OBSERVATIONS ON THE TURNING OF FOREIGN AFFAIRS JURISPRUDENCE

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I.

When I entered the legal academy in the early 1970s, the field of foreign affairs jurisprudence seemed to have a discernible character. Its practitioners, with one important exception, were persons whose backgrounds and interests centered on international law. Most domestic constitutional scholars spent little time on foreign relations issues in their casebooks and rarely wrote about them elsewhere.[1] Their lack of interest in foreign affairs appeared to proceed from some widely-shared starting assumptions. Foreign affairs issues decided in American courts were assumed to be different in kind from domestic legal issues. This was not only because the constitutional structure of governmental powers and interbranch relationships in which foreign relations powers were exercised was treated as different from the structure of domestic powers and relationships, but because foreign affairs issues themselves, with their international implications, were taken as *sui generis*.

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1. Louis Henkin, the leading foreign affairs scholar of his generation, wrote in 1972 that "books . . . that deal with the Constitution say little about American foreign relations; [those about foreign relations] expound, scrutinize, dissect and criticize the international relations, foreign policy, and the 'foreign-policy-making process' of the United States, but the controlling relevance of the Constitution is roundly ignored." LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION vii (1972). Henkin himself had been a notable contributor to the literature of domestic constitutional law before writing his foreign affairs treatise, and continued to contribute after its appearance. *See, e.g.*, Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974); Louis Henkin, *The Supreme Court, 1967 Term—Foreword: On Drawing Lines*, 82 HARV. L. REV. 63 (1968). Perhaps the great stature of Henkin's work deterred others from following his example: if one places his foreign affairs treatise to one side, the comments he made in 1972 serve to describe the state of foreign relations jurisprudence for the next two decades.

Moreover, constitutional scholars adopted a broad definition of "foreign affairs" issues as a starting point: any litigation in which a foreign citizen or government was a party potentially had foreign affairs implications. However "local" or "private" a matter in dispute appeared by American common law standards—for example, the disposition of inheritance proceeds located within a state by that state's probate court—if the case involved a foreign element, the matter was assumed to have possible foreign affairs implications, and thus was possibly subject to the discrete rules of foreign relations law.[2]

In an overview of foreign affairs law written for this symposium, Professor Curtis Bradley has associated the above assumptions with a "twentieth-century view" of foreign affairs jurisprudence.[3] Bradley's twentieth-century view features an assumed emphasis on the plenary powers of the federal Executive in foreign relations, the absence of restraints on federal power emanating from federalism concerns, and the obligation of the courts to buttress the plenary foreign relations powers of the executive branch through the formulation of federal common law doctrines that are derived from international law and preempt state law in disputes involving foreign countries or nationals.

For most of my career, Bradley's twentieth-century view has been dominant among foreign affairs scholars and accepted as unproblematic by domestic constitutionalists.[4] Now, as the century nears its close, the view has come to be questioned, first with respect to its arguably most vulnerable point, the judicial and academic incorporation of customary international law into federal common law,[5] and second with respect to its

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2. In *Zschernig v. Miller*, 389 U.S. 429, 432 (1968), the Supreme Court held that an Oregon probate court's application of a state statute to deny an inheritance to a resident of East Germany because he could not prove that he would be able to enjoy the inheritance "without confiscation" amounted to "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress." *Id.* at 432.

3. *See* Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089 (1999).

4. *See, e.g.*, LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 211 (2d ed. 1988) ("[T]he Constitution's separation of powers and its arrangement of checks and balances are less precise [in the area of foreign affairs] than a survey of the text might suggest.").

5. *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).

assumption that the interests of the states should play no role in American foreign relations law, despite the Constitution's commitment to federalism.[6] At this point the attacks have widened to include suggestions that aggressive doctrinal creativity by the courts under a "public law litigation" model of judicial decision making no longer seems defensible, even when used to buttress the executive branch's power in foreign affairs.[7] It now appears that the line of revisionist scholarship seeks to question all of the starting assumptions of orthodox foreign relations jurisprudence since the 1970s.

