
ARTICLES

The Disciplines of International Law and Policy

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Abstract: This article considers the idea that the professional and intellectual disciplines which have developed in the United States to advance insight into international affairs also have characteristic blind spots and biases which leave professionals and intellectuals working within them more sanguine about the *status quo* than they might otherwise be. I am particularly interested in blind spots and bias which emerge from interactions among the disciplines of public international law, international economic law, comparative law, and international relations. Although internationalists in the United States working in these disciplines have broadly divergent methodologies and political ideologies, they share a sensibility which narrows the range of concerns and the scope of political possibilities which seem plausible to professionals and intellectuals concerned with international law and policy.

1. INTRODUCTION

These essays explore the idea that the professional and intellectual disciplines which have developed in the United States to advance insight into international affairs also have characteristic blind spots and biases which leave professionals and intellectuals working within them more sanguine about the *status quo* than they might otherwise be. I am particularly interested in blind spots and bias which emerge from interactions among the disciplines within which those who concern themselves with matters of international law and policy work: public international law, international economic law, comparative law, and international relations. My claim is that internationalists in the United States who operate in each of these indi-

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vidual disciplines have enough in common – common starting points, vocabularies, institutional experiences – to give their work a characteristic style or sensibility. Despite the range of debate in each discipline, both the sensibilities of individual disciplines and the interactions among them narrow the range of concerns and the scope of political possibilities which seem plausible to United Statesean¹ professionals and intellectuals who are concerned with international law and policy.

The disciplines discussed here are, of course, relatively minor players in the overall cultural process by which people in the United States, including intellectuals, learn to think about and discuss international affairs. Among foreign policy professionals, there are also those who work in the disciplines of military affairs, strategic studies, journalism, political science, diplomatic history, education, international economics, and so on. People working in the disciplines which concern me in these essays – whom I term ‘legal internationalists’² – share a professional relationship to law which encourages them to think of their expertise as more technical, practical, institutional, and doctrinal than the expertise they attribute to professionals in other fields. International legal professionals share with other lawyers in the United States a belief in the pragmatic and central place law occupies (or, for internationalists, should occupy) in society and in government. It is not at all clear that this professional commitment to the centrality of law is correct – prejudices in the opposite direction are equally marked in other internationalist disciplines which often see international legal professionals as hopelessly soft or dogmatic, utopian, or conservative. I nevertheless start from the premise that it is reasonable to assume that international legal professionals influence the structure and interpretation of numerous legal doctrines and institutional frameworks, perhaps less in their initial conception or establishment than in their ongoing interpretation and management. This disciplinary work may in turn play some role in shaping the outcomes of international political and economic bargaining, at least to the extent that if the discipline’s sensibility leads its participants to overemphasize the inevitability and desirability of the *status quo* or to underestimate the plausibility of alternatives, that would be a fact worth knowing.

1. Although it is conventional in the United States to use the adjective ‘American’ when referring to United States citizens or to people living in the United States, the overinclusiveness of the term has made it a contested one, particularly by some Canadians and Latin Americans who, in different ways, resent their invisibility in this common English construction. In these essays, as I am particularly concerned with professional traditions in the United States, I have borrowed the adjective ‘United Statesean’ from the Spanish to avoid imprecision and offense.
2. When I speak of ‘internationalists’ or ‘legal internationalists’, I mean intellectuals and professionals concerned with international law and policy who work in any of these disciplines: public international law, international economic law, and comparative law. Each of these professional disciplines, in turn, is composed of both professionals and intellectuals: people who think of themselves as practitioners, lawyers, policy makers, judges, activists and those who think of themselves as academics. Each contains people with political orientations and ideological projects which span the range of positions – left-center-right – in the broader intelligentsia. In each discipline, people carry on intense political and ideological debate about the nature and direction of international governance, the desirability of one or another form of international order, and the viability of particular international policies, rules, or institutional arrangements.

At the same time, it is far from clear how significant any of these various professional vocabularies are in shaping the broader popular traditions in the United States which influence attitudes towards international affairs – patriotism, populism, isolationism, American exceptionalism, Manifest Destiny, democratic messianism, the Melting Pot idea, the Frontier idea, various strands of capitalist and religious sensibility, anti-communism, and so forth. To the extent these professionals and intellectuals control the institutional, cultural, or discursive terrain through which potentially broader popular discussions, impulses and commitments are transformed into policy, their disciplinary sensibility may narrow the range and moderate the volatility of international political initiatives. I am led to an investigation of disciplinary sensibilities, in other words, by the rather commonplace intuition that a disciplinary culture of this sort could have an effective substantive bias.

This is easiest to imagine – and also to spot, if sometimes also to overemphasize – when the disciplinary culture self-consciously asserts its distinctive political commitments. Although participants in the disciplines which are the focus of these essays do share the range of ideological positions available in the larger society, in the simple sense that there are conservatives, liberals, and centrists working in each of these fields, it is also true that as internationalists they self-consciously set themselves apart from what they take to be the layman's approach to international affairs. To legal internationalists in the United States, it seems clear that the larger society, including most of its intellectuals, is far too 'parochial' and insufficiently 'cosmopolitan' to understand or contribute to a proper understanding of international law and policy. From this point of view, parochialism in the United States is taken as an unfortunate fact which must be taken into account, struggled against, accepted, resisted, explained.

I do not know whether this widespread estimation of the sociological background facts is correct. Legal internationalists often turn out to be rather parochial, and one finds internationalist dreamers and imperialists scattered throughout the broader culture. It is also far from clear what role the existence of a class of legal professionals and intellectuals defining itself as the cosmopolitan alternative to a popular consensus might have upon the popular consensus, if there is one, or on the popular acceptance of existing international institutional or doctrinal arrangements. Legal internationalists in the United States for most of the last 50 years have linked their status to the reputational ups and downs of a broadly liberal cosmopolitanism, for which there have certainly been as many downs as ups. It seems possible that the ideas, institutional practices, and doctrinal arrangements generated by these intellectuals and professionals have an influence – even when they are rejected – upon the range and terms of debate within the society at large about the direction and desirability of international governance – contributing to the definition of the groups among whom political and economic struggle will occur transnationally, as well as to the available avenues, contexts, and vocabularies for those struggles. More importantly, perhaps, it seems plausible that the displacement of ideological struggle between left and right by an alternative, even if largely imaginary, division

between an elite 'internationalist' and a popular 'nationalist' consciousness which crosses ideological divisions could have some stabilizing effect on the existing distribution of power or legitimacy among ideological positions in both groups.

A bias is more difficult to spot when it is not part of the discipline's conscious self-conception. In arguing amongst themselves for and against particular doctrines, institutional structures, or programs, participants in all the international legal disciplines I consider have a well developed practice of arguing that particular institutional or doctrinal arrangements – usually those proposed by others, but often thought to typify the discipline as a whole – are biased, favouring the West, or the South, or men or Europeans, large states or small states, and so forth. Such charges are a routine part of argument in favour of particular reform projects which claim to reverse or neutralize such biases. In my experience, this argumentative practice is generally far more insistent and far broader in its claims than seems plausible to me – it is notoriously difficult, for example, to determine with any confidence exactly which rules promote or impair 'economic development' on the national or international level, and a social process as broad as, say, 'colonialism' or 'patriarchy', or 'the market' could probably thrive with a variety of conflicting rules and institutional structures. Of course, where it is possible to diagnose a distributive bias in the choices among rules made by practitioners within these disciplines, even on an *ad hoc* or situation specific basis, that can be very important to know.

It seems more plausible to me, and this is the ambition of this study, to link disciplinary sensibility to bias in a 'deeper' or more systematic way than is usually suggested by direct efforts to argue that particular rule patterns favour one group or another. For example, if it turned out that international legal professionals and intellectuals routinely used arguments about overt bias to critique rules, but normally justified alternative rules they were proposing as more 'balanced' or 'neutral' in their effect, the result over time might be to moderate the capacity of the system to pursue redistributive goals through legal reform, even if all the particular claims, for both bias and balance, were wildly overstated. Or, if it turned out that legal internationalists were overwhelmingly preoccupied with the *level* at which a policy was to be made and managed – international rather than national – instead of with the particular distribution of political gains and losses likely to occur if a given policy were managed one way rather than another, this might result in a different set of substantive outcomes from those which would emerge from a direct focus on outcomes rather than constitutional structures. Similarly, if intellectuals and professionals within a discipline were motivated to overemphasize the universalist or balanced nature of rules and institutions and to forget the political context or compromised nature of their origins, these people might come to have a hard time identifying cultural or political biases which had become part of their background assumptions. It might be, in other words, that a discipline's blind spots, strategies of

evasion, elision, or forgetfulness might be linked to bias of various sorts.³ Much of the work out of which these essays have grown has been concerned with linking identification of elisions or contradictions internal to a disciplinary sensibility with external biases of this sort.⁴

My largest hesitation about this description of the project I pursue in these essays is that the focus on professional and intellectual disciplines and their 'sensibilities' will seem too disembodied, as if I thought the people who worked in these disciplines were automatons being spoken by their disciplinary languages. I do think that the disciplinary materials with which one works impose all sorts of constraints on the imagination. People who speak two languages often encounter thoughts which are easy or hard to express in one language rather than another, and so it is with disciplinary discourses as well – when one makes an international legal argument, one often says more or less than one intended as a result of the mass of other arguments, institutions, and professional cultures of interpretation within which the argument has been developed.

But I do not think these disciplinary conventions are the end of the matter – far from it. Indeed, in exploring the sensibilities of legal internationalists, I have been repeatedly struck by the degree to which individuals are not blinded by their disciplinary commitments, but instead rush headlong to establish, embrace, and embellish their discipline's blind spots and contradictions. Their disciplinary sensibility is as much about desire, construction, and work as it is about error or ignorance. As a result, I am increasingly convinced that a disciplinary sensibility does not precede the people who occupy it, but is their common project, made and remade as they pursue the projects of their hearts and heads.

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3. We might find, *e.g.*, that international legal professionals were likely to think of 'colonialism' in political rather than cultural terms, to see it as a thing of the past, a bias fully eradicable through balanced doctrines and participatory institutions, just as they might come to have a consensus about the meaning of 'development' even if they differed dramatically on the means through which 'it' might be achieved. *See, e.g.*, A. Anghie, *Francisco de Vitoria and the Colonial Origins of International Law*, 5 *Social and Legal Studies* 321 (1996); and J. Gathii, *International Law and Eurocentricity: A Review Essay*, 9 *European Journal of International Law* 184-211 (1998). It might turn out that even the most open doctrines of comity or reciprocity, calling for a balancing of all implicated transnational interests, nevertheless remained skewed because they tended only to 'see' interests which could be assimilated to one or another 'national' interest. *See, e.g.*, R. Malley, J. Manas & C. Nix, *Constructing the State Extra-territorially: Jurisdictional Discourse, the National Interest, and Transnational Norms*, 103 *Harvard Law Review* 1273 (1990).
 4. Feminists in international law have worked to identify bias both in specific rules or institutional practices and in the deeper fabric of the disciplinary imagination. Among the feminist works which have influenced my own work by seeking to blend these two strands have been H. Charlesworth, C. Chinkin & S. Wright, *Feminist Approaches to International Law*, 85 *American Journal of International Law* 613-645 (1991); H. Charlesworth, *Women and International Law*, 19 *Australian Feminist Studies* 115 (1994); H. Charlesworth, *Transforming the United Men's Club: Feminist Futures for the United Nations*, 4 *Transnational Law and Contemporary Problems* 421 (1995); H. Charlesworth & C. Chinkin, *The Gender of Jus Cogens*, 15 *Human Rights Quarterly* 63-76 (1993); K. Engle, *International Human Rights and Feminism: When Discourses Meet*, 13 *Michigan Journal of International Law* 517-610 (1992); and K. Knop, *Re/State-ments: Feminism and State Sovereignty in International Law*, 3 *Transnational Law and Contemporary Problems* 293-344 (1993).

I have tried in these essays to frame the disciplines of international law, comparative law, or international economic law as groups of people in concrete situations pursuing projects. In my image of the discipline, individuals have projects – personal, professional, political – which they pursue in, around and through the argumentative, doctrinal, and institutional materials the discipline offers. Sometimes these materials thwart or facilitate or redefine a project, sometimes the reverse, and sometimes both. As a result, it is surprising how often one can describe a disciplinary sensibility in a way which explores its elisions and contradictions, even its blind spots and biases, but which still somehow seems sympathetic to the projects, ambitions, and personalities who have constructed it, and may even be embraced by participants in the discipline itself as a helpful account of their sensibility. My starting point is an effort to explore precisely this register of disciplinary desire.

It may be significant in understanding my own disciplinary project that what follows began as the English text for five lectures I delivered at the University of Paris II in the winter of 1998.⁵ The audience had some background in international law, was entirely European and was largely French trained. Like anyone delivering a general course of this sort, I wanted to touch on some classic theoretical problems in the discipline of international law: the relationship between public and private law, the nature of economic regulation, the role of the state in international governance, issues of cultural relativism and the universality of international legal forms, the lessons of international legal history, and the fate of cosmopolitan or enlightenment secularism in a religious, political, and ideological world. In course discussion, we looked at particular regulatory contexts: labor standards in a global economy, pornography regulation, human rights, post-colonial governance and intervention, the laws of war.

More than anything else, however, I wanted to explore with my disciplinary colleagues in Europe my general sense that in the United States we think about international governance rather differently than elsewhere. These essays are intended, then, as an introduction to the specificity of international law in the United States, especially in the years since 1945. At the same time, for some years I have been part of a broad project to develop new or alternative approaches to international law, a project which has been called by any number of names and acronyms, including ‘New Approaches to International Law (NAIL)’,⁶ ‘The New Stream’,⁷

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5. D. Kennedy, *Les clichés revisités: Le droit international et la politique*, five lectures delivered at the University of Paris in February 1998, forthcoming also in French by Pedone.
 6. See D. Kennedy & C. Tennant, *New Approaches to International Law: A Bibliography*, 35 *Harvard International Law Journal* 417 (1994). A number of conferences were organized under the New Approaches to International Law rubric at the Harvard Law School, the University of Wisconsin Law School, and the University of Connecticut Law School between 1991 and 1997. The Bibliography was updated for the conference: ‘Fin de NAIL: A Celebration!’ held at the Harvard Law School on 9-11 May 1997. Copies are available on request from the European Law Research Center, Harvard Law School, Cambridge, Massachusetts 02138, USA. See also, O. Korhonen, *New International Law: Silence, Defence or Deliverance*, 7 *European Journal of International Law* 1 (1996). A selected bibliography focusing on materials available

'Critical Legal Studies (CLS)',⁸ and has overlapped with a number of other projects, including 'Third World Approaches to International Law (TWAIL)',⁹ 'International Legal Feminism',¹⁰ the 'Feminism, Law Sexuality and Culture (FLASC)' project,¹¹ the 'New Approaches to Comparative Law' project,¹² and the 'Postcolonialism and Sexuality' project.¹³ All of these projects have, in one way or another, grown out of the peculiar tradition of international law in the United States, even if they are largely a reaction against it, and even if a large majority of their practitioners have not, in fact, been citizens of the United States. In my experience, to give any sense for this new work, one must begin by exploring the peculiar United Statesean legal tradition out of which it grows and against which it reacts. To the extent these essays offer an introduction to that more recent body of work, they do so by situating it in relationship to the mainstream professional disciplines concerned with international law and policy in the United States.

The first essay takes up the specificity of the United Statesean international law tradition, introducing the relationship between schools of thought about public in-

in Europe is O. Korhonen & T. Skouteris, *Under Rhodes Eyes: The 'Old' and the 'New' International Law at Looking Distance*, 11 *Leiden Journal of International Law* 429-440 (1998).

7. This title seems to have been taken from an essay I wrote called *A New Stream in International Law Scholarship*, 7 *Wisconsin International Law Journal* 1 (1988). See, e.g., D. Cass, *Navigating the New Stream: Recent Critical Scholarship in International Law*, 65 *Nordic Journal of International Law* 337 (1996).
8. The tendency to link (at least the male) internationalists criticizing the mainstream international law tradition with the 'Critical Legal Studies' movement or school in the United States reached a high point in L. Henkin, R.C. Pugh & O. Schachter, *International Law, Cases and Materials*, 48-50 (1993). See also N. Purvis, *Critical Legal Studies in Public International Law*, 32 *Harvard International Law Journal* 81 (1991); A. Carty, *Critical International Law: Recent Trends in Theory of International Law*, 2 *European Journal of International Law* 66 (1991); P. Trimble, *International Law, World Order and Critical Legal Studies*, 42 *Stanford Law Review* 811 (1990); and O. De Schutter, *Les Critical Legal Studies au pays du droit international public*, 22 *Droit et Société* 585-605 (1992).
9. A group of scholars led by Antony Anghie, Bhupinder Chimni, Robert Chu, James Gathii, Celestine Nyamu, Balakrishnan Rajagopal, and Amr Shalakany used this title for a series of conferences between 1994 and 1998. Their work, much of it in progress, is compiled in the *New Approaches to International Law Bibliography*, *supra* note 6.
10. Many participants in this broad movement have also been involved in the *New Approaches to International Law* project. See, e.g., note 4. Additional sources are listed in the *New Approaches to International Law Bibliography*, *supra* note 6.
11. A conference and an ongoing research group have been organized under this title by Lama Abu-Odeh, Stella Rozanski, Brenda Cossman, Karen Engle, Ratna Kapur, Kerry Rittich, Vasuki Nesiiah, and others in 1997 and 1998.
12. A conference and journal symposium under this title were organized by Antony Anghie, Marie Claire Belleau, Karen Engle, Jorge Esquirol, and Mitch Lasser, at Utah Law School in the fall of 1996. The symposium volume of the *Utah Law Review* was published in 1997 under the title 'New Approaches to Comparative Law.'
13. Several conferences and workshops were organized under this title in 1997-1998 by Lama Abu-Odeh, Ratna Kapur, Tayyab Mahmud, Vasuki Nesiiah, Geeta Patel, Kerry Rittich, Hani Sayed, and Robert Wai. See B. Cossman & R. Kapur, *Subversive Sites: Feminist Engagements With Law in India* (1996); and V. Nesiiah, *Toward a Feminist Internationality: A Critique of U.S. Feminist Legal Scholarship*, 16 *Harvard Women's Law Journal* 189-210 (1993).

ternational law and broader trends in legal scholarship.¹⁴ The second essay places this public international law discipline alongside the burgeoning discipline of international economic law, contrasting the governmental sensibilities of the two domains.¹⁵ The goal is to unravel their partnership in power, not in terms of a 'public' which might be revitalized against a 'private' international law, but as an ongoing governance project common to the two disciplines which offers a number of different strategic sites for political intervention and disputation. The third essay looks at the relationship between the international regime and the localization of culture, exploring the relationship between the humanist cosmopolitanism of much legal internationalism in the United States and the technocratic empire.¹⁶ This exploration places the disciplines of public international law and international economic law alongside the disciplines of comparative law and private international law. The fourth essay considers the use of history common to these four disciplines – the narratives of progress and necessity which are part of the contemporary internationalist's polemical toolbox.¹⁷ The objective is to re-situate contemporary interna-

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14. Background influences on this essay include D. Kennedy, *A Critique of Adjudication: Fin de Siècle* (1997); D. Trubek, Y. Dezalay & R. Buchanen, *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 *Case Western Reserve Law Review* 407-498 (1994); M. de S.-O.-E. Lasser, *Judicial (Self)-Portraits: Judicial Discourse in the French Legal System*, 104 *Yale Law Journal* 1325 (1995); M.-C. Belleau, 'Les Juristes Inquiets': Critical Currents of Legal Thought in France at the End of the Nineteenth Century (S.J.D. Dissertation, Harvard Law School 1994). I developed the historical narrative in this essay earlier in *A New World Order: Yesterday, Today and Tomorrow*, 4 *Transnational Law and Contemporary Problems* 330 (1995); and *A New Stream of International Law Scholarship*, 7 *Wisconsin International Law Journal* 1 (1988).
 15. My thinking about international economic law has been influenced by D. Tarullo, *Beyond Normalcy in the Regulation of International Trade*, 100 *Harvard Law Review* 546 (1987); J. Paul, *Comity in International Law*, 32 *Harvard International Law Journal* 1 (1991); J. Paul, *The Isolation of Private International Law*, 7 *Wisconsin International Law Journal* 149 (1988); and B. Langille, *General Reflections on the Relationship of Trade and Labor (Or: Fair Trade is Free Trade's Destiny)*, in R. Bhagwati & R. Hudec (Eds.), *Fair Trade and Harmonization, Prerequisites for Free Trade?* 231-266 (1996). Parts of the argument in this essay were published by D. Kennedy, *The International Style in Postwar Law and Policy*, 1 *Utah Law Review* 7 (1994); and D. Kennedy, *Receiving the International*, 10 *Connecticut Journal of International Law* 1-26 (1994).
 16. This essay was influenced by L. Abu-Odeh, *Post-Colonial Feminism and the Veil: Considering the Differences*, 26 *New England Law Review* 1527 (1992); L. Abu-Odeh, *Crimes of Honor and the Construction of Gender in Arab Societies* (S.J.D. Dissertation, Harvard Law School 1996); R. Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 *Harvard Law Review* 1843-1921 (1994); G. Frankenberg, *Critical Comparisons: Rethinking Comparative Law*, 26 *Harvard International Law Journal* 411 (1985); *New Approaches to Comparative Law Project*, *supra* note 12; J. Esquirol, *The Fictions of Latin American Law (Part 1)*, 2 *Utah Law Review* 425 (1997); A. Riles, *Aspiration and Control: International Legal Rhetoric and the Essentialization of Culture*, 106 *Harvard Law Review* 723-740 (1993); A. Riles, *The View from the International Plane: Perspective and Scale in the Architecture of the Colonial Encounter*, 6 *Law and Critique* 39 (1995); and A. Riles, *Representing In-Between: Law, Anthropology and the Rhetoric of Interdisciplinarity*, 3 *University of Illinois Law Review* 597-650 (1994). This essay is largely a shortened version of D. Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 2 *Utah Law Review* 545 (1997).
 17. This essay was influenced by A. Anghie, *Creating the Nation State: Colonialism and the Making of International Law* (S.J.D. Dissertation, Harvard Law School 1995); N. Berman, *A Perilous Ambivalence: Nationalist Desire, Legal Autonomy and the Limits of the Interwar Framework*, 33 *Harvard International Law*

tional law as a modernist cultural production, and to explore the influence of common historical narratives on the discipline's program of action and geographical perceptions. My claim is that disciplinary mythologies about the origins and development of international governance create bias and blindness of their own. In the final essay, I consider the approach to United States foreign policy which emerges from these disciplines and finds its most overt expression among those specialists in international relations concerned with international law and policy.

2. THE TRADITION OF PUBLIC INTERNATIONAL LAW IN THE UNITED STATES

I want to begin by stressing what may be quite obvious, but often escapes comment: international law is different in different places. Internationalists, and among them lawyers, will often insist that a body of doctrine, a common history, a common cosmopolitan 'college' of international legal colleagues, a common language, bind international lawyers to one another across different national cultures or legal traditions, despite deeply felt differences of personal political commitment. Legal cosmopolitans today often feel, or dream, that it should be possible to wring a body of legal techniques and commitments from the idea that as people everywhere share basic humanist values and face rather similar technical problems, a rational or functional inquiry will generate convergence on a set of governmental best practices. That socialists and capitalists, imperialists, and post-colonials are all part of

Journal 353 (1992); N. Berman, *Modernism, Nationalism and the Rhetoric of Reconstruction*, 4 Yale Journal of Law and the Humanities 351 (1992); N. Berman, *But the Alternative Is Despair: European Nationalism and the Modernist Renewal of International Law*, 106 Harvard Law Review 1792 (1993); N. Berman, *Between Alliance and Localization: Nationalism and the New Oscillationism*, 26 International Law and Policy 449 (1994); D. Bederman, *Compulsory Pilotage, Public Policy and the Early Private International Law of Torts*, 64 Tulane Law Review 1033 (1990); D. Bederman, *The Souls of International Organizations: Legal Personality and the Lighthouse of Cape Spartel*, 36 Virginia Journal of International Law 275-377 (1996); A. Carty, *The Decay of International Law: A Reappraisal of the Limits of Legal Imagination in International Affairs* (1986); D. Kennedy, *The Rise and Fall of Classical Legal Thought*, (unpublished manuscript on file with author); D. Kennedy, *Towards an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America 1850-1940*, 3 Research in Law and Sociology 3 (1980); M. Koskenneimi, *From Apology to Utopia: The Structure of International Legal Argument* (1989); C. Landauer, *J.L. Briery and the Modernization of International Law*, 25 Virginia Journal of Transnational Law 881 (1993); E. Morgan, *Internalization of Customary International Law: An Historical Perspective*, 1 Yale Journal of International Law 63 (1987); and O. Yasuaki, *Japanese International Law in the Prewar Period: Perspectives on the Teaching and Research of International Law in Prewar Japan*, 29 Japanese Yearbook of International Law 23 (1986). I have developed this historical argument in more detail in D. Kennedy, *Primitive Legal Scholarship*, 27 Harvard International Law Journal 1 (1986); *id.*, *The Move to Institutions*, 8 Cardozo Law Review 841 (1987); *id.*, *Images of Religion in International Legal Theory*, in M. Janis (Ed.), *The Influence of Religion on the Development of International Law* 137 (1991); *id.*, *A New World Order: Yesterday, Today and Tomorrow*, 4 Transnational Law and Contemporary Problems 330 (1995); and *id.*, *International Law in the Nineteenth Century: History of an Illusion*, 65 Nordic Journal of International Law 385-420 (1996).

one international legal system – a tautological, if true, observation – suggests the existence of a single disciplinary object of study which, as lawyers in various places and times studied its essence, would operate to unify the field of study.

Suspending for the moment the question whether ‘the international legal order’ exists in such a concrete and unified way, it is certainly the case that to be an internationalist means something quite different in different national traditions. At a broad level, for example, polemics for cosmopolitanism have entirely different histories and political valences in different cultures. Relations with a place called ‘the international community’, or ‘abroad’, like relations with the professional study and practice of ‘international relations’, are different in Mexico, the United States, France, Tibet. More prosaically, being an international lawyer in France is simply a different job than being an international lawyer in the United States or Rwanda. Relations between international lawyers and the national foreign policy establishment differ, methodological preoccupations differ, rank in the order of professional status, situation in the intelligentsia, the role of lawyers, of professors, all differ.

The international regime which lawyers see and struggle to build differs as well. It should not surprise us that lawyers from different national cultures setting out to build a system of ‘international law’, would begin by building whatever in their own experience was most associated with the term ‘law’. And would build it wherever they thought ‘the international’ to be located. If law at home is about courts and codes, it will be difficult to imagine that international law, properly so called, could be something altogether different. If the international means the North Atlantic or the Organization of Economic Cooperation and Development, then international law will find its focus there. If the international is the place of military struggle, then international law will find its object in the regulation of war. And similarly where the international means ‘the North’ or seems the site of commerce rather than conflict. So let us imagine thousands of international lawyers setting out for work each morning, with quite different ideas about where they work, the object of their endeavours, the measure of their success, the nature of their opponents, even the discipline within which they will work. International law is simply the product, however messy and contradictory and confused, of all that endeavour.

Although international lawyers in many places share a wish to overcome, deny, or ignore differences of this sort, if we are to understand the field, we must think about it as a set of particular human projects situated in time and place. It is for this reason that I focus on the sensibilities with which professionals and intellectuals in the United States have contributed to what they have imagined as ‘international law’. I do not start with a general theory or definition of international law, such as the familiar “international law is the law governing relations among states”, but rather with the projects of particular internationalists, and the culture or sensibility within which they have worked.

2.1. International law in the United States: eclectic and marginal

My own scholarly project is both rooted in the United Statesean legal tradition – might even be heard simply as the current form of some typically United Statesean pre-occupations – and has been developed as a criticism of the international law discipline in the United States. It seems sensible, therefore, to begin with a description of the projects and sensibility of legal internationalists working in the United States. Identifying these projects and sensibility with any precision is complicated not only by the disciplinary habit of pretending that international lawyers everywhere speak the same language, but also by the sprawling divergences within the American international law establishment. It is easiest, perhaps, to start with a recognizable, if rather stereotypical, description of the differences between the traditions of international law in the United States and in Europe. Take method, for example: I suspect one could rather quickly get agreement on the proposition that the United Statesean tradition is less formalist in method, more interdisciplinary, less court focused, less state focused, less philosophical, and more pragmatic than its European counterpart. For international lawyers in the United States, public and private international law bleed into one another, as do law and politics, law and ethics, law and economics, or law and sociology. Arguments about what we term ‘policy’ play a larger role in our scheme of things, clarity about rules is less important. International lawyers in the United Statesean tradition are more open to ‘soft law’ and to a legal order in which the bindingness of norms will be a relative matter of degree rather than a formal matter of kind. United Stateseans are more interested in private players, both governmental and non-governmental, and are less interested in the State Department than in Wall Street or the Ford Foundation.

This penchant for blurry boundaries is reflected in pedagogy: it is rare in the United States to find a course in either ‘public’ or ‘private’ international law. Among the most common internationalist courses offered in United Statesean law schools are variants of ‘international business transactions’, a field which focuses on the legal problems encountered by commercial clients doing business across borders, whether those problems arise from national or international, public or private, law. Although perhaps loosely identified with “private” law, this type of course is as often taught by instructors whose basic training was in what would elsewhere be thought ‘public international law’ and whose basic orientation is toward wise regulation or human rights as by those rooted in ‘private’ international law or oriented toward savvy deal-making.¹⁸ In a typical United Statesean interna-

18. This difference in orientation has been present from the start. We need only contrast the bottom-up/client focus of the original Katz and Brewster materials on ‘international business transactions’ with the rather more top/down regime orientation of the Steiner and Vagts materials on ‘transnational’ law. Nevertheless, both styles self-consciously embrace what had, in the author’s views, theretofore been considered both national and international law, both private and public law. See M. Katz & K. Brewster, *The Law of International Transactions and Relations: Cases and Materials* (1960); and H. Steiner & D. Vagts, *Transnational Legal Problems: Materials and Texts* (1968).

tional law curriculum one would find, on the 'public' side, courses in 'foreign relations law of the United States' which focus on the constitutional law or international law regulation of our foreign policy machinery, as well as courses in human rights or 'litigating in a transnational environment' which might contain material from domestic civil rights law or civil procedure, depending upon the inclinations and training of the instructor. On the 'private' side, most law schools faced with burgeoning student and professional interest in 'globalization' or 'internationalization' have responded with a proliferation of quite different elective offerings, ranging from general courses ('transnational law', 'international business transactions') to area specializations (Islamic Law) and advanced electives on 'international aspects' of everything from intellectual property and taxation to family law. If anything, the divide between domestic and international law courses is more pronounced than that between the private and public dimensions of either – witness the broad insulation of American constitutional law from international human rights law – despite the conviction of every United States internationalist that one should not 'artificially' distinguish international and domestic law.

From a disciplinary standpoint, international lawyers in the United States can be found with loose allegiance to the professional fields of 'international law', 'foreign relations law', 'international economic law', 'international relations', and 'comparative law', as well as to the 'international' dimensions of a specialized field like taxation or antitrust. Even this crude organization remains vague and unstable: at last count, the 'interest groups' of the American Society of International Law numbered almost 20 and it would not be unusual for professors to teach across several of these fields, not to mention holding down a course in any number of particular domestic law specialties, from civil procedure or evidence to constitutional law.

The boundaries of the profession 'international lawyer' are as blurry as the pedagogical category. Lawyers with a wide range of commercial practices claim to practice 'international law'. Students wishing to practice 'international law' are drawn to a wide range of practice environments which promise work for United States clients abroad or foreign clients in the United States. For the purposes of these essays, my own disciplinary definition is a narrower and more traditional one, which would not include most lawyers with international commercial practices: law teachers working in one of the disciplines examined here and lawyers working with governmental or intergovernmental clients, whether working for public agencies or private firms, or for non-governmental bodies whose interests touch on the institutions and materials of what used to be called 'public international law'. This is a much smaller group than all lawyers who are interested in foreign affairs or once traveled abroad on business. It includes more government lawyers and international civil servants – and many more academics – than would be part of the United States representation at, for example, the International Bar Association. This more restricted group is both more comparable to the 'international lawyer' or 'jurist' in many other countries and shares an intellectual sensibility and disciplinary history

even in the United States which sets it apart from other lawyers doing 'international' work.

Although there is more career rotation in the United States than in many other national traditions, it remains true that international lawyers in the United States who practice in firms or institutions, those who have some role in the foreign policy establishment, and those in the academy, have different concerns and preoccupations. Perhaps because the practice of 'international law', in the sense I define it, is a rather limited and esoteric one, my sense is that academics have had a much larger impact on the sensibility of the discipline of international law in the United States than on the sensibility of, say, corporate or commercial law, or regulatory specialties like labour law, antitrust, or environmental law. At the same time, the international law discipline has served less as a revolving door to government than other United States law specialties. There have been, by United States standards, a relatively low number of academic or practicing international lawyers who have had any relationship with either the State Department or the Pentagon.¹⁹ Even the 'legal advisors' office in the State Department has not generally been manned by an international lawyer. This may be partly explained by the political appointment of large numbers of top civil servants, by the relatively low prestige of government work in the United States, the relative marginality of government agencies to foreign policy development, the centrality of private commercial law practice to policy making in all fields, including most international regulatory or economic law fields, and by the disconnection between what might be termed the 'intelligentsia' or the intellectual class and the political establishment in the United States. Nevertheless, Madeleine Albright, Zbigniew Brzezinski, Henry Kissinger, and Anthony Lake were all academics (in political science, not law) and Dean Acheson, Clark Clifford, Warren Christopher, John Foster Dulles, John McCloy, William Rogers, and Cyrus Vance were lawyers (in corporate and commercial, not international, practice). Part of the explanation for the distance between the international law discipline and the foreign policy establishment lies with the political self-marginalization of legal internationalists in the United States throughout the century.

This marginalization is difficult to explain. From an ideological point of view, there have been international lawyers who would describe themselves as comfortable within each of the main political currents in the United States: conservative, centrist, and liberal. There have also been people who would describe themselves as 'progressives', 'populists', 'Christians', or 'radicals'. In terms of legal methodology, all of the various academic movements which have influenced thinking

19. A quick review of the 104 people who have so far served on the Board of Editors of the *American Journal of International Law* in this century turned up one Secretary of State (Robert Lansing for President Wilson), about two dozen who had experience exercising state power, usually in short stints as legal advisors to one or another United States governmental agency, and another dozen who had been in a position to see what governmental institutions looked like from the inside, at least for a short while.

about law in the United States in other fields have also had an impact on international law: legal realism, functionalism, the legal process, law and society, policy science, law and economics, feminism, critical legal studies, critical race theory, liberal political theory, Anglo-Saxon moral philosophy, continental social theory, Kantian liberalism, and so on. Given this broad embrace of political and methodological ideas available in the broader intelligentsia, it is reasonable to ask how they might have come to be so marginal to foreign policy.

A large part of their marginality results from the relationship among elements of what, for all its internal diversity, is nevertheless a rather uniform disciplinary sensibility. The common sensibility of international lawyers in the United States has been defined by political and methodological commitments marginal to the intellectual mainstream. When it comes to mainstream political identification, international lawyers in the United States, for all their diversity on other matters, have been surprisingly uniform in seeking to express broadly 'internationalist' or 'cosmopolitan' commitments within the confines of the United Statesean tradition of political 'liberalism'. This is a marginal strand in liberal tradition, and liberalism has itself been on the defensive during much of the last 30 years. When it comes to method or attitudes about what law is and can do, international lawyers, particularly those with more public law orientations, have tended toward the legalistic end of the broadly 'pragmatic' sensibility they share with other lawyers in the United States.

