June 2006

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MAINE LAW REVIEW

THOUGHT VERSUS ACTION: THE INFLUENCE OF LEGAL TRADITION ON FRENCH AND AMERICAN APPROACHES TO INTERNATIONAL LAW

Dana Zartner Falstrom

I. INTRODUCTION

In the months leading up to the U.S. intervention in Iraq in March 2003, the dialogue between the United States and France on the appropriate course of action to take in response to Iraq's report on its weapons of mass destruction revealed differences between these traditional allies as to the options available under international law. These differences did not center on the goals of any proposed action—both sides in fact agreed upon the goals,1 which were to ensure there were no weapons of mass destruction; to prevent an increase in terrorist activity; and to address the continuing violations of international law perpetuated by Saddam Hussein.2 What was in dispute, however, was the timing and form of action available under international law.3 In particular, France and the United States were unable to come to

1. This has been the case most often post-WWII. France and the United States typically agree upon the goal, but disagree about the means of attaining that goal. See ROBERT KAGAN, OF PARADISE AND POWER 29 (2004).

2. Interview with Jacques Chirac, at the French Ministry of Foreign Affairs (Feb. 16, 2003), available at http://www.iraqwatch.org/government/France/mfa/france-mfa-chirac-021603.htm. Mr. Chirac stated: Nor do we have any differences over the goal of eliminating Saddam Hussein's weapons of mass destruction. For that matter, if Saddam Hussein would only vanish, it would without a doubt be the biggest favour he could do for his people and for the world. But we think this goal can be reached without starting a war.

3. France's position, highlighted by President Chirac on March 10, 2003: We have said: "we want to disarm Iraq." . . . We unanimously chose the path of disarming him. Today, nothing tells us that this path is a dead end and, consequently, it must be pursued since war is always a final resort, always an acknowledgement of failure, always the worst solution, because it brings death and misery. And we don't consider we are at that point. That's why we are refusing to embark on a path automatically leading to war so long as the inspectors haven't told us: "we can't do any more." And they are telling us the opposite.

Interview with Jacques Chirac, at the French Ministry of Foreign Affairs (Mar. 10, 2003), available at http://www.iraqwatch.org/government/France/mfa/france-mfa-chirac/031003.htm. Contrast this with the following statement by President Bush on December 2, 2003: Americans seek peace in this world. We’re a peaceful nation. War is the last option for confronting threats. Yet the temporary peace of denial and looking away from danger would only be a prelude to broader war and greater horror. America will confront gathering dangers early, before our options become limited and desperate. By showing our resolve today, we are building a future of peace. In the decisions and missions to come, our military will carry the values of America and the hopes of the world. The people of Iraq, like all human beings,
agreement on whether a valid interpretation of the international laws of war would allow for the United States’ proposed anticipatory intervention, or whether pre-existing notions limiting military intervention to imminent threats were binding on any proposed action, no matter how noble the goal.\footnote{The norms of just war have long been recognized to include, in addition to the right of self-defense if attacked, the right to engage in military operations if a state is under imminent attack. While there has been debate over the meaning of the term ‘imminent,’ it has been held that the definition put forth by U.S. Secretary of State Daniel Webster in the \textit{Caroline} case provides fundamental guidelines: “exceptions growing out of the great law of self-defence do exist, those exceptions should be confined to cases in which the ‘necessity of that self-defence is instant, overwhelming and leaving no choice of means, and no moment for deliberation.’” 2 John Bassett Moore, \textit{A Digest of International Law} 412 (1906). In the recent debate over Iraq, the argument made by the U.S. further pushed this conception of anticipatory strike. The U.S. position was that, in a world of terrorism and weapons of mass destruction the possibility of attack takes on a new meaning, and this new meaning calls for new interpretations of international law. France, on the other hand, preferred to maintain the existing definition of imminent attack, considering the evidence available as to weapons of mass destruction in Iraq to be insufficient. For further discussion of the \textit{Caroline Doctrine}, see Martin Rogoff & Edward Collins, \textit{The Caroline Incident And The Development Of International Law} 16 Brook. J. Int’l L. 493, 498 (1990).}

The United States and France ultimately did not see eye to eye on the appropriate course of action and in the end, the United States entered Iraq without the support of the French. Many saw this as a manifestation of a growing divide between the two countries. The reasons given for this rift have been plentiful—the French resent U.S. power; the United States resents France’s efforts to balance the United States with a stronger European Union; the two countries disagree on trade relations; there is a general growing anti-American sentiment among the French population. But do these accounts truly provide an explanation for the disagreement between the two counties? In fact, is it true that there is even a significant division between France and the United States in terms of the laws of war? Or for that matter, is there, as many of the above-mentioned theories would indicate, is there an underlying division between the two states when it comes to international law and the international system generally? Many might argue the evidence is overwhelmingly so. But do these explanations truly provide an accurate depiction of French and American behavior?

To address these questions, this essay will examine the approaches of France and the United States towards international law. In doing so, I suggest that although in the past several decades France and the United States have frequently approached international law from different perspectives, neither view results in a greater notion of justice nor an absolutely better record of compliance with international law. At the same time, however, I consider why these two countries, although similar in many ways (both countries are advanced, industrialized democracies founded on the liberal principles of the Enlightenment), and although both having past records of adhering to international law, have a historical tension in their approaches to international law. That tension is evident in both countries’ willingness to recognize and adhere to international law, and their willingness to change it.
I contend that understanding this tension is key, not only for understanding the recent disagreement between the two states, but for explaining the different approaches the two states have taken to international law. Further, I theorize that this tension can be illuminated by an examination of the legal traditions that have shaped the behavior of the two countries. Specifically, I suggest that the different legal traditions of France and the United States contribute to the different outcomes we have seen in terms of the two countries and their treatment of international law. The legal tradition of a state, developed from the state’s history with law and conception of the role of law in society, coupled with the legal and political institutions that have developed out of this history, help to determine the position a state affords international law as a guiding force in determining state behavior. France and the United States certainly maintain many similarities, and remain close allies in many situations. However, different legal histories and perceptions of the role of law have led to different beliefs today that shape the idea of international law as a guiding factor affecting state behavior. Beliefs that are shaped by legal tradition include conceptions of state sovereignty and the willingness of a state to give up absolute sovereignty for a cooperative purpose; acceptance of foreign relationships and entanglement; and whether change is better made through multilateral, diplomatic discourse, or through more direct action adopted to fit new and changing circumstances. France and the United States sometimes have different positions on these beliefs, positions developed through history and reinforced through the creation of institutions and the evolution of perceptions of law. It is these differences which cause the United States and France to view international law through different lenses, and which can thus result in conflict between the two on how international law should be treated in any given situation.

The French legal tradition, founded on a mixture of Roman law, Canon law, and local custom, and heavily influenced by the French Revolution and France’s position in Europe, has developed into one in which law plays a central role in the life of all French people. The centrality of law and the conception that law exists to benefit the community facilitates the incorporation of international legal principles into the domestic legal framework.

5. The continental conception of law, which prevails in France, is very different [from the common law]. Although law is certainly the concern of jurists, it is not their concern alone. It involves the whole population, because it establishes the very principles of social order and thus tells citizens how they should behave, in accordance with the community’s ideas of what is moral and just. Law should not be, and is not, an esoteric science; rather, it must be accessible to the greatest possible number of persons. Because it has an educational role, it is linked to the whole prevailing existential philosophy. It takes the place of social morality and, for some, aspires to replace religion itself.


6. International law is, of course, created at the international system level through multilateral discussion, treaties, and the work of international organizations. Compliance with international law, however, must take place through incorporation of international legal principles into the domestic legal structure of a state. For a state to truly comply with its international legal obligations it must believe such rules are binding. In countries like France and the United States (i.e. representative democracies) it is the voting population that influences government decisions about state behavior. The better international law is incorporated into the domestic framework, the more likely the populations of these states are to acknowledge and accept its tenets, and the more likely it is that the population will want the government to act according to those tenets that it feels are binding. Once incorporated, principles of international law are
legal institutions of the state, on the sources of law and methods of interpretation used, and on the public perception of the role of law and the position of France towards international law shapes the behavior of France when acting within the international system.

The legal tradition of the United States, on the other hand, originating in the common law tradition of England, but influenced by the principles of the American Revolution and by the unique circumstances of the growth and development of the United States as a country, uses the law primarily as a mechanism to protect individual interests. This focus inward and concentration on individual rights founded in U.S. legal history has made more varied the recognition of the settled interpretations and binding force of international law by the United States. Moreover, in addition to the general attitude about law, the structure of the political and legal institutions in the United States makes incorporation of international law into the domestic legal system more difficult. Thus, although it is generally a state that adheres to international law and supports the international legal system, the United States has historically been more likely than France to push the outer boundaries of accepted concepts of international law.

In this essay, I will discuss the role of the French and American legal traditions in explaining each state's behavior in terms of recognition and adherence to existing international law. Although not suggesting this is an all-encompassing explanation for the behavior of these two states, I propose consideration of legal traditions as a key contributing factor; a hypothesis supported by historical analysis. For purposes of this essay, I will use as my primary example the international laws regarding anticipatory intervention that was the central point of debate leading up to the Iraq intervention in 2003. However, I suggest that this same theory would explain the behavior between these two countries in terms of public international law generally.

The first section of this essay will define legal tradition and explain the importance of legal tradition as an explanatory variable for state behavior. In examining the influence of legal tradition, I focus on four specific components: the historical development of the tradition; the legal institutions developing out of the tradition; the sources of law and their interpretation that form part of the tradition; and the public perceptions of the role of law stemming from the legal tradition. I will next turn to a discussion of the legal traditions of France and the United States, focusing my discussion on the historical development of law in each country and how this development has influenced the modern-day role of law in each of the states. In doing so, I will concentrate on the values underlying the historical development of law and how this has influenced the legal institutions which have developed, the sources and interpretation of law, and the role of law in society as perceived by the population of each country. Third, I will discuss the role that legal tradition plays in influencing a state's behavior in the international system, particularly in regards to the treatment of views in the same manner as domestic laws, both in terms of binding authority and in terms of interpretation and alteration.

7. See generally MARY ANN GLENDON, ET AL., MICHAEL WALLACE GORDON, & CHRISTOPHER OSAKWE, COMPARATIVE LEGAL TRADITIONS (2d ed. 1994); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW (2d ed. 1985); JEAN-BAPTISTE DUROSELLE, FRANCE AND THE UNITED STATES: FROM THE BEGINNINGS TO THE PRESENT 12 (Derek Coltman trans., 1978).
international law. In doing so I will also examine some of the key alternative explanations that have been put forth to explain the different views of France and the United States. I suggest that rather than refuting these alternative explanations, considering a state's legal tradition provides the constitutive framework through which all other variables influence decision-making. Finally, I will conclude with a discussion of the importance of understanding the subtle differences among legal traditions in order to minimize the potential for misunderstanding, as was evident between the two countries leading up to the 2003 Iraq intervention.

II. THE ROLE OF LEGAL TRADITION

Although state behavior in the international system has long been the subject of academic discussion, the role that law and legal institutions play in framing state behavior has received scant coverage in the literature.\(^8\) Perhaps paradoxically, when considering a state's approach to international law, it is important to first examine its domestic treatment of law, arising as it does out of a state's legal tradition. This is because for international law to be binding on a state it must be incorporated from the international system level into the domestic legal system. While power, interests, and reputation\(^9\) are all factors in a state's determination of its appropriate course of action, whether in the domestic or international arena, each of these factors is framed in terms of the legal possibilities and the perceptions of the just course of action for the state. It is therefore important to consider the influence of legal tradition on a state's domestic behavior as a paramount factor in determining the approach a state takes in determining how it will function within an international legal framework.

A. What is a Legal Tradition?

Legal tradition has been defined as a set of deeply rooted, historically conditioned attitudes about the nature of law, the role of law in the society and the polity, and the proper organization and operation of a legal system.\(^10\) The legal tradition of a state arises out of the historical and cultural roots that led to the formation of modern legal institutions within the state, and thus affects the way law is used as well as the perception of the population towards law and its role in society. This applies to both national law as well as international law.

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9. For a discussion of alternative theories on state behavior, see Part V.