One of the interesting features of the recent appearance of revisionist scholarship in foreign affairs law has been the furious reaction it has generated from adherents of the orthodox view. Curtis Bradley and Jack Goldsmith's critique of the late-twentieth-century emergence of customary international law as federal common law in the federal courts precipitated strident attacks that seemed, at first blush, disproportionate to the issues at stake.[8] But if one considers the current context of revisionist foreign relations scholarship, and some of the logical implications of the revisionist critique, the stakes escalate. We may be witnessing one of those moments in which an academic field's core presuppositions shift from being beyond dispute to being up for grabs. We may, in short, be looking at a jurisprudential turning.[9]

II.

Consider first the context of international relations, from an American perspective, as the twentieth century nears its

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6. *See* Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617 (1997).

7. *See* Bradley, *supra* note 3, at 1102-03; Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395 (1999).

8. *See, e.g.*, Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997).

9. *Cf.* Lawrence Lessig, Erie-*Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785 (1997) (suggesting that the positions taken by Bradley and Goldsmith in their 1997 article, see *supra* note 5, have recently become utterable).

end. As Bradley points out, the end of the Cold War and the massive development of international trade have altered the shape of contacts between the United States or American citizens and foreign countries or nationals.[10] On the one hand, an implicit division of the world of foreign policy between the "Communist bloc" and the "free world" no longer serves as a working model. The failure of Communist regimes, whose superimposition on diverse ethnic and regional groups had created a surface geopolitical unity, has had an effect comparable to the withdrawal of colonialist regimes from Third World regions. Suppressed nativist and tribalist energies have burst forth, making the geopolitical map of the world considerably more varied and complex. But if these tendencies cut in the direction of selective, *ad hoc* foreign policymaking, the increasing economic interdependence of the world seems to have cut in the direction of international management and planning organizations. As NATO's mandate seems more difficult to conceptualize or to implement and the United Nations seems unable to control its pluralist tendencies, the European Union surfaces and the International Monetary Fund assumes greater importance.

At the same time, the collapse of the Soviet Union has, at least temporarily, left the United States as the world's most dominant military and economic power—one with a symbolic heritage of standing for the expansion of individual liberties and democratic freedoms. It has been tempting for less powerful nations to encourage the United States to serve as the world's police force on behalf of human rights, and it has been difficult for the United States government to resist playing that role. Yet the increased frequency of international trade relations and the increased complexity of world geopolitics has made it harder for Americans to define their goals in specific police ventures and to sort out international economic cooperation from international political conflict.

In this context there seems to be a certain logic to what might be called the "domesticization" of international contacts. In a world whose geopolitical composition seems to be changing rapidly and whose increasingly international economic character seems assured, why not avoid too great an involvement in international politics and concentrate on keeping the American

10. *See* Bradley, *supra* note 3, at 1089.

economy robust through international trade? Why not adopt a presumptive skepticism toward police ventures on behalf of human rights, on the assumptionsthat it is hard to assess the geopolitical character of a prospective venture and that America's international allies may not be in an economic or military position to help out?

Domesticization of foreign policy might go hand in hand with the domesticization of foreign affairs law. Consider a line of recent cases where federal courts have concluded that the fact that tort or contract claims arose out of incidents occurring abroad, and involved foreign individuals or corporations, made the disputes potential "foreign relations" cases that could be analyzed independently under federal common law.[11] If a tort or contract claim filed in a state court against a foreign defendant was deemed to "rais[e] issues of international relations [that] implicate federal [common law]," it could be removed to federal court and resolved under the federal common law of foreign relations.[12] Each of these cases raises the question whether the fact that "foreign" elements exist in what appears to be an ordinary economic transaction, not involving a foreign sovereign, requires the transaction to be treated as a matter "implicating foreign relations," so as to preempt its resolution by state law. An American citizen in the late twentieth century, on confronting this line of cases, might intuitively think that, in a world in which most contacts with foreign countries or foreign nationals are in the form of economic transactions, and in which the geopolitical implications of such contacts cannot easily be determined in advance, the appropriate question ought to be whether a tort or breach of contract has actually occurred. That citizen might well conclude that the case had nothing to do with international geopolitical relations. If American courts were to think the same way, most such cases would be governed by state law.

