

*The Battle of Mars and Venus:
Why Do American and European Attitudes
Toward International Law Differ?[]*

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“International law is merely a magnifying mirror that reflects faithfully and cruelly the essence and logic of international politics. In a fragmented world, there is no ‘global perspective’ from which anyone can authoritatively assess, endorse, or reject the separate national efforts at making international law serve national interests above all. Like the somber universe of Albert Camus’ Caligula, this is a judgeless world where no one is innocent.”³

Why do American and European attitudes towards international law appear to differ so profoundly? What explains the United States’ (supposedly) characteristic “unilateralism” in international law?⁴ This essay examines one very rich and fascinating theory of the difference – that of Professor Jed Rubenfeld of the Yale Law School⁵ – and advances another. To be more exact, the essay analyzes Professor Rubenfeld’s theory, which is framed primarily in terms of the differences between American and European constitutional *values*, and attempts to weight its merits against those of a theory that focuses instead on divergent political *interests*.

¹ My title alludes, of course, to Robert Kagan’s now-famous remark that “on major strategic and international questions today, Americans are from Mars and Europeans are from Venus.” Robert Kagan, *Of Paradise and Power: America and Europe in the New World Order* 4 (2003).

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³ Stanley Hoffman, “*The Uses and Limits of International Law*,” excerpted in Robert J. Art & Robert Jervis (eds.), *International Politics: Anarchy, Force, Political Economy, and Decision Making* 126, 129 (2d ed. 1985).

⁴ A disclaimer: As a government attorney at the Office of Legal Counsel in the U.S. Department of Justice, I provided advice regarding some of the U.S. legal positions discussed in this essay.

⁵ See Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. Rev. 1971 (2004).

Outline

We shall begin with an introductory overview of recent American-European conflicts over the application of international law. The overview will consider four situations in which such conflict has emerged. We shall argue that the United States has had reasonable international law defenses for its conduct in each of those instances and, indeed, that it has the better of the legal argument in most of them. The common European charge that the United States has been merely “lawless” in its recent conduct in international affairs⁶ thus seems exaggerated and unfounded. Nonetheless, there are sufficiently serious and substantial differences between the United States and Europe over the status and application of international legal norms that some theoretical explanation for those differences seems required. The attempt to find a satisfactory explanation unfolds into three main parts.

Part I outlines Professor Rubinfeld’s theory of the difference between American and European attitudes toward international law. Rubinfeld’s theory depends on a contrast between two distinct conceptions of constitutional law: one that he calls “democratic constitutionalism,” and the other that he calls “international constitutionalism.” Democratic constitutionalism, which reflects a characteristically

⁶ Thus, to take one entirely representative European intellectual, the British-Polish sociologist Zygmunt Bauman informs us that Europe – “and only Europe” – can offer a “salutary alternative” to America in the creation of a humane and civilized world order: “At a time when America, which relegated Europe to the second division of power games, has . . . ‘disqualified itself from the fight for security, prosperity, and justice,’ Europe . . . stoutly refuses ‘to regard force as a source of justice,’ and even more so to confuse the two, and it is well placed to ‘oppose the United States as *justice* opposes *force* rather than as *weakness* opposes *power*.’” Zygmunt Bauman, *Europe: An Unfinished Adventure* 39 (2004) (italics in original, citations omitted). In a similar vein, the German philosopher Jürgen Habermas has opined that “[t]he Bush administration, with moralistic phrases *ad acta*, has laid aside the 220-year-old Kantian project for the *legalizing* of international relations. The comportment of the American administration allows for only one conclusion, that, as they see it, international law is finished *as a medium* for the resolution of conflicts between states, and for the advancement of democracy and human rights.” *America and the World: A Conversation with Jürgen Habermas, with Eduardo Mendieta*, available at http://www.logosjournal.com/habermas_america.htm (italics in original).

American outlook, traces the nation's organic law to a founding act of popular lawmaking. International constitutionalism sees constitutional law, not as deriving from an act of democratic self-government, but as deriving from universal, hence transnational, principles and rights. These principles and rights – in effect, an overarching structure of natural law in which particular national régimes should be embedded – operate to restrain rather than to express democracy. On Rubinfeld's account, international constitutionalism underlies the legal systems of at least some of the major western European nations. The divergent constitutional traditions of the United States and Europe reflect, in large measure, the different reactions of the United States and Europe to the horrors of Nazism and the violence of the Second World War. Each of these conceptions of constitutionalism generates, in turn, a distinctive approach to international law.

Rubinfeld's analysis is framed in terms of the different values expressive of two different constitutional traditions and cultures. Without altogether disagreeing with it, we shall argue that an alternative theory seems to have equal, if not more, explanatory power. Part II offers a theory of the international law divergence between the U.S. and Europe that sounds in *interests* rather than in *values*. (It is, therefore, a more banal and commonplace explanation than Rubinfeld's⁷). On this alternative approach, both U.S. and European policymakers and élites use international law instrumentally, to promote and serve competing national interests in various ways.⁸

⁷ Rubinfeld does not deny the possibility of interest-based explanations, but contends that by “explaining everything so well, [they] explain little with any depth.” Rubinfeld, *supra* n.-, at 1984.

⁸ The “Realist” school of international relations has long taken the view that international law may be, and often is, used both to cloak and to promote national or hegemonic interests. *See, e.g.*, Edward Hallett Carr, *The Twenty Years' Crisis, 1919-1939: An Introduction to the Study of International Relations* (2d ed. 1946) at 73-75, 82-83. Carr is also correct to insist, however, that “[t]he necessity, recognized by all politicians, both in domestic and international affairs, for cloaking interests in the guise of moral principles is itself a symptom of the inadequacy of realism.” *Id.* at 92.

The proffered explanation takes its start from the unremarkable observation that the post-Cold War United States is the global hegemon. In the United States' view of itself, it uses its power benignly⁹: it functions as the chief global provider of public goods, including peace, order and trade.¹⁰ This is not of course due entirely to altruism on the part of the United States, but it may well have some altruistic features. The real risk to global peace and order is not that the United States will behave more and more like a traditional imperial power, but that its people will weary of their nation's global responsibilities ("isolationism")¹¹ or that, as theorists like Paul Kennedy¹² and Niall Ferguson¹³ have forecast, it will find itself financially overspent and overstretched.

Despite their reluctance to admit it, moreover, it seems likely that, at present, most other major nations, including the European ones, largely agree in practice with the United States' self-image, and are not actively seeking to overturn the American ascendancy. In the sixty years of the Long Peace that has settled on it since the end of the Second World War, Western Europe has benefited substantially from America's dominant global role.

⁹ The view that the U.S.' hegemonic role is generally benign is shared by American writers of very different ideological standpoints. Compare George Weigel, "Moral Clarity in a Time of War," available at <http://www.firstthings.com/ftissues/ft0301/articles/weigel.html> with Robert D. Kaplan, *Warrior Politics: Why Leadership Demands a Pagan Ethos* 109, 127 (2002). For a far less sympathetic (European) reading of American dominance and its uses, see Emmanuel Todd, *After the Empire: The Breakdown of the American Order* (2003). For a critical American perspective, see Francis Fukuyama, *America at the Crossroads: Democracy, Power, and the Neoconservative Legacy* 111-13 (2006).

¹⁰ See, e.g., John C. Yoo, "Using Force," 71 U. Chi. L. Rev. 729, 792-93 (2004) (analyzing questions of international security in terms of "public goods" approach); Lea Brilmayer, *American Hegemony: Political Morality in A One-Superpower World* 115-18 (1994) (outlining "hegemonic stability theory"); see also Michael Mandelbaum, *The Case for Goliath: How America Acts as the World's Government in the 21st Century* (2005).

¹¹ See Robert Gilpin, *War & Change in World Politics* 168-69 (pb. ed 1983) (analyzing why the costs of dominance for a hegemonic power tend to rise and pointing out the consequences of the fact that hegemonic providers of public goods tend to overpay for them: "[t]he increasing costs of protection and the fact that . . . hegemonic powers tend to overpay mean that in time the costs of protection of the status quo rise faster than [its] economic benefits With increasing costs and decreasing revenues, . . . hegemony become[s] decreasingly profitable. As in any enterprise, a decrease in the rate of profit is a sign of potential bankruptcy."). See also Christopher Layne, "The Unipolar Illusion: Why New Great Powers Will Arise," 17 Int'l Security 5, 34 (1993) (even "benign" hegemony tends to precipitate the hegemon's relative decline).

¹² See Paul Kennedy, *The Rise and Fall of the Great Powers: Economic Change and Military Conflict from 1500 to 2000* (1989).

¹³ See Niall Ferguson, *Colossus: The Price of America's Empire* (2004).

But it appears that Europe rests less and less easy under the current arrangements. To some extent, political and military cooperation with the United States is simply less necessary after the Soviet collapse. Moreover, if Europe faces a “near enemy,” it is Islamic and, to a great extent, disturbingly home-grown.¹⁴ But it is not at all certain that close cooperation with the United States would be the most effective way to counter that threat.

The post-Cold War stage is therefore set for the emergence of conflicts between the United States and Europe; and those conflicts have begun to dawn. One might even trace the origins of renewed conflict as far back as an early phase of the Cold War – the 1957 creation of the six-member European Economic Community. For as Richard Rosecrance has argued, European economic and political integration after 1957 “provided a make-weight to the two [Cold War] superpowers. One must remember that the launching of Europe took place after the invasions of Suez and Hungary and (from a European point of view) reflected the unreliability of the alliance with America as well as the probable hostility of the Soviet Union.”¹⁵ Whenever one thinks they were first planted, the seeds of what looks not unlike a traditional Great Power rivalry seem to have started to sprout.¹⁶ The

¹⁴ See generally Olivier Roy, *Globalized Islam: The Search for a New Ummah* (2004); Gilles Kepel, *The Revenge of God* (1994). Large numbers of young European Muslims, even if born in Europe and outwardly assimilated, “are drawn to the idea of a Muslim ‘ummah’ (nation) to which they could belong.” Roula Khalaf and Jonathan Guthrie, “Europe’s radical young Muslims turn to violence,” *The Financial Times* at A2 (July 9/10, 2005); see also Robert Winnard and David Leppard, “Leaked No. 10 dossier reveals Al-Qaeda’s British recruits,” *The Sunday Times* (July 10, 2005), available at <http://www.timesonline.co.uk/article/0,,2087-1688261,00.html>. An unknown number of radicalized young British and French Muslims have also been volunteering to join al Qaeda forces fighting in Iraq, giving rise to police fears of violent “blowback” when they return. See Peter Taylor, “A reason to hate,” *The Guardian* (Sept. 1, 2006), available at <http://www.guardian.co.uk/print/0,,329566119-111274,00.html>.

¹⁵ Richard Rosecrance, “Mergers and Acquisitions,” *The National Interest* 65, 67 (Summer 2005).

¹⁶ The possibility of the emergence of traditional “Great Power” conflict between the United States and Europe (or some parts of Europe) cannot be dismissed as idle. Indeed, the historical record shows that very existence of a hegemonic power, even a non-threatening, “benign” one, is likely to produce rivals. “This is because the threat inheres in the hegemon’s power. In a unipolar world, others must worry about the hegemon’s capabilities, not its intentions. The preeminent power’s intentions may be benign today but may not be tomorrow. . . . Moreover, even a hegemon animated by benign motives may pursue policies that run counter to others’ interests.” Layne, *supra* n.–, at 13-14. The United States’ own history demonstrates that as the nation’s power grew in the late nineteenth century, it grew increasingly restive under the hegemony of

pervasive presence of American hegemony may be creating a classic “security dilemma”¹⁷ for European nations that will ultimately drive them towards complete political integration and the formation of a unitary European “superstate.”¹⁸

We may take the existence, or at least emerging possibility, of such American-European rivalry as the basis for an explanation of the two parties’ divergent attitudes toward international law. Such an explanation would differ from Rubinfeld’s in seeing conflicting interests, and not differing values, as the chief source of the divergence. The United States is interested in maintaining its dominating position in world affairs; Europe is interested, not so much perhaps in supplanting the United States, as in checking and counter-balancing it. International law then becomes an instrument that can be wielded in that power conflict.

Nonetheless, we will also argue, both sides also have a substantial interest in *mitigating* the conflicts between them and in restoring their relations nearer to equilibrium. This, of course, includes compromising their outstanding differences over international law. We shall argue that we are seeing specific attempts to bridge over these legal differences, and that the initiatives are coming from both sides. To illustrate this tendency, we will briefly discuss Security Council Resolution 1483 of May 22, 2003, which in practical terms (whether or not in legal effect) cleansed the United States’ occupation of Iraq from the taint of illegitimacy caused by the (assumedly) unauthorized use of force against that country earlier in the year.

Great Britain, even though the United States was a major beneficiary of Britain’s preeminence and was hardly threatened by it. *See id.* at 27-28.

¹⁷ *See* John H. Herz, “*Idealist Internationalism and the Security Dilemma*,” in John H. Herz, *The Nation-State and the Crisis of World Politics: Essays on International Politics in the Twentieth Century* 72-98 (1976).

¹⁸ *See* Glyn Morgan, *The Idea of a European Superstate: Public Justification and European Integration* 161-62 (2005).

Finally, in Part III, we shall attempt, very briefly and allusively, to outline a possible approach that seeks to *reconcile* Professor Rubinfeld's values-based theory with the theory that emphasizes national interests. This attempt at reconciliation starts from the observation, made several years ago by the distinguished political scientist Robert Putnam, that

[t]he politics of many international negotiations can usefully be conceived as a two-level game. At the national level, domestic groups pursue their interests by pressuring the government to adopt favorable policies, and politicians seek power by constructing coalitions among those groups. At the international level, national governments seek to maximize their own ability to satisfy domestic pressures, while minimizing the adverse consequences of foreign developments.^[19]

Although Putnam's theory has its origins in international negotiations over matters such as trade and currency rates, it can be adapted to negotiations over human rights and international humanitarian law. Viewing Euro-American differences over international law as such a two-level game, one can appreciate, first, that important European domestic political constituencies may have strongly critical views of American foreign and military policies, based on the values and norms that those constituencies espouse; second, that European governments, including of course their executive branches, will inevitably be highly sensitive to those constituencies' demands, and will reflect them in their policy deliberations and choices; but also that, third, those executive branches will be dealing with the United States across a wide array of matters of common concern, will look for the United States' support and cooperation on many of them, and will therefore be reluctant to offend the United States (or its executive) unduly. Hence one would expect to find - and, it is argued, we do in fact find - a pattern of, on the one hand, highly vocal, values-based European condemnations of American foreign and military policies that uses the language

¹⁹ Robert D. Putnam, "*Diplomacy and domestic politics: the logic of two-level games*," 42 Int'l Organizations 427, 434 (1988).

of international law and, on the other hand, a more muted, less censorious approach to the same American policies on the part of European governments, especially executive branches.

In this type of analysis of Euro-American differences over international law, both “values” and “interests” contribute to the explanation. “Values” drive the condemnations of interested sectors of European publics, “interests” underlie the more tempered and pragmatic approach of European leaders.

