3

Competing Conceptions of the International Rule of Law

This concluding section of Part I looks through the lens of American foreign policy ideology to define the core elements of competing conceptions of IL. To make this possible, the chapter begins with an institutional definition of the 'international rule of law' drawn from classic tripartite formulations in Anglo-American jurisprudence. Translated to the global level, three questions must be answered to constitute an analytically useful meaning: how to develop non-arbitrary global governance; how to define equality under IL; and how to determine the integrity of international judicial power. A set of coherent answers to each of these questions will constitute a distinct ideologically informed meaning of the international rule of law.

The development of a working definition moves beyond any attempt to find a universal and fixed meaning of *the* international rule of law by instead identifying various 'received' conceptions of the rule of law that exist in the minds of identified legal policymakers. The first of these ideal type conceptions is the 'legalism' evident in the scholarship and practice of states, NGOs and individuals who have challenged American IL policy. The elements of this conception are that the international rule of law requires formalised development of global governance; a commitment to the sovereign equality of states; and separation of international judicial powers between state subjects of IL and international legal institutions. Opposition to US policy has converged sufficiently around legalist principles for this to constitute a meaningful ideal type, without denying that each state may hold its own idiosyncratic conception of law.

Turning to American legal policymakers, the constitutive elements of four rule of law conceptions are identified according to the underlying dimensions and ideal types of general foreign policy ideology. *Liberal internationalism* is centred on America's global mission to promote the liberty of natural persons through IL. The principles of this conception are: the transnational development of IL; the promotion of liberal over sovereign equality; and democratic checks and balances on international judicial

power. *Illiberal internationalism* is focused on preserving national security by maintaining the capacity to project global power through law. This translates into principles of: pragmatic development of IL; maintaining hegemonic privilege; and consent as the basis for ordering international judicial powers. For *liberal nationalism* the core of the international rule of law is guarding liberal protections afforded by American constitutional government against external corruption. Resulting rule of law principles are: the protective development of IL as a shield; upholding the inviolability of national sovereignty; and vertical separation between international and municipal judicial powers. Finally, *illiberal nationalism* perceives IL as a threat to America's national security and distinctive cultural identity. This translates into principles of: permissively developing IL to maximise US autonomy; relativity of state sovereignty; and upholding the supremacy of municipal over international judicial powers. The meaning of 'coherence' in American IL policy becomes that a legal policymaker's stance on any one of the three international rule of law elements is a reliable indicator of positions taken on remaining elements.

The Indeterminacy of the International Rule of Law

Ambiguity in the meaning of American policymakers' commitment to 'the international rule of law' is symptomatic of a longstanding but inconclusive wider debate about the meaning of the concept.[1] References are ubiquitous by international legal scholars and practitioners both supportive and dismissive of its analytical worth, reflecting the centrality of the ideal to the Western legal tradition. The UN Secretary General has emphasised that the '"rule of law" is a concept at the very heart of the Organization's mission'.[2] This was followed by states' reaffirmation at the 2005 UN World Summit of their 'universal adherence to and implementation of the rule of law at both the national and international levels'[3] and in 2012 of their 'commitment to the rule of law and its fundamental importance for political dialogue and cooperation among all States'.[4]

[1] Heike Krieger & Georg Nolte, 'The International Rule of Law: Rise or Decline? Points of Departure' (October 2016) No. 1 *KFG Working Paper Series*, p. 9.
[2] UNSC, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General,* S/2004/616 (23 August 2004), p. 4.
[3] UNGA, A/RES/60/1, Resolution Adopted by the General Assembly on 16 September 2005 (24 October 2005), par. [134].
[4] UNGA, A/67/L.1, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels (19 September 2012), p. 1.

This apparent consensus dissolves, however, when attention shifts to specifying the substantive meaning of the aspiration in the design and development of IL. Even in relation to municipal law, Joseph Raz warned that 'promiscuous use' threatened to reduce the concept to a procrustean 'slogan' justifying almost any exercise of government power.[5] Judith Shklar characterised the contemporary concept as

> meaningless thanks to ideological abuse and general over-use. It may well have become just another one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians. No intellectual effort need therefore be wasted on this bit of ruling-class chatter.[6]

The force of criticism aimed at the municipal rule of law only multiplies when aimed at any notion of the *international* rule of law, including scepticism about whether and how the concept applies to IL at all.[7] Simon Chesterman is surely correct that widespread support for the concept in global institutions owes much to the silence on precise meaning.[8]

John Murphy's prominent account in *The United States and the Rule of Law in International Affairs* declares that, although he is prepared to 'join the nearly universal support for the rule of law as an ideal', he does 'not intend to join the debate over its precise meaning'.[9] It is a telling choice that a work seeking to evaluate American adherence to the international rule of law avoids staking out a definition of what that would actually mean.[10] Murphy's elusion corroborates Brian Tamanaha's observation that, where the concept is raised, 'everyone is for it, but [all] have contrasting convictions about what it is'.[11] Goldsmith and Posner point out, in responding to a review of *The Limits of International Law*,[12] that

[5] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 1979), pp. 210–11.

[6] Judith N. Shklar, 'Political Theory and the Rule of Law', in Stanley Hoffmann (ed.), *Political Thought and Political Thinkers* (University of Chicago Press, 1998), p. 21.

[7] James Crawford, 'International Law and the Rule of Law' (2003) 24 *Adelaide Law Review* 3, p. 5.

[8] Simon Chesterman, 'An International Rule of Law?' (2008) 56 *American Journal of Comparative Law* 331, p. 332.

[9] John F. Murphy, *The United States and the Rule of Law in International Affairs* (Cambridge University Press, 2004), p. 1.

[10] See, for example, the assertion in relation to the 2003 Iraq War that 'the United States closely followed the rule of law, even though it was ultimately unsuccessful in this endeavour': ibid., p. 353.

[11] Brian Z. Tamanaha, *On the Rule of Law* (Cambridge University Press, 2004), p.3.

[12] Jack Goldsmith & Eric A. Posner, *The Limits of International Law* (Oxford University Press, 2005).

exhortations to promote the rule of law remain incoherent in the absence of a clear definition:

> [W]hat, then, is the international rule of law? Is it the idea that international law should apply to states generally and impartially? Regardless of their relative power, or domestic form of governance? Are states supposed to engage in principled deliberation in designing international institutions? Does this mean that relative power and self-interest should be off the table in international negotiations? How, in a decentralized world of necessarily quite different nation-states . . . are we supposed to establish this international rule of law?[13]

Goldsmith and Posner conclude: '*Limits* does not address the ideal of the international rule of law . . . because the ideal is inadequately defined – in . . . [the book review in question] and more generally.'[14] And yet, despite this criticism, the concept remains fundamental, with even Goldsmith acknowledging that the frequent invocation of 'rule-of-law rhetoric' is 'not empty and is not irrelevant to international law and politics. It often genuinely reflects the values and commitments of the nations uttering it.'[15]

A Working Definition of the International Rule of Law

Despite imprecision and overuse of the term, there remains great value in the 'rule of law' as more than a mere 'synonym for "law"'.[16] At the most elementary level, the concept encompasses the principle that arbitrary self-judging should be substituted with a 'pre-agreed, principled procedure for decision-making'.[17] However, where the concept is applied to the institutional design and development of an actual legal system, some justification is required for a necessarily subjective definition of core elements. This book accordingly looks to British Jurist A. V. Dicey, as the earliest and most frequently cited in Anglo-American jurisprudence, without denying the merit of

[13] Jack Goldsmith & Eric A. Posner, 'The New International Law Scholarship' (2006) 34 *Georgia Journal of International and Comparative Law* 463, p. 480.
[14] Ibid., p. 480.
[15] Jack Goldsmith, 'The Self-Defeating International Criminal Court' (2003) *The University of Chicago Law Review* 89, p. 104.
[16] Terry Nardin, 'Theorising the International Rule of Law' (2008) 34 *Review of International Studies* 385, p. 397.
[17] Michel Cosnard, 'Sovereign Equality: "The *Wimbledon* Sails On"', in Michael Byers and Georg Nolte (eds.), *United States Hegemony and the Foundations of International Law* (Cambridge University Press, 2003), p. 146.

classic municipal formulations.[18] Dicey emphasised: 'the supremacy of law' over arbitrary power as a defining element of the English and American constitutions;[19] 'equality before the law' for rulers and the ruled alike; and the determination of rights through judicial power.[20] This has formed the starting point for most major analyses of the concept, especially in an Anglo-American context, and therefore with well-documented strengths and weaknesses. More particularly, modern theorists including Simon Chesterman,[21] Stéphane Beaulac[22] and Rosalyn Higgins[23] have externalised Dicey's three municipal elements by analogy to the global level. Beaulac adopts Dicey's formulation on the basis that it 'is well known and largely accepted; it has also been analysed and criticised from a variety of angles, thus adding to [its] credibility'.[24] In Chesterman's report *The UN Security Council and the Rule of Law*, the common understanding is identified as the 'application of these rule of law principles to relations between States' and other legal subjects.[25]

Owing to the gap between municipal and global conditions, Chesterman characterises each of his principles and the international rule of law itself as more of a 'political ideal' than a legal reality, with closer adherence to ideals remaining a means rather than an end.[26] Higgins and Beaulac concur that evidence of the approximation of each element demonstrates, at most, an emergent international rule of law.[27]

[18] See, for example, Joseph Raz, *The Authority of Law*, pp. 214–18; Lon L. Fuller, 'The Morality of Law', in Dennis Lloyd, Baron of Hampstead & M.D.A. Freeman (eds.), *Lloyd's Introduction to Jurisprudence* (Stevens, 1985).

[19] Citing de Tocqueville: Albert V. Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (Macmillan & Co., 1885), pp. 172–6.

[20] Ibid., pp. 180–4.

[21] Simon Chesterman, *The UN Security Council and the Rule of Law* (Federal Ministry for European and International Affairs, 2008).

[22] Stéphane Beaulac, 'The Rule of Law in International Law Today', in G. Palombella & N. Walker (eds.), *Relocating the Rule of Law* (Hart Publishing, 2009).

[23] Rosalyn Higgins, 'Speech by H.E. Judge Rosalyn Higgins, President of The International Court of Justice, at the United Nations University on "The ICJ And The Rule of Law"', 11 April 2007, http://archive.unu.edu/events/files/2007/20070411_Higgins_speech.pdf.

[24] Beaulac, 'The Rule of Law in International Law Today', p. 198.

[25] Chesterman, 'An International Rule of Law?', pp. 355–6.

[26] Ibid., pp. 360–1.

[27] Rosalyn Higgins, 'The ICJ, the United Nations System, and the Rule of Law', London School of Economics and Political Science, 13 November 2006, www.lse.ac.uk/collections/LSEPublicLecturesAndEvents/pdf/20061113_Higgins.pdf, p. 15; Beaulac, 'The Rule of Law in International Law Today', pp. 220–1. Crawford similarly concludes that 'we have only enclaves of the rule of law in international affairs': Crawford, 'International Law and the Rule of Law', p. 12.

