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# BOOK NOTES

## ARE AMERICAN HUMAN RIGHTS GROUPS EXCEPTIONAL IN THEIR SILENCE?

AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS. Edited by Michael Ignatieff.[1] Princeton and Oxford: Princeton University Press. 2005. Pp. vi, 353. $24.95.

*American Exceptionalism and Human Rights* is exceptional in the timeliness and significance of its question, the caliber of the diverse answers it presents, and the degree of dialogue among its essays. Professor Michael Ignatieff identified a central paradox in American human rights policy: America's zeal to spread human rights norms through international bodies coupled with its hostility toward accepting these norms for itself (pp. 1–2). He called upon ten other stars in international relations and law to explain this tension.[2] And then he pushed them a step further to engage with each other's explanations, to criticize and complement competing views.

To highlight key features of these accounts while also presenting their limits, this note emphasizes an element of theories of politics that the volume curiously downplays: interest group strength and focus. The authors concentrate on cultural and structural obstacles to American implementation of international human rights standards. Yet these obstacles have been surmounted in areas such as trade, in which interest groups are strong and focused. Why then have these obstacles not been overcome in human rights? A peculiar silence of American human rights groups on domestic issues, coupled with a hesitancy of domestic groups focused on race and inequality to frame problems as human rights violations, might be part of the answer. Relatedly, interest group focus on rights violations in foreign countries might help explain the part of the paradox most authors in the volume set aside — American efforts to promote human rights abroad.

What do the authors seek to explain? At the broadest level, all of the authors examine America's reluctance to accept international commitments for itself in the area of human rights. But the authors diverge in how broadly they define human rights, with some

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[1] Carr Professor of Human Rights Practice and Director of the Carr Center for Human Rights Policy at the John F. Kennedy School of Government, Harvard University.

[2] Also contributing to this volume are Professors Stanley Hoffmann, Paul W. Kahn, Harold Hongju Koh, Frank I. Michelman, Andrew Moravcsik, John Gerard Ruggie, Frederick Schauer, Anne-Marie Slaughter, Carol S. Steiker, and Cass R. Sunstein.



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concentrating on traditional civil and political rights,[3] and others including social and economic rights.[4] Similarly, they diverge in whether they focus on the failure of American law to match the substance of international norms,[5] or focus on America's procedural stance on formally adopting international norms. For example, Professors Ignatieff, Moravcsik, and Ruggie examine U.S. reluctance to sign and ratify treaties (pp. 1–26, 147–97, 304–38), while Professors Michelman and Slaughter study the reluctance of U.S. judges to use foreign decisions in their deliberations (pp. 241–303).

Unsurprisingly, the authors do not identify one factor that explains American exceptionalism, but instead offer diverse suggestions. These arguments can be grouped into four categories: America's powerful geopolitical position, America's decentralized and fragmented domestic political institutions, American political ideology, and historical accident.[6]

The first explanation of exceptionalism interprets America's powerful geopolitical position through what international relations scholars term realism.[7] According to this account, both national strength and national interest derive from geopolitical power. America's power, especially its military predominance, implies that it can promote (or presumably obstruct the promotion of) human rights abroad as it sees fit and need not worry about what others think of its domestic practices. Professor Hoffmann's essay, a strong normative critique of American interventionism, comes closest to accepting realism as an implicit model of how the world works (pp. 225–40). Professors Koh and Moravcsik explicitly include America's geopolitical strength as a central element of their accounts (pp. 118–24, 167–71).

A second set of explanations focuses on domestic political structures. Several authors highlight federalism and the separation of powers as central obstacles to the acceptance of international norms.[8] Jurisdiction over criminal punishment, for example, is dispersed among the fifty states and the federal government. Additionally, a President

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[3] Professor Schauer, for example, examines freedom of speech (pp. 29–56), while Professor Steiker examines criminal penalties (pp. 57–89).

[4] Professor Sunstein, for example, discusses social and economic rights (pp. 90–110).

[5] Professor Steiker, for example, asks why capital punishment, a practice condemned in many international law instruments, persists in the United States (p. 58).

[6] Professor Ignatieff also organizes the arguments of the volume into four categories: realism, culture, institutions, and politics (pp. 11–20).

[7] This explanation overlaps fully with Professor Ignatieff's "realism" category and simply uses the label "geopolitics" to avoid confusion with the term "realism" as used by Professor Sunstein, among other legal scholars, to indicate an interpretation of the Constitution shaped by judicial politics (p. 106).

[8] Professor Moravcsik provides the most detailed explanation (pp. 186–90), and Professor Steiker addresses this structural argument as well (pp. 79–80).