2.2. **Cosmopolitan liberalism: a marginal politics**

In national political terms, international lawyers in the United States have had a narrower range of mainstream commitments than lawyers more generally, for most of the last 50 years, from slightly right of center (the old Rockefeller wing of the Republican Party) to liberal, in the American sense (the mainstream Democratic Party from Roosevelt through Carter). During this period, the tradition of political conservatism has been weak among international lawyers in the United States. Although the American Society of International Law was founded at the turn of the century as an offshoot of the largely progressive American Peace Movement, a more conservative political strand dominated between the wars.²⁰ This conservative turn resulted in part from a disciplinary commitment to 'legalism' in international affairs which seemed to clash with the more pragmatic, 'functionalist', or 'realist' attitude toward law which was associated with the Rooseveltian New Deal. When the founders' legalist commitment to arbitration was disappointed in 1914, the Society hitched its wagons to legal 'codification' rather than to the progressive effort to support the League of Nations. Although experiences in World War I had brought many to the field of international law, these were often disillusioning

20. See F. Kirgis, *The Formative Years of the American Society of International Law*, 90 *American Journal of International Law* 559-589 (1996).

'never again' experiences which moved international lawyers away from political engagement to both legalism and isolationism. The broadly conservative group who remained with the Society during the interwar years emphasized American neutrality and remained out of step with the policy orientations of the new regulatory and administrative law of the New Deal. After 1945, the conservative tradition within public international law was discredited for its pre-war neutralism. In the postwar period, conservative lawyers with international orientations moved towards private or commercial law, while populist conservatives remained hostile to internationalism of all sorts. Although lawyers who work with one or another branch of the United States military form perhaps the largest group of practicing 'international lawyers' in the sense I am using the term, they have not played a large role in the intellectual or professional development of the discipline in the post 1945 period.

At the same time, legal internationalists in the United States tend to be humanist and liberal in the European sense; overwhelmingly committed to the idea that international law is a good thing, both inevitable and worth working quite hard for against formidable odds. Their most significant disciplinary commitment is less to the politics of American liberalism than to the simple idea that things go better when they go internationally. Many in the post-1945 generation were brought to the field by their positive experiences in the World War II and in the military occupations or redevelopment efforts which followed. These people were often optimistic about internationalism, of an administrative and institutional variety. For whatever reasons, one generally does not find in the United States, as one certainly does in some national European traditions, international lawyers who are also nationalists. International law in the United States after 1945 provided a congenial intellectual home for a large number of immigrants, among them European and Jewish refugees, whose American patriotism was cosmopolitan rather than jingoistic and who have been among the field's strongest intellectual leaders. International lawyers in the United States tend to be apologetic, even sheepish about American hegemony, while remaining enthusiastic about cooperative internationalist schemes and interventions. The political cosmopolitanism of United Statesean international lawyers blends several strands which are often difficult to reconcile: general enthusiasm for international over national and multilateral over bilateral institutional machinery ('governance' in the argot of the 1990s); broad humanist values, which translate at various times into support for human rights, decolonization, foreign aid, or less restrictive immigration rules; and a conviction that through respect for an international 'rule of law' all countries, regardless of their ideology, could get along peacefully, which translated into a support for 'co-existence' where necessary, co-operation where possible, with the Soviet bloc and a deep scepticism about the mobilization of international governance machinery for 'containment' rather than collective security and peacekeeping.

The relative political marginality of legal internationalists in the United States results in part from the encounter between this cosmopolitan outlook and the

broader tradition of post-New Deal political liberalism. Although it is true that those in the political spectrum between progressive and liberal have been the core constituency for the United Nations and many other multilateral endeavours in the United States, it is also true that, at least until Reagan, the Cold War was largely fought by liberals, from Truman through Kennedy and Johnson to Carter. For most Cold War liberals, an internationalist 'coexistence' felt uncomfortably like neutralism or appeasement, 'humanism' could seem apologetic about both 'nonalignment' and those violations of liberal values which could be dressed up as cultural differences. For many United States liberals, in short, legal internationalists seemed too soft – on communism, on post-colonial corruption and totalitarianism, on threats to American interests abroad.

International lawyers who *did* work with the foreign policy apparatus found themselves either conducting the low-level legal work necessary to administer an expanding empire of American governmental commitments abroad or developing legal advice many steps removed from the center of the foreign policy process. The cosmopolitan liberal establishment State Department of Colonel House or Alger Hiss simply did not exist after McCarthyism – think of Cyrus Vance's quixotic struggles with the Kissinger/Brzezinski axis during the Carter administration. As a result, despite the fact that they were all political 'liberals', the foreign policy establishment empowered for a generation after the 1960 election was often at odds with the generation of cosmopolitan international lawyers who took over the American Society of International Law at the same time, and not just on Vietnam. Or, to put it more precisely, a broad coalition of Cold War and cosmopolitan liberals was only possible on issues of development or humanitarianism, or, in the late 1970s, on human rights, and only possible until pursuit of such policies ran afoul of mainstream liberal nationalism or Cold War sensitivities. Legal internationalists could be good fair weather allies for the Cold War foreign policy establishment, but they always seemed soft on the power questions: intervention, anti-communism, foreign intelligence, and military affairs.

To an extent, this reflected a strategic divide within United States liberal internationalism between a majority, styling itself 'realist', who saw the United States playing a privileged and often lonely role defending democratic values in the harsh world of foreign relations, a world which required all sorts of uncomfortable alliances and in which commitments must be backed up by the use of force, and a minority, including most legal internationalists, who preferred to engage all kinds of regimes in a common discourse in the hope of eventually socializing the bad guys rather than excluding, containing, or defeating them. In their internal debate, each liberal camp thought itself both humanist and realist, and understood the other to threaten both liberal values at home and the pursuit of a more liberal international order.

After 1980, of course, the entire liberal establishment was placed on the defensive as the struggle for multilateralism was displaced by military considerations and unilateralism. In this period, the remaining legal internationalists – pursuing quixotic campaigns against nuclear weapons, against the use of United States military

force to counter perceived terrorist threats, in favour of human rights against our authoritarian allies in South America, Africa, or Asia, or in favour of relaxed immigration and asylum rules – became an embarrassment for out of office Cold War liberals hoping to prove their mettle and fitness for election.

As we might expect, after 1989, all sides declared victory and the mainstream internationalist liberals, repackaged as ‘neo-liberals’ for the post-welfare state age, again sought the stage. To an extent, of course, recent efforts to rewrite the new United States hegemony and the spread of deregulatory free trade as the triumph of political liberalism have seemed as hollow as they are brash. They seem both to smuggle jingoism into the tradition of cosmopolitan internationalism and to so firmly ally themselves with the politics of the Washington Consensus on free trade as to betray the humanist tradition of political liberalism’s earlier commitments to social, racial, gender, or economic justice. Although, the term ‘liberalism’ continues to surface in the United Statesean literature on international law, it is a much chastened – Thatcherized or Reaganized – term, aiming to re-enter the foreign policy establishment by cleansing the discipline of its earlier substantive commitments to focus on capitalist expansion and the proceduralist democracy of ‘good governance’ or the ‘rule of law’. Legal internationalists now seem to accept United Statesean hegemony as the inevitable structure of multilateralism today. It is too early to tell if this effort to reclaim the political initiative will succeed. The interesting point is rather how far international lawyers in the United States feel they must go to come in from the political wilderness.

2.3. Legalist pragmatism: a marginal methodology

But the marginality of legal internationalism in the United States is not simply the product of its cosmopolitan position within the old liberal establishment. It also results from the way international lawyers managed the dominant tensions within American legal thought. At least since World War II, United Statesean international lawyers have shared with other lawyers in the United States an encounter with the philosophical traditions of pragmatism, functionalism, and American legal realism, at least in their legal education.²¹ The ideas which emerged from this intellectual

21. We can see the impact of this encounter, at the level of legal theory, in a difference between the approach international legal scholars in Europe and United States take to a common philosophical problem: how can norms be binding upon sovereigns, how can one contemplate a horizontal public law, how can the private law ‘analogy’ really work between states, etc. In the European tradition, broadly speaking, the response has been primarily on the side of norm generation – clarifying the process by which one can say that a given set of agreements or a given history has or has not left us with something we are right to call a norm or rule. The focus is on the origin of rules, a culling of history and social life in the cause of restatement. In such a project, the key point would be to distinguish the norm from habit, rule from rote. In the United Statesean tradition, by contrast, the methodological preoccupation with the possibility for law among sovereigns generates a look less at norm generation than at norm application and enforcement. There are norms when norms are followed. Again we find a culling of history and practice and text, this time in search, not of norms to be restated, but of instances of governmental regularity, communication,

encounter have been described in various ways, but would include rule scepticism – a well-developed and ubiquitous practice of criticizing rules in the name of anti-formalism – and a blurring of the boundary between law and what United States lawyers call ‘policy’, a mix of expert arguments about how disputes should be resolved and institutions developed that opens legal analysis in the United States to all sorts of interdisciplinary input and social considerations which might elsewhere seem more like ‘politics’.

The encounter with these ideas shaped United Statesean international law in some predictable ways, leaving it more open to interdisciplinary argument, more skeptical about the force or clarity of particular rules, quick to criticize one another’s rule based arguments as ‘formalism’: less focused on both states and courts. Every American international lawyer will have learned that the International Court of Justice is far less significant than the network of relations among domestic courts, private arbitration schemes, and inter-state negotiations. As a leading professor of international law confided to me recently: “you know, if the International Court of Justice disappeared tomorrow, I wouldn’t notice.” Students of international law in the United States learn that the state is best thought of as a disaggregated set of institutions, all governed by some combination of rules, habits, and expectations, who interact with a broad range of other institutions, at home and abroad in a social ‘process’. Relations between the United States Trade Representative and IBM or Microsoft might be more important in thinking about the international regulatory regime for intellectual property, say, than relations between the State Department and the Quai d’Orsay.

One way of putting these issues together would be to say that after the encounter with pragmatism and legal realism, for international lawyers in the United States, law is less a matter of norms which are applied by some functional equivalent of the state, than a matter of claims and counterclaims, of bargains and the expectations of actors. A United Statesean lawyer would say that international law is

deference. There are norms where nations behave. In such a project, the line between norms and habits is altogether less pivotal: the point is a regime of predictable behaviour. Where that exists, we might as well call its descriptions ‘norms’. One is tempted here to say that these differences reflect a difference between the common law, with its focus on cases, and the civil law, with its focus on codes. However attractive this idea, my sense is that this is at best only part of the story. The most obvious difficulty is that the British tradition of international law could not be more ‘European’. To me, the difference lies elsewhere, in a very particular United Statesean jurisprudential development: the encounter with pragmatism, sociological jurisprudence, and what we call ‘American legal realism’, beginning with Holmes in the late 19th century. Duncan Kennedy analyzes this methodological American exceptionalism in *D. Kennedy, A Critique of Adjudication: Fin de Siècle* (1997). See also W. T. Fisher II & M. Horwitz (Eds.), *American Legal Realism* (1993). It would not be too much to say that in the United States the dominant forms of legal thought for a century have been in dialog with these ideas, setting international law in the United States in a different orbit from our European counterparts. Although the European legal tradition encountered these ideas as well in the sociological jurisprudence of France, the free law movement in Germany, etc. they were more firmly marginalized from the start. My sense, moreover, is that European international lawyers may see themselves less as exponents of particular ‘schools of thought’: and more as objective instruments of normative elaboration, influenced perhaps by one or another mentor figure of their youth.

the relatively stable 'process' in which reciprocal claims, whether political or legal, are made and addressed – it is the 'structure' for a 'regime' of 'behaviour'; it is a 'discourse' of claims, the 'language' of interstate 'relations'. A typical international law text in the United States will begin by informing students that international law *has often been thought of as* "the law governing relations between states", but the point of the book will be to move the students away from this 'primitive' understanding, to adopt a more complex understanding of 'law' as a sociological phenomenon, of 'governance' as a mixed political/legal process of mutual claim making and communication, of 'states' as disaggregated social functions in a broad civil society, and so on.

But, and this is the crucial point, after pragmatism it is not all 'policy' either. Despite training in the practice of rule scepticism and policy argument, all lawyers in the United States *also* sometimes embrace formal rules and make sharp distinctions between rules and policy, between international and national, between adjudication and political decision making, and so forth. A great deal of legal theory in the United States is a reflection on the management of the tension between rule fidelity and a very self-conscious rule scepticism, between rules and standards, or between norms and policy. United Statesean international law is no exception. Of course everyone doesn't 'balance' norms and policy in the same way. On the contrary – differences between schools of thought about law – as between disciplinary subfields – are often marked by commitments to slightly different mixes of rules and policy. Orientation to rule fidelity and rule scepticism, like enthusiasm about and allergy against 'policy', are also differentially distributed. Some legal fields in the United States have embraced policy more often and enthusiastically than others. Broadly speaking, legal internationalists have fallen on the 'rule' rather than the 'policy' end of the spectrum in the United States. Among legal internationalists, moreover, the traditions of 'private' and 'public' international law differ rather dramatically in this regard, public law internationalist again falling on the rule end of the spectrum.

The inheritors of the private international law tradition – conflicts of law, international business transactions, comparative law, and international economic law – are all policy embracers. Public international lawyers, although sharing the encounter with pragmatism and American legal realism, have tended toward legalism. And in this they are methodological outliers. They have emphasized rules not only out of methodological solidarity with the "invisible college" of international lawyers in other more rule-oriented traditions, a solidarity born of their cosmopolitan sensibility, but also for political reasons within the United States legal intelligentsia. They seem to have concluded that only by expanding the domain of rules and shrinking the domain of policy would it be possible to redeem their particular brand of internationalist liberalism – to restrain the American hegemon during the Cold War while making their claims for 'co-existence' with the Soviet Union seem plausible, and to give their humanism bite in foreign cultures.

Indeed, the school of thought most closely linked to the embrace of policy characteristic of most of the broader United States legal academy after 1945 – McDougal and Lasswell's 'Yale School' – remained a minority strand in the discipline precisely because it seemed unable to criticize American foreign policy in the name of a legal multilateralism and did not embrace a legalist coexistence. Instead, McDougal and his colleagues called on the United States international lawyer to evaluate choices within their field as other United States lawyers in other fields might – on the basis of values which they felt were advanced by the rules, institutions, and policies associated with different schemes of public order. To legal internationalists in the United States, however, it was legalism, not an open-ended policy process, which seemed to provide the only satisfactory basis for 'coexistence' with the Soviet Union – and here internationalist liberals in the United States had a convenient ally in the largely formal and positivist international law texts of Soviet authors like Tunkin. Legalism allowed the liberal internationalist to argue that he was not a communist (he supported the rule of law), that he supported a workable coexistence with the Soviet Union on the basis of agreed rules, that the United States should not intervene unilaterally in the Dominican Republic or Cuba, or Vietnam because doing so would violate 'the rules', and that human rights and standards of human decency should increasingly be respected by all nations.

This strategic attachment to legalism, however, in fact provided only a very weak basis for persuading other United Statesean lawyers to these commitments. Given the policy orientation and rule scepticism of everyone else in the foreign policy establishment, legal arguments for restraint were less persuasive and easily open to rebuttal. Few outside the field believed that international lawyers had really discovered a neutral language of coexistence and restraint, any more than they believed either that the Soviet Union was a formal law abider or that Communist policy makers repudiated governmental regularity. People in the United States foreign policy establishment assumed that Soviet policy makers were policy "realists" just like themselves – that their mutual realism could be understood by diplomatic history or modeled by game theory, but was not likely to be deduced from the historical accidents of legal doctrine or the utopian imaginations of cosmopolitan lawyers. Relations among the superpowers would be managed by hard-boiled realists, clear about national interests and values, who understood the messages subtle political moves communicated about intent, restraint, commitment.

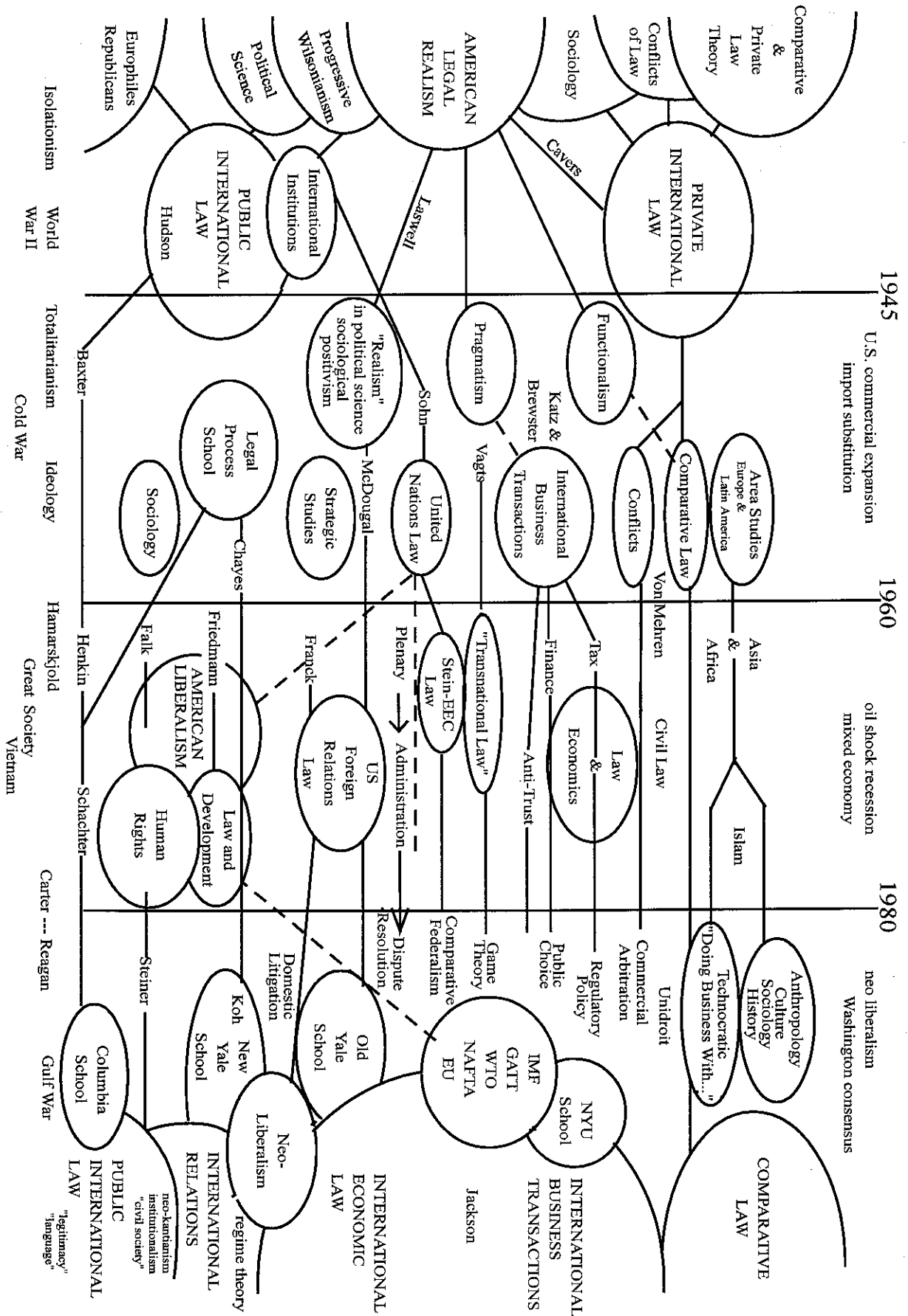
At the same time, legalism seems to have brought something to the professional identity of international lawyers which disempowered their advocacy in the foreign policy process – a judicious posture of self-abnegation and neutrality which demobilized more than it empowered liberal internationalists. As a result, international lawyers were more often fellow-travelers than leaders in the campaigns against United States interventions after 1960. In many ways, the result was a tragic one – a whole generation of committed internationalist intellectuals easily identifiable from a hundred yards as political liberals and humanists disempowering themselves by fealty to a set of ideas about the neutrality of their rule systems neither they nor

anyone else took seriously. One can easily sense the relief after the end of Cold War when they could finally admit that they, like everyone else in the United States legal establishment, had always known that law is political. McDougal and Laswell were suddenly back in fashion. As the editors of one casebook explained in adding the admission that “First, law is politics” to the first page of the chapter exploring “international law as law” in its post-1989 edition, it had become possible to come out “chapter one, page one” now that “the demise of international communism has mooted the significance of Marxist-Leninist ideology.”²²

As a result of this historical encounter between legalism and internationalist liberalism, the tradition of international law in the United States has been doubly marginalized within the United States legal intelligentsia – both for its cosmopolitan rejection of nationalist or Cold War liberalism and for its continued attachment to legalism in a world of rule-skeptics and policy wonks. It is in this sense that we would dramatically misunderstand the project of international lawyers and legal scholars in the United States if we looked only at their manifest contributions to the theoretical project of explaining “how law could bind sovereigns.” A far more significant part of their project has been to use the practice of answering *that* theoretical question – the work of the discipline – to solve a different set of problems. First, how one could be a liberal in the United States and support multilateralism and co-existence in the face of ‘totalitarianism’, and second, how one could be a rule-sceptic or policy enthusiast in the tradition of American pragmatism or legal realism while preserving enough coherence in the international legal fabric to restrain the American hegemon, build a reliable co-existence with the real law sceptics in Moscow and promote humanitarianism.

To get some sense for the play of these ideas within the discipline over the twentieth century, I have placed some of the major tendencies in the discipline on a very idiosyncratic diagram.

22. See Henkin, Pugh & Schachter, *supra* note 8, at 1, iii (1993).



INTERNATIONAL LEGAL STUDIES IN THE UNITED STATES

2.4. Complicating the story: public and private law

One could certainly describe the discipline's development differently. This particular chart is designed to highlight what happened to the fields of 'public' and 'private' international law in the United States to create such a disciplinary proliferation and how these two sub-fields reacted differently to the discipline's encounters, first, with the broad ideas about law represented by pragmatism and American legal realism, and then with political liberalism. The top half of the chart reflects the private law tradition, the lower half the public international law tradition in the United States. Although 'public' and 'private' international law in the United States always differed from their European counterparts, they nevertheless existed in the United States as relatively integrated disciplines early in the century. The private law tradition had a far more thorough-going encounter with American legal realism and bypassed the post-1945 political preoccupations of American political liberalism almost entirely. The private law side of the story is important, in part because it illustrates how narrow has been the path of the public international law tradition which led it to marginality. The private law side of the field has always been a methodological and theoretical innovator, strongly linked to the development of policy, and remains so today. As private international law emerged in the late nineteenth century as a separate discipline it did so in parallel with the field of 'conflicts of law', built on the United Statesean experience with multiple jurisdictions, balancing the policies of individual states within the United States against one another to work out compromises of interstate 'comity', beginning well before the Civil War. American legal realism, pragmatism and the move to policy all happened in this field, as 'formal' rules to resolve inter-jurisdictional conflicts seemed ever more susceptible to criticism.

After 1945, the policy oriented field of 'conflicts' separated itself from international private law and might well have seemed quite overtly political to some foreign ears. The fields of comparative law and international private law in the United States nevertheless felt comfortable embracing a policy solution to conflicts without becoming political in any ideological sense. They felt this way in part because they believed they could identify relatively stable social 'functions' common to societies at similar levels of economic advancement which could be achieved in a variety of technically different ways. They developed, in other words, a self-consciously autonomous professional expertise, a 'policy science', parallel to the 'legalism' of their public law colleagues, directed to identifying ways to fulfill these social functions, often by drawing on other human sciences, from economics and sociology to negotiation and game theory, in a way which did not directly implicate politics or ideology.

In the post-1945 period, three quite different traditions of specialized knowledge emerged on what had been the 'private' side of the international field – all oriented toward a policy understanding of law. First, the field of comparative law, itself split among technical work searching for solutions to the policy problems

shared by industrialized societies, unifying private law and promoting more reliable international commercial dispute settlement, and a range of 'area specialties' building on the academic traditions of comparative politics, anthropology, history, and comparative literature. Focused on the legal traditions outside the Western industrialized world, these area specializations saw themselves building specialized cultural and political knowledge and developing policies for doing business in foreign cultural situations. Second, as American businessmen began investing abroad in the 1950s, a new field of 'international business transactions' was inaugurated which self-consciously rejected the study of legal systems or regimes in favour of focus on the perspective of the businessman who would encounter law coming from a variety of different authorities. To the extent there was a systemic dimension, the orientation was to understand the rules and institutions, of whatever source, which facilitated and hindered international business transactions. Third, coming on the heels of international business transactions, specialists in national regulatory policies which had an impact upon international business transactions – particularly tax, finance, and antitrust – developed advanced specializations in 'international' policy. To the extent one thought about an international regime to facilitate international business – the beginnings of an 'international economic law' field – it was conceptualized in policy terms – identifying the policy machinery necessary to stabilize risk and facilitate transactions: a dispute settlement system immune from national court prejudices, a scheme for currency stability and financial transactions, a trade system to suppress tariff and other national barriers to trade, an antitrust machinery to prevent private arrangements which operated as barriers to trade, and so forth.

Meanwhile, the public international law tradition had resisted legal realism until well into the World War II while pursuing a legalist project of codification and a political project of neutralism and isolationism. After Pearl Harbor the field simply imploded, its realist intellectuals (Hans Morgenthau prime among them) recoiling to political science. Throughout the 1950s the field was an anxious and uncertain one, the dominant figures worried about how one might support 'co-existence' with the Soviet Union and resist McDougal's turn to 'policy' in the face of Soviet totalitarianism and the perceived communist rejection of the 'rule of law'. Reinvented after 1960, the field was more interested in the political project of squaring internationalism or cosmopolitanism with American political liberalism than in methodological innovation. It was in this period that the Columbia School – of Friedmann, Henkin, Schachter, *et al.* – rose to prominence: a United Statesean international law tradition at once recognizable to its European counterparts (if a bit preoccupied with 'soft law') and offering its United Statesean audience a vigorous legalist defense of cosmopolitan liberalism and global humanism. After 1960, the field rode the wave of American liberalism and the Great Society into a series of humanitarian concerns – development, decolonization, and later human rights – where American political interests seemed to overlap with both cosmopolitanism and international legalism. When these projects lost their place in the political

mainstream after Vietnam and the 1980 election, the field drifted, marginal both to the American political establishment and to the methodological concerns of the American legal academy.

It was only after 1989, when American post-Cold War triumphalism suddenly expanded the domain within which the alliance of political cosmopolitanism, political liberalism, and methodological legalism seemed possible again, that the field experienced something of a rejuvenation. Suddenly everything which might be arguably connected to a 'transition to the free market' yielded enthusiasm for an international 'regime' combining democratic governance, strong states, strong civil societies, and free market institutions, uniting United States internationalists across the political and methodological spectrum. The inheritors of the old Yale School became indistinguishable from the liberal inheritors of legal process, international economic law specialists joined neo-Kantians to celebrate the Washington Consensus²³ and an emerging right to democratic self-governance.

The Achilles' heel of the current consensus within the field is less the opposition of colleagues from elsewhere to the fusion of United Statesean international law with the global hegemony of the United States, than the fact that within the United Statesean legal tradition neither political opposition to liberalism nor methodological critiques of legalism have gone away. The relationships between cosmopolitanism and national interest, between expertise and politics, between policy and fidelity to rules – all remain as unstable internationally as nationally.

The surprising thing, given its vulnerability, is that this rather idiosyncratic United Statesean way of thinking about international legal matters is fast becoming the most significant one. In part by embracing the policy orientation of private international law, in part by jettisoning more traditional liberal political commitments, in part by riding the wave of enthusiasm for internationalism in the broader intelligentsia which has accompanied the new American hegemony, legal internationalists feel, for the first time in decades that the wind is in their sails. Whether we focus on the spread of New York style corporate legal practice, with its mix of business strategy and legal advice, the displacement of traditional public international law machinery by the disaggregated institutions of international economic law, the explosion of interest in non-state actors and the private practice of international law, the dramatic expansion of the neo-liberal project of institution building and economic synchronization into the so-called transitional economies or emerging markets, the expanded role of public interest litigation and negotiation at the national level in developing international law in areas like environmental protection – leaving the great multilateral codifications of Rio or Stockholm in the dust – or on the marginalization (often self-imposed) of the International Court of Justice and the mediatization of foreign policy so that everything, from missiles to interest rate changes becomes a 'message' rather than an act of norm generation or compliance,

23. See, e.g., J. Cypher & J. Dietz, *The Process of Economic Development* (1997).

whether we like it or not, the international law world is, for the moment, United Statesean.

And so I have two quite different objectives for these essays – to understand the way lawyers and legal scholars in the United States think about international law and politics, and then to figure out how to react to their thinking. There are, of course, a range of extant criticisms of this United Statesean way of thinking, often developed in Europe. It is said, for example, that our eagerness to abandon the distinction between law and politics is simple the product of our hegemony – it is the weak who need law, the powerful can dispense with it. The marketization of international law – the encroachments of international economic law, of private law, on the public domain – has been criticized as part of a United Statesean political project to jettison the welfare state in the name of an unrestrained market. In this style, when European international lawyers defend a methodological formalism, a focus on the state, or a fetish for courts, they can think of themselves as protecting European cultural patrimony against the cowboys.

To my ears, and let me put it bluntly, all that is simply naive. There may be some connection between the United Statesean way of thinking about law and the American empire, but it is not a connection which a revitalized formalism or state-centrism or methodological sanctimony about the distinctiveness of ‘law’ will counter. In my view, the alternative to the American future will not be found in the European past. It must be invented from scratch – drawing upon the traditions of critique which already inhabit the discipline in the United States.

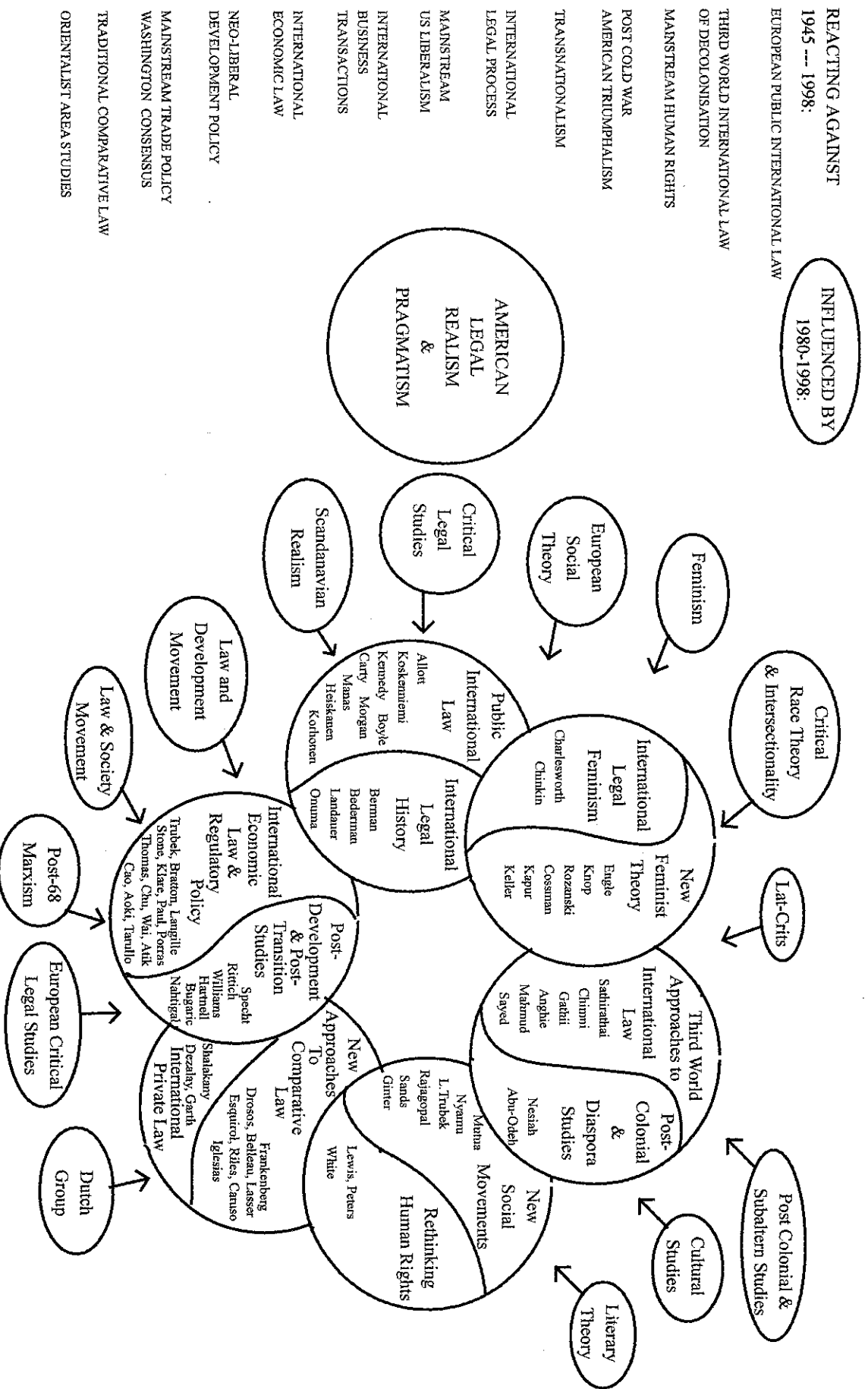
2.5. Outside the mainstream

It turns out that alongside this mainstream United Statesean tradition – in international law as elsewhere – a counter-tradition of criticism has developed. This counter-tradition begins by accepting the transformation of international law into a process, a disaggregated regime of claims and counter-claims. This tradition shares with the mainstream its anti-formalism, its disaggregation of the state, its focus on communication and rhetoric, its vision of judicial and scholarly actors as people with strategies, its enthusiasm for interdisciplinary borrowings from fields as diverse as economics, social theory, cultural studies, sociology, anthropology, or literature. This tradition does not advocate a revitalization of form, of the state, of the public, of a conventional domain of politics or an emboldened welfare state, as a panacea. Methodologically, it shares an image of law as rules *and* policies, and its political commitments are often both cosmopolitan and humanist.

At the same time, this counter tradition sets itself off from the mainstream. On the one hand, we find internal criticism of mainstream work for failing to complete its own anti-formalist project – for continuing ambivalence about the state, about legal form, about sovereignty, and so forth. Criticism of this sort is parallel to that developed by United States lawyers within the mainstream – demonstrating that one or another rule or institution or policy proposed by someone else is less com-

pelled by the legal tradition than it is the product of political choice. The only difference is that here the mechanisms of critique developed within the mainstream field are also directed against the liberal policy conclusions and legalist sympathies of the mainstream discipline itself. The objective is to unearth the blind spots, overstatements, or elisions which are part of the discipline's normal doctrinal or institutional practices. On the other hand, we find external criticism which seeks to link the mainstream to an ideological bias. The bias might be a quite straightforward matter of content or structure: women's concerns are not addressed, women play too narrow a role in the discipline's institutions. Or the bias might be a less visible one: the discipline's argumentative practices make it hard to articulate some claims, apology for the *status quo*, justify empire, etc. This project is a situated historical and strategic one, investigating how one or another mainstream blend of rule and policy may function as a cover or polemic for particular interests.

Most of my own work in international law, as well as that of colleagues in the broader *New Approaches to International Law* project, shares in these critical projects. Our endeavour is to situate the dominant United Statesian international law tradition historically and culturally, to probe its internal contradictions and gaps, and to explore its unstated biases, strategies, and objectives. The goal has been to develop ways of criticizing the mainstream United States approach to international law without relying on a revitalization of the traditions against which that approach sets itself. One way of thinking about this work would be to say that we are trying to figure out how we might respond to the hegemonic claims of legal pragmatism in the United States, to the universalistic and technocratic claims of the new international legal order, and how we might identify its biases and philosophical weaknesses, other than in terms of a revitalized European welfare state. That said, it is an effort which is just beginning, with a number of quite different strands, which might be illustrated by the following diagram.



NEW APPROACHES TO INTERNATIONAL LAW 1980-1998

In my experience, whenever one tells a broad story about a group of scholars, one is sure to leave someone out, to include someone who is sure he or she does not belong, to misrepresent the relationship among people and their ideas, and I am sure I have done so here. But in the interests of a broad, if idiosyncratic introduction, as I see it, there are a half dozen sorts of related work which react against the mainstream traditions of international law in the United States. All these strands are methodological inheritors of American legal realism, pragmatism, sociological jurisprudence, and so forth. All are, in that sense, United Statesean. At the same time, all are self-consciously seeking to reject a part of the current United States international law tradition. There are, of course, other young scholars outside this network who are seeking to develop, extend, influence, defend, remake the various traditions I describe above – neoKantians, neoliberals, new voices on the human rights tradition, and so forth. Those I place on this diagram, however, are reacting against one or another of these United States traditions: post-Cold War triumphalism, political liberalism, the legal process school, neoliberal trade theory or development policy, mainstream comparative law. Some have also drawn on the tradition of critique in United Statesean legal culture to react against mainstream European public international law. Others have drawn on the same tradition to oppose orientalist efforts by first and second generation Third World scholars, to oppose the universalist claims of European and United States international law in the 1950s, 1960s, and 1970s.

