

Sovereignty for a New American Century

A Critical Interpretation of the Neo-Conservative Defence of American Sovereignty Against the Idea and Institutions of Global Governance

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As the strongest and richest country in the world, the United States can afford to safeguard its sovereignty.

Jeremy Rabkin¹

Introduction

Although it has its origins in the 1980s, the American Right's reaction against the advances of global governance and international law only really took shape throughout the 1990s under the leadership of a number of political scientists, jurists, diplomats and media commentators organised around neo-conservative think tanks such as the American Enterprise Institute (AEI) and the Project for a New American Century (PNAC). Against the background of the uneven and incomplete transition to globalisation and the emergence of a seemingly unipolar world, neo-conservatives criticised both the woolly legalism of the Clinton administration and the Republican isolationist tendencies and urged a re-orientation in foreign policy that would put the sovereignty of the American nation-state at the heart of the international liberal order. The primary motivation for this offensive was strategic, and it remains so to this day. With the end of the Cold War, the argument goes, as violence and discontent becomes increasingly directed at the world's only superpower, the multilateral framework through which the US has co-ordinated its security strategy since 1945 has become increasingly constraining on American power. As one of the most vocal proponents of this agenda puts it, multilateralism and global governance have diminished 'American freedom of action by making it subservient to, dependent on, constricted by the will – and interests – of other nations'.²

Beyond these strategic considerations, neo-conservatives complain that global governance has transformed international law as a mechanism for the regulation of inter-state relations into a mechanism designed to regulate the relationship between states and their citizens, especially in the area of human rights. But America, they argue, has no lessons to learn about rights from anyone. As a three hundred years old constitutional republic, why should the US be restrained by international agreements that have no genuine democratic legitimacy? Global governance, the argument goes, is a tyrannical world state in the making orchestrated by a self-interested cosmopolitan elite out to undermine the democratic consensus around American values and social preferences. As eccentric as these arguments may be, the conservative consensus around this sovereigntist agenda had by the turn of the millennium gained a lot of support inside the Bush administration. It played an important role in shaping its strategic response to the attacks of 9/11 and in its opposition to the International Criminal Court, its withdrawal from the Kyoto Protocol, and its dubious re-interpretation of the Geneva Conventions and Convention on Torture in the context of the war on terror.

This paper seeks to shed light upon the theoretical and political nature of the above set of arguments. It offers a critical interpretation of the constellation of ideas that

¹ Jeremy Rabkin, *The Case for Sovereignty: Why the World Should Welcome American Independence* (Washington D.C.: the AEI Press, 2004).

² Charles Krauthammer, *Democratic Realism: An American Foreign Policy for a Unipolar World*, American Enterprise Institute's Irving Kristol Lecture, Washington February 12 2004, p. 8. Online at http://www.aei.org/publications/pubID.19912,filter.all/pub_detail.asp, [Accessed 8 February 2006].

constitute this case for American sovereignty and draws out the main political and ethical implications of those ideological constructions. The analysis suggests that what is really at stake for neo-conservatives in those debates is not only the policy autonomy of the United States from multilateral frameworks but also the substantive interpretation of democratic justice upon which their domestic libertarian political and economic agenda is predicated. It is argued that neo-conservative discourses on American sovereignty rest upon a decisionist legal-constitutional interpretation of the normative order that weaves together democracy, rights and national autonomy by means of a volatile identity politics that is fundamentally at odd with both the pluralist character of Westphalian diplomacy and the solidarist cosmopolitan order envisaged by advocates of global governance. The conceptual and political failure of this sovereigntist enterprise, the paper concludes, stems from the fact it asserts the primacy of the political and recognises the conflictual nature of political life while at the same time closing off all possibilities for legitimate dissent by tying this antagonistic notion of politics to a universal ethics.

Unipolarity and the ‘Problem of Sovereignty’ in the Post-Cold War Era

The American Right’s resistance to the advances of global governance and international law must be understood in the context of the systemic transformation from bipolarity to unipolarity and the mounting controversies that have accompanied the shift from the ideological and military containment of competing political systems to debates about humanitarian intervention and the expansion of the democratic ‘zone of peace’ since the end of the Cold War. In essence, those controversies have to do with the extent to which the US operates or should operate within the limits of international law and multilateral frameworks in its role as the self-appointed leader and policeman of the liberal international order. Discontent with US foreign policy in this respect stems mainly from the fact that America does not always live up to the multilateral and legal commitments that it seeks to enforce upon others. The US displays exceptional leadership in promoting human rights and liberal standards for the conduct of foreign policy. At the same time, however, it resists complying with some of those same standards at home or to align its own foreign policy with them primarily on the ground that the effectiveness of American leadership as the ‘indispensable nation’ often depends on being free from such constraints.

It is often suggested in this respect that the unilateralist character of the Bush administration’s 2002 *National Security Strategy* marks a radical break with the reverend multilateralism of the previous Clinton administration.³ Emboldened by America’s unprecedented supremacy and stirred to action by the attacks of 9/11, the argument goes, the Bush administration has suddenly decided to opt out of the system that US had itself generated and nurtured since 1945.⁴ But this interpretation is misleading. Already under Clinton, the United States had begun to turn its back on the United Nations (UN) and asserted the moral superiority of its rule over the UN

³ The White House, George W. Bush Administration, *The National Security Strategy of the United States of America* (Washington, DC, September 2002).

⁴ See, for instance, John Ikenberry, ‘Liberalism and Empire: Logics of Order in the American Unipolar Age’, *Review of International Studies*, vol. 30, no. 4, 2004, p. 620; Martin Jacques, ‘Above the Law’, *The Guardian*, March 26 2005; Ivo H. Daalder and James M. Lindsay, *America Unbound: The Bush Revolution in Foreign Policy* (Washington, DC: Brookings Institution Press, 2003).

when it subverted international law and launched a series of unilateral military interventions in East Africa and Haiti during the early and mid-1990's, and when it intervened in Kosovo and bombed Serbia in defiance of the Security Council in 1998.⁵ Clinton's failure to submit the statute of the International Criminal Court (ICC) as well as the Kyoto Protocol for ratification also bears witness to this exemptionalism-unilateralist trend in post-Cold War American foreign policy. That being said, there is no doubt that the coming to power of the Bush administration and the latter's declaration of a war on terrorism in September 2001 has radicalised and intensified this exceptionalist tendency. At the very least, it has made the US's claim to a set of prerogatives explicit and removed the rhetorical veil that until 9/11 had camouflaged its claim to 'universal sovereignty'.

Universal sovereignty is the term used by Étienne Balibar, following Giorgio Agamben, to refer to 'a power that is "internal" and "external" to the system at one and the same time in that includes itself in the normative order by excluding itself from the constitutive norm and abrogates for itself the responsibility to enforce that norm'.⁶ In Robert Kagan's formulation, it is the exceptional Hobbesian power that maintains order and allows other states to live in a Kantian legal paradise but that cannot itself enter this paradise by virtue of its responsibility: 'It mans the wall but cannot walk through the gate'.⁷ The universal sovereign is the power that disarms others while building up its own arsenal, that controls global political and financial institutions without being controlled by them, that judges without being judged, and that opens up markets without opening its own.⁸

Neo-conservative assertions of sovereignty against the pulls of global governance are set out within this exceptionalist paradigm. For neo-conservatives, the necessity of defending American sovereignty against the legalism of international institutions and human rights regimes is above all a geopolitical imperative that follows from the 'unipolar predicament' of having both increased capabilities and vulnerabilities. In a unipolar world, they argue, what prevents the international system from degenerating into complete anarchy is not the bogus security of international treaties nor the benevolent civility of liberal nations but the overwhelming power of the United States. In Charles Krauthammer's rather odd formulation, 'America is the landmine between barbarism and civilization'.⁹ But being the sole superpower also breeds resentment and renders the need for autonomy and defence capacity even greater. In this setting, neo-conservatives argue, multilateralism, which manifests itself today 'in the slavish pursuit of "international legitimacy" and opposition to any American action undertaken without universal foreign blessing', has become inimical to the American national interest and, by extension, to the stability of the international order.¹⁰ For them, hegemonic legitimacy cannot presuppose multilateralism and law

⁵ Adam Branch, 'American Morality over International Law: Origins in UN Military Interventions, 1991-1995', *Constellations*, vol. 12, no. 1, 2005, pp. 103-127.

⁶ Étienne Balibar, *L'Europe. L'Amérique, la guerre* (Paris: La Découverte, 2003), p. 134. My translation. See also Giorgio Agamben, *State of Exception* (Chicago: University of Chicago Press, 2005).

⁷ Robert Kagan, *Of Paradise and Power: America and Europe in the New World Order* (New York: Knopf, 2003), p. 76.

⁸ Balibar, *L'Europe, l'Amérique*, pp. 134-141.

⁹ Krauthammer, *Democratic Realism*, p. 8.

¹⁰ *Ibid.*, p. 6.

abidingness. Legalism and cooperation is all well, but it must be backed by a sovereign, legally autonomous power.

It is, of course, to Carl Schmitt that we owe this exceptionalist interpretation of sovereignty.¹¹ The sovereign, Schmitt argued, ‘is he who decides on the exception’.¹² It is the underived and legally unbound power that decides when it is appropriate to suspend the law in order to deal with a perceived threat and maintain order or institute a new set of norms. Schmitt developed his exceptionalist interpretation of sovereignty in the context of the constitutional debates of inter-war Germany and his critique of liberal democracy. It rests upon a decisionist legal-constitutional interpretation of the nature of politics that has travelled to America in various forms through the work of various prominent German/European émigrés such as Hans Morgenthau, Friedrich Von Hayek and Leo Strauss, all of whom have been highly influential in American conservative circles after the Second World War.¹³ Here is not the place to go into the philosophical and historiographical details of Schmitt’s theoretical construction. But a number of brief clarifications concerning the origins and main characteristics of Schmitt’s decisionism are nevertheless necessary to appreciate the ambivalent nature of this particular position towards norms and liberal modernity and to understand how the latter manifests itself in contemporary neo-conservative discourses.

