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Squaring the Circle? Reconciling Sovereignty and Global Governance Through Global Government Networks (Review of Anne-Marie Slaughter, a New World Order)

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BOOK REVIEW

SQUARING THE CIRCLE? RECONCILING SOVEREIGNTY AND GLOBAL GOVERNANCE THROUGH GLOBAL GOVERNMENT NETWORKS

A NEW WORLD ORDER. By Anne-Marie Slaughter. Princeton and Oxford: Princeton University Press. 2004. Pp. xviii, 341. \$29.95 (cloth).

*Reviewed by Kenneth Anderson**

I. INTRODUCTION: THE GLOBALIZATION PARADOX

The eminent political scientist Robert O. Keohane propounded several years ago what he calls the “governance dilemma.”¹ He states that “[a]lthough institutions are essential for human life, they are also dangerous.”² Collectively we stand to benefit from a world governed by rules and institutions; even determined market libertarians will concede a certain level of public rules. Yet we also collectively resist the creation of the institutions that might provide increased governance because of the threats those institutions pose to our liberty.

A New World Order is Anne-Marie Slaughter’s ingenious offering to solve this collective global dilemma. Slaughter proposes a way to avoid being impaled on either of the dilemma’s horns, securing the benefits of cooperation without creating a wholly unregulated world order or an oppressively coercive global authority.

Slaughter frames the dilemma as a “globalization paradox”: needing more government yet fearing it (p. 8). On the one hand, she says, “[p]eoples and their governments around the world need global institutions to solve collective problems that can only be addressed on a global scale” (p. 8). Problems such as “global markets, global travel, and global information networks . . . [as well as] weapons of mass destruction and looming environmental disasters of global magnitude” (p.

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¹ Robert O. Keohane, *Governance in a Partially Globalized World*, 95 AM. POL. SCI. REV. 1, 1 (2001).

² *Id.*

4) cannot be solved by any geographically limited legal jurisdiction; they must be solved by an institution that is able to regulate the full social and geographical extent of the activity. If the issue is the spread of weapons of mass destruction, regulation applicable only in NATO countries clearly will not deal with the problems arising from missiles in North Korea or Iran. If the issue is the depletion of fishing stocks in the common global seas, unilateral or even regional regulation cannot solve the tragedy of the commons. As Slaughter indicates, one could produce almost endless examples from the global economy, the environment, global organized crime, terrorism, and so on. These problems suggest a need for global governance.

On the other hand, Slaughter notes that all of us have reasons to fear the centralization of power that a truly global government implies, if such a government were modeled on the existing ideal of the sovereign state. Slaughter rejects from the outset the ideal of a world government that would have the Hobbesian attributes of sovereignty that nation-states now claim — the monopoly on legitimate violence within a territory and the ability to enforce the law as a genuine command backed by a threat. She flatly rejects the dream of world government, now or in the future, on both idealist and practical grounds:

Yet world government is both infeasible and undesirable. The size and scope of such a government presents an unavoidable and dangerous threat to individual liberty. Further, the diversity of the peoples to be governed makes it almost impossible to conceive of a global demos. No form of democracy within the current global repertoire seems capable of overcoming these obstacles. (p. 8)

Slaughter's language here is unambiguous. The second horn of the dilemma is not merely a practical one. It is also a theoretical one: a one-world government is undesirable because of the threat it poses to liberty. This clarification is greatly welcome and tremendously helpful to understanding Slaughter's model.³ Slaughter's ultimate aim then is to resolve the globalization paradox without relaxing one of the horns, thus ultimately eliminating the dilemma of governance.

³ Specifically, I had never been wholly clear about the relationship of the model of liberal internationalism that Slaughter developed throughout the 1990s to state sovereignty or world federalism. See, e.g., Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907, 1922–23 (1992); Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503, 516–34 (1995); Anne-Marie Slaughter, *A Liberal Theory of International Law*, 94 AM. SOC'Y INT'L L. PROC. 240 (2000); see also Jose E. Alvarez, *Interliberal Law: Comment*, 94 AM. SOC'Y INT'L L. PROC. 249 (2000). This Review discusses aspects of this relationship in more detail in Part II.

The solution Slaughter offers is a theory of “government networks.”⁴ The term “networks” refers to relatively loose, cooperative arrangements across borders between and among like agencies that seek to respond to global issues (p. 14).⁵ Many of the most serious threats perceived by nation-states, such as transnational terrorism, are themselves caused by global networks — Al Qaeda and its many loose affiliates being perhaps the most infamous example — and so, Slaughter says, “[n]etworked threats require a networked response” (p. 2). Likewise, Slaughter sees networks forming throughout the globalized world and believes that, as a descriptive and predictive matter, these networks will form the core of a new world order of governance.

Yet it is not networks as such that form the core of Slaughter’s vision in *A New World Order*; vital to her account is the role played by *government* networks. By “government networks” she means networks of regulatory agents and agencies that reach out to their homologues and other regulators across national borders and state jurisdictions. The function of such outreach, which includes the sharing of information and, ultimately, the responsibility for action within a given regulatory sphere, is to close the gap between sovereign state jurisdictions that might otherwise allow global threats to go unaddressed. For example, Slaughter points out that since September 11, 2001, public attention has focused on military action, but “the networks of financial regulators working to identify and freeze terrorist assets, of law enforcement officials sharing vital information on terrorist suspects, and of intelligence operatives working to preempt the next attack have been equally important” (p. 2). As another example, she notes that under NAFTA, “U.S., Mexican, and Canadian environmental agencies have created an environmental enforcement network, which has enhanced the effectiveness of environmental regulation in all three states, particularly in Mexico” (pp. 2–3).

A New World Order supplies many such examples from many fields. What these examples have in common is that they feature a transnational actor or issue that either exists beyond a single state’s borders while having effects within it, or else dwells in the spaces and commons between states’ borders while having effects on states. Coordinated, networked action by government officials from different states permits the gaps between sovereign states to be closed, while at the same time (and this is a cornerstone of the theory) creating a new sort of power, authority, and legitimacy.

⁴ Slaughter gave this concept an earlier airing. See Anne-Marie Slaughter, *Government Networks: The Heart of the Liberal Democratic Order*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 199 (Gregory H. Fox & Brad R. Roth eds., 2000).

⁵ The term is deliberately drawn from information theory and computer science; the nonhierarchical sharing of information is a vital part of Slaughter’s theory.

We might say, therefore, that Slaughter here presents a *theory of global interstices*, a theory of the gaps. But this is a two-way theory. Indeed, Slaughter offers both a theory of the power that can exist in exploiting the interstices between sovereign states and a theory of the power generated through new structures of authority to close those gaps. Global networks can create genuinely new forms of authority that are at once liberated in some special sense from their original jurisdictional framework and yet remain undeniably governmental, in the sense that they are wholly creatures of governments that have pre-existing grounds of legitimacy. The double function of power in the interstices, and the combined functions of governments and networks, are fundamental elements in Slaughter's forceful theory.

A New World Order characterizes its theory of government networks as one based upon "descriptive and predictive empirical claims" (p. 18). A certain amount of moralizing is necessarily part of Slaughter's discussion of a just world order, but overall *A New World Order* is a work of descriptive social order, not of moral imagination. Yet it is a groundbreaking book, a striking combination of both pragmatism and vision. Despite my several disagreements with the work, it is thoughtful, profound, and deserving of wise reading and discussion. Slaughter represents the cutting intellectual edge of this decade's new way of thinking about global governance.

This Review proceeds in six parts. Following this Introduction, Part II lays out the range of available positions in the perennial debate — standoff, really — between sovereignty and global governance. This debate provides the framework for the solution offered by *A New World Order*. Part III focuses on Slaughter's internal argument, reconstructing and critiquing its central tenets, in particular the concepts of "horizontal" and "vertical" government networks. Part IV examines the fundamental premise of Slaughter's internal argument, the claim of "disaggregated states," which leads to the corollary of "disaggregated sovereignty." Part V moves away from internal critique to offer an explicitly external critique of *A New World Order* based on the ideal of "democratic sovereignty." The external critique reaches a skeptical conclusion as to whether *A New World Order* indeed offers a *stable* solution for avoiding the horns of Slaughter's starting dilemma. The analysis suggests that, eventually, government networks will seek to assume supranational governance powers that are inconsistent with democratic sovereignty and accountability, notwithstanding *A New World Order's* strenuous efforts to preserve balance among our desired values. Finally, Part VI provides a brief conclusion to this Review.

II. THE PERENNIAL ARGUMENT BETWEEN SOVEREIGNTY AND GLOBAL GOVERNANCE

A. Forms of Idealism in the Debate over Sovereignty and Global Governance

Any serious discussion of global governance typically frames itself in the context of the perennial debate between realism and idealism in international relations, politics, and law.⁶ Without addressing directly the question of realism versus idealism in global governance, a discussion risks being categorized as irrelevant utopianism.

A New World Order must face up to realist scrutiny from those asking whether it supports or hinders sovereignty and sovereign interests, which governments and states stand to benefit the most, and many similar questions. It therefore begins with a discussion that is emphatically realist and empirical. Indeed, much of the book's introduction specifically addresses the United States and discusses why, in cold political realism, it would serve America's traditional sovereign interests to embrace government networks. As a foreign policy option, Slaughter says, "a world of government networks . . . should be particularly attractive to the United States" (p. 4). After all, the United States has taken an active role in identifying the domestic roots of many international problems, and it is also "coming to understand the vital need to address those problems multilaterally rather than unilaterally, for reasons of legitimacy, burden sharing, and effectiveness" (p. 4).

Yet addressing realist concerns about sovereignty is not at the heart of Slaughter's endeavor in *A New World Order*. Her primary goal, rather, is to resolve the tangentially related standoff between sovereignty and global governance, between the preservation of liberty and the benefits of institutional governance. The realist point is always there — a political community or state risks losing its liberty and the liberty of its members if it does not look to its sovereign interests and to the maintenance of political power. But, as Slaughter recognizes, gaining the benefits of cooperation among states remains an issue *even if* a state has sufficient sovereign power to secure its liberties and those of its subjects. The governance dilemma is not resolved simply by having sovereign power, even a lot of it. The dilemma, in other words, is not captured by the perennial debate about power between realists and idealists. It is captured, rather, by a debate among different kinds

⁶ For this debate set in a standard international relations text, see JAMES E. DOUGHERTY & ROBERT L. PFALTZGRAFF, JR., *CONTENDING THEORIES OF INTERNATIONAL RELATIONS: A COMPREHENSIVE SURVEY* 58–99 (4th ed. 1997).

of idealists about whether sovereignty is desirable or fundamental.⁷ Although *A New World Order* makes many arguments based on an appeal to the realist interests of states (and those of the United States in particular), much more fundamental to its thesis is a debate over the ideal nature of sovereignty and the ideal form of global governance.

This debate is, in essence, one among differing idealisms. It asks, in effect, whether sovereignty embodies anything other than interests, and whether one conception or another of sovereignty supports specific moral and political values — in particular, those of liberty and democracy. The debate asks the same of global governance: how it might be conceived and what moral and political values it embodies and supports. The debate assumes that conceptions of sovereignty and global governance become contradictory and mutually exclusive; at least as pertaining to first principles, it seems that they do. The ambition of *A New World Order* is to reconcile what seem to be otherwise irreconcilable values and, hence, irreconcilable paradigms of sovereignty and global governance.

Before examining how *A New World Order* attempts to fulfill its ambitions, it may be helpful to map the various conceptions of sovereignty and global governance that, to this point, have seemed irreconcilable. The leading contemporary positions on sovereignty (as traditionally understood to mean the power to be left alone and to ignore any outside interference) and global governance (as ordinarily understood to mean some kind of legal structure of rules binding on sovereigns or to mean the weakening or even disappearance of sovereignty altogether) can be grouped into seven distinct categories.⁸

1. *Sovereignty As Its Own Value, Sovereignty for Its Own Sake.* — Starting at the extreme end of the sovereignty spectrum is the simple position that sovereignty is a value all its own. Under this theory, the ability of a state, as a political community, to be subject to no outside power, to be able to act without interference, is valuable for its own sake. Sometimes expressed as the right of self-determination, the interest at the core of this position is sovereignty itself — the liberty of a

⁷ Jeremy Rabkin has recently offered a new, robust defense of democratic sovereignty. See JEREMY A. RABKIN, *THE CASE FOR SOVEREIGNTY: WHY THE WORLD SHOULD WELCOME AMERICAN INDEPENDENCE* (2004). This Review returns to this question about the fundamental nature of sovereignty in Part V.

⁸ Although the most important two categories, democratic sovereignty and liberal internationalism, are terms widely in use — albeit with varying meanings — several of the others (multilateral pooled sovereignty, for example) are parsings of the existing positions, offered as analytic possibilities in order to show the precise progression from one end of the spectrum of sovereignty to the other. These parsed positions, in practice, get wrapped into one or the other of the widely recognized positions. I do not mean to imply that there are actual adherents to each enumerated position. In practice, participants in the debate tend to identify themselves as fundamentally sympathetic to democratic sovereignty or to liberal internationalism.

political community.⁹ Moreover, sovereignty is valuable even if the state asserting this sovereignty has little if anything to recommend it — the state need not be democratic, it need not respect human rights, and so on. Because sovereignty is valuable per se, value attaches to the sovereignty even of undemocratic states such as Saudi Arabia or Saddam's Iraq. Respect for the sovereignty even of wicked states can be defended on realist grounds, but the position herein described grounds itself in the intrinsic value of sovereignty, and so is a form of idealism.

2. *Democratic Sovereignty.* — Like the “pure” sovereignty position, democratic sovereignty champions the value of sovereignty. But it does so not for the sake of sovereignty as such — although it often recognizes sovereignty as an independently legitimate value — but instead because sovereignty, and the pursuit of sovereign power and interests in the realist fashion, is a means of expressing *another* value: democracy. Sovereignty is justified as a means of expressing and respecting the democratic will of a particular political community.¹⁰ With democratic sovereignty, therefore, the state itself essentially becomes the democratic expression of the political community. Democracy matters inside that political community in order for sovereignty to be more than a very limited moral or political value. But the crucial corollary — difficult to absorb into a conception of global governance — is the fidelity of the state to its own internal democratic processes rather than to any exterior structure of rules, laws, or commands from larger global institutions. Democratic sovereignty is emphatically *not* realism — the pursuit of sovereign power and interests for their own sake. It is, rather, a form of idealism — one that gives precedence to moral fidelity to the political community from which states and rulers derive their legitimacy, their authority, and indeed their very claim to sovereignty.¹¹

This ideal of democratic sovereignty can be further refined to mean constitutional democracy, a concept that those who embrace democratic sovereignty also accept. Constitutional democracy embraces constitutional limitations on the power of democratic majorities, the rule of law expressed through independent courts, and a core of human and

⁹ Perhaps the most sympathetic defense of sovereignty as its own value is offered from the perspective of self-determination. See MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 86–108 (1977). Offering an argument grounded purely on communal self-determination, Walzer believes that sovereignty can be seen as a value even in manifestly unjust and undemocratic states.

