. “Sweden has an economic system that many argue curtails individual property rights, France until recently had a state monopoly on television, and England has an established religion,” not to mention a monarchy, no judicial review, and an unwritten constitution—all things that look very suspicious to Americans. See Zakaria, *supra* note 19, at 25.

66. See KENNAN, *supra* note 48, at 118 (“It [the Soviet Union] has no right to risk the existing achievements of the revolution for the sake of the vain baubles of the future.”). For a discussion of the concept of “socialism in one country,” see EDWARD HALLETT CARR, *SOCIALISM IN ONE COUNTRY*, 1924-1926, at 22, 178, 180-81, 305, 352 (1958); 1 JOSEPH STALIN, *LENINISM* 296-308 (1933); Michael Head, *The Passionate Legal Debates of the Early Years of the Russian Revolution*, 14 CAN. J.L. & JURIS. 3 (2001).

67. See *supra* notes 48 & 50, and accompanying text.

68. Philip Allott, *Kant or Won't: Theory and Moral Responsibility*, 23 REV. INT'L STUD. 339, 343 (1997).

69. *How Sick Is Europe?*, *supra* note 58, at 11.

70. Allott, *supra* note 68, at 344 (citing Max Weber, *Science as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 149 (H.H. Gerth & C. Wright Mills eds. and trans., 1958)).

legitimate.⁷¹ This may seem merely to be a convenient way to justify actions that were in clear violation of the United Nation's Charter, but the justification seems to reflect something deeper. Paper international law is not the same as international justice. When paper international law stood in the way of the American historic mission, the United States simply appealed to a higher authority of international law.

Refiltering this American understanding of international law through American impulses towards Wilsonianism/interventionism and Isolationism/non-interventionism brings American policy into focus. During more isolationist phases—Kennan would argue that this is the default⁷²—the United States, suspicious of the dangerous outside world, uses international law as a shield, reifying the state system to protect its borders and its citizens. When roused to action, to intervention, the United States girds itself in its utopian mission; the United States takes action on behalf of the world's "oppressed" people, asserting the illegitimacy of the states against which it fights.

This understanding of international law appears starkly in the recently expressed "Bush Doctrine." In the wake of the September 11th attacks, U.S. President Bush presented the Taliban—the *de facto* government of Afghanistan—with an ultimatum:

And tonight, the United States of America makes the following demands on the Taliban: Deliver to United States authorities all the leaders of al Qaeda who hide in your land. Release all foreign nationals, including American citizens, you have unjustly imprisoned. Protect foreign journalists, diplomats and aid workers in your country. Close immediately and permanently every terrorist training camp in Afghanistan, and hand over every terrorist, and every person in their support structure, to appropriate authorities. Give the United States full access to terrorist training camps, so we can make sure they are no longer operating. These demands are not open to negotiation or discussion. The Taliban must act, and act immediately. They will hand over the terrorists, or they will share in their fate.⁷³

If the Taliban did not deliver on these demands, the United States would be roused to action. However, Bush made it clear that this would not be a war against Afghanistan or the Afghan people.⁷⁴ Rather, this would be a war against the Taliban alone:

71. See, e.g., Ruth Wedgwood, *NATO's Campaign in Yugoslavia*, 93 AM. J. INT'L L. 828, 832 (1999) ("This situation supports the general conclusion that the NATO campaign was illegal, yet legitimate."); W. Michael Reisman, *Kosovo's Antinomies*, 93 AM. J. INT'L L. 860, 862 (1999) ("The procedures for deciding and appraising the lawfulness of the Kosovo action were not those contemplated by the Charter. . . . Yet, if the circumstances require, it should—it must—be done again!"). *But see* INDEPENDENT INTERNATIONAL KOSOVO COMMISSION, *THE KOSOVO REPORT* 186 (2000) (accepting this general proposition, yet nonetheless criticizing the gap between legitimacy and legality).

72. KENNAN, *supra* note 48, at 66 (famously analogizing democracies to dinosaurs which require significant disturbances to rise to action, but which destroy their surroundings indiscriminately once roused).

73. George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>.

74. The ultimatum reminded many of that delivered by the Austrians to the Serbians after the "terrorist" assassination of the Austrian archduke. It is hard to imagine the Austrians announcing that their attack on Serbia was not against the Serbian people, but instead to protect them from Black-Hand terrorists.

The United States respects the people of Afghanistan—after all, we are currently its largest source of humanitarian aid—but we condemn the Taliban regime. It is not only repressing its own people, it is threatening people everywhere by sponsoring and sheltering and supplying terrorists.

By aiding and abetting murder, the Taliban regime is committing murder. Our response involves far more than instant retaliation and isolated strikes. Americans should not expect one battle, but a lengthy campaign, unlike any other we have ever seen. We will starve terrorists of funding, turn them one against another, drive them from place to place, until there is no refuge or no rest. And we will pursue nations that provide aid or safe haven to terrorism. Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime.⁷⁵

American attacks would be justified not only as self-defense, but also by the very illegitimacy of the Taliban regime.⁷⁶

The leadership of al Qaeda has great influence in Afghanistan and supports the Taliban regime in controlling most of that country. In Afghanistan, we see al Qaeda's vision for the world. Afghanistan's people have been brutalized—many are starving and many have fled. Women are not allowed to attend school. You can be jailed for owning a television. Religion can be practiced only as their leaders dictate. A man can be jailed in Afghanistan if his beard is not long enough.⁷⁷