Schmitt’s decisionism is highly indebted to Max Weber’s pessimistic interpretation of the dilemmas of modernity. For Weber, modernity as a socio-temporal condition was determined by the problem of the self-justification of reason – the manifestation of which he observed in the fragmentation of social life into a multitude of value spheres and belief systems, all normatively independent from one another. Weber understood rationalism as an infinite series in which every cause of an effect is itself an effect of a prior cause. Thus whereas in pre-modern times this infinite chain of cause and effect could trace its ultimate original cause to God, the discrediting of religious world views eventually forced the realisation that the belief in the superiority of reason over other systems of beliefs in fact rests upon a leap of faith just as much as the belief in an omnipotent deity. Accepting that scientific rationality was therefore incapable of providing authoritative answers to questions concerning the meaning of life, Weber sought to establish the limits of modern rationalism in instrumentalist terms. Modern rationality for him could only help human societies to choose the most appropriate and most effective means to achieve their rationally unjustifiable objectives. And yet,

¹¹ Many analysts of various theoretical inclinations have noted the important parallels between Schmitt’s decisionist jurisprudence and American foreign policy since 9/11. See, for instance, Andrew Norris, ‘“Us” and “Them”: The Politics of American Self-Assertion After 9/11’, *Metaphilosophy*, vol. 35, no. 3, 2004; Couze Venn, ‘World Dis/Order: On Some Fundamental Questions’, *Theory, Culture and Society*, vol. 19, no. 4, 2002, pp. 121-136; Nehal Bhuta, ‘A Global State of Exception? The United States and World Order’, *Constellations*, vol. 10, no. 3, 2003, pp. 371-391; Stanley Hoffman, ‘American Exceptionalism: The New Version’, in Michael Ignatieff (ed.), *American Exceptionalism and Human Rights* (Princeton and Oxford: Princeton University Press, 2005), pp. 225-240.

¹² Carl Schmitt, *Political Theory: Four Chapters on the Concept of Sovereignty*, trans. George Schwab, (Chicago: University of Chicago Press, 2006 [1922]), p. 3.

¹³ John McCormick, ‘Political Theory and Political Theology: The Second Wave of Carl Schmitt in English’, *Political Theory*, Vol. 26, No. 6, 1998; William Scheuerman, *Carl Schmitt: The End of Law* (New York: Rowan and Littlefield, 1999); Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (Cambridge: Cambridge University Press, 2001), pp. 415-422 and 437-440; Jean-François Drolet, ‘The Cryptic Political Realism of Leo Strauss’, *International Politics*, forthcoming, 2008.

even this instrumentalist ethos could not be rationally justified. For if reason cannot justify itself, then the educator cannot justify the need to educate the population, the artist her desire to create aesthetically pleasant objects, or the doctor the need to prevent illnesses and cure diseases.¹⁴ The consequence of this differentiation of value spheres is what Weber saw as a ‘pluriverse’ of ‘warring gods’ in which no decisive victory can be expected since all gods are equally powerful within their respective value system but none reign supreme over the totality. As he puts it, ‘So long as life remains immanent and is interpreted in its own terms it knows only of an unceasing struggle of these gods with one another... The ultimately possible attitudes toward life are irreconcilable, and hence their struggle can never be brought to a final conclusion. Thus it is necessary to make a decisive choice’.¹⁵

In the legal sphere, the ‘crisis of modernity’ analysed by Weber expresses itself in the fact that ‘the axioms of natural law have lost all capacity to provide the fundamental basis of a legal system’.¹⁶ No longer capable of deriving its validity from transcendent theological-cultural beliefs, modern law must take a positivist form and draw its validity from a logically abstract set of formal rules immanent to the legal sphere. In this positivist framework, all expressions of substantive values must be integrated into a formal process that requires the application of laws to go beyond the specific case and that institutes a mechanism of checks and balances to mediate between competing interests and values. Authority in this self-enclosed legal system is not only formalised but also rationalised. All norms immanent to the legal sphere must derive their validity from a previous norm, leading to an impossible quest to ban all subjective moral or emotional judgments concerning the substance of the law and to organise the latter by rationally and legally defined procedures. As Weber argued, modern logical formalism necessarily de-personalise the legal system and subsumes all concrete facticity under abstract rules. It ‘enables the legal system to operate like a technically rational machine’ and confines the judge or decision-maker to the mechanical application of already-existing law.¹⁷ Yet, as Weber knew all too well, this abstract formalism is misleading because there is always a gap between abstract law and concrete reality that must be mediated by the subjective belief of the individual decision-maker.¹⁸

Schmitt developed his decisionist jurisprudence at this juncture, or I should say disjuncture, between factual power and legal form. His formulation of sovereignty was a reaction to the impossibility of determining rationally or logically a ‘highest, legally independent, underived power’.¹⁹ For him, the modern legal positivist attempt at objectifying political authority and subjecting it to the formal and rational rule of law rested on an ill-fated logical paradox that could only be resolved through an existential political decision. If the highest underived power is the norm that establishes the rule of law, it must necessarily be subject to law itself otherwise it simply exempts itself in the same manner as sovereignty operates. Yet if this highest

¹⁴ Max Weber, *From Max Weber: Essays in Sociology* (Oxford: Oxford University Press, 1946), pp. 140-146.

¹⁵ *Ibid.*, p. 152.

¹⁶ Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, R. Roth and C. Wittich (eds.), (Berkeley: California University Press, 1978), pp. 874-875.

¹⁷ *Ibid.*, p. 811.

¹⁸ *Ibid.*, p. 758.

¹⁹ Schmitt, *Political Theology*, p. 17.

underived power is enclosed within the predefined procedures of the legal system, it cannot be the highest underived power since its actions must be declared legal or illegal by an authority that must necessarily be higher. To arrive at a point of origin, an underived norm that will determine the right procedures, there must be a political act of creation *ex nihilo* – a normatively ungrounded decision on the substance of the legal form. The ‘problem of sovereignty’, for Schmitt, thus stemmed from this tension in the relationship between the legally highest authority and the one who factually holds the power to enforce a decision and ensure that a decision is being made to prevent the collapse of the normative order. For Schmitt, and this is the main feature of decisionism as a constitutional-legal theory, the arbitrary exercise of power was a permanent and immanent condition of the normative order in conditions of modernity.

There are two closely related aspects of this decisionist response to legal modernity that are particularly important for the present discussion. The first is that although it ultimately has its roots in a pessimistic interpretation of the human condition traditionally associated with the realist school in IR, it does not share the latter’s radical scepticism towards international law. Unlike the classical realism of E.H. Carr or the positivist neo-realism of Waltz, for example, decisionism does not write off the constitutional-legal dimension of international relations altogether.²⁰ Decisionism recognises the constitutive and constraining power of law and norms in international relations. However, it insists that international law can only retain its validity if backed by an overarching and legally autonomous power factually capable of acting unilaterally and decisively in times of constitutional crisis to determine whether the formal processes that normally mediate social relations are still valid and effective or whether they have broken down and need to be remedied by a sovereign intervention. Yet, and this is the other aspect that needs to be underlined, decisionism is not a theory of crisis. As Jef Huysmans points out, ‘it is not a theory that accounts only for those extreme situations in which the existing normative order faces a challenge threatening its survival. Rather, it seeks to formulate the normal reality of legal life that is inherent in the legal form’. The exception, in other words, is a permanent condition of the normative order.²¹

Nearly three quarters of a century after Schmitt first exposed his *Political Theology* in the ill-fated Republic of Weimar, the ‘problem of sovereignty’ re-emerges as one of the most contested issue of our times. Except today it is played out in the international arena as a contest between the American Right and the partisans of global governance to determine who has the authority and actual capacity to maintain order and decide on the exception. As Francis Fukuyama put it in his book on state building, the one defining question of the post-Cold War era is

who gets to decide on whose sovereignty to violate, and on what grounds. To what extent does it remain the prerogative of sovereign nation-states, and to what degree must such decisions be constrained by international laws or norms? These questions take us into the domain of a different set of democratic legitimacy issues, this time focused not so much on

²⁰ For an excellent discussion of decisionism as a constitutional-legal theory in a post-9/11 IR context see Jef Huysmans, ‘International Politics of Exception: Competing Visions of International Political Order Between Law and Politics’, *Alternatives*, vol. 31, 2006, pp. 135-165.

²¹ *Ibid.*, p. 149.

individual states but on the international system. This debate has exposed an enormous gulf between the United States and its European allies, which is likely to be a neuralgic source of friction for some time to come.²²

For neo-conservatives the answer to this question is straightforward. America is the only power that has the global reach and competence to bridge the gap between fact and law when the latter cannot be closed through normal formal procedures. The end of the Cold War, globalisation and recent technological developments, they argue, have produced a security environment which is at odd with both the Westphalian *modus operandi* of contemporary international society and the woolly and encumbering multilateralism of global governance favoured by Europeans. Global terrorism, state-failure and the proliferation of weapons of mass destruction (WMD) pose a series of strategic challenges to the liberal order that cannot be addressed within the limits of its normative framework. On the one hand, sovereignty can no longer be interpreted as an absolute normative good behind which tyrannical regimes can hide, massacre their own population or sponsor and nurture terrorism. On the other hand, as the sole superpower and leader of the West's liberal democratic civilisation, America must remain fully sovereign and at times exempt itself from the multilateral system that it has itself set up in 1945 in order to deal with rogue systemic elements and ensure the continued viability of this multilateral system. By virtue of its exceptional responsibilities, neo-conservatives argue, America 'must live by a double standard. And it must sometimes act unilaterally, not out of a passion for unilateralism but only because, given a weak Europe that has moved beyond power, the United States has no choice but to act unilaterally'.²³

As in Schmitt's decisionism, the aim of the argument here is not to discard the relevance of norms in conditions of anarchy. Rather, it is to re-assert the continued and indispensable necessity of American state sovereignty even as America's closest allies are moving away from the power politics of sovereignty towards the 'brave new judicial world' anticipated by cosmopolitan advocates of global governance.²⁴ Neo-conservatives understand that Europe wants to move in that direction but insists that this judicial paradise cannot function as a closed legal system determined by strictly formal procedures. It needs an outside. As Fukuyama puts it, Europeans 'have indeed created an end of history for themselves within the EU, where sovereignty has given way to supranational organization. What they don't understand, however, is that the peace and safety of their European bubble is guaranteed ultimately by American power'.²⁵ Hence, in this interpretation, American power is not necessarily averse to multilateralism but it is its very condition of possibility. James W. Ceasar, a neo-conservative and Straussian professor of political science at the University of Virginia makes this point explicitly:

Even when the United Nations serves as the instrument of enforcement, as in the Gulf War, no one should be under any illusion that it can proceed in any significant case without American support. What looks like – and in a

²² Francis Fukuyama, *State-Building: Governance and World Order in the Twenty-First Century* (London: Profile Books, 2004), p. 142.

