

# HISTORICAL AMERICAN PERSPECTIVES ON INTERNATIONAL LAW

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## I. INTRODUCTION

The topic of this year’s International Law Weekend, “The United States and International Law: Legal Traditions and Future Possibilities,” cries out for additional historical perspective. This may, at least initially, sound like a surprising claim. Conversations about the relationship between the United States (U.S.) and International Law seem saturated with history. Advocates of American participation in the International Criminal Court and opponents of Bush Administration tactics in the war on terror, both harken back to American sponsorship of the Nuremberg tribunals to support their views. The names of obscure World War II-era cases like *Quirin*,<sup>1</sup> *Eisentrager*,<sup>2</sup> and *Hirota*<sup>3</sup> roll off the tongues of lawyers debating the Bush Administration’s tactics in the war on terror. More generally, foreign affairs law and foreign affairs law scholars often seemed obsessed with history—even compared to constitutional law scholars. We pour over nineteenth century prize cases,<sup>4</sup> long-forgotten international incidents,<sup>5</sup> and long-lost treatises on the law of war.<sup>6</sup> We bandy around

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\* Assistant Professor, University of Georgia School of Law; J.D., New York University School of Law 2003; M.A. History, Yale University 2000; B.A., Yale University 1998. Thank you to organizers of International Law Weekend (ILW) and to my fellow panel members, Elizabeth Borgwardt, John Witt, Dan Hulsebosch, and David Golove, for the opportunity to put this panel together.

1. *Ex parte Quirin*, 317 U.S. 1 (1942).
2. *Johnson v. Eisentrager*, 339 U.S. 763 (1950).
3. *Hirota v. MacArthur*, 338 U.S. 197 (1949).
4. *See, e.g.*, *Bas v. Tingy*, 4 U.S. 37 (1800); *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804); *The Antelope*, 23 U.S. (10 Wheat.) 66, 101–02 (1825).
5. *See, e.g.*, Anthony J. Colangelo, ‘*De Facto Sovereignty*’: *Boumediene and Beyond*, GEO. WASH. L. REV. (forthcoming 2009) (discussing *Jones v. United States*, 137 U.S. 202 (1890), a case concerning jurisdiction over murder committed on a disputed guano island).
6. *See, e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557, 590–608 (2006) (quoting extensively from “[t]he

the names of long-dead scholars like Grotius, Vattel, and Bynkershoek as if they were close personal friends. Even foreign affairs law doctrine gives history a role, recognizing the force of longstanding political branch practice.<sup>7</sup>

And yet, the work of the four scholars on this panel—Elizabeth Borgwardt, Associate Professor of History at Washington University in St. Louis, John Fabian Witt, Professor of Law and History at Columbia Law School, David Golove, Hiller Family Foundation Professor of Law at New York University School of Law, and Daniel Hulsebosch, Professor at New York University School of Law—highlight how little we really know about the history of American perspectives on international law. Largely lost amongst the history of American diplomacy and warcraft, foreign affairs caselaw and doctrinal development is the rich cultural and intellectual history of American engagement with international law and justice. What is international law? Is it a progressive tool to achieve American goals and ideals, a means of negotiating cooperative solutions to transnational problems, or an illegitimate foreign attempt to constrain U.S. power? Different Americans, at different times, have held these and other more complex views of international law. Debates between these views have had major impact on the shape of international institutions and American engagement with them. Yet very little of this is captured by the more traditional legal histories.

American conceptions of international justice and ideas of American mission have long helped shape international law and institutions. Conceptions of American national identity, in turn, have been deeply influenced by international law and by American perceptions of it, both positive and negative. This history of ideas begins to bring the dynamic relationship between the United States and international law, its history and its potential future, truly into focus. These scholars, along with others, have begun to explore the history of these ideas. There is much more to be done.

This short discussion describes some of the real, powerful contributions this new type of historical scholarship can make to our understanding of American relations with international law and the rest of the world. In particular, it focuses on three specific contributions: enriching and improving our historical picture of American relations to international law, complicating the common stereotypes of that relationship that dominate current debates, and

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classic treatise penned by Colonel William Winthrop, whom we have called ‘the ‘Blackstone of Military Law.’” (internal citation omitted)).

7. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J. concurring) (“[i]n short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on ‘executive Power’ vested in the President by § 1 of Art. II.”).

facilitating study of various theories of international law, particularly constructivist ones. It also serves as a call for more scholarship in the area.<sup>8</sup>

## II. MISSING PIECES

Scholarship on American ideas about international law and justice seeks to fill a major gap in the legal literature. Despite voluminous scholarship on the history of the United States and international law, the intellectual history of American perceptions of, engagement with, and contributions to international law remain amazingly underdeveloped.