For Beaulac in particular, these principles apply only *mutatis mutandis* to the extent that IL diverges from municipal law. The key differences are that 'there is no one formal norm-creating authority on the international level; states (not individuals) remain the principal legal actors and there is no enforcement mechanism'.[28] Higgins concludes that, although 'the phrase "rule of law" is today very much in vogue in international relations', the 'domestic rule of law model does not easily transpose to international relations in the world we live in'.[29]

The tripartite definition nevertheless remains sufficient for the defined purpose of directly comparing commitment to rule of law ideals across competing IL polices. The definition that emerges is an institutional and 'functionalist' one, in the sense that it is concerned with 'how and why the rule of law is *used*—as distinct from the formal understanding of what it *means*'.[30] Here, Chesterman means that the term is articulated at the global level within a political context: 'as a tool with which to protect human rights, promote development, and sustain peace'.[31] This also responds to the warning of a former State Department legal adviser not to attribute a 'talismanic meaning to the phrase "rule of law"'.[32] Dicey's formulation can be usefully adopted to analyse legal policy in a specific institutional context without refuting well-known criticisms[33] or claiming to exhaustively capture the term's meaning. Coherent answers to three questions amount to a distinct conception of the international rule of law:

1 **Developing non-arbitrary global governance:** For Chesterman, the first element of the international rule of law is that there be 'a government of *laws*'.[34] Here, the concept of 'global governance' is more apt for describing the situation where 'functions normally associated with governance are performed in world politics without the institutions of government'.[35] This is a broader concept than government 'concerned with purposive acts, not tacit arrangements. It emphasizes what is

[28] Beaulac, 'The Rule of Law in International Law Today', p. 204.
[29] Higgins, 'The ICJ, the UN System, and the Rule of Law,' p. 6.
[30] Chesterman, 'An International Rule of Law?', pp. 333 & 359, original emphasis.
[31] Ibid., pp. 358–9.
[32] Michael J. Matheson, Interview with Author (19 October 2011).
[33] Crawford, 'International Law and the Rule of Law', p. 5.
[34] Chesterman, *The UNSC and the Rule of Law*, p. 4, original emphasis.
[35] James N. Rosenau, 'Governance, Order, and Change in World Politics', in James N. Rosenau & Ernst-Otto Czempiel (eds.), *Governance without Government: Order and Change in World Politics* (Cambridge University Press, 1992), p. 7.

done rather than the constitutional basis for doing it.'[36] Applying Chesterman's formula, this is the requirement of 'non-arbitrariness in the exercise of power' through increasing codification of law, greater uniformity in its rules and eliminating the distinction between 'legality' and self-judging standards of 'legitimacy'.[37] Beaulac similarly focuses on 'the existence of principled legal normativity on the international plane'.[38] This translates into the development of IL sufficient to ensure '*certainty*, *predictability*, and *stability*' while eliminating '*arbitrary power*'.[39] Finally, Higgins identifies the first principle of the international rule of law by analogy from 'an executive reflecting popular choice, taking non-arbitrary decisions applicable to all, for the most part judicially-reviewable for constitutionality'.[40] In these formulations, the common question is how to develop 'systems of rule' through IL that establish non-arbitrary global governance.[41]

2 **Defining equality under IL:** The second element of the international rule of law is described by Chesterman as '*equality* before the law'.[42] This entails a 'more general and consistent application of international law to States and other entities', with less regard to disparities in power.[43] Beaulac describes equality as a 'primordial value of the rule of law' recognised by all key theorists.[44] His variation is a question of 'how these norms are made and are applicable equally to all legal subjects'.[45] Finally, in Higgins' analysis, Dicey's second element requires that there be 'laws known to all, applied equally to all'.[46] The principle of 'equality' is far from clear-cut in practice, however, since a key meaning of equality is not merely identical treatment but 'treating like cases alike'.[47] Indeterminacy unavoidably intrudes when distinguishing between different cases, since external criteria are

[36] Lawrence S. Finkelstein, 'What Is Global Governance?' (1995) *Global Governance* 367, p. 369.
[37] Chesterman, *The UNSC and the Rule of Law*, p. 4.
[38] Beaulac, 'The Rule of Law in International Law Today', p. 204.
[39] Ibid., p. 206, original emphasis.
[40] See Higgins, 'The ICJ, the UN System, and the Rule of Law', p. 1.
[41] James N. Rosenau, 'Governance in the Twenty-First Century' (1995) 1 *Global Governance* 13, p. 13.
[42] Chesterman, *The UNSC and the Rule of Law*, p. 4, original emphasis.
[43] Chesterman, 'An International Rule of Law?', pp. 360–1.
[44] Beaulac, 'The Rule of Law in International Law Today', p. 210.
[45] Ibid., p. 204.
[46] See Higgins, 'The ICJ, the UN System, and the Rule of Law', p. 1.
[47] Herbert L.A. Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593, pp. 623–4.

required to measure what is 'alike' and what is 'unalike'.[48] As Beaulac concedes, equality 'cannot mean that all legal norms apply to every state in the same way; some of them may only apply to certain states because of their situations'. Thus, the principle 'entails similarly situated states being treated in the same way by international law, with no discriminatory treatment tolerated by the system'.[49] E. H. Carr's earlier formulation was that there be an 'absence of discrimination for reasons which are felt to be irrelevant'.[50] In applying this principle, 'equality' *simpliciter* is shown to be 'an empty vessel with no substantive moral content of its own. Without moral standards, equality remains meaningless, a formula that can have nothing to say about how we should act.'[51] Thus 'equality' as an element of the international rule of law is not a self-contained 'organising principle' for sovereign states,[52] but rather a question of the proper criteria for defining who is alike under IL and how to allocate correspondingly equal rights and duties.

3 **Determining the integrity of international judicial power:** The final element is described by Chesterman as 'the *supremacy* of the law', which 'distinguishes the rule of law from rule *by* law'.[53] The meaning of this principle in Dicey's and Chesterman's formulations is 'privileging judicial process'[54] sufficient to provide 'determinative answers to legal questions'.[55] This will be achieved through increasing acceptance of the jurisdiction of international courts and tribunals, and the deference to law by political institutions. Likewise, Beaulac looks to 'the way in which normativity is enforced through adjudication'.[56] The clear deficiencies of judicial power at the 'institutional level' present 'what is without doubt the most difficult set of formal values associated with the rule of law'.[57] Finally, Higgins notes that Dicey's third element

[48] Peter Westen, 'The Empty Idea of Equality' (1982) 95 *Harvard Law Review* 537, p. 540.
[49] Beaulac, 'The Rule of Law in International Law Today', p. 211.
[50] Edward Hallett Carr, *The Twenty Years' Crisis, 1919–1939: An Introduction to the Study of International Relations* (Macmillan & Co., 1939), p. 163.
[51] Peter Westen, 'The Empty Idea of Equality', p. 547. For a critical response see Steven J. Burton, 'Comment on "Empty Ideas": Logical Positivist Analyses of Equality and Rules' (1982) 91 *Yale Law Journal* 1136.
[52] Gerry J. Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge University Press, 2004), p. 41.
[53] Chesterman, *The UNSC and the Rule of Law*, p. 4, original emphasis.
[54] Chesterman, 'An International Rule of Law?', p. 336.
[55] Ibid., pp. 360–1.
[56] Beaulac, 'The Rule of Law in International Law Today', p. 204.
[57] Ibid., pp. 212 & 221.

requires 'independent courts to resolve legal disputes and to hold accountable violations of criminal law, themselves applying the governing legal rules in a consistent manner'.[58]

It is evident from these formulations that this third rule of law element requires significant modification when externalised to the international level. Limited institutionalisation of judicial power at the global level is not equivalent to the *absence* of these powers; rather, it is the case that states (and the United States in particular) underwrite the international legal system by directly exercising powers variously resembling 'executive', 'legislative' and 'judicial' functions wherever they are not already delegated to global institutions. The consequence is a weak separation of powers, since it is the legal subjects of the system who often determine when and how legal powers are exercised, by creating, interpreting and executing legal rules. The repercussion of power being so diffused is that all three 'legal' powers are exercised concurrently by each member state alongside a range of institutions, and in many cases absent an entity wielding supreme authority. The integrity of international judicial power requires a principle for determining what international judicial functions are properly reserved to states and what functions should be separated into international courts and tribunals.

Received Conceptions of the International Rule of Law

The central theme of this book is the role of foreign policy ideology in structuring the reception of IL by legal policymakers. The quest for a universal and fixed concept of 'international law as an objective, apolitical body of rules'[59] is thus explicitly set aside as chimerical. Rather, what may appear to be commitment by diverse actors to a unified ideal of the rule of law is instead commitment to divergent interpretations informed by ideological beliefs. Martti Koskenniemi presents the international rule of law as a site for political contestation, describing the ideal as a 'reformulation of the liberal impulse to escape politics'.[60] Thus, it is 'impossible to make substantive decisions within the law which would imply no political choice . . .: in the end, legitimising or

[58] See Higgins, 'The ICJ, the UN System, and the Rule of Law', p. 1.
[59] Shirley V. Scott, *International Law, US Power: The United States' Quest for Legal Security* (Cambridge University Press, 2012), p. 235.
[60] Martti Koskenniemi, *The Politics of International Law* (Hart Publishing, 2011), p. 37.

Table 3 *Competing conceptions of the international rule of law*

	Developing non-arbitrary global governance	Defining equality under international law	Determining international judicial power
Legalism	Formalised development	Sovereign equality	Separation of powers
Liberal internationalism	Transnational development	Liberal equality	Democratic checks and balances
Illiberal internationalism	Pragmatic development	Hegemonic privilege	Consent-based division of powers
Liberal nationalism	Protective development	Inviolable sovereignty	Vertical separation of powers
Illiberal nationalism	Permissive development	Relative sovereignty	Municipal supremacy

criticising state behaviour is not a matter of applying formally neutral rules but depends on what one regards as politically right, or just'.[61] Foreign policy ideology informs this choice by setting out the values and interests constituting law for an identified political community. Accordingly, the structure of the four ideal type American conceptions of IL, plus a concept of 'legalism', is crossed with the three core rule of law questions to produce a model of competing conceptions of the international rule of law (see Table 3).

Legalism

It would be contradictory to interpret American IL policy through divergent foreign policy ideologies and yet treat all other states as holding an undifferentiated conception of law. That is certainly not the case, with comparative IL scholarship revealing the extent to which legal policymakers in each state look through the lens of their own foreign policy ideologies.[62] The claim being made here is the narrower one that

[61] Ibid., p. 61.
[62] See Anthea Roberts, *Is International Law International?* (Oxford University Press, 2017), pp. 6–8.

opposition to US IL policy has converged around the beliefs of 'legalism', irrespective of culturally specific conceptions of the international rule of law.[63] Apart from evidence of legalism's dominance in the relevant scholarship,[64] and that certain states do indeed exhibit culturally entrenched commitments to variants of legalism,[65] there are clear incentives for America's global counterparts to receive law in forms that diminish advantages of preponderant power. Sustained advocacy for the 'international rule of law' has been attributed in part to its perceived 'utility in challenging American exceptionalism, which threatens . . . the legitimacy of the international legal order based on the principle of the legal equality of all states'.[66] Koskenniemi identifies the power lying behind 'the juxtaposition between European constitutional formalism and the "imperial" challenge to international institutions by the United States'.[67] There are compelling reasons for treating legalism as an ideological ideal type structuring opposition to US IL policy.

The legalist approach is best defined by Judith Shklar as 'the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules'.[68] In the context of IL specifically, Tai-Heng Cheng defines it as the '*claim* to apply prescriptions, through a process of reasoning and logic, neutrally to facts in an international problem'.[69] The rhetorical attraction of contesting American international legal power in these terms lies in the claim to a 'depoliticised' conception of law:

> Law aims at justice, while politics looks only to expediency. The former is neutral and objective, the latter the uncontrolled child of competing interests and ideologies. Justice is thus not only the policy of legalism, it is treated as a policy superior to and unlike any other.[70]

[63] See José E. Alvarez, 'Contemporary International Law: An Empire of Law or the Law of Empire' (2008) 24 *American University International Law Review* 811, pp. 817–18.