²³ Kagan, *Paradise and Power*, p. 99. Italics original.

²⁴ Anne-Marie Slaughter, 'A Brave New Judicial World', in Ignatieff, *American Exceptionalism and Human Rights*, pp. 177-203.

²⁵ Fukuyama, *State Building*, p. 159.

strict sense is – multilateral action nonetheless ultimately requires the approval and backing of one particular nation. For other nations, multilateralism means choosing to engage in an action along with the United States; for the United States, it means assuming the primary responsibility in any major engagement. There are no doubt very good practical reasons for downplaying this fact, but it is dangerous to allow the gentle fictions of modern diplomacy to penetrate too deeply into our own way of thinking. The whole system depends on the national resolve of the United States, and this resolve cannot be maintained over the long run without a strong sense of national purpose.²⁶

As Ceasar's comments makes clear, and this is crucial for the coming discussion, this decisionist interpretation of the normative order is inexorably linked to a domestic politics of identity that asserts the need to mobilise the nation behind the case for American sovereignty just as the idea of national sovereignty is losing its appeal in the rest of the Western liberal world. In this reading, it is precisely because Americans are good nationalists and accept the burden of the United States' exceptional role as the guarantor and producer of normative order that Europeans have the luxury of moving beyond the nation state. Hence the more post-national, multilateral and juridified international politics become, the greater the need for national unity and American sovereignty. Again Ceasar is worth quoting at length:

What has changed, accordingly, is not the importance of the nation for *us*, but its importance for others. Other nations do not bear the primary responsibility for maintaining a world order; when they engage in action under our umbrella they are less likely to use a national rhetoric and more apt to speak in terms of enforcing an international norm. At the same time, therefore, that we must think more nationally than before, we must accept that others will be thinking more internationally. Our understanding of the nation must be different from others' because our power and responsibilities are different. We must be prepared to make appropriate demands and claim appropriate prerogatives for the nation – this nation, at any rate – even when others oppose or condemn this. This is what it means to be alone on top. The challenge we face is to learn how to command, and no challenge is harder for a democratic people.²⁷

In sum, the decisionist standpoint adopted by neo-conservatives in their interpretation of the post-Cold War normative order and geopolitical environment not only establishes the necessity of American autonomy from the institutions of global governance. It also frames the issue in terms of a cultural identity politics that unfolds within the West as a conflict that pits a virtuous and clear-headed American citizenry capable of recognising the necessity of state-centredness in global politics against a self-indulging and frivolous Europe that wants to foster alternative kinds of politics at the expense of the American people.

²⁶ James W. Ceasar, 'The Great Divide: American Interventionism and its Opponents', in William Kristol and Robert Kagan (eds.), *Present Dangers: Crisis and Opportunity in American Foreign and Defense Policy* (New York: Encounter Books, 2000), p. 36.

²⁷ *Ibid.*, pp. 41-42.

The Assault on Global Governance

This takes us to the second set of arguments advanced by neo-conservatives and their colleagues of the AEI in defence of US sovereignty. Although they are closely related to the decisionist standpoint surveyed above and tie into the same identity politics, these have less to do with geopolitics and more with social preferences and competing understandings of the relationship between democracy, human rights and international law. The core of the controversy concerns the nature, scope and purpose of international law and whether or not the latter should trump US domestic courts. Here, neo-conservative aspirations to universal sovereignty converge with the emergence of a juridical revisionism that is deeply hostile to the internalisation of international law and with a militant ideological reaction against the idea and institutions of global governance that has been gaining ground in conservative circles since at least the early 1990s.

At the juridical level, the American Right's resistance against the advances of international law and global governance has been led by a number of jurists associated with the University of Chicago and the AEI such as Curtis Bradley, Jack Goldsmith and Eric Possner. The opposition here has been focused primarily upon what these jurists see as the increasingly intrusive and unmediated incursion of international law in the American legal system. Among other things, American juridical revisionists lament that rules and norms of customary international law may now be introduced into domestic courts directly by judges without having been subject to approval by Congress, which acts as the representative of the people. For them, these developments simply go against the core features of the American Constitutions, namely the separation of powers, representative democracy and federalism.²⁸ The revisionists owe their name to their effort at reversing the trend established by the *Restatement of the Foreign Relations Law of the United States*, a document widely accepted as authoritative within the American juridical community and which asserts that international law is indeed part of American federal law.²⁹ In their view, large segments of international customary law are illegitimate because i) they concern matters like human rights that are property of the domestic and not the international realm and ii) because they are not 'customary' since in several cases they do not correspond to state practices but simply express various forms of international agreements. Unlike the international customary law that prevailed between the 19th century and 1945, revisionists complain, post-WWII international

²⁸ See, for instance, Curtis Bradley and Jack Goldsmith, 'Customary International Law as Federal Common Law: A Critique of the Modern Position', *Harvard Law Review*, vol. 110, no. 4, 1997; Bradley and Goldsmith, 'U.N. Human Rights Standards and the U.S. Law: The Current Illegitimacy of International Human Rights Litigations', *Fordham Law Review*, vol. 66, November 1997; Goldsmith, 'Should International Human Rights Trump U.S. Domestic Law?', *Chicago Journal of International Law*, vol. 1, Fall 2000; Bradley and Goldsmith, 'International Delegations, the Structural Constitutions and Non-Self Executions', *Stanford Law Review*, vol. 55, May 2003. Eric Possner, 'Do States Have Moral Obligation to Obey International Law?', *Stanford Law Review*, vol. 55, 2003; Possner, 'Terrorism and the Law of War', *Chicago Journal of International Law*, vol. 5, no.2, 2005. For a good analytical survey of American legal revisionism see John Gerard Ruggie, 'American Exceptionalism, Exemptionalism, and Global Governance', in Ignatieff, *American Exceptionalism*, pp. 323-334. See also Peter J. Spiro, 'The New Sovereignists: American Exceptionalism and Its False Prophets', *Foreign Affairs*, vol. 79, November/December 2000.

²⁹ Ruggie, 'American Exceptionalism', p. 326.

customary law does not seek to regulate inter-states relations but to regulate the relationship between states and their citizens, especially in the area of human rights.³⁰

In fact, legal revisionists overstate the degree to which the intrusion of international customary law into the US legal system is actually taking place. As John Gerard Ruggie noted, the *Restatement of the Foreign Relations Law of the United States* attacked by legal revisionists represents an ‘overreaching’ by liberal internationalists of the time that exaggerated the extent to which US courts recognize the principle that international law is part of federal law.³¹ Revisionists take the Alien Tort Claims Act (ATCA) as their main example and point of departure. But the ACTA is more of an anomaly than anything else.³² The set of human rights treaties signed by the US at the end of the 1980s (the Genocide Convention, the International Covenant on Civil and Political Rights, the Torture Convention, and the International Convention on the Elimination of All Forms of Racial Discrimination) were all ratified by Congress with a series of reservations that effectively denied the self-executive character of those treaties in American courts.³³ The problem with revisionist arguments, critics correctly point out, is not so much that they are flawed in legal terms but that the threats that they identify remain strictly hypothetical and that they fail to show what concrete public policy problems they would help solving.³⁴

The intricacies of the debates over the legal substance, merits and flaws of revisionist proposals should not detain us. What is really important for the present discussion is not so much the legal and policy practicalities of revisionist proposals as the political significance of those nationalist contestations. For what is at stake here is not only the self-executive character of international customary law within the domestic courts of the United States or any other states. More fundamentally, it is the constitutionalisation of a system of international law that asserts the primacy of individual rights over those of the nation-state. Opposition to those two principles puts American legal revisionism firmly at odds with the legal climate of Europe, where those notions have been institutionalized and welcomed as positive political developments.³⁵

It is this political dimension of the debate that has been tapped in by neo-conservatives over the last decade or so in their war against global governance. They argue that the internalisation of international customary law is unconstitutional and that it undermines the political matrix through which America has understood itself over the last three centuries. Again, the argument here is played out in a cultural register. According to neo-conservatives, globalization and the spatio-temporal advanced of liberal modernity have given rise to an elitist ‘globalist’ culture and ideology in Europe and within American academic circles that is increasingly hostile to American

³⁰ See, in particular, Bradley and Goldsmith, ‘International Delegations’.

³¹ Ruggie, ‘American Exceptionalism’, p. 326.

³² Andrea Bianchi, ‘Interantional Law and US Courts: The Myth of Lohengrin Revisited’, *European Journal of International Law*, vol. 15, no. 4, 2004, p. 777.

³³ Christian G. Vergonis, ‘The Federalism Implications of International Human Rights Law’, The Federalist Society for Law and Public Policy Studies, 2002, p. 9. Online at http://www.fed-soc.org/publications/PubID.72/pub_detail.asp.

³⁴ Ruggie, ‘American Exceptionalism’, pp. 327-328; Spiro, ‘The New Sovereignists’; Anne Marie-Slaughter, ‘Building Global Democracy’, *Chicago Journal of International Law*, vol. 1, no. 2, 2000.

