EHRLR aims to promote better understanding of European human rights law, and to provide a forum for serious debate on the European Convention on Human Rights. Tailored to the needs of the practitioner and academic lawyers, it carries articles on all aspects of human rights law as well as providing authoritative commentaries on current developments in this field.

TABLE OF CONTENTS

The Politics of the Invisible College: International Governance and the Politics of Expertise
David Kennedy ................................................................. 463

Bulletin ........................................................................... 498

Regaining a Sense of Proportion: The Human Rights Act and the Proportionality Principle
Richard Clayton ................................................................. 504

Vertically Challenged: Private Parties, Privacy and the Human Rights Act
Ivan Hare ......................................................................... 526

Divergent Views of the European Commission and Court of Human Rights
Iain Christie ................................................................. 541

The Slow Development of the Right to Conscientious Objection to Military Service under the European Convention on Human Rights
Howard Gilbert ................................................................. 554
The Politics of the Invisible College: International Governance and the Politics of Expertise

David Kennedy
Henry Shattuck Professor of Law, Harvard University, Cambridge, Massachusetts

In the final article of a series of three, on the politics of international governance and policy, the author explores how the perceptions and language developed by the professions involved in international policy and humanitarian work, influence its outcomes. Emphasizing the need to move beyond debates about the desirability or otherwise of international governance and the flaws in international constitutional structures, the author suggests that humanitarian aims would be better achieved by an acceptance of the distributive role of international governance, and a focus on its outcomes, whether progressive or regressive. These outcomes are dictated in part by the language of the professions and by their understanding of the nature and objectives of their work. It is suggested that, although international policy professionals often perceive themselves to be intervening neutrally, their real role is one of government. An acknowledgement of this would lead to a better assessment of the gains and losses that result from their work.

Humanitarians and Progressives Evaluate Global Governance

Progressive and humanitarian lawyers, like many left-oriented intellectuals, have a hard time thinking pragmatically about the fact that international policy-making now affects almost every domain in which the contemporary welfare state is active. Our various enthusiasms and suspicions about international governance often reflect only loose prejudices and vague preferences about things local and things global. But global policy-making has become too important not to be evaluated more rigorously. Although there remain activities barely touched by international policy initiatives and the density of international regulation varies in different places and policy sectors, there is no question that we have come to live under a new form of “governance”, at once more international and more technical. The globalisation of policy-making may be the most significant change in the structure, site and substance of political culture since

---

1 I presented these thoughts at the British Institute for International and Comparative Law on April 26, 2001, and I am grateful for the helpful discussion which followed, and to Karen Engle, Jerry Frug and Janet Halley for their comments on earlier drafts. My thinking about the politics of professional consciousness has been shaped by more than two decades of conversation with Duncan Kennedy.

the consolidation of the nation state as an arena of popular political contestation a century or more ago.

We might begin an evaluation by working through a list of recent policy initiatives undertaken outside, among and between governments, tallying those aimed to make the world a more humane and progressive place. We would find an extremely wide range of initiatives and it would be easy to conclude that in one way or another almost every item holds out some humanitarian promise: agriculture, arms control, banking, commercial law, criminal law, economic development, energy policy, environmental protection, health and safety, human rights, immigration and refugee affairs, insurance, intellectual property, labour, monetary policy, tax policy, trade and commercial policy, transport policy. Many people who are progressive, humanist, liberal, compassionate, in all the best senses of these terms, have let it go at that—perhaps bolstered by a general commitment to internationalism, cosmopolitanism, to thinking about things holistically, solving problems together for our whole planet. And indeed, many international policy-making initiatives have sprung from humanitarian motives and had progressive results.

An international lawyer, thinking myself progressive, I am drawn to the humanitarian promises of international policy-making. But I would like to develop our ability to assess global governance more pragmatically. Unfortunately, the most common arguments in favour of international policy-making are the least helpful. Like the idea that internationalisation is technically or historically inevitable. Or the idea that some social and economic problems simply are global phenomena which therefore require international policy solutions. By many measures social and economic life today is no less global than a century ago. Modernisation is also a story of specialisation, fragmentation and the rise of local identities. "The" environment or "the" market can be equally well contemplated, and regulated, as local phenomena. Even problems which seem global may sometimes be addressed locally. International finance might well be regulated most successfully in a few global cities, just as global warming might best be addressed by local initiatives to curtail the most aggressive polluters. Addressing such matters with international policy initiatives can be a way of disengaging them from policy oversight altogether. Moreover, local policies often have broad global effects, while many global initiatives concern only narrow localities. In short, debating whether things are "getting more international" will not much help us understand the pros and cons of international policy-making. However inevitable the internationalisation of policy-making seemed, if we concluded it was a bad idea, there might be much we could do as progressive and humanitarian people to slow its course.

In a sense, of course, international policy-making should simply be evaluated like policy-making anywhere, through careful assessment for particular policy initiatives of the costs and benefits, likely risks, outcomes, distributional consequences for various groups, and so forth. International policy-making is prone to the same difficulties as policy-making elsewhere—underestimating costs, overestimating benefits, over or under estimating the effects of rule changes, overlooking secondary costs, foreshortening time horizons, hyperbole in discussing the pros and cons of proposals, underestimating the plasticity of rules and institutions to appropriation and reinterpretation, and so forth. In this sense, there is not much that can or should be said about international policy-making in general. All too often, good hearted people substitute
general enthusiasm or resistance for difficult assessments of particular policy initiatives. Yet, the general conversation is also an important one. People often shape policy initiatives to advance or retard the globalisation of governance, and the level of international policy making reflects the status of forces between friends and foes of internationalisation. More significantly, the international policy-making machinery may itself skew political outcomes at the wholesale level.