¹⁰ See RABKIN, *supra* note 7, at 26–35; see also Kenneth Anderson, *The Role of the United States Military Lawyer in Projecting a Vision of the Laws of War*, 4 CHI. J. INT'L L. 445, 456–57 (2003).

¹¹ For a splendid recapitulation of this view by an unabashedly liberal American constitutional scholar, see Jed Rubenfeld, *The Two World Orders*, WILSON Q., Autumn 2003, at 22.

constitutional rights beyond amendment by mere democratic majorities. Democratic constitutional sovereignty privileges the political community from which a democratic constitution arises, sees the state's legitimacy and sovereignty as arising from that community, and sees the state's fidelity as belonging to that community, even when this fidelity conflicts with the demands of the larger institutional structures of global reach and pretension. Global institutions neither carry nor confer legitimacy upon constitutional, democratic sovereigns.

3. *Sovereign State Multilateralism*. — That democratic (or even undemocratic) sovereigns do not derive their legitimacy and authority from international institutions or global structures does not deprive them of the ability to work with these institutions and structures. Accordingly, the ideal of sovereign state multilateralism recognizes that sovereign states can cooperate together on any number of matters, in structures ranging from ad hoc to formal, without compromising the commitment of democratic sovereignty, provided that the state retains its sovereignty by being able to opt out. The state may exercise its prerogative to opt out even when doing so constitutes a violation of its treaty agreements and incurs responses by other sovereigns. The opt-out arrangement represents an ideal of multilateralism that is compatible with democratic sovereignty, because ultimately the extent, type, and duration of multilateral cooperation is determined by democratic sovereigns accountable to their political communities and acting with their communities' consent. The sovereign state multilateralism model has been instantiated in ad hoc forms, such as the Bush Administration's call for a "coalition of the willing" rather than for forces authorized and sent forth by the Security Council, and in institutionalized forms, such as NATO. The importance of this ideal in relation to the government networks proposed by *A New World Order* is plain.

4. *Multilateral Pooled Sovereignty, Looking Toward Federalism*. — Another ideal of multilateralism is what might be called "multilateral pooled sovereignty." Here, the key normative feature is that sovereign states act together in ways that are deliberately aimed at "pooling" their sovereignty, through agencies, institutions, organizations, and networks, both formal and informal. The institution, agency, or regulator that acts is the multilateral creation of sovereigns, but the result is one in which the individual sovereign identities are commingled and pooled so that it is not an actor consisting of identifiably sovereign parts. The U.N. Secretariat, U.N. agencies such as the World Health Organization, and other international organizations, such as the World Bank or the International Monetary Fund, can all be conceived of as realizations of this ideal. Indeed, it is this ideal to which the Secretary General appeals — not, in my view, with complete sincerity — when

he says that the U.N. is the creature of member states and not itself an independent actor.¹² Yet there is a deep ambiguity here, because many of those committed to the ideal of pooled sovereignty, especially as instantiated in formalized institutions such as U.N. agencies, are also committed, at least in their own world views, to transcending sovereign state multilateralism as the basis of institutional legitimacy and adopting a genuinely global federal structure in which legitimacy resides not in sovereign states but in global government.

Hence the additional description, “looking toward federalism.” This descriptive label recognizes that the ideal of pooled sovereignty is conceived of by many of its participants — albeit often covertly — as a progressive, transformative ideal whose optimal end is not the continued reign of democratic sovereigns, but is instead a pooling of sovereignty that leads to a new world federal political institution no longer dependent for its legitimacy on the assent of democratic sovereigns. Clearly, this transformative ideal draws on the ideals of theorists of the transformation of the European Union’s “ever closer union”; clearly, too, it is an ideal of marked importance for the government networks proposed by *A New World Order*.¹³

5. *Global Governance Through (Public-Private) Global Policy Networks*. — A rising concern about the lack of democratic accountability in theories of supranational government led, as Slaughter notes, to the championing in the 1990s of a new concept, “global governance,” as an alternative to global government.¹⁴ Global governance was conceived as “a much looser and less threatening concept of collective organization and regulation without coercion. A major element of global governance, in turn, has been the rise of global policy networks, celebrated

¹² As Slaughter puts it, “Kofi Annan repeatedly reminds his audiences that as Secretary General he is a spokesman for the United Nations and exercises limited powers on behalf of the Secretariat, but in the end his power depends almost entirely on the will of the member-states” (p. 159). I would suggest, however, that the Secretary General is being disingenuous and falsely modest in suggesting that his role is fundamentally ministerial. The Secretary General is obviously a “player,” and never so much as when he is able to exploit disagreements of policy and interest among the great powers of the Security Council to promote the independent agendas of the U.N. agencies. To suggest that the Secretariat and the U.N. agencies are not canny bureaucratic and diplomatic players pursuing their own agendas, quite apart from those of member states, beggars the imagination.

¹³ Slaughter discusses the influence of EU models on her own ideas about global governance at page 134.

¹⁴ For examples of this literature from the 1990s, see WOLFGANG H. REINICKE, *GLOBAL PUBLIC POLICY: GOVERNING WITHOUT GOVERNMENT?* (1998); Wolfgang H. Reinicke, *The Other World Wide Web: Global Public Policy Networks*, *FOREIGN POL’Y*, Winter 1999–2000, at 44; and R.A.W. Rhodes, *The New Governance: Governing Without Government*, 44 *POL. STUD.* 652 (1996).

for their ability to bring together all public and private actors on issues critical to the global public interest" (p. 9).¹⁵

Global policy networks typically feature a combination of representatives of national governments, international organizations, corporate and business interests, and nongovernmental organizations (NGOs). Representative tasks include the creation of standards, regulations, and best practices with respect to a particular global issue, such as landmines, human trafficking, development programs for the world's poor, the role of multilateral economic actors such as the World Bank or the International Monetary Fund, or cross-border pollution.¹⁶ During the 1990s, however, the concept of global governance was prominently driven by international NGOs, which increasingly flexed their muscles in areas ranging from human rights to the environment and increasingly made claims that they "represented" the peoples of the world in their dealings with governments and international organizations. NGOs recast themselves as "global civil society" to reflect their increasingly expanded claim to a place at the table in establishing transborder policies, regulations, and law.¹⁷ International organizations such as the U.N. began to support and even court the NGOs, seeing in the NGOs an opportunity to further their own legitimacy.¹⁸ The question that remains is whether governance through such networks increases or decreases the accountability of government — or governance — to the governed.

6. *Liberal Internationalism.* — Liberal internationalism is the ideal that asserts, openly and unapologetically, that true legitimacy rests on

¹⁵ A footnote has been omitted. Slaughter notes that global policy networks "focus on the many ways in which private actors now can and do perform government functions, from providing expertise to monitoring compliance with regulations to negotiating the substance of those regulations, both domestically and internationally" (p. 9). It should be understood that Slaughter's favorable account of *government* networks arises in no small part because she agrees that NGOs and other private actors indeed lack accountability and therefore the legitimacy to participate in the direct decisionmaking and policymaking that advocates of global governance by public-private networks endorse. Her forthright agreement on this crucial issue is a great strength of the argument and one of the reasons her argument is a serious advance in the intellectual debate over global governance.

¹⁶ For a representative account, see ROBERT O'BRIEN ET AL., *CONTESTING GLOBAL GOVERNANCE: MULTILATERAL ECONOMIC INSTITUTIONS AND GLOBAL SOCIAL MOVEMENTS* (2000).

¹⁷ For an enthusiastic endorsement of these claims, see JOHN KEANE, *GLOBAL CIVIL SOCIETY?* (2003). For a less enthusiastic account, see Kenneth Anderson & David Rieff, "Global Civil Society": *A Sceptical View*, in *GLOBAL CIVIL SOCIETY* 2004/5, at 26 (Mary Kaldor et al. eds., 2005).

¹⁸ I discuss this symbiosis at greater length in Kenneth Anderson, *The Limits of Pragmatism in American Foreign Policy: Unsolicited Advice to the Bush Administration on Relations with International Nongovernmental Organizations*, 2 *CHI. J. INT'L L.* 371 (2001) [hereinafter Anderson, *The Limits of Pragmatism*]; and Kenneth Anderson, *The Ottawa Convention Banning Landmines, the Role of International Non-governmental Organizations and the Idea of International Civil Society*, 11 *EUR. J. INT'L L.* 91, 104–20 (2000) [hereinafter Anderson, *The Ottawa Convention*].

universal principles and that international, transnational, and supranational institutions can be stewards of such universal principles. Unlike constitutional democratic sovereignty, liberal internationalism seeks legitimacy not in democracy and popular sovereignty, but rather in universal principles of human rights. Such principles are unattached to the will of the people, except at the most abstract level in the form of the assumption that the decisions made on account of those principles are what the “people” would approve of if they were fully rational, fully moral human beings. The principles animating liberal internationalism require no real assent from the bottom up for their legitimacy; the model’s legitimacy depends not on consent but on the presumed rightness of its human rights universals. The model presumes that elites at the top of the global social structure are best qualified to determine these universal principles and to teach them to and inculcate them in those individuals further down the social hierarchy.¹⁹

The model herein described is “liberal” insofar as its human rights universals often have a liberal content; it is internationalist not in the sense of multilateralism, but instead in the sense that the universal is identified with the international, the transnational, and the supranational. At the same time, liberal internationalism is a *transformative* ideal. It evinces an understanding that it is necessary to move from the legitimacy now residing in democratic sovereigns to legitimacy residing in transnational, supranational institutions.²⁰ It begins with a realistic assessment of where legitimacy exists at this moment, but it idealizes a transmutation of sovereign state legitimacy, through a gradual pooling process, into a genuinely transnational, supranational legitimacy. Liberal internationalism differs from multilateral pooled sovereignty in that it rejects the convenient ambiguity that allows multilateral pooled sovereignty to slide covertly between democratic sovereignty and human rights universalism as the source of ultimate political legitimacy. Liberal internationalism does, however, share with multinational pooled sovereignty the understanding that realism requires a transformative path to move from democratic sovereignty to global federalism. It thus shares with pooled sovereignty a common theoretical outlook that derives from the theory and experience of, and that reflects an enthusiasm for, the evolving European Union.²¹

¹⁹ For a critique of liberal internationalism as a function of a certain form of top-down universalism, see Rubinfeld, *supra* note 11, at 34–36.

²⁰ A representative example of such thinking within American jurisprudence is Antonio F. Perez, *On the Way to the Forum: The Reconstruction of Article 2(7) and Rise of Federalism Under the United Nations Charter*, 31 TEX. INT’L L.J. 353 (1996).

²¹ Political scientists such as David Held generally take this kind of transformative line. See, e.g., DAVID HELD ET AL., *GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS AND CULTURE* 446–52 (1999).

7. *Parliamentary World Government*. — The parliamentary world government model asserts that legitimacy rests — and ought to rest — with global institutions.²² Although it shares with liberal internationalism an enthusiasm for precisely the world government that Slaughter rejects as “infeasible and undesirable” (p. 8), parliamentary world government acknowledges that *democratic* legitimacy matters. The model attempts to facilitate and preserve democratic legitimacy by calling for a global parliamentary system, modeled somewhat on the structure of today’s European Parliament, operating partly parallel to and partly above existing national legislatures.²³

The intent is to create a genuinely federal and democratic global government. Wherein lies its utopianism. If parliamentary world government’s most admirable quality is its forthright recognition that democracy cannot be dispensed with as a value in a federal world, then its answer is equally forthright but utterly utopian: “Let the whole planet vote.” As Slaughter says, the “diversity of the peoples to be governed makes it almost impossible to conceive of a global demos. No form of democracy within the current global repertoire seems capable of overcoming these obstacles” (p. 8). She is surely correct. And yet parliamentary world government is both an analytically important part of the spectrum of possible idealisms and one that is, however utopian, admirably forthright in its acknowledgment of the essential value of democracy.

B. “We Are All Idealists Now”

Viewed in one way, the above idealisms form a continuum, running from one extreme of national sovereignty to another of world government. The move from one to the next is a matter of degree, the gradual ceding of sovereignty from states to international institutions and the gradual shift from state sovereignty to global government. Viewed in another way, however, at some point in the continuum there is a clear break of principle: ought state sovereignty to be supreme or ought we, instead, to seek a federal world in which state sovereignty gives way to the legal and political supremacy of global institutions?

The above taxonomy is an elaborated restatement of the dilemma with which *A New World Order* grapples. How shall we see sover-

²² See, e.g., COMM’N ON GLOBAL GOVERNANCE, OUR GLOBAL NEIGHBORHOOD 257 (1995) (“One suggestion widely canvassed is to establish ‘an assembly of the people’ as a deliberative body to complement the General Assembly, which is representative of governments. What is generally proposed is the initial setting up of an assembly of parliamentarians, consisting of representatives elected by existing national legislatures from among their members, and the subsequent establishment of a world assembly through direct election by the people.”).

²³ See, e.g., Richard Falk & Andrew Strauss, *Toward Global Parliament*, FOREIGN AFF., Jan.–Feb. 2001, at 212, 216–20.

eignty? As that which guarantees democratic accountability to a political community at the level of the nation-state? Or as that which not only deprives us of the benefits of cooperative global governance, but also fails to secure for us the benefits of a universal reign of human rights that ought not to depend on democratic majorities for its enforcement? Or might we frame precisely the same questions in the obverse: how, instead, shall we see global governance?

A New World Order struggles to find a way out of this dilemma. It searches for a position on the sovereignty-global governance continuum that captures the benefits of *both* core ideal positions — democratic sovereignty and liberal internationalism — while avoiding the disadvantages of each. It is an extraordinarily difficult proposition, and it is what makes *A New World Order* such an ambitious book.

Slaughter thus proposes to square what some might have thought was a circle and, moreover, to do it honestly, without recourse to definitional sleight of hand. Specifically, she eschews the temptation to redefine sovereignty in such a way that, by definition, it no longer threatens the terms of global governance. *A New World Order* is, however, at times drawn to such redefinition and indeed quotes — but does not assume — precisely such a “de-fanged” definition of sovereignty drawn from legal-political theorists Abram and Antonia Chayes. This “new sovereignty” is defined as

the capacity to participate in international institutions of all types — in collective efforts to steer the international system and address global and regional problems together with their national and supranational counterparts. This is a conception of sovereignty that would accord status and recognition to states in the international system to the extent that they are willing and able to engage with other states, and thus necessarily accept mutual obligations. (p. 267)²⁴

This definition is sovereignty “de-fanged” because it *defines* sovereignty as acceding to global governance and the rule of others. Accept this as the definition of sovereignty and nearly all questions of sovereign power and interest disappear into the global collective. Sovereignty, in this case, just *is* federal global governance, and everything becomes very, very easy.

While Slaughter’s own instincts run in favor of precisely such a view of sovereignty, *A New World Order* nearly always resists the temptation to avoid doing the hard work simply by a priori definition. Instead, Slaughter offers this redefinition of sovereignty as the *result* of her solution to the governance dilemma. Whether Slaughter’s solution in fact manages to derive this new form of sovereignty in a way that

²⁴ A footnote has been omitted. The author cites ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 4 (1995).

makes it rational for states and political communities to accept it is another matter, to which we shortly turn. But *A New World Order*, to its credit, nearly always concedes that it cannot reach that conclusion simply by assuming it.

