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America's 'Exceptional' International Law Policy

In 2013 'American Exceptionalism' became a focal point in US–Russian wrangling over the alleged use of chemical weapons in the Syrian Civil War. President Barack Obama advocated a military intervention over the top of strict legal prohibitions against the use of force outside UNSC authorisation. To make the case, he turned to American 'ideals and principles' as the more fundamental source of legitimacy. For the end of 'enforcing' international agreements, Obama argued: 'I believe we should act. That's what makes America different. That's what makes us exceptional.'[1] These assertions and the attempt to 'bypass the United Nations' were rejected by Russian President Vladimir Putin in *The New York Times*:

> It is extremely dangerous to encourage people to see themselves as exceptional, whatever the motivation. There are big countries and small countries, rich and poor, those with long democratic traditions and those still finding their way to democracy. Their policies differ, too. We are all different, but when we ask for the Lord's blessings, we must not forget that God created us equal.[2]

The high-level conversation on exceptionalism concluded that month when Obama responded in the UNGA: 'Some may disagree, but I believe America is exceptional – in part because we have shown a willingness through the sacrifice of blood and treasure to stand up not only for our own narrow self-interests, but for the interests of all.'[3]

[1] Barack H. Obama, 'Remarks by the President in Address to the Nation on Syria', 10 September 2013, www.whitehouse.gov/the-press-office/2013/09/10/remarks-president-address-nation-syria.

[2] Vladimir Putin, 'A Plea for Caution from Russia: What Putin Has to Say to Americans about Syria', *The New York Times*, 11 September 2013, www.nytimes.com/2013/09/12/opinion/putin-plea-for-caution-from-russia-on-syria.html.

[3] Barack H. Obama, 'Remarks by President Obama in Address to the United Nations General Assembly', 24 September 2013, www.whitehouse.gov/the-press-office/2013/09/24/remarks-president-obama-address-united-nations-general-assembly.

Part I of this book makes the case for bringing 'foreign policy ideology' into legal scholarship, as the missing puzzle piece to explain the meaning and causes of 'exceptional' American international law (IL) policy. As a term of art in political science, American exceptionalism refers to the idea that history and values set the country qualitatively apart from other nations, which is the meaning followed in this book as the most historically grounded and analytically useful. In contrast, its increasing use in legal scholarship has more often narrowed the concept to pejorative shorthand for the American practice of seeking 'exceptions' to global legal rules, and therefore as uniformly detracting from the international rule of law. This meaning has not therefore drawn a strong distinction between policymakers' beliefs that the United States is normatively 'exceptional' and observations that the United States is an outlier in IL policy outcomes, instead classifying both under the exceptionalism umbrella. Isolating the causal effect of exceptionalist beliefs is necessary, however, when seeking to understand the rationale and thereby the apparent hypocrisy behind divergent US legal policy in specific cases. By tracing the influence of exceptionalist beliefs, while distinguishing from the influence of other variables, the 'exceptionalism' label can be saved from reduction to a tautological restatement of the primary observation that US policy is different.

This chapter disaggregates and unpacks three prevalent explanations for policy distinctiveness embedded in exceptionalist legal accounts. The first is relative political power and the consequences of its unequal distribution in the international system. The second is distinctive American jurisprudence, which redefines IL less as formalised rules and more as a policy process embedded in broader political and social contexts. The final explanation is cultural, where the contours of American IL policy are structured by a unique political culture forged across the nation's history. This comes closest to the insights of exceptionalist literature by identifying the importance of belief in American difference as a cause of divergent legal policies. Read together, these three explanations exhibit striking correlation, indicating the need for a fresh account that maps deep-seated connections between the ideas and interests shaping IL policy.

The Turn towards 'American Exceptionalism'

References to 'American exceptionalism' have become ubiquitous in discussions of US foreign policy, with its use increasing exponentially

over time.[4] In this process, the term has sometimes swollen into a catch-all explanation for every idiosyncrasy in American politics, in accordance with the ordinary dictionary definition of 'the condition of being different from the norm'.[5] More usefully defined, American exceptionalism is 'the notion that the United States was born in, and continues to embody, qualitative differences from other nations. Understanding other nations will not help in understanding it; understanding it will only mislead in understanding them.'[6] Seymour Lipset's leading work claimed that, properly used, the concept does not mean that 'America is better than other countries or has a superior culture', only that it is 'qualitatively different, that it is an outlier'.[7] Yet the idea has always been accompanied by a notion that the distinctive values of American political culture do offer a superior alternative to those of global counterparts.

The term resonates by virtue of the long history of exceptionalist analysis, often traced back to the nineteenth-century writings of Alexis de Tocqueville. A defining formulation was in John Winthrop's 1630 invocation that the American people 'shall be as a city upon a hill, the eyes of all people are upon us'.[8] The core of this strand of exceptionalism was a conviction that the founding of the American polity marked a break from the values and practices of the Old World. Politics in the European continent continued to be marked by relentless wars and the dominance of mercenary political interests over moral purpose. For Anatol Lieven, 'the most important root' of exceptionalist ideas was thus geographic and cultural separation from the destructive experiences of European war and

[4] McCoy found the term in national publications only 457 times for the twenty years up to 2000; 2,558 times during the next ten years; and approximately 4,172 times when he published these findings: Terrence McCoy, 'How Joseph Stalin Invented "American Exceptionalism"', *The Atlantic*, 15 March 2012, www.theatlantic.com/politics/archive/2012/03/how-joseph-stalin-invented-american-exceptionalism/254534/.

[5] Merriam-Webster, *Merriam-Webster Online Dictionary and Thesaurus,* www.merriam-webster.com/dictionary/exceptionalism. Notably, since this chapter was first drafted, the Merriam-Webster definition has been expanded to include a second meaning: '*also*: a theory expounding the exceptionalism especially of a nation or region'.

[6] Byron E. Shafer, 'American Exceptionalism' (1999) 2 *Annual Review of Political Science* 445, p. 446.

[7] Seymour M. Lipset, *American Exceptionalism: A Double-Edged Sword* (W. W. Norton & Co., 1996), p. 18. Lipset's well-known 'American creed' sets out the exceptional elements of political culture as 'liberty, egalitarianism, individualism, populism, and laissez-faire': p. 19.

[8] Cited in John F. Kennedy, '"City upon a Hill" Speech', 9 January 1961, www.jfklibrary.org/learn/about-jfk/historic-speeches/the-city-upon-a-hill-speech.

revolution.[9] The colonists of New England embraced a confluence of religious puritan values and secular enlightenment ideals of human progress, forging a worldview that America had a uniquely reforming role in its global relations and thereby an exceptional place in history. In his 1776 rallying cry for the American Revolution, Thomas Paine expressed the conviction that 'we have it in our power to begin the world over again'.[10]

Because this book focuses on the influence of foreign policy ideology over policymaking, the truth or otherwise of appeals to normative superiority is not relevant.[11] What matters is that there has been 'throughout American history a strong belief that the United States is an exceptional nation, not only unique but also superior among nations'.[12] As long as policymakers genuinely hold such beliefs, and employ them in formulating and garnering support for policy, then 'exceptionalism is a genuine and confirmedly empirical phenomenon'.[13] Former Secretary of State Madeleine Albright explicitly affirmed her belief in American exceptionalism and used it to underpin her frequent portrayal of the United States as 'the indispensable nation'.[14] Irrespective of the veracity of the concept, she remained equally aware of the term's political power. Acknowledging global allies' negative associations with the idea of 'American exceptionalism', she defended her invocation for its power 'to stir a sense of pride and responsibility among Americans, so that we would be less reluctant to take on problems'.[15] In other words, whatever the empirical basis for the claim, it is a concept with real political influence in directing political actions. Starkly divergent formulations have been propounded under the exceptionalist rubric, but the core belief that America is exceptional persists and shapes discourse at the highest levels.