Introduction and Overview

That there *are* deep differences between the United States and several of its major continental European allies (chiefly France and Germany) seems plain enough. We need only consider the visit in January, 2006 by the new German Chancellor, Angela Merkel, to Washington, D.C., during which she repeated, both privately to President Bush and in public, an opinion that she had previously expressed in an interview with *Der Spiegel*— that the United States’ detention camps at Guantanamo Bay “should not exist.”²⁰ The existence of these camps is, of course, a longstanding cause of complaint by European leaders.²¹ Chancellor Merkel’s references to it seemed only to underscore the depth and persistence of American and European views of the legality of the United States’ practice.²²

²⁰ See “*M. Bush defend la ‘nécessité’ de Guantanamo devant Mme Merkel; En visite à Washington, la chancelière allemande a exposé sa ‘divergence’ sur la base de Guantanamo. George Bush n’a rien cédé,*” *Le Monde* at 6 (Jan. 15, 2006), 2006 WLNR 794189.

²¹ See, e.g., Michael Byers, *War Law: Understanding International Law and Armed Conflict* 129 (2005) (“Rumsfeld’s disdain for international humanitarian law became blatantly apparent in January 2002 when suspected Taliban and al-Qaeda members were transported to the US naval base in Guantánamo Bay, Cuba. Ignoring public criticism from a number of European leaders, the UN High Commissioner for Human Rights and even the normally neutral and extraordinarily discrete [sic] International Committee of the Red Cross, the Secretary of Defense insisted the detainees were not prisoners of war In November 2002, the English Court of Appeal correctly described the position of the Guantánamo Bay detainees as ‘legally objectionable’; it was as if they were in a ‘legal black hole.’”).

²² Subsequently, in an interview on May 4, 2006 with ARD German Television, President Bush, after emphasizing the closeness both of the U.S-German alliance and of his own personal relationship with Chancellor Merkel (“I call her Angela, by the way”) told his German audience that “obviously, the

But appearances can be deceptive; and even this apparently significant conflict between German and American legal and policy views proves, on closer examination, to be far more muted than it might at first have seemed. Aides to Chancellor Merkel reportedly worked hard to persuade the German press delegation that her visit to Washington “is not about detentions at Guantanamo Bay,” and the Chancellor’s remarks to *Der Spiegel* were, so a British paper said, “an attempt to get an awkward subject out of the way early.”²³ The U.S. State Department’s press release, headlined by a reference to the President and Chancellor’s “full agreement on Iran,” stated only that “the two leaders said in a joint press conference that their meeting marked a renewed sense of unity of purpose between the two allies despite a continuing difference on issues such as the detainees in the War on Terror held at Guantanamo Bay, Cuba.”²⁴ At the press conference itself, Chancellor Merkel said merely that she had “mentioned Guantanamo” in her meeting with the President. When the President responded by affirming unequivocally that “Guantanamo is a necessary part of protecting the American people,” the Chancellor replied mildly that “what counts is that we come back to the situation where we openly address all of the issues.”²⁵ In other words, the fact that the two leaders were able to discuss Guantanamo candidly was to be taken as

Guantánamo issue is a sensitive issue for people. I very much would like to end Guantánamo; I very much would like to get people to a court.” *Interview of the President by Sabine Christiansen of ARD German Television* (May 4, 2006), available at <http://www.whitehouse.gov/news/releases/2006/05/print/20060507-3.html>. See also *Press Conference of the President* (June 14, 2006), available at <http://www.whitehouse.gov/news/releases/2006/06/20060614.html> (“I’d like to close Guantánamo, but I also recognize that we’re holding some people that are darn dangerous”).

²³ “Merkel foreign policy signals warmer relationship with US. Bernard Benoit reports on the German chancellor’s aim of correcting the balance in her country’s ties with Washington and Moscow,” *The Financial Times* at 8 (Jan. 13, 2006), 2006 WL 718362.

²⁴ “State Dept.: Bush, Germany’s Merkel in Full Agreement on Iran,” *US Fed. News* (pg. unavailable)(Jan. 13, 2006), 2006 WLNR 768294.

²⁵ “Remarks by President Bush and Chancellor Angela Merkel of the Federal Republic of Germany in Joint Press Availability,” *The White House Office of the Press Secretary* (transcript) (Jan. 13, 2006). In fact, the Chancellor went even further to minimize the disagreement. She stated that the question of detention was “only one facet in our overall fight against terrorism” and that she “completely share[d] [President Bush’s] assessment as regards the nature and dimension of th[e terrorist] threat.” Indeed, she even implicitly faulted her own and other European countries which, she said “need to come up with convincing proposals as to how we ought to deal with detainees.” *Id.*

evidence, not so much of an intractable difference over the requirements of international law, as of the strength, intimacy and resilience of the German-American alliance.

The lesson to be drawn from the Bush-Merkel exchange is not, of course, that Americans and Europeans do not disagree in their attitudes towards international law. They do disagree, and the disagreements may be substantial. But the exchange should also caution us not to exaggerate the differences. Further, it is also fair to say that while there have been numerous conflicts in recent years between American and European governments on matters *relating to* international law, by no means all of those conflicts have involved real, or even alleged, *violations* of international law by the United States. Consider (briefly) the following four contentious episodes:

The Kyoto Protocol: Notwithstanding vigorous European protests over the United States' unwillingness to become a party to the Kyoto Protocol, there is no question but that, as a matter purely of *international law*, the United States was well within its rights, as a sovereign nation, not to ratify that treaty.²⁶ Whatever the policy merits or demerits of the United States' decision not to ratify, it was legally unassailable. Indeed, if either side should be faulted for *violating* international law, it is those European parties to the Kyoto Protocol that the International Energy Agency reports have missed their targeted reductions in greenhouse gas emissions.²⁷

²⁶ There are some unusual circumstances in which a State can be deemed to be bound to discharge the obligations of a treaty to which it is not a signatory or a party. However, as the International Court of Justice has noted, "it is not lightly to be presumed that a State which has not carried out these formalities [of ratification or accession], though at all times fully able and entitled to do so, has nevertheless somehow become bound in another way." *North Sea Continental Shelf Cases*, 1969 I.C.J. Reports 4, 26. There is no reason to think that the United States has become bound to the Kyoto Protocol in some such unusual way.

²⁷ See Robert J. Samuelson, "*Greenhouse Hypocrisy*," *The Washington Post* at A 21 (June 29, 2005) ("Here are some IEA estimates of the increases [in carbon dioxide emissions]: France, 6.9 percent; Italy, 8.3 percent; Greece, 28.2 percent; Ireland, 40.3 percent; the Netherlands, 13.2 percent; Portugal, 59 percent; Spain, 46.9 percent."). The U.S. increase for the same period was 16.7%, not far from the global total of 16.4%, and well below that of several European nations. See also Dan Seligman, "*Bye-Bye, Kyoto*," 177 *Forbes* 130 (Jan. 9, 2006), 2006 WLNR 109018 ("The Kyoto rules say that western Europe must get their

The ABM Treaty: On December 13, 2001, President Bush announced that the United States had given formal notice to Russia, in accordance with Article XV of the Anti-Ballistic Missile [“ABM”] Treaty of 1972,²⁸ that it would withdraw from the Treaty. Despite the misgivings that some expressed, the United States was in full compliance with international law in taking that step. Article XV stated that “[e]ach party shall, in exercising its national sovereignty, have the right to withdraw from this Treaty if it decides that extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests.” The Treaty demanded six months’ notice before withdrawal, which the United States gave. The Treaty otherwise merely required the withdrawing party to provide the other party with an explanatory statement, apparently leaving it to each party’s unilateral judgment whether “extraordinary events” such as to “jeopardize[] its supreme interests” had arisen.²⁹ President Bush’s announcement referred both to the fundamental changes that had occurred in world affairs since the Treaty had been formed in 1972 – including the disappearance of the Soviet Union, one of the two original signatories – and the risk that weapons of mass destruction might fall into the hands of terrorists or rogue States – a risk that, he said, required the United States to abandon “a treaty that prevents us

emissions to a level 8% below those prevailing in 1990. But virtually all those countries – the only significant exception is Germany – are going in the wrong direction.”); Jon Walter, “*World faces massive increase in CO2 emissions as population grows*,” Agence France Presse English Wire (July 19, 2005) (“Even those countries which have ratified the Kyoto protocol appear unlikely to meet its modest goals Between 1990 and 2002 Canada’s CO2 emissions rose by 22 percent and Japan by 13 percent while those of the EU emissions have risen by 3.4 percent.”); Amanda Brown, “*EU Greenhouse Gas Emissions Rise*,” Press Association News Wire (June 21, 2005) (“The worldwide bid to curb global warming suffered a major blow today as new figures showed EU emissions in the 15 oldest member states increased by 1.3% between 2002 and 2003. . . . Today’s figures also show the EU is way off track in meeting its Kyoto Protocol target of cutting emissions by 8% by 2012.”) Perhaps as a result of the failures of its member States to meet the treaty’s targets, the European Union has adopted a more conciliatory attitude toward the U.S. approach to the problems of climate change. See Raf Casert, “*EU, Washington look beyond Kyoto to tackle climate change*,” Associated Press Worldstream (Feb. 22, 2005).

²⁸ Treaty on the Limitations of Anti-Ballistic Missile Systems, May 26, 1972, U.S.-U.S.S.R., 23 U.S.T. 3435.

²⁹ See Frederick L. Kirgis, “*Proposed Missile Defenses and the ABM Treaty*,” American Society of International Law Insights (May, 2001), and the ensuing addenda and correspondence, available at <http://www.asil.org/insights/insigh70.htm>.

from developing effective defenses.” Whether or not one agrees with the United States’ rationale, it would be hard to claim that it was utterly *unreasonable*, or that adopting it demonstrated disrespect for international treaty law.³⁰ Moreover, as a strategic matter, the introduction of ABM systems would not affect the stability of the international security system by upsetting the nuclear balance between the United States and Russia; it did, however, hold out the possibility of neutralizing the more limited nuclear capacities of smaller, “rogue” States.³¹ European - and Russian - reaction to the United States’ action was muted.³²

The Rome Statute: The United States has also come under criticism from the European Union for its decision to “unsign” the Rome Statute establishing the International Criminal Court [“ICC”]. Nonetheless, the decision to “unsign” the Treaty, while perhaps unprecedented, appears to be valid as a matter of international law.³³ Article 18(a) of the 1969 Vienna Convention on Treaties,³⁴ while imposing interim obligations on a nation that has *signed* a treaty but not yet *ratified* it, also clearly contemplates that those interim obligations will lapse once the signatory “shall have made clear its intention not to become a party to the treaty.” That clause seems clearly to entail that a signatory may indeed, before ratification, withdraw its signature from the treaty. One careful legal study of the question of “unsigning” found that “the bottom line . . . is that if a signatory feels

³⁰ Accord W. Michael Reisman, “Assessing Claims to Revise the Laws of War,” 97 Am. J. Int’ L. 82, 86 (2003) (“[T]he denunciation of the ABM treaty did not undermine the viability of the international treaty regime, for the treaty in question was susceptible, by its terms, to termination, on notice”).

³¹ See *id.* at 86, 89.

³² See Eric A Posner, “International Law and the Disaggregated State,” 32 Fla. State U. L. Rev. 797, 822 & n. 74 (2005).

³³ See Curtis A. Bradley, “U.S. Announces Intent Not to Ratify International Criminal Court Treaty,” American Society of International Law Insights (May 2002), available at <http://www.asil.org/insights/insigh87.htm>.

³⁴ 1155 U.N.T.S. 331, U.N. Doc. A/CONF. 39/27 (1969), entered into force Jan. 27, 1980. Although the United States has not ratified the Vienna Convention on Treaties, it regards most of its clauses as merely declaratory of customary international law. See S. Exec. Doc. L., 92d Cong., 1st Sess., at 1 (1971) (State Department description of Vienna Convention as “the authoritative guide to current treaty law and practice”).

burdened by the interim obligation, and contemplates taking acts that might be viewed as violating a treaty's object and purpose, it can quickly disengage itself.”³⁵ The United States surely “made clear its intention” not to ratify the Rome Statute in a variety of ways, including by sending formal notice to the Rome Statute's depositary, the United Nations; by making clear official pronouncements both before and after submitting that formal notice of its intent to unsign; and by actively seeking to enter into treaty arrangements with nations hosting U.S. military bases that, if ratified, would tend to defeat the object and purpose of the Rome Statute. Again, therefore, while European criticism of the United States' decision not to participate in the ICC may or may not be sound as a policy matter, it is hard to find fault with the decision as a matter purely *of international law*.

Even more importantly, the United States' decision to unsign the Rome Statute did *not* evince an arrogant “unilateralism,” demonstrating the nation's unwillingness to join other leading members of the world community in an international organization dedicated to enforcing the laws of war. The United States has had a long record of supporting, and indeed initiating, legal developments in this area, including its roles in founding the International Military Tribunals at Nuremberg and Tokyo, in helping to establish and operate the United Nations' war crimes tribunals for Yugoslavia and Rwanda, and even in negotiating the Rome Statute. As William Schabas has observed,³⁶ the U.S. decision not to participate in the ICC stemmed primarily from a fundamental change that was made during the negotiations concerning the powers of the Security Council. In 1994, when the International Law Commission [“ILC”] presented its report on the proposed ICC to the

³⁵ Edward T. Swaine, *Unsigning*, 55 Stan. L. Rev. 2061, 2082-83 (2003); *see also id.* at 2089 (“Unsigning, in short, should be acknowledged as a legitimate and understandable course of action under the Vienna Convention . . .”).

³⁶ The discussion that follows in the text relies heavily on William A. Schabas, “*United States Hostility to the International Criminal Court: It's All About the Security Council*,” 15 Eur. J. Int'l L. 701 (2004).

General Assembly, the United States was well-disposed to the idea. The ILC's draft treaty provided for an ICC that fitted neatly within the existing legal scheme of the United Nations Charter and that, therefore, was subordinate to the Security Council. Draft Article 23(3) of the ILC's proposal would have provided that "No prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, *unless the Security Council otherwise decides*" (emphasis added). In effect, the ILC would have given the Security Council, and thus its Permanent Members (including the United States) a veto over prosecutions before the ICC. Such an arrangement would have been consistent, not only with the overall Charter scheme, but with existing legal procedures for the *ad hoc* United Nations criminal tribunals. At the insistence of nations such as Germany and Canada at a later phase of the negotiations, however, this provision was stricken. In its place, Article 16 of the Rome Statute merely permits the Security Council, to *delay* prosecution for up to a year (subject to renewal). To secure a temporary delay of even one year, the votes of all five Permanent Members of the Council, and a nine-vote majority of all the Members, is required. This, of course, represents an extremely severe dilution of the United States' ability to control prosecutions - a matter of overriding concern to it as the world's dominant military power.³⁷ The insistence of the nations that prevailed in the negotiations on this revision of the ILC draft seems to have stemmed from their resentment of the special position that the Charter secures for the Permanent Members of the Security Council. In other words, the disagreement was in essence merely a power struggle between medium- and small-sized

³⁷ The veto has indeed always been an indispensable feature of the Charter scheme from the United States' perspective. See Stephen C. Schlesinger, *Act of Creation: The Founding of the United Nations* 193-94 (2003); Samuel Flagg Bemis, *A Diplomatic History of the United States* 904 (3d ed. 1951).

powers and the United States. It is surely difficult to see why the United States' decision not to participate in the ICC on those unfavorable terms should be taken to show its hostility to international legal régimes, while Germany's and Canada's pursuit of their own *realpolitik* objectives, even at the risk of losing the United States' crucial support for the ICC, should not.