The grand majority of legal-history scholarship on the United States and international law focuses on the history of U.S. Foreign Affairs law.<sup>9</sup> This scholarship tends to focus on one of two sets of questions. The first is how various Constitutional provisions that concern foreign affairs, e.g., the treaty clause,<sup>10</sup> the declare war clause,<sup>11</sup> the foreign commerce clause,<sup>12</sup> the define-and-punish clause,<sup>13</sup> and the ambassador clauses,<sup>14</sup> have historically been interpreted and how those clauses incorporate, ignore, or otherwise respond to international law. The second set explores questions typical of diplomatic history by asking how various American leaders have interpreted, followed, or violated international law in their practice of foreign affairs and war.<sup>15</sup> The importance of both sets of questions has only been enhanced by recent events and controversies—the fight against global terror has raised difficult constitutional and international law questions—and nothing in this discussion should be understood as diminishing the importance of this work in any way.

But read alone, these histories present a distorted and potentially dangerous picture of American perspectives on international law. One problem with the focus of these histories is that it tends to encourage a picture of the United States and international law as in opposition, as two distinct entities eyeballing each other across a rift (to some, that rift might look like the Atlantic

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8. For more discussion of some of these issues, see generally Harlan Grant Cohen, *The American Challenge to International Law: A Tentative Framework for Debate*, 28 YALE J. INT'L L. 551 (2003).

9. This is to be contrasted with more strictly historical scholarship, in which the intellectual and cultural history of American foreign policy has been extensively explored. Scholars of international and American foreign affairs law would be well-served to engage with this historical work.

10. U.S. CONST. art. II, § 2, cl. 2.

11. *Id.* art. I, § 8, cl. 11.

12. *Id.* art. I, § 8, cl. 3.

13. *Id.* art. I, § 8, cl. 10.

14. *Id.* art. II, § 2, cl. 2., art. II, § 3.

15. As a note, one result of this focus on U.S. Foreign Affairs law is that American views of international law are rarely placed in the context of scholarship on international law history rather than scholarship on American history.

Ocean), sometimes embracing, sometimes ignoring each other, sometimes in conflict. In these histories, the Constitution's text treats international law in some way; American leaders choose to follow or not to follow international law's precepts. Such a distinction between the two is clearly overdrawn. International law is not an entity, but an idea or set of ideas. While some Americans at some times may have been opposed to those ideas, others have believed deeply in them, and still others have helped shape them. It is strange to talk about the United States as a state, having any kind of distinct relationship with them. But this oppositional view, even if misperceived, can be quite dangerous, lending support to some commonly-held views about American exceptionalism, a concern that will be discussed in the next section.

These sorts of histories also tend to overemphasize a particular conception of international law: international law as a body of rules either to be observed or violated, an "International Law" in quotation marks. In these histories, the question is usually how a particular rule of international law is treated, either by the Constitutional text or by American leaders. Although international law can be described, at any given point, as a collection of rules on particular subjects, at least historically, international law has been much more than just a set of blackletter rules (if anything, blackletter rules often seen maddeningly missing). A broader, better understanding of international law would place those rules in their larger context, as part of a constantly evolving set of ideas and normative commitments about international relations, justice, and governance. To truly understand the complex relationship between Americans and international law, one must look not only at legal developments, but at discussions of American mission and Manifest Destiny, anti-slave trade movements,<sup>16</sup> immigrant anti-colonialism,<sup>17</sup> the international peace movement,<sup>18</sup> Jacksonian isolationism,<sup>19</sup> and the development of various American foreign policies from the Monroe Doctrine to Wilsonianism to Containment. Many of these ideas are only tangentially related to specific international law rules. Often, those who developed, held, and discussed these ideas did so in non-legal language, citing religious imperatives, international morality, global justice, or *realpolitik*.<sup>20</sup> Nonetheless, these ideas have consistently shaped American

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16. See generally Jenny S. Martinez, *Antislavery Courts and the Dawn of International Human Rights Law*, 117 YALE L.J. 550 (2008).

17. See generally MATTHEW FRYE JACOBSON, *SPECIAL SORROWS: THE DIASPORIC IMAGINATION OF IRISH, POLISH, AND JEWISH IMMIGRANTS IN THE UNITED STATES* (Harvard Univ. Press ed. 1995).

18. See John Fabian Witt, *Crystal Eastman and the Internationalist Beginnings of American Civil Liberties*, 54 DUKE L.J. 705, 729–33 (2004) [hereinafter John Fabian Witt].