The legal tradition that develops within a particular state is both a function of a multitude of historical factors, and a framework that allows certain institutions and beliefs to develop. In both France and the United States, revolution and principles of the Enlightenment have had a great influence on the legal tradition. From these notions—captured in the works of Locke, Montesquieu, Montaigne, Tocqueville, and Rousseau—institutional arrangements have come into existence which further the underlying values concerning the law prevalent in the two systems.\(^\text{11}\) While France and the United States share many core values, the differences in history surrounding the development of these values and the situations in which the countries have found themselves post-revolution have created differing conceptions of law between the two.\(^\text{12}\)

**B. A Theory on the Influence of Legal Tradition**

This paper suggests that the legal traditions of France and the United States illuminate the different perspectives of the two countries regarding international law. A country’s legal tradition shapes all aspects of law within that society. Legal tradition influences the role of law in a society and the institutional structure of its legal system, as well as its general political system and the public perception of law in terms of what it is designed to achieve. These components combine to create the framework in which a government makes decisions about the appropriate course of state action. France, with its civil law tradition founded on a mixture of Roman law, Canon law, and customary law, and combined with a history of authoritarian government and a delayed realization of the French Revolution’s democratic principles, has developed a particular set of beliefs about the role of law and consequently the place of international law. On the other hand, the United States, with its legal tradition arising out of English common law but heavily influenced by the American Revolution, the ideas of the Enlightenment philosophers, and the unique geographical position of the United States in the world, has developed a different perspective. When these different perspectives collide, as they did in the case of the United States intervention in Iraq in 2003, France and the United States are very likely to disagree on the international legality of particular actions.

Accordingly, a state’s legal tradition is the underlying force behind its treatment of international law. A state’s level of compliance with international law is a function of the historical role of law, both domestic and international, within the state, as well as the role the population of the state feels the law should play. Legal tradition can create a binding sense of legal obligation and an identifiable course of appropriate action, while at the same time shaping the state’s interests, which remain an integral

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\(^{12}\) For a discussion of the different interpretations of constitutionalism between the two states, see **Martin A. Rogoff**, *A Comparison of Constitutionalism in France and The United States*, 49 ME. L. REV. 21 (1997).
part of any state decision-making process. More specifically, contemporary attitudes towards the authority of existing international law can best be seen as a function of a state's historical legal tradition and how this legal tradition shapes the legal culture and institutional structures within each state. Beyond the reality that France is a civil law state and the United States a common law state,\textsuperscript{13} the underlying historical and cultural characteristics that form the foundations of these two legal traditions have created differing perspectives in the two countries on the role of law in society, the acceptance of international law as a form of law, and the freedom to push our understanding of law beyond existing doctrine.

France and the United States share many similarities, stemming from the revolutionary principles that form the basis of each country's identity.\textsuperscript{14} However, each country developed under unique historical circumstances and each produced, and in turn were influenced by, distinctive legal and political institutions. While both countries are adherents to the rule of law, France and the United States do have different histories when it comes to the consideration of international law. These differences come not only from recognition and acceptance of international legal principles,\textsuperscript{15} which are greatly influenced by each state's conception of the idea of sovereignty,\textsuperscript{16} but also from the treatment afforded by each state to those principles they hold as binding. France and the United States maintain different approaches to the incorporation of international law into the domestic law of the state, the authority given to such law, and the means by which to change such law. It is these differences—all stemming from the legal traditions of the state supported by unique historical development—that account for variation between the two countries in their treatment of international law.

Both the historical ties of the civil law tradition in France and the institutional structures that have developed from this foundation facilitate the incorporation of international law into French legal doctrine. Each has created a profound awareness of international law in France. At the same time, the historical French connection to written law and the French use of codes\textsuperscript{17} has made it more difficult for France to adapt quickly to changes in the international system that may require corresponding changes in international law. As a legal culture that relies heavily on the mechanism of public discussion, which should take place before changes in the law can occur within the legislative body, the French legal tradition is not as able to facilitate rapid change in the law through highlighting differences in present cases compared to the past, as the United States attempted to do with Iraq in 2003. France is and has long been a diplomatic nation at its core, preferring to discuss and negotiate resolutions to crises

\textsuperscript{13} On France, see John P. Dawson, The Oracles of Law 263 (1968) ("In modern times throughout most of the world France is regarded as the very model of a 'civil law' country.").

\textsuperscript{14} See Rogoff, supra note 12, at 30 ("[T]he French and American Revolutions, guided by the principles of democracy, respect for the rule of law, and the inalienable rights of man, together mark the transition from the old world to the new.").

\textsuperscript{15} France has more readily incorporated modern international rules into its domestic legal system. For example, of twenty major multilateral treaties sponsored by the United Nations since 1945, France has ratified seventeen, compared to only six for the United States. See United Nations Treaty Database, available at http://untreaty.un.org (subscription required).

\textsuperscript{16} Rogoff, supra note 12, at 58.

\textsuperscript{17} See David, supra note 3, at 11-16.
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rather than act boldly.\textsuperscript{18} This preference is evident throughout France’s history\textsuperscript{19} and was certainly the case in the months leading up to the 2003 Iraq crisis.

On the other hand, the history and institutional characteristics of the legal tradition of the United States have led to the establishment of a legal culture much less influenced by or accepting of outside legal influences such as international law.\textsuperscript{20} The incorporation of international legal norms into the domestic legal culture is correspondingly more difficult in the United States than it is in France. As a country based on the rule of law, however, the United States does take part in the international legal order, and like France complies with international rules more often than not. Where the two countries differ, however, are those instances where the United States has been willing to push the boundaries of existing international law to meet new and changing needs in the international system. This was the case with the U.S. push to alter the laws of war to include anticipatory intervention in Iraq given the new threats created by terrorism and weapons of mass destruction. Given the institutional structures that have developed out of the U.S. version of the common law tradition, with its heavy reliance on judicial lawmaking based on the distinguishing of facts (a mode of lawmaking considered not only the norm but also essential to allow the law to keep up with the times), the perception of the United States is that it is perfectly natural to adapt international law by acting first and arguing about legal technicalities later.\textsuperscript{21} This, however, is not the tradition in France, and therein lies the basis for disagreement.

This essay explores the historical development of the French and U.S. legal traditions, and how this affects each state’s approach to international law. In doing so, I focus on four factors that combine to support my theory that legal tradition influences a state’s treatment of international law. The first, and most important of these, is the historical development of law and the legal tradition within the state. Any theory of the relationship between law and society, whether domestic law or international law, must rest on knowledge of the history of individual legal systems.\textsuperscript{22} Understanding the historical circumstances surrounding the development of the French and American legal traditions is crucial, because only by understanding the unique historical characteristics present in each state during the formation of the rule of law

\textsuperscript{18} See Interview with Jacques Chirac, supra note 3. See also KAGAN, supra note 1, for a general discussion of France’s preference for diplomacy. While Kagan’s argument centers on France’s use of diplomacy as a substitute for its lack of power relative to the United States, which is not the position of this paper, the historical discussion remains relevant.

\textsuperscript{19} Examples include the period leading up to World War II, when appeasement was preferred to military action, and the Balkan crisis in the 1990s. For further discussion of France’s preference for diplomacy, see generally KAGAN, supra note 1.


\textsuperscript{21} See DAWSON, supra note 13, at xiii (noting that in the U.S., in contrast, “it seems obvious and beyond dispute that the application of law necessarily involves some new creation. . . . Conflict itself. . . . is a major source of growth and change [and adjudication is the settlement of conflict].”).

\textsuperscript{22} Alan Watson, Legal Change: Sources of Law and Legal Culture, 131 U. PA. L. REV. 1121, 1122 (1983); see also CLINTON ROSSITER, THE AMERICAN QUEST 1790-1860: AN EMERGING NATION IN SEARCH OF IDENTITY, UNITY, AND MODERNITY 6 (1971) (“If we are to arrive at a better understanding of this harsh world and the kindlier one we would like to build, we must study the history of nations just as intensively as we study the behavior of individuals.”).
can we understand the nature of the subsequent legal institutions and sources of law that have developed, as well as the public perception of the role of law in society. In other words, the legal tradition of a state is a constitutive factor, determining the position of many components of society—all of which combine to provide the framework under which decisions are made regarding international law.

The second factor is that a state’s treatment of international law is influenced by the legal and political institutions in the state. This institutional component arises directly out of the historical development of legal tradition. However, as the political and legal institutions grow and solidify, they are not only constituted by the legal tradition, but they themselves become constitutive mechanisms for the recognition of, adherence to, and incorporation of international law within the law of the state. Legal and political institutions include the branches of government in the state, as well as the separation of the branches and the powers bestowed on each (in particular, the powers regarding international law and the ability to change or amend the laws). The third component of the legal tradition that determines a state’s treatment of international law is the recognition of sources of law and the methods of interpretation of these sources. Whether or not international law becomes part of the legal toolbox that a state uses to make decisions about the appropriate course of action is determined in large part by the ease with which the international rules are incorporated into the domestic legal system. Depending on what a legal system considers a source of law, how international law fits into that categorization is a key determining factor. Moreover, once an international legal rule becomes a source of law, the method of interpretation for these rules can also influence how influential the international rules ultimately are in guiding state behavior, as well as how free a state might feel to push the boundaries of international legal norms.

The final component of legal tradition that contributes to a state’s treatment of international law is the population’s understanding of law and of the role of law in society. As with institutions and sources, public perception of law is greatly

23. Slaughter Burley, A Dual Agenda, supra note 8, at 228.

24. For a general discussion of the political and legal institutions of France and the United States, see Durosselle, supra note 7; Jean-Marie Guéhenno, L’Avenir de la Liberté: La Démocratie dans le Mondialisation (1999); Patrice Higonnet, Sister Republics: The Origins of French and American Republicanism (1988); Rogoff, supra note 12.

25. An understanding of the domestic legal tradition matters because it is at the domestic level—whether government or public—where acknowledgement and adherence occur. International law may be developed and agreed upon at the international level, among governments and diplomats; but it is at the domestic level, among the population, where it gains its authority. International law is incorporated into domestic legal orders—those legal orders founded on a state’s historical legal tradition—so that all citizens of a state, from the leaders to the general populace, are bound by its tenets—the tenets which form the framework within which all decisions are made. However, depending on what the historical development of the legal tradition has been and what legal institutions have come from such history, a state may be more or less able to incorporate international law into its domestic legal framework. The easier the incorporation, the more likely it will be that international law considerations form part of the basis for action promoted by the population. In those states where it is more difficult (or time-consuming) to transfer international law from the level of diplomats to the level of domestic law, attention and adherence to international law will be less. See Francis Boyle, World Politics and International Law 20 (1985); see also Richard A. Falk, The Role of Domestic Courts in the International Legal Order (1964), for a discussion of the importance of national courts as instruments for incorporating international law.
influenced by the historical development of the legal tradition within a given state. All societies are products of their history, as are their understandings and beliefs about law and what it is designed to do. This component is particularly important in a democratic society such as France or the United States, in that the public's perception of the appropriate course of action is a crucial factor in what the state does, regardless of its legal tradition.  

What people think about the law and the values embedded in this thought have a great deal to do with how people behave and, ultimately, how they expect their elected representatives to behave. In fact, it has been said that public opinion is international law's "ultimate sanction." Liberal democracies like France and the United States base foreign policy decisions on popular support.

Ultimately, this analysis leads to the conclusion that the difference of opinion between France and the United States on the issue of Iraq was not the monumental split among allies that many proclaimed, but was instead just the latest in a series of differing perspectives between the two nations on international law. Law is a primary cornerstone of any society, shaping the perceptions of justice and the sense of right and wrong within the society it governs. These perceptions and attitudes about law are historically grounded and continually reinforced by a state's legal culture and institutions. It is important to understand these differences in examining state behavior in the international system and treatment of international law. Given the constantly changing nature of the international community and the new problems that continually arise, more situations like that of Iraq are likely to occur in the future. A better understanding of each other's point of view may facilitate international agreement the next time.

III. FRANCE

What then are the different legal traditions of France and the United States that influence different attitudes towards international law? What follows is an examination of the historical legal tradition of each state as well as the political and legal institutions, sources and methods of interpretation, and public perception of the role of law.

A. Historical Development

The legal tradition of France arose over time to be one of the most influential legal traditions in the world. This tradition did not develop in isolation, but rather incorporated forms of law and ideas about law from sources as varied as the Romans, the Catholic Church, the German tribes, the Spanish theologians, and a succession of


29. See generally Falk, supra note 25.

some of the greatest political and legal thinkers of all time. This combination of influences has shaped not only the concept of law in France, but also the relationship that the French legal tradition has with international law. Moreover, both the historically unique circumstances surrounding the French Revolution and the beliefs which emerged from its aftermath—which include the conception that political and legal leaders are responsible for ensuring that law is observed and enforced—have contributed to the understanding of the role of law in France. Finally, France’s position at the center of Europe and its relationship to not only its European neighbors, but also its former colonial territories around the globe, have combined to develop among the French people a singular sense of state sovereignty and the role of France in the world, a role many see as foundational to the appropriate conception of international law.