The U.S.-Led 2003 Invasion of Iraq. The United States-led intervention in Iraq in March, 2003 was perhaps the most important occasion on which the United States differed vehemently from several of its traditional continental European allies over a vital question of international law. The judgment of United Nations Secretary General Kofi Annan that the intervention was unlawful because the United States had not obtained specific authorization, in the form of a new Security Council Resolution, before beginning hostilities, is shared by many independent legal experts and scholars.³⁸ Nonetheless, this episode hardly justifies European complaints that the United States has become heedless of international law.³⁹

As is well known, Article 2(4) of the United Nations Charter requires Member States to “refrain in their international relations from the threat or use of force against the

³⁸ For Annan's pre-war position, see Patrick E. Tyler and Felicity Barringer, “*Annan Says U.S. Will Violate Charter if it Acts Without Approval*,” *The New York Times* at A8 (March 11, 2003). After the war, in an interview on September 16, 2004 with the British Broadcasting Corporation, Annan repeated his view that the intervention was illegal. See “*Excerpts: Annan Interview*,” available at http://news.bbc.co.uk/2/hi/middle_east/3661640.htm (“I have indicated it is not in conformity with the UN Charter, from our point of view and from the Charter point of view it was illegal.”).

³⁹ See Jacques de Lisle, “*Illegal? Yes. Lawless? Not So Fast: The United States, International Law, and the War in Iraq*,” Foreign Policy Research Institute (March 28, 2003), available at <http://www.fpri.org/enotes/20030328.americawar.delisle.intllawwariraq.html> (“True, the United States and its handful of active partners in the coalition did not obtain the Security Council's specific authorization for their use of force against Iraq, nor has the Bush administration articulated a credible claim that this is a case that falls within one of the few, narrow exceptions permitting the international use of military force without Security Council authorization. But, contrary to what much of the chorus of criticism asserts or assumes, unlawfulness is not the same as lawlessness. Eschewing or rejecting prescribed legal processes is not the same thing as rejecting all legal principle. Not adhering to the international legal requirements set forth in the U.N. Charter does not lead ineluctably to the world of Thucydides' Melian Dialogue in which the strong do what they wish and the weak do what they must.”).

territorial integrity or political independence of any state.”⁴⁰ Under the Charter, armed force may be used by one State or group of States against another only in two circumstances. First, Article 51 recognizes Member States’ “inherent right of individual or collective self-defence if an armed attack occurs against a Member,” but the United States and its coalition partners did not place their primary reliance on the argument that their action against Iraq was lawful under that provision.⁴¹ Second, Article 42 of Chapter VII of the Charter authorizes the Security Council to “take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security” in a troubled area. The United States’ original intervention against Iraq in January, 1991, following upon

⁴⁰ On the background and meaning of the Charter clauses relating to international armed conflict, *see, e.g.*, John F. Murphy, *The United States and the Rule of Law in International Affairs* 142-44 (2004).

⁴¹ To be more accurate: the United States made an Article 51 argument to the Security Council, but in somewhat sketchy and allusive terms; the United Kingdom and Australia did not make such an argument in that forum. *See* Helen Duffy, *The ‘War on Terror’ and the Framework of International Law* 197-98, 205-07 (2003). Outside the United Nations, the United States did of course rely, sometimes quite heavily, on the claim that preemptive action or even preventive war against “rogue states” and terrorists was compatible with international law. *See generally* The National Security Strategy of the United States of America, September 2002, available at <http://www.whitehouse.gov/nsc/nss.html>; *see also* Letter from President George W. Bush to the Speaker of the House of Representatives and President Pro Tempore of the Senate (March 21, 2003), available at <http://www.whitehouse.gov/news/releases/2003/03/20030321-5.html> (stating President’s determination that further diplomatic efforts would “neither adequately protect the national security of the United States against the continuing threat posed by Iraq” nor “lead to the enforcement of all relevant United Nations Security Council resolutions regarding Iraq”). For a thoughtful evaluation of the United States’ position, *see* Alan M. Dershowitz, *Preemption: A Knife That Cuts Both Ways* 153-89 (2006). *See also* Ruth Wedgwood, “*The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*,” 97 *Am. J. Int’l L.* 576, 582-85 (2003); Carl Bildt, “*Pre-emptive military action and the legitimacy of the use of force: A European Perspective*” (CEPS/IISS European Security Forum, Jan. 13, 2003), available at <http://www.eusec.org/bildt.html>; Walter B. Slocombe, “*Preemptive military action and the legitimate use of force: An American Perspective*,” CEPS/IISS European Security Forum, Jan. 13, 2003), available at <http://www.eusec.org/slocombe.html>.

The British position specifically rejected the idea that military action against Iraq was legally justified on the grounds of preemptive self-defense. *See* “*Extract from Debate in the British House of Lords*,” (Apr. 21, 2004) (remarks of Lord Goldsmith), *reprinted in* Mary Ellen O’Connell, *International Law and the Use of Force* 259-61 (2005). Instead Britain relied on the argument that Iraq’s material breaches of Security Council Resolutions authorized the resumption of hostilities. *See* Letter from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the President of the United Nations Security Council (Mar. 20, 2003), U.N. Doc. S/2003/350 (2003); *see also* Lord Goldsmith, “*Legal Basis for Use of Force Against Iraq*,” (Mar. 17, 2003), available at <http://www.labour.org.uk/news/legalbasis>; Murphy, *supra* n.--, at 171-72 (discussion and critique of Goldsmith opinion). The legal analysis that Lord Goldsmith, Britain’s Attorney General, communicated privately to Prime Minister Blair was considerably more guarded than his public memorandum. *See* “*Full text: summary of attorney general’s legal advice on March 7 2003*,” available at <http://www.guardian.co.uk/Iraq/Story/0,2763,1471655,00.html>.

Iraq's invasion of Kuwait in 1990, had been authorized on precisely such a basis: Resolution 678 of November 29, 1990, enacted "under Chapter VII of the Charter," expressly authorized "Member States co-operating with the Government of Kuwait . . . to use all necessary means" to enforce earlier Security Council Resolutions relating to the Kuwaiti crisis against Iraq in the event that Iraq failed to comply with them beforehand.

The 1991 U.S.-led offensive came to a halt with the adoption of Security Council Resolutions 686 of March 2, 1991 and 687 of April 8, 1991, which imposed a variety of obligations upon the defeated Iraqi Government. Both before and more especially after the terrorist attacks on the United States of September 11, 2001, the United States sought to persuade the United Nations that Iraq remained a danger to regional, and world, peace and security. Focusing on Iraq's failure to permit United Nations inspectors immediate and unrestricted access to verify its undertaking to rid itself of weapons of mass destruction, President Bush made it clear, in a speech to the General Assembly on September 12, 2002, that the United States wanted and expected the Security Council to reauthorize armed intervention in Iraq, but that the United States was prepared to act unilaterally in the absence of such a Resolution ("We will work with the U.N. Security Council for the necessary resolutions. But the purposes of the United States should not be doubted.").⁴² As a result of the intense diplomatic activity that ensued, the Security Council, acting under Chapter VII, adopted Resolution 1441 of November 8, 2002, which in part decided that "Iraq has been and remains in material breach of its obligations under relevant resolutions, including resolution 687 (1991)." Resolution 1441, however, unlike Resolution 678, did not in terms authorize the United States or other Member States to "use all necessary

⁴² See "President's Remarks at the United Nations General Assembly," (Sept. 12, 2002), available at <http://www.whitehouse.gov/news/releases/2002/09/20020912-1.html>.

means” to bring Iraq into compliance. Rather, Resolution 1441 reflected a two-stage approach that had been advocated by France: disarmament through resumed inspections or, if that failed, reconsideration by the Security Council of its options, including recourse to force.⁴³ Four months after the adoption of Resolution 1441, the United States and its coalition partners tabled a resolution that would have provided specific legal authorization to resume hostilities in Iraq.⁴⁴ France, supported by Russia and China, announced publicly that it would veto the draft resolution, which in any case had no chance of passage and was withdrawn.⁴⁵

In these circumstances, the United States took the legal position that Resolution 1441’s finding that Iraq had been and remained in material breach of Security Council Resolution 687, coupled with Iraq’s subsequent failure to cure those and other breaches after the adoption of Resolution 1441, authorized the United States and its coalition to resume the concededly lawful hostilities that had been suspended eleven years earlier by Resolution 687.⁴⁶ Several prominent legal scholars agreed with the United States’ view.⁴⁷ Others, of course, did not.⁴⁸

⁴³ See Remarks of M. Dominique Galouzeau de Villepin, Minister for Foreign Affairs of France, United Nations Security Council Fifty-eighth year, 4707th meeting Friday, 14 February 2003, 10 a.m. New York, U.N. Doc. S/PV.4707.

⁴⁴ See Provisional Resolution --, March 7, 2003, U.N. Doc. S/2003/215. In any event, Secretary of State Colin Powell had stated previously that, in the event of an Iraqi breach of Resolution 1441, the Security Council could “decide whether or not action is required,” but the United States would “reserve our option of acting” unilaterally and would “not necessarily be bound by what the Security Council might decide at that point.” Quoted in Michael J. Glennon, *How War Left the Law Behind*, The New York Times at A33 (Nov. 21, 2002).

⁴⁵ See Ayman El-Amir, *“A world united against war,”* Al-Ahram Weekly Online: 20-26 March 2003 (Issue No. 630), available at <http://weekly.ahram.org.eg/print/2003/630/sc2.htm>. President Bush remarked that “some permanent members of the Security Council have publicly announced they will veto any resolution that compels the disarmament of Iraq The United Nations Security Council has not lived up to its responsibilities, so we will rise to ours.” *“President George W. Bush Addresses the Nation on Iraq”* (March 17, 2003), reprinted in Craig R. Whitney (ed.), *The WMD Mirage* 166, 167-68 (2003).

⁴⁶ See Letter from the Permanent Representative of the United States of America to the President of the United Nations Security Council (March 20, 2003), U.N. Doc. S/2003/350; see also William H. Taft & Todd F. Buchwald, *“Preemption, Iraq, and International Law,”* 97 Am. J. Int’l L. 557 (2003). Mr. Taft wrote as Legal Adviser to the U.S. State Department, and Mr. Buchwald as Assistant Legal Adviser.

My purpose here is not to defend the United States' legal position, nor even to argue that it was a reasonable (if perhaps erroneous) one. Rather, I want only to make the point that even if the United States (and Britain and Australia) were clearly in error about the legality of using force against Iraq, the continental European governments that were critical of the coalition's position themselves had "dirty hands." For the NATO Alliance's armed intervention in 1999 in Kosovo, which was designed to prevent Serbia from carrying out its program of "ethnic cleansing" of that province, was certainly on no better footing under international law than the U.S. coalition's intervention in Iraq in 2003.⁴⁹ Having themselves violated the very same constraints of the U.N. Charter only four years earlier, the European governments involved in NATO's Kosovo intervention could hardly claim that the United States was an international scofflaw for having done so.⁵⁰

⁴⁷ See, e.g., Yoram Dinstein, "Comments on War," 27 Harv. J. L. & Pub. Pol'y 877, 889-91 (2004); Christopher Greenwood, "International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaida, and Iraq," 4 San Diego Int'l L. J. 7, 34-36 (2003); Ruth Wedgwood, "The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense," 97 Am. J. Int'l L. 576, 578-82 (2003); Ruth Wedgwood, "Legal Authority Exists for a Strike on Iraq," The Financial Times at 19 (Mar. 14, 2003). For a sophisticated defense of the United States' intervention (albeit one not keyed to the textual analysis of the relevant Resolutions), see Michael D. Ramsey, "Reinventing the Security Council: The U.N. as a Lockean System," 79 Notre Dame L. Rev. 1529 (2004).

⁴⁸ For a recent critique of the U.S. legal position, see Byers, *supra* n.--, at 44-45; see also Simon Chesterman, "Just War or Just Peace After September 11: Axes of Evil and Wars Against Terror in Iraq and Beyond," 37 N.Y.U. J. Int'l L. & Pol. 281, 288-97 (2005). For a survey of some objections, see Helen Duffy, *The 'War on Terror' and the Framework of International Law*, *supra* n.--, at 201-02.

⁴⁹ Many of the pertinent legal objections are summarized in David Chandler, *From Kosovo to Kabul and Beyond: Human Rights and Humanitarian Intervention* 127-39, 158-66 (2006). See also Michael Glennon, *Limits of Law, Prerogatives of Power: Interventionism After Kosovo*, ch. 1 (2001); John C. Yoo, *Using Force*, 71 U. Chi. L. Rev. 729, 735 & n.22 (2004); Dinstein, *supra* note --, at 881; Jules Lobel, *Benign Hegemony? Kosovo and Article 2(4) of the U.N. Charter*, 1 Chi. J. Int'l L. 19 (2000); Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 European J. Int'l L. 1 (1999). Despite setting out the legal case against intervention altogether flawlessly, Richard Falk attempts, unconvincingly in my view, to defend the legality of NATO's actions under international law. See Richard Falk, "Humanitarian Intervention After Kosovo," in Aleksandar Jokic (ed.), *Lessons of Kosovo: The Dangers of Humanitarian Intervention* 31-52 (2003). Other efforts to find justification - even if retrospective - for the Kosovo intervention under international law include Louis Henkin, *Kosovo and the Law of "Humanitarian Intervention"*, 93 Am. J. Int'l L. 831 (1999).

⁵⁰ Moreover, it seems fair to point out that even if the United States did violate the U.N. Charter's restrictions on the use of force (Article 2(4) in particular) by attacking Iraq, that infraction was hardly unique in the Charter's history. In a classic article written thirty-six years ago, the international law scholar Thomas M. Franck pronounced Article 2(4) dead: "today the high-minded resolve of Article 2(4) mocks us from its grave

What we should deduce from these four situations, I submit, is that the views of the United States and continental Europe on the place of international law in regulating State practice are not as sharply opposed as is often assumed. Sometimes the differences, though real, prove on analysis to turn on policy rather than law. And sometimes the conduct of the European nations, judged by the standards they would apply to the United States, is no better, or even worse, than American conduct. True, we have not examined a host of other controversies that have arisen in recent years between Europe and the United States over international law, such as whether the United States could properly denounce the optional protocol to the Vienna Consular Convention that subjected it in cases under that treaty to the jurisdiction of the International Court of Justice [“ICJ”],⁵¹ or whether the United States was correct in concluding that Taliban captives taken in the Afghan conflict were not entitled as a matter of law to the status of prisoners of war under the Third Geneva Convention, or whether the United States is violating the Torture Convention or other international human rights treaties by its (asserted) practices in detaining al Qaeda or Taliban captives indefinitely, or by (assertedly) holding them in secret locations without visitation by the International Committee of the Red Cross, or in subjecting them to certain methods of interrogation, or in attempting to assassinate particular al Qaeda leaders. Again, no one could deny that these disagreements are real and substantial. But in acknowledging them, we should also be careful not to reduce any characteristic differences there may be between the United States and Europe over international law to the moralizing simplicities of Maoist street theater.