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11. *See* Marathon Oil Co. v. Ruhrgas, A.G., 115 F.3d. 315 (5th Cir. 1997) (tort claim filed in Texas state court against German corporation for interference with agreements to explore for natural gas in the North Sea); Torres v. Southern Peru Copper Corp., 113 F.3d 540 (5th Cir. 1997) (tort claim filed in Texas state court against American and Peruvian corporations for environmental damage in Peru); Grynberg Prod. Corp. v. British Gas, P.L.C., 817 F. Supp. 1338 (E.D. Tex. 1993) (contract claim filed in Texas state court against British Corporation for breach of contract under an agreement to develop oil fields in Kazakhstan).

12. *Grynberg*, 817 F. Supp. at 1355.

If such intuitive thinking seems compelling, consider some of the logical implications of the domesticization of potential "foreign affairs" cases. The thinking emanates from a sense that, at the close of the twentieth century, a number of contacts between Americans and foreign nations or nationals occur in the context of random encounters or economic transactions whose geopolitical impact is faint or difficult to discern. In such cases the foreign status of the nations or nationals does not, by itself, invest the contact with any foreign affairs implications, especially if "foreign affairs" is thought of in its traditional twentieth-century sense: that of a sphere primarily involving the international geopolitical relations of the United States. This implicit definition of "foreign affairs" has been the basis for one of the major starting assumptions of the twentieth-century view: that cases with a foreign affairs component are exceptional, radically different from domestic cases, and require different legal treatment.[13]

Foreign affairs exceptionalism initially rested on the proposition that, as George Sutherland put it as early as 1909, the "internal" and "external" affairs of the United States were essentially different.[14] In advancing that proposition, Sutherland had among his goals the establishment of a much larger role for federal power in foreign relations than he believed the Constitution permitted in the domestic arena. Sutherland's strategy, as it was to unfold over the next three decades, was to develop an extra-constitutional basis for federal foreign affairs powers—one resting on conceptions of sovereignty rather than on positive textual grants of authority.[15] Part of the reason Sutherland developed this strategy was because he subscribed to an essentialist theory of constitutional powers and to a categorist methodology in constitutional interpretation. He believed that all the enumerated and reserved powers of the

13. For a recognition of this exceptionalist conception of foreign affairs in connection with the removal of limitations on the treaty power, see Bradley, *supra* note 6.

14. *See* GEORGE SUTHERLAND, THE INTERNAL AND EXTERNAL POWERS OF THE NATIONAL GOVERNMENT, S. DOC. NO. 61-417 (2d Sess. 1909). Sutherland's essay was subsequently published as George Sutherland, *The Internal and External Powers of the National Government*, 191 N. AM. REV. 373 (1910).

15. For a discussion of Sutherland's theory of the sources of the foreign affairs powers of the national government, see G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 46-62 (1999).

federal government, the states, and the people had been parceled out in the Constitution's text, and that the task of constitutional interpreters was to identify the spheres and boundaries of the respective powers through the placement of new cases in one category or another. Since he believed that the text's distribution of governmental powers had resulted in readily discernible lines constraining federal power, the only way he could justify broad plenary foreign relations powers for the national government was to ground them in a source other than that text.[16]

Sutherland's distinction between the "internal" and "external" powers of the federal government has remained one of the staples of twentieth-century foreign relations jurisprudence. His interpretive methodology, however, is no longer in fashion. Today's judges do not think of themselves as discerning boundaries between the essentialist spheres of federal and state power; most think of themselves as balancing interests, making pragmatic adjustments based on an appreciation of the consequences of extending or contracting the scope of federal law where choice of law or federalism issues are at stake. In cases potentially implicating foreign relations, their language emphasizes effects rather than boundaries or categories.[17] Thus, in the line of cases noted above,[18] Sutherland's premise that foreign affairs issues are exceptional and require different treatment from domestic cases remains in place, but the courts no longer ask whether a case is "essentially foreign," amounting to an exercise of geopolitical policymaking, but whether the activity that is the subject of the dispute is one that might have effects on foreign relations.