19. See Walter Russell Mead, *The Jacksonian Tradition and American Foreign Policy*, 58 NAT'L INTEREST 5 (1999).

20. See Cohen, *supra* note 8, at 556–60.

perceptions of international law and have informed various Americans in their attempts to reform the international system, develop new rules of international law, and create new international institutions. Understanding the diverse positions the United States has taken toward international law in the past, e.g., support for the creation of the United Nations and the Nuremberg Tribunal but opposition to the League of Nations and the International Criminal Court, requires a fuller understanding of how each of those institutions either resonated or was in tension with other ideological commitments of particular groups of Americans. Predicting the positions future American administrations might take on international law and institutions requires a deeper understanding of international law's place within competing foreign policy ideas and philosophies.

But more important than its narrowness and inaccuracy is the ability of this description of international law to distort our understanding of American perceptions of international law over time. If international law is perceived as no more than a body of specific laws, then the relationship between the United States and international law can take one of only two forms, compliance or non-compliance. And not surprisingly, the traditional histories focus on specific moments when the choice had to be made between compliance and non-compliance. It is difficult, however, to extrapolate more durable U.S. positions on international law from these moments of crisis.<sup>21</sup> First, violations of international law are almost certainly overrepresented in these histories. By definition, these moments are ones where possible violation of the rule has been placed on the table for consideration. Missing are more general patterns of compliance. International law might be most successful when its precepts are so deeply internalized by international actors as to make the question of compliance or non-compliance unthinkable—the question is simply taken off the table. As a result though, true compliance may mean no discussion of the rule at all. Most compliance may thus be invisible to history (or at least difficult to discern). Second, these moments of crisis present the most powerful possible reasons for violating an international law rule, most notably, national survival.<sup>22</sup> It is unremarkable to find that legal rules will be under the most strain during these moments. As a result, moments of crisis tell us little about the more ordinary perceptions of the rule. Even the most human rights

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21. Cf. David M. Golove, *Leaving Customary International Law Where it Is*, 34 GA. J. INT'L COMP. L. 333, 348–50 (2006) [hereinafter Golove] (making a similar point about the case studies used in JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 45–78 (2005)).

22. Cf. Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1883–86 (2002) (noting that compliance may be less likely in situations involving national security where the cost of compliance may seem higher than those of violation).

respecting states have committed horrible acts in defense of national security.<sup>23</sup> Most of all, moments of compliance or noncompliance fail to capture the complex processes by which the rules and institutions of international law are created, debated, transformed, and sustained. They fail to capture the complex role the United States and Americans have had in helping to shape international law as well as the ways international law has influenced American national identity.

A number of scholars, including those on this panel, have begun to remedy the situation by focusing less on historical conflicts over international *laws* and more on the intellectual history of *conceptions* of international law. Mark Janis, for example, has tracked the transfer of ideas about international law from British scholars like Blackstone and Jeremy Bentham to American scholars like Joseph Story, James Kent, and Henry Wheaton.<sup>24</sup> He has also explored the longstanding influence of American religion and religious movements on American conceptions of international law and justice and the lasting imprints those movements have made on the international law rules passed down to today.<sup>25</sup> Mary Dudziak has written about the complex relationship between the global Cold War politics and the success of the civil rights movement in the United States.<sup>26</sup> Jonathan Zasloff has focused on the lawyer-statesmen like Elihu Root and Henry Stimson, who dominated American foreign policy during the first half of the 20th Century.<sup>27</sup> Each brought their domestic legal training to their new foreign policy roles and in the process, transmuted then-current ideas about domestic law into American foreign policy.

Elizabeth Borgwardt, Daniel Hulsebosch, David Golove, and John Fabian Witt are all engaged in similar projects. Elizabeth Borgwardt has previously written about the role of domestic New Deal ideas in the shaping of the post-

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23. The United Kingdom, United States, France, and Israel, for example, have all been accused of using torture to fight terrorism. See generally *Ir. v. U.K.*, 25 Eur. Ct. H.R. (ser. A), ¶ 96 (1978) (United Kingdom); COMM'N OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR: ANALYSIS AND RECOMMENDATIONS 14 (2006), [http://www.csars-sirc.gc.ca/pdfs/cm\\_arar\\_rec-eng.pdf](http://www.csars-sirc.gc.ca/pdfs/cm_arar_rec-eng.pdf) (last visited Mar. 20, 2009) (United States); *El-Masri v. United States*, 479 F.3d 296, 300 (4th Cir. 2007); *THE BATTLE OF ALGIERS* (Casbah Films, Igor Film 1966) (France); *HCI 5100/94 Pub. Comm. Against Torture v. Isr.* [1999] IsrSC 46(2) (Israel). Such torture may be an inexcusable violation of international law, but its use may not be the best indicator of each state's full commitment to or perception of human rights law, let alone the international rule of law more generally.