³⁵ See Peter Spiro, ‘Treaties, International Law and Constitutional Rights’, *Stanford Law Review*, vol. 55, 2003.

values and to the political culture and democratic constitutionalism of the United States. Composed of a cohort of IR and international law professors as well as humanitarian and environmental entrepreneurs, it is argued, the small group of intellectuals and activists that promotes this cosmopolitan culture is generally uneasy with the capitalist and individualist sensibility of the very large majority of the American people. Globalists and their European allies wish to anchor international cooperation into a global constitutional order and subject the democratic will of the American people to the authority of what they see as a world state in the making. As John Bolton puts it in one of his most provocative polemics:

[T]hese “globalists” find allies all around the world. Their agenda is unambiguously statist, but typically on a worldwide scale rather than a national level.... Globalists have seized more readily the opportunities provided by the end of the Cold War to advance their agenda, building on an iceberg-like mass produced by years of writing, conference-going, resolution-passing and networking. In substantive field after field – human rights, labor, health, the environment, politicalmilitary affairs, and international organizations – the globalists have been advancing while the Americanists have slept. Recent clashes in and around the United States Senate indicate that the Americanist party has awakened, and that the harm and costs to the United States of belittling our popular sovereignty and constitutionalism, and restricting both our domestic and our international policy flexibility and power are finally receiving attention. Nonetheless, Americanists find themselves surrounded by small armies of Globalists, each tightly clutching a favorite new treaty or multilateralist proposal.³⁶

What is startling in those polemics is the importance and degree of influence accorded to Europe as a political bearer of this globalist ‘adversarial-culture’. Echoing the first generation of neo-conservatives who led the counter attack against the Third World’s demand for a New International Economic Order (NIEO) in the 1970s, Bolton argues that ‘the European Union of the 1990s and the next decade has replaced the Developing World (and its NIEO and NWICO) as the leading source of substantive Globalist policy’. He goes on,

Faced with sweeping international economic change, European Globalists have found that the international power of their states is too insignificant, their currencies too weak, and their social-democratic welfare systems too expensive to withstand. The European reaction, especially on the left, has been to aggregate state power through the EU mechanism, precisely the opposite of the instinctive Americanist inclination.... Thus, not content alone with transferring their own national sovereignty to Brussels, they also decided, in effect, to transfer some of ours to worldwide institutions and norms, thus making the European Union a miniature precursor to global governance.³⁷

Along similar lines, Jeremy Rabkin, another neo-conservative traveller who teaches politics at Cornell, argues that the European model of shared sovereignty poses a

³⁶ John Bolton, ‘Should We Take Global Governance Seriously?’, *Chicago Journal of International Law*, vol. 1, no. 2, 2000, pp. 205-206.

³⁷ *Ibid.*, p. 220.

threat to the sovereignty of non-member states because it transfers a great deal of state power to supranational institutions in the public sector and to non-governmental organizations (NGOs) in the private sector that are all bent on regulating environmental, human rights and social issues. In his view, the fact that this 'Euro-tizing' process could incite other states to adapt their own regulations to the standards set by another group of states – i.e. EU member states – is an offence to the principle of sovereignty.³⁸ According to Rabkin, the primary source of conflict between Europe and the United States for the years to come will not be any particular substantive issue but the interpretation and practice of sovereignty itself.³⁹

Although certainly no great supporters of participatory democracy themselves when it comes to domestic politics, neo-conservatives criticize the spread of supranational institutions because the latter reduce the possibility of individual and national parliamentary participation in the political process and redistribute power and decision-making authority from elected governments to a conglomerate of international bureaucrats and technocrats. In an AEI conference on the subject, for example, Jeane Kirkpatrick sustained that the functions and mode of operations of a 'nascent superstate' like the EU are fundamentally antithetical to the idea of democracy: 'The capacity to act without accountability is disturbing because positions are taken by persons who are elected by no one and accountable to no one... This is what Mrs. Thatcher called a democratic deficit... The representatives are not, in fact, with the single exception of the Strasbourg parliament, elected... and so they violate fundamental principles of democratic governance'.⁴⁰ The problem, it is argued, is not only the democratic deficit that underpins institutions of global governance but also the fact that it opens the formal political and decision-making process to NGO participation and renders the constitutional order vulnerable to capture by a multitude of interest groups, all operating outside the bounds of democratic accountability and pursuing a self-interested 'welfarist' agenda.⁴¹

This crowding out of the international political process by NGOs, neo-conservatives argue, dovetails with the efforts by human rights group to remove various humanitarian and social issues from the realm of national politics and democratic oversight by 'judicializing' them at the international level. For neo-conservatives, this emerging global civil society is threatening because it 'sees itself beyond national politics' and markets itself as an alternative to the nation-state as a vehicle for decision-making'.⁴² But the anti-statist appeal of global civil society, they anxiously warn, is deeply misleading. Far from being the manifestation of libertarian aspirations,

³⁸ Jeremy Rabkin, 'Is EU Policy Eroding the Sovereignty of Non-Members States?', *Chicago Journal of International Law*, vol. 1, no. 2, 2000.

³⁹ See, Rabkin, *The Case for Sovereignty; Law Without Nation: Why Constitutional Government Requires Sovereign States* (Princeton N.J.: Princeton University Press, 2005). See also American Enterprise Institute, Transcripts From the Conference on War, International Law, and Sovereignty: Reevaluating the Rules of the Game in a New Century, June 24 2004. Available online at <http://www.aei.org>.

⁴⁰ Jeane Kirkpatrick, Transcript of AEI Conference Proceedings, on file with the Chicago Journal of International Law. Cited in Andrew Moravscik, 'Conservative Idealism and International Institutions', *Chicago Journal of International Law*, vol. 1, no. 2, 2000, p. 307.

⁴¹ Bolton, 'Should We Take Global Governance Seriously?', p. 215; Rabkin, *The Case for Sovereignty; 'Is EU Policy Eroding the Sovereignty of Non-Members States?'*.

⁴² Bolton, 'Should We Take Global Governance Seriously?', p. 216. See also Rabkin, *The Case for Sovereignty; 'Is EU Policy Eroding the Sovereignty of Non-Members States?'*.

global civil society and the whole network of advocacy groups of which it is composed is the expression of the same modern rationalist impulse to plan and socially engineer everything that gave us the social democratic welfare state. Except now, there is nothing democratic about the super-state envisioned by European and American globalists. Indeed, Bolton provocatively argues that the idea of global civil society bears family resemblance with Mussolini's fascist regime in that it 'suggests a "corporatist" approach to international decision-making that is dramatically troubling for democratic theory because it posits "interests" (whether NGOs or business) as legitimate actors along with popularly elected governments'. Global governance, he concludes, 'represents a kind of worldwide cartelization of governments and interest groups. Even though its proponents purportedly abjure global government as such (at least rhetorically, and only for now), the consequence is, for all practical purposes, the same'.⁴³

Although highly improbable, neo-conservatives apparently do not completely exclude the possibility that the conglomeration of international institutions like the International Criminal Court and the various agencies of the U.N. could lead to the creation of a supranational state. But they insist that the belief that this cosmopolitan super-state could be legitimate, democratic, or anything else than a tyrannical behemoth is dangerously misleading. As Fukuyama puts it, the chance that a democratic world government will ever come into being 'is as close to zero as you ever get in political life. What will be practically possible to construct in terms of international institutions will not be legitimate or democratic, and what will be legitimate and democratic will not be possible to construct'.⁴⁴

Such contestations over the possibility and desirability of a global constitutional order bring political philosophy to the fore. In fact, what neo-conservatives present as a culture clash between globalists and Americanists over the principle of sovereignty can be read as a conflict over the interpretation of some of the basic principles of the liberal tradition concerning the source of democratic legitimacy, the role of government in society, and the concepts of freedom and equality. First, as seen above, neo-conservatives reject the view that the source of democratic legitimacy can be located at some level higher than the democratic nation-state. For them, the idea that international legitimacy derives from the will of an international community that transcends any individual nation-state is an irrational leap of faith. Because the international community is not concretely anchored in a global democratic constitutional order, it cannot confer legitimacy upon international and state institutions from above. From their perspective, humanitarian interventions, peace-keeping operations and all other such collective endeavours sanctioned by the United Nations have nothing to do with the moral expression of the will of a broader international community. They are no more and no less than improvised and temporary interstate initiatives. As Francis Fukuyama argues, 'That any international organization has legitimacy is because duly constituted democratic majorities have

⁴³ Ibid, p. 217, p. 221.

⁴⁴ Francis Fukuyama, 'Does the West Still Exist?' in Tod Lindberg (ed.), *Beyond Paradise and Power: Europe, America and the Future of a Troubled Partnership* (New York and London: Routledge, 2005), pp. 146-147.

handed that legitimacy up to them in a negotiated, contractual process. Such legitimacy can be withdrawn at any time by the contracting parties'.⁴⁵

At the more philosophical level, neo-conservatives oppose the interpretation of democratic legitimacy because of its noumenal character. International law and the institutions of global governance, they argue, sever the moral basis of international legitimacy from the principle of democratic consent. Rather than reflecting the contractual will of the peoples concerned, they are the expression of a set of universalistic rules of morality that are binding, even if actually rejected by the majority, by virtue of our nature as free and equal human beings. In other words, they are binding because no rational human being considering his or her genuine interest would fail to endorse them.⁴⁶ Conversely, from this same noumenal position, it can be declared that some choices adopted by the democratic majority are in principle invalid on the basis that they do not pass the test of rational validation. As Peter Berkowitz argues, this 'doctrine of derived consent' is a child of the French Enlightenment, genealogically tied to Rousseau's 'doctrine of the general will of forcing the individual to be free' and Kant's categorical imperative – i.e. the notion that 'each person should regard himself or herself as a legislator for, but also a subject in, a universal kingdom of ends'.⁴⁷ It is one of those potentially tyrannical ideas closely tied to the notion of positive freedom that underpins the perpetual demands of the Left for the government to expand its role 'from guarantor of rights to imposer of burdens and distributor of benefits'. According to Berkowitz, the doctrine of sovereign equality invoked by Europeans today to 'counter American supremacy' and 'hold back the prosperous and prominent' has its origins in the same ill-conceived modern liberal rationalism:

The liberal spirit intensifies among Europeans the sense of equality among nations, whereas the reality of American power and European weakness painfully reminds Europe of the sense in which they are unequal. So the Europeans make a priority out of increasing the realms in which they can regard themselves as equal. They arrogantly confuse equality among nations in respect of sovereignty for equality in all respects, including equality in regard to competence and accountability. They one-sidedly assume that more equality between states in international affairs is always to be preferred, denying in the process such other relevant attributes of states as population size, respect for human rights and the rule of law, and the power to defend justice by force.⁴⁸

The above passage highlights how this critique of modern rationalism feeds into a decisionist interpretation of the normative order in the neo-conservative framework. In a typically Straussian fashion, neo-conservatives argue that Europeans and American globalists are correct in their belief that there indeed exists a set of universal values that can be ascended to through rational theoretical arguments. But this universal 'ought', they insist, remains very imperfectly embodied in international

⁴⁵ Ibid., p. 144. See also John Bolton, "Legitimacy" in International Affairs: The American Perspective. Theory and Operation', remarks to the Federalist Society, Washington, DC, 13 November 2003, online at www.state.gov [accessed 6 May 2004]; Rabkin, *Why Sovereignty Matters*; and Law Without Nations.