[64] Leslie Vinjamuri & Jack Snyder, 'Advocacy and Scholarship in the Study of International War Crime Tribunals and Transitional Justice' (2004) 7 *Annual Review of Political Science* 345, pp. 346–8.

[65] Martin Gelter & Kristoffel Grechenig, 'The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism' (2008) 31 *Hastings International and Comparative Law Review* 295.

[66] Randall P. Peerenboom, 'Human Rights and Rule of Law: What's the Relationship?' (2004) 36 *Georgetown Journal of International Law* 809, pp. 935–9.

[67] Koskenniemi, *The Politics of International Law*, p. 73.

[68] Judith N. Shklar, *Legalism* (Harvard University Press, 1964), p. 1.

[69] Tai-Heng Cheng, *When International Law Works* (Oxford University Press, 2012), p. 83, original emphasis.

[70] Shklar, *Legalism*, p. 111.

In this view, 'the appeal of a global rule of law lies in the promise of protection against the pathologies of internal domestic politics'.[71] For Nardin, the international rule of law comes to mean 'no more than that states conduct their relations within a framework of non-instrumental law'.[72]

Leading accounts describing legalism at the municipal level remain relevant here owing to the power of a 'domestic analogy' in which '[c]ustom, usage, conventions, and treaties provide a complete system of law, analogous to municipal law'.[73] Legalist beliefs thus possess the features of 'a political ideology which comes into conflict with other policies' no less than do specifically American conceptions.[74] Such 'deliberate isolation of the legal system – the treatment of law as a neutral social entity – is itself a refined political ideology, the expression of a preference'.[75] Moreover, Shklar suggests that conceptions of international (as opposed to municipal) law are 'perhaps the most striking manifestation of legalistic ideology. Its ideological character is especially discernible because the principles of international law are not supported by effective institutions.'[76]

The 'legalism' appellation has more often been employed from a critical perspective to challenge those who oppose American legal policy. Posner defines legalism as 'the view that law and legal institutions can keep order and solve policy disputes. It manifests itself in powerful courts, a dominant class of lawyers, and reliance on legalistic procedures in policymaking bodies.'[77] In the externalised form of 'global legalism', the concept is defined pejoratively as 'an excessive faith in the efficacy of international law'.[78] Nevertheless, in the present work, adoption of the legalist rubric is for comparative purposes only and disavows any strong normative implications. It is merely 'intended to express social facts about a specialized mode of interaction in the process of decision-making in international problems, without engaging in unnecessary conceptual debates about whether or not this mode of interaction is

[71] Paul W. Kahn, 'American Exceptionalism, Popular Sovereignty, and the Rule of Law', in Michael Ignatieff (ed.), *American Exceptionalism and Human Rights* (Princeton University Press, 2005), pp. 198–9.
[72] Nardin, 'Theorising the International Rule of Law', p. 399.
[73] Shklar, *Legalism*, p. 136.
[74] Ibid., p. 3.
[75] Ibid., p. 34.
[76] Ibid., p. 129.
[77] Eric A. Posner, *The Perils of Global Legalism* (University of Chicago Press, 2009), p. 21.
[78] Ibid., p. xii.

actually "law"'.[79] This use in no way excludes the possibility of advocating the normative merits of legalist conceptions. Importantly, Shklar wrote not to defeat legalism but to harness its potential to advance liberal values.[80] Her primary objective remained 'to save legalism for liberal politics by showing central liberal ideas like the rule of law to be useful ideologies'.[81] Criticism was directed only at 'those of its traditional adherents who, in their determination to preserve law from politics, fail to recognize that they too have made a choice among political values'.[82]

It is instructive to compare how legalist conceptions of IL align with the governance and values dimensions structuring American IL policy. At the risk of stating the obvious, the legalist conception is internationalist, in the sense that it advocates forms of governance through global legal architecture. In particular, legalist conceptions envision domestic decisions with transnational implications, including about war and peace, being transferred to the international level. Along the values dimension, legalism draws upon the 'cosmopolitan ethos' embedded in modern IL, which mirrors the aspiration in the wider project of modernity for more than a normatively agnostic international order. Cosmopolitanism requires that the rule of law uphold 'non-instrumental' rules that treat persons as ends and not merely means for satisfying political objectives. The effect of seeking politically neutral normative foundations is to displace the controlling role of democratic accountability so central to American understandings of liberalism. Consistently with this idea, authors variously identify the norms underpinning IL with 'universal values'[83] and an 'international value system'.[84] Believing in the genuinely cosmopolitan foundations of global legal order has the same effect as faith in American exceptionalism, which is the tendency toward a 'messianic' IL policy.[85]

[79] Cheng, *When International Law Works*, pp. 80–1.
[80] Shklar, *Legalism*, p. 5.
[81] Samuel Moyn, 'Judith Shklar versus the International Criminal Court' (2013) 4 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 473, p. 475.
[82] Shklar, *Legalism*, p. 8.
[83] Pierre-Marie Dupuy, 'Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskenniemi' (2005) 16 *European Journal of International Law* 131.
[84] Erika de Wet, 'The International Constitutional Order' (2006) 55 *International and Comparative Law Quarterly* 51.
[85] Andrea Bianchi, 'Human Rights and the Magic of Jus Cogens' (2008) 19 *European Journal of International Law* 491, p. 495.

It is important to note that included among legalist advocates are prominent American individuals and organisations, which can and have vocally advocated a range of policies in legalist terms (especially within NGOs). The theorised IL policy typology does not encompass all policies capable of being internalised by American citizens, only those influential among American legal policymakers. George Kennan identified an attachment to 'moralistic-legalistic' beliefs as an affliction of American foreign policy itself.[86] However, attachment to legal rules and solutions as described by Kennan is largely encompassed by the liberal internationalist type and remains distinct from legalism as that term is used here.[87] The adoption of legalist beliefs by Americans other than legal policymakers would not in itself falsify the typology unless such positions were accepted by and structured American IL policy.

Formalised Development of International Law

The first element of the legalist international rule of law is that the primary and secondary rules of the international legal system should be progressively formalised as binding legal obligations. Attainment of the rule of law at the municipal level is not a static condition, but a process of progressively adapting and extending the law to achieve a complete legal system.[88] The rule of law in the common law world, for example, was advanced in 1689 when the English Bill of Rights removed the monarch's prerogative to suspend the operation of the law or its application to certain categories of people. International legal scholarship has likewise maintained a strong presumption against declaring a *non liquet* in which the law remains silent on rights and duties.[89] The 'Grotian tradition' of IL, for example, envisions the 'subjection of the totality of international relations to the rule of law'.[90] The rationale behind that sometimes 'unrealistic' presumption is 'to "tame" state sovereignty and to subject states to

[86] George F. Kennan, *American Diplomacy* (University of Chicago Press, 1984), pp. 101–2.
[87] Use of the term here can also be distinguished from Abebe and Posner's 'foreign affairs legalism' on the same basis: Daniel Abebe & Eric A. Posner, 'The Flaws of Foreign Affairs Legalism' (2010) 51 *Virginia Journal of International Law* 507.
[88] Helen Duffy, *The 'War on Terror' and the Framework of International Law* (Cambridge University Press, 2005), p. 9.
[89] Literally that the law 'is not clear': see Michael W. Reisman, 'International Non-Liquet: Recrudescence and Transformation' (1968) 3 *International Lawyer* 770, p.771.
[90] Hersch Lauterpacht, 'The Grotian Tradition in International Law' (1946) 23 *British Yearbook of International Law* 1, p. 19.

the rule of law'.[91] That principle is now recognised in the UN Charter and as the central purpose of the International Law Commission (ILC) in promoting 'the progressive development of international law and its codification'.[92]

For adherents of legalism, the case for global law displacing global politics relies on the advantages of 'formalism', which for Shklar is the idea of law as 'a self-contained system of norms that is "there," identifiable without reference to the content, aim, and development of the rules that compose it'.[93] Shklar saw Hans Kelsen's formalism as a creature of his own positivist jurisprudence, in which law was 'its own creation' progressively derived from his *Grundnorm*.[94] Hans Morgenthau described the positivist claim as being to a 'logically coherent system which virtually contains, and through a mere process of logical deduction will actually produce, all rules necessary for the decision of all possible cases'.[95] The claimed advantage of this jurisprudence is to establish legal rules 'without the ideological bias or the historical and cultural myopia' entailed in non-formal approaches.[96] For legalism, policy is legitimate because it complies with formalised sources of authority and not merely because it is congruent with policy objectives. Having rules that are progressively more comprehensive, internally consistent and clear becomes the necessary presumption for the central legalist claim that 'following rules impartially is a virtue'.[97]

Sovereign Equality

US IL policy has been most forcefully challenged by the principle that all states must accede to international rules and institutions according to equal rights and duties. The principle of equality before the law was described by Dicey as the 'universal subjugation of all classes, to one law'.[98] Legalism extends that norm to the rights and duties of states as IL's

[91] Prosper Weil, 'The Court Cannot Conclude Definitively . . . Non Liquet Revisited' (1998) 36 *Columbia Journal of Transnational Law* 109, p. 113.
[92] *Charter of the United Nations* (1945), Art. 13(1)(a); *Statute of the International Law Commission* (1947), Art. 1(1).
[93] Shklar, *Legalism*, p. 33.
[94] Ibid., p. 131, citing Hans Kelsen, *General Theory of Law and State* (Harvard University Press, 1945; reprinted Russell & Russell, 1961).
[95] Hans Joachim Morgenthau, 'Positivism, Functionalism, and International Law' (1940) 34 *American Journal of International Law* 260, p. 262.
[96] Shklar, *Legalism*, p. 33.
[97] Ibid., p. 113.
[98] Dicey, *Lectures Introductory to the Study of the Law of the Constitution*, p. 178.

primary subjects, irrespective of external influence or internal character. For Gerry Simpson, this has meant 'formal equality' according to 'the principle that in *judicial settings* states have equality in the vindication and "exercise of rights"'. This conception of sovereign equality constitutes a 'basic rule of law notion'.[99]

The very purpose of the international rule of law in the legalist approach is to minimise the significance of power disparities when determining rights and duties. The structure of the international system remains an 'association of independent and diverse political communities, each devoted to its own ends and its own conception of the good'.[100] Such an arrangement necessitates common constraints for respecting one another's autonomy, with 'sovereign equality' becoming the constitutional principle on which the international legal system is constructed.[101] 'Equality' in this sense is a legal fiction, but a necessary one to establish legal rights not dependent on the reality of inequality. To derive rights from actual distributions of power would result in a world with states at the periphery lacking legal personality and a 'corresponding gradation of rights'.[102] The rule of law in these terms protects the structure of the international order without reference to the idiosyncratic beliefs and cultural commitments of particular states.

In more robust incarnations, this legalist rule of law element extends beyond mere obligation to respect equal sovereignty and encompasses positive obligations to participate equally in multilateral treaties having near universal membership. A US claim to significant treaty reservations, or exemption entirely even from multilateral instruments such as the Paris Climate Agreement, 'seems now to require some justification if it deviates from the stance of the great majority of states'. In this sense 'freedom of contract plays an ever-decreasing role when it comes to law-like treaties'.[103]

Separation of Powers

Closely related to sovereign equality is the principle that the integrity of international judicial power is determined by its separation from

[99] Simpson, *Great Powers and Outlaw States*, p. 43, original emphasis.
[100] Terry Nardin, *Law, Morality, and the Relations of States* (Princeton University Press, 1983), p. 19.
[101] See *Charter of the UN*, Art. 2(1): 'The Organization is based on the principle of the sovereign equality of all its Members.'
[102] Nico Krisch, 'More Equal Than the Rest? Hierarchy, Equality and US Predominance in International Law', in Byers & Nolte, *United States Hegemony*, p. 147.
[103] Ibid., p. 151.

competing legal powers of global governance. No domestic system implementing the rule of law would vest executive control over judicial decisions, nor would it allow citizens to determine the legality of their own actions under the state's civil or criminal jurisdiction. Likewise, the supremacy of IL restricts states' discretion to determine the scope of their own global privileges and obligations. The domestic analogy influences legalism to 'read international law in the image of our domestic legalism: multilateral treaties as legislation, international courts as an independent judiciary, the Security Council as the police'.[104] States continue to exercise the key 'legislative' and 'executive' functions of global governance and therefore cannot also be the final arbiters in international judicial matters.