The work is not methodologically uniform – nor would its authors agree on a set of canonical propositions. What we have is more a set of overlapping projects of criticism and reinvention which have influenced one another, whose authors are in contact with one another, and who have borrowed, if quite unsystematically, from the same philosophical and political influences. The influences on this new work are also many – ranging from Critical Legal Studies in the United States through feminism, and post-colonial or ‘subaltern’ studies – there may be others. One might organize this work to reflect the broad disciplinary orientations of its authors, the fields within which these scholars seek to intervene – public international law, international economic policy, comparative law, etc. But in many ways more significant are the large group identities whose implications for international law and politics these scholars are seeking to understand, and it is not surprising that these scholars more self-consciously identify themselves as ‘feminist’, ‘third world’, ‘post-colonial’, or ‘diasporic’ scholars. The remaining essays are meant as illustrations of the range of work being done by scholars working in these new traditions. All are efforts to take the tradition of international law out of the wilderness without harnessing it to neoliberal hegemony.

3. THE POLITICS OF GLOBALIZATION: PUBLIC INTERNATIONAL LAW AND INTERNATIONAL ECONOMIC LAW

3.1. A tale of two disciplines

In the last essay, I contrasted the 'United Statesean' and the 'European' traditions of public international law both to highlight the heterogeneity of international law, the quite different political and methodological preoccupations and presuppositions which animate it in different places, and to situate the approach I develop here both in and against the internationalist tradition developed in the United States. In fact, the disciplinary divisions *within* the broad United States international law tradition are as important as its methodological and political commonalities. Regulatory and institutional choices are often the product of more than one internationalist discipline. Over the last few years, I have begun exploring relations between the field of international law (and now when I say 'international law' I mean the United Statesean discipline) and three sister disciplines: international economic law, comparative law, and international relations.

I come to each of these fields as an outsider – a visitor from public international law – which leads me to emphasize their conceptions of public law and governance and to focus on the similarities and differences from the professional discourse with which I am most familiar. As it turns out, each of these disciplines has a characteristic sensibility, a peculiar way of identifying the problems to be solved by international law, and a conventional set of solutions. Each relates to public international law and to the project of international governance in a characteristic way. My own project begins with the hypothesis that the broad domain of international policy science in the United States functions in part by managing a methodological division of labor among these sister fields, even where the participants in each might feel their projects were quite separate.

Let me start by contrasting the fields of public international law and international economic law. The traditional definitions which differentiate them are familiar. Public international law is the 'law governing relations among states', the legal corollary of interstate diplomacy. As the name implies, it is a field of 'public' law. It concerns the rights and obligations of sovereignty and the mobilization of governments to common institutional and normative endeavours. It is a venerable field, tracing its ancestry at least to the Treaty of Westphalia, if not to ancient Greece and Rome.

International economic law, by contrast is a relative newcomer, bursting out as an autonomous field of law only in the last decades. It is defined not by the subjects it governs, but by its regulatory terrain – the law, of whatever origin, which governs international economic transactions. It mixes national and international law, and is rooted in private law – both national regimes of contract or property and international regimes of private law unification and conflict of laws. We might have called aspects of this field 'international private law' some years ago, but the newer

phrase ‘international economic law’ embraces the public law institutional machinery of trade law and policy – General Agreement on Tariffs and Trade (GATT), North American Free Trade Association (NAFTA), the European Union, Mercado Comunitario Suramericano (MERCOSUR), and the rest.

Defined in this way, the distinction between the two fields quickly becomes embedded in a broader narrative. We ‘know’, at least in stereotypical terms, what sorts of people study one or the other. We know the politics associated with each field and which has the upper hand at different historical moments – we know today which is more up-to-date, more fashionable. Some clichés: public international law is studied by leftists and liberals, utopian dreamers, and the Machiavellian future apparatchniks of the foreign ministry. They worry about social welfare and public order. They talk easily about politics, and fancy themselves realists. International economic law is studied by centrists and conservatives, technical people who will become Treasury drones or banking gnomes, and brash entrepreneurs who worry about commerce and trade and money. They talk easily about economics and fancy themselves practical men (and women) of affairs. My sense is that public international law has a chip on its shoulder – our international economic law colleagues are certain to have more fun, more power, more money. Public international law seems somehow old fashioned, quaint in its aspirations and formal in its analysis, in the shadow of international economic law. International private law is cool, creative, forward looking – public law either a tiresome insistence upon the nobility of a ‘public interest’ commitment to human rights or an endless defense of an eroding welfare state, settling each year for less and less.

3.2. Governing in the shadow of the market

These stereotypes are associated with a common story about the shortcomings of the international political class. The indictment, which often comes from the left, focuses on the strength of international economic actors and the weakness of international public order. According to this story, as ever broader dimensions of public life have come to be discussed in international terms (‘globalization’), the terms of the discussion have become ever narrower and more technocratic. It is common to place the relationship between the disciplines of public international law and international economic law at the center of this puzzle: the one asleep with our political hopes, the other furiously weaving our technocratic fears. Many see a lag between the bold new world of international commerce, communications, regulation, and policy which *has* adapted to life in a global village and the international political institutions which have not.

I am particularly interested in the rather widespread perception (common in left, populist, or progressive circles) that the international is somehow skewed against progressive politics, as if some sorts of politics – consumer protection, social policy, environmental regulation – were only possible at the national level or required a form of state and sovereignty which, tragically, the new international order cannot

provide; or maybe as if the whole realm of international government – the GATT, the European Union, Brussels, New York, Geneva – had somehow fallen inescapably into the hands of the right.

International public regimes seem too weak to pursue a political program of their own, while international economic law is too technocratic and deregulatory in ambition to respond adequately to the political needs of national clients or the democratic participation of citizens. The solution seems as easy to see as it would be hard to accomplish: strengthen the institutions of ‘public’ law and weaken the autonomy of international ‘private’ law and the democratic deficit will be solved – hence proposals for a political Council alongside the European Central Bank, for a stronger European Parliament, for a ‘social’ component in NAFTA or GATT.

The idea that politics will be or is being transformed by internationalization is hardly new – it has been ubiquitous in political rhetoric for at least a century. If we leave some utopian socialists and progressives aside, moreover, internationalization has always had the same general valence – somehow the potential for social regulation, for progressive politics, will be reduced, and control of the society will pass from the ‘people’ to one or another group of rootless cosmopolitans. Of course you also hear enthusiasm for internationalization in progressive circles, particularly when they feel stymied by conservative nationalism on the local or national front – at least the international will bring with it the liberal or libertarian spirit of commerce. In their most idealistic moments it may even seem possible to rebuild internationally the welfare state being dismantled at home. Still, even this hope seems structurally limited – what we can hope for internationally will, it seems, inevitably be less than we (at least in the North) have grown accustomed to at home, at best a lowest common denominator of public aspiration, a liberalism of the nineteenth century; secular, pluralist, tolerant, mercantile rather than regulatory or redistributive. In this conception, internationalization means, in short, a move from public to private. The state will be weaker and commerce will be strengthened.

This internationalization seems to have two unavoidable consequences for political thought. First, we will have to reduce our expectations about what public authorities – any public authority – can accomplish; we will have to accept the limitations imposed on regulatory initiatives by the larger, more forceful, inescapable operations of the international market which wear away at sovereignty like waves at yesterday’s sand castles. In this view, trade dilutes the capacity to regulate, perhaps by placing regulators in a market of their own, competing for the favours of fickle financiers. This suggests a strategy for the left: to carve out from the international islands of local sovereignty, regulatory oases for the public interest in the harshly commercial international market.

Second, political cultures, which seem local, will somehow have to receive, adapt to, adopt the international. Politics will itself have to internationalize, seek in Brussels what can no longer be guaranteed in Rome, in GATT what can no longer be bargained by ‘social partners’ in a national parliament. In this view, for example, the protections of a familiar national labour law regime must be won again in the

European Union or the GATT. This view also suggests a strategy for the left: to pursue a progressive agenda at the supranational level.

The conflicts between these two general strategies often define debate on the left. We repeatedly find what seems a defining choice between embrace and opposition to the international – protection and internationalization – whether in debate about the aftermath of Maastricht, about European Free Trade Association (EFTA) membership in the European Union, about NAFTA, or about the role of national or regional autonomy in development. And there is, of course, an analog on the right – to whip the left between the poles of protectionism and abandonment of sovereignty, between refusing the fact of globalization and enthusiasm for international government. Indeed, the defense of globalization comes largely from the right, which shares with the left the general story that globalization will strengthen the technocratic at the expense of the political. But from this point of view nothing could be finer – globalization will complete the critique of sovereignty once and for all.

The relationship between these two rhetorical poles, moreover, is not equal. To the extent internationalization seems inevitable and general, those who embrace it seem modern, reasonable, realistic, pragmatic – those who don't nostalgic, rigid, radical. At the supranational level the public interest seems doomed to settle for less, given the weakness of international public law, the apparent harmony of commercial interests with internationalization and the lowest-common-denominator quality of much harmonized regulation. At its most extreme, thinking about internationalization in terms of these two strategies can leave the left divided and demoralized, arguing in both cases for a return to state power, nationally or internationally, as the state comes to seem ever more an anachronism.

Although this combination of technocratic strength and political weakness is, in some senses, an undeniable description of the contemporary international system, I am nevertheless as skeptical of those who would right the balance by rejuvenating the international political machinery as I am of those who would have us bow to the inevitability of the technocratic. As I read the consciousness of the international intelligentsia, these common sense observations have somehow grown up together, as part of a common puzzle, as if there were a division of labour between two sensibilities – one holds out the political as a promise and the other holds out the technocratic as a fact.

As a result, I do not share the common sense that something called 'globalization' will *inevitably* weaken the 'public' and strengthen the 'private'. Indeed, it seems questionable to me whether the relationship between 'public and private' or 'political and technocratic' adequately captures the central tension in the postwar international policy sensibility. To my mind, this general story of political weakness and technocratic strength depends on a misunderstanding of the relationship between international public and international economic law. Public international law is no longer accurately described as a domain of 'public' law, or as the law doing something called 'governing' relations 'among sovereign states'. And inter-

national economic law is not simply the explosion of private initiative and private ordering. Indeed, the two fields share a largely liberal and centrist tradition we might term 'pragmatic', which merges public and private elements in both disciplines. Nor do I feel a shift in the level at which policy is made will inexorably alter its political content. It does not seem to me that the international policy regime suffers from a general political weakness or is, as a general matter, necessarily more technocratic or attuned to the 'interests of business' than any other governmental unit. I am skeptical about claims that internationalization brings with it a general transfer of power from public to private authorities.

In fact, it seems the redistributive consequences of particular regulatory initiatives, internationally as locally, are notoriously difficult to assess or predict and very little can be said *a priori* about political or legal initiatives simply on the basis of the level of government involved. The shifting and fragmented interests of those participating and affected by exercises of state power routinely complicate and confound our assessment of their efficacy, especially when we try to compare gross aggregations like 'national' and 'international' regulation. At the same time, our expectations about the autonomy of public authority and the efficiency of its law as an instrument of social policy has been eroded both nationally and internationally. You often get the opposite of what you bargained for, principles and rules often seem indeterminate in application, we routinely experience a gap between statutes and social life, and so forth.

If globalization has a political valence, its origins are neither in the politics of international policy makers nor in the absence of an extra-sovereign government which might regulate newly interdependent social and economic forces. The politics of internationalism are located rather in its commitment to a particular form of sovereignty and a particular definition of government, both nationally and internationally. Surprisingly, it is an idea about sovereignty and government which has been universally rejected by contemporary internationalists and is normally thought almost automatically outdated.

But the disciplines of public international law and international economic law nevertheless share a commitment to sovereignty and government as the juridical concentration of power in public hands for intervention in civil society, a sense of politics as public discourse about state intervention in civil society, of law as a technical mechanism to focus and enable an interventionist politics, of power as a force to be juridically concentrated and allocated, of the national state as the primary organ of politics, of sovereignty as a juridical absolute. These ideas are commonly associated with a commitment to the separation of public and private, especially in law. Public law seems the discourse of state action toward a passive civil society, itself structured by the apolitical or consensual rules of private law. Despite criticism of these ideas for over a century, they remain central, if often submerged, elements in the sensibility of public and private international lawyers alike. And it is they who are responsible for the sense of public disempowerment we associate with globalization. To develop this point, I need to go back to the distinction be-

tween public international law and international economic law, to develop the sensibilities of the two disciplines in more depth than the common stereotypes allow.

3.3. Triangles in a void and a banana

If we think of ourselves as international ‘policy makers’, an abstract, professional, and often technical conception of rulership, setting out to regulate some new domain, it often will seem to make all the difference whether one works with the institutions of public international law or those of international economic law. We need only recall the recent struggles over whether the International Labour Organization (ILO) or the World Trade Organization (WTO) should be charged with developing international labour standards. Part of that struggle, of course, turned on an assessment of which institution was more likely to be able to generate a workable scheme of labour protection – with developing countries opposed to regulation preferring the ILO, largely perceived as ineffective at standard setting, and industrialized nations hoping to extend labour protection regimes to the Third World preferring the World Trade Organization, partly because it seemed more likely to ‘work’. Strategic calculations like these about what will work combine short term political calculations with background intuitions and prejudices about the institutions, bureaucracies, and disciplines associated with different solutions.

In this dispute, there were certainly immediate calculations about the bureaucratic, political, and national forces at work in both institutions. At the level of institutional structure, the ILO could ‘set standards’ only by drafting conventions which would need to be ratified to become effective. Developing countries feared that the WTO, once charged with labour policy, would simply encourage developed nations to demand labour protection and wage concessions in trade negotiations, regardless of whether the ‘standard’ had been officially adopted. These narrow strategic assessments were set against a range of broad background ideas. For some, it seemed obvious that the ILO, a public law institution, simply was the ‘appropriate’ vehicle for standard setting. For others, accustomed to flexible or mixed public/private state agencies, there was nothing odd about giving labour jurisdiction to the WTO – organizations can be given whatever tasks we think they can perform. At the same time, the ILO seemed less likely to be effective in part because it was part of the whole unfashionable United Nations public law structure, while the WTO had the disciplinary energy of trade and finance and international economic law.

Some of this was certainly based on a series of misunderstandings – ILO standards could be polemically effective, could even serve as the basis for state-to-state claims, even if not ratified, and GATT parties are already free to make demands about labour regimes which can be analogized to subsidies or dumping or non-tariff barriers to trade. It is easy to imagine that the sharply different sensibilities of these two fields contributed to the sense of contrast, leading policy makers to overemphasize the differences at various levels. To the extent public law in general seems

less 'with it', policy makers may exaggerate the WTO's potential and underestimate that of the ILO. At the same time, disciplinary prejudices might have affected the structure of each institution, or the attitudes of bureaucrats within it about what is possible. Indeed, it is surprising how similar in structure institutions within the international public law family are, regardless of the substantive problem they are addressing, just as it is striking how similar the tools are which international economic lawyers bring to bear on a similarly wide range of policy problems. We are not surprised to find out that ILO functionaries are more preoccupied with their legal 'mandate', for example, or that their institutional structure seems to require a consensual standard before it can act, while the WTO seems open to whatever demands one or another party makes in open-ended negotiations with one another, reinterpreting all sorts of regulatory issues as potential barriers to trade, rather than potential domains for multilateral regulatory consensus. In short, the choice between an international public law institution like the ILO and the regime of international economic law presents policy makers with strategic choices determined by more than the practical requirements of a particular policy problem. It seems at least plausible that their choices are influenced, both concretely and fantastically, by the disciplinary preoccupations and sensibilities animating professionals in different settings.

The most telling difference between public international law and international economic law is their starting point and objective. Whatever its various qualifications, public international law still begins with sovereign states, which it imagines largely as autonomous units drifting in a void. The job of public international law is to bring governance to sovereigns, and the success of the regime is measured in the density of public order, the distance between the regime and an imaginary state of anarchy. More international law is better than less. This disciplinary project is more than mere background – the discipline will often treat particular substantive areas of law or policy problems primarily as opportunities to increase the density of the legal regime. One often finds it said that the solution to a particular policy problem needs to be tempered, even abandoned, because of medium or long term fidelity to the broader regime itself.

Public international law offers public order in two styles. The first is largely horizontal and procedural, epitomized by systems of jurisdiction and state responsibility. Here, the goal is to cabin substantive problems within the boundaries of one or another sovereignty, deducing levels of responsibility from the nature of sovereignty itself. Sovereignty 'means', for example, not allowing your territory to be used as a stage for attacks upon the territory of another. Terrorism is often addressed this way, in the absence of any well developed international criminal law. Likewise the law of the sea – largely an affair of differentiating jurisdictions and sovereign liberties.

The second mode of public order is at least aspirationally vertical – aggregating the wills of sovereigns through the doctrines of sources of law into norms which can be applied, interpreted or enforced by institutions. Substantive regimes of this

sort can be either relatively formal, adjudicative, norm oriented, like the human rights system, or more open ended systems of technical negotiation, vague principles and political accommodation, as in the emerging field of international environmental law. The law of war combines both models – an institutional machinery of norm enforcement and a disaggregated system of claims about the legitimacy of force deduced from the boundaries of sovereignty itself.

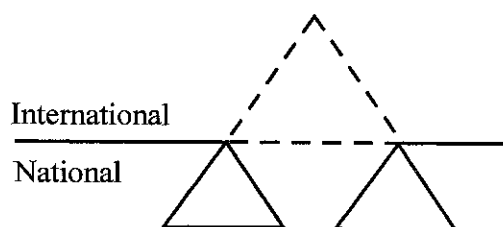
Whatever its precise form, the public international regime approaches a substantive problem, like labour regulation, in an effort to develop more international regulation, compliance, institutional monitoring, normative clarity, etc. There remain many differences within the field – should one work horizontally or vertically, seek to define clear rules and rights or vague principles, rely on national or international enforcement, lean toward legalizing the problem or facilitating a political solution, etc. The contours of the particular problem will certainly play a role in resolving these issues – but so will the discipline's stock of experiences and memories about the consequences of proceeding in one or another way, and so will the broader project of building a more effective 'regime' to link sovereigns into an order which can resist their drift towards anarchy.

The objectives and methods of international economic law could not be more different. The international economic lawyer starts with a completely different fantasy – not sovereign states drifting toward anarchy, but buyers and sellers drifting towards autarchy. Many textbooks begin with a tale of entrepreneurial risk – buyer and seller live in two different countries. Against all odds they want to trade with one another – which we all hope they will do, more for our sake than their own. But there are many risks – they don't understand one another, they don't know one another, they have different business customs and cultures, their national legal systems may be biased against one another, they price their goods in different currencies, etc. The goal of international economic law is to protect Mr Buyer and Ms Seller from such risks – by stabilizing currencies, providing a common language of standard contractual terms, insulating their contract from the vagaries of national adjudication, and, most importantly, protecting the space of their transaction from interference by governments. The goal of international economic law is not more regulation, but more trade. The mainstay is the development of an international private law and the demobilization of national barriers to trade through structured bilateral and multilateral negotiations. The key is the bilateral deal to lower tariffs – everything else in the system is simply a corollary of that agreement.

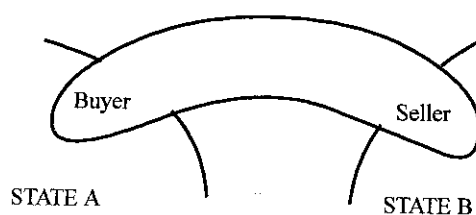
There is a role here for government, to be sure, both nationally and internationally, but it is a limited one – providing the background structure for stable transactions (monetary stability, enforceable private law, military and police protection) and liberating buyers and sellers to trade with one another at market prices (tariff and subsidy reduction, antitrust enforcement, anti-dumping enforcement). There is also a theory about international governance at work, which foregrounds the bilateral or multilateral bargain and the process of ongoing negotiation over the institutional enforcement of consensual legal norms. And there is a theory of law, both

private and public. Resources will only be allocated efficiently by buyers and sellers if the regime of property rights and contract enforcement facilitates deals to move resources to their most productive use – both between individuals and between national economies. Of course this leaves many questions open – how aggressive a scheme of adverse possession, how many excuses not to perform a promise – but it nevertheless provides an orienting spirit for arguing about such matters. Public law provides a structure for bargaining more than an enforceable setting for compliance with rules. Here also much is open – how vertical or horizontal a setting, how binding its results, what mechanisms of enforcement, etc. – but again, these questions, so familiar from public international law, are now to be discussed in the spirit of trade liberalization rather than regime construction.

I customarily illustrate these differences with two little pictures like these:



Triangles in a Void:
International Law



The International Trade Law
Banana

For public international law, success means the construction of a regime which can regulate the relations among the triangles. For international economic law, the point is to keep the international trade law banana within which the buyer and the seller transact free of governmental intervention. For both regimes, these images are largely inaccurate. We all know that sovereigns are not really equal triangles, that other actors play an increasing role in international law, and so forth. We also know that most trade is not between buyers and sellers who are strangers to one another – that is much more likely to characterize domestic economic transactions. In fact, most international trade is bartered, or conducted at administrated prices between units of a single transnational entity, or occurs between repeat players. Nevertheless, the two images are part of the imaginary background against which the two regimes operate. If we regulate labour through the ILO, we can expect a series of universal standards promulgated by collective consent and enforced through an array of institutional machinery – reports, technical assistance, etc. If we proceed through the WTO, we can expect a disaggregated effort to reimagine national labour laws as potential barriers to trade and then bargain them against other concessions.

In this sense, the one system seems regulatory in the extreme – the other profoundly deregulatory. And yet, it is not at all clear that the results would be that different – at least not in any way one could predict in advance. It is not the case, for example, that international economic law is about ‘policies’ and public international law about ‘rules’ – both are about both. One is not more ‘legal’ or ‘formal’ than the other – international economic law is astonishingly formal about the tariff bindings which provide the backdrop for interstate bargaining, as it is about the private law rules whose very formality ensures their insulation from the interpretative prejudices of national judges or international arbitrators, just as public international law has come to understand governance in symbolic and discursive terms, as the product of an open-ended policy process. Neither is the difference well captured by the distinction between public and private – both disciplines embrace both domains of law and are rather blurry about the distinction between them. Nor can we say that the fields are ideologically different, with international economic law the domain of ‘conservatives’, and public international law the domain of ‘liberals’. In fact, the distribution of broad political commitments among professionals seems rather similar in the two fields.

Nevertheless, the imaginary worlds within which professionals debate these common issues differ quite dramatically. The old policy chestnuts of ‘rules v. policy’ or ‘law v. politics’ or ‘vertical enforcement v. horizontal bargaining’ look different when discussed in the search for a better governance regime than when discussed in the spirit of trade liberalization. Of course the same policy might well be pursued in both – say favouring capital mobility and labor immobility to enable low wage strategies by developing economies, at least to some very low minimum standard, while demobilizing and reducing returns to labour in industrialized societies. One could do this with an international economic law regime which defined

both wage supports above a very low 'basic human rights' standard and legislative support for labour organization as 'subsidies' or 'non-tariff barriers to trade' and then encouraged bargaining, or with a public law regime which procedurally allocated responsibility for labour regulation to national jurisdictions except in accordance with agreed international substantive standards. In fact, such a policy might best be pursued by the two disciplines in a sort of unstated partnership, where the weaknesses of each facilitated the project of the other. For example, from the point of view of international economic law, the formal allocation of jurisdiction over labour to national authorities, like a formal system of property rights at the level of private parties, provides a starting point for bargaining, just as the existence of a potential for international substantive regulation, particularly if unlikely or ineffective, provides an outlet for concerns about the social consequences of the bargains which are struck. If you are worried about low wage strategies or race to the bottom, then try to engage the public law machinery in establishing uniform or harmonized standards. To understand this sort of implicit partnership between these two disciplinary sensibilities, we must look more carefully at the two regimes.

3.4. The cosmopolitan regime of international economic law

At first blush, it does appear that this regime – if the decentralized mechanisms of international private law and the institutions of the GATT and WTO can be called a regime – aims precisely to replace national public politics with an international private technocracy. Or, perhaps more correctly, to harness national political elites to the objectives of a liberal international commercial order, in which many types of domestic political activities and regulations will be eliminated or downplayed. Broadly conceived, the international trade regime divides traders and trade relations into the normal and the deviant. Normal trade is open, structured solely by comparative costs and pursued by private actors without government intervention. Normal traders are diversified, developed economies with stable currencies that free private enterprises to participate in trade without what seems abnormal state support or regulation. Everything else – subsidies, dumping, cartels, dependence, instability, state trading, underdevelopment, undue vulnerability to imports, exchange rate instability, or price supports – is abnormal.

In normal situations, governments adopt a passive *laissez faire* attitude toward international commercial activities which are supported by the background norms of 'private international law' – rules about property and contract, mechanisms to stabilize jurisdictional conflicts while liberating private actors to choose forums, and *ad hoc* mechanisms of dispute resolution. These facilitating rules seem outside or before the fray of political struggle or regulatory policy and somehow outside the realm of public state 'sovereignty' so sharply criticized for its formalism.

The dominant players in this scheme are private traders, and to a far greater extent than in even the most *laissez faire* national system, they legislate the rules that govern their trade through contract. And when governments do participate, they

operate 'commercially' – as private actors. In normal situations with normal trading partners, tariffs, quantitative restrictions, subsidies, and any other national public activity which can be interpreted to 'distort' the flows of trade are to be reduced to a minimum. Such national state public interventions, if only as a result of the arbitrary formalism of national jurisdictional boundaries, are only likely to get in the way.

The international economic law system itself is a decentralized scheme of interstate bargaining, as in the Uruguay Round, aimed either to reduce government involvement in commerce on a reciprocal basis or to strengthen national commitments to a functioning regime of background norms supporting commerce. Government 'intervention' is permitted as a sanction against a trader which acts abnormally or unfairly – its imports may be restricted or subjected to special duties, its domestic competitors may be subsidized or protected while they 'adjust'. As it turns out, of course, the international trade regime is overwhelmingly composed of exceptional measures designed to overcome perceived abnormalities or unfair practices, and the image of 'normal' traders remains largely a fantasy, particularly where underdeveloped economies are involved. Nevertheless, the important common point is that government action in all these situations – like all other public activity which impinges on free commercial exchange – is figured as exceptional.

In this overall conception, it *does* seem that internationalization will alter political culture, reinterpreting and reducing the role of the state, will, in effect, complete the antiformalist critique of state sovereignty. The state's role is either passive, like a map, staying out of the way as economic activity flows about, or facilitative, enlisted as exceptionally may be necessary in the implementation of international commercial objectives. All other national political activity is just mud in the gears. The national political arena works best as a mopping up operation, attuned to the needs and rules of the international regime and managed in the spirit of liberal trade. National actors will generate synergy when they implement and translate the imperatives of the trade regime. This national authority is welcomed into the international trade regime, and internationalization poses no threat to it, indeed even requires national policy of this sort. But governments constantly seem tempted to operate in a different, more parochial spirit, to misuse or interpret cynically the facilitative rules of international economic law. Such national policy making, which fancies itself autonomous, unitary, or sovereign, which relies on outmoded images of autonomy and seeks to subvert the spirit of free trade, seems incompatible with internationalization. In this sense, you might say that the international regime is tilted against innovative national regulatory initiatives and brings deregulatory pressure to bear on the national political decision making. National social or consumer protection or environmental policy seems automatically at risk of seeming an impediment to the 'needs' of international commerce. It is important, however, to qualify this observation in three crucial respects.

First, the international trade regime, even at its most imperious, does *not* see itself disabling the *mechanisms* of national or local legislation, does not aspire to re-

place the institutions of public law, still less to establish an international state. International economic law reorients us away from the *level* at which the regime operates and toward its substantive *spirit* or policy orientation. The international trade law regime is a *mélange* of law and non-law, institutions and non-institutions, a scattered array of obligations and sites for bilateral or multilateral engagement. As a result, the international trade law 'manager' might as easily work for a national as an international governmental body, for a corporation or a union as for the state, and so on. The point is the *spirit* with which he or she manages or makes policy choices.

International economic law is a complex edifice of institutions and treaties, of which GATT is the most important. But what has distinguished the international trade regime is the vague, loose, open textured nature of its legal regime. Maybe the GATT is an international institution, maybe it is not, maybe the GATT is a binding treaty, maybe not. The most basic provisions are riddled with exceptions and sectoral exemptions, the only available enforcement mechanism a shifting process of consensual dispute resolution and bargaining. Managing interdependence simply means enhancing the rules and practices which bring stability and growth to the international economy. It is in this sense that the sophisticated practitioner sees the spirit of this regime to be far more important than its legal form.

The second qualification comes from the observation that for the international economic law regime, this spirit is a very flexible thing. There is no clear sense about the particular international or national rules that are *in fact* facilitative of commerce or that can be certified *a priori* to be in the spirit of liberal trade. Even the most basic rules against subsidies or dumping are acknowledged to be far too vague and contradictory to be self-executing. Sometimes these are helpful, sometimes they are not. As for national legislative regimes, as viewed by international economic law, sometimes they are hidden subsidies or hidden barriers to trade, and sometimes differences in regulatory cultures are necessary to sustain comparative advantage. Although particular rules will often be opposed in the *name* of free trade, it is almost impossible to know in advance if this opposition is in good faith.

In fact, every sophisticated international economic law expert knows that you need regulation to have a market. And just about any national regime can, in fact, be accommodated to the international economic law regime – even the regimes of non-market societies, developing countries, countries with unstable currencies and so forth. The international trade regime prides itself on an ability to design appropriate interface mechanisms which will permit the widest diversity of national regulatory regimes to participate in the international economy. In this sense, it is simply not true that participation in international commerce compels or precludes any particular national political or legal regime as a matter of logic or ideology. Even the Chinese communist regime might be accommodated to GATT.

The international economic regime, in short, although it advocates public management attuned to the 'needs of commerce' and seems to figure national state action as exceptional, as unnecessary or unwise formalism, erecting 'barriers to

trade', in fact does not give the 'needs of commerce' any firm content or status. There is no international public order mandate other than the bargains struck by states themselves and any national political activity can be defended and accommodated. If we take the international economic law regime as a whole, then, it would be a misunderstanding to think of it as compulsorily narrowing the range of national political options in any conventional sense. Nor would it seem to require a more technocratic style of government. It is true that the liberal policy manager will be attuned more to the spirit of trade than to parochial political concerns, but the mainspring of the international regime which will discipline national parochialism is precisely the most aggressive political bargaining and competition among sovereign regulatory establishments.

In this sense, the international economic law regime is more than a set of legal forms – it is also a lived sensibility, a practice, a social form. This common sensibility is a form of cosmopolitanism whose policy scientist lives in a fluid world, outside or perhaps beyond the neat jurisdictional delineations of public authority. He is concerned about harnessing public and private actors to the management of complex forces – public and private, governmental and commercial – which constitute the international market. His goal is less a strengthened international order than a widespread and vigorously liberal spirit. This cosmopolitan world is an ethereal rootless space, suggestive of international finance and private commerce, associated perhaps with New York or Frankfurt, or Hong Kong. In this world, sovereigns are marginal, bundles of rights to be avoided or deployed. But this cosmopolitan world is not a 'private' world. Quite the contrary, it takes for granted, or even promotes a kind of decentralized international public order. As a matter of temperament, it leaves room for – is tolerant of – all sorts of national and local political initiatives. All we can say is that it is antiformalist about public law and institutions, at all levels. But so is just about everyone else.

To substantiate our sense that internationalization will weaken the public and strengthen the private, we must look elsewhere. But the regime of international economic law gives us two important clues about our intuition. The first clue is international economic law's attitude towards private law. The international trade regime's claim to leave the public capacity undisturbed is false to the extent the international trade regime strengthens the idea, long attacked, even abandoned nationally, that the realm of private law – contracts, property, etc. – is an apolitical realm, merely supportive of commerce, immune from public or political contestation or without redistributive consequences. And indeed, even as international economic law eschews public or political ambition, remains agnostic about regulation, both nationally and internationally, it holds firmly to the idea that facilitating international commerce means, at its minimum or at its core, defending the ability of market actors to rely on the norms of (largely national) private law without hindrance. The distinction between normal and abnormal is marked by a set of unstated assumptions about the 'appropriate' national balance between public politics and private commerce. A 'normal' allocation of public and private will allow eco-

conomic factors to flow freely across borders, unhindered by the formalism of jurisdictional concerns, liberated from the old world of local political interventions. In fact, the world of international private law contains a combination of hyper-formality (standard terms, absolute property rights) and 'reasonableness', or 'comity', even policy, of conflicting rights and clashing institutional prerogatives, which opens it to the pursuit of various political agendas. The bargains which would be struck among buyers and sellers would be different in a scheme of property rights with very aggressive permission for adverse possession of unused assets – characteristic of many Third World land reform schemes – than in a scheme permitting absentee owners to hold unproductive plots indefinitely. Similarly in a regime whose default rule assured buyers of credit from the seller or offered broad excuses for non-performance.

The second clue to international economic law's contribution to our intuition about internationalization's inevitable alignment with the 'needs of commerce' lies in international economic law's rather flimsy sense of the politically possible – in its low aspiration for public policy. To the extent governments deviate from its ideal or impinge on its rules, there is not much that the international economic law regime feels it can or should do legally or politically. All the international economic regime seeks, at its most sophisticated, is that such local governmental initiative remain *transparent* in the hope that as particular measures become visible, a decentralized process of bargaining will lead to their termination where they hinder the spirit of liberal trade. The point, in short, is a matter of spiritual orientation in the policy class, a vigilance about duplicitous government action which belies the spirit of liberal trade. This attitude makes it difficult to credit the cosmopolitan's easy assurance that any loss of national regulatory capacity can simply be made up by international – or European – regulation. To explore the suggestion that an international *public* law regime could take up the slack, however, we must look again at the discipline of public international law.

3.5. The metropolitan world of public international law

If we still retain a feeling that somehow internationalization will cramp our political style, it is of course possible to compensate by adding international regulatory machinery to the decentralized international economic law regime, transferring to the international arena the full throated regulatory and political culture we are used to at the national level. It is quite usual to feel that the international economic regime can only be subjected to a public political control by building international replacements for the regulations which we think of as having been able to tame and channel national market forces, preserving redistributive bargains struck through national political struggle by reproducing them in Brussels or Geneva, or New York. The international economic law professional may be quite enthusiastic about this effort, may even help to promote it, and will usually hold out the *promise* of a

substantive international legal regime which would/could cure whatever political or public deficit remained after the internationalization of the commercial system.

And yet the mechanisms for doing so seem so cumbersome and inadequate. We might trace our sense that internationalization moves politics from public to private, strengthens commerce at the expense of the state, to the unequal relationship we intuit between the international economic law cosmopolitan and his public international brother. Indeed, the world of public international law, like the institutional apparatus of the United Nations family, seems hopeless in the face of the international market. Public international institutions seem, as they have seemed in every generation, far too focused on the state to regulate market actors, and far too formal in their approach to law to be able to construct a modern market regulatory regime. International institutions have too state-focused an attitude about politics and are entirely too dependent upon outdated notions about sovereignty to be effective. Their bureaucracies have become bloated by sovereign patronage, their normative contributions more rhetoric than regulation. International institutions seem committed to imitating a form of sovereignty which is no longer available, even nationally. Moreover, the public international regime seems to operate with an entirely different sensibility from the international economic order. It is a sensibility which seems, to the international economic lawyer's ears, not to have absorbed the antiformalist critique of public sovereignty.