Progressive assessments of global governance run the gamut from enthusiasm to hostility. The enthusiasts focus on the most humanitarian elements of international policy—human rights, humanitarian law, environmental protection, arms control—and are swayed by a general sense that internationalisation is inevitable and probably for the better—offering, on the whole, a more modern, technically expert, rational and civilised way of organising the world than an irrational division into nation states. At the same time, those hostile to global governance, among them people who have mobilised on the streets in places like Seattle, Prague, Quebec, and Davos, as well as in Chiapas, Indonesia, India, or Brazil, criticise international policy-making as biased against progressive and humanitarian policy. They are often swayed by a general fear that internationalisation will roll back more politically promising local cultural, political and economic arrangements.

I come at this debate with ambivalence. I share with the progressive left a worry that we have overlooked or underestimated serious objections to international policymaking. At the same time, much progressive scepticism about global governance leaves me cold. Progressive critics of global governance seem preoccupied with the constitutional structure in which policy is made and with the possibility that international policy-makers and institutions are subject to capture by ideology, interest, or professional error. Although both are important, to me, constitutional inadequacies and capture seem far less significant parts of what ails the international policy process. Both misread the internal consciousness and vocabulary of the policy professions—overestimating their clarity or determinacy and underestimating their ubiquity and power.

Progressive critics share with international policy-makers the perplexing sense that overt political efforts to influence matters in faraway places are not normally legitimate—that international governance, if necessary, should be exceptional, temporary, should require a special justification, and, when undertaken, should seek to leave local conditions, culture and politics as undisturbed as possible. And that international policy-makers should therefore exercise power only as advisors, experts, knowledge professionals, representatives of a politics located somewhere else. This wildly underestimates the role of international governance—of rules, standards, institutions, collective decisions and expert management—in the allocations of power or wealth in the world “before” the interventions of international policy-making. By accepting the a-political posture of policy-making expertise, progressives forgo the opportunity to assert our agenda forcefully at the international level.

But progressive enthusiasts about global governance don’t get it right either. They overestimate the ability of international policy-makers to affect outcomes as detached and exceptional interveners and underestimate the biases and blindesses built into trying. They overlook the dark side of policy-making expertise, often carried away by the idea that one or another form of policy intervention will quasi-automatically turn out to be progressive—intervention to defend human rights, intervention by non-
governmental organisations from other places, intervention by experts who come only to share knowledge or technology, intervention in the form of "humanitarian assistance" and "aid", and so on. They forget that all too often saying "I'm from the United Nations and I've come to help you" will not sound promising at all.

Moreover, progressives—whether critics or enthusiasts—seem ambivalent about what they would have global governance accomplish. At times, of course, they advocate global policies which would distribute wealth, status, and power in ways they deem progressive—from those who profit by the generation of greenhouse gases to those injured by global warming. But when speaking of "globalisation" as a whole, progressives often seem to imagine that if the constitutional structure for global policy-making is satisfactory—transparent, even-handed, checked and balanced—and policymakers are not captured by outside interests or ideologies, the outcomes will be in some sense neutral or benign. Good for everybody—as if the distributional effects of policy-making were aberrant. In this, progressives aspire to inoculation against the egg-breaking that accompanies all governance and rulership, for there simply is no policy—and no forbearance from policy—which does not distribute. In this, international governance is an exercise of power.

But it is also the work of experts and the product of expertise. Critics and enthusiasts underestimate the significance of the policy-making professions—international lawyers, economists, political scientists—in global governance. Global governance is largely their creation and their ongoing practice. The background ideas common to the professional vocabularies of these people affect everyone who becomes involved in the international policy-making process. In a real sense, we are all speaking policy prose—and yet we do not have intellectual tools or habits to grasp the politics or the centrality of what remains an expertise. And the political limits imposed by this vernacular affect even those who rail against globalisation and its policy professionals from the streets.

Too many progressive voices have judged global governance without understanding the vernacular in which it takes place. Focusing on constitutional deficiencies or institutional capture avoids getting inside the mind of the policy-maker—he is determined either by the structure within which he works or by external interests and ideas which have captured his allegiance. The odd thing is how many participants at the very centre of the policy process also leave their professional vocabulary unexamined, content to treat the politics of their expertise as somehow external to themselves.

My suspicion is that as progressives come to understand the hidden-in-plain-view politics of this shared vocabulary, we will shed some of our customary enthusiasm—and suspicion—about global governance. Progressives, whether deep inside the international policy machinery or protesting far outside, have been both insufficiently critical of international policy-making and insufficiently vigorous in asserting our political will on the international stage. By overestimating the political importance of constitutional structures and overlooking the biases of expertise, humanitarian and progressive intellectuals have reinforced policy-makers' own claims to be structurally exceptional and technically apolitical. One result is an unwarranted hesitance by humanitarian and progressive intellectuals to assert our political agendas on the international stage. We need a deeper sense of what can go wrong when international policy-makers govern and a broader feeling of empowerment to pursue progressive
objectives internationally. My hope is that as progressives come to appreciate the structural limitations and biases of international policy-making expertise from the inside, perhaps we will shed our hesitance to see ourselves as participants in rulership.

