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Abstract

The USA and Australia have historically had similar foreign policies. Over the past several decades, however, a divergence has occurred between the two countries in one key area: policy toward international human rights law. This article examines the reason for this divergence and theorizes that Australia has been a more active participant in the international human rights regime because of its legal tradition, which facilitates the internalization of international law into society's cultural perceptions about appropriate standards of behavior. The article concludes that while they share the same origins, there are differences in the US and Australian legal traditions that explain the two states' differing policies on international human rights law.

Keywords

international law, legal tradition, human rights, foreign policy

Introduction

The USA and Australia frequently demonstrate cohesion in their foreign policies. This may be attributed to commonalities in history, interests, institutions, and values. Despite numerous similarities, over the past several decades a divergence between the two countries has appeared in the area of international human rights law. Australia has increasingly taken a multilateral, global approach to addressing human rights. It has become a party to all 15 of the human rights treaties included here (see Appendix). The USA, by contrast, remains outside much of the international human rights regime and retains a relatively unilateral approach to such issues. The USA has only ratified seven human rights treaties, and has given no indication of changing its policies.

The fact that Australia has become a party to twice the number of human rights treaties as the USA is indicative of a diverging trend between the two states. This is further bolstered by Australia's

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participation in international dispute-resolution mechanisms such as the Human Rights Committee and the use of international human rights law by Australian courts. This article examines this split between Australian and US policies on international human rights law and addresses the question of why we see this divergence in their policies.

Despite their similarities, there are institutional and cultural differences in the Australian legal tradition that facilitate the internalization and acceptance of international law in a way that does not occur in the USA. While both states have a dualist approach to international law and an independence of spirit grounding the role of law in society, they possess singular legal characteristics that have led to different approaches to international law. The institutional and cultural differences between the Australian and US legal traditions have resulted in a greater level of internalization of international norms in Australia than in the USA, resulting in more policy support by Australia for international human rights law.

Section 1 of this article describes the role of legal tradition in the acceptance of international human rights law, highlighting the importance of internalization for state policy formation. Section 2 examines the legal traditions of the USA and Australia. Despite their many commonalities, variations in legal culture and institutions between the two states lead to different policies. Finally, Section 3 considers the two states' policies toward international human rights law and demonstrates how the divergence in policy between the two states is explained by their respective legal traditions.

Internalization and legal tradition

There is significant literature examining state compliance with international law. Some have argued that compliance is merely incidental to a state's broader power position or interests (Morgenthau, 1978; Waltz, 1979). Others, focusing on institutional factors at the state and interstate level, have considered explanations such as regime type (Mitchell, 1994; Simmons, 1998), market forces (Simmons, 2000), and reputation (Downs and Jones, 2002; Simmons, 2000; Zartner and Ramos 2011). Compliance, however, does not occur solely at the state and interstate level, but is largely achieved at the substate level when international legal norms are internalized into the fabric of society.

Internalization is the vehicle through which states incorporate international law into domestic practice (Cleveland, 2001). While ratifying an international treaty technically binds a state to follow the rule, for international law to be integrated into the understanding of what is lawful behavior, it must be internalized into the domestic legal system. Rules and norms become binding when they are part of the fabric of society and internalization is a necessary component of this process (Finnemore and Sikkink, 1998; Koh, 1998). Internalization can both make international legal principles punishable through domestic legal mechanisms and increase the domestic reputation costs for noncompliance. This affects the view of international law as part of domestic law and increases support for favorable policy toward international law.

This process has been discussed in a number of studies, each of which highlights the importance of the internalization of international law into the domestic sphere (Finnemore and Sikkink, 1998; Goodman and Jinks, 2004; Koh, 1998; Risse et al., 1999). Internalization, however, can vary by state (Koh, 1998). I argue that this variance is explained by the legal tradition of the state, and how the cultural and institutional characteristics of legal traditions facilitate or hinder the internalization process.

A legal tradition is the set of deeply rooted, historically conditioned attitudes about the nature of law, the role of law in society, and the organization of legal institutions within a state (Merryman,

1985). Legal tradition 'represents a heritage which is valuable … because it is an integral part of a society's history, shared values and present character' (Parkinson, 2005: 18). A state's legal tradition encompasses both cultural and institutional characteristics. The nature of these characteristics facilitates or hinders the internalization of international law, and shapes subsequent state policy.

Cultural factors

A strong connection exists between domestic legal culture and the behavior of states toward international law (Jouannet, 2006). Internalization of international law is effective only with local legitimation, and cultural attributes are key for such legitimation (Finnemore and Sikkink, 1998; Goodman and Jinks, 2004; Koh, 1998). Cultural attributes include perceptions of the role of law in society and understandings about appropriate standards of behavior, the historical ties between a people and their law, and attitudes about a state's reputation as a follower of international law.