24. See generally MARK WESTON JANIS, *THE AMERICAN TRADITION OF INTERNATIONAL LAW: GREAT EXPECTATIONS 1789–1914* (2004).

25. *Id.*

26. See generally MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2002).

27. See generally Jonathan Zasloff, *Law and the Shaping of American Foreign Policy: The Twenty Years' Crisis*, 77 S. CAL. L. REV. 583 (2004); Jonathan Zasloff, *Law and the Shaping of American Foreign Policy: From the Gilded Age to the New Era*, 78 N.Y.U. L. REV. 239 (2003).

World War II international system.<sup>28</sup> In her retelling, the Atlantic Charter and its four freedoms represented a New Deal manifesto for the world, marrying civil and political rights (freedom of speech and religion) to economic and social rights (freedom from want and fear).<sup>29</sup> Franklin Delano Roosevelt and his fellow New Dealers brought a positive, pragmatic vision of the role government and institutions could play in rebuilding and managing the world; and the experience of the Depression, the New Deal, and World War II created the domestic base of support for such actions that had been notably missing during the League of Nations campaign following World War I.<sup>30</sup> The postwar international machinery—the United Nations, the Bretton Woods system, and the Nuremberg tribunals—were the products of these American ideas and realities.<sup>31</sup> Borgwardt's current project looks at the fate of those postwar institutions, particularly the Nuremberg principles and the core human rights treaties. Here though, the story changes from one of American influence on international law to one of international law's influence on the United States. Borgwardt's new project, "The Rise and Rise of the Nuremberg Principles 'Constitutionalizing' Wartime Reconfigurations of Sovereignty," seeks to explain the expanding influence of human rights in the face of Cold War domestic opposition to human rights treaties.<sup>32</sup>

David Golove and Daniel Hulsebosch look at this kind of cross-influence between American and international law ideas during an earlier period. Their project, "The Status of the Law of Nations in the Early American Republic," places the U.S. Constitution and the early Republic into its wider Atlantic context.<sup>33</sup> One aspect of the project is to explore the foreign affairs role and impact of the U.S. Constitution. As they explain, one key purpose of the Constitution was to establish the United States as an independent member of the international community of states, capable of self-governance, ready for diplomacy, and able to ratify and abide by agreements. The Constitution was designed to impress potential allies and trading partners.<sup>34</sup> This experiment, in

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28. See generally ELIZABETH BORGWARDT, *A NEW DEAL FOR THE WORLD: AMERICA'S VISION FOR HUMAN RIGHTS* (2005) [hereinafter BORGWARDT].

29. BORGWARDT, *supra* note 28 at 250–285.

30. See *id.* at 28.

31. *Id.*

32. Elizabeth Borgwardt, Remarks on the "Historical American Perspectives on International Law" panel at International Law Weekend 2008 (Oct. 18, 2008).

33. David Golove & Daniel Hulsebosch, Remarks on the "Historical American Perspectives on International Law" panel at International Law Weekend 2008 (Oct. 18, 2008).

34. As well as to rectify the mistakes of the Articles of Confederation: state recalcitrance in relation to treaties, foreign policy, and the law of nations was met with the Supremacy Clause, federal court jurisdiction over treaties, ambassadors, etc., and the centralization of foreign affairs authority in the federal government.

turn, had lasting effects on international law, as other new states followed the constitution-writing path to independence. At the same time, Golove and Hulsebosch explain, the Constitution was itself deeply influenced by the law of nations. This second aspect of their project traces the path of many international law ideas into constitutional doctrine: the law of nations' status as "higher" law was transferred to the Constitution. Ideas about judicial review first applied to the law of nations were eventually applied to the Constitution.<sup>35</sup>