Like the policy mavens of international economic law, public international lawyers and institutions share a sensibility or style – a style which we might term 'metropolitan', if only to contrast it with the particular cosmopolitanism of the international economic lawyer. The metropolitan lives in a radial space rooted in international capitals like London or Paris and linked to the world of colonialism as much as to the United Nation's new world order. This is the international world of war and peace, norms and national interests, intergovernmental interventions, cultural representations, and universal rights. The metropolitan lawyer or policy scientist governs a conceptually delineated space arranged in interconnected levels, planes, or spheres of international and national, each related to the others as jurisdictional arenas for public policy development and implementation. This metropolitan situates himself firmly with the international and worries about the triggers, conditions, and opportunities for intervention in the national. Despite his repeated gesture against national sovereignty, he works for sovereignty's renewal, if at the international level. He is concerned about government and administration, and beckons the intelligentsia to a personal commitment to public service with an international orientation. From this perspective, the fluid world of the cosmopolitan imagination seems unmanageable. The metropolitan seems ham-handed around the suave cosmopolitan – rooted in precisely the forms of sovereignty and exactly the jurisdictional boundaries which must be set to one side to manage effectively in a liberal spirit. To the extent that internationalization will mean the displacement of the public sovereign order by private rationality, the metropolitan, of course, is put at an automatic disadvantage.

Indeed, we might read these two styles, taken together, as a sort of collusion to eviscerate the public or the political and eliminate the force of social participation and collective responsibility from international life. In this familiar view, the public is attacked by a self-effacing (largely private) cosmopolitanism and left undefended by a (largely public) metropolitan imagination cross-dressing its theoretical obsession with the unsolvable riddles of sovereign order as pragmatism about world public policy. There is a lot of truth in this *pas de deux* of cosmopolitan days and metropolitan dreams.

A great deal of the urgency in the progressive case for building international institutions has always come from the fear that the international regulatory project would fall behind the natural advances of the international market. In this view, technology and a naturally shrinking globe are creating a global economic area as a matter of fact, while the international political projects of regulation remain wedded to the false boundaries of state sovereignty. It is only the *public* realm which is too formal, too focused on the state, too narrow in its conception of politics, outdated in matters of language. The *private* sector is certainly not hung up on jurisdictional boundaries and imaginary authorities. The urgent rejection of state sovereignty by public international lawyers and their embrace of international regulatory projects at least partly reflects a desire that the public realm catch up with the private. Hence the new-age ambition to learn from the market that we might contain its excesses. The market's slick modern flexibility makes earlier international institutionalists, indeed everyone associated with public law and culture, seem hopelessly weak and out of date.

But we must qualify this sense of public inadequacy in important ways. If the international regulatory project were purely public, and the international economic regime purely private, this problem might well arise. But, as we saw, the international economic regime, the cosmopolitan's international order, does not reduce the realm of the political – it simply seeks to harness it to the liberal spirit of international commerce. There is no structural demobilization of the public. Indeed, the public may expand to a wide range of local, international, and national institutions. Similarly, the sophisticated metropolitan regulator is not focused exclusively on *public* order – quite the opposite, the most sophisticated international regulatory regimes are precisely arranged as partnerships between industrial, non-governmental, and government actors. Nor, it turns out, is the contemporary public international lawyer a formalist – in fact, public international law has fully absorbed the critiques of formalism about sovereignty, has completely adapted to the most decentered sociologically inspired understanding of the international public law regime and the most relativist or rhetorically up-to-date notions about the symbolic rather than the literal quality of normative discourse. In this sense the international and the national differ little – we've lost faith in the formal efficacy of public law nationally as well as internationally, retain faith in post-formalist public order for both the nation and the world.

Why then does international public law seem weak, the international trade regime strong? Where are we to lay our sense that internationalization will narrow politics, render our public thought technocratic? One clue might be the quite common view, unarticulated but common to metropolitans and cosmopolitans alike, that only international governments must be made, while the international market makes itself. In this view, the international government that will be erected, whether it will be made nationally, locally, regionally, wherever, will be political precisely to the extent it is *public* – and by this is meant a juridically concentrated site for active intervention in a naturally occurring private terrain. This makes international economic law seem passive, accommodating a natural force, while the public international legal order seems active, trying to construct a regulatory apparatus. It also makes the international economic regime seem comfortably antiformalist – eschewing the construction of sovereign forms – while the public international lawyer seems unable to do without the only legal tools available to consolidate political power for intervention and regulation.

As has been recognized since the last century, this whole set of ideas dramatically obscures the process by which a market is constructed – the choices required to elaborate, enforce, and interpret the background norms of private law, the financial and other service institutions which must be put in place. It not only makes the state seem too active, too able to will, to govern, it also makes the private seem too depoliticized, too immune from contestation, outside the proper scope of government. In some sense, it is impossible for the public to lag behind the private, or the government to lag behind the market. The idea of a lag simply expresses an unwillingness to treat the entities and choices which *do* structure the activities of private actors as open to public debate or participation. And in some sense it is impossible for public law forms to lag behind private pragmatism or efficiency. Anti-formalism only about public law simply obscures the political choices and roles of private law.

We might lay our intuition that internationalization will bring with it a narrowing of political possibility not to any axiomatic move from public to private which will accompany internationalization, but to an intensification of this false image of the politics – or un-politics – of private law, an idea which also plagues our thinking about national political activity. For both the cosmopolitan and metropolitan international lawyer, it seems obvious that a system of private transactions operates outside or before the sovereign, constituted on the basis of a different sort of politics, perhaps more minimal or consensual. For the metropolitan internationalist, internationalization will simply place this private sphere in the context of an international rather than a national public sovereignty.

The difficulty is that, for the moment at least, it seems that the project of building an international public order which could perform this regulatory feat must remain a *dream*. And it must remain a dream not least because the legal and conceptual tools to construct such a juridical concentration of political authority, as we have learned from the antiformalist critiques of national public law and the mecha-

nisms of the welfare state, are not available. Even were we to succeed, we would simply have duplicated internationally precisely those outmoded regulatory forms rooted in formalism which have failed at the national level.

The persistence of this idea makes it less surprising that the problem of internationalization would be perceived as a *general* one which could be solved by a general institutional form. If the problem is the erosion or inadequacy or rigidity of the national public state, rather than dissatisfaction with the redistributive or other consequences of one or another particular decision, it seems only natural that the solution is to strengthen the general international public order – almost regardless of the details of particular issues. To the extent those choices are embedded in the regime of private law, they will remain outside the discussion. Indeed, for all the hand wringing about internationalization, this focus on the *level* at which public order is to be erected makes it possible to talk about reforming the entire international institutional and regulatory system, and talk about it as a progressive project, without talking about the specific redistributive consequences for anybody.

3.6. The European Union: politics is always somewhere else

It is worth looking for a moment at the European Union – the most developed international regime which might evoke our concern about the politics of the international – because it has been structured by the interaction of an economic and a political idea which track, in some sense, the cosmopolitan and metropolitan sensibilities animating the broader international legal and political regime. The European Union *does* seem to reduce the realm of the political, shrinking the public sphere as it strengthens the hand of commerce. It does so mainly through its focus on building an ‘internal market’ in an institutional structure which privileges the new forms of administrative governance over old-fashioned parliamentary sovereignty. The European Union has even developed a name for the phenomenon: the ‘democracy deficit’.

The European Union’s economic idea is sophisticated and cosmopolitan. It combines deregulation and technocratic expertise. The overriding idea is to build an ‘internal market’ which allows the free play of commercial forces throughout the community unhindered by the formalities of national jurisdiction. National governments in this vision will simply be left alone, urged or required to stay out of the way, or placed in a structured reciprocal negotiation to reduce impediments to the free movement of the factors of production among the member states. The internal market is conceived to liberate private forces over a larger geographical terrain by dismantling national government, regulatory differences, and tariffs. But the regime is not intended to replace national public authority with international private authority. Quite the opposite. The economic regime will require a harmonization of regulation, an aggressive antitrust regime, and a continual bargaining among public authorities about their regulatory efforts.

The tools to build the international market are large scale legislative and administrative interventions. The objective is deregulation, the means expertise. Broadly speaking, the implementation of the famous internal economic freedoms (free movement of workers, goods, and capital, freedom of establishment, freedom to provide cross border services) has repeatedly moved from liberalization to regulatory harmonization through either the setting of minimum standards plus mutual recognition, or the development of a unified European Union wide regulatory regime. Taken together, the European Union's economic freedoms and policies have produced both a deep governmental presence in the European market and a transformation of deregulatory ambition into sophisticated technical regulation, a move from opposing national regulatory distortions to promoting a unified and technocratic standardization.

The European Union's political idea is similarly advanced, combining centralization with sectoral functionalism. On the one hand, the European Union is committed to a project of government building, coordination, harmonization, and unification of legislation. This is a classic metropolitan endeavour – sneaking up on national sovereignty, replacing it with a European public law. As a modern metropolitan effort, however, the European Union has from the start differentiated this government building project from the historical project of nation building, or the project by which the great state institutions were built in the last century. In the sphere of public law and politics, the European Union's institution building enterprise has fully absorbed the anti-formalist critique of the nation state. For Brussels, the European legislative and legal structure is the technical implementation of legally delegated sectoral competencies rather than the juridical concentration of absolute authority. As a result, the politics of Brussels cannot be equated with the territorial mass politics we now associate with the late nineteenth century.

For one thing, the political combination of centralization and sectoral functionalism has rendered the European Union's governmental apparatus less visible than a more conventional national liberal market democracy. Because the Brussels political apparatus is structured to supplement, complement and sneak up on sovereign states, rather than displace them, the politics of industrial policy and market intervention remain oddly difficult to locate, submerged at both the European Union and member state levels in a self-image of formally limited administrative action. The political arguments which move the establishment in Brussels are not rooted in the implementation of a party political program. Brussels responds, on the one hand, to apparently depoliticized, small scale, and technical arguments about the efficient or most appropriate form for regulation, and on the other, to arguments about the impact of a given regulatory initiative on the *general* ambition to build or extend the internal market idea at the European level. The European institutions acknowledge only a politics which responds to the imperatives of technical expertise and 'Community building' or 'establishing the internal market'.

At the same time, both in Brussels and in the national capitals, this political regime is able to pose as the legal implementation of a politics established elsewhere.

The European Union is either technical and administrative – or political in the very limited sense that it establishes itself as expertise in service of technical necessity and as a legislative instance which opposes the politics of government. In European Union related matters, the member states seem similarly depoliticized – they are either implementing European Union legislation or adjusting the imperatives of an internal market to their own largely executive sovereignty. At the same time, the familiar forms of political life have been transformed as they have migrated to Brussels. The European Union decision making process has shifted legislative competence from parliaments to the executive as it has moved authority from the regions to the center, fragmenting the state. The administration has become a more transient and flexible process with significant legislative authority and responsive to the technical political imperatives of expertise. The judiciary has transcended its classic role as keeper of the dogmatics of constitutional limitation, although the Court, rather than the elected Parliament remains the only institution empowered to control the executive organs. Perhaps most dramatically, the European Union has institutionalized the Parliament as a promise, a place holder for the democratic aspiration. In the complex practice of advisory ‘co-decision’, the administration and judiciary are its closest allies rather than competitive adversaries. All this transpires with only the most vague commitment to the classic human rights norms we associate in our more nostalgic moments with parliamentary democracy.

The result is a broad political culture with a technocratic and legal face, in which politics is treated as having somehow already happened elsewhere – in the treaty, or the European Summit, or in the member states, or in the Council, and so forth. The political instance is freed from the institutions and pressure points of a mass politics and responsive to the bureaucratic imperatives of managing ‘industrial policy’ and the wishes of member state governments. Politics is either an aspiration for institutional designers or has been transformed into a management problem for updated institutional players. This democracy-as-management vision is nowhere more startling than in the bizarre Keynesian discussion about the European Union’s ‘democracy deficit’. Democracy has become a policy orientation. On the one hand, in a market oriented governmental structure of delegated powers, institutional reforms lag behind increasing regulatory competencies. On the other, popular perceptions of legitimacy place an unnatural limit on the system’s ability to respond flexibly to a changing market. The result is a structural legitimation deficit that must be managed by policies directly engaging the ‘European citizen’ (signage changes, coinage of the Euro, education about European rights and culture, etc.) and a continual process of institutional reform in which participatory forms are introduced once difficult decisions in new areas of competence have been made and a domain of policy has been routinized.

Well, there is much not to feel comfortable with in this structure. The European Union seems to track one’s worst fears about the internationalization of public life. The political has become technocratic. The government exists only to serve the market. Together, the cosmopolitan and metropolitan sensibilities seem to have

guttled the regime of any site for political engagement and turned it over to the logic of international commerce. But we must be careful. This proves too much and too little.

One difficulty is the nagging feeling that there is nothing *unique* about the European level at which all this seems to have taken place. Indeed, we are familiar with precisely the same sorts of developments in many national states – even cities. It is only against the implicit comparative background of a ‘sovereign who could really intervene in the market and get things done’ that we blanch at this modern Brussels confection. But this nostalgic image of national political cultures is itself mostly fantasy. It is simply not true that ‘the state’ or the ‘legislator’ exist as formally delimited political instances onto which the law concentrates absolute authority for intervention in civil society. Or that civil society is a depoliticized terrain awaiting state regulation or intervention. In an ironic way, the whole drive for internationalization began where faith in this idea about national politics waned – began, in other words, with an antiformalist critique of public law and sovereignty, and with awareness of the politics of adjudication, the policy choices of private law, the public authority of property holders.

A second difficulty is the feeling that the problem, as stated, might well be quite easily solved – at the European as at the national level – simply by reinvigorating the institutions of public sovereignty. In the European Union context, no one is more emphatic on this point than the Eurocrats themselves – we must, they insist, strengthen local and regional political authorities, increase the breadth of European Union wide regulatory competence and inaugurate at the European level a parliamentary process modeled on the national legislatures, thus curing the ‘democratic deficit’. But we know that this has also not worked at the national level, that it has not been possible to cabin political power in identifiable institutions and forms, that the welfare state as a model for wise or informed public decision making has been called into question.

3.7. Two disciplines; one political vision

And suddenly the whole problem no longer seems one of *national* and *international* government, but a problem of *government*. In some way the idea of politics as a contestation over the spoils, over entitlement, distribution, interest, has been displaced by a more technocratic discourse, attuned only to general directions (in the public interest / for private interest) and fought about sovereign levels or forms (international or national, local or federal). But neither the general direction nor the difference between levels can be given sufficient content to be helpful. It is ultimately only possible to figure out what will be in the needs of ‘commerce’ in a specific and tentative way. Business pulls in different directions and is not simply hostile to state action as a general matter. Neither can we be sure, in a general way, what will be the redistributive consequences of internationalization.

Our intuition that internationalization strengthens commerce at the expense of public interest – an unhelpful and distracting intuition – must remain rooted in an instinctive, if inaccurate, sense for the formalism of public law and the apolitical nature of private law. Our political intuitions about globalization arise from the relationships among rhetorical positions and sensibilities – which routinely cast either the national or the international as *locus* for the promises or perils of sovereignty. At the same time, for all their antiformalism, both public international lawyers and international economic lawyers, both the trade regime and the public regulatory regime, leave unacknowledged the politics of the private.

We might therefore locate the politics of this broad international style in its commitment to a doubled idea about sovereignty: public sovereignty as promise and peril, alternatively projected as formal and antiformal, while private law remains outside the politics of sovereignty. Sovereignty as the juridical concentration of power in public hands for intervention in civil society has brought with it a constellation of familiar ideas: politics as public discourse about state intervention in civil society; law as a technical mechanism to focus and enable an interventionist politics; power as a force to be juridically concentrated and allocated; the national state as the primary organ of politics; sovereignty as a juridical absolute. These ideas are commonly associated with a commitment to the separation of public and private, especially in law, with public law the discourse of state action toward a passive civil society, itself structured by the apolitical or consensual rules of private law. This set of ideas has, of course, been universally criticized – both because it is not a good description of how politics actually works in the public realm and because the normative and linguistic framework to sustain this sort of formal division between public and private, or the mechanics of a de-politicized private law machinery, are not available.

But these ideas – with their critiques – remain the animating rhetorics of globalization, and defining disciplinary commitments for metropolitans and cosmopolitans alike. As a result, we might think less of a general transformation of politics, or of a necessary erosion of the national by the international, than of the triumph in international law and policy of one conception, one rhetoric, for politics. When people debate the general politics of globalization, they figure politics as a general site for the management of allocative efficiency, fragmented into debate about governmental structure, rather than as a set of particular sites for struggle over distribution and social policy. This focus is reinforced by background assumptions about the relatively de-politicized character of private law and the correlative unavailability of a meaningful politics outside the state apparatus, whether national or international.

In thinking about internationalization, we might shake this rhetorical frame by focusing less on the turn to private interest than on the turn from the politics of private law which seems the common project of both public international law and international economic law. In this vision, the problem would not be a general failure of national governments, still less a necessary erosion of the national by the inter-

national. We would not think of an international institutional regime which remained to be built or reformed, but which already existed, in all the forms of power and sites of choice accompanying the international market. Since the project would be less to build a new public order than to recognize and engage the order which currently structures civil society *as if* it were public, whether understood as public or private, international, state, local, or familial, sometimes the right thing to do would be to promote the state as a *locus* of intervention, even to insist on form, and sometimes it would be better to champion an international institution; sometimes a local court, sometimes a private person or corporate player. In this conception there is no general problem and no general solution. Saying that “things are getting more and more international” is a way of not talking about who is getting what. When that question is brought into focus, sometimes what is needed is more formalism, sometimes less; sometimes more state focus, sometimes less. Once we let go of the idea that a natural private realm needing public intervention could survive the rejection of a public sovereignty, we are without a general theory to orient our reform. Neither international nor national, neither public nor private will be sure routes.

As for our two disciplines – public international law and international economic law – we should see them less as opponents than as ideological partners. Both are aware of the limits, ambiguities and illusions of a legal and policy argument which relies on the traditional vocabulary of sovereignty. Both invoke a world of facts outside of law – in anthropology or economics, or politics – which will operate as a check on law’s illusions. For both, this is a largely technical project – deploying the technique of law or ‘managing’ interdependence – which holds out a general political vision of peace or economic security as a distant promise and modest hope.

Together, these disciplines perform a sort of duet, able together to respond to the challenges of globalization – its technocratic excesses and political weakness. The public international lawyer mobilizes governments to multilateralism and internationalism, dreams of building a political process on the international plane. His expectations are modest, but his direction is sure. He sets himself against what he interprets as the economic lawyer’s defeatist attitude toward public order and ideological commitment to private ends and domestic laws. He will renew the international political order: there should be built a great ark for international policy, many cubits in all directions, and there should be assembled all forms of public life for embarkation. Meanwhile, the international economic lawyer sets himself against the public international lawyer’s dreamy idealism and nostalgic romance with international institutions and regulatory regimes. He reinvents the terms of policy debate, placing governments and companies in an idealized and interminable process of market bargaining, developing a cosmopolitan esprit at once vigilant against parochial politics and open to the widest range of policy choices. If only policy managers at all levels could remain true to this spirit, the degradations of an outmoded politics could be avoided.

When the public international lawyer explains the evolutionary urgency of his task, the international economic law specialist can only smile at his naivety. Surely there is a role for a vigorous international public policy machinery, it is just hard to think for the moment what it is. But when the international economic lawyer talks about the end of the regulatory state, the obsolescence of national regulation, and the new interdependence, the public international lawyer looks up from his work and agrees. He knows this all already. That is why he is building an ark.

4. CULTURE AND GLOBAL GOVERNANCE: INTERNATIONAL AND COMPARATIVE LAW

In the preceding two essays, I described some differences between the North American and European traditions of international law and contrasted the sensibility of public international law with that of international economic law. One goal was to suggest a way to think about what might be called the 'politics' of international law: as a byproduct of the sensibilities of a discipline rather than as a set of overt ideological commitments. Disciplinary politics of this sort is often harder to identify or change than a more conventional 'bias' in the rules or institutions with which a discipline works. In this essay I take up one particular political question, albeit a very general one – the relationship of global governance to culture and cultural difference. This relationship looks different from different disciplinary vantage points. My project here is to explore the sensibilities of United Statesean legal professionals who participate in two related legal fields – international law and comparative law – both of which address themselves to global governance and cultural difference, although in quite different ways.

We might think of these two sub-disciplines as illuminating contrasting facets in the broader sensibility of the modern legal internationalist who worries about improving global governance while respecting cultural differences. Over the course of a lengthy tradition, comparative law has focused on elaborating differences: between an 'us' and a 'them', a center and a periphery, an east and a west, a 'common' and a 'civil' law. Difference is, in a way, their *métier*. For an internationalist, however, the issue is somewhat different: to empower an international public order above the nation, an international private order below or outside the state, or a complex regime of transnational order. We could overstate this disciplinary difference, of course. Comparativists also participate in a universal project, elaborating a universal legal ideal, a universally applicable comparative method or an aspirationally universal taxonomy of law. And cultural difference troubles the internationalist, threatens to disturb his emerging order (what about women's rights in Chad or intellectual property in China?), but the internationalist's optic is less 'understanding' than governing.

4.1. Culture and difference: international and comparative style

For international law, global governance means, at least in part, norm generation and enforcement. Relations with something called “culture” are both more fraught and less central than those with sovereigns. Like politics or religion, culture and cultural difference precede the move to law, exist external to it as a constant challenge or threat, or live below it, beneath the veil of the sovereign state. For the internationalist, culture is a natural, local, antiquated, and largely national thing.

The goal of internationalist discourse is to erect a zone or plane, or viewpoint above relations between states, and to build bridges among states by remaining agnostic about culture, by having no culture. The neologism ‘nation-state’ reminds us not simply of the idea that each nation might one day have a state, that the relation between state and nation is somehow natural, but also that the nation and the state are terms in different registers. International law reflects, engages, bridges, governs, states. Nations have cultures. For the internationalist, the problem of culture disappears from view once equated with ‘nation’, while the term ‘culture’ creates difficulties when it wriggles free of the term ‘nation’ – when the nation-state becomes a formal, legal, administrative unit, and culture an alternative pattern of differences and solidarities, a conflicting set of loyalties. If culture can slip the collar of the nation, it might transform a cosmopolitan bridge into a cultural hierarchy.

Culture may break the internationalist frame in two related ways: by generating solidarities which cross the neat boundaries of nation-states or by empowering smaller entities within states to erupt into international consciousness. These may be familiar identities – ethnic, religious, familial, gender, racial, indigenous – or they may be associated with aspects of social life which seem inappropriate for international expression at all because private or personal or primitive. We might think of a wall of family portraits, effacing the interior lives of one stoic figure after another, reconfiguring whatever confusing relations they might have had in life into the familiar patterns of a family tree. Just so the ranks of flags before the United Nations headquarters or the rows of even nameplates within. Or we might think of childhood simulations of international governance – each nation one national costume, one anthem, just as every state in the United States has one bird, one flower. The architecture by which the pull of culture is shaken off is, of course, not a simple thing, nor is it accomplished in the same way by the various strands and traditions of international public and private law.

The interesting point is that comparative law shares this imaginative construction from the other side, seeing itself as precisely not about politics or governance, as existing rather in the realm of history or thought, as an intellectual project of understanding between cultures whose similarities and differences are foregrounded. The comparative enterprise is less internationalist in spirit than intercultural. To the comparativist, matters of intercultural struggle and international rule are matters of history, background to understanding. Imperialism or free trade, the migration of armies or intellectuals or ideas, are facts, not projects.

Although the comparativist's knowledge might be useful to the internationalist, the comparativist will often feel that after it has left his hands, he cannot be responsible. Where the internationalist who becomes too interested in culture has 'gone native', the comparativist who becomes too interested in governance has given in to a messiah complex, or to the insecurity of the intellectual in the world of practical men. For the comparativist, internationalists seem rather vulgar presentists, always wanting lessons and applications and solutions, content that the other has been understood when he has consented to be ruled. For the internationalist, the comparativist seems a snob or dilettante, as if society might be organized through understanding without the taint of control.

In bringing comparative law and internationalist governance together, I want to focus on the frame common to both, which we might put baldly in these terms: there is a problem of order above states and a problem of understanding between cultures. Once posed this way, it doesn't take Freud to wonder about the internationalist's relationship to culture or the comparativist's relationship to governance. At the very least, these terms are reciprocal temptations, positioned by each discipline as an external real, forever threatening to erupt into the disciplinary project. My suggestion is that the internationalist and comparativist share more than they realize, indeed that they have evolved an uncanny partnership to manage relations with these parallel threats and temptations.

4.2. Public international law: governance among states/culture within nations

The effort to link the internal contradictions and pragmatic limitations of international law to its cultural exclusions has generated a number of working hypotheses about international law's relation to culture which might be stated as:

1. international law has a culture and a politics which is less that of Europe than that of the Cosmopolis or the Enlightenment;
2. treating the local or national or the periphery as the site for something called 'culture' or 'politics', which must be 'let in' to the international, is one of the standard rhetorical gestures of cosmopolitan government itself;
3. scholars have underestimated the extent to which local political sensibilities (whether European national identities or professional cultures of anticolonial struggle) are back formations of engagement with the international order; and
4. specific doctrinal contradictions or philosophical weaknesses uncovered by internal criticism of the internationalist discipline often turn out to have been forged in an effort to imagine an order among those who seemed most culturally different – placing the problem of cultural difference at the center, rather than the periphery, of the discipline.

We might come to these propositions by revisiting the discipline's history of engagement with the cultural.

For public international law, we might begin with the nineteenth century consolidation of a territorial sovereignty, the international gaining a procedural competence over the boundaries between sovereigns by forswearing substantive scrutiny of the activities of sovereigns within their territories. Cultural differences between sovereigns became internal matters, while relations between sovereigns, to the extent they were matters of law rather than politics, would be based upon a formally imposed similarity – all actors on the international plane would be states, absolute within their territories, equal before the law. This was a passive image of international law – a governance system which did not rule, was precisely not a vertical authority, but a horizontal public order, disconnected from matters of subjective politics or culture which themselves would remain firmly within the reserved domain of sovereign power. This classical order has been variously defined – as primitive, decentralized, horizontal – but for our purposes, the key point is that no state would experience itself submitting to a foreign culture or politics or interest, but rather only to itself, to the entailments of its own absolute sovereignty or the norms to which it had consented. The cosmopolitan international would not be another culture, one culture among many, but would have no cultural content, no subjective or political preferences of its own.

At the same time, however, international law was never fully disengaged from inter-cultural struggles. Many of the substantive doctrines and debates in international law concern issues of cultural identity, in establishing the national identities of sovereigns within and without Europe as well as in managing differences, both among the nation states of Europe and between European and non-European cultures. One might even say that from Westphalia on, the overt point of the enterprise was to develop a way of solidifying nations as cultural entities and managing relations between them. The Westphalian solution embodies a certain systemic agnosticism, or areligiousity, which would only much later be read as a contending cultural tradition in its own right. But in thinking about this engagement with culture, all too often, the scholarly debate gets stuck in a routine conflict between defenses of an acultural posture and assertions of cultural relativism – insistence upon the unassimilable, unrepresentable other of international law.

Indeed, it would be interesting to develop a history and a conceptual geography of 'cultural relativism' in the field. It is clear that substantive issues which seem more technical, more closely related to 'functions' or 'tasks' which themselves seem universal, are less encumbered with talk of cultural relativism. The environment, for example, presents a common technical problem. On the other hand, substantive issues which are thought to involve cross border solidarities or value choices, like human rights, become home to the discourse of cultural relativism. And it is clear that cultural relativism itself appears in different forms at different times. In the 1940s and 50s, it seemed possible to embrace something called 'cultural relativism' without disabling a project of universal human rights – perhaps be-

cause culture itself was understood through the anthropological tradition which had invented 'cultural relativism' in the first place, as both compatible with and expressive of universal human functions, social needs, and institutions. Each person, in whatever culture, could be guaranteed the form of freedom which his or her culture expressed. By the 1980s, faith in universal human 'needs' or 'social functions' had eroded and the term 'cultural relativism' seemed much less congenial. It seemed obvious that there was no way of describing what counted as 'freedom', say, except in culturally specific terms.

If we are to go beyond this deadlock of universalism and cultural relativism, we might begin disaggregating international law's difference-managing strategies. Here are four which link international law's internal structure with its relationship to cultural variance:

1. cabining differences within the boundaries of the state;
2. facilitating assimilation to the state form;
3. internalizing differences within the international regime either geographically or substantively; and
4. externalizing differences as beyond civilization's pale.

Of the wide range of methods for managing what are understood to be political or cultural differences developed by the discipline in the years since Westphalia, the most significant remain the two established in the Westphalian period to deal with cultural differences within Europe and with the recently discovered cultures of the 'New World'. First, within Europe, religious differences would be managed by territorial deference, leaving the issue of religious confession to the territorial sovereign. The cost, of course, was disconnection from the local practices of minority assimilation. Second, relations with newly discovered non-European cultures were doctrinally organized to compel assimilation to the territorial sovereign form, through submission to conquest or cession, or autonomy. In this way, alternative cultures could be compelled to internalize their own differences. Once dressed as sovereigns, they could be treated with a sense of equality and deference which continues to be cited as humanitarian, tolerant, and accepting. Less prominent, of course, were the many exceptional doctrines permitting interference in the non-European world all the same. Nevertheless, the broad doctrinal result in both settings was to render cultural differences internal to the sovereign form, outside the arena of international governance, as local matters of politics or culture. Where differences threatened this form, they would be assimilated to it. In this system, most cultural differences simply do not rise to the level of the international. Differences are manageable when they can remain internal matters, below the water line of sovereignty. Sometimes, however, and especially in exceptional situations which might threaten the placidity of the sovereign fabric itself, international law does become directly involved in the domestication of difference – in doctrines about aboriginal cultural practices, in the criteria for effective statehood, in the various inter-

national regimes of trusteeship and tutelage, in systems of minority protection or self-determination, and so on. The goal of this intervention, however, is to stabilize and reassert the structures of sovereignty.

A third difference-managing strategy has been to internalize differences within the international regime either geographically or substantively. Although the internationalist project now firmly rejects the idea that there might be more than one international legal order, insisting since the middle of the nineteenth century on universality, even at great cost to the range of substantive legal norms, this insistence has been tempered by efforts to recognize special situations in which norms, even within a universal system, might be different. In the pre-classical period, this could be done simply by suggesting that some nations might be governed by an alternative international law. Once the classical system extended itself universally, at least in its self-image, this was no longer tenable. Rather, one might carve out a separate geographical terrain of application – for ‘special’ or ‘regional’ customary rules, for example. First Asia, later the Americas (or at least Latin America), and, more recently, Africa, have all been thought to be governed by special regional international law.

The traditional distinctions between the law of peace and the law of war, or between the law of coexistence and the law of cooperation, allow an international order to embrace both peace and war either as different statuses for recognized subjects or as different domains for substantive activity. Through such mechanisms, states with strong differences can be regulated by a different set of rules from states whose views are more harmonious without detracting from the unity and agnosticism of the order as a whole. Similarly, where states differ, they fall within the law of ‘coexistence’, while remaining able to participate in projects of ‘cooperation’.

These are all efforts to moderate the sacrifice of substantive depth to procedural breadth without bringing questions of the substantive relationship between coexistence and cooperation or between war and peace into the analysis. Such situational distinctions may also be coded ideologically or geographically as, for example, in the conventional alignment during the Cold War of ‘coexistence’ for relations between the different social and economic systems in East and West, and ‘cooperation’ for relations between the North/West and the South. The effect was to remove international law during the Cold War from inquiry into the causes and consequences of the bipolar regime, and to promote an alignment of the North/West with the South without taking sides in the Cold War. In the post-Cold War period, this technique has been extended to embrace overtly political differences as well, as in the distinctions between the law among ‘liberal’ and ‘illiberal’ states, or among Western European states and between Western Europe and the ex-socialist states to the East, which treat cultural and political formations agnostically, as inert international facts to be accommodated in a regime of disaggregated sovereignties, while encouraging a deeper and more substantive order within the sphere of ‘cooperation’ or ‘liberalism’.

But sometimes international law is also willing to take a stand – as a general cosmopolitan order, a culture of reasoned governance, as civilization itself – against particular political or cultural formations. In such cases it deploys a fourth difference-managing strategy, the externalization of difference as ‘beyond the pale’ of civilization. Of course this strategy is most evident in doctrines relating to out-law groups: barbarians, pirates, war criminals, or terrorists. It is also present in the various substantive doctrines which have neither arisen through the consensual apparatus of sources nor been deduced from the nature of sovereignty itself. These doctrines concern situations which ‘shock the conscience’ of mankind as a whole, expressing a normative commitment so fundamental as not to need codification in a treaty or customary rule. There is very little agreement in the discipline about the content of these super-norms, and less experience with their application. Yet they remain central to discussions of numerous fields, as if the internationalist needed to admit that at a certain point (a point too obvious to be partisan, too clear to be subjective), the international too would be a culture, would have a politics. Or perhaps the point is simply to reconfirm that elsewhere, between the permission and the prohibition, there would fall not even the shadow of commitment.

If we take the public international law discipline in broad strokes, then, we find a general effort to step back from issues of culture – to cabin them locally or generalize them to a global civilization – coupled with a wide range of efforts to engage, embrace, and assimilate divergent political and cultural ideas. And yet public international law itself has a culture, is a culture – both a professional culture, and part of a broader Enlightenment or cosmopolitan culture. The point is not that international law is somehow the instrument or reflection, or product of European culture. Like the claim that law reflects or enforces the interests of a particular class, the more conventional claim that international law is a European product continues the aspiration that international law shake off this bias, be purged of the taint of colonialism, live up to its agnostic, acultural promise. The project I have in mind is exploration of the culture of precisely that promise. The more conventional effort to condemn international law as a colonial instrument has led to numerous studies trying (with very little success) to identify and then alter particular rules which served the colonial project. The difficulty is that the colonial project expressed itself through a wide range of contradictory rules, including many favoured today by anti-colonial interests. The alternative project I have in mind explores international law’s role in generating the frame within which cultures, colonial and anticolonial, could share an aspiration for and belief in an international law outside of culture itself.

The same effort to isolate the cultural imagination of governance can also be pursued by focusing attention on the range of practices and identities the international order regards as external, unable to be transformed into a manageable difference within. We can learn a great deal about the internationalist sensibility by attending to areas and individuals which fall outside its ken or can be seen to threaten its universality – terrorists, pirates, and territories which may no longer be *res nullius*, but must be either internationalized or organized into a sovereignty. As a first

hypothesis, we might say that from the perspective of international governance, when differences within cannot be managed, the potential for differences between must be opposed. We might also focus on the traditions through which forces which are understood to be 'cultural' and 'external' to the project of international governance are arranged for engagement or assimilation, seeing international law as one cultural form among others. Seen this way, the notion of 'culture' itself comes under pressure as an alternative to governance. Once we imagine a number of intellectuals with projects, some imagining themselves to be inside and some outside the governance project, it is easier to see these positions of marginality and centrality as strategic or accidental matters of choice or assignation.

4.3. Comparative law and governance

This effort to map the encounter between governance and cultural difference so as to frame governance as a project of culture and the establishment of cultural difference as a project of governance suggests a parallel project in comparative law, to read the comparativist's sense of disengagement from government in strategic terms. We should probably begin reading comparative law's engagement with governance alongside its overt concern with intercultural understanding by noting comparative law's links and stylistic affinities with the broad tradition of private international law. For those working in the tradition of private international law, the most salient law seems less a 'regime' than a helter-skelter affair, the product of numerous professional jurists or legal scientists in many countries struggling to work out the requirements of a rational, objective legal science and the requirements for reliable market transactions. Private international lawyers tend to see themselves in relationship to the projects of private parties in a sphere outside government, regulated only exceptionally.

Comparativists share much of this private law sensibility. Many of the leading comparativists have focused on private law and the most central stories of comparative law – the difference between civil and common law, the reception of Roman law – are largely private law stories. Comparativists more often attribute the adoption of particular rules to accidental borrowings or autonomous expertise or to the extension of broad legal cultural families than to political choice or struggle. Like private international lawyers, the comparativist is more likely to focus on non-governmental ordering, or on the judiciary, than on the parliament or administration. This is true despite the fact that comparativism had an important early connection to the project of informed regulation, comparing regulatory initiatives of nascent welfare states in the late nineteenth century.