[9] Anatol Lieven, *America Right or Wrong: An Anatomy of American Nationalism* (Oxford University Press, 2005), p. 30.

[10] Cited in Ronald W. Reagan, 'Ronald Reagan's Announcement for Presidential Candidacy', 13 November 1979, www.reaganlibrary.gov/11-13-79.

[11] For empirical research sceptical of the truth of exceptionalist claims see Joseph Lepgold & Timothy McKeown, 'Is American Foreign Policy Exceptional? An Empirical Analysis' (1995) 110 *Political Science Quarterly* 369.

[12] Trevor B. McCrisken, *American Exceptionalism and the Legacy of Vietnam: US Foreign Policy since 1974* (Palgrave Macmillan, 2003), p. 4.

[13] Shafer, 'American Exceptionalism', p. 446.

[14] Albright attributes the phrase to President Clinton from the period when she served as UN Ambassador: Madeleine K. Albright, *Madam Secretary: A Memoir* (Macmillan, 2003), p. 506.

[15] Ibid., p. 506.

Exceptionalist Analysis in Legal Scholarship

Legal scholarship has seized upon the concept with particular vigour, with critical assessments of American IL policy as beset by 'exceptionalism' becoming an article of faith. These accounts harness the pedigree and familiarity of the ideas in politics to shed light on the American practice of seeking 'exceptions' in the legal sphere – a case of 'international law for others and not for itself'.[16] However, treatments vary significantly in whether they find it necessary to analytically distinguish between the exceptionalist beliefs influencing decision-making processes and the outcomes said to comprise exceptions. An illustrative definition from a scholar and practitioner is in the memoirs of former US Ambassador-at-Large for War Crimes David Scheffer, which in part explore his difficulties in securing US support for establishment of the ICC. For Scheffer, 'the siren of exceptionalism enveloped the entire enterprise of the International Criminal Court on my watch'. His definition demonstrates how this single label encompasses multiple competing influences on policy:

> By 'exceptionalism' in the realm of international law, I mean that the United States has a tradition of leading other nations in global treaty-making endeavors to create a more law-abiding international community, only to seek exceptions to the new rules for the United States because of its constitutional heritage of defending individual rights, its military responsibilities worldwide requiring freedom to act in times of war, its superior economy demanding free trade one day and labor protection and environmental concessions the next, or just stark nativist insularity. We sometimes want the rest of the world to 'right itself' but to leave the United States alone because of its 'exceptional' character.[17]

It is clear that divergent IL policy shaped by 'constitutional heritage' fits squarely within a conventional exceptionalist explanation. On the other hand, legal exceptions designed to protect a 'superior economy' are not necessarily a product of beliefs in 'American exceptionalism' but, rather, the outcome of preponderant US power. Since this book is concerned with decision-making processes, it remains essential to isolate the effect of different exceptionalist beliefs from other causes of unique policy. Doing so has the potential to shed light on a spectrum of US IL policies that are more complex than binary support for or opposition to the international rule of law.

[16] James Crawford, 'International Law and the Rule of Law' (2003) 24 *Adelaide Law Review* 3, p. 8.

[17] David J. Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012), p. 165.

John Murphy's exceptionalist account sets out to address the apparent contradiction that, despite being the key proponent of the major twentieth-century international institutions, the United States has itself found it 'increasingly difficult to adhere to the rule of law in international affairs'.[18] He argues that US legal policy is shaped by attitudes of 'triumphalism, exceptionalism, and provincialism' that 'stand in the way of US support of the rule of law in international affairs'. This troika of concepts encompasses but is not limited to exceptionalist thinking, with 'exceptionalism' itself defined as the idea that 'the United States bears special burdens and is entitled to special privileges because of its status as the sole surviving superpower'.[19] Slaughter observes, however, that, despite the clear relevance of these related attitudes, Murphy's formulation has 'shed no light on the microfoundations of U.S. decisions to take specific positions in individual cases'.[20]

Hilary Charlesworth focuses more directly on beliefs, by defining exceptionalism to mean that 'while other states should comply with international legal norms, it is not appropriate to subject the United States to the same regime'. Charlesworth lists relevant beliefs to include that 'the United States is already an exemplary international citizen and its domestic legal system can be relied on to provide appropriate accountability and/or the expectation that international law will inevitably be used in a politicised way to discriminate against the United States'. For Charlesworth, such exceptionalism, whatever its constitutive beliefs, is antithetical to the rule of law.[21] Similarly, Natsu Saito defines exceptionalism in relation to 'uniquely American' IL policy as the belief that 'America is special, or exceptional, because it claims certain incontestable values; the possibility that its hegemony was consolidated and continues to be exercised at the expense of those values can be ignored in the name of a greater good.'[22] Only by overcoming the 'tremendous power of the

[18] John F. Murphy, *The United States and the Rule of Law in International Affairs* (Cambridge University Press, 2004), pp. 4 & 349.

[19] Ibid., p. 7. More detailed definitions are found in: John F. Murphy, 'The Quivering Gulliver: US Views on a Permanent International Criminal Court' (2000) 34 *International Lawyer* 45, p. 46.

[20] Anne-Marie Slaughter, 'Book Reviews: The United States and the Rule of Law in International Affairs' (2005) 99 *American Journal of International Law* 2, p. 516.

[21] Hilary Charlesworth, *No Country Is an Island: Australia and International Law* (University of New South Wales Press, 2006), p. 147.

[22] Natsu T. Saito, *Meeting the Enemy: American Exceptionalism and International Law* (New York University Press, 2010), p. 4.

narrative of American exceptionalism' can the United States contribute to strengthening the rule of law.[23]

More systematic analyses are sought in Michael Ignatieff's edited volume *American Exceptionalism and Human Rights*[24] and Harold Koh's article 'On American Exceptionalism',[25] each of which provides a definition and typology that have shaped broader legal scholarship. For Ignatieff, American exceptionalism is the uniquely contradictory 'combination of leadership and resistance' to IL that has produced the 'paradox of being simultaneously a leader and an outlier'.[26] Ignatieff identifies three types of policy outcome that he labels exceptionalism: *exemptionalism*, *double standards* and *legal isolationism*.[27] These are said to constitute an exceptional and harmful IL policy in that no other democracy engages in these practices to the same extent as the United States, or does so while simultaneously claiming to lead the global human rights movement.[28] In all three forms, Ignatieff groups together causal beliefs and policy outcomes under the single 'exceptionalism' banner.