In an earlier project, John Witt focused on Crystal Eastman's transformation from American labor advocate to international peace activist to civil libertarian, and explored the internationalist origins of the American civil rights movement.<sup>36</sup> Witt described how turn-of-the-twentieth-century Americans joined in the general fervor for international law and governance that swept the world in the years surrounding the 1899 and 1904 Hague Conventions, the establishment of the Permanent Court for International Arbitration, and other positive developments in international governance.<sup>37</sup> While some, like Elihu Root and the other founders of the American Society of International Law, saw these developments as proof of the power of international law as a means of mediating between states, Crystal Eastman and other members of the international peace movement saw these developments as the triumphs of cosmopolitanism.<sup>38</sup> The international peace movement they joined would link citizens of the world and vindicate their rights against the tyranny of states.<sup>39</sup> When World War I made membership in the international peace movement politically unacceptable in the United States, many of the movement's former leaders refocused their efforts on domestic civil liberties, creating the organization that would eventually become the American Civil Liberties Union.<sup>40</sup>

John Witt's current project is similarly concerned with the ways international law has helped shape American ideals and self-image. In this project, Witt argues that since early in U.S. history, Americans have been torn between two visions of the international law of war: an enlightenment law of war that sought to regulate the conduct of war and minimize humanitarian harm, and an earlier "just war" tradition that legitimated actions based on the justice of either side's cause. Both traditions are at work in the Civil War-era Lieber Code, Witt argues. On the one hand, the Code codified humanitarian rules applicable to all

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35. As an example of the former, Golove and Hulsebosch point specifically to *Rutgers v. Waddington* (N.Y. Mayor's Court 1784).

36. See generally John Fabian Witt, *supra* note 18.

37. See *id.* at 725–30.

38. See *id.* at 730–33.

39. See *id.* at 731–33.

40. See *id.* at 746–50.

sides of the conflict. On the other, it authorized some of the most brutal of Union tactics during the final stages of the war. The tension between these two impulses—one towards law and the other towards justice—survives to this day, and it is the seeming conflict between them, Witt argues, that has animated many of the most difficult debates over American war-fighting.<sup>41</sup>

All four of these scholars are thus beginning to provide a fuller history of the American relationship with international law and justice. The cultural and intellectual history that emerges is far more complex than often presumed. Americans and international law ideas have been deeply influenced by each other and cannot be easily disentangled even when in seeming opposition. The relationship between the United States and international law cannot be understood solely in terms of legal rules, compliance, and non-compliance. Instead, a deeper understanding of how international law responds to American self-identity, American views of the role of the United States in the world, and American conceptions of international justice is required.

### III. BEYOND CARICATURE

Popular discussions of the relationship between the United States and international law often fall back on a few common but dangerous memes about that relationship. History of the type described here can help rectify and complicate these too quickly drawn caricatures.

There are a few different caricatures of American relations to international law. The first involves a tendency towards presentism. This caricature essentializes current perceptions of American relations to international law—for example, the view that the Bush Administration opposes international law—and projects it back into the past, creating an almost inevitable chain from the founding of the Republic to today.<sup>42</sup> Depending on who's telling the story and when, this presentism lends itself to an overly simplified and sometimes dangerous picture of the United States as longstanding "champion" of

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41. John Witt, Remarks on the "Historical American Perspectives on International Law" panel at International Law Weekend 2008 (Oct. 18, 2008).

42. See, e.g., Mark C. Rahdert, *Comparative Constitutional Advocacy*, 56 Am U. L. Rev. 553, 589 (2007) ("Contemporary negative reactions to the use of comparative constitutional precedent tap into a longstanding tradition of exceptionalism and particularism in American attitudes toward foreign law."); Edward Lazarus, *A "Moral" Foreign Policy That Ignores International Law?: The History and Ironies of the U.S.'s Current View of Its Role In the World*, FINDLAW'S WRIT, May 1, 2003, <http://writ.news.findlaw.com/lazarus/20030501.html> (last visited Mar. 20, 2009) ("The recent surge of moral thinking in U.S. foreign policy has longstanding roots in our national history and spirit—and indeed, in world history. It's likely to be a feature of U.S. policy for a long time.").

international law,<sup>43</sup> or constant defender of American rather than European or international values, or eternal opponent of international governance.

Whereas this first caricature essentializes the present, two other caricatures essentialize apparent aspects of American identity or thinking. The latter two are thus versions of American exceptionalism. One might be described as a normative exceptionalism. Versions of this caricature emphasize the founders' desire to break with the ways of the old world—to be a “city on a hill.”<sup>44</sup> According to this caricature, the United States holds and has held different values from other parts of the world. These values might include different, or in some views greater, commitments to democracy, liberty, or individualism.<sup>45</sup> One recent example argues that Americans are constitutionalists, viewing popular sovereignty as the most legitimate source of law, while Europeans are universalists, looking beyond democracy to universal fundamental rights.<sup>46</sup>

The second form of exceptionalism, by contrast, is almost anti-normative. This caricature describes the United States as a holdout from international law and institutions, a state only willing to abide by international law to the extent it suits its interests. This view explains the different views that the United