Shklar notes that legalism generally supports policies 'promoting the institutionalization of the administration of justice'. The objective of resolving 'as many social conflicts by judicial means as possible' provides the rationale for separating international legal powers and institutionalising judicial power in independent courts.[105] Crucial here is the legalist presumption that judges 'lie outside politics; they resolve cases impartially by appealing to the rules'.[106] At the international level, this translates into supremacy of institutionalised judicial power as the only form of legal power independent of national politics.[107] Article 20 of the ICJ Statute expresses the ideal that its judges must solemnly declare to exercise their powers 'impartially and conscientiously'. For Roslyn Higgins, as former ICJ president, this constitutes 'a proper separation of powers'.[108] Executive power in the international system is approximated in the UNSC and so, apart from its distortion of sovereign equality, its control cannot properly extend over an international court. The principle was reflected in the separate opinion of Judge Simma in *The Armed Activities Case*[109] in reference to the role of the ICJ as the UN's 'principal *judicial* organ'. It followed that the court had a duty 'to arrive at decisions based on law and nothing but law', reflecting the 'division of labour between the Court and the political organs of the United Nations'.[110]

[104] Martti Koskenniemi, 'International Law in Europe: Between Tradition and Renewal' (2005) 16 *European Journal of International Law* 113, p. 117.
[105] Shklar, *Legalism*, p. 117.
[106] Posner, *The Perils of Global Legalism*, p. 19.
[107] Ibid., p. 25.
[108] Higgins, 'The ICJ, the UN System, and the Rule of Law', p. 3.
[109] *Armed Activities on the Territory of the Congo (Democratic Republic of Congo* v. *Uganda)* (2005) *ICJ Rep* 168.
[110] Ibid., par. [3], original emphasis.

Liberal Internationalism

Of the four ideal American policy types, liberal internationalism is the most important for understanding the beliefs of American policymakers strongly committed to international legal order. The unparalleled commitment to developing IL has often led liberal internationalists to view alternative American conceptions as 'IL sceptics' or what Spiro memorably called 'new sovereigntists'.[111] Liberal internationalism identifies the international rule of law in externalisation of American constitutional government to establish a seamless system of law, with international and national legal systems reinforcing universal liberal values. Self-identified liberal internationalist Anne-Marie Slaughter defines the essence of the rule of law as 'ordered liberty'.[112] At the global level, however, that ideal involves a 'continual tension between the requirement under international law that we respect *nations*, meaning governments, and our own democratic value of respecting all *peoples*'.[113] Here, Slaughter invokes the belief that the reason for establishing the rule of law is identical across the municipal and international levels: to achieve 'a steady progression toward greater freedom of conscience, choice and country – first within America and then beyond our borders'.[114] This forms the foundational principle of a liberal internationalist conception of IL:

> At the most fundamental level, an image of the world as a projection of the United States means that international order, like domestic order, requires the rule of law. From this perspective multilateralism is nothing more than the internationalization of the liberal conception of the rule of law.[115]

General accounts of 'Wilsonianism', as an equivalent tradition of thought, have focused on democracy promotion as the 'first

[111] Peter J. Spiro, 'The New Sovereigntists: American Exceptionalism and Its False Prophets' (2000) *Foreign Affairs* 9. See also Jens David Ohlin, *The Assault on International Law* (Oxford University Press, 2014).

[112] Anne-Marie Slaughter, *The Idea That Is America: Keeping Faith with Our Values in a Dangerous World* (Basic Books, 2007), p. 36.

[113] Ibid., p. 190, original emphasis.

[114] Ibid., p. 36.

[115] Anne-Marie Burley, 'Regulating the World: Multilateralism, International Law, and the Projection of the New Deal Regulatory State', in John Gerard Ruggie (ed.), *Multilateralism Matters: The Theory and Praxis of an Institutional Form* (Columbia University Press, 1993), p. 144.

principle',[116] the 'most essential ingredient'[117] and the 'keystone'[118] of the tradition. Liberal internationalism identifies democracy as the conduit between the enjoyment of liberty by natural persons and an international system of law. In 1917, Elihu Root wrote: 'The world cannot be half democratic and half autocratic ... If it is democratic, international law honored and observed may well be expected as a natural development of the principles which make democratic self-government possible.'[119] Liberal internationalism is distinctive among the American ideal types for valuing democracy as constitutive of the international rule of law itself: 'the global rule of law depends on the domestic rule of law'.[120] Believing that liberal states adhere more consistently to the rule of law at both the national and the international level thus presents a utopian vision in which a world of liberal states progressively enforces mutual respect for IL.[121]

The vision of taming global politics through law is what forms the common ground with the legalist conception of IL, with both promoting a 'Kantian vision of a law-governed international society'.[122] However, liberal internationalism diverges categorically in identifying the centrality of American power and values to the project. John Ikenberry advocates the establishment of 'American "rule"' through 'the provisioning of international rules and institutions and its willingness to operate within them'. In short: 'Liberal order building is America's distinctive contribution to world politics.'[123] In this way, IL and American constitutional government share the same firm foundation in hard-won political bargains.

[116] Walter R. Mead, *Special Providence: American Foreign Policy and How It Changed the World* (Routledge, 2002), p. 162.

[117] Tony Smith, 'Wilsonianism after Iraq', in G. John Ikenberry, Thomas J. Knock, Anne-Marie Slaughter & Tony Smith (eds.), *The Crisis of American Foreign Policy: Wilsonianism in the Twenty-First Century* (Princeton University Press, 2009), p. 58.

[118] Anne-Marie Slaughter, 'Wilsonianism in the Twenty-First Century', in G. John Ikenberry, Thomas J. Knock, Anne-Marie Slaughter & Tony Smith (eds.), *The Crisis of American Foreign Policy: Wilsonianism in the Twenty-First Century* (Princeton University Press, 2009), p. 97.

[119] Elihu Root, 'The Effect of Democracy on International Law' (1917) 11 *Proceedings of the Annual Meeting (American Society of International Law)* 2, pp. 166–7.

[120] Anne-Marie Slaughter, 'A Liberal Theory of International Law' (2000) 94 *Proceedings of the Annual Meeting (American Society of International Law)* 240, p. 246.

[121] This is a variant of the 'democratic peace theory': see Bruce Russett, Christopher Layne, David E. Spiro & Michael W. Doyle, 'The Democratic Peace' (1995) 19 *International Security* 164.

[122] Harold H. Koh, *The Trump Administration and International Law* (Oxford University Press, 2019), p. 3.

[123] G. John Ikenberry, 'Liberal Order Building', in Melvyn P. Leffler & Jeffrey W. Legro (eds.), *To Lead the World: American Strategy after the Bush Doctrine* (Oxford University Press, 2008), p. 86.

Transnational Development of Global Governance

Legalism and liberal internationalism are united by a commitment to closing gaps in the law. The very notion that effective legal regimes *can* and *should* be crafted to respond to global challenges is 'shaped by a liberal conception of the rule of law'.[124] What distinguishes liberal internationalism is the function of formalised legal authority in achieving that outcome. Whereas legalism seeks the codification of all internationally relevant rights at a global level, liberal internationalism values variants of 'transnational legal processes' by which international standards are equally integrated and enforced at the level of US municipal law. For Harold Koh, legal compliance is determined through a process whereby 'public and private actors, including nation states, . . . interact in a variety of fora to interpret, enforce, and ultimately internalize rules of international law'.[125] In this view, increasing establishment of non-arbitrary global governance is achieved through formal and informal processes by which 'domestic decision-making becomes "enmeshed" with international legal norms'.[126]

By virtue of transnational processes, it may even be preferable to limit development of supranational legal authority where legal obligations are sufficiently internalised to provide effective global governance. To this end, liberal internationalism welcomes the penetration of foreign and international legal decisions into American courts, even to the extent of interpreting the US Constitution in light of universal liberal standards.[127] A defining element of liberal internationalism distinguishing it from legalism, and every other American conception, becomes the value attached to aspirational support for IL short of formal accession to legal obligations – what one US legal policymaker has termed 'dexterous multilateralism'.[128] For legalism, this degrades IL by permitting deformalised obligations, while for each of the alternative American conceptions it falsely suggests legal constraints beyond what the United States is actually willing and able to accept.[129]

[124] Burley, 'Regulating the World', p. 145.
[125] Harold H. Koh, 'Jefferson Memorial Lecture: Transnational Legal Process after September 11th' (2004) 22 *Berkeley Journal of International Law* 337, p. 339.
[126] Harold H. Koh, 'Transnational Legal Process' (1996) 75 *Nebraska Law Review* 181, p. 204.
[127] See Peter J. Spiro, 'Treaties, International Law, and Constitutional Rights' (2003) 55 *Stanford Law Review* 1999, pp. 2021–5.
[128] Eric P. Schwartz, 'The United States and the International Criminal Court: The Case for Dexterous Multilateralism' (2003) 4 *Chicago Journal of International Law* 223.
[129] For criticism along these lines see Simon Lester, 'Should the United States Use Treaties to Make the World "More Like Us"?' (2013) 54 *Virginia Journal of International Law Digest* 1, p. 8.

Liberal Equality

The second rule of law principle is that the equal access of natural persons to universal liberal freedoms trumps the formal equality of states as juridical legal persons. For liberal internationalism, the purpose of IL is to uphold basic rights of 'citizens rather than states as subjects', which is 'the hallmark of a new and distinctively liberal conception of a world under law'.[130] To realise this principle, a distinction is drawn between the sovereignty of states who uphold liberal norms through democratic processes and those who do not. The principle of sovereign equality treats states as the legal persons of IL, and in so doing is 'at least one remove, and often at two removes' from actual individuals.[131] Accordingly, states should be treated equally to the extent that their municipal law protects the liberal freedoms of their own citizens, but compromise any claim to equal sovereign integrity should they fail to do so. In its most robust iterations, the commitment to liberal equality can translate into conceptions of IL as a 'progressive sword to extend those rights to others'.[132]

In cases of conflict between liberal and sovereign equality, exceptionalist beliefs reassure that the proven resilience of American constitutional democracy and its global role promoting these values are the stable foundations for realising true equality in the international legal order. The classic demonstration is the 1999 NATO-led Kosovo intervention, spearheaded by the Clinton administration absent UNSC authorisation. The action to prevent a 'humanitarian catastrophe' revealed a willingness to displace the right of Yugoslavia (as it then was) to equally enjoy territorial sovereignty to the right of its threatened ethnic Albanian population to enjoy equality in basic human rights.[133] In the *Princeton Project*, Slaughter and Ikenberry advocated the authority of a 'supermajority' of democratic states to override the positive obligations of the UNSC where it 'prevented free nations from keeping faith' with liberal principles.[134]

[130] Burley, 'Regulating the World', p. 146.

[131] Anne-Marie Slaughter & Jose E. Alvarez, 'A Liberal Theory of International Law' (2000) 94 *Proceedings of the Annual Meeting (American Society of International Law)* 240, p. 245.