A New World Order correctly acknowledges that the central debate in international law and politics focuses not on the comparative merits of realism versus idealism but rather on the governance dilemma and on what constitutes a defensible position on the sovereignty-global governance continuum. Realism is as important as ever, in one sense, but in another sense, realism is servant to the goals articulated by one or another form of idealism. Put another way, it is true, of course, that the real and anticipated consequences of actions matter, and power matters — but in the service of our ideals. Hence, what we identify as the defensible ideal matters in the first place. Even our moral realists have enlisted their analyses and prognostications of consequences in the service of one ideal or another. We are all idealists now.

III. GOVERNMENT NETWORKING IN A NEW WORLD ORDER

A. *The Inadequacy of Existing Ideal Solutions*

With all of the above said, none of the idealisms described in section II.A is suited to the rigors of *A New World Order*'s project. Each fails in some way to avoid being pinned on one of the horns of the governance dilemma. Consider first the “outlier” positions on the sovereignty-global governance continuum — “sovereignty for its own sake” and “parliamentary world government.”

According to Slaughter, neither of these two sovereignty positions is sufficient to secure the benefits that flow from a regime of transnational cooperation that employs a fixed structure of binding rules. Each sovereign calculating its interests and power alone is not enough to give us the collective benefits of regulatory cooperation, however enlightened and farsighted such a sovereign might be (p. 8). Yet at the other extreme, “parliamentary world government” indulges a fantasy of planetary democracy (p. 8). Even “liberal internationalism,” to which Slaughter — in this and other writings — is sometimes drawn,²⁵ is deemed insufficiently respectful both of democracy as a value and of the accountability to a political community that democracy anchors (pp. 8–9).

Yet the “interior” positions, too, while each purporting to reconcile the desire for two potentially conflicting values, are no less problematic in Slaughter's view. “Sovereign state multilateralism” appears too

²⁵ See sources cited *supra* note 3.

ad hoc to provide stable cooperative benefits. So-called shifting “coalitions of the willing” *might* be adequate for narrow special circumstances, such as certain armed conflicts (the Kosovo war, perhaps), but they are too unstable to serve longer-term interests (p. 265). “Multilateral pooled sovereignty” appears attractive at first sight, but it suffers from a fatal (and deliberate) ambiguity in its definition that allows it to claim the benefits of both transnational cooperation and sovereignty while nevertheless redefining sovereignty in a congenial and unthreatening way (p. 262).

Even “global governance through global policy networks” — the NGO–private actor alternative and the ideal closest to what *A New World Order* has in mind — suffers from a lack of genuinely democratic accountability (p. 9). Slaughter’s rigorous criticism of what she might otherwise find an attractive solution to the governance dilemma is worth noting because global governance through policy networks has been the ideal most pursued in recent years by those drawn to liberal internationalism. The problem with global policy networks, Slaughter says, lies in ensuring that private actors, including NGOs, uphold the public interest. She strikingly quotes the conservative critic John Bolton:

[I]t is precisely the detachment from governments that makes international civil society so troubling, at least for democracies. . . . [T]he civil society idea actually suggests a “corporatist” approach to international decision-making that is dramatically troubling for democratic theory because it posits “interests” (whether NGOs or businesses) as legitimate actors along with popularly elected governments. (p. 9)²⁶

The accountability problem is most acute with respect to NGOs, which typically define themselves as upholding the public interest and the common good. No one is surprised that corporations typically advocate the position that is best for their business interests, owners, and shareholders. But NGOs typically claim the do-gooder’s writ of universal authority based on good intentions, even when NGOs pursue narrow, single-interest advocacy issues that cannot be said to represent the “common good” in the way that popularly elected governments — or for that matter, broad-based political parties — do.²⁷ Martin Shapiro notes that the shift to the rhetoric of governance betokens “a significant erosion of the boundaries separating what lies inside a gov-

²⁶ Internal quotation marks have been omitted. The author quotes John R. Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT’L L. 205, 217–18 (2000).

²⁷ Thomas Carothers makes this important point about the messy, real-world, “integrative” function of political parties, versus the moral purity of single-interest advocacy NGOs, in *Civil Society: Think Again*, FOREIGN POL’Y, Winter 1999–2000, at 18, 19–23.

ernment and its administration and what lies outside them.”²⁸ Echoing him, Slaughter warns that the “result [of NGO involvement] is to advantage ‘experts and enthusiasts,’ the two groups outside government that have the greatest incentive and desire to participate in governance processes” (pp. 9–10). Thus, even when the private participants in governance networks are NGOs rather than obviously self-interested business entities, the problem remains, as Shapiro puts it, that “[w]hile the ticket to participation in governance is knowledge and/or passion, both knowledge and passion generate perspectives that are not those of the rest of us. Few of us would actually enjoy living in a Frank Lloyd Wright house.”²⁹

The governance dilemma, Slaughter acknowledges, is even bleaker than we first thought. Indeed, it is not just a dilemma; it is a “trilemma”: First, we “need global rules” (p. 10). Second, we need global rules “without centralized power” (p. 10). Third, we need global rules without centralized power but “with government actors who can be held to account through a variety of political mechanisms” (p. 10).³⁰

Slaughter proposes “government networks” as a solution to the trilemma. But what exactly does Slaughter mean by government networks, how does she understand them to solve our governance dilemma (or trilemma), and how will they, unlike other networking solutions, meet Slaughter’s rigorous criteria? This Review turns now to *A New World Order*’s internal argument, focusing specifically on the core concepts of “disaggregated sovereignty” and “horizontal” and “vertical” government networks.

B. What Are “Government Networks”?

A New World Order aims at the proliferation of government networks. Such proliferation is, says Slaughter, a phenomenon that is happening now, although it is insufficiently noted or understood by observers of globalization. But in Slaughter’s view, such a phenomenon is also a highly desirable outcome, one that best resolves the globalization trilemma.

Just as “[t]errorists, arms dealers, money launderers, drug dealers, traffickers in women and children, and the modern pirates of intellectual property all operate through global networks,” governments increasingly do likewise (p. 1). Slaughter offers as immediate examples networks of many kinds of regulators and government officials, includ-

²⁸ Martin Shapiro, *Administrative Law Unbounded: Reflections on Government and Governance*, 8 IND. J. GLOBAL LEGAL STUD. 369, 369 (2001).

²⁹ *Id.* at 374.

³⁰ Accountability is, as Slaughter correctly notes, a separate consideration from libertarian limits on centralized power. Each may be served by democracy, but they are in fact distinct concerns.

ing police investigators, financial regulators, and even judges and legislators. These governmental actors, she observes, “increasingly exchange information and coordinate activity to combat global crime and address common problems on a global scale. These government networks are a key feature of world order in the twenty-first century, but they are underappreciated, undersupported, and underused to address the central problems of global governance” (p. 1).

Slaughter offers many examples beyond cross-border law enforcement, antiterrorism, and international security. For example, in the global economy — interlinked through financial and business ties now more than ever — “networks of finance ministers and central bankers have been critical players in responding to national and regional financial crises” (p. 2). In environmental protection, the U.S. Environmental Protection Agency (EPA) “and its Dutch equivalent have founded the International Network for Environmental Compliance and Enforcement . . . , which offers technical assistance to environmental agencies around the world” (p. 3).³¹ In matters of justice and judiciaries, national judges

are exchanging decisions with one another through conferences, judicial organizations, and the Internet. Constitutional judges increasingly cite one another’s decisions on issues from free speech to privacy rights. . . . Bankruptcy judges in different countries negotiate minitreaties to resolve complicated international cases; judges in transnational commercial disputes have begun to see themselves as part of a global judicial system. National judges are also interacting directly with their supranational counterparts on trade and human rights issues. (p. 3)

Even legislators, “the most naturally parochial government officials[,] . . . are reaching across borders” (p. 3).

Practically everywhere Slaughter looks, therefore, she sees a proliferation of governmental networks. Such networks have, she says, certain common functions, even across subject matter areas. First, they “expand regulatory reach” and in effect allow governments to close the gaps between their jurisdictions (p. 3). Second, they “build trust and establish relationships” among their participants, “conditions essential for long-term cooperation” (p. 3). Third, they exchange information regularly and develop “databases of best practices” (p. 3). Fourth, they offer “technical assistance and professional socialization to members from less developed nations” (p. 4). Of these functions, the tendency is

³¹ Indeed, the United States provides substantial technical assistance of all sorts through global networks. Slaughter points out that “[w]hen the official U.S. foreign aid budget is tallied, it does not include technical assistance from the SEC, the EPA, the Justice Department, or the Treasury Department. Yet all of these parts of the U.S. government provide growing amounts of such assistance to their counterparts around the world”; the amount of money poured into such networks — essentially a transfer from developed to less developed countries — is sizable and likely to grow (p. 57).

to focus on the first, the one that seems most “realist” in its assertion of power over the gaps between legal and national jurisdictions. Slaughter, however, emphasizes (correctly, in my experience) that over the long term the following phenomena constitute the sine qua non of government networks: the creation of common ties, personal relationships, camaraderie, a shared professional and social outlook, and an expectation that what others in the network think of what I do in my home jurisdiction, whether as a judge, regulator, or law enforcement official, genuinely matters. In short, the most significant effect of global networks might be characterized as the creation of a global bourgeoisie with a set of similar elite-class views—that is, as a process of socialization, rather than simply a network of one-off transactions.

Conceived this way, the importance of government networks is perhaps unclear. *A New World Order* understands these government networks to play a much more robust role in governance than might be apparent from the general description provided above. This more robust conception of government networks can only be deduced through a closer examination of the various types of global networks.

In the first three chapters of the book, Slaughter distinguishes three categories of government networks: harmonization networks, enforcement networks, and information networks (although in practice the three might overlap). Harmonization networks, for example, “contribute to world order by allowing nations to standardize their laws and regulations in areas where they have determined that it will advance their common interests in trade, environmental regulation, communications, protecting public health, or any number of other areas” (p. 167). Such networks involve the exercise of genuine regulatory power. Harmonization networks are far from being merely cross-border talking shops or debating societies because coordination of laws and regulations across borders closes the gap between jurisdictions. Harmonization networks seek to close the regulatory gaps by harmonizing legal systems across borders, not by establishing a single, supranational law, but instead by inducing each jurisdiction to accept the same system. The process is as fundamental and familiar as the adoption of the Uniform Commercial Code by the various states of the United States. Through harmonization networks, states may gain in regulatory reach but may also lose or at least have to compromise on the nature of the regime. Harmonization requires harmony. Signing on to a harmonization network means giving up the privilege of dissonance so long as one remains in, and benefits from, the network.

Enforcement networks, by contrast, “contribute to world order by helping nations enforce law they have individually or collectively determined to serve the public good” (p. 167). Enforcement networks, in other words, enforce the laws created by harmonization networks. The most obvious examples of enforcement networks occur in the area of criminal law enforcement. Raiding internet distributors of child

pornography, for example, requires coordinated arrests in order to capture the entire criminal web and to preserve the evidence necessary to obtain convictions. Outside the criminal law context, tax regulations, accounting standards, and cross-border riparian rights, among others, all implicate enforcement networks.

Information networks, for their part, contribute to world order by allowing maximization of efficient and rational decisionmaking in various substantive matters. Information networks are perhaps easiest to conceptualize in the case of scientific knowledge. Knowing the etiology of HIV-AIDS, for example, is a universal ground of rational decisionmaking; even if the political and social response must be calibrated to local culture, the knowledge of physical processes is universal and universally relevant. Information networks allow the rapid production and diffusion of such knowledge. Yet surprisingly, information networks may be sources of potent conflict. This is particularly true when the issue at stake involves the legitimacy of social practices or government, rather than scientific information. Although, as Slaughter says, scholars “tend to assume automatically that more information is better,” those concerned with the legitimacy of a political system and its decisions may be far more “concerned with the *source* of particular information — from within a particular polity, constituted by the people of a specific nation, or from abroad,” than they are with its *content* (pp. 167–68).³²

Why? If one is talking not about universal knowledge (laws of physical science, for example) but instead about information in the social sense (which can include judicial decisions from other jurisdictions, model legal codes from other places, and cultural models in the form of media content), then the legitimacy and the social, cultural, political, and legal provenance of that “information” is the issue far more than is its content. It might be true that I would be, in fact, a better president than any given candidate for office — but, of course, that “fact” is not the issue, while the legitimate process of becoming president is. Or, to give another example, there are obvious legitimacy issues with the proposition that the United States should adopt a ruling of the German Constitutional Court, even if the German ruling appears to be a better way of doing things.

Curiously, therefore, as Slaughter points out, the seemingly most benign and least coercive type of government network, information networks, might actually invoke the most serious issues of political legitimacy. Whether information networks produce legitimate outcomes depends on how actors within the networks deal with the information and with one another. Slaughter observes that there often is network

³² Emphasis has been added.

pressure for convergence of practices, which may or may not create a result that is legitimate within a particular political context and society (pp. 171–72). She also notes, however, that there is the possibility of what she calls “informed divergence,” in which those “who are purportedly on the receiving end” of information may “choose to continue to diverge from the model being purveyed, but do so self-consciously, with an appreciation of their own reasons” (p. 172). So, for example, a central bank may choose not to follow the network model of a certain monetary policy during a financial crisis, for essentially political reasons, but at least it will do so with clear knowledge of what the financial consequences are likely to be.

The combined effect of all three categories of government networks is to “marry soft with hard power” (p. 168).³³ This insight is deft, and one that I would put somewhat more strongly by describing government networks as mechanisms for the conversion of soft power *into* hard power. The power within networks themselves is, Slaughter says, soft power, and even when “the supranational entity has formal legal authority over its national counterpart, it has no actual means of enforcing the obligation” (p. 168). Instead, the supranational entity “must use everything from expertise to endearments” (p. 168) to convince member nations to fall into line. “Once convinced of a particular path of action,” however, national government officials “possess hard power to make things happen” (pp. 168–69).

This sketch of what *A New World Order* understands government networks to do is necessarily incomplete. Yet an essential element driving *A New World Order*’s model of government networks still awaits description — the distinctive functions of what Slaughter calls “horizontal” and “vertical” networks, and their respective roles in the process of turning soft power into coercive hard power.

C. Horizontal and Vertical Government Networks

Government networks need not be categorized only as harmonization networks, enforcement networks, or information networks. Another way of categorizing the same government networks is as “horizontal” or “vertical.” Distinguishing analytically between horizontal

³³ The author draws upon Joseph S. Nye, Jr.’s celebrated distinction in *THE PARADOX OF AMERICAN POWER: WHY THE WORLD’S ONLY SUPERPOWER CAN’T GO IT ALONE* (2002). Hard power, for Nye, is “command power that can be used to induce others to change their position” (p. 168) (quoting NYE, *supra*, at 8) (internal quotation marks omitted). Soft power, by contrast, “flows from the ability to convince others that they want what you want. It is exercised through setting agendas and holding up examples that other nations seek to follow” (p. 168). Though hardly a realist, I am skeptical that soft power means quite as much as promoters of the distinction would urge, at least outside the civilized, urbane, and quintessentially “soft” precincts of the European Union.

and vertical networks is crucial for the function that *A New World Order* envisions for government networks to play. The former is essentially about coordination and the latter essentially about coercion.

