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

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 Statesian 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 Statesian 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 Statesian way of thinking about law and the American empire, but it is not a connection which a revitalized formalism or state-centricism 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 Statesian 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, over-statements, 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 Statesean 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.
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 apparatchiks 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 distributive. 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-
between 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 legalization 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:

\[\begin{align*}
\text{International} \\
\text{National} \\
\text{Triangles in a Void: International Law}
\end{align*}\]

\[\begin{align*}
\text{Buyer} & \quad \text{STATE A} \\
\text{Seller} & \quad \text{STATE B} \\
\text{The International Trade Law Banana}
\end{align*}\]
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 as 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-
nomic 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 redistributional 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 redistributional 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 parliament 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 dogmaticus 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