The historical roots of the French legal tradition can be traced to the early days of the Roman Empire. In fact, to this day, France has remained “continuously open to influence from Roman law.” As part of the Roman Empire beginning with the first century B.C., France received the foundational tenets of Roman law as compiled in the lex romana visigothorum in 506 A.D. The laws of the Roman Empire were sophisticated and diverse, as they were required to cover a vast territory encompassing a multitude of different nations and ethnic groups, all with pre-existing local rules and customs at the time of incorporation into the Roman Empire. By necessity the Roman law developed a common law of nations: one capable of engendering order and

31. France, being at the center of Europe, was witness to most of the influential writings of the 15th - 19th centuries on law and politics, including the works of the Glossators at the University of Bologna, Aquinas, Vitoria, Las Casas, Sepúlveda, Montaigne, Gentili, Hobbes, Locke, Montesquieu, Grotius, Pufendorf, Vattel, Wolfe, Voltaire, Rousseau, Descartes, and Kant. For a general discussion of the development of international law through the works of these authors, see Joachim Von Elbe, The Evolution of the Concept of Just War in International Law, 33 AM. J. INT’L L. 665 (1939). See also INTERNATIONAL RELATIONS IN POLITICAL THOUGHT: TEXTS FROM THE ANCIENT GREEKS TO THE FIRST WORLD WAR (Chris Brown et al. eds. 2002).

32. See JOHN BELL, SOPHIE BOYRON, & SIMON WHITTAKER, PRINCIPLES OF FRENCH LAW (1998) for a discussion of the values underlying French law and how these have contributed to the modern French legal system.

33. This view that the French have had throughout their history about their place in the global system and what they can offer others is referred to as la mission civilisatrice. Discussion of la mission civilisatrice and what it has meant for the development of France’s position in the world and French law can be found in TZVETAN Todorov, ON HUMAN DIVERSITY: NATIONALISM, RACISM, AND EXOTICISM IN FRENCH THOUGHT (Catherine Porter trans. 1993). See also ERNST ROBERT CURTIUS, THE CIVILIZATION OF FRANCE (1932); TZVETAN Todorov, LA CONQUÊTE DE L’AMÉRIQUE: LA QUESTION DE L’AUTRE (1982); Rogoff, supra note 12.

34. DAWSON, supra note 13, at 263 (“In its history . . . France . . . remained continuously open to influence from Roman law.”). See generally DAVID, supra note 5.

35. DAWSON, supra note 13, at 263.

36. RENÉ DAVID & JOHN E.C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY, 34 (2d ed. 1978). This was especially true in the Southern portion of France. The Northern part of France remained for the most part a pays de droit coutumier, rather than a pays de droit écrit. The customary law of Northern France, in fact, became the foundations for the English common law after William gained the English throne in 1066. The Southern portion of France (South of the Loire), as a region of written law, had extensive reception of Roman law, to the point where local custom almost disappeared. For further discussion of the development of the Roman law in France, see generally DAWSON, supra note 13; GLENDON ET AL., supra note 7.
security in Roman territory, yet also providing unifying principles which regulated such common activities as trade and treatment of government representatives in foreign territories. This early form of international law, or law between nations, is still reflected in both our modern international law and in those countries, such as France, that received the Roman law tradition.

French law developed from this early Roman law, both based on the codification of the Roman law in the Corpus Juris Civilis by Justinian, and (more noticeably) from the jus commune developed by the Glossators at the University of Bologna at the beginning of the Renaissance. The glosses and later commentaries in the 12th and 13th centuries adapted classical Roman law to the problems of the day. In doing so they were heavily influenced by the new spirit of rational inquiry and freedom from the literalism that characterized earlier Roman law. Although France was still a country with multitudes of individual laws and practices, French law from the period of the early 14th century until the time of the French Revolution in the late 18th century steadily incorporated the treatises on Roman law coming out of the universities across Europe.

These “French-Roman” foundations are responsible for a number of unique characteristics of the French legal tradition that facilitate the modern day incorporation of international law into the French system and shape French attitudes about law. First, in addition to France, many if not most other countries belonging to the civil law tradition share legal characteristics based on their historical ties to the Roman law. The resulting cohesiveness among these states in terms of general understandings of law facilitates engagement in international relations without the types of misunderstandings that the United States and France have shared. Second, because the system of Roman law itself incorporated components of international law, including laws governing war, diplomacy, and trade, understanding and incorporating international law into the domestic legal framework is a historical commonality for a country like France. By comparison, the United States’ history with international law did not begin until the 18th century.

Besides Roman law, the most important historical influence on the development of the French legal tradition and the French conception of law is the Canon law of the


38. France stretched across the main invasion routes in the northward advance of Roman law. The south of France, roughly one-third the area of modern France, was already governed by a vulgarized Roman law inherited from the earlier Middle Ages. In the late 1100’s the doctrines of the Bologna school were taught at Montpellier by Placentinus, himself one of the well-known doctors of Bologna. Other men also who had been trained at Bologna lived and wrote in twelfth century France.

DAWSON, supra note 13, at 263. See also GLENDON ET AL., supra note 7, at 48-49.

39. GLENDON ET AL., supra note 7, at 48.

40. Voltaire famously noted that one traveling across France changed laws as often as one changed horses. MICHAEL BOGDAN, COMPARATIVE LAW 167 (1994).

41. See generally DAVID & BRIERLEY, supra note 36; GLENDON ET AL., supra note 7.

42. DAWSON, supra note 13, at 100 (explaining that Roman law has helped maintain some attitudes about law in France that differ from those held in the United States).
Catholic Church. In the Middle Ages, after the Roman Empire fell, France lacked any unifying authority or source of law. Into this breach rose the Catholic Church.\(^4\) Subsequently, in the 11th and 12th centuries, the revival of Roman law combined with the spread of the Canon law through the works of such eminent scholars as Thomas Aquinas. This combination of Roman and Canon law allowed the latter's status as a guiding force for the moral aspects of society to supplement the former's practical utility.\(^4\) The fact that Canon law continued to influence French legal thought up to the revolutionary period provides a crucial component of the French legal tradition.

France's historical ties to the moral principles of the Canon law ensured that notions of morality and law working together to serve justice and the good of society would remain a part of the French legal tradition.\(^4\) This conception of law as the key mechanism for protecting society as a whole is vital to understanding the French perception of what law is and what it is supposed to accomplish. In the French mindset, law is designed to protect society from the actions of bad individuals, and to serve as the guiding principles for one's actions.

Moreover, like the Roman law, the Canon law took on international aspects. The impetus of much of the discussion of international law within the Canon law was, in fact, the discovery of the Americas and the concomitant questions about humanity and law that occurred upon the discovery of new races of people. As Spanish theologians and French philosophers struggled with the task of applying the Canon law to these new civilizations around the world, they honed and elaborated principles of the laws of nations that had first begun with the Romans.\(^4\) The Spanish theologians Vitoria and Las Casas, for example, argued that a law of sovereignty existed which applied to all humans, and was inviolable barring a direct attack on one's own person.\(^4\) After reading the works of these theologians, Montaigne questioned the wisdom of the French government's position on laws and rules concerning the new territories. Montaigne's position was later taken up by Rousseau and refined into the Enlightenment principles of liberté, égalité, and fraternité, principles that formed the basis of the French Revolution and the legal system that eventually developed from it.\(^4\)

As in the case of French law, international law carries with it many foundations, including the concepts of morality and justice. Much of international law rests on

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43. GLENDON ET AL., supra note 7, at 22-23.
44. DAVID & BRIELEY, supra note 36, at 39-40; DAWSON, supra note 13, at 279 (Canon law borrowed from the conceptual frameworks and vocabulary of the Roman law, and the connections between the two laws were "always close.").
45. See generally DAWSON, supra note 13; GLENDON ET AL., supra note 7.
46. See Von Elbe, supra note 31. This debate, which originally centered on the Spanish scholars such as Vitoria, Sepúlveda, and Las Casas, was incorporated into French dialogue through the writings of French thinkers such as Montaigne and Montesquieu.
47. For an in-depth discussion on the Valladolid Debate of 1550 between Las Casas and Sepúlveda, including a discussion of Vitoria's and Las Casas' position, see LEWIS HANKE, THE SPANISH STRUGGLE FOR JUSTICE IN THE CONQUEST OF AMERICA (2002) (1949).
48. See MONTAIGNE, supra note 11, at 228-241 (for his essay 'On the Cannibals'); ROUSSEAU, supra note 11. For a more detailed discussion, see Rogoff, supra note 12, at 51-52 ("Rousseau's ideas continue to express the feelings of the French toward their fundamental law—which since 1791 has been embodied in a succession of written constitutions. The fundamental law must be malleable; it must express the current will of the people.")
general rules designed to guide behavior, so that actions taken by any one state are not harmful to the international community as a whole. Many international rules feature undertones of morality and a sense of justice, which are akin to the French conceptions of law and its role. Because the French view of law generally has these historical ties, the act of understanding and incorporating international law is not particularly foreign to the French.

The period surrounding the French Revolution is a crucial one for both the solidification of the foundational principles of the French legal tradition and the development of the modern French legal institutions. From the 15th century onward, as French scholars were returning from Bologna with new Roman law, the French nation was beginning to centralize, creating the need for a uniform French law. This came, at first, through both royal ordinance and the creation at the end of the 13th century of the parlements, "specialized group[s]" of men who, "shortly after 1250 began to hold regular sessions that were primarily devoted to judicial business." In theory, the parlements would apply the law fairly to all people. However, in practice, they became corrupt and abused their power for the benefit of their members and the noble classes.

These actions would ultimately have a profound influence on the development of the French legal tradition, and most importantly, on the development of French legal institutions after the French Revolution. The reaction to the corruption of the parlements has structured the role of the French legal institutions ever since, in such a way as to minimize the power of the judicial branch in favor of the legislative, and particularly after de Gaulle, the executive branches of the government. The reaction also had a great effect on the treatment of international law by France; since that time the incorporation of international legal rules, as with the creation of all law, has remained primarily within the realms of the non-judicial branches of government.

Ultimately, the actions of the parlements, coupled with those of the monarchy, led to the French Revolution. The Revolution was a turning point in the development of the French legal tradition, because it caused a shift in both French institutions—one which continued into the 20th century—and the perception of the population of France regarding the correct role of law in society. Most significantly, the Revolution raised awareness among the population as to the government’s obligations to the French
people and the state concerning the rule of law. In this new French view, the focus is on the individual's dependence on civil society such that the goal of law is not so much the protection of individual rights, but rather the dissemination of rules regarding the fundamental duties one owes to the community. The primary goal of law, under this conception, is the betterment of all, which takes precedence over protections for the individual.

While the underlying values of the French legal tradition remained uncertain during the 19th century, the legal institutions which developed post-revolution continued to thrive, despite the continuous shift in government. The Napoleonic Code of 1804, drafted under the rule of Napoleon, adopted many of the principles found in Justinian's Code while reflecting the political and social revolution. The Code incorporates a mélange of sources, including Roman law, Canon law, customary law, and doctrines established by pre-revolutionary court decisions. It forms the heart of French identification with the law and their legal culture, having a "very unique and central role in the French legal system, and even in French culture as a whole." The Code remains, in many respects, unchanged today, and still reflects the fundamental ideology behind the Code's rules: an ideology based on the belief in law

54. MERRYMAN, supra note 52, at 443 ("The emphasis on the rights of man in the revolutionary period produced statements about individual liberty of the sort found . . . in the French Declaration of the Rights of Man and of the Citizen." Examples included the "right of a man to own property" and "the obligation of the law to protect his ownership" as well as the "right to conduct his own affairs and to move laterally and vertically in society." This was a reaction to "the tendency under feudalism to fix a man in place and status."). For a discussion of the public sentiment rising out of the French Revolution in terms of the role of government and its obligations to the citizenry as captured in the writings of Rousseau, see Rogoff, supra note 12, at 53-54.