1. *Horizontal "Networks of Networks" and Coordination.* — Horizontal government networks involve networks of government officials of different countries coordinating their work across borders. Such networks can be described as "horizontal" because their activities occur among regulators at the same hierarchical level within their own national structure. *A New World Order* concentrates on horizontal networks in a more particular sense, as "networks of networks." Drawing on information technology theory, a network of networks takes advantage of "network effects" — the efficiencies gained by linking together more and more networks — to optimize the exchange of information and the coordination of policy and action.

A New World Order gives several examples of such government networks of networks. One is the Financial Stability Forum, which was formed in 1996 as a joint venture of the Basel Committee, the International Organization of Securities Commissioners (IOSCO), and the International Association of Insurance Supervisors (IAIS) — each a government network. The Forum is "composed of senior bank, insurance, and securities supervisors from thirteen countries, with the EU Commission attending in an observer capacity" (p. 135). The Financial Stability Forum has issued papers that, presumably, facilitated international coordination on matters such as capital adequacy for financial institutions and information sharing between financial conglomerate regulators (p. 135). Another example, also in the international financial field, is the Year 2000 Network. Created by the Basel Committee, the Bank of International Settlements (BIS) Committee on Payment and Settlement Systems, the IOSCO, and the IAIS, with a secretariat supplied by the BIS, its mission was to "encourage the development of coordinated national strategies to address the Year 2000 problem" (p. 136). Slaughter notes that this network of networks was remarkable in the speed and sophistication with which it addressed the Y2K problem; it created guidelines, common standards, and global coordination all within a mere six months (p. 136). "It is difficult," she adds, to "imagine the global community doing anything that fast or that effectively through the traditional machinery of international negotiations or even through traditional international institutions" (p. 136).

True enough. Yet we ought to be cautious in generalizing from such examples. For instance, it may have been the nature of the Y2K problem that made possible such a speedy, sophisticated, and coordinated response. Y2K was not a matter in which policies would produce winners and losers — all would gain by cooperating. Put another way, because Y2K responses protected networks, no one had an interest in losing the benefits of network effects, least of all the wealthier

and larger countries. Indeed, the success of global cooperation to address Y2K may have been due to the characteristics of the problem, rather than to anything about the networks created to solve it.

In addition to financial networks, *A New World Order* provides many examples of different kinds of horizontal networks responding to different kinds of problems. But these examples elicit a different worry: how to determine whether these government networks are actually solving problems or merely talking about problems, writing reports, suggesting standards, holding meetings, socializing, and so on. National governments, international agencies, and large corporations are all subject to bureaucratic ossification, which leads such entities to consume ever greater resources that may or may not be justified by the quantity or quality of the entities' outputs. Why should the phenomenon of government networks be any different? And how does one measure outputs so as to evaluate whether the networks are actually contributing anything?

Slaughter acknowledges the latter question: how do we know that government networks "actually have, or will have, any impact on addressing the problems that the world needs to solve" (p. 23)? She suggests that government networks contribute to world order "by creating convergence and informed divergence" with respect to particular practices "by improving compliance with international rules" and by increasing international cooperation (p. 24). She does not, however, present sufficiently persuasive empirical evidence to support her conclusions. Moreover, it is not clear that achievement of these goals proves actual "ground-level" results, since Slaughter does not show how such goals improve actual lives on a global scale.³⁴

Rather than providing evidence of both the costs and the benefits of networks, *A New World Order* often resorts to conclusory statements like the following: "[T]he Commonwealth is emerging as much the most appropriate and effective type of international organization in existence" (p. 137).³⁵ This assessment of whether the Commonwealth is a model for horizontal government networks is by the former chairman of the British House of Commons All-Party Committee on Foreign Affairs. Perhaps this is a keenly accurate assessment, but it would be helpful to know if the Commonwealth had actually been a great waste of resources and a bureaucratic sinkhole. To be fair, *A New World Order* is often candid in its assessment of networks' ac-

³⁴ Slaughter candidly notes the difficulty in supplying empirical proof (p. 170). I agree with her that the heterogeneity of the examples makes it hard to provide such proof of outcomes. Also, it is probably too early in many developing networks to determine how effective they have been and will be.

³⁵ The author quotes David Howell, *The Place of the Commonwealth in the International Order*, 345 *ROUND TABLE* 29 (1988).

complishments, noting, for example, that the Commonwealth's Ministerial Action Group for violations of human rights, democracy, and good governance "did not, in truth, accomplish much [in its early years] beyond monitoring progress toward the restoration of democracy in countries such as Nigeria and Sierra Leone" (p. 138).

A New World Order's discussion of the Ministerial Action Group exemplifies how the book often misses opportunities to address the challenges and costs of network activity. Monitoring is certainly a positive output of networks. The accumulation of monitoring activities has pressured governments in some places to boost human rights and to hold reasonably fair and transparent elections. Elections in such places as Peru, the Philippines, and South Africa at moments of transition have benefited enormously from outside monitoring.³⁶ Even in places where electoral fraud or massive unfairness has occurred, such as Zimbabwe, a denunciation by a respected outside voice alerts the world not to accept the announced results.³⁷ But networks like the Ministerial Action Group can face unique problems stemming from their being blessed and backed by sovereign states, some of which have considerable economic and political heft and all of which are, to varying extents, self-interested. Slaughter could say more about the difficulties of network multilateralism, whether in organizations such as the Commonwealth or the U.N., in addressing serious and persistent problems of human rights and democracy. She would, for instance, have to address the problems of what we might call "corrupt networks," a good example of which is the U.N. Commission on Human Rights, which has session after session been filled to the brim with human rights abusers who, after all, have the greatest incentive to join.³⁸ To be truly persuasive, *A New World Order* would have to account more thoroughly for not only the benefits but also the problems and the costs of networks — particularly corrupt ones.

Far more common throughout the book than accounts of the successes of horizontal coordinating networks in the real world are de-

³⁶ See, e.g., Andrew F. Cooper & Thomas Legler, *A Model for the Future?*, J. DEMOCRACY, Oct. 2001, at 123 (Peru); Thomas Carothers, *The Observers Observed*, J. DEMOCRACY, July 1997, at 17, 18 (Philippines).

³⁷ See Editorial, *Putting Pressure on Mugabe*, CHI. TRIB., Mar. 22, 2003, § 1, at 30.

³⁸ The presence on the Commission of such countries as Sudan, China, and Cuba, and the exclusion of the United States from the Commission in 2002, reflect the dilemma the U.N. faces in its human rights efforts. Inviting the foxes to guard the chicken coop and maintaining that there is no real distinction between foxes and chickens might civilize the foxes and help them behave better. Of course, once in the chicken coop the foxes may feast. In my view, the inclusion approach has resulted in corrupt international networks, which helped to create tragedies in Darfur and Rwanda. Slaughter believes that the growing influence of government networks, dominated by the resources and soft power of "good guys," will help cure corruption; I confess to serious doubt.

scriptions of bureaucratic outputs. Networks held meetings, wrote papers, made recommendations, and drafted statements. To be sure, this is what networks must do in order to create successful outcomes in which network members go back to their own operations and implement now-coordinated policies. Yet unfortunately this is also precisely the procedure followed when networks create *unsuccessful* outcomes. Thus, distinguishing between effective networks and bureaucratic blackholes may prove difficult. Information, as Slaughter notes in another context, does not always translate into results; we scholars think of it as a good for its own sake, but in many contexts, it is not (pp. 167–68). Thus, it cannot be assumed that government networks result in positive real-world change.

I emphasize that I am genuinely agnostic on this question of whether horizontal networks achieve results, measured not by bureaucratic activity, but by real-world change. *A New World Order* does not provide clear evidence across the board of the actual benefits of government networks; the evidence that it presents stops one and sometimes two layers short, often proving only that government networks exist or that such networks engage in or sustain bureaucratic activities. Concededly, measuring the final outputs is a very difficult empirical task. It is obviously not enough to measure results on the basis of what the networks themselves did as bureaucracies. Nor is it enough to take the word of actors who tend to share a bias either for or against such networks. On the other hand, it is hard for me not to believe, based on anecdotal evidence from Slaughter's work and from my own work with international actors, that horizontal networks often do produce important coordination results. It is hard for me to believe that coordinated responses in financial crises, for example, by central banks do not help control crises that would otherwise get much, much worse. Similarly, it is hard for me to accept that criminal law enforcement and antiterrorism activity are not enhanced by coordination across borders. *A New World Order* is fundamentally a book documenting the *existence* of government networks; their ultimate effectiveness in the world is another question, and one that is, as an empirical matter, in many instances probably fiendishly difficult to answer.

2. *"Vertical" Networks and Coercion.* — Horizontal networks are fundamentally about coordination of information, policy, and action. They are "looser and less coercive — even aspirationally — than other forms of international organization. They thus guarantee that power remains principally in the hands of nation-states through their national officials" (p. 145). But horizontal networks are not, according to *A New World Order*, the only type of government network. There are also "vertical" government networks, which seek to infuse supranational organizations, such as international criminal tribunals, adjudicatory bodies of the World Trade Organization, and other trade groups, with the coercive powers of national governments. What makes verti-

cal government networks “vertical” is that they mediate between national government actors and supranational entities.

Vertical government networks are fundamentally, as *A New World Order* describes them, about coercion. Vertical networks “can be the critical ingredient that gives a supranational organization real power” (p. 145). This is because vertical networks give to supranational organizations the ability to compel and direct the coercive powers of national agencies with which they are networked. Thus, “[t]he possibility of direct relations between a supranational court and national courts, or between a supranational regulatory agency and its domestic equivalent, pierces the shell of state sovereignty and creates a channel whereby supranational officials can harness the coercive power of national officials” (p. 145).

I shall return later to the question of what it means to “pierce[] the shell of state sovereignty.” For now, it is enough to note that when Slaughter describes a vertical network and its coercive possibilities, she does not mean that a supranational organization can command a sovereign state to use its coercive power — power that, in the nature of multilateral politics, might not be given by a ministry of foreign affairs or approved by a legislature. Instead, Slaughter understands a vertical network as one in which an agency of the sovereign, acting on such authority as it already has (or takes itself to have), puts the sovereign’s coercive powers behind the supranational organization. Thus, when members of the EU sought to create the single market or when members of NAFTA sought to ensure the recourse of foreign investors against governments, they created vertical networks by transferring a “measure of their sovereignty to a supranational court or arbitral tribunal, empowering the judges or arbitrators to make legally binding decisions with which the parties to the dispute in question are expected to comply” (p. 146). The coercive mechanism of a vertical government network thus becomes clear: it is to make *individual* government institutions “responsible for the implementation of rules created by a supranational institution” (p. 132). If under traditional international law such rules, if they bind a state at all, bind the whole sovereign state (which, in accordance with its sovereignty, can choose how to comply with those rules internally) (p. 132), then “[v]ertical government networks make it possible for a supranational court, regulatory entity, or parliament to create a relationship with its national counterparts to make those rules directly enforceable” (pp. 132–33).

The coercion of vertical government networks runs against two different kinds of actors. First, putting the power of national governmental agencies behind a supranational agency enables it to confront third-party actors. Perhaps the most important example of such a vertical network is one that, curiously, *A New World Order* does not mention — the U.N. Security Council. The Security Council has no armies of its own; its ability to enforce its will is entirely a function of the will-

ingness of its members to provide the coercive muscle. When members do so, they and the Security Council satisfy the requirements of a vertical government network.

However, the real importance of vertical government networks, in Slaughter's account, lies in directing coercive power in a quite different direction. This coercion occurs when the power of vertical government networks is directed not against a third party, but against a *member government of the network itself* by using the power of a constitutive part or regulatory agency of that very sovereign member. Member states of vertical government networks may, therefore, get more than they bargained for. Indeed, if the state is unaware that its administrative subagency or court system has decided on its own authority to join the network, then it may not have bargained for anything at all and yet still find itself facing the coercive power, not of the supranational entity directly, but of its own government agency.

One might pause to ask how this can be, since a subagency of a government, for example a regulatory agency, would not appear to have the power to compel its own sovereign state. The answer is easiest to see with courts, which in modern democratic systems act independently of the government and can even compel the sovereign, at least in certain types of cases. If a court system, or perhaps just a lower court, concludes that it has the power, and maybe the obligation, to enforce the decisions or rules of a supranational actor, then either the sovereign complies or a constitutional crisis may ensue. Even in the United States — which, because of its size, power, and long tradition of internal constitutional fidelity, is one of the democracies in the world most resistant to following the rules of supranational actors — it is not impossible to imagine a federal judge deciding that he or she has the authority to freeze or turn over the assets of an accused war criminal to an international tribunal, or even to order the surrender of an accused foreigner to an adjudicatory body such as the Security Council-created tribunals for the former Yugoslavia and Rwanda.³⁹ Relatedly, even in the United States, bureaucracies frequently possess administrative hearing powers that permit them to bind the government in certain circumstances. It is administrative law territory that has been established in treaties such as those creating NAFTA or the WTO; for Western European governments engaged in the process of creating “ever closer union” through the EU, the power of bureaucracies to bind states is an entirely ordinary state of affairs. It is not at all

³⁹ The Alien Tort Statute, 28 U.S.C. § 1350 (2000), in coordination with the orders of an international tribunal, might be deployed for some tort actions of this kind. That statute's future evolution is difficult to predict following the Supreme Court's decision in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004), which is noteworthy for its lack of clear guidance amidst many platitudinous admonitions of caution.

absurd to think that vertical government networks can sometimes operate coercively against a sovereign state through the actions of that state's own agencies.

In fact, *A New World Order* envisions a concept of vertical government networks and their coercive powers that is even more radical than the preceding examples indicate. *A New World Order* asserts that vertical networks do not involve an agency of the sovereign ordering about the sovereign, but instead involve one agency of the state ordering about another agency of the state. This conception of vertical networks assumes that agencies can order about other agencies because there really is no overarching sovereign state. Slaughter observes:

The direct interaction of a supranational institution and a national government institution pierces the shell of sovereignty that formally defines the state as a unitary actor in the international system. It penetrates the domestic political system, working to command or persuade *not the government as a whole, but rather one government institution that has power with regard to other government institutions* according to the rules of the domestic political game. (p. 146)⁴⁰

This observation takes us to the critical premise of *A New World Order*, the “disaggregated state.”⁴¹ But let us dwell a little more on vertical government networks as such. Because the “coercive power of vertical networks is much greater than that of horizontal networks[,] it is thus not surprising that they are much harder to find” (p. 133). With respect to “third party-directed” vertical government networks, such as the Security Council, the paucity of such arrangements might be due to free rider and other collective action problems inherent in multilateral action, especially in matters involving the use of force. With respect to actions that are directed at member-states, matters are more complex. Why would a sovereign allow itself to be bound in this way? One answer that Slaughter provides is that the sovereign stands to gain much more over the long term from playing by the rules, including rules of arbitration and decision, than it does in the short term from breaking them. So, according to Slaughter, in some cases,

governments will in fact choose to delegate some functions to an independent organization, whether to solve a collective action problem, tie their hands, or compensate for their own domestic incapacity or the incapacity of other countries. When they do so choose, they will want the organization to actually work. They will thus either establish a vertical network directly or create the structural conditions for the emergence of one. (p. 145)

⁴⁰ Emphasis has been added.