Shifting the inquiry from an essentialist categorization to an "effects" test has the potential, of course, to permit a large number of cases involving ordinary economic transactions to be labeled "foreign affairs" cases. But it also has the potential to muddy the definition of "foreign affairs" so as to undermine the exceptionalist premise of twentieth-century foreign relations jurisprudence. If, because of late-twentieth-century changes in the international order and in the nature of American global involvement, an increasing number of "foreign contacts" cases

16. *See id* at 53-55.
17. *See* Goldsmith, *supra* note 7.
18. *See supra* notes 11-12 and accompanying text.

are not easily cognizable as having significant geopolitical implications, then the unique structure of constitutional and common law rules created for foreign affairs cases over the course of the twentieth century appears to require some justification. Put starkly, if most "foreign affairs" cases are not in fact *international geopolitical* cases, but are rather *domestic* or *international economic* cases with a nominal "foreign" component, what justifies the special jurisprudential treatment of such cases? What justifies the emphasis on the plenary foreign relations powers of the federal government and the broad reach of those powers into state law? The primary rationales for plenary federal power in foreign relations, such as the need for secrecy and swiftness of action, or the embarrassment to the United States that might come from the intervention of parochial state or local interests in diplomatic relations, would seem to be based on an implicit definition of foreign affairs cases as exercises in international geopolitical relations. What if that definition no longer accurately describes the majority of foreign contacts by American citizens?

So the logic of domesticization in foreign affairs jurisprudence not only threatens the starting assumptions of orthodox twentieth-century jurisprudence but seems to associate itself with a certain disengagement from American ventures in international geopolitics. This might tempt advocates of orthodoxy to ascribe overtones of isolationism to the revisionist critique. But that supposition itself seems to rest on a conception of foreign affairs as international geopolitics. Were "foreign affairs" reconceived to include domestic and international economic transactions involving Americans and foreign contacts, the revisionist view would seem to be predicated on a more detailed understanding of the new international order than its orthodox counterpart. One might say adherents of the orthodox twentieth-century view, by implicitly insisting on an exceptionalist definition of "foreign affairs," have isolated themselves from the contemporary international context.

In short, the furious response of some orthodox foreign affairs jurists to the revisionists may arise from an intuitive sense that the revisionist critique has begun to historicize the view in which they have invested. If "foreign affairs" is now a blend of garden-variety economic transactions taking place across international boundaries and sporadic, unpredictable geopolitical disputes, statements such as "the conduct of our

foreign affairs is entrusted under the Constitution to the National Government"[19] begin to prove too much. Once a jurisprudential paradigm cuts itself loose from the material with which it is working, it begins to disintegrate.

III.

The historicization of constitutional arguments has been one of my goals as a scholar. But I worked for two decades as a legal and constitutional historian without paying much attention to foreign relations jurisprudence, implicitly subscribing to the premise that the realm was exceptional and bore little connection to domestic constitutional or common law issues. I then began a work on early-twentieth-century constitutional history that sought to reconsider the relationship between the New Deal and changes in constitutional jurisprudence in the late 1930s and 1940s.[20] As I proceeded with that work, it rapidly became apparent that my initial time frame was inappropriate: to achieve a more accurate understanding of those changes it was necessary to entend the scope of my study backwards in time to the first years of the twentieth century.

One of my primary goals in that project was to offer a new vantage point on a series of changes in constitutional doctrine that I felt had been too glibly and indiscriminately associated with the rise of the New Deal. By extending the scope of the study backwards, I anticipated encountering important doctrinal changes that could not readily be associated with the Court-packing crisis, the presidential election of 1936, and other events of the mid-1930s external to the judiciary. In particular, I sought to recreate the arguments and assumptions of persons engaged in the process of formulating and analyzing constitutional doctrine from their own perspective at the time—a perspective that could not have anticipated the dramatic growth of the national government as a regulatory force or the unprecedented expansion in judicial protection for the civil and political rights of selected minorities, both of which characterized American constitutional jurisprudence for three

19. Zschernig v. Miller, 389 U.S. 429, 443 (1968) (Stewart & Brennan, JJ., concurring).

20. *See* G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL: A REASSESSMENT (forthcoming 2000) (manuscript on file with author).

decades after the close of the Second World War.

I was, then, looking for doctrinal "transformations" in constitutional jurisprudence that occurred in the early twentieth century, that were undertaken by participants who could not have anticipated the New Deal or its aftermath, and whose radical nature had been lost by those who had conventionally ascribed changes in constitutional law to changes in national politics, in part because the changes seemed natural and inevitable when assessed from a mid- or late-twentieth-century perspective. One of the most dramatic transformations I found was in the constitutional jurisprudence of foreign affairs.