Societal perceptions about the role of law center on whether the purpose of law is primarily focused on the individual or the community (Hofstede, 2001; Wu and Keysar, 2007). A state with an individual purpose is culturally less predisposed to adopt international legal norms because international law is a communal law, which is often viewed as conflicting with an individualistic view of law. If a society perceives international law as infringing on individual rights protected by domestic law, it is less likely there will be acceptance of international legal rules. On the other hand, in states where the focus is primarily on the communal good, international law may be more readily internalized because it is seen as further support for protecting the community.

Closely related to the societal understandings of the purpose of law are the ties between a people and their law. This may encompass the circumstances surrounding the origins of the law, for example whether by revolution or peaceful negotiation, as well as the relationship a society has with its founding documents. The stronger the tie between a people and their law, the more difficult it will be to alter the domestic law through internalization of international law.

A final cultural factor is societal attitudes about a state's reputation as a follower of international law. People differ in the value they place on international law and the role they see for their state within the international legal community. In states where the public is particularly aware of international legal norms, where past actions have caused shame for violating international law, or where a population desires that the state be well regarded as a leader in the international community in its following international law, it is more likely that international law will be internalized. In states where the population does not know or does not care about international law, or where there is no strong societal pressure or concern about whether a state has a reputation as a follower of international law, there is less pressure on a state to adhere to and internalize international legal norms.

Institutional factors

Legal tradition also encompasses institutional characteristics that influence internalization: the separation of powers within a state, the strength and processes of the judiciary, and whether the state is monist or dualist. The separation of powers within a state is important because the greater the number of actors that can participate in, alter, and delay the internalization process, the less likely it is that international law will be internalized in the domestic legal system and be considered binding on state behavior (Diehl et al., 2003). This follows the idea of veto players (Tsebelis, 2002).

The strength and processes of the judiciary are another critical determinant for internalization (Mitchell and Powell, 2011; Simmons, 2009). In states where the judicial branch has the power of judicial review, the internalization of international law may be hindered because the judiciary at the international level does not possess such power (Bianchi, 2004). It has also been found that states that adhere to the legal concepts of precedent and *stare decisis* may have greater difficulty internalizing international law because international law does not recognize these concepts. These differences create a divide between the domestic and international legal systems which makes internalization of international law more difficult (Mitchell and Powell, 2011; Simmons, 2009).

Finally, internalization is influenced by whether a state is monist or dualist. A monist state is one in which international law automatically becomes part of the domestic law and can be immediately applied by state courts and relied on by citizens; no additional domestic action is needed to make the law binding (Bradley, 1999; Henkin, 1995). In a monist system, internalization is facilitated by the absence of additional layers of institutional involvement. A dualist state is one in which additional domestic action, such as enacting legislation or approval by a religious council, is required to make the international legal rule part of the domestic legal system (Bradley, 1999). The presence of additional steps in the process in a dualist system makes integration of international law into the domestic system more difficult.

The combination of these cultural and institutional factors facilitates or hinders the internalization of international human rights law. The more international law is internalized, the greater influence it will have on state policy. While Australia and the USA have many similar legal features and are both part of the common-law tradition, examination of their respective cultural and institutional characteristics illuminates key differences between the two states that explain their divergent policies toward international human rights law.

The legal traditions of the USA and Australia

The legal traditions of the USA and Australia both originate in the common-law tradition of England (Glendon et al., 1994). Although half a world separates the two countries, the US and Australian legal traditions developed along similar trajectories. Today, the two retain commonalities, including a strong role for the judiciary and a culture of individualism. There are, however, some distinct differences in the history and development of the legal traditions of the two countries that facilitate the internalization of international law in Australia and hinder it in the USA. Contributing to the divergence between the two states is the manner in which each country gained its independence and the corresponding importance each society places on the state's foundational legal documents, the differing actions of the judiciary, and societal perceptions about the role that the state should play as a proponent of international law.

The legal tradition of the USA

The US legal tradition emerged from a backlash against strict adherence to English law during the American Revolution. American legal culture was grounded not on the sovereign authority of the English king, but on freedom, independence, and the protection of individual rights (Friedman, 1985). These ideals were reinforced by the US Constitution. Coupled with the Americans' perceptions of their country as a 'city on a hill' and as 'exceptional,' this led to both an institutional development and a public perception of the role of law in society that focus on individualism and resist outside interference with domestic law.