Koh finds Ignatieff's typology 'both under- and over inclusive' in that it conflates some forms of exceptionalism and omits others.[29] Koh's own piece acknowledges the indeterminacy of exceptionalist ideas by calling on the United States to 'preserve its capacity for positive exceptionalism by avoiding the most negative features of American exceptionalism'.[30] Here, Koh adopts a four-part typology, listed 'in order of ascending opprobrium': *distinctive rights culture*, *different labels*, *the 'flying buttress' mentality*, and *double standards*.[31] The advantage of this formulation is in its distinguishing between unique IL practices according to whether underlying beliefs strengthen or weaken the rule of law. Invoking Gothic architectural imagery, the 'flying buttress' mentality, for instance, describes the idea that the United States frequently provides support for

[23] Ibid., p. 229.
[24] Michael Ignatieff, 'Introduction: American Exceptionalism and Human Rights', in Michael Ignatieff (ed.), *American Exceptionalism and Human Rights* (Princeton University Press, 2005).
[25] Harold H. Koh, 'On American Exceptionalism' (2003) 55 *Stanford Law Review* 1479.
[26] Ignatieff, 'Introduction', p. 1. Ignatieff writes about US human rights legal policy, but makes clear that his conclusions are relevant to US IL policy generally: p. 2.
[27] Ibid., pp. 3–11. Ignatieff cross-references Koh's piece for the concept and meaning of 'double standards': p. 7.
[28] Ibid., p. 4.
[29] Koh, 'On American Exceptionalism', p. 1483.
[30] Ibid., p. 1503.
[31] Ibid., p. 1483.

treaty regimes from outside the institution, while refusing to stand as a pillar within.[32] For Koh, this represents a threat to America's own interests far more than to the system of IL generally. It is only in the final form of policy that Koh identifies a challenge to IL, where the United States 'uses its exceptional power and wealth to promote a *double standard*'.[33]

The key question for present purposes remains: What specific factors cause America to exhibit contradictory IL policy behaviours, including the disjunct between expressions of commitment to the rule of law and policy outcomes? In particular, are these outcomes explained by exceptionalist beliefs properly so-called, thereby justifying adoption of the terminology? As with other legal accounts, the typologies of Ignatieff and Koh mask a range of competing and perhaps interrelated causes of distinctive behaviour such that the exceptionalism label sometimes does more to obscure than to clarify. Ignatieff identifies four possible explanations for distinctive US policy:

> a realist one, based in America's exceptional power; a cultural one, related to an American sense of Providential destiny; an institutional one, based in America's specific institutional organization; and finally a political one, related to the supposedly distinctive conservatism and individualism of American political culture.[34]

Of these, only the 'cultural' explanation directly encapsulates the influence of exceptionalism as the term is used here. The distinct elements are not mutually exclusive, however, such that exceptionalist beliefs indirectly shape each of the alternative explanations for policy uniqueness. Ignatieff recognises these linkages to the degree that American IL policy goes further than realism strictly requires in 'defending a mission, an identity, and a distinctive destiny as a free people'.[35] Cultural attachment to messianism is thereby a key explanation for the 'power dynamics and the distinctive ideology' underpinning different forms of 'exceptional' IL policy.[36]

[32] The analogy is Henkin's: 'In the cathedral of human rights the United States is more like a flying buttress than a pillar – choosing to stand outside the international structure supporting the international human rights system, but without being willing to subject its own conduct to the scrutiny of that system.' Louis Henkin, *How Nations Behave: Law and Foreign Policy* (Columbia University Press, 1979), p. 183.

[33] Koh, 'On American Exceptionalism', pp. 1486–7, original emphasis.

[34] Ignatieff, 'Introduction', p. 11.

[35] Ibid., pp. 13–14.

[36] Ibid., p. 16.

Institutional explanations likewise reveal much about unique IL outcomes, but ultimately depend on exceptionalist and ideological factors to explain policy contradictions. The power to develop and execute IL policy resides primarily with the US executive, but it is institutionally divided between the branches of federal government and subject to the prerogatives of the various states. The '*invitation to struggle* for the privilege of directing American foreign policy'[37] means that IL policy is determined not merely by a competitive market of ideas across government, but through amplification or suppression of certain ideas via 'decentralized and fragmented political institutions'.[38] Citing institutional factors, however, merely begs the question: *What* divergent beliefs distinguish policymakers competing for influence across divided government? Within Ignatieff's volume, Andrew Moravcsik identifies the roots of US failure to ratify key human rights treaties in 'senatorial suspicion of liberal multilateralism' among a minority of senators 'disproportionately representative of the conservative southern and rural Midwestern or western states'.[39] Although institutional veto points such as 'supermajoritarian treaty ratification rules in the Senate' shape legal policy outcomes,[40] this book addresses the more fundamental content of ideology itself. In this sense, exceptionalist beliefs of legal policymakers remain prior to institutional explanations for unique policy preferences.

To his typology, Koh adds a fifth positive element of *exceptional global leadership*, which comes closer to capturing the variable influence of exceptionalist ideas on American IL policy.[41] He concludes by posing a choice between an American exceptionalism that is 'power-based' and disregards IL and 'good exceptionalism'[42] that is 'norm-based', showing deference to 'universal values of democracy, human rights, and the rule of law'.[43] Understanding the variable influence of exceptionalism confirms that any useful typology must be built not upon policy outcomes but, rather, on the content of competing exceptionalist beliefs guiding policymakers' decisions and the ways these interact with power. Returning to the questions posed by this book, these illustrative legal

[37] Edward S. Corwin, *The President: Office and Powers 1787–1957* (New York University Press, 1957), p. 171, emphasis added.
[38] Andrew Moravcsik, 'The Paradox of US Human Rights Policy', in Michael Ignatieff (ed.), *American Exceptionalism and Human Rights* (Princeton University Press, 2005), p. 150.
[39] Ibid., p. 187.
[40] Ibid., p. 150.
[41] Koh, 'On American Exceptionalism', p. 1487.
[42] Ibid., p. 1501.
[43] Ibid., pp. 1526–7.

accounts emphasise the need to identify more sharply underlying exceptionalist beliefs and their interaction with other causes of distinctive IL policy.

Sources of Unique American International Law Policy

Three leading explanations for the outlier status of American IL policy will be subjected to closer interrogation in order to refine exceptionalist legal treatments. The first is that hegemonic US power creates capabilities and incentives to reshape or evade IL. This is not a product of exceptionalist beliefs but, rather, a manifestation of general principles of great power behaviour. The second is that distinct institutionalised jurisprudence influences the American approach to IL. Specifically, ingrained in the academy and practitioners are conceptualisations of IL as a purposive process of policymaking, rather than formalised rules. Finally are cultural explanations that directly identify the role of exceptionalist ideas in shaping American engagement with IL. The possible effect of these ideas is to alter American commitment to legal rules in ways directly influenced by national political culture. In analysing these common explanations, the focus is on both isolating the independent influence of each variable and mapping how they relate to one another as complementary causes of distinctive legal policy.

Power-Based Explanations: Hegemonic International Law

In the year prior to the 2003 Iraq War, Robert Kagan surveyed divided transatlantic approaches to IL to conclude that 'Americans are from Mars and Europeans are from Venus'.[44] Kagan's thesis proved especially significant during the Bush 43 administration, where it was widely circulated and read in 2002. Then senior administration lawyer Jack Goldsmith wrote that the 'essay gave structure to intuitions that top administration officials already possessed'.[45] For Kagan, Europeans evinced a preference for 'a world where strength doesn't matter, where

[44] Robert Kagan, 'Power and Weakness' (2002) June–July *Policy Review* 3, p. 3. For a fuller treatment see also Robert Kagan, *Of Paradise and Power* (Vintage Books, 2004).