⁴¹ See *infra* Part IV.

In other types of cases, however, sovereigns, or institutional parts of sovereigns, may find that their hands are tied without their knowledge and without the consent of the democratically accountable branches of government — what Slaughter calls, perhaps understatedly, “according to the rules of the domestic political game” (p. 146). Such cases often involve adjudicatory mechanisms and administrative agencies — courts and bureaucracies — that operate against not just *any* institution of the state, but principally against the democratically accountable branches of government, that is, legislatures and elected executives.⁴² *A New World Order*’s innovative uses of vertical government networks mostly — though perhaps not always — involve endowing democratically unaccountable supranational entities with the coercive powers of democratically unaccountable national institutions so as to allow such powers to be used against the democratically accountable institutions of the state. Later, I shall develop this observation as a point of critique, but even in describing the nature of vertical government networks, it seems to me that *A New World Order* — a book that is on nearly all counts very careful to be plain about the bottom lines of power and accountability — might have been clearer about such an important matter.

Slaughter is well aware that the machinery of vertical government networks can easily undermine the delicate balance that her book states as its goal — avoiding impalement on any of the horns of the trilemma with the effect of losing the benefits of global governance, undermining democracy, and undercutting democratic accountability. But her response is curiously impotent and her locution curiously telling: “Given a presumed aspiration to avoid world government,” she says, “the power of vertical government networks should be used sparingly” (p. 145).

Used sparingly by whom? One might conclude by logical necessity that if there is an institution that ought to use such power sparingly, it likewise has the possibility to use it *unsparingly*. Charitably, one might

⁴² Slaughter does cite the example of the European Parliament (EP), stating that it “is developing direct relationships with national legislators, which should ultimately strengthen its position against the executive and even the judicial branches of the European Union” (p. 147). Slaughter’s claim about the legitimacy of the EU being strengthened by the EP is unpersuasive since it assumes, to start, that the EP has some genuinely strong democratic legitimacy. Moreover, it expresses an expectation that sounds more like a hope that the EP will strengthen its position vis-à-vis the democratically unaccountable and overwhelmingly powerful bureaucratic and judicial institutions of the EU. The EP does not disprove the proposition that vertical government networks rely on and exploit the power of unelected and unaccountable bureaucrats and courts. *A New World Order* would be more powerful, if more controversial, if it admitted directly that vertical government networks involve bureaucracies and unelected judiciaries doing an end-run around, if not simply curtailing, the power of democratically accountable branches of government.

interpret the decisionmakers to be democratic national governments, who ought to be chary of approving participation in such vertical networks, because they might get “more than they bargained for.” Uncharitably, but perhaps more convincingly, one might interpret the decisionmakers to be either supranational institutions, able to decide to coerce democratic sovereigns, or alternatively, national bureaucratic or judicial institutions, able to decide to take advantage both of their lack of democratic accountability and of the privilege of coercing their own sovereign. The possibility of creating a certain privileged position for democratically unaccountable actors, whether supranational or national, over democratically accountable ones, is far from merely residual.

IV. DISAGGREGATED STATES, DISAGGREGATED SOVEREIGNTY, AND A DISAGGREGATED WORLD ORDER

In *A New World Order*, the very possibility of government networks, whether horizontal or vertical, as a form of global governance depends on a key premise, a claim that underlies nearly everything else. Once this claim is accepted as a crucial insight into the nature of international political order, the role and growth of government networks becomes at least descriptively plausible — whether one agrees normatively with the functions Slaughter assigns them, and whether one agrees that this mechanism of governance manages to avoid impalement on the horns of the trilemma. If, however, this claim is rejected as a description of how the world works, or is beginning to work, then the ingenious machinery of government networks as a means of governance largely loses its point.

A. *The Disaggregated State and the Unitary Fiction*

So what, then, is Slaughter’s critical claim? Foundational to *A New World Order* is the claim that the unitary sovereign state is a fiction. The unitary state is a simplifying construct useful for certain analytic purposes, but it is not descriptive of the real world of states. Slaughter explains:

[The concept of] the unitary state . . . has long dominated international legal and political analysis. International lawyers and international relations theorists have always known that the entities they describe and analyze as “states” interacting with one another are in fact much more complex entities, but the fiction of a unitary will and capacity for action has worked well enough for purposes of description and prediction of outcomes in the international system.

. . . .

The result is the willful adoption of analytical blinders, allowing us to see the “international system” only in the terms that we ourselves have imposed. (pp. 12–13)

A New World Order posits that what we call “sovereign states” are in fact far from unitary entities that speak with one voice and behave as single actors; instead, they are collections of different institutions, agencies, and power structures that speak with different institutional voices and act according to different mandates. *A New World Order* names this condition the “disaggregated state” (p. 12). The term captures Slaughter’s view that the state is not unitary, indeed not even an “aggregation”; instead, it is a disaggregated collection of disparate institutions that have their own powers, mandates, incentives, motivations, and, crucially, abilities to interact directly with a variety of institutions — which sometimes are their homologues — in other states and international organizations based on their own power, legitimacy, and authority, without recourse to any higher authority (pp. 12–13).

Slaughter urges us to consider the descriptive case for the “disaggregated state” by analogy to how we think about domestic government:

We call it “the government,” but we can simultaneously distinguish the activities of the courts, Congress, regulatory agencies, and the White House itself. We do not choose to screen out everything except what the president does or says, or what Congress does or says, or what the Supreme Court does or says. But effectively, in the international system, we do. (p. 13)

Each institution of government, according to Slaughter, thus has its own power, legitimacy, and authority. Each is able to act within a certain scope without recourse to other institutions of government. And in the view of *A New World Order*, this scope is sufficient to allow a wide variety of actors — not just the elected branches of government, but also the unelected branches⁴³ — independent power, legitimacy, and authority to interact with both coordinating horizontal networks and coercive vertical networks. Thinking about states as “aggregations of distinct institutions with separate roles and capacities[] provides a lens that allows us to see a new international landscape. Government networks pop up everywhere” (p. 13).

1. *Horizontal Networks and the Disaggregated State.* — (a) *National Regulatory and Administrative Agencies, Horizontal Networks, and the Disaggregated State.* — The disaggregated state is the condition in which horizontal and vertical government networks can thrive. This Review has described horizontal, coordinating networks as national governmental actors meeting, coordinating, and reaching common positions with their homologues or functionally related actors in other jurisdictions, perhaps with a coordinating secretariat. The as-

⁴³ The “unelected branches” include the judiciary as well as bureaucratic agencies that are, as a matter of constitutional conception, part of and answerable to the executive but that are not formally a “branch” of government.

sumption behind such horizontal networks is that these actors already have the legal power and authority — as well as the will and initiative — to enter into such relationships across borders. Clearly, at least in many cases, the legal authority exists, in that the courts have sustained or would sustain the authority of an agency to work with its cross-border counterparts on matters within its regulatory sphere. *A New World Order* seems to take that authority as evidence not just of the existence of horizontal government networks, but also of a higher abstraction: partial evidence for the existence of a disaggregated state.

In my view, however, the legal theory behind the ability of regulatory agencies to operate across borders is *not* that the state is disaggregated and therefore that regulatory bureaucrats have the intrinsic power to coordinate with their foreign counterparts. It is, rather, that the executive branch, of which the bureaucrats are a part, has the ability to set, *on behalf of the unitary government of the United States*, the terms on which such bureaucrats deal with their homologues abroad, including the ability to limit, curtail, or withdraw such authority. *A New World Order* reads into U.S. jurisprudence a concept of regulatory and agency independence that is, on the one hand, contrary to the history of U.S. constitutional and administrative law and, on the other, something of a wishful import from European traditions that are more deeply obedient to the independent authority of bureaucracy.⁴⁴ Certainly it is true that some American scholars of administrative law have been devising theories of administrative law and jurisdiction compatible with — and in some cases considerably more radical than — the network approach of *A New World Order*.⁴⁵ But the mainstream tradition of American legal approaches to state bureaucracy continues to be that administrative legitimacy is achieved through the legitimacy of either the democratically accountable executive⁴⁶ or the democratically accountable legislature.⁴⁷

⁴⁴ See, e.g., Lee A. Casey & David B. Rivkin, Jr., *Europe in the Balance: The Alarming Un-democratic Drift of the European Union*, POL'Y REV., June–July 2001, at 41.

⁴⁵ Paul Berman's work on jurisdiction comes to mind; it supports, however, a globalized view of jurisdiction that goes considerably further than Slaughter's book does. See Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 490–512 (2002).

⁴⁶ See, e.g., *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make policy choices . . ."); Cass R. Sunstein, *Is Tobacco a Drug? Administrative Agencies as Common Law Courts*, 47 DUKE L.J. 1013, 1056 (1998) ("*Chevron* emphasizes[that] the President is generally in charge of [agencies'] policy judgments, and hence agencies have a kind of democratic pedigree . . ."); see also Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–2347 (2001).

⁴⁷ See, e.g., Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 767 (1983).

(b) *National Judiciaries, Horizontal Networks of Judges, and the Disaggregated State*. — The assumption that already existing, independent governmental actors enter into direct relations with their foreign counterparts in horizontal networks is even plainer in the case of the judiciary. The judiciary is an institution on which *A New World Order* rests many hopes for the cause of global governance. Indeed — at least to this admittedly skeptical American reviewer who is unabashedly in favor of a strong notion of democratic sovereignty — the book sometimes reads as a plea directed specially at judges and at the U.S. Supreme Court Justices above all. It urges global governance by exhorting networks of judges to use the power of the judiciary to order about even the state. *A New World Order* makes an explicit call for a globalist socialization of judges, to get them to think of themselves as part of a benevolent, paternal, global fraternity: Slaughter wants judges to “feel part of a larger judicial community,” a network “tied together not only by the awareness of foreign courts and decisions,” but also by active engagement in “transjudicial dialogue on common problems ranging from privacy to the death penalty” (p. 101).

It is striking, however, that *A New World Order* specifically mentions privacy and the death penalty as paradigmatic of the kinds of “common problems” judges should discuss as part of their socialization process into this global fraternity.⁴⁸ There is no doubt they should discuss these problems, and at length. Yet these are issues that in the end are inextricably tied to a particular culture, society, and history — that is, to issues of values that are fundamental to a political community,

⁴⁸ *A New World Order* discusses not just constitutional issues, which so frequently implicate questions of values, but also the intensely practical matters of comity, forum, and jurisdiction in commercial cases. The latter discussion is a persuasive one, detailed in its consideration of the important and unavoidable results of globalization. I do not dwell on that discussion here because I want to focus on matters on which I find the argument less persuasive and more controversial. Nevertheless, one of the important and laudable points of Slaughter’s discussion of commercial cases is that she scrupulously avoids the temptation, succumbed to by much of comparative constitutional discussion, to generalize from commercial cases to value-driven cases. I use the term “temptation” because it suggests, quite problematically, that one can usefully deal with the values questions on the same basis as one deals with commercial issues. For an example of a theory that does fall prey to this “temptation,” see Posting of Lawrence Solum, *Jackson v. Posner on the Authority of the Decisions of Foreign Tribunals*, at http://lsolum.blogspot.com/archives/2004_06_01_lsolum_archive.html (June 22, 2004). Solum raises the question of how the U.S. Supreme Court should deal, if at all, with the decisions of foreign tribunals; he suggests briefly that it might be helpful to begin by thinking about how the Court should deal with international commercial law cases and go from there. I think Solum gets it quite backwards. The intrinsic feature of hard constitutional law cases is the values question, which is precisely what is missing from typical commercial law cases; this distinction explains why compromise and efficiency arguments are so persuasive in commercial matters. For instance, I imagine that we would not think that a case involving trafficking in women and children is best and first understood by analogizing to trade in goods or trade at all. The moral dimension, not the trade dimension, is all-important for the legal issue — notwithstanding that we cannot understand the nature of such trafficking without understanding the economic incentives involved.

however much informed by discourse with outsiders.⁴⁹ The death penalty is not, after all, a problem “common” to all countries. It is, rather, a U.S. practice,⁵⁰ which happens to be deeply offensive to the sensibilities of European elites. To characterize it as a common problem comes perilously close to assuming the conclusion, drawn by elite Europeans, that the practice is not acceptable. Overreliance on global networks of judges invites the unelected judiciary to make decisions that undermine democratic legitimacy and accountability.

Perhaps Slaughter would argue that this concern about unelected officials’ usurping the power of the elected branches is overblown, that the type of dangerous and potentially coercive networks described above do not fit into her definition of “government networks.” But then consider whether there could be *any* international network that would be counted as a government network within the meaning of *A New World Order’s* ideal of global governance. For instance, the United States could gather together networks of pro-death penalty countries, including prosecutors and judges, if it were to endorse bringing back the death penalty in Western Europe. I doubt very much that such a narrowly defined network would count as a government network for purposes of global governance; it would be ruled out by definitional fiat.

If true, such a scenario raises the disturbing possibility that on questions of the fundamental values of a political community, the networks that count as networks of global governance turn out to be only those that essentially subscribe to Western European norms, rather than to American norms (let alone the norms of others).⁵¹ Indeed, there seems to be no example of a government network that champions any widely held U.S. value as against those held by Europeans; yet examples such as the death penalty, which run in favor of European values and against American ones, are prominent.⁵²

⁴⁹ *But see* Printz v. United States, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting) (casting federalism and state sovereignty as a “common legal problem” to which the Court could turn to other jurisdictions for examples of possible solutions).

⁵⁰ Of course, there are other countries, such as Japan, that also have capital punishment.

⁵¹ More precisely, they are Western European norms as perceived by politically progressive, Europhile Americans. While Slaughter describes, for example, U.S. First Amendment jurisprudence as an “outlier” position in comparative constitutional law, nowhere does she discuss abortion. However, when measured against secular Western European legal norms — let alone those of the rest of the world, including the Muslim and Latin American worlds — the standard of *Roe v. Wade* is just as much an “outlier”; Western Europe, while permitting abortion, has imposed many intermediate requirements that have been struck down in the United States. *See* MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES* 15–24 (1987).

⁵² I stress values as distinguished from merely economic issues; I leave aside debates such as whether government networks tend to favor U.S. or EU approaches to competition law, corporate governance, or securities regulation.

