U.S. Unilateralism (Opposition to the Precautionary Principle) Does Not Reflect Disdain for Multilateralism – Rather it Reflects a Difference in the Notion of Constitutional Law

The following excerpts were taken from an article entitled "The Two World Orders", authored by Jed Rubenfeld, Robert R. Slaughter Professor of Law at Yale University. The article, which appeared in the Autumn 2003 issue of the Wilson Quarterly, is accessible in its entirety at: (http://wwics.si.edu/index.cfm?fuseaction=wq.essay&essay_id=56056).

> "[U]nilateralism [and] …isolationalism…[are]…very different phenomen[a]… An isolationist country withdraws from the world, even when others call on it to become involved; ***a unilateralist country feels free to project itself—its power, its economy, its culture—throughout the world, even when others call on it to stop***.
>
> …[A]t the end of World War II…[i]n 1945, when victory was at hand and his own death only days away, Franklin Roosevelt wrote that the world's task was to ensure "the end of the beginning of wars." So Roosevelt called for a new system of international law and multilateral governance that would be designed to stop future wars before they began. Hence, the irony of America's current position: **More than any other country, the United States is responsible for the creation of the international law system it now resists**.
> …America's leadership in the new internationalism was, at the beginning, so strong that one might be tempted to see today's U.S. unilateralism as a stunning about-face, an aberration even, which may yet subside before too much damage is done. But **the hope that the United States will rediscover the multilateralism it once championed assumes that America and Europe were engaged in a common internationalist project after World War II. Was that in fact the case?**
>
> It's undoubtedly true that, **after the war, Americans followed the path Roosevelt had charted and led Europe and the world toward an unprecedented internationalism**. We were the driving force behind the United Nations, the primary drafters of the initial international human-rights conventions, the champions of developing an enforceable system of international law. Indeed, America pressed on Europe the very idea of European union (with France the primary locus of resistance). At the same time, **America promoted a new constitutionalism throughout Europe and the world, a constitutionalism in which fundamental rights, as well as protections for minorities, were laid down as part of the world's basic law, beyond the reach of ordinary political processes.**
>
> *How then did the United States move from its postwar position of leadership in the new international order to its present position of outlier*?
>
> **The Cold War played an essential role in the change, fracturing the new international order before it had taken root**. At the same time, the Cold War also had the effect of keeping the Atlantic alliance intact for many decades by suppressing divisions that would show themselves in full force only after 1989. ***When, in the 1990s, the United States emerged as the last superpower standing, it became much easier for***

the forces of European Union to move ahead and for the buried divisions between America and its European allies to be made apparent. The most fundamental of those divisions had been the most invisible: **From the start, the postwar boom in international and constitutional law had had different meanings in America and Europe—because the war itself meant different things in America and Europe**.

At the risk of overgeneralization, we might say that **for Europeans (that is, for those Europeans not joined to the Axis cause), World War II, in which almost 60 million people perished, exemplified the horrors of nationalism**. Nazism and fascism were manifestations, however perverse, of popular sovereignty…[and]…rose to power initially through elections and democratic processes. Both claimed to speak for the people…From the postwar European point of view the Allies' victory was a victory against nationalism, against popular sovereignty, against democratic excess.

[By contrast,]… [f]or Americans, winning the war was a victory for nationalism—that is to say, for our nation and our kind of nationalism. It was a victory for popular sovereignty (our popular sovereignty) and, most fundamentally, a victory for democracy (our democracy). Yes, the war held a lesson for Americans about the dangers of democracy, but the lesson was that the nations of continental Europe had proven themselves incapable of handling democracy when left to their own devices. If Europe was to develop democratically, it would need American tutelage. If Europe was to overcome its nationalist pathologies, it might have to become a United States of Europe.

…**These contrasting lessons shaped the divergent European and American experiences of the postwar boom in international political institutions and international law.**

For Europeans, the fundamental point of international law was to address the catastrophic problem of nationalism—to check national sovereignty, emphatically including national popular sovereignty. This remains the dominant European view today. The United Nations, the emerging European Union, and international law in general are expressly understood in Europe as constraints on nationalism and national sovereignty, the perils of which were made plain by the war. They are also understood, although more covertly, as restraints on democracy, at least in the sense that they place increasing power in the hands of international actors (bureaucrats, technocrats, diplomats, and judges) at a considerable remove from popular politics and popular will.