That transformation was, in several respects, an archetypal illustration of the deficiencies in the conventional account of early-twentieth-century constitutional history I was seeking to revise. Its earliest manifestations, in cases and academic commentary, occurred at the turn of the nineteenth century. Two of its leading cases, *Missouri v. Holland*[21] and *United States v. Curtiss-Wright Export Corp.*,[22] were handed down before the Court-packing plan was announced. One of its principal architects, Sutherland, repeatedly advanced constitutional objections to the extension of national powers in the domestic arena in the 1930s.[23] Most significantly, the transformation of the constitutional jurisprudence of foreign relations carved out a deeper and broader sphere of discretionary national power, and a more activist role for the federal courts as creative expounders of customary international law as federal common law, than any of the domestic transformations that had been identified with the "constitutional revolution" supposedly engendered by the New Deal.[24] Yet it played no role in any of the

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21. 252 U.S. 416 (1920).

22. 299 U.S. 304 (1936).

23. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936).

24. None of the transformations in the jurisprudence of the Commerce Clause or the Due Process Clauses, typically identified by standard historical accounts as examples of a "constitutional revolution" brought about by external political pressures on the Court after the 1936 presidential election, resulted in the virtual disappearance of the states as regulatory actors in the area of domestic political economy. *See, e.g.*, WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 231-36 (1995). Moreover, in *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), the Supreme Court ruled that, in the vast majority of domestic common law cases, federal courts were to follow the holdings of the courts of the states in which they sat. In contrast, the early-twentieth-century transformations of the constitutional jurisprudence of foreign relations had the effect of eliminating state legislatures and

conventional accounts of early-twentieth-century constitutional history. By the latter part of the twentieth century, the sweeping nature of the judiciary's expansion of the President's foreign relations powers had largely disappeared from view.

The nature of the transformation that took place in the constitutional jurisprudence of foreign relations was not difficult to discern once I began investigating sources that had been ignored for years.[25] In a series of parallel areas, a relatively limited and confined conception of executive power in foreign affairs was replaced by a broad conception of executive discretion. In orthodox nineteenth-century foreign affairs jurisprudence, most international agreements were expected to be treaties, requiring the consent of two-thirds of the Senate, which was taken to be a collective embodiment of the concerns of the states. Foreign relations decision making by the Executive was thus circumscribed both by the enumerated and reserved powers of the Constitution, which were taken to be essentialist powers. The legal impact of discretionary foreign affairs decisions by the Executive, as reflected either in the creation of a category of international "political questions" that were isolated from judicial scrutiny, or in judicial deference to suggestions made by the executive branch in foreign sovereign immunity cases, was narrow. Constitutional issues in the foreign relations realm were treated as being governed by the same set of essentialist constitutional powers and limitations as those in the domestic realm.

By the close of the Second World War, every one of these characteristics of orthodox foreign relations jurisprudence had been modified. Executive agreements now occupied the same constitutional status as treaties, being treated as authoritative expressions of national policy that could displace state law, even though they did not require senatorial consent. Treaties themselves could provide a justification for federal regulation of matters, such as the protection of wild game, that had not been regarded as within the reach of the federal government's constitutionally enumerated powers.[26] Judicial deference to executive policymaking in foreign relations became routine, ei-

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state courts as contributors to the jurisprudence. *Erie* was not applied to "foreign affairs" cases.

25. The assertions in the next several paragraphs are documented in White, *supra* note 15.

26. *See* Missouri v. Holland, 252 U.S. 416 (1920).

ther justified by an expanded category of international political questions or by a perceived obligation to respect executive department suggestions in foreign sovereign immunity cases. Most importantly, the realm of constitutional foreign relations jurisprudence had been sharply disassociated from the domestic realm, as the plenary power of the national government in foreign affairs, as well as the discretionary powers of the executive branch in that area, were identified with inherent powers of national sovereignty rather than with enumerated constitutional powers. The President and his agents were deemed to have special sovereign powers to fashion policy in foreign relations, and the states were deemed to have disappeared from the area.

IV.

In short, by the close of the Second World War, Bradley's "twentieth-century" view of foreign affairs law was largely in place, with developments between the late 1940s and the early 1990s only serving to expand the implicit definition of the foreign affairs realm so as to encourage the further federalization of customary international law and increased deference to executive decisions. That view not only has been deeply rooted among the internationalist scholars who have dominated foreign affairs law since the 1970s, but has been considered sufficiently conventional to be ignored by most domestic constitutionalists. Yet this conception of judicial deference in the realm of foreign affairs is almost entirely the creation of a limited time period in the early years of the twentieth century.