Legal culture. The founders of the US legal system were students of the Enlightenment. In particular, Locke's belief that civil society is created for the purpose of protecting individual rights such as life, liberty, and property formed the foundations of US legal culture (Boyle, 1985). In the USA, law exists to order society, but such order comes first through the protection of the interests of the individual rather than of the community (Rogoff, 1997). With this history, the USA became 'fundamentally individualistic' in its social forms, including the understanding of law (Boyle, 1985: 64–65), and, today, the USA has the highest level of individualism in the world (Hofstede, 2001). The individualist focus of the law has provided remarkable consistency in the US legal tradition over time. From the Bill of Rights to struggles for equal rights for women and minority groups in the 20th century and on to issues in the news today, such as same-sex marriage, the law in the USA emphasizes the individual.

This tradition of individualism in the USA is extremely important for US policy toward international human rights law. The difference between the individualistic US law and communal international law hinders internalization and minimizes the likelihood of favorable US policies. Additionally, the individualist nature of US law has resulted in resistance to outside interference with one's business. The same way that individuals in the USA do not like the state interfering with their rights, the country as a whole does not like international law interfering with its sovereignty. As go attitudes about law domestically, so go attitudes about law internationally. This creates a significant obstacle to the internalization of international law.

Closely tied to the individualistic purpose of US law, and one of the primary driving forces of the US legal tradition, is the United States Constitution. The US Constitution has a pride of place, not just within the legal tradition, but within the country's broader culture. It maintains an almost sacred aura – both a symbol of a nation and a functioning legal document. This cultural attachment is a framing factor for every other component of the US legal tradition (Rogoff, 1997). The deeply held belief in the exceptional nature of the US Constitution and in the rightness of its provisions means that public sentiment toward an outside force seen as interfering with the Constitution is often very dismissive. No international law will be accepted that is viewed as infringing on the US Constitution. This creates a significant hurdle for favorable policies toward international law in the USA.

These same beliefs also shape society's views on the role of the USA in the world and perceptions of international law. Because protections are provided by the Constitution and domestic law, there is little perceived need for additional protections provided by international human rights law. This minimizes the view among the American public that it is necessary to accept and internalize international law in order to adopt appropriate standards of behavior on these issues. Correspondingly, there is less concern about the country's reputation abroad in terms of being viewed as a 'law-abider.'

This attitude is reflected in a number of places. Americans consistently hold that domestic policy concerns trump those of foreign policy (Chicago Council on Global Affairs, 2010). While there is general support for international law, this is often belied by other beliefs on the direction the country should take in terms of its position in the world. Moreover, there is a general lack of public discussion on issues of international law in the USA as well as a great deal of misunderstanding. This is made clear in the recent push in a number of US states to ban the use of foreign or international law in state courts (Fellmeth, 2011).

This general attitude toward international law is also evident among policymakers. Members of the Senate Foreign Relations Committee have long used the Constitution's advice and consent procedure as a way to table international treaties viewed as infringing on the US Constitution. Supreme Court justices, as well, have shown a general reluctance to rely on international law as the

basis for their decisions. Justice Scalia has summarized this attitude: 'You are talking about using foreign law to determine the content of American constitutional law – to be sure that … we have the same moral and legal framework as the rest of the world. But we don't have the same moral and legal framework as the rest of the world, and never have' (Dorsen, 2005: 521). While the Supreme Court has cited international law, there is significant debate over whether the use of international law as the basis for US decisions is appropriate. Given these attitudes, there is very little pressure on policymakers to adopt favorable policy.

Legal institutions. The US legal tradition includes a strong separation of powers among the branches of government, including substantial powers of review for the judiciary. As a result, the courts have been able to assert for themselves additional power to share control of the legal and political agenda (Henkin, 1995). The power of the Supreme Court to declare international law incompatible with the principles of the Constitution makes the Supreme Court an important player in the internalization of international law. It is, in effect, an additional veto player that can slow down or halt the internalization process.

Additionally, the Supreme Court adheres to the provisions of precedent and *stare decisis*, whereas international law does not. This difference has been found to hinder favorable policy toward international law because it might hinder the rights of US judges to decide cases (Simmons, 2009). The more an international legal norm is seen as infringing on the established practices in the USA, the more difficult it will be for that norm to become internalized and accepted as a binding rule (Powell and Mitchell, 2007; Simmons, 2009).