For that matter, I have looked in vain in *A New World Order* for any recognition of global governance status for government networks among Muslim states that might be seeking to promote practices and values that the secular West can hardly view with equanimity, such as the subservience of women, the imposition of Shari'a law in a wider and wider range of countries, and the dismantling of the wall between church and state.⁵³ My concern here is internal consistency: why should such fundamentalist values not be considered as legitimate expressions of global governance as the heroically progressive, secular, and Western examples offered by *A New World Order*? Are Muslim states not also participants — and is Shari'a law not an important growing participant — in what Slaughter calls an emerging “global jurisprudence” (p. 243)?⁵⁴ Shall we wait for Justice Breyer, for example, to cite approvingly Shari'a law in a future opinion on gender discrimination, perhaps in a matter of how many female witnesses are needed to disprove a male witness, to uphold state criminal laws against adultery, or to strike down criminal laws against polygamy? Or even to cite it *disapprovingly*, while yet “distinguishing” it — in both senses, alas, of that term?⁵⁵

Thus, when it comes to the death penalty, free expression and the First Amendment, or the International Criminal Court (ICC), it appears that widely held, democratically enacted expressions of Ameri-

⁵³ I am unapologetically unsympathetic to making a place at the table, in the name of a mis-conceived multiculturalism, for a system that is so obviously hostile to universal human rights values and to secular democracy. Mark Steyn has best expressed my own view. See generally Mark Steyn, *We Still Don't Get It*, THE SPECTATOR, Sept. 11, 2004, at 14.

⁵⁴ This omission is curious, as Slaughter has written approvingly elsewhere on the virtue of international tribunals in terrorism cases reserving places specifically for Muslim judges — that is, for judges officially qualified by *their religion* to sit on a court. See Anne-Marie Slaughter, Editorial, *Terrorism and Justice*, FIN. TIMES (London), Oct. 12, 2001, at 23. I criticize this approach in Kenneth Anderson, *What To Do with Bin Laden and Al Qaeda Terrorists? A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 HARV. J.L. & PUB. POL'Y 591, 603–06 (2002). Slaughter replies to that article in Anne-Marie Slaughter, *Beware the Trumpets of War: A Response to Kenneth Anderson*, 25 HARV. J.L. & PUB. POL'Y 965 (2002).

⁵⁵ I grant that this argument is boorishly put, but it reflects a certain exasperation at the complacency with which transatlantic elites, including both Slaughter and Justice Breyer, confidently assert that *this* is part of global jurisprudence and that *that* is not. Such line-drawing is blind to its own moral presuppositions while studiously ignoring the growth of a global jurisprudence that, objectively and on its own terms, can only pose a threat to the pluralism that such elites prize. Worse, such an approach is blind to the fact that although there are heroic efforts within Islamic traditions to find ways to come to grips within Shari'a law with universal human rights and secular political pluralism, such efforts have largely been unsuccessful. It is a harsh and unreformed Shari'a law that increasingly holds sway over whole populations, not just Saudi Arabia, but in such places as Sudan and, now, large portions of Nigeria. It is incomprehensible how this movement and its antiwomen agenda does not merit even minimal discussion as to its place or lack thereof in “global jurisprudence.” But U.S. jurisprudence somehow always seems at once an easier and more important target.

can values, implicit or explicit in those debates, are treated as outliers. The disturbing implication is that if U.S. judges or other actors continue to endorse certain long-held U.S. positions — in a world in which the point of judicial opinions is to engage both the domestic political community and a global judicial audience, as well as to socialize American judges as part of a global judicial elite — they would be encouraged to do so in terms that affirm them *as* global outliers, effectively delegitimizing them. As Slaughter says with respect to the First Amendment:

[I]f the judges of the U.S. Supreme Court thought that they were playing to a global as well as a national audience, they might readily acknowledge that U.S. First Amendment jurisprudence is on the extreme end of the global spectrum for protecting speech, an artifact of the particular history of this country and the political value traditionally placed on free speech. (p. 243)

Note how much rhetorically weaker this formulation is than simply ruling that “Congress shall make no law . . . abridging the freedom of speech,”⁵⁶ and relying on some two hundred years of Supreme Court opinions interpreting those phrases. It is surely facile to suggest that playing to a global audience has any rhetorical effect other than weakening the force of the U.S. constitutional command by announcing it as a global outlier, a mere artifact of a particular culture.⁵⁷

Of course, Slaughter follows by saying that the U.S. Supreme Court might “well try to argue for the U.S. approach as compared to less speech-protective doctrines applied in other countries, to strengthen the impact of the decision in the global judicial human rights dialogue” (p. 243). Leave aside the question whether Supreme Court judges ought to conceive of themselves as involved in a “global” judicial dialogue at all over matters in which they are not agents of the world at large but of a particular political community constituted by a particular constitution.⁵⁸ Leave aside whether the U.S. Supreme Court has any business “try[ing] to argue” with the rest of the world over U.S. constitutional jurisprudence. Even in terms of Slaughter’s internal argument, there still remains the question whether, as a matter of the rhetoric of judicial opinion writing, even entering into the game of defending one’s constitutional tradition to the whole world, rather than *within* that admittedly particular tradition, constitutes anything other

⁵⁶ U.S. CONST. amend. I.

⁵⁷ This question is distinct from one we shall take up shortly: *why* should U.S. judges, bound by fidelity to the U.S. Constitution and owing allegiance to it and to no foreign power, believe it either part of their duty or within their discretionary gift to play to foreign audiences at all?

⁵⁸ I believe Michael Walzer best articulates the theoretical, deep moral argument for fidelity by members and fiduciary office holders to a particular political community and its constitutive constitutional norms. See MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 31–63, 129–64 (1983).

than a defensive weakening of the argument. One only really raises the status of being an outlier for the purpose of questioning that status within one's domestic constitutional debate.⁵⁹ The argument that the United States is an outlier has appeal, I suggest, principally to those who are skeptical in the first place of the American protection of free speech; the argument, in other words, is a rhetorical form for undermining the status quo by casting American protection of free speech out upon the fringes.⁶⁰

⁵⁹ The role of the transcendent, outside critic is, in fact, a noble and heroic, though often badly rewarded, one. Consider the Bible's Jeremiah. I wish to question whether this is the proper role of a judge in a democratic society, since such a judge does not stand outside in order to *call* upon the people to repent, but instead holds real power in his or her hands to *compel*, in a democratic, constitutional order, the people to repent. Calling the people to repentance and having the power to compel their repentance are two very different actions; the former corresponds to the role of the outside critic, but the latter is based on a critique that is drawn from outside that tradition, yet with power drawn from within. Thus, "compelling repentance" is *not* the role of a judge in a democratic polity. Yet it seems that this role is precisely what Slaughter urges.

⁶⁰ Slaughter herself engages in exactly this move in another reference to the free speech debate, when she says, more candidly than in the quotation above:

Suppose that in attending a conference of constitutional judges from around the world, U.S. judges become aware of *just how far out of line* they are with prevailing doctrine in other countries. They might discover, for instance, that their fellow constitutional judges from different countries, having consulted one another's decisions, virtually all agree that hate speech constitutes an exception to a liberal constitutional right of freedom of speech and should not be permitted. (p. 182) (emphasis added)

This quotation is a telling example of what Slaughter actually seems to mean by government networks; the phrase "just how far out of line" presumes that there *is* a way (in any sense other than a conclusory one) in which U.S. Supreme Court opinions interpreting the First Amendment to the U.S. Constitution are *supposed* to fit in relation to other constitutional courts' interpretations. This example is an unfortunate and rare case of *A New World Order's* presuming its conclusion.

For that matter, U.S. judges, on finding out just how "far out of line" their fidelity to U.S. constitutional precedent is when measured against the constitutional traditions of other societies, might then ask themselves just how long the constitutional tradition actually is in the vast majority of the countries that *A New World Order* encourages them to consult. Centuries? Decades? Years? The European Union, which is at bottom the measure of most things in *A New World Order*, is still in the process of ratifying its constitution. Even the constitutional traditions of the Western European states that Slaughter holds in such esteem have developed principally from 1945; the German postwar democratic achievement is magnificent, but *long* it is not. The same observation applies even to France of the Fifth Republic — a country that, for all its glories, still was, one should note, subject to the serious possibility of a military coup as late as the 1960s. The South African court, Slaughter tells us, is a more influential source of human rights law than is the U.S. Supreme Court (p. 207); but it is no disrespect to that genuinely great and honorable court to say that when it has had a life of more than a decade or two — and when, as we all hope, the state of which it is a branch has survived more than a few decades without suffering a coup or falling prey to any of the many other disasters that can befall countries — then perhaps we can talk of its influence. As for the Zimbabwe high court, cited by Justice Breyer in his much commented-on dissent in *Knight v. Florida*, 528 U.S. 990, 996 (1999) (Breyer, J., dissenting from denial of certiorari), it is no slight to that court, a last bastion of official virtue in a sea of official barbarity, to say that there is nonetheless something grotesque about Justice Breyer citing *any* court, no matter how persuasive its rulings or brave its members, of a country suffering under such an abusive and tyrannical government as Robert Mugabe's. This critique is not intended to denigrate

Yet to stop here would be unfair to *A New World Order*, for the book acknowledges and indeed strives to limit the horizontal role of judges in their respective jurisdictions. “Our judges,” Slaughter acknowledges, “remain American judges, bound by our laws and Constitution” (p. 242). Elsewhere she says that foreign opinions in a national court can only be of persuasive value, not precedential value (p. 101). Likewise, she says that horizontal judicial networks preserve the possibility of informed cultural and social differences, and she believes that a system of horizontal government networks will help ensure pluralism and respect for differences (p. 102).

I respect Slaughter’s belief that these are all principles of government networks, and I respect the effort to make them all compatible with each other. Although I have broadly hinted at my normative problems with Slaughter’s model, the purpose of the my criticisms is to raise questions about the internal consistency of the argument. I find it hard to square *within* the structure of the disaggregated state the many things that *A New World Order* seeks to square and seems to believe it has squared.

I do not yet understand, for example, how the deeply serious conflicts between cultures, systems of law, systems of administration, and perceptions of the meaning and importance of democratic legitimacy in relation to unelected branches and agencies of government can be reconciled among the various states. *A New World Order* urges that we generate “reasoned consensus on many problems” (p. 203). Well, surely. The book, however, does not explain how to generate consensus when the disagreements are at the level of values. In matters such as the death penalty, the meaning of privacy, or free expression, to suggest that reason can solve the issue seems naïve or disingenuous. This critique extends even to matters that, one might have thought, if one thought of international affairs as a kind of Kelsenian science, as being amenable to universal reason.

Slaughter offers examples of how she believes such reasoning can occur. One is James Fearon’s methodology for making collective decisions (pp. 204–05);⁶¹ his criteria are possibly persuasive, if we are com-

the outstanding job constitutional courts in these countries have done both within their own societies and sometimes on a wider stage; rather, it is to point out two basic facts that Slaughter resolutely ignores. The first is that however much Slaughter makes of the “disaggregated state,” the Supreme Court of Zimbabwe is still the high court *of a state*, in this case a state of tyranny against the freedoms and rights of its people. To cite such a court in any context other than the defense of its freedom of action against the dictator is problematic at best. Second, Slaughter makes few references to the length of American constitutional tradition except to refer to it in reference to particular issues such as the First Amendment (p. 243) that, seemingly, might have to be tolerated as quaint custom from a culture slow to progress.

⁶¹ The author cites to James D. Fearon, *Deliberation as Discussion*, in *DELIBERATIVE DEMOCRACY* 44 (Jon Elster ed., 1998).

mitted in the first place to believing that the decision ought to be a collective one and that the relevant collective is the group, the global government network of judges or others, convened to discuss the issue. In the case of the death penalty or the range of free expression, for example, it is not self-evident that we are or ought to be committed to having a collective discussion rather than to confining ourselves to a discussion with the people to whom we are constitutionally committed. To say that judges ought to be committed to both discussions as matters of the formation of constitutional law is one thing, but it is not clear how the global discussion has a legitimate place in existing constitutional theory. When push comes to shove, one of the discussions must take precedence as controlling and the other becomes, well, mere discussion.

Slaughter also offers us Thomas Risse's methodology for group process, based on Habermas's theory of communicative action (p. 205).⁶² Habermas's theory might be criticized, however, for stressing that politics can be reduced to something like a graduate seminar discussion in which each participant speaks for himself without any real consequences for anyone other than himself. What Risse's form of communicative action theory lacks is any acknowledgment that in the international system participants in politics speak for, and owe a primary duty to, their constituents, not to themselves or to the group. They are primarily fiduciaries acting on behalf of others whose values

⁶² The author cites to Thomas Risse, *Let's Argue! Communicative Action in World Politics*, 54 INT'L ORG. 31 (2000). The problem with Risse's proposal is that it treats argument as a way of trying to give the participants a sense of obligation to adhere to the outcomes of the group. This proposal has a certain paternalistic feel similar to discussions between children and parents in which, after much discussion, "we" reach a conclusion that will not, however, actually be conclusive until "we" reach the conclusion that our parents wanted us to reach in the first place. Such arguments are not really arguments; they are paternalistic discussions in which the only acceptable outcome is foreordained. This foreordained paternalism is the reason that I have sometimes urged the United States simply to stay out of debates of issues involving deep questions of sovereignty. Its interlocutors will never regard the discussion as over until a suitably antisovereignty stance is reached, and if it is not, then the result is a denunciation of the United States for not having argued in good faith. Better for the United States to say in advance that it is not worthwhile to argue about matters on which, because of constitutional fidelity to its people, the United States cannot compromise.

This approach would have been the wisest one in, for example, negotiations over the ICC. I cannot agree with Slaughter's assessment that the ICC negotiators "got it right" by allowing the ICC prosecutor to determine, subject only to review by a panel of the court itself, that it should take over a given prosecution from national authorities (pp. 148-49). This procedure seems, on the contrary, a clear instance of supranational federalism, as Dean Harold Koh candidly acknowledged in calling it a "*Marbury versus Madison* moment" in the development of international law. Neil A. Lewis, *U.S. Is Set To Renounce Its Role in Pact for World Tribunal*, N.Y. TIMES, May 5, 2002, at 18 (reporting Koh's comments); see also Anderson, *The Limits of Pragmatism*, *supra* note 18, at 373 (noting the opposition to the ICC "on the grounds that it represents the strengthening of international governance at the expense of American institutions"); Anderson, *supra* note 10, at 453-57 (discussing the ICC negotiation process).

they represent, *not* seekers of reason or the truth as such, and they are not free to ignore the constituents they represent and to depart on their own searches for truth with their fellow truth-seekers in an international forum.⁶³

The practical import of being a fiduciary is that matters about which participants might be willing to compromise for the sake of group process if they were only bargaining for themselves might well seem non-negotiable, precisely because they do not act for themselves alone. There is a reason, after all, why diplomats so often must seek instructions from their governments: namely accountability.