Where comparativism shows a technocratic bent, in developing universal private law rules or facilitating wise resolution of potential conflicts, the job presents itself as one for experts, trusted for their erudition and neutrality, only able to be undertaken with the most careful study and a detached scientific rigour achievable by the true scholar. On visiting the legal office of a typical United Nations special-

ized agency and then UNIDROIT or the International Chamber of Commerce in quick succession, one cannot help but be struck by the fact that in the United Nations, staff lawyers have nationalities which are often politically coded, at least in the broadest terms, while at UNIDROIT or the International Chamber of Commerce, the lawyers one meets are introduced rather by linguistic expertise and disciplinary specialty.

One consequence of this stylistic difference is that in the American legal academy, the common collegial alliance between internationalists and comparativists remains thin, an alliance of convenience against the parochialism of colleagues or a sharing of boondoggles. From the comparativist perspective, the public internationalist seems philistine, crassly preoccupied with enlisting participation in newfangled governance structures built on the flimsiest base of cross-cultural understanding. To the internationalist, the comparativist can seem quaint, elitist, irrelevant. At the same time, however, their rather different methodological self-denials, the comparativist of easy solutions or political ambition, the internationalist of cultural commitment, can lead to a similar tone of cautious anxiety, a combination of modesty and self confidence, of methodological obsession and reticence to talk about oneself, the conviction that one is both marginal and part of a larger and ultimately more significant community, characteristic of the pragmatic cosmopolitan in both fields. The rethinking of comparative law I am proposing would begin by uncovering connections to governance which may underlie this outer pattern of denial. Comparative law work, at least in the North American tradition, can be rather easily divided into three broad geographic categories and two broad methodological styles. Geographically, we find work predominantly concerned with the Western tradition and differences within it (say between civil and common or capitalist and socialist law), work focused on non-western cultures (typically studied in their specificity rather than in explicit relation to the civil/common or capitalist/socialist traditions of Western law) and work which styles itself universal or global in its reach. Comparative work focused on the Western tradition distances itself from issues of governance somewhat differently than work concerned primarily with understanding non-Western cultures, or work that positions itself geographically in more universal terms. The issues of governance from which it is most concerned to keep distant are also somewhat different.

At the same time, for all the discipline's internal divisions among historicists, idealists, functionalists, and so forth, at the broadest level of intellectual style we can differentiate two types, which I think of as 'technocrats' and 'culture vultures'. The technocrat is more overtly concerned with ongoing projects of harmonization or modernization which require comparativist expertise. The culture vulture is more likely to stress history and cultural specificity, and to think of him or herself less as an expert than as an intellectual. In the broadest terms, technocrats distance themselves from governance in the language of autonomous expertise, culture vultures in that of erudition.

International economic law – the bundle of institutions and legal doctrines structuring international trade and finance, from the GATT through national anti-dumping regimes – is home to a range of comparativist projects. Much of international economic law – the definition of ‘dumping’ or ‘subsidy’, the equation of regulatory non-tariff barriers during negotiations over tariff concessions, the identification of departures from agreed tariff levels – depends upon defining a distinction between a base line of free market trade and governmental intervention. Difficulties arise because this distinction looks quite different in various legal cultures – for example, is governmental licensing of retail outlets part of the background market structure or an intervention? Answering such questions requires comparative analysis of various sorts – to establish a constructed market price against which dumping can be measured, to mesh, or ‘interface’ different regulatory regimes in application of WTO and GATT commitments, etc. Although a great deal of this work relates the national frameworks of OECD countries to one another, international economic law is meant as a universal project – the standards deployed to measure dumping in Indonesia no different from those applied to Canada.

The perception that economic interdependence is growing, coupled with the new mobility of capital relative to other productive factors, has fueled interest in regulatory harmonization. If national environmental or consumer protection, or labour regimes seem to be undercut by increased foreign trade, one response has been to search for common standards across markets. This work also employs comparativists who can work out differences and identify similarities among different national schemes for, say, protecting intellectual property, and who can then participate in formulating possible common approaches. This sort of comparative work has been actively pursued within the European comparativist academy through the regulatory initiatives of the European Union, but exists in North America as well, particularly among those specializing in international aspects of various national regulatory regimes, like taxation or labour law.

The study of non-Western legal cultures also hosts a range of technocratic comparativist projects, most of which are concerned with identifying the legal prerequisites to economic development. The traditions of ‘law and development’ or ‘modernization’ in the 1960s and 1970s have been followed by initiatives aimed at facilitating the emergence of so-called ‘transitional societies’ into the international market. Each of these projects has had a comparative dimension – in identifying the legal structures which have been or remain present in various developed or post-transition economies, comparing these to the legal structures available in the developing or transitional world, and identifying the most viable first world legal implants for export. Comparativists work at identifying the best regulatory regime for emerging securities markets, the importance of judicial review for modernization, the most viable constitutional court procedures, and so on.

There is no question that technocratic comparative law, whatever its geographic orientation, seems more closely associated with the issues and institutions of governance than culture culture comparativism. Nevertheless, even the technocratic

comparativist stands somewhat aloof and apart from government itself, primarily by figuring him or herself as an expert or staffer. For the lawyer as technical expert, there are a number of well trodden ways to explain one's independence from the political machinations of government. Perhaps the political questions have been resolved elsewhere – in parliament, or diplomatic negotiation. The expert may seem to work only within the confines of bargains others have struck, implementing a commitment to tariff reduction or market viability. For some technocrats, the point of expertise is that it is directed solely at illuminating the conditions under which uniformly sought goals can be achieved – development or efficiency, or growth. For others, the key point is that expertise as a whole is oriented against corporatist local politics and entrenched interests in the name of a rational general will.

Each of these technocratic stances is familiar from comparative work associated with international economic law, projects of harmonization, and development. The comparativist who identifies a non-tariff barrier or constructs a market price for Indonesian lumber is implementing a broader multilateral deal struck by politicians, embodied in the GATT and ratified by the legislature. In this sense, he is not governing. The comparativist who prepares the background papers for an effort to harmonize intellectual property law in Europe is searching for the 'best practice', the most efficient, most administrable regime. The comparativist developing model securities codes for Eastern Europe is less governing than facilitating the disestablishment of locally entrenched *ex-nomenklatura* in favour of a more rational scheme of capital accumulation from which everyone will benefit.

The governance with which the technocratic comparativist wishes to be disassociated is the messy politics of intersovereign negotiation, national parliamentary ideological conflict, and questions of distribution, involving winners and losers rather than a more efficient pie. And this is the governance associated with public law internationalism. It is easy to get a sense for this difference by considering how a particular question, say global environmental protection, would look to the public law internationalist and the technocratic comparativist embarked on a project of harmonization – that point at which the internationalist and the technocratic comparativist might seem to have the most in common. For the internationalist, the issues would be boldly political – bargains between North and South, regimes to structure bargaining and enforce results, the emergence of global norms and commitments. The comparativist participating in a harmonization project would more likely be concerned with finding out exactly who was doing what, comparing technical solutions, implementing a framework agreement.

Of course, the comparativist who participates in these technocratic projects might forswear even the role of expert, claiming simply to be providing information about cultural differences, best practice and the history of inter-cultural legal influence. This stance, however, is far more familiar among culture vultures, whose distance from governance is marked in the language of erudition rather than expertise. We find culture vulture comparativists of global orientation pursuing a variety of projects, from elaborating the doctrines of a potentially universal private legal

order to developing taxonomic criteria for identifying and studying 'law' across all cultures. Both of these inquiries lead toward the philosophy of law: either by identifying the core doctrines necessary for order outside the state, or defining the social phenomena which can properly be termed law. Culture vulture comparativists write about these exercises as intellectual projects and tend to explain cultural differences as local variations on universal human or market needs. This general stance seems to have been developed by the tradition of classic comparative law, which focused on relations among Western legal cultures (particularly common and civil law), the history of Roman law's reception, or the reception of common law pragmatism and American style adjudication or legal practice in civil law settings. Some culture vulture classicists pursue historical study of the origins and structure of the West's legal specificity. Others are more concerned with contemporary practices and institutions, again primarily of private law. All are concerned with what is unique in the Western legal tradition, and with understanding which differences within that tradition can be sustained without threatening what makes the West special.

For this whole group of comparativists, nothing could be farther from their mind than governance. They might be making an argument about what is necessary to sustain the West against the rest, or about what is universally human, but it is an intellectual argument for an intelligentsia, a matter of philosophy or knowledge, not politics or power. These comparativists present themselves as academics obeying only the dictates of scientific rigour, objective analysis, and so forth. To polemicize would vulgarize. The governance from which they distinguish themselves is not merely the institutional will to power, the committed world of subjective politics and ideology, the normative impulse to control or punish, but also the quotidian profession of practical management and technical expertise. For these comparativists, even their technocratic cousins may have gone too far.

We can see this difference most profoundly in the difference between culture vulture and technocratic comparativists whose geographical orientation is to the world outside the West. For the comparativist interested in area studies, by which is meant the study of legal systems other than European civil and Anglophone common law, the project is one of sustained cross-cultural inquiry – listening and reading carefully, noting and explaining differences in historical, local, contextual terms, etc. Area studies comparativists tend to be the most modest about their enterprise. At stake is not comprehension of the universal in law, but simply empathetic understanding of a different society. Culture vulture comparativists interested in exotica are much more likely to see their project as inevitably unfinished, a continual process of trying to understand. Here also is a distance from governance, although now the governance to be avoided is colonialism or imperialism, reinterpreted less as political or institutional projects than as the quite personal sins of arrogance or undue ambition.

Viewed from the culture vulture's vantage point of an infinitely extending project of incomplete knowledge, governance always requires premature closure. There is always the danger that any well conceived universalist project, even an intellec-

tual one, may turn out to be insufficiently sensitive to exotic cultural differences, just as there is always the danger that local cultural expressions in the periphery will verge toward the nationalist, themselves insensitive to the particularity of Western values. The culture vulture can only try to warn, caution, and inform.

Nothing could be farther from the sensibility of the technocratic comparativist pursuing development, modernization, or the transition to democratic market capitalism. Where the technocratic comparativist distances himself from governance in the name of universal projects and the specialized role of the expert with technical knowledge, the culture vulture distances himself from governance precisely by forswearing the universalizability of governance projects in the name of a deeper understanding of difference. His is the distance of the intellectual, not the technocrat.

The governance projects which the culture vulture comparativist avoids in the periphery are precisely those taken up by the public law internationalist. A good example would be the quite different responses comparativists and public international lawyers have to an issue like female genital mutilation (FGM). For the public law internationalist, FGM presents a basic challenge to the structure of public law. FGM is often practiced consensually by individuals within a private domain, and yet seems to conflict with universal human rights norms which have been agreed by states. For public international lawyers, FGM raises a basic governance problem – does cultural variation place a limit on the aspiration to global normative order? The project is to figure out how the normative fabric can be sustained and extended in the face of this cultural challenge. For some the answer is simply to respect (and seal off within the state) the domain of cultural difference, for others the answer is to strengthen the enforcement of human rights norms, for still others, a middle way seems best, perhaps sneaking up on local cultural practices through redefinition of the problem as a health issue, by providing support for local feminists struggling against the practice through the mechanisms of international ‘civil society’, etc. For public international lawyers confronting FGM, the basic question is “what are we going to do about it?” Quite different the voice of the area studies comparativist, for whom FGM needs to be addressed not because it presents a conflict between local and global order, between culture and governance, but because it has become an issue in the governance community. Rather than wondering “what shall we do”, the comparativist will write to answer the question “how can I make them understand?” A comparativist article on FGM will not likely end with a policy proposal – the point is far more likely to be “it’s much more complicated than you thought”.

Common to all these comparativisms, of both expertise and erudition, is a stance which we might term ‘cosmopolitanism’, always complexly distanced from what it pictures as governance. Governance is the domain of ideology and political choice, the work of national elites jockeying for position, all dirty stuff for a cosmopolitan. Those who govern are ambitious men, subjective in their political commitments, seeking illegitimate rents and dominion in an unseemly struggle to distribute yesterday’s pie rather than working together to bake a larger pie tomorrow. For the cosmopolitan, values are universal and humanist, projects rational and

pragmatic, knowledge – of the self as of the other – good for its own sake. The cosmopolitan knows he lives in a world which others rule, but has carved out a niche and made it virtuous. His objective is to expand options rather than offer solutions. We see this broad humanist tradition in both the technocrat only trying to get things right and in the culture vulture straining to hear the murmurs of cultural difference. This is cosmopolitanism in the sense of the ‘family of man’, of universal pragmatics, and of the de-politicized world of market finance and trade. What we see in differences between technocrats and culture vultures or across comparativists’ different geographic orientations are differences within a common sensibility – different ways of picturing the governance to be elided and different images of the virtuous cosmopolitan self.

It might appear that we could begin to get beneath these various distancing strategies, to explore the governance dimension of comparativist projects, by asking about the politics of comparative law. For example, if we think of public law internationalists in the United States largely as liberals, should we think of comparativists in the United States as conservative? The focus on private ordering and the distance from government might suggest this, but it turns out that each of these comparativist projects has been pursued in a range of political orientations, with, for example, greater and lesser enthusiasm for the separation of private law from politics, or greater and lesser enthusiasm for centralized public law regulation. These projects have been pursued with attitudes towards the culturally different easily recognizable in the national political lexicon as both liberal and conservative. Although most comparativists in the United States see themselves as part of the intelligentsia’s center-left political consensus, we find a layering of positions broadly recognizable as ‘left’ and ‘right’ in the broader legal academy.

These political positions do not translate smoothly into differing modes of participation in governance. Although coded in political terms, these academic postures or styles are far more significant relative to one another, as auxiliary means to differentiate one comparativist from another, and comparativism as a whole from public law internationalism. In that, they track quite closely the various styles by which comparativists distance themselves from governance. For culture vultures, not to be a technocrat – to forswear the quotidian and compromised world of the expert for the rigours of science or the compassions of intellection – is a political experience. Technocratic comparativists can experience their insistence on the perquisites and immunities of expertise against the public law internationalist, or their determination to make the musings of the culture vulture practical, as personal political commitments.

Let me propose three starting points for a broader exploration of participation by comparativists, both culture vultures and technocrats, in what we might broadly call the project of international governance. These common starting points cut across attitudes toward public regulation, the state or centralization, and toward cultural diversity. First, in relation to other internationalist fields and projects, comparativists act as the diversity department, reassuring either that cultural differences

can be accommodated or that they may remain safely (even pleasurably) exotic. Second, comparativists play a role, both practical and ideological, in the construction and defense of an apparently de-politicized private law. Third, comparativists participate in the broader legal academic project of explaining, apologizing for and stabilizing elite understanding of the 'quasi-autonomous' role of law in society, as a force at once effective in society yet safely removed from political or ideological manipulation. Each of these projects is made easier precisely by comparativism's trademark posture of distance from power and broad ranging political sympathies.

In a very general way, the presence within the intelligentsia of a special culturally attuned discipline might help reassure that, although problems of cultural difference are not directly within the internationalist's domain, they are certainly important. Comparativists generally make two sorts of arguments, explicitly or implicitly, about cultural differences between nations: first, that cultural differences are not that big a deal and one might safely assume that they will either stay below the water line of sovereignty, perhaps within the realm of personal preferences, or will yield softly to the pressures of assimilative globalization; and second, that they are a big deal and may well limit the ambit of universal or internationalist governance. To a certain extent, of course, these two arguments (as we might expect) vary with geography – it is often said that human rights simply run into the wall of cultural relativism in Chad, Beijing, or Rangoon, but that differences, say, between civil and common law traditions, are more fanciful than real. But it is not always this way. One often finds area studies explaining that Chinese ways of protecting property, properly understood, will fit into the GATT scheme very nicely, that African and Asian empires invented the Universal Declaration of Human Rights centuries before the West thought to draft it up, and, on the other hand, that German and British administrative or French and American judicial styles are simply too different to be readily compared, let alone harmonized.

The calm sense throughout comparativist work that one can distinguish the familiar or neighborly from the exotic greatly simplifies the governance endeavour and might easily be reinterpreted by an internationalist to mark the borders of the assimilable, the civilized, or the liberal. The internationalist can leave culture alone, can remain agnostic about whether Rwanda is run by Hutus or Tutsis or some multiethnic combination, whether the state formerly known as Yugoslavia remains intact, so long as the result, one way or the other, can be read. At the same time, comparativists play a role in constructing perceptions of cultural difference – in identifying for themselves and for the public internationalists what is the 'same' and thus generates no anxiety about 'culture', and what is 'different' and needs either to be assimilated or excluded. The definition of what is, and is not, 'comparable' is a fundamental and continuing operation of all comparative work. The idea here is not that the comparativist serves the internationalist directly, as a native informant ferreting out elements in the foreign culture which might yield to internationalist pressure, or warning the public international lawyer to steer clear of local hot spots. Jorge Esquirol suggests that comparative law has played a role, both in

Latin America and in Europe, and North America, in settling an image of Latin American legal consciousness as European-in-exile, a liberal sensibility stranded in an illiberal society.²⁴ This common understanding provides the basis for a set of common political projects to protect the European sensibilities of Latin American jurists as a basis both for cross cultural cosmopolitan governance and defense of what is unique in the Latin American legal tradition. Here the comparativist facilitates governance by calming the threat that internationalist cosmopolitanism will itself be seen as a culture in struggle with what it would prefer to see as the terrain for engagement.

From a social point of view, the comparativist intellectual can be thought to pursue an ideological project, developing lenses through which the center will interpret the periphery, the law will interpret society, the global will interpret the local, as well as roles through which the periphery, the social, the local, can express its identity. The impact of this work might be felt in the self confidence of the internationalist, or in the strategy of the culturally remote. In this, the comparativist assists the internationalist by developing the alternatives of assimilation and exclusion for particular cultures while solidifying an ideological picture of international governance 'above' cultural differences, either absorbing or avoiding them. Some of the ideological work is done simply by defining what culture is – slipping between images of culture as a set of harmless residual differences after assimilation and as a set of exotic unassimilable local commitments.

We might also think of the comparativist's role in psychological terms. In such a conception, the comparativist plays a role in the libidinal economy of the internationalist, assisting in the management of his desire by rendering the other either available or exotic. In this image, comparativist work might be read as a symptom of the global intellectual's strategy of identity formation and stabilization. Fear and desire at the heart of governance can be made compatible with the internationalist's autonomy by projection onto an other who can then be dealt with either by routinization (they are just like us, this difference is like all others, don't worry, I know them well, you too can know them without losing control) or exclusion (they really are different, understanding and engagement are almost impossible, available only to the intrepid, the exceptional, the libertine, the comparativist, whose reports can be read as pornography from the frontier).

Comparativists play their most direct role in international governance when they help build the regime of international private law. It is here that the comparativist project blends most easily into a concrete legal practice in ways which involve both culture vultures and technocrats, elaborating rules, manning institutions devoted to the restatement and reform of private law rules, developing a scholarly consensus on the most reasonable or workable rules, resolving disputes through arbitration or the provision of legal opinions, advising legislators in the periphery on

24. J. Esquirol, *The Fictions of Latin American Law (Part I)*, 2 Utah Law Review 425 (1997).

how such matters are handled in the most advanced economies or advising at the center on the applicability of common commercial rules in peripheral settings.

The private law elaborated by comparativists in these ways constitutes an international regime of sorts, outside the realm of sovereignty. Unlike the public international law scheme, it is built not on sovereign consent or the expression of sovereign political will, but outside the realm of sovereignty, disconnected from government, in the realm of private actors and commercial transactions. This work proceeds both as harmonization among industrialized economies and export of private law machinery to the periphery. We find many technocratically inclined comparativists at the forefront of efforts to build an interoperable private law system in post-socialist societies and developing nations seeking to participate in the neoliberal international market.

The fact that this regime differs from the traditional public law regime in this way, standing outside the project of sovereignty rather than among or above sovereigns, allows the comparativist the sense that all this regime building activity can remain compatible with a distance from the messy business of government, if for no other reason than that private law is thought to be less political than public law. In a way, the whole point of constructing an international commercial legal system removed from particular national legal cultures is to reduce the risks posed for those who trade by the intrusion of politics, policy, and the whims of national government into the law governing their contracts. If an international commercial transaction can be legally constructed in a regime detached from local legal cultures, in a place without public policy, the risks from prejudiced national public policy, intercultural misunderstandings, national elite rent seeking, or biased judiciaries can be diminished.

This distance from government would be threatened were the same thing to be attempted through the sovereignty based regimes of public international law. In this vision, the liberation of commercial energy from politics and national cultural prejudice can only succeed in a government-free space, governed only by the wills of the parties, made comprehensible to one another through a set of standardized terms and education in a common commercial spirit. There is both institutional and ideological work here for the comparativist. On the one hand, the development of a system of rules which can be communicated and administered by commercial actors without the engagement of governments is an elaborate governance project. On the other, it takes continual work to define the allocative consequences of such a scheme of rules as in some sense not political.

For all this apparent distance from the regimes of public international law, as it turns out, the international private law regime elaborated by comparativists has come to resemble quite closely the overtly governmental structures developed by public law internationalists. Public international law governance is also a relatively dispassionate affair, in part because so much of international public law, its horizontal, contractual sensibility, has been developed by analogy to private law. In the last decades, moreover, public international law has become less preoccupied with

deference to the political wishes of actual sovereigns and more attuned to broader interpretation of the rules idealized sovereigns or 'the state system' requires. International law has become ever more procedural, ever less committed to particular substantive outcomes while pursuing construction of one or another general international regime, and more willing to embrace the disaggregated institutions of a fragmented state in a broad terrain of international, or transnational 'civil society'.

All this has taken the public international lawyer ever further towards a cosmopolitan disengagement from the overtly political as a self-conscious strategy of regime building. The interesting point is that the same rather technocratic structures and professional styles which seem savvy strategies of international governance in the hands of the most advanced public international lawyer continue to present as escapes from the political in the hands of comparativists and private international law scholars.

This ideological role is reassuring not only to the comparativist extending the ambit of international private law. It also reassures about the capacity of more public internationalist regulation by setting a limit on the ambit of the private sphere. Across many cultures, private law rules have developed according to their own logic, in the face of numerous interventionist initiatives and divergent public styles. One need not worry that the ecology partisans or the human rights fanatics will screw up your culture or disable your participation in the global market. Private order can be built outside all that, and culture is more resilient than that – take heart in the gap between law in the books and law in action.

The third significant way in which comparative law scholars participate in governance, across a range of political positions, is by engaging in a broad polemic about the nature of law and its relationship to society. In particular, much American legal scholarship makes an argument for one or another version of the claim that law is an autonomous social institution and value system, and at the same time is able to reflect and affect other cultural or political values and institutions. It is easy to see that such an argument might play an ideological role in particular instances, persuading the reader that this or that rule or social fact, or political initiative is or is not part of the law, that this or that governmental initiative is or is not political rather than legal. It is also possible to imagine academic work of this sort having a more general political effect, both ideologically and psychologically. To the extent we are able to credit this scholarly activity with a broader social or political role, reassuring an elite about the strengths and docility of law, legitimating the work of judges or legal scholars, justifying or obscuring or apologizing for aspects of social life which seem determined by legal rules, making aspects of law seem more or less integrated with or entailed by one another, making one or another aspect of law or social life seem easier or harder to change, this is governance work in which comparativists also participate. Study of foreign legal cultures is frequently deployed to substantiate arguments concerning the ability of judges to fill gaps in legislation without themselves legislating, or the ability of harmonizers to have reference to a body of rules which have developed accidentally, have been exported

and borrowed by experts without reference to their political redistributive consequences across radically different social situations, or the extent to which law can retain its integrity in the face of social repudiation or export to more primitive social situations.

4.4. A disciplinary partnership for understanding and governance

Putting it all together, we are left with an odd difference between scholars of international law and comparative law. Internationalists seem comfortable with power and uncomfortable with culture, while comparativists are eager for cultural understanding and wary of involvement with governance. Thus, as the internationalist Wolfgang Friedman states:

[t]o confuse policies born of changing positions of interest with religious, cultural, or other values inherent in the national character or the culture pattern of a people, can only lead to a grave distortion of the real problems of contemporary international politics and law. Just as in the Western world, the relative positions of Britain, France and the United States, and other countries have changed, with the change in their political and economic status, so the positions of the presently underdeveloped countries will be affected by their development.²⁵

This view was picked up by scholars from the periphery as well. Take Anand, who comments:

[i]n fact the attitudes of the Western countries, as well as those of the Asian and African nations, whether toward the traditional principles of customary law, international organizations, or newly developing areas of international law are determined, as always, by their views of their interests. It is this conflict of interests of the newly independent States and the Western Powers, rather than differences in their cultures and religions, which has affected the course of international law at the present juncture.²⁶

In comparative law, it is striking how firmly scholars introduce their work by disclaiming any but an accidental use value – their goal is understanding or contributing to a broadly humanist understanding of a universal phenomenon called ‘law’. Glendon, Gordon, and Osakwe describe the ‘aims and uses of comparative law’ in the introduction to their casebook this way:

[i]n a world where national and cultural “difference” is often seen as posing a formidable challenge, comparatists hold up a view of diversity as an invitation, an opportunity, and a crucible of creativity [...]. Comparatists are witnesses to the joys and discoveries awaiting those who make the effort to enter imaginatively into another mental framework [...].

25. W. Friedmann, *The Position of the Underdeveloped Countries and the Universality of International Law*, 2 *International Law Bulletin* 5, at 9-10 (1963).

26. R.P. Anand, *Attitudes of the Asian-African States Toward Certain Problems of International Law*, in F. Snyder & S. Sathirathai (Eds.), *Third World Attitudes Towards International Law* 5, at 17 (1987).

Among the aims of comparative law, we would put first the pursuit of knowledge as an end in itself: comparative law responds to that characteristic of the human species which is curious about the world and wants to understand it.²⁷

The knowledge thereby gained may turn out to be useful, but for Glendon *et al.* the various possible 'practical applications' of comparative law are byproducts, not goals. For the comparativist, practical matters are significant as facts against which to test evolving knowledge.

The only harm comes if one forgets that the practical aims just mentioned are furthered by serious pursuit of scholarly objectives, and that scholarly exercises are apt to prove sterile if they are carried on without close attention to the way law operates in the rough and tumble of daily life. The fact is that, in law as elsewhere, theory and practice are like the two blades of a scissors, complementary and indispensable to one another. The best practical work is grounded in theoretical understanding; the soundest theory emerges from constant testing against practical know-how and experience.²⁸

At the same time, international lawyers have a quite complex and engaged relationship with matters of culture. Unpacking that relationship has been helpful in illuminating their governance strategies. It is precisely by eschewing involvement with matters of culture, which can be kept below the line of sovereignty, and forswearing any particular culture of their own, that international lawyers have sought to persuade sovereigns to submit to their rule. The international legal order presents itself as nothing more than the normative restatement of the wills, claims, and commitments of sovereigns, confirming, enshrining, recognizing sovereigns as sovereign and registering their prerogatives.

But the internationalist is not simply content to wait and see whether anyone seeks his services – he aspires to build the international order, to induce sovereign participation, thereby assisting the hand of evolution in advancing international society. He can do this in only two ways: patiently waiting for sovereigns who might take up his offer to formalize their intentions or by advertising the perfection with which he mirrors the sovereign's will and facilitates the sovereign's desire. The international lawyer governs by flattery of the king, in an endless process of seduction and transcription. And it is here that the internationalist begins to play a role not simply in governance, but in culture, stabilizing the innocence of his transcription by strengthening the sovereign as a veil between the culture and politics within society and the acts, demands and forms of interest in international law. The internationalist persuades sovereigns to come to his studio to be recorded, to see themselves in his mirror, and then constructs a regime consonant with his promises, for which his scholarly texts work less as polemics or proposals or ads than as works of justification, legitimization, or apology. By describing what he wishes to make true, by treating contestable matters as settled fact, by remembering his history as prog-

27. M.A. Glendon *et al.*, *Comparative Legal Traditions: Text, Materials, and Cases* 8 (1994).

28. *Id.*, at 9.

ress, the internationalist contributes not only to governance but also to culture, re-making culture as local and governance as global, rearranging the international public space, at least in the legal imagination, as distanced from messy matters of value or dispute, a technical terrain of objective procedures and consensual rules. For whatever reasons, moreover, the internationalist has been astoundingly successful, as a matter of both culture and governance – we all live, to some extent, in the international as a legal concept.

The comparativist's focus on culture at first suggests a distance from such ideological and institutional projects of governance. But the comparativist's modest posture as expert or erudite facilitates a remarkably parallel set of ideological and psychological relations to problems of power, reinforcing ideas about culture, about the posture of rulership and about the role of law which are familiar from internationalism. In the legal academy, if international law is the department of global governance, comparativists serve as a department of diversity. In differentiating themselves from governance by engaging with culture while asserting that culture can be understood without being ruled, comparativists reinforce the internationalist's claim to govern from a space beyond culture. By dividing the assimilable from the exotic, the comparativist stabilizes the boundaries between center and periphery while reinforcing the claim that those boundaries are matters of culture and history rather than political products of an ongoing international regime. At the same time, comparativists construct and defend a cosmopolitan private law regime which presents itself as detached from both cultural and governmental pressures, facilitative of commerce and wrought by a combination of technocratic consensus, historical accident and deracinated expertise. Comparativists participate in the academy's broad ideological project to defend the integrity, autonomy, and pragmatic capacity of the international legal order to remain above the specifics of political dispute, and precisely thereby to provide a rational and pragmatic machinery for practical government.

By rendering plausible a project of understanding divorced from management, the comparativist contributes, in his small way, to a regime which separates problems of order among sovereigns from problems of understanding between cultures, a separation of government and culture as useful to the internationalist as to the local politician consolidating a domain of resistance to foreign rule. The comparativist, in this sense, works as ideologist for the global system of government, reinforcing the legitimacy of local potentates and cosmopolitan technocrats alike. By foregrounding legal cultures in historical, even familial relations with one another, the comparativist reinforces the artificiality and deracinated character of the international legal regime, both public and private. In short, the comparativist and internationalist form a partnership to imagine and then create a geography of global governance and local culture. We might begin to unravel their work by reading global governance as a local culture, and the localization of culture as a governance project common to international and comparative law.

5. ILLUSIONS OF A HISTORY: PROVENANCE AND PROGRESS

5.1. What is international law?

So far, I have proposed that we think of international law not as a set of rules or institutions, but as a group of professional disciplines in which people pursue projects in various quite different institutional, political, and national settings. Their projects may be personal, or professional, or political, may be pursued alone or collaboratively. Sometimes they are self-consciously 'ideological' in the narrow political sense that people pursue conservative or centrist or liberal agendas within their disciplines. More often, professionals in these fields think of their disciplinary projects as not being ideological in this sense and criticize fellow professionals whom they think have introduced an element of 'subjective' political bias into their professional activities. People typically present their projects as 'balanced' or simply 'professional', sometimes as the quotidian management of the international system and sometimes as part of a very general human struggle for better global governance or intercultural understanding or economic growth.

At the same time, legal internationalism, in each of its disciplinary incarnations, is also a fantasy that there is or might be or should be something more going on than simply the pursuit of individual professional projects. Perhaps a fantasy that all this activity will or has added up to a 'regime' or 'system' or 'market' or a framework, or set of rules or principles. Perhaps a fantasy that there is something called an 'international community' which, in a disembodied way, has 'agreed' to some things and foregone agreement on others. And whose agreement might be elaborated as a set of rules and standards of conduct. Or a fantasy that an 'international market' is expanding to link buyers and sellers, swooping down to reward the productive and punish the corrupt.

Fantasies of this type provide an orienting context and direction for professionals and intellectuals working in these disciplines about what to do next. They tell legal internationalists, as they debate with one another about what rule to adopt or what institution to build, that they are working on the international plane, managing 'the international system' or 'the global market'. They also provide a measure for progress: one should improve, expand, build, strengthen international governance or the global market or intercultural understanding.

By focusing on the fantasy element in more conventional descriptions of the field, I want to emphasize my sense that international law is not a stable *thing* which relates in some complicated way to society or political economy or class structure. Neither is the 'market' or the 'regime', or the 'system' a place or thing which can be built or advanced in this sense. These are all terms in a debate, arguments, images, ideals. When people say 'the international community', for example, it is both a way of referring to a particular group of people – perhaps the few hundred people active on a particular issue in the governmental bureaus of significant states – and a way of suggesting that this 'community' is more than the sum of

their efforts. When we say 'globalization' of the 'market' has done this or that, or been advanced here or there, we might be referring to a few hundred businessmen or investors who are pursuing some interests and not others, or we might be referring to a particular set of regulatory initiatives, property rules, governmental practices, and institutional projects, which have some distributional effects and not others, which are the projects of some groups and not of others. But we are also suggesting, or promising, that something more intangible, natural, transcendent, is at work.

When international lawyers make arguments in pursuit of their various professional, personal, or political projects, they do so in terms which express this sort of fantasy – that there is an 'international law' and an 'international politics' which diverge and can, must, should be reconnected, by norms, institutions, etc., or that there is a 'market' of modern global rationality which is threatened by the subjective political overreaching of local rent seekers, by self-dealing and corrupt managers, by national politicians, etc., and which must be protected through professional fealty to a liberal spirit at all levels of governance to rebuild 'confidence'. To my mind, it is more accurate to think of international law as a practice of argument among a rather narrow range of people scattered about in the world, often about the relationship between something they posit as 'international law' and something they refer to as 'international society', than to describe it as 'the law governing interstate relations'. Likewise, rather than defining international economic law as the 'law governing international transactions', we should think of it as a set of opportunities, settings and practices of debate among professionals and intellectuals about the status of forces they imagine between something they call 'the market' and something else they refer to as 'politics' or 'protectionism, or 'corruption'.

But international law is more than a fantasy medium or rhetorical field in which people pursue projects – it is also a polemical field, a domain of desire; a commitment that this fantasy thing, international law or the international market, is basically good and that there should be more of it. The specific projects people pursue are oriented in part to build, develop, sustain, legitimate, improve, international law or the international market. The object of this desire is obscure, a loose *mélange* of liberal (in the European sense), humanist, and cosmopolitan ideas – that things should be done internationally, that the nation and the state are things of the past, that internationalizing pretty much any endeavour is a good thing, that progress means globalization, that cross-cultural contact will advance understanding, that people should learn foreign languages, that people should trade more, that 'comparative advantage' will ensure that everyone ends up better off, and so forth. Although vague, an internationalist orientation, like a general sense of being 'modern' or 'cosmopolitan, or 'reasonable' can be extremely powerful in building or cementing social, professional, and political connections.

This internationalist orientation looks different in each of the disciplines I have looked at so far – public international law, international economic law, and comparative law. International public lawyers worry about sovereigns drifting toward

anarchy and know they share the desire to build better international governance. The discipline of international economic law is concerned less with governing than with liberating a set of imaginary buyers and sellers from risk in an international commercial world and with separating economics from politics; protecting transactional space from governmental encroachment. Comparative law is concerned less with governing than with understanding intercultural differences and articulating the functionally common needs of apparently disparate cultures. Taken as a group, this division of sensibility among these three disciplines strengthens our sense that governance is somehow different from both the market and culture; that governance is public while the market is private, that governance is international while culture is local.

A lawyer might pursue a political project in one of these disciplines (more refugees should be admitted to a particular country), but when he or she argues for a looser doctrinal approach to refugees, he or she thinks, probably correctly, that to be most persuasive with disciplinary colleagues he or she should present the proposal so as to induce the fantasy of a more perfect relationship between international law and its subjects – this way of handling refugees will strengthen international law or the international system. Indeed, as the projects pursued by international lawyers unfold, this broader desire, this disciplinary will to power, often surpasses whatever particular objective, pragmatic or political, the specific projects might seem to have had. Sometimes this results from the fact that a proposal is made as a general matter – “it would be a good thing to use national courts to enforce international norms” rather than “this case, if brought here, will be useful to these interests.” Indeed, this generality often seems an independent virtue, more significant than the results of particular cases. We might say that all these internationalist disciplines aspire to generality, to universality, to rationality – to their own scientific perfection and instantiation – which inflects the way individuals pursue more particular projects.