The USA is also a dualist state. While the US Constitution appears monist because the language of Article VI(2) indicates that treaties are the 'supreme law of the land,' the advice and consent procedure outlined in Article II(2) has resulted in making the USA 'fundamentally dualist' (Bradley, 1999: 531). This means that an international agreement that the USA does ratify is not automatically internalized into US domestic law; rather, such instruments are generally held to be non-self-executing and must be enacted into US law through additional government action (Bradley, 1999; Kirgis, 1997). This has been upheld by the US Supreme Court for more than a century. Even though the Constitution declares treaties to be the supreme law of the land, in practice the USA's legal tradition treats international law as secondary, and this shapes policymakers' perceptions of international law (Kirgis, 1997). This, in turn, affects the internalization of international law because if the public at large is not able to reference international law in legal actions, they are less likely to push policymakers to adopt favorable policies toward international law.

Internalization. This combination of cultural and institutional factors hinders the internalization of international law in US domestic law, which minimizes the influence of international legal norms on subsequent policy. The additional levels of veto players seen in the strong judiciary and dualist US system, coupled with a cultural understanding of law focused on the individual and grounded emphatically in the US Constitution, minimize societal pressure to conform US policy to international law and reduce the pressure on policymakers to ratify treaties.

This does not imply that the USA does not support international law or follow international legal standards, because in many instances it does. In fact, the USA is often a leader in pushing for new concepts of international law and encouraging expanded protections. The issue is not with the US belief in the value of international human rights law over the broad course of the country's history. The issue is that, because of the way the US legal tradition has developed over the past 250 years, there is an extreme reluctance to accept any outside interference with the foundational legal

principles of the state. Official US policy is not formulated around ratifying and executing international law within the domestic legal tradition, which creates very different attitudes about international law.

This effect of legal tradition on US policy is not a recent phenomenon. The US legal tradition has been remarkably consistent over time. This consistency exists regardless of the power position that the USA maintains in the international system. The USA did not begin to emerge as a global power until the turn of the 19th century and it did not achieve great-power status until World War II. Throughout its history, however, the USA has acted fairly consistently toward international law (Zartner Falstrom, 2006). Early on, the USA was largely inferior to the major European states in military, naval, and economic power. Yet, on numerous occasions it 'engaged in actions that would belie its power position' and pushed the boundaries of international law (Zartner Falstrom, 2006: 369). For example, both the Monroe Doctrine and its Roosevelt corollary are built on the ideas outlined here that constitute the US legal tradition: individual purpose and a sense of exceptionalism, belief in the supremacy of the US system, and refusal to allow encroachment on US sovereign law. While Presidents James Monroe and Theodore Roosevelt grounded their policies on the law of nations, the specific terms of the policies reflect the USA's legal culture. Moreover, issues about power are moderated by the legal tradition. In the case of these foreign policy doctrines, US power did not quite support its position. However, grounding the policies in legal justification, the US adopted them nonetheless. These types of actions can be seen throughout US history.

The legal tradition of Australia

Though sharing origins in English common law, the development of the Australian legal tradition was influenced by different factors than that of the USA. With a much longer period as an English colony, a history as a penal settlement, and with its independence stemming from an act of the English Parliament rather than being grounded in a revolutionary movement, the foundations of Australia's tradition do not possess the exalted aura of those of the USA. Additionally, cultural perceptions about appropriate standards of behavior and the place of international law within the domestic system differ in Australia.

Legal culture. Australian history has created an individualist perception about the role of law within the state. As a country whose population descended from those whose freedom was limited, the purpose of law in Australia today is one in which the protection of individual freedom is highly valued (Chisholm and Nettheim, 1984; Hofstede, 2001). Also, as a state that was long closely connected to England, preserving Australia's independence from outside influence remains important. Australia has been characterized as having an 'independence of spirit' and a 'streak of resentment' stemming from historical interference in its domestic business (Perlez, 2001). Like the USA, Australia has one of the highest individualism ratings in the world (Hofstede, 2001).

The codification of this desire for individual freedom into a bill of rights, however, has not occurred in Australia. Moreover, there is no Australian legal foundation that creates the same sense of attachment that the American people feel toward the US Constitution. Throughout much of Australia's history there has been a limited sense of national identity among the population. In the US case, a key component of the development of the legal tradition was the role of national identity and the close attachment between the people and the country's founding. What it means to be American has had a profound impact on the development of the legal tradition in the USA. Australia lacks a similar sense of nationality, and as a result, there has been no unifying understanding of 'Australian-ness' to bind the population together behind a single legal purpose.

