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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individual 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 Statesean 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’ – 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 centrist 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. 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.

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. Gahiti, *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).

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. 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)’, ‘The New Stream’,

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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.

‘Critical Legal Studies (CLS),’ and has overlapped with a number of other projects, including ‘Third World Approaches to International Law (TWAIL),’ ‘International Legal Feminism,’ the ‘Feminism, Law Sexuality and Culture (FLASC)’ project, the ‘New Approaches to Comparative Law’ project, and the ‘Postcolonialism and Sexuality’ project. 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 States 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 States legal tradition, introducing the relationship between schools of thought about public in-


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).


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 Nesiah, 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.’

ternational law and broader trends in legal scholarship. 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. 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. 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. The objective is to re-situate contemporary interna-


17. This essay was influenced by A. Anghe, 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 Framwork, 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

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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 States—pre-occupation 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 States, as a 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 States 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 States 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 States 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. In a typical United States interna-

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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.\footnote{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.} 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
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. 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.

‘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 populists 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 Statesian 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 peaceably, which translated into a support for ‘co-existence’ where necessary, cooperation 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 Kissing/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 liberalism, 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 Statesan 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 Statesan 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 Statesan 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. The ideas which emerged from this intellectual

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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 Statesan 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

dereference. 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 Statesian 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 that 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 hegemom 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 States lawyer 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.”

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 rulesceptic 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).
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 States 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 Statesian international law tradition at once recognizable to its European counterparts (if a bit preoccupied with 'soft law') and offering its United Statesian 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 Consensus\(^{23}\) 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, liberal 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,