55. BOYLE, supra note 25, at 65.

56. See id.; see generally ROUSSEAU, supra note 11 (calling for the establishment of social duty over individual right). It should be noted that after the Revolution, the French people clamored for a centralized law that would protect the interests of the people and ensure a functioning society. BOGDAN, supra note 40, at 168; GLENDON ET AL., supra note 7, at 52-53. In response, the National Assembly, in the years immediately following the Revolution, "made individualism the new pivot of social and economic life." HIGONNET, supra note 24, at 2-3. Individual protections, rather than those of society, were seen as the goal of the state and the laws. This focus on individualism, however, did not last. The concept of law as a protection for all people was subsumed in the re-emergence of totalitarian forms of rule. Four years after the Revolution, in fact, Robespierre's rise to power meant that these policies regarding individualism would be reversed and individualism restrained. While this restraint started out under the rubric of a better government for society as a whole, the result was instead a crackdown on any form of individual liberty or any manifestation of the rule of law and a resulting return to "arbitrary, monarchic rule"—an early form of modern totalitarianism. Thus, although the French Revolution was initially based on the same principles as the American Revolution, unlike the United States—which continued to grow and develop without pause based on the cause of individual liberty—France lost the principles of the Revolution rather quickly and they did not return to France until a century later. Id.

57. From the time of the French Revolution in 1789, France has had "two monarchies, two empires, and five republics." HIGONNET, supra note 24, at 274.

58. This consisted of five separate codes: the Civil Code, the Penal Code, the Code of Civil Procedure, the Code of Criminal Procedure, and the Commercial Code. BOGDAN, supra note 40, at 168.

59. See GLENDON ET AL., supra note 7, at 53.

60. DAWSON, supra note 13, at 349.

61. BOGDAN, supra note 40, at 169.
and justice for the community and the common sense of human beings. 62 The Napo­
leonic Code provides the basic structure and foundation for the legal institutions
present in France today, in both the civil and criminal law arenas. 63 This body of law
encompassed the historical influences of Roman and Canon law. It then spread
throughout the French empire begun by Napoleon and continued through the first half
of the 20th century. Accordingly, today’s French code and legal institutions have long
historical experience with concepts of the law of nations. This historical familiarity
informs the modern day approach to international law taken by the French. It provides
both a more ready means of incorporating international law into the domestic law of
France, and a more ingrained sense among the French people that international law is
another set of rules designed to protect society and the community as a whole, and is
thus a form of law to be obeyed.

B. Legal Institutions

While important in its own right as the constitutive element of the role of law in
France today, France’s particular legal history is also crucial in explaining the French
treatment of international law because of the legal and political institutions that have
developed out of this history. The legal tradition in France greatly influenced the
creation of new political institutions after the French Revolution and continues to
influence French institutions today. After the Revolution, as the French Republic was
created, much attention was paid to creating governmental and legal institutions that
would serve the goals of the people, rather than the goals of the upper classes. 64
Among the most important of these institutional structures are the separation of powers
and the relative levels of power accorded to the various branches of government in the
area of lawmaking—whether by enacting domestic law or incorporating international
law.

The French government maintains a separation of powers, as do most democratic
states in the world today. 65 However, French institutions, their powers, and the
separation of these powers have changed periodically since the end of the French
Revolution. France has experienced a variety of institutional structures since 1789. 66
However, no matter which period of history one considers—from the empire of
Napoleon to the Third, Fourth, and Fifth Republics—the separation of powers has
always split the preponderance of the power between the legislative and executive

62. Id.
63. See DAVID, supra note 5, at vii.
64. This was ensured by the subordination of the court to the legislature in drawing up post-
Revolutionary separation of powers. See DAWSON, supra note 13, at 374-378; DAVID, supra note 5, at 27
(“Frenchmen have always had some difficulty ... thinking of the courts as exercising a 'power' comparable
to those exercised by Parliament and the executive”); MERRYMAN, supra note 52, at 447 (“The state is
bound through its legislation to free its citizens from the traditional authority of feudal, church, family, guild,
and status groups, and to equip all citizens with equal rights.”) and at 450 (“Fear of a 'gouvernement des
juges' hovered over French post-revolutionary reforms and colored the codification process. The emphasis
on complete separation of powers, with all lawmaking power lodged in a representative legislature, was a
way of insuring that the judiciary would be denied lawmaker power.”).
65. For a more detailed discussion of the institutions of the French government, see Rogoff, supra note
12.
66. See supra note 57.
branches, leaving the judicial branch with minimal powers. This institutional structure, in turn, affects the incorporation of international law into the domestic law of France.

The French legislature, together with (since the era of de Gaulle and the creation of the Fifth Republic) the French executive, maintains the almost exclusive authority to draft and pass new laws. The Executive alone maintains the preponderance of power to negotiate and sign foreign treaties binding France to international law. In turn, because of the heavy emphasis in France on law being made by the representative branches of government, the judiciary has a very minimal role in either deciding whether an international legal rule is valid in France, or how that rule should be applied.

The French judiciary’s powers of review are minimal; except for the special role of the Constitutional Council, the judiciary does not have the power to declare any act of Parliament void. Moreover, the French judiciary has limited powers in deciding the cases that come before them. French judges are expected to render their decision based strictly on interpretation of existing codes and statutes. They, generally, do not have the authority to make law with judicial decisions, but must instead interpret the law as made by the legislature. This role for the French judiciary is rooted in the population’s history of resentment of judicial abuses prior to the Revolution. Traditionally, the judiciary in France, as members of the upper class and often servants of the king, were seen as unjust in their decision-making. Prior to the French

67. See GLENDON ET AL., supra note 7, at 83; MERRYMAN, supra note 52, at 450.
69. 1958 CONST. 52-53.
70. For a discussion of the changes that have occurred in the French institutional structure since the enactment of the 1958 Constitution, see generally Rogoff, supra note 68. There are instances where the French courts have taken the initiative in determining whether or not a particular international rule is valid as French law, or how to interpret an international legal rule. These cases have come most often over the past fifty years in the form of decisions over France’s obligations as a member of the European Union. See, for example, the Café Jacques Vabre (1975) case in which the French Cour de Cassation determined that French Courts, in accordance with European Union law, could make determinations on the validity of legislative provisions under French treaty obligations. This decision essentially provided French courts with a modicum of judicial review over state actions in terms of compliance with international law, but did not extend this review to conformity with the French Constitution. See Café Jacques Vabre, Cass. ch. mixte, May 24, 1975, D.1975.497, reprinted in FRANÇOIS TERRE & YVES LEQUETTE, LES GRANDS ARRETS DE LA JURISPRUDENCE CIVILE 15 (1994).
71. The French Constitutional Council may review a law, prior to the law’s enactment, to ensure conformity with the Constitution: “Institutional Acts, before their promulgation, and the rules of procedure of the parliamentary assemblies, before their entry into force, must be referred to the Constitutional Council, which shall rule on their conformity with the Constitution.” 1958 CONST. 61.
72. DAVID & BRIERLEY, supra note 36, at 122-23.
73. DAWSON, supra note 13, at 392 (“Law-making was not for the judiciary or the executive; it was entirely reserved for the legislature. From this monopoly of the law-making function it seemed to follow that the only worthy subject of the interpreter’s attention was code or statute, duly invested of the legislator’s sanction.”).
74. GLENDON ET AL., supra note 7, at 82-83.
75. DAVID, supra note 5, at 11 (“The chief reason for undertaking codification and carrying it through to completion was practical. The diversity of customary law and the overall lack of uniformity in French law could no longer be justified, post-Revolution.”). See also DAVID, supra note 5, at 23 (stating that the
Revolution, judges were widely seen as a tool of the wealthy, used to keep the masses subjugated.\textsuperscript{76} Judgeships in France were often passed through noble families or made available for sale to the highest bidder.\textsuperscript{77}

The French Revolution resulted in very different roles for judges.\textsuperscript{78} Although judges, as the original center of opposition to the authoritarian government, were actually responsible for the instigation of the French Revolution, from the days of the Revolution forward they have been held in a state of distrust.\textsuperscript{79} Accordingly, when the post-Revolution French legal system was created, the judiciary received very little power.\textsuperscript{80} To the extent that the French believe law exists to protect and serve the people of the country as a whole (i.e., to ensure a good society),\textsuperscript{81} they believe that the making of law should be left to the legislature or the President (as the elected, representative body of the people), and should not be in the hands of the judiciary (as a non-elected body of government employees who have no responsibility to the population as a whole).

France is also a monist system in terms of the incorporation of international law into the domestic legal structure.\textsuperscript{82} Once ratified by the Executive or National Assembly, the treaty becomes law in France without further execution necessary by the government.\textsuperscript{83} Moreover, neither the legislature nor the courts have the authority to alter the provisions of the treaty through reservations or understandings.\textsuperscript{84} This means that treaties, once ratified by the French government, become law in France on par with, and treated the same as, domestic law.\textsuperscript{85} This streamlined process for
ratification and publication, combined with the potential for the French public’s direct participation in the treaty process through public referendum.\footnote{86} and the great public interest in France’s position regarding international law,\footnote{87} facilitates the recognition and incorporation of international law into the French legal system.

C. Sources of Law, Interpretation, and Change

Closely related to the physical legal institutions that have developed in France out of the French legal tradition are the sources of law these legal institutions turn to in order to define the appropriate standards of behavior. As judges themselves are not involved in the making of law on a case-by-case basis, the recognized sources of law become all the more important for determining what the legal rules actually are.\footnote{88} Moreover, it is important to examine the explicit position given to international law in the French legal structure, as the ease with which international legal rules can become binding on the French population as a whole determines the framework in which government decisions are taken regarding French action in the international system.

In France, as with both the Roman law and the Canon law, one of the primary sources of law has historically been the writings of legal scholars and jurists.\footnote{89} While this diminished slightly in importance during the latter part of the 20th century,\footnote{90} the publications of eminent legal scholars on various legal subfields are still relied on by the legislature in drafting new law and by the judiciary in interpreting law.\footnote{91} They are regarded as authoritative indicators of both the current state of the law and the perceptions and preferences of the French population concerning the law.\footnote{92} This is especially true in terms of international law, a branch of law which has long been the realm of legal scholars as opposed to legislators.\footnote{93} Legal scholarship plays a significant role in providing French jurists and lawmakers with an assessment of the

\footnote{86} 1958 \textit{Const.} 11.\n
The President of the Republic may, on a proposal from the Government when Parliament is in session or on a joint motion of the two assemblies, published in either case in the \textit{Journal officiel}, submit to a referendum any government bill which . . . provides for authorization to ratify a treaty that, although not contrary to the Constitution, would affect the functioning of the institutions.

\textit{Id.}\footnote{87} See discussion \textit{infra} Part II.D.

\footnote{88} See supra note 70.

\footnote{89} See \textit{David & Brierley, supra} note 36, at 134; \textit{David, supra} note 5, at ix. While in the early days of the Roman legal system laws were made on a case-by-case basis, by the turn of the millennium these decisions of the jurisconsults began to be codified in written volumes, which were eventually synthesized into the \textit{Corpus Juris Civilis}. On the history of Roman law, see \textit{supra} notes 36-38.

\footnote{90} See \textit{David & Brierley, supra} note 36, at 134; \textit{Glendon et al., supra} note 7, at 210.

\footnote{91} See \textit{David & Brierley, supra} note 36, at 134; \textit{Glendon et al., supra} note 7, at 210.

\footnote{92} \textit{Glendon et al., supra} note 7, at 210 ("[T]he importance of the academics’ function in presenting analyses of cases and statutes to judges and lawyers is hard to overestimate."). For a brief discussion of the role of scholarly opinion in the broader legal system see \textit{David, supra} note 5, at 80-81.

\footnote{93} See generally Malcolm Shaw, \textit{International Law} 91 (5th ed. 2003) ("Historically . . . the influence of academic writers on the development of international law has been marked."); Mark Janis, \textit{An Introduction to International Law} 80 (3rd ed. 1999) ("[T]he doctrines of scholars have played a surprisingly important part in the development of international law.").
various issues in foreign jurisdictions and international law, and informs the public as to the international legal rules to which their state is bound.