In this essay, I first consider three common ways of evaluating global policy-making which locate the politics of global governance outside the policy vocabulary—in the constitutional structure of global governance, in the tools used to implement global policy, or in forces which have, in one or another way, captured the policy-making machinery. Although these can be helpful, they also contribute to our sense of distance from the decisions and responsibilities of political assertion. To counteract these tendencies, I propose that we replace constitutionalism with a focus on distribution, that we stop blaming the tools and focus on those who use them, and that we supplement our attention to capture with inquiry into the politics of our shared policy vocabulary itself. In the second half of the essay, I bring together five ideas about the politics of our policy-making vocabularies.

The Politics of Global Governance is Everywhere but in its Vernacular

**Constitutional fetishism: blaming the structure**

Debate about the desirability of global governance gets off the track when it worries too much about the constitutional structure of global governance. Progressives focus far too much on questions like: what is the right mix of centralisation and decentralisation in an ideal global governance system and how close do we come? How does the institutional apparatus for making international policy compare to the public law structures we are familiar with in industrial democracies, or about which we fantasise in fashionable theories about "justice" or "democracy"? Is there sufficient judicial review? Representation? Transparency? Notice and opportunity to be heard? A functioning separation of powers among three branches of government? Checks and balances? And above all, should we (internationalists, hegemons, leading powers) intervene or not?

These can be important questions, to be sure. For many, people, constitutional structure will matter regardless of the policies which are made or the outcomes which result. But it seems odd to prefer one governmental level or structure over another without at least an intuitive sense for the specific policies and distributional outcomes which will result. Although policy outputs can differ when issues are addressed in different institutional structures, a focus on constitutional questions can lead us to misestimate the political outcomes of policy-making. It also encourages us to view international policy-making as exceptional, overlooking opportunities to contest the international rules, institutions, shared professional sensibilities and practices which structure the background situation onto which we imagine policy making its exceptional intervention.

People often have intuitions about distribution in mind when they say that some types of issues can only be handled internationally. What the speaker often means to suggest is that some types of solution, some desirable governmental interventions, some worthy distributions of power, resources or wealth, will, as a matter of fact, only be possible at the international level. Perhaps only the international community has the financial resources to bail out the central bank of a medium-sized nation—the
alternative to international policy-making is the policy of allowing bank failure. Perhaps only the international community has the collective will to impose sanctions on a particular regime in an effective way—the alternative to international policy-making is more freedom of action for "rogue" regimes, or for this particular regime. There is, in other words, behind the idea that "the environment" calls for international policy-making, an idea about what policy is called for, and behind that an idea about the distributional outcomes progressives should prefer. A policy of unrestrained local environmental exploitation, for example, could be pursued perfectly adequately without resort to overt international policy-making.

Or take the progressive insistence that we need an international labour policy. In a sense, of course, we already have one. The arrangement of rules, prohibitions, permissions, enforcements and so forth—about sovereignty, about trade, about contracting and ownership and labour association—effects a policy of differing levels of wage protection, raising some wages and lowering others. The historic use of the International Labour Organisation (ILO) to "regulate" international labour conditions reflects a policy of authorising local labour conditions and the political and legal arrangements which support them intact except as they can be affected by sporadic technical assistance and the enunciation of universal norms in widely ratified, if not always implemented, treaties. This policy arrangement makes relatively little use of "fair trade" laws and institutions to assess labour conditions. What proponents of the need for an international labour policy mean is a particular kind of policy—more aggressive top down regulation aimed at achieving different distributional results—forcing higher wages for some workers through stricter enforcement of at least formally universal norms, at some cost to other workers, consumers or investors.

When humanitarians and progressives consider whether to prefer locating international labour policy in the International Labour Organisation or the World Trade Organisation (WTO), it would be tempting to focus on the quite different constitutional structures these two institutions bring to the task—different memberships, powers, implementation authorities, and so forth. We might conclude that the WTO is constitutionally "stronger" and therefore more likely to be an "effective" enforcer of labour rights. This sort of analysis can be helpful—but the ILO and the WTO are not simply two different constitutional mechanisms for doing the same thing, different institutions for implementing public norms about the treatment of employees which we know as "international labour policy". The policy made in each institution will be a function of distinct professional cultures which think about what labour policy is in different terms. For example, systematic and aggressive use of the national and international trade law regime to challenge low wage regimes as trade subsidies or dumping practices might raise some wages (perhaps lowering others) without public law regulation or standard setting of any overt type.

Constitutional questions can sometimes raise distribution issues, to be sure. We might ask whether it is progressive to pursue labour policy through an institution (like the WTO, but unlike the ILO) in which labour has no constitutionally guaranteed voice. Different memberships, powers, organs, all may have an across the board distributive impact. But these constitutional differences are likely to be swamped by different political climates, different disciplinary vocabularies, institutional histories, contexts of engagement for other purposes, and so forth. As progressives, we would have been better off starting with some sense for the particular outcomes we prefer—whose
wages increased or stabilised, whose working conditions transformed, at what costs to whom—and then focusing on the institutional mechanisms most likely to achieve this outcome. Although this sounds commonsensical enough, and is the practice of many sophisticated practitioners and strategists, it is surprising how often humanitarian and progressive voices focus instead on one or another institutional form or level as an unstated and largely unexamined proxy for their preferred outcomes.

Of course, placing distributional issues front and centre may also bring to light conflicts among progressive and humanitarian voices—exactly whose ox should we gore, exactly where should we concentrate our resources? But when distributional issues remain in the background it is easy to get carried away by belief in the consistency of constitutional form, and in the importance of constitutional factors in generating results. The most classic example is probably the “race to the bottom”—the assumption that globalisation of policy-making will lead, through regulatory competition among national units in the absence of a strong centralised policy-making capacity, to ever “lower” levels of environmental or health or labour or safety protection. Although this has an intuitive appeal, the empirical story is far more mixed. Sometimes there is a race to the top, sometimes other factors swamp the effects of “regulatory competition”, it is difficult to figure out what are “high” and “low” standards where regulatory objectives themselves compete, and so on. More significantly, the idea of what public policy-making “is” at the national and international level may well be different—a loss of public law regulatory capacity might well be made up, from a progressive standpoint, by other forms of political intervention and contestation in the international regime. And of course, in terms of outcomes, we might well prefer an ineffective international machinery to an effective national one where the policies implemented generate less progressive outcomes than the existing framework of background norms and practices.