. . . [A]s with Ozymandias, only the words remain.” Thomas M. Franck, *Who Killed Article 2(4)?*, 64 Am. J. Int’l L. 809, 809-10 (1970).

⁵¹ See generally *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006).

With those cautions taken, we shall go forward on the assumption that there *are* significant differences between the United States and at least some of its continental Allies, not only over the precise requirements of international law, but more importantly over the role international law should play in controlling State practice, especially in the “War on Terror.” Let us briefly to survey the landscape -- from an altitude 30,000 feet above the earth.

We may stipulate that the United States typically prefers a “positivistic” approach to questions of international law,⁵² tending to acknowledge no international legal duties or constraints upon its sovereignty except those that have arisen from its actual or express consent.⁵³ This approach enables the United States to argue that it is not constrained by “customary law” (unless it has specifically endorsed or adopted it) or, still less, by *jus cogens* (a category of law that is purportedly binding even in the face of a State’s deliberate refusal to consent⁵⁴). It also permits the United States to read its written treaty obligations

⁵² A positivist view of international law rather than a natural law-based one has been characteristic of American jurisprudence since at least the post-Civil War period. See Stephen M. Feldman, “From Premodern to Modern American Jurisprudence: The Onset of Positivism,” 50 Vand. L. Rev. 1387, 1421-25 (1997); William S. Dodge, “The Story of the *Paquete Habana*: Customary International Law as Part of Our Law,” available at [SSRN], at 10-14.

⁵³ Although this tendency has deep roots in American jurisprudential and political traditions, it has surely been reinforced by the current “neo-conservative” ascendancy. See Fukuyama, *supra* n.1., at 49, 64-65. However, as Richard Pildes notes, the divergence between European and American understandings of the proper relationship between law and politics has been growing for at least the last generation. See Richard H. Pildes, “Conflicts Between American and European Views of Law: The Dark Side of Legalism,” 44 Va. J. Int’l L. 145, 146-47 (2003).

⁵⁴ The paradigmatic statement of the *jus cogens* concept is Article 53 of the Vienna Convention on Treaties, which provides that “[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law . . . from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 8 I.L.M. 679, 698-99 (1969). The ICJ has from time to time referred to particular norms as *jus cogens*. See, e.g., *Case Concerning the Barcelona Traction, Light and Power Co., Ltd, Second Phase, Belgium v. Spain*, 1970 I.C.J. 3, 1970 WL 1, ¶¶ 33-34.

Although it has antecedents that can be traced back to Roman law, see Egon Schwelb, “Some Aspects of International *Jus Cogens* as Formulated by the International Law Commission,” 61 Am. J. Int’l L. 946, 948 (1967), the concept of *jus cogens* was hardly found in international law until the twentieth century. See generally George D. Haimbaugh, Jr., “*Jus Cogens: Root & Branch (An Inventory)*,” 3 Touro L. Rev. 203, 207-12 (1986/87). The concept was applied to treaties beginning in 1937. See Alfred von Verdross, “*Forbidden Treaties in International Law*,” 31 Am. J. Int’l L. 571 (1937).

in a lawyerly – or, its critics would say, legalistic – way. By contrast, the continental Europeans characteristically favor an approach to international law that encourages a willingness on the part of national sovereigns to submit their powers of unilateral decision-making to consensual, intergovernmental arrangements, to construe their treaty obligations (especially in human rights and humanitarian law) broadly, to rely on and follow custom and, most interestingly of all, to assume that certain unwritten, natural law norms have a binding effect. If this characterization is even roughly right, we could say (to borrow William James’s terms) that the United States is tough-minded about international law, and Europe is tender-minded about it. What, then, explains these differences?

I.

Rubinfeld’s starting-point is the claim that “the new international order that emerged after the Second World War had very different meanings in America and in Europe.”⁵⁵ Grasping those different interpretations of the War is, he argues, “essential to understanding the phenomena of U.S. unilateralism and European internationalism today.”⁵⁶

Pondering the wreckage left by Nazism, war, genocide and defeat, Europeans, on this account, drew two fundamental lessons for their constitutional future. The first concerned the evils of nationalism; the second, the risks of democracy.

First, nationalism. Rubinfeld is undoubtedly right in stating that the end of the Second World War led to the decline of nationalism all over Western Europe, but above

⁵⁵ Rubinfeld, *supra* n.--, at 1985.

⁵⁶ *Id.* See also Morgan, *supra* n.--, at 45 (“Fifty years ago – roughly at the time when the current process of European integration got going – very few people in European intellectual and scholarly circles had anything favorable to say about nationalism. Conservatives disliked it because of its revolutionary potential to undermine existing state boundaries; socialists saw it as a threat to the international solidarity of workers; and liberals condemned it as a regressive form of collectivism.”).

all in Germany.⁵⁷ As Russell Hittinger puts the point, “[i]n 1945, after two world wars, the crown jewel of modernity – the sovereign nation state – was brought before the bar of moral judgment. The Protestant theologian, Karl Barth aptly called this the era of ‘disillusioned sovereignty.’”⁵⁸ One lasting effect of the aversion to nationalism has been the continuing drive toward closer European integration, leading to the creation in time of such supranational bodies as the European Union.⁵⁹ Indeed, in the words of a former judge on

⁵⁷ Various causes might be assigned to the post-War decline of nationalism in Western Europe. The political scientist John Mearsheimer attributes the decline partly to the active steps that the occupation forces in Germany took to dampen nationalism, and partly to the fact that since the European states had been relieved of the need to provide for their own security, they “lacked the incentive to purvey hyper-nationalism in order to bolster public support for national defense.” John J. Mearsheimer, *Back to the Future: Instability in Europe after the Cold War*, reprinted in Michael E. Brown, Owen R. Coté, Sean M. Lynn-Jones and Steven E. Miller (eds.), *Theories of War and Peace* 3, 27 (1998). In addition, Mearsheimer also notes that strategic reliance on nuclear weapons to maintain the peace of Europe had the effect of “reducing the importance of mass armies for preserving sovereignty, thus diminishing the importance of maintaining a hyper-nationalized pool of manpower. *Id.*; see generally Philip Bobbitt, *The Shield of Achilles: War, Peace, and the Course of History* 190 (2002) (noting connection between emergence of nationalism and strategic need for mass armies).

⁵⁸ Russell Hittinger, *The Ethical Traditions of Europe and the USA: Common Roots and Possibilities for Dialogue: Comments on Yves Simon*, at 5 (Palermo, July 18-23, 2004), available at http://www.thomasinternational.org/conferences/200407118palermo/russell_paper.htm.

⁵⁹ After the end of the Second World War, both European and American statesmen and diplomats favored a type of European federation that would forge close economic ties between Germany and its Western neighbors, thus at once preventing Communism from spreading to the West and averting the revival of German militarism. See, e.g., G. John Ikenberry, *After Victory: Institutions, Strategic Restraint, and the Rebuilding of Order After Major Wars* 182, 202-03, 207, 209-10 (2001). The European Union [“EU”], established in 1993, see Treaty on European Union (The Treaty of Maastricht), entered into force November 1, 1993, as amended by the Treaty of Amsterdam, O.J.C. C 340/173, November 10, 1997, originated in 1957 as the six-member European Economic Community in 1957, see Treaty Establishing the European Economic Community (EEC), March 25, 1957, 298 U.N.T.S., 4 Eur. Y.B. 412, as amended, which itself was the outgrowth of the 1951 Coal and Steel Community, see Treaty Establishing the European Coal and Steel Community (ECSC), April 18, 1951, 261 U.N.T.S., as amended. See Ernest A. Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales From American Federalism*, 77 N.Y.U. L. Rev. 1612, 1621-36 (2002) (detailing origins of EU). The formation of the EU is widely, and correctly, understood to have entailed the diminution of its Member States’ national sovereignty. See, e.g., George Sørensen, *Changes in Statehood: The Transformation of International Relations* 87 (2001) (EU exemplifies “a new type of sovereign statehood . . . which is qualitatively different from the modern state”); Stephen D. Krasner, *The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law*, 25 Mich. J. Int’l L. 1075, 1085 (2004) (“The member states of the EU have used their international legal sovereignty, their right to sign treaties, to create supranational institutions and pooled sovereignty arrangements that have compromised their Westphalian/Vattelien sovereignty. For instance, the rulings of the European Court of Justice have direct effect and supremacy in the legal systems of the member states. Thus, the member states of the EU are not juridically independent, even though this loss of independence is the result of freely chosen commitments.”). European judicial institutions have recognized this fact: “[b]y creating a community of unlimited duration, having its own institutions . . . and, more particularly, real powers, . . . the Member States have thus created a body of law which binds both their nationals and themselves.” *Costa v. Enel*, 1964 E.C.R. 585, 593. EU Member States have now created a system of

the European Court of Justice, the guiding purpose of European integration has been “to prevent the evils of nationalism.”⁶⁰ No longer would it be the fate of the European peoples to suffer from what Jean-Jacques Rousseau had called their “deadly intimacy;” no longer would it be the case that “the state peculiar to the Powers of Europe is simply a state of war.”⁶¹ Throughout the course of this extraordinary project, the EU and its precursors have used economic means not only to achieve greater efficiency and competitiveness and to promote intra-European trade,⁶² but even more fundamentally to secure deeper political integration.⁶³ While the post-War phenomenon of the erosion of national feeling and national sovereignty has by no means been confined to Europe,⁶⁴ it has, perhaps, been felt

powerful supranational institutions, including the Council of Ministers (roughly, an executive); the European Commission (a centralized administrative bureaucracy); a European Parliament; and the European Court of Justice and the European Court of Human Rights.

⁶⁰ Manfred Zuleeg, “A Community of Law: Legal Cohesion in the European Union,” 20 *Fordham Int’l L. J.* 623, 623 (1997).

⁶¹ Jean-Jacques Rousseau, “*Extrait du projet perpetuelle de M. l’Abbé de Saint-Pierre*,” quoted in Jonathan Haslam, *No Virtue Like Necessity: Realist Thought in International Relations since Machiavelli* 82 (2002).

⁶² The same trends were, of course, powerful throughout the post-War developed world. “Between 1972 and 1991, it has been estimated, imports grew 65 percent more rapidly than home demand and exports grew twice as fast as the economy as a whole. Neither multinational corporations nor the national economies in which they operated could therefore retreat from the global economy without forfeiting their ability to participate in the growth of world trade. In consequence, governments began to back off from efforts to insulate their economies from competition and sought instead to prevail in the increasingly competitive environment.” James E. Cronin, *The World The Cold War Made: Order, Chaos, and the Return of History* 248 (1996).

⁶³ See Robert Gilpin, *The Challenge of Global Capitalism: The World Economy in the 21st Century* 193-96 (2000); Robert J. Art, *Why Western Europe Needs the United States and NATO*, 111 *Pol. Sc. Q.* 1, 2 (1996) (“The desire for security vis-à-vis one another has played a role in the Western European states’ second great push for closer union in the 1990s, just as it did during their first great push of the late 1940s and early 1950s. In neither phase of Europe’s integration can economic considerations alone explain elite motivations.”). The strategy of the EU’s architects – Jean Monnet, Robert Schumann, Konrad Adenauer and (later) Jacques Delors – “was to move incrementally with technical and economic measures designed to increasingly bring member states together in a seamless, interdependent, commercial web of relationships. Each small step of economic integration would result in a slight, sometimes imperceptible erosion of their national sovereignty. None of the steps alone, they figured, would be enough to arouse the ire of member states and threaten the furtherance of the Union. The upshot of this piecemeal strategy would be that ‘one day the national governments would awaken to finding themselves in a “spreading web of international activities and agencies” from which they would find it almost impossible to extricate themselves.’” Jeremy Rifkin, *The European Dream: How Europe’s Vision of the Future Is Quietly Eclipsing the American Dream* 203-04 (pb. ed. 2005).

⁶⁴ No longer can it be asserted with confidence that “[m]odern man in general has shown a stronger loyalty to the state than to church or class or other international bond. . . . [A] modern sovereign state . . . might almost be defined as the ultimate loyalty for which men today will fight.” Martin Wight, *Power Politics* 25 (Hedley Bull & Carsten Holbraad eds. 1978). Rather, throughout much of the developed world, it appears that “[t]he

unusually keenly there. In the United States, by contrast, nationalism remains powerful – some would say, too powerful.⁶⁵

Second, democracy. Rubenfeld argues, rightly in my opinion, that post-War Europeans also viewed the Allied triumph as “a victory not only against nationalism, but [also] against popular sovereignty, against democratic excess.”⁶⁶ However resistant we might be to accepting the claim that Nazism and Fascism were popular movements that achieved power through electoral victories, and that Hitler’s program of racism, nationalism, militarism, and conquest long enjoyed the broad support of the German people, a large body of historical writing beginning with Hannah Arendt’s *The Origins of Totalitarianism* (1950) and J.R. Talmon’s 1952 study, *The Origins of Totalitarian Democracy*, has vindicated that understanding.⁶⁷

The trend in post-War European opinion to regard nationalism and popular sovereignty mistrustfully, even anxiously, has led to profound changes in European constitutional law. Consider, for example, the German Constitution of May 23, 1949 – the *Grundgesetz* or “Basic Law.”⁶⁸ Three fundamental innovations made by this Constitution deserve notice here.

First, the *Grundgesetz* begins with a series of nineteen articles enumerating basic individual rights and thus emphasizing their centrality in the post-War German *régime*.

nation-state faces . . . a double crisis, both of rationality, whereby the state cannot adequately perform its traditional functions, and of legitimation, whereby the state is unable as a consequence to rely on mass loyalties.” Mathew Horsman & Andrew Marshall, *After the Nation-State* 219 (1994).

⁶⁵ See, e.g., Anatol Lieven *America Right or Wrong: An Anatomy of American Nationalism* (2004).

⁶⁶ Rubenfeld, *supra*, at 1986.

⁶⁷ See, e.g., Jack Snyder, *From Voting to Violence: Democratization and the Nationalist Conflict* (2000); Sheri Berman, “Civil Society and the Collapse of the Weimar Republic,” 49 *World Politics* 3 (1997) (attributing much of Nazi political success to strength rather than weakness of German civil society). See generally Fareed Zakaria, “The Rise of Illiberal Democracy,” 76 *For. Aff.* 22 (1997). A controversial explanation of the nexus between Nazism and popular feeling is found in D.J. Goldhagen, *Hitler’s Willing Executioners: Ordinary Germans and the Holocaust* (1996). Goldhagen’s account is examined critically in Fritz Stern, *The Goldhagen Controversy: One Nation, One People, One Theory?*, 75 *For. Aff.* 128 (1996).

⁶⁸ Although the illustration is my own, I believe it helps to crystallize Professor Rubenfeld’s analysis.