[132] Harlan G. Cohen, 'The American Challenge to International Law: A Tentative Framework for Debate' (2003) 28 *Yale Journal of International Law* 551, p. 561.

[133] See Michael P. Scharf & Paul R. Williams, *Shaping Foreign Policy in Times of Crisis: The Role of International Law and the State Department Legal Adviser* (Cambridge University Press, 2010), pp. 166–7.

[134] Anne-Marie Slaughter & G. John Ikenberry, *Forging a World of Liberty under Law: U.S. National Security in the 21st Century* (Woodrow Wilson School of Public and International Affairs, 27 September 2006), p. 26.

Slaughter later became a strong advocate for a form of humanitarian intervention in the Syrian civil war, externalising ideas from Thomas Jefferson and the US Declaration of Independence to render sovereignty contingent on the liberal equality of Syrian citizens.[135] For Koh, refusal to read a humanitarian exception into IL is flawed for exhibiting an 'absolutist, formalist, textualist, originalist quality' that cannot be squared with beliefs that 'international law should serve human purposes'.[136] That argument can appear incoherent to competing ideological perspectives, which tend not to distinguish between legalism and liberal internationalism. Goldsmith finds Koh's position 'hard to square with his commitment to transnational legal process, which at its core is about taking international legal rules seriously and absorbing them into domestic legal culture'.[137] Yet it is the crucial nuance of liberal internationalism's 'rejection of legalism' that reveals the foundations of IL in liberal equality.[138]

Democratic Checks and Balances

The keystone role of democracy means that the integrity of IL is determined by the effective separation of powers at the municipal rather than at the international level. There is no mechanism in the international legal system itself to ensure that international courts determine rights and duties solely on a judicial basis. Liberty guaranteed under American constitutional government is achieved not merely through the good faith of its participants, but also by ensuring: 'Ambition must be made to counteract ambition.'[139] The primitive structure of the international legal system is, in contrast, incapable of sustaining the integrity of an effective institutional separation of executive, legislative and judicial powers of global governance.[140] Rather, the anchoring role of the domestic rule of

[135] Anne-Marie Slaughter, 'How the World Could – and Maybe Should – Intervene in Syria', *The Atlantic*, 23 January 2012, www.theatlantic.com/international/archive/2012/01/how-the-world-could-and-maybe-should-intervene-in-syria/251776/.

[136] Koh, *The Trump Administration and International Law*, pp. 129–30.

[137] Jack Goldsmith, '*The Trump Administration and International Law*. By Harold Hongju Koh. New York, New York: Oxford University Press, 2019. Pp. viii, 221. Index' (2019) 113 *American Journal of International Law* 408, p. 413.

[138] Richard A. Falk, 'Kosovo, World Order, and the Future of International Law' (1999) 93 *American Journal of International Law* 847, pp. 852–3.

[139] James Madison (1788) *Federalist No. 51*, cited in Thomas S. Mowle, *Allies at Odds?: The United States and the European Union* (Palgrave Macmillan, 2004), p. 94.

[140] Alex Mills & Tim Stephens, 'Challenging the Role of Judges in Slaughter's Liberal Theory of International Law' (2005) 18 *Leiden Journal of International Law* 1, pp. 12–14.

law provides democratic checks and balances on international judicial institutions that counter their inherent political weaknesses.

In some formulations of a liberal legal order, domestic legislative and judicial institutions are projected onto the international plane. This was the view of Wilson's contemporaries, including Elihu Root in designing the Permanent Court of International Justice attached to the League of Nations. However, the politically influential variant of liberal internationalism does not conceive of IL as centralised in these institutions, but, rather, as existing foremost at the state level, and only secondarily in international bodies. The modern liberal internationalist emphasis on transnational process relies on rules and decisions from the international sphere being internalised and enforced by domestic courts. International institutions should therefore only fulfil this role in a 'backstopping' capacity where a state's own legal institutions are incompatible with the rule of law – by design, or owing to disruption in the case of conflict. Slaughter identifies backstopping as being effected either by 'provision of a second line of defense when national institutions fail' or through 'the ability of the international process to catalyze action at the national level'.[141] States are incentivised to comply with IL, even absent formal separation of judicial power into international courts.

Illiberal Internationalism

Illiberal internationalism actively engages with global rules and institutions to facilitate foreign policy objectives, but does so for the overriding purpose of strengthening US national security. The rule of law for illiberal internationalists means a flexible framework of legal rules and institutions that facilitates US strategic autonomy and diplomatic justifications. The absence of concern for the moral purpose of states has parallels with the *realpolitik* and balance of power politics of Continental Europe.[142] IL is thereby preserved as a diplomatic tool between states rather than a means for vindicating the legal rights of natural persons. Former US Attorney General John Ashcroft objected to the US Supreme Court holding in *Hamdan* v. *Rumsfeld* that litigants had rights exercisable

[141] Anne-Marie Slaughter & William Burke-White, 'The Future of International Law Is Domestic (or, the European Way of Law)' (2006) 47 *Harvard International Law Journal* 327, p. 341.

[142] Dueck labels adherents of his equivalent set of beliefs simply 'American realists': Colin Dueck, *Reluctant Crusaders: Power, Culture, and Change in American Grand Strategy* (Princeton University Press, 2006), p. 33.

against the US government under the Geneva Conventions.[143] Consistent with an international rule of law between sovereign states, Ashcroft responded that 'those treaties within themselves have provisions which limit the parties that can raise them and enforce them to the high contracting parties, not to the citizens of various nations'.[144] This reflects a fundamentally illiberal conception, addressing the interests of individual citizens only indirectly and in the aggregate through the principal focus on national security. Liberal internationalism addresses national security more indirectly, by externalising liberal values into an international legal environment to reinforce global security over the long term. Illiberal internationalism rejects such utopian visions, instead engaging with IL to manage rather than overcome security threats. The conception is further distinguished by a clear separation between the illiberalism of international legal policy and national political values, with no assumption of mutual reinforcement. The privileging of American security interests abroad has nevertheless translated into greater deference to executive power and therefore weaker institutional checks and balances integral to protecting liberty at home.

Pragmatic Development of International Law

Illiberal internationalism seeks a legal framework within which the United States can pragmatically determine the limits of IL. Contrary to both legalism and liberal internationalism, this approach embraces potential gaps and ambiguities in IL for enhancing discretion to exercise effective diplomatic power as a part of law itself. Michael Glennon has sought to define a 'pragmatist' method that treats the development of IL as 'a multifaceted method of problem-solving rather than a formula for finding a single, correct solution'.[145] The first distinguishing belief is that 'reliance upon formal legalist categories masks the decision-making process that actually occurs, which is situationally contingent'.[146] Applying this principle to the vexed question of whether the Geneva

[143] Referring to Art. 75 of Protocol I to the *Geneva Conventions* (1949): *Hamdan* v. *Rumsfeld* (2006) 548 *U.S.* 557, pp. 70–1 per Stevens J.

[144] Responding to a question posed by the author: John Ashcroft, 'The Constitution and the Common Defense: Who Ensures America's National Security?', *Preserve the Constitution,* The Heritage Foundation, Washington, DC, 11 October 2011, last accessed 27 February 2015.

[145] Michael J. Glennon, *The Fog of Law: Pragmatism, Security, and International Law* (Woodrow Wilson Center Press, 2010), p. 2.

[146] Ibid., p. 3.

Conventions applied to Al-Qaeda and Taliban detainees during the 2001 War in Afghanistan, Glennon considers the full range of factors, including the negative reactions of US allies and the status of US prisoners of war seeking reciprocal protections. For Glennon, '[w]hether such factors are, strictly speaking, legal or political is, to the pragmatist lawyer, beside the point: in the real world, these are, to varying degrees, the kinds of factors that international lawyers do take into account'.[147] This approach, however, does not 'open the door to a law-free zone', since it relies on the default principle that 'in the absence of a rule a State is deemed free to act'.[148] In this sense, the 'formalists are, perversely . . . right that there are no gaps in the international legal order'.[149] Kenneth Anderson characterises this as a case of the legal system 'formalizing its pragmatism'. In so doing, pragmatism 'serves to protect international law from itself', which is threatened by formalism to become 'ever more internally "pure" but ever more disconnected from the world of international politics where, ultimately, it must live'.[150] Using national security interests to clearly demarcate the sphere in which the United States accepts the development of IL, and where it does not, is seen as the only non-arbitrary basis for developing IL. The United States demonstrates fidelity to the international rule of law in the sense of complying with carefully adapted legal obligations, thereby facilitating appeals to law rather than naked power.

Pragmatic development approaches IL as a valuable tool for arranging the relations between states, but otherwise as lacking autonomous institutional force. Former Deputy Secretary of State Robert Zoellick argued that IL 'can facilitate bargaining, recognise common interests, and resolve differences cooperatively. But international law, unlike domestic law, merely codifies an already agreed-upon cooperation.'[151] A specific example of this view is endorsement of a developing UNSC practice to alter formal treaty provisions on an ad hoc basis in order to address threats to international peace and security. John Bellinger welcomes the 'significant development' of 'tailoring a specialized body of international

[147] Ibid., p. 20.

[148] Applying the 'freedom principle' from *S.S. Lotus, The (France* v. *Turkey)* (1927) No. 10 *PCIJ Ser A*, p. 44.

[149] Michael J. Glennon, 'The Road Ahead: Gaps, Leaks and Drips' (2013) 89 *International Law Studies* 362, p. 373.

[150] Kenneth Anderson, 'Readings: Michael Glennon on the "Incompleteness" of International Law Governing the Use of Force', *Lawfare,* 13 May 2013, www.lawfareblog.com/2013/05/readings-michael-glennon-on-the-incompleteness-of-international-law-governing-the-use-of-force/.

[151] Robert B. Zoellick, 'A Republican Foreign Policy' (2000) 79 *Foreign Affairs* 63, p. 69.

law to better work in a specific set of circumstances'.[152] Stefan Talmon responds critically within a legalist rubric that 'adaptation' here is merely a euphemism for 'abrogation' of formal treaty provisions pursuant to 'a culture of exceptionalism' among Council members.[153] The practice accordingly 'raises serious concerns from the point of view of the rule of law'.[154] From the illiberal internationalist perspective, however, these are examples of pragmatic development in IL, where the coherent logic of strategic and security judgements is valued over arbitrary rule obedience.

Hegemonic Privilege

The fact of American power preponderance precludes any international legal arrangement that presumes to level political power through sovereign equality. Rather, the meaning of equality is that states should be accorded privileges commensurate with their unequal role in upholding the international legal order.[155] Of the four ideal legal conceptions, exceptionalist beliefs remain weakest in this variant, and so any such privileges are grounded foremost in the prudence of acknowledging preponderant power, with a normative defence of American political culture playing a secondary role only. Prior to his tenure as Secretary of Defense in the Obama administration, Chuck Hagel argued that 'long-term security interests' are strengthened where international legal institutions are developed 'as extensions of our influence, not as constraints on our power'.[156] The rule of law will never be more than an idealistic aspiration if it requires powerful states to submit to the interests of weaker states as sovereign equals. Neither will it be effective where powerful states are incentivised to remain outside of the law. Rather, IL should seek a stable structure for global power relations, without shifting the balance of that power.

[152] John B. Bellinger III, 'Legal Adviser Address to International Institute of Humanitarian Law in San Remo', 9 September 2005, https://2009-2017.state.gov/s/l/2005/87240.htm. This power is authorised under *Charter of the United Nations*, Art. 103: see José E. Alvarez, 'Contemporary International Law: An Empire of Law or the Law of Empire', p. 821.