Progressives should develop the habit of recasting our arguments in distributional terms—exactly what sorts of policies, benefiting whom, are “too hard” to implement nationally? When we say international policy-making will be more “rational” or less “political”, whose interests in what contexts are we thinking will be taken more and less into account? Which sorts of policy outcomes will be more or less likely if taken up by international policy-making machinery? What is the distribution wrought by the default policy now in place against which more “international” or “national” policy-making seems preferable? It may be easier to build coalitions around feel good constitutional generalisations—globalisation is terrible or international policy-making is inevitable or both—but doing so will retard, not advance, our understanding of the politics of global governance.

__Blaming the hammer: the politics of institutional and doctrinal tools__

Progressive evaluations of international governance go awry when they focus on the institutional and doctrinal tools used for policy-making, rather than on the professional expertise and routine practices through which international policy-making is undertaken. Of course, sometimes the available policy tools at the international, as opposed to the national level can affect the distributional outcomes of policy. To take a familiar example, it is easy to see that using international treaties to make rules will often have
different outcomes from using a series of national statutes. It is notoriously difficult to enforce a treaty rule against or within the jurisdiction of a signatory state which is not committed to the treaty’s enforcement, just as it is difficult to formulate rules which cut sharply into the prerogatives of other governmental entities through the consensual machinery of treaty-making. Indeed, a strong national statute in a leading economy can have more international overspill than a treaty drawn in general terms. Treaties are often vague or embody loose compromises and may set back the regulatory agenda by licensing weak national regimes. Contemplating these facts as progressives, it is tempting to conclude that we should simply prefer the use of national regulatory machinery whenever practically possible, relying on treaty-making only where the problem escapes national jurisdiction for one reason or another.

So long as we can be confident that progressive policy-making means passing strong “progressive” rules for enforcement by public authorities in a context which would otherwise be less progressive, there is much to this conventional assessment of the treaty-making tool. But the situation is not nearly that clear-cut. National regimes can protect local interests at significant cost to a general regulatory objective. A weak or differentially effective public law rule may prove more progressive where public authorities are not themselves progressive or where background rules and institutions have more progressive potential. Vague treaties enforced by progressive judges may be much better than strong statutes passed by conservative legislatures. In the rush to generate the strongest possible public rules, opportunities to contest background norms and practices may be overlooked. Where public law norms license anti-progressive practices, this effect may be stronger for statutes than treaties.

Most importantly, the progressiveness of treaties will depend upon what is put in them and how their provisions are accepted by living people managing policy machinery. Much will depend upon the use made of policy tools by the professionals who wield them, and by what they have been trained to think plausible and proper. We are familiar with extremely weak treaties being very favourably received by local elites—and the reverse. Focusing on the tools themselves both turns our attention from their distributional consequences to their constitutional authority, and encourages us to act as if policy tools had a kind of inherent virility or potency, as well as a politics of their own. This idea obscures the effects of professional knowledge and practice about their uses, as well as the responsibility of real people for their consequences.

In a broader sense, focus on policy-making “tools” assumes too readily that we know what “international governance” is. But global governance is not simply the sum of public law analogs developed by international policy makers to replicate the functions of national governments. The international “system” is an activity of people—of lawyers, economists, political scientists, bureaucrats, civil servants, street protesters, entrepreneurs, media moguls and businessmen in thousands of locations who share a commitment to international policy-making. These people might work for the great international governmental bureaucracies, but they are equally likely to be found in national governments, in private enterprises, in non-governmental organisations, in the media, in universities or in the streets. Wherever they are located, these people propose, accept, expect, hope for, resist, yield to and interpret the internationalisation of social and economic policy, and their shared consciousness is more important in setting the terms and extent of global governance than the formal powers or presence.
of the international policy-making machinery. Consequently, international policy-making is the collective practice and consciousness of a people. Not the people of a nation, but the people (from central bank presidents to street protesters) of the diffuse cosmopolitan and international space. Theirs is the "consciousness of an establishment", and the politics of global governance will be their collective politics.

Many, but by no means all, of these people are professionals who learned the policy-making vernacular in their training to become economists, lawyers, political scientists, journalists and so forth. Their professional vocabularies give us a window into this more general establishment consciousness, both because they are influential, and because they articulate overtly what is common sense in the broader society of cosmopolitan people who influence international policy-making. We might therefore begin our evaluation of the politics of international governance by evaluating the politics of these policy-making disciplines.

This may seem odd at first, and not only because we are used to thinking of these disciplines as domains of relatively neutral "expertise". At the national level, we think of policy-making as the servant to a political class implementing a political program, an ideological agenda, perhaps a democratic mandate. We think of policy-makers—and they think of themselves—as bound, in their acts and in their imagination, by the delegated powers of their institutions. But to the extent international governance is the act of a diffuse establishment above or outside national political contestation, it floats free of these familiar conceptual restraints. Although savvy policy professionals rarely present themselves as naive voices of a neutral science, they think of themselves as participants in something altogether less parochial or ideological than "politics". They often feel they have left the bad old (national) politics of rent seeking, subjectivity, corruption, national and ethnic parochialism behind to build a shiny new and objective politics of cosmopolitan expertise. The term "policy" suggests the tendency to think in terms of "best practices", practical necessity, efficiency, rather than political positions or distributional outcomes. People have this in mind when they complain that European Union officials seem less to be implementing the left, right or centre political program of a government than advancing their own authority in the name of the abstract ideological goal of "building Europe". International policy-makers speak far more about the "best" policy or practice than about winners and losers, and about the work of the "international community" than about the prerogatives of this or that institution.