Indeed, Article 1 (“Protection of human dignity”) insists upon the *universality* of human rights: in sweeping language, it posits that “[t]he dignity of man is inviolable. To respect and protect it is the duty of all state authority. . . . The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and justice in the world.” In emphasizing the centrality of human dignity, the Framers of the *Grundgesetz* “were well aware that [it] had been utterly trampled by the Nazis.”⁶⁹ Breaking with the main traditions of German jurisprudence, the *Grundgesetz* “does not regard the state as the source of fundamental rights. The core of individual freedom, like human dignity itself, is anterior to the state.”⁷⁰

Second, equally if not more innovative was the so-called “eternity clause” in Article 79(3), which set forth that “the basic principles laid down in Article[] 1” were unamendable, along with the guarantees in Article 20 that Germany was to be “a democratic and social federal state,” that political authority derived from the “people” and was exercised at elections, and that executive, legislative and judicial powers were to be separated.⁷¹ As Professor Peter Lindseth’s masterful recent study in *The Yale Law Journal* of German and French constitutionalism points out, Article 79(3), while affirming the democratic nature of the German state, was also designed to limit democratic majorities and even super-majorities: “[t]he purpose of Article 79(3) was to prevent a momentary political majority (following the practice of the Reichstag of the Weimar Republic) from authorizing the executive or any other body to abrogate the separation of powers or

⁶⁹ David P. Currie, *The Constitution of the Federal Republic of Germany* 11 (1994).

⁷⁰ Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 41 (2d ed. 1997).

⁷¹ *See Id.* at 48 (“One doctrine that has emerged . . . is the concept of the unconstitutional constitutional amendment. The doctrine holds that even a constitutional amendment would be unconstitutional were it to conflict with the core values or spirit of the Basic Law as a whole. . . . The Constitutional Court accepted the concept of the unconstitutional constitutional amendment as valid doctrine in the *Article 117* case (1953).”

constitutionally protected rights, *even if that majority was of a sufficient magnitude to amend the constitution in order to grant such power.*⁷²

Third, Articles 92 and 93 of the *Grundgesetz* established a Federal Constitutional Court, the *Bundesverfassungsgericht*, that was to act of the final guarantor of constitutional rights. These provisions eradicated any doubt that had existed under earlier law whether the courts could enforce the provisions of the organic law against the legislature, the executive, or even “the People.”⁷³

Professor Rubenfeld argues, persuasively I believe, that the kind of thinking about human dignity, popular sovereignty and the limits of State power that shaped the *Grundgesetz* carries inescapable implications for views of international law.⁷⁴ In particular, a jurisprudence of this kind will be open to, resemble, or even expressly affirm natural law and, in doing so, will inevitably make universal claims about human rights and the limits of State power such as those found in Article 1 of the *Grundgesetz*. Natural law thinking unquestionably influenced post-War European constitutionalism deeply, through the writings of the French Roman Catholic philosopher Jacques Maritain and other lesser-known natural law theorists, as well as through the constitution-building activities of such prominent Catholic political figures as Konrad Adenauer.⁷⁵ Although arguably not a consistent natural law theorist himself, Germany’s most influential post-War

⁷² Peter L. Lindseth, “*The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s*,” 113 *Yale L. J.* 1341, 1388 (2004) (emphasis added).

⁷³ See Currie, *supra* n.--, at 5 (discussing judicial review under Weimar Constitution); *id.* at 171-72 (discussing judicial review under *Grundgesetz*).

⁷⁴ Other scholars have, of course, noted the close historical connection between the atrocities of the Nazi period and the rise of a new international law. Michael Ignatieff, for example, has observed, with regard to the United Nations Universal Declaration of Human Rights (1948), “without the Holocaust, then, no Declaration.” Ignatieff sees the Declaration as “a studied attempt to reinvent the European natural law tradition.” Michael Ignatieff, *Human Rights as Politics and Idolatry*, 66, 81 (2001).

⁷⁵ See Edward M. Andries, “*On the German Constitution’s Fiftieth Anniversary: Jacques Maritain and the 1949 Basic Law (Grundgesetz)*,” 13 *Emory Int’l L. Rev.* 1, 37-43 (1999).

jurisprudentialist, Gustav Radbruch, expressed this tendency forthrightly when he wrote in his first work after the War:

There are, therefore, principles of law that are stronger than any statute, so that a law conflicting with these principles is devoid of validity. One calls these principles the natural law or the law of reason. To be sure, their details remain somewhat doubtful, but the work of centuries has established a solid core of them and they have come to enjoy such a far-reaching consensus in the declarations of human and civil rights that only the deliberate skeptic can still entertain doubts about some of them.^[76]

Given this constitutional culture, with its grounding in natural law doctrines and its mistrust of both nationalism and the belief in popular sovereignty that often accompanies it, we should expect to find, as Rubinfeld says, that the “dominant European understanding today” is that “the fundamental point of international law, and particularly of international human rights law, [i]s to check national sovereignty, emphatically including national popular sovereignty.”⁷⁷ Accordingly, as he says, “[i]nternational law enjoys a kind of higher-law status throughout much of Europe It is, for many, a form of constitutional law - a body of supreme law authorized to override all other laws and governmental decisions.”⁷⁸

The passage from constitutional law to international law is mediated by the concept of *universality*: as Rubinfeld explains, constitutional rights can be understood (as in

⁷⁶ Quoted in Heather Leawoods, “Gustav Radbruch: An Extraordinary Legal Philosopher,” 2 Wash. U. J. L. & Pol’y 489, 496 (2000). Radbruch’s post-War views on natural and positive law “occasioned a massive debate [in Germany] in the late forties and fifties on natural law.” Peter Caldwell, “Legal Positivism and Weimar Democracy,” 39 Am. J. Juris. 273, 274 (1994). See also Markus Dirk Dubber, “Judicial Positivism and Hitler’s Injustice,” 93 Colum. L. Rev. 1807, 1807-08 (1993) (“In 1945, Gustav Radbruch, perhaps the most influential German legal philosopher in this century, spent the remaining years before his death in 1949 renouncing positivism and calling for the recognition of law beyond positive statutory law (*übergesetzliches Recht*). In the first decade or so after 1945, German courts, including the German Supreme Court (*Bundesgerichtshof*) and the German Constitutional Court (*Bundesverfassungsgericht*) often invoked Radbruch’s endorsement of a limited role for supra-legal concepts and displayed much hostility toward ‘the attitude of an anormative legal positivism (*wertungsfreien Gesetzespositivismus*) . . . which legal science and practice ha[ve] overcome some time ago.’”).

⁷⁷ Rubinfeld, *supra* n.--, at 1986.

⁷⁸ *Id.* at 1991.

Germany) as universal: “They are rights people have by nature, by virtue of being persons, by reason of morality, or by reason of Reason itself. Constitutional principles . . . possess an authority superior to that of politics, including, of course, democratic politics. This special authority, residing in a normative domain higher than that of politics, is what allows constitutional law properly to displace the outcomes of political decisionmaking, including democratic decisionmaking.”⁷⁹ Constitutional principles, so conceived, cannot be tied to specific nations, peoples, cultures or traditions; they are not contingent elements of some (but not other) national legal régimes. “On this view, constitutional principles and structures ought in principle to be supra-national. Constitutional rights transcend national boundaries. Constitutional principles are superior to claims of national sovereignty or self-determination.”⁸⁰

These characteristics of European constitutional culture, although admirable in many respects, can also generate considerable friction with non-European nations that do not comply with Europe’s purportedly universal standards. An obvious example is the American (state and federal) death penalty. Although opposition to the death penalty is reflected in a variety of international human rights conventions,⁸¹ the most vehement criticism comes from European governments, courts and publics.⁸² Former U.S.

⁷⁹ Rubinfeld, *supra* n.--, at 1991-92.

⁸⁰ *Id.* at 1992.

⁸¹ *See, e.g.*, International Covenant on Civil and Political Rights, Art. 6, 999 U.N.T.S. 172, 6 I.L.M. 368 (1967), entered into force March 23, 1976; Protocol No. 6 to the European Convention for the Protection of Human Rights and the Fundamental Freedoms Concerning the Abolition of the Death Penalty, E.T.S. No. 114, entered into force March 3, 1985. On the other hand, “[i]n]o human rights convention abolishes the death penalty,” and “it is difficult to argue that customary international law contains a rule prohibiting the death penalty.” John Dugard & Christine Van den Wyngaert, “*Reconciling Extradition with Human Rights*,” 92 Am. J. Int’l L. 187, 196 (1998).

⁸² Although there is a widespread international consensus against the death penalty, negative sentiment seems to be particularly strong among European élites. (Public opinion in leading European countries had supported the death penalty at the time of abolition.) *See* Carol S. Steiker, “*Capital Punishment and American Exceptionalism*,” 81 Or. L. Rev. 97, 109 (2002). European hostility to the death penalty may stem

Ambassador to France Felix Rohatyn has observed that “no single issue evoked as much passion and as much protest as executions in the United States. . . [S]ome 300 million of our closest allies think capital punishment is cruel and unusual and it might be worthwhile to give it some further thought.”⁸³ Dean Harold Koh and Ambassador Thomas Pickering have warned that “[f]or a country that aspires to be a world leader on human rights, the death penalty has become our Achilles’ heel.”⁸⁴ “Since 1998, the European Union has intervened repeatedly in U.S. executions through clemency appeals or by conveying its abolitionist views directly to local legislators.”⁸⁵ There is even some evidence that the death penalty is damaging joint U.S.-European counter-terrorism efforts.⁸⁶

European judicial decisions reflect the same implacable and (some would say) excessive hostility to the U.S. death penalty. For example, in 1989, the European Court of Human Rights held in *Soering v. United Kingdom*, (1989) 11 E.H.R.R. 439, that it would violate Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,⁸⁷ which states that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment,” if the United Kingdom extradited a German national to the United States to stand trial on a capital charge in the State of Virginia. Although the Court acknowledged that the Convention itself allowed for capital punishment in certain circumstances (*id.*, ¶ 101), it held that the circumstances to which the

from a variety of historically contingent causes, including Europe’s recent experiences of massive state-sanctioned violence and persisting ethnic conflicts. *Id.* at 126.

⁸³ Quoted in Mark Warren, “*Death, Dissent and Diplomacy: The U.S. Death Penalty as an Obstacle to Foreign Relations*,” 13 Wm. & Mary Bill Rts. J. 309, 313 (2004). See also Felix G. Rohatyn, “*Dead to the world*,” The International Herald Tribune at 8 (Jan. 27, 2006).

⁸⁴ *Id.* at 315 (quoting Harold Hongju Koh & Thomas Pickering, “*American Diplomacy and the Death Penalty: For a Country That Aspires to be a World Leader in Human Rights, the Death Penalty Has Become Our Achilles’ Heel*,” Foreign Serv. J., Oct. 2003, at 9, 20-25).

⁸⁵ *Id.* at 318.

⁸⁶ See A. John Radsan, “*The Massouli Case: The Mess from Minnesota*,” 31 Wm. Mitchell L. Rev. 1417, 1440 (2005).

⁸⁷ E.T.S. 5, 213 U.N.T.S. 221, entered into force September 3, 1953.

applicant would be exposed as a death row inmate in Virginia, including the likely 6 to 8 year delay he would face as his appeals ran, would in themselves pose “a real risk of treatment going beyond the threshold set by Article 3” (*id.*, ¶ 111). The Court allowed that “[t]he length of time awaiting death is . . . in a sense largely of the prisoner’s own making in that he takes advantage of all avenues of appeal which are offered to him by Virginia law, *id.*, ¶ 106; and it also conceded that “[t]he democratic character of the Virginia legal system in general and the positive features of the Virginia trial, sentencing and appeal procedures in particular are beyond doubt.” *Id.*, ¶ 111. Nonetheless, even the use of the extradition process to enable Virginia to *try* the applicant was considered to be a serious human rights violation.⁸⁸

Summarizing the dominant European position, Jeremy Rifkin writes:

No issue more unites Europeans than the question of capital punishment. For them, opposition to the death penalty is as deeply felt as opposition to slavery was for the American abolitionists of the nineteenth century. Indeed, for a society so used to muting its passions, Europeans express a raw emotional disgust of capital punishment that is not evident anywhere else in the world. Whenever a prisoner on death row in the United States is executed, it is barely noticed in America but elicits vehement protest across Europe. Make no mistake about it: Europeans are the abolitionists of the twenty-first century, and they are determined to evangelize the world and will not rest until capital punishment is abolished across the Earth.^[89]

⁸⁸ Other European national courts have been influenced by *Soering*. See, e.g., *The Netherlands v. Short*, HR 30 Mar. 1990, NJ 249 (A.H.J. Swart), *excerpted and translated in* 29 I.L.M. 1375 (1990). On the other hand, the Canadian Supreme Court arrived at a markedly dissimilar conclusion in *Kindler v. Crosbie*, [1991] 2 S.C.R., where it upheld the constitutionality under the Canadian Charter of Rights and Freedoms of the Canadian Minister of Justice’s decision, pursuant to the extradition treaty between Canada and the United States, to extradite a U.S. national who had been tried and found guilty of a capital offense in Pennsylvania and who had escaped to Canada before sentencing. Justice La Forest’s judgment examined the same “death row phenomenon” that had persuaded the European Court of Human Rights, but noted that the phenomenon was largely the effect of a “generous appeal process,” and observed that “[w]hile the psychological stress inherent in the death row phenomenon cannot be dismissed lightly, it ultimately pales in comparison to the death penalty. Besides, the fact remains that a defendant is never forced to undergo the full appeal procedure It would be ironic if delay caused by the appellant’s taking advantage of the full and generous avenue of the appeals available to him should be viewed as a violation of fundamental justice.” *Id.* at 838.

⁸⁹ Rifkin, *supra* n.--, at 84.

So much, then, for European attitudes toward international law, the sources in European constitutionalism from which they derive, and the aggressive universalism that they sometimes exhibit. What, by contrast, of the characteristic American view of international law? Certainly our dominant jurisprudence does not accord international law the privileged status of the Constitution itself; indeed, other than treaties that the United States has ratified and that are interpreted to permit judicial enforcement, the place of international law in American jurisprudence has been somewhat problematic.⁹⁰ Moreover, the American “unilateralism” that Rubinfeld is seeking to explain is clearly inimical to the European vision of international law, as he describes it. On the other hand, American legal and constitutional thinking, like that of post-War Europe, has a decidedly “universalist” turn.⁹¹ And throughout most of the post-War period, the United States has been the world’s most influential proponent of international law. One need only glance at the structural features of the United Nations Charter – a Security Council, General Assembly and ICJ paralleling the American Executive, Congress and Supreme

⁹⁰ See, e.g., Andrea Bianchi, “*International Law and U.S. Courts: The Myth of Lohengrin Revisited*,” 15 *Euro. J. Int’l L.* 751 (2004).

⁹¹ As Rubinfeld observes, “Americans have at times been the most aggressive proponents of international constitutionalism, seeking to disseminate or impose (American) constitutional principles around the world, without much concern about whether these principles reflect other nations’ self-given commitments.” Rubinfeld, *supra* n. 8, at 1994.

An instructive recent example of the American tendency to export our own constitutional values is found in the case of the new Iraqi Constitution. The United States attempted to use its military, diplomatic and political leverage to induce the Iraqis to adopt a Constitution that would reflect American (rather than indigenous Iraqi) traditions and values in various ways. In particular, the United States was anxious that the new Iraqi Constitution *not* accord too prominent a place to Islam. The U.S.-drafted Interim Constitution therefore included in Article 7 only bare and abstract language stating that “Islam . . . to be considered a source of legislation.” Further, Article 7 stated that while the Constitution “respects the religious identity of the majority of the Iraqi people,” it merely “guarantees the full religious rights of all individuals to freedom of religious belief and practice.” Iraqi Prime Minister Ja’fari and other Iraqi leaders sought to establish a more secure constitutional place for Islam. Their view prevailed. The Iraqi Constitution, as approved by the voters of that country on October 15, 2002, states in Sec. I, Art. 2, that “Islam . . . is a *fundamental* source of legislation” (emphasis added). Further, Sec. I, art. 2 does not merely “respect” the Islamic identity of the Iraqi majority but “guarantees” it. Finally, protection of religious liberty and practice is guaranteed to all individuals . . . *such as* Christians, Yazedis, and Mandi Sabeans” (*id.*) (emphasis added). See generally Kristen Stilt, “*Islamic Law and the Making and Remaking of the Iraqi Legal System*,” 36 *Geo. Wash. Int’l L. Rev.* 695 (2004).