As a result of these academic roots, the civil law tradition in France developed with a much deeper focus on "the systematic, philosophical, and structural side of the law."94 In fact, in conformity with history, the civil law tradition remains a system that can be described as a jurist's law.95 International law originated as a law of scholars, and the close relation the French legal tradition has to these writings facilitates even today its incorporation of these historical international law ideas and their modern descendants into French law.96

For the French lawyer, jurist, or layperson, la loi, referring to the detailed rules which society must follow, coexists with le droit, referring to the broader concept of the law as an ideal and guiding principle for society. While the idealized concepts of le droit have never been entirely adopted as concrete rules, la loi— that which comes from the legislature and the executive— has never been regarded by scholars or the general population as the true law.97 This understanding of the law, so different from a common law understanding by which the law is a single entity stemming from the work of the courts, is a core component of the entire French legal tradition. It forms the foundation of not only the French understanding of the sources of law, but also the public perception of how law is designed to function in and for society. It follows that France "place[s] case law far down on the scale among available sources of law."98

In addition to the sources of law themselves, the actual methods of interpretation used by scholars, judges, and others influence the way in which a state approaches international law. Modes of legal reasoning include formal versus pragmatic, deductive versus inductive, and abstract versus contextual.99 These different modes provide different methods of interpretation and application of the law. In France, legal interpreters use deductive reasoning, in which the responsibility of the judge is to apply general principles already in existence to specific facts without unique interpretation or the creation of new law.100 Although these differences may seem subtle, they play a significant role in how law is created and perceived in the different legal

94. Alan Watson, supra note 22, at 1131.
95. DAVID & BRIERLEY, supra note 36, at 98.
96. Modern international law stems directly from the work of European scholars working between the 15th and 18th centuries, including Vitoria, Gentili, Grotius, Puffendorf, Vattel, and Kant. These works form a canon of legal scholarship and theory studied by Continental lawyers, but often ignored by their common law counterparts. For a discussion of the role of the scholar in French law and international law, see supra notes 92 and 93. For a discussion of the historical origins of international law, see generally Von Elbe, supra note 31; see also SHAW, supra note 93, at 12-30.
97. DAVID, supra note 5, at ix.
98. DAWSON, supra note 13, at 374; DAVID, supra note 5, at ix. It should be noted, however, that the use of case law as a source of law is becoming more common in France. See generally Rogoff, supra note 68; see also GLENONDON ET AL., supra note 7.
traditions. A country like France would rarely countenance the application of a new legal rule prior to its being promulgated by the law-making body (in domestic law, the Parliament; in international law, the international community under the rubric of the United Nations). Moreover, the French see law as an elemental force in their society, so it can be difficult to change, in the sense that it is always more difficult to change foundations than outer structures. The law can be changed, of course, but this change must come through an amendment to existing code provisions or statute, rather than through judicial decision. Although seemingly the operation of the French legal system does not operate at any slower pace than that of the United States, the underlying philosophy about sources of law, interpretation, and change in the law does, I suggest, have an effect on the approach France takes towards international law.

D. Public Perception of the Role of Law

The role of the public in the approach of a state to international law is also important to consider, especially in democracies where the government is responsible to the people for the laws, and the people will use their perception of laws and their role in society to judge the appropriateness of state action according to their historically-developed notions of justice. Legal rules are rooted in social norms and values, and the legal tradition frames the notions of what a society believes is just. What people think about the law and the values embedded therein has much to do with how they behave, as well as significant consequences for the larger political and legal systems. In general, attitudes toward the rule of law likely influence a people's willingness to comply with the law. France provides an illustration of how this mechanism works.

As mentioned above, law in France has long been a communal endeavor. Students are educated in law from an early age, and the public participation in the development of French law is substantial. As the French legal scholar René David has stated, "Among the peoples of Europe the French probably hold law in the greatest esteem." By way of example, issues of legal structure and judicial fairness played

101. DAVID, supra note 5, at 75.
102. For example, if France has ratified an international treaty, but it is determined by the Constitutional Council that the treaty may contradict an existing provision of the French Constitution, then rather than the Court providing a legal interpretation of the treaty, the Constitution must be amended before the treaty provisions officially enter into force. The French Constitution states:

If the Constitutional Council, on a reference from the President of the Republic, from the Prime Minister, from the President of one or the other assembly, or from sixty deputies or sixty senators, has declared that an international commitment contains a clause contrary to the Constitution, authorization to ratify or approve the international commitment in question may be given only after amendment of the Constitution.

1958 CONST. 54.
104. Gibson & Caldeira, supra note 27.
105. See supra notes 55-56.
106. DAVID, supra note 5, at 75.
a key role alongside rights and freedoms in the French Revolution. Moreover, from the beginning of Napoleon’s attempts to codify French law, public elementary schools were charged with providing rudimentary lectures on law, not for the purpose of creating new lawyers or judges, but in order to create “virtuous citizens” by giving children an understanding of the role of law. Napoleon also ordered the creation of ten new law schools, bringing the study of law back into importance after decades of disrespect. In France, law is “not simply a matter for lawyers.” A general knowledge of the law is highly valued, and an understanding of law and legal history is considered “an almost essential element” of a well-rounded education. Law is historically seen as superior to politics—perhaps a reflection of the idealistic view of le droit which places justice above politics.

This extensive French involvement with the law as part of the course of everyday life means that the French public plays a large role in the French attitude towards international law as well. The French population, having long experience with international relations and the importance of international law, remains active in ensuring that the actions of the French government incorporate the popular will on international legal issues, whether it be ratifying a human rights treaty, rejecting the European Constitution, or staying out of Iraq. Regarding the last of these issues, Europeans in general, and perhaps the French in particular, see little in their long experience to support the notion that force and occupation can bring democracy to the Arab world. This historical pessimism, combined with an extensive and devastating experience with war, helps foster France’s reluctance to embrace new visions of pre-emptive intervention.

108. Dawson, supra note 13, at 386.
109. Id. at 387.
110. David, supra note 5, at ix.
111. Id. at 51, 73.
112. Id. at ix.
114. Id. A global survey has revealed that Europeans and Americans do share similar views as to the biggest threats to global security: international terrorism; North Korea’s and Iran’s access to weapons of mass destruction; Islamic fundamentalism; and the Arab-Israeli conflict. These similarities closely track statements made by the two governments over their shared goals for Iraq. However, Europeans and Americans sharply disagree, as do their leaders, over the use of military force to deal with global threats. Approximately 84 percent of Americans have said war may be used to achieve justice, while only 48 percent of Europeans agree, and 78 percent of Europeans, compared with 67 percent of Americans, believe U.S. unilateralism poses a possible international threat over the next ten years. And while both groups support strengthening the United Nations, 57 percent of Americans are prepared to bypass the world organization when vital interests are at stake, while only about 40 percent of Europeans say they would do so. Glenn Frankel, Poll: Opposition to U.S. Policy Grows In Europe, WASH. POST, Sept. 4, 2003 at A15. These figures reflect the different perceptions the French and the Americans maintain towards international law, particularly in terms of the United States’ willingness to push the boundaries of definition of anticipatory intervention. The French view on the matter supported the ultimate French position—a position, as discussed here, that reflects many of the components of the historical French legal tradition and institutions—that the best course of action to take in regards to Iraq was to continue diplomatic negotiations through the United Nations, adhering to existing understanding of the laws of intervention that required a threat of imminent attack.
IV. THE UNITED STATES

A. Historical Development

Contrary to the development of the French legal tradition, the legal tradition of the United States developed in isolation, only tangentially tied to the English common law upon which it was founded. The first English settlers to North America brought with them, by judicial decree, English common law. The common law of England at the time of the founding of the United States was a very different system of law than was in place in France. Although England, like France, was a monarchy, a centralized judicial system had been in place since the reign of William the Conqueror in the 11th century. William created in England a system of laws and courts—available to all citizens of England, and featuring the use of writs and the operation of a centralized court structure which culminated in an appeal directly to the King—which still remains much the same today. Furthermore, England was geographically isolated from the rest of continental Europe. This kept it predominantly free from outside influence, including that of the Roman Empire and the Catholic Church. As a result, early English legal development centered on a body of case law built through judicial decisions, and was seen primarily as a means of solving disputes. This meant that legal cases centered on the specifics of each dispute as outlined in each available form of action, rather than on general principles of justice. This fundamental difference in the approach to law between common law states such as the United States, and civil law states such as France, forms the core basis for the different approaches the two states take to international law. The manner in which law is created and applied in the two countries—through case decision in the United States and through written doctrine in France—ties the historical development of each legal tradition to the modern view of law and determines the ease with which international law is viewed as a part of the modern legal system.

Despite the rejection of many English institutional structures by the United States colonists, the English system of law creation which centered on judicial decision and dispute resolution proved to be useful for the new colonies, due to its flexibility and scalability. However, American legal culture was based not on a sovereign authority, but instead on freedom and independence, in keeping with the American colonists' perception of what the role of law should be in their new society. Thus,

115. DAVID & BRIERLEY, supra note 36, at 375.
116. This was decreed by English judicial decision in Calvin's Case, 7 Co. Rep. 1a, 77 Eng. Rep. 377 (1608). English subjects carry with them the common law of England when they settle in new lands that are not already under control of civilized nations. This applies unless circumstances in the new territory are such that the English common law cannot be adapted to local institutions and circumstances. See DAVID & BRIERLEY, supra note 36, at 369.
118. DAVID, supra note 5, at 73.
119. Id.
120. See FRIEDMAN, supra note 7, at 40.
121. Id. at 41; DAVID & BRIERLEY, supra note 36, at 369-70.
rather than rely on the body of case law built within the royal courts in England, the colonists set up their own court structure, with new courts which could refer to English law but whose primary mission was to create their own laws which identified with the spirit of the new country. These ideals were reinforced by both the American Revolution and the founding documents of the new nation (the Declaration of Independence, Constitution, and Bill of Rights).

In this way, the legal tradition of the United States developed based on the goal of protecting individual rights above all else, combined with a definitive separation of powers and a provision of power for the judiciary. Each of these components, to some extent, contradicts those characteristics that formed the early French legal tradition. The American legal system that emerged out of the American Revolution, and the focus on republican ideals, led to the development of unique institutions which were unlike any that would develop in Europe for at least another 100 years. This, coupled with the general perception of the young United States as being "exceptional"—as having a "Manifest Destiny"—led to both an institutional development and a public perception of the role of law in society that differed greatly from that of France. The United States legal culture that developed in the early 19th century saw law as a dynamic, rather than static, tool of the masses that could be used to "harness the energy" latent in the new republic.

Although the founders of the United States were, like the French, children of the Enlightenment, the works of Locke, Montesquieu, and Rousseau took on a different meaning in the United States, largely due to geography and circumstance. In the United States, Locke’s belief that man creates civil society for the purpose of protecting individual rights such as life, liberty, and property formed the foundations of Jefferson’s Declaration of Independence. By focusing on the views of Locke regarding civil society, rather than the views of Rousseau (which were so influential in France), the American people adopted as their mantra a focus on individualism. In this paradigm, law must exist to order society, but this order comes through the protection of the interests of the individual rather than the community.

After the Revolution, between 1776 and 1787, Americans moved to "forge a new political consciousness that resolved the tensions of their historical experience," reconciling it with their unique position as a new state. America became

122. FRIEDMAN, supra note 7, at 40-41.
123. Id. at 122.
124. As discussed above, although initially the laws post-revolution in France were based on the same individualistic foundations as in the United States, within four short years this had been reversed as the promise of a republic of the people gave way once again to authoritarian rule.
126. HIGONNET, supra note 24.
127. FRIEDMAN, supra note 7, at 114; Rogoff, supra note 12, at 38 ("The dominant ideology in the United States is that each person can advance to the full extent of his talents and ambition. The principal function of government is the protection of this liberty of individual action."); for a more general discussion of the development of the United States during the 18th and 19th centuries, see ROSSITER, supra note 125.
128. BOYLE, supra note 25; for Locke’s discussion see LOCKE, supra note 11, at 318.
129. For further discussion of Locke’s influence see BOYLE, supra note 25, at 64-65.
130. HIGONNET, supra note 24, at 4-5.
“fundamentally individualistic” in its social forms. This belief has persisted to the present day, providing remarkable consistency in the American tradition. Rooted in essentially a single source, and developing from a single set of principles outlined by the American Revolution, the United States’ legal tradition has maintained both its basic tenets and its basic institutional structure since the end of the 18th century. This consistency has also provided invariance with respect to the United States’ approach to international law. Notwithstanding occasional idiosyncrasies due to the personality traits of particular presidents, the United States has maintained a fairly consistent view of international law since its inception. While the United States supports the rules of international law as essential components of a just society, it also commonly works within the international legal system in order to push the boundaries of legality so that it can pursue its individual interests, just as individuals commonly resort to American courts to advance their own causes. To maintain that stare decisis can be trumped by the presence of new facts is a quintessential American legal pastime, and for the United States, the Iraq situation post-9/11 provided a sterling example of the applicability of this stratagem.