⁴⁶ Peter Berkowitz, 'Liberalism and Power', in Lindberg, *Beyond Paradise and Power*, pp. 203-208.

⁴⁷ Ibid., pp. 205-206.

⁴⁸ Ibid., pp. 209-210.

institutions and many states and non-states actors today remain uncommitted to those moral laws of nature. War still very much casts its shadow on peace. And in such conditions, the most important task of statesmen is to resist illusory humanist beliefs and recognize the weakness of justice in the international affairs. Moreover, they argue, it is precisely because the shadow of war is often the by-product of the self-interested spirit that modern liberalism fosters that we ought to impose democratic safeguards on universal reason.⁴⁹ No laws of human construction can do away with the fallibility of man and the primacy of conflict in social life. It is this reality that establishes the essential conditions of democratic politics. To forget this reality and think the political through abstract ethical categories is to abandon the normative order to a relativistic legalism that cannot be justified from a moral standpoint outside of itself. It saps liberal internationalism of all its meaning and severs the normative order from its mooring in a factual power capable of ensuring the viability of this order.

Sovereignty as Democracy

What should we make of those ‘political’ philosophical arguments against global governance and the constitutionalisation of the international order? As various critics have argued, from a foreign policy perspective, in the highly interdependent environment in which we live today, the suggestion that sovereign, unilateral policies are optimal for the US makes little sense from a rational, pragmatic point of view. Ruggie, for instance, argues that sovereigntists unwisely privilege ‘doctrine over practical considerations’ in making their case and along the way completely misconstrue the nature of international authority. Their case against global governance, he argues, ‘externalizes and objectifies the very concept [of international authority], as though this authority were embodied in *someone* or *something* other than states’. ‘With rare exception’, Ruggie insists, ‘authority in global governance involves no formal relations of super-and-subordination, but remains largely horizontal in character’.⁵⁰ Along similar line, Andrew Moravcsik argues that the picture of the EU as a nascent, socialist super-state whose governing elites are not accountable to anyone is obviously a gross mischaracterisation of the democratic deficit and of the residual commitments to social democracy in Europe. Getting to grip with Rabkin’s recent publications on American sovereignty and his attack on global governance and European integration, Moravcsik argues that the idealism of such polemics verge on the romantic. Rabkin and his colleagues, he insists, are no proponents ‘of a traditional foreign policy dedicated to the “national interest”’. Their defence of sovereignty eschew all pragmatic considerations about the costs and benefits of multilateral cooperation in conditions of globalization. They are deluded ‘conservative idealists’ for whom ““autonomy” and “sovereignty” is an end in itself, regardless of the concrete consequences’.⁵¹ Against ‘conservative idealists’, Moravcsik insists that in a globalised world, ‘governments must increasingly trade away a certain amount of unilateral policy discretion in order to achieve the domestic policy objectives to which they collectively aspire’. Invoking Robert Keohane’s *After Hegemony* and Stephen Krasner’s work on international regimes, he emphasises that welfare-maximization under conditions of global interdependence requires policy coordination and stresses that the collective action problems of international

⁴⁹ Ibid, p. 207; Fukuyama, ‘Does the West Still Exists’, pp. 145-146.

⁵⁰ Ruggie, ‘American Exceptionalism’, p. 330. Italics original.

⁵¹ Moravcsik, ‘American Idealism and International Institutions’, p. 298.

cooperation can only be resolved efficiently with a high degree of institutionalisation.⁵²

These are certainly valid criticisms. As I hope the analysis so far makes clear, there is no doubt that neo-conservatives are primarily concerned with the substantive rather than the practical consequences of sovereignty and independence. Yet, what the above criticisms are missing is that for neo-conservatives this is precisely what politics is all about. The type of rationalist-materialistic theories and interpretation of the national interests *à la* Keohane and Krasner invoked by Moravcsik is exactly what neo-conservatism has sought to define itself against in foreign policy debates since the 1970s. For them, the reduction of the national interest to narrow conceptions of self-interest characteristic of modern rationalism is both analytically flawed and politically destructive. A democratic social order that is no more than the summation of the egoistic interests of individuals or social groups, neo-conservatives argue, is unsustainable and bound to collapse into political, social and moral decay. Unless it is capable of linking morality and identity with power and of generating a compelling notion of the public interest, such a society will rot from within and be unable to assert itself in the international sphere. The national interest, neo-conservatives insist, is as much a question of substantive ideals as one of political practice and interest calculation. It weaves geopolitics together with moral and socio-cultural dilemmas that have been constitutive of American society since the founding of the republic.⁵³

As Michael Williams points out, this value-laden interpretation of the national interest has over the years given neo-conservatives a remarkable advantage over their realist and liberal opponents within the social and political fields in which they operate: 'Neoconservatism claims to represent the majority of 'real' Americans, to speak on their behalf, and to defend the validity of their beliefs in the virtue, values, and their place as the basis for the national interest of the United States, just as vociferously as it has represented those values the depredations of elites in the culture wars'.⁵⁴ As we have seen above, they present themselves as the 'anti-intellectual intellectuals' who represent and guard the true and authentic character of American culture against the patronising cosmopolitanism of a naïve minority.

The rationalist outlook and conscious marginalisation of issues of values and identity in the type of theorising endorsed by Moravcsik's prevents him from appreciating the political symbolism that is at work in neo-conservative discourses and from acknowledging the constitutive role that this cultural politics plays in their attempt at re-articulating class interests and mobilising support for their domestic and foreign policy agenda. To be fair, Moravcsik does indeed suggest that the apparent lack of pragmatism of their defence of American sovereignty indeed *conceals* a partisan, domestic right-wing agenda.⁵⁵ However, what he fails to recognise is that this

⁵² Ibid., p. 296.

⁵³ See, for instance, Irving Kristol, *Reflections of a Neo-Conservative: Looking Back, Looking Ahead* (New York: Basic Books Inc., 1983), p. xiv; Michael C. Williams, 'What is the National Interest? The Neoconservative Challenge in IR Theory', *European Journal of International Relations*, vol. 11, no. 3, 2005.

⁵⁴ Michael C. Williams, *Culture and Security: Symbolic Power and the Politics of International Security* (London: Routledge, 2007), p. ?

⁵⁵ Moravcsik, 'Conservative Idealism', pp. 298-303. Robert Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton: Princeton University Press, 1994); Stephen D. Krasner, *International Regimes* (Ithaca: Cornell University Press, 1983)

‘irrational’ emphasis on the substantial consequences of sovereignty does not *conceal* a rational, materialistic agenda. Rather, it is the manifestation of an identity politics that both *constitutes* this hegemonic agenda and facilitates its articulation and advancement. For neo-conservatives, the attack on global governance and European integration is as much about defending America’s capacity to pursue its geopolitical and geoeconomic objectives autonomously as it is about fixing the cultural content of American citizenship. The two are inexorably linked with one another. As will be argued in the remainder of this discussion, what is really at stake for neo-conservatives in those debates is not only the sovereign capabilities of the United States in international affairs but the symbolic and cultural structure attached to the communitarian interpretation of democratic justice that they have been nurturing in support of their domestic political and economic agenda since the late 1960s. My main contention here is that it is not really the link between the normative order and democracy as a practice and ethical value in itself that is being defended by neo-conservatives in those debates. It is the tie between the normative order, American sovereignty and democracy as an ideal that is constitutive of a particular way of life.

As we have seen above, and not incorrectly, the challenge for the Right here stems from the fact the transformation of international law from a mechanism regulating interstate relations to a regime of individual rights demands that we think of individual identity and rights as being prior to political association. In these normative conditions, the state remains an important institution but it ceases to be an end in itself. It exists strictly to create an environment in which individual rights are protected and the individual can pursue his or her interests at will. It becomes just one of many intermediate associations – competing with ethnic groups, religious groups, professional guilds, corporations and other such identity-conferring social formations for the loyalty of its members. As Paul W. Kahn points out, this whole process institutes a whole new, ‘post-modern’ understanding of the relationship between law and rights whereby law ceases to ‘function as an expression of popular sovereignty that chooses to invest itself in particular rights ... and gains its legitimacy from the defence of rights’.⁵⁶

Unsurprisingly, neo-conservatives insist that this ‘post-modern’ interpretation of the relationship between law and rights is fundamentally at odd with America’s constitutional tradition. Appealing to the eternal wisdom of the Founding Fathers, they maintain that the law is first and foremost the expression of the will of an historical community.⁵⁷ From this perspective, the exceptional character of America’s political experience stems not so much from the fact that the American constitution expresses a set of universal values but from the fact that Americans have agreed to govern themselves according to universal principles of natural right. The law therefore ties citizenship not only to a set of rights but also to a common obligation to maintain and carry the project of popular sovereignty into the future. It directs citizenship towards a good that is constitutive of both individual and collective identity. As in all liberal interpretations, the law here is understood as a critical means to prevent abuse of

⁵⁶ Paul W. Kahn, ‘American Hegemony and International Law. Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order’, *Chicago Journal of International Law*, vol. 1, no. 2, 2000, p. 6.

