
Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory

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Abstract

Anne-Marie Slaughter's application of so-called 'liberal' theory to international law leads to questionable descriptions of how 'liberal' or 'democratic' states behave, as well as equally questionable prescriptions for how international rule-making ought to proceed in the future. Treaties exclusively between parties whose governments respect human rights, the market, and periodic elections are not necessarily more likely to be characterized by 'deep' cooperation enforced via binding dispute settlement; liberal courts have ample reasons to resist (as well as to enforce) international obligations. Contrary to what this version of liberal theory would suggest, compliance with all forms of international legal obligations, including those within international economic law, may not fall along 'liberal'/'non-liberal' lines. Liberal norm-making prescriptions, including overly optimistic assessments of regulation via 'transnational networks' and 'transjudicial communication' and unduly grim assessments of more pluralist alternatives, shrink the domain of international law in misdirected, probably counterproductive, pursuit of the 'liberal peace'.

1 Introduction

Professor Anne-Marie Slaughter's version of liberal theory builds upon Andrew Moravcsik's challenge to prevailing state-centric theories of international relations, including most prominently, realism. Like Moravcsik, Slaughter contests all the fundamental assumptions that realists make, namely (1) that states, the primary international actors, are rational, functionally identical, and unitary actors; (2) that states' preferences are exogenous and fixed; and (3) that the anarchic structure of the international systems create such uncertainty and mistrust that power, exercised in

* Professor, Columbia Law School. I am grateful to George Bermann, Christine Chinkin, Susan Damplo, Lori Damrosch, Mark Freeman, Benedict Kingsbury, Karen Knop, Petros Mavroidis, Gerald Neuman, Steve Ratner, Kai Raustiala, Gerry Simpson, Eric Stein and participants at presentations at Australia National University, the American Society of International Law, and Columbia Law School for providing comments on earlier drafts. Remaining errors are, of course, my own.

typically zero-sum games, is the only constant.¹ Following Moravcsik, Slaughter argues that state preferences are not fixed or autonomous but are the aggregation of individual and group preferences and that these preferences are the primary determinant of what states do.² But while Moravcsik seeks to up-end traditional verities within political science, Slaughter's target is international law. Slaughter contends that international lawyers, through recourse to nebulous concepts such as 'sovereignty' and 'sovereign equality' and reliance on state-centric sources of legal obligation, have been, no less than the realists of political science, equally willing to treat states as so many indistinguishable 'black boxes' despite differences in political ideology and domestic institutions and equally oblivious to the impact of non-state entities, including subgovernmental units. Classical international law, with its fixation on liberal internationalist institutions on the model of the United Nations premised on hierarchical authority and universal membership, is increasingly irrelevant because it has failed to include the new, more effective modes of international governance emerging in the wake of the 'disaggregating' state.³

According to this latest version of liberal theory,⁴ 'how States behave depends on how they are internally constituted'.⁵ Liberal theory is not, however, a pale application of the familiar interest-group or rent-seeking models applied by public choice theorists. It 'transforms states into governments':⁶ unlike traditional international law, liberal theorists distinguish between types of regimes, including between liberal and non-liberal regimes. While Slaughter has wavered over time on how sharply distinctions between 'liberal' and 'non-liberal' need to be drawn,⁷ she has consistently argued that liberal theory 'permits, indeed mandates, a distinction

¹ See, e.g., Slaughter, 'International Law in a World of Liberal States', 6 *EJIL* (1995) 503, at 507. See also Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics', 51 *International Organization* (1997) 513, at 516–524.

² See, e.g., Slaughter, *supra* note 1; Moravcsik, *supra* note 1; Slaughter, 'A Liberal Theory of International Law', *Proceedings of the 94th Annual Meeting of the American Society of International Law* (2000) 240.

³ See, e.g., Slaughter, 'The Real New World Order', 76 *Foreign Affairs* (1997) 183. See also Slaughter, 'Government Networks: The Heart of the Liberal Democratic Order', in Gregory H. Fox and Brad R. Roth (eds), *Democratic Governance and International Law* (2000) 199; and Burley, 'Toward an Age of Liberal Nations', 33 *Harvard International Law Journal* (1992) 393.

⁴ See Gerry Simpson's contribution in the next issue of this journal for an intellectual history.

⁵ Slaughter, *supra* note 1, at 537.

⁶ See, e.g., Slaughter, *supra* note 2, at 240–241.

⁷ The sharpest dichotomy between liberal and non-liberal appears in Burley, 'Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine', 92 *Columbia Law Review* (1992) 1907. In this 1992 piece, Slaughter (then Burley) argued that liberal insights required rejecting the cornerstone of the international lawyers' pluralist project: the concept of universally applicable sources of law. Slaughter argued that, since only liberal states operate in a 'zone of law', courts in those states ought to use the act of state doctrine to repudiate the laws and legal system of non-liberal states; that is, that liberal courts ought to impose a badge of 'alienage' on non-liberal states. *Ibid.*, at 1990. The act of state doctrine, she argued, ought to be used as a democratizing tool: to help 'nudge nonliberal states toward the liberal side of the divide'. *Ibid.*, at 1912. Despite Slaughter's claims that the act of state doctrine has been applied in this fashion by US courts, there appears to be not a single judicial citation to Slaughter's controversial article since its publication and it is not clear whether even its author would today defend its central thesis. Slaughter's most recent work, on the relevance of transnational networks, avoids drawing such clear fault lines between liberal/non-liberal, but still maintains that 'the emerging transgovernmental

among different types of States based on their domestic political structure and ideology'.⁸ At the same time, however, Slaughter, again following Moravcsik, has suggested that liberal theory applies to all states, even totalitarian, authoritarian or theocratic regimes, since all 'can all be depicted as representative of some subset of actors in domestic and transnational society, even if it is a very small or particularistic slice'.⁹ While its potential for universal applicability has consequences for liberal theory's claims to analytical priority over rival accounts within political science,¹⁰ Slaughter's liberal theory has not gone in this direction. Instead, liberal theory is touted as a corrective to the inclinations of universalist international lawyers precisely because it 'permits more general distinctions among different categories of States based on domestic regime-type'.¹¹ The liberal view of international law builds upon the purportedly distinctive quality of legal relations among liberal democracies, and especially the members of the European Union and the system of human rights centred at Strasbourg.¹²

Slaughter's liberal theory has both a philosophical and an empirical basis and attempts to build a bridge between political science and law. It traces its origins to Immanuel Kant's prediction, in 1795, that liberal states would some day form a 'free federation' blessed by perpetual peace,¹³ but it is most directly grounded in the work of Michael Doyle and other neo-Kantians who have attempted to provide empirical

order is concentrated among liberal democracies' of the West. Slaughter, 'Government Networks', *supra* note 3, at 201. See also Slaughter, *supra* note 2, at 249 ('I do subscribe to a distinction between liberal and non-liberal states as a positive predictor of how they are likely to behave in a wide variety of circumstances, including within or toward international organizations').

⁸ Slaughter, *supra* note 1, at 504 (noting the growing body of evidence highlighting the 'distinctive quality of relations among liberal democracies').

⁹ Slaughter, *supra* note 1, at 509. See also Moravcsik, *supra* note 1, at 518 (arguing that all states are 'representative institutions subject to capture and recapture, construction and reconstruction by coalitions of social actors').

¹⁰ See, e.g., Moravcsik, *supra* note 1, at 538–549.

¹¹ Slaughter, *supra* note 1, at 509. As Slaughter has suggested in presentations on liberal theory, this is because, even though non-liberal nations may 'represent' some particularistic segment of society, the small size and unity of that segment means that for all practical purposes the non-liberal state behaves much like the unitary actor of realist theory. Slaughter, 'A Liberal Theory of International Law', presentation at Columbia Law School, 2 December 1999.

¹² See, e.g., Burley, *supra* note 3, at 402–403. See also Burley and Mattli, 'Europe Before the Court: A Political Theory of Legal Integration', 47 *International Organization* (1993) 1; Burley, 'Democracy and Judicial Review in the European Community', *University of Chicago Legal Forum* (1992) 81; Slaughter and Helfer, 'Toward a Theory of Effective Supranational Adjudication', 107 *Yale Law Journal* (1997) 273; Mattli and Slaughter, 'Revisiting the European Court of Justice', 52 *International Organization* (1998) 177. See also Sullivan, 'Effective International Dispute Settlement Mechanisms and the Necessary Condition of Liberal Democracy', 81 *Georgetown Law Journal* (1993) 2369, at 2374–2387.

¹³ See Burley, *supra* note 3, at 394 (citing Kant's prerequisites for such a free federation, namely (1) cooperation among republics with market economies that respect equality before the law and private property rights; (2) an agreement between these republics to refrain from the use of force against one another; and (3) extensive international commerce). See Kant, *Perpetual Peace*, reprinted in Carl J. Freidrich (ed.), *The Philosophy of Kant* (1949) 430–76.

evidence of the ‘liberal’ or ‘democratic’ peace.¹⁴ Slaughter builds on Kant’s insights as well as the neo-Kantians’ premise that liberal states do not go to war with one another.¹⁵ At the same time, her version of liberal theory denies that it is either a normative or an abstract interdisciplinary exercise. Its ‘unsentimental analysis of the domestic origins of international behavior’¹⁶ is purportedly grounded in positive fact.

Slaughter’s liberal theory professes to be, first, an accurate description of that growing part of the world that is composed of liberal states. Liberal theory explains ‘legal relations among States such as the United States, Canada, the Member States of the European Union, Japan, Australia, and New Zealand’ and provides at least a ‘point of departure’ for ‘conceptualizing the legal relations’ of others (presumably those that are almost as democratic?), namely, ‘among Argentina, Chile, Brazil, Ecuador, Mexico; Poland, Hungary, and the Czech Republic; Taiwan, South Korea, and the Philippines; India, Israel, and, with luck, South Africa’.¹⁷ Much of liberal scholarship is accordingly devoted to showing how the growing number of states that are ‘functioning democracies’ — loosely defined as those with a freely elected government, a flourishing civil society according respect for human rights, and a free market that respects private property — ‘strengthen and expand’ international norms and institutions while enjoying the fruits of a ‘separate’ peace.¹⁸ Liberal theory assumes that liberal states will comply more readily with the treaties that they sign and that these treaties are more likely to be subject to effective judicial enforcement at either the international or domestic level (or both).¹⁹ Liberal states are also more likely to turn to alternative mechanisms not captured by the traditional sources of international law (and that obviate the need for some treaties altogether), including efforts by liberal judges to build a ‘transnational community of law’ through a readiness to cite one another’s opinions, as well as through international obligations, cooperative ventures by liberal regulators on a range of issues from antitrust to criminal law enforcement, and transnational regulatory networks engaged in everything from securities regulation to the setting of interest rates by central banks.²⁰ Liberal theory also professes to explain the legal relations (or lack thereof) between liberal and non-liberal

¹⁴ See, e.g., Burley, *supra* note 7, at 1914–1916. See, generally, the contributions by Michael W. Doyle, Bruce Russett, and John M. Owen in Michael E. Brown *et al.* (eds), *Debating the Democratic Peace* (1996).

¹⁵ See, e.g., Burley, *supra* note 3, at 395; Slaughter, *supra* note 1, at 509. See, generally, Levy, ‘Domestic Politics and War’, in Robert I. Rotberg and Theodore K. Rabb (eds), *The Origin and Prevention of Major Wars* (1989) (discussing the ‘liberal peace’, the ‘closest thing we have to an empirical law in the study of international relations’).

¹⁶ Burley, *supra* note 3, at 393.

¹⁷ Slaughter, *supra* note 1, at 514–515.

¹⁸ Burley, *supra* note 3, at 395. Slaughter’s definition of a ‘liberal state’ faithfully adheres to Doyle’s. See Doyle, ‘Kant, Liberal Legacies, and Foreign Affairs’, in Brown, *supra* note 14, at 3, at 5–6.

¹⁹ Slaughter, *supra* note 1, at 530 and 533–534; Slaughter and Stone, ‘Assessing the Effectiveness of International Adjudication’, in *Proceedings of the American Society of International Law* (1995) 91. See, generally, Burley and Mattli, *supra* note 12.

²⁰ See, e.g., Slaughter, ‘Government Networks’, *supra* note 3; Slaughter, ‘A Typology of Transjudicial Communication’, 29 *University of Richmond Law Review* (1995) 99; Slaughter, ‘The Real New World Order’, *supra* note 3.

states, including the relative ineffectiveness of legal institutions attempted by 'mixed' groups of states.²¹

Liberal theory speculates about but does not draw definitive conclusions about what causes the democratic peace or general law-abiding behaviour among liberal nations. While Slaughter argues that the precise mapping of cause and effect for the democratic peace 'does not matter', she outlines the correlative attributes that characterize the world of liberal states as follows: (1) mutual assurances that inter-state disputes will not be resolved by military means; (2) representative governments secured by the separation of powers, constitutional guarantees of civil and political rights, juridical equality, and a functional judicial system dedicated to the rule of law; (3) market economies based on private property rights ensuring an economic sphere distinct from the state; (4) a dense network of transnational social and economic relations among individuals and groups; (5) informal ties between governmental elites, including direct meetings and communications among bureaucrats from different countries; and (6) the relative parity of security with economic and environmental issues, along with the breakdown of a firm distinction between 'foreign' and 'domestic' politics.²² In more recent work on transnational contacts among subcomponents of liberal governments — that is, among liberal courts, regulatory agencies, executives and legislatures — Slaughter speculates that the emerging transgovernmental order is concentrated among Western industrialized states for a number of reasons: liberal nations' devotion to the norms of separation of powers (and the quasi-autonomous governmental institutions that result), the 'unified foreign policy stance' that comes with the 'certainty' that conflicts will not become military confrontations, the macroeconomic interdependence that accompanies economic development among mature democracies, and shared political values of pluralism and tolerance.²³

Slaughter's liberal theory is, secondly, prescriptive. It is not content with merely trying to explain matters that classical international law and its state-centric sources of legal obligation leave out. It seeks to provide prescriptions to policy-makers intent on creating effective legal institutions and instruments that are useful because they

²¹ See, e.g., Slaughter, *supra* note 1, at 515. See also Helfer and Slaughter, 'Toward a Theory of Effective Supranational Adjudication', 107 *Yale Law Journal* (1997) 273 (contrasting the relative ineffectiveness of the International Court of Justice and the Human Rights Committee with the integrating successes achieved by the European Court of Justice and the European Court of Human Rights); Burley, *supra* note 3, at 393 ('nonliberal states ... are freer now than at any time since 1945 to pursue their ambitions, however defined, and when frustrated, to settle their grievances by force').

²² Slaughter, *supra* note 1, at 510 and 511–514. Slaughter does not try to explain just how each of these six correlatives, intended to be congruent with those suggested by Kant, work in tandem to produce the liberal peace, but speculates that factor (1) 'establishes a different psychological and political context' for the resolution of disputes; that (2) assures the operation of civil society and makes available a neutral arbiter for private disputes; that (3) is an engine for social interaction that is a source of demand for legal rules and institutions and the stability these bring; that (4), (5) and (6) all inhibit governments from acting violently toward one another, and that the degree of transnational free market contacts between liberal states result in foreign and domestic policies that are increasingly 'subject to the same constraints'. *Ibid.*, at 511–514.

²³ Slaughter, 'Government Networks', *supra* note 3, at 201 and 221–226.

are more firmly rooted in the way state preferences arise and take shape. The liberal theory of international relations, or ‘transgovernmentalism’, is accordingly presented as a ‘blueprint for the international architecture of the 21st century’, offering nothing less than ‘answers to the most important challenges facing advanced industrial countries’.²⁴ Although the prescriptive and descriptive lines of liberal thought often merge in liberal scholarship,²⁵ its policy prescriptions include the following:

- 1 Those who would use law to shape state behaviour should pin their hopes less on public international law and its global institutions than on domestic commercial and constitutional law, as well as private transnational law, as it is the ‘velocity’ and ‘density’ of transnational transactions among disaggregated, liberal states that are likely to facilitate legal convergence and effective forms of international governance.²⁶
- 2 Since more effective and more intrusive forms of international regulation are likely to be achieved within regional or other organizations whose memberships consist wholly or primarily of liberal states than within institutions with more universal membership, we need to encourage a deepening of cooperation among liberal institutions and liberal cooperation within more pluralist institutions.²⁷
- 3 Judicial opinions demonstrating conscious attempts to engage in cross-border judicial communication are most likely to occur within the courts of liberal states and need to be promoted and encouraged among such courts.²⁸
- 4 Informal transnational networks among government bureaucrats (like the central bankers of the Basle Committee) need to be pursued as more flexible and more effective vehicles for transnational regulation than traditional, more formal methods of inter-state agreement (such as treaties proposed and negotiated by executive branches and approved by formal legislative processes but subject to only horizontal forms of enforcement at the inter-state level).²⁹
- 5 To the extent states continue to rely on traditional treaty-making, we should expect and ought to be able to secure better compliance and enforcement of any kind of treaty when the parties to these agreements consist of liberal states, since such

²⁴ Slaughter, ‘The Real New World Order’, *supra* note 3, at 197.

²⁵ Slaughter’s most widely cited and detailed attempt to date to elaborate a liberal theory of international law, is cast as a ‘thought experiment’ — a ‘largely deductive effort supplemented with inductive illustrations’. Slaughter, *supra* note 1, at 532–533.

²⁶ See, e.g., Burley, *supra* note 3, at 405. See also Slaughter, ‘The Real New World Order’, *supra* note 3 (discussing transnational networks); and Slaughter, ‘Government Networks’, *supra* note 3 (same).

²⁷ See, e.g., Burley and Mattli, *supra* note 12. See also Slaughter, ‘The Liberal Agenda for Peace: International Relations Theory and the Future of the United Nations’, 4 *Transnational Law and Contemporary Problems* (1994) 377 (arguing that, given the mixed membership of organizations such as the United Nations, its best prospects lie not in security functions but in enhancing democratization and in the actions of a ‘caucus’ of like-minded liberal states that can deepen cooperation within the broader organization).

²⁸ See Slaughter, ‘A Typology of Transjudicial Communication’, *supra* note 20.

²⁹ Slaughter, *supra* note 1, at 532–534. See also Slaughter, ‘The Real New World Order’, *supra* note 3 (describing how liberal states’ ‘separate, functionally distinct’ disaggregated networks are models for the ‘next generation of international institutions’ which are more likely to look like the Basle Committee or, more formally, the OECD, than pluralist institutions like the UN).

states are ‘more likely to be monist than dualist, as evidenced by international “override” provision in domestic constitutions that mandate the supremacy of international over domestic law’.³⁰

- 6 Since liberal states are more likely to resort to peaceful forms of dispute settlement such as arbitration, we can expect better compliance with international dispute settlement among these states and we ought to encourage resort to such methods whenever possible.³¹
- 7 Since ‘vertical’ enforcement of treaty obligations (where domestic courts enforce treaty obligations) is the most effective way of securing compliance with treaties, and since this is most likely to take place within a community of liberal states, such forms of deepening cooperation ought to be included in treaties among such states whenever feasible.³²
- 8 The liberal internationalist agenda (including 1–7 above) needs to be pursued because it promotes peace among all nations as well as the rule of law.³³

Notwithstanding normative disclaimers, Slaughter’s sympathies for the law-making regimes and the political institutions of the West are never in doubt. The political message liberal theory conveys to international policy-makers is not subtle: ‘hopes for international order should be pinned on our hopes for democracy’.³⁴ While Slaughter shies away from the most provocative normative claims made by some of her fellow neo-Kantians, such as Fernando Teson, she endorses the more gentle reformist agenda of scholars like Thomas Franck.³⁵ Unlike Teson, who prescribes war against illiberal nations for the sake of bringing about Kant’s perpetual peace,³⁶ Slaughter is the more tempered liberal, urging patient transmittal of liberal values over time (through the expansion of a ‘liberal zone of law’) as the more effective way to liberal peace.³⁷

Slaughter’s liberal theory is millenist, triumphalist, upbeat. The examples being set by liberal nations’ treaties and their transgovernmental networks in the wake of the

³⁰ Slaughter, *supra* note 1, at 532–533.

³¹ Slaughter, *supra* note 1, at 533; Slaughter and Stone, *supra* note 19. See also Sullivan, *supra* note 12 (arguing that democratic forms of government are essential to effective international dispute settlement and that non-liberal states need not apply).

³² Slaughter, *supra* note 1, at 534.

³³ See, e.g., Burley, *supra* note 3, at 399–405; Slaughter, ‘Government Networks’, *supra* note 3, at 226; and Slaughter, *supra* note 1, at 538. See also Fitzgerald, ‘An Emerging Liberal Theory of International Law and the Non-Enforcement of Foreign Public Laws’, 16 *Australian Yearbook of International Law* (1995) 311, at 315 (describing liberal theory’s reliance on the liberal peace).

³⁴ Burley, *supra* note 3, at 403.

³⁵ *Ibid.*, at 404.

³⁶ See, e.g., Fernando R. Teson, *A Philosophy of International Law* (1998) 62–63. For Teson’s answer to the ‘neoliberals’, see *ibid.*, at 65–66.

³⁷ See, e.g., Burley, *supra* note 3, at 393–394 (suggesting that the prospects for real multilateral cooperation and effective international organizations turn on ensuring that the post-Cold War wave of democratization continues and continuing the distinctively ‘American internationalism’ of statesmen like Woodrow Wilson, Franklin Roosevelt and Harry Truman — all of whom fought communism, fascism and imperialism). See also *ibid.*, at 405 (expressing support for Thomas Franck’s notion of an emerging right to democracy); Slaughter, *supra* note 2, at 249, note 19 (same).

victory over communism mark the beginning of a global ‘new deal’³⁸ or a ‘new liberal democratic order’.³⁹ Liberal international law promises to replicate the liberal welfare state.⁴⁰ Its organizing polity ‘would mirror the organizing principle of liberal States’; the resulting system of ‘checks and balances’ would create sufficient friction to curb the abuse of power.⁴¹ A world of liberal nations would be a ‘negarchy’ — a political order straddling anarchy and hierarchy where power is checked horizontally.⁴² While ‘neither a utopia nor panacea’,⁴³ and not the ‘end of history’,⁴⁴ the liberal vision of ‘transnationalism’ is a hopeful progress narrative that highlights how the ‘virtuous circle’⁴⁵ of judicialized foreign policy and a regulatory web of ‘positive comity’ among like-minded nations is capable of drawing bipartisan support from both the right and left spectrums of US political opinion.⁴⁶ Slaughter’s deeply optimistic liberal order is politically feasible, fills regulatory gaps that need filling in the midst of globalization, promotes the deepening of democratization in states with fragile democracies, engages non-democratic states, expands and solidifies the benefits of the democratic peace, and helps establish effective international institutions less susceptible to ‘democratic deficits’.⁴⁷ Who could ask for anything more?

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The version of liberal theory described above has enjoyed an extraordinarily positive reception among policy-makers, at least in the United States. Slaughter’s work is cited frequently (and usually not critically) in policy-oriented periodicals intended for an audience of Washington insiders, and its ‘blueprint’ dovetails nicely with the prevailing mainstream ‘Washington consensus’.⁴⁸ Few in Washington question the proposition that US foreign policy ought to be directed at fostering conditions and institutions to ‘democratize’ the world consistent with globalization

³⁸ See Burley, ‘Regulating the World: Multilateralism, International Law, and the Projection of the New Deal Regulatory State’, in John Ruggie (ed.), *Multilateralism Matters* (1992).

³⁹ Slaughter, ‘Government Networks’, *supra* note 3, at 199–201. See also Slaughter, ‘The Real New World Order’, *supra* note 3.

⁴⁰ See, e.g., Burley, *supra* note 38.

⁴¹ Slaughter, *supra* note 1, at 535.

⁴² Slaughter, *supra* note 1, at 535 (adopting terminology originally coined by Daniel Deudney in ‘The Philadelphian System: Sovereignty, Arms Control, and the Balance of Power in the American States-Union, circa 1781–1861’, 49 *International Organization* (1995)).

⁴³ Slaughter, *supra* note 1, at 536.

⁴⁴ Burley, *supra* note 3, at 405.

⁴⁵ Slaughter, ‘Government Networks’, *supra* note 3, at 207.

⁴⁶ See, especially, Slaughter, ‘The Real New World Order’, *supra* note 3, at 186–193.