B. Legal Institutions

The legal institutions that have developed in the United States, also stemming from the time of the American Revolution, further support this approach. Like the development of the French legal institutions, the U.S. system began with the division of powers among different branches of government. Unlike the French system, however, the powers separated in the United States included substantial powers for the judiciary, including the power of judicial review. The Court’s assumption of the power to review the actions of the other branches of government is a clear illustration of the different roles of the judiciary in the United States and France. French courts...
do not have such power, and indeed are unlikely to even interpret themselves as having the authority to possess a power of judicial review on a widespread basis. U.S. courts, on the other hand, are in the business of making law, and in making law they have been able to assert for themselves additional power to share control of the legal agenda. Of course, in the United States, Congress and the executive have the power to draft and pass legislation. But the power of the Supreme Court to at any time declare legislation incompatible with the principles of the Constitution alters the legal structure within society. As the Supreme Court is the final arbiter of the appropriate interpretation of the Constitution, so ultimately judicial decision remains the primary source of law in the United States.

This system of separation of powers within the United States, and the corresponding roles granted to each political institution, have had a significant effect on the manner in which the United States approaches international law. The Senate advise-and-consent procedure required by the U.S. Constitution prior to treaty ratification has often made such ratification subject to the political whims of the Senate Foreign Relations Committee. Obtaining a two-thirds majority vote to consent to a treaty frequently becomes the subject of a low-level political game in a way that is not possible in France. This political maneuvering over incorporation of international law into the U.S. domestic legal framework is primarily a function of the historical individualism and isolation the United States has adopted as a foreign policy stance; interference with U.S. ideals by outside sources is generally not welcome. In turn this has contributed to a lower interest in international law and international relations among the American public than their French counterparts, which accordingly puts lesser impetus on the incorporation of international legal norms into the domestic legal structure of the United States.

An additional institutional component of the United States that affects the country’s approach to international law is that of the U.S. federal system. Although states on their own do not have the authority to enter into international treaties or bind themselves or the United States to international agreements, the power of states to make their own laws and structure their own judicial systems plays a role in how easily international law can be incorporated into the domestic law of the United States.

137. U.S. CONST., art. II, § 2, cl. 2. In the United States, the advice and consent procedure proceeds as follows: Once a treaty has been signed by the President or his representative, the Senate, by a two-thirds majority, must pass a resolution of “advice and consent.” In this way, the Senate, which has no authority during negotiation, can essentially freeze U.S. action on a treaty or dilute the treaty’s terms through the addition of reservations and understandings.
139. Many of the more controversial treaties signed by the United States have “gathered dust for decades” within the annals of the Senate. For example, it took four decades for the United States to ratify the UN Convention on Genocide, and the United States and Somalia remain the only two countries in the world that have failed to ratify the Convention on the Rights of the Child, which was adopted in 1989. Evelyn Iritani, U.S. GIVES COLD SHOULDER TO TREATIES, L.A. TIMES, March 13, 2005, at A22.
140. For a discussion of the historical relationship between the states and international law, see HENKIN, supra note 135.
Not only do international laws have to pass muster among the members of the legislative, executive, and judicial branches at the federal level, they also must overcome any objection at the state level.\textsuperscript{141}

Thus, on the one hand, it can be difficult to incorporate international legal principles into the domestic legal foundations of the United States, due to a combination of institutional structural resistance and indifferent public attitudes towards international law. On the other hand, because of both the historical "pioneering spirit" of the United States and the country's common law belief in the adaptation of law to changing circumstances on a case-by-case basis, the United States has traditionally been in the forefront of the development of new international legal norms.

\textbf{C. Sources of Law, Interpretation, and Change}

The sources of law are also significantly different in the United States than they are in France. This has had a profound effect on the incorporation and institutionalization of international legal principles into United States domestic law.

Although Congress is responsible for passing legislation that is considered the law across the United States, the supreme law of the land in the United States remains the Constitution.\textsuperscript{142} Unlike France, where an entire section of the Constitution of 1958 is devoted to international treaties and their role as law in France, the U.S. Constitution has but one clause relating to international law.\textsuperscript{143} This treatment of treaties in the Constitution, coupled with subsequent interpretation by the three branches of government, has placed international law in a different position in the United States than in France. Whereas in France, treaties are held in high regard as a source of written law, the United States has a historical skepticism concerning the power of treaties as a form of law.\textsuperscript{144} Even though the Constitution declares treaties to be the supreme law of the land, in practice, the United States government has taken a dualist approach to international law, meaning that any international agreement that the United

\textsuperscript{141} An example of the influence states can have can be seen in the issue of the death penalty. In the United States, primary responsibility for institution of the death penalty is left to the states. The United States has not signed on to a number of international treaties that prohibit the death penalty, or has inserted reservations as to treaty clauses on the death penalty, due in large part to political pressure by states that wish to maintain the death penalty as a form of punishment.

\textsuperscript{142} Rogoff, \textit{supra note} 12, at 32.

\textsuperscript{143} "Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST., art. VI, § 2.

\textsuperscript{144} \textit{See, e.g.}, \textbf{THE FEDERALIST}, No. 15 at 109 (Alexander Hamilton) (Clinton Rossiter ed., 1961): [T]hey were scarcely formed before they were broken, given an instructive but afflicting lesson to mankind how little dependence is to be placed on treaties which have no other sanction than the obligations of good faith, and which oppose general considerations of peace and justice to the impulse of any immediate interest or passion. \textit{But see} \textbf{THE FEDERALIST} No. 64, at 390 (John Jay) (Clinton Rossiter ed., 1961) (arguing in support of both the proposed method of treaty ratification and on making treaties the supreme law of the land). This disparity highlights one of the key differences between France and the United States. Whereas France has long historical ties to the development of international law and international legal theorists, the United States has taken very little part in the scholarly discussion that took place on the continent, and has very little legal scholarship of its own to clarify the position of the founders on international law. \textit{See supra note} 31.
States does ratify is not automatically incorporated into the panoply of domestic laws upon publication. Rather, in the U.S., such instruments are generally held to be non-self-executing, and thus must be enacted into U.S. law through additional Congressional legislation.

Moreover, in contrast to the French tradition, rarely in the history of United States law have the writings of legal scholars or general legal doctrine been used as a source of law. Nor have the moral precepts of religion been allowed to pervade (at least overtly) U.S. courtrooms. Historically, United States law adheres to judicial decision-making as its primary source of law, followed by statutory law as a relatively distant second. Because of this limited collection of sources of law, the law in the United States is able to be more adaptable because new law is primarily formed out of judicial decision. At the same time, however, the institutional structures of the U.S. legal system make the incorporation of international law into the sources of law in the United States extremely difficult (even where it is desired) and subject to political games.

Because the sources of law in the United States are limited, and because international treaties rarely make it out of the Senate (if they make it to the Senate at all, and even if they do, they must be executed through additional legislation), international law rarely becomes a part of the U.S. legal fabric and is not considered an important source for use in U.S. Supreme Court decisions. Occasionally a justice will point to foreign or international law in support of his or her position, but the reference is invariably as a supporting reference, not as binding authority. Furthermore, those on the U.S. Supreme Court who adhere to the “original intent” mode of Constitutional interpretation are even less likely to find international law persuasive.

145. See Kirgis, supra note 20.
146. Id.

Provisions in treaties and other international agreements are given effect as law in domestic courts of the United States only if they are “self-executing” or if they have been implemented by an act (such as an act of Congress) having the effect of federal law. Courts in this country have been reluctant to find such provisions self-executing . . . .

Id.
147. DAVID & BRIERLEY, supra note 36.
148. See HENKIN, supra note 135; Eisemann and Kessedjian, supra note 82; Kirgis, supra note 20. See also supra note 15 and accompanying text. But see Martin A. Rogoff, Interpretation Of International Agreements By Domestic Courts And The Politics Of International Treaty Relations: Reflections On Some Recent Decisions Of The United States Supreme Court, 11 AM. U. J. INT’L L. & POL’Y 559 (1996). It is true that there have been times throughout U.S. history where the Supreme Court has been more active in incorporating public international law into its judicial decisions. In the context of the body of U.S. case law, these cases are few and far between, and throughout the 20th century the use of international legal principles as legal grounds for judicial decision has become even more infrequent. For a contemporary discussion of these views see A Conversation between U.S. Supreme Court Justices: The Relevance Of Foreign Legal Materials In U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia And Justice Stephen Breyer, INT’L J. CONST. L. 519 (2005).
149. For a recent example of Supreme Court Justices referring to international norms, see Roper v. Simmons, 543 U.S. 551 (2005).
150. See supra note 145.
On the other hand, because new law is made as situations happen—as cases come before the courts—the United States has a history of pushing the envelope and making new arguments where the law is concerned. Those skills are what U.S. jurists are taught in law school, and that is how the advancement of law is carried out. If a new argument works, then the new principles enter the realm of law as precedent. If the argument works repeatedly across the nation, it often becomes codified in legislation. This mirrors the approach of the United States where international law is concerned: act first, then argue consequences later. While the French will take the very generalized rules of international law and see them as binding rules, those in the United States regard these international law concepts as having less the authority of rules and more the character of general expressions towards which one should work—lacking sufficient specificity for one to believe they are absolutely binding.  

D. Public Perception of the Role of Law

Finally, we must consider the role the American public plays in the approach of the United States to international law. When surveyed about the most pressing concerns on which the United States needs to be focused, Americans consistently aver that domestic concerns trump foreign policy issues. Only during war-time, including recently, post-9/11, have foreign policy issues surfaced as important areas of concern for the American public. Predictably, these concerns relate not to international law and the legality of U.S. actions but instead to terrorist threats and U.S. soldiers fighting a war. In contrast, where compliance with international treaties or other obligations is concerned, the U.S. public plays a very small role, and puts very little pressure on the Senate or the executive to ensure ratification. This is not due solely to the institutional structure of the treaty ratification process; it is also due to the lack of interest by the American population at large in issues of international law.

151. See David, supra note 5, at 79 (highlighting the example of articles 146, which states that “[t]here is no marriage when there is no consent,” and 180, which states that “[a] marriage contracted without the free consent of both spouses, or, of one of them, can only be attacked by such parties themselves, or by the one whose consent was not free,” which are very general). According to David, “Frenchmen are not shocked by the generality of these articles and find that they contain perfectly ordinary legal rules.” Id. In a common law system like the United States, however, these rules would be considered too vague, and the only real rules would come with judicial decisions deciding the specific errors concerning whether the “nationality, health, chastity, or criminal record of one of the spouses is, or is not, a grounds for the nullity of the marriage.” Id. To David, it is a serious problem that in the United States, judges have become exceedingly reluctant to interpret rules of international law, and that in many cases, the legislative and executive branches do not even give them the opportunity.


153. Id.

154. Id.

155. For a general discussion of the ambivalence Americans have historically shown towards issues of foreign affairs, see P. Terrence Hoppman, French Perspectives on International Relations after the Cold War, 38 Mershon Int'l Studies Rev. 69 (1994). Given the current general apathy towards the conduct of foreign affairs, it should come as no surprise that the ability of the American people to either evaluate or participate in this realm of politics has been a subject of inquiry since de Tocqueville's time. See de Tocqueville, supra note 11 (observing that American society is too ill-informed and too fickle to make
The roots of this ambivalence can be seen in the historical legal tradition of the United States. Developing in relative isolation, under its own unique brand of the common law tradition, the population of the United States as a whole has developed a view of the law as a tool to assist individual citizens to solve their grievances and problems. Law is not seen as a remedy for society's ills, nor is law seen as the moral compass for societal good. Law and morality have long been kept separate in U.S. jurisprudence. This paradigm, coupled with the protection of individual interests that has remained the focus of U.S. legal development, helps to create a public not particularly interested in the broader, societal themes that generally make up international law. It is, therefore, not that the United States seeks to disregard the rules of international law, nor that the people of the United States do not care if their country abides by these rules. Instead, the incorporation of an international rule into the domestic law of the United States simply becomes a more difficult task, given both the United States' historical relationship with international law and the institutional structures present there. Moreover, given the way the development of law progresses in the United States, pushing the boundaries of international law is perceived as perfectly natural.