⁵⁷ See, for instance, Bolton, “‘Legitimacy’ in International Affairs”; Rabkin, *Why Sovereignty Matters*, p?; Irving Kristol, ‘The American Revolution as a Successful Revolution’, in *Neo-conservatism: The Autobiography of an Idea* (New York: Free Press, 1995);

power and impose constraints on government. But it does so in the name of the political community rather than the individual; it is about popular sovereignty, not the contents of universal rights. Bolton makes this point clearly with regards to the death penalty in his tirade against human rights regimes. As he explains, ‘Americans in the last several decades have soberly examined the death penalty, and by and large reaffirmed it in a textbook demonstration of popular sovereignty at work’.⁵⁸

Yet, neo-conservative insist that in spite of some relatively minor disagreements over the substance of rights Americans understand their political experience to be fully compatible with the liberal moral substance of international law and human rights regime. However, they stress that such a common ethical ground cannot be the basis for a common political identity. Moral values can only become constitutive of a collective political identity when they express the will of the democratic majority. And this, they argue, necessarily entails the drawing of boundaries to determine who is a member of the political community and who is not. In Rabkin’s Words:

To feel obligated by the decision of the requisite majority in the framing of a constitution, one must already accept the necessity or appropriateness of living under the same system with those others who make the majority. When we spew of America as a democracy, we imply that government is accountable to the majority of our own people. For there to be a democracy, there must first be a demos – a distinct people.⁵⁹

What deserves attention here is that fact that this substantive understanding of democracy rests upon a cultural a priori that is just as pre-political as the interpretation of human rights posited by advocates of global governance. That is, legal status in this account is defined in terms of civil rights that are made contingent upon membership in a culturally defined community. This is a move that is typical of practically all forms of nationalism. It hinges upon what Habermas describes as a normative ‘conceptual gap in the legal construction of the constitutional state’. On the one hand, democratic constitutionalism as a joint practice necessarily requires some form of commonality. Yet, on the other hand, the social boundaries of any constitutional association are purely contingent from a strictly normative perspective since, beyond the fiction of the social contract, it is the reality of war and civil war that has most often settled the issue of who gets to define the boundaries of a political community.⁶⁰ Historically, nationalism has concealed the arbitrariness of the nation’s boundaries by appealing to the notion of an organic national consciousness crystallized around the idea of a common history, ancestry, language and so on that puts these boundaries beyond the need for normative justification. This cultural rendering of political membership has contributed immensely in the consolidation of the nation-state as a political unit and in facilitating a more abstract level of social integration through the juridification of democratic citizenship.

Now it is often suggested that the United States is an exception to this process since the social compact in America took hold in a multi-ethnic setting. US nationalism, it

⁵⁸ Bolton, ‘Should We Take Global Governance Seriously?’, pp. 213-214.

⁵⁹ Rabkin, *Why Sovereignty Matters*, p. 95, note 19.

⁶⁰ Jürgen Habermas, ‘The European Nation-State: On the Past and Future of Sovereignty and Citizenship’, in Habermas, *The Inclusion of the Other: Studies in Political Theory* (Cambridge: Polity Press, 1999), pp. 115-116.

is argued, is not based on blood and soil but on America's civic tradition. However, the civic religion from which American nationalism draws its exceptional character is rooted in a majority culture that has historically performed a very similar pre-political, integrative function in the US by putting the boundaries of democratic identity beyond the need for normative justification.⁶¹ It is precisely in reaction to the disintegration of this 'pre-political' consensus in the face of social and cultural diversification that neo-conservatism has crystallised as a movement during the 1970s. Taking their cue from Tocqueville's exceptionalist interpretation of American democracy, neo-conservatives maintain that the cultural revolutions of the 1960s have disturbed the cultural consensus around the Protestant ethos, bourgeois values and republican virtues that for so long have contained class and racial conflicts and made American capitalist democracy possible in the face of such racial and class inequality. In questioning this consensual and rather problematic reading of American democracy, the counterculture politicised a whole range of issues – poverty, race, education, homosexuality, patriotism, the family and so on – that had until then been kept out of the political realm. Against the abstract moral universals that has inspired the American Revolution, it is argued, the liberal Left has introduced a relativist liberalism that celebrates cultural individuality and asserts the not only the rights of man but of man as a Black, a Jew, a Muslim, a worker, a woman or an homosexual. As Allan Bloom put it in his famous polemics against the cultural revolutions:

That dominant majority gave the country a dominant culture with its traditions, its literature, its tastes, its special claim to know and supervise the language, and its Protestant religions. Much of the intellectual machinery of twentieth-century American political thought and social science was constructed for the purposes of making an assault on that majority. It treated the founding principles as impediments and tried to overcome the other strand of our political heritage, majoritarianism, in favor of a nation of minorities and groups each following its own beliefs and inclinations. In particular, the intellectual minority expected to enhance its status, presenting itself as the defender and spokesman of all the others.⁶²

According to neo-conservatives, the rise of the counterculture and the civic rights movement in the 1960s has had a devastating and lasting effect on American society. For it was the strong moral convictions of the protestant ethos and the republican virtues of self-reliance and self-restraint that historically has counterbalanced the individualistic temper of America's liberal society and kept its hedonistic and utopian impulses within reasonable limits. The disconnection of individualism from a widely accepted public philosophy, they argue, dissolved the moral and ideational framework that kept unreasonable expectations under control and prevented the pursuit of private economic interests from dominating and corrupting the political sphere, the *res publica*. It has turned the ethical and political ideal of democracy into a mere technique to govern a populace rendered increasingly ungovernable by the moral relativism and multiculturalism propagated by the liberal elite.⁶³

⁶¹ Ibid., p. 113.

⁶² Allan Bloom, *The Closing of the American Mind* (New York: Simon and Schuster, 1987), p. 31.

⁶³ See, for instance, Nathan Glazer and Irving Kristol (eds.), *The American Commonwealth* (New York: Basic Books, 1976); Daniel Bell, *The Cultural Contradictions of Capitalism* (New York: Basic Books, 1978); Irving Kristol, "When Virtue Loses All her Loveliness" – Some Reflections on

The point here is that the whole neo-conservative enterprise hinges on the belief that liberalism can only flourish in conditions of substantive homogeneity. Like neo-liberals, they are committed to laissez-faire economics and to some form of libertarian understanding of the quantitatively weak state. But this commitment is predicated on the belief that freedom and liberty are only possible where the state is qualitatively strong. Within the neo-conservative framework, it is only in presence of a strong moral and cultural consensus on the common good that the state can withdraw from its historically evolved entanglement with civil society and let the invisible hand of the market discipline the poor and perform its social steering function.⁶⁴ Accordingly, since the early 1970s, neo-conservatives have responded to this pending crisis of governability by means of 1) a relentless campaign against liberal intellectuals as bearers of modern cultural values that conflict with the functional imperatives of the state and the capitalist economy and 2) a concerted effort to transform the political rationales underpinning state intervention in socio-economic processes (by advocating harsh retributive welfare and penal measures for example) in order to restore the consensus around the majority culture deemed necessary to ensure the peaceful coexistence of capitalism and democracy.⁶⁵

It is in this context that neo-conservative resistance to global governance and the constitutionalisation of the international order must be understood. International law and human rights regimes are premised on a procedural understanding of domestic democracy that effectively breaks the tie between popular sovereignty and the pre-political consensus of the majority culture. To the particularism of a democratic community united by their political commitment to a set of universal values and their historical destiny, global governance and international law oppose a vision of democracy in which free individuals are united in the universalism of a multicultural and egalitarian legal community. It substitutes the pre-political integrative force relied upon by neo-conservatives to sustain the social compact by a formal deliberative process whose integrative power is derived not from its substantive moral or cultural content but from its universal ethical value as a mechanism for mediating between different conceptions of the good and sources of political identity.

For neo-conservatives, the idea of an upward transfer of sovereignty from the nation-state to some form of pluralistic, global constitutional order is a just another symptom of the modern crisis of relativism against which they have defined their own brand of reactionary and moralizing liberalism since the early 1970s. As Fukuyama argues, because the notion of democratic legitimacy from which international institutions draw their authority accommodates various types of moral and political cultures, it necessarily involves the abandonment of a standard of right and wrong independent of positive right. By associating and entrusting their commitment to a liberal moral order with global institutions, he sustains, European and American globalists adopt a procedural understanding of democratic legitimacy that in fact contradicts their belief

Capitalism and the “Free Society”, in I. Kristol, *On the Democratic Idea in America* (New York: Harper & Row, 1972).

⁶⁴ Jean-François Drolet, ‘The Visible Hand of Neo-Conservative Capitalism’, *Millennium: Journal of International Studies*, vol. 37, no. 2, 2007.

⁶⁵ Peter Steinfels, *The Neo-conservatives* (New York: Simon and Schuster, 1979); Mark Gerson, *The Neo-conservative Vision: Politics, Culture, and the War of Ideology* (Philadelphia: Temple University Press, 1993).

in a hierarchy of ethical values. For neo-conservatives, the legitimacy of a constitutional order must necessarily come from the 'prior rights and norms that come from a moral realm higher than that of the legal order'.⁶⁶ And this, they contend, is precisely what current debates over sovereignty, legality and legitimacy are all about. It is how the political manifests itself in the post-Cold War era. For them there can be no distinction between the domestic and the international in this respect. Abandoning state and popular sovereignty to this emerging cosmopolitan legal culture would empty the ideal democracy of its moral and cultural substance and deprive the American Right from a key site of political mobilisation in its effort to roll back multiculturalism, re-moralise the social contract and contain the cultural contradictions of capitalism. As Kristol and Kagan make clear in their neo-Reaganite manifesto:

The remoralization of America at home ultimately requires the remoralization of American foreign policy. For both follow from American's belief that the principles of the declaration of Independence are not merely the choices of a particular culture but are universal, enduring, 'self-evident' truth. That has been, after all, the main point of the conservatives' war against a relativistic multiculturalism.⁶⁷

Along similar lines, James Ceasar maintains that for the Right the end of the Cold War and the emergence of a cosmopolitan discourse of global civil society have meant that the culture wars would now have to be fought in a global context. As he explains, for him and his colleagues, Clinton's departure from the Wilsonian commitment to a right of national self-determination in favour of a 'universal multi-ethnic future' was a shedding moment in this respect:

And in Clinton's case, conservatives cannot help but suspect that his universalistic multiculturalism is a way also to promote his domestic agenda. At a minimum, he often seems to see the foreign and domestic through the prism, with the Kosovo war sometimes justified in the language paralleling his calls for hate-crime legislation. For the traditional American principle of rights based on nature, the president has substituted a respect for groups based on a tolerance of diversity, replete with fashionable postmodern references to the "other"... Somehow or other, the nation as the central unit of international affairs has been removed from the scene and replaced by the management of race and ethnic group conflict.⁶⁸

Sovereignty as Universal Ethics

Linking national autonomy with a culturally charged interpretation of democracy in this manner necessarily has implications for the way that sovereignty is practiced in the international arena. In the liberal international order envisioned by cosmopolitan globalists, where states are committed to a procedural understanding of democratic

⁶⁶ Fukuyama, 'Does the West Still Exist?', pp. 145-146.