Corresponding to this more limited sense of nationalism is a difference in how the foundations of Australia's law emerged. Whereas in the USA the principles laid down in the founding documents were devised by the sovereign will of the people, the Australian Constitution was created as 'just another English Parliamentary Act' (Lindell, 1977: 165). This has minimized the tie between the people and the law and means that, in Australia, there is no absolute attachment to the founding documents. The Australian Constitution has been described as a 'deeply ambiguous document … created at a time of ambivalence about Australia's place in the world, whether it was an independent country or a child of England' (Parkinson, 2005: 145). This facilitates the internalization of international law in Australia in a manner not seen in the USA insofar as there is not the added burden of international law automatically being viewed as an infringement of founding principles.

In addition, attitudes in Australia over the state's position in the international system also differ from those in the USA. In the past several decades, there has been a great deal of debate in Australia about the role of international law in the state's legal system, and how Australia is perceived around the world. This has coincided with an increase in Australia's ratification of international treaties and internalization of international law. Concern over Australia's international reputation as a law-abiding state, particularly in the absence of a domestic bill of rights and recent criticisms of rights practices, has created a cultural belief that adhering to international law is the appropriate standard of behavior for the country to maintain its reputation as a regional and global leader. In 2007, a Lowy Institute poll found that 74 percent of Australians believe that 'Australia's democratic or humanitarian values should be considered more important than its economic or political interests' (Gyngell, 2007: 2). Additionally, 81 percent of Australians support the introduction of more specific laws to protect human rights in Australia and 85 percent believe it should be a high priority for the government (Amnesty International, 2009).

Legal institutions. As in the USA, the Australian legal tradition maintains a separation of powers and an independent judiciary that operates under the concepts of precedent and *stare decisis*. Since independence, the Australian Constitution has endowed the High Court of Australia with extensive powers of judicial review, which gives the judiciary authority to act as a veto player in the internalization of international law (Kritzer, 2002). The Australian judiciary, however, has utilized this power in a different manner than the judiciary of the USA. Whereas the US Supreme Court has been reluctant to cite international law, Australian judges have been more willing to incorporate international human rights law into judicial decisions. The other branches of government have also been more willing to accept international law and supranational authority on human rights issues. This is largely a result of the more limited sense of nationalism, the absence of a bill of rights, and minimal fear of outside interference with domestic laws, in contrast to the USA.

Australia is also a dualist state when it comes to the internalization of international law (Harris, 2004). Under the Australian Constitution, treaties ratified by Australia are non-self-executing, requiring enactment into domestic law by the parliament. The Australian government, however, has been relatively active in the past two decades in enacting legislation incorporating international legal obligations into the domestic rule of law. The government has also become a party to the Human Rights Committee of the International Covenant on Civil and Political Rights, and has actively abided by the committee's requirements and decisions.

Internalization. The differences present in the history and development of the Australian legal tradition have led to an environment more favorable to the internalization of international human rights

law than that found in the USA. The lack of strong attachment to revolutionary principles, coupled with perceptions among both the mass public and the political elites that Australia should accept international law in order to be perceived as a law-abiding citizen of the international community and a greater willingness within the parliament and judiciary to rely on international law, has created a different attitude toward international law in Australia.

This greater ease of internalization is evident not only in the number of treaties Australia has ratified vis-a-vis the USA, but also in the relative speed with which Australia submits its instruments of ratification. Unlike in the USA, where treaties that have been ratified averaged sixteen years between opening for signature and ratification, Australia averages five years, with a number of treaties being ratified in less than three years (UN Treaty Database, 2012). This indicates greater domestic support for the norms outlined in the treaties and greater cultural and institutional support for internalizing the provisions in domestic law.

Moreover, Australia has enacted the requisite domestic law required to fulfill its obligations under these treaties, while undertaking many of the same burdens as the USA in terms of global politics. Australia has troops stationed throughout the globe. Australia has also taken the lead in several UN-sponsored actions in its region. This, for example, places Australian soldiers in the same potential situation as US soldiers in regards to the International Criminal Court (ICC), and opens Australia up to similar complaints before UN human rights bodies. Despite this, Australia has ratified treaties and joined international bodies that focus on human rights, even though this seemingly conflicts with Australia's interests. The legal culture and institutions of the state overcome these obstacles and have resulted in ratification because it is considered the appropriate standard of behavior, even when contrary to interests.

How common is the common law?

Of the fifteen human rights treaties included in the Appendix below, the USA has ratified seven, less than half the number of Australia. This might be surprising given that a number of the treaties that the USA has not ratified had US support during the drafting phase. It is only at the final step of ratification and internalization that the USA has withheld its support. Common explanations for this lack of support center on US power and the fact that the USA follows international law only when it suits its interests. However, power and interest explanations leave many questions unanswered. For example, why, then, has the USA ratified seven of the treaties? Why does Australia seem immune to similar interests? Furthermore, why does the USA participate in the international treaty process at all if the intention from the beginning is not to ratify? Theories based on power and interest cannot adequately answer these questions. But understanding state policy toward international law through the lens of legal tradition does provide an explanation.