The United States, attempting to understand the words of its liberal democratic God, must constantly balance between protecting the Revolution at home and spreading the gospel abroad. Had the Taliban fulfilled Bush's demands (though arguably, they were impossible to fulfill) their regime would have been no more legitimate. In fact, the attack on the Taliban's legitimacy prefaced the ultimatum in Bush's speech. Yet the United States would have then respected its sovereignty. Only when the Afghan "state" failed to protect Americans from its "citizens" would the United States feel compelled to extend the blessings of liberal constitutionalism to the oppressed people of Afghanistan. In essence, a new *de facto* test of legitimacy is formulated: legitimacy is based not only on the level of protection a state provides to its own people, but also on the level of protection it provides to the American people. History is on the United States' side—worldwide liberal constitutionalism is inevitable. So long as the American revolution is safe and protected, the United States can afford to be patient, spreading the revolution through commerce⁷⁸ and culture rather than war.⁷⁹ This is the "true" international law.⁸⁰

75. Bush, *supra* note 73.

76. This mentality seems similarly exemplified by the Bush Administration's waffling over whether or not captured Taliban are covered by the Geneva Convention. See Thom Shanker & Katharine Q. Seelye, *Word for Word/The Geneva Conventions: Who Is a Prisoner of War? You Could Look It Up. Maybe*, N.Y. TIMES, Mar. 10, 2002, § 4, at 9 (noting the initial Bush Administration position that the Geneva Conventions did not apply to the Taliban compared with the Administration's eventual reconsideration that they did apply but "that neither Taliban nor Al Qaeda would be granted prisoner-of-war status under the treaties," and explaining the legal arguments employed to that effect).

77. Bush, *supra* note 73.

78. This has always been the preferred method of influence. See *supra* note 37.

79. Cf. KENNAN, *supra* note 48, at 118:

But we have seen that the Kremlin is under no ideological compulsion to accomplish its purposes in a hurry. Like the Church, it is dealing in ideological concepts which are of

This is not a Bush Administration innovation. The same themes were echoed in President Clinton's address to the nation on the NATO bombing of Kosovo:

Do our interests in Kosovo justify the dangers to our Armed Forces? I've thought long and hard about that question. I am convinced that the dangers of acting are far outweighed by the dangers of not acting—dangers to defenseless people and to our national interests. If we and our allies were to allow this war to continue with no response, President Milosevic would read our hesitation as a license to kill. There would be many more massacres, tens of thousands more refugees, more victims crying out for revenge.⁸¹

American intervention is justified by the illegitimacy of the Milosevic regime. The people of Kosovo need American (and NATO) protection. Nonetheless, the United States is loathe to interfere in Yugoslav internal affairs for fear of the eventual erosion of the state sovereignty shield that protects the revolution at home.⁸² Clinton argued:

Over the last few months we have done everything we possibly could to solve this problem peacefully. Secretary Albright has worked tirelessly for a negotiated agreement. . . . Hopefully, Mr. Milosevic will realize his present course is self-destructive and unsustainable. If he decides to accept the peace agreement and demilitarize Kosovo, NATO has agreed to help to implement it with a peace-keeping force. If NATO is invited to do so, our troops should take part in that mission to keep the peace. But I do not intend to put our troops in Kosovo to fight a war.⁸³

Even after "winning" its war with Serbia, the United States continues to uphold Yugoslav territorial integrity—if in name only.

This same pattern was followed by Woodrow Wilson, who initially refused to enter World War I, but after American security was threatened, declared war not on the Central Powers alone but on the immoral, illegitimate old order of Europe as well.⁸⁴ Even William McKinley announced that the United States was morally justified in warring upon Spain:

long-term validity, and it can afford to be patient. It has no right to risk the existing achievements of the revolution for the sake of the vain baubles of the future.

80. These themes were reiterated by the Bush Administration in its National Security Strategy. Although the United States commits itself to "look outward for possibilities to expand liberty," "[d]efending [the] Nation against its enemies is the first and fundamental commitment of the Federal Government." NATIONAL SECURITY STRATEGY, *supra* note 49, at *Introduction*. Further, demonstrating American distrust of even U.S. allies, the National Security Strategy specifically reserves the right to act preemptively and unilaterally. *See id.* at 6.

81. William Jefferson Clinton, Address to the Nation, Washington, D.C. (Mar. 24, 1999), available at http://www.pbs.org/newshour/bb/europe/jan-june99/address_3-24.html.

82. Notably, the illegitimate immoral acts of the Serbian government were not enough to compel action without the concomitant threat to American security. "It is this challenge that we and our allies are facing in Kosovo. That is why we have acted now—because we care about saving innocent lives; because we have an interest in avoiding an even crueler and costlier war; and because our children need and deserve a peaceful, stable, free Europe." *Id.*

83. *Id.*

84. Woodrow Wilson, *War Messages*, Address Before the 65th Congress (1917), available at <http://www.lib.byu.edu/~rdh/wwi/1917/wilswarm.html>. Wilson explained:

We have no quarrel with the German people. We have no feeling towards them but one of sympathy and friendship. It was not upon their impulse that their Government acted in entering this war. It was not with their previous knowledge or approval. It was a war determined upon as wars used to be determined upon in the old, unhappy days when peoples were nowhere consulted by their rulers and wars were provoked and waged in the

The grounds for . . . intervention may be briefly summarized as follows: *First*. In the cause of humanity and to put an end to the barbarities, bloodshed, starvation, and horrible miseries now existing there, and which the parties to the conflict are either unable or unwilling to stop or mitigate. It is no answer to say this is all in another country, belonging to another nation, and is therefore none of our business. It is specially our duty, for it is right at our door.⁸⁵

III. REEVALUATING TRADITIONAL INTERNATIONAL LAW

A. *The American Challenge*

If this ideological trend plays any role in American foreign policy thinking, it poses a dramatic challenge to traditional understandings of international law and its legitimacy. Moreover, the American example discussed above does not seem completely anachronistic. Arguably, similar foundational ideologies play a role in other countries as well, whether it is Communism in the old Soviet Union, Islam in Iran, or national/ethnic greatness in much of Europe.⁸⁶ Traditional conceptions of international law, whether Positivist or Cosmopolitan, focus on producing neutral⁸⁷ principles.⁸⁸ Positivists and Cosmopolitans seek to found the legitimacy of international law on principles external to particular states and state preferences. The

interest of dynasties or of little groups of ambitious men who were accustomed to use their fellow men as pawns and tools. Self-governed nations do not fill their neighbour states with spies or set the course of intrigue to bring about some critical posture of affairs which will give them an opportunity to strike and make conquest. Such designs can be successfully worked out only under cover and where no one has the right to ask questions. Cunningly contrived plans of deception or aggression, carried, it may be, from generation to generation, can be worked out and kept from the light only within the privacy of courts or behind the carefully guarded confidences of a narrow and privileged class. They are happily impossible where public opinion commands and insists upon full information concerning all the nation's affairs.