⁹⁴ William Kristol and Robert Kagan, 'Towards a Neo-Reaganite Foreign Policy', *Foreign Affairs*, no. 75 (July/August 1996), p. 31.

⁶⁸ Ceasar, 'The Great Divide', pp. 34-35.

legitimacy in both the international and domestic sphere, sovereignty is tied to the private and public autonomy enjoyed by all who participate as free and equal subjects in democratic procedures. External sovereignty in this case has to do primarily with the quest for state power and securing the existence of the political community. This deliberative model of democracy sets up strict criteria concerning how domestic political rule is legitimated and what a legitimate international order would ideally look like. But those criteria do not necessarily affect the way external sovereignty is exercised.⁶⁹ By contrast, the substantive notion of democracy defended by neo-conservatives assumes an essential link between the freedom and liberties of the people and the external independence of that people, since in this account the nation – defined by its majority culture – mediates between the rule of law and democracy. External sovereignty in this setting is therefore not only about preserving state power and the existence of the political community but also about securing its particular cultural character over and against other nations. As Habermas argues, ‘The meaning of democratic self-determination based on the majority culture is not the political autonomy of individual citizens but rather national independence – the self-assertion, self-affirmation, and self-realization of a nation in its specificity’.⁷⁰

There is, of course, nothing so exceptional about the fact that American nationalists consider the American experience to be exceptional and want to assert that myth through a politics of sovereignty. Many political communities have their own myth of exceptionalism and have appealed to it to justify various policies and claim various prerogatives in the past. Yet the difference here is that whereas the exceptionalism of other countries or societies resides in the past and cannot be emulated, American exceptionalism also claims to be universal in its particularity and ‘insists on the necessity and desirability of being emulated’.⁷¹ As Kagan argued recently in the pages of the *Financial Times*, ‘The real “traditional approach” to American foreign policy is based on ‘the conviction that American power and influence can and should serve the interests of humanity’. Citing Williams Appleman Williams, Kagan explains that ‘Americans believe their nation “has meaning...only as it realises natural right and reason throughout the universe’.⁷² American exceptionalism in this interpretation therefore sees itself as the expression of the historical unfolding of a universal morality deeply at odds with the relativistic procedural character of modern international law: ‘By nature, tradition, and ideology, the United States has generally favored the promotion of liberal principles over the niceties of Westphalian diplomacy. Despite its role in helping to create the UN and draft the UN Charter, the United States has never fully accepted the organization's legitimacy or the charter's doctrine of sovereign equality’.⁷³ It is unreservedly committed to the establishment and preservation of a liberal order, but ‘one with American power at the centre and with America as the indispensable nation’.⁷⁴

⁶⁹ Jürgen Habermas, ‘Nation, the Rule of Law, and Democracy’, in J. Habermas, *The Inclusion of the Other*, p. 136.

⁷⁰ *Ibid.*

⁷¹ Achin Vanaik, ‘Introduction’, in A. Vanaik (ed.), *Selling US Wars* (Adlestrop: Arris Books, 2007).

⁷² Robert Kagan, ‘America Supports Democracy, How Novel’, *Financial Times*, December 6, 2006, p. 19.

⁷³ Robert Kagan, ‘America’s Crisis of Legitimacy’, *Foreign Affairs*, March/April, 2004, p. 19.

⁷⁴ Robert Kagan, ‘One Year After: A Grand Strategy for the West?’, *Survival*, vol. 44, no. 4, 2002-03, pp. 138-139.

What renders the practice of sovereignty all the more volatile in this setting is not only that it links external autonomy and America's aspirations to 'universal sovereignty' with the self-realisation of a cultural community but that it does so by elevating ethics above both law and politics as it ties the ethical identity of a particular way of life with a universal system of values. As Jacques Rancière points out, neo-conservatives construct America as 'first and foremost a community united by common moral and religious values, an ethical community more than one of law and politics. The Good, by which the community is founded, is therefore the identity between law and fact'.⁷⁵ In this context, commitments to procedural principles of justice that claim a general validity beyond the boundaries of the concrete legal community necessarily constitute a negation of the substantive 'Good' from which the state draws its symbolic structure of meanings. In these circumstances, unilateralism takes a whole new dimension. It ceases to be strictly a short-term strategy chosen by a powerful state to attain a set of geopolitical objectives and becomes an existential imperative. As Ceasar argues, neo-conservatives

see no difficulty in squaring the assertion of universal principles with a belief in the nation and national purpose. What is more an expression of the particular mission of *this* nation, they ask, than to give voice to the universal principles on which it was founded? To renounce this element of the American founding in the name of avoiding internationalism would mean, ironically, to reject the foundation of our own nationalism. The fact that America rests on a different foundation from that of most other nations – that the American people become one by adhering to certain principles as well as sharing certain cultural features – is surely no reason to abandon what is our own. A good nationalist should rather proudly assert it.⁷⁶

By linking normative principles of international legitimacy with the moral principles that guided the American founding, neo-conservatives collapse the limit between fact and norms that is normally mediated by objective procedures that endow the law with general, universal validity. During the Cold War, when the US intervened in various regions of the Third World, there was an explicit or implicit contradiction between the founding principles of the republic and the practices that subordinated those moral principles to a politics of the national interest. Indeed, it is in great part against this gap between principles and practices that the counter-culture mobilised in the 1960s and 1970s.⁷⁷ Today, by turning law and norms into a universal ethics tied to the popular and state sovereignty of the US, the neo-conservative formula appears to have closed the circle. Foreign policy is no longer about *defending* abroad what America is at home. It is about *defining* abroad what it is at home.⁷⁸

⁷⁵ Jacques Rancière, 'Prisoners of the Infinite', *Counterpunch*, April 30 2002, online at <http://www.counterpunch.org/ranciere0430.html>. [12 October 2002].

⁷⁶ Ceasar, 'The Great Divide', pp. 38-39. Italics original.

⁷⁷ Rancière, 'Prisoners of the Infinite'.

⁷⁸ This point is made incisively by William McDougal in his study of American foreign policy since 1776, *Promised Land, Crusader States: The American Encounter with the World Since 1776* (Boston: Houghton Mifflin, 1997), p. 37.

Conclusion: The Imperial Paradox of American Sovereignty

Ultimately, the unviability of the defence of sovereignty presented above stems from the fact that it is based on two conflicting notions of politics – one particularistic and one universalistic. In the first, politics is defined by antagonism and the constant possibility of war. In this realist universe, conflicts can be resolved but human nature and the irremediable differentiation of modern society into incommensurable value spheres sets limits on the possibility of a universally accepted notion of the good and ensures that conflict, as a self-reproducing structure of differentiation of unities, will always re-emerge into one form or another – religious, civilisational, economic, ideological, etc.... Politics in this setting is not a contest over the actualisation of a universal good but a mechanism that negotiates and limits conflicts that stem from the impossibility of such a universal agreement. In this understanding, as William Rasch puts it, ‘the specific nature of politics is determined by the specific constitution of opposing unities, making the origins of politics already political, already a battle about what constitutes a legitimate unity’.⁷⁹ This is the notion of politics that underpins the decisionist attitude of neo-conservative pundits towards the normative order as well as their substantive interpretation of democracy and their defence of the sovereign nation-state against the constitutionalisation of the global order pursued by cosmopolitan theorists and practitioners.

By contrast, the other notion of politics traversing the discourses surveyed above is one that sees politics as the historical unfolding of a three hundred years ‘worldwide liberal revolution’ characterised by the pacific expansion of a universal morality.⁸⁰ In this reading, politics is driven by a belief in the *possibility* of a universal agreement on what constitutes the good society and of actualising this ideal in a normative order. Here, violence and conflict – both at home and abroad – are the product of morally flawed social institutions. This is the moralising notion of politics that sustains the universal pretensions of neo-conservative nationalism and that gives meaning to American hegemony. It links the assault on the welfare state and multiculturalism with the attack on the principle of sovereign equality, the procedural relativism of international law and the formal value pluralism of international institutions.

Again, this only makes some kind of sense when we realise that, in the same way that neo-conservative commitments to freedom and liberty are predicated upon a deep-seated social conservatism, the moralising and teleological tropes of their programme are in fact predicated upon their antagonistic view of politics. As I hope the above analysis makes clear, whatever liberal aspirations neo-conservatives may have in the realm of foreign policy, these are processed through a conservative and conflictual view of the human condition. Neo-conservatives are communitarian realists above all else and are therefore deeply ambivalent about the self-generating and transformative power of liberalism. For the realist, as Schmitt argued, in the same way that ‘the educator will consider man capable of being educated, because the sphere of the political is in the final analysis determined by the real possibility of enmity, political conceptions and ideas cannot very well start with an anthropological optimism. This would dissolve the possibility of enmity and, thereby, every specific political

⁷⁹ William Rasch, *Sovereignty and its Discontents: On the Primacy of Conflict and the Structure of the Political* (London: Birkbeck University Press, 2004), p. 21.