Of course, the politics of the professions is not only a function of their expertise, and it would be useful to know a great deal more than we do, sociologically and historically, about this cosmopolitan policy class. The professions encompass a broad range of political commitments and people who pride themselves on the flexibility and eclecticism of their expertise. International policy-making elites pursue all sorts of projects using, stretching, ignoring, free-riding on their professional vocabularies, credentials, expertise and institutions. Sometimes these are projects of deep commitment or aversion, often, though not always, to the stated objectives of various policy initiatives—reduce global poverty, increase the efficiency of global capital markets—only some of which will, of course, be progressive or humanitarian. But also projects of affiliation and disaffiliation—associating themselves with those in power, with those out of power, with the hip, the helpful, the wise or the savvy. And, of course, projects
of power and submission, willing themselves to rulership, to service, to marginality or centrality. As they pursue these quotidian professional practices, working within or against the possibilities of their professional vernacular, policy initiatives of one sort or another emerge.

When progressives focus on the politics of policy professionals, they can be disarmed by the fact that most international policy-makers share a humanitarian and progressive sentiment. These are largely good people, humanist, rational, practical, cosmopolitan, liberal in sentiment. Theirs is an enlightenment project, a liberal project in the widest sense, embracing liberalisms of the right, the centre, and the left, carrying with it all the problems and promises of the liberal philosophical tradition. It can be difficult to see much more of their politics than this. These are people who seek to govern, not in their own name, but as representatives of knowledge, necessity, reason. They imagine themselves governing from outside government, figuring themselves as knowledge, speaking to everyone else as power. These are people hesitant to act directly or openly on their progressive and humanitarian sentiment, people to whom the thought “personally I’d like nothing better, but unfortunately…” comes very easily.

They understand their entitlements to flow from their expertise, sharpened and certified by disciplinary training and validation, and their reference group is first and foremost collegial. They share the idea that the object of their expertise pre-exists their disciplinary formation—“the law” is out there, they study it, interpret it, reform it, apply it. “The economy” is out there—they study it, describe it, formulate its rules of action, manage it. Moreover, these professionals wear their expertise lightly. The best international policy-makers are eclectic—used to flexibility, interdisciplinarity, alive to the experience of scepticism, to the failures of knowledge. We might say the best economist knows how little is known about the economy, the best lawyer how fluid and undecided the corpus of law—know that the work of the professions is less the application of expertise than a modest practice of eclectic social or institutional management.

Although it may seem obvious that the terms of the policy discussion may limit the policies which are made, these are extremely subtle and ambivalent vocabularies. It is not at all clear that the policy-making vocabulary has a politics, except as practised or applied. Like anyone, policy professionals bring a range of professional deformations to the task, the limits of their training, their imagination, their understanding of the terrain upon which they work, their sense of the sorts of solutions which will and will not work. But these may, and sometimes are, compensated for by the presence of other professional disciplines and other voices.

It can be difficult to get a good grip on the politics of the cosmopolitan policy-making establishment, even by focusing on the vocabulary of the dominant policy-making professions. Progressives who have tried to isolate the politics of the international policy establishment have taken two paths. Some take the vague flexibility and apolitical posture of the professional vocabularies themselves at face value, and focus rather on the possibility that the entire discussion has in one way or another been hijacked. Others, more sceptical about the notion of political capture have tried to isolate elements in the policy-making vernacular itself, background understandings and shared assumptions, which might, in one context or another, turn out to skew the politics of global governance in an anti-progressive direction.
Body snatchers: the politics of capture

The institutions and professions of global governance have been politically captured.

The most familiar claims about the distributional biases of international policy-making are made in the language of political capture. International policy-making will favour some policies and exclude others, and distribute resources from some groups to others, because the policy-making machinery has been captured by political forces committed to these results. Capture seems bad both when specific politics dear to the speaker are made less possible, and when policy-making departs from an abstractly desirable political range. There are three quite different ideas out there about how international policy-making could be politically captured.

In the first vision, the global policy-making machinery has (perhaps secretly) come under the influence of some group or set of economic interests. Whatever is said by international policy-makers, and whatever the actual structure of decision-making at the international level, the shots are really called by someone else—by capital, by industry, by the first world, by the United States, by the Trilateral Commission, and so forth. Those hostile to policy-making by the European Union speak this way when they suggest that when policies are made in Brussels, decisions are really taken in Paris or Berlin. It is also familiar in claims that the world trading system serves the interests of "global capital" or has been taken over by the agents of multinational corporations.

A second idea is that the actual participants in international policy-making are themselves ideologically or politically committed partisans of one faction or another rather than pragmatic and objective assessors of the costs and benefits of alternative policy options. International policy-makers might be more conservative or socialist or liberal than policy-makers elsewhere, or the range of political commitments among international policy-makers might be narrower than the abstract range of possible political positions. These political commitments will either lead policy-makers to distort their professional analyses or exploit opportunities left open for discretion within their professional analyses to promote their political agenda. We hear this idea in British debates about European policy-making which suggest that Eurocrats are less liberal and more socialist in sentiment than policy-makers in London. In the broader international context, the claim is more often the reverse: international policy-makers are liberals with a libertarian or mercantilist rather than a socialist bent.