[45] Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (W. W. Norton & Co., 2007), pp. 126–7. Kagan is also cited approvingly by the former Deputy Assistant U.S. Attorney General in the Office of Legal Counsel, Department of Justice during the Bush 43 administration: John C. Yoo, *War by Other Means: An Insider's Account of the War on Terror* (Atlantic Monthly Press, 2006), p. 47.

international law and international institutions predominate, where unilateral action by powerful nations is forbidden, where all nations regardless of their strength have equal rights and are equally protected by commonly agreed-upon international rules of behaviour'.[46] The success of the European Union (EU) in ending centuries of interstate conflict encouraged faith in this formula as the answer to a more peaceful world. The United States, in contrast, continued to perceive a 'Hobbesian world where international laws and rules are unreliable and where true security and the defence and promotion of a liberal order still depend on the possession and use of military might'.[47] For Kagan, 'these differences in strategic culture do not spring naturally from the national characters of Americans and Europeans'; rather, they emerge from underlying power differentials.[48] Tracing shifts in global power over 200 years:

> When the United States was weak, it practiced the strategies of indirection, the strategies of weakness; now that the United States is powerful, it behaves as powerful nations do. When the European great powers were strong, they believed in strength and martial glory. Now, they see the world through the eyes of weaker powers.[49]

The disparity of transatlantic power has accordingly lain behind 'a broad ideological gap' in which 'material and ideological differences reinforce one another' to crystallise in irreconcilable conceptions of IL.[50]

The decisive role of preponderant global power provides the first explanation for distinctive American IL policy. Lassa Oppenheim argued over a century ago that, without a functioning balance of power at the global level, 'an overpowerful State will naturally try to act according to discretion and disobey the law', thereby becoming 'omnipotent'.[51] Hedley Bull likewise recognised a mutual relationship between the efficacy of the balance of power and that of IL.[52] For Hans Morgenthau, the condition of international anarchy[53] meant that enforcement of IL was

[46] Kagan, 'Power and Weakness', pp. 10 & 15.
[47] Ibid., p. 3.
[48] Ibid., p. 5.
[49] Ibid., p. 6.
[50] Ibid., p. 6.
[51] Lassa Oppenheim, 1912, cited in Hans Joachim Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (Knopf, 1973), p. 274.
[52] Hedley Bull, *The Anarchical Society* (Macmillan Press, 1995), pp. 125–6.
[53] In the IR sense of an absence of global government rather than a world in chaos.

ultimately left to 'the vicissitudes of the distribution of power between the violator of the law and the victim of the violation'.[54] Morgenthau thus recognised that applying a legal 'positivist' account 'cannot but draw a completely distorted picture of those rules which belong in the category of *political* international law'.[55] In consequence, 'the rights and duties established by them appear to be clearly determined, whereas they are subject actually to the most contradictory interpretations'.[56] This expresses political realism's basic view of institutions as 'epiphenomenal': a mere expression of power distribution between states and of their self-interested behaviour. IL has an instrumental value when serving state interests, but any general commitment to its terms is anomalous.[57] The bulk of IL may even command voluntary compliance by virtue of its useful administrative functions, but in cases where IL has a direct bearing on relative power between states, especially in matters of national security, power and not law determines compliance.

The most influential modern account in these terms is Jack Goldsmith and Eric Posner's *The Limits of International Law*.[58] The authors' aim is 'to explain how international law works by integrating the study of international law with the realities of international politics'. Specifically, they theorise 'that international law emerges from states acting rationally to maximise their interests, given their perceptions of the interests of other states and the distribution of state power'.[59] Thus, 'the best explanation for when and why states comply with international law is not that states have internalized international law, or have a habit of complying with it, or are drawn by its moral pull, but simply that states act out of self-interest'.[60] In this view, the expectation that the United States will act in the same way as every other state is implausible for expecting US policymakers to acquiesce to the legal fiction of sovereign equality. In earlier writing defending an American 'double standard', Goldsmith noted: 'The explanation is not subtle. The United

[54] Morgenthau, *Politics Among Nations*, p. 290.
[55] Hans Joachim Morgenthau, 'Positivism, Functionalism, and International Law' (1940) 34 *American Journal of International Law* 260, p. 279, emphasis added.
[56] Ibid., p. 279.
[57] John J. Mearsheimer, 'The False Promise of International Institutions' (1994) 19 *International Security* 5, p. 13.
[58] Jack Goldsmith & Eric A. Posner, *The Limits of International Law* (Oxford University Press, 2005).
[59] Ibid., p. 3.
[60] Ibid., p. 225.

States declines to embrace international human rights law because it can.'[61]

Anu Bradford and Posner apply this perspective to the exceptionalist literature and conclude that, since all powerful states claim the mantle of exceptionalism, such beliefs cannot be treated as the cause of distinctive policies: 'great powers typically support a view of international law that embodies their own normative commitments but is presented as a universal set of commitments'.[62] Exceptionalism thus defined is 'the view that the values of one particular country should be reflected in the norms of international law' by virtue of being 'a model or leader in international relations because of its unique attributes'.[63] Where the United States, Europe and China have each translated great power in this way, the 'criticism of exceptionalism, then, is just a criticism of power, or the use of power to achieve ends of which the critic disapproves'.[64] Exceptionalist beliefs, of American, European and Chinese IL policy, are in the end considered epiphenomenal.

Accounts of power being systematically transformed into the norms of the legal system can be refined yet further by specifying how *hegemonic* power specifically shapes distinctive IL policy. Ian Brownlie defined the 'hegemonial approach' to lawmaking as 'an approach to the sources which facilitates the translation of the difference in power between States into specific advantages for the more powerful actor'. Doing so maximises the hegemonic state's ability to gain 'legal approval', while minimising occasions when approval is 'conspicuously withheld'.[65] The power to fashion unique privileges out of general rules creates incentives for a hegemon to blunt their *constraining* effect upon itself while enhancing their value as *enabling* instruments that facilitate strategic objectives. Doing so challenges any assumption that binding a hegemon to legal rules protects the international order against imperialism. Rather, in the words of ICJ Judge Charles De Visscher, 'the great powers after imprinting a definite

[61] Jack Goldsmith, 'International Human Rights Law & the United States Double Standard' (1998) 1 *Green Bag* 365, p. 371.
[62] Anu Bradford & Eric A. Posner, 'Universal Exceptionalism in International Law' (2011) 52 *Harvard International Law Journal* 1, p. 12.
[63] Ibid., p. 7.
[64] Ibid., p. 53.
[65] Ian Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations* (Martinus Nijhoff Publishers, 1998), p. 33.

direction upon a usage make themselves its guarantors and defenders'.[66]

Wilhelm Grewe speculated in the immediate post–Cold War period whether 'we have entered a new age of United States hegemony' in which the United States would play a distinctive role shaping the global legal order.[67] The weight of evidence strongly suggests as much, with broad and frequent system-wide tasks providing unique opportunities to legally entrench American interests. American hegemony has thereby manifested not as control over every legal development but, rather, as the United States becoming 'the one against whose ideas regarding the system of international law all others debate'.[68] At times hegemonic impulses have translated into explicit US privileges under the law, as most conspicuously achieved in its designation as one of the five permanent members of the UNSC (P5). However, the most contentious debates over American IL policy relate to its de facto exceptional legal status rather than the limited cases where it is accorded *de jure* privileges. Michael Byers notes two strategies through which the United States has achieved hegemonial lawmaking within the existing framework of IL. Firstly, laws may sanction behaviour that is only practically available to a limited number of states. Preponderant military power over any other state or alliance means that broad legal rights may in practice become '*de facto* exceptionalism' exercisable only by the United States.[69] A second form of hegemonial lawmaking is where rules remain deliberately indeterminate, 'enabling power and influence to determine where and when' actions are legal, thus deflecting criticism under the guise of legality.[70] Precise 'rules' enable *ex ante* decisions about acceptable conduct, whereas creating vague 'standards' enables *ex post* definitions of legality.[71]

[66] Cited in Oscar Schachter, 'New Custom: Power, Opinio Juris and Contrary Practice', in Jerzy Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (Kluwar Law International, 1996), p. 531.

[67] Wilhelm G. Grewe, *The Epochs of International Law: Translated and Revised by Michael Byers* (Walter de Gruyter, 2000), p. 703.

[68] Shirley V. Scott, 'The Impact on International Law of US Non-Compliance', in Michael Byers and Georg Nolte (eds.), *United States Hegemony and the Foundations of International Law* (Cambridge University Press, 2003), pp. 450–1.

[69] Michael Byers, 'Preemptive Self-Defense: Hegemony, Equality and Strategies of Legal Change' (2003) 11 *The Journal of Political Philosophy* 171, p. 184.

[70] Ibid., p. 180.

[71] Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter & Duncan Snidal, 'The Concept of Legalization' (2000) 54 *International Organization* 401, p. 413.

The logic of hegemonial lawmaking cuts both ways, shaping the interests of states forced to adapt to conditions of international hegemony. Those opposing preponderant American influence have a vested interest in an international legal system that diminishes political advantages. An overriding incentive thus exists to structure international legal rules and institutions in accordance with 'counter-hegemonic' interests.[72] In this vein, Martti Koskenniemi persuasively argues that the shape of the international legal system represents a form of 'hegemonic contestation' in which participants aim to 'make their partial view of . . . [legal doctrines] appear as the total view, their preference seem like the *universal preference*'.[73] As such, the 'fight for an international Rule of Law is a fight against politics'.[74] Here, the rule of law will be achieved through the levelling of international power via rules that are nominally universal and therefore place constraints on states that increase in a magnitude commensurate with geopolitical power. Counter-hegemonic dynamics effectively corroborate the arguments of those US scholars who perceive 'universal' legal rules as a challenge to American political power. The validity of Kagan's insight into the nexus between law and power is therefore highly persuasive even for those critical of his normative conclusions.[75]

Nevertheless, returning to the puzzle of contradictory US IL policy, Kagan's argument equally illustrates the explanatory limits of a purely power-based explanation for US IL policy. Kagan relies on the problematic assumption that divergent US and EU legal policies correspond to a binary opposition between American political interests and the ideal of the rule of IL. Kagan, for example, characterises European policy as being 'all about subjecting inter-state relations to the rule of law', whereas the United States chooses to operate outside of the rule of law.[76] It is the

[72] In contrast to the more established literature on 'hegemonic international law'. For use of the term in relation to the ICC see José Manuel, 'Defensive and Oppositional Counter-Hegemonic Uses of International Law: From the International Criminal Court to the Common Heritage of Mankind', in Boaventura de Sousa Santos & César A. Rodríguez-Garavito (eds.), *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge University Press, 2005).

[73] Martti Koskenniemi, 'International Law and Hegemony: A Reconfiguration' (2004) 17 *Cambridge Review of International Affairs* 197, p. 199, original emphasis.

[74] Martti Koskenniemi, 'The Politics of International Law' (1990) 1 *European Journal of International Law* 4, p. 5.

[75] Kalypso Nicolaidis, 'The Power of the Superpowerless', in Tod Lindberg (ed.), *Beyond Paradise and Power: Europeans, Americans and the Future of a Troubled Partnership* (Routledge, 2005), p. 94.

[76] Kagan, 'Power and Weakness', p. 17, quoting Steven Everts (2001).

claim of this book, however, that the evidence instead points to legal policymakers on both sides interpreting legal principles through political interests, such that the concept of law itself is contested. There are clearly intimate connections between preponderant power and the 'exceptional' outcomes of American IL policy, which are influenced by incentives to follow certain patterns of behaviour. But at the level of analysing processes of IL policy decision-making, power is indeterminate as an explanation for the positions taken in domestic debates between opposing legal policymakers, each claiming to advance American national interests. Explanation at the level of political realism 'discounts the influence of particular normative values, history, and culture, all of which shape the attitudes of a country's leaders toward international law and foreign affairs'.[77] Power alone cannot explain observed contradictions in policy in circumstances where US legal policymakers express fidelity to the rule of law even while giving contradictory accounts of how this advances political interests.

Institutional Explanations: Policy-Oriented Jurisprudence

A second common explanation for distinctive American IL policy is institutionalised jurisprudence in the US academy and practice, which has a causal effect distinct from either relative power or cultural beliefs. The most distinguishing feature of American IL jurisprudence is a greater scepticism toward conceptions of IL isolated from social and political context.[78] American international legal jurisprudence is instead strongly influenced by various 'policy-oriented' approaches, which originated in response to perceived limitations in legal positivism and have grown into the dominant IL jurisprudence in American scholarship and practice. The most well-known is the distinctive New Haven School, but elaborate variants abound and continue to be fiercely debated.[79] The precise formulation is less important than the general

[77] John E. Noyes, 'American Hegemony, U.S. Political Leaders, and General International Law' (2004) 19 *Connecticut Journal of International Law* 293, pp. 294 & 297.

[78] On historical stages of American IL jurisprudence see David Kennedy, 'The Twentieth-Century Discipline of International Law in the United States', in Austin Sarat, Bryant Garth & Robert A. Kagan (eds.), *Looking Back at Law's Century* (Cornell University Press, 2002).

[79] See Harold H. Koh, 'Is There a "New" New Haven School of International Law?' (2007) 32 *Yale Journal of International Law* 559.

observation that 'policy-oriented law is, by now, an accepted orthodoxy in the United States'.[80]

The chief innovation is to approach IL as a form of policymaking, while rejecting the plausibility of treating IL as a body of value neutral rules. Rules represent 'merely the accumulated trends of past decisions' stripped of the context of their creation and their connection to contemporary circumstances.[81] Koskenniemi's account of this jurisprudence identifies the 'one theme' connecting different approaches as a 'deformalized concept of law'. By this is meant that IL has not been seen as

> merely formal diplomacy or cases from the International Court of Justice but that . . . it had to be conceived in terms of broader political processes or techniques that aimed towards policy "objectives." A relevant law would be enmeshed in the social context and studied through the best techniques of neighboring disciplines.[82]

David Kennedy documents the rise of this approach across the twentieth century, where it was the proponents of IL themselves who

> slowly abandoned the doctrinal purity and institutional isolation characteristic of the pre-war generation . . . They imported into public international law precisely the realist attack on doctrinal formalism which the pre-war generation had resisted. They rejoiced as the discipline lost its coherence – renaming it 'transnational' law. These men were also successors to the progressive faith in international administration – and they brought to the United Nations their faith in New Deal federal reform.[83]