Doing history can be a subversive enterprise. It can reveal that current orthodoxies are better described as provisional and contingent responses to specific historical contexts than as universal or timeless truths. It can also reveal the extent to which such orthodoxies rest not on their essential wisdom but on the common lessons those who subscribe to the orthodoxies draw from their shared experiences. In retrospect, it seems possible to recreate the lessons generations of early-twentieth-century Americans drew from their experiences with international relations. Those experiences were dominated by the continuous growth of American commercial development outside American borders, and, during the same time period, the continued existence of an unstable and foreboding international

geopolitical order. From 1900 through 1945, Americans witnessed not only the global expansion of American businesses but the emergence of arms buildups and complicated military alliances among European nations, the outbreak of a European war into which the United States was eventually drawn, the emergence of the Soviet regime in Russia, the rise of totalitarian governments in Italy, Germany, and Japan in the 1930s, and another global war in which Americans fought.

Although the combination of increased international commercial contacts and externally based threats to American national security made it more difficult for Americans to isolate themselves from the rest of the world in the first four decades of the twentieth century, the destabilizing geopolitical features of the international order in those years did not directly infect the domestic political character of American government. Totalitarian movements of the right or the left did not make any significant political headway in the United States, and the North American continent, even at the height of Axis military success, remained free from invasion. It was easy enough, in this context, for Americans to see foreign relations as complicated, dangerous, alien, and utterly different from what was taking place at home. Foreign relations was the realm in which Americans confronted an unstable world of international geopolitics whose sovereign actors seemed to behave in incomprehensible but threatening ways. Policymaking in that realm seemed to bear little relationship to policymaking in the still peaceful, democratic, capitalist American domestic arena. As such, foreign relations policymaking appeared to be a natural province of specialists who could respond to internationally generated threats to American security with swift and flexible diplomatic or military actions. The transformation of constitutional foreign relations jurisprudence, by increasingly centering foreign relations powers in the executive branch of the federal government, accomplished these goals.

One will notice that this historical explanation for the early-twentieth-century view of foreign relations jurisprudence emphasizes the resonance of a particular conception of foreign affairs policymaking—delicate, potentially dangerous exercises in international geopolitics—with the commonly shared domestic and international experiences of Americans at a certain period in history. A similar analysis may shed some light on the current ferment in foreign affairs law. If one were to consider

the common domestic and inter-national experiences of Americans for four decades after the close of the Second World War and compare them with our current experiences, a contrast would seem to emerge.

Between 1945 and the late 1980s, the dissonance between the foreign and domestic experiences of Americans may well have seemed roughly comparable to the dissonance experienced by their early-twentieth-century predecessors. No sooner had the Axis powers been defeated than Americans entered the Cold War, pitting themselves against another expansionist, totalitarian, anti-democratic, and anti-capitalist set of enemies. The domestic experience of most Americans in those decades, featuring irregularly expanding economic and expressive freedoms, a general sense of social leveling, and the diminished power of authorities, was in direct contrast to their perceived relationship to most of the rest of the world. The prospect of nuclear war and the apparent incompatibility of democratic and collectivist regimes continued to make international relations seem alien, delicate, and dangerous. At the same time, the division of the world into hostile blocs confined and limited the range of international economic transactions. Contacts between Americans and other members of the world were still significantly affected by international geopolitics.

In such a context, the continued predominance of a model of foreign policymaking that treated foreign affairs as a separate and distinct area of lawmaking dominated by international geopolitics would seem to be natural and uncontroversial. The associated model of constitutional foreign relations jurisprudence—the twentieth-century view—would appear to be equally resonant with Americans' continued sense of the dissonance between the domestic and foreign affairs realms. By now that model had been in place for several years, its once revolutionary character forgotten, the special historical circumstances that led to its creation largely lost because they seemed endemic to the American experience in the twentieth century.