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signing a treaty has no guarantee of legislative support, as would the leader of a parliamentary system. The Senate, often controlled by a different party, must separately endorse treaty ratification (and by a supermajority vote).[9]

The third set of explanations concerns American ideology.[10] The authors present both fundamental ideologies regarding democracy and America's identity and role in the world, and policy-specific ideologies on issues such as crime and individual rights as obstacles to the domestic influence of international norms. Professor Kahn elevates the relationship between the American Revolution and the U.S. Constitution to the status of "an American civic religion," a faith that somehow prevents foreign ideas and criticism from mattering (p. 198). Professor Michelman identifies a related concern among the judiciary — that references to foreign legal decisions could compromise the integrity of American constitutional jurisprudence (pp. 241–76). At the policy level, Professor Steiker highlights the heightened salience of crime in U.S. politics, as compared to European politics (pp. 66–72), while Professor Schauer identifies a libertarian streak in American political culture, especially on issues of freedom of expression (pp. 45–47).

Finally, a fourth set of explanations emphasizes the transient nature of political coalition–building and attributes American uniqueness to a particular historical confluence of factors, rather than to more stable features of the American polity. Professors Steiker and Sunstein both highlight near misses — cases in which the Supreme Court used its power of interpretation to bring the United States into compliance with international norms, only to reinterpret the Constitution shortly thereafter. Professor Steiker describes how the Court invalidated capital punishment,[11] but then backtracked and reinstated the death penalty a few years later[12] (pp. 86–89). Similarly, Professor Sunstein identifies a series of decisions that recognized economic disadvantage as a basis for some constitutional protections,[13] a theory the Court rejected

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[9] U.S. CONST. art. II, § 2, cl. 2. Other American institutions may, however, increase, rather than diminish, the possibility of compliance with international law. Several of the volume's contributors — Professors Michelman, Slaughter, Steiker, and Sunstein — focus on judges' authority to interpret ambiguous constitutional language as a mechanism with the potential to place the United States in compliance with international law (pp. 57–110, 241–303).

[10] In classifying the authors' arguments, Professor Ignatieff labels political commitments to democracy and republicanism as "culture" and political commitments to racial separation and conservatism as "politics" (pp. 13–20). Since each of these ideologies is articulated at both the mass and the elite levels, they can be analyzed jointly.

[11] Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (per curiam).

[12] Gregg v. Georgia, 428 U.S. 153, 206–07 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

[13] *See* Shapiro v. Thompson, 394 U.S. 618, 621–22 (1969) (forbidding states from denying welfare benefits to new arrivals, and thus lifting an obstacle to relocation for poor people); Harper v. Va. Bd. of Elections, 383 U.S. 663, 666–67 (1966) (eliminating the poll tax, and thus making poor

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once its composition changed[14] (pp. 106–08).

Yet these four sets of accounts are incomplete, and focusing on interest groups could improve them. The first three explanations — geopolitics, domestic structures, and American ideology — should apply broadly but do not account for variation across different issue areas. They cannot explain why, for example, U.S. military dominance is sometimes translated into human rights promotion abroad, and at other times into support for regimes that systematically violate human rights. Nor do they explain why U.S. domestic institutions have succeeded in blocking certain kinds of treaties but have been overridden in other cases. For example, in the area of trade, Congress has often granted the President fast-track authority, which enables the United States to enter into international commitments with great domestic distributional consequences.[15] Relatedly, a cultural explanation does not clarify why the International Criminal Court poses a challenge to American identity, while World Trade Organization tribunals proclaiming certain U.S. subsidies impermissible are acceptable. The fourth explanation, historical accident, helpfully identifies actors who could shape human rights policy. However, it makes no general predictive claims and focuses excessively on Supreme Court Justices, rather than on the full set of agents who could prompt policy change. In addition to accounting for variations across issue areas, an interest group explanation might also clarify when change will take place. This note does not aim to develop fully such an alternative, but instead suggests that thinking through human rights politics in interest group terms would be both plausible and useful.

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people's right to vote more meaningful); Douglas v. California, 372 U.S. 353, 356–58 (1963) (requiring states to provide poor criminal defendants with counsel for their first appeal); Griffin v. Illinois, 351 U.S. 12, 18–20 (1956) (plurality opinion) (requiring states to provide trial transcripts to indigents).

[14] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 54–55 (1973) (refusing to require that states equally fund public schools serving the poor); Lindsey v. Normet, 405 U.S. 56, 74 (1972) (holding that no constitutional provision mandates adequate housing); Dandridge v. Williams, 397 U.S. 471, 486 (1970) (permitting states to limit the maximum welfare payment to a family regardless of an individual family's size and needs).