As discussed in the previous section, the US legal tradition is grounded in a culture of individualism and views the US legal system as exceptional. Outside legal principles are neither desired nor needed and, even if the public were to desire the internalization of international norms, the institutional hurdles in place in the USA would make this exceedingly difficult. As the process of internalization rarely occurs, this puts no additional pressure on policymakers to adopt policies favorable toward international human rights law. Moreover, upon examination of the reasons most often given for why the USA does not ratify human rights treaties, it is evident they come directly from the cultural and institutional attributes of the US legal tradition.

For example, the USA has not ratified the Convention on the Elimination of All Forms of Discrimination Against Women, despite the fact that it holds itself up as a leader in women's rights. In October 1994, President Clinton submitted the convention to the Senate Foreign Relations

Committee for advice and consent. The treaty was recommended by the committee to the full Senate by a vote of thirteen to five (Steiner et al., 2007). The recommendation, however, contained a number of reservations. The committee stated:

> [The] Constitution and laws of the United States establish extensive protections against discrimination … However, individual privacy and freedom from governmental interference in private conduct are also recognized as among the fundamental values of our free and democratic society. The United States understands that by its terms the Convention requires broad regulation of private conduct … The United States does not accept any obligation under the Convention to enact legislation or to take any other action with respect to private conduct except as mandated by the Constitution and laws of the United States. (Steiner et al., 2007: 210)

The committee also proposed reservations to a number of other provisions of the treaty that were viewed as infringing on the constitutionally guaranteed rights to freedom of speech, expression, and association and asserted that the USA 'must guard against treaties that overreach' (Steiner et al., 2007: 211). Ultimately, the congressional session ended before the full Senate could vote on the treaty.

These reservations about ratification are grounded in the US legal tradition. There is great concern over preventing infringement of constitutionally guaranteed rights by an international treaty. Moreover, despite acknowledging the importance of the subject matter, there has been little pressure from the general public for ratification. Institutionally, this example illustrates the difficulties of the dualist US system. Both the Senate Foreign Relations Committee and the full Senate body can act as veto players, preventing the ratification and internalization of an international treaty. Twice, in 1994 and 2002, the committee approved a resolution of advice and consent, but in both instances the measure failed to come to a vote by the full Senate before the congressional session ended (Steiner et al., 2007: 211). Since 2002, the convention has not made it out of committee.

Another example is the US failure to ratify the Rome Statute to the International Criminal Court. US policy has recognized the importance of the legal principles at issue, but the manner in which these principles are codified in the treaty is contrary to US legal tradition. Most of the arguments heard within the US policy community against ratification reflect apprehension that provisions of the Rome Statute will conflict with US law, and that adherence to the treaty would infringe on the protections of due process provided by the US Constitution (Crossette, 2000). In US legal culture, 'human rights law gives primacy to protecting the rights of the arrested and the accused over the requirements of the prosecution for securing conviction,' which many fear is the primary aim of the ICC (Thakur, 2002). Such a shift in protections would be contrary to the very foundation upon which the US legal tradition is built. As stated by Senator Rod Grams, 'When Congressional and other ICC critics complain that "this Court strikes at the heart of sovereignty," they are not spouting empty rhetoric; instead, at some level, they are appealing to deeply held conceptions of national identity and the proper relationship between law and self-government' (Wippman, 2004: 163).

This sentiment is further echoed by the strongly held belief that, because of the special nature of the US Constitution, no US citizen should be subjected to an outside criminal tribunal such as the ICC. General public opinion has been mixed on US participation in the ICC. While many respondents to recent surveys appear to support the court, the support comes in response to questions about trying individuals for terrorism or genocide, rather than overall support or support for US citizens being tried at the court (Chicago Council on Global Affairs, 2010). Since there is minimal public pressure on elected officials to ratify the Rome Statute,

the cultural and institutional hurdles of the US legal tradition continue to hinder favorable US policy.

These public beliefs have also been reflected in the policy decisions of three US presidents, crossing the political spectrum. The USA participated in the negotiations for the Rome Statute largely under the Clinton administration (Scharf, 1998). While Clinton signed the statute, he warned that neither he nor his successor would be able to ratify the treaty in its existing form (*New York Times*, 2002). President George W. Bush notified the United Nations in May 2002 that the USA would not ratify the treaty and that it had 'no legal obligation arising from its signature' (Bolton, 2002). After his election in 2008, President Barack Obama remarked that it remained premature to commit the USA to the ICC for the 'maximum protection' of US soldiers abroad and to protect their constitutional rights under US law (Obama, 2008).