Court – or at the human rights provisions of the United Nations Covenants – paralleling the American Bill of Rights – to see in these foundational documents that fine American hand at work.⁹² How can these apparently contradictory strains of thought be reconciled?

Rubinfeld’s explanation of the American case proceeds at two levels: through a description of the American constitutional self-understanding, and through an account of the American interpretation of the Nation’s enormous victories in the Second World War.

First, American constitutionalism is, in its own eyes, “democratic.” The American Constitution (on this understanding) has been made (and over time, re-made) through “national democratic processes.”⁹³ American constitutional law has thus enabled the American people “to make their own fundamental law – to decide for themselves on the enduring legal and political commitments that will govern the polity in the future.”⁹⁴ Although America’s constitutional commitments “will include fundamental rights that stand against majority rule at any given moment” and are thus “counter-majoritarian,” they are *not* therefore “counter-democratic.”⁹⁵ Rather, they are democratic because “they represent the nation’s self-given law, enacted through a special, democratic, constitutional politics, subject to democratic amendment processes in the future.”⁹⁶ Because “democratic constitutionalism is much more deeply ingrained in American thought and practice (concerning our own constitutional law) than it is in contemporary European thought and practice (concerning international law),” Americans will view

⁹² See, e.g., Louis Henkin, “*Rights: American and Human*,” 79 Colum. L. Rev. 405, 415 (1979) (“[T]he Universal Declaration of Human Rights, and later the International Covenant on Civil and Political Rights, are in their essence American constitutional rights projected around the world.”).

⁹³ Rubinfeld, *supra* n.--, at 1993.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

international law very differently from Europeans.⁹⁷ While Americans regard their fundamental law as “made by the people,” they cannot possibly view international law in the same light: international law has been made “in response to the most cataclysmic expression of ‘popular will’ the world had ever known.”⁹⁸

These characteristic American narratives of the diverse origins of constitutional law and international law also help to explain America’s post-War “equivocation on international law.”⁹⁹ In stark contrast to the defeated Europeans, Americans interpreted the successful outcome of the Second World War as “a victory for nationalism – for our nation, for our kind of nationalism,” and as “a victory for popular sovereignty (our sovereignty) and a victory for democracy (our democracy).”¹⁰⁰ The remedies that we proposed or approved for a vanquished Europe – an internationalism that would bridle nationalism, a constitutionalism that would check popular sovereignty – were neither necessary nor useful for us. In remodeling Europe and establishing the new, post-War world order, we were refashioning the continent and the globe in our own image: “when drafting international human rights treaties, founding the United Nations and the World Trade Organization (WTO), imposing constitutions on Germany and Japan, and pushing Europe toward integration, Americans were able to see themselves as laboring generously, for the sake of people everywhere, to make the world more American.”¹⁰¹ But simply because we were (as we saw it) Americanizing the world through the construction of a new world order, we would not ourselves be bound by all its dictates: “in the American view, all this internationalism, all this multilateralism, was more for the

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 1989.

¹⁰⁰ *Id.* at 1986.

¹⁰¹ *Id.* at 1987-88.

rest of the world than it was for us From the beginning, Americans imagined international law applying to the world, but not applying – or not applying in exactly the same way – to America.”¹⁰²

Such, then, is Rubinfeld’s theory in outline. Its brilliance is obvious and its explanatory power, incontestable. The historical narrative upon which it is based – even if one might quarrel with it at the margins¹⁰³ – is broadly true and illuminating. Most of all,

¹⁰²*Id.* at 1988-89. Andrew Moravcsik arrives at similar conclusions by Rubinfeld’s here, but by a different analytic route. See Andrew Moravcsik, “*The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*,” 54 *International Organization* 217 (2000) (finding that while “new” post-War democracies such as Germany and Italy strongly supported international human rights regimes such as the European Convention on Human Rights, established democracies such as Great Britain did not, and seeking to explain these differences by arguing that the “new” democracies sought to “lock in” protections against the potential triumph of popular extremist parties, whereas established democracies believed they faced no such internal political risks).

¹⁰³ Rubinfeld’s argument may overemphasize the extent to which the post-War United States was unwilling to accept that its international human rights commitments required it to make changes in its domestic law – especially with regard to racial segregation; equally, he may fail to acknowledge the extent to which European nations, in the process of post-War decolonization, refused to honor their international legal obligations.

On the first point, Rubinfeld rightly notes that U.S. State Dep’t Circular No. 175 (Dec. 13, 1955), strenuously resisted the idea that international treaty obligations could entail changes in our domestic law. Equally, one might note, the Supreme Court declined to puff the breath of life into Justice Black’s, Douglas’ and Murphy’s early suggestion that the U.N. Charter would necessitate changes in our racial laws, see *Oyama v. California*, 332 U.S. 633, 647-50 (1948) (Black, J., concurring); *id.* at 673 (Murphy, J., concurring); and other courts swiftly foreclosed the possibility of private enforcement of such treaty obligations, see *Sei Fijii v. State*, 38 Cal.2d 718 (1952). Nonetheless, Russell Hittinger is right to say that “[m]ost Europeans do not appreciate how profoundly the American constitution was revised in response to the crisis of the 1930s and 1940s.” Hittinger, *supra* n.–, at 5. Under the pressure of arguments by the Truman and Eisenhower Administrations that the Nation’s foreign policy needs required that the Supreme Court dismantle State-sponsored racial segregation, the Court did so with greater and great boldness. See Robert J. Delahunty & Antonio F. Perez, “*Moral Communities or A Market State: The Supreme Court’s Vision of the Police Power in the Age of Globalization*,” 42 *Houston L. Rev.* 637, 669-75 (2005). If the Court’s decisions were not explicitly founded on international human rights agreements, they certainly reflected the post-War forces that had called such agreements into being.

Conversely, Rubinfeld’s argument ignores European disregard for the United Nations and for international human rights law during the wars of decolonization that followed the Second World War, such as the War in Algeria. During the latter conflict, for instance, France argued strenuously that the United Nations General Assembly had no competence to consider the situation in Algeria, which France contended was a matter “essentially within [its] domestic jurisdiction” within the meaning of Art. 2(7) of the United Nations Charter. Indeed, after the General Assembly decided to take up the question of Algeria, the French delegation left the Assembly and, for a period, it appeared that France might withdraw from the United Nations. See Thomas Oppermann, *Le problème algérien: données historiques, politiques, juridiques* 256 (1961).

The French conduct of the war in Algeria was also marked by grave human rights violations. The disclosures by General Paul Aussarès of official complicity by leading French political figures in the Army’s use of torture during the war in Algeria brought on a major scandal in France. See Paul Aussarès, *The Battle of the Casbah: Terrorism and Counter-Terrorism in Algeria 1955-1957* (pb. ed. 2005); see also General Aussarès’ interview in *Le Monde* after the publication of his book, available at The Project on

perhaps, it is persuasive in explaining why the differences between the United States and Europe over international law seem to be so intractable and so passionately felt. Europe's "international constitutionalism," as Rubinfeld calls it – the insistence that the particular rights and structures embedded in European constitutions are universal in nature, and not the contingent outcomes of specific national histories, is likely to make disagreements with the United States (and other non-European powers) harder to resolve. Universalism, alas, is inherently liable to become *belligerent* – to demand that human rights and immunities from State power, as it conceives them, must be realized *everywhere*.¹⁰⁴ Illustrative of this tendency is the 2004 Barcelona Report, *A Human Security Doctrine for Europe*, which was presented to Javier Solana. The Report recommends that the "European Union's security policy should be built on human security and not only on state security. Human security means individual freedom from basic insecurities. . . . A human security approach for the European Union means that *it should contribute to the protection of every individual human being* and not focus only on the defense of the Union's borders, as was

Soldier Testimony & Human Rights, http://soldiertestimony.org/France_A1Document.2004-03-01.3817. However, the French political leadership, governmental bureaucracy, intellectuals and even wider public were well aware through the 1950s of the Army's practices. For example, after allegations of torture were raised in the National Assembly in 1955 and all but confirmed by François Mitterand, then Minister of the Interior, the French government commissioned a report from a high-ranking colonial official, Roger Wullaume, on the use of torture in Algeria. Wullaume's report (for limited government circulation) not only acknowledged the use of torture, but also recommended sanctioning it as effective and indispensable. See Gil Merom, *How Democracies Lose Small Wars: State, Society, and the Failures of France in Algeria, Israel in Lebanon, and the United States in Vietnam* 112-13 (2003). Public criticisms of the Army reached a high-water mark in 1957, during the Battle of Algiers, but subsided thereafter, largely because the charges had lost their power to shock. Writing in her journal in "this sinister month of December 1961," Simone De Beauvoir said that she like many others was "suffer[ing] from a kind of tetanus of the imagination . . . One gets used to it. In 1957, the burns in the face, on the sexual organs, the nails torn out, the empalements, the shrieks, the convulsions, outraged me." Quoted in John Talbott, *The War Without a Name: France in Algeria, 1954-1962* at 93 (1980).

¹⁰⁴ See Hitinger, *supra* n.--, at 6 (discussing what Yves Simon calls "belligerent universalism"). Zygmunt Bauman considers it to be "an integral trait of European identity" to "presume[]" Europe's values to be "universal, all-human; the distinctive feature of European values is to believe that values 'make sense' only if seen as all-inclusive, and are indefensible unless applied to all humanity." Bauman, *supra* n.--, at 125.

the security approach of nation-states.”¹⁰⁵ A “Human Security Response Force” is proposed to execute this task.¹⁰⁶ International law is construed to give the European Union “not only a right, but also a legal obligation to concern [itself] with human security worldwide.”¹⁰⁷ If the European nationalism of the past threatened the peace, the European universalism of the future bids fair to do the same.

The explanatory success of Rubinfeld’s theory on these very points, however, also exposes some vulnerability in it: his analysis seems weakest in explaining why the European and American sides should also be willing to compromise their differences over international law – as indeed they are. It is difficult, if not impossible, to bridge over differences that arise from alleged violations of fundamental human rights whose existence owes nothing to purely national law and which it is imperative that every State respect. On the other hand, disagreements over national interests are intrinsically negotiable: reaching accommodations over them is the very stuff of diplomacy. For that reason, if no other, Rubinfeld’s theory must be measured against a theory that is based on a conflict, not of values, but of interests.

II.

Many observers have noted in recent years that the United States and its major Cold War allies are drifting apart. And, as Professor John Mearsheimer has written, “[t]his trend is most apparent in Europe, where NATO’s 1999 war against Serbia and its messy aftermath have damaged transatlantic relations and prompted the European Union to begin building a military force of its own that can operate independently of NATO –

¹⁰⁵ *A Human Security Doctrine for Europe: The Barcelona Report of the Study Group on Europe’s Security Capabilities, Presented to EU High Representative for Common Foreign and Security Policy Javier Solana* at 9 (Sept. 16, 2004) (emphasis added), available at http://www.cercle.lu/article.php3?id_article=588.

¹⁰⁶ *Id.* at 22.

¹⁰⁷ *Id.* at 10.

which means independently of the United States. The United Kingdom, France, Germany, and Italy are slowly but inexorably realizing that they want to provide for their own security and control their own destiny. They are less willing to take orders from the United States than they were during the Cold War.”¹⁰⁸ Mearsheimer’s words, which were written before September 11 and the Second Gulf War, are certainly far truer now. In a study published last year, Professor Robert Lieber observed that “it is by no means excessive to ask whether the United States and Europe may now be on the verge of a divorce in which their alliance of more than half a century collapses or they even become great power rivals.”¹⁰⁹ Statements by European leaders have underscored a growing sense of competition and estrangement. Romano Prodi, the former head of the European Commission, has said that one of the chief goals of the EU is to create “a superpower on the European continent that stands equal to the United States.”¹¹⁰ Jacques Chirac, the President of France, has said that “we need a means to struggle against American hegemony.”¹¹¹ A French Foreign Minister, Hubert Vedrine, echoed Chirac by saying, “We cannot accept . . . the unilateralism of a single hyperpower.”¹¹² European public opinion, as surveyed by the Pew Research Center, is deeply unfavorable to the United States.¹¹³ Josef Joffe, the publisher-editor of *Die Zeit* and no friend of European anti-Americanism, concludes that if the post-modern States of Western Europe have any

¹⁰⁸ John J. Mearsheimer, *The Tragedy of Great Power Politics* 391 (2001).

¹⁰⁹ Robert J. Lieber, *The American Era: Power and Strategy For the 21st Century* 62 (2005). See also Fukuyama, *supra* n.--, at 103-13 (2006) (discussing sources of estrangement between U.S. and much of the rest of the world, including Europe).

¹¹⁰ Quoted in *id.* at 62.

¹¹¹ Quoted in *id.*

¹¹² Quoted in *id.* at 67.

¹¹³ See “America’s Image Slips, But Allies Share U.S. Concerns About Iran, Hamas,” Pew Global Attitudes Project (June 13, 2006), available at <http://pewglobal.org/reports/display.php?ReportID=252>. For example, only 43% of the French public, 41% of the German, and 23% of the Spanish, expressed positive views of the United States.

“common identity, it defines itself in opposition to the United States – both its culture and its clout.”¹¹⁴ And European intellectuals like Zygmunt Bauman utterly seethe with resentment at the American hegemony. In *Europe: An Unfinished Adventure*, Bauman complains that until recently, Europe had never lived

in the shadow of a power mightier than itself, more ambitious and resourceful in its resolve to set its own ambitions as standards for everyone else’s practice, and so also of holding such imported/imposed standards up to its own practice as the pattern to follow. Europe had never faced the threat of being conquered by another continent – and never before had it been looked at from on high and denigrated as a second-rate power obliged to swear allegiance to a foreign empire and ingratiate itself to an alien force it had so little hope of mitigating, pacifying, or converting to its own ways – let alone of subduing it and subordinating it to its will. Never had Europe lived with a demeaning awareness of its own inferiority and with the experience of being obliged to look up to patterns of life preached and practiced by others, of struggling to adjust and adapt its own acts to such patterns, of emulating alien forms of life and/or matching them by raising its forms of life to their level.^[115]

Plainly, post-Cold War Western Europe feels deep misgivings about the fact of the United States’ global hegemony. These misgivings have two main sources: one is that the United States will underplay that role, and the other is that it will overplay it.

Take the first fear: disengagement. American dissatisfaction with the operational complications in the Kosovo War that we attributed to NATO’s cumbersome consultative arrangements fed European fears that we might gradually disengage from our NATO commitments.¹¹⁶ Further, although the United States was eventually persuaded to enter

¹¹⁴ Josef Joffe, *Überpower: The Imperial Temptation of America* 123 (2006).