Id.

85. William McKinley, *War Message* (1898), reprinted in MAJOR PROBLEMS, *supra* note 13, at 383 (1898).

Another example might be seen in the Bush Administration's policy towards Iraq. Many of the proponents of the recent war against Iraq pointed not only to the potential strategic threat, but also to their belief that regime change in Iraq could have a domino effect, spreading democracy and stability throughout the Middle East. Keller, *supra* note 33, at 48.

The third striking thing about Wolfowitz is an optimism about America's ability to build a better world. He has an almost missionary sense of America's role. In the current case, that means a vision of an Iraq not merely purged of cataclysmic weaponry, not merely a threat disarmed, but an Iraq that becomes a democratic cornerstone of an altogether new Middle East. Given the fatalism that prevails about this most flammable region of the world, that is an audacious optimism indeed.

Id.

86. The challenges presented by an American ideology of international law can be seen in the functioning of the international system as a whole. See generally Martti Koskenniemi, *The Politics of International Law*, 1 EUR. J. INT'L L. 4 (1990).

87. I use "neutral" here as between states and peoples, rather than to mean value-free.

88. "Organizing society through legal rules is premised on the assumption that these rules are objective in some sense that political ideas, views, or preferences are not." Koskenniemi, *supra* note 86, at 7. "It lies behind such dichotomies as 'positivism'/'naturalism,' 'consent'/'justice,' 'autonomy'/'community,' 'process'/'rule,' etc., and explains why these and other oppositions keep recurring and do not seem soluble in a permanent way." *Id.* at 8.

American example of ideological foreign policy seems to expose such neutral principles as mere chimera.

1. *Positivism*

Positivism is best explicated by the classic international law treatise written by Lassa Oppenheim. According to Oppenheim,

[t]he law of Nations is a law for the intercourse of States with one another, not a law for individuals. As, however, there cannot be a sovereign authority above the several sovereign States, the Law of Nations is a law *between*, not above, the several States, and is, therefore, since Bentham, called "International Law."⁸⁹

For Positivists, the state is the basic unit of international law. Moreover, "[s]ince the Law of Nations is based on the common consent of individual States, and not of individual human beings, States solely and exclusively are the subjects of International Law. . . . An individual human being, such as king or an ambassador for example, is never directly a subject of International Law."⁹⁰

In turn, Oppenheim argues that the basis of international law is the consent of states:

The sources of International Law are therefore twofold—namely: (1) *express* consent, which is given when States conclude a treaty stipulating certain rules for the future international conduct of the parties; (2) *tacit* consent, which is given through States having adopted the custom of submitting to certain rules of international conduct. Treaties and custom are, therefore, exclusively the sources of the Law of Nations.⁹¹

Finally, this system is founded on a notion of sovereign equality. "Since the Law of Nations is based on the common consent of States as sovereign communities, the member States of the Family of Nations are equal to each other as subjects of International Law."⁹² Thus for Positivists, international law resembles contracts between states by which states agree/consent to abide by certain rules. The content of international law is not determined by moral or natural principles but simply by consent (though the consent may nonetheless reify particular agreed-upon values).⁹³

Many have proposed that in a world fraught with state rivalry and suspicion as well as seemingly irreconcilable cultural differences, only Positivist international law can carry any legitimacy or force. Any attempt to ground international law in the rights of individuals, or in moral or natural rights, would raise suspicions of cultural imperialism and would be rejected as

89. LASSA OPPENHEIM, 1 INTERNATIONAL LAW 4 (2d ed. 1912).

90. *Id.* at 19. *See also* Bull, *supra* note 15, at 112 ("For Oppenheim international society is composed of states, and only states possess rights and duties in international law.")

91. OPPENHEIM, *supra* note 89, at 22.

92. *Id.* at 20. "States are by their nature not equal as regards power, extent, constitutions, and the like. But as members of the community of nations they are equals whatever differences between them may otherwise exist." *Id.* Cf. U.N. CHARTER art. 2, para. 1 (codifying this concept: "The Organization [the United Nations] is based on the principle of the sovereign equality of all its Members").

93. *See* Bull, *supra* note 15, at 111 ("Natural law, in Oppenheim's view, forms no part of international law; and indeed he holds in addition that it does not exist.")

an encroachment upon state sovereignty.⁹⁴ Moreover, a Positivist international law seems to be better adapted to a Realist political reality. “And it may be said of the pluralist doctrine [here associated with Oppenheim] that so far from constituting a disguised form of *Realpolitik*, it presents a set of prescriptions more conducive to the working of the international order than the Grotians.”⁹⁵ If there is to be any international law at all, it will have to be of the Positivist nature.⁹⁶

Looking at a world seemingly caught in the midst of a “Clash of Civilizations,”⁹⁷ such an argument sounds reasonable. The globalization of liberal values appears to be under attack in various parts of the world, and it is hard to imagine a universally acceptable notion of international justice or morality. The seeming stability of Positivist international law, however, is mere illusion. The very basis of the system is an acceptance of the axiom of sovereign equality. But as the American ideological example demonstrates, that axiom may not be nearly as accepted as Positivists like Oppenheim would have us believe.