[15] Fast-track authority gives the President the power to negotiate international trade agreements and to compel Congress to debate implementing legislation speedily and without the possibility for amendments. *See* 19 U.S.C. § 2191 (2000 & Supp. II 2002). Fast-track authority has permitted the negotiation of trade agreements, such as the North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 8–17, 1992, 32 I.L.M. 289, and the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1143, that greatly limit the United States's ability to make subsequent unilateral decisions. *See generally* LAEL BRAINARD & HAL SHAPIRO, FAST TRACK TRADE PROMOTION AUTHORITY (Brookings Inst. Policy Brief No. 91, 2001), *available at* http://www.brookings.edu/comm/policybriefs/pb91.pdf. The distributional implications of free trade often involve benefits to U.S. export-oriented industries and multinationals, and costs to low-skill, labor-intensive industries that face import competition. *See* HELEN V. MILNER, RESISTING PROTECTIONISM (1988).

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What is an interest group model, and how does one construct a coherent one? Whereas in a pluralist model of democracy, voters with equal voices form shifting coalitions to determine public policy,[16] in an interest group model of democracy, on distributive issues, actors facing concentrated benefits can often overcome collective action problems and thus impose costs on many others.[17] Thus, interest group models can shift the analytical focus from aggregate public opinion to differentiated preferences and can help explain how these preferences shape decisionmakers' actions. Such models are standard explanations for material conflicts: when, for example, labor and management fight over resources, or when government and industry debate regulation or subsidies. At the same time, the rapid growth of interest groups pushing for all types of ideology-based policy change in Washington at least since the 1960s suggests that human rights is a fertile field for lobbyists.[18]

What would an interest group model of human rights look like? The seeds of such a model appear in two contributions to the volume. Professors Moravcsik and Ruggie attribute the initial hostility toward the Genocide Convention[19] in the late 1940s and early 1950s to Southern fears that it could apply to lynching cases (pp. 179, 323). However, this hostility may not explain delays in treaty ratification in later decades, and may not account for American exceptionalism across the human rights field as a whole. Professor Ruggie also offers a description of a global public domain populated by interconnected nonstate actors, including nongovernmental organizations, international organizations, and multinational corporations (pp. 307–23). Yet he does not explain how this global civil society could influence U.S. policy.

A more systematic investigation of how and under what circumstances interest groups can change human rights policy is in order. Such an account holds promise because it could clarify some historical developments, cross-sectoral patterns, and cross-national differences that *American Exceptionalism*'s accounts leave unexplained. The following account seems plausible: National governments, including centrally the United States, advocated for human rights treaties in the years following World War II and were assisted in this task by established humanitarian organizations. These states lost their enthusiasm quickly, once Cold War realities called for unwavering support for

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[16] *See, e.g.*, ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 280–98 (1989).

[17] *See, e.g.*, THEODORE J. LOWI, THE END OF LIBERALISM 42–63 (2d ed. 1979); MANCUR OLSON, THE RISE AND DECLINE OF NATIONS (1982).

[18] *Cf.* JACK L. WALKER, JR., MOBILIZING INTEREST GROUPS IN AMERICA 1–17 (1991) (examining interest group development and involvement in U.S. politics).

[19] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

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undemocratic allies. Maybe human rights organizations took up the slack and grew rapidly in number and prominence. Perhaps these groups are still domestically weak relative to other interest groups. Perhaps U.S. human rights groups are less connected to the international community than comparable groups in other advanced industrialized countries, and perhaps most critically, U.S. groups have focused on changing policy abroad rather than domestically.[20] The above claims are mostly speculative, intended to illustrate why further research regarding interest group influence on human rights policies is worthwhile. Nonetheless, these claims are consistent with the available research.

Many recent studies on countries violating human rights ask when an international norm shapes domestic practice. The emerging answer is that such norms matter when a domestic group exists and can campaign to connect these norms to national practices. For example, according to Professors Thomas Risse and Kathryn Sikkink, "the diffusion of international norms in the human rights area crucially depends on the establishment and the sustainability of networks among domestic and transnational actors."[21] Professors Margaret Keck and Kathryn Sikkink's analysis suggests that advocacy coalitions influence policy through their ability to circulate information, to call upon symbols, to access more powerful actors, and to lobby those actors to accept accountability.[22] But if Professor Ruggie's international civil community matters, are U.S. groups part of it? To a growing extent they are, but less so than comparable European ones, according to a recent study. Professors Kiyoteru Tsutsui and Christine Wotipka report membership patterns in international nongovernmental human rights organizations for 1978, 1988, and 1998.[23] In all three years, these organizations were more likely to have French or British members than American ones.[24] Moreover, small European countries like Belgium and Switzerland,

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[20] Such arguments about interest groups seek to supplement, rather than to cast doubt upon, the arguments in the volume. After all, interest groups themselves flourish in certain cultures and political structures but not in others. Adding interest groups to the mix helps explain why a similar cultural and political structure embraces internationalism on some occasions and rejects it on others.