⁴⁷ *Ibid.*, at 194–197.

⁴⁸ Interestingly, although Slaughter was initially inspired by the work of political scientists working on the ‘liberal peace’, including Bruce Russett, now Slaughter is being cited by such authors to support basic tenets of the liberal peace. See, e.g., Russett, ‘Why Democratic Peace?’, in Brown, *supra* note 14, 82, at 95 (citing Slaughter for the proposition that ‘courts in democracies share enough common values to recognize and enforce each other’s law in accord with pluralist principles of tolerance and reciprocity’ but do not ‘recognize the legal systems of nondemocratic states as equal partners’ since these are ‘lacking the political autonomy of democratic legal systems, and hence not appropriate as providing norms for conflict resolution’).

trends and the economic needs of the United States.⁴⁹ Most assume that democratization efforts will in turn facilitate effective forms of international governance.⁵⁰ The notion that only liberal democracies should be members in good standing of international organizations is in turn also gaining support, including within institutions of 'mixed' (liberal and non-liberal) membership.⁵¹ A number of human rights organs, including the ICCPR's Human Rights Committee and the UN's Human Rights Commission, as well as the European and Inter-American Commissions of Human Rights, have suggested that the right to democratic governance is indispensable to compliance with other human rights.⁵² Even the Security Council and UN Secretary-Generals have suggested that democracy is a newly minted imperative.⁵³ Within academe, the notion that liberal democracies behave better has at times drawn the support of even those Western scholars most closely associated with traditional international law.⁵⁴ Crucial liberal assumptions are also widely shared outside of law. Prominent economists agree that democratic governance is consistent

⁴⁹ Indeed, the best-selling and influential book by Thomas L. Friedman, *The Lexus and the Olive Tree* (2nd ed., 2000) is a down-market, popularized version of liberal theory. Thus, like Slaughter, Friedman stresses the significance of transnational transactions over traditional sources of international law (*ibid.*, at 10, noting that, while the 'defining document' of the Cold War was the treaty, the defining document of globalization is 'The Deal'); draws a line distinguishing states that have donned the 'golden straitjacket' (democracies with free markets) and the rest; emphasizes the power of non-state units including 'super-empowered' individuals and NGOs without discounting the continuing power of the nation-state; defines his approach as in opposition to, among other things, realism (*ibid.*, at 23) and notions of global government (*ibid.*, at 206); emphasizes the need for states to 'democratize' following the model of the United States and other Western democracies; postulates that there is no ideological alternatives to free-market capitalism; advocates bottom-up regulation as the recipe for better governance without global government (*ibid.*, at 207); and adopts his own version of the liberal peace (*ibid.*, at 248–275, proposing the 'Golden Arches Theory of Conflict Prevention', namely, that no two countries economically developed enough to support a McDonald's network are likely to make war with each other).

⁵⁰ Thus, former President Clinton called democratization the 'third pillar' of his foreign policy, in part because 'democracies don't attack each other'. See 'Excerpts from President Clinton's State of the Union Message', *New York Times*, 26 January 1994, A17; 'The Clinton Administration Begins', 3 *Foreign Policy Bulletin*, Nos 4/5 (January–April 1993) 5. See also Lake, 'From Containment to Enlargement', US Department of State, 4 *Dispatch*, No. 39 (September 1993) 3 (arguing that the strategy of enlargement of the community of market democracies ought to succeed the defunct policy of containment); Cutter, Spero and D'Andrea Tyson, 'New World, New Deal', *Foreign Affairs* (March–April 2000) 80 (proposing continuation of the Clinton Administration's 'democratic approach to globalization'); Carothers, 'The Clinton Record on Democracy Promotion' (Carnegie Endowment Working Papers No. 16, September 2000) (contending that, of all the foreign policy themes prevalent during the Clinton Administration, democracy promotion 'has stayed the course').

⁵¹ See Fox and Roth, 'Introduction: The Spread of Liberal Democracy and Its Implications for International Law', in Fox and Roth, *supra* note 3, at 1; Cerna, 'Universal Democracy: An International Legal Right or the Pipe Dream of the West?', 27 *New York University Journal of International Law and Policy* (1995) 289 (surveying developments within international organizations, including the OAS).

⁵² See Fox and Roth, *supra* note 51; and Cerna, *supra* note 51.

⁵³ See, e.g., Boutros-Ghali, 'Democracy: A Newly Recognized Imperative', 1 *Global Governance* (1995) 3; and Fox and Roth, *supra* note 51, at 3 and 9. For a survey of the UN's manifold efforts to 'consolidate democracy', see, e.g., 'Report of the Secretary-General', UN Doc. A/53/554 (20 October 1998).

⁵⁴ See, e.g., Louis Henkin, *How Nations Behave* (2nd ed., 1979) 63 ('[i]n general, Western-style democracies have tended to observe international law more than do others').

with and probably promotes economic growth;⁵⁵ sociologists confirm the central insight that non-state actors are increasingly having an impact on the ‘disaggregating’ state.⁵⁶ For many in the West the answer to the question posed in the title of this essay is only too obvious.

At the same time, the critiques of liberal theory that have emerged have largely failed to engage its substantive assumptions concerning how liberal states purportedly behave. Harold Koh has criticized liberal theory for being ‘essentialist’ and for failing to recognize that nations are not permanently liberal or non-liberal.⁵⁷ Susan Marks has criticized Slaughter’s liberal theory as part and parcel of, though a less extreme version of, the ‘liberal millenarianism’ most notoriously propounded by Francis Fukuyama in the late 1980s and 1990s.⁵⁸ Marks has also taken issue with Slaughter’s and other neo-Kantians’ uncritical and superficial view of democracy, noting that liberal millenarists too readily assume that periodic elections ensure a genuine political choice or a real free market of ideas.⁵⁹ Harsher critiques have emerged from some of those who identify themselves as either ‘critical’ legal scholars, ‘new streamers’ or scholars of the ‘sub-altern’ or the ‘post-colonial’.⁶⁰ For these critics, liberal theory does more than ‘shift attention away from the scale, character and sources of deprivation, oppression and conflict in the contemporary world’:⁶¹ it is the oppressive voice of neo-liberal hegemony.⁶²

⁵⁵ See, e.g., Douglass C. North, *Institutions, Institutional Change and Economic Performance* (1990) (arguing that the institutional structure most favourable to approximating a market of free exchange and information most amenable to efficient economic exchange and better economic performance is a democratic society with universal suffrage). See also Mancur Olson, *Power and Prosperity Outgoing Communist and Capitalist Dictatorships* (2000).

⁵⁶ See, e.g., Sassen, ‘The State and Economic Globalization: Any Implications for International Law?’, 1 *Chicago Journal of International Law* (2000) 109.

⁵⁷ Koh, ‘Why Do Nations Obey International Law?’, 106 *Yale Law Journal* (1995) 2599, at 2650. But see Burley, *supra* note 7, at 1989 (acknowledging that this ‘relatively crude classification scheme’ is only ‘a first cut’); Slaughter, *supra* note 2, at 249 (*semble*).

⁵⁸ Marks, ‘“The End of History” Reflections on Some International Legal Theses’, 3 *EJIL* (1997) 449 (citing, among other works, Fukuyama’s ‘The End of History’ in *The National Interest* (Summer 1989)). As might be expected, liberalism’s populist apostle, Thomas Friedman, see *supra* note 49, has been criticized along the same grounds. See, e.g., Frank, ‘It’s Globalicious! Two Servings, Half-Baked, of the New Economy’, *Harper’s* (October 1999) 72–73.

⁵⁹ Marks, *supra* note 58, at 470–472.

⁶⁰ See, e.g., Martti Koskeniemi, ‘Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations’, in Michael Byers (ed.), *The Role of Law in International Politics* (2000) 17 (critiquing Slaughter’s attempt to build bridges between international law and political science).

⁶¹ Marks, *supra* note 58, at 473.

⁶² Thus, in a lengthy article that purports to outline existing ‘disciplines of international law and policy’ and that, remarkably, omits mention of Slaughter, David Kennedy lashes out at ‘legal internationalists’, especially within the United States, who ‘overemphasize the inevitability and desirability of the *status quo*’ or ‘underestimate the plausibility of alternatives’ and whose ostensible objectivity conceals their national biases and blindspots. Kennedy, ‘The Disciplines of International Law and Policy’, 12 *Leiden Journal of International Law* (1999) 9, at 10. While all traditional ‘schools’ of international law within the US legal academy are the subject of Kennedy’s wrath, Kennedy reserves special scorn for the pragmatic ‘neo-liberals’ of the post-welfare age who are so anxious to ally themselves with the prevailing Washington consensus that they become engaged in rewriting ‘the new United States hegemony and the spread of deregulatory free trade as the triumph of political liberalism’. *Ibid.*, at 25. For Kennedy, the

This essay examines liberal theory from the inside. It seeks to examine only one set of premises or assumptions within liberal theory. My aspirations are limited. I am not here challenging the merits of going beyond the concept of a unitary state to examine the impact of preferences within it. Nor do I aspire to topple democratization as a pillar of US foreign policy or the ‘right to democratic governance’ seemingly being recognized by some international organizations. To the extent democratic governance is the new Holy Grail, there are no scarcity of possible justifications: (1) because it is morally and ethically compelling; (2) because it is the only political system consistent with a respect for both traditional civil and political rights as well as economic development; (3) because it prevents internal armed conflict, including those arising from ethnic clashes; (4) because it prevents inter-state conflict or encourages resort to peaceful forms of dispute resolution; or (5) because its attendant virtues (including transparent and free flows of information between those governed and the governing) facilitates the implementation or compliance with international obligations apart from human rights. This essay does not take issue with 1–3 and, while it addresses 4 and 5, it does not conclude that liberal states are *more* likely to go to war or *less likely* than other states to comply with international law. I also do not take issue with many of Slaughter’s premises, including her thin and highly uncritical account of the concept of a liberal state.⁶³ Instead, I take seriously Slaughter’s call that we verify whether her ‘thought experiment’ accurately describes how liberal states behave.⁶⁴ First, I examine, based on the little that we know about compliance, whether liberal theory accurately describes the international law-making practices of liberal states, whether in the context of traditional treaties, transnational networks or ‘transjudicial communication’. Secondly, I explore whether Slaughter’s prescriptions for lawyers drafting or designing effective international treaty regimes are sound. Finally, I critically examine the premise that adherence to liberal theory and its prescriptions will further peace among nations. My conclusions on these points are a

neo-liberals ‘smuggle jingoism into the tradition of cosmopolitan internationalism’ such as to ‘betray the humanist tradition of political liberalism’s earlier commitments to social, racial, gender, or economic justice’. *Ibid.* Their liberalism has been ‘Thatcherized or Reaganized’ — cleansed of earlier substantive commitments and narrowed to focus on capitalist expansion and proceduralist democracy. *Ibid.*

⁶³ Cf. Marks, see the text and notes 58 and 59 above. But Susan Marks has raised only some of the problems with Slaughter’s premises. Some might question the alleged connection between ‘democracy’ and peace given the history of exclusions for various groups within democracies and how that history dramatically shrinks the relevant period over which truly ‘liberal’ nations have been dealing with each other. Nor do liberal theorists consider whether one can call a state, such as France and the UK, truly ‘liberal’ over those periods in which these states had overseas colonies. Some might also question the ‘liberal’ credentials of states that have regular elections but dwindling public participation in them. Finally, the generic ‘liberal’ label fails to take into account the many differences among liberal states, including parliamentary democracies and presidential systems, that might lead to distinct results with respect to, for example, the supposed ‘liberal’ disinclination to distinguish between domestic and foreign policy issues.

⁶⁴ Slaughter, *supra* note 1, at 505 (noting that the ultimate value of the ‘thought experiment’ must await ‘empirical confirmation of specific hypotheses distilled from this model’).

great deal more equivocal than those reached by Slaughter but less damning than those reached by her harshest critics. My answer to the question posed in the title of this article is that we do not know for sure but that there is plenty of reason to be sceptical. While that response is not likely to satisfy either side, it is intended to put the burden of proof on those who would contend that liberal states are better law-abiding members of the international community.

2 Liberal Theory as Description

A *Treaties*

While post-colonial critiques of liberal theory focus on the inadequacies, blindspots and biases of an approach that would exclude large parts of Asia, Africa and parts of Latin America from the ‘zone of law’, few have noted another obvious omission: the United States. Although liberals assume that the United States is the pre-eminent example of a liberal state, it is difficult to contend that the United States’ approach to treaty obligations accords with liberal premises. On the contrary, it is demonstrably not true that US treaties with liberal treaty partners are characterized by ‘deep’ cooperation enforced via vertical, or at least horizontal, forms of dispute settlement or that, to the extent that the United States has accepted such obligations, it has done so primarily with fellow liberal democracies.

The United States has plainly not taken the route followed by European states with respect to direct or vertical enforcement of human rights conventions. As is well known, the United States has not seen fit to permit the enforcement, in its local courts, of most human rights treaties.⁶⁵ US reservations, understandings or other conditions attached to the ratification of such treaties make ‘vertical’ enforcement of international human rights notoriously difficult in US domestic courts and generally affirm the primacy of US laws where international norms would diverge.⁶⁶ The United States’ refusal to provide domestic judicial enforcement for human rights treaties does not appear to have anything to do with the fact that ‘non-liberal’ nations are also parties to such conventions, and the types of other conditions attached to US ratification also do not appear to reflect any such concerns. Certainly there has never been any suggestion of crafting more narrowly tailored reservations to such conventions to secure more effective enforcement among ‘like minded’ or ‘liberal’ nations, nor has there been any move by the United States to become a party to Slaughter’s principal example of a ‘liberal’ human rights regime, namely, the European Convention on

⁶⁵ Even with respect to the Torture and Genocide Conventions, US domestic law is an imperfect, incomplete vehicle for implementation. See, e.g., Torture Victim Protection Act of 1991, 106 Stat. 73; Genocide Convention Implementation Act of 1987, 18 USC sections 1091–1093.

⁶⁶ See, e.g., US Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781 (1991).

Human Rights. Indeed, the prospect that the United States will become a full participant to the comparable system in its hemisphere — the Inter-American system for human rights — remains highly dubious. The United States shows no inclination of ratifying the American Convention on Human Rights, of making it self-executing in US courts, or of submitting itself to the Inter-American Court's binding jurisdiction — regardless of the number of democracies in the hemisphere that do the same.

While there are many explanations for the United States' stance with respect to international human rights conventions, most pose serious questions for Slaughter's account of liberal nations' treaty relations. Particularly troublesome to liberal assumptions about treaty compliance is the possibility that the United States fails to give these treaties priority due to a widespread perception, at least within the United States, that US laws already equal or exceed the protections accorded by international instruments. To the extent this perception (erroneous or not) prevails among US policy-makers, it suggests that the very 'success' of 'liberal' regimes may sometimes prevent the 'vertical' enforcement of certain international obligations — even when these are not inconsistent with domestic law. Equally troublesome, however, is the argument that, in liberal states with 'legitimate' law-making institutions, domestic rights norms — such as those arising from the Supreme Court's interpretation of the US Constitution — have greater legitimacy than those created by remote, unrepresentative international processes.⁶⁷ Under this view, even when domestic and international human rights norms diverge, the latter should not prevail. One need not agree with either account to understand the difficulties they have posed — even for Presidents (like Jimmy Carter) anxious to demonstrate the United States' good faith on human rights questions.

There is no evidence that the United States has historically distinguished between 'liberal' and 'non-liberal' treaty partners in terms of its readiness to enter into judicial forms of dispute settlement. The first compromissory clauses committing the United States to settle treaty disputes before the International Court of Justice came in post-Second World War Friendship, Commerce and Navigation (FCN) treaties, negotiated with a variety of countries, including many non-democratic states.⁶⁸ The FCN treaty network would appear to be a perfect example of inter-state regulation emerging from an ever-growing density of transnational contacts, principally among the treaty partners' traders and investors, and indeed these treaties were designed to protect the rights to trade and invest. This treaty network constitutes one of the first, and certainly the most widespread, set of submissions by the United States to

⁶⁷ For a critical assessment of prevailing 'American exceptionalism', see Hathaway, 'America, Defender of Democratic Legitimacy?', 11 *EJIL* (2000) 121.

⁶⁸ FCN treaties, dating back to the beginning of the republic and ending with the emergence of the GATT after the Second World War, include many treaty partners with little or no claim to 'liberal status' at the time they entered into agreements with the United States, such as Argentina (1853), Bolivia (1858), Brunei (1850), Colombia (1846), Costa Rica (1851), France (1822), Morocco (1836), Paraguay (1859), Spain (1902), Turkey (1929), Honduras (1927), Nicaragua (1956), Pakistan (1959), Iran (1955), Greece (1951) and Ethiopia (1951).

international dispute settlement by a standing court, and indeed, the first FCNs to commit the United States to submit treaty disputes to the ICJ came at a time when the United States was reluctant to submit more broadly to that Court's jurisdiction. Yet the first such FCN clause, coinciding with the Connally Amendment (by which the United States declared its intention not to accept the compulsory jurisdiction of the ICJ with respect to matters which are essentially within the domestic jurisdiction of the United States as determined by the United States),⁶⁹ appeared not in the context of ever-deepening cooperation with a long-standing liberal ally but in the dubious case of nationalist China in 1946. All post-Second World War FCNs (with the exception of two, with Muscat and Oman and with Thailand) subsequently included such a reference to the ICJ, despite the United States' reservations with respect to that Court and in the case of those two exceptions, the request to forego reference to the ICJ emerged at the request of the other treaty partner and not the United States.⁷⁰

It is only with respect to very particular types of treaties such as those regulating extradition or mutual defence pacts such as NATO that one can even attempt to apply a workable 'liberal' distinction in US treaty practice and there is very little evidence that treaties between the United States and fellow liberal nations evince any greater propensity to include a mutual commitment to 'vertical' enforcement via domestic courts.⁷¹ Quite apart from their reference to international judicial resolution, FCNs, those concluded both before the Second World War and after, have been the prime examples of US treaties deemed to be 'self-executing' within US domestic courts. For much of the twentieth century, FCNs were the principal network of treaty obligations interpreted to provide 'vertical' enforcement of treaty obligations. It is striking that such treaties were concluded with both 'liberal' and 'non-liberal' states and that no US court ever suggested that the distinction should have any bearing on judicial enforcement. Indeed, the most cited example of 'vertical enforcement' of a treaty obligation by a US court, the *Asakura* case, involved a US court's direct enforcement of an FCN in a context involving a citizen of a 'non-liberal' state.⁷²

In recent years, the leading examples of US treaty obligations permitting 'vertical' enforcement by US domestic courts have not been treaties with other liberal nations but bilateral investment treaties (BITs), mostly with non-liberal nations. Such treaties

⁶⁹ See 12 *Whitman Digest of International Law* 1301.

⁷⁰ See Charles H. Sullivan, 'Study of Standard FCN' (unpublished, undated draft study prepared for the Office of the Legal Adviser, US Department of State) 329.

⁷¹ Moreover, even with respect to extradition and mutual defence pacts, it is doubtful whether the relevant criterion for being a US treaty partner has been the existence of a liberal political system as such. With respect to extradition treaties, the relevant issue is more likely to be whether the treaty partner is likely to respect the rights of a criminal defendant. (On the distinction between type of political regime and respect for the rule of law, see, e.g., Simmons, 'Money and the Law: Why Comply with the Public International Law of Money?', 25 *Yale Journal of International Law* (2000) 323). With respect to defence pacts concluded during the Cold War, the question was whether the prospective treaty partner opposed communism.

⁷² *Asakura v. City of Seattle*, 265 US 332 (1924). As is suggested by that case, there is nothing in the judicial elaboration of the doctrine of 'self-executing' treaties in the US case law to suggest that the type of regime of the parties to the underlying treaty should be at all relevant to the determination of whether or not a treaty is self-executing. See, e.g., Vazquez, 'The Four Doctrines of Self-Executing Treaties', 89 *AJIL* (1995) 695.

contain, in addition to provisions for dispute resolution between the state parties, investor/state dispute resolution procedures permitting private investors, including individuals or companies, to take governments acting in breach directly to international arbitration, with the subsequent arbitral award subject to direct enforcement in local courts.⁷³ This extraordinary provision, providing perhaps the closest analogue to the use by private parties of domestic courts in the enforcement of European Community obligations in US treaty practice, has now been incorporated into the investment chapter of the NAFTA.⁷⁴

The United States established its BIT programme precisely to give US investors confidence in doing business where there was some concern about the stability of the foreign nation's investment regime. The first group of US BITs, entered into in 1986, were with Bangladesh, Cameroon, Egypt, Grenada, Morocco, Senegal, Turkey and Zaire.⁷⁵ US BITs with Haiti, Panama, the Congo and Poland soon followed. As this list of states indicates, the United States was most anxious to conclude directly enforceable treaties precisely where there was some likelihood that US investors would want such reassurance. For their part, the foreign states that sought to enter into such treaties were either illiberal states trying to overcome a legacy of hostility to the market or 'fragile' democracies anxious to do the same. No one would suggest that this list of BIT parties were, at the time of treaty ratification, 'liberal' states within Slaughter's criteria. Similarly, when the United States and Canada adhered to the Canada–United States Free Trade Agreement, the precursor to the NAFTA, Canada was attempting to overcome its history of hostility to free investment flows.⁷⁶ The Canada–US FTA provided direct investor remedies to the two states' private investors in a context where Canada was still operating a government bureaucracy to screen foreign investors and extract concessions from them and where it was unclear that US investors would be otherwise protected from, for example, divestment for acts threatening Canada's cultural sovereignty. Significantly, when the FTA expanded to include Mexico, a country whose claim to 'liberal' status was even more questionable than Canada's, the commitment to investment dispute resolution deepened, contrary to liberal assumptions.⁷⁷ The NAFTA's Chapter 11 dispute settlement guarantees to

⁷³ See Kenneth J. Vandavelde, *United States Investment Treaties: Policy and Practice* (1992).

⁷⁴ North American Free Trade Agreement, Chapter 11.

⁷⁵ For a history of the US BIT programme, see Vandavelde, *supra* note 73.

⁷⁶ See Canada–United States Free Trade Agreement, 27 ILM (1988) 281. For background on Canadian investment policies before this Agreement, see, e.g., Comment, 'The Canadian Foreign Investment Review Act: Red, White, and Gray', 5 *Law and Policy in International Business* (1973) 1018; 'Canadian Regulation and Restriction of American Investment', 1 *Boston University International Law Journal* (1982) 1 (symposium).

⁷⁷ See Price, 'An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor–State Dispute Settlement', 27 *International Lawyer* (1993) 727 (describing changes from FTA to NAFTA). This suggests that, of the three NAFTA parties, it was actually the least 'liberal' of the three, namely, Mexico, that sought, successfully, to lock in its liberal investment rules in a manner not available through the WTO. Cf. Sullivan, *supra* note 12, at 2398–2403 and 2408 (arguing that international dispute settlement mechanisms elude non-liberal states).

US and Canadian investors going into Mexico were valuable (and arguably all the more necessary from the standpoint of the United States) precisely because Mexico was, at the time that the treaty was negotiated, a nation struggling with a history hostile to private property and an illiberal political system.⁷⁸

Liberal/non-liberal distinctions are also not obvious in other commitments to international arbitration. The participation by the United States and its nationals in prominent arbitral bodies, whether established by treaty or by other means, has not been limited to other liberal nations or their nationals. In fact, what has been called ‘the most significant arbitral body in history’, the United States–Iran Claims Tribunal, has involved a prominent ‘non-liberal’ nation in a treaty regime that relies on directly enforceable judicial decisions by a supranational body.⁷⁹ While that tribunal was established only because both parties were compelled by circumstances to do so, liberal theory does not explain how or why that tribunal continues to operate 20 years later. As David Caron has noted, the US–Iran Claims Tribunal has been part of a quiet revolution in the way international commercial disputes are now being resolved. Today, few disputes are formally ‘espoused’ by governments. Far more are resolved by private party arbitrations, with the subsequent awards enforced, as under the New York Convention, by domestic courts.⁸⁰ As Caron argues, the New York Convention would appear to be an important example of a treaty regime that harnesses the power and legitimacy of domestic courts in pursuit of settling disputes that could otherwise disrupt inter-state relations.⁸¹ It reflects many of the virtues of ‘vertical enforcement’. As Slaughter would predict, this arbitration revolution has been brought about primarily through the actions of thousands of private lawyers and business people but, contrary to the attempt to divide the world into liberal and non-liberal spheres, participation in international arbitration regimes has not been limited to liberal states. The advent of the New York Convention (in 1958) and the Convention on the Settlement of Investment Disputes (ICSID) (in 1965) predate the post-Cold War wave of ‘democratizations’. The many parties to these treaties have for years turned their courts into agents of vertical enforcement of international obligations long before the appeal of ‘democracy’ became evident, and many remain ‘non-liberal’ by Slaughter’s criteria.⁸²

⁷⁸ See, e.g., Sandoval, ‘Mexico’s Path Towards the Free Trade Agreement with the United States’, 23 *Inter-American Law Review* (1991) 133.