43. See, e.g., Helen Stacy, *Relational Sovereignty*, 55 STAN. L. REV. 2029, 2053 (2002–2003) (“[T]he United States has a longstanding presence in international human rights treaty negotiations and has made significant contributions to the contours of human rights practice, policy, and action worldwide.”); *id.* at 2054 (“The longstanding nature of the relationship between the United States and the United Nations has built a deep reservoir of shared human rights commitment.”); Michael H. Posner & Peter J. Spiro, *Adding Teeth to United States Ratification of the Covenant on Civil and Political Rights: The International Human Rights Conformity Act of 1993*, 42 DEPAUL L. REV. 1209, 1213 (1993) (“Uncorrected derogation thus may prompt serious and continuing international opprobrium at the same time as it undermines our standing as a longstanding champion of human rights.”).

44. John Winthrop, *City Upon a Hill* (1630), in MAJOR PROBLEMS IN AMERICAN FOREIGN POLICY VOLUME I: TO 1914, at 28–29 (Thomas G. Patterson ed., 1989) (1978); George Washington, *Farewell Address* (1796), in MAJOR PROBLEMS IN AMERICAN FOREIGN POLICY VOLUME I: TO 1914, at 76 (Thomas G. Patterson ed., 1989) (“Europe has a set of primary interests which to us have none or a very remote relation.”). See also Paul W. Kahn, *American Hegemony and International Law Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order*, 1 CHI. J. INT’L L. 1, 4 (2000) (“America’s relationship to the rest of the world still seems to us to be one of example: the ‘city on a hill’ that the rest of the world is to imitate.”).

45. Adam Liptak, *U.S. Court is Now Guiding Fewer Nations*, N.Y. TIMES, Sept. 18, 2008, at A1 (“‘It’s American exceptionalism,’ Professor [Eric] Posner added in an interview. ‘The view going back 200 years is that we’ve figured it out and people should follow our lead.’”); Steven G. Calabresi, “*A Shining City on a Hill*”: *American Exceptionalism and the Supreme Court’s Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335, 1373 (“Like it or not, Americans really are a special people with a special ideology that sets us apart from all the other peoples of the Old and New Worlds.”).

46. See generally Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971 (2004). See also ROBERT KAGAN, OF PARADISE AND POWER 3 (Alfred A. Knopf 2003) (“It is time to stop pretending that Europeans and Americans share a common view of the world . . . Americans are from Mars and Europeans are from Venus.”).

States has had of international law—support for the creation of the United Nations but apparent contempt for it now, sponsorship of the Nuremberg tribunal but opposition to the International Criminal Court, support for the WTO but opposition to Kyoto—as no more than naked power politics and blatant hypocrisy.<sup>47</sup>

Most international law scholars know that these caricatures are overdrawn and are usually careful to couch them in those terms. Nonetheless, these memes can be quite powerful and pervasive, particularly in more informal settings. These caricatures are also quite dangerous, suggesting an inevitability in American views of international law that can make progress difficult. Normative exceptionalism becomes a defense against calls for cooperation or compliance; an American tradition of pragmatism (or hypocrisy) becomes an excuse in itself for unilateralism. Belief in longstanding American support for international law obscures the real concerns of international law's opponents and the equally long tradition of isolationism. Those holding this view may also fail to recognize the importance of American violations, as each is swept aside as a mere exception to the general rule of compliance.<sup>48</sup> None of these caricatures encourage the engagement with ideas necessary to move past disagreements and to find common ground.

The type of history discussed here provides an antidote to these common caricatures. Far from essentializing the present or certain American values, these projects unearth a series of counter-stories of how different Americans, at different times, translated ideas about American values into very different views on international law and international justice. Early leaders of the Republic turn to international law to protect the country's independence.<sup>49</sup> New Dealers translate their ideas about domestic justice into the Atlantic Charter and postwar international institutions,<sup>50</sup> but Cold War Americans retreat from international agreements they fear might be used to undermine their values.<sup>51</sup>

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47. See, e.g., Moisés Naím, *Missing Links: The Hypocrisy Audit*, FOREIGN POLICY, Sept./Oct. 2008, [http://www.foreignpolicy.com/story/cms.php?story\\_id=4440](http://www.foreignpolicy.com/story/cms.php?story_id=4440) (last visited Mar. 20, 2009) (“Double standards have always been a part of U.S. foreign policy.”); JULIE A. MERTUS, BAIT AND SWITCH: HUMAN RIGHTS AND U.S. FOREIGN POLICY 1 (1st ed. 2004) (“The United States is in fact still leading the world on human rights, but in the wrong direction, promoting short-term instrumentalism over long-term ethical principles, double standards instead of fair dealing, and a fearful view of human nature over a more open one.”). Cf. MICHAEL WALZER, JUST AND UNJUST WARS 20 (4th ed. 2006) (“Hypocrisy is rife in wartime discourse, because it is especially important at such a time to appear in the right.”).