[153] Stefan Talmon, 'Adaptation of Treaties by the Security Council and the Rule of Law' (2009) 103 *Proceedings of the Annual Meeting (American Society of International Law)* 249, p. 249.

[154] Ibid., p. 251.

[155] This has parallels to IR 'hegemonic stability theory', which posits that 'hegemony will lead to openness and stable regimes': see Michael Mastanduno, David A. Lake & G. John Ikenberry, 'Toward a Realist Theory of State Action' (1989) *International Studies Quarterly* 457, p. 461.

[156] Chuck Hagel, 'A Republican Foreign Policy' (2004) 83 *Foreign Affairs* 64, p.68.

The thinking is evident in Jacob Cogan's concept of 'operational noncompliance', defined as noncompliance with parts of IL for the purpose of upholding the system as a whole through 'bridging the enforcement gap created by inadequate community mechanisms of control'.[157] The primitive nature of the international legal system weakens the integrity of law, mandating formally illegal actions of 'law making and law termination' to make the system work.[158] This becomes a principle for granting unequal legal privileges to the United States in answering the question of the proper relationship between sovereign states. Cogan emphasises that 'law is the congruence of policy, authority, and control, and, thus, without power there is no law'. Accordingly, 'international lawyers should acknowledge and take account of the special responsibilities of the powerful'.[159] Exceptionalist beliefs are relevant to the extent that checks against the abuse of operational noncompliance are provided by the United States itself as a state with 'acculturation' consistent with rule of law values.[160]

Consent-Based Division of Powers

The integrity of international judicial power is not determined by a general illiberal internationalist ordering principle, but, rather, by states consenting to international judicial constraints according to material interests. Resistance to any non-consensual legal authority reflects scepticism that global 'judicial power' is truly independent from real decision-makers situated in states equally motivated to protect relative power.[161] Any reliance on the separation of powers to prevent abuse of power at the global level will itself be a vulnerability for US security. The scepticism extends to municipal courts that directly exercise international judicial powers via 'universal jurisdiction', thereby eliminating the requirement of consent.[162]

[157] Jacob Katz Cogan, 'Noncompliance and the International Rule of Law' (2006) 31 *Yale Journal of International Law* 189, p. 191.
[158] Ibid., p. 196.
[159] Ibid., p. 207.
[160] Ibid., p. 194.
[161] For an argument that greater independence reduces the effectiveness of international adjudication see Eric A. Posner & John C. Yoo, 'Judicial Independence in International Tribunals' (2005) 93 *California Law Review* 1.
[162] This objection has been equally applied to reject the legitimacy of US courts claiming universal jurisdiction over other states under the *Alien Tort Statute* 28 U.S.C. § 1350: John B. Bellinger III, 'The U.S. Can't Be the World's Court', *Wall Street Journal*, 27 May 2009, www.wsj.com/articles/SB124338378610356591.

The emphasis on consent has manifested in significant resistance by illiberal internationalism to the penetration of IL through domestic courts. Policymakers influenced by this conception have placed a heightened emphasis on the distinction between 'self-executing' and 'non-self-executing' treaties.[163] Under this doctrine, the president's constitutional power to enter into treaties does not create rights enforceable in US courts unless the treaty is designated as 'self-executing' and thereby effective by its own force. Treaties deemed 'non-self-executing' may not be invoked in the courts unless implemented through legislation passed by the US Congress. The distinction is an elementary principle in American law, but one subject to ongoing disagreement as to the indices of a self-executing treaty and whether the supremacy clause of the US Constitution creates a presumption that treaties are self-executing.[164] The illiberal internationalist approach favours a narrow interpretation of the doctrine and even the reverse presumption that legislative consent is mandatory for treaty obligations to be enforceable in domestic courts.[165]

Resistance to judicial incorporation of IL into domestic law is evident in Henry Kissinger's characterisation of international adjudication 'being pushed to extremes which risk substituting the tyranny of judges for that of government'.[166] One expression is rejection of the hitherto settled principle that customary IL automatically forms part of the US federal common law.[167] Ashcroft disapprovingly cited reasoning in *Hamdan* that the United States is bound by a customary legal obligation contained in a treaty it has declined to ratify. For Ashcroft, it was

> strange that a justice of the United States Supreme Court basically is arguing there are only two kinds of international treaties that ought to be appropriate to shape our behaviour: the ones that we have signed and the ones we haven't signed. I think that carries the international law situation far beyond what is prudent and in the interests of the country.[168]

[163] A distinction established in *Foster* v. *Neilson* (1829) 27 *U.S.* 253.

[164] Curtis A. Bradley, *International Law in the U.S. Legal System* (Oxford University Press, 2015), pp. 41–4.

[165] Sloss draws the relevant distinction as being between 'nationalists', who favour non-self-execution, and 'transnationalists', who favour self-execution: see David L. Sloss, 'Executing Foster *v.* Neilson: The Two-Step Approach to Analyzing Self-Executing Treaties' (2012) 53 *Harvard International Law Journal* 135, p. 137.

[166] Henry Kissinger, *Does America Need a Foreign Policy?: Toward a Diplomacy for the 21st Century* (Simon and Schuster, 2002), p. 273.

[167] See Curtis A. Bradley & Jack Goldsmith, 'Customary International Law As Federal Common Law: A Critique of the Modern Position' (1997) 110 *Harvard Law Review* 815.

[168] Responding to a question posed by the author: John Ashcroft, 'The Constitution and the Common Defense'.

Similarly, Julian Ku and John Yoo reject judicial incorporation of IL as undemocratic and a challenge to US sovereignty. They argue that 'NGOs have used creative and effective litigation strategies to develop and enforce global governance regimes via the U.S. court system. Such litigation can result, and has resulted, in the adoption of an interpretation of international law over the opposition of the government's chief foreign policy organ: the executive branch.'[169] The penetration of IL may on rare occasions be accepted where it strategically demonstrates credible commitment to previous US consent,[170] but this remains unlikely where national security is at stake.

Liberal Nationalism

Liberal nationalist legal policy honours liberalism by engaging with IL to guard against global governance and preserve the example of American constitutional government. The ideology has a long tradition extending back to the founding fathers' belief that the United States represented a break from the European 'old order of diplomacy'.[171] Whereas liberal internationalists believe that a greater US role in international governance extends and strengthens democracy, liberal nationalists often perceive 'fundamental conflicts between democracy and international law'.[172] IL itself is said to suffer from a 'democratic deficit' such that, to the extent of any conflict, IL should be subordinated to domestic laws with democratic legitimacy.[173] The appearance of unilateralist tendencies is 'not simply out of self-interest but because the United States is committed to democratic self-government'.[174] The intervention of IL may well be legitimate for 'the many nations incapable at present of sustaining flourishing democratic politics', for whom IL 'offers the hope of

[169] Julian Ku & John Yoo, *Taming Globalization: International Law, the US Constitution, and the New World Order* (Oxford University Press, 2012), pp. 3–4.

[170] The Bush 43 administration's response to the ruling in *Avena and Other Mexican Nationals (Mexico* v. *United States of America*) (2004) *ICJ Rep* 12 represents a key example of illiberal internationalist IL policymaking concessions within municipal law for international institutional gains. The administration's policy was, however, ultimately struck down by the Supreme Court in *Medellín* v. *Texas* (2008) 491 *U.S.* 552.

[171] Paul A. Varg, *Foreign Policies of the Founding Fathers* (Penguin Books, 1970), p. 3.

[172] See Jed Rubenfeld, 'The Two World Orders', in Georg Nolte (ed.), *European and US Constitutionalism* (Cambridge University Press, 2005), p. 292.

[173] Jon Kyl, Douglas J. Feith & John Fonte, 'The War of Law: How New International Law Undermines Democratic Sovereignty' (2013) 92 *Foreign Affairs* 115, p. 121.

[174] Rubenfeld, 'The Two World Orders', p. 289.

economic and political reforms'.[175] But the imperative of preserving the outward example of liberalism excludes IL extending inward to America's own institutions.

Liberal internationalists are wary of any exceptional US role enmeshed in global governance, since 'American presidents may be tempted to use the role of the world's law enforcer as a justification for a new American militarism', thereby fostering broad and unaccountable executive powers.[176] These beliefs establish a preference for the US Congress to control IL policymaking, as more directly democratically accountable than presidential prerogative.[177] For these reasons, and consistent with theorised weaker support among elites, few contemporary legal policymakers advocate IL policy primarily in these terms, although it has enjoyed some resurgence, including in the policy platform of 2016 and 2020 Democratic presidential candidate Senator Bernie Sanders. The outlier status of liberal nationalism was demonstrated in the wary reception toward 2012 presidential candidate and then Congressman Ron Paul and his son Senator Rand Paul, each of whom has been categorised according to equivalent belief types.[178] Both have cast themselves as 'libertarian' candidates, and for this reason oppose US government intervention domestically and internationally as equally a threat to liberal values.[179]

This legal conception frequently aligns with the two illiberal American conceptions, with all united by a scepticism toward the utopian visions of legalism and liberal internationalism. Legal policymakers advocating quite illiberal policies have accordingly been drawn to justify municipal consequences of their positions consistently with liberal nationalism. Curtis Bradley and Jack Goldsmith have bolstered support for pragmatic US engagement with IL by arguing that the automatic incorporation of customary IL into American municipal law 'is in tension with basic notions of American representative democracy'. The danger is that law derived from the 'views and practices of the international community' is 'neither representative of the American political community nor responsive to it'.[180] Similarly, Ku and Yoo warn that the pressure to conform to international

[175] Ibid., p. 295.
[176] Ibid., pp. 295–6.
[177] See Rubenfeld's criticism of a unilateral Whitehouse decision to withdraw from treaty obligations absent congressional approval: ibid., p. 296.
[178] Walter R. Mead, 'The Tea Party and American Foreign Policy: What Populism Means for Globalism' (2011) 90 *Foreign Affairs* 28, p. 40.
[179] Ron Paul, *A Foreign Policy of Freedom* (Ludwig von Mises Institute, 2007), p. i.
[180] Bradley & Goldsmith, 'Customary International Law As Federal Common Law', p. 857.

legal obligations 'could undermine the existing balance of powers' among the three branches of US federal government.[181] In these cases, the outwardly focused illiberal internationalism is treated as complementary to rather than in competition with the inwardly focused liberal nationalism.

Protective Development of International Law

The key interest of liberal nationalism is limiting the reach of IL so that it does not encroach on the integrity of American constitutional government. IL is supported primarily as a protective framework shielding liberal states as autonomous political units. The international rule of law is therefore advanced by developing non-arbitrary legal rules necessary to uphold the stability of global relations, but without shifting the legal rights and obligations of American citizens. This creates scepticism toward institutions of global governance, which necessarily take up functions otherwise left to states themselves. The UN itself may pose a threat, for drawing the president to engage internationally, while providing authority to bypass Congress to force domestic compliance with UN standards. On this basis, Ron Paul repeatedly presented a bill to the House of Representatives to end US membership of the UN for threatening American values 'from the beginning', while his son has made similar gestures in the Senate.[182] Rubenfeld rejects suggestions that such wariness toward IL represents a 'categorical' rejection of law. Rather, the United States can legitimately submit to treaties provided 'the agreement is narrow in scope, and when it creates no third-party, supranational entities empowered to supervise U.S. policy or to make, interpret or apply U.S. law'.[183] In its strongest form, a liberal nationalist policy would isolate the United States from negotiations to establish international institutions and treaty regimes and engage only to craft laws that oppose encroachment on US autonomy.