Contrary to the Positivist view, American liberal utopianism asserts not sovereign equality, but sovereign inequality. The United States sees itself as uniquely inspired by a moral international mission. It has a special role as the embodiment of liberal constitutionalism. Such a worldview—and it is not at all clear that other states do not have similar self-perceptions—makes an international system based merely on the contracted consent of states inherently unstable.⁹⁸ As Bull inadvertently implies, Positivism often does track Realist assessments of power-political expedience.⁹⁹ To the extent that much of the substance of old-fashioned consent-based international law, e.g., diplomatic immunity, does comport with *Realpolitik*, it does seem amazingly stable. But an ideological worldview un.masks such results as naked expedience.

Judging its treaty partners as inherently unequal, once political expedience disappears, the United States recognizes no special duty to stand by its contracts. Faced with U.N. Charter treaty law outlawing the unilateral use of force without U.N. approval, the United States argued that bombing

94. As Hedley Bull explained:

But if, on the other hand, no solidarity on these matters obtains; if international society finds itself unable to agree as to criterion of just war; if the outbreak of war typically finds international society at large, as well as the belligerents themselves, divided as to which side embodies the just cause, then our conclusion must be a different one. It must be argued of the Grotian conception [here, international law based in natural law] in this event not merely that it is unworkable but that it is positively damaging for the international order; that by imposing upon international society a strain which it cannot bear, it has the effect of undermining those structures of the system which might otherwise be secure.

Bull, *supra* note 15, at 114. Note that Kingsbury criticizes Bull’s attempt to put Grotius into such a “solidarist” box. Kingsbury, *supra* note 15, at 25-27.

95. Bull, *supra* note 15, at 114.

96. *Id.* at 115-16.

97. See SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1996).

98. Consider, for example, armed conflict and the laws of war: “If one side in an armed conflict regards itself as specially privileged by the laws of war, then the reciprocal observance of these laws which is the basic condition of their efficacy, is undermined.” *Id.* at 115.

99. See *supra* text accompanying note 95.

Serbia was nonetheless justified—"illegal, yet legitimate."¹⁰⁰ The United States similarly appealed to "collective self defense" as a justification for its actions against Nicaragua, not because any neighboring country had requested its help, but because its moral duty to save the world from communism simply outweighed paper laws.¹⁰¹ Determining the Anti-Ballistic Missile treaty as no longer in American interests, the United States has sought to amend it, unilaterally if necessary.¹⁰² The United States believes itself uniquely capable of interpreting its international obligations and determining when violating international law is justified. In the face of such beliefs, paper obligations can have little real meaning. Every treaty is subject to subjective moral reinterpretation.

2. *Cosmopolitanism*

Cosmopolitanism does not fare much better. Cosmopolitan views of international law seek to ground international law in the rights of individuals, of people rather than states. Cosmopolitan international law does not end at state borders; it reaches within them, dictating not only state obligations to each other but to their own citizens as well. Human rights are universal and international law is universally binding—states cannot opt out of its dictates.

Bull argues that insofar as States do not agree on the shape of human rights, an international system based on the universality of such rights is impossible. The system will simply lack the international acceptance required for it to have any legitimacy or meaning.¹⁰³ But there is a deeper problem with Cosmopolitanism demonstrated by the American example, and by the thinker most associated with the Cosmopolitan position (though perhaps wrongly), Immanuel Kant.¹⁰⁴

According to Kant, "[t]he history of the human race . . . can be regarded as the realization of a hidden plan of nature to bring about an internally—and for this purpose also externally—perfect constitution as the only possible state within which all natural capacities of mankind can be developed completely."¹⁰⁵ The push and pull of man's contradictory natural inclinations towards both sociability and selfishness lead to competition and innovation as

100. See *supra* note 71 and accompanying text. Article 2 of the Charter reads in relevant part: All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

U.N. CHARTER art. 2, paras. 3-4.

101. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 189-90 (June 27).

102. See, e.g., David E. Sanger, *Bush Calls Allies in Advance of Missile Speech*, N.Y. TIMES, May 1, 2001, at A8. After negotiations to amend the treaty's terms failed, the United States eventually withdrew from the treaty completely. See Eric Schmitt, *Antimissile System, In a Limited Form, Is Ordered by Bush*, N.Y. TIMES, Dec. 18, 2002, at A1 ("[T]he United States formally withdrew from the Antiballistic Missile Treaty of 1972, which lifted constraints on the Pentagon to test and field a system to shoot down long-range and short-range missiles.").

103. See *supra* notes 94-96 and accompanying text.

104. This strain of thought can also be identified in the work of Hugo Grotius. See generally Bull, *supra* note 15; Kingsbury, *supra* note 15.

105. IMMANUEL KANT, *IDEA FOR A UNIVERSAL HISTORY* (1784), reprinted in KANT'S POLITICAL WRITINGS 50 (Hans Reiss ed., 2d ed. 1990) [hereinafter KANT, UNIVERSAL HISTORY].

well as society and rules. Enlightenment and “perpetual peace” are reached when man finds the equilibrium between personal freedom and the freedom of all other people.¹⁰⁶ The inevitable result dictated by nature, or “providence,”¹⁰⁷ is a “perpetual peace” based on a loose federation of republics and the establishment of a “cosmopolitan right.”¹⁰⁸ Moreover:

Although this political body exists for the present only in the roughest of outlines, it nonetheless seems as if a feeling is beginning to stir in all its members, each of which has an interest in maintaining the whole. And this encourages the hope that, after many revolutions, with all their transforming effects, the highest purpose of nature, a universal *cosmopolitan existence*, will at last be realised as the matrix within which all the original capacities of the human race may develop.¹⁰⁹

Kant goes into some detail describing the shape of that future. Nonetheless, Kant’s chiliastic history leaves us uncertain how to proceed. Is Kant’s perpetual peace normative—i.e., a course of action—or merely descriptive—what will inevitably happen? Can we hasten its arrival, or is any attempt at peace prior to the ripening of history doomed to failure and catastrophe? Kant’s hopeful thesis leaves us despairing of how to bring our actions in line with the historical narrative.