In the late 1990s, by contrast, the Cold War has ended. The road map of the world now looks far less bifurcated. Americans are making contacts with countries and peoples to whom they previously had very limited access. Communications technology has generated the metaphor of the global village, a place where incidental, even random international

contacts are routine for Americans. Geopolitical barriers to international economic exchange, and to international communication generally, are receding. The "Americanization" of international popular culture reportedly is widespread. Given these tendencies, it would seem quixotic to predict that the sharp separation perceived by generations of twentieth-century Americans between foreign and domestic affairs will continue into the next century. One would expect the trend to be in the opposite direction.

V.

Given the developments identified above, it seems that a model of foreign relations jurisprudence erected upon the assumptions of the exceptional character of foreign affairs, the geopolitical cast of most American-foreign contacts, and the dissonance between the domestic and international experiences of ordinary American citizens is bound to lose its resonance and, thus, its authority. In this sense, the revisionist wave of scholarship that recently has appeared seems to reflect the first stirrings of a quite different international order, and of quite different perceptions on the part of Americans as to what "foreign affairs" entails. But the inevitability of a turning in foreign affairs law seems to be resisted by some scholars who seem well aware that the international order of the early twenty-first century is likely to be different from its twentieth-century counterparts. One issue in particular appears to be serving as a rallying point for persons who continue to believe that, even in the face of an altered international context, the orthodox twentieth-century view of foreign affairs law should continue to be regarded as authoritative.

The issue, put in the terms of this essay, is that the less exceptionally one treats the sphere of foreign affairs law, the more the lines between domestic and foreign affairs law blur, and the more the established doctrines of American constitutional and common law may come to control in foreign relations cases. In a world in which foreign relations jurisprudence has been treated as exceptionalist in character, the opportunities for internationalist scholars to help federal courts infuse American foreign relations law with customary norms, some of them derived from aspirational internationalist goals, have been extensive. A proper fear of some such scholars may be

that, if foreign affairs comes to be perceived as a less exceptionalist realm, and a domesticization of foreign affairs law takes place, domestic doctrines may supercede these customary international norms. The result might be a loss in the momentum of aspirational international norms, most acutely in the area of human rights, as guidelines for American courts.

I think the concept of universal human rights will continue to be an aspirational guide for any new international order, all the more so, perhaps, because the end of the Cold War has not diminished the capacity of the human race to produce aggression, brutality, and tyranny. But I also think that proponents of foreign affairs exceptionalism who stake their position on the protection of human rights not only overestimate the capacity of the United States to serve as a police force for human rights principles but may underestimate the extent to which the idea of human rights, in mainstream American culture, is a double-edged sword. We include among our constitutional freedoms the right not to be tortured, but we retain and enforce the death penalty in our jurisprudence. We have historically identified ourselves as a nation dedicated to equal rights, but we have consistently upheld the right of American citizens not to treat their fellow citizens equally in private relations. Our domestic jurisprudence embodies our deep cultural commitments to punishment, vengeance, and autonomy as well as to the ideals of equality and fairness.

Thus, it is not obvious that the incantation of universal human rights principles will provide a sufficient justification, in the face of the changing nature of international relations, to resist the logic of domesticization in American foreign affairs law. To the contrary, as Americans come to see international contacts and transactions as less "foreign," the unique mix of respect for equal rights and respect for the right to treat others unequally that characterizes our domestic jurisprudence is likely to serve as a barrier to the infiltration of international human rights norms into American foreign relations cases. At the same time, I think that this issue is where the beleaguered adherents of orthodox foreign relations jurisprudence ultimately will make their last stand.

The essential character of a jurisprudential turning is that it happens, however it is characterized or resisted. It happens not because a particular scholar or court has had a brilliant idea, but because the idea has come to resonate with the intui-

tive responses of contemporary Americans in their experiences. The orthodox twentieth-century view came into being and became unproblematic gospel because of its cultural resonance. Now the cultural mix has changed. What today seems fierce political infighting in the community of foreign affairs scholars will someday be seen as the ordinary strains of transition from one jurisprudential orthodoxy to another. No one can tell what form the new foreign affairs law will take, but one can be sure that its starting assumptions will align with the common, largely inarticulate reactions twenty-first-century Americans have to the international world they confront. That world, even to the most casual observer, already seems light-years away from its counterpart in 1989. With such a radically transformed understanding of global interconnectivity, one can surely expect an eventual transformation in the way domestic courts resolve disputes with international dimensions. What I have described as a turning is the first stage of that forthcoming transformation.