Accountability presents an internal problem for Slaughter's argument, oddly, *because* she acknowledges it — as indeed she acknowledges practically every objection to her theory, often eloquently, elegantly, and in knowledgeable detail. I admire her forthrightness in acknowledging, for example, that representatives of a group cannot simply set aside their representativeness and solely pay attention to conditions of collective decisionmaking when they enter a negotiating group (p. 218).⁶⁴ But Slaughter's acknowledgement of objections eventually becomes frustrating because it is one thing to acknowledge the potential conflict of interest and another to explain how it is resolved within the theory itself. I do not know how to reconcile, for example, the following two statements: On the one hand, *A New World Order* says, with respect to comparative constitutionalism, that "officials searching for solutions may be less concerned with the source of an argument than with the merits of the argument itself" (p. 207). On the other hand, as noted above, Slaughter acknowledges that to politicians (and, I would add, to judges within a democratic polity) and the citizens they represent, the critical democratic accountability issue really is the process, the *source* of legitimacy, rather than the quality of ideas; the "problem, from this perspective, is not so much a lack of good ideas, which could be remedied by looking to other countries, but the underlying battle of interests that informs any policy choice" (p. 226). Well, which is it?

Or consider another example. On the one hand, we are told, many "problems will not be suitable for resolution in [government network] forums: problems involving vital national security interests, for instance, or touching on issues of high domestic political sensitivity" (p. 208). On the other hand, among the issues that *A New World Order*

⁶³ The discussion at pages 205–06, analogizing judges to teenagers reasoning about smoking and reaching an informed decision, is simply inapposite to the actual conditions of fiduciaries acting for constituents. This inapposite analogy illustrates the sharp limits of simplifying analogies about communicative action and reasoned debate.

⁶⁴ For an account of the problems arising from such failures to understand the representative's role, see Anderson, *supra* note 10, at 453–57.

thinks are ripe for solution by government networks are not only “how best to regulate online sales of securities over the Internet” and “how to mesh antiterrorism legislation to minimize loopholes,” but also “how best to balance the competing constitutional demands of liberty and order” (p. 208). Are not the demands of liberty and order as important as vital national security and hence just as unsuitable for resolution in government network forums and international seminars of judges? Again, this seems to be not just a problem of external critique in the name of democratic sovereignty, but a problem of internal inconsistency within the argument itself, of wanting to have it both ways.

The resolution, in any case, too often seems to be a kind of *deus ex machina*. It consists of acknowledging the difficulty and then suggesting that with enough goodwill and wisdom, the problem can be overcome. As Slaughter says, the tone of all these discussions is “largely optimistic” (p. 257). Leaving to one side my larger, external objection on the basis of the value of democratic sovereignty, I find myself admiring *A New World Order*’s can-do attitude. The academic world abounds, after all, with those who make their reputations by showing why pretty much nothing at all can work and how all is for the worst in this worst of all possible worlds. I am grateful for the presence of academics like Slaughter who are determined to deploy vision and remarkable ingenuity to figure out how to make things work and make things better. Yet I worry that the optimism glosses over contradictions in the argument’s internal structure — whether and to what extent government networks really can avoid being spitted on the horns of our trilemma without requiring recourse to a sort of extratheoretical, extrastructural appeal to goodwill. Perhaps Slaughter, with her long experience in the world of diplomats, international regulators, and internationally minded judges, believes that such goodwill can be treated as though it were genuinely structural and that discretion in the use of power is part of the checks and balances of the structure. If so, perhaps she is right. But such a formulation is not exactly Madisonian.⁶⁵

2. *Vertical Networks and the Disaggregated State*. — The above, admittedly somewhat priggish, complaint is one that applies to the

⁶⁵ Whereas it is, worryingly, *Monnetian* in its EU-style reliance upon the consensus of elites to make up for structural contradictions and upon the supranational conclave of national elites to go where national populations would not themselves go. Hence, *A New World Order* devotes so much attention to the proper socialization of bureaucrats and judges in order to prepare them to play the role required to reach the proper outcomes on the range of value issues (p. 198). The analogy to the process of European integration succeeding at the elite level while lagging at the popular level is too well understood to rehearse again. *A New World Order*, as ever, acknowledges this point and says that the world, of course, cannot be assimilated to the experience of the EU, but then proceeds with a proposal that still resembles the experience — and, significantly, also the hopes and aspirations — of the EU.

book as a whole, not just to horizontal networks. Vertical government networks under the premise of the disaggregated state not only carry over many of the features and concerns of horizontal networks but also, because of their coercive aspirations, raise new concerns about internal inconsistency in the argument.

The point of vertical government networks is to put the coercive powers of national regulators or judges, who are constitutionally able to compel their own states, behind the orders of a supranational entity. These vertical networks “depend on the disaggregation of the state no less than do horizontal . . . networks” (p. 21). Because of the existence of the disaggregated state, individual institutions within a national state are able to develop what amount to dual functions, one within their national system and the other within their vertical network. Slaughter asserts that this dual function, far from creating a confusion of loyalties, in fact results in greater transparency and accountability. National officials, she says, may have “two faces, internal and external, but they still have only one audience,” namely, their domestic democratic constituency (p. 232). Indeed, she continues, vertical government networks actually increase accountability, which should reassure those critics of earlier forms of global government who worried that combinations of international organizations, NGOs, and other private actors would lack accountability. Thus, dual function “does not imply dual accountability” (p. 232).

I find this a difficult claim to accept, given what else *A New World Order* has to say about the ways that officials are to be explicitly socialized to think of themselves as having responsibilities in a global system and, further, to consider themselves subject at least in some cases to individual liability for their failures to uphold international agreements. Slaughter suggests that the solution to this problem of dual function and, potentially, dual allegiance is that national officials are to be

actors in national and global policymaking simultaneously[. Thus,] officials would have to be able to think at once in terms of the national and the global interest and to sort out the relative priorities of the two on a case-by-case basis. A national environmental regulator would have to be able to push for a set of global environmental restrictions that do not unduly burden her national constituents, while at the same time making the case for those restrictions to her constituents. And at times she might have to agree to restrictions that would be considerably tighter than her constituents wanted to get an agreement that advanced the collective interests of all nations. (p. 234)

How this is not an explicit statement of dual allegiance, dual loyalty, and dual accountability is, frankly, unfathomable. And how the ability lies within the authority, legitimacy, and power of a regulatory agency, on the say-so of a particular regulator, to make the determinations of when to press for national interest and when, without the authority of

a higher national government, to abandon national interest in favor of an official's perception of collective interest is also unfathomable — unless one makes the assumption of a disaggregated state. In *that* case, then, the power of the regulator to make these kinds of calls on her own is evident because there is, by definition, no higher unitary state to make those judgments for her. But if this disaggregation does exist, then it is hard to see that there is at bottom any true accountability, except when some other national actor with greater power happens to notice that a regulator has made a judgment that it does not like. In the case of the judiciary, no such actor may exist at all.⁶⁶

Slaughter's theory conceives of these bureaucrats as masterless *ronin*. Charged in this dual system with deciding, on the basis of their own authority, when to act for their supposed constituents and when to act for the supposed global collective, bureaucrats are free to go their own way.⁶⁷ Yet *A New World Order* has, once again, anticipated the objection and suggests that if networks are sufficiently transparent, then they can be "monitored by ordinary voters" (p. 259). This proposition is doubtful, to judge by the experience of both the United States and the European Union; in fact, Slaughter acknowledges as much (p. 235). But I wonder how Slaughter would regard matters if, for example, ordinary American voters, through their legislators, took due consideration of global jurisprudence, as cited and incorporated by suitably globally socialized American judges in responding to the concerns of their global networks of judges, but nevertheless decided that certain issues, such as the death penalty, really were not an appropriate

⁶⁶ Mechanisms to override a bureaucratic administrative action are greater in number than those to override judges, who in this constitutional system have the last word. Slaughter wants to take advantage of that "last word" in a completely different system.

⁶⁷ There is another problem here with *A New World Order's* enthusiasm for "positive comity." At page 259, Slaughter introduces five norms as conditions for participation in government networks, which she sees as preserving the sovereign self-respect of widely differing states. One norm is "deliberative equality," a presumption that all government networks should be open "to any government officials who meet specified criteria or conditions of membership." She does not say what those conditions might be, although I read this in context to mean such morally neutral criteria as the kind of subject matter under discussion, rather than normative criteria that would, for example, exclude officials from governments engaged in serious abuses of human rights. If I am correct in my interpretation, should officials of the government of Sudan be permitted to join the government officials' network discussing ways to deal with genocide? We are back at the problem of corrupt networks, which is one reason why the United Nations can never achieve a moral status above that of a discussion forum among the good, the bad, and the indifferent: the U.N. is itself almost by definition a corrupt network because its doors are open to the wicked as well as the good. It should be noted that, by calling the U.N. a corrupt network, I do not mean that it is itself wicked — merely that it can never rise above a certain moral status. One of the virtues of hard-nosed sovereignty, as opposed to the kind of moral relativist internationalism that Slaughter's criteria suggest, is that accepting sovereignty as a minimal value does not commit oneself to comity with the wicked, but rather requires merely a certain willingness to talk and come to prudent arrangements when necessary to avoid greater evils.

matter for judicial dialogue with the rest of the world and consequently stripped the federal courts of certain subject matter jurisdiction. I doubt that Slaughter would greet such a development with equanimity — as nothing more than the legitimate result of ordinary citizens placing what they regard as the proper bounds on the “dual allegiance” of their judges and bureaucrats through the democratic process.

As *A New World Order* acknowledges, vertical networks “pierce the shell of state sovereignty by making individual government institutions — courts, regulatory agencies, or even legislators — responsible for the implementation of rules created by a supranational institution” (p. 132). In a world of disaggregated states, and even more so in a world in which individual regulators or judges are able to decide when and to what extent to choose between national and global interests, vertical networks represent a significant shift of power. It is not precisely a shift of power away from national actors to supranational actors; according to *A New World Order*’s proposal, under the assumption of a disaggregated state, the power whether to enforce still rests with a national actor. But in terms of the new forms of global socialization that *A New World Order* endorses, and in terms of accountability to democratic constituencies, vertical networks represent a shift in power from democratic constituencies to supranational institutions. Indeed, vertical networks explicitly endorse the ability of regulatory and judicial agencies, and even individual agents, to make their own decisions as between national and global interests.

Somewhat ominously for an account intended to preserve the independent sphere of national governments, Slaughter adds that national officials, as individuals, “would also be directly subject to the obligations of treaties and other international agreements” (p. 35). Since the state is disaggregated, it would therefore not be up to “the state” as such to uphold human rights, protect the environment, abjure child labor, or seek a peaceful resolution to conflicts. It would instead “be up to the members of the executive branch, the judiciary, and the legislature,” as institutions within the disaggregated state, to do so (p. 35). Remarkably, Slaughter adds that “in a world in which violations of international law *increasingly carry individual penalties*, such obligations could make themselves felt” (p. 35).⁶⁸

Vertical government networks — in the form of international courts, international agencies, or other international organizations that can count upon the coercive power of a bureaucratic or judicial actor through socialization, group identity, political affinity, the force of individual liability for officials, or any other factor — represent a shift in

⁶⁸ Emphasis has been added.

power indeed. One might think that this shift is in serious, if not fatal, tension with the respect for national government policy that *A New World Order* is also pledged to protect. And the condition that makes such individually coercive networks possible, on this account, is the disaggregated state: “Aid, pressure, socialization, and education would no longer flow state to state, but would penetrate the state to the level of *specific individuals who constitute a government*” (p. 35).⁶⁹ The resolution of this internal tension again turns out to be merely an extra-theoretical, non-structural one: that the coercive power of vertical networks is a power to “be used sparingly” by someone, somehow, in his or her presumed wisdom and discretion (p. 145). In an account that otherwise seeks to establish a self-regulating structure, invoking checks and balances, this concession of unrestrained discretion seems troublingly ad hoc.

B. Disaggregated Sovereignty and a Disaggregated World Order

The claim of the disaggregated state carries with it a theoretically important corollary — that a world of disaggregated *states* implies a world of disaggregated *sovereignty*. What is the difference and why is this difference important?

The notion of a disaggregated state requires understanding the state not as a unitary institution, but instead as an agglomeration of different centers of power, different institutions, and competing actors, including both elected actors such as legislators and unelected actors such as judges and bureaucrats. If the state is reconceived in this disaggregated way in its international relations, then the result will also be a reconceived understanding of state sovereignty. It, too, becomes disaggregated. The disaggregation of sovereignty signifies that the constituent institutions and actors of the disaggregated state achieve a measure of formal and legal sovereignty of their own — the formal legal capacity to undertake activities within government networks and make them binding upon their disaggregated state. Each government institution, Slaughter says, “would have an independent obligation to interpret and implement international legal obligations,” in much the way that “each branch of the U.S. government has an independent obligation to ensure that its actions conform to the Constitution” (pp. 268–69). Government networks would become formalized actors, because their individual constituent agencies and institutions would have the sovereign status, at least within a certain subject matter, to bind the states of which they are a part, under an umbrella of international obligations entered into through government networks. Why describe these substate units as sovereign over a particular subject matter? Be-

⁶⁹ Emphasis has been added.

cause they can bind the state of which they are nominally a part, and in that sense they meet Lincoln's classic definition of sovereignty as "a political community, without a political superior."⁷⁰

Slaughter claims that this extension of sovereignty to substate agencies, for the purpose of being able to bind their own nominal state, "will bolster the power of the state as the primary actor in the international system" (p. 269). She reasons that giving each government institution a measure of "legitimate," that is, sovereign, authority under international law "marks government officials as distinctive in larger policy networks and allows the state to extend its reach" (p. 269). Her conclusion might be reasonable if states were indeed disaggregated. But to the extent global governance exists, it is by unitary states exercising their sovereign privileges — even if that means considerably less global governance than Slaughter would like to see. In the case of a unitary state, giving substate agencies sovereign powers within a particular subject matter really does weaken the state. *A New World Order* suggests that this problem can be dealt with by the "dual" obligations of all substate actors — specifically, by the expedient of granting the "last word in case of disputed interpretations of international law" to either the national courts or the national legislature (p. 269). Such a remedy would preserve the vital feature of unitary state sovereignty.

But this remedy likely weakens, not strengthens, the state. After all, much of *A New World Order* is devoted to urging that courts, in particular, socialize their members and conform their jurisprudence to an internationalist ideal, in a manner contrary to any traditional notion of state sovereignty. Slaughter wants courts to see themselves as willing to enforce international law obligations as judges have learned to interpret them through their global socialization — which is to say, in ways that favor internationalist views and disfavor merely parochial, nationalist ones. It is slightly disingenuous to suggest that, in Slaughter's model, courts or, for that matter, legislatures properly socialized will be able to protect state sovereignty. Combined with Slaughter's vision of national officials taking personal responsibility for carrying out the decisions of the international networks to which they belong, it is hard to see the concept of disaggregated sovereignty as meaning anything other than a weakening of the unitary sovereign state.