The conception built upon the work of American legal realism, which had aimed to penetrate the legal formalist myth that law was a self-contained body of rules by which judges could produce determinate outcomes.[84] Most significant, for present purposes, is recognition of the relationship between decision-makers and law: 'legal history could not simply chronicle the emergence and development of legal doctrines, nor treat them largely as intellectual insights divorced from the actual world

[80] Rosalyn Higgins, *Themes and Theories: Selected Essays, Speeches, and Writings in International Law* (Oxford University Press, 2009), p. 20.
[81] Ibid., p. 101.
[82] Martti Koskenniemi, *The Gentle Civilizer of Nations 1870–1960* (Cambridge University Press, 2001), pp. 478–9.
[83] David Kennedy, 'A New Stream of International Law Scholarship' (1988) 7 *Wisconsin International Law Journal* 1, p. 4.
[84] See Oliver Wendell Holmes, Jr, *The Common Law* (Little, Brown and Company, 1881), p. 1.

in which they occurred'.[85] Here the compatibility with hegemonial dynamics becomes clear in the inherent 'tension between the [legal] realist understanding of law as an instrument of policy and the legalist view of law as a constraint on policy'.[86]

The New Haven School of Myres McDougal and Harold Lasswell aimed to move legal realism beyond mere critique toward a methodology that made these insights '*operational in a systematic way*'.[87] 'Law' is recast as a *process* in which legality is conditional upon attaining social, moral and political goals through 'authoritative and effective decision-making'. Policy decisions are 'authoritative' in cases that advance 'world public order' and 'human dignity',[88] while they are 'effective' when backed by enforcement mechanisms and therefore 'controlling'.[89] In each case, the interests and values shaping foreign policy decisions more generally are imbued with a legal function, of providing predetermined criteria that permit legal subjects to organise their actions with known consequences. With the twin criteria of authority and control, the policy-oriented approach aims to overcome a misperception in International Relations (IR) and IL scholarship that 'law is concerned with authority (but not power) and that international relations is concerned with power (but not authority)'.[90] Decisions that lack one or both of the elements of authority and efficacy are distinguished from law and remain merely political acts.

Siegfried Wiessner and Andrew Willard advocate the merits of policy jurisprudence by drawing a contrast with a perceived 'counterimage' of legal positivists, who 'gain no help from their theory when asked what the law "should" be. Indeed, their theory eschews any creative or prescriptive

[85] Stephen Diamond, 'Legal Realism and Historical Method: J. Willard Hurst and American Legal History' (1979) 77 *Michigan Law Review* 784, p. 785.

[86] Simon Chesterman, 'An International Rule of Law?' (2008) 56 *American Journal of Comparative Law* 331, p. 358, n. 150.

[87] Richard A. Falk, 'Book Reviews: *Studies in World Public Order* by M. S. McDougal, New Haven: Yale University Press, 1960, pp. xx, 1058' (1961) 10 *American Journal of Comparative Law* 297, p. 299, original emphasis.

[88] Myres S. McDougal & Michael W. Reisman, 'International Law In Policy-Oriented Perspective', in Ronald St J. MacDonald & Douglas M. Johnston (eds.), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine, and Theory* (Martinus Nijhoff Publishers, 1983), pp. 112–14.

[89] Harold D. Lasswell & Myres S. McDougal, *Jurisprudence for a Free Society: Studies in Law, Science, and Policy* (Martinus Nijhoff Publishers, 1992), p. 190.

[90] Higgins, *Themes and Theories*, p. 106.

function.'[91] This is an influential retort among American legal policy-makers who have portrayed positivist rules as no less politicised than the US policy decisions they seek to constrain. John Bellinger here draws a distinction between the Anglo-American common law tradition and the civil law tradition of continental Europe. On the one hand, American jurisprudence is inclined toward 'pragmatism and scepticism':

> we probe the purpose and function of law, examine it through the lenses of other disciplines such as economics and sociology, weigh its costs against its benefits, test its flexibility against the facts at hand, judge its value by its effectiveness, and seek, where we can, an equitable solution.[92]

Law must therefore be devised to reflect 'the virtues that have been drummed into us'. On the other hand, Bellinger acknowledges that such claims give rise to suspicion from Continental jurisprudence that American IL policy is 'opportunistic or, worse, self-serving'. Nevertheless, to American lawyers, the European conception is marked by 'excessive formalism, a doctrinal inflexibility, and an unwillingness to acknowledge that different paths may lead to the same end'.[93] Although Bellinger depicts worldviews uniting the common law tradition, the divergence is one more specific to American legal culture. Former ICJ President Rosalyn Higgins' observation that conflicts between 'American' and 'British' views 'now permeate the entire fabric of international law' precisely mirrors Bellinger's comparison with Continental Europe.[94]

A concrete example of a practitioner's defence in these terms comes from Abraham Sofaer, who served as Legal Adviser to the Department of State under Presidents Reagan and Bush 41. Sofaer wrote: 'Many, if not most international lawyers, have reacted to the need to use force in self-defense and in the defense of humanitarian rights by seeking to preserve what they consider the purity of international law.' Sofaer was responding to an article by Professor Tom Franck entitled 'Break It, Don't Fake It', which argued that the United States should have explicitly breached IL when it failed to obtain UN authorisation for the 1999 Kosovo

[91] Siegfried Wiessner & Andrew R. Willard, 'Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity' (1999) 93 *American Journal of International Law* 316, p. 320.

[92] John B. Bellinger III, 'Reflections on Transatlantic Approaches to International Law' (2007) 17 *Duke Journal of Comparative and International Law* 513, p. 518.

[93] Ibid., p. 519.

[94] Higgins, *Themes and Theories*, pp. 17 & 21.

intervention, rather than trying to fit it into existing doctrine.[95] Franck's rationale was that, by so doing, the purity and therefore the integrity of IL would be preserved. To this, Sofaer responded:

> It would be like people in the 1930s dealing with Constitutional issues in the U.S. saying 'Don't make up new constitutional law, it's going to mess up our Constitution. Just break the Constitution, violate the Constitution, with no explanation, and that way we will keep the purity of this rigid Constitution that the pre-New Deal Supreme Court was insisting on applying. Everything will be fine someday when we all return to the purity of the intended words.'[96]

Policy jurisprudence sees such expunging of policy from law as chimerical, and instead aims to make law conform to the *right* sort of policy. The proper distinction for the policy-oriented approach is that 'the terms "political dispute" and "legal dispute" refer to the decision-making process which is to be employed in respect of them, and not to the nature of the dispute itself'.[97]

Cases of divergent international legal decision-making reinforce the significance of this institutionalised jurisprudence as an explanation for contradictions in IL policy. Yet, it is also clear that the jurisprudence remains profoundly intertwined with explanations from both power and culture, in ways not always fully acknowledged. IR realism and American legal realism assume in common that law is a '"means to social ends and not … an end in itself"; a "distrust" of "traditional legal rules and concepts," as a description of what the system actually does; and an "insistence on evaluation of any part of the law in terms of its effects."'[98] Shared assumptions buttress the undeniable compatibility between hegemonial lawmaking and policy jurisprudence, such that it is problematic to view either in isolation as a causal explanation for unique policy outcomes. Specific policy-oriented theories developed across the twentieth century inevitably reflected prevailing national interests and, in particular, the long fixation of US foreign policy on Cold War politics. In this process, American lawyers 'increasingly conceived international law from the perspective of a world power, whose leaders have "options" and routinely choose among alternative

[95] Thomas M. Franck, 'Break It, Don't Fake It' (1999) 78 *Foreign Affairs* 116.
[96] Abraham D. Sofaer, 'The International Court of Justice and Armed Conflict' (2003) 1 *Northwestern Journal of International Human Rights* i, p. vii.
[97] Higgins, *Themes and Theories*, p. 34.
[98] Karl N. Llewellyn, cited in Jonathan D. Greenberg, 'Does Power Trump Law?' (2003) 55 *Stanford Law Review* 1789, p. 1805.