⁷⁹ See Caron, ‘The Nature of the Iran–United States Claims Tribunal and the Evolving Structure of International Dispute Resolution’, 84 *AJIL* (1990) 104.

⁸⁰ See, e.g., the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 UNTS 38, 21 UST 2517, TIAS No. 6997; and the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 18 March 1965, 575 UNTS 159.

⁸¹ Caron, *supra* note 79.

⁸² As of the end of 1999, the 120 parties to the New York Convention, *supra* note 80, included: Algeria, Bahrain, Bangladesh, Bosnia and Herzegovina, Botswana, Cambodia, Cameroon, Central African Republic, China, Croatia, Cuba, Georgia, Indonesia, Kazakhstan, Lesotho, Mongolia, Nepal, Nigeria, Viet Nam, Yugoslavia and Zimbabwe. The 149 parties to the ICSID Convention, *supra* note 80, constitute an even more diverse list of states. See www.worldbank.org for the most recent listing.

Nor can liberals easily denigrate these developments as limited to a 'narrow' specialized area, such as foreign investment, and its attendant remedies (international arbitration).⁸³ Liberals see the movement of goods and capital that has been the subject of FCNs, BITs, regional economic agreements, and the arbitration revolution as leading forces for globalization and catalysts for legal harmonization. They can scarcely denigrate treaty developments in this area as being of 'marginal' importance. Indeed, much of the transnational regulatory activity that is at the heart of the liberal transnational order — involving the regulation of securities, banking and even environmental regulation — seems directly related (in both a temporal and a causal sense) to these treaty developments.⁸⁴

At the same time as the United States and many 'non-liberal' states have been developing directly enforceable treaty obligations regarding investment, no comparable developments have emerged where liberal theory would suggest, namely, within the OECD, the world's most prominent example of a non-geographically based association of primarily 'liberal' nations. With respect to protecting the rights of foreign investors within their members, OECD states have only managed to enact an exceptionally weak Code of Capital Movements.⁸⁵ Under this Code, OECD parties are obligated to report laws or regulations that would, for example, impede the entry of foreign investors into a particular economic sector or impede the repatriation of profits from such an investment. While the Code of Capital Movements, enacted by a decision by the OECD Council, is arguably legally binding on OECD member states, the obligations these liberal states have assumed as a group with respect to such issues has been essentially to report their restrictive measures and not to impose further restrictions.⁸⁶ The OECD Code contains no inter-state or private investor dispute settlement or any other 'enforcement' provision. The substantive and procedural obligations imposed on OECD member states are far weaker than any assumed by the typical signatory to a US BIT and, as a result, as noted below, there have been various unsuccessful attempts to strengthen the OECD investment regime. As a group, these liberal states, consisting of the world's most powerful capital exporting states, have not managed to agree among themselves on measures to provide their own investors with the directly enforceable treaty rights contained in their own BITs (with mostly 'non-liberal' nations) or, in the case of Canada and the United States, the NAFTA. Indeed, the mode of enforcement anticipated by the Code of Capital Movements is precisely that which Slaughter disparages as 'horizontal' (and supposedly characteristic of international agreements between liberal and non-liberal nations or within the

⁸³ Cf. Slaughter, 'Government Networks', *supra* note 3, at 224 (acknowledging that illiberal states can sometimes operate specialized ministries for such purposes as to promote foreign investment).

⁸⁴ There is a vast literature linking domestic and international regulatory efforts to these treaty developments. See, e.g., Graham and Wada, 'Domestic Reform, Trade and Investment Liberalisation, Financial Crisis, and Foreign Direct Investment into Mexico', 23 *World Economy* (2000) 777.

⁸⁵ OECD, *Code of Capital Movements* (1986).

⁸⁶ For a summary of Code obligations, see Alvarez, 'Political Protectionism and United States Investment Obligations in Conflict: The Hazards of Exon-Florio', 30 *Virginia Journal of International Law* (1989) 1, at 46–50.

non-liberal world) — that is invoking traditional remedies stemming from the doctrine of state responsibility such as reciprocal treaty breaches or countermeasures. It is striking that this group of liberal states, operating in an institution that has long encouraged an atmosphere of mutual trust, has failed to achieve enforcement by either of liberal theory's favoured methods, namely, through the efforts of a domestic or international neutral tribunal or through an effectively binding but informal code promulgated among relevant transnational bureaucrats.⁸⁷

While liberal theorists can always reply that the existence of liberal regimes may be a necessary but not a sufficient precondition for a vertically enforced treaty regime,⁸⁸ the OECD's repeated failures to reach a multilateral agreement concerning investment issues tell us much about the flawed assumptions and predictions of liberal theory. Contrary to Slaughter's rosy picture of the cumulative value of abundant transnational contacts, common history of mutual tolerance, comparable domestic institutions, and shared commitments to the judicial settlement of disputes, various attempts to add teeth to the Code of Capital Movements, to negotiate an OECD draft Convention on the Protection of Foreign Property, and, most recently, to conclude an OECD Multilateral Agreement on Investment (MAI), failed in part *because* the negotiating states were liberal states responding to the pressure of domestic and supranational interest groups. Most observers have concluded that the MAI negotiations, for example, failed (1) because the United States Congress failed to approve fast-track negotiating authority in time and (2) because of a growing number of concerns, particularly within significant interests in Canada and France, that the MAI would challenge national 'sovereignty' and cultural values.⁸⁹ Particularly interesting from the standpoint of liberal theory is the contention that at least some of the opposition to the MAI emerged precisely because of an adverse reaction by some countries to the 'vertical' enforcement contained in the investment chapter of the NAFTA. Investor disputes brought under the NAFTA challenging, for example, Canada's attempt to ban the fuel additive MMT in the *Ethyl* case as an unwarranted 'expropriation' alerted OECD government officials, and, more significantly, environmental groups, to the risk that public health measures would now be subject to treaty

⁸⁷ The OECD's failure to negotiate an effective multilateral investment regime is particularly striking in light of the European Union's relative success on the same issue. Perhaps investment liberalization has succeeded within Europe in a way that it has not within the OECD because the Europeans found other political and economic reasons upon which to base cooperation. If so, the liberal nature of the underlying European regimes may only have been one of the underlying factors. For other examples of failures among liberal regimes with respect to reaching important inter-state agreements, see Benvenisti, 'Exit and Voice in the Age of Globalization', 98 *Michigan Law Review* (1999) 1, at 180–184. See also Benvenisti, 'Domestic Politics and International Resources: What Role for International Law?', in Byers, *supra* note 60, at 109 (applying collective action theory to international regimes involving common pool resources).

⁸⁸ Cf. Sullivan, *supra* note 12, at 2397.

⁸⁹ For an account of the demise of the MAI and the role of NGOs, see Kobrin, 'The MAI and the Clash of Globalizations', 112 *Foreign Policy* (Fall 1998) 97.

challenge by private parties — a hazard that would only be exacerbated under the MAI.⁹⁰

The failed MAI negotiations suggest that a tradition of democratic governance can sometimes block the assumption of ‘deep’ international obligations — particularly where these obligations are seen as threatening achievements reached through democratic procedures — even in instances such as foreign investment where the ‘velocity’ and ‘density’ of transnational transactions among this group of wealthy states can scarcely be denied. For the United States, the perception that international obligations may be ‘undemocratic’ helps explain many instances where the United States has resisted or breached its international obligations (e.g. Congress’ hostility to paying UN peacekeeping and regular expenses). Fears that international obligations may be used to ‘short-circuit’ democratic ‘checks and balances’ are, within the United States, at least as old as the US Supreme Court’s decision in *Missouri v. Holland* and appear to be growing (witness the street protests in Seattle and Washington DC against international organizations). They have prompted actions as diverse as attempts to restrict the scope of the permissible treaties,⁹¹ proposals to enact statutes that differ from existing treaty obligations or that impose stringent consultation or reporting requirements on the Executive’s compliance with treaty obligations,⁹² refusals to permit self-execution of treaty obligations or otherwise seeking to limit the United States’ commitment to change existing laws in conformity with a treaty,⁹³ as well as more recent revisionist efforts to find constitutional limitations on the United States’ ability to participate in particular international regimes.⁹⁴ These efforts appear to be directed at both the symbol and substance of supranational regulation.

⁹⁰ For a summary of some of the troublesome NAFTA cases brought to date and the emerging concerns, see Ganguly, ‘The Investor–State Dispute Mechanism (ISDM) and a Sovereign’s Power to Protect Public Health’, 38 *Columbia Journal of Transnational Law* (1999) 113.

⁹¹ For an account of recent attempts within the US Congress, see Tiefer, ‘Adjusting Sovereignty: Contemporary Congressional–Executive Controversies About International Organizations’, 35 *Texas International Law Journal* (2000) 239.

⁹² See, e.g., Leebron, ‘Implementation of the Uruguay Round Results in the United States’, in John Jackson and Alan Sykes (eds), *Implementing the Uruguay Round* (1997) 175.

⁹³ For a concrete example in the trade context, see, e.g., Leebron, *supra* note 92. For an attempt to justify the United States’ reservations, understandings, and declarations to human rights treaties in terms of the requirements of constitutional democracy, see Bradley and Goldsmith, ‘Treaties, Human Rights, and Conditional Consent’, 149 *Pennsylvania Law Review* (2000) 399. For a recent attempt to revive the notion that non-self-executing treaties are intended to protect US constitutional framers’ notions of democratic self-government and popular sovereignty, see Yoo, ‘Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding’, 99 *Columbia Law Review* (1999) 1955.

⁹⁴ See, e.g., Bradley, ‘The Treaty Power and American Federalism’, 97 *Michigan Law Review* (1998) 390 (reviving the 10th and 11th Amendments as limits on the treaty power); Ku, ‘The Delegation of Federal Power to International Organizations: New Problems with Old Solutions’, 85 *Minn. Law Review* (2000) 71 (expressing ‘structural’ concerns with ‘international delegation’); Yoo, ‘The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause’, 15 *Constitutional Commentary* (1998) 87 (arguing that treaty-authorized weapons inspections violate the Appointments Clause). One need not agree with these assessments to recognize their political impact.

Resistance stemming from ‘democratic’ or ‘federalist’ concerns helps to explain the United States’ failure to join a growing international consensus in favour of certain treaty regimes. The United States’ failure to ratify, for example, all but one of the seven treaties considered ‘fundamental’ by the International Labor Organization is due at least in part to the suspicion by some members of the US Congress that supranational treaty obligations will be used to change existing labour laws within the United States or to strengthen the federal government’s hand with respect to such laws (or both).⁹⁵ Left unexplored by liberal theory is the extent to which federal systems within existing liberal states — and the democratic values such systems defend — pose additional hurdles to liberal states’ submission to and compliance with international norms.⁹⁶ Similarly unexplored is the extent to which liberal nations, and their need to respond to particular constituencies, are responsible for negotiating treaty texts so deliberately ambiguous that they breed subsequent conflict.⁹⁷

Of course, it may be that the United States is the outlier with respect to these issues. Perhaps the size of its economy, its sole superpower status or other cultural factors (e.g. ‘American exceptionalism’)⁹⁸ make the United States the exception among liberal states that prove the rule. But, if so, liberal theory needs to take account of the US exception, and, depending on the explanation, permit realists (and their accounts of the behaviour of ‘hegemons’)⁹⁹ or constructivists (and their emphasis on the role of ideas) to take proper credit.¹⁰⁰ But it is far from clear that the United States is the sole liberal exception and it is certainly not plausible to explain US treaty practices extending to the early years of the republic on the basis of the United States’ arguably unique status after the Cold War.

⁹⁵ See, e.g., Walter Galenson, *The International Labor Organization* (1981) 198–199.

⁹⁶ Indeed, for decades US Government officials, asked to defend the United States’ exceptionally poor record of adherence to ILO Conventions, have defended the US record on the basis of the ILO Convention’s ‘federal state’ clause in Article 19(7). See Galenson, *supra* note 95. Under that provision, a federal state that regards a particular ILO convention or recommendation as ‘inappropriate’ for federal action, need not pursue ratification or enactment. Federalism clauses have long since become standard in US practice, at least with respect to human rights treaties. See, e.g., US Reservations, Understandings and Declarations to the ICCPR, 138 Cong. Rec. S4781–01 (1992).

⁹⁷ See, e.g., Keohane and Nye, ‘The Club Model of Multilateral Cooperation and the World Trade Organization: Problems of Democratic Legitimacy’ (paper presented at Conference on Efficiency, Equity and Legitimacy: The Multilateral Trading System at the Millennium, John F. Kennedy School of Government, 1–2 June 2000) 16 (arguing that the divide between the EU and the United States, as over agriculture, led to deliberately ambiguous provisions of the Uruguay Round and subsequent high-profile trade disputes).

⁹⁸ See, e.g., Hathaway, *supra* note 67.

⁹⁹ Cf. Kahn, ‘Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order’, 1 *Chicago Journal of International Law* (2000) 1 (‘powerful states have been wary of adjudicatory mechanisms for settling disputes’); Lobel, ‘Benign Hegemony? — Kosovo and Article 2(4) of the UN Charter’, 1 *Chicago Journal of International Law* (2000) 19 (attributing the US’s defiance of international law to its unrivalled post-Cold War power).

¹⁰⁰ See, e.g., Oran A. Young, *Governance in World Affairs* (1999) 68 (suggesting that international agreements might be reached not just among states with similar political systems but among those with similar economic systems or those sharing certain cultural characteristics).

While other liberal nations, such as Canada and Australia, today enjoy far better reputations for international law compliance than does the United States, neither of those nations' historical approach to treaties give unambiguous support to liberal assumptions. Although both of these countries have been, particularly in recent years, more amenable to certain forms of international dispute settlement such as the International Court of Justice,¹⁰¹ neither has been, historically, as favourable to the prospect of vertical enforcement of treaty obligations by domestic courts as has the United States. Unlike the United States, both Canada and Australia insist that treaty obligations be transformed via domestic legislation prior to domestic judicial enforcement; neither has accepted the concept of self-executing treaties.¹⁰² (Although Canadian Supreme Court citations to international human rights norms and fora are far more abundant than such cites are in US Supreme Court practice, Canadian scholars attribute this to the adoption, in 1982, of the Canadian Charter of Rights and Freedoms, which drew heavily from international human rights texts.)¹⁰³ Further, the peculiarities of Canadian federalism do not permit treaties to supersede the laws of their respective provinces.¹⁰⁴ Canada lacks a decision comparable to *Missouri v. Holland* on which to rely for the supremacy of treaty obligations over domestic law, while Australian federalism concerns have historically led that state to favour inclusion of federal clauses in some treaties, most recently in the form of reservations

¹⁰¹ See Canada's Declaration under Article 36(2), 1406 UNTS 133; and Australia's Declaration under Article 36(2), 961 UNTS 183. Neither declaration is conditioned on the type of political regime of other states accepting the same obligation and such a condition would appear to be unprecedented in ICJ practice. While both Canada and Australia are, unlike the United States, parties to the World Court's optional clause, neither has participated in as many actual ICJ cases as has the United States. In addition, Australia is not a party to any regional or other pact with dispute settlement provisions as far-reaching as those in NAFTA's Chapter 11.

¹⁰² See, e.g., Hugh M. Kindred *et al.*, *International Law Chiefly as Interpreted and Applied in Canada* (5th ed., 1993) 147–206; and Sam Blay *et al.* (eds), *Public International Law: An Australian Perspective* (1997) 127–128. Countries that adhere to this Commonwealth tradition may therefore find it easier to ratify treaties since ratification in and of itself may not produce any internal legal effect. In addition, neither Canada nor Australia appears to be as favourably disposed to the automatic incorporation of customary international law as domestic law as has been, historically, the United States. Kindred, *supra* this note, at 149–157; Blay, *supra* this note, at 121–124. Cf. *The Paquete Habana*, 175 US 688, at 700 (1900).

¹⁰³ William A. Schabas, *International Human Rights Law and the Canadian Charter* (2nd ed., 1996) 12 (noting that, while pre-Charter references to international human rights law were 'rare and perfunctory', Canadian courts have cited international human rights instruments in more than 400 reported cases in the 15 years since the adoption of the Charter). Schabas notes that the adoption of the Charter also increased Canadian jurists' comfort level in citing Commonwealth and US sources on civil liberties matters. *Ibid.*, at 14. At least according to Schabas, there are few examples where Canadian law has expressly incorporated international human rights norms into domestic law and the argument that such norms have been introduced 'by implication' or can be used to construe domestic law remains controversial. *Ibid.*, at 15–54 and 232–233.

¹⁰⁴ It is also not clear whether Canadian courts go any further than do US courts with respect to applying the principle that domestic laws should be interpreted wherever possible to be consistent with international law, including unimplemented treaties. Compare Kindred, *supra* note 102, at 188–195 to Restatement (Third) of the Foreign Relations Law of the United States (1987), section 114.

or declarations.¹⁰⁵ In addition, it does not appear that Canada or Australia have limited their equivalents of FCNs or BITs to fellow liberal treaty partners and neither state's implementation of, for example, the Uruguay Round suggests that the WTO's mixed (liberal and non-liberal) membership played any role in delimiting the scope of domestic implementation of that agreement.¹⁰⁶ And, to the extent that Canadians and Australians have been more inclined than is the United States to accept the jurisdiction of some international tribunals, it does not appear that either state has applied a liberal/non-liberal distinction with respect to other treaty parties to such mechanisms. Finally, despite the generally excellent reputations that both Canada and Australia enjoy in international human rights circles, both countries have sometimes refused to give effect to human rights norms or balked at complying with requests from international human rights organs — as has the United States.¹⁰⁷

Even this cursory examination suggests that one needs to be cautious about generalizations of the 'law-abiding tendencies of liberal nations'. We are not entirely certain, even if we restrict our gaze to treaties, what one ought to measure or how to judge across diverse factors given differing legal cultures.¹⁰⁸ Is the United States' unwillingness to accede to compulsory ICJ jurisdiction more or less significant to this conclusion than its submission to dispute settlement under NAFTA? Is the Canadian reluctance to apply international law directly through local courts a significant

¹⁰⁵ See Blay, *supra* note 102, at 115–116. Indeed, concerns over the 'democratic deficit' inherent in treaty negotiations that are, under long-standing Australian domestic procedures, controlled by the federal executive led that country, in the 1990s, to adopt special procedures to permit the tabling of treaties before both Houses of Parliament as well as to permit states and territories to express their views as to the wisdom of treaty ratification. *Ibid.*, at 114–116. See also 19 *Australian Yearbook of International Law* (1998) 229–230 (discussing the newly created mandate for a National Interest Analysis for presentation to parliament); and *ibid.*, at 362 (response by the Minister of Foreign Affairs to concerns expressed over the lack of transparency in treaty-making).

¹⁰⁶ Indeed, for both states, constitutional issues, especially those arising from federalism concerns, appear to have been significant for the purposes of WTO implementation. See Steger, 'Canadian Implementation of the Agreement Establishing the World Trade Organization', in Jackson and Sykes, *supra* note 92, at 243; and Waincymer, 'Implementation of the World Trade Organization Agreement in Australia', in Jackson and Sykes, *supra* note 92, at 285.

¹⁰⁷ See, e.g., Schabas, *supra* note 103, at 233–235 (discussing the Canadian courts' rejection of challenges to extradition where the defendant faced the death penalty despite a request for a stay from the Human Rights Committee, the exclusion from the Canadian Charter of certain human rights developments and of economic/social rights, and the continued failure to ratify some human rights conventions); and International Commission of Jurists, Press Release, 30 August 2000 (expressing concern over the decision of the Australian Government to 'review' its participation in UN treaty bodies).

¹⁰⁸ Some of the difficulties may stem from methodological uncertainties within comparative law: see, e.g., Chodosh, 'Comparing Comparisons: In Search of Methodology', 84 *Iowa Law Review* (1999) 1025. Others may arise due to endemic difficulties within compliance studies: see, e.g., Simmons, 'Compliance with International Agreements', 1 *Annual Review of Political Science* (1998) 75 (discussing general methodological problems); Simmons, *supra* note 71 (distinguishing between the propensity to ratify a treaty and the likelihood of implementing the agreement thereafter as distinct subjects for study); and Scott, 'Beyond "Compliance": Reconceiving the International Law–Foreign Policy Dynamic', 19 *Australian Yearbook of International Law* (1998) 35 (arguing the benefits of measuring states' compliance with the 'ideology' of international law and not by examining adherence to specific norms).

blemish on its compliance record, on par with the United States' refusal to permit international human rights instruments to be self-executing, or simply not comparable? What can be said with greater certainty is that each one of these countries has significant peculiarities, whether as a result of judicial attitudes, constitutional structures, political culture, or other factors. Canadians' amenability to enforcement of treaty norms and to international dispute settlement will, for the foreseeable future, be complicated by the status and histories of its provinces and especially of Quebec, as well as lingering Canadian concerns that adjudicative mechanisms likely to be dominated by US multinationals may undermine Canadian culture or sovereign prerogatives. The reception given to treaty obligations within Australian courts may vary, depending on whether, for example, the issue involves politically sensitive indigenous peoples' rights. The differing perspectives of these three states towards distinct forms of international dispute resolution also suggest that variations in regime type may sometimes be less significant than differences in type of fora or subject matter sought to be adjudicated.¹⁰⁹

If Slaughter is claiming not that liberal states tend to act in accord with liberal tenets all or most of the time but merely that they are more apt to do so than non-liberal states as a whole, she gives us little to undertake this comparative assessment except conjecture and anecdotal evidence. There is plenty of conjecture and anecdotal evidence on both sides, however.

The most elaborate attempt to assess implementation, compliance and effectiveness issues with respect to international treaties, Jacobson and Weiss' examination of the record of eight countries and the European Union with respect to five environmental treaties, does not suggest that the single crucial variable is the type of regime.¹¹⁰ While Jacobson and Weiss conclude that 'richer and democratic countries' in general comply better with respect to the treaties examined over the period covered by the study, this is only one of many factors that they conclude matter. Others include the characteristics of the activity involved (the number of actors involved, the effect of economic incentives, the role of multinational corporations in the activity, and the concentration of activity in major countries), the characteristics of the accord (the perceived equity of the obligations, their precision, provisions for obtaining scientific and technical advice, reporting requirements, other forms of monitoring, secretariat, incentives and sanctions), the international environment (whether the treaty was the subject of a major international conference or of worldwide media attention, the presence of international non-governmental organizations, the number of parties to the accord, and the role and significance of other international organizations), as well as factors involving the country.¹¹¹ With respect to the last variable, Jacobson and Weiss conclude that the type of political regime is only one of many factors, with the

¹⁰⁹ See, e.g., Kupfer Schneider, 'Getting Along: The Evolution of Dispute Resolution Regimes in International Trade Organizations', 20 *Michigan Journal of International Law* (1999) 697, at 757 (concluding that international arbitration for investment disputes relies least on the existence of a democratic regime, and that regime type is relatively unimportant for this form of dispute settlement).

¹¹⁰ Edith B. Weiss and Harold K. Jacobson, *Engaging Countries* (1998).