⁸⁰ Robert Kagan, ‘A Tougher War for the US is One of Legitimacy’, *New York Times* January 24, 2004.

consequence'.⁸¹ But the problem with this pessimistic view of politics is that it is fundamentally ill suited to fight the culture wars and manufacture consent for the hegemonization of the neo-conservative vision at home and abroad. As Irving Kristol put it in the early 1980s, 'in the modern world, a non-ideological politics is a politics disarmed... ideological in the sense that it consists of political beliefs that are oriented in a melioristic way – a 'progressive' way, as one says – toward the future. It is impossible for any set of political beliefs in the modern era to engage popular sentiments without such a basic orientation'.⁸² Hence, lest the American citizenry sinks into cynicism and political anomie, neo-conservatives appeal to a set of transcendent values and future-oriented ideals to endow their antagonistic politics with meaning and moral character. As Krauthammer explains:

Unless conservatives present ideals to challenge the liberal ideal of a domesticated international community, they will lose the debate.... Which is why among American conservatives, another, more idealistic, school has arisen that sees America's national interest as an expression of values... [and]... sees as the engine of history not the will to power but the will to freedom.... The rationality of the enemy is something beyond our control. But the use of our power is within our control. And if that power is used wisely, constrained not by illusions and fictions but only by the limits of our mission – which is to bring a modicum of freedom as an antidote to nihilism – we can prevail.⁸³

The reader familiar with the political debates of Weimar and the intellectual genealogy of neo-conservatism will certainly have recognised the mark of Leo Strauss here. For Strauss, the idea of a domesticated international community based on a 'value-neutral', procedural constitutional order did not only go against the antagonistic nature of the political but it emptied life of all meaning.⁸⁴ Like Strauss, neo-conservatives assume and assert the primacy of the political and build their defence of the sovereign nation-state on its behalf but end up denying its autonomy by collapsing it into a moral category. The conceptual and political failure of their enterprise hinges on this move. Neo-conservatives weave together sovereignty, democracy, national autonomy and individual rights through a moralising identity politics that is radically anti-pluralist not only inside but also outside the state.

This is where their decisionism crucially parts company with that of Schmitt. Schmitt defended sovereignty as a correlate of his interpretation of the nature of the political. For him, the need for a sovereign who stands both inside and outside law and that has the factual capacity to decide on the exception necessarily followed from the political

⁸¹ Carl Schmitt, *The Concept of the Political*, trans. George Schwab, (Chicago: University of Chicago Press, 1996 [1932]), p. 64.

⁸² Irving Kristol, *Reflections of a Neoconservative: Looking Back, Looking Ahead* (New York: Basic Books, 1983), pp. ix-x.

⁸³ Krauthammer, 'Democratic Realism', pp. 10-11, 14.

⁸⁴ As he put it in his famous variation on Schmitt's concept of the political, 'Agreement at all costs is possible only as agreement at the cost of the meaning of human life; for agreement at all costs is possible only if man has relinquished the question of what is right; and if man relinquishes that question, he relinquishes being a man. But if he seriously asks the question of what is right, the quarrel will be ignited, the life-and-death quarrel: the political – the grouping of humanity into friends and enemies – owes its legitimation to the seriousness of the question of what is right'. Leo Strauss, 'Notes on Carl Schmitt's Concept of the Political', in Schmitt, *The Concept of the Political*, p. 103.

groupings of humanity into friends and enemies. But he insisted that the friend/enemy distinction should always be drawn on a strictly political manner, not on the basis of ethics or economics. As Gopal Balakrishnan observed, Schmitt's thesis rests upon a 'minimal ethics: not love your neighbour; but respect your enemy'.⁸⁵ For him, preserving the autonomy of the political was a means to allow for the possibility of legitimate dissent. He loathed liberalism and what he saw at the time as the emergence of a new American-led world order for its universalistic ethics of humanity and its tendency to collapse the friend/enemy distinction into a moral friend/demoralised enemy distinction that outlaws dissent and deprives the enemy of a legitimate voice.⁸⁶ In other words, Schmitt's defence of the sovereign state as a culturally homogenous unit against the pluralist and differentiated civil society of liberalism was at the service of a pluralist international order of equal sovereign states.

I certainly do not wish to suggest that Schmitt's vision of world order abounds with emancipatory potential. Nor that I unreservedly endorse his 'minimal ethics' of legitimate enmity or his claim that humanitarian motives are simply nothing but the instantiations of sovereign power. His rejection of the normativity of the rule of law and his interpretation of the constraining or enabling role of international institutions as merely expression of dominant power is both totalising and ahistorical.⁸⁷ But what I want to emphasise by invoking Schmitt's anti-liberal pluralism against the moralising anti-pluralism that characterises the neo-conservative enterprise is the explosive paradox upon which the case for American sovereignty analysed above is constructed. On the one hand, neo-conservatives embrace sovereignty as an expression of the primacy of the political and thereby recognise that conflict and antagonisms cannot be eliminated by a unification of the world that transcends the political. On the other hand, by tying American sovereignty to a universal ethics that trumps the formal universal validity of international norms and legal procedures, they effectively leave no possibility for dissent to find any legitimate form of expression.⁸⁸

It is this 'imperial paradox' at the heart of the neo-conservative enterprise that discredits whatever legitimate grievances they may have against the project of global governance. Sovereignists have good reasons to doubt the viability and desirability of the constitutionalised global order wished for by the most ardent advocate of global governance. The constitutionalisation of the global order amounts to no less than a complete reversal of the ordering principle of the international system. International law in this setting would no longer exist to guarantee the formal equality of states but to ensure the compliance of the latter to a set of principles whose political and cultural impartiality is at best unconvincing – even in the most careful formulations.⁸⁹ To

⁸⁵ Gopal Balakrishnan, *The Enemy: An Intellectual Portrait of Carl Schmitt* (London: Verso, 2000), p. 108.

⁸⁶ Carl Schmitt, *Le Nomos de la Terre* (Paris: Presse Universitaire de France, 1988).

⁸⁷ The invocation of humanitarian values by the U.N. and other institutions involved in the struggle against apartheid in South Africa, for example, conferred global capacities to those organisations in spite of the opposition of the powerful.

⁸⁸ In this context, it is certainly not a coincidence that in the post-Cold War era, as socio-political alternatives to Western modernity seem to no longer be on offer, opposition to American hegemony is taking an increasingly radical form. See Jean-François Kervégan, 'Ami ou ennemi?', *Le nouvel observateur*, January, 2002.

⁸⁹ Here I am thinking about Habermas's most recent reformulation of Kant's cosmopolitan order of rights. See Jürgen Habermas, 'Kant's Idea of perpetual Peace, with the Benefit of Two Hundred Year's Hindsight', in James Bohman and Matthias Lutz-Bachman, *Perpetual Peace: Essays on Kant's*

reduce politics to the application and policing of a rational consensus on procedures is to deny the plurality of interests and values that characterise politics as a human activity. And it can indeed exempt ethical preferences from concrete democratic control on the grounds that they could not possibly fail the test of public rational deliberation. Kant himself warned against attempts at establishing constitutions that are geared towards ethical rather than political ends. For him, a normative order could only be established upon a set of tensions that leaves room for the indeterminacy and contingency of political action.⁹⁰ These ethical considerations aside, the main problem here is that advocates of global governance must presuppose that coercive power as an attribute of states can be severed from its source in social relations and be ‘borrowed’ by international institutions ‘from domestic government officials to implement supranational rules and decisions’.⁹¹ Needless to say, such an asocial and functional view of power rests upon a silence on the real possibility of disagreement and dissent that mirrors the ideological zeal of the most ardent American nationalists. Those who call for new set of norms involving a radical re-interpretation of the notion and function of international law tend to forget that this ‘brave new judicial world’ can itself only be imposed through conflict and political struggle. So much we have learned from the decolonisation process.

Yet, and this is where both Schmittians and neo-conservatives go wrong, politics needs law to legitimise its objectives. Law does this by universalising those objectives and inscribing in formal procedures the guarantees and sanctions tied to the pursuit of democratic objectives in a world of inequality and violence.⁹² As Jean Cohen argues, ‘The concept of sovereignty is a reminder not only of the political context of law but also of the ultimate dependence of political power and political regimes on a valid, public, normative legal order for their authority’.⁹³ True, in times of uncertainty it is power that ‘removes doubts and resolves differences of opinion’.⁹⁴ However, although it may indeed be born of legal nothingness, the sovereign decision on the exception is not a self-justificatory act. There is a gap between act and justification and between rule and legitimacy that is independent from neither politics nor law but that cannot be reduced to any one of them. In the international arena this gap between pure power politics and positive law is where international institutions operate. By grounding their defence of sovereignty in the moral superiority of America’s rule over the institutions of the United Nations and collapsing law into a universal ethics, neo-conservatives foreclose all possibilities for the maintenance of a space that allows for the management of tensions between law and politics. They confiscate the ‘norm of humanity’ in the name of a communitarian conception of democratic justice and a narrow right-wing domestic agenda that is increasingly being pursued abroad and taking its toll on the Middle East, trans-Atlantic relations and American society.

Cosmopolitan Ideal (Cambridge, MA.: MIT Press, 1987); *Between Facts and Norms* (Cambridge: Polity Press, 1997).

⁹⁰ Immanuel Kant, ‘Perpetual Peace: A Philosophical Sketch’, in I. Kant, *Political Writings*, ed. H.S. Reiss (Cambridge: Cambridge University Press, 1991), pp. 93-125.

⁹¹ Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004), p. 21.

⁹² Balibar, *L’Europe, L’Amérique, la guerre*, p. 118.

⁹³ Jean L. Cohen, ‘Whose Sovereignty? Empire Versus International Law’, *Ethics and International Affairs*, vol. 18, no. 3, 2004, p. 14.

⁹⁴ Carl Schmitt, *Legality and Legitimacy*, trans. Jeffrey Seitzer (Durham: Duke University Press, 2004), p. 34.