In America, the postwar internationalism had a very different meaning. Here, **the point of international law could not ultimately be antidemocratic or antinationalist because the Allies' victory had been a victory for democracy (American democracy) and for the nation (the American nation). America in the postwar period could not embrace an antinationalist, antidemocratic international order as Europe did.** It needed a counter-story to tell itself about its role in promoting the new international order.

The counter-story was as follows: When founding the United Nations, writing the first conventions on international rights, creating constitutions for Germany and Japan, and promoting a United States of Europe, Americans were bestowing the gifts of American liberty, prosperity, and law, particularly American constitutional law, on the rest

of the world…International law would be, basically, American law made applicable to other nations, and the business of the new internationalism would be to transmit American principles to the rest of the world.

… In the American imagination, then, the internationalism and multilateralism we promoted were for the rest of the world, not for us. What Europe would recognize as international law was law we already had. The notion that U.S. practices—such as capital punishment—held constitutional by our courts under our Bill of Rights might be said to violate international law was, from this point of view, not a conceptual possibility. **Our willingness to promote and sign on to international law would be second to none—except when it came to any conventions that might require a change in U.S. domestic law or policy. The principal organs of U.S. foreign policy, including the State Department and, famously, the Senate, emphatically resisted the idea that international law could be a means of changing internal U.S. law.**

… In part, this exceptionalist attitude reflected American triumphalism in the wake of the war; in part, it expressed American know-nothing parochialism… But it reflected something more fundamental as well: a conception of constitutional democracy that had been reaffirmed by the war. It was impossible for Americans to see the new international constitutionalism as Europeans saw it—a constraint on democratic nationalism—for that would have contradicted America's basic understanding of constitutional democracy.

It's essential here to distinguish between two conceptions of constitutionalism. The first views the fundamental tenets of constitutional law as expressing universal, liberal, Enlightenment principles, whose authority is superior to that of all national politics, including national democratic politics. This universal authority, residing in a normative domain above politics and nation-states, is what allows constitutional law, interpreted by unelected judges, to countermand all governmental actions, including laws enacted by democratically elected legislators. From this perspective, it's reasonable for international organizations and courts to frame constitutions, establish international human-rights laws, interpret these constitutions and laws, and, in general, create a system of international law to govern nation-states. I call this view "international constitutionalism."

The alternative to international constitutionalism is American, or democratic, national constitutionalism. It 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 the countermajoritarian rights are not therefore counterdemocratic. Rather, they are democratic because they represent the nation's self-given law, enacted through a democratic constitutional politics. Over time, from this perspective, constitutional law is supposed to evolve and grow in a fashion that continues to express national interpretations and reinterpretations of the polity's fundamental commitments.

In American constitutionalism, the work of democratically drafting and ratifying a constitution is only the beginning. Just as important, if not more so, is the question of who interprets the constitution. In the American view, constitutional law must somehow remain the nation's self-given law, even as it is reworked through judicial interpretation and reinterpretation, and this requires interpretation by

national courts. **By contrast, in international constitutionalism, interpretation by a body of international jurists is, in principle, not only satisfactory but superior to local interpretation, which invariably involves constitutional law in partisan and ideological political disputes.**

…European constitutionalism today invests courts with full jurisdiction over individual rights, without fully acknowledging that judicial decisions about the meaning of constitutional rights are fundamentally political in character.

…[W]hat makes the new European constitutionalism cohere, and gives European constitutional courts their claim to legitimacy, is **the ideology of universal o[f] 'international' human rights, which owe their existence to no particular nation's constitution, or which, if they derive from a national constitution, possess nonetheless a kind of supranational character**, rendering them peculiarly fit for interpretation by international juridical experts.

In America, by contrast, it would be nothing short of scandalous to suggest that U.S. constitutional questions had to be decided by an international tribunal claiming supremacy over our legal system.