IL may equally be developed protectively as a *constraint* against US government actions seen to erode liberty.[184] During the 2012 presidential campaign, Ron Paul made perhaps the only supportive statement about

[181] Ku & Yoo, *Taming Globalization*, p. 4.

[182] *American Sovereignty Restoration Act* 2009, H.R. 1146, introduced 24 February 2009 (2009); S.Amdt.381 to S.Con.Res.8 (2014). See Ron Paul, *A Foreign Policy of Freedom*, p. 133.

[183] Jed Rubenfeld, 'Commentary: Unilateralism and Constitutionalism' (2004) 79 *New York University Law Review* 1971, pp. 2021–4.

[184] Support among some members of the Bush 43 administration for the decision in *Hamdan* is consistent with IL being employed to correct the federal government's illiberal detainee policies: William H. Taft IV, Interview with Author (22 November 2011).

IL among Republican candidates when he called the practice of waterboarding 'torture'. This he condemned as 'illegal under international law and under our law', with it being 'really un-American to accept on principle that we will torture people that we capture'.[185] This perhaps seems contradictory given Paul's strong stance against the UN, but it is logical when read as an implication of Paul's own legal conception grounded in liberty. From the opposite side of domestic politics, Sanders has also appealed to a rule of law that constrains executive discretion. On issues of 'War and Peace', Sanders committed in 2016 to '[c]lose Guantanamo Bay, rein in the National Security Agency, abolish the use of torture, and remember what truly makes America exceptional: our values'.[186] So, arguing sharply distinguishes liberal nationalist policymakers from counterparts who invoke similar arguments to defend American sovereignty but have been among the strongest advocates of illiberal legal rights, including to engage in forms of torture.[187]

Inviolable Sovereignty

It is precisely the absence of political and normative equality between sovereign states that necessitates a framework of international legal rules maintaining inviolable sovereign equality. Here, the United States, 'suspicious of the dangerous outside world, uses international law as a shield, reifying the state system to protect its borders and its citizens'.[188] IL thus upholds reciprocal rights and duties by America and its global counterparts not to interfere in one another's affairs. Because the US system is *sui generis*, this equality does not extend to a positive obligation to participate equally in multilateral institutions. Equality is expressed only as a negative obligation to respect inviolable sovereignty – including as a constraint on the United States itself. Perennial third-party presidential candidate Ralph Nader[189] levelled strident criticism at president Obama for taking actions that 'violate international law because they infringe upon national sovereignties with deadly drones, flyovers and secret

[185] The American Presidency Project, 'Republican Candidates Debate in Spartanburg, South Carolina', 12 November 2011, www.presidency.ucsb.edu/node/297510.

[186] Bernie Sanders, 'War and Peace', Bernie Sanders for President 2016 Website, https://berniesanders.com/issues/war-and-peace/, last accessed 1 September 2016.

[187] See John C. Yoo, *War by Other Means: An Insider's Account of the War on Terror* (Atlantic Monthly Press, 2006), pp. 155–87.

[188] Cohen, 'The American Challenge to International Law', p. 564.

[189] Mead and Dueck both identify Nader with their equivalent belief type: Walter R. Mead, 'Do Jeffersonians Exist?', *The American Interest,* 8 January 2010, www.the-american-interest.com/2010/01/08/do-jeffersonians-exist/; Dueck, *Reluctant Crusaders*, p. 32.

forays by soldiers'.[190] In an analysis by Ron Paul's own think tank, Flynt and Hillary Leverett criticised the Obama administration's argument that, under the Nuclear Non-proliferation Treaty, Iran has no legal right to enrich uranium, even for civilian purposes. For the Leveretts, 'the right to indigenous technological development – including nuclear fuel-cycle capabilities, should a state choose to pursue them – is a sovereign right'.[191] No breach of IL had therefore occurred allowing the United States to intervene internationally. These arguments contradict the assumption of hegemonic IL and realist political scholarship that the United States will always seek to shape law to enhance its autonomy. For Nader, interpreting sovereignty as a constraint on US action draws back to a demand that 'the United States comply with international law and our constitution on the way to ending the American Empire's interventions worldwide'.[192] Paul's institute seeks to constrain US foreign policy by denying the Obama administration's 'main motive' of seeking 'to maximize America's freedom of unilateral military initiative and, in the Middle East, that of Israel'.[193] In both cases, states are treated as sovereign equals in law precisely to protect the integrity of the American polity against foreign entanglement.

Vertical Separation of Powers

For liberal nationalism, IL governs the relations between states while municipal law governs the relations between American citizens, which therefore should not conflict as a matter of course. The international rule of law is determined by a vertical separation between international and domestic judicial powers, rather than by a horizontal separation between international executive, legislative and judicial powers. Legalist conceptions emphasise the separation and institutionalisation of international judicial power while vertically integrating international judicial power as a check on domestic judiciaries. Liberal nationalism, in contrast, strongly resists any design purporting to fuse the judicial power of international courts to American law. The constraints of IL are ultimately set by real

[190] Ralph Nader, 'Obama to Putin: Do As I Say Not As I Do', *The Nader Page*, 21 March 2014, https://blog.nader.org/2014/03/21/obama-putin-say/.

[191] Flynt Leverett & Hillary M. Leverett, 'America's Lead Iran Negotiator Misrepresents U.S. Policy (and International Law) to Congress', Ron Paul Institute for Peace and Prosperity, 5 November 2013, www.ronpaulinstitute.org/archives/featured-articles/2013/november/05/america-s-lead-iran-negotiator-misrepresents-us-policy-and-international-law-to-congress/.

[192] Nader, 'Obama to Putin'.

[193] Leverett & Leverett, 'America's Lead Iran Negotiator Misrepresents U.S. Policy'.

policymakers who represent particularistic state interests and values foreign to the traditions defining US constitutional government. To the suggestion that the United States could democratically elect to submit to such constraints, Jed Rubenfeld provocatively warned that the 'crucial transition to beware is the moment when international cooperation shifts to international governance ... A person can sell himself into slavery voluntarily, but he will still be a slave thereafter.'[194] In this way, IL continues to operate as a framework for the basic structure of global relations without unsettling constitutionally guaranteed liberal values at the national level.

Illiberal Nationalism

Illiberal nationalism rejects the strategic value of a freestanding body of IL altogether, engaging only to defend national security and protect non-universal cultural values and identity. More than any of the other ideal types, illiberal nationalists are defined by a transactional conception of IL, being 'fundamentally dubious of the ability of law to order relations in an international community that is strikingly reminiscent of a lawless Western frontier town'.[195] In this tradition, John Bolton, former US ambassador to the UN and later a national security adviser to President Trump, sees any submission to IL as 'the first step to abandoning the United States of America. International law is not law; it is a series of political and moral arrangements that stand or fall on their own merits, and anything else is simply theology and superstition masquerading as law.'[196] The conception has a lineage in pre-enlightenment worldviews of an order founded in folk wisdom and tradition, with adherents of Mead's equivalent belief type valuing 'rule of custom' over the rule of law.[197]

Former acting US Attorney General and federal judge Robert Bork criticised IL as an expression of global anti-Americanism that targets both American moral standing and US national security.[198] For Bork, IL advocates are characterised as liberal elites who, consistent with legalism and liberal

[194] Rubenfeld, 'Commentary', pp. 2022–3.
[195] David J. Bederman, 'Globalization, International Law and United States Foreign Policy' (2001) 50 *Emory Law Journal* 717, p. 722.
[196] John R. Bolton, 'Is There Really "Law" in International Affairs?' (2000) 10 *Transnational Law & Contemporary Problems* 1, p. 48.
[197] Mead, *Special Providence*, p. 246.
[198] Robert H. Bork, *Coercing Virtue: The Worldwide Rule of Judges* (AEI Press, 2003), pp. 15 & 21.

internationalism, are in search of 'transcendent principles and universalistic ideals'.[199] Elites wield these values in a 'transnational culture war' that circumvents popular democratic will.[200] Bork identified both himself and the 'great mass of citizens' with a contrary conception, centred on 'particularity – respect for difference, circumstance, tradition, history, and the irreducible complexity of human beings and human societies'.[201] These values form the populist heart of illiberal nationalism, which is incompatible with the deliberately elitist intent of internationalist legal conceptions that seek to remove popular passions from foreign policy. Daniel Bodansky clearly distinguishes Bork from Goldsmith and Posner in this respect, for viewing IL as solely a constraint rather than a tool for American foreign policy.[202]

The conception is distinct from illiberal internationalism to the extent that it interprets IL through substantive cultural values at all. Michael Ignatieff observes that Senator Jesse Helms and Southern senators generally have made the United States unique among its peers for having 'a strong domestic political constituency opposed to international human rights law on issues of family and sexual morality'.[203] Bork specifically criticised the transformation of modern IL into 'a body of rules about the rights of individuals against their own nations'[204] and the trend for courts to strike down traditional moral prohibitions by reading 'universal' values into the constitution.[205] Doing so may ensure that 'we are all more free', but it would be an improper freedom 'to act in ways that most of us had decided were unacceptable'.[206] Ultimately, there 'can be no authentic rule of law among nations until they have a common political morality or are under a common sovereignty', neither of which is at hand.[207] Illiberal nationalists thus diverge from illiberal internationalists in willingly acting against 'short-term interest' to defeat the existential threat that IL will 'constrict the United States' over time.[208]

[199] Ibid., p. 3.
[200] Ibid., pp. 5–6 & 11.
[201] Ibid., pp. 3–4.
[202] Daniel Bodansky, 'International Law in Black and White' (2006) 34 *Georgia Journal of International and Comparative Law* 285, pp. 291–2.
[203] Michael Ignatieff, 'Introduction: American Exceptionalism and Human Rights', in Michael Ignatieff (ed.), *American Exceptionalism and Human Rights* (Princeton University Press, 2005), pp. 19–20.
[204] Bork, *Coercing Virtue*, pp. 31 & 50.
[205] Such as those relating to homosexuality, abortion rights and women's rights: see ibid., p. 5.
[206] Ibid., p. 12.
[207] Ibid., p. 47.
[208] John R. Bolton, cited in Committee on Foreign Relations, United States Senate, *The Nomination of John R. Bolton to be U.S. Representative to the United Nations with Rank of*

Permissive Development of International Law

Where illiberal nationalists do engage with IL, they seek to interpret law permissively to eliminate any possible constraining effect on American foreign and domestic policy. Global governance is denounced as a strategy of global adversaries to constrain American sovereignty and its exceptional political culture. Any IL development that constrains US global autonomy is aggressively opposed, particularly in areas such as military policy where the United States maintains a material advantage. Here, Bork argued that it was one of the 'great deceptions practiced by proponents of international law that there is something deserving the name of "law" by which the use of armed force between nations can be controlled'.[209] Paul Wolfowitz, Deputy Secretary of Defense under President Bush 43,[210] likewise dismissed use of force rules for requiring the United States to go 'to the United Nations, or previously the League of Nations, to get a unanimous vote to do nothing, or whatever it is that those organisations do'.[211]

The critique that IL is 'infinitely flexible and indeterminate'[212] sustains a strategy of employing the rhetorical form and language of IL while rejecting accepted conventions of international legal reasoning drawn from non-American sources. The presumptively arbitrary constraints of IL are thereby neutralised through permissive interpretations that privilege national interests. This does not mean flagrant breach of treaty obligations, however, but rather that illiberal nationalists 'hesitate to ratify a treaty if they felt that at a later date the treaty would either limit American freedom of action or put the US in the position of having to break its freely given word to achieve some necessary goal'. Equally, however, adherents will 'insist on being the sole and final judge of

Ambassador and U.S. Representative to the United Nations Security Council and U.S. Representative to Sessions of the United Nations General Assembly during His Tenure of Service as U.S. Representative to the United Nations, 1st Session 109th Congress (2005), p. 53.