V. LEGAL TRADITION AND INTERNATIONAL LAW

Ultimately, what does this examination of the legal traditions of France and the United States tell us about the behavior of the two states in relation to international law? Does this provide us with a basis for addressing the differences between the two states that might facilitate agreement, or at least mutual understanding, in the future? This essay has considered the effects legal traditions and the legal system that developed out of them have on the ways in which the United States and France approach international law. Law, by its very nature, is designed to provide guidance for actions, whether they be the actions of individuals or states. While other institutional components of domestic systems have been examined in relation to their ability to affect compliance with international law, 156 most international relations scholarship has shied away from an examination of legal traditions, legal systems, or legal institutions. 157 The role of legal tradition and legal systems has been alluded to in several recent pieces but never empirically studied in either international relations or international law. 158 Given that the law often forms the third in the triumvirate of reasonable judgments).

156. One example of such an explanation is regime type. A number of studies have been done examining whether a state's regime type (i.e. democratic, partially-democratic, authoritarian, monarchical) determines its treatment of international law. Results of these studies have generally suggested that democracies are more likely to recognize international law than other forms of regime. However, this does not provide an explanation for the different positions of France and the United States, as both are advanced, industrial democracies with strong commitment to the rule of law. It is because of this discrepancy that the underlying historical development and values concerning law ultimately may play the decisive role in determining a state's treatment of international law. Andrew P. Cortell & James W. Davis, Jr., Understanding the Domestic Impact of International Norms: A Research Agenda (2000); Andrew Moravcsik, The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe, 54 INT'L ORG. 217 (2000); Simmons, Commitment & Compliance, supra note 8, at 8-9.

157. See generally Boyle, supra note 25.

158. See Beth Simmons, Why Commit? Explaining State Acceptance of International Human Rights
domestic institutions—and, perhaps even more importantly, given that international law is, after all, law, and law is dealt with through legal institutions—an examination of the role of the law as a constraint on a state’s decision-making process could provide new explanations for state behavior.

France and the United States are similar in many ways, sharing common liberal traditions, values, and beliefs, as well as maintaining a long-standing alliance. This makes it crucial to understand why the two countries have taken different approaches to international law and have maintained differing beliefs on the authority of international law as a guide for state action. Much of the social science research from the past several decades suggests that the United States and France, as similarly situated countries, should take the same approach to international law. Both are advanced Western capitalist democracies; they are traditional allies who have a long-standing respect for the rule of law. One might think that these similarities in values and economic position would lead to them sharing an identical approach to the international system, including international law.

The United States and France do not always take different positions on the validity, existence, or importance of international law, and both are generally adherents to international law. However, this essay reveals that there are historical differences in the legal traditions of the two countries that influence the approaches taken by France and the United States towards international law. The unique characteristics of each state’s legal history have created distinctive views on what international law means, how easily it is incorporated into the domestic legal structure of the state, and how it is to be interpreted and amended. These different views have, sometimes, created a difference of opinion between France and the United States on the appropriate course of action under international law. This difference of opinion is not indicative of a rift between allies, nor is it an indication that one state is more law-abiding than the other. Each state simply has its own constitutive view of the role of law in society that frames all decisions it takes in terms of action in the international system. This, I suggest, is what we saw in the case of the U.S.-French debate leading up to the recent intervention in Iraq.


159. Indeed, since the American Revolution, when France came to the aid of the emerging United States in their struggle against the British, France and the United States have had a strong relationship. France and the United States “respect the values” of one another and “have the same sense of history.” With republics founded on the same liberal, Enlightenment values, France and the United States have, in the words of President Chirac, “always stood together and have never failed to be there for one another. That’s been the case since Yorktown and it still holds true today.” Interview with Jacques Chirac, at the French Ministry of Foreign Affairs (Sept. 8, 2002), http://www.iraqwatch.org/government/France.

160. See generally Simmons, Int’l Agreements, supra note 8.


162. See supra p. 20.
As mentioned in the introduction to this essay, however, many other explanations have been raised as to the differences of opinion between France and the United States, some predicting dire outcomes as a result of this most recent split. Do any of these theories provide a better explanation than the one offered here? For example, what about the effect of the relative positions of power of France and the United States as an explanation for their different positions? Proponents of power theory argue that international law is simply an epiphenomenal manifestation of interests and is only made effective through the balance of power. Rather than viewing the legal tradition of a state as a fundamental component of the values and identity of the state, proponents of power politics point to the positions of states within the international community. Under the power politics theory, the United States, as the world’s sole superpower, has the ability to disregard international law if it so desires, while France, as a great power but not a superpower, does not have the luxury of ignoring international norms, and still must be concerned with maintaining a coalition with other “law-abiding” states to balance the power of the United States.

I would suggest that theories based on power relations among states are incomplete. Power certainly plays a role in state behavior; in simply considering international law an “epiphenomenon” of interests, however, power-based explanations fail to explain why norms exist at all. Furthermore, power theories are not able to explain the consistency in the behavior of these states—particularly the United States—towards international law throughout history. Power theory would argue that the United States, as the world’s sole superpower, has the ability to ignore international law if it wants and change it if it wants. This, the argument goes, is why the United States went ahead and intervened in Iraq, despite the lack of U.N. approval. However, an examination of U.S. history with regard to international norms points to the opposite conclusion. The United States did not begin its shift to great power status until the turn of the 19th century, and did not achieve great power status until World War II. In the preceding period, the United States was inferior to major European powers such as England, France, and Spain, in terms of military, naval, and, in some cases, economic power. Yet the United States, on several occasions during the period from 1787 to 1898, engaged in actions that would belie its power position. This

163. See Kenneth Waltz, THEORY OF INTERNATIONAL POLITICS (1979); BOYLE, supra note 25, at 7 (“In the realist view of international relations, international law and organizations totally lack any intrinsic significance within the utilitarian calculus of international political decision making.”). See also L. Oppenheim, INTERNATIONAL LAW (2nd ed. 1912); J. G. Ruggie, What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge, 52 INT’L ORG. (1998).

164. See generally ROBERT AXELROD, THE EVOLUTION OF COOPERATION (1984); Simmons, Int’l Agreements, supra note 8; Simmons, Commitment & Compliance, supra note 8.


166. BOYLE, supra note 25, at 56.

167. Examples of this behavior include the War of 1812, the enactment of the Monroe Doctrine in 1823, the Mexican-American War of 1846, and the Spanish-American War of 1898. In each of these cases, the United States engaged in activity either directly or indirectly against a great power, in a way contrary to what power theorists would predict, yet in each case the United States felt that it was behaving in accordance with the laws of nations. On these examples, see DUROSELLE, supra note 7, at 45-49, and BOYLE, supra note 25.
history indicates that compliance with international rules and action within the international system is not merely a result of power, but is rather based on the state’s view of the appropriate course of behavior: the legal framework guides the decision, and concerns regarding power are moderated by the state’s legal tradition.  

As for the arguments that the United States can act the way it wants to simply because it is the most powerful country in the world, two responses are in order. First, an historical look at the actions taken by the United States in relation to international law indicates that U.S. treatment of international law has been consistent throughout its history, whether from the perspective of adhering to and abiding by treaties or other obligations, or in terms of pushing the boundaries to create new international norms. Second, post-WWII, the United States has been the predominant power across the globe; certainly, post-Cold War, the United States is the only country in the world with enough military power to carry out operations around the world. If the explanation of power theorists is true, then the United States would have no need whatsoever to adhere to international norms at any time—yet the United States continues to engage in the international legal process, sign on to treaties, actively participate in the international community, and support existing interpretations of international law most of the time, just as France, Britain, Italy, Germany, Australia, and other advanced democracies do.  

Historical analysis indicates that differences between the United States and her allies surface in those situations which call for a decision to be taken that might be on the fringe of international law—something which pushes the boundaries of international law beyond their current limits. This was the case in Iraq in 2003. The United States did not flout international law in Iraq, but rather viewed the new circumstance evolving out of the situation as a call for a new interpretation of existing law. Like France, the United States is a country founded on the rule of law; and

168. But see KAGAN, supra note 1, in which the author suggests that the post-World War II rise in U.S. power at the expense of Europe is the explanation for, for example, the United States’s “reliance on force as a tool of international relations.” The historical evidence contradicts Kagan’s assessment in two ways. First, the United States has adhered, and continues to adhere, to international law most of the time. Second, the United States has been and continues to be willing to challenge rules of international law when they are deemed outmoded (or, in the alternative, to declare new principles when necessary). Because of the way that law is perceived in the United States, and because of the form of institutions that have developed, the United States treats international law not only as a rule to be obeyed, but also one that can be changed when necessary. This has been the case when the United States was a brand-new country and when it was the world’s sole superpower.  

169. To be sure, power theorists are correct when they note that “[s]trong powers naturally view the world different[ly] than weaker powers.” KAGAN, supra note 1, at 27. However, it is not enough to simply rely on power position as the explanation. Certainly the United States has more power than France, but at the same time, most of the time the United States works together with France and other allies to formulate the best possible diplomacy or best possible course of action under the law. Although it could do so if it wanted to, the United States does not invade every country that disagrees with it, or undermine every business that competes with its own. On the other hand, there are states in the world that have nowhere near the power of the United States, yet engage in behavior in the international system that belies their lack of power. Iraq under Saddam Hussein, North Korea, Iran, and various African states have all engaged in policies or actions in the international arena that are more aggressive than perhaps their actual power can support. One reason for this is that these states have a willingness to ignore the rules of international law, rules that constrain states like the United States and France because of the beliefs in those two states that
neither country is more law-abiding than the other. What I am suggesting is that, because of the historical legal tradition of the United States, and the resulting meaning the law has assumed, coupled with the institutional framework in place to deal with the law, the United States is more willing to look at the possible reaches of a given tenet of international law, and argue the distinctions in a new situation that call for a new interpretation. This is the same technique that lawyers use in arguing cases before the courts in the United States every day—in fact, it is the primary method by which new law is made. This is not the way that law is made in France, but it is the way that law is made in the United States. Each country approaches problems differently and may, therefore, have different interpretations of what international law says, and what actions are allowable thereunder.

Another explanation provided by scholars for the different approaches to international law between France and United States centers on the issue of interests. Interest theory would argue that a state’s actions are determined by its assessment of what is necessary to protect or promote its own interests. This interests-based theory claims that in the case of the intervention in 2003, the United States underwent a rational-choice calculation of costs and benefits, and determined that it was in its interests to intervene in Iraq, despite existing international norms that would have constrained any other country. France, on the other hand, made a determination that its interests would be better served by continuing with weapons inspections. This view is closely related to the above explanation which focused on power capabilities. The United States, as a superpower, has the military and economic might to follow its own interests, despite some opposition. France, it could be argued, does not.

As with power-based explanations, however, interest-based theories do not provide a nuanced explanation of the behavior of France and the United States towards international law. In the case of Iraq, for example, as Jacques Chirac himself indicated, France and the United States had the same interests: ensuring there were no weapons of mass destruction contrary to U.N. mandate, and that there were no terrorist cells; and seeing the removal of Saddam Hussein from power. Where France and the U.S. differed was on the best means to protect their stated interests. The United States, influenced by its own historical development, believed the best way to protect its interests was an immediate attack; if this position required a shift in the understanding of pre-existing international law, then so be it—new situations call for new rules. France, on the other hand, felt the best way to protect its interests, as well as those of the international community, was through further diplomatic maneuvering. These sharp differences did not alter the fact that both countries ultimately wanted the same outcome; an outcome that would indeed protect their tangible interests. What these differences did highlight, however, was the length to which each state would go to protect its interests. The United States was willing to risk flouting international law

170. See generally Stephen Krasner, Structural Causes and Regime Consequences as Intervening Variables, in International Regimes, Stephen Krasner ed., 1983); Cardenas, supra note 158; Simmons, Commitment & Compliance, supra note 8; Simmons, Why Commit?, supra note 158.

171. See generally Krasner, supra note 170; Cardenas, supra note 158; Simmons, Commitment & Compliance, supra note 8; Simmons, Why Commit?, supra note 158.

172. See Interview with Jacques Chirac, French President, supra note 3.

173. Id.
by charging ahead with military force. France was unwilling to engage in force, but was willing to continue working towards a solution through the United Nations. What, other than their differing legal histories, can fully account for these very different approaches to achieving the same goals?