"strategies" in an ultimately hostile world'.[99] For some accounts of the New Haven jurisprudence, 'world public order' was effectively defined to coincide exactly with the interests of the Western Bloc.[100] More generally, a well-founded criticism is that powerful states are able to use this jurisprudence to self-judge their parochial interests as 'law'. The clear prescriptions of legal rules and the decisions of international courts are liable to be set aside for inconsistency with claimed 'fundamental goals of the international community'.[101]

Hedley Bull thus rejected the imprecision of the policy-oriented approach as liable to render law unintelligible.[102] Likewise, the former president of the ICTY declared the tribunal 'bound only by international law' to the exclusion of 'meta-legal analyses'. Accordingly, 'a policy-oriented approach in the area of criminal law runs contrary to the fundamental customary principle *nullum crimen sine lege*'.[103] Professor Oscar Schachter levelled a particularly strident critique while sitting on a conference panel with McDougal, warning that the approach produced a 'unilateralist version of policy jurisprudence in which law plays a secondary role and policy is determined by the [American] perception of self-interest'.[104] On the same panel, Professor Richard Falk wryly described the 'miraculous' capacity of McDougal's jurisprudence to coincide with US foreign policy interests.[105] Even Higgins, as a strong advocate of the jurisprudence, accepts that there is 'a very fine line between insisting that decisions be taken in accordance with the policy objectives of a liberal, democratic world community and asserting that *any* action taken by a liberal democracy against a totalitarian nation is lawful'.[106] Modern exponents have applied policy-oriented analysis to support the legality of the most prominent examples of American IL policy diverging from orthodox interpretations of IL. These include

[99] Koskenniemi, *The Gentle Civilizer*, p. 475.
[100] See Richard A. Falk, *Legal Order in a Violent World* (Princeton University Press, 1968), pp. 86–7.
[101] Michael W. Reisman, *Nullity and Revision: The Review and Enforcement of International Judgements and Awards* (Yale University Press, 1971), p. 562.
[102] Bull, *The Anarchical Society*, pp. 123–4 & 153–4.
[103] 'No crime without law.' *Prosecutor* v. *Drazen Erdemovic (Appeal Judgment), Separate and Dissenting Opinion of Judge Cassese* (1997) IT-96–22-A, par. [11].
[104] Oscar Schachter, 'McDougal's Jurisprudence: Utility, Influence, Controversy: Remarks' (1985) 79 *American Society of International Law Proceedings* 266, p. 273.
[105] Richard A. Falk, 'McDougal's Jurisprudence: Utility, Influence, Controversy: Remarks' (1985) 79 *American Society of International Law Proceedings* 266, p. 281.
[106] Higgins, *Themes and Theories*, p. 52.

arguments for the legality of the 2003 Iraq War[107] and using policy analysis to challenge the legal definition of torture.[108] In all such cases, jurisprudence is both distinct from and yet correlates with American hegemonic power, as presumptive causes of unique IL policy.

Cultural Explanations: Exceptionalist Beliefs

The final causal explanation embedded in 'exceptionalist' accounts is the role of culturally specific beliefs about America's unique role in the international legal system. These explanations come closest to capturing the exceptionalist concept, in the sense of distinctive practices drawn not from hegemonic power or institutionalised jurisprudence but from beliefs and identity. John Murphy's characterisation of 'exceptional' American legal practice is sceptical of Kagan's conclusion that distinct approaches to IL are fundamentally rooted in transatlantic differences in power and weakness. Rather, sovereignty limitations created by the EU 'are simply inconceivable' to most Americans, who possess 'an historical distrust of power, especially centralized power'.[109] Here, culturally based beliefs remain a principle explanation for distinctive IL policy.

One of the most enlightening interventions from this perspective is an argument by Jed Rubenfeld that a primary source of exceptional IL policy is America's distinctive constitutional democracy and the divergent transatlantic lessons of WWII.[110] For Continental Europe, WWII represented the perverse outcome of unrestrained popular will and confirmed for European leaders that national politics must be answerable to the explicitly antinationalist and antidemocratic higher authority of IL. In contrast, the lesson for America was confirmation that its nationalism, in the form of popular sovereignty, was the surest guardian of individual liberty. Far from seeking to curb American popular will, the post-war

[107] For a contrary argument from a policy-oriented approach see Michael W. Reisman & Andrea Armstrong, 'The Past and Future of the Claim of Preemptive Self-Defense' (2006) 100 *American Journal of International Law* 525.

[108] Tai-Heng Cheng, *When International Law Works* (Oxford University Press, 2012), pp. 227–48.

[109] Murphy, *The US and the Rule of Law*, p. 354.

[110] Jed Rubenfeld, 'Commentary: Unilateralism and Constitutionalism' (2004) 79 *New York University Law Review* 1971; Jed Rubenfeld, 'The Two World Orders', in Georg Nolte (ed.), *European and US Constitutionalism* (Cambridge University Press, 2005). Koh describes Rubenfeld's views as 'a powerful statement' of a 'deeply rooted American culture of unilateralism and parochialism': see 'On American Exceptionalism', p. 1495, n. 52.

years saw a US strategy to extend its democratic values outward and 'Americanise' the rest of the world.[111] The contradiction entailed in that lesson, however, was that legal regimes moderating the politics of other states had no legitimate claim over the United States itself. Henceforth, the United States became both the principal architect of IL and its most conspicuously reluctant subject.

Rubenfeld traces these formative experiences into two distinct understandings of how constitutionalism guards liberty. For European states, 'international constitutionalism' perceives supranational legal institutions transcending state sovereignty as the ultimate guardians of liberty. Power is deliberately transferred from the control of popular sovereignty to 'international experts – bureaucrats, technocrats, diplomats, and judges – at a considerable remove from popular politics and popular will'.[112] In contrast, American 'democratic constitutionalism' identifies the legitimacy of constitutional law in its foundations as a special act of popular lawmaking. These beliefs reinforce distinctive American jurisprudence and its scepticism toward the possibility of a higher law divorced from democratic political foundations.[113] Henry Nau concurs that, from 'the European point of view, law must be inclusive of all cultures and check democratic as well as non-democratic states'. In contrast, for Americans, 'democratic politics legitimates law'. For Nau, this explains much of the divergence in beliefs about the binding authority of the UN in the 2003 Iraq invasion relative to the democratic legitimacy of US policy.[114] Intentionally undemocratic foundations of IL are therefore illegitimate fetters on American constitutional government.

Rubenfeld's argument is especially significant for understanding the meaning of hypocrisy in US IL policy, as considered in this book. He suggests that, because European international constitutionalism dominates global conceptions of IL, the United States is relegated to being an outlier consistent with its exceptionalist beliefs. In this, Rubenfeld agrees with Kagan's conclusion that, although US actions are exceptional, they are not thereby hypocritical in the proper sense of that word. In Paul Kahn's terms, the price of US resistance to legal constraints is that: 'To the rest of the world, this is bound to look hypocritical. In the

[111] Rubenfeld, 'Commentary', p. 1986.
[112] Ibid., p. 1987.
[113] Ibid., p. 1997.
[114] Henry Nau, *Perspectives on International Relations: Power, Institutions, and Ideas* (CQ Press, 2014), p. 266.