Part of what it means for an international lawyer to eschew politics and ideology, to be professional, is precisely to pitch one’s concerns in this general way – to will for the discipline rather than for oneself, to fuse a personal professional destiny to that of the field, to work that the discipline might achieve its aims in the name of human progress, and to experience its success as a personal triumph. A legal internationalist works to enhance the authority of international norms or the jurisdiction of international institutions. Progress or reform means that the ‘international system’ defeats great power statecraft or national particularism by sanctioning or deterring the aggressor or remaking sovereignty and the state, that the ‘market’ has expanded to embrace ‘societies in transition’ to it, has consolidated its defenses against backtracking by national or local elites. For professionals working in sub-fields, this disciplinary objective will pull particular projects into the grooves of the discipline’s self image. Comparativists should address problems so as to further intercultural understanding – which means eschewing what seems the governmental. Internationalists should further global governance – which means avoiding or

managing the cultural aspects of a problem and staying clear of private law. International economic lawyers build the market best when they likewise avoid both governance and culture, focusing instead on extending a liberal commercial spirit.

Of course, such general disciplinary desires may be at odds with any number of particular projects, almost by definition. After all, in the disciplinary lexicon, international 'law', like the 'market' or intercultural 'understanding', is general and universal, while politics, illiberality or nationalism are local and specific. For regime building, one must therefore forego the political in this particularist sense in the name of a law which, in some future moment, once strengthened, will return to judge and rule, just as one must forego the temptations of regulation or rent-seeking in the name of a future market which will reward productivity with growth. Concrete proposals – to build an international judiciary, to reshuffle voting rights, to establish new institutions – are seen as expressions of a general intellectual commitment to the possibility that a universal or enlightened rationality will prevail over local political passions or that an institutional pragmatism will get us beyond the formal bureaucratic rationality or balance of power preoccupation of the state system.

It is not just that internationalists make arguments for particular goals in terms which highlight their systemic contributions, or that they sometimes get carried away with their own systemic rhetoric and forget their particularist objectives, but that service of the disciplinary desire carries with it an erasure of particularist projects, sands them down, harnesses them to a universal project. For the internationalist, these general projects come to define what it means to pursue the particular. For such a discipline, a global politics of identity is simply unthinkable – everyone benefits from the governance or the market, or the understanding which will emerge from the disappearance of particularist politics. In this disciplinary imaginary, Russia's interest or Indonesia's interest, or Japan's interest aligns with the interests of the international market – local politics (of protectionism, exchange controls, redistribution, corruption, etc.) are equally detrimental to both the growth of the international market and to the local economy, leading naturally to a loss of confidence, then to autarchy, until ultimately one simply slips back from modernity altogether. Or think of the common sense among public law internationalists that participating in an international non-proliferation regime would, properly understood, be in India or Pakistan's own best interest. It is in this sense that international law is a project of governance, bringing law *in general* to bear on politics *in particular*, order to bear on anarchy, reason on chaos, the international on the national, etc., even when – especially where – it also presents itself as a set of specific responses to practical problems.

Even, in fact, when the particular projects misfire and solution to the practical problems remains out of reach. So long as the field remains oriented towards 'governing', particular failures of government will be comprehensible simply as warnings to do more, to intensify one's efforts to build the system as a whole. Similarly for an orientation to building a 'market' or advancing intercultural understanding.

International law, in this sense, lives in an interminable procedural or constitutional present, polishing its tools, embroidering its technique, strengthening itself, that it might one day tackle particular substantive problems. It would perhaps be more accurate to say that solutions to particular problems emerge as a by-product of this system building agenda. Or that solutions to particular problems are cash payments on a dramatically leveraged legitimacy account – every now and then you must actually produce a resettled refugee or drained swamp, or defused border crisis to render the broader project of regime building rhetorically plausible.

These general desires also blunt the sense that the internationalist disciplines I have been exploring are ideological or biased. The professional within each is oriented rather to building the system, within which others, later, elsewhere, may pursue ideological or political projects of various sorts. Of course this is not the whole story. These disciplines also have blind spots and biases. Even if by default, they have developed a substantive program – this regime of doctrines and institutions, this market, these interests and not those – as *the* instantiation of enlightenment, rationality, and modernization. We have seen the articulation and defense of this program in the collaboration among the disciplines of public international law, international economic law, and comparative law. Although these disciplines understand themselves to be separate from one another, to work with different methods on different problems, in a broad sense we should see them as collaborators – to equate politics with public governance rather than private law, to insulate private law from political contestation, to differentiate global governance and local culture, to define and limit the political aspirations and avenues of the international regime.

Sometimes these projects, obscurely present in the background assumptions of international law, international economic law, and comparative law are presented more directly and forcefully as orientations for foreign policy. In the United States, the discipline of international relations has been remarkably consistent in expressing the broad desires animating these other legal disciplines as the background conditions and objectives for United States foreign policy. This work has continued in the post-Cold War period. In the next essay, I explore the interpretations of the post-Cold War international terrain offered by the mainstream international relations discipline in the United States, which turn out to be altogether consistent with the background projects pursued by the disciplines I have examined thus far. I end with a polemic for an alternative interpretation and an alternative vision.

It is sometimes difficult, however, to imagine the ways in which a discipline which sees itself as outside ideology, which develops precisely by purging itself of particularist bias, could nevertheless be engaged in a polemic for a particular political vision. Two of the most characteristic ways in which this happens are through the sense of geography and history which the discipline develops for its members. In this essay, I examine the role of history in the field of international law in this sense – as a tool with which the discipline pursues its desire. As it turns out, historical narratives are central expressions of fantasy, buttresses for desire, and disciplinary tools deployed by international lawyers pursuing projects.

Mainstream international lawyers use history in what seem two broadly different types of argument. First, history figures in arguments about the provenance and power of particular rules, principles, and procedural arrangements, operating as a mnemonic to remember the discipline's favourite argument bytes and institutional techniques. Second, broad historical stories about the discipline's origins and development figure prominently in polemics for and about international law, offered as models for the field's progress and renewal. As it turns out, however, arguments about doctrinal provenance are tinged with stories of progress, and the progress narrative is more than it seems – at once a program and a geography. It is worth looking at these types of historical story in turn.

5.2. History as provenance

Absent a code or legislature, international lawyers have long read their rules in history, culling famous texts, diplomatic incidents, and judicial pronouncements for insight about what 'the international community', as we would now call it, treated as a binding rule. This effort has been more or less systematic at various moments – before the nineteenth century the citation practice was too haphazard to be called 'history' in a modern sense – and has been pursued with quite different senses of rigour or completeness in different national traditions. Nevertheless, an argument about a rule or principle, or institutional technique in international law is almost always also an argument about history – that the particular norm proffered has a provenance as law rather than politics, has become general rather than specific, has come through history to stand outside history. Alongside these everyday assertions of normative provenance has arisen a more general historical scholarship aimed at doctrinal restatement – what was 'the law' about this or that in a particular period? This style of scholarship has been more popular in Europe, and particularly in England, than it has been in the United States. Innumerable doctoral dissertations have been produced tracing the 'history' of the right to conquest, or the binding force of treaties, or the meaning of sovereign immunity. Even when enriched by interdisciplinary work in international relations or diplomatic history, the project remains one of doctrinal restatement: what was/is the law?

A United Statesean international lawyer typically asks the question somewhat differently. Of course there is a practice of assaying history to ascertain the pedigree of customary norms. But in United Statesean post-war international law, one is more used to asking questions about the machinery through which what might (or might not) be described as norms have made themselves *felt* than questions about the origins, sources, history, or precise content of norms. The United Statesean international lawyer – whether influenced by the relatively legalist process jurisprudence of the 1950s or by the policy orientation of the Yale school – is likely to think a rule's provenance at best a make-weight argument for its applicability. We are used to agnosticism about a rule's origin or precise content, seeing international law as a domain in which various claims are made about rules and principles which

sometimes do in fact persuade. Provenance is only a weak explanation for persuasion and only the weakest provenance is required before a rule can be asserted – the claim must simply be plausible. After that, one must wait to see how nations in fact behave. For United Statesean lawyers, history offers rather a lexicon of plausible arguments and a storehouse of possible institutional arrangements, rather than a mode for judging the force or precise content of a rule or principle.

Although United Statesean preoccupations with state behaviour and process, like our embrace of relative normativity, soft law, and an unstable boundary between legal and political argument, will often seem ahistorical and squishy to continental colleagues (just as European historical work confidently stating what the law 'is' can seem formalist to our ears), these two traditions in fact deploy history in broadly similar ways. Both write history to generate a holding. Ultimately, the reduction of one historical event after another to an instance of norm generation is no less forced and presentist than the effort to draw from one case study after another comparative insight into how norms are applied. Both inquiries compress the historical record into a list of factors and a holding. In both traditions, it is often hard to withhold a smile when reading accounts of both sorts which narrate a conflict only to conclude with a statement of its 'significance' which could only startle the participants – e.g. 'and so it turns out there is an exception to the doctrine of ...', or 'the UN does have jurisdiction over ...', or 'international rules can influence policy, even in a crisis' – that sort of thing.

Of course, history-as-provenance is always threatened by the differences among actors over time. The rhetorical gestures and motives of scholars and statesmen are extremely hard to compare across time as applications of similar ideas or contributions to a single institutional project. Moreover, it is unlikely that historical actors were primarily concerned, or even noticed, the relationship between their actions and a transcendent historical development of something which would later come to be summarized as 'international law'. The complexity of the historical record – different ideas about what 'law' was, different attitudes about 'sovereignty' and 'war' and 'right' – tend to disappear when one looks at historical events for evidence of what 'the law' about some transhistorical phenomenon like 'conquest' or 'sovereign immunity' has been. A similar flattening occurs when one canvasses historical events to see whether the norm held, was applied, influenced behaviour.

One result of this instability is that individual accounts of what the law 'is' are open to challenge. And the discipline has developed a rich practice of argument, of challenge, and response and restatement – in scholarship, in the great projects of codification, and in the day to day argument of lawyers and statesmen – about what the law which enables their action or binds their opponent actually 'is'.²⁹ The point of history as provenance is less to establish or clarify, or even to 'progressively develop' the law, than it is to open a terrain of professional dialogue, a 'discourse' if

29. I explore the doctrinal 'sources of international law' in D. Kennedy, *The Sources of International Law*, 2 *American University Journal of International Law & Politics* 1 (1987).

you like, about what the law is. When practicing this discourse, although professionals may disagree sharply about the content or existence of norms, about the history which binds, about the players whose views should count, and so on, they share the fantasy that there is a law out there. For the discipline this is a strategic fantasy: in arguing for their interests and pursuing their projects, professionals imagine the preexistence of the law which the discipline is intent on building. The practice of history-as-provenance situates professionals as instruments, interpreters of a law which precedes them, which is always already out there to be read.

Although historical argument of this sort will generally present itself as evoking the motives, fantasies, and projects of various historical players – may even require that they had a certain subjectivity, an *opinio iuris* – the project also has a quite different effect: to reinforce the fantasy that some thing called ‘international law’ has had a continuous presence across differences in time and place. In this project, the international lawyer reads history to map an evolving line between something imagined as ‘law’ and something imagined to have been ‘politics’, the ebbs and flows in the long term project of building an international law against the threat of politics.

The work which emerges offers a polemic for, as much as a restatement of, the discipline’s commitment to an evolving relationship between international law and political power. We might say there is a retrospective fantasy at work here – a fantasy that there really is an international law which can be and has been comprehended similarly across time and space, and that its restatement will clarify for some group of interested players some aspect of our current situation, some regularity in our political and legal culture we might not otherwise have noticed. In this sense, the development of history as provenance is also a story about history as progress, about the achievements of our hero, international law, over time. It is in this sense that history-as-provenance is also history-as-progress.

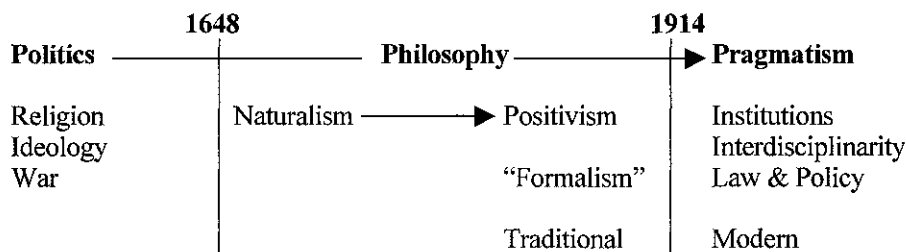
A history which paid attention to counter principles and counter rules, to the differences between historical contexts, the breaks and gaps in the historical record, the fantastic quality of notions like an ‘international community’ which might ‘agree’, which foregrounded the stories of projects pursued by particular people in an intelligentsia, would both recapture different aspects of the historical record and pursue a different contemporary agenda. If we think of Nathaniel Berman’s work recovering the astonishingly omnipresent *ambivalence* of modern international law, for example, we can see an entirely different disciplinary polemic – for a situated profession, confronting human possibilities and choices, pursuing political projects which distribute power among groups and interests in one way or another, rather than a college of cosmopolitan professionals working out among themselves the entailments of a rational humanist order.³⁰

30. See Berman, *supra* note 17.

5.3. History as progress

Accounts of international law's progressive history do not emerge solely from efforts to establish the provenance of norms – there is also an elaborate disciplinary practice retelling international law's progressive development which serves as a common intellectual background for professionals in the field. This story is a grand narrative of the slow and unsteady progress of law against power, reason against ideology, international against national, order against chaos in international affairs over 350 years. When the history of the field is told in broad sweeps, two dates stand out – 1648 and 1914. The year 1648 is thought significant because the Treaty of Westphalia closed the religious wars in Europe in that year with a system of territorial authority over religious questions which came to be remembered as the legal inauguration of the 'state system' and the beginning of international law. Before, we remember precursors (even in the ancient world), and famous publicists who foresaw one or another doctrinal element of what was to come, but we mostly recall a pre-legal international world of politics, war, religion, empire, and ideology. The broad period from 1648 to 1914 is remembered primarily for developments in legal philosophy – a move from 'naturalism' to 'positivism' – which refined this state system until culminating in the 'traditional law' of the late nineteenth century. The modern era, in turn, is seen as the period of pragmatism, of reaction against the theoretical preoccupations of the 1648-1900 period and the 'formalism' of the traditional late nineteenth century synthesis.

We might capture this tale in the following little picture:



That this broad story is not 'historically accurate' hardly needs mention. Obviously there were elements of law before 1648, and of politics, war, diplomacy, and so forth thereafter. It is more than odd that 'diplomatic history' and the 'history of international law' should be thought different subjects in the 1648-1914 period, but related stories both before and after. In temporal terms, the years 1648-1914, while conventionally treated as one long 'traditional' period, saw a range of extremely diverse ideas about the universality of international law, the status of the sovereignty, the relationship between law and rights, between law and morality, the status of violence. The players, whether scholars or statesmen, whose behaviour and writings are now cataloged to produce conclusions about the state of the law

had quite different conceptions of their own prerogatives, as of the status of law or statecraft.

What we now call the 'traditional' system of international law emerged only as the fragile fantasy of a few lawyers and scholars in the late nineteenth and early twentieth century. And even they were far more aware of its contradictions and ambiguities than is visible in the best retrospective restatement. We call them 'formalist' more to establish a progressive baseline in arguments between legalist and policy orientations within modern international law than as a description of their actual consciousness. To say there was no 'state system' before 1648 and a 'state system' thereafter is to forget the complex stories of nation building and the consolidation of a unified idea about 'sovereignty' which took place not only in the nineteenth century, but, more crucially, in our own century of decolonization, Keynesianism, the welfare state, the industrialization of war, and so forth.

The story is important for another reason, however. It is a simple narrative: once there was politics, war, religion. Into this darkness came the state system, with international law as its philosophical lady in waiting. For 250 years scholars worked to develop its doctrines, both perfecting sovereignty and answering the riddle how sovereigns so strong could be bound by law. But there was a problem – international law had drifted too far from diplomacy and statehood and politics, had flown too near the sun of philosophy. In the modern period we have redeemed international law by reintegrating it with political science, embroidering it into practical institutions. Reduced to bare bones: politics was displaced by philosophy; philosophy was displaced by pragmatism.

As a disciplinary fable, this history instructs us: international law has progressed by turning its back first on politics and then on philosophy. It grows by rejecting both the politics of ideology and the law of forms for a pragmatic profession of purposive rules and policy. The discipline remembers its origins as moments of escape and renewal – escape from the world of religion and nation and power, and politics into the domain of reason and philosophy, guaranteed by the formalities of the 'state system'. And then, in this century, a hundred year effort at renewal – rejecting the traditional synthesis as 'formalism', rejecting sovereignty and the state in favour of a chastened pragmatism of technique and management, flexibility, and practical reason. The conventional tale of international legal history is a progress narrative, a fable about how the discipline grew and who its enemies are – above all, this history teaches, turn your back on politics and ideology, and then also on philosophy, theory, and form.

Like many disciplinary progress narratives, this very general fable is repeated in the histories of numerous specific doctrines which arose as imperfect responses to political chaos, were clarified into a classic or traditional approach, and which have now been modernized. Stories like this are reassuring at a general level – we've come a long way, have a long way to go, that sort of thing. They read various ruptures and transformations – wars in particular – as opportunities, moments of diversion, challenges, to a longer central narrative. This continuity, the stability of the

disciplinary project over time, itself contributes to the broad sense that there is such a thing as international law, a system or point of view with a history. In this sense, of course, progressive history also provides provenance.

At the same time, such progress narratives reinforce the field's identity – we are those who have stood against politics, against religion, and who have turned our back on formalism, who have modernized our techniques by rejecting the abstractions of traditional international law. Of course this sort of identity reads some people out of the field – those who are not secular, cosmopolitan, pragmatic, who are interested in philosophy or enthusiastic about the traditional forms. But more importantly, perhaps, it models what it means to progress, establishes a tradition of renewal by which individual doctrinal innovations can be judged. The progress narrative is also a catalog of progressivism. To the extent international law has a project, offers a polemic for the international over the national, this desire is defined, to a large extent, by its sense of the forms progress has taken up to now.

5.4. History as progress is also history as program

Put most simply, we could say that international lawyers share a naive starting point in thinking about doctrinal or institutional reform. The template might be expressed as two principles gleaned from 1648 and 1914. First, if faced with a choice between reason and belief, law and politics, the secular and the sacred, to choose the first term is to build the international, to choose the second is to reinforce the national. Second, as between the formal and the material in law, the doctrinal and the institutional, rules and principles, the first term sets back the project of internationalism, the second promotes it. We might illustrate these tendencies in the following two pictures:

1648	means that	politics/religion	is to	law
	as	chaos	is to	the state system
1914	means that	form/rule/abstraction	is to	pragmatism/principle/institution
		Positivism/Traditionalism		Modernism/Policy Science
	as	sovereign autonomy	is to	international community

These historical lessons reinforce the sense that what we might think of as a problem in the domain of society – is the 'international system' disaggregated or unified, oriented towards local autonomy or international community? – has a corollary and can be addressed within the domain of law – by purging law of ideology and politics, and then reforming it to abolish formalism. The idea is less that the development of a pragmatic law *causes* the system to integrate, although you hear arguments of this sort, than that a pragmatic law is the very *definition*, the indicia, of an integrated or cooperative international system. Wherever two are gathered in the name of law, there is the system a cooperative one. The disciplinary will to modernize and expand *is* the will to social integration. It is surprising how fervently

international lawyers seem to believe that a reformed international legal process is sign and substance of a more cosmopolitan, internationalist world. It is surprising how many international legal arguments read as arguments for international law, for international lawyers, as if insistence on the generality of law, and then on the method of legal antiformalism, were more important than, or simply substitutes for, efforts to address particular international conflicts or social problems.

This simple progress narrative gives the international lawyer a domain of engagement internal to his discipline which is more general, universal, modern, than particular solutions to problems. And anyway, where there is a regime, cooperation, good governance, specific problems will be taken care of, or will take care of themselves. International lawyers should certainly care about human rights or alleviating the AIDS crisis, or reducing the violence of warfare – but when one reforms the human rights machinery, purges the World Health Organization of its attachment to sovereign forms, relativizes the law of war to erase its formal commitments to a distinction between war and peace, neutral and belligerent, there is progress – a progress more important, more general, more historically enduring and reliable, than the quotidian matter of actually helping any particular person avoid AIDS or landmines, or torture.

Consequently, in evaluating professional projects, what counts is the contribution to the status of forces between law and politics, between the international and the national, the general and the particular, and between form and policy, not the distributional consequences among groups in society. The progress narrative provides the international lawyer with a domain of engagement as broad as his fantasy of international law itself, both defining the disciplinary will to power as progressive and providing a blueprint for action, reinforcing the importance of reform work which remains at this systemic level rather than tarring its objectivity with the distributional details of particular political projects. The serious reformer moves from politics to law to pragmatism, from form to policy, as the measure of the rational, the universal, the modern, against the primitive politics of particularism.

5.5. Pursuing the program: a century of renewal

The double movement of this most general narrative of international legal progress – law replaces politics, pragmatism replaces form – has oriented a century of efforts to renew, rebuild, or modernize international law. The history of international institutions from 1914 through the end of the Cold War, for example, saw three waves of disciplinary enthusiasm and renewal: after World War I (establishing the League), after World War II (establishing the United Nations system), and after the Vietnam War and decolonization process (inaugurated by the drafting of the 1982 Convention on the Law of the Sea and the project for a New International Eco-

conomic Order).³¹ There are those who claim that we are now in the midst of a fourth wave, spurred by the end of the Cold War, the expansion of international economic contacts known as 'globalization', and symbolized by the move away from global institutions to decentralized bargaining (as in the WTO and GATT) and the regime building activities of institutions in 'civil society', including private actors, non-governmental organizations, and the like.

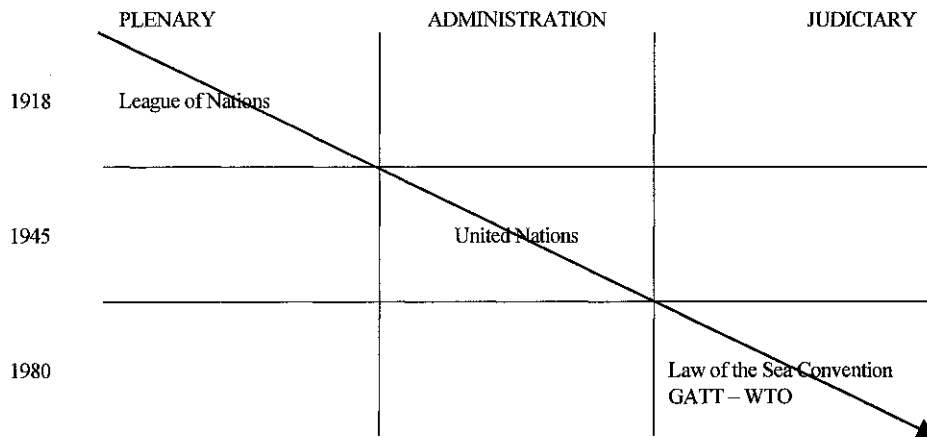
In each period, international lawyers and scholars launched a general critique of the field in very similar terms. International law had gotten out of touch with power, had become too formal and abstract, too fixated on the state, too wedded to an old fashioned idea about sovereignty. In each generation renewalists called for interdisciplinary work, embrace of political science or international relations, and an opening to new voices – from America, from the post-colonial world, from women, indigenous peoples, the unrepresented. In general terms, each wave presented an explicit critique of its disciplinary forbears for being too theoretical and abstract, calling upon the discipline to renew itself by turning to pragmatism, practice, and case by case solutions. Reform in each phase was to be guided by real politics, by sociological conditions, by functional considerations, by embrace of 'political science'. In each generation it seemed that new theoretical insights, often from neighbouring disciplines, allowed international lawyers to see, perhaps for the first time, that sovereignty and the state are illusions, linguistic misunderstandings, inconvenient superstitions, or religious fantasies the secular pragmatist best sets to one side. Something called 'positivism' and 'formalism' seemed in each era to have dominated the discipline until just moments before. And it is not surprising that almost all histories of the field are written as progress narratives away from positivism, formalism, and a focus on states. Great figures of the field are overwhelmingly remembered and studied as old-fashioned positivists or formalists whose occasional good idea was almost accidental. And yet the most cursory look at the actual arguments of most all the leading figures in this century in the fields of international public law or international institutions reveals an extremely self-conscious modernism and realism.

At the very least, there is some forgetting going on. Perhaps these are simply good ideas which bear repeating. But if we look back on a century of institutional innovation, it is striking how insistently this narrative has shaped what people in the discipline thought it made sense to do at each stage. Specific reform projects – constitutional reform proposals addressed to the particular failures of the League or disappointments of the United Nations – were designed as applications of the discipline's own broader narrative of progress; a story about how a fantasy called 'international law' wrought order from chaos and practicality from philosophical speculation.

31. D. Kennedy, *A New World Order: Yesterday, Today and Tomorrow*, 4 *Transnational Law and Contemporary Problems* 330 (1995); and *id.*, *The Move to Institutions*, 8 *Cardozo Law Review*, 841 (1987).

The story of institutional renewalism across three generational moments is remarkably parallel whichever of the three conventional branches of government we choose as a focal point. In the League, the action was all in the design and implementation of the plenary, for the United Nations it was the proliferation of administrative agencies, and for the Law of the Sea, WTO, and so forth, it has been the dispute resolution mechanisms.

We might illustrate this development with the following little picture:



In each phase, professionals and intellectuals in the discipline of international organizations understood progress less in terms of peace kept, hungry people fed, wealth created or more equitably distributed, than in terms of either the movement from one branch to another or the movement within one branch from politics to law and then to pragmatism. At the most general level, generational progress was measured by a rotation among governmental branches from the politics of the plenary to the bureaucratic formalism of the administration to a free-wheeling smorgasbord of dispute resolution mechanisms. Why was the United Nations better than the League? – in part because its broad administrative apparatus could do things which the gridlocked politics of the League plenary could not. What have we learned from the weaknesses of the entrenched United Nations bureaucracies? – to focus on flexible dispute resolution among the disaggregated governmental agencies of interested states, as in the 1982 Law of the Sea Convention or the World Trade Organization. Law displaces policies, pragmatism displaces formalism, no matter that in each moment the institution offered an elaborate balance of all these elements.

Individual branches of the evolving international government are also understood to have 'progressed'. We say that the plenary of the United Nations improves on that of the League in several ways: unanimity voting gave way to a more complex system of weighted and majority voting (an elaboration of specific legal rights

displacing respect for the political autonomy of each member), the veto has been introduced (a respect for real politics replacing the formalism of unanimity voting). By the 1980s, the proliferation of legal voting rules had given way to a more flexible 'consensus' style – perhaps similar to unanimity, but only if one failed to recognize the maturation of the community (from formal rules to fluid pragmatic arrangements) which made consensus possible. In the League, moreover, membership was a political problem (would the United States join, how would Russia and Germany be dealt with); for the United Nations, membership became a matter of legal entitlement (remember the International Court of Justice case about 'package deals').³² But we have now gone further still, replacing an entitlements approach with a more 'functional' attitude, allowing all the 'entities' which are relevant to the solution of a problem to 'participate', rather than insisting upon a right to 'membership' only for 'states'. Politics displaced by law, law displaced by pragmatic arrangements.

The judiciary has also matured. In the League period, the Permanent Court was established as a legal alternative to the political institutions of the League. By 1945, the International Court could be established as an integrated 'organ' of the United Nations system. By 1980, the focus had gone off adjudication altogether, in favour of a more flexible, *ad hoc* range of alternative dispute resolution mechanisms. And the administration progressed as well, by giving up the political contestations of the League period between the 'activism' of the ILO and the more formal civil service style of the League secretariat in favour of the wise and modest leadership first asserted by Dag Hamarskjöld. At the same time, the independence of the international civil service was protected after 1945 by an increasingly dense body of administrative law, until the bureaucracy began to choke on its own conflicting regulations and needed to be reformed in the direction of a smaller and more flexible administration, borrowing from non-governmental organizations and the private sector. Or perhaps the better move is to an international organization without a formal administration. In the WTO, the objective is less to administer agreed rules than to facilitate a continual process of bargaining among members on a wide range of topics, so disaggregated from one another that it would be extremely unlikely that differences between artificial entities like 'states' would ever be able to congeal sharply enough in polarization to need international intervention. Less, in this sense, really is more.³³

Each of these developments may well have marked a real advance. Perhaps it is generally better to resolve disputes through alternative dispute resolution techniques than through adjudication, to decide by consensus rather than to vote by unanimity, and so on. In evaluating these changes, however, professionals in the

32. Conditions of Admission of a State to Membership in the United Nations, Advisory Opinion of 27 May 1948, 1948 ICJ Rep. 57.

33. The best articulation of this last idea is J.H. Bello, *The World Trade Organization Dispute Settlement Understanding: Less is More*, 90 American Journal of International Law 416 (1996).

discipline are removed from a strategic calculation about the winners and losers in particular disputes, and tend to equate development of the system as a whole with the interests of all parties equally. In the United States, this emerges most dramatically in the passionate articles, books, editorials, and television appearances by committed legal internationalists arguing that the interests of the United States are, in fact, identical with the development of the international legal order – and so, coincidentally enough, are the interests of everyone else. This is exactly the sort of presentation, however, which has placed the legal internationalist off-sides the foreign policy establishment for a century. At the international level, we can see the result in the remarkable uniformity of international organizations designed to tackle the widest range of particular problems. In each period, all sorts of institutions would suddenly find themselves working with weighted voting, or deciding by consensus, or offering to resolve disputes with a buffet of different schemes. The conclusion is inescapable that at least part of the constitutional effort of renewal has not been a pragmatic response to historical conditions, but has rather been wearing the groove of the broad progress narrative ‘politics-law-pragmatism’ ever deeper into the fabric of the discipline. In this sense, the progress narrative provides a template for disciplinary action as much as a record of the discipline’s achievements.

5.6. Who’s on the bus: the progress narrative as geography

These disciplinary progress narratives also mark a number of spatial boundaries. First, the story of international law’s progress differentiates the domain of internationalism, of cosmopolitan rational universalism, from the domain of old fashioned formal boundaries and specific political commitments. To the internationalist, odd as it sounds to most United Statesean ears outside the discipline, international governance is a more advanced form of politics than one generally finds at the national level – precisely because it is more universal, rational, pragmatic, and expert than what goes on nationally or locally. Brussels is better than Bonn and Bonn is better than Bremen. The International Monetary Fund is better than the Russian Central Bank as that Bank is better than the government budgetary process in Uzbekistan. Of course, as a procedural regime, the international is agnostic about how one conducts oneself at home – international law bridges between states by providing a space above cultural differences. But the progress narratives of the field reinforce the feeling that this sort of deracinated bridge is, ultimately, better than the politics of interest and identity which occupy governments below the water line of sovereignty.

The boundary between the political and formal, on the one hand, and the rational and pragmatic on the other, also differentiates the ins and outs, the old fashioned and the up-to-date. In this sense, these disciplinary progress narratives distinguish a center and a periphery – even as they insist upon their agnostic universalism. At the imperial center, and most particularly in North America, the move to antiformalism has progressed the furthest – our international law is far more agnos-

tic about governmental and legal form, open to a range of shifting entities, to the soft law of business practice, the normative demands of private investors, the legitimate participation of myriad actors in civil society. We have, we say, disaggregated the state, purged the field of its fetish for the state and sovereign, eradicated the last vestiges of what Justice Bedjaoui has termed “legal paganism”.³⁴ And because we speak the language of antiformalism, we also speak the language of international community.

Contrast Saddam Hussein, insisting on his sovereignty, his autonomy, on a narrow and formal reading of the Security Council’s various resolutions. Or contrast the Third World at any recent United Nations conference, on the environment or women, or intellectual property, insisting on their sovereignty, their autonomy, their rights. Of course they are entitled to do so, just as the Europeans are certainly entitled to worship the International Court of Justice – but it is behind the times. To be for international law is to go beyond forms, as we have gone beyond politics. Think of the doctrine of *uti possidetis*. We can understand post-colonial societies returning to a formalism about boundaries, insisting that the open and flexible rules of occupation, functional control, self determination, and economic viability be set aside in favour of the administrative boundaries of the colonial powers. It makes sense that they should rely on the priority of law over possession – but why? Because they are primitive states, corrupt, passionate, who cannot trust themselves to make the turn to a more pragmatic order.

There is a paradox here. Even as it tells the story of an advancing international order, universal precisely because it eschews political commitment and formalism about boundaries, international law’s broad progress narrative restates the distinction between an advanced center and a primitive periphery. In the advanced center we are beyond rights, beyond statehood, beyond sovereignty. We live in the international, the global, for the spirit of our own law is also the spirit of international law. At the periphery, one must make do with an earlier form, a form at odds not with the interests of the center, but with the project of internationalism itself.

In this sense, it is not surprising that international legal histories have given short shrift to the colonial encounter. Even the most politically correct writing in Europe and the United States, giving equal treatment to doctrines and developments outside the North Atlantic theater, assimilates the colonial situation to the generic project of law building. Thus, in European style histories, the colonial theater will serve as a more exotic origin for doctrinal holdings, or as the terrain for the evolution of doctrinal mutants. In the United Statesean version, the non-European world offers a domain of special problems on which international law can be deployed and terrain of special attitudes which might inflect the application or interpretation of norms. In both sides of the genre, the role of international law in the ongoing production of a distinction between the West and the rest, and the role

34. See *Towards a New International Economic Order* (UNESCO) 98 (1979).

of that distinction in the generation of doctrines, institutions, and state behaviour is underplayed.

And this role has by and large not been challenged by Third World international legal scholars. A tradition of criticizing international law for its 'roots' in colonialism is by now a familiar part of the mainstream literature. But criticism of the *origin* of international legal rules can take one only so far. Perhaps the doctrine had a bad birth, an illegitimate parentage, but, we should ask, what is wrong with it *now*? Are we not evenhanded in its application? If not, let us be. Is it not consented to by the post-colonial world? If not, let us put it to the vote. Is the Third World still excluded from participation in its institutional application? If so, let us invite them in. Initiatives of this sort do not meet their mark because the relationship between center and periphery is not written in the *content* of legal rules – indeed, the international regime has progressed precisely by emptying itself of substantive content which might display a bias.

If we suspect bias, we must look elsewhere. Either the doctrine's origin must have given it a structure, a virus of some sort, which continues to differentiate the center and the periphery however the doctrine mutates. Or there must be in the project of international law's universalism some differential interpretation of center and periphery. It is here that historical narratives are suggestive. To unsettle the relationship between center and periphery would take a historical recovery of the heterodox at both the center and the periphery. A history which questioned the easy relations between antiformalism and communitarianism would also unsettle the sense of a center/periphery distinguished as modern and primitive. One could imagine a historical project to uncover the formalisms in modern international law, the antiformalisms in the nineteenth century system, the moments of political discretion in both methodological moments, which would be parallel to scholarly efforts to uncover the interpenetration of the center and the periphery – the First World in the Third, the Third World in the First. Both projects – one spatial, one temporal – would unsettle the way in which the discipline's normal narrative of progress reinforces its sense of a steady boundary between an advanced center and a primitive periphery.

Indeed, the field's most basic historical narratives offer a window on the structure of international law's own desires and on the field's broader governance agenda which can be recovered by focusing on the ambiguities, contradictions, and ambivalences of various moments of doctrinal or institutional development. If we unsettle the idea, for example, that methodological antiformalism is an automatic mark of international cooperative progress, it will be easier to ask whose interests are advanced by particular doctrinal and institutional arrangements. We could do this by demonstrating that the traditional period of the nineteenth century was not 'formal', but rather a *mélange* of formal and antiformal positions, or that the movement to renew international law in the early modern period sought to do so precisely by blending abstract forms with outreach to political movements, or that most policy choices offered a choice between two different interventions rather

than between an old system of formal restraint and a modern regime of cooperative internationalism. It would be interesting to map the geography of claims about the progressiveness of anti-formalism. I have been struck, for example, by the extent to which internationalists thrill to the pragmatic flexibility of modern environmentalist regimes, in contrast to the formalism of Third World assertions of sovereignty over natural resources, while also arguing in economic matters that a market can only be achieved once flexible inter-governmental bargaining and discretion has been replaced by a formal system of transparent respect for property rights. In both cases, the internationalist is expressing the interests of a particular group or class, but this interest is submerged in a more general rhetoric of modernization and progress. Internationalists often claim, for example, in a standard Weberian progress narrative, that economic development requires a move from feudal governmental discretion to a predictable system of rights. Indonesia must break up its family monopolies and open the way for a market in productive assets. They should do this because 'the market' will only work if rules are predictable and rational. It may well be that more economic growth will come to Indonesia if the interests of the international private investors who wish to purchase these family monopolies are respected, because the current distribution of rights and entitlements gives them the power to make or break a regime, but this is a somewhat different articulation of the point.