From the American perspective, national constitutional courts are an essential feature of constitutional law, and it's critical that constitutional interpretation remain interwoven with the nation's processes of democratic self-governance. This is done in various ways: through a politically charged judicial nomination mechanism; through judges' membership in the national polity and the nation's particular political and legal culture; through the always-open possibility of amendment; and, perhaps most important but least understood, through periodic but decisive contests between the judicial and political branches…**The ideal is *not* to make constitutional courts responsive to popular will at any given moment, but to make sure that constitutional law remains answerable to the nation's project of political self-determination over time.**

… To summarize: ***International constitutionalism** contemplates a constitutional order embodying universal principles that derive their authority from sources outside national democratic processes and that constrain national self-government*. ***American or democratic national constitutionalism***, by contrast, **regards constitutional law as the embodiment of a particular nation's democratically self-given legal and political commitments. At any particular moment, these commitments operate as checks and constraints on national democratic will.** But constitutional law is emphatically not antidemocratic. Rather, it aims at democracy over time. Hence, **it requires that a nation's constitutional law be made and interpreted by that nation's citizens, legislators, and judges.**

…**Europeans** have embraced international constitutionalism, according to which the whole point of constitutional law is to check democracy. **For Americans**, constitutional law cannot merely check democracy. It must answer to democracy—have its source and basis in a democratic constitutional politics and always, somehow, be part of politics, even though it can invalidate the outcomes of the democratic process at any given moment.

In the European view, human rights transcend national politics and ought, at least ideally, to be uniform throughout the world…**The**

American view holds that democratic nations can sometimes differ on matters of fundamental rights.

… **For Europeans, *a great marker of successful constitutional development is international consensus and uniformity. They point to such consensus as if agreement throughout the "international community" were itself a source of legal validation and authority***. The more consensus there is on a constitutional principle throughout the international community, the greater the strength of that principle.

Americans do not share this view. We've learned to see our own constitutional judgments as worth defending even during periods when most of the nations of Europe scorned or violated them. ***For Americans, a democratic nation's constitutional law is supposed to reflect that nation's fundamental legal and political commitments. Consensus in the "international community" is not the compelling source of legal or constitutional authority that it's made out to be in the European perspective***.

…[T]he **United States has *not* understood its support for international law and institutions to imply a surrender of its own commitment to self-government.** As the international system became more powerful, and international law diverged from U.S. law, the United States inevitably began to show unilateralist tendencies—not simply out of self-interest but because **the United States is committed to democratic self-government.**

The continental European democracies, with their monarchical histories, their lingering aristocratic cultures, and their tendency to favor centralized, bureaucratic governance, have always been considerably less democratic than the American democracy.

… And **what…is the United Nations really about**? The several possible answers to the question are not attractive: **hot air, a corrupt bureaucracy, an institution that acts as if it embodied world democracy when in reality its delegates represent illegitimate and oppressive autocracies…can be elected president of a human-rights commission**.

A second spur to U.S. unilateralism has been **a growing skepticism about the agenda the "international legal community" has been pursuing**. The skepticism is partly due to the proliferation of human rights conventions that are systematically violated by many of the states subscribing to them.… ***A deeper reason for the skepticism lies in the indications that international law may be used as a vehicle for anti-American resentments.***

… ***Unilateralism*** does not set its teeth against international cooperation or coalition building. ***What sets its teeth on edge is the shift that occurs when such cooperation takes the form of binding agreements administered, interpreted, and enforced by multilateral bodies—the shift, in other words, from international cooperation to international law. America's commitment to democratic self-government gives the United States good reason to be skeptical about—indeed, to resist—international legal regimes structured, as they now are, around antinationalist and antidemocratic principles***" (emphasis added).

Article III-129 (articulating environmental policy) of the failed draft treaty that would have established a Constitution for Europe, stated that it "shall be based on the

precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay."
(http://europa.eu.int/constitution/futurum/constitution/part3/title3/chapter3/section5/index_en.htm)

Article 130r of the 1992 Treaty establishing the European Community – The Maastricht Treaty – adds the ***precautionary principle*** to the list of environmental principles. "Community policy on the environment…shall be based on the precautionary principle and on the principles that preventative action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay." (http://europa.eu.int/en/record/mt/title2.html).