48. More cynically, the notion that the United States is a longstanding supporter of international law can become a shield against rightful criticism of United States actions. Each violation is justified by its exceptional nature.

49. See *supra* notes 33–35 and accompanying text.

50. See BORGWARDT, *supra* note 28.

51. See *supra* note 32 and accompanying text.

Early twentieth century rights advocates first look outside the United States to world citizenship as a protection against governmental abuse, but eventually discover the values they hold dear in American civil liberties.<sup>52</sup> Americans beset by war are torn between the justice of their cause and their commitment to the law of war.<sup>53</sup>

Moreover, although each of these scholars tells stories that are uniquely about the United States—the ways domestic politics and domestic political ideologies have shaped American views of international law—theirs is at the most a very different type of exceptionalism. The Americans they describe do see international law through the lens of their own history, culture, and national ideology. That history, culture, and national ideology are often the product of international law ideas as well. Far from placing the United States outside of international law, choosing how to deal with it, these scholars tell a story of interaction and cross-fertilization in which the seams between international and domestic ideas quickly disintegrate. In this sense, the American exceptionalism they describe is one the United States shares with other international actors, each of whom brings its own views of history to these problems. The United States they describe is part of the project of international law (even when seemingly opposed to it), not exempt from or outside of it.

#### IV. CONSTRUCTION ZONE

The type of historical project pursued by these scholars can also contribute to our understanding of how and when states comply with international law. These projects provide information useful in exploring various theories of compliance, including three of the most popular: rationalism, liberalism, and constructivism. Of all those theories, however, constructivism may be benefitted most of all.

Of each of these theories of compliance, rationalism may seem to have the least to gain from these sorts of historical studies. Rationalist theories (there are multiple flavors with important differences) apply game theory and economic analysis to explain and predict when self-interested states<sup>54</sup> will choose cooperation through international law, and international institutions.<sup>55</sup>

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52. See generally John Witt, *supra* note 18, at 325–350.

53. See *supra* note 41 and accompanying text.

54. As one rationalist theorist puts it: “States are assumed to be rational, self-interested, and able to identify and pursue their interests . . . States do not concern themselves with the welfare of other states but instead seek to maximize their own gains or payoffs.” ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* 17 (2008).

55. See Richard H. Steinberg & Jonathan M. Zasloff, *Power and International Law*, 100 AM. J. INT’L L. 64, 79 (2006) [hereinafter Steinberg & Zasloff] (“Political scientists began using rationalism to identify means by which international law could facilitate cooperation that would otherwise not occur. Some

The traditional histories of U.S. foreign affairs law might seem like the perfect fodder for these sorts of theories. Focusing on the decisions between compliance and non-compliance, between joining treaties and spurning them, these histories would seem to provide the perfect cases for testing and honing rationalist predictions.<sup>56</sup> As David Golove has pointed out, however, without a better understanding of historical context, rationalists might misidentify the actual choices made and might misconstrue cooperation as non-compliance.<sup>57</sup> A dispute between two states, ripped from its larger context, may look to a rationalist like an international law failure. At times, however, historical context may minimize the dispute, revealing the incident as a good faith argument over how to apply a rule to which both states are committed.<sup>58</sup> The dispute itself may be the proof and product of a longer cooperative relationship.<sup>59</sup> Proper rationalist modeling thus requires a fuller understanding of American engagement with that rule and that state.

The role these cultural and intellectual histories can play with regard to liberal international theory is far more obvious. Liberal international theory “opens the black box of the state and considers the role of substate actors.”<sup>60</sup> Liberalism suggests that “state interests are best understood as an aggregation and intermediation of individual interests. Sources of power and interests are found within and between states. International law is driven from the bottom up.”<sup>61</sup> These histories, drawing the linkages between mercantile interests and the Constitution,<sup>62</sup> domestic rights advocates and the international peace movement,<sup>63</sup> New Dealers and the United Nations,<sup>64</sup> can help liberal theorists to explore the mechanisms through which domestic interests lead to international action.