A New World Order's final response to this problem is one of the few places where the argument operates by pure definitional fiat. Slaughter defines "sovereignty" not according to Lincoln's traditional "without a political superior" view, but instead as the "capacity to par-

⁷⁰ Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 421, 434 (Roy P. Basler ed., 1953).

ticipate in international institutions of all types — in collective efforts to steer the international system” (p. 267). This formulation is the “new sovereignty” championed by Chayes and Chayes, a conception of sovereignty that accords “status and recognition to states in the international system to the extent that they are willing and able to engage with other states, and thus necessarily accept mutual obligations” (p. 267).⁷¹ *A New World Order* mostly sees the new sovereignty as the *consequence* of globalized problems so compelling as to drive even powerful states such as the United States to participate in government networks. The concept is “new” in that it gives up the sovereign’s traditional claim to do as the sovereign will, and instead claims that sovereignty resides in accepting the obligations of the international legal system and its institutions.

Yet this new definition of sovereignty confuses sovereign power with its benefits: there are many reasons why a sovereign would voluntarily give up certain powers in order to gain certain benefits in an international system, but that says merely that sovereign power can be used to secure international benefits, not that sovereignty *consists* of those benefits. An empirical realist critic might challenge the new sovereignty by pointing out that the actual evidence of the disaggregated state, the erosion of the unitary sovereign state, and the collapse of traditional sovereignty is wildly exaggerated in the literature on global governance, including in *A New World Order*, and by arguing that the behavior of substate institutions is in fact largely explainable in traditional realist terms of sovereign interests of unitary sovereign states.⁷² Not being an empirical political scientist, I do not propose to offer that kind of detailed empirical response here.

My critique, rather, is a narrower one. It is simply that telling government officials that because of the disaggregated state they are authorized to see themselves as actors at least partly independent of the state tends, on any traditional definition of sovereignty, to weaken the state. To then claim that the state is, on the contrary, somehow strengthened because one has redefined sovereignty to mean engaging in activities characteristic of giving up traditional sovereignty — regardless whether giving up sovereignty is desirable, prudent, or moral — is just to capture the castle by definition.

⁷¹ The author cites CHAYES & CHAYES, *supra* note 24, at 4. It is worth noting that the formal scope of Chayes and Chayes’s book concerns regulatory agreements, a context in which many of their arguments make considerably more sense. It is when they — and Slaughter — go beyond narrow regulatory and economic issues that the conceptual strain becomes evident.

⁷² This is the kind of realist argument I imagine would be offered by an empirical political scientist such as Stephen D. Krasner. Cf. STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY (1999) (providing a defense of the realist approach to sovereignty).

A New World Order evades the question by viewing disaggregated sovereignty not as the consequence of something else — disaggregated states — but rather as the cause. Instead of redefining sovereignty, *A New World Order* ought simply to admit that it wants to see the old sovereignty pass away. But so admitting would raise a large question whether the argument really intends to avoid being impaled on the horns of the government trilemma or whether it is, all along, knowingly or unknowingly committed to the erosion of democratic legitimacy.

V. REVALUING “A POLITICAL COMMUNITY, WITHOUT A POLITICAL SUPERIOR”

The foregoing discussion has sought to critique *A New World Order* from within its own premises. This Review has emphasized that the book is mostly admirably transparent about its assumptions as well as about its aspiration to formulate a world order that respects the three fundamental values of global governance, democracy, and democratic accountability. If this Review has noted places in which the vision of *A New World Order* either falls short or seems internally inconsistent, it is because the argument is so impressively transparent and because the vision itself is nothing if not ambitious. But the internal critique effectively amounts to a single concern, which is that the global governance by global government networks that Slaughter proposes fails to balance the three fundamental values at issue and instead winds up tipping in favor of global governance in ways that devalue democracy and democratic accountability. More precisely put, the internal critique suggests that the system of global governance through global government networks, as it grows and develops in the ways that Slaughter outlines, *over time* tends to erode the respect for democracy and democratic accountability with which it began and may finally lead to a form of liberal internationalism, a world of de facto federalized global governance. The system of global governance that Slaughter promotes does not appear to be stable over time, and the value that it erodes is inevitably democratic sovereignty.⁷³

Slaughter herself is not troubled by this conclusion — far from it, since this result is what she believes promotes a stable and just world order. As she sees it, one effect of government networks and their socialization of a new global elite will be that over time the question of democracy, at least insofar as it means democratic sovereignty in the

⁷³ Given that this is a review essay about the internal arguments of *A New World Order*, this section is not intended as a full-blown defense of democratic sovereignty. But I think the essay would be incomplete if it confined itself solely to internal arguments and failed to acknowledge the larger, external critique.

traditional sense of “without a political superior,” will wither in importance. Such a transformation will occur because, although national legislatures will continue to exist and act, they will be checked by courts and bureaucratic actors with a globalized sense of obligation; as a result, perhaps even legislators will transcend the parochialism of specifically representing their constituents (p. 104). In that case, democracy and democratic accountability will cease to be issues of sovereignty. Slaughter offers, then, a gradualist vision of global governance, one in which the trilemma ceases to bite *not* because matters remain balanced among the trilemma’s sharp horns, but instead because, over time, key elites will be educated and socialized to see things differently and will no longer value democratic sovereignty so much.⁷⁴ The hope seems to be that globalist socialization gradually alters the perceptions

⁷⁴ This process of elite formation is one that strives to maintain a horizontal as well as a vertical dimension — horizontal in its integration with global government networks, and vertical in its connection to democratic electorates within a country. I have suggested that in the hard cases, when one or the other has to give, unelected bureaucrats and judges, if they have been properly socialized in the way that the book urges, will favor the horizontal dimension. I also suggest that this is the intention of *A New World Order*’s ideal position over time, because Slaughter, in the hard cases, locates global justice in horizontal networks rather than in purely national judges.

But I would also suggest that the example of elite formation most relevant to Slaughter’s argument — apart from European Union integration — points to horizontal integration as gradually replacing vertical integration. What *A New World Order* proposes is, in other words, the formation of a global and globalist bourgeoisie, horizontally integrated with its counterparts independent of mere geography and place. This, in fact, occurred during the rise of civil society in England and Scotland at roughly the time of Adam Smith and Adam Ferguson. What is striking about the rise of this new bourgeoisie and its associated civil society, however, is that its class formation was “forged not only by individuals acting on the basis of economic interest but also as a result of the *withdrawal of aristocrats and gentry from village communities*.” MARVIN B. BECKER, *THE EMERGENCE OF CIVIL SOCIETY IN THE EIGHTEENTH CENTURY* 3 (1994) (emphasis added). Becker adds:

There had always been a separate and clearly defined elite culture . . . but these quality folk had joined in the more broadly based rituals, ceremonies, and plebian pastimes. By the late seventeenth century, however, English polite society had become freer from the need to patronize local customs and the recreation of ordinary folk . . .

This tendency toward a *withdrawal of the “best people” from common residential, linguistic, and cultural context* shaped more than the townscape. It offered a “polite and commercial people” the prospect of a relaxation from a demanding public life.

Id. at 4 (emphasis added). Thus, the new bourgeoisie was established by the horizontal integration of society at the expense of the vertical connection. This history finds echoes in the call for contemporary global elite formation. For example, Wolfgang Reinicke, in support of global public policy networks, has predicted that the “nation-state as an externally sovereign actor in the international system will become a thing of the past. . . . This requires *political elites to dissociate themselves to some degree from territory*.” Wolfgang H. Reinicke, *Global Public Policy*, FOREIGN AFF., Nov.–Dec. 1997, at 127, 137 (emphasis added). Global networks demand a gradual replacement of an unstable equal commitment to horizontal and vertical integration with a horizontal integration of a global and globalist bourgeoisie, freed from the constraints of territory in both their economic activities and culture. This is not a prescription, however, for democracy and democratic accountability. Strikingly, this process has cognates even within an advanced capitalist economy such as that of the United States. See, e.g., Kenneth Anderson, *Review Essay: A New Class of Lawyers: The Therapeutic as Rights Talk*, 96 COLUM. L. REV. 1062 (1996).

of elites about the value of sovereignty, because sovereignty's hold is ultimately believed to be a cultural one, and not, as the realists might understand it, one rooted in the facts of power. One might think of this in Rousseau's terms, as a hope that gradually the "popular will" of particular constituencies will be replaced by the leadership of elites who instead respond to the "general will" without diverging significantly on their understanding of the mandates of that general will because they share a similar socialization and global elite outlook.⁷⁵

The above is a sweeping restatement of *A New World Order's* thesis, one which Slaughter might well reject as unfairly broad in its prediction that global governance by global government networks will — over time — proved unstable. But plainly the argument of *A New World Order* depends crucially on judges and bureaucrats — unelected and, at best, only partially democratically accountable actors — relying on their own perception of their authority in order to bind the states of which they are nominally a part. The successive chapters of the book are a call, in fact, to bureaucrats and judges to free themselves of what they might have thought were national limitations on their legitimate authority, in order to enroll themselves in more socially desirable and globally elite networks and to use their power to bind their states. If questioned about the theory of state legitimacy on which this exercise of bureaucratic or judicial power is based, Slaughter would likely answer that the state is disaggregated, and so is sovereignty. If the state is not a unitary creature, then centers of substate power are freer, if not completely free, to act on their own. The legislature — typically lagging behind the unelected bureaucrats and judges given, as Slaughter says, its democratic parochialism — might put some restrictions on that freedom, but that freedom exists simply because the judges are not all-powerful, not because of any respect for democracy. In her view, one can rely on the respect for judicial independence commonly found in sovereign constitutional democracies to insulate judges from much political pressure, even when those judges develop a jurisprudence that leaves sovereign democratic constitutionalism far behind.

The critique this Part advances is not fundamentally an internal one. It is instead evaluating Slaughter's argument on the basis of the value of democratic sovereignty, traditionally defined as a *democratic* "political community, without a political superior."⁷⁶ This external critique highlights a disagreement with *A New World Order* that is vastly more profound than pointing out certain internal inconsistencies. The

⁷⁵ See JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND DISCOURSES* 26 (G.D.H. Cole trans., E.P. Dutton & Co. 1950) (1762).

⁷⁶ See Lincoln, *supra* note 70, at 434.

easiest way to articulate this fundamental disagreement is to consider, with respect to the matter of constitutional interpretation, what roles *A New World Order* considers appropriate for judges and the decisions of foreign courts, both of which put the issue of democratic constitutional sovereignty squarely on the table.

The debate over the role of foreign court decisions is widening among members of the U.S. Supreme Court, and Slaughter provides a fair-minded summary of the positions. On one side is Justice Breyer, who reviewed in his *Knight v. Florida*⁷⁷ dissent several foreign judicial precedents on the ground that, although such precedents were not binding, the “[w]illingness to consider foreign judicial views in comparable cases is not surprising in a Nation that from its birth has given a ‘decent respect to the opinions of mankind.’”⁷⁸ He put this claim more modestly in his earlier dissent in *Printz v. United States*,⁷⁹ noting that the experience of foreign courts may “cast an empirical light on the consequences of different solutions to a common legal problem.”⁸⁰ This view is seconded by Justice Ginsburg, who has argued that many legal problems, such as discrimination and prejudice, are global and that “experience in one nation or region may inspire or inform other nations or regions.”⁸¹ Justice O’Connor has similarly remarked that although international law and the laws of other nations are “rarely binding on our decisions in U.S. courts, conclusions reached by other countries and by the international community should at times constitute persuasive authority in American courts.”⁸² And quite recently, Justice Kennedy took note of European jurisprudence in his opinion in *Lawrence v. Texas*.⁸³

A New World Order makes this ideal of transjudicialism a central theme of what global government networks should be and do. Judges

⁷⁷ 528 U.S. 990 (1999) (mem.).

⁷⁸ *Id.* at 997 (Breyer, J., dissenting from denial of certiorari).

⁷⁹ 521 U.S. 898 (1997).

⁸⁰ *Id.* at 977 (Breyer, J., dissenting). Beneath Justice Breyer’s soothingly disarming dissents, which argue merely for considering such views in the same way that one might read the law reviews, lurks an actual commitment to a more robust role for foreign precedent in United States courts. Justice Breyer advocated such a view when he debated Justice Scalia about the propriety of referencing the decisions of foreign tribunals on January 13, 2005, at a forum cosponsored by the U.S. Association of Constitutional Law and hosted by the Washington College of Law at American University. See Tom Curry, *Justices Debate Use of Foreign Precedents*, MSNBC.COM, Jan. 14, 2005, at <http://msnbc.msn.com/id/6824149>.

⁸¹ Ruth Bader Ginsburg, *Affirmative Action as an International Human Rights Dialogue*, BROOKINGS REV., Winter 2000, at 2, 3.

⁸² Justice Sandra Day O’Connor, Keynote Address Before the Ninety-Sixth Annual Meeting of the American Society of International Law (Mar. 15, 2002), in 96 AM. SOC’Y OF INT’L L. PROC. 348, 350 (2002). One may argue that Justice O’Connor’s words are merely platitudinous; after all, she was addressing the American Society of International Law.

⁸³ 123 S. Ct. 2472, 2481 (2003) (citing decisions of the European Court of Human Rights).

should be encouraged to see themselves as engaged in a common enterprise of judging, in which they are socialized to understand themselves as creating a global jurisprudence. This transjudicialism should be tempered, to be sure, by local and national concerns — culture, social considerations, and so on — but, in keeping with Slaughter's ideal of dual allegiance, the judiciary should also consciously see itself as part of a global order. Judges should have many interactions with each other, and specifically many face-to-face meetings, in order to develop their sense of identity and community as actors engaged in a common enterprise of creating a global jurisprudence. They should see themselves as engaged in "dialogue" with other courts to help find common ground and approaches to common legal problems that, as noted earlier, are far from limited to such cross border matters as trade but also include the death penalty and similar "values" issues.

Indeed, there is a curious elision in both Slaughter's and Justice Breyer's invocation of "common" legal problems. By invoking "common" legal problems, they implicate two distinct kinds of legal questions. One concerns legal matters that are "common" because they cross borders, such as trade or air pollution, or because the same actual thing, circumstance, or event touches two jurisdictions. The other concerns problems — such as the death penalty — that, in any actual instance, exist in a single jurisdiction, but that might also occur in another jurisdiction. The latter is "common" only because it might occur in either or both jurisdictions; it is not "common" in the sense that it actually involves both jurisdictions. Conflating these two meanings of "common" allows the considerations and analysis of the first, which plainly requires some transnational rules to settle at least the jurisdictional questions, to sweep in those issues that might independently arise in two places, such as the death penalty. While the first requires some level of interaction, the second does not; wrapping the two together, however, conveys the impression that it does.

Slaughter makes clear that the socialization of judges is not intended merely as a means for judges to extend their knowledge and sophistication. Rather, socialization is intended to allow judges over time to develop genuinely global allegiances that will affect the very process of judging. It is intended to reveal practices, such as First Amendment jurisprudence, as "outliers" and to be a vehicle for encouraging U.S. courts to deploy their considerable powers in the interest of a globalist agenda. Slaughter intends for judges to cite foreign cases as "persuasive authority" and argues that when judges do in fact "cite foreign decisions as persuasive . . . constitutional cross-fertilization begins to evolve into something deeper, resembling an emerging global jurisprudence" (p. 78). And this is to take place as "genuine transjudicial deliberation within a newly self-conscious transnational community" (p. 78).

Well, what is wrong with this vision? One concern is the rather obvious point that Justice Thