

This article first appeared in Prospect Magazine.

<http://www.prospect-magazine.co.uk/>

January 22, 2005

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A Dangerous Myth

Jed Rubinfeld offered a description of “two world orders” in last month’s Prospect that was superficially appealing but both wrong and deeply worrying. On his account, Europeans embrace international law as a form of “international constitutionalism,” while Americans reject it, rightly, on the basis of “American, or democratic constitutionalism.” Academics are no strangers to oversimplifications and ideal types. But the stakes in this debate, at this time, extend far beyond the academy.

Real or apparent respect for international law has become one of the axes of transatlantic tension and of tension, even enmity, between the US and countries around the world. Beyond relations between individual countries, the question looms of whether the international community, such as it is, can muster the will and build the institutions necessary to address global problems, most of which are likely to be built at least in part on international law. In this context, it is irresponsible and even dangerous to indulge in hyperbolic and unsupported claims that international law is a threat to democracy.

Rubinfeld’s account of both European and American constitutionalism is historically inaccurate and politically naive. And his projection of these purported conceptions of constitutionalism on to international law is unrecognisable to an international lawyer.

Rubinfeld claims that international, or European, constitutionalism “views the basic tenets of constitutional law as expressing universal, liberal Enlightenment principles . . . This universal authority, residing in a normative domain above politics and nations, is what allows constitutional law, interpreted by unelected judges, to countermand the actions of an elected government.” Britons should be scratching their heads at this point, given their tradition of parliamentary sovereignty with no judicial review. For them, and for most other Europeans (except the Germans, who accepted the imposition of US-style constitutionalism with a federal constitutional court after the second world war), this is the description not of Europe but of the US—a country with powerful judges permitted to strike down democratically passed legislation as unconstitutional.

But Rubinfeld points not to national constitutional traditions in Europe but to the EU itself. He explains that Europeans understand the EU, along with the UN and international law in general, as both constraints on nationalism and “restraints on democracy, at least in the sense that they place increasing power in the hands of international actors . . . at some remove from popular politics.” Why exactly then has the principal political issue surrounding further steps towards

European integration been the alleged “democracy deficit”? Why is it so difficult to pass an EU constitution? And why do national governments of the big member states still call the economic shots even with a single currency and European Central Bank? These are hardly the hallmarks of a group of countries that have understood acceptance of European (and international) law as a surrender of their own commitment to self-government.

Finally, Rubinfeld relies on a favourite canard of American lawyers (including this one, for a long time): American lawyers are all legal realists, understanding the inevitable intertwining of law and politics, whereas European lawyers cling to a belief in “an apolitical legal reason.”

Really? How then can we explain the appointment of judges to the European court of justice (ECJ) for a term of no more than 12 years, rather than for life in the US system, and the acceptance that these judges are appointed by different national governments that in turn carefully monitor the way in which they interpret EU law? Indeed, EU member governments have been as vocal in denouncing the judicial activism of the ECJ as various US groups are in attacking our own supreme court. And far from Rubinfeld’s claim that the EU has emerged through a process that “betrays a disconnection with, and even a disrespect for, democratic processes,” national constitutional courts in various EU member states have been careful to guard their own power and prerogatives against the ECJ, precisely on the ground that their function is to uphold democratically passed constitutions. Finally, EU human rights law is explicitly a compendium of the human rights laws of the member states, as well as of principles embedded in the European convention on human rights, again a treaty ratified by the nation states of the EU.

If Rubinfeld’s picture of European international constitutionalism is unrecognisable, his account of democratic national constitutionalism, American-style, is incoherent. As he explains it, democratic national constitutionalism “holds that a nation’s constitution ought to be made through that nation’s democratic process, because the business of the constitution is to express the polity’s most basic legal and political commitments. These commitments will include fundamental rights that majorities are not free to violate, but are not therefore counter-democratic.” So far, so good. He is not arguing that the US political system produces more democratic results than European parliamentary systems but rather that the multiple checks and balances designed to control faction and create friction in the US political system, as well as the judicial protection of minority rights against majority will, are more democratic “because they represent the nation’s self-given law.”

But in European systems, as well as in the EU as a whole, the protection of minority rights and checks on various branches of government are also the result either of democratically ratified constitutions (indeed, constitutions that are far easier to amend to reflect majority will) or of democratically ratified treaties. Is acceptance of a treaty any less a “nation’s self-given law”? How then to explain or justify the provision in article VI of the US constitution declaring that “treaties are the law of the land,” and so trump state laws?