¹¹¹ *Ibid.*, at 511–542.

others being previous behaviour concerning the subject matter of the treaty, history and culture, physical size, physical variation, number of neighbours, economy, attitudes and values, administrative capacity, leadership, role and impact of non-governmental organizations, and knowledge and information.¹¹² The Jacobson and Weiss study is a useful reminder of the variety and complexity of treaty regimes in existence — even within those addressing the ‘environment’ — as well as the futility of attempts at monocausal analysis.¹¹³

Perhaps less intentionally, the Jacobson and Weiss study also suggests the risks of attempting to extrapolate from the compliance record of liberal nations the conclusion that these states are better compliers with international norms. Unless such studies direct our attention to the extent that treaties force states to alter pre-existing laws and behaviour, the fact that any particular country does a better job of complying with, for example, the Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) may simply tell us that the country in question had in place, either before the treaty was negotiated or before it was ratified, adequate laws to protect such species. Indeed, there is evidence that, at least with respect to some of the treaties examined by Jacobson and Weiss, the richer, democratic states were far ahead of others in terms of ‘compliance’ long before the treaties were negotiated and that the treaty negotiations sought to replicate at the international level regulation that was already in place or about to be put in place nationally. It is difficult to attribute the success of the richer democratic states to their political regimes or to other characteristics of ‘democracy’ when we do not really know the extent to which the treaties merely codified their pre-existing preferences, laws or regulations.¹¹⁴ More-

¹¹² *Ibid.*, at 529–542. See also David G. Victor *et al.* (eds), *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (1998) (concluding that compliance with environmental norms requires examining a multitude of factors, including extant domestic policy, and concluding that ‘the most complex cases of international regulatory cooperation — and the deepest integration — occur primarily among the liberal states of the West’).

¹¹³ For these reasons, Beth Simmons’ attempt to measure what drives states to obligate themselves to certain IMF commitments and to abide by these once they accede to them attempts to distinguish between factors that Slaughter assumes invariably go together. See Simmons, *supra* note 71, at 355 (distinguishing between the existence of participatory democracy and a strong domestic commitment to the rule of law (the latter shown by the existence of a strong court system, sound political institutions, and provisions for orderly succession)). Contrary to liberal assumptions, Simmons finds that ‘the quality of being democratic actually contributes little or nothing when other factors are held constant’, while a strong commitment to the rule of law contributed positively to compliance internationally. Simmons, *supra* note 71, at 357. In addition, she finds that other factors, not encompassed by liberal theory, such as the pervasiveness of non-compliance within a region, also affects a state’s tendency to comply. Simmons, *supra* note 71, at 356–357.

¹¹⁴ See, e.g., Simmons, *supra* note 108, at 89 (discussing the problems of selection bias and endogeneity in compliance studies). In a country such as the United States, which generally ratifies only those treaties that do not pose significant conflicts with pre-existing national law, one would expect to find less evidence of legal changes brought on *because of* the assumption of a treaty obligation. Whether this means that the United States is, in any objective sense, more likely than other states to be in compliance with those treaties to which it adheres remains to be seen but this characteristic of the United States suggests that we cannot easily conclude, from the fact that the US law appears to be in accord with US treaty obligations, either that the United States is more inclined than other states to abide by international law or that treaties have an impact on the behaviour of the United States.

over, even where treaties force all states, liberal and non-liberal, to change their existing laws, the democratic ‘success stories’ recorded by Jacobson and Weiss may conceal these countries’ greater negotiating power going into the treaty process. These states may have had an easier time complying with many or most of these treaties at least in part because the agreements reflected more of their own preferences.

A principal barrier to the successful implementation of many treaty regimes — the perception that international regulation will threaten ‘sovereignty’ (variously defined) — also tests liberal assumptions. John Jackson and Alan Sykes conclude, at the end of a large study of countries’ records in implementing the Uruguay Round, that, while the perceived threat to ‘sovereignty’ posed by the successful WTO round was evident to some extent in all states, it was most serious within the larger, more developed (and often more democratic) nations, including those within the European Union that had faced little international interference in the past.¹¹⁵ Jackson and Sykes conclude that such fears played a lesser role within smaller countries that already saw themselves as having little control over their international commercial policy and that tended to see global trade rules as a source of protection rather than constraint.¹¹⁶ ‘Developing countries’, they write, ‘tend to see the implications of the WTO for “sovereignty” as modest in comparison to other sources of intrusion, especially the World Bank and the International Monetary Fund, which have in some cases undertaken to restructure domestic fiscal and monetary policies in exchange for assistance.’¹¹⁷ As this suggests, there may still be plenty of room for realist accounts of states’ differing attitudes towards implementing international regulation, namely, explanations relying on relative power and not regime type.

As the Jackson and Sykes study of the Uruguay Round suggests, it is wrong to presume that liberal states will find it easier to enter into all or most treaty obligations. On this question, the most instructive tale is Switzerland’s. The authors of the study, ‘The Challenge of Direct Democracy’, describe the difficulties posed by the Swiss Federal Constitution’s requirement that there be an opportunity for a popular referendum before the country can become a member of an international organization.¹¹⁸ The history of Swiss efforts to join the WTO, finally successful but only five months after the WTO was established, lead the authors to conclude that ‘direct democracy is at odds with the pace set by, and potentially with the very fact of, the increasing internationalization of law-making’.¹¹⁹ Along the way, the authors of the

¹¹⁵ Jackson and Sykes, *supra* note 92, at 466.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ Cottier and Schefer, ‘Switzerland: The Challenge of Direct Democracy’, in Jackson and Sykes, *supra* note 92, at 333.

¹¹⁹ *Ibid.* The authors also contend that the referendum requirement influenced the Swiss negotiating team going into the Uruguay Round as, in a futile attempt to avoid a referendum, the Swiss successfully argued against supranational elements, such as automatically binding treaty revisions upon majority approval by a ministerial meeting. *Ibid.*, at 342.

Swiss study remind readers of the mixed legacy of Swiss referenda efforts dealing with foreign affairs — in support of accession to the League of Nations in 1920, to the Swiss–EC Free Trade Agreements in 1972, and to the Bretton Woods institutions in 1992 but against full UN membership in 1986 or participation in the European Economic Area Agreement in 1992.¹²⁰ There is nothing in this account to suggest that the ‘challenges’ posed by direct democracy in Switzerland are any the less with respect to entering into treaties with other liberal nations, including those of the European Union, or that the number of fellow democratic members within the WTO mattered one way or the other to the Swiss electorate. This account may be a useful corrective to those who assume that, for example, the United States’ lengthy delays prior to acceding to certain conventions (e.g. the human rights covenants or the Genocide Convention) or its refusal to ratify others (e.g. the Landmines Convention or the Rome Treaty for the International Criminal Court) is uncharacteristic of a liberal nation. The Swiss example suggests that, while the United States may well be an anomalous outlier with respect to many widely ratified conventions (e.g. the Convention Against Discrimination Against Women or the Convention on the Rights of the Child), what makes the United States an anomaly may have something to do with the fact that it is a ‘liberal’ nation — as well as a superpower. As with respect to compliance after treaty ratification, the evidence that we have suggests that the decision to ratify a treaty varies with the context; regime type is only one of the possible relevant factors and in particular instances may not be a significant causal factor.¹²¹

Human rights treaties pose another layer of complexities. While the difficulties the United States has had in terms of ratifying and complying with such treaties is well known, liberals cannot ignore as well the difficulties other liberal states have encountered, especially in the context of respect for the rights of minorities within the democratic polity. But quite apart from these difficulties, human rights conventions pose a large circularity problem within Slaughter’s analysis. Since Slaughter defines liberal nations as those that, among other things, respect ‘human rights’, the inescapable fact that non-liberal nations violate human rights norms, including human rights treaties, tells us little about non-liberal states’ record with respect to other types of international treaties or other international norms. Iran’s post-Second World War compliance with fundamental human rights norms may well be, by most measures, vastly inferior to the United States’ record, quite apart from differences of relative wealth and technical capacities of the two governments concerned. Yet, even at the height of Iran’s revolution in 1979 and during the nadir of US–Iran relations immediately after, Iran, with some prodding, complied with all of its obligations arising from the United States–Iran Claims Settlement Agreement. The same can

¹²⁰ *Ibid.*, at 339.

¹²¹ See, e.g., Simmons, *supra* note 71, at 348–350 (concluding that, while the presence of a democratic regime ‘had no independent effect’ on a state’s propensity to accept certain IMF obligations, the likelihood of accepting these obligations was affected by the ‘universality’ of participation, the proportion of other regional participation, changes in institutional incentives, and the degree of openness to international trade).

probably be said with respect to most other treaty obligations incurred by the Shah but faithfully carried out by the successor regime (but we do not know for sure, in part because liberal theorists have tended to devote most of their attention to treaty compliance by liberal states). At the same time, both Iran and the United States have ignored legally binding judgments by the World Court and both are likely to resist participation in the International Criminal Court, while an increasing number of 'non-liberal' states are turning to the World Court and seem likely to join the Statute of the ICC.¹²²

The evidence that exists with respect to many treaty regimes, including those relating to international economic law, does not support a liberal/non-liberal distinction with respect to the decision to be bound, the level of compliance after ratification, or the likelihood of resort to peaceful dispute resolution when treaty disputes arise. Much more research is needed, for example, even with respect to the United States, with respect to whether the liberal nature of a prospective treaty partner matters and, if it does, how much of US treaty relations has been or remains affected. At least with respect to the ever-burgeoning numbers of treaties involving economic relations — arrangements that are of particular importance to liberals for reasons previously indicated — the burden would appear to be on scholars like Slaughter to prove that a liberal/non-liberal distinction exists either with respect to the prospects for initial ratification or later compliance once treaty obligations are assumed. As Harold Koh has noted, the respect accorded to commercial international law, including *lex mercatoria*, whether contained in treaties or not, is not limited to liberal states.¹²³ Indeed, the foreign investment regime discussed earlier, now consisting of approximately 1,600 BITs around the world — treaties between 'liberal' and 'non-liberal' and, increasingly, between 'non-liberal' states — has generated relatively few arbitrated investment disputes around the world and seems to be working at least as well as any treaty regime among liberal states. An increasingly dense web of international economic obligations binds both liberal and non-liberal states and it seems doubtful, contrary to what Slaughter has suggested, that non-liberal states will be 'freer ... than ever before to pursue their nationalist ambitions unfettered by them'.¹²⁴

Nor, as is suggested by the challenges to the WTO dispute settlement system posed by beef hormones, bananas, and agricultural subsidies, does liberal theory accurately predict the types of states that are most likely to pose challenges to existing modes of

¹²² Recent parties to ICJ disputes have included Indonesia, Malaysia, Guinea, Congo, Eritrea, Ethiopia, Botswana, Namibia, Cameroon, Nigeria, Yugoslavia, Burundi, Rwanda, Uganda, Libya, Croatia and Pakistan. While some of these states have restricted the assertion of the Court's jurisdiction to the case at hand, and some have not adhered to the Court's compulsory jurisdiction, neither of these facts distinguish these states from the United States. Significantly, none of these states have refused to participate in the judicial process — unlike, for example, the United States during the merits phase of the *Nicaragua* case.

¹²³ See Koh, *supra* note 57, at 2650; Berman and Dasser, 'The "New" Law Merchant and the "Old": Sources, Content and Legitimacy', in Thomas E. Carbonneau (ed.), *Lex Mercatoria and Arbitration: A Discussion of the New Merchant Law* (1990) 21–36.

¹²⁴ See Burley, *supra* note 3, at 393.

international dispute settlement or that are most likely to establish or participate in international tribunals. Judged by Freedom House criteria, only 58 per cent of the present WTO membership, in terms of population, belongs in the 'liberal' camp.¹²⁵ There is no evidence that the substantial non-liberal portion of the WTO membership is less committed to WTO dispute settlement or is more likely to fail to comply with a panel judgment once issued.¹²⁶ Yet, as noted, the political backlash against WTO forms of dispute settlement seems at present most acute within liberal nations, including within the United States.¹²⁷ At the same time, we should not hastily reach for the opposite conclusion: namely, that, as might be suggested by the United States' reactions to the ICJ, liberal states are presumptively less committed to all forms of international dispute settlement.¹²⁸

For all these reasons, Slaughter's liberal theory does not leave international lawyers, in a descriptive sense, better off than we were before. It may be that what Louis Henkin said years ago continues to be true: almost all states continue to comply with almost all of their international obligations almost all of the time.¹²⁹ But, even if this is wrong, we still have little reason to be confident that the level of compliance across the range of subjects covered by international obligations falls along 'liberal'/'non-liberal' lines.

¹²⁵ See Ostry, 'WTO: Institutional Design for Better Governance' (paper presented at Conference on Efficiency, Equity and Legitimacy: The Multilateral Trading System at the Millennium, John F. Kennedy School of Government, 1–2 June 2000) 21. After China accedes to the WTO, this will drop to 43 per cent. *Ibid.*

¹²⁶ As of 1999, the disputes that have resulted in either retaliation or negotiation, rather than full compliance, have involved Australia, Brazil, Canada, the European Union, India and Korea. Stephan, 'Sheriff or Prisoner? The United States and the World Trade Organization', 1 *Chicago Journal of International Law* (2000) 49, at 68 note 31.

¹²⁷ See, e.g., Keohane and Nye, *supra* note 97.

¹²⁸ The forms of international dispute settlement vary greatly, from non-binding review or reporting mechanisms of UN human rights bodies to binding investor/state arbitration (as in NAFTA), and it is possible that 'liberal' states, contrary to what Slaughter suggests, may be more inclined to accept the former but less inclined to accept the latter — at least in some cases. See, e.g., Raustiala, 'Compliance and Effectiveness in International Regulatory Cooperation', 32 *Case Western Reserve Journal of International Law* (2000) 387 (symposium on compliance) (arguing that non-binding instruments work best among liberal states since these states are more comfortable with non-binding external scrutiny, such as reporting obligations). It may be that liberal states such as the United States do not accept more binding forms of vertical enforcement in some instances because these are thought unnecessary given the likelihood that the United States will comply with both treaty and customary obligations. It would also be premature to conclude that the type of political regime of the disputing parties is *never* relevant to the forms of peaceful dispute settlement that these states choose in particular cases. One could argue, for example, that the United States would never have voluntarily submitted the *ELSI* or *Gulf of Maine* cases to the ICJ but for the fact that these cases involved liberal friends (Italy and Canada respectively) and were to be judged by special ICJ chambers of judges from liberal nations. At the same time, it would appear that the subject matter of these cases (expropriation and maritime demarcation respectively) was also relevant to the choice of forum and possibly to the selection of judges. See also Victor, *supra* note 112, at 690–697 (noting the many reasons, apart from their liberalism, why wealthier liberal states evince deep cooperation with respect to environmental concerns and suggesting that in this area liberal states show greater capability for collective management and cooperation).

¹²⁹ Henkin, *supra* note 54, at 47.

B Transnational Networks and Transjudicial Communication

Liberal theory's view of the general law-abiding nature of liberal regimes extends far beyond treaties. Slaughter's most recent work on transnational networks suggests that liberal states are also more likely to establish, maintain and adhere to these networks, and all the 'soft' informal obligations that result from them. A full examination of the validity of this set of compliance claims lies outside the scope of this essay but it needs to be said that these claims are also based on anecdotal and inconclusive evidence. We do not know whether, as Slaughter claims, the formal and informal voluntary norms established by actors other than unitary states not encompassed by the Article 38 sources of law 'may well be the most important and effective sources of law' and a significant step towards the disaggregation of the state,¹³⁰ or whether, as Philip Alston claims, they are epiphenomena of considerably less consequence.¹³¹ It may be true that the kinds of transgovernmental contacts that Slaughter describes prevail among Western industrialized states. After all, if one defines the relevant governmental contacts to be those that one finds among the West's quasi-autonomous governmental institutions, it stands to reason that we would find more such contacts in the West. But the existence of such networks among liberal nations does not tell us that we need to reframe every international law issue away from state to state interactions since it tells us little about the overall importance of such contacts, relative to other more traditional forms of law-making, or as compared to other types of informal contacts that may flourish outside rich Western states — whether based on cultural, religious or other sources of 'we-feeling'.¹³² Liberal theory leaves these non-Western connections, whether governmentally based or not, in the shadows, presumptively outside the 'zone of law'. The basic liberal insight — that there is something unique about the way liberal democracies treat one another¹³³ — might or might not be true but we need more than that intuition upon which to build a general theory of law that is supposed to apply to all states.

Liberals' suggestions that the 'nationalization of international law' is most likely to

¹³⁰ Slaughter, *supra* note 2, at 245.

¹³¹ Alston, 'The Myopia of the Handmaidens: International Lawyers and Globalization', 3 *EJIL* (1997) 435, at 441. There is certainly no evidence that treaty-making, among both liberal and non-liberal states, is slowing down or that transnational networks are displacing them. As is suggested most recently by the formal institutionalization of the GATT, the creation of ad hoc war crimes tribunals, and the likely establishment of a permanent International Criminal Court, it is too early to suggest that international actors are no longer turning to international organizations created by treaty and governed by traditional rules of international institutional law. Cf. Slaughter, 'The Real New World Order', *supra* note 3, at 196–197 (arguing that the 'next generation of international institutions' is more likely to look like the Basle Committee than traditional international organizations since 'liberal internationalism' has 'reached its limits'); Slaughter, 'Remarks', *Proceedings of the Annual Meeting of the American Society of International Law* (1997) 233 (contending that 'government by network' is in and 'hierarchy is out').

¹³² Cf. *infra* note 243. For a discussion of non-traditional forms of norm-making outside of liberal theory, see, e.g., Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (1991); Kahan, 'Privatizing Criminal Law: Strategies for Private Norm Enforcement in the Inner City', 46 *UCLA Law Review* (1999) 1859.

¹³³ See, e.g., Sullivan, *supra* note 12, at 2398.

occur through the action of transnational regulatory networks rests on a false dichotomy between the supposed subjects of ‘traditional international law’, namely, issues dealing with the ‘global commons and inter-State relations’, versus the subjects dealt with by transnational networks, namely, ‘crime, monopoly, securities fraud, pollution, tax evasion’.¹³⁴ As Slaughter elsewhere acknowledges but does not examine, her transnational networks ‘coexist and interact with traditional international agreements’.¹³⁵ If the agents of the modern regulatory state today cooperate, as Slaughter argues, on the administration of anti-trust policy, securities regulation, environmental policy, criminal law enforcement and banking and insurance supervision, much of this activity arises under the shadow of an intricate web of obligations arising from obligations assumed under treaties and international organizations. While it is true that the Basle Committee itself operates in a regulatory area not traditionally regarded as ‘international’, without benefit of treaty or intergovernmental organization, and through the medium of non-binding recommendations, its success is very much dependent on other treaty regimes and the work of more traditional forms of international organization, including the Bretton Woods institutions. Further, neither its subject matter nor its style of regulation really distinguishes the Basle Committee from a wide number of more traditional treaty regimes and institutions. The subject matter of treaties and of international organizations, along with the often ‘soft’ products of both, has proliferated in the modern era no less than transnational networks.¹³⁶ It is hard to understand why accurate description requires reordering the priorities of international law such that non-treaty sources of law demand more attention.¹³⁷ What Slaughter claims is only true of transnational regulatory networks is also true of the traditional sources of international law today: both ‘produce rules governing subjects that each nation must and does already regulate within its borders’.¹³⁸ Indeed, what is today producing some of the political (and scholarly) backlash against attempts to ‘nationalize’ traditional international law, and what may yet produce a similar backlash against

¹³⁴ Slaughter, ‘Government Networks’, *supra* note 3, at 217.

¹³⁵ *Ibid.*, at 220.

¹³⁶ See, e.g., Young, *supra* note (100). This can hardly be otherwise given the internationalization of human rights — a subject that is not, on its face, about either the global commons or inter-state relations. Ironically much of the political science literature characterizes traditional international organizations in ways that are scarcely distinguishable from Slaughter’s transnational regulatory networks. Cf. Keohane and Nye, *supra* note 97, at 2 (describing Bretton Woods institutions as clubs of ‘cabinet ministers or the equivalent, working in the same issue-area, initially from a relatively small number of relatively rich countries [who] together to make rules’). Liberal theory needs to explain just how the trade ministers of the GATT, finance ministers of the IMF, and central bankers of the Bank for International Settlements, see *ibid.*, interact, on a day to day basis, in fundamentally different ways from, for example, the central bankers of the Basle Committee.

¹³⁷ Cf. Slaughter, *supra* note 2, at 242.

¹³⁸ All of the topics mentioned by Slaughter are now the subject of treaties, either at the universal or regional level and some are the arguable domain of customary international law (thanks to the efforts of entities such as the General Assembly). See, generally, Young, *supra* note 100, at 163–188 (discussing embedded, nestled, clustered and overlapping regimes).

international norm-setting by transnational networks,¹³⁹ is the perception that international law is today indistinguishable, in terms of subject matter, from domestic policy and that intergovernmental organizations, such as the international financial institutions, are purporting to export the virtues of good governance, democracy and the rule of law without themselves being democratically accountable.¹⁴⁰

Slaughter vastly oversimplifies how international norms are ‘nationalized’ under the classic sources of international law. ‘Traditional international law’, she writes

requires States to implement the international obligations they incur through national law where necessary, either through legislation or regulation. Thus, for instance, if States agree to a twelve-mile territorial sea, they must change their domestic legislation concerning the interdiction of vessels in territorial waters accordingly. However, the subject of such legislation would be international. . . Bilateral and plurilateral regulatory cooperation does not seek to create obligations between nations enforceable at international law. Rather, the agreements reached are pledges of good faith that are essentially self-enforcing, in the sense that each nation will be better able to enforce its national law by implementing the agreement reached if all other nations do likewise. The binding or coercive dimension of law emerges only at the national level.¹⁴¹

The suggested dichotomy — traditional international law is coercive and top-down while regulatory networks are soft and bottom-up — does not accurately describe either approach to norm-making or the complex interplay between the two. Many treaties, not only those seen as ‘promotional’, contain purposely ambiguous ‘soft’ commitments that are indistinguishable from Slaughter’s ‘pledges of good faith’; like the ‘soft’ products of transnational networks, they too become ‘self-enforcing’ only when national laws emerge to make reciprocal enforcement possible or when other forms of interpretation give them the concreteness that they originally lacked.¹⁴² Other treaties, even those with more definitive textual commitments, are difficult to classify as ‘coercive’ because of an absence of enforcement provisions or because of ambiguities within the enforcement schemes that are provided.¹⁴³ Contrary to what Slaughter implies in the above passage, the UN Convention on the Law of the Sea does not explicitly require changes in domestic laws or regulations regarding the breadth of

¹³⁹ Compare Alston, *supra* note 131 (questioning the accountability of norm-setting by transnational networks) to Slaughter, ‘Agencies on the Loose? Holding Government Networks Accountable’, in George A. Bermann *et al.* (eds), *Transatlantic Regulatory Cooperation* (forthcoming 2001) (defending the accountability and democratic legitimacy of transnational networks).

¹⁴⁰ See, e.g., Anghie, ‘Time Present and Time Past: Globalization, International Financial Institutions, and the Third World’, 32 *New York University Journal of International Law and Policy* (2000) 243, at 270.

¹⁴¹ Slaughter, ‘Government Networks’, *supra* note 3, at 217.

¹⁴² Consider, for example, many ILO conventions and recommendations. See, e.g., the Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value’s vague commitment to promote the ‘principle of equal remuneration’, alongside the more concrete commitment to apply this principle to government employees in the ILO’s Recommendation Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value. ILO Convention No. 100, adopted 29 June 1951; ILO Recommendation No. 90, adopted 29 June 1951.

¹⁴³ As is suggested by, for example, disagreements over the ‘binding’ force of WTO panel judgments even among eminent trade scholars. See Bello, ‘The WTO Dispute Settlement Understanding: Less is More’, 90 *AJIL* (1996) 416; Jackson, ‘The WTO Dispute Settlement Understanding — Misunderstandings on the Nature of Legal Obligation’, 91 *AJIL* (1997) 60.

the territorial sea; as do most treaties, that agreement leaves states considerable discretion as to how to achieve compliance with its terms. Slaughter's simple rubric is impossible to apply to other treaty commitments, such as that contained in the NAFTA's side agreement on labour cooperation, that, without providing for the possibility of judicial enforcement at the international level, formally obligates state parties to enforce their own labour laws.¹⁴⁴ Moreover, the converse implication that plurilateral regulatory cooperation results only in mere pledges of good faith and not real enforceable inter-state obligations does not accurately describe, for example, aviation authorities' mutual commitments to abide by ICAO standards¹⁴⁵ or products of transnational networks such as the apparently 'binding' commitment between Nestlé and a group of non-governmental organizations to abide by the WHO Code for Marketing of Breast Milk Substitutes or private industries' more recent agreement to abide by an arrangement to assign internet domain names.¹⁴⁶

Comparable difficulties emerge when liberal theory turns to describing networks among domestic judges. Slaughter argues that democratization, along with the increased internationalization of domestic transactions, has produced more 'transjudicial communication', that is, a higher number of instances than ever before in which national courts explicitly cite the judgments of foreign national courts ('horizontal communication') or the judgments of supranational tribunals ('vertical communication') even in the absence of any legal requirement.¹⁴⁷ Such transjudicial communication portends, she argues, healthy collective deliberation with respect to common legal problems, especially with respect to human rights, and reflects commonalities among the judiciaries of liberal democracies, namely, a common sense

¹⁴⁴ NAFTA, Side Agreement on Labor. Even those international law schemes that seem to be prototypically top-down under Slaughter's rubric, such as the International Criminal Tribunal for the Former Yugoslavia (ICTY), contain elements that suggest the 'nationalization of international law'. Cf. Article 111 of the ICTY Statute (directing judges to 'have recourse to the general practice of prison sentences applicable in the courts of the former Yugoslavia').