[21] Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices: Introduction*, *in* THE POWER OF HUMAN RIGHTS 1, 5 (Thomas Risse et al. eds., 1999). For an analogous argument about the importance of national migrant associations in translating transnational citizenship norms into domestic practice, see YASEMIN NUHOĞLU SOYSAL, LIMITS OF CITIZENSHIP 84–118 (1994).

[22] *See* MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS 16 (1998).

[23] Kiyoteru Tsutsui & Christine Min Wotipka, *Global Civil Society and the International Human Rights Movement: Citizen Participation in Human Rights International Nongovernmental Organizations*, 83 SOC. FORCES 587, 594 tbl.1 (2004).

[24] *See id.*

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with about one-thirtieth of the U.S. population,[25] had comparable numbers of memberships in these international organizations.[26] So perhaps one pathway to change is greater connectedness between domestic groups and international norms: as U.S. and international human rights groups become more connected, pressure on the U.S. government to comply with international human rights treaties will increase.

These studies are not based on superpowers, so perhaps different pathways might influence the United States. Again, these pathways involve interest groups. Professors Chaim Kaufmann and Robert Pape have examined why the nineteenth-century superpower, Great Britain, engaged in a costly moral campaign to fight for the human rights issue of the day: ending the Atlantic slave trade.[27] This issue had great implications internationally and domestically; Britain previously dominated both the slave trade and the slave-dependent sugar trade and lost nearly two percent of national income annually for over sixty years.[28] Professors Kaufmann and Pape conclude that a middle-class group of religious dissidents made persistent moral demands on Tory ruling elites, who eventually took on the moral abolitionist cause to escape the taint of corruption scandals.[29] Taking on human rights issues in the modern United States might be a task for the Christian Right, who have already shown some interest in rights violations abroad, including sex trafficking and the civil war in Sudan.[30] And such issues should also greatly interest activists concerned about racial disparities in the United States. Professor Carol Anderson traces how mainstream African American activists concerned about domestic inequalities formed alliances with left-wing and pro–United Nations forces in the late 1940s to ensure that domestic concerns became part of new international treaties.[31] She also describes how the early Cold War climate prompted U.S. activists to dissociate themselves from a broad human rights struggle and to focus more narrowly on civil and political rights.[32] Professor Clarence Lusane calls upon black groups to focus on human rights discourse once again, so as to address persistent

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[25] *See* CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK (Oct. 4, 2005), http://www.cia.gov/cia/publications/factbook/rankorder/2119rank.html.

[26] Tsutsui & Wotipka, *supra* note 23, at 594 tbl.1.

[27] *See* Chaim D. Kaufmann & Robert A. Pape, *Explaining Costly International Moral Action: Britain's Sixty-Year Campaign Against the Atlantic Slave Trade*, 53 INT'L ORG. 631 (1999).

[28] *Id.* at 631.

[29] *See id.* at 644–45, 663–64.

[30] *See Right On*, ECONOMIST, July 2, 2005, at 34, 34.

[31] *See* CAROL ANDERSON, EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944–1955, at 273 (2003).

[32] *See id.* at 273–74.

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material inequalities that go beyond civil and political rights.[33] Indeed, recently, Amnesty International and Human Rights Watch have focused growing efforts on domestic racism and anti-Muslim sentiment.[34]

American society experienced a curious silence in previous decades: insufficient activism connected international human rights norms to domestic problems. *American Exceptionalism and Human Rights* offers exceptional analyses of cultural and structural obstacles to U.S. acceptance of human rights norms, analyses that could become more complete if they included data on who is pressuring for reform, who is conspicuously absent from the field, and who is fighting against such efforts.

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[33] *See* Clarence Lusane, *Changing (Dis)course: Mainstreaming Human Rights in the Struggle Against U.S. Racism*, BLACK SCHOLAR, Fall 2004, at 21, 31.

[34] *See, e.g.*, HUMAN RIGHTS WATCH, WITNESS TO ABUSE: HUMAN RIGHTS ABUSES UNDER THE MATERIAL WITNESS LAW SINCE SEPTEMBER 11 (2005), *available at* http://hrw.org/reports/2005/us0605/us0605.pdf (anti-Muslim sentiment); Amnesty Int'l USA, Racial Profiling, http://www.amnestyusa.org/racial_profiling/index.do (last visited Nov. 13, 2005) (racism).

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