An exploration of the discipline's historical tools – the practice of argument from provenance or progress – may open a rethinking of international law's geographic sensibility, and of the identity politics inherent in a regime which eschews identity politics of all sorts. It might be possible to recover something of international law's ongoing relationship to colonialism if we can set aside the sense that the colonial encounter was relevant only to provenance and could easily be corrected by proper attention to international law's agnostic generality and pragmatic flexibility. Whether recovering the ambivalence of doctrinal origins or the discontinuities in the discipline's progress narratives, the idea is to use historical study to recapture a sense for international law as a terrain open to the free play of politics and passion by individual people – to loosen the field from its own fantasies of transcendence, its own inbuilt recipes for progress, its own insistence on setting the local, the quotidian, to one side in the name of a broader universal fantasy of transcendence. The proposal is that we see international legal history is a terrain on which to read the development of ideas about identity, geography, and entitlement.

6. INTERNATIONAL RELATIONS TODAY: WHAT FOREIGN POLICY SHOULD BECOME

6.1. Foreign policy from both sides now

Among the internationalist disciplines in the United States, the field of 'international relations' stands out both for its self-consciousness about politics and its

willingness to articulate goals and ends for United States foreign policy. International relations specialists often seem more at home in the foreign policy establishment than do professionals from the other internationalist fields I have considered: international law, comparative law, and international economic law. Their disciplinary viewpoint seems less cosmopolitan, while their connection to politics and nation – and their corollary aversion to both law and deracination – often sets them apart from other internationalists. Despite these differences, however, an odd partnership between international law and international relations has reinforced a broad consensus on the frame for contemporary foreign policy. As the disciplines have converged over the last decade, this consensus has become both narrower and more visible. In my view, the narrowness of this shared vision can be traced to a series of typical disciplinary blind spots and biases which parallel those endemic to other related internationalist fields.

International relations developed as a specialization within the discipline of political science by combining the ostensibly realist or fact-oriented sensibility of diplomatic history with an effort to think about relations among the great powers in more systematic, even scientific, terms. Since its origins in Britain during the interwar period, the field has blended these two elements in various ways, always in an effort to understand and wisely steer the statecraft of the great powers. For these professionals and intellectuals, it is realism about power and a willingness to speak about the interests of particular powers (particularly, in the post war period, the interests of the superpowers) which sets the field apart from legal internationalists in public international law, international economic law, and comparative law. Unlike international lawyers (including comparativists and international economic law professionals) who fantasize themselves part of a cosmopolitan college of like-minded intellectuals which spans the globe, international relations experts are quite sanguine about the fact that the field is composed almost exclusively of United Statesians, alongside various scholars in Britain and the white Commonwealth. For foreign policy professionals in the field, the only real counterparts abroad have been specialists in international politics and military affairs in the old Soviet Union.

However forthright about a politics of national interest, international relations experts have also sought to elaborate the 'system' or 'regime', or 'structure' within which power and interest are expressed. This might be the balance of power 'system' of diplomatic history, amended for bipolarity or trilateralism, or post-hegemony developments. It might be the more scientific game theory systems of strategic studies – it is hard to think of an academic theory which has been more aggressively implemented at greater expense than the deterrence model, adopted by all the nuclear powers during the Cold War. It might be the implicitly universal and humanist system of comparative politics, in which one imagines that societies develop and interact in accordance with evolutionary rules which can be discerned by empirical or sociological study. Or it might be the softer regimes of transnational cooperation which have brought international relations back into contact with international law in the last 15 to 20 years.

The goal of all these systemic efforts has been to clarify the conditions, limitations, and possibilities for foreign policy. International relations specialists imagine themselves less as part of a cosmopolitan class of experts or intellectuals or managers of an international order, looking down upon states from an international plane, than as part of the rulership cadre of states, promoting wise and effective statecraft on the basis of their study of the system within which states live. It is not surprising that international relations professionals have played a more salient role in the exercise of state power in the United States than professionals and intellectuals in other internationalist fields.

The interesting point, however, is that international relations experts have only sometimes seen themselves implementing a national interest determined elsewhere – by historical necessity or popular will, or political choice. More often, they have seen themselves speaking *for* or *in the name of* the national interest, discovering the rules by which a hegemon *should want* to live, the objectives a hegemon *should want* to achieve, through careful, objective, and scientific study of the way states relate to one another, the nature of hegemony, the situation of this hegemon in the system. The goal here is to understand the actual conditions within which the state will need to act – the structure of the current international system – and then figure out what a state ‘like this one’ should/will want. It is, in other words, a distinctly internationalist understanding of the national interest.

This effort to speak for the state by understanding ever more clearly what *such a state in such a system* should want parallels efforts by legal internationalists to speak for the international order by articulating the systemic entailments of sovereignty. Here we have all the makings of a partnership: the international lawyer speaks for the international legal regime, on behalf of the professional disciplines which man its institutions, by imagining what a sovereign would want. At the same time, international relations specialists speak for the national interest, on behalf of the professionals who man the machinery by which it develops a place for itself in the world, by imagining how states would act in an international system. For both disciplines the exercise has an element of imagination about the relationship between types of states in a type of system. Although the imaginations of the two disciplines might be quite different, they might also run parallel to one another.

Indeed, however much each discipline might stigmatize the other for misinterpreting the situation in characteristic ways (lawyers are idealists, political scientists are barbarians), since each is actually performing a similar act of imagination which embraces both states and systems, it would not be surprising if an outside observer felt their visions were roughly similar. It is not surprising, for example, that as variants of game theory made their way through the academy, some participants in both disciplines found it helpful to compare their imaginary states to imaginary prisoners in an imaginary dilemma. If both disciplines were to agree about what such a prisoner would do, the apparent difference between looking at things from a national perspective and from the point of view of the international system would disappear.

In fact, during the post-Cold War period the discipline of international relations has drawn ever closer to international law, international economic law, and comparative law. The pretense that the law fields were insensitive to 'policy', like the idea that international relations was unaware of governmental regularities (which might be termed 'norms'), patterns of legitimacy or persuasion (which might be enhanced or produced by 'law'), or the elaborate procedures and institutions which both knit states together and structure their difference, has been dropped. As we might expect, international law experts approach this convergence from a more cosmopolitan point of view and stress the role of law, while international relations specialists come to convergence more through articulation of a vision for United States foreign policy in a changing world system. But together these fields have developed a broadly convergent interpretation both of the current international order and of the opportunities and risks for United States foreign policy.

In this essay, I explore this shared interpretation to assess the impact of disciplinary blind spots and biases on the development of foreign policy. I look at three broad developments in the terrain of statecraft which have been identified in all these disciplines: 'globalization' (or the disaggregation of sites for public policy), the displacement of military security by economic security, and the emergence of a central tension between cosmopolitan and ethnic or national sentiment which has displaced the ideological rivalries of the Cold War period. These three transitions have been interpreted by commentators in all these fields as the backdrop for conclusions about what foreign policy should become.

Unfortunately, international policy specialists have developed this common vision under the influence of bad ideas they bring with them from their disciplinary specialties – like the idea that international governance is somehow separate from the market and from culture, is more a matter of public than private law, or the idea that governance is international while culture is local. Within each of the disciplines I have explored, common ideas about what is foreground and what is background have sharply reduced the sense professionals have about what is possible and appropriate for foreign policy. Some emphasize public at the expense of private order, governance at the expense of culture, economy at the expense of society, law at the expense of politics. The same can be said for international relations which has typically foregrounded national interest in a political system over the interests of a cosmopolitan international regime in a world of sovereigns. As a result, each of these transitions has been understood by specialists in each discipline in light of characteristic disciplinary tendencies to underestimate what are seen to be background conditions or norms.

We are all familiar with the idea that disciplines would have different blind spots, which are often almost inverse to one another. We expect economic law specialists to overemphasize economic problems and fashion solutions which are narrowly economic, just as we expect international relations experts to stress the political, lawyers the legal, and so forth. I have met many public international lawyers who are proud to know nothing about economic matters and vice versa. These run

of the mill disciplinary limitations could be corrected by an aggressive interdisciplinarity. If we had political scientists, economists, and international lawyers all working together, they would compensate for their respective blind spots and bias.

The most interesting point to emerge from the exploration of internationalist disciplines side by side, however, is that this sort of blindness to the 'background' can be maintained in the face of interdisciplinary work. Indeed, the disciplinary blind spots we have encountered so far have been reinforced rather than ameliorated by relations between the disciplines. This has been true even where neighbouring disciplines have exactly opposite images of what is foreground and what is background; where comparative law foregrounded culture and international law governance, or international law foregrounded public order and international economic order foregrounded private order.

Sometimes disciplines reinforce one another's blind spots through a sort of tacit division of labour (comparative law is responsible for cultural understanding while international law takes care of governance or international law builds a public order while international economic law responds to global market imperatives) which reinforces the sense of difference between the two types of activities. Sometimes, as in the case of international law and international relations, the blind spots are reinforced, surprisingly enough, through a self-conscious effort at interdisciplinary understanding directed precisely at correcting for this sort of disciplinary myopia. The result, which I explore in this essay, is a shared interpretation of the post-Cold War international situation and a program of action for United States foreign policy which is blinded by the very disciplinary biases which a newly self-conscious interdisciplinarity has been designed to eliminate.

As we have seen, for example, specialists in all fields overestimate the impact of globalization on the capacity for public governance because they share a sense that public order must be made as a matter of politics, while private order builds itself through the work of the economic market. As a result they underestimate the possibilities for political contestation within the domain of private and economic law. This sense is shared by public internationalists who foreground public order, and by international economic law specialists who foreground private commercial relations. Indeed, the division of labour between public international law and international economic law reinforces rather than softens this tendency. In a similar way, foreign policy intellectuals overestimate the degree to which military intervention can stabilize or cauterize a local situation while remaining neutral or disengaged from local political and culture struggle. As security has come to seem more a matter of economics, specialists share a tendency to overestimate the technocratic or apolitical nature of economic security concerns, including the independence of recipes for economic development from cultural, political, and institutional contexts. Similarly, a shared sense that culture can be disentangled from governance leads specialists to misinterpret the emergence of ethnic conflict in the post-Cold War era by overemphasizing the exoticism of national or ethnic claims as well as the cosmopolitan character of global governance. This sense is shared by both pub-

lic internationalists who foreground governance and comparativists who foreground culture. Again, the division of labour between these fields reinforces rather than softens the conviction that governance can be pursued autonomously from culture. The result is a professional tendency to overlook opportunities for an inclusive global politics of identity, for working constructively on the distributional conflicts among groups and among individuals which cross borders.

6.2. Convergence: international relations and legal internationalism

The disciplines of international law and international relations share an ambivalence about the autonomy of international law from international political life. As we might expect, one discipline foregrounds law, the other politics. We might well anticipate that each discipline would overestimate the contribution its own object of study could make to understanding foreign policy, and we might try to correct for these disciplinary biases by merging the two fields. And indeed, as they have periodically through the last century over the past decade international relations and international law have pursued precisely this sort of interdisciplinary partnership to overcome bias and compensate for blind spots of this sort. Unfortunately, this partnership has intensified rather than softened the blind spots and biases of professionals in both fields, sharply narrowing their sense for possible and appropriate foreign policy initiatives. Indeed, professionals from each field experience their interdisciplinary work as broadening only by remembering an unduly cramped version of their own field, just as they had once separated their fields by seeing an unrealistically narrow version of their counterparts across the disciplinary divide.

When I studied international relations and political science in the 1970s, law was distinctly out of fashion. International law seemed a marginal and utopian wish to the hard-headed realists of international relations with their strategic models and multilevel games. At the risk of stating this tendentiously, we thought law was just a hypothesis – while we thought we knew what a prisoner would do in a dilemma. Relations between the disciplines are quite different now. The study of ‘regimes’ and ‘institutions’, and now ‘governance’ has taken political scientists interested in the international on a great looping trek towards law. Their journey coincides with a post-Cold War outbreak of enthusiasm for international law in the foreign policy establishment – the law of a ‘New World Order’, the law of liberal democracies, the law of a global market. This transformation has programmatic consequences. Although numbers are hard to find, it appears spending on ‘rule of law’ injection projects around the world now rivals food aid, refugee assistance, humanitarian aid of all sorts. Military assistance has itself turned increasingly to providing legal assistance, the need for good discipline and clear rules of engagement merging, in a post-CNN world, into compliance with international humanitarian norms. Indeed, the United States military may now provide more training in

international law and human rights than all the world's non-governmental organizations put together.

At the same time, when I studied international law, the point was to demonstrate our savvy about power. There was nothing abstract or utopian about the field. Even as we insisted that international law 'was law', we were interested only in how nations behaved, in the regularities of coexistence and the modalities of cooperation. International law presented itself as technical and hard-boiled, neither overtly political nor subjectively ethical. We were told only communists thought law was politics and even they supported the manifestly technical, procedural, rational rules of the international legal order. At the same time, the rational, pragmatic, cosmopolitan sensibility of the field reduced concern about ethics and community and value to the periodic lamentations of crackpots and Catholics. All this has also changed. The study of human rights and democracy and the commonplaces of 'liberal' societies has taken international law on a goose chase after the ethical. At the same time, the collapse of a communist alternative has left international lawyers more sanguine about acknowledging the politics of law.

Intellectuals concerned about international law and policy have consequently developed a new sensibility about both political science and law. Political science has taken a shine to law just as international law has embraced the worlds of both ethics and politics. For both disciplines, the convergence seems oddly thrilling, this new sensibility carrying an emotional tone of bravura and risk. In some way both disciplines seem suddenly to feel it is no longer suspect to stand for something, even if it is still feels scary – to go ahead and admit it, we are liberals. Perhaps once loosed from the constraints of Cold War coexistence it is thrilling for international lawyers to stand tall for democracy and the peaceful tendencies of liberal states, just as it can be thrilling for political scientists to return to law as an ethical mooring, an identity, a culture, after years in the wilderness of empirical models.

I think part of the pleasure and relief for both sides in this new disciplinary convergence may also result from some internal sense that the disciplines were never as separate as they seemed. The lawyer's denial that law is political *or* ethical, apology *or* utopia, the political scientist's denial that politics is legal, all were equivocal denials at best. However prone legal internationalists have been to deny the politics of law, they also developed a range of admissions to go with their denial, places for politics, exceptions, constitutional moments perhaps, or moments of private cynicism. However sure political science has been that only utopians (and lawyers) dreamt of the normative, there were also regimes and stable expectations and feedback cycles of legitimation and compliance. International law and international politics have been disciplinarily divided by a smokey mirror, the lawyer claiming to see in politics only subjective arbitrariness and ideology, the political scientist in international law only hapless dreaming.

In such a situation of willful blindness, it is a relief finally to let it out, to violate the prohibition on admitting what one has known all along. The difficulty, of course, is that when one finally does embrace the other discipline in this way, one

finds there only what one has already been – a modest liberal realism, at once hard-boiled and hopeful – and one loses thereby a repository of fantasy and imagination. Moreover, one remembers one's earlier self with all the limitations once projected onto it by the other discipline. International lawyers who have embraced political science remember their legal colleagues as either moralists or as formalists who fetishize an absolutist conception of sovereignty. International relations specialists who have embraced the domain of law remember their political science colleagues as unsophisticated about regimes, procedures, and norms. It is hard not to think of these things in psychological and cultural terms – perhaps international law plays Mrs Robinson for the political scientist, himself all wet behind the ears with new fangled college talk about regimes and compliance loops, a delicious Dustin Hoffman for jaded international lawyers, at once fresh and formidable. One can fantasize about the other, seduce it, pursue it, but what happens when one gets it?

The thrill for the political scientist lies in finally enunciating the pluralist commitments which have hitherto dared not speak their name. For a generation, it seemed that coming out as legal might disarm the liberal hegemon, just as coming out for the ethical would throw the game of cosmopolitan scientific neutrality – would make one just one more Cold Warrior. Only a studied ethical neutrality could steel the will of democratic hegemons to do what was necessary, could sustain the science of strategic studies, for 50 years the bulwark political science offered the West against the East. To speak of norms would have been to wash out the rocks of agnostic reason upon which the edifice of policy pragmatism had been built. And now, if all the subtle communications of one hegemon to another across an ideological divide were normative all along, each assured about what the other prisoner would do in a dilemma, all that past could be redeemed as the work of a liberal spirit, which, we now know, makes commerce, not war. We were not playing with destroying the world, fiddling while Rome armed, we were hammering a new covenant, modeling a new language, enunciating a new law, the science of strategy redeemed as a subtle ethical discourse.

Meanwhile, an obverse story for law. For a generation international lawyers began their training by learning a thousand and one explanations why their discipline was 'legal', why international law was 'law', rather than politics or ethics. To have come out as politics or ethics would have both thrown the game to the totalitarians and sullied one's neutral posture, sacrificing the cosmopolitanism of coexistence and the agnosticism which was humanitarianism's best advocate. But how tiresome to insist on one's legality, integrity, rectitude. For international lawyers, the thrill in walking the wild side of politics lies in escaping the censors of this apparent pragmatism and doing so by confessing faith in comfortably safe liberal pieties. It would not be too simple to observe that international lawyers feel comfortable saying law is politics now that politics has come out everywhere for the ethical, the normative, the liberal. After 1989, flush with victory over an ideological foe onto whom all challenges to law's legality had been projected, we find in-

international lawyers saying, chapter one, page one, that “law is political”. Nothing else has changed, the thousand and one reasons for law’s legality are still there, but now it can be said. And so also for political science – all the models and systems are still there, but now it can be said, the regime, my dear, is normative.

There is much to be said for this new convergence – the old distinctions had become tiresome to defend. I am more concerned, however, about the disciplinary blind spots and biases which are reinforced by this new interdisciplinary harmony. So long as international politics remained the great disciplinary other, international lawyers could imagine it in broad terms – containing all manner of ideologies and possibilities, and commitments. For political scientists the situation was similar – over there, in international law, we might find all sorts of crazy idealists and utopian speculators. In the new dispensation, however, international law has devoured the political other only to find there the same structures and processes of liberal governance, just as political science has embraced its weird normative cousin only to find the same regime it left behind. Possibilities are lost when we embrace a global politics which eschews the ideological, which is committed to the forms of a cosmopolitan global liberalism, just as possibilities are lost when political scientists embrace a global law purportedly purged of ideological commitment but cautiously committed to liberal virtue. My sense is that the convergence of international law and politics has narrowed the disciplinary imagination in precisely this way, leaving professionals and intellectuals concerned about foreign policy with an impoverished interpretation of each of the three main transformations all agree have overtaken the foreign policy arena in the last decade.

6.3. A common diagnosis and program

Since the Cold War, internationalists from all four disciplines considered here have come to share a diagnosis of the changed conditions for statecraft. International politics has become fragmented and has proliferated among diverse actors in myriad new sites. Military issues have been tempered, if not replaced, by economic considerations, transforming the meaning of international security. A new politics of ethnicity and nationalism is radically altering the meaning of terms like ‘international’ or ‘universal’, transforming the conditions of both coexistence and cooperation. Consequently, internationalists know they must get beyond the equation of international politics with diplomatic engagements and the United Nations institutions, the assessment of regional or global security primarily in military terms, the complacent hopefulness about the rationalist or humanist or universal claims and aspirations of the international regime. But how?

Interpreting these broadly recognized transformations has become a matter of deep ideological and political contestation among intellectuals concerned with international law, organization, and security. In my view, the collaborative disciplinary sensibilities of mainstream commentators have influenced their interpretations for the worse. The separation of national cultures and global governance, the

isolation of politics in the public sphere, the separation of economics and politics, the reinforced commitment to the apolitical nature of private law, the conviction that governance must be built while markets grow naturally, the shared disciplinary desire for the triumph of cosmopolitan rationalism over local particularism, for more international law and an expanded global market, all these things have affected what professionals and intellectuals working in these fields see as possible and desirable avenues for post-Cold War foreign policy. In their interpretations of each transformation, foreign policy professionals underestimate the opportunities for (even the inevitability of) engagement with what seem to them background conditions: private law, market institutions, the politics of cultural change. As a result, participation in a global politics of identity, an overt professional attention to the political, economic, or cultural gains and losses to particular groups, is made more difficult, as is a foreign policy which is attentive to and participates directly in such struggles.

Internationalists have tended to see possibilities for governance and politics only in what has been thought of as the public sphere, even as the most familiar sites for public statecraft have been eclipsed. Although presented as the consequence of well-known facts of the post-Cold War system – global economy, democratization, erosion of sovereignty – the repeated emphasis on the expansion and democratization of a diminished public authority against the background of a depoliticized private order makes much mainstream commentary an argument for a traditional liberal political vision of a weak state and a market of relatively unrestrained private power, structured but not tempered by law. Most mainstream commentators, moreover, remain ambivalent about the particularity of the national interest of the United States in all this – oscillating between the idea that national interests are and should remain both local and political, and the idea that the United States interest is fused with a broader cosmopolitan agenda of depoliticised and deracinated globalism. In both views, attention to the transnational alliances among individual interests and social groups as well as engagement in cultural struggle ‘abroad’ is made more difficult to imagine or pursue.

In my view, professionals and intellectuals concerned with international law and policy should reject these disciplinary conventions. From the fragmentation of international politics, often referred to as ‘globalization’, mainstream specialists have too readily drawn both an optimistic conclusion about global democratization and a pessimistic conclusion about the narrowed horizons for public policy, both nationally and internationally. As military issues have been tempered by economic considerations, mainstream specialists have become unduly sanguine about projecting military force abroad and have overestimated the technocratic nature of the terms within which issues of economic security will be measured and achieved, both for ourselves and for the less-developed. The result is an elite which oscillates between thinking of military force as an expression of national interest, leaving it unwilling to place a single soldier in harm’s way, and thinking of the military as a technical tool for cosmopolitan governance, leaving it too willing to extend force

abroad, on the unrealistic condition that the international live up to its promise to govern without political, economic, or cultural entanglement. Whether specialists are thinking about economic stability among the wealthier powers or development at the periphery, they think of the global economy in strangely depoliticized and technical terms. The new politics of nationalism and ethnicity have also divided mainstream specialists between two tendencies. On the one hand, they have reaffirmed the conventional internationalist project of universal, cosmopolitan, rationalist, and pragmatic institutions and doctrines against what they read as outbreaks of primitive or pre-ideological cultural passions frozen by the Cold War. On the other, many mainstream analysts have been willing to set universalism aside, affirming the peculiarly 'Western' quality of the contemporary world system in preparation for a global clash of 'civilizations'.³⁵ In all these domains, internationalists are ambivalent about the relationship between the United States' national interest and their own disciplinary interest in internationalism. Sometimes the result is an accommodative argument in which 'short term' political interests (formulated by non-specialists) need to be set against 'long term' interests in the stability of the game. Sometimes the result is an endless search for a constitutional structure, a procedure, a system, which could align the two once and for all. Either way, the result is a strangely decontextualized, deracinated, and depoliticized international domain and foreign policy.

To my mind, the new globalization offers us the opportunity to rethink the locus of political contestation and public policy, the chance to invigorate debate about a wider range of structuring institutions and rules, for which 'democratization', however rhetorically salutary, in practice focuses too narrowly on formal participation in the public institutions of the state. We should rather seize the opportunity to redefine the terrain of the politically contestable to include the rules, institutions, and cultural habits of the private sphere. The re-interpretation of security in economic terms, moreover, should neither lead us to turn security issues over to the technical managers of the economy and the new humanitarians, divorcing military engagement from politics, nor to return to an isolationism of national interests. Rather, we should see the transformation in the conditions of security as an opportunity to rethink issues of global economic justice in broader terms. We should rethink development policy in cultural, political, and institutional terms rather than focusing on the iron 'fundamentals' of an imaginary market. We should accept that the projection of military force abroad is part of an internationalist economic, political, and cultural engagement, neither the simple expression of a uniform 'American national interest', nor participation in a technical or decontextualized humanitarianism.

The new engagement, within and among societies, between national, ethnic, or religious sensibilities and the traditions of cosmopolitan rationalism and technocratic policy science should lead us neither to reaffirm an a-cultural international-

35. See, e.g., S.P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (1996).

ism against 'outbreaks' of primitivism nor to retreat behind the walls of a 'Western' civilization. The fragmentation of the state and the geographical expansion of the economy place local and global groups in complex and intersecting new relations of competition and cooperation for which the broad categories of citizenship or culture or class are unduly limiting. We have the opportunity for a reinvigorated engagement with a global politics of identity on the basis of this new reality of mixed, interconnected, and diasporic identities and affiliations. The global market, like the global political order now being built should be judged by the distribution of its effects among such groups.

6.4. Transition: a disaggregated and chastened public policy

The post-Cold War transition is being played out on an international terrain dramatically different from that which followed World War II. In this transition, it is difficult to identify a center of decision-making or a nexus for international political and social transformation. Reading the biographies of the great statesmen of the last post-war period, one cannot help being struck by their feeling of having been, in the words of Dean Acheson, "present at the creation".³⁶ Whether creating the institutions of 1945 or rewriting their missions thereafter, statesmen felt present at a moment and a place where world politics was being rebuilt before their eyes. They knew where significant international decisions were made and could identify the institutions which would carry the burden of constructing the post-war order. In the event, international politics continued to be defined by these decision makers and institutions throughout the Cold War. Even after the emergence of powerful non-state actors, among them the great multinational corporations and non-governmental organizations, the conflicts and interactions of global private and commercial life remained in the shadow of the sharp militarized split between East and West. Even the rise of individuals as backbone of the human rights regime did not disturb the priority of sovereignties, for all these other actors became subjects of international law in relation to states – as claimants, advocates, duty holders – rather than in relation to one another.

It should not be surprising that the academic study of international relations became increasingly narrow under such circumstances, despite the growing sophistication of its models. During the Cold War, the academic establishment devoted to international relations became increasingly focused on how a hegemon might think. In a bid for objectivity, the study was quite often abstracted from the actual political and ideological objectives of our century's particular hegemons, and cast, in the name of realism, in terms of what a reasonable hegemon could be expected to do. In this respect, 'peace studies' carried out by foreign policy intellectuals located in Europe, between the two superpowers, were no different from the international relations academies of the Cold War protagonists. In the United States, the

36. D. Acheson, *Present at the Creation: My Years at the State Department* (1969).

study of international relations was linked to a foreign policy establishment, uniting those who would study the thinking of the hegemon with those who would do that thinking. By the end, all could generally be confident that their legislature, like that of their adversary, would fund whatever it appeared model actors would do in just such a model dilemma.

As many have said, the end of the Cold War disrupted the structuring assumptions which made this mode of thought possible. In 1989 the field of international relations plunged not to the end of history but back into history. Unfortunately, on arrival there was no longer a legible map: no group of institutions or political leaders now experience themselves as present at the creation. In this transition there is no unified plan for systemic transformation, no primary sites or pre-set sides. Contemporary international history seems less rational, its decisive actors more random or diffuse, less game theory than chaos. The key systemic optic is fragmentation or decentralization, an international system without a central focal point, institutionally or psychologically, a transition without a central plan or institutional locus. At the same time, the conveyor belt between the strategic studies or international relations academy and statecraft has been replaced by a broader academic struggle of interpretations. In this environment, we can see academic work more clearly as culture or ideology or politics than science. Or, to put it another way, an intellectual focus on the rational actions of states has become but one among many ideological positions about the way we should understand and construct international affairs.

Many of the trends which produced this fragmentation were underway throughout the Cold War. Although sharply increased after 1989, the broadening of participation in the international system – dozens of new states, many with economic and military power approaching or surpassing that of the old great powers, multitudes of splinter groups with access to weapons and the international media – was already long underway. So also the fragmentation of the political class within the modern welfare state, the transformation of political decision-making into a complex administrative and social process, the involvement of legislatures in foreign policy, and so on. The boundaries between local, national, and international questions were already breaking down as the result of newly disaggregated patterns of governance and new technologies of communication and social organization.

In many ways, the post-Cold War focus on these transformations simply registers the previously nascent eclipse of the state by a wide variety of economic, social, and religious actors. At the conceptual level, these changes have offered many international legal analysts the opportunity to reaffirm some of the field's most familiar and dogmatic propositions: that sovereignty as a legal form has eroded, that international law should be understood in political terms, that the boundary between international and municipal law is a porous one, that 'transnational' law is a more appropriate description of the international legal order, that international law may be more enmeshed in cultural and governmental forms than its pretensions to

'universality' suggest, that the international regime may be better understood to be structured by an ongoing legal process than governed by substantive legal norms. With interdisciplinarity again in fashion, international lawyers embrace the political and political scientists reciprocate with interest in the legal process. In this burst of reaffirmation we have again seen the enthusiasm for relations between law and politics or politics and economics, which, like the relaxation of formalism and universalism, has accompanied every post-war moment of disciplinary anxiety and renewal since the late nineteenth century. One result is more complex models of international behaviour as analysts rush to embrace multi-level games, porous regimes, autopoietic feedback loops, and transnational public interest litigation. In the enthusiasm of renewal, all previous thinking about international relations can seem formalist, legalistic, entranced by a fantasy billiard ball world of states.

This methodological reaffirmation has the advantage of suggesting that we can understand our new situation by applying, perhaps more carefully or completely, elements of what has been disciplinary common sense for a century. At the same time, we can finally throw off the most annoying disciplinary pretensions of the Cold War – that international law was sufficiently autonomous to be beyond the reach of ideological struggle or sufficiently neutral to be universal. The methodological self-confidence which has accompanied the relaxation of these disciplinary conventions has linked well with a political optimism. The end of the Cold War will permit the completion of what has been the internationalist project of the century, a humanitarian 'civil society', an 'international community' which could de-throne the state, open participation to a wider range of individuals and groups, and open international legal discourse to the political. Non-governmental advocates will gain access to the corridors of international institutional decision-making just as mainstream internationalists can become more open about their politics. In the United States, internationalists can take some pleasure when a Senator Helms or a Secretary Albright bring their political convictions into international affairs, now that the tentative diplomatic or legal vocabulary and ritualistic ideological denunciations of the Cold War internationalist establishment have all been relaxed, or blended together.

When you speak with young internationalists from a wide variety of different countries who are enthusiastic about this moment of transition, who feel they too might be present at the creation, they are not talking about working with the United Nations or the foreign ministry, but about Médecins Sans Frontières or Greenpeace, or Citibank. The United Nations system seems a relatively marginal actor, even if those loyal to the United Nations idea can still find moments where it can and has made a singular contribution. Rather, institutions like CNN, the European Central Bank, or Federal Reserve now seem far more likely sites for management of international relations. At a global level, mainstream internationalists have tended to welcome all this as a democratic opening, offered as a new internationalist project, perhaps as an emerging 'right' to democratic self-governance which could provide a new justification for an 'international community', even for the

United Nations, as intervening guarantor of non-state participation in national governance. Indeed, it has become conventional to celebrate the disaggregation of the state into a set of loosely associated social actors on a stage with a diversity of other players.

There is another side to this decentralization or fragmentation of international political decision-making which the mainstream internationalist has come to regard, wrongly in my view, as a completely separate development to be accepted with ambivalence rather than promoted with enthusiasm. A shorthand for this change, for the rise of technocratic decision-making which has accompanied the geographical expansion of the economic market once concentrated in the old industrialized North, might be simply: from politics to law, from public to private. The erosion of the state has been accompanied by, has been largely accomplished by, the replacement of traditional political machinery with institutions of expert management in both the public and private sectors. At the same time, the United Nations system has been overtaken by the institutions of international economic law; no longer simply the Bretton Woods intergovernmental regime, but an *ad hoc* mixture of international private law, commercial practice, local schemes of arbitration and adjudication, finance mechanisms, and decentralized market initiatives.

The result has been not simply the opening up of international politics to new actors, still less the immersion of international law in 'politics', but a transformation in the methods and objectives of public policy. We could describe this transformation in a number of ways: as an erosion of the ambitions and potency of public law; as an expansion in the importance of private law, private initiatives, and private arrangements; as the withering of the welfare state under the pressure of globalization; as a democracy deficit; as governance by experts; as technocracy. We could focus on the legalization of political decision-making, the importance of adjudication and administration, and the decline of the legislative. This is a legalization of politics less as norm than as process, with law fragmenting political choices, spacing them out in numerous bureaucratic phases, structuring them with proliferating standards and rules, redefining political interests as factors to be balanced in an apparently endless process. Trade law provides a good illustration. Once broken down into hundreds of technical disputes about particular commercial behaviour and dozens of individual negotiations about specific tariffs and regulations, each proceeding on its own timetable in its own institution, it is difficult to imagine aggregating these interests into a monolithic 'trade war' between two 'nations' in anything except rhetorical or hyperbolic terms.

But there is more here than a new public law regime for resolving or blunting the emergence of interstate disputes. If we say that the spirit of free trade has replaced the spirit of multilateralism, it is clear more has changed than the level of decision-making, for the two terms seem to come from different vocabularies altogether. It is not simply the level of political action which has shifted or the site which has fragmented. The terms within which one can think of a political initiative at all have been altered, become both more technical and more often played

out in the commercial and private domains. In technocratic decision-making for a private market, the moment of decision, the locus for political choice, is not proliferated or opened up, but rendered invisible. We see this perhaps most acutely in the European Union, whose political decision-making always seems to take place elsewhere – last year at the summit, or across the road in the Council, and so on, the idea of a government promoting a program replaced by the enlightened management of prosperity. At the same time, a new Europe, a European identity as much as a political structure, is being built by businessmen in Birmingham and Duisburg rather than by either the Commission in Brussels or the Parliament at Westminster.

This image dramatically narrows the participants whose interests are understood to be in contestation with one another internationally – exactly at the moment it celebrates an opening up of the policy process to civil society. The replacement of political choices by technical options, the reinterpretation of international affairs in terms of economic management, the disappearance of the levers of the public state, empower some interests and disempower others. We need only think of the process by which European Union policy managers have differentiated their internal regime from the trade system connecting them to the ‘transitional economies’ of Central and Eastern Europe – not as a set of political exclusions or choices between groups, but as the natural consequence of technical differences in levels of development.

Mainstream internationalists greet these transformations in the objectives and modes of politics with a tone of tragic resignation cut off from their enthusiasm for the erosion of state sovereignty. In this view, we must simply accept that with the withering welfare state must go the aspiration for a vigorous public policy. Something called ‘globalization’ has rendered public intervention in the emerging global market more difficult than it once seemed within the confines of the welfare state, whether in the name of the environment, labour standards, consumer protection, or redistributive taxation, as if the triumph of private over public ordering brought about by a global market by definition meant a reduction in the domain of the political. Certainly welfare states everywhere have experienced a weakening of their traditional levers of public policy in the face of increasingly mobile capital and labour. The erosion of wage policy or macroeconomic freedom in the democratic West is no different in this respect from the erosion of totalitarian controls elsewhere under the impact of global communication and trade.

The resignation with which most internationalists have greeted these changes is starkly at odds with the enthusiasm they have shown for a newly open international political process. Perhaps the enthusiasm for new public actors is linked to confidence that, after all, the domain in which they can do much mischief has been dramatically reduced. Even those most aggressive in battling for international labour or environmental regulation have tended to accept the equation of an expanded global market with diminished public capacity. It is common in the international relations establishment to think it obvious that the decentralization of

authority which empowers new strategies of advocacy by myriad groups at diverse levels should not lead back to a regulation of the international market. The link here is a familiar liberal one between democracy and a disempowered state. In some versions, the problem is rather that the welfare state's capacity to mount a public policy has been eroded by economic globalization, while it nonetheless has been able to retain sufficient political authority to incapacitate other potential centers of public policy for a global economy, whether at the local or international level. The common theme is a disempowering of public law and a disappearance of private and commercial affairs from the jurisdictional domain of politics.

In my view we should reject this combination of enthusiasm about the fragmentation of international political life and resignation before the shrinking ambitions of public policy in the face of a growing private sector. The missing element in both responses is recognition of the politics of the private domain. The politics of the private is occluded, as we have seen, by the collaborative separation of public international law and international economic law. Perhaps ironically, the repeated mantra of enthusiasm for erosion of sovereignty perpetuates rather than questions the definition of the political which lies at the core of the state system. If we began to think of the private domain as political, it would not at all be obvious that the current situation is one of increasing fragmentation rather than concentration in a few key institutions – the major financial institutions and corporations. Global governance in this sense has not fragmented, it has simply moved from Washington to New York, from the East Side to Wall Street, from Geneva or the Hague to Frankfurt, Hong Kong, and London. Nor would it be clear that a global market should reduce our political or policy aspirations, rather than simply our aspirations for a politics or for policy which could be imagined as a public initiative and be implemented through the traditional vehicles of state authority.