Rubinfeld’s illustrations of this “contrast between American and European conceptions of constitutionalism” do not help. He compares the French declaration of the rights of man with the purportedly more modest US bill of rights, which declared only the rights of US citizens and

then only as against the federal government. But the real counterpart to the declaration of the rights of man, which was a French revolutionary manifesto, is the declaration of independence, which speaks equally sweepingly of “self-evident truths” and the endowment of all men with “unalienable rights” by “their creator.” It is this creed of universal human rights that Americans have preached around the world, just as much as we have preached democracy. Indeed, it is conventional wisdom that the US and the French argue so much precisely because they are so similar-proud nations convinced that their history, their institutions, and their ideology are a model for mankind.

Democracy constrained by inalienable human rights (to life, liberty, and the pursuit of happiness, not to mention property) is liberal democracy, of course, which is the hard-fought heritage of western civilisation as a whole, stretching from the Urals to the Pacific. Europeans and Americans could enjoyably engage in an endless theoretical argument over who is more liberal or democratic, but Rubinfeld draws on these accounts of national constitutional traditions for very practical, political ends. He claims point-blank that international law reflects the European conception of top-down constitutionalism and hence is anti-democratic. Conversely, by taking unilateral action that flies in the face of international law, Americans are defending democracy and “the hopes of democratic peoples all over the world.”

European international lawyers will be amused at the wonderful irony of this claim. The European tradition in international law, dating back at least to the mid-19th century, is one of strong positivism, which means that the basis of all international law is state consent. Positivism is the opposite of natural law theories of international law, which do indeed hold that international law (or national law, for that matter) reflects a body of fundamental principles emanating either from God or natural reason. Positivists, by contrast, insist that states can only be bound to treaties or custom that they have explicitly agreed to.

It is American international lawyers who spend a huge amount of time developing theories to explain why international law either is or should be something other than what states formally agree to. Consistent with Rubinfeld’s claim about the legal realist traditions in which all American lawyers are steeped, American international lawyers link international law to international politics, international economics and international morality. Indeed, Rubinfeld’s closest allies in contemporary US legal debates are Jack Goldsmith, now assistant attorney general of the office of legal counsel in the Bush administration and Curtis Bradley, a law professor at the University of Virginia, who have been arguing for several years that liberal US human rights lawyers have been inventing human rights law and attempting to foist it on US federal and state governments. One of their targets is Rubinfeld’s new dean at Yale Law School, Harold Koh. Another of his Yale colleagues is Michael Reisman, heir to what is popularly known as the “New Haven school” of international law, which has long rejected positivist legal rules (based on formal state consent) if they are not consistent with fundamental global norms of human dignity. Rubinfeld should perhaps take a look closer to home before launching attacks on “European” views of international law.

But so what? So a distinguished American constitutional lawyer has overgeneralised from his experience serving on the Kosovo constitutional commission and launched a grand but unsupported theory of American and European constitutionalism and internationalism. Why

should we care? Because Rubinfeld offers these theories as a “justification of unilateralism.” His bottom line is that “America’s commitment to democratic self-government gives the US good grounds to be sceptical about—indeed to resist—international legal regimes structured, as they now are, around anti-nationalist and anti-democratic principles.”

These are fighting words. They are a licence, from the American left, for the US to continue on its present path of self-destruction not only in terms of its relations with many of its oldest allies but also its ability to achieve its own goals. Rubinfeld claims that unilateralism is consistent with “international co-operation or coalition building,” that the problem arises only with “the shift from international co-operation to international law.” But here is the most dangerous misunderstanding of all. Successful long-term international co-operation depends on collective respect for international law—not perfect compliance or legalism for its own sake, but respect for a body of rules that are created bottom-up and ratified by democratic legislatures because they serve all nations’ long-term interests. If other nations no longer believe that the US will honour those rules, they will no longer agree to bind themselves. And if they will no longer bind themselves, then we will slide from coalitions of the willing to chaos.

As Rubinfeld rightly points out, the US was a prime mover in the creation of the present international order. We did this neither out of altruism nor out of the belief, as Rubinfeld claims, that the rules would apply to everyone else but us. On the contrary, as political scientist John Ikenberry argues, we did so because we understood that we could reassure our allies that we were willing to restrain our own power in the service of common goals, thereby increasing that power by diminishing the incentive of either allies or enemies to balance against us. It was hard-headed reasoning, not fuzzy visions of either democracy or constitutionalism. And it is precisely the reasoning that we need again today.