Individual men and entire nations little imagine that, while they are pursuing their own ends, each in his own way and often in opposition to others, they are unwittingly guided in their advance along a course intended by nature. They are unconsciously promoting an end which even if they knew what it was, would scarcely arouse their interest.¹¹⁰

More dangerously, such an historical narrative, whether Kantian Perpetual Peace, American liberal constitutionalism, or Soviet Communism, is threatened by what Tony Judt has described as an “infallibility paradox.”¹¹¹ According to Judt, one of the primary problems with Marxism and the project of the “radical left” was the lack of accountability intertwined with its messianic message. Marxists believed that the world was on an unstoppable march towards Marx’s socialist utopia. The patterns of history made it inevitable. Within such a worldview, it became impossible to recognize mistakes in policy. Short-term failures were necessary parts of the dialectic of history and progress. Any and all means, including the deaths of millions of people, were acceptable in achieving the prophesy of human history.¹¹² It

106. *Id.* at 44. In later years, Kant wrote: “Thus that mechanism of nature by which selfish inclinations are naturally opposed to one another in their external relations can be used by reason to facilitate the attainment of its own end, the reign of established right.” IMMANUEL KANT, PERPETUAL PEACE (1795), reprinted in KANT’S POLITICAL WRITINGS, *supra* note 105, at 93, 113 [hereinafter KANT, PERPETUAL PEACE].

107. KANT, PERPETUAL PEACE, *supra* note 106, at 108. “Perpetual peace is guaranteed by no less authority than the great artist Nature herself.” *Id.*

108. *Id.* at 105-08.

109. KANT, UNIVERSAL HISTORY, *supra* note 105, at 51.

110. *Id.* at 41.

111. Tony Judt, What Is To Be Done? Post-Strategic Politics and its Discontents, Speech for the Grand Strategy Lecture Series, Yale University, New Haven, Conn. (Apr. 12, 2000) (transcript and video available at International Security Studies, Yale University) (“infallibility paradox” quotation from author’s notes taken during speech).

112. *Id.* Cf. Allott, *supra* note 68.

seems reasonable to extend this criticism to both Kant and American liberal constitutionalism.¹¹³

Moreover, this concern extends beyond historically determined ideologies to any conception of international law founded upon “universal” values. A cosmopolitan international law aspires to universality. In order to have any meaning, a cosmopolitan international law must be singular; it must monopolize conceptions of international justice. But even assuming the existence of a single widely acceptable set of values, there is little to guarantee that those values will be understood and interpreted the same way by different groups and states. In fact, a cosmopolitan international law seems to guarantee a multiplicity of interpretations. By grounding international law in human rights and international justice, such a conception of international law can generate little more than *prima facie* duties to obey the law; every state is invited and exhorted to measure its paper obligations against its understanding of those values.

The illegal legitimate war rears its head again. The American model once again demonstrates the limits of such a conception. American liberal constitutionalism is a Cosmopolitan worldview; it does espouse “universal” values, and does seek a monopoly in value interpretation. Nonetheless, it has failed to achieve such a monopoly, as widespread criticism of the U.S.-led attempts at globalization, democratization, and privatization demonstrate. American moral mission is a Cosmopolitan worldview lacking Cosmopolitan acceptance. More importantly, even where American values have been widely accepted, the United States continues to act not in accordance with treaty law or international consensus but with its own interpretation of the underlying values of liberal constitutionalism.¹¹⁴ Thus it eschews participation in the International Criminal Court despite its seeming reification of American values. It ignores the United Nations, a body it helped to create, when at odds with American assessments of international justice and legitimacy (e.g., Kosovo). Finally, proving the danger of the infallibility paradox,¹¹⁵ the United

113. Judd, however, disagrees with the analogy between Marxism and liberal constitutionalism. Judd disagrees about the strength of the utopian strand within liberal constitutionalism, believing liberal constitutionalists to be more grounded in practical realities and more likely to learn from the lessons of the past. Interview with Tony R. Judd, Director, Remarque Institute, in New Haven, Conn. (Apr. 12, 2000).

114. Nathaniel Berman seconds this view, comparing U.S. justifications for its behavior with those of the Soviet Union:

Compare the U.S. justification of the Dominican Republic, 1965, with the Soviet justification of the invasion of Czechoslovakia, 1968. The U.S. justification relied heavily on the O.A.S., as an international community based on the substantive value of anticommunism; the Soviet justification relied heavily on the Warsaw Pact, as a community based on the substantive value of Marxism-Leninism. Both at least implicitly acknowledged the formal illegality of their actions under the [U.N.] Charter.

Berman, *supra* note 52, at 9 n.1.

115. There is real danger in this lack of accountability. Allott explains the problems inherent in such a deficit of responsibility:

In this way, every society member is a participant, everyone is a contributor, everyone is involved in the collective product. But there is a dramatic side effect. Everyone participates but no one is responsible. All the social good and all the social evil—war, social injustice, human indignities of all kinds, the exploitation of women, the oppression of minorities, mass unemployment, the criminal law, popular culture, the arms trade, drugs—are the work of the system, and a social system is not a moral agent.

States has determined that protecting democracy may require the overthrow of democratic regimes in Guatemala (Arbenz), Iran (Mossadeq), and perhaps most recently Venezuela (Chavez).¹¹⁶ American unilateralism is not at odds with Cosmopolitanism; it feeds off of it.