However, constructivism benefits the most from these types of history. Constructivist theories of international law suggest that state interests and state

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early work showed how simple games could be used as metaphors for the kinds of cooperation problems that could be solved by international organizations and international law.”).

56. See JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 45–82 (2005).

57. Golove, *supra* note 21, at 350, 376.

58. See *id.* at 375 (“[A] fuller understanding of the circumstances reveals that the United States had many compelling reasons to alter its position on these legal questions and that the opposite claim—that the United States was fully justified in changing its position is at least equally plausible.”).

59. See *id.* at 350–76 (discussing dispute over neutral shipping rules during the American Civil War).

60. Guzman, *supra* note 54, at 18.

61. Steinberg & Zasloff, *supra* note 55, at 81.

62. See *supra* notes 33–35 and accompanying text.

63. See *supra* notes 36–40 and accompanying text.

64. See *supra* notes 28–31 and accompanying text.

identity are not constant but are instead “constructed” through legal rules, interaction with other states, and the activities of individuals and advocacy groups. “Constructivism asks how norms evolve and how identities are constituted, analyzing, among other things, the role of identity in shaping political action and the mutually constitutive relationship between agents and structures.”<sup>65</sup> “International law may be understood as both a reflection of identities and interests of the powerful, *and* as a social artifact that reinforces identities, interests, and power.”<sup>66</sup> Constructivism thus dovetails well with the intellectual and cultural histories here. Like these histories, it seeks to trace the origins of particular international and domestic ideas, to understand how Americans came to perceive international law in particular ways and how particular international law rules and ideas have helped shape American interests and identity. Both these histories and constructivist theory explore the mechanisms through which ideas are transferred between individuals, states, and the international system, when ideas will be accepted and assimilated and when they will be opposed.

One difficulty in studying international law from a constructivist point of view is that developments in international law and perceptions of international norms may be overdetermined. At least with relatively contemporary events, it may be very difficult to isolate the real reasons why perceptions of international law rules change.<sup>67</sup> There are too many actors and too many variables. Here, these cultural and intellectual histories can help. The passage of time may help clarify the mechanisms involved; the relative importance of different events and individuals may emerge—as each of these histories suggest.

Though the main concern with constructivist approaches is that they yield few of the comprehensive models or predictions that are normally the hallmark of social science theories.<sup>68</sup> The theory’s embrace of complexity, something it shares with history, makes prediction difficult. Although a number of constructivist theories have been advanced, it is difficult to imagine a comprehensive model of norm change that can predict with precision the

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65. Oona A. Hathaway & Ariel N. Lavinbuk, *Book Review: Rationalism and Revisionism in International Law*, 119 HARV. L. REV. 1404, 1411 (2006).

66. Steinberg & Zasloff, *supra* note 55, at 82.

67. Margaret E. McGuinness, *Medellin, Norm Portals, and the Horizontal Integration of International Human Rights*, 82 NOTRE DAME L. REV. 755, 766–67 (2006) (“Constructivism may tell us something about global processes and interactions at a macro level, but to the critics offers little help in predicting how a norm shift—for example from toleration of the death penalty to abolition—will take place.”).

68. *Id.* at 766. (“The central critique of constructivism is that it is insufficiently concrete or specific, and thus fails to provide an effective framework through which to make causal predictions of state behavior and/or to design a blueprint for regimes or strategies for addressing human rights violations.”).

different positions states will take with regard to international law.<sup>69</sup> But the similarities between constructivism and history suggest that the criticism is ill-placed. History too yields few predictive models, but is rarely criticized for that fact.<sup>70</sup> We simply understand that the historical inquiry is different from that in the social sciences, one more concerned with explaining and understanding than with simplifying and predicting. Putting aside for the moment the potential emergence of a comprehensive constructivist model of state behavior, constructivists may be best served by allying themselves more closely with cultural and intellectual historians like those on this panel. Historians are already experts in constructivist-like inquiries, drawing narratives of causation and influence out of seemingly incoherent, impossibly complex snapshots of history, and weighing the importance of individuals and moments. Together with constructivist theorists of international law, they can work to try to understand the complex history of international law ideas and the complex ways in which they have interacted with American domestic politics and self-identity.

#### V. CONCLUSION

This panel highlights some of the cutting edge historical work being done on the intellectual and cultural history of American perspectives on international law. Hopefully, it can also serve as a call to arms for other scholars of international and American foreign affairs law, demonstrating the real value of engagement with this sort of history.

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69. See Guzman, *supra* note 54, at 20 (“[T]his flexibility makes it difficult for constructivism to produce a general and tractable theory of state behavior.”).

70. Though partisans of social science have at times been known to do so.