¹⁴⁵ See, e.g., Thomas Buergenthal, *The International Civil Aviation Organization* (1969).

¹⁴⁶ See, e.g., Sikkink, 'Codes of Conduct for Transnational Corporations: The Case of the WHO/UNICEF Code', 40 *International Organization* (1986) 815; Spiro, 'Globalization, International Law, and the Academy', 32 *New York University Journal of International Law and Policy* (2000) 567, at 571 note 7. Tellingly, the WHO/UNICEF was implemented under many states' domestic law (as if it were a treaty), while the Memorandum of Understanding on the Generic Top-Level Domain Name Space of the Internet Domain Name System became an agreement deposited with the International Telecommunications Union.

¹⁴⁷ Slaughter, 'A Typology of Transjudicial Communication', *supra* note 20. Transjudicial dialogue consists of the respectful exchanges one would expect between courts that recognize one another as 'like units, dedicated to and legitimated by the same core principles of the rule of law: assumptions of impartiality in adjudication, of the separation of the political and judicial branches, and of the equality of all citizens before the law'. Slaughter, *supra* note 1, at 524. Examples of such dialogue include cases where US courts give effect to foreign law on the ground that the foreign state in question is a democracy and can be contrasted with instances in which US courts have refused even to assess the validity of a foreign law for non-liberal states under the 'act of state' doctrine. *Ibid.*, at 524–525.

of judicial autonomy, judicial identity, and enterprise.¹⁴⁸ For Slaughter, liberal courts engage because of a ‘common methodology’, including a common reliance on persuasive authority.¹⁴⁹ Liberal judges engage their foreign brethren despite cultural differences because they see themselves engaged in solving the generic legal problems that characterize liberal democracies, namely, the balancing of rights and duties, individual and community interests, and the protection of individual expectations.¹⁵⁰ Transjudicial communication is both a reflection of and a step toward a ‘transnational community of law’ as well as another example of the ‘disaggregation of state sovereignty into component executive, legislative, and judicial institutions that can interact independently across borders’.¹⁵¹ For Slaughter, liberal transjudicial communication is far more likely to establish the international rule of law than is a single international court or a global constitution.¹⁵²

But how accurate is this description of transjudicial communication? Consider Slaughter’s use of the recent Israeli Supreme Court’s decision severely restricting the use of torture by Israeli security forces as an example of ‘liberal’ judges’ ostensible sensitivity to the views of their ‘brethren’ elsewhere.¹⁵³ This is a decidedly odd judgment to use to support this proposition as what is most striking about that decision is precisely the Israeli Court’s clear and presumably conscious refusal to cite or rely upon the many foreign and international sources of authority concerning the illegality of torture to which its attention was drawn by both advocates and commentators. This is a case that fails to cite other states’ laws on torture, the Torture Convention, customary international law, European and Inter-American human rights cases directly on point, or even the US *Filartiga* case — despite their obvious relevance. Instead, the case adheres closely to Israeli law and the Israeli Constitution. The judgment is embedded in the domestic law from which it seeks to draw legitimacy. If anything, the decision is an apt reminder of the risks liberal courts run when they turn to foreign or international sources of authority and the extremes to which some domestic judges resort to avoid risking their own hard-won legitimacy. Whether or not Slaughter is correct when she speculates that the result in this case was prompted by what the Israeli judges feared their liberal ‘brethren’ would think of them were they

¹⁴⁸ See, e.g., Slaughter, ‘A Typology of Transjudicial Communication’, *supra* note 20, at 125–126 (arguing that liberal courts see themselves, as well as their interlocutors, as ‘servants of the law — of rules and standards neutrally and uniformly applied — rather than as the direct instruments or agents of political masters’).

¹⁴⁹ Citations to a foreign court as persuasive authority ‘assumes that the audience for a particular decision will recognize the foreign court as sufficiently like the national court, or at least sufficiently embodying the aspirations of the national legal system, to give weight to its words’. Slaughter, ‘A Typology of Transjudicial Communication’, *supra* note 20, at 127.

¹⁵⁰ *Ibid.*, at 125–130. Slaughter implies that the courts of non-liberal nations are less apt to engage in reciprocal dialogue. *Ibid.* See also Burley, *supra* note 7, at 1921.

¹⁵¹ Slaughter, ‘A Typology of Transjudicial Communication’, *supra* note 20, at 136.

¹⁵² *Ibid.*, at 137.

¹⁵³ HCJ 5100/94, *Public Committee Against Torture in Israel et al. v. State of Israel et al.*

to have ruled otherwise,¹⁵⁴ this case suggests that sometimes it may be important for a liberal court to refuse to cite foreign or international authority if its opinion is to be accepted by those most likely to resent ‘foreign’ intervention.

Eyal Benvenisti’s account of ‘judicial misgivings regarding the application of international law’ among the judges of liberal states is a forceful rebuttal to Slaughter’s sanguine perspective.¹⁵⁵ Benvenisti identifies the tendency of national courts to interpret narrowly constitutional demands requiring the import of international law, to interpret international rules so as not to upset executive prerogatives, and to deploy a variety of ‘avoidance’ techniques, including act of state, standing and justiciability to avoid engaging in judicial review under international law.¹⁵⁶ As Benvenisti argues, most liberal courts, and not merely those within the United States, seem only too inclined to distinguish their role depending upon whether they are being asked to review governmental actions taken within or outside the state. When it comes to ‘foreign affairs’, many liberal courts refuse to engage in judicial review — whether on the basis of the ‘one voice’ doctrine, ‘separation of powers’, or for other reasons, such as fear of promoting international repercussions.¹⁵⁷ Benvenisti suggests that, absent a pre-existing community-wide commitment to cooperate as under the European Union, national courts may be caught in a classic prisoner’s dilemma: they are afraid to enforce international law without assurance that others will do the same.¹⁵⁸ His analysis of the attitude of the Supreme Court of Israel toward the implementation of international law suggests that that Court’s avoidance of such norms in its recent torture decision is part of a readily understandable pattern of avoidance, and he contends that this pattern extends to matters not involving national security, including trade and other economic concerns.¹⁵⁹

¹⁵⁴ The English translation of the passage in the Israeli judgment reads: ‘Deciding these applications weighed heavy on this Court. True, from the legal perspective, the road before us is smooth. We are, however, part of Israeli society. Its problems are known to us and we live its history. We are not isolated in an ivory tower. We live the life of this country. We are aware of the harsh reality of terrorism in which we are, at times, immersed. Our apprehension is that this decision will hamper the ability to properly deal with terrorists and terrorism, disturbs us. We are, however, judges. Our bretheren [*sic*] require us to act according to the law. This is equally the standard that we set for ourselves. When we sit to judge, we are being judged. Therefore, we must act according to our purest conscience when we decide the law.’ Judgment, *supra* note 153, at para. 40. According to Eyal Benvenisti, the English translation is, on this point, misleading as the sentence beginning ‘Our bretheren . . .’ in the English translation appears to be referring, in the original Hebrew, to the biblical Golden Rule.

¹⁵⁵ Benvenisti, ‘Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts’, 4 *EJIL* (1993) 159. See also Kirby, ‘The Role of the Judge in Advancing Human Rights with Reference to International Human Rights Norms’, 62 *Australian Law Journal* (1988) 514 (surveying the many rationales for such misgivings).

¹⁵⁶ *Ibid.* at 16–173.

¹⁵⁷ *Ibid.* at 174–175.

¹⁵⁸ *Ibid.* at 175.

¹⁵⁹ *Ibid.* at 182. Note that Benvenisti’s analysis, like Slaughter’s, focuses on the actions of judges from liberal states and does not address whether judges in non-liberal states are likely to act differently. At least some of the reasons that Benvenisti gives for liberal judges’ avoidance of international law (e.g. fear of lack of reciprocal action) would appear to be applicable to judges in non-liberal states as well.

As Slaughter acknowledges, the instances of ‘transjudicial communication’ that she is trying to generalize from cover a wide spectrum of distinct phenomena, involving a wide variety of types of courts and uses of foreign and international law. As is well known, US courts routinely, through judicial notice or expert evidence, take cognizance of foreign law as just another ‘fact’ wherever foreign law is applicable to a dispute.¹⁶⁰ One suspects that not even Slaughter would claim that US courts should take cognizance of the type of regime from which a foreign law emerges when, for example, a US judge is asked to apply Egyptian contract law to a contract that so provides. Further, one suspects that absent unusual circumstances Slaughter would not contend that courts in non-liberal states would be any the less likely to look to foreign law in such instances. The use of foreign law to assist in the interpretation of US law or to help determine the policies sought to be achieved by a US law is undoubtedly what Slaughter has in mind, as well as the citation of international law for such purposes.

Slaughter does not try to explain why US courts, most prominently the United States Supreme Court, show little inclination to engage in either vertical or horizontal communication despite her claim that liberal states engage in ever-increasing levels of such communication.¹⁶¹ Putting aside act of state cases, such reluctance by US judges would appear to have little to do with the type of regime from which those foreign laws emanate.¹⁶² Indeed, although Slaughter draws support from act of state cases that purportedly (but usually not explicitly) draw a distinction between liberal and non-liberal states, she says nothing about the many cases in which US judges are given such opportunity and fail to do so.

¹⁶⁰ See, e.g., Rudolf Schlesinger *et al.*, *Comparative Law* (6th ed., 1998) 53–156. The acceptance of foreign law as ‘fact’ is not dependent, in US courts or elsewhere, on the type of regime from which the law emerges.

¹⁶¹ Thus, as Ruth Baker Ginsburg, one of the few US Justices openly sympathetic to transjudicial communication in the sense used by Slaughter has noted: ‘Readiness to look beyond one’s shore has not marked the decisions of the court on which I serve. The United States Supreme Court has mentioned the Universal Declaration of Human Rights a spare five times, and only twice in a majority opinion. Nor does the US Supreme Court invoke the laws or decisions of other nations with any frequency. When Justice Breyer referred in 1997 to federal systems in Europe, dissenting from a decision in which I also dissented, the majority responded: “We think such comparative analysis inappropriate to the task of interpreting a constitution”.’ Ginsberg and Jones, ‘Affirmative Action: An International Human Rights Dialogue’, 21 *Cardozo Law Review* (1999) 253, at 280.

¹⁶² The ‘paradigm’ which Slaughter finds in *Bi v. Union Carbide Chemicals & Plastics Co.*, 984 F 2d 585 (2nd Cir. 1993), see Slaughter, *supra* note 1, at 524, in which the US court dismissed an attempt by a class of tort victims to challenge India’s Bhopal settlement on the express ground that ‘India is a democracy’ is not common. In that case, the court reasoned that the challenge to India’s Bhopal Act prompted concerns analogous to those posed by act of state cases and opted to defer to the statute of a ‘democratic country’. 984 F 2d at 586. Such blatantly political rationales for the application of foreign law remain the rare exception in US case law. Indeed, were US courts, state and federal, encouraged to make such distinctions among foreign countries in instances in which foreign laws were relevant to the case at hand, the subsequent diplomatic turmoil would likely result in federal intervention to prevent such ‘judicial intervention’ in foreign affairs. Compare *Zschering v. Miller*, 389 US 429 (1968) (invalidation of Oregon statute requiring detailed examination of a foreign state’s inheritance policies); see, generally, Comment, ‘Iron Curtain Statutes, Communist China, and the Right to Devise’, 32 *UCLA Law Review* (1985) 643 (discussing constitutional challenges to ‘iron curtain’ statutes). It also appears that at least some

Consider, for example, the single clearest vehicle for ‘vertical’ enforcement of customary human rights in US courts, the Alien Tort Claims Act. As is well known, that Act, passed in 1789, makes no distinction between regime type and since its revival in the *Filartiga* case has been providing remedies not to the citizens of liberal states (including the United States) but to the alien victims of usually illiberal regimes.¹⁶³ The treatment of alien tort claims in the United States, the most obvious manifestation of ‘vertical’ enforcement of international human rights norms by US courts, would appear to present an ideal instance for drawing distinctions between liberal and non-liberal states. Yet, contrary to what Slaughter suggests ought to occur when liberal courts encounter the laws of illiberal nations, the appellate judgment in *Filartiga* shows a US court seeking support from and attempting to enforce Paraguayan laws prohibiting torture and a subsequent US district court judgment trying to reconcile Paraguayan laws regarding applicable damages with international norms.¹⁶⁴ At both the appellate and trial level, US courts used international law to justify their interpretation of Paraguayan laws despite the illiberal regime that gave rise to them; the judges did not simply dismiss such laws or relegate the Paraguayan regime that permitted the torture to occur (and that failed to accord the victim a remedy) to the ‘zone of politics’, thereby leaving the dispute to be resolved by the executive branch.

Consider another and much more routine example, *Santa Fe International Corporation v. Watt*, where the US district court overturned the Secretary of Interior’s decision that would have barred Kuwaiti citizens and corporations from acquiring interests in oil and gas leases on public lands under the Mineral Lands Leasing Act.¹⁶⁵ The Mineral Lands Leasing Act permits foreign nationals to acquire such interests under a reciprocity provision, that is, where the foreign country grants similar privileges to US nationals.¹⁶⁶ Watt denied Kuwaiti participation in leases on US land on the basis that Kuwait had discriminated against US nationals when it nationalized its petroleum industry and acquired all US interests while leaving intact a Japanese concession in an offshore region. The court overturned Watt’s decision because he had not investigated or shown that Kuwait had discriminated against US citizens because of their citizenship.¹⁶⁷ Although, under Slaughter’s criteria, it seems clear that Kuwait would not qualify as a liberal nation either at the time the decision was

international tribunals have also avoided making the kinds of judgments that Slaughter would appear to encourage. See Stein, ‘Jurisprudence and Jurists’ Prudence: The Iranian-Forum Clause Decisions of the Iran–United States Claims Tribunal’, 78 *AJIL* (1984) 1 (discussing that Tribunal’s prudent refusal to make judgments about Iran’s legal system despite US requests that it do so).

¹⁶³ *Filartiga v. Peña-Irala*, 630 F 2d 876 (2nd Cir. 1980).

¹⁶⁴ See *Filartiga v. Peña-Irala*, *supra* note 163; and *Filartiga v. Peña-Irala*, 577 F Supp 860 (EDNY 1984). While it is true that the district court in *Filartiga* did not respect Paraguayan law in its award of punitive damages, such differences would appear to be well within the ‘zone of legitimate difference’ that Slaughter should apply only between liberal nations.

¹⁶⁵ 591 F Supp 930 (D. Del. 1984).

¹⁶⁶ Mineral Lands Leasing Act, 30 USC sections 181 *et seq.*

¹⁶⁷ 591 F Supp 930, at 931.

rendered or today,¹⁶⁸ the case shows a singular deference to Kuwaiti law and Kuwaiti governmental decisions. Despite a surface similarity to some of the issues raised by the *Banco Sabbatino* case, the case illustrates how US courts usually deal with foreign law when neither human rights nor act of state questions are explicitly raised. The Mineral Lands Leasing Act is also an apt illustration of how narrowly directed reciprocity provisions — in this case targeting precisely defined objectionable conduct abroad to comparable measures in the United States — may obviate the need to use US courts to impose a badge of ‘alienage’ upon an entire nation in order to promote free markets.¹⁶⁹

Slaughter argues that ‘the most intensive and interactive examples of transjudicial communication’ arising today — within European and South African courts and by supranational tribunals such as the European Court of Human Rights — emerge from unifying factors common to liberal states such as autonomous judicial identity and engagement in a common enterprise.¹⁷⁰ *Pace* Slaughter, that courts engaged in a common regime (European Union or regional human rights) should cite one another requires no such explanation. Nor is such a rationale necessary to explain the fact that US courts, for a variety of evident reasons (including what advocates cite in their briefs), are probably more likely to cite a House of Lords decision than the supreme judicial authority in Iraq or the fact that international tribunals are likely to cite one another even in the absence of a specific treaty warrant or formal doctrine of *stare decisis*.¹⁷¹

It is important to distinguish instances in which domestic judges cite foreign and international law for guidance as opposed to citing them as rules of decision to determine the case at hand (compare *Filartiga*) and it is also important to consider by what warrant judges do either. A judge that reaches for a foreign judicial opinion or an international judgment for guidance merely because that case involved discussion of a policy question comparable to the one the judge now faces probably does not care whether the decision was rendered in a ‘liberal’ context. In such cases, the foreign or international material is used as yet another piece of evidence, no different than an expert’s opinion on whether, for example, a higher speed limit prevents more traffic fatalities, although perhaps differently treated in terms of persuasive impact or ‘weight’.

Liberal theory would appear more potentially relevant, however, when a foreign or international judgment is used as persuasive judicial or legal authority. Yet, even here, we need considerably more data before we leap to the conclusion that it is

¹⁶⁸ The most recent Freedom House country report places Kuwait in the ‘partly free’ category, with scores on political and civil rights just barely above, for example, Lebanon, which is classified as ‘not free’.

¹⁶⁹ Cf. Burley, *supra* note 7, at 1990–1991.

¹⁷⁰ Slaughter, ‘A Typology of Transjudicial Communication’, *supra* note 20, at 131–132.

¹⁷¹ The international lawyers who often serve on such tribunals have been described as members of an ‘invisible college’: see Schachter, ‘The Invisible College of International Lawyers’, 72 *Northwestern University Law Review* (1977) 217, as members of an epistemic community engaged in a common enterprise, see, generally, 46 *International Organization* (1992) 1; and as an ‘informal priesthood of believers’ in international law and institutions: see Kennedy, ‘A New World Order: Yesterday, Today, and Tomorrow’, 4 *Transnational Law and Contemporary Problems* (1994) 329, at 335.

something about the liberal judiciary as such that prompts transjudicial communication. It is one thing when a domestic judge resorts to, for example, the judgment of a supranational judicial body when the similarity between the local and the foreign laws in terms of substance make such comparisons compelling, or when the local law itself (or even the state's constitution) licenses such comparisons. It is quite another when such a judge reaches for such authority without legislative or constitutional warrant. If liberal judges are citing foreign or international decisions as persuasive (or even binding) authority because they have been instructed or urged to do so under domestic law, transjudicial communication may show evidence of some enlightened legislators or constitutional drafters but does not prove that liberal judges are themselves disaggregated, independent liberal actors anxious to secure the approval of overseas brethren.¹⁷² Contrary to what Slaughter suggests, when liberal judges cite such authorities without legislative or constitutional warrant, they may be asking for trouble, and Slaughter's anecdotal examples do not prove that transjudicial communications of this kind are either common to all liberal courts or sustainable over time.¹⁷³ Slaughter builds her theory of the import of transjudicial communication on a selective compiling of very recent evidence while ignoring such notorious counterexamples as the South African Constitutional Court's decision in *AZAPO v. President of South Africa*, a decision that gives short shrift to international law despite a constitutional licence to take it into account.¹⁷⁴ More fundamentally, despite a number of impressive gatherings of judges from the liberal world, one is left with no reason to assume that judges from liberal states — from nations as diverse in attitudes towards the judiciary and distinct in judicial traditions as France and the United States — see themselves engaged, in any meaningful or deep sense, in a common enterprise such that it is useful to generalize about their 'distinctive' behaviour.

C *Europe*

But what about the claim that liberal theory accurately describes Europe? Despite the attention that Slaughter lavishes on that region, we should not cede too quickly to the conclusion that Europe epitomizes liberal theory in action. Slaughter does not devote

¹⁷² Cf. Slaughter, 'A Typology of Transjudicial Communication', *supra* note 20, at 135: 'The reinforcement of courts as autonomous international and transnational actors is a step toward the disaggregation of state sovereignty into component executive, legislative, and judicial institutions that can interact independently across borders. The fruits of such interaction could be envisioned as networks of institutions, or of institutionalized relations, that would emulate the form and substance of a world government without in fact transcending or displacing nation-states.' Many international lawyers appear to agree that national judges' independent, apolitical status make them the best candidates to recognize the need for 'international solidarity' and implement international law. See Benvenisti, *supra* note 155, at 161 note 5 (quoting Conforti).

¹⁷³ Cf. Weiler and Trachtman, 'European Constitutionalism and its Discontents', 17 *Northwestern Journal of International Law and Business* (1997) 354, at 376 (discussing the problematic aspects of direct effect absent direct democratic participation in the formulation of the directly effective law).

¹⁷⁴ *Azanian Peoples Organisation (AZAPO) v. President of the Republic of South Africa*, 1996 (8) BCLR 1015, 25 July 1996 (finding that South Africa's international obligations to prosecute war crimes under international instruments do not bar the truth and reconciliation approach or amnesty despite constitutional obligation to have regard for public international law).

much attention to whether or how European states enforce other treaty obligations apart from those arising under the European Community or the European Convention on Human Rights. Slaughter's striking suggestion, for example, that liberal states are more likely to be 'monist than dualist' rests primarily on textual comparisons of constitutional provisions contained in recent European constitutions undertaken by Eric Stein and Antonio Cassese.¹⁷⁵ While Stein's and Cassese's conclusions that more of these constitutions appear to recognize the supremacy of international law over domestic law is interesting, this tells us nothing about how such provisions will be interpreted, whether judges will enforce them, or whether anyone will have standing to challenge domestic laws on this basis before local courts. The history of such 'monist' provisions suggests caution; in all too many countries with 'monist' constitutional provisions, including within Europe, the likelihood of someone actually successfully challenging a domestic law in a domestic court on the basis of a superseding international obligation is nil.¹⁷⁶ At a minimum, the fact that such changes have been so recent and limited to such a relatively small number of states in a particular region emerging from a comparable experience with socialism gives us little historical context to make the inferential leap that Slaughter takes for 'liberal' states as a whole. Slaughter presents no evidence that, apart from Community and European human rights norms, European states are more likely to permit direct enforcement of international treaty norms than is the United States. Certainly, she does not discuss the well-known historical difficulties European states have encountered in recognizing internationally protected rights for minorities,¹⁷⁷ the European Union's apparent aversion to human rights texts not originating in Europe,¹⁷⁸ the European Court of Justice's failure to equate the European Community to a classic international organization under international law,¹⁷⁹ or that body's clear reluctance to equate Community edicts to other international obligations assumed by the members of the Community.¹⁸⁰

Further, while Slaughter builds elegantly upon Joseph Weiler's court-centred perspective on the role of national and international courts in the 'transformation of Europe',¹⁸¹ the transformation under discussion is, in the scope of history, of relatively

¹⁷⁵ Slaughter, *supra* note 1, at 533 note 66.

¹⁷⁶ For an enumeration of the complexities concealed by the 'monist/dualist' distinction, see, e.g., Jackson, 'Status of Treaties in Domestic Legal Systems: A Policy Analysis', 86 *AJIL* (1992) 310. See also Jackson and Sykes, *supra* note 92 (illuminating country studies within both allegedly 'monist' and 'dualist' systems). For specific examples of judicial difficulties with the implementation of international law despite constitutional incorporation of international law, including within Europe, see Benvenisti, *supra* note 155, at 162–165; Danilenko, 'Implementation of International Law in CIS States: Theory and Practice', 10 *EJIL* (1999) 51, at 53–54.

¹⁷⁷ See, e.g., Louis Henkin, *et al.*, *Human Rights* (1999) 444–474.

¹⁷⁸ See, e.g., the Union's ongoing efforts to secure implementation of a *European Charter of Human Rights*.