My argument is not that we should reverse the mainstream interpretation, revivifying the state or disestablishing the international market. The welfare state often did entrench class, race, or gender privilege within its borders while preventing movement of people, ideas, and capital in ways which buttressed inequitable resource distributions across the globe. In some cases the move to a more technocratic politics has been a counterweight to the corrupt tendencies of mass politics and the capture of the welfare state by rent seekers of various sorts. Treating the construction of a state apparatus as the *sine qua non* of decolonization has entrenched all sorts of gruesome political practices in the name of respect for sovereignty. Similarly, the boundaries of national markets have often operated to block entrepreneurial initiatives which would improve the global distribution of wealth, just as they have often blocked ideas in ways which shrunk the global imagination.

Nor, at the methodological level, do I propose that we should reject interdisciplinary conversation or return to the fealty for international law's exaggerated, often disingenuous claims to political neutrality, coexistence, or universality which characterized the discipline during the Cold War. The coexistence hypothesis often pulled the fields of international relations and law away from moral commitment

during the Cold War and occasionally made uncomfortable hypocrites of good-hearted liberals insisting on the legality of law and the virtues of formal equality in the face of the gulag. At the least, commitment to the legality of international law and respect for sovereign equality channeled humanitarian impulses in narrow and often hypocritical institutional channels. The insistence on the universality of international law often denied the roots of international law in Western projects of conquest and understated the obvious density of legal and political relations within cultural, economic, or ideological blocs. The claim that international law might be sharply distinguished from politics was always at least partly in bad faith, at least in a North American legal academy which had fully integrated the insights of American pragmatism and realism. The political scientist's insistence that international law was mere morality never fit with his more complex understanding of the legalization of domestic politics, anymore than the international lawyer's insistence on the autonomy of legal judgment fit with his understanding of the contextual politics of legal rules and reasoning.

My argument, rather, is that the resignation with which the mainstream accepts the demobilization of a vigorous state policy suggests that even as the institutions of the welfare state have been eroded, the notion of public policy which states exemplified is alive and well. The mainstream remains wed to an image of public policy as the territorial intervention by 'public' authorities in a background of private initiative, even as they celebrate the erosion of the institutions which have been structured for action on this basis. This resignation is also a refusal to treat as political, as public, as open to contestation, the institutions and norms which structure that background market. In this sense, the turn to political science and the new affirmation of the 'politics' of international law has paradoxically narrowed rather than expanded the mainstream's political imagination. In many sectors, often where factors of production are relatively immobile, a locality may have more capacity to conduct a global public policy, not as the bottom tier in a scheme of devolution or decentralization, but as a direct participant in global political culture, than either the welfare state or the new institutional structures of international economic law. If capital and commodity markets are to be successfully taxed and regulated, for example, it may be better to focus on the powers of a few 'global cities' than on the cumbersome interstate machinery for regulating trade in services.

The question, in other words, is not whether politics or where politics, but what politics. Internationalists should care less about whether the state is empowered or eroded than about the distribution of political power and wealth in global society. Because mainstream international analysts are content to accept that the political and economic results which flow from a particular system of private initiative are outside the legitimate bounds of political contestation, they can be enthusiastic about a disaggregation of the state and the empowerment of diverse actors in an international 'civil society' without asking who will win and who will lose by such an arrangement. As a consequence, at the analytical level, the turn to political sci-

ence too often illuminates the structure of the regime without adding to our understanding of its substantive choices.

This idea is sharply illustrated by the observation that a great deal of nonsense can be done in the name of elections and completion of an international human rights agenda. Respect for elections or progress on human rights can blind us to local grievances as effectively as respect for the sovereignty of the post-colonial state. Similarly, an opening of borders can contribute to an unjust global distribution of wealth as surely as national autarky. Indeed, this is particularly likely where the demobilization of the welfare state mechanism has been accompanied by a redefinition of politics which demobilizes new social actors from political engagement with the private law institutions of the market itself. It is, of course, troubling that we should use the collapse of the state as an entrée to demand participation in its constitution, just as it is troubling that the new international decentralization should yield a new generality about the relationship of law to politics, a newly hegemonic form for political participation, a renewal of a universal enlightenment writ now in the lexicon of the local.

The disaggregation and legalization of global political culture is the most significant of the post-Cold War transformations. Technocratic governance, a displacement of public by private, of political alignments by economic rivalries, of politics by law, the unbundling of sovereignty into myriad rights and obligations scattered pragmatically across a global civil society, all this has transformed international affairs. That it has often meant an opening of international affairs to new actors and concerns, a democratization and proceduralization of international relations, an intensification of human rights, may well be to the good. But this openness is not the most significant dimension of the new internationalism. Rather, the transformation wrought by technocratic governance has shriveled the range of the politically contestable, confirming as natural the geography of center and periphery wrought by the private market. Because they underestimate the political nature of private institutions and initiatives, many mainstream internationalists have accepted the demobilization of policy making as they have applauded increasing access to its machinery. The result is an intellectual class unable to develop viable political strategies for the new world it has applauded into existence, ratifying the political choices which result from the particular arrangements of private power to which the state has handed its authority while celebrating the expansion of participation in an emasculated public policy process.

6.5. Transition: economic security displaces military security

It is now often said that national security is increasingly understood in economic, rather than military terms. Of course, whether one thinks in regional or global terms, the question of who can project force abroad, who has armies available to do what, remains important, undergirding patterns of trade, prosperity, and emiseration. But we have all felt the pressure of a new security vocabulary, of surpluses

and deficits, hard and soft currencies rather than throw weights and silos. As weapons proliferation has become as much a matter of economic as political alliance, aspiring members of the foreign policy elite are learning more about prosperity than throw-weight. Disarmament and non-proliferation have become matters of economic 'conversion', enmeshed in trade deals and complex buyouts. This is more than post-war military demobilization or the expectation of a peace dividend – it may be that military establishments remain at wartime levels, even expand. We experience instead a re-evaluation of their function and deployment, their relation to national security determined less by Clausewitz than Keynes.

If we think of the expansion of NATO and the European Union into Central and Eastern Europe, agricultural subsidies, market access, the security of investments, labour costs, seem somehow more central than military commitments and strategies. It seems quaint that someone should bother to write the *New York Times* to point out that expanding NATO will, after all, mean expanding a military commitment. Does anyone think we would intend such a commitment now, would indeed ever have pushed the button for Bavaria? In the new international relations of communication, missiles are merely missives, the Cold War a symbolic grid-locked game, and anyway, East and West Europe relate to one another now as North and South – their relations structured by ideas about 'stages' of economic development. If we felt the quickened pulse of a new security politics in 1989, the moment passed. All the run-ups to NATO expansion, like the European Union's endless internal structural revisions, are less moments of constitutional clarification than a routinized procedural reform carried out against a backdrop of concern about economic growth and prosperity. The emergence of a neo-liberal global market has taken the idea of 'convergence' to levels unimagined when the concept entered the field 25 years ago. Suddenly the Third World presents less as an arena for political and ideological struggle than as an unending series of 'emerging' markets. Development is back on the table, the Central Intelligence Agency (redeployed to ferret out trade secrets and foil economic espionage) taking a back seat to the International Monetary Fund in structuring relations between North and South. The great commercial banks have replaced the military suppliers as economic partners to the Third World state. From the United Statesean point of view, security is less the survival of one or another military structure than the survivability of neo-liberalism, the preservation of trade and currency flows, the stability of the investment climate.

Like the disestablishment of the state, the economization of security has largely been welcomed by mainstream specialists in international relations and law. If the liberal peace hypothesis proves correct, the disaggregation of the state into a global market has left the world militarily more secure, free to worry now about prosperity. Economic security seems achievable through technocratic means – through sound management and trade deals, and a smorgasbord of alternative dispute resolution mechanisms. Trade wars are, in the end, friendlier than real wars, even cold ones. They cost less and can be won by lawyers. In the meantime, we can

think of all sorts of new uses for military machinery. During the Cold War, military interventions and proxy wars were hard wired to the central problem of global security. Now they float more freely, limited police actions, humanitarian gestures, stabilization at the periphery. Nothing is so urgent, we could do it or not, it's a moral question, a technical question, maybe we should send the Red Cross instead, or hold a plebiscite, or enforce an embargo.

Foreign policy experts have oscillated between two quite different modes in thinking about the role of the military in this new world. On the one hand, the military remains an instrument of national interest and policy, with a much less urgent need to project itself outside the territory. There are fewer threats to the United States: *ergo* fewer armies and fewer boats far away. The projection of force abroad should be measured against the national interest in a neo-liberal global order of free trade – protecting the sources of raw materials, the trade routes, and the stability of trading partners, stabilizing other people's wars more often than fighting our own. At this point the discussion shifts easily to the other hand – perhaps the national interest coincides with the stability and extension of the cosmopolitan agenda of global governance. If so, perhaps the military should be thought of as a national contribution to international order, for which we should be thanked and probably reimbursed. In this setting, however, when force is projected abroad, we must be clear that it is the sort of sanitary action one might expect from a global order which had no stakes in local disputes but stability – intervention without political entanglement, a police action, an air strike, with limited objectives and clear avenues of retreat back to the cosmopolis.

A focus on securing prosperity is certainly welcome. But we should worry about two aspects of this new consensus: the thin vocabulary available for speaking about international economic security and the newly assertive sense that military uses can be disentangled from ongoing political judgment and risk, if only the original mission objectives are clear and don't creep. As international relations specialists have embraced a transformed state and an expanded market, they have defined economic security in terms of stability, investor confidence, and growth, itself seen as a technical matter which arises with the market, which requires more governmental abstinence than public policy, and which can be built best by submitting to the disciplines of price in an open market. The economization of security comes with a political program – the neoliberalism of the Washington Consensus – proposed not as a contested matter of ideological commitment but simply as the facts of a new international situation.

The embrace of the economic has led to an emptying out of political judgment about the meaning of economic security which makes it more difficult to think about distributive issues, both within and between societies. Economic security need not mean deference to the impulses of the largest market actors – there are, after all, more than one possible markets, structured by different background values and distributive choices. This is particularly true at the periphery. Although the conditions for economic security are commonly understood to be radically differ-

ent in the center and at the periphery, the difference is usually seen precisely backwards. Mainstream commentators seem to expect the periphery to live closer to the bone of a uniform market discipline than do the more amply padded economies of the center. The wealthier nations of the North experience a chastened public policy apparatus slowing, but not arresting their submission to the imperatives of the global market. For the poorer economies of the periphery, the vision is quite different – as they ‘emerge’ into the market, they face more bracing winds – a trade regime more hostile to national policy than anything in the internal markets of the North, a far more fickle relationship to international finance, and an internal market far less institutionally and politically capable of blunting the shock to market prices. The economization of security is more devastating to local cultures under conditions of modernization than in the developed world. But these institutional, cultural, and local dimensions of economic change are but dimly lit background facts in the imagination of the mainstream internationalist disciplines.

At the same time, if the Vietnam or Afghanistan syndrome left policy makers unduly wary of using military force to achieve ideological objectives abroad during the late period of the Cold War, a war fought politically and economically by the competitive production of military hardware and cultural export, the new mainstream suffers from an inverse Vietnam syndrome: so long as the mission can be detached from ideology, can be purely humanitarian or internationalist, or an expression of the ‘real’ as opposed to the ideological national interest, and can be accomplished by the military acting alone, without economic or cultural, or political entailments, proceed. The military has emerged from the collapse of the welfare state as the only bureaucracy broadly thought capable of acting successfully, so long as the mission does not bleed back into economic or political matters. Seen this way, the military is available for a wide variety of technocratic tasks, but should be protected from the quagmire of political or social engagement. At its most extreme, this has meant a willingness to engage in democracy building, but only to the extent possible by securing boundaries, supporting the state’s security apparatus, and remaining studiously neutral among national political forces. Problematically, however, this means using the military to stabilize borders and prop up failing states at precisely the moment globalization renders those borders porous, and those state institutions marginal sites for public policy.

The odd part about this cross-disciplinary consensus is that it neatly fulfills both long-standing disciplinary aspirations – to sabotage sovereignty once and for all, to build an international regime both open and stable – and a recognizable political program – finally the end of the welfare state, the emergence of a liberal international law, the separation of economics and politics. Something has happened to allow capture of these largely progressive and humanitarian internationalist disciplines by a Thatcherist or Reaganite political program. Partly, of course, the political ideology of the intelligentsia has moved dramatically to the right since 1980. But something else is at work as well – a conspiracy of disciplinary blindnesses which has led professionals in all these fields to interpret new conditions without

engaging what are understood to be the background cultural, political, or institutional conditions for policy.

The ideas of universalism and coexistence did blind many internationalists to a great deal of injustice, weakening the discipline's role in the great ideological struggles of the Cold War. The new focus on participation and democracy is meant to eliminate that blindness, with the hypothesis of a 'liberal peace' justifying an international preference among regimes. But we cannot ignore that the new regime among 'liberal' states will effect a new division across the globe, virtual perhaps, but every bit as decisive as the iron curtain. An ideological curtain will have fallen, separating normal from abnormal societies, those living inside a complex, integrated, post-industrial domestic regime from those who must live more directly in the harsh light of the international order of free trade.

I attended an interesting conference of investment bankers and securities experts, shortly before the Thai currency crisis sparked a wave of global economic difficulties. It was an enormous hall, a thousand enthusiastic and wealthy people considering how one should fashion a portfolio of security investments in the post-Cold War climate and how one should understand the role of 'emerging markets'. One speaker after another told basically the same story: politics has little to do with twentieth century international affairs. The most significant historical fact of the century is economic: throughout the twentieth century, the geographical terrain within which capital could safely and securely be invested was smaller than could absorb the amount of available investment capital, leading to an excess of capital and a shortage of labour, creating high wages and low interest rates. Since 1989, that has all changed: the domain for safe capital investment has expanded dramatically, leading to a global shortage of capital and excess of labour. So we can expect an avalanche of capital moving out of Western Europe and the United States towards emerging markets, coupled with falling wages and higher returns to capital. In short, it is a good time to get out of labour and into capital.

Of course, economic transformations of this magnitude may create a variety of security problems. These investors were rather blithe about the idea that wages would fall in the first world by 20 percent or more, as if this were possible without political transformations and instabilities. They were quite calm about the fickleness of this capital avalanche as it moves into emerging markets, Mexico or Argentina or Asia, or Russia, attractive today and unattractive tomorrow, creating a whip-saw effect as countries and sectors go in and out of fashion. It is true that the security issues and political transformations which need to be addressed have economic rather than military roots. They are driven by the actions of private parties, not states, the emiseration they throw off unlikely to be interpreted as a humanitarian crisis until it is far too late. But none of these security concerns can be addressed adequately either in the technocratic terms within which economic security is sought, terms blind to distribution and the social context in which economic growth occurs, or through the use of military force detached from economic cost and political risk.

The economization of security reflects more than the increasing interdependence of prosperity or a new appreciation for the costs and externalities of the military. It reflects as well a new vocabulary for understanding the global system and one's place in it. The point is not simply that during the Cold War security was understood militarily, while now people are more worried about prosperity. During the Cold War security was understood to be a function of one's position in an ideological geography of East, West, and Nonaligned, a geography which was then mapped and defended in military terms. Issues of global wealth and poverty, North/South issues, remained secondary to this broader divide, matters of national economic development rather than global security. In this structure, a nation's primary identity would be mapped ideologically and defended militarily. It would then turn out that the nation also had one or another Gross National Product.

This hierarchy of politics and economic has been reversed. The global compulsion is no longer to assimilate to the Cold War, but to the market, to take one's place in a primary arrangement of wealth and poverty organized by stages of development, to be 'shocked' into one's natural place in a global division of labour. States are divided today between prosperous and underdeveloped, hard and soft currencies, and so forth. This reimagining of global social geography has transformed the terms within which interstate competition takes place from a conflict of ideology to a stage of development. At the same time, the terms within which this economic division is written and in which its development is to be understood are technical, the global market presented as a strangely depoliticized zone. The price system will simply allocate a wealth to each participant on the basis of productivity, resources rushing to the productive and fleeing the corrupt, the shiftless, the lazy.

But finding one's place in such a world and defending it can only be done with political choices which implicate background cultural and institutional conditions, both within national markets and globally. Defending the stability of the political order necessary for investor confidence, permitting the 'natural' reallocations foreseen by my happy investors, will require a set of political choices both among states and among groups, among ethnic groups or classes within nations, as among transnational interests of labour or capital or women, or men. Choices between groups and sectors with different stakes in different patterns of modernization, between different classes of investors, and those with stakes in different patterns of production, trade, and consumption. It is common to imagine, for example, that the global market 'requires' an emerging market to enforce the 'rule of law' to permit transparency and predictability in market transactions. But the alternative is generally not arbitrary or chaotic allocations, simply a different, and often equally predictable allocation of resources, perhaps to local rather than foreign investors, to domestic oligarchs rather than foreign shareholders, or vice versa. Such choices can only be engaged, can only be seen beneath the blanket insistence on technical 'transparency', once the mainstream tendency to efface analysis of background cultural, institutional, or political structures has been overcome.

As security has come to be understood in economic rather than military terms, the terms within which economics are considered have narrowed, depoliticization and the erosion of the welfare state eliminating the possibility for a distributive politics, prosperity understood as the natural result of energy exerted in a transactional market. What is missing from this story is a vocabulary for addressing issues of wealth and poverty, of distribution, of economic justice in political terms as the struggle among groups in societies. It is as if the old coexistence mentality which had led internationalists to be agnostic as between liberal and totalitarian regimes had paradoxically reasserted itself within a newly economized understanding of security, as agnosticism as between wealth and poverty.

The result is a tragic combination of exultation about democratization or human rights, passivity about market generated winners and losers, and a tendency to interpret the economization of security in technocratic terms stressing stability and the inexorable authority of large market actors. The emergence of human rights as a preoccupation of international law is all to the good, but it threatens to remain limited to formalizing participation in a governance regime which has lost its authority and *raison d'être*. If the new story is economic, the new mark of participation is less the vote than the living wage. The international lawyer or policy analyst who today ignores economic justice will be like the internationalist during the Cold War who ignored democratic rights in the name of 'coexistence'; he or she will have missed the boat.

In a sense, mainstream interpretations of the first two post-Cold War transformations reinforce one another. It is only after accepting the attenuation of public policy capacity in the face of globalization that it makes sense to reinterpret security in economic terms turned over to technocratic experts likely to be indifferent to distributive concerns. And it is by invigorating our sense for the politics of private law and private initiative that the economization of security can be coupled with a political pursuit of economic justice as well as the technocratic pursuit of stability. In both cases, the key is overcoming a disciplinary blindness to what seem background facts, norms, and institutions. This inattention to context, this unwillingness to engage, contest, embrace what seem immutable social facts is most evident where one might least expect it: where internationalist disciplines turn their attention directly to what they think of as 'culture'.

6.6. Transition: cosmopolitanism and the cultural politics of ethnicity and nationalism

It has become common in thinking about international affairs after the Cold War to stress the importance of culture. This has two broad associations. On the one hand, it implies a transformation in the medium of international affairs. Sometimes this simply means that the spread of Coca-Cola has become a more important vehicle of United States hegemony than Voice of America or the military establishment. Sometimes it means that the traditional methods of diplomacy have been trans-

formed by the media, as CNN has replaced the embassy cable. At its extreme, the turn to culture and language suggests a transformation in the meaning of governance, from a matter of normative enforcement to communication and persuasion. Mainstream internationalist commentators have tended to welcome this idea, as they welcome the economization of security and the disaggregation of the state, all suggest an international affairs more openly amenable to expertise, a matter of texts rather than either guns or butter. The cosmopolitan internationalist is likely to embrace the importance of symbols and the media, advocating a realism informed by sociology and culture as well as politics. In this sense, the internationalist disciplines in the United States have generally embraced the symbolic as functional to their objectives, without changing those objectives.

We can see this in the new advocacy strategies, which stress adjudication over legislation, and devote energy to activities disconnected from the politics of interstate relations, working in a broader zone of international cultural politics. The intuition behind this gesture seems to combine two feelings: that international debate and institutional resolutions are 'just rhetoric' and that hoping for government compliance with what purport to be international obligations is an unsatisfactory solution to most problems. Only a cultural strategy seems likely to make internationalist initiatives on behalf of refugees or the environment successful. Even the World Court can be reinterpreted as a one political player among others, contributing by its rulings to the 'legitimacy' or 'illegitimacy' of government or institutional action. The idea about 'culture' which undergirds this enthusiastic embrace of new professional modes of understanding and operating in the international system is a very general one – within the cosmopolis at least, culture is a matter of persuasion and communication, a way of augmenting or draining one's legitimacy stockpile in a community, the 'international community' in which everyone speaks roughly the same language of missiles and missives, sanctions and sanctimony. *Within* the international, one can embrace the cultural background as a set of general communicative possibilities and methods.

On the other hand, outside the international, the emergence of culture presents a challenge to the cosmopolitan. We saw this vividly in the attitudes of the comparativists and public internationalists. This is culture as a set of local or particularist commitments, a different language altogether from the communicative methods of cosmopolitan governance. Culture in this sense makes the cosmopolitan interested in governance uneasy, either by insisting upon a broader tolerance and respect for the relativism of values than that demanded by the ideological agnosticism of Cold War 'coexistence', or through the emergence of cultural alternatives to cosmopolitanism which had been overlooked or prevented from expressing themselves on the world stage by the rigid divisions of the Cold War. It is common to think of the blocs, empires, states, and ideologies which have broken up in the aftermath of the Cold War as artificial constructs, giving way to more authentic, if dangerous, cultural identities. Just at the moment when the last remnants of ideology have crumbled away, allowing a glimpse of the end of history and the triumph

of rational secularism, one finds the cosmopolitan sensibility confronting an array of allegiances and cultural forms one had thought long vanquished or dormant. Suddenly, for example, religion is back, and not simply as an expanding evangelical Protestant handmaiden to market rationality, but in a wide range of more primitive, mystical, and irrational creeds.

Contemporary internationalist commentary has reacted in two quite different ways to the challenges posed to cosmopolitan commitments by culture in this second sense. Sometimes the idea seems to be to reaffirm the universalism of the cosmopolitan sensibility, the achievement of a historic liberation from particularism through rationalism. In this view, cosmopolitanism, often associated with pragmatism and the logic of the marketplace, needs to be defended against outbreaks of more primitive sensibilities when those sensibilities challenge the possibility of a universal pragmatism, and to be more tolerant of diverse cultural differences when they do not threaten that hegemony. The most dramatic examples, of course, are nationalisms and ideologies which threaten the peace or condemn enlightenment universalism as itself culturally particular (most notably some Islamic fundamentalisms) and need therefore to be kept in place. At the same time, ethnic customs more local and unthreatening to a global cosmopolitan project (most notably involving women's roles or family structures) should be scrupulously respected. Where this line should be drawn remains, of course, a matter of controversy, but the frame is stable: culture can be managed by exclusion or assimilation. This is not only a matter of bold ethnic or religious challenges, of course. The claim to cultural specificity can also threaten the technical universality of the new market sensibility – by insisting on distributional commitments or productive forms which can best be respected by governmental initiatives which will seem 'interventionist', 'protectionist', even 'corrupt'.

The effort to assimilate or exclude cultural differences of the ethnic sort has a long tradition in the disciplines of international and comparative law. Efforts to ensure that outbreaks of economic culture (in the form of subsidies or protection) remain abnormal or are eliminated form a core preoccupation of international economic law. Internationalists have long thought of the problem of nationalism and ethnic violence as one of conflict between international rationalism and a variety of primitive forces. One often hears the observation that nationalism is breaking out all over or ethnic hatreds that are very old are reemerging, as if from the unconscious. Nationalism is associated with desire, with primitivism, with pre-modern sensibilities and considerations, with pre-rational deformations, and our job as members of the international political establishment is to find a way of keeping the super-ego in charge of these forces emerging from the same. In this strand, cosmopolitanism is not itself a culture, but comes after culture, emerges from the defeat of the particularism of culture, and must be 'tolerant' of cultural differences, such as those involving family structures or other 'private' matters, precisely to retain distance from the cultural. But therein lies the tension. A demobilized international, able only to defend itself by cultural agnosticism, will find it difficult to

implement the cultural strategy suggested by the transformation of international political life into a matter of missives and messages, except where the objective is to exile a cultural form from the domain of global civilization altogether. The idea of a committedly deracinated international, no matter how up to date its media toolkit, will have a difficult time participating in the struggle among cultural groups whose practices and commitments do not 'shock the conscience of mankind', or engaging with economic institutions or cultural forms other than as abnormal public interventions to be quarantined or eliminated. What approach should one take, for example, to the consolidation of Islamic nationalism by enforcement of a restricted role for women in urban areas which enhances employment security?

At the same time, a second strand of reaction has emerged which takes almost precisely the opposite tack, affirming the cultural specificity of the enlightenment tradition and insisting on a defense of the West against the rest. In its softer form, this strand simply continues the relaxation of the internationalist's aspiration to universalism begun with the observation that a disaggregated regime might well engage liberal and illiberal states quite differently, or that as market distinctions displaced ideological alignments, post-industrial and less developed societies might well inhabit rather different legal and political regimes, or that as democratization became increasingly a preoccupation of the international regime itself, participation in numerous international institutions and arrangements might well vary quite dramatically between democratic and non-democratic states. In this softer version, it is unclear exactly how these new distinctions will be played out. We can as easily imagine a WTO reaching out to China, insisting that concerns about local democratic conditions be set aside in the name of a universal market, or that market engagement be itself the vehicle for promoting local democracy, as we can imagine MERCOSUR or the European Union making democratic governance a condition of admission, or the attachment of conditions of respect for human rights to their recognition of newly emerging states.

In the harder version of this strand, which embraces the cultural specificity of the liberal cosmopolitan tradition, universalism is explicitly derided as a fantasy of the West. Although one might wish to promote democracy more generally, one should recognize it as an explicit part of the struggle for Western cultural hegemony. Paradoxically, however, this strand is likely to insist that market structures remain untainted by cultural or political baggage – that the market be universalized precisely to constrain the clash of cultures. In this sense, we should trade with the Chinese without expecting to change them, should understand that they will experience democratic conditionality as cultural overreaching, and expect a backlash.

In this we see many of the blind spots of our several disciplines: a sense for the separation of economy and politics, for the entailment of government and culture, for the apolitical nature of private law, for culture as a local affair. A puzzling result is an image of the distinction between public and private as naturally universal of democracy as a peculiarly Western concoction, and the odd sense that non-

Western societies are likely to experience conditions of democratization as culturally intrusive (akin to interference in family structures or gender roles), but will not experience International Monetary Fund conditionality the same way.

There is much to be said for the internationalist embrace of the cultural. During the Cold War, ideological conflict did obscure a range of other differences, and internationalists were unduly constrained to the traditional methods and strategies of interstate politics. As the *locus* of international affairs has splintered and spread, the number of differences asserting themselves internationally has increased, and we need to think of an international regime with a more complex and layered structure. All of these efforts to embrace the cultural are efforts to correct for the blind spots and bias of earlier disciplinary conceptions. All reach out to what have been background institutions, facts, and norms – to the local, to value, to identity, to the non-technical, and non-rational. Rather than overcoming these disciplinary biases, however, these mainstream interpretations continue them.

Embracing the cultural nature of global governance is intended to enrich the tools and techniques available to the internationalist beyond the narrowly procedural or normative. The difficulty is the continued commitment to the distinction between the global market and global governance, however mediatized, on the one hand, and local cultures on the other. Engaging with local cultures in the name of assimilation is also an effort to pierce the veil of sovereignty to embrace what have been the background institutions and norms of local societies. The problem has been that this appreciation of cultural difference homogenizes cultural identities and relates them exclusively to either consumption preferences (Germans like beer) or forms of public life (minority rights) rather than permitting a direct clash among cultural, institution, or contextual forces which would suggest different modes of production, of distribution, and of governance. Like the effort to acknowledge the 'Western' nature of international governance itself, this approach to culture leaves the economy, with all the groups and institutions, both local and global, which structure its distribution of power and wealth outside the field of vision.

When mainstream internationalist disciplines interpret the emergence of the cultural, they typically either overstate the contrast between the nationalism breaking out all over and the acultural world of modern secular rationality, or they overstate the fusion of modern cosmopolitanism with the cultural interests of the 'West'. Neither is accurate. Although obscured by disciplinary sensibilities in numerous ways, the internationalist disciplines articulate a vision of society, a practice of statecraft, a theory of the economy, which reinforces some institutions, some groups, some nations, some states, and not others. They neither stand outside culture nor are they identical with the West. As we have seen, even the cosmopolitanism of international law means something different, is associated with different politics and groups, in the United States and elsewhere. Whether one advocates 'cosmopolitan internationalism' as one culture or as the lack of culture, one remains blind to the political competition of groups and interests at both the national and international level. I find that sometimes and in some places the values, inter-

ests, and agendas advocated by internationalists align with the interests of groups I care about, while at other times they do not. But in most all situations, the disciplinary practices of internationalists make it hard to see through to the interests which will be advanced or retarded by their advocacy.

When reacting to 'outbreaks' of nationalism or ethnic passion, the effort to retain the sense for cosmopolitanism's distance from the cultural hardens the line between the modern or secular and the primitive or contextual in numerous unhelpful ways. It is difficult to distinguish cleanly between local cultures to be assimilated and those to be opposed as threats to the universal without inadvertently reinstating precisely the distinction between public and private, or the distinction between national and international that the disaggregation of the state was meant to undo. The result is likely to be an unhelpful overstatement of the solidity and coherence of both local cultures and of internationalist modernity, when in fact the most interesting and important international problems of the next period are likely to arise precisely from the debate within cultures between modern and pre-modern identities and values, and within the culture of internationalism between deracinated cosmopolitanism and a variety of new identities of gender, race, national origin, religion, and so forth. The differences between men and women are more significant within both international and national cultures than is the difference between international and national culture, just as differences among men or among women are often more significant than those between them. In the same way, differences among different 'markets', different forms of market economy, are more significant than the imaginary line between 'the' market and public life. Similarly, differences among groups within developing economies, among strategies of development, among groups in 'developed' and 'underdeveloped' economies are more significant than relations between two economic systems (developed/underdeveloped, or global market/national economy) imagined to be easily distinguishable.

At the same time, when the internationalist embraces the culture of the internationalist project, labeling it 'Western', the result is similarly limiting. Of course it is true that people around the globe pursue various political and economic projects in terms of large cultural identities, seeking to make 'West' and 'East', 'Asian' and the 'West', or Islam and Christian carry the freight of particular differences. And conflicts are likely to break out along boundaries of this type. But these identities are neither exclusive nor particularly stable. Like nationalism, the idea of a global Christianity or Islam or Western tradition has ebbed and flowed over time. It can certainly be resurrected now, as a modern response to the disaggregation of international affairs. But the re-emergence of such broad identities will have to contend with other patterns and identities, both global and fragmented.

Patterns of communication, migration, and economic development have produced a Third World in the First and a First World in the Third, have proliferated 'Western' sensibilities as well as nationalist resistances of various sort in a wide variety of places. If we embrace the cultural by stressing the distinction between

the West and the rest, or global and national economy, we will miss what may be the most significant cultural developments of the post Cold War period – the intermeshing of cultures through disaggregation of politics and economization of security – which offer the opportunity for a more invigorated international politics of identity.

In my view, this effort is the key to understanding each of the other major transformations in international affairs. To build an international order in a ‘globalized’ world of proliferated sites for public authority without accepting the narrowed political aspirations which come from blindness to the political nature of private law and the constructed nature of the market, we must make the distributional arrangements among groups in global society – between finance and production, between capital and labour, between these and those distributors, these and those consumers, between male and female workers – places of political contestation. Some of these groups will be national, Thai and Malaysian producers for example, but most will not. So long as we think of military force as the arm of a deracinated international order or think of prosperity as the operation of a technically autonomous market, we will not be secure. After the economization of security, we must accept the cultural and political entailments of military engagement in terms of the distribution of power and wealth among groups abroad, this warlord and not that one, these oil producers and not those. Only by thinking of development policy as a set of choices among groups – these investors and not those, these public officials and not those – will we avoid consigning emerging markets to the authority of powerful market players. In my view, we need an international which is open to a politics of identity, to struggles over affiliation and a shifting embrace of the conflicting and intersecting patterns of identity asserting themselves in the newly opened international regime.

6.7. On avoiding disciplinary blind spots and bias

International affairs after the Cold War is indeed profoundly different. The familiar terrain of international political engagement has broken up, expanding the range of players in many directions. The transition to technocratic governance and the displacement of traditional political questions by problems of economic management has transformed the search for security and the role of the military. The relaxation of ideological differences and the insistence on a formal universalism which characterized the Cold War era of ‘coexistence’ have opened international affairs to a wide range of cultural challenges and opportunities.

These changes are easy to see, but hard to interpret. Difficult as it is to say what the next period of international political life will be like, we can all sense that the conditions of political life, for Cold War protagonists and bystanders alike, have been transformed. And we know from experience that the first interpretations are likely to be both enduring and misguided. After all, none of the institutions created in the wake of the World War II would perform as anticipated – all would require

massive reinterpretation, often almost immediately. The uncertainty of such a postwar moment has hardly encouraged our statesmen and commentators to keep their powder dry until the mist clears. In the struggle to interpret what has become us since 1989, our scholars and statesmen have largely returned to familiar themes, even as we acknowledge that the traditional questions are no longer the right points of departure.

In making these assessments, the disciplinary sensibilities of specialists in international law, international economic law, comparative law, and international relations together overemphasize the disconnection of public and private, the apolitical nature of private law, the disconnection between governing and comprehending, the distinction between local culture and global governance. Historical progress mythologies support each of these discipline's own claims to authority and reinforce geographical divisions between the center and the periphery, while offering a narrowed definition of possible and desirable directions for reform.

One result is that the interpretations which mainstream commentators in these fields have given recent transformations of international life have had similar limitations, reinforcing the invisibility of background norms and private arrangements and taking important areas of political contestation out of the internationalist's vision at precisely the moment a turn to the market and a disaggregation of the state makes these norms and institutions potentially the most significant sites for international contestation and struggle. They reinforce the naturalness of current distributions of global wealth and poverty, focusing our attention on participation in public structures at precisely the moment questions of economic justice provide the most salient challenges for the international regime as a whole. The result is a strangely passive policy-maker. And they reinforce the stability of cultural identity at precisely the moment conflict and contestation among and within cultural identities created by diasporic and hybrid experiences are emerging as the most dramatic international dynamic for both politics and economics in the post Cold War period.

When we think about nationalism or ethnicity or race or gender consciousness, we should see a quintessentially modern phenomenon, an identity politics which will be with us throughout the next period. The issue is not how we can repress these claims, containing them within the private or the national domain, but how we can understand and engage them internationally. The desire for sovereignty, for political participation, for autonomy, for independence, are not alternatives to an international or rational way of running the world. The typical approach taken by political scientists and international lawyers confronted with these dramatic transformations, the parceling out of sovereignty into thousands of units, is to think of international relations as a problem of management. How can we manage this situation? How can we turn it into a process that is amenable to the operations of expertise? And the move to expertise is an important part of a transition period such as this. The challenge before us, however, is to embrace, to manage this tran-

sition without transforming political, economic, or military questions into technical matters which narrow our political options and naturalize inequalities.

As we think about international politics and security after the Cold War, I urge professionals and intellectuals concerned with international law and policy to think beyond the blind spots and biases they inherit with their disciplinary expertise. Perhaps we will be able to transform our disciplinary practices so as to embrace the disaggregation of the international regime and the economization of security without resignation about global poverty, to embrace the displacement of ideology by culture without sharpening the distinctions between cultures or the cosmopolitan conceit of living beyond the cultural. Perhaps we will develop an internationalism based on a global politics of identity, a shifting sand of cultural claims and contestations among constructed and overlapping identities about the distribution of resources and the conditions of social life.