United States, it will look like an insistence on democratic self-government.'[115] The argument does not deny the clear correlation between exceptional conceptions of IL and their facilitation of exceptional American power since WWII. However, self-interest is not determined objectively but is received through a nation's 'history, culture, values, and worldviews'.[116] Two forces have thus guided American IL policy: a 'high-minded' messianic impulse to spread American constitutional rights and a 'geopolitical' motive to construct an order augmenting American economic and political power. Both motives are united in the objective of establishing a new global order replicating American values.[117] The convergence of two distinct causal explanations thus resolves potential hypocrisy in the decision-making of US IL policymakers.

Rubenfeld's argument raises questions about whether exceptionalist explanations provide insights beyond the influence of power. Robert Delahunty accepts that the explanatory value of Rubenfeld's argument is 'incontestable', particularly in relation to the depth of commitment of opposing sides to their worldview.[118] Nevertheless, he concludes that more orthodox explanations, such as that propounded by Kagan, retain equivalent or greater explanatory power, while eschewing complex historical narratives.[119] The value of the richer analysis lies in a different analytical purpose, however, of identifying the contested meanings of 'the international rule of law', as understood by American policymakers and as they shape decision-making processes. Delahunty's conclusions confirm an abstract theory of the fundamental dynamics of states' IL policies, making it unnecessary to unpack the concept of 'national interests'. However, when the objective is to develop a framework for understanding the IL policy of a named state in specific policy contexts, then an abstract concept of national interest is simply inadequate. The national interest is a dependent concept, requiring specification of both perceived objectives and a state's strategy for advancing them through IL. Upholding *America's* national interest, as defined by Rubenfeld, entails

[115] Paul W. Kahn, 'American Exceptionalism, Popular Sovereignty, and the Rule of Law', in Michael Ignatieff (ed.), *American Exceptionalism and Human Rights* (Princeton University Press, 2005), p. 221.
[116] Rubenfeld, 'Commentary', p. 1984.
[117] Ibid., pp. 1987–8.
[118] Robert J. Delahunty, 'The Battle of Mars and Venus: Why Do American and European Attitudes toward International Law Differ?' (2006) 4 *Loyola University Chicago International Law Review* 11, pp. 36–7.
[119] Ibid., p. 38.

constructing a system of IL that reproduces distinct American constitutional values, while using those same values to shield American domestic law against the world. Each account is equally valid and compatible. But, just as a parsimonious approach best explains abstract motivations, it is weakest in providing an ideographic account of interests as they actually guide policymakers.

Chapter Conclusion

The most striking features of flourishing 'exceptionalist' legal scholarship are the multiplicity of causal explanations embedded in the central concept and the analytical potential for mapping connections between them. Although legal applications engage with the broader literature, they have tended to categorise any unique cause and outcome of American legal policy as 'exceptional'. Questioning this use of language is no mere terminological dispute since it weakens the insights offered by exceptionalist ideas: believing that America is guided by exceptional values sustains support for IL just as often as it erodes it. Benjamin Coates identifies the fallacy whereby 'it has become conventional to think about exceptionalism and empire, on the one hand, and compliance with international law, on the other, as mutually exclusive. More international law means less empire; more exceptionalism means less international law.'[120] Exceptionalist beliefs, properly understood, are equally capable of sustaining enlarged conceptions of IL – imperial or otherwise.

Placed side by side, it is impossible to ignore the correlation and overlap between the three common causal explanations examined here. In the case of power-based explanations, even strong defenders of IL policy based on American preponderance have sought reconciliation with normative explanations of why such might is also right. Kagan acknowledges that the 'modern liberal mind is offended by the notion that a single world power may be unfettered except by its own sense of restraint … [T]he spirit of liberal democracy recoils at the idea of hegemonic dominance, even when it is exercised benignly.'[121] Responding in these terms, he asserts that by 'nature, tradition, and ideology, the United States has generally favoured the promotion of

[120] Benjamin A. Coates, *Legalist Empire: International Law and American Foreign Relations in the Early Twentieth Century* (Oxford University Press, 2016), p. 178.
[121] Robert Kagan, 'America's Crisis of Legitimacy' (2004) 83 *Foreign Affairs* 65, p. 70.

liberal principles over the niceties of Westphalian democracy'.[122] Conversely, from a critical perspective, Charlesworth acknowledges that the exceptionalist ideas evident in American IL policy that she finds so problematic have 'at least some basis in US political, military and economic dominance globally'.[123]

Likewise, the substantive content of policy-oriented jurisprudence is to be found in 'exceptionalist' ideas as defined in this book. In the New Haven approach, conceptions of 'world public order' and 'human dignity' and of the American role in bringing these values about necessarily draw upon long-established conceptions of America's global mission.[124] The main contemporaneous challenge to the New Haven approach was led by Professor Falk of Columbia University, who criticised its overt parochialism. Yet, in practice, the competing approaches merged: 'one on the right, the other on the left, but alike in projecting American values on the rest of the world'.[125] In this way, the dominant American approach to jurisprudence opens the way for messianic and teleological forms of exceptionalism to be instituted as a foundational element of American IL policy. Interpretations of IL that are inconsistent with exceptionalist values can be rejected not only as politically undesirable, but also, for that very reason, as lacking *legal* authority.

So what does this observed convergence mean for our understanding of the international rule of law? One way of proceeding is to treat these explanations as located at different levels of analysis reflecting the distinction between IR and FPA.[126] The rationality of hegemonic power approaches the question of policy contradictions at the level of the international system and the incentives for a uniquely powerful state to institutionalise its position in law. Policy jurisprudence provides the framework within which these interests can be flexibly promoted while reconciling with fidelity to legal principle. Finally, exceptionalist beliefs provide the substantive content informing legal policy. These different sources of distinctiveness fall short of a complete answer for observed contradictions when considered in isolation but complement each other as nested levels of explanation.

[122] Ibid., p. 79.
[123] Charlesworth, *No Country Is an Island*, p. 147.
[124] Oscar Schachter, 'McDougal's Jurisprudence: Utility, Influence, Controversy: Remarks', p. 270.
[125] Terry Nardin, 'Theorising the International Rule of Law' (2008) 34 *Review of International Studies* 385, p. 389.
[126] See Introduction, *supra*, pp. 9–10.

The overall picture challenges suggestions that American legal policymakers perceive a simple choice between the ideal of the rule of IL and national political interests. Shirley Scott concludes that the exceptionalism term has more often been employed 'cynically' where 'key figures in US foreign policy circles apparently believe that a different rule should apply to the United States than applies to the rest of the world'.[127] Yet, by virtue of the symbiotic relationship among power, jurisprudence and culture, a legal policymaker could conceivably pledge good faith fidelity to the rule of IL while departing significantly from global expectations. For this reason, Chapter 2 turns to the role of foreign policy ideology, as a compound concept encompassing interests and ideas as they structure IL policy.

[127] Shirley V. Scott, *International Law, US Power: The United States' Quest for Legal Security* (Cambridge University Press, 2012), p. 20.