¹⁷⁹ See, generally, Weiler and Haltern, 'The Autonomy of the Community Legal Order — Through the Looking Glass', 37 *Harvard International Law Journal* (1996) 411.

¹⁸⁰ *Ibid.*

¹⁸¹ Compare, e.g., Burley and Mattli, *supra* note 12, at 63 (citing Weiler, 'The Transformation of Europe', 100 *Yale Law Journal* (1991) 2409).

short duration and shows some signs of backsliding at present.¹⁸² We have no way of knowing how enduring this ‘liberal’ European regime is or, more significantly, how exportable are its basic elements.¹⁸³ Far from being the case that proves liberal theory, Europe may be, for historical, cultural and political reasons, unique. Similarly, while the effort by the then CSCE to expand the domain of European liberal democracies through the Helsinki process might appear to be a potent example of liberal theory in action, that effort is inextricably linked to the desires of former Eastern bloc nations to become economically as well as politically integrated into the European Community. The success of the Helsinki process in promoting democratization may not be replicable where there are no comparable prospects for economic integration.

The liberal account of the rise of the European Community, like the liberal account of the rise of the European human rights regime, stresses the role and impact of courts and the interest groups to whom these appeal.¹⁸⁴ Moravcsik’s account of what led to the creation of an enforceable European human rights regime emphasizes the interests of groups within fragile democracies; his account of the ‘deepening’ of that regime stresses the interests of those anxious to stabilize democratic rule and remove a threat to their own (tenuous) hold on power.¹⁸⁵ This preference-dependent account disparages the explanatory power of realist and ideational factors; on this view neither power politics, socialization, nor the constitutive power of the institutions or the norms themselves explains why states acceded to an ever more intrusive system of human rights scrutiny.¹⁸⁶ Of course, if the liberal explanation for the rise of the European Union and the European human rights system is wrong, this is yet one more reason to be sceptical about liberal explanations about how Europeans might be expected to act towards non-Europeans, including other democracies. Further, even if the liberal’s historical account is accurate with respect of Europe, this does not tell us how the interest-group dynamic plays out elsewhere under dramatically different conditions. Finally, even if Moravcsik is right that some kind of interest group dynamics explains the evolution of all human rights regimes, his account of the rise of the European human rights regimes would suggest that domestic constraints on liberal governments are not always more likely to create conditions favourable to domestic judicial enforcement of treaty obligations. Moravcsik concludes, after all, that established democracies like the UK were the holdouts with respect to accepting

¹⁸² See, e.g., Mattli and Slaughter, *supra* note 12, at 205.

¹⁸³ Nor, as is suggested by recent political developments within Austria and unsuccessful European Union efforts to punish that regime, do we know whether the European Union has created an effective bulwark to prevent undemocratic backsliding by its members.

¹⁸⁴ Thus, Slaughter and Mattli argue that the drivers of European legal integration ‘are supranational and subnational actors pursuing their own self-interests within a politically insulated sphere’. Burley and Mattli, *supra* note 12, at 43.

¹⁸⁵ See Moravcsik, ‘The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe’, 54 *International Organization* (2000) 253.

¹⁸⁶ *Ibid.*, at 239–243.

European human rights obligations.¹⁸⁷ Moravcsik's account of the rise of the European human rights regime would appear to lead to legal prescriptions that work best within fragile, not established, democracies.

As Moravcsik's application of liberal theory suggests, his key assumptions — the primacy of individuals and private groups as actors, the notion that states represent some subset of these actors, and that the configuration of the resulting state preferences shapes behaviour in foreign affairs — do not necessarily lead to Slaughter's descriptive account of liberal international law-making. The interest group dynamic that Moravcsik describes may deter a state's entry into those forms of deep cooperation that Slaughter finds prevalent among liberal states, particularly 'vertical' enforcement of international norms via local courts. As those who have examined the pros and cons of self-execution have suggested, the use of domestic courts to enforce a treaty obligation may only exacerbate democratic deficit concerns (whether real or feigned) among such interest groups.¹⁸⁸ In such instances, particularly where courts are enforcing, without the benefit of implementing legislation, a treaty, a text negotiated primarily by one branch of government is being enforced by the entity that is routinely (if inaccurately) seen as the least accountable body in a democracy, a court.¹⁸⁹ Qualms about such a result or the need to secure consent to ratification often lead democratic states to treaties lacking in such enforcement provisions, even within Europe.¹⁹⁰ The risks posed by judicial enforcement are all the greater in so-called 'monist' systems, given the possibility that a judge may use a treaty to render a domestic law invalid. The reluctance to permit direct judicial application of treaty norms may be even greater when these are subject to reinterpretation by an international organization.¹⁹¹

¹⁸⁷ Indeed, the UK experience with the European system of human rights may have fuelled concerns within its closest ally, the United States, concerning the intrusiveness of such supranational supervisory systems. For a cautionary note about the much noted successes of European human rights law, noting the many gaps in our knowledge about compliance with that law, see Janis, 'The Efficacy of Strasbourg Law', 15 *Connecticut Journal of International Law* (2000) 39. For a discussion of the continued tensions between Strasbourg law and UK legal traditions despite the domestic incorporation of the European Convention on Human Rights, see Ewing, 'The Human Rights Act and Parliamentary Democracy', 62 *Modern Law Review* (1999) 79.

¹⁸⁸ See, e.g., Jackson, *supra* note 176.

¹⁸⁹ See, e.g., Trimble, 'International Law, World Order and Critical Legal Studies', 42 *Stanford Law Review* (1990) 811.

¹⁹⁰ See, e.g., Jackson and Sykes, *supra* note 92. In that multi-country study, no state, with the possible exception of Korea, opted to permit their domestic courts to directly enforce WTO obligations. Interestingly, the type of regime of fellow WTO parties appeared irrelevant to domestic implementation considerations within the group of states studied. Indeed, only the European Community and Korea appeared to have even considered whether other states had provided for self-execution of WTO obligations in deciding whether to open their own courts to such disputes.

¹⁹¹ See, e.g., Jackson, *supra* note 176. This helps to explain some of the reluctance to provide for direct enforcement of WTO obligations. See, generally, Jackson and Sykes, *supra* note 92.

3 Liberal Theory as Prescription

Liberal theory focuses on two contrasting approaches to international regulation: informal transnational networks of bureaucrats (such as the Basle Committee) and formal treaty regimes subject to vertical enforcement by local courts (such as the European Union and the European system of human rights). Both are seen as more effective than ‘horizontally enforced’ treaties or regulatory efforts by traditional international organizations and both ostensibly prevail among liberal states. As the preceding section suggests, Slaughter’s policy prescriptions¹⁹² may not be based on accurate description. This alone is sufficient to undermine them. But is there nonetheless something to be said in favour of liberal prescriptions, assuming that what we are seeking are modes of ‘effective’ international regulation? Does Slaughter give us good advice on what it takes to get relevant actors to comply or are there instances, contrary to what Slaughter suggests, in which, to have successful or effective international regulation, one ought to:

- (1) emphasize and rely upon public international law obligations; (2) encourage the widest possible participation of states, including by non-liberal states; (3) rely on formal methods of interstate contacts, including a formal treaty duly ratified by legislative processes; and (4) avoid international or domestic forms of dispute settlement, including ‘vertical’ enforcement of treaty obligations within domestic courts;¹⁹³

The international law and political science literature is filled with prescriptions that, *pace* Slaughter, adhere to 1–4 above; in fact there is an entire school within the compliance literature based on ‘managerial’ or ‘transformative’ models.¹⁹⁴ Thus, in a variety of areas, including especially ‘framework’ agreements in the environmental area, many people have sought to establish treaty regimes that provide arenas for interactive discourse among its members on the assumption that the ‘self-reinforcing dynamic’ thereby established will lead states to deepen cooperation and encourage them to enter into increasingly ambitious commitments.¹⁹⁵ Contrary to what would be suggested by Slaughter’s general prescriptions, the essential design principles — applied in contexts as the Vienna Convention for the Protection of the Ozone Layer and its subsequent Montreal Protocol — involve: (1) explicit reliance on a formal treaty, to be negotiated by state representatives within an international conference that strives for universal participation and whose result is submitted to legislative processes for formal ratification; (2) treaty commitments that are, at least initially, vague and unthreatening, consisting of few, if any, specific performance targets or timetables and which, given their nature, are not subject to enforceable dispute settlement at either the international or domestic level; and (3) reliance on decision-making rules that require unanimity or near unanimity (and do not permit a

¹⁹² See the eight prescriptions presented in the text above and *supra* notes 24–32.

¹⁹³ Compare Slaughter’s policy prescriptions in the text above and *supra* notes 24–32.

¹⁹⁴ See, generally, Abram Chayes and Antonia Chayes, *The New Sovereignty* (1995).

¹⁹⁵ See, e.g., Downs, Danish and Barsoom, ‘The Transformative Model of International Regime Design: Triumph of Hope or Experience?’, 38 *Columbia Journal of Transnational Law* (2000) 465, at 467–488 (summarizing the ‘transformative’ literature).

subgroup of states, such as liberal nations, to carve out their own obligations or decision-making procedures).¹⁹⁶

Managerialists defend these design elements on several grounds. With respect to a variety of problems, especially environmental concerns, it is important to secure wide participation as early as possible. It is argued that, at least in certain cases, regimes with wide participation ‘deepen’ quicker, as the socialization process works better with a more nearly universal membership in part because of its greater legitimacy and authoritativeness.¹⁹⁷ Inclusive regimes permit ‘community pressures’ to be brought on laggardly states while smaller regimes might be seen as ‘user’s clubs that further only narrow and usually environmentally unfriendly interests’.¹⁹⁸ Establishing a low threshold of commitment entices states to join, permits the diffusion of information, and begins the collective deliberation that will lead to a deepening of the regime since what is important is to ‘engage states’ such that they are encouraged to create a domestic bureaucracy capable of seeing the treaty regime as part of its core mission. At the same time, the ‘reporting’ and other horizontal enforcement tools that Slaughter disparages facilitate the gradual solidification of treaty norms, while helping to establish and encouraging the operation of supportive ‘epistemic communities’ both in and outside the treaty regime. The actual rules for such regimes borrow a page from Slaughter’s insights into the non-threatening merits of ‘soft law’ regimes such as the Basle Committee but import these merits into a formally binding treaty. Thus, the environmental accords that are deemed to be consistent with the managerial model include legally binding reporting obligations but relating only to soft or vague commitments that reduce the price of admission. The ‘softness’ of the commitments, which usually are the products of consensus decision-making, also lessen predictable objections concerning national sovereignty.¹⁹⁹

Managerialists argue that at least some treaty violations are not the product of deliberate cheating that ought to be the subject of sanctions or a court decision, but result from interpretative ambiguities, unavoidable time lags between reform and performance, or the lack of technical or administrative capacity to comply.²⁰⁰ It is also argued that many of the issues are too ‘highly policy-centric’ to lend themselves well to a single plaintiff versus defendant model of resolution and that such a model may, in any case, be too adversarial and alienating to be effective.²⁰¹ This helps to explain these regimes’ reliance on such measures as technical assistance rather than court adjudication or enforceable sanctions.

Critics of the managerial approach have noted its many flaws — that it ignores the wider community of agents involved in making the treaty effective; that such regimes,

¹⁹⁶ Cf. *ibid.*, at 471.

¹⁹⁷ See, e.g., *ibid.*, at 477–478.

¹⁹⁸ *Ibid.*, at 478.

¹⁹⁹ See, generally, Young, *supra* note 100, at 79–132; Raustiala, *supra* note 128; and Dinah Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (2000). See also Trachtman, ‘Bananas, Direct Effect and Compliance’, 10 *EJIL* (1999) 655 (contesting the proposition that hard law and vertical enforcement of such law is necessarily desirable).

²⁰⁰ Chayes and Chayes, *supra* note 194.

²⁰¹ Downs *et al.*, *supra* note 195, at 484.

however universal their ostensible membership, may in reality serve the interests of one or more hegemonic powers; that the degree to which such regimes ‘transform’ states is attenuated by the lack of autonomy of state representatives and their distance from the actual actors who are the key to the effectiveness of the regime; that it ignores the possible impact of factors outside of the regime leading to compliance (such as relative price changes arising from technological advances); or that the continuing effectiveness of a regime may require tightening its reliance on binding dispute settlement (as seen in the GATT’s transformation into the WTO).²⁰² Yet, at the end of the day, even the harshest critics of the managerial model concede that the model has not been proven ineffective in all contexts; the critics of the managerialists argue only that no single strategy or model can apply to all types of subject matter in diverse contexts.²⁰³

The managerial model appears to have worked fairly effectively in some contexts, as for example in regulating international civil aviation. The regime established under the Chicago Convention on Civil Aviation, the constitutive instrument of the International Civil Aviation Organization (ICAO), works very much under a managerial model. The ICAO has a nearly universal membership drawn from both liberal and non-liberal states. The standards and recommended practices (SARPs) developed by its technical committees and promulgated by consensus by the ICAO Governing Council are ‘hard’ in terms of substance (including specific rules on flying over the high seas, on procedures for approaching aircraft and forcing them to land, etc.) but ‘soft’ in terms of binding authority.²⁰⁴ All that ICAO members are required to do with respect to these SARPs is to report their failure to comply; no dispute settlement bodies exist to report the lack of compliance or to settle interpretative or other disputes. ICAO standards, though sometimes incorporated into members’ domestic laws, are rarely the subject of adjudication and there is considerable academic debate concerning whether SARPs are ‘legally binding’ or whether it is possible even to talk about ‘vertical enforcement’.²⁰⁵ The only kind of ‘enforcement’ tool to which SARPs are usually subject are technical assistance provided by ICAO experts, accorded to states at their request. In all these respects, the ICAO regime is as far from the European Union-influenced Slaughter model of an effective treaty regime as one can get. There are also some sharp differences between the ICAO regime and Slaughter’s transnational networks/Basle Committee model for regulation. While, like the Basle Committee, the effectiveness of the ICAO regime is partly based on the credibility of the technical experts whose standards it promulgates, ICAO standards are nonetheless the product of a process that is sanctioned by a formally ratified treaty and the authoritativeness of SARPs is at least partly due to the legitimacy of the more political, pluralistic and formal international organs that also pass on these standards (and that on occasion have demanded revision).²⁰⁶

²⁰² *Ibid.*, at 493–505.

²⁰³ *Ibid.*, at 507–509.

²⁰⁴ See, generally, Buergenthal, *supra* note 145.

²⁰⁵ *Ibid.*, at 57–122.

²⁰⁶ See Frederic L. Kirgis Jr, *International Organizations in Their Legal Setting* (2nd ed., 1993) 302–314.

The ICAO example should not be dismissed on the basis that it constitutes a mere technocratic ‘coordination’ game that falls short of ‘deep’ cooperation. Many SARPs have required extensive and expensive changes to members’ internal procedures and regulations.²⁰⁷ Quite apart from SARPs, the ICAO has been the venue of choice for the negotiation of highly political (and initially controversial) terrorism conventions. The ICAO’s legal committee has been charged with drafting such significant ‘extradite or prosecute’ air law conventions as the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, and its Protocol for the Suppression of Unlawful Acts at Airports Serving International Civil Aviation.²⁰⁸ The relative success and the prompt and widespread ratification of these conventions — which have managed to establish the illegality of such highly charged acts as aircraft hijacking even between states as diverse as the United States and Cuba — appears to have something to do with the credibility of the organization that helped to draft them, including its universal membership and its non-adversarial approach to international norm-making and enforcement. The same claim can even be made, though perhaps with less certainty, concerning such highly charged ICAO decisions as its Council Resolutions condemning the USSR’s use of armed force against a Korean airliner in 1983 and its determination of probable negligence in the United States’ use of armed force against an Iran Air flight in 1988.²⁰⁹ Despite the highly politicized nature of the instances in question, both of these determinations, and the resulting amendment to the Chicago Convention barring the use of force against civil aircraft, have considerable legitimacy within the international community precisely because they were the product of this particular organization.²¹⁰

As the ICAO example suggests, Slaughter too quickly dismisses the continuing relevance of the sources and institutions of public international law as not up to the challenges faced by the ‘disaggregating state’. While Slaughter may be right to contend that the velocity and density of private transactions will, in the end, prompt more adjustments in state behaviour than any single international organization or

²⁰⁷ But arguably the ICAO example does suggest that one way to encourage compliance with international regulation is to promote the perception, among members of the relevant constituencies (e.g. the general public and legislatures), that the regulation is merely ‘technocratic’ — even when in fact it is more than that. As Slaughter’s work on transnational networks suggests, one way to propagate this perception is to hand over regulatory power to a technocratic subset of governmental bureaucrats such as aviation experts. But, to the extent the ICAO is accomplishing this today, it appears to be doing so within a ‘traditional’ intergovernmental organization, using old-fashioned sources of international law.

²⁰⁸ See, e.g., Kirgis, *supra* note 206, at 303.

²⁰⁹ See *ibid.*, at 309–318 and 469–477.

²¹⁰ For a discussion of Article 3*bis* of the Chicago Convention, see Kirgis, *supra* note 206, at 316–318. For an implicit recognition of the legitimacy of the ICAO’s resolution of the use of force issue, see, e.g., Security Council Resolution 670, S/Res/670, 25 September 1990, para. 7 (recognizing the Chicago Convention’s limit on the use of force in the enforcement of sanctions against Iraq), discussed in Kirgis, *supra* note 206, at 655–656.

treaty regime, the attempt to denigrate the significance of public international law ignores how much both private transactions and transgovernmental networks are embedded in public international law and traditional international institutions such as the IMF, the World Bank and the WTO. It overlooks the possibility that such embedded regimes may create a sense of obligation not fully encompassed by liberals' instrumentalist accounts.²¹¹ More broadly, Slaughter's policy prescriptions do not take into account causal theories of state behaviour apart from examining the preferences of actors within states, including rationalist or utilitarian state-actor theories, norm-driven or sociological theories, and those looking to domestic institutions.²¹² Slaughter does not consider whether or to what extent the qualities of an institution or a rule or even the process of creating a rule (e.g. Franckian legitimacy) may heighten the likelihood of compliance.²¹³

One must also question, on democratic legitimacy grounds, Slaughter's suggestion that regulation by a 'small, unaccountable, self-selected, non-transparent, elite groups (which are, more often than not, wholly US-centred)',²¹⁴ as exemplified by the Basle Committee, is preferable to international regulation via horizontally enforced treaty or traditional international organization. The legitimacy issues posed by traditional sources of international obligation organizations do not disappear when regulation occurs via Slaughter's transnational networks; they merely take a different shape. Although Slaughter spends considerable time discussing the accountability of transnational networks,²¹⁵ she does not pay sustained attention to comparing the relative benefits of these two forms of international regulation on this basis. As is suggested by the country studies regarding the implementation of the Uruguay Round noted above, democratic legitimacy often requires turning to a treaty formally ratified by domestic legislative processes.²¹⁶ Indeed, whatever else is said about the difficulties Switzerland encountered in implementing the Uruguay Round, the requirement of a formal referendum in that case appeared to have produced a legitimate result that is

²¹¹ Cf. Young, *supra* note 100, at 149–153 (discussing endogenous factors within the institutions themselves including the role of ideas and processes of social learning); and *ibid.*, at 202–208 (discussing 'nonutilitarian' mechanisms for affecting behaviour).

²¹² For one summary of these, see, e.g., Raustiala, *supra* note 128. As Raustiala indicates, the 'managerial' approach to compliance, discussed above, combines elements of norm-driven and rational theories and need not be hostile, in application, to Moravcsik's liberal theory. As she argues, compliance with international norms may result from the 'soft' pressures asserted by market participants just as easily as through Slaughter's favoured methods (transnational networks and vertically enforced treaties). *Ibid.*

²¹³ Cf. Simmons, *supra* note 108, at 85–88. See also Franck, 'Legitimacy in the International System', 82 *AJIL* (1988) 3 (suggesting that the process of rule creation may help to explain compliance).

²¹⁴ Alston, *supra* note 131, at 443. Accountability concerns are not limited to scholars. See, e.g., *New York Times*, 22 November 1999 (example of numerous advertisements in the US press by a variety of NGOs, accusing undemocratic or faceless Geneva bureaucrats of mounting an attack on sovereign prerogatives).

²¹⁵ See, e.g., Slaughter, *supra* note 139.

²¹⁶ See Jackson and Sykes, *supra* note 92.

fully the equal of any domestic law in Switzerland.²¹⁷ The obverse problem — the undemocratic, unaccountable nature of regulation by transnational bureaucrats — is too hastily dismissed by Slaughter on the basis that such forms of international regulation (by contrast to traditional international law sources) are ‘non-coercive’, that such transgovernmental regulation has already been ‘pre-approved’ by domestic processes, or that transgovernmental bureaucrats need only make their activities transparent via the web.²¹⁸

Liberals are interested in transnational regulation precisely because, or to the extent that, these networks are more than mere ‘talking shops’ but are sites of power — of effective norm-making among relevant policy-makers. It is untenable to maintain that transnational networks are ‘soft’ for the purposes of accountability but are ‘hard’ vehicles for more effective and deeper forms of cooperation than are usually possible under traditional sources of international law. If transnational networks such as the Basle Committee come to exercise real power, those affected are bound to notice eventually and to begin to ask questions about accountability strikingly similar to those that are now being asked of those international organizations whose regulatory effects are becoming too prominent to ignore. Nor can the accountability issues raised by transnational networks be deflected by pointing to the domestic legitimacy of executive agency power. Whatever authority US citizens might have delegated to their own central bank regulators on the Basle Committee with respect to the regulation of the US central bank, it is not clear that such delegation was meant to extend to other central bankers’ powers to regulate US banks.²¹⁹ Further, this response to the accountability issue ignores perennial challenges to the legitimacy of federal agency delegation, as within the United States, and does not indicate how, for example, expanding the mandate of federal agencies internationally helps them to become more responsive to local concerns.²²⁰ Finally, the accountability benefits of making information available via the internet should not be assumed or exaggerated.²²¹ Even assuming that those who have become accustomed to the exercise of power without transparency will cede to the general public relevant information without a struggle, it is not clear that internet access will serve all relevant constituencies. To the extent the accountability objection relates to fear of ‘neo-

²¹⁷ Cottier and Schefer, *supra* note 118, at 362. Thus the authors conclude that notwithstanding its challenges, direct democracy ‘can considerably enlarge the basis for direct application’ and that Switzerland is ‘an excellent candidate to use direct application of WTO law to its own advantage — to enhance political checks and balances, to improve the competitive environment, and to achieve an optimal allocation of resources within the country’. *Ibid.*

²¹⁸ See Slaughter, *supra* note 139.

²¹⁹ Nor is it clear how citizens of states whose central bankers are among those represented on the Basle Committee have ‘preapproved’ the Basle process.

²²⁰ For an overview of many of these challenges and the substantial literature enumerating them, in both constitutional and administrative law, see, e.g., Dorf and Sabel, ‘A Constitution of Democratic Experimentalism’, 98 *Columbia Law Review* (1998) 267, at 270–272.

²²¹ Cf. Slaughter, *supra* note 139.

colonialism' or US domination via technocratic rule, internet access may only aggravate these concerns given the wide gap between rich and poor (nations as well as between individuals) with respect to access to the web itself. Putting that issue aside, internet access to information without incorporating other procedures for outside input into decision-making processes (at least comparable to those used by domestic administrative agencies) brings us only one step closer to meeting process concerns. Without knowing what questions to ask — what information among the mass that may be available is relevant — and without the ability to influence what these networks do, internet access may not seriously ameliorate accountability concerns.

Ironically, the most promising answers to the accountability dilemmas posed by transgovernmental networks that Slaughter gives all involve borrowing from or incorporating the tools and sources of traditional international law. Proposals to bring network decisions before legislative oversight committees or to have them approved by legislative processes, to nestle the networks or their work products within international organizations, to have the network norms or codes enforced by private investors or by international institutions such as the IMF and the World Bank, or to expand the representation of countries within these networks,²²² help to answer accountability concerns but only at the expense of claims that transnational networks are distinctive tools of international law-making that remain outside of and are superior to the 'coercive' structures of international law. As Slaughter's own answers to the accountability dilemma implicitly acknowledge, it is premature to conclude that transgovernmental regulation is invariably more flexible, faster, more capable of deploying technical expertise, or more amenable to domestic implementation and forms of 'deep' cooperation than is the ordinary treaty.²²³ Treaty regimes vary, coming in all shapes and styles of discourse, covering a multitude of subjects unaddressed by the Slaughter oeuvre (including the law of the sea, diplomatic immunity and international communications). Some such agreements come in forms that are not clearly distinguishable from liberals' transnational networks to the extent that they establish mere mechanisms for the application of technical expertise (e.g. the ICAO's use of SARPs), while others anticipate (but usually do not dictate) domestic implementation and very deep cooperation indeed (e.g. BITs and NAFTA).