A third vision of political capture stresses structural dimensions of the international policy-making machinery which lead some interests to be under or over represented—in comparison either with an imaginary "justly" representative order, or with actual policy-making machinery at the national or local level. To the extent we imagine policy-makers to be themselves representative, rather than the implementers of political objectives set by other representative groups, some groups or interests may be underrepresented. If we think of policy-makers as more neutral experts, some interest groups may face structural impediments—through their own organisational structure or their distance from international machinery—in articulating their claims so as to be heard by international policy-makers. The key here is participation, voice, presence, and the transparency of the international policy machinery. Claims of this sort are common—from both the third world and the first, from states as well as non-state actors and.
groups. Concerns of this type lie behind accusations that international policy-making suffers from a "democracy deficit", whether in the European Union, the United Nations or the International Monetary Fund. Or that the machinery for trade governance favours the dominant interests within large diverse economies, favours producers over consumers, or proliferates machinery for defending and compromising the claims of first world interest groups while offering nothing compatible to interest groups in Third World locations.

There is no question that political capture of policy-making in each of these three senses is possible, does happen, and should be a matter of concern to those whose interests or objectives are consequently not attended to. My own sense, however, is that political capture claims have been exaggerated when it comes to assessing international policy-making as a whole. The attention given these claims, moreover, has crowded out investigation of other sources of bias in international policy-making which may well turn out to be more significant.

International policy-making is simply too complex and multifaceted to be easily characterised as captured by one political tendency or another—it is no accident that people have charged international policy-making with prejudices in all sorts of directions. People associated with international policy-making themselves turn out to be diverse in their personal political affiliations. Far more are vaguely progressive than would be compatible with claims to conservative or neo-liberal capture—and far more are centrist liberals than would be compatible with claims of socialist or right-wing capture.

But my scepticism about political capture claims has another source. It is notoriously difficult to link particular policy alternatives with particular political interests in any determinative way—and far more difficult to do so for the array of policies implemented at the international level. What is, precisely, in the interests of capital or labour, of the first world or the third? The consequences of particular policy initiatives are extremely difficult to predict. These interests are themselves aggregates of various competing groups with divergent interests. Often their interests overlap. Once one begins to formulate an answer, one is in the slippery realm of international policy-making itself, attuned to perverse effects, reverse interpretations, unexpected costs and benefits. To make policy is, after all, to distribute—too often claims of "capture" are simply ways of disagreeing with the policies which have been made.

Claims about a lack of representation have, at first blush, more plausibility. And yet if we think of the international policy making apparatus as a broad cultural process rather than a narrow institutional structure, it is hard to identify interests or groups whose claims have not, one way or another, been articulated on the international plane. For more than a century, reformers have insisted on, and generally received, ever more open patterns of participation and transparency. The outsiders have been repeatedly let in, and the feeling that international policy-making is both biased and cut off from the possibilities of popular engagement remains. Of course, one could always conclude that as excluded voices are let into the room, the "real" decision-making has moved elsewhere, and this certainly does happen. But it may also be that the outcome bias did not spring primarily from a lack of participation in the first place, or that the modes of marginal expression are themselves biased or self-limiting. Although thinking of international policy-making as the activity of an establishment consciousness would seem to make claims of ideological capture easier to sustain, the consciousness of the
policy establishment is extremely fluid. It would be more accurate to describe it as post-ideological, post-political, eclectic or flexible, than as politically captured.

I am left suspecting that the problem is not primarily one of transparency or participation or ideological closure. What is needed is not openness or "transparency" as that term is understood by even the most aggressive proposals to render inter-governmental institutions transparent—documents published sooner, meetings broadcast on the web, non-governmental representatives allowed access as observers. If there is a problem of "participation" or voice in international governance, it seems a far more profound one—an almost complete absence of politics, in the sense of collective contestation among groups over the allocation of power, wealth, services, or status. Legal structures for governance abound and an extremely wide array of people now participate in global governance. But an overt and conscious global political process is altogether absent, replaced by conversations and struggles within a limited policy vernacular. To evaluate the politics of the international policy-making process, we need a far more nuanced conception of how professional expertise itself works, for assessing the biases of people who are eclectic in their commitments and committed to standing outside the terrain of commitment itself.

The policy-making professions are subject to doctrinal, policy or methodological capture

The claim here is that international policy-making will distribute resources from some groups to others because the expertise of policy-makers is itself biased to favour policies which in turn favour these groups. There are at least two common ideas about how this can happen. In the first, a policy-making discipline will become gripped by a fashionable policy, theory or doctrine, and advocate it more forcefully and more often than good sense would dictate. The over-investment in this particular policy, theory or doctrine will then have unfortunate distributional consequences.

Of course international policy-makers do succumb to fads. For years experts involved in development policy-making at the international level were bullish about import substitution policies, fifteen years later export led growth was all the rage, five years after that experts seemed unanimous that neo-liberal polities of privatisation and return to world prices were the only way to go. It would be entirely fair to say that the development policy profession was not able, in any of these periods, to embody the breadth of its own expertise. Broad public discussion about development largely ran parallel. Similarly, for years international policy-makers approached situations of ethnic conflict offering minority rights and assimilation—and then switched to self-determination and population transfer—and then reversed again. This is the sort of thing people in the United Kingdom have in mind when they complain that policymaking in Europe is captured by "corporatist" thinking, or when those in the third world charge the international financial institutions with a bias for neo-liberal free-market policies. International lawyers are constantly being accused of a professional over-investment in the doctrine of "sovereignty" or in "the State".