Bull sums up this essential problem with Cosmopolitanism:

If a right of intervention is proclaimed for the purpose of enforcing standards of conduct, and yet no consensus exists in the international community governing its use, then the door is open to interventions by particular states using such a right as a pretext, and the principle of territorial sovereignty is placed in jeopardy.¹¹⁷

Under a Cosmopolitan conception of international law, everyone is more concerned with international justice. This may be desirable. But insofar as States are free to judge the morality of their own actions, such a conception cannot serve as law.

B. *A New Approach to International Law and its Legitimacy?*

Positivism and Cosmopolitanism attempt to found international law on neutral principles external to particular states and ideologies. But in trying to create a system from without, those conceptions of international law ignore the ideological reality of the American utopian world vision, leading to serious concerns about their ability to provide legitimacy or binding force. Neutral principles of consent or individual rights are exposed as mere myths.¹¹⁸ What is left? Must international lawyers resign themselves to a Hobbesian world of realpolitik? Is there an alternative vision of international law that can forward international order and justice while accounting for the realities of state action?

The answers to these questions seem to lie in a shift of observational standpoints.¹¹⁹ Rather than trying to discover what international law requires, we must think about how international law is created.¹²⁰ By focusing on the role of international lawyers in the creation rather than the discovery of

Allott, *supra* note 68, at 344.

116. Christopher Marquis, *Pentagon To Investigate its Role in Venezuela*, N.Y. TIMES, Apr. 23, 2002, at A13.

117. Bull, *supra* note 15, at 115.

118. Martti Koskenniemi launches a much deeper, though in many ways similar, attack on the traditional foundations of international law. Koskenniemi demonstrates that the apparent neutrality of international law disintegrates even in such seemingly traditional activities as treaty interpretation. See Koskenniemi, *supra* note 86.

119. For a deeper discussion of how shifting observational standpoints can illuminate aspects of international law that otherwise remain hidden, see W. Michael Reisman, *The View from the New Haven School of International Law*, 92 AM. SOC'Y INT'L L. PROC. 118 (1992).

120. To an extent, this echoes the move suggested by the New Haven School. As Reisman argues:

For the positivist, a primary jurisprudential and intellectual task is the identification of what must be obeyed. Hence the recurring concern with finding the 'sources' of law. From the standpoint of the New Haven School, jurisprudence is a theory about making social choices. The primary jurisprudential and intellectual tasks are the prescription and application of policy in ways that maintain community order and, simultaneously, achieve the best possible approximation of the community's social goals.

Id. at 120.

international law, we can begin to see a role for international law and the international lawyer in a world of ideology.¹²¹

First, international law cannot ignore ideology. If Positivism and Cosmopolitanism fail it is because they seek to create a system from without, a system disconnected from individual states and thus seemingly neutral. The American example, however, demonstrates that any effective conception of international law must instead look to state practice and ideology. In order to have normative force it must interact and cooperate with existing ideas about the international order and morality, present in both the municipal and diplomatic contexts. International law will be seen as binding only insofar as it speaks to, and with, preexisting senses of obligation. This more complex interaction of theory and practice would seem to bring international law much closer to the conceptions of the "classical" international law theorists, e.g., Vitoria, Pufendorf, Hobbes, Kant, and in particular Grotius, who all struggled to reconcile religious or natural law with actual state practice.¹²²

Second, international lawyers must think less of "discovering" international law and more of "constructing" an international legal regime. Even a Positivist international law based on consent and contract must be grounded in a pre-existing belief in the justice of adhering to promises.¹²³ International lawyers should look to the ideas driving state policy, and build an international regime that utilizes, rather than overcomes them. This should not merely be a practice of codifying current state practices or beliefs. Rather, international lawyers should look to build a legal regime founded upon arguably parochial ideas but that can nonetheless become a source of self-perpetuating universal norms. International law must be "both consistent with the expectations of rightness held by members of a community (authoritative decisions) and effective (controlling decisions)."¹²⁴ To an extent, this echoes Nathaniel Berman's suggestion that international law should be pragmatic, ambivalent, and where necessary inconsistent. International law should take

121. By focusing on neutral principles, Positivism and Cosmopolitanism succeed in pushing the international lawyer into the background, out of view. The international lawyer is less an actor than a facilitator working at the behest of either the state or the law. Once neutral principles are discredited, the international lawyer is forced back into the foreground. The international lawyer becomes a key actor in international law—in a world bereft of neutral principles, the international lawyer and his choices matter.

122. Kingsbury explains how Grotius struggled to reconcile these two concepts in Grotius's theory of international law:

Grotius asserts that the law of nature could be proven by either of two means: *a priori*, "by demonstrating the necessary agreement or disagreement of anything with a rational and social nature," and *a posteriori* (as a matter of probability if not absolute certainty), by showing what is believed to be the law of nature "among all nations, or among all those that are more advanced in civilization."

Kingsbury, *supra* note 15, at 22-23. See also RICHARD TUCK, THE RIGHTS OF WAR AND PEACE 78-108 (1999).

123. As Kingsbury writes:

This position was at variance with that of Martin Wight, who remarked, as to the question "why must agreements be observed," that "[u]tilitarian reasons may be adduced as the sources of authority for this principle, but the oldest and profoundest answer is that the observance of agreements represents an ethical norm; it conforms to an inherent standard of justice."

Kingsbury, *supra* note 15, at 19.

124. Reisman, *supra* note 119, at 121.

advantage of conflicting sentiments to gain acceptance in any given situation.¹²⁵ But insofar as Berman argues that international law should be nothing more than pragmatic responses to practical and ideological problems, he does not go far enough.¹²⁶ Based upon a pragmatic, parochial foundation, international law should build upon it, developing a commitment not merely to the original pragmatic responses but to an entire legal regime.