Even assuming that transnational networks ought to be encouraged and that accountability concerns can be assuaged, liberal theory provides overly narrow prescriptions with respect to them. As Margaret E. Keck and Kathryn Sikkink have argued, transnational networks — in human rights and the environment for example — include a variety of groups with both instrumental goals and a shared technical knowledge base, extending far beyond the groups of government regulators that Slaughter emphasizes.²²⁴ Keck and Sikkink contend that 'global civil society' emerges

²²² *Ibid* (making these suggestions).

²²³ Cf. *supra* note 29. See also Wu, 'The New Face of International Regulation: The Case for Government Networks' (forthcoming) (explicit attempt to apply Slaughter's insights to create a model of transgovernmental regulation).

²²⁴ Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders* (1998) 30.

from economic globalization or from the increased density of transnational contacts only under some conditions. Their case studies conclude that the effectiveness and viability of such networks turn on the characteristics of the subject matter sought to be regulated, the types of actors sought to be affected (including their vulnerability to both material and moral leverage), *as well as* the type of domestic regimes involved. Keck and Sikkink agree with liberals that the structure of domestic institutions is relevant to the rise and impact of transnational networks but argue that the lack of participatory outlets within some states may actually lead to the development of transnational networks, as citizens seek international allies to bring pressure on a state from the outside.²²⁵ They also contend that the countries that are most susceptible to network pressures may be those states that are 'actively trying to raise their status in the international system'.²²⁶ For these reasons, Keck and Sikkink direct their attention to the effects of transnational networks within states that Slaughter would classify as 'non-liberal' as well as within liberal states, and their focus on a wider number of non-state actors leads them to descriptions and prescriptions at odds with those suggested by liberal theory. They conclude, for example, that in at least some cases, fragile democracies or states in transition may be *more* amenable to the impact of transnational networking than are established democracies.²²⁷ For Keck and Sikkink, unlike Slaughter, a 'liberal' political regime is only a starting point for understanding why and how actors form networks or to explaining their differing impact on governmental policy.²²⁸

Keck and Sikkink also suggest that liberal theory's prescriptions are impoverished to the extent these ignore how preferences within states take shape:

Liberalism, as currently formulated, lacks the tools to understand how individuals and groups, through their interactions, might constitute new actors and transform understandings of interests and identities. We argue that individuals and groups may influence not only the preferences of their own states via representation, but also the preferences of individuals and groups elsewhere, and even of states elsewhere, through a combination of persuasion, socialization, and pressure.

Network theory can thus provide a model of transnational change that is not just one of 'diffusion' of liberal institutions and practices, but one through which the preferences and identities of actors engaged in transnational society are sometimes mutually transformed through their interactions with each other. . . Modern networks are not conveyor belts of liberal ideals but vehicles for communicative and political exchange, with the potential for mutual transformation of participants.²²⁹

Keck and Sikkink's description of the operation of transnational networks may

²²⁵ *Ibid.*, at 12 and 201–202 (describing a 'boomerang pattern of influence' in which domestic NGOs bypass their state through international allies).

²²⁶ *Ibid.*, at 29.

²²⁷ *Ibid.*, at 208.

²²⁸ *Ibid.*, at 202.

²²⁹ *Ibid.*, at 214.

provide a more plausible account of the scope and nature of ‘transjudicial communication’ than does liberal theory, especially in fragile democracies such as South Africa’s. If we are trying to understand both the problematic aspects and the potential benefits of, for example, the House of Lords decision in the *Pinochet* case, or how that decision may have served to embolden a judge in Senegal to charge a former President of Chad or appear to be affecting Chilean judges’ evolving interpretations of the scope of Chile’s amnesty law,²³⁰ it is not clear that we ought to start with a theory that extols the role of judges within established liberal states as independent ‘disaggregated’ actors pursuing a ‘common’ calling on behalf of the rule of law or that suggests looking for evidence of ‘vertical’ or ‘horizontal’ cross-citation, implying that transjudicial communication occurs only when supranational judgments or the judgments of foreign courts are cited as authority for enforcing international norms by judges operating within a long-standing ‘democratic’ tradition. Slaughter’s focus on actual citations by local courts of foreign or international judgments may be well intentioned but misdirected. The transnational impact of human rights decisions such as the *Pinochet* case is not necessarily evidenced by whether that case is cited by other courts or even consciously accepted by domestic judges as persuasive precedent. Its greatest impact may not be felt within other liberal courts. As Keck and Sikkink suggest, the *Pinochet* case may have the greatest resonance precisely in those fragile democracies subject to the ‘boomerang pattern of influence’ that they describe as characterizing much transnational network activity — where activist lawyers use transnational allies and sources of authority to influence internal governmental structures that have not always been sensitive to the rule of law. Further, even when transjudicial communication occurs within liberal states, it may not take the form of vertical enforcement of international norms but, as is suggested by the Israeli torture case, may occur much more subtly and more creatively, as through the interpretation and application of local law, against a backdrop of transnational influence. Domestic courts may ‘translate’ international norms in the course of applying them and the results may not be, as liberal theory appears to presume, legal convergence or harmonization.²³¹ Such transjudicial impacts may be much more difficult to measure than court citations but no less real.

The liberal view of transjudicial communication sets artificial limits on the transformative potential of both national and supranational courts and its implications are not identical to those suggested by more openly constructivist

²³⁰ See Onishi, ‘An African Dictator Faces Trial in His Place of Refuge’, *New York Times*, 1 March 2000 (discussing case against Hissen Habré); Krauss, ‘Pinochet, at Home in Chile: A Real Nowhere Man’, *New York Times*, 5 March 2000, at A12 (discussing the recent reinterpretation of the amnesty law by Chilean courts to permit the pursuit of ‘continuing crimes’, such as unresolved disappearances).

²³¹ See Knop, ‘Here and There: International Law in Domestic Courts’, 32 *New York University Journal of International Law and Policy* (2000) 501. See also Otto, ‘Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference’, in Eve Darian-Smith and Peter Fitzpatrick (eds), *Laws of the Postcolonial* (1999) 145, at 172 (criticizing the ‘imperialist urge to improve the world by standardization’) (emphasis in original). Of course, transnational impacts may also occur outside the judiciary, as by influencing executive agencies or legislators.

approaches.²³² If transjudicial communication is seen as primarily or exclusively a phenomenon common to liberal courts, we underestimate the transformative possibilities that may be available elsewhere — in supranational as well as national courts.²³³

* * *

Slaughter's policy prescriptions are both overly optimistic, particularly with respect to the prospects of effective international regulation among liberal states, and unduly pessimistic, particularly with respect to the prospect of successful cooperation between liberal and non-liberal nations and between non-liberal states. Slaughter's policy prescriptions would have suggested turning to the OECD for a successful and effective multilateral investment regime and not a network of bilateral treaties with non-liberal states to achieve the same ends. Her liberal prescriptions would not have readily led to establishing international rules over civil aviation through the establishment of a formal institution aspiring to universal membership notably lacking in enforcement tools (at either the international level or at the level of national courts) and would not have advised use of that institution as the drafter or venue for rules to control terrorist acts.²³⁴ As Slaughter appears to acknowledge, liberal theory offers only a meagre reform agenda for states that lack a polity, much less a liberal one, such as 'failed states'.²³⁵ To date, liberal theory has little to say about how compliance with international norms occurs in non-liberal societies.²³⁶

When it comes to the likelihood of effective international cooperation and

²³² Liberals would argue, for example, that the International Court of Justice should not and cannot be expected to assume a judicial review power over the Security Council since that requires a 'common liberal culture' notably absent from that pluralist institution. Cf. Moravcsik, *supra* note 1, at 539–541 (noting compatibilities between constructivists and liberals).

²³³ Compare, for example, Alvarez, 'Judging the Security Council', 90 *AJIL* (1996) 1 (suggesting subtle ways that forms of judicial review can occur) with Moravcsik, *supra* note 1, at 528 (arguing that 'substantial prior convergence of underlying values is a necessary prerequisite for ... significant surrenders of sovereign decision-making to supranational courts and bureaucracies') or Sullivan, *supra* note 12 (arguing that effective international dispute mechanisms require liberal participants or at least domination by liberal states as with respect to the WTO).

²³⁴ Apart from recommending cooperation among 'transnational networks', liberal theory appears to have little to say on, for example, the type of international mechanism that would most effectively promote international criminal cooperation between liberal and non-liberal states (as with respect to handling terrorist acts).

²³⁵ See, e.g., Slaughter, 'Pushing the Limits of the Liberal Peace: Ethnic Conflict and the "Ideal Polity"', in David Wippman (ed.), *International Law and Ethnic Conflict* (1998) 128, at 140–144 (advancing a tentative theory that the ICTY might help establish, within the former Yugoslavia, an 'ideal polity' in the image of Western liberal democracy, but acknowledging that, while liberal democracy 'may be the best cure available for a host of ills', liberal theory assumes a polity but does not provide guidance for creating one or holding one together). As Slaughter appears to acknowledge, the prospects that judge-made law can, in the Yugoslav context, serve as 'mask and shield' to conceal and alter political realities seem radically reduced. Cf. Slaughter and Mattli, *supra* note 12, at 44.

²³⁶ Cf. Ann Kent, *China, the United Nations and Human Rights* (1999) (discussing the decidedly mixed record of Chinese compliance with human rights norms over time but examining distinct criteria, including treaty accession, procedural compliance with reporting requirements and other requests, *de jure* compliance through domestic incorporation of international standards, and *de facto* compliance).

regulation between liberal and non-liberal states, liberal theory's otherwise optimistic assessment darkens. As is suggested by Slaughter's policy prescriptions for the UN,²³⁷ her proposals for institutions that have or aspire to universal membership are limited or non-existent.²³⁸ Notwithstanding Slaughter's claims that liberal theory provides valuable insights for how liberal and non-liberal can productively interact, her policy prescriptions apply mostly by negative inference to such interaction, even though such interaction may be vital to solving concrete problems of interests to all kinds of states. Slaughter's reliance on the implications of the liberal peace leaves her with few practicable reform proposals for the Security Council or with respect to collective security more generally.²³⁹ Notwithstanding the apparent support for the emerging 'right to democratic governance' within some factions of the UN, the recommendation that the organization transform itself from a security arrangement to a tool for democratizing half its membership would not appear to be politically viable. Even within US policy circles, Slaughter's UN reforms, including for a 'democratic caucus' within the UN, are likely to be seen as perilously close to the controversial 'reform' suggestions made by Senator Jesse Helms.²⁴⁰

4 Liberal Theory and Peace

The alleged connections between compliance with international law and the 'fact' of the liberal or democratic peace are ill-defined in the Slaughter oeuvre. Despite avowals to use liberal theory to build bridges between law and political science, there is no attempt in Slaughter's work to situate the democratic peace within its broader literature. The liberal peace, stated as positive fact and little nuance, is used as a strut upon which to build the liberal democratic order. Readers are not given a sense of how contested this alleged 'law of policy science' is — even among political scientists. Slaughter says nothing about the many debates about which wars or how many casualties ought to 'count',²⁴¹ about arguments that the thesis of a liberal peace may

²³⁷ See *supra* note 27.

²³⁸ Perhaps because the WTO deals with disputes between all kinds of states, liberal and non-liberal, liberal theory has had, at least to date, little to say concerning arguably the most effective and significant international dispute settlement scheme in the world, the WTO's. If liberals' proposals on human rights are any indication (see, e.g., Slaughter and Helfer, *supra* note 12), liberal prescriptions might suggest that the WTO dispute settlement system needs to develop along the lines of the European Union, namely, towards vertical enforcement of WTO obligations in domestic courts. As post-Seattle concerns suggest, this may not be the best (or indeed even a viable) route to achieve the greater legitimacy or effectiveness of the trade regime. Cf. Leebron, 'Trade Linkages' (draft paper presented at the Conference on the Multilateral Trade Regime in the 21st Century: Structural Issues, Kellogg Center, Columbia University, 3–4 November 1995) (enumerating a number of ways to link trade with other issues).

²³⁹ Cf. Slaughter, *supra* note 27, at 414–415.

²⁴⁰ Cf. Helms, 'Saving the United Nations', *Foreign Affairs* (September–October 1996) 2, at 7 (arguing that, absent dramatic UN reforms, the United States ought to withdraw from the organization and 'replace it with a league of democracies').

²⁴¹ Most of the liberal peace thesis builds on the premises of the Correlates of War Project (COW) under which a conflict is not coded as 'war' unless 1,000 battle fatalities have resulted. See Damrosch, 'Use of Force and Constitutionalism', in Jonathan I. Charney *et al.* (eds), *Politics, Values and Functions* (1997) at 431, note 43. For one critique of what is excluded by this criterion, see, e.g., David E. Spiro, 'The Insignificance

only be viable for the relatively short post-1945 period,²⁴² or about other critiques of liberal theorists' methodology or assumptions.²⁴³ For Slaughter's readers — especially lawyers who may not closely follow controversies outside their field — the liberal peace appears only as the unquestioned premise upon which to build the broader liberal project.²⁴⁴

This approach raises a basic problem: we are given no reason, within the Slaughter oeuvre at any rate, to believe that the liberal peace, if it exists and truly reflects something more than the transitory experience of a number of post-1945 democracies, matters to the legal developments at issue. Slaughter does not improve on the inconclusive social science literature with respect to underlying causes for the liberal peace. Like both advocates of the liberal peace and its detractors, she too fails to provide a single unifying explanation for why liberal states reputedly do not wage war on each other.²⁴⁵ Instead, Slaughter provides at least six (alternative? cumulative?) explanations for the liberal peace, suggesting that finding the correct account 'does not matter'.²⁴⁶ But for lawyers, and especially for those trying to propose legal prescriptions, a general conclusion that, when it comes to issues of war and peace, the relationship between liberal states is distinctive in some fashion, even if true, is not particularly helpful. As those international lawyers who have tried to examine the legal implications of the liberal peace have noted, finding out whether, for example, democracies do not make war on one another because of normative/cultural explanations, due to structural/institutional factors, or because of complex interactions between the two, would appear to have radically different implications as well as pose very distinct research methodologies.²⁴⁷ Absent a convincing rationale for the liberal peace, it is difficult to make it relevant to specific legal prescriptions.²⁴⁸

of the Liberal Peace', in Brown, *supra* note 14, at 202. Among the conflicts that, for this reason or for others, are treated as 'exceptions' to the liberal peace thesis are the United States–United Kingdom War of 1812, the United States Civil War, the Spanish–American War, the First World War, Finland's alliance with the Axis powers during the Second World War, the conflict between Peru and Ecuador, and Israel's invasion of Lebanon.

²⁴² See, e.g., Farber and Gowa, 'Politics and Peace', in Brown, *supra* note 14, at 258–261; Chan, 'Mirror, Mirror on the Wall . . . Are the Freer Countries More Pacific?', 28 *Conflict Resolution* (1984) 617, at 642.

²⁴³ See, e.g., Layne, 'Kant or Cant: The Myth of the Democratic Peace', in Brown, *supra* note 14, at 157.

²⁴⁴ Martti Koskeniemi suggests that such unexamined adherence to 'international relations orthodoxy' is endemic to the liberal project: 'Only so long as lawyers can look at these [non-legal] disciplines from the outside can they sustain a faith in the exotic that keeps them blind to the doubts, anomalies, and contradictions harboured within sociology and moral theory. Instead, the call is to accept as authoritative, and controlling, the styles of argument and substantive outcomes that international relations scholars have been able to scavenge from the battlefield.' Koskeniemi, *supra* note 60, at 33.

²⁴⁵ See, e.g., the text and notes 22 and 23 above (Slaughter's rationales); Russett, *supra* note 48, at 82; Owen, 'How Liberalism Produces Democratic Peace', in Brown, *supra* note 14, at 116; and Damrosch, *supra* note 241.

²⁴⁶ Cf. *supra* note 22.

²⁴⁷ See Damrosch, *supra* note 241. For a description of these two types of explanations, see Russett, *supra* note 48, at 30–42.

²⁴⁸ See, e.g., Layne, *supra* note 243, at 157 and 164; Farber and Gowa, *supra* note 242, at 243–244; and Damrosch, *supra* note 241, at 429.

The six possible correlative attributes of liberal states that Slaughter identifies as potential causes encompass both normative/cultural and structural/institutional factors and point in all directions at once. Of the six, the first possible explanation — because liberal states have given to each other mutual assurances that inter-state disputes will be resolved peacefully — suggests the potential relevance of law, including international law (assuming that the assurances were given in legally binding form). This explanation is broadly consistent with the contention by Professor Henkin that societies that are culturally accustomed to adhering to the rule of law domestically are more apt to honour their international obligations.²⁴⁹ But, as Henkin's own work concerning the United States' relatively frequent disregard for international legal prohibitions on the use of force demonstrates,²⁵⁰ this normative or cultural explanation is too broad. It is inaccurate concerning the likelihood of a liberal state's compliance with relevant international (or even constitutional) legal rules relating to the use of force, most prominently Article 2(4) of the UN Charter. The United States' invasions of Grenada and Panama and its mines in Nicaragua (to name but only some examples from recent history) are all arguably consistent with the liberal peace but inconsistent with Article 2(4).²⁵¹ The notion that liberal states tend to be law-abiding therefore needs to be supplemented with an account of why the *mutuality* of obligation among fellow liberal states allegedly matters. For the liberal peace to matter to lawyers (or at least to Slaughter's prescriptions), we need a credible rationale for the liberal peace that indicates why the ostensible tendency not to make war on a fellow democracy connotes a tendency to ratify, implement or comply with treaties, establish transnational networks, or cooperate in all forms of peaceful international dispute settlement.

Slaughter suggests one such account: perhaps it is not that liberal states tend to be law-abiding as such but that they (or perhaps those government officials capable of initiating the resort to force) share a shared sense of identify or 'we-feeling', that is, 'liberal democracies may identify with one another as members of an in-group confronted with non-democracies'.²⁵² This explanation for the liberal peace suggests that it is inherently subjective. The liberal peace arises when one state, correctly or incorrectly, *perceives* another as 'democratic'; it may be breached when those perceptions change.²⁵³ Ido Oren has built a critique of the theory of the democratic peace on this proposition, arguing that the liberal peace claim is not about democracies per se as much as it is about countries that are perceived to be 'of our kind'.²⁵⁴ But, if democracy is not an objectively defined criterion, the liberal peace is

²⁴⁹ Henkin, *supra* note 54, at 60–68 (but also crediting constitutional and institutional factors as other 'internal forces impelling observance of international law'). See also Simmons, *supra* note 71, at 354 (characterizing such contentions as 'affinity arguments').

²⁵⁰ See, e.g., Henkin, *supra* note 54, *passim*; and Henkin, 'The Use of Force: Law and US Policy', in Henkin *et al.* (eds), *Right v. Might* (1991) 37.

²⁵¹ See, e.g., Henkin, *supra* note 250.

²⁵² Slaughter, 'Government Networks', *supra* note 3, at 224–225.

²⁵³ See, e.g., Russett, *supra* note 48, at 92.

²⁵⁴ Oren, 'The Subjectivity of the Liberal Peace', in Brown, *supra* note 14, at 263 (building a case primarily on changing perceptions within the United States of Imperial Germany).

not an immutable independent variable promoting peace, stability and the rule of law, but an endogenic factor that is very much contingent on, for example, the United States' self-image and on whom it chooses to define as comporting with that image.²⁵⁵

Whether or not this critique undermines the liberal peace within political science, it poses serious questions for liberal legal prescriptions. When we build legal prescriptions on manipulable notions of self-image, all that we may be doing is giving US and other liberal policy-makers a legal licence to wage war against those that they choose to define as outside the 'zone of law'. This is all the more dangerous to the extent that — as is suggested by Slaughter's grim assessment of the UN's prospects for effective collective security²⁵⁶ or her disparagement of liberal institutionalism more generally²⁵⁷ — liberals appear ready to discount the alternative: that pluralist institutions and their rules may exert a constraining influence on states, liberals and non-liberals alike.²⁵⁸ A defence of 'humanitarian' intervention, such as NATO's actions in Kosovo, not clearly sanctioned by the Security Council, built on such liberal assumptions is bound to face severe credibility problems.²⁵⁹

Most of Slaughter's speculative rationales for the liberal peace are structural or institutional.²⁶⁰ But, as is suggested by Part 2's discussion of US treaty practices, these factors have a double edge. While institutional 'checks and balances' may, as Kant originally suggested, act as a brake on the initiation of conflict, they have not prevented the United States and other democracies from initiating conflict and there are a number of ways in which divided democratic government (and the opportunities it affords branches or subunits to act independently) poses problems with respect to compliance with international legal rules dealing with the use of force.²⁶¹ As the widespread support for the Gulf War among the US public indicates, the 'openness' of American society leaves it open to both media-induced nationalist fervour and sober reflection based on complete information. Drawing concrete policy prescriptions from

²⁵⁵ Cf. Louis Hartz, *The Liberal Tradition in America* (1955) 302 (noting connections between American liberalism and the tendency to judge foreigners by the extent that they contrive to be like ourselves).

²⁵⁶ See Slaughter, *supra* note 27.

²⁵⁷ See, e.g., Slaughter, 'The Real New World Order', *supra* note 3.

²⁵⁸ Cf. Henkin, *supra* note 54, at 146–153 (arguing, based on historical precedents, that it is at least plausible that the law of the Charter has exerted influence to prevent the escalation of some conflicts); Simmons, *supra* note 71, at 329 and note 20 (discussing empirical evidence of compliance with international norms even in the midst of hostilities between states). Liberal theory has little to say about the potential relevance of law *during* inter-state conflict.

²⁵⁹ Cf. Slaughter, *supra* note 2, at 246 (defending humanitarian intervention on 'instrumental' grounds, that is, in terms of the likely impact on other states). Cf. O'Connell, 'The UN, NATO, and International Law After Kosovo', 22 *Human Rights Quarterly* (2000) 57, at 84 (criticizing argument that NATO did not need to secure Security Council authorization because as a league of democracies committed to human rights it should not be beholden to an entity with dictatorships among its members).

²⁶⁰ Of Slaughter's six potential causes for the liberal peace, see the text at note 22 above, factors 2, 3, 4 and 5 would all appear to point to alleged structural features of democracies that presumably act as a brake on the initiation of conflict. Cf. Damrosch, *supra* note 241, at 428–442 (noting structural features of democratic states that may make it more difficult for these states to defuse conflicts with non-liberal states). Note that Slaughter's explanation for liberal transjudicial communication (see pages 214–215 above) also melds structural with cultural rationales.

²⁶¹ See Damrosch, *supra* note 241, at 424–431.

the United States' and other liberal states'²⁶² chequered past with respect to the initiation of force is a risky business.²⁶³

Liberal prescriptions for 'perpetual peace' say little about the possibility, not denied by Doyle or other advocates of the liberal peace, that liberal states may have a tendency, perhaps a greater tendency than non-liberal states, to wage war on those that they perceive to be non-liberal.²⁶⁴ This possible second 'rule of policy science', which may be no less valid than the proposition that liberal states do not wage war on each other,²⁶⁵ should temper our embrace of liberal theory as the recipe for perpetual peace. No less troubling for the prospects of peace is the proposition — advanced by Edward D. Mansfield and Jack Snyder — that democratizing states are more likely to fight wars than are mature democracies or stable autocracies. Mansfield and Snyder contend that the aftershock of failed democratization is at least one of the factors explaining the link between autocratization and war.²⁶⁶ While neither the possible war-prone tendencies of democratizing states nor liberal states' hostility towards 'the other' need deter us from pursuing democratization as a policy goal,²⁶⁷ these consequences need to be considered when we seriously propose, for example, splintering the United Nations with a democratic caucus or using that organization primarily as an instrument for democratization. Even if liberals adhere to their policy prescriptions, their recipes for perpetual peace need accompanying warning labels about the prospects for conflict. These risks are particularly ironic for a theory that purports to adhere to Kant's admonition that the key to perpetual peace is to foster pluralist values amidst difference, that is, to adhere to the principles of 'tolerance and mutual accommodation based on recognition of competing interests'.²⁶⁸

5 Conclusion

Liberal—adj. tolerant; not narrow in one's views and ideals; broadminded; n. a person favourable to progress and reforms.