A third potential explanation offered for the differing positions of the United States and France on international law over the past several decades is that the United States and France see different roles for themselves in the international community, and are acting consistently with these visions. Historically, France has been a diplomatic leader, preferring negotiation and discussion through multilateral diplomatic channels to engaging in more direct action. This approach is consistent with France’s diplomatic history. For example, in the months leading up to the start of World War II, France (and Britain) engaged in a policy of appeasement with Hitler, resorting to almost continuous diplomatic maneuvers in hopes of averting another war. Even after Hitler engaged in breaches of international law, France preferred to continue diplomacy rather than act. Another example can be seen more recently in the case of the conflict that embroiled the region of the former Yugoslavia. Europe, with France in the diplomatic lead as usual, could not agree on a tactic with regard to the ongoing conflict in Bosnia and other areas of the former Yugoslavia. The United States had to push intervention in the Balkan conflicts based on humanitarian and security grounds, ultimately acting through NATO, even though many thought that it would be more appropriate for the European Union to address the crisis. Once again the French predilection towards diplomacy and discussion, rather than action, created a divide between the United States and France.

The United States, on the other hand, possessing as it does a legal tradition based on the freedoms associated with the founding of the country, views self-initiative and action as valid responses to new situations. Reputation in the United States is built through individual achievement. Even bending the rules is regarded with tolerance if an individual is trying to “make something of himself.” The legal system in turn supports this by creating a system in which creative lawyering—distinguishing the differences, finding the unique circumstances in any given situation—can result in a new rule favorable to one’s client, even if such a law did not exist at the time of his action. Acting first and arguing the consequences later is part of the American legal tradition. France, on the contrary, does not share this tradition. The judicial system is based on carefully constructed written codes, codes designed to cover all possible scenarios that might arise for the express purpose that the general population understand the rules and abide by them. This, in the French view, creates a society in

174. But here we are faced with a problem of principle, I would say a moral problem. Are we going to wage war when there’s perhaps a means of avoiding it? In line with her tradition, France is saying: ‘If there’s a way to avoid it, it must be avoided.’ And we shall do our utmost to do so.

Interview with Jacques Chirac, French President, supra note 3.

175. KAGAN, supra note 1, at 15.

176. General Wesley Clark complained that an “unambiguous and clear warning” could not be sent to Milosevic because the European states, with France in the lead, would not act without a U.N. Security Council mandate. Quoted in KAGAN, supra note 1, at 48. Clark goes on to say that it “was always the Americans who pushed for escalation to new, more sensitive targets . . . and always some of the Allies who expressed doubts and reservations.” Id.
which all are on an even playing field, everyone knows what the law does, and thus everyone is protected. Changes in these rules may only come about with the participation of the entire community, not through individual judicial decisions.

Naturally, there are exceptions to these general statements, as no legal system is an absolute. Certainly the United States has statutory law designed to protect the community good, and judges in France are deciding more and more cases in a manner similar to the United States. The underlying beliefs about the role of law, however, which have been formed through the historical development of the legal tradition, do seem to reflect the recent behavior of the United States and France, and do explain why there was such a difference of opinion. The U.S. action in pushing the boundaries of the definition of anticipatory intervention, arguing that circumstances have changed and therefore a new concept is needed—even if the international community as a whole has not yet agreed on such a change—is perfectly in line with the general attitudes Americans have about law. At the same time, the French view that continued diplomacy and discussion was the appropriate course of action, in line with existing international law, and that no drastic changes could have been made without community agreement, is in line with historical French views of the law.

Thus, while the role-based position has some merit, it serves in fact to bolster this essay’s contention that legal tradition, developed out of historical circumstances, provides a better explanation for U.S. and French differences. France, with its history of involvement at the center of Europe, its experience as a colonial empire, and its influences characterized by international tradition has a more ingrained recognition of existing principles of international law, which make it reluctant to act without thoughtful, multilateral deliberation. The United States’ history of isolation, along with its domestic legal tradition, which has never easily incorporated international rules, leads the United States to feel less constrained by many existing international rules—but the United States is willing, when required, to push the boundaries of the rules that it does recognize.

The historical examination shows that the United States and France have maintained their internal consistency in their individual treatment of international norms over time. In the United States, for example, the country’s legal and political institutions have remained virtually identical since their inception in the late 18th century. Moreover, since that time, the country’s position on international law has been consistent, despite the fact that both the United States’ power position in the international system and the United States’ interests have changed substantially. France, on the other hand, has experienced a number of changes to its political and legal institutions since the late 18th century, in addition to seeing its power position and interests change dramatically. At the same time, however, France has maintained its underlying belief in the values that formed the core of the French Revolution in 1789 and its relationship to the ideals of the key legal thinkers of the Enlightenment. France has also held its position as a leader of diplomacy in the international system.

177. See supra note 168.
178. "Diplomacy, negotiations, patience, the forging of economic ties, political engagement, the use of inducements rather than sanctions, compromise rather than confrontation, the taking of small steps and tempering ambitions for success . . . ." KAGAN, supra note 1, at 58 (describing the tools France prefers to use in its international actions—in this instance, referring to the creation of the European Union).
Despite its shift from being a key power both in Europe and globally to being in the shadow of the United States, France has maintained its position as a key instigator and negotiator among states, adhering to international law and focusing on diplomacy as a means to solve problems, and emphasizing gradual change and incremental legal solutions.

While all of these alternative explanations may play a part in the two countries’ divergent positions on the intervention in Iraq and their approach to international law generally, they do not provide a complete explanation of these positions. A more comprehensive explanation comes from a deeper historical and cultural analysis. The legal traditions of the two countries, combined with the development of legal cultures and institutional structures out of these traditions, have created two very different perceptions of the role that law (whether domestic or international) is to play in governing society, and have influenced the approach that each state has taken in complying with existing international law. International law does not exist in a vacuum, but is instead based on conceptions of law found in the legal traditions around the world. Adherence to international law, therefore, depends on the foundation of the legal tradition of the state, the historical role of law in society, and the institutional structures that have developed to incorporate and interpret legal principles.

VI. CONCLUSION

In the case of Iraq, the point of disagreement, again, was not the ultimate goals, which France and the United States agreed on, but on the means to achieve those goals. International law has always held that a state is allowed to defend itself, with armed force if necessary, against an aggressor. International law has also long held that a state does not have to wait to be physically attacked if it has clear evidence that such an attack is imminent. As international legal jurisprudence has developed, it has come to be held that imminent is defined as “instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”179 This position on anticipatory self-defense remained the international legal principle up to the 2003 action in Iraq, at which time its bases were questioned by the United States.

The U.S. position on international law has been greatly influenced by its history, culture, and institutional structure, such that the United States has adopted a position on international law that is almost the complete opposite of that of France. Throughout its history, the people of the United States have shown an “extraordinary ambivalence” towards international law.180 The American version of common law is driven by an entrepreneurial spirit and economic referents, where continental law is driven by social and political considerations.181 Feelings of exceptionalism have been driven by U.S. history, beginning with the “City on a Hill” sermon by John Winthrop, founder of the Massachusetts Bay Colony.182 This was followed by centuries of policy of pushing the

179. See supra note 4.
180. See Iritani, supra note 139.
182. William M. Wiecek, America in the Post-War Years: Transition and Transformation, 50 SYRACUSE L. REV. 1203-04 (2000). See also KAGAN, supra note 1, at 86-87 (“The ambition to play a grand role on the world stage is deeply rooted in the American character. Since independence and even before, Americans
boundaries of international law, which can be traced through the Monroe Doctrine, the
Roosevelt Corollary, the rebuff of the League of Nations, and, most recently, the
military intervention in Iraq. This is based on what James Opolot calls that American
tradition of lawlessness. 183 This is not to suggest that the United States does not ever
comply with existing international law, because it does, more often than not. Rather,
these instances are offered as examples of the willingness of the United States
throughout its history—whether it was in the position of a newly emerging state in the
international system or that of the world’s only superpower—to push the envelope of
international law.

The United States argued, in support of its efforts to amass an international
coalition in support of military intervention in Iraq, that the international legal
principle governing anticipatory intervention had changed as a result of the changed
circumstances of the international community. With the creation and spread of
weapons of mass destruction, and increasing globalization facilitating communications,
travel, and trade in weapons, the position of the United States was that the concept of
imminent attack must also change. The United States made, in fact, a classic common
law argument, distinguishing the present case from previous cases to highlight why
existing law did not apply, and in fact should be changed. The United States’ position
was that new terrorist threats and new weapons call for a new approach to stopping
them, in order to ensure international peace and security. Lack of cooperation and
secrecy was enough to validate military intervention to ensure one’s safety. No longer
were the traditional criteria of imminence valid, because if a state waited to respond
until it knew for certain that it was about to be attacked, with modern weapons of mass
destruction and modern weapons delivery systems, it would already be too late.
Response time was reduced from weeks, to days, to hours. This created changed
circumstances and called for a new legal norm.

France, on the other hand, approached the problem differently. While supporting
the goals of preventing the spread of weapons of mass destruction, stopping terrorism,
and encouraging the removal of Saddam Hussein, France preferred to follow the
guidelines provided by existing international law—a law that had been around for
centuries, and which was clear cut, already available for interpretation, and that had
stood the test of time. Changing the components of the doctrine of anticipatory
intervention might be possible, and indeed might be desirable, but these changes must
come through international discussion, study, and agreement, not through an ex ante
argument focused on distinctive circumstances. The approach of France echoed the
French perception of law, its role, and its application. Putting faith in the political
branches of government to come up with the best solution, the French government did

who disagreed on many things always shared a common belief in their nations’ great destiny.”).

183. JAMES S.E. OPOLOT, AN ANALYSIS OF WORLD LEGAL TRADITIONS 1 (1980).

People in the United States do not have the respect for law that people have in other
countries . . . . The law-abiding tradition is not strong. On the contrary, America has a sort
of lawless tradition, at least a fairly strong sub-culture of lawlessness, which came with the
settlement of a new country and the pushing out to new frontiers. Many persons in the
United States oversubscribe to the philosophy of taking chances with laws and regulations
and getting by with infractions.
not agree that a new doctrine of international law could be created out of the blue, even in response to a crisis like the terrorist attacks of September 2001.

Different legal traditions are not equally capable of absorbing international law into the domestic legal system, even if the underlying social values are sympathetic to the international law in question.\footnote{Gleidon et al., supra note 7, at 234.} For example, in common law countries, “[s]ocial change is thought to be introduced . . . through the adaptation of precedent to new circumstances, not by means of legislation [of which treaties are an example].”\footnote{Id.} Moreover, common law historically has been more concerned with the administration of justice than with justice itself.\footnote{David & Brierley, supra note 36, at 331.} This seems to fit the case of Iraq in 2003, where the United States was seemingly so concerned with carrying out its plan of intervention, that there was very little consideration of whether this was the just thing to do, whereas the French discourse surrounding the same decision focused on achieving the just end to the situation, using existing lawful means.

For the United States, law is there to protect the individual and his or her striving for the “American Dream.” Law can be used to push the envelope, to achieve the results that conform with our current values. This is how law functions at the domestic level, and this is how the United States treats international law as well. In France, on the other hand, law is a safety net, a constant recognized to protect the best interests of society as a whole. It is not a tool to be altered on a whim. This too is carried forward to international law, where strict adherence to principles designed to better the whole is considered a moral imperative.

Neither approach is necessarily wrong, nor better or worse than the other. And, in fact, both have allowed the achievement of some periods of progress when it comes to international law. After World War II, the United States pushed the creation of the modern human rights system and the modern world order. This was new; this was different; and this is not a system that would have likely developed out of the French tradition.\footnote{Indeed even the development of the E.U. has largely been due to its aspects of the common law tradition, which allow the pushing forward of the law, rather than the more rigid bases of the civil law tradition.} At the same time, however, the approach of France to international law is essential to ensure that states actually do accept and internalize international law. If there is no consensus among states or stability and enforcement for accepted principles, then international law will fail. Constant change undermines compliance with the law, and international law, given the vast diversity of states to which it applies, must maintain some consistency, and clear principles, in order to survive—to transcend the differences among states and be effective. So, both are necessary. The point of understanding how these historical differences affect the way a state approaches international law, and the corresponding perceptions of populations toward international law, is that such understanding will allow those who work to further the role of international law in society to understand one another, work together, and create a stronger international legal system.
FRANCE, EUROPE, THE UNITED STATES

Abdelkhalq Berramdane

I. A EUROPEAN UNION
   A. A Europe as Balance Point
   B. A Europe-Power

II. A EUROPE À LA FRANÇAISE
   A. Europe as a Lever to Increase French Influence
   B. Europe as a Counterweight to the Transatlantic Partnership