Both Positivism and Cosmopolitanism seem to be attempts to respond to a nineteenth-century Austinian conception of what the law is. For Austin, law was the command of the sovereign backed by force.¹²⁷ As Austin himself proclaimed, international law with its absence of hierarchy, legislature, etc., could not be rightly classified as law.¹²⁸ The echoes of Austin's observation have continued to reverberate, and international law has been obsessed with self-definition. Observers cannot help noticing the stark contrasts between municipal and international law, the absence of an overarching sovereign, and the limited coercive power of the laws.¹²⁹ International lawyers are forced to ask whether international law is law at all—whether international law is binding.¹³⁰ “Almost from the beginning of the science of the Law of Nations the question has been discussed whether the rules of international law are *legally* binding.”¹³¹ Positivism and Cosmopolitanism seek to give international law force by grounding it either in notions of consent and contract or in a priori precepts of natural law.

But we need not conceive of law in this way. Even in the context of municipal law, law need not be defined by its coercive impact. Such an analysis misses the way in which law serves as a social fact, a codification of

125. See generally Berman, *supra* note 52.

126. Koskenniemi criticizes such an approach. Responding to Richard Falk's argument that international law doctrine should establish “[a]n intermediate position, one that maintains the distinctiveness of the legal order while managing to be responsive to the extralegal setting of politics, history and morality,” Koskenniemi argues that “such a movement towards pragmatic eclecticism seems self-defeating.” Koskenniemi, *supra* note 86, at 12 (quoting Richard Falk, *The Interplay of Westphalia and Charter Conceptions of the International Legal Order*, in 1 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 34-35 (Richard A. Falk & Cyril E. Black eds., 1969)). “Middle-of-the-road doctrines may seem credible only insofar as their arguments, doctrines or norms are uncontested. But as soon as disagreement emerges, such doctrines, too, must defend their close relationship with what states actually do. At this point, they become vulnerable to the charge of being either utopian or apologist.” *Id.*

127. See generally JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (W.E. Rumble ed., Cambridge Univ. Press 1995) (1832), reprinted in *READINGS IN THE PHILOSOPHY OF LAW* 96 (Keith C. Culver ed., 1999).

128. See *id.* at 98 (placing international law in “a set of objects frequently but *improperly* termed *laws*,” and comparing international law to “The law of honour” or “The law set by fashion”).

129. See OPPENHEIM, *supra* note 89, at 5 (“They define law as a body of rules for human conduct set and enforced by a sovereign political authority. If indeed this definition is correct, the Law of Nations cannot be called law.”).

130. Hart poses the question in the following way:

International law presents us with the converse case. For, though it is consistent with usage of the last 150 years to use the expression ‘law’ here, the absence of an international legislature, courts with compulsory jurisdiction, and centrally organized sanctions have inspired misgivings, at any rate in the breasts of legal theorists . . . These differences are indeed striking and the question ‘Is international law really law?’ can hardly be put aside.

H.L.A. HART, *THE CONCEPT OF LAW* 214 (2d ed. 1994).

131. OPPENHEIM, *supra* note 89, at 4.

community standards that guides people's actions regardless of the threat of coercion. As H.L.A. Hart writes,

To argue that international law is not binding because of its lack of organized sanctions is tacitly to accept the analysis of obligations contained in the theory that law is essentially a matter of orders backed by threats. . . . Yet, as we have argued, this identification distorts the role played in all legal thought and discourse of the ideas of obligation and duty. Even in municipal law, where there are effective organized sanctions, we must distinguish . . . the meaning of the external predictive statement "I (you) are likely to suffer for disobedience," from the internal normative statement "I (you) have an obligation to act thus" which assesses a particular person's situation from the point of view of rules accepted as guiding standards of behavior.¹³²

Even more so, the Austinian conception of law misses the way in which law, initially derived from community norms, actually has the ability to reshape them.¹³³ Regardless of one's theory of the grounds of law and its relationship to morality, it seems indisputable that people often confuse what is legal with what is moral. People know that laws often run parallel to morality—murder is illegal, and it is also immoral. When faced with more ambivalent moral situations, issues on which we may not have a clear moral view, e.g., insider trading, there seems to be a tendency to think that because it is illegal it may be immoral as well. In this sense law has the ability to colonize our morals.¹³⁴

In the international context, one might look to the illegality of territorial acquisition. Prior to 1945 such a notion must have seemed anachronistic; however, since the adoption of the U.N. Charter the illegitimacy of territorial acquisition has become ingrained not only in law but in international morality as well. One need only look to the negative international reaction to Israeli occupation of the West Bank, Indonesia's occupation of East Timor, and China's occupation of Tibet, all of which might have been par for the course in an earlier period of international relations.

International lawyers need to embrace this power. As constructivist and "international society" scholars have argued, laws derived from existing political custom and ideas have the ability, in turn, to reify them.

[N]orms, values, and social structure of international society [help] to form the identity of actors who operate within it. Nations thus obey international rules not just because of sophisticated calculations about how compliance or noncompliance will affect their interests, but because a repeated habit of obedience remakes their interests so that they come to value rule compliance.¹³⁵

132. *Id.* at 217-18.

133. See Reisman, *supra* note 119, at 121. Reisman writes:

The notion of law as a body of rules, existing independently of decision makers and unchanged by their actions is a necessary part of the intellectual and ideological equipment of the political inferior. It makes no sense in a jurisprudence which conceives of law as a process in which human beings try to influence the way social choices are made about the production and distribution of the things they want, including considerations about the ways in which those decisions should be made.

Id.

134. See, e.g., Catharine A. MacKinnon, *Toward Feminist Jurisprudence*, in READINGS IN THE PHILOSOPHY OF LAW, *supra* note 127, at 284 ("Politics neutralized and naturalized becomes morality . . . Law is the real moment in the social construction of these mirror-imaged inversions as truth. Law, in societies ruled and penetrated by the liberal form, turns angle of vision and construct of social meaning into dominant institution.").

135. Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599,

International lawyers should use the law, derived from parochial ideas, to reshape international politics in a more cosmopolitan way. Working with ideas should not be a one-way street—it should not merely involve adapting pragmatic solutions to existing ideas. Instead international lawyers should enter into a dialectic with ideas and ideology, building international laws upon them but then using those laws to reshape those underlying ideas.¹³⁶ Ideas first used to support particular instances of international law should be reshaped to support the legal regime itself.¹³⁷ Thus an international lawyer might appeal to notions of democracy and individualism to convince the United States to join an international body. Yet the same international lawyer should then reshape American notions of democracy and individualism in light of America's new membership in the body, reconfiguring the original commitment as one not only to democracy and individualism, but to international consensus as well.¹³⁸ This is not a quick or easy process, and in the short term, it may

2634 (1997). For a discussion of the constructivist and "international society" school of international law, see *id.* at 2633-34.

136. "[A]s constructivist scholars have long recognized, national identities, like national interests, are socially constructed products of learning, knowledge, cultural practices, and ideology." *Id.* at 2650. International lawyers should see law as one of those sources of identity construction.

137. This understanding of international law and the role of the international lawyer is similar to that of Harold Koh. In trying to explain why nations obey international law, Koh turns to "transnational legal process."

It is through this transnational legal process, this repeated cycle of interaction, interpretation, and internalization, that international law acquires its "stickiness," that nation-states acquire their identity, and that nations come to "obey" international law out of perceived self-interest. In tracing the move from the external to the internal, from one-time grudging compliance with an external norm to habitual internalized obedience, the key factor is repeated participation in the transnational legal process. That participation helps to reconstitute national interests, to establish the identity of actors as ones who obey the law, and to develop the norms that become part of the fabric of emerging international society.

Id. at 2655. See also Slaughter, *supra* note 54, at 248 ("International institutions must be embedded in domestic society in some way to be maximally effective."). The argument of this Essay may diverge from Koh's in its conception of the role of the international lawyer. Although Koh does see this transnational legal process as "both a theoretical explanation of why nations obey and a plan for strategic action for prodding nations to obey," *id.* at 2655, and does see a role for activists in "promoting the internalization of international norms into domestic law," *id.* at 2658, he is less clear about where the international norms to be internalized should come from. Koh's emphasis is on norm internalization not norm creation. Insofar as the American understanding of international law forces us to question the possibility and existence of neutral principles, I argue that the international lawyer must take an active role not only in fostering obedience but in choosing the very principles upon which international law will be based.

138. An example of how this might happen can be seen in the experience of Europe. European states initially formed the European Coal and Steel Community as a pragmatic attempt to defend against wars *between* European states and to encourage the economic reconstruction of Europe; aside from a commitment to peace, the original members asserted no common ideals, and indeed, hoped the Community would help to cabin cultural conflicts. However, the success of the Community, and the European Union that grew out of it, has led Europeans to reinterpret these foundational principles. Europeans now assert that the European Union stands for specifically European values, that there is a moral meaning to Europeaness, and that all Europeans are bound by a common set of values, such as human rights or opposition to the death penalty. (Whether such values are truly held by Europeans is a separate question.) Agreements on Europe-wide social justice issues, e.g. the death penalty, would have been inconceivable prior to the establishment of the European Community. The legal institution itself, over time, was able to reshape the values of its member states. Compare Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140, with the "Copenhagen Membership Criteria" developed in 1993, which include as a criterion for accession "the stability of

appear no different from Berman's pragmatism. But that does not diminish either its power or its normative force.

An American conception of international law based on liberal constitutionalist utopianism challenges the possibility of finding neutral principles upon which to build an international legal order. In a world dominated by ideological foreign policy the international lawyer cannot hide behind neutral principles of consent or rights. Martii Koskenniemi writes: "It is impossible to make substantive decisions within the law which would imply no political choice. . . . [I]n the end, legitimizing or criticizing state behaviour is not a matter of applying formally neutral rules but depends on what one regards as politically right, or just."¹³⁹ The international lawyer has the power to determine the shape of the international order as well as its effectiveness. In a world battling over principles, the international lawyer must choose sides.¹⁴⁰

IV. CONCLUSION

American foreign policy often appears to be in antagonism with international law. The United States has announced its intention to remove its signature from the International Criminal Court treaty. It has announced that it does not believe the Taliban and Al Qaeda captives held in Cuba are subject to the Geneva Convention. It has sought to unilaterally scuttle the Kyoto Protocol on climate change. This may simply be a reflection of American intransigence, but it may also reflect a failure of international law to account for the power of ideas and ideology. Recent events demonstrate that these issues are not merely academic. In attacking Iraq, the United States forcefully demonstrated its willingness to act on its own interpretations of international law and justice, unilaterally if necessary. As international lawyers and foreign policy analysts examine the effects of the United States' newfound activism on international law and legal institutions, they will be forced to confront the part ideology is playing in American conceptions of its world role.

This tentative look at ideas in American foreign policy and their impact on perceptions of international law should at least demonstrate the problematic nature of an international law premised on neutral principles. It should give pause to those who advocate disciplinary independence, and who seek to create an international law free from politics, history, and ideology. Only by better understanding the ideas that animate states and people can we begin to build a universal international regime.

institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities." Copenhagen European Council, Presidency Conclusions, E.C. BULL., no. 6, at 7 (1993), available at http://www.europarl.eu.int/enlargement/ec/cop_en.htm.

139. Koskenniemi, *supra* note 86, at 31.

140. Obviously, to the extent that existing state ideologies will continue to require appeals to consent or rights, the international lawyer will have to couch his choices in those terms.