[209] Bork, *Coercing Virtue*, p. 38.

[210] Mead identifies Wolfowitz's worldview in ideas that 'resonate strongly' with the Jacksonian belief type: Walter R. Mead, 'Email from Walter Russell Mead to James Fallows', *The Atlantic*, 27 December 2001, https://www.theatlantic.com/past/docs/unbound/fallows/jf2001-12-06/mead3.htm.

[211] Responding to a question posed by the author: Paul Wolfowitz, 'In Uncertain Times: American Foreign Policy after the Berlin Wall and 9/11', 13 October 2011, www.wilsoncenter.org/event/uncertain-times-american-foreign-policy-after-the-berlin-wall-and-911.

[212] Bork, *Coercing Virtue*, p. 44.

whether they had kept or broken their word'.[213] President Bush 43 sought to redefine the UN's powers in entirely permissive terms in 2002 by labelling it 'irrelevant' unless it sanctioned an otherwise illegal use of force in Iraq.[214] Likewise, the notorious 'torture memos' sought to alter a well-settled definition of torture by adopting legalistic phrasing from an unrelated healthcare law.[215] That latter approach was rejected by illiberal internationalist lawyers such as Jack Goldsmith, among other senior legal policymakers, for failing to follow any accepted international conventions for interpretation.[216] Nevertheless, each of these cases remained consistent with the principle of permissively developing IL to remove any possible encumbrance on American foreign policy.

Relative Sovereignty

For illiberal nationalists, the principle of sovereign equality is foremost an attempt to constrain legitimate discrimination between states on moral and political grounds. The mischief is to create what Bork refers to as a false 'moral equivalence' that prevents the United States from distinguishing between democratic and tyrannous regimes.[217] Phyllis Schlafly colourfully denounced President Clinton's enthusiasm for international treaties by invoking Saint Paul's Second Letter to the Corinthians: 'Be ye not unequally yoked together with unbelievers, for what fellowship hath righteousness with unrighteousness?'[218] This belief is the foundation of relative sovereignty, where IL should be developed to recognise degrees of sovereignty based on the threat states pose to US national security and cultural values. Ronald Reagan's ambassador to the UN Jeane Kirkpatrick declared, in relation to the international rule of law, that 'we are as committed to that proposition today as ever in our history'.[219] Her defence of US intervention in Nicaragua was expressed in illiberal

[213] Walter R. Mead, Personal Communication with Author (19 January 2015).
[214] George W. Bush, 'President's Remarks at the United Nations General Assembly', 12 September 2002, https://georgewbush-whitehouse.archives.gov/news/releases/2002/09/20020912-1.html.
[215] See Jay S. Bybee, 'Memorandum for Alberto R. Gonzales, Counsel to the President: Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A', 1 August 2002, www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-gonzales-aug2002.pdf.
[216] Jack Goldsmith, *The Terror Presidency: Law and Judgment inside the Bush Administration* (W. W. Norton & Co., 2007), pp. 165–6.
[217] Bork, *Coercing Virtue*, p. 46.
[218] Phyllis Schlafly (1998), cited in Anatol Lieven, *America Right or Wrong: An Anatomy of American Nationalism* (Oxford University Press, 2005), p. 16.
[219] Jean J. Kirkpatrick, 'Law and Reciprocity' (1984) 78 *Proceedings of the Annual Meeting (American Society of International Law)* 59, p. 67.

nationalist terms, however, according to which the principle of 'equal application of the law' was flawed for assuming that 'all parties want the same thing, that what they really want is peace'. In circumstances where Nicaragua was seen to defy that assumption, the United States could not 'feel bound to unilateral compliance with obligations which do in fact exist under the [UN] Charter, but are renounced by others. This is not what the rule of law is all about.'[220]

The idea of states enjoying sovereignty commensurate with their moral standing has been expressed in the concept of 'rogue states'.[221] The *National Security Strategy 2002* defined the attributes of 'rogue states' to include that they 'display no regard for international law ... and callously violate international treaties to which they are party' and that they 'reject basic human values and hate the United States and everything for which it stands'.[222] Despite being couched in terms of IL, the rogue state concept strengthened the so-called 'Bush Doctrine', of a right to 'pre-emptive' self-defence, contrary to any generally accepted legal interpretation.[223] The heart of the doctrine can be interpreted as a claim that states exhibiting proscribed attributes were 'unlike' the United States and therefore enjoyed a relative diminution in sovereignty. Eyal Benvenisti suggests that the doctrine upholds the principle of 'reciprocity' in relation to states who fail to mutually honour the foundational obligations of the international legal system.[224]

The notion of relative sovereignty has clear parallels with the theorisation of Carl Schmitt, who envisioned a bifurcation of legal personality between the full rights enjoyed by 'civilised' European states and the lesser rights of states deemed otherwise.[225] William Scheuerman's review of the Bush 43 response to the 'War on Terror' goes so far as to suggest that 'anyone familiar with Schmitt's work on international law occasionally finds herself wondering whether the White House playbook for foreign policy might not have been written by Schmitt or at least by

[220] Ibid., p. 67.
[221] Alex Miles, *US Foreign Policy and the Rogue State Doctrine* (Routledge, 2013), p. 113.
[222] The White House, *The National Security Strategy of the United States of America 2002* (The White House, 2002), p. 14.
[223] Heiko Meiertöns, *The Doctrines of US Security Policy: An Evaluation under International Law* (Cambridge University Press, 2010), pp. 179–224.
[224] Eyal Benvenisti, 'The US and the Use of Force: Double-Edged Hegemony and the Management of Global Emergencies' (2004) 15 *European Journal of International Law* 677, pp. 694–5.
[225] See Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (Telos Press Publishing, 2003), pp. 94–5 & 292.

one of his followers'.[226] This is consistent with Simpson's observation that states have long been 'differentiated in law according to their moral nature, material and intellectual power, ideological disposition or cultural attributes'.[227] Powerful states have adopted a stance of 'anti-pluralism' to reduce the sovereign rights of 'outlaw states' deemed 'mad, bad or dangerous'.[228] All such determinations by illiberal nationalists become a claim to respect sovereignty under IL in proportions equal to the threat that each state poses to US national security and values.

Municipal Supremacy

The straightforward principle for determining the integrity of judicial power is municipal supremacy, to the point of denying the character of so-called judicial power at the global level. In a 2000 address to the UNSC, Senator Helms declared: 'We abide by our treaty obligations because they are the domestic law of our land, and because our domestic leaders have judged that the agreement serves our national interest. But no treaty or law can ever supersede the one document that all Americans hold sacred: the U.S. Constitution.'[229] For illiberal nationalists, the 'insidious appeal of internationalism'[230] is that IL advocates have sought to have 'liberal views adopted abroad and then imposed in the United States'.[231] The role of international courts in this process is aimed at 'the wholesale reconstruction of American society' according to views antithetical to the traditions that define the American people.[232] The proper policy approach toward institutionalised global judicial power is therefore to oppose forcefully its influence over American government and, ultimately, its relevance to questions of international politics.

The international rule of law is not advanced through attempts to differentiate and separate forms of global power and designate some as independent 'judicial' powers. There is a long history of the United States refusing to recognise or withdrawing consent to international judicial forums. In 2018, John Bolton responded to an ICJ ruling ordering the

[226] William E. Scheuerman, 'International Law As Historical Myth' (2004) 11 *Constellations* 537, p. 537.
[227] Simpson, *Great Powers and Outlaw States*, p. 6.
[228] Ibid., pp. xi–xii.
[229] Cited in Jesse Helms, *Here's Where I Stand: A Memoir* (Random House, 2005), p. 298.
[230] Bork, *Coercing Virtue*, p. 22.
[231] Ibid., p. 16.
[232] Robert Nisbet (1982), cited in ibid., p. 10.

United States to ease sanctions against Iran by saying that 'the ICJ failed to recognize that it has *no jurisdiction* to issue any order with respect to sanctions the United States imposes to protect its own essential security under the treaty'.[233] Bolton then announced a decision to withdraw from dispute resolution provisions under the 1961 *Vienna Convention on Diplomatic Relations* (VCDR) and to 'commence a review of all international agreements that may still expose the United States to *purported binding jurisdiction* dispute resolution in the International Court of Justice. The United States will not sit idly by as baseless, politicized claims are brought against us.'[234] In neither case was the jurisdiction of the ICJ in doubt from any orthodox legal interpretation, yet it remained inherently illegitimate for illiberal nationalists. The underlying legal conception was more nuanced than a simple denial of IL, with Bolton reminding that the United States remained a party to the VCDR and therefore 'we expect all other parties to abide by their international obligations under the Convention'.[235] From competing American ideologies the withdrawal appeared to be 'an overreaction, motivated more by ideological dislike of the ICJ . . . than by any real legal necessity'.[236] Yet, for Bolton, the policy was precisely an ideological necessity: rejecting the legitimacy of judicial power at the international level.

Chapter Conclusion

What unifies the four American conceptions of the international rule of law is the belief that the United States is *not* a like case in international legal matters. Each of the ideal types in some way draws upon exceptionalist or hegemonic beliefs that justify greater autonomy and unequal treatment as a principled position for the United States within the international legal system. The legalist principle of sovereign equality – that all states enjoy equal legal personality without reference to their

[233] John R. Bolton, 'Press Briefing by Press Secretary Sarah Sanders, Small Business Administrator Linda McMahon, and National Security Advisor', 3 October 2018, www.whitehouse.gov/briefings-statements/press-briefing-press-secretary-sarah-sanders-small-business-administrator-linda-mcmahon-national-security-advisor-100318/, emphasis added. See *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran* v. *United States), Provisional Measures* (2018) 3 October 2018.

[234] Bolton, *Press Briefing*, emphasis added.

[235] Ibid.

[236] John B. Bellinger, 'The Trump Administration's Approach to International Law and Courts: Are We Seeing a Turn for the Worse?' (2019) 51 *Case Western Reserve Journal of International Law* 7, p. 19.

international power – is itself founded on a conscious legal fiction that all states are 'like cases'. Yet, for that reason, the presumption is inconsistent with conceptions of law that incorporate policy considerations about America's role in the operation of the legal system itself. Nico Krisch concluded that 'the hierarchical superiority of the United States is either inconsistent with sovereign equality, or – if one wants to defend hierarchy – sovereign equality has to be abandoned as a principle of international law'.[237] Any recognition of the unequal normative status of the United States entails the fiction of sovereign equality falling away in order to advance the international rule of law. For US policymakers, the principle that 'like cases are treated alike' is filtered through foreign policy ideology to reconcile privileges and the principle of 'equality' within the foundations of IL.

Each of the competing conceptions entails a distinctive definition of American national interests and a strategic formulation for advancing them through law. Mary O'Connell defends her liberal internationalism by challenging the illiberal internationalism of Goldsmith and Posner, not because they err doctrinally, but because 'if the authors of this and other attacks on international law believe they are acting in the interest of the United States, or any state, they are mistaken'.[238] National interests underpinning the concept of law are informed and structured by foreign policy ideology, with each formulation set out in this chapter founded on an alternative understanding of the purpose of IL in American global engagement. The meaning of 'coherence' in American policy toward the ICC, the subject of the remainder of this book, becomes that a legal policymaker's stance on any one of the three international rule of law elements is a reliable indicator of legal positions taken on the remaining two elements.

[237] Krisch, 'More Equal Than the Rest?', p. 174.
[238] Mary Ellen O'Connell, *The Power and Purpose of International Law* (Oxford University Press, 2008), p. 14.