Australia, on the other hand, has adopted much more favorable policies toward international human rights law. One way for Australia to meet its goals of achieving good international citizenship and to improve its reputation in the absence of a domestic bill of rights is to adhere to international human rights law. This has opened the way for internalization of international human rights norms in Australia. Once internalized, the norms become part of the fabric of Australian law and people accept them as the appropriate standards of behavior. This, in turn, pressures policymakers to adopt more favorable policies toward international law.

Australia's greater acceptance of international law is largely a consequence of two key facets of the Australian legal tradition: Australia does not have a written bill of rights and Australians have a greater concern about their country's reputation as a leader in international human rights. This has motivated both policymakers and the general population to demonstrate acceptance of international human rights norms as the appropriate standard of behavior. While both Australia and the USA have been critiqued for certain human rights practices, in Australia concern over damage to the country's reputation has resulted in broader internalization of human rights provisions.

While no one suggests that the absence of a bill of rights means that Australia is completely lacking in human rights protections, former High Court Justice McHugh (2007) asserted that 'The fact that we appear to be the only Western country in the world without a Bill of Rights raises questions about our true commitment to … human rights.' Justice McHugh, along with others, has 'urged the adoption of a bill of rights' and argued that 'Australia's legal system was "seriously inadequate in protecting the rights of the most vulnerable and disadvantaged groups in our society"' (Pelly, 2005). These sentiments have been echoed by the Executive Director of the Human Rights Law Resource Center, Phil Lynch (2010): 'Australia's status as the only Western Democracy without a national human rights law undermines our authority and legitimacy on international human rights issues and in regional human rights dialogues'.

While a national human rights act remains under debate, acceptance of international human rights treaties has come to be seen as a proxy by which Australia can show its commitment to the protection of human rights.

This has been demonstrated in a number of different ways. Australia has enacted implementing legislation for most human rights treaties to which it has become a party. For example, following Australia's ratification of the International Covenant on Civil and Political Rights (ICCPR) in 1981, the government established the Australian Human Rights Commission to increase the acceptance and observance of human rights in Australia according to the provisions of the treaty. The commission has responsibility for the implementation of the ICCPR, as well as the Convention on the Rights of the Child, treaties concerning refugees and migrants, and the

issues of torture and trafficking (Australian Human Rights Commission, 2011). Australia also enacted legislation implementing the Convention on the Elimination of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, and the International Criminal Court, among others.

Australia has also implemented the decisions of international human rights bodies to which it is a party, such as the Human Rights Committee of the International Covenant on Civil and Political Rights. The Human Rights Committee reviews complaints filed by citizens of member states who feel their rights under the treaty are being violated. Shortly after Australia's ratification, a claim was filed against the country for violations of the right to privacy (Human Rights Committee, 1994). The Human Rights Committee found against Australia, and, in response, the state passed new legislation in line with the committee's decision, which protected the privacy of consenting adults engaging in sexual relations.

An erosion of strict dualism has also been apparent in the Australian judiciary, which has been more willing than its counterpart in the USA to draw on international legal principles in court cases, even when the international law in question has not been internalized in Australian law. For example, in the 1992 Mabo case, the High Court of Australia rejected the long-standing Australian policy of *terra nuillius* and recognized indigenous rights to land. In rendering its decision, the court stated that international law, particularly the Universal Declaration of Human Rights, is influential on Australian law.

While neither of these outcomes has been without critics, the fact that Australia has accepted decisions of the Human Rights Committee and that Australian judges use international law, coupled with the country's adherence to the human rights treaties it has ratified, indicate a significant willingness on the part of Australia to adopt favorable policies toward international law that is absent in the USA. The absence of a domestic bill of rights in Australia also minimizes conflict between international and domestic law and facilitates internalization (Maddox, 2001). It has been suggested that precisely because Australia lacks a comprehensive charter of rights, the country's litigants and lawyers are 'turning to international law in the quest for a peg on which to hang arguments designed to persuade Australian courts that part of international jurisprudence has been, or should be, incorporated by judicial decision' (Kirby, 1997). By making international law part of the fabric of the domestic law through the court system, lawyers and judges are providing further institutional support for internalization, as well as enhancing cultural perceptions about appropriate standards of behavior.