Slaughter and Moravcsik are entitled to call their approach to international relations and law 'liberal'. Their preference-based approach to the state is generally consistent

²⁶² See *ibid.*

²⁶³ Given this chequered history, one wonders whether US or other democratic policy-makers really share the 'certainty' that conflicts will not escalate into military confrontation that Slaughter asserts helps lead to a unified foreign policy stance. Cf. Slaughter, 'Government Networks', *supra* note 3, at 201.

²⁶⁴ See, e.g., Slaughter, *supra* note 2, at 249; Doyle, *supra* note 18, at 17.

²⁶⁵ Cf. Chan, *supra* note 242, at 626 (indicating that Israel, India and France had the highest war-per-year scores through 1980 and the UK tied with the USSR in fourth place). Quite apart from the empirical evidence for this second rule of policy science, this possibility gains credibility to the extent that liberal states come to believe that they are on the side of the angels, that is, on the side of pluralism, economic growth and development, and the rule of law — not to mention history. These are precisely the kinds of views that liberal theory would appear to encourage.

²⁶⁶ Mansfield and Snyder, 'Democratization and the Danger of War', in Brown, *supra* note 14, at 332.

²⁶⁷ See *supra* at 193 (identifying different rationales for democratization).

²⁶⁸ Burley, *supra* note 7, at 1918.

with the ideas generated by Hobbes, Locke, Bentham, Madison and Mill.²⁶⁹ Slaughter and Moravcsik put individuals (along with other groups in society) in the place realists reserved for states.²⁷⁰ Like classic liberals, they put real persons free to pursue their rational preferences, and not impersonal abstractions such as 'states', at the centre. For Slaughter, the legitimacy of international norms ought to be determined by their procedural pedigree, namely, by whether they result from processes in which elected representatives have played some role even if indirectly (as in the case of transnational bureaucrats or through ratified treaties). On this view, legitimate law-making in foreign affairs appears to be liberal law-making at one remove. In classic liberal style, liberal theory agrees that legitimate law-making 'is merely the result of aggregating the preferences of a majority of representatives, who mirror the preferences of a majority of their constituents'.²⁷¹

Existing critiques of Slaughter's liberal theory posit that her approach is not 'liberal' in the dictionary sense noted above. Both Marks and Kennedy argue that liberal theory is profoundly illiberal since it is intolerant of those states and peoples not regarded as 'democratic', narrow minded in its conception of the 'ideal society', and ill-disposed to the notion of real progressive reform within institutions or regimes of universal membership.²⁷² Liberal theory's early and blithe dismissal of the pluralist project that characterizes much of contemporary international law,²⁷³ its continuing emphasis on the virtues of transnational governmental networks prevalent in liberal states, and its optimistic presumptions that the forces of economic and political liberalization and the rule of law are all compatible²⁷⁴ make these charges credible.

²⁶⁹ For a classic articulation that the concept of 'liberal society', means, in the United States, 'an absolute and irrational attachment' to atomistic, Lockian individualism, see Hartz, *supra* note 255.

²⁷⁰ It is not entirely clear, however, whether Slaughter would agree with the utilitarian notion that the rights of the individual ought to prevail and that international structures, including international law, are mere instruments to this end. Nor is it entirely clear whether liberal theory would give priority to either political or economic liberalism since Slaughter's assumptions of what constitutes a 'liberal' state merges the two concepts. In addition, as this essay has taken pains to show, liberal theory's connections to other possible notions of liberalism are ill-defined and uncertain. Liberal theory does not really explore what might be called liberalism within states, that is, it does not really focus on the relationship between domestic civil society and international law or alleged connections between federalism, liberal values and foreign relations. At the same time, liberal theory does not countenance what might be called liberalism freed from states (e.g. as is touted by enthusiasts of transnational civil society), although its embrace of transnational regulatory networks comes close to espousing liberalism freed of *unitary* state actors.

²⁷¹ See William N. Eskridge *et al.*, *Legislation and Statutory Interpretation* (2000) 20.

²⁷² David Kennedy argues that even the attempt to bridge political science and law under one all-embracing vision of legal internationalism narrows our ability to imagine new solutions and impoverishes our interpretations of the real changes brought about by globalization. Kennedy, *supra* note 62, at 109. He also argues against an all too ready tendency to draw optimistic conclusions about global democratization, along with pessimistic conclusions about 'the narrowed expectations for public policy, both nationally and internationally'. *Ibid.*, at 110. See also Otto, *supra* note 231, at 145; and Koskeniemi, *supra* note 60.

²⁷³ See, e.g., note 7 above and the text accompanying it.

²⁷⁴ Cf. Anghie, *supra* note 140, at 248–249 (contending that globalization as presented by the international financial institutions supplants the human rights paradigm of the Universal Declaration with one that protects the 'collective rights of global capital'); and Kahn, *supra* note 99, at 3 ('democracy is as likely to bring nationalism as markets').

The charge that liberal theory is a re-thread of nineteenth-century attitudes,²⁷⁵ essentially a reprise of Article 38's maligned reference to 'civilized states',²⁷⁶ remains the most serious obstacle to liberal theory's widespread acceptance among traditional international lawyers.²⁷⁷ But, as those critical and post-colonial scholars who have made these arguments most eloquently also point out, the sincerity and success of traditional international law's universalistic project is, especially in today's unipolar world, open to question. Accordingly, this essay emphasizes a somewhat different point: namely, that liberal theory's flawed descriptions and prescriptions provide us with few convincing reasons to impose a new 'iron curtain'²⁷⁸ between liberal and non-liberal (and less directly between North and South). Whether or not traditional international law has successfully embraced non-Western traditions and needs, there is a significant difference between its universalist aspirations and an attempt to brand certain states as 'illegitimate' because outside the 'zone of law'.²⁷⁹ Some of the work propounded under the liberal label would exclude where traditional international law would attempt to persuade. Worse still, the liberals' 'badge of alienage',²⁸⁰ once imposed, tends to put the target beyond reach or leaves the question to be resolved

²⁷⁵ Most international lawyers see modern international law as the culmination of a struggle to establish a set of doctrines and sources as applicable to all states, regardless of their specific cultures, belief systems and political organizations. See, e.g., Koh, *supra* note 57, at 2650 (arguing that liberal theory would deny the universalism of international law and would effectively condone the 'confinement of nonliberal states to a realist world of power politics'); Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law', 40 *Harvard International Law Journal* (1999) 1, at 77–78 (nineteenth-century international law 'posits an essentialist dichotomy between the non-European and the European; it characterizes relations between these entities to be inherently antagonistic; it establishes a hierarchy between these entities, suggesting that one is advanced, just, and authoritative while the other is backward and barbaric; it asserts the only history that may be written of the backward is in terms of its progress towards the advanced; it silences the backward and denies it any subjectivity or autonomy; it assumes and promotes the centrality of the civilized and legitimizes the conquest and dispossession of the backward; and it contemplates no other approaches to solve the problems of society than those that the civilized have formulated'). Anghie notes the similarities between these attitudes and elements in Samuel Huntington's 'clash of civilizations', Francis Fukuyama's 'end of history', and Michael Doyle's 'liberal peace'. *Ibid.* But see Kennedy, *supra* note 62, at 98–101 and 123 (identifying commonalities between neo-liberals and traditional international lawyers' 'progress narratives away from positivism, formalism, and a focus on states'); and Simpson (in the next issue of this journal) (presenting an entirely different, revisionist view of the history of the universalism/particularism debates in international law).

²⁷⁶ See, e.g., Kingsbury, 'Sovereignty and Inequality', in Andrew Hurrell and Ngaire Woods (eds), *Inequality, Globalization, and World Politics* (1999) 66, at 90; Orford, 'Embodying Internationalism: The Making of International Lawyers', 19 *Australian Yearbook of International Law* (1998) 120–122. Orford's work dissects the 'sense of self' of those engaged in this 'civilising mission', namely, those who celebrate monetary and other forms of interventionism by the West and 'make globalization palatable'. *Ibid.*, at 20–32. She speculates that such international lawyers respond as well to the West's post-Cold War needs for new enemies. *Ibid.*, at 28–31.

²⁷⁷ But some appear to welcome the return of the 'civilized states' standard. See, e.g., Fidler, 'A Kinder, Gentler System of Capitulations? International Law, Structural Adjustment Policies, and the Standard of Liberal, Globalized Civilization', 35 *Texas International Law Journal* (2000) 387.

²⁷⁸ Kennedy, *supra* note 62, at 123.

²⁷⁹ See, especially, Burley, *supra* note 7.

²⁸⁰ See *supra* note 7.

outside the constraints of law. This kind of liberal theory shrinks, rather than expands, the domain of law. The inadequacies of liberal theory's descriptions and prescriptions discussed here counsel against this. The liberals have not yet made the case for abandoning the traditional presumption that, *at least in law*, states should not be judged by the colour of their politics.

Slaughter's most recent scholarship, to the extent that it purports to focus on the operation of transnational networks within all states, may be going in a different direction and highlights the many positive attributes of liberal theory.²⁸¹ This work brings to light developments in norm-making that have been ignored, demonstrates anew law's 'relative normativity',²⁸² and presents new reasons for dissatisfaction with the unduly confining traditional sources of international law listed in Article 38 of the ICJ's Statute. Liberals convincingly show those studying compliance questions that they cannot ignore, *as one factor among many to be considered*, the relevance of domestic political structures.²⁸³ Slaughter rightly argues that internal political structures relate to the enforcement of international law and that strategies of 'embedded internationalism' that build on these structures hold the greatest potential for regulatory effectiveness.²⁸⁴

As a model applicable to all states that seeks to *complement* traditional sources of international law and institutions with insights from the less visible world of *all types of* transnational networks (including NGOs, cultural networks, and multinational corporations and not just the transgovernmental networks found among some liberal states), liberal theory may provide even greater interdisciplinary insights, showing how preferences within and outside of all kinds of states shape what governments (and their component parts) do.²⁸⁵ At a time when many are trying to 'democratize'

²⁸¹ But the contradictions between liberal theory's 'Western' leanings and its universalistic aspirations continue to appear in Slaughter's most recent work. Thus, while Slaughter proposes turning to transnational networks in order to sidestep 'strategies that require a core "liberal democratic order" that must be enlarged' (see Slaughter, 'Government Networks', *supra* note 3, at 227), her argument that these networks require quasi-autonomous governmental institutions found only within Western liberal democracies betrays the claim that liberal theory does not have a Western provenance. Cf. *ibid.*, at 228. See also *ibid.*, at 235 ('The "first", "second", and "third" worlds have given way to liberal democracies versus everyone else; transgovernmentalism looks beyond such labels to the nature and quality of specific government institutions. Expanding government networks can thus help expand the liberal democratic order, albeit slowly and undramatically').

²⁸² Cf. Weil, 'Towards Relative Normativity in International Law?', 77 *AJIL* (1983) 413.

²⁸³ Interestingly, Slaughter's most recent work appears to be backing away from earlier claims that liberal states are more apt to comply with international norms. See Slaughter, *supra* note 2, at 249 (noting but not elaborating on the 'paradox' that 'it is precisely those states with the strongest domestic legal systems and rights traditions that are likely most strongly to resist strong enforcement mechanisms').

²⁸⁴ See, e.g., Slaughter, *supra* note 2, at 246–248. But this insight should not be attributed solely to liberal theorists. See, e.g., Benvenisti, 'Domestic Politics', *supra* note 87 (applying Putnam's two-level games, public choice and collective action approaches to his concept of governments as 'agents of domestic politics').

²⁸⁵ Cf. Slaughter, 'Rationalizing Politics: The Emerging Synthesis of International, American, and Comparative Politics', 52 *International Organization* (1998) 759 (urging relaxation of basic international relations tenets — such as the centrality of unitary states — but, unlike Moravcsik and Slaughter, emphasizing the role of institutions as well as preferences).

international law-making processes by making them more transparent to non-governmental organizations and other non-state interests, an approach premised on the significance of actors apart from unitary states has much to contribute.²⁸⁶ An interest-group/preference-seeking model of international relations could help explain the difficulties states such as the United States have with respect to assuming certain international obligations or could help explain the *absence* of vertically enforced compliance mechanisms within treaties concluded among liberal states. Alternatively, it could show how internal political constraints may help stabilize other states' long-term compliance with international obligations (e.g. Switzerland and the WTO). It could also help explain the dynamics of certain international regimes, such as that of the International Labour Organization — which relies on tripartite forms of membership (governments, employer and employee representatives) that correspond to some domestic constituencies — as compared to, for example, the WTO, which arguably lacks some of these internal political connections.²⁸⁷ Applied to a variety of grassroots groups, individuals and social movements that serve as agents of institutional transformation even when operating within 'non-liberal' regimes, liberal theory could serve as a useful corrective to top-down functionalist accounts of international institutions that now ignore the contribution of, for example, Third World social movements to the evolution of the Bretton Woods institutions.²⁸⁸ Liberal theory liberally applied could suggest reforms within universal institutions (as to enhance their 'democratic accountability') as well as within established democracies (as by suggesting ways to bypass constraints such states face with respect to entering into certain international regimes).²⁸⁹

But those seeking to transpose Moravcsik's critique of existing international relations theories to law need to clarify their own stance towards both realist conceptions of power and the normative power of ideas and institutions. Moravcsik, anxious to establish the 'analytical priority' of liberal theory over realist, institutionalist and constructivist claims, spends little time exploring the intersection with

²⁸⁶ See, e.g., Maxwell A. Cameron *et al.* (eds), *To Walk Without Fear: The Global Movement to Ban Landmines* (1998); Keck and Sikkink, *supra* note 224. But see Spiro, *supra* note 146, at 583 (suggesting that liberal theory remains too state-centric to the extent that it still relies on preference determinations within states).

²⁸⁷ Cf. Keohane and Nye, *supra* note 97 (noting that what is missing from institutions like the WTO, dominated by 'small networks of professionals', are connections with domestic politics). But few would maintain, consistent with the apparent implications of liberal theory, that the ILO is, for these reasons, a more effective institution than is the WTO.

²⁸⁸ For one attempt to identify these contributions, see Rejagopal, 'From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions', 41 *Harvard International Law Journal* (2000) 529.

²⁸⁹ Cf. remarks by Dharmaraj at the Friedman Conference, Columbia Law School, 3 March 2000 (discussing local municipal attempts to implement CEDAW within the United States, bypassing the federal government's failure to ratify that Convention).

these rival approaches.²⁹⁰ But if, as liberals maintain, the role of the state continues to be of principal importance to effective international regulation, we need to know whether, for example, considerations of relative power between states that act, for all practical purposes as units primarily through their foreign offices, still matter to liberal lawyers, and, if so, when. Slaughter maintains that we need to ‘reframe every international issue’ away from ‘top-down’ views of state-to-state interactions towards ‘bottom-up’ views that do not separate international from domestic spheres, that examine the multiplicity of internal state actors, and that look at political regimes and not indistinguishable ‘nations’.²⁹¹ But surely some issues, including both treaties and transnational networks and legal relations among liberal and non-liberal, can still usefully be analyzed in terms of the relations of interacting unitary states reacting to the realities of relative power?²⁹² Liberal theory needs to recognize, at least as much as its popularizer Thomas Friedman has, the role of power and particularly of the United States (and the ‘Electronic Herd’) in the legal developments that it describes, as well as the potential consequences of such domination.²⁹³ How do liberals, who now restrict their gaze to how elements of liberal domestic society shape their government’s preferences to effectuate compliance with law, take into account the fact that ‘politics has not been completely displaced by markets’?²⁹⁴

In its haste to focus on non-opaque billiard balls, liberal theory appears to lose sight

²⁹⁰ On the one hand, Moravcsik writes that ‘liberal [international relations] theory elaborates the insight that state–society relations — the relationship of states to the domestic *and transnational* social context in which they are embedded — have a fundamental impact on state behavior in world politics’. Moravcsik, *supra* note 1, at 513 (emphasis added). Nonetheless, he affirms that ‘liberal variables are more fundamental than constructivist ones, because they define the conditions under which high rates of communication and transaction alter state behavior’ and writes that ‘domestic liberal factors may explain both peace and transactions, rendering the correlation between international communication and peace not just secondary, but spurious’. *Ibid.*, at 540. He also suggests that ideas and communication matter only when these are congruent with existing domestic values and institutions. *Ibid.* See also Moravcsik, ‘The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe’, 54 *International Organization* (2000) 217, at 248 (‘what seems at first to be a conversion to moral altruism is in fact an instrumental calculation of how best to lock in democratic governance against future opponents’).

²⁹¹ Slaughter, *supra* note 2, at 241.

²⁹² Cf. Schachter, ‘The Nature and Process of Legal Development in International Society’, in R.St.J. McDonald and D.M. Johnston (eds), *The Structure and Process of International Law* (1983) 745, at 755 (‘A conception of legal development that ignores the realities of power is futile. The ability of states to impose their will on other states is a pervasive fact of life. It profoundly affects the creation of law and its application. We must recognize it not merely as a contingent “accident” of history but as an aspect of the structure of international society, deeply embedded in the system of states. We need to see it, both as a limit on law and as a basis for the efficacy of law’).

²⁹³ See, e.g., Friedman, *supra* note 49, at 464 (candidly recognizing that the ‘hidden hand of the market will never work without a hidden fist’ and acknowledging that McDonald’s ‘cannot flourish without McDonnell Douglas’); Quigley, ‘The UN Security Council: Promethan Protector or Helpless Hostage?’, 35 *Texas International Law Journal* (2000) 129 (reflecting on the effects of the United States’ dominance within the Council).

²⁹⁴ Cf. Kahn, *supra* note 99, at 9.

of the fact that for both hard and soft forms of law-making states may at times continue to operate as unitary units. Slaughter's application of liberal theory also tends to ignore the possibility that considerations of relative power (involving factors as diverse as the presence of nuclear arsenals or the impact of Friedman's 'Electronic Herd') impact on whether treaties are concluded or breached, transnational networks are established, regimes deepen, or disputes are settled (and, if so, in what forum). If lesser developed countries sign BITs with the United States which, as some assert, 'hurt them', this must surely reflect, at some level, the realities of power, including the power of the United States Government to apply pressure, the power of US multinationals to deny capital, or the power of international financial institutions to deny international creditworthiness or other resources.²⁹⁵ If, on the other hand, the European Union continues to defy WTO panel rulings on bananas, this too seems at least partly due to perceptions of relative power that need to be assessed at *both* the inter-state and the 'disaggregated' state levels.²⁹⁶ A theory that attempts to describe inter-state relations solely as the result of the rational choices made by domestic actors primarily within liberal states wins the war against realists at the expense of considerable descriptive reach and accuracy.

An insistence on banishing realist perspectives also impoverishes liberals' legal prescriptions. The activist who wants to deepen her state's enforcement of women's rights would still benefit from both 'top-down' and 'bottom-up' recipes for action: both mechanisms for international reporting obligations (to shame state officials into compliance) as in a ratified treaty as well as domestic enforcement efforts, by courts and others, may be desirable. Those striving to secure effective dispute settlement procedures within a treaty cannot afford to ignore the transnational networks that may be operating behind the scenes but they will also need to strategize in terms of the likely state-to-state interactions within those negotiations — where it is still likely that only states will have official votes on a one state one vote basis and where the foreign offices of such states, charged with conducting 'foreign policy', will still be responsible for casting them. And some issues are simply not susceptible to treatment in dichotomous 'top-down' or 'bottom-up' terms. As Benvenisti reminds us, international negotiations to resolve common pool resource issues, such as the use of the Danube river, may both reflect and influence domestic and regional coalitions of interests.²⁹⁷

As is suggested by, for example, Slaughter's recommendations for rendering transnational networks more accountable,²⁹⁸ her version of liberal theory appears to assume that compliance may be enhanced through the normative force of law, the discursive power of rule-making processes, and its institutions, at both the international and national level, but she does not tell us how or why. What exactly is the

²⁹⁵ See, e.g., Guzman, 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties', 38 *Virginia Journal of International Law* (1998) 639.

²⁹⁶ Cf. Simmons, *supra* note 71, at 348–357 (noting the impact of regional 'peer pressure' in accepting and complying with IMF obligations).

²⁹⁷ Cf. Benvenisti, 'Domestic Politics', *supra* note 87.

²⁹⁸ See Slaughter, *supra* note 139.

relationship between Slaughter's liberal theory and normative approaches to compliance?²⁹⁹ Does liberal theory's indifference to ideational factors³⁰⁰ mean to deny that in some instances the legitimacy of an institution (its pluralist membership, for example) or its procedures (such as a circumspect approach to sensitive issues by an international tribunal) or the substance of a rule (such as its relationship to notions of fairness or morality) matter to compliance or to deepening forms of enforcement?³⁰¹ If not, how does an instrumentalist account grounded in rational choice theory fully capture how these other factors have an impact on the making, evolution and enforcement of norms?³⁰² The need to address this set of issues relates as well to Slaughter's multifaceted conception of a 'liberal' state. A theory that blends factors as diverse as representative government, respect for the 'rule of law', constitutional protections for human rights, and respect for the free market with multifarious causal theories of how states (and elements within them) behave and how the 'liberal peace' emerges does not tell us whether all or only some of these factors are relevant to compliance with international norms and may mislead us as to available legal options.

But, even if Slaughter were to clarify liberal theory's relationship to rival accounts of international behaviour, she may still need to temper her ambition to provide an overarching single 'blueprint' for dealing with all legal problems and all kinds of states.³⁰³ As Part 2 above indicates, dichotomous descriptions of the respective worlds of 'traditional' versus 'transgovernmental' forms of law-making oversimplify complex realities. The suggestion that a single blueprint can be superimposed on all forms of international norm-making, however amenable to the quasi-scientific aspirations of political science, may not be attainable and, particularly to the extent it obscures questions of power, can be easily converted into a weapon to 'civilize the other'. As argued in Part 3 above, Slaughter's prescriptions fail to take into account the number of models for international law-making now being used, with mixed success, as well as the constraints on both managerial and liberal models of law-making for liberal and not-so-liberal states. As the examples cited there suggest, a truly *liberal* (in the dictionary sense) account of how treaties evolve may lead to normative conclusions very different from those suggested by Slaughter. Vertical enforcement (as in BITs) may evolve and be all the more necessary precisely in cases where at least one of the

²⁹⁹ Cf. Simmons, *supra* note 108, at 85–88. See also Simmons, *supra* note 71, at 324–325 and 327 (arguing that governments use law as a signalling device directed at private market actors as well as other governments and that governments comply with law to preserve their reputation).

³⁰⁰ See *supra* note 290 and the accompanying text.

³⁰¹ Cf. Simmons, *supra* note 71, at 357–362 (noting evidence that the making of a legal commitment has an independent impact on states' behaviour).

³⁰² Cf. Goldsmith, 'Sovereignty, International Relations Theory, and International Law', 52 *Stanford Law Review* (2000) 959, at 977 (discussing comparable failings in Krasner's work); and Simmons, *supra* note 108, at 87 (contending that the rationalist literature only acknowledges that institutions can narrow the range of equilibrium outcomes).

³⁰³ See, e.g., Slaughter, 'The Real New World Order', *supra* note 3, at 197; and Slaughter, *supra* note 2, at 240–242.

parties is 'non-liberal'; deep forms of inter-state cooperation (e.g. the MAI) may fail precisely because the prospective parties are 'liberal'. And, as Part 4 above suggests, the law of unintended consequences seems to apply, perforce, to liberal recipes for perpetual peace. But a final reason to resist Slaughter's invitation to international lawyers to up-end our entire perspective and embrace the liberal 'causal paradigm'³⁰⁴ emerges from law's normative and expressive functions. As Slaughter appears increasingly ready to recognize,³⁰⁵ *international* law at a fundamental level needs to continue to insist that all states be treated as equal — whatever liberals say. Liberal theory tells us nothing about why this is so.

³⁰⁴ See Slaughter, *supra* note 2, at 3 and 20.

³⁰⁵ *Ibid.*, at 20.