¹¹⁵ Bauman, *supra* n.–, at 45. Bauman sees a way forward, however, that will both overturn American hegemony and involve Europe in a planetary *mission civilatrice*: Europe, which itself is already moving “towards the Kantian world of perpetual peace, in which law, negotiation and cooperation gain the upper hand where violence and raw force once ruled,” is now “well prepared if not to *lead*, then most certainly to *show* the way from the Hobbesian planet to the Kantian ‘universal unification of the human species.’” *Id.* at 40.

¹¹⁶ These fears were exacerbated when the United States decided, on the basis of its experience in the Kosovo War, not to conduct its 2002 campaign in Afghanistan as a NATO operation. See Lieber, *supra* n.–, at 68. The Bush Administration believed that the desire to work multilaterally through NATO in Kosovo had tied American hands. See Fukuyama, *supra* n.–, at 99. For example, French President Chirac had stated on French television that “[n]ot a single air strike – and there were about 22,000 of them – was carried out

the war for Kosovo, its reluctance to do so could hardly have been greater: Americans and their political leaders were beginning to insist that a wealthy and democratic Europe should guard its own house and fight its own wars: thus, the Senate unanimously passed a resolution “bemoaning the ‘significant shortcomings’ in European defense capabilities and urging the European Union to rectify the ‘overall imbalance’ within the Atlantic Alliance.”¹¹⁷ Fear of American disengagement after the Kosovo War in turn led European leaders to create the European Union Rapid Reaction Force in December, 1999, and provided the backdrop for the establishment of the European Defense Agency [EDA], an EU armed force independent of NATO, in July, 2004. Among other purposes, the EDA could serve one function that NATO has: that of keeping the peace on the European continent by preventing conflict, not only between the Western European powers and the Russians, *but also among the Western European powers themselves.*¹¹⁸ NATO has done that, most obviously, by ensuring that the United States would throw its full military weight on the side of any NATO member that was attacked (including by another NATO member).¹¹⁹ But NATO has also achieved that end by making the military strength, capabilities and intentions of each of the major Western European allies

without France’s approval . . . When France objected, the strikes were not carried out.” Quoted in “*Chirac Says He Spared the Bridges*,” *The Washington Post* at A 17 (June 11, 1999). Other NATO allies objected to attacking one of Slobodan Milosevic’s residences because it housed a painting by Rembrandt; and Italy asked for an Easter bombing moratorium so that tourism in Venice would not be injured. See Roger W. Barnett, *Asymmetrical Warfare: Today’s Challenge to U.S. Military Power* 57 (2003).

¹¹⁷ Charles A. Kupchan, *The End of the American Era: U.S. Foreign Policy and the Geopolitics of the Twenty-First Century* 64 (pb. ed. 2005) (citing S. Res. 208, Nov. 8, 1999).

¹¹⁸ See Art, *supra* n.--, at 3 (“Western Europe’s drive to create a European Defense Identity (EDI) . . . was motivated by three elite worries: fears about the power of a newly reunited Germany; concern that the United States might leave Europe now that the Cold War had ended; and as a consequence of the first two, the nightmare that Europe might revert to its destructive nationalistic past unless corrective steps were taken.”).

¹¹⁹ See Mearsheimer, *supra* n.--, at 45 (“America’s hegemonic position in NATO . . . mitigated the effects of anarchy on the Western democracies and facilitated cooperation among them . . . [S]tates do not trust each other in anarchy and they have incentives to commit aggression against each other. America, however, not only provided protection against the Soviet threat, but also guaranteed that no EC state would aggress against another. For example, France did not have to fear Germany as it rearmed, because the American presence in Germany meant that the Germans were not free to attack anyone.”).

utterly transparent to each of the others. The Australian historian Geoffrey Blainey, in his classic study *The Causes of War*, argued persuasively for the thesis that “[w]ars usually begin when two nations disagree on their relative strength.”¹²⁰ Certainly there is abundant evidence that ignorance of each others’ capabilities or uncertainty about its purposes can draw potential belligerents into actual hostilities.¹²¹ The NATO Alliance has reduced the risks of European conflict by ensuring that the French, German and British militaries would so interpenetrate each other that such ignorance or uncertainty would be impossible. If America were induced to withdraw from NATO and if, as a result, the Alliance were to disintegrate, such transparency might disappear, and the risks of an intra-European war would be correspondingly heightened. The Europeans may be contemplating an integrated EU military as an alternative to NATO, not so much because they fear the Americans, but because they fear one another.¹²² The problem with

¹²⁰ Geoffrey Blainey, *The Causes of War* 293 (3d ed. 1988).

¹²¹ See *id.* at 115-24; 241-42. By the same logic, transparency can *prevent* war. See Stephen Van Evera, *Causes of War: Power and the Roots of Conflict* 137-42 (1999) (adducing historical evidence that military secrecy contributes to likelihood of war, while openness diminishes risks). “Transparency . . . allays suspicions. It is because the United States was able to fully inform both India and Pakistan about each other’s military preparations in 1989 that it was able to convince both countries not to drift into war – which would undoubtedly have been nuclear.” Philippe Delmas, *The Rosy Future of War* 226 (1995). As the great theorist of war, von Clausewitz, saw, in a world of perfect information and rational choices, “one would never really need to use the physical strength of the fighting forces – comparative figures of their strength would be enough. That would be a kind of war by algebra.” Carl von Clausewitz, *On War* 76 (Michael Howard & Peter Paret eds. & trans. 1984).

Later scholars have given the name “The War Puzzle” to this phenomenon. “[S]tates led by rational decisionmakers should not fight because both sides could avoid the costs and risks of war by negotiating a prewar bargain reflecting their relative power Since wars do happen, it appears that states overestimate their relative power. At the brink of war, history tells us, rivals’ estimates of their chances of winning commonly sum to more than 100 percent – for example, both think that they have more than a 50 percent chance of winning (one thinks it has an 80 percent chance and the other thinks its chance is 40 percent), an attitude that betrays unwarranted confidence on one or both sides.” Dominic D.P. Johnson, *Overconfidence and War: The Havoc and Glory of Positive Illusions* 4 (2004).

¹²² Those who doubt the very possibility of a war between European powers should reflect on the reasons why Britain, France and Russia all opposed German reunification in 1989. See Philip Zelickow & Condoleezza Rice, *Germany Unified and Europe Transformed: A Study in Statecraft* 114-18; 132-34; 137-39; 144-45; 204-08 (1995). See also Art, *supra* n.–, at 10-14. Indeed, many Germans opposed reunification out of self-mistrust, and Chancellor Helmut Kohl, despite being the chief architect of reunification, insisted on a policy of “Europeanizing Germany, not Germanizing Europe.” *Id.* at 23-4.

American hegemony, from this perspective, is not that the United States will intervene in European affairs, but that it will turn its back on them.¹²³

The *second* major source of European misgivings about American hegemony is the fear that the United States will *overplay* the part, leading to the (further) loss of European political independence, cultural distinctiveness, or ability to influence world affairs. Here, as before, one can discern the stirrings of what might eventually ripen into a traditional Great Power rivalry – though in this case the rivals would not be the different continental powers themselves, but the EU and the United States. The EU is now a match, or even more than a match, for the United States in several key dimensions: not militarily, to be sure,¹²⁴ but in terms of population, wealth, and (increasingly) global influence.¹²⁵ Indeed, we

True, what is called “democratic peace theory” – the doctrine that democracies never (or rarely) go to war with each other – would suggest that the chance of war between or among Western European powers is negligible. But even though democratic peace theory seems to guide American foreign policy, there are substantial reasons, both theoretical and empirical, to doubt its truth. See Christopher Layne, “*Kant or Cant: The Myth of the Democratic Peace*,” 19 *Int’l Security* 5 (1994).

¹²³ This fear is by no means unrealistic, especially given the “casualty-aversion phenomenon” that has been so prominent a feature of America’s recent military operations. (I take that term from Colonel Charles J. Dunlop, Jr.’s essay, *A Virtuous Warrior in a Savage World*, available at <http://www.usafa.af.mil/documents/virwar.doc>.) As Colonel Dunlop points out, both the United States’ electorate and its military have exhibited a marked aversion to incurring virtually *any* friendly casualties in most military operations (consider, *e.g.*, the United States’ refusal to use ground troops in the Kosovo campaign; the United States’ hasty withdrawal from Somalia caused by the deaths there of 18 Rangers during a 1993 mission; or the American public’s misgivings about the current war in Iraq, despite the small number – by historical standards – of U.S. casualties in that war). Even more strikingly, Colonel Dunlop notes the American public’s apparent demand that wars be won with the minimum number of casualties *on the enemy’s side*, even when those losses are inflicted without violating the Laws of War. In the First Gulf War, for instance, the American public recoiled at the bombing of Baghdad’s Al Firdos bunker, an underground command and control facility that was also being used to shelter the families of high Iraqi officials. See also Barnett, *supra* n.–, at 46 (“Perhaps the logical extreme was reached in the Clinton Administration’s 1994 cruise missile attack on Iraq in retaliation for the failed assassination plot against ex-President Bush. The launches were carried out against the Iraqi intelligence agency that planned the attempt. But they were executed at night, when the guilty parties were almost certain not to be in their offices.”); Allan C. Stam, III, *Win, Lose, or Draw: Domestic Politics and the Crucible of War* 27 (1999) (levels of violence Americans inflicted on North Vietnamese unnerved the deliverers of the violence, not its recipients);

¹²⁴ On Europe’s military liabilities, see Lieber, *supra* n.–, at 85-88.

¹²⁵ See Rifkin, *supra* n.–, at 61 (“The European Union, what some observers call the ‘reluctant empire,’ is already a looming giant, although still in its infancy. Four hundred and fifty-five million people are citizens of the European Union. They represent nearly 7 percent of the human race. . . . [T]he EU already overwhelms the U.S., whose 293 million people constitute 4.6 percent of the human race The European Union is now the largest single internal market as well as the largest trader of goods in the world. The EU is also the world’s largest trader in services. . . . The European Union’s Gross Domestic Product of \$10.5 trillion in

might conceivably be seeing, at the start of the 21st century, a curious reversal of 19th century roles: an emerging European giant on one side of the Atlantic, economically strong but as yet militarily weak; and an established Great Power on the American side, militarily formidable but perhaps past its economic prime.¹²⁶ At any rate, given the growing strength and self-confidence of the EU, the disappearance of the Soviet threat to Europe, the embarrassments that the American alliance can create for Europe in the Islamic world, and the irksomeness of American leadership, we should expect to find – and we do find – emerging conflicts of interest between the United States and Europe.

It should come as no surprise that international law might be used as an instrument to advance or retard the pursuit of such interests. For better or for worse, international law lends itself readily to the needs of Great Power statecraft: Josef Joffe was not far wrong in saying that international law is “a most pliant code [that] nations have always bent to their purposes.”¹²⁷ For much of the Cold War, the United States routinely castigated the Soviet bloc for its violations of international human rights law, while turning a blind eye (or a near-blind eye) to human rights violations in countries such as Marcos’ Philippines, Pinochet’s Chile, Samozza’s Nicaragua or, for that matter, the Soviet Union (during the early 1970s, in the pursuit of *détente*). Or, to take an interesting but less well known example, Great Britain declared war on Germany in 1914 allegedly on the basis of Germany’s violation of

2003 already exceeds the United States’ \$10.4 trillion GDP The bottom line is that the EU’s GDP already comprises nearly 30 percent of the GDP of the world, making the European Union a formidable competitor to America in the global economy.”)

¹²⁶ See, e.g. Kupchan, *supra* n.–, at 62 (“The near-term challenger to America is not a single country trying to play catch-up – which takes time – but a European Union that is in the process of aggregating the impressive economic resources that its member nations already possess. . . . [A]mass their collective wealth, add the resources of more than a dozen other European countries – perhaps including before too long a recovered Russia – and an economic behemoth is on the horizon.”)

¹²⁷ Joffe, *supra* n.–, at 48.

Belgium's neutrality, of which Britain claimed to be, by treaty, the guarantor.¹²⁸ But Germany had previously invaded Luxembourg, whose neutrality Britain had also guaranteed, with no demurral by the British. The crucial difference was the Belgium fronted the English Channel - a zone of extreme strategic sensitivity to Britain - while Luxembourg did not.¹²⁹ Although Britain's true concern was the German threat to its national security rather than Germany's violation of international law,¹³⁰ it was in no way remarkable that it should have advanced the latter rather than the former as its stated reason for war.

Several commentators have contended that Europe has been using international law as a means to control and restrain American hegemony. Their arguments are persuasive. The American political scientists John Ikenberry,¹³¹ and following him Stephen Walt,¹³² have made a careful study of the various mechanism by which European and other powers have responded to the massive reality of American global power. Ikenberry notes that there are two "extreme" or "ideal-type" strategies for coping with such concentrated power. One strategy, which he calls "balancing," is to attempt to resist a dominant State

¹²⁸ British leaders and high-ranking officials, including Prime Minister William Gladstone in 1870, had long doubted whether Belgian Guarantee Treaty of 1839 committed Britain unconditionally to resist and violation of Belgian neutrality. See Carr, *supra* n.--, at 183-84. Some legal scholars during the First World War also argued that Britain did not, in fact, have any treaty obligations to guarantee Belgian neutrality. See Alexander Fuehr, *The Neutrality of Belgium: A Study of the Belgian Case Under its Aspects in Political History and International Law* (1915).

¹²⁹ See Blainey, *supra* n.--, at 236 n*.

¹³⁰ According to the official report of August 4, 1914 prepared by the British Ambassador to Germany, Sir Edward Goschen, he personally informed the German Chancellor that "it was, so to speak, a matter of 'life and death' for the honour of Great Britain that she should keep her solemn engagement to do her utmost to defend Belgium's neutrality if attacked. That solemn compact simply had to be kept, or what confidence could any one have in engagements given by Great Britain in the future?" See <http://www.firstworldwar.com/source/scrapofpaper1.htm>. Prime Minister Sir Edward Grey's speech of August 3, 1914 before the House of Commons spoke more candidly of Britain's "obligations of honour and interest as regards the Belgian treaty." 65 Great Britain, Parliamentary Debates, Commons, Fifth Series, 1914, at 1809 (emphasis added).

¹³¹ See g. John Ikenberry, "Strategic Reactions to American Preeminence: Great Power Politics in the Age of Unipolarity," National Intelligence Council Conference Report (July 28, 2003), available at http://www.cia.gov/nic/confreports__stratreact.html.

¹³² See Stephen M. Walt, *Taming American Power: The Global Response to U.S. Primacy* 144-52 (2005).

through aggregating countervailing power by forming a coalition against it. The opposite strategy, which he calls “binding,” attempts to make the dominant power less threatening by “embedding that power in rules and institutions that channel and limit the ways that power is exercised.”¹³³ Both strategies, of course, can be manifested in a rich variety of ways; each has its strengths and limitations; both can be pursued, separately or together, with greater or less overt hostility. In addition to “balancing” and “binding,” weaker States can follow strategies that Ikenberry calls “buffering” (or developing alternative regional political spheres); “baiting” (or forming groupings of weaker States that are designed in part to lure the dominant State into interaction, and eventually conformity, with the groupings); “bargaining”; “bandwagoning” (or adopting policies designed to support or accommodate the dominant power); “bonding” (a version of bandwagoning in which the leaders of weaker powers since to form “special relationships” with the United States or its President); and “specialization” (or seeking out niche specialities in military and economic affairs that may prove useful or necessary to the dominant State).

Europe’s uses of international law can readily be seen as a type of “binding” strategy enabling it more effectively to tame American power. Such a strategy can be pursued, and correspondingly resisted, in at least two broad ways.

The first way is by attempting to reduce the United States’ freedom of action by inducing it to enter into international institutions or to accept international rules that would create *new* international obligations for it. Obvious examples here would be the Rome Statute or the Kyoto Protocol which, if ratified by the United States, would have bound it to commitments that its political leadership considered inimical to its security interests and its economic vitality. American responses to these proposed new institutions included, not

¹³³ Ikenberry, *supra* n.--, at 14.

merely the refusal to join them, but also, *e.g.*, attempts to carve out special immunities from ICC jurisdiction for the U.S. military forces in the U.N. peacekeeping mission in Bosnia.¹³⁴

The second way is by arguing that the United States is breaching its *existing* international legal commitments or obligations, and by applying, or threatening to apply, legal or diplomatic sanctions as a result. Thus, for example, European governments might cite to alleged U.S. violations of international human rights agreements or provisions of international humanitarian law to which the United States is a party. The United States typically replies by denying the factual allegations at issue, or by pleading circumstances claimed to excuse or justify its actions, or by interpreting the relevant legal obligations more narrowly. At the extreme, the United States might rescind its earlier legal commitments as, *e.g.*, it has done (or sought to do) by withdrawing its consent to the ICJ's jurisdiction in Consular Convention cases.¹³⁵

American political scientists are not alone in viewing European-American clashes over international law through the prism of interest analysis, and in seeing the use of a binding strategy at work in at least some European legal claims. Josef Joffe is one such European commentator is Josef Joffe. In his 2003 John Bonython Lecture, *Gulliver Unbound: Can America Rule the World?*,¹³⁶ Joffe argued that many recent "international law" disputes between the United States and other powers are, "[*a*]u fond, . . . not about principle, but power. . . . [S]o with the International Criminal Court (ICC). In the end, even the Clinton team correctly understood the underlying thrust of the ICC. Claiming the right to pass judgment on military interventions by prosecuting malfeasants *ex post facto*,

¹³⁴ See Bryan MacPherson, "Authority of the Security Council to Exempt Peacemakers from International Criminal Proceedings," ASIL Insights (July 2002), available at <http://www.asil.org/insights/insight89.htm>.

¹³⁵ See Frederick L. Kirgis, "Addendum to ASIL Insight: President Bush's Determination Regarding Mexican Nationals and Consular Convention Rights," ASIL Insight (March 2005), available at <http://www.asil.org/insights/2005/03/insights050309a.html>.

¹³⁶ Available at <http://www.cis.org.au/Events/JBL/JBL.03htm>.

the Court might deter and thus constrain American forays abroad. All the Lilliputians [*i.e.*, the Europeans] would gain a kind of *droit de regard* over American actions.”¹³⁷

An interest-based theory of the kind put forward by writers such as Ikenberry, Walt and Joffe appears to have as much power as Rubinfeld’s in explaining the rifts between Europe and America over international law. What is more, an interest-based account may be more successful than a values-based one in explaining why European and American differences in international law can be, and sometimes are, compromised.

To illustrate this aspect of interest analysis, consider Security Council Resolution 1483 of May 22, 2003, which, together with subsequent related Resolutions, addressed the international standing of the Iraqi government that was beginning to emerge after the Second Gulf War, and delineated roles for the various institutions, including the United Nations, in the transition to a new, internationally recognized Iraqi government.

Resolution 1483, which was sponsored by the United States and its coalition allies Britain and Spain, was adopted by a 14-0 vote in the Security Council (Syria being notably absent). As one commentator said, the Resolution “bore the hallmarks of a compromise throughout.”¹³⁸ Specifically, it created a loose framework under which the Anglo-American dominated Coalition Provisional Authority [“CPA”], a contemplated “Iraqi interim administration . . . run by Iraqis” and distinct from the CPA, and the United Nations would together share responsibilities with respect to the transition to an internationally recognized, representative government Iraq. The Resolution lifted longstanding international sanctions against the régime of Saddam Hussein and, in a move much desired by the United States, guaranteed United Nations’ participation in monitoring the export of Iraqi oil, making it

¹³⁷ *Id.* at 4.

¹³⁸ Thomas D. Grant, “*The Security Council and Iraq: An Incremental Practice*,” 97 Am. J. Int’l L. 823, 824 (2003).

possible for the oil to be sold in world markets without legal hazard. On the other hand, as the French delegate to the Security Council, M. de la Sablière, insisted, the Resolution also ensured that the United Nations would play a crucial *political* as well as humanitarian role alongside the Anglo-American coalition in the reconstruction of post-war Iraq,¹³⁹ and he reminded that coalition that the Resolution “affirm[ed] the obligations of the occupying Powers in this area, in conformity with their obligations under international humanitarian law.”¹⁴⁰ Mr. Pluger, the German delegate, after noting that the Resolution was “a compromise reached after intensive and sometimes difficult negotiations,” also laid stress on the fact that the United Nations was to have “a central role in the political and economic process” of reconstruction.¹⁴¹

As legal commentators noted, one outstanding and unresolved point of difference between the Anglo-Americans and their continental European antagonists concerned “the ex post validating effect, if any, of Resolution 1483.”¹⁴² Was the Resolution to be construed as a legal *ratification* of the coalition’s armed intervention in Iraq in March, 2003 – over the prospective authorization of which the Security Council and its Permanent Members had been so bitterly divided three months earlier? Did it fall short of a ratification of the

¹³⁹ “From the Franco-German-Russian viewpoint, the resolution . . . serves two purposes: it reengages the [United Nations] after a period of relative withdrawal; and it contains the American-British coalition, the initiative for which France, Germany, and Russia had sought to curtail prior to the hostilities.” Grant, *supra* n.--, at 830.

¹⁴⁰ “[T]he resolution substantiates the essential role of the United Nations, which France, alongside others, has tirelessly defended. More than ever before, the strong and independent involvement of the United Nations in defining and leading the political process will condition the success of this exercise – in other words, its ownership by the Iraqi people and its acceptance by countries of the region and by the international community.” United Nations Doc. S/PV.4761, Security Council, 58th year, 4761st meeting, May 23, 2003 (Translation of remarks of M. Jean-Marc de la Sablière).

¹⁴¹ *Id.* (Remarks of Mr. Gunter Pluger).

¹⁴² Grant, *supra* n.--, at 826.

original intervention, but nonetheless have some legal effect on the *ensuing occupation*?¹⁴³

Or was it, legally, a *nullity*?

The U.S. State Department did not explicitly claim that Resolution 1483 ratified what had previously been an unauthorized and illegal Charter violation. How could it have done so, given its own arguments earlier in the year that the United States' resumption of hostilities in Iraq *accorded* with Iraq-related Security Council Resolutions from a decade before? On the other hand, the State Department *did* try to squeeze legal juice out of the lemon. In November, 2003, a State Department spokesman, Assistant Secretary Kim R. Holmes, characterized Resolution 1483 in the following way:

We do not want to find ourselves implying that, since the [Security] Council could not agree on a military course of action during the debate in February [2003] on a second resolution, that it was the will of the international community that Saddam Hussein be allowed to continue to torture and murder his people. The Council, in fact, had spoken on the matter, and indeed it has spoken since . . . [I]n Resolution 1483, it has recognized the legitimacy of the coalition presence under international law.^[144]

What this characterization leaves unexplained, of course, is why the United States should have desired the Security Council to affirm that coalition's presence in Iraq was legitimate, if the United States found itself in Iraq as a result of having taken nothing but lawful steps.

No matter. The key point is that the United States and the European nations aligned against it in the Security Council found in Resolution 1483 a viable and pragmatic way to compromise (if not resolve) their bitter differences over the legality of the Iraq

¹⁴³ See Eyal Benvenisti, *The International Law of Occupation* ix (1st pb. ed. 2004) (Resolution "provided a mechanism to legitimate the [Coalition's] temporary control of Iraq").

¹⁴⁴ Kim R. Holmes, Assistant Secretary of State for International Organization Affairs, "*The UN Charter: Then and Now*," Remarks at a Conference on "The Future of the UN and International Law," sponsored by the Konrad Adenauer Foundation, Bonn, Germany, November 21, 2003.

War.¹⁴⁵ The United States could hardly ask for – and perhaps fail to obtain – the ratification of an invasion that it had defended as fully legal not long before; but it *did* want some measure of affirmative legal authorization *going forward* for its presence in Iraq and for its activities as occupier (if not as invader). If, moreover, this prospective legitimation could plausibly be construed as an admission by the Council, however tacitly and grudgingly, that it had been wrong to withhold authorization *in advance* of the Iraq war, then so much the better. For their part, the French, Germans and Russians all had an interest in conferring some measure of legitimacy on the U.S. occupation, while being able to maintain consistently the position that the original U.S. intervention had been unauthorized. The U.S. occupation of Iraq was, by May 2003, an established fact; and to allow the United States to continue its occupation indefinitely without the sanction of the Security Council could over time only weaken the Council’s (and therefore *their*) influence and authority. These three Council Members likely felt that the currency they possessed – the power to legitimate the coalition’s actions – had to be spent before it dwindled in value. *Both* sides had a compelling interest in saying that the Iraq War had not stripped the Security Council of its legal authority, brought down the United Nations Charter, or caused irreparable damage to the fabric of international law.

Put it this way: at the time of Resolution 1483’s adoption, the relationship between the United States on the one side and the Franco-German-Russian bloc on the other was not unlike that which existed on December 2, 1804 in the Cathedral of Notre

¹⁴⁵ See Richard Falk, “*After Iraq Is There a Future for the Charter System? War Prevention and the UN,*” Counterpunch (July 2, 2003), available at <http://www.globalpolicy.org/security/issues/iraq/attack/law/2003/0702unfuture.htm>. Falk argues that Resolution 1483 indicates a tension within the Security Council over the Anglo-American recourse to war: on the one hand, it divides responsibility between the Coalition and the U.N. for Iraq, granting the Coalition control over the most vital concerns of economic and political reconstruction and governance; on the other hand, it stops far short of retroactively endorsing the Coalition’s intervention.

Dame in Paris between Napoléon on the one side and Pope Pius VII on the other, as the Pope watched Napoléon, who was standing (rather than kneeling) before him, lift the crown of the Emperor of the French out of the papal hands and place it on his own head.¹⁴⁶ Both Napoléon and the Pope had something to gain from this curious transaction (to which the Pope had agreed beforehand). From Napoléon's point of view, his action was a way of dramatizing the claim that his authority did not come from the Church, but from another source (himself?). At the same time, however, the Pope had *anointed* Napoléon only shortly before; and the Pope's very presence at the Emperor's (self-)coronation lent Napoléon's claim to the imperial title a legitimacy that it otherwise would have lacked. A papal consecration at the cathedral in Paris conferred on the new Emperor a cachet in royalist, Catholic and international circles that Napoléon could never have created for himself.¹⁴⁷ So it was between the United States and the Security Council: the holder of power and the holders of legitimacy found it in their mutual interest to agree rather than disagree.

III.

So far, I have been contrasting two theories that offer to explain, on different grounds, the existence of a characteristic divergence in attitudes towards international law between Europe and the United States. One theory sounds in values, the other in interests. But the choice may conceivably be a false one. This brief concluding section addresses that possibility.

While abstractions may be illuminating, we are surely be wrong to think of "Europe" (or the "United States") as monoliths. "European" attitudes towards

¹⁴⁶ See Steven Englund, *Napoleon: A Political Life* 243-46 (2004).

¹⁴⁷ "No other major European sovereign showed up at an event to which all of them were invited and all considered the defining moment of any monarch's life, yet the presence of the leader of Christendom outweighed their collective absence." Englund, *supra* n.--, at 244.

international law may, e.g., be either attitudes characteristic of European governments, or those characteristic of European publics. European publics (especially perhaps certain élites within them) may have views about the morality or legality of American policies that are held with great intensity and conviction. Those constituencies, who may be important actors in European domestic politics, will urge their views forcefully on their elected political leaders. These leaders, in turn, will be likely to engage in what the Israeli political scientist Gil Merom calls “sisterly vigilance” of the United States.¹⁴⁸ Democratic governments exercise such “sisterly vigilance” when they seek publicly to restrain other democracies from engaging in what they perceive to be radical departures from accepted international standards, particularly in the conduct of war. A good example is Sweden’s criticism of the United States’ use of certain weapons systems during the war in Vietnam during the 1960s.¹⁴⁹

But because European political leaders, especially in the executive branches of European governments, have to interact repeatedly with their American counterparts on a wide range of matters of common concern, their criticisms of American war and counter-terrorism policies is likely to be tempered with a high degree of pragmatism. If their American counterparts are offended by what they perceive as “excessive” European condemnation or resistance, the resulting bitterness and antagonism may preclude cooperation on other, important issues. (For instance, while American leaders may have been willing to forgive France for opposing a Security Council Resolution that would have authorized intervention in Iraq in 2003, they apparently felt deeply aggrieved by the French Foreign Minister’s trip to Africa to enlist African governments’ votes against such a

¹⁴⁸ Merom, *supra* n.--, at 25, 250.

¹⁴⁹ See Isabelle Daoust, Robin Coupland and Rikke Ishouey, “*New War, New Weapons? The obligation of States to assess the legality of means and methods of warfare*,” 84 *Int’l Rev. Red Cross* 345, 354 (2002).

Resolution.) In fashioning their policy choices, European leaders therefore have to keep an eye both on their domestic constituencies (not all of which will feel strongly averse to alleged American violations of international law) *and* on the likely reactions of their American counterparts. Their dealings with the United States form, as Robert Putnam calls it, a two-level game.

For these reasons, we should expect to find, not so much a divergence between European and American views of international law, but rather *two* divergences, one greater and one less: a more marked divergence between American views (or rather, the views of American political leaders) and the views of European publics (especially, perhaps, articulate and influential élites in sectors such as higher education, law and journalism), and a less marked divergence between American political leaders' views and the views of European governments (especially the executive branches that interact most frequently with those American political leaders). And this, we submit, is exactly what we see in the rather equivocal remarks of Chancellor Merkel cited near the start of this paper. While both interests and values will likely figure in explaining both of these divergences, values will likely be more important in explaining the extent of the first divergence, and interests the comparatively limited divergence in the second case.

Conclusion

The argument of this paper has been, first, that the differences between America and Europe over international law and international institutions are not as stark and unqualified as they are often represented to be and, second and more importantly, that such attitudinal differences as there are can be explained as plausibly in terms of the play of conflicting power interests as in terms of constitutional outlooks, structures and histories. Without in the least denying the force and persuasiveness of an explanation that locates the

sources of antagonism in a characteristically European “international constitutionalism” to a characteristically American “democratic constitutionalism,” a more banal explanation in terms of divergent and competing national interests may well suffice. Finally, the analysis presented here also suggests that the two approaches might well be understood, not as offering rival explanations of a unitary phenomenon, but as offering compatible explanations of two distinct but related phenomena – the attitudes of European publics on the one hand, and European governments on the other.