Concern over Australia's reputation for abiding by human rights law also stems from public disapproval, both domestic and international, of events such as Australia's granting of temporary residence to individuals who have committed acts of torture, murder, and rape (Heneroty, 2005). For example, Australia was accused of having a 'lax attitude' to Nazi war criminals because gaps in Australian legislation meant that war crimes could not be prosecuted in Australia (BBC, 2000). These reports energized calls for a change in Australian law because 'as a good international citizen and decent society Australia must do its part to secure … justice' (O'Reilly, 1997). Unlike in the USA, where these types of global concerns do not motivate policymakers or society at large to greater action internalizing international norms, Australian policymakers and public have demonstrated a concern for addressing such criticism to protect the state's reputation. As stated by former Australian Attorney General Robert McClelland (2008): 'We respect the rule of law and human rights … Australians are tolerant and respectful, and engage positively on all levels within the international community. But in recent times … Australia was not as active as it should have been within the UN. Renewing this participation will enhance our standing in this region as a middle power and partner.'

Recognition of the importance of being a leader in promoting and protecting human rights in this manner is not a quality strongly advocated in the USA. The different attitudes in Australia and the USA about the significance of international human rights law stem from different cultural and institutional attributes of the two states' legal traditions. In Australia, the legal culture and institutions ease the way for internalization and subsequent favorable policies toward international human rights law. This is largely grounded in the view that it is the appropriate standard of behavior for Australia, should the country wish to be viewed as a leader in the region and around the world. This has freed Australian policymakers to adopt favorable policies toward international law without the fear of infringement on their domestic legal tradition that faces their counterparts in the USA.

Conclusion

This article has explored why Australia and the USA have developed divergent policies toward international human rights law. While sharing common legal origins, historical circumstances and cultural contexts have resulted in different characteristics in the contemporary legal traditions of the two states. These are evident in relation to the 15 human rights treaties examined here. Australia has ratified and internalized many international laws that the USA has not. Most of the arguments heard within the US policy community detailing the reasons for the lack of ratification express concern that provisions of the treaties will conflict with US law and highlight the fact that US law already provides protections for these issues, so international law is not necessary. These reasons, coupled with an institutional structure in the USA that makes internalization generally difficult, are a great part of the US failure to ratify these major human rights treaties.

In Australia these same hurdles do not exist. The legal culture of Australia eases the way for internalization and subsequent favorable policies toward international human rights law. This is largely grounded in the view that it is the appropriate standard of behavior for Australia should the country wish to be viewed as a global leader. Internalization and acceptance of international law in Australia is also facilitated by the absence of a number of the cultural and institutional factors that make internalization so difficult in the USA. This has freed Australian policymakers to adopt favorable policies toward international law without the fear of infringement of their domestic legal culture that faces their counterparts in the USA.

Legal tradition is a significant factor shaping state policy toward international human rights law. Given the necessity of internalizing international law within a state in order to make it fully binding and an accepted part of a domestic legal system, understanding the cultural and institutional mechanisms by which this occurs is an important part of broadening our understanding of state compliance with international law. Through this study, it is evident that even states with significant similarities and shared legal origins can differ on the policies they adopt. In the case of Australia and the USA, differences in legal institutions and culture have resulted in divergent policies on international human rights law.

These results provide insight for future endeavors in better understanding the policies that states adopt toward international law. While this article focuses on human rights, I anticipate that the theory applied here would be applicable to other areas of public international law. This is important for our overall understanding of state decision-making, as well as the use state populations might make of international law domestically. The potential broad implications at multiple levels of analysis (including state negotiation and mediation, rule-of-law initiatives, and the use of international law to protect rights and freedoms in domestic courts) provide exciting avenues for future work.

Appendix

Table A1. US and Australia Ratification Dates.

Treaty (date treaty opened for signature)	USA	Australia
International Covenant on Civil and Political Rights (1966)	1992	1980
Optional Protocol to the International Covenant on Civil and Political Rights (1966)		1991
Second Optional Protocol to the International Covenant on Civil and Political Rights (1989)		1990
International Covenant on Economic, Social, and Cultural Rights (1966)		1975
Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (1984)	1994	1989
Convention on the Prevention and Punishment of the Crime of Genocide (1948)	1988	1949
Convention on the Rights of the Child (1989)		1990
First Optional Protocol to the Convention on the Rights of the Child (2000)	2002	2006
Second Optional Protocol to the Convention on the Rights of the Child (2000)	2002	2007
Convention on the Elimination of All Forms of Discrimination Against Women (1979)		1983
Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (1999)		2008
Convention on the Elimination of All Forms of Racial Discrimination (1966)	1994	1975
Rome Statute to the International Criminal Court (1998)		2002
Convention on the Rights of Persons with Disabilities (2006)		2008
Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (2000)	2005	2005

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