In my experience, however, claims about doctrinal or theoretical capture often seem exaggerated. The policy choices against which the discipline is said to have closed its eyes turn out to be present in mainstream thinking. Policy alternatives which seem stark turn out to be more nuanced. The fluidity of the doctrinal or policy options
themselves makes it notoriously difficult to tell exactly what the distributional consequences of different policy options will be. Routine professional practices of internecine conflict and criticism, although often sounding doctrinaire and sectarian, in fact leave the best professionals ambivalent and quite unlikely to lash themselves too long to any policy or doctrinal fad. It is no surprise that those accusing policy professionals of bias in this sense so rarely go on to articulate the outcome consequences they fear.

It is far too easy to conclude, for example, that since international policy-makers are all advocating neo-liberal free market policies, they and the policy-making system of which they are a part are biased in favour of, say, capital over labour, or the first world over the third. It turns out that within “free-market” ideas there lurks an exception for situations of “market failure” which can be interpreted in broad or narrow terms. Making out a case for bias would require saying quite a bit more about how policy-makers resolve the various choices internal to this broad policy choice (how broadly or narrowly do they interpret “market failures”) as well as a clear sense about what policies will in fact favour a group as diverse and general as “capital”, or “the first world”. A “free market” policy could turn out, if properly structured, to be more friendly to “workers” than its “socialist” alternative.

This sort of debate is more often about the rhetoric of international policy than the outcomes. Repeatedly, the expertise of the policy-making professions returns to well-worn argumentative alternatives—between import substitution and export-led growth, between neo-classical and institutional economic ideas, between praise and condemnation of sovereignty. It is simply not true that experts in, say, the international financial institutions are committed to a neo-liberal policy panacea. There are those voices, to be sure, but they are not alone—in the institutions, or even in the expertise of individual professionals. As a result, efforts to locate professional bias in doctrinal or policy capture almost always seem to underestimate the range and flexibility of the professional expertise they seek to criticise.

A second vision of the biases in the expertise of international policy-makers focuses on “methodological” or “theoretical” capture. In this conception, debate among policy professionals about things such as “how much sovereignty is the right amount” or “what is the appropriate mix of import substitution protection and openness to free trade” assume, after a time, a predictable form. When this happens, schools of thought form within a discipline which tend to answer a range of similar questions the same way—always defaulting to more, rather than less, sovereignty, or more rather than less protectionism. It often comes to seem, at least to those involved, that the answers people in a school of thought give to specific policy questions are in some sense entailed by a “theory” about something quite general—what law is like, how economies work, what justice requires, and so forth. These theories (positivism, naturalism, neoclassicism, institutionalism, formalism, antiformalism) are then thought to have policy consequences.

Thus, if you “are” a formalist, we can reasonably predict that you will favour some doctrines over others, almost regardless of the policy context. You will favour rules over standards, doctrinal over institutional solutions, deference to sovereignty over the development of newfangled international authority structures. Moreover, once you “become” a formalist, you advocate some policies and not others because of what you believe law to be like. If disciplines are composed of people representing the full range
of theories or methods or schools of thought, debate between different schools should ensure an appropriate doctrinal selection. But this turns out not to be the case. Professional disciplines do get captured at times by theories or methods, and this may bias their choice of doctrinal or policy options. Even in disciplines with vigorous methodological debate, doctrinal choices more often reflect the status of forces among theoretical combatants—the strength of theoretical sects—than pragmatic assessments of the appropriate solution to specific practical problems.

So, for example, it was long argued that international lawyers during the first half of the twentieth century were almost exclusively “positivist” and “formalist”. As a result, so the story went, they tended to default to rules rather than standards, to treaties rather than custom, to sovereign and State-based solutions rather than more open-ended or flexible institutional arrangements. And this, it was said, favoured the first world over the third, and favoured entrenched interests over newly emerging powers. To reform international law to take the needs of the decolonising world into account, international lawyers would need to abandon their formalism in favour of more “process” or “policy” or “functional” approaches, would need to replace their attachment to sovereignty with something altogether more “transnational” and pragmatic. In similar fashion, it is often argued today that too many international policy-makers, particularly lawyers with North American educational backgrounds, are antiformalist, and hence advocate policies which highlight opportunities for discretion and flexibility—a flexibility which, in turn, favours the hegemon.

There is no question that policy-making professions in particular places can get mired in one or another theory and find themselves working with a dramatically reduced set of doctrinal and policy tools when confronting problems. I think American policy-makers have something like this in mind when they complain that the international policy-making machinery is too formalist, or too “European” it its attitudes about law, or what national policy-makers mean when they suggest that the European Central Bank has been captured by economists who overestimate the threat of inflation and underestimate the threats of recession, or what third world policy-makers mean when they charge that international financial institutions have been captured by neo-liberal supply-siders. Still, charges of methodological or theoretical capture, like claims of political, doctrinal or policy capture, underestimate ambivalences and exceptions within each contending school of thought which open the window for more diverse policy commitments. And if it is extremely difficult to trace the connection between a general theory or school of thought and a particular doctrine or, policy in determinate ways, it is even more difficult to link these theories to outcome biases.

The argumentative materials which constitute the school of thought are generally simply too thin and porous, the contest between formal and antiformal positions too vigorous, the aggregation of interests and their link to policy formulations too tenuous, to be confident that methodological or theoretical capture could bias something as broad as international policy making in an interesting way. Of course it could turn out that people who are “formalists” or “antiformalists” are also captured by a political commitment of one or another sort, and that surely also happens. But it would seem more appropriate to see this as a case of political, rather than methodological capture. Contemporary international policy disciplines are self-consciously agnostic about
political commitment and ideological alignment—agnostic about the doctrines, theories and schools of thought which divide their own disciplines. Sometimes it seems incontestable that normative flexibility will favour the hegemon, while formal rights will protect the weak, but sometimes the opposite will seem equally true. Figuring out which will be true when is what policy-making is all about. To suggest that antiformalism a priori expresses hegemony is less to uncover methodological capture than to be methodologically captured.

Capture by disciplinary specialisation and the false panacea of interdisciplinarity

There remains a suspicion that policy-making “experts” will nevertheless approach policy questions too narrowly. Unlike the common man, or, for that matter politicians, whose minds are expanded by campaigning about the polity, experts have had their thinking narrowed by professional specialisation. The claim here is not that they have been captured by a political enthusiasm, nor that they are failing to engage the full range of positions and schools of thought made available by their discipline, but that their discipline as a whole is simply too narrow in ways which bias outcomes. To the extent broader public debate about global policy-making occurs in these professional languages, it too will be too narrow. It is easy to think of examples—lawyers are too litigious and try to solve things with rules, economists only worry about what’s efficient, businessmen worry only about the short term bottom line, military officers always want more hardware and are too prone (or not prone enough) to use it. Nobody seems professionally responsible for ethics or values, everyone over-discounts the future or too sharply privileges the past. This sort of bias does affect international policy-making. Economists and political scientists and lawyers do focus on different sides of a problem and come up with different solutions. When violence breaks out, it makes a difference whether one sends lawyers, doctors, soldiers, priests, therapists or aid specialists to respond. In thinking about the pros and cons of international policy-making, it would be useful to have a better sense for the particular biases of the various professionals who are likely to be involved.

If we focus only on international lawyers, with whom I am more familiar, much will depend on the person’s speciality—human rights lawyers, public international lawyers, international economic lawyers, comparative lawyers all see different things, worry about different things, bring a different stock of solutions, reach out to different non-legal disciplines for assistance. International lawyers do seem to see a world of states, worry about how law can be possible among sovereigns, focus on avoiding the trauma of war, reach out to political science for inspiration, seek to strengthen global governance. International economic lawyers, by contrast, seem to see a world of would be buyers and sellers, worry about how the risks to trade can be contained, focus on avoiding economic depression, reach out to economics for inspiration, and seek to strengthen free trade. There is no doubt these disciplines think about an issue like international labour policy very differently. For an international lawyer, the problem will be a lack of governance capacity, a need for norms and institutions to ensure compliance with them. International labour policy will mean a network of international legal rules and standards and enforcement machinery. For an international economic lawyer, the problem will be the transformation of different national conceptions of normal labour practices into arguments for restricting trade. Producing against the
background of a different national legal regime can seem like an “unfair” trade advantage. International labour policy will mean a process for adjusting, diffusing, co-ordinating such claims in ways which will not unduly impede trade flows. The policies which result from thinking about labour in these different ways may well differ dramatically. It may well be that progressive scepticism about international policy-making might be grounded in the fact that too many economists or lawyers or political scientists, or whatever, are involved.

In my experience, however, many efforts to identify and address this sort of deformation run into trouble. As with political or methodological capture, it is terribly difficult to link disciplinary focal points to outcomes in any convincing way. Just because international economic lawyers focus on trade flows, even have a project of increasing trade, does not mean that they will, for example, be inhospitable to strengthening the international minimum wage, raising health and safety standards or promoting conditions more conducive to labour organisation. As far as I have been able to see, there is nothing in the tools of their trade which would dispose them in that direction. Neither is it clear that the trade lawyers’ efforts to develop an interface among different background national legal regimes is biased towards homogenisation—let alone unity at a high, low or medium level of protection. Facilitating trade is, after all, about facilitating exploitation of comparative advantage—differences in the background conditions of production. Again, to think about professional specialisations this narrowly is to be oneself captured by them.

The international economic lawyers we now have might, as a matter of fact, have been politically or methodologically captured, but that would be something altogether different. Similarly, just because international lawyers focus on states and seek to build a regime of law among them does not make them hostage to formalist conceptions of sovereignty—it places them in a professional vocabulary preoccupied with relations between formal and informal conceptions of law and sovereignty. In any event, it is not at all clear what the policy outcome bias of insistence on formal sovereignty would be. A more formal sovereignty, for example, might strengthen either high or low wage economies in defending their labour regimes, or might be the basis for a strengthened intergovernmental co-operative regime.

Moreover, although the terms and preoccupations of various policy-making disciplines do differ, efforts to understand their relative weaknesses or blind spots are prone to underestimate the internal flexibility of each discipline. Are military professionals too prone, or not prone enough, to use force? It turns out that economists have a vocabulary for internalising factors which non-economists tend to think of as matters of “value” rather than matters of “efficiency”, just as lawyers have a vocabulary for criticising and limiting reliance on rules or litigation, broadening exceptions, promoting alternative dispute resolution, structuring administrative discretion and understanding the role of political life in constituting the rule of law. In a similar way, political scientists have a vocabulary for speaking about the influence of rules on the structure and operation of regimes, even if they often preface their stories about multilevel games and predictive stability with denunciations of “idealistic” lawyers who think politics can be tamed by rules or ethics.

As a result, it is easy to overestimate the differences between the preoccupations of the disciplines, and to underappreciate both their internal ambivalence and the contestability of what seem their central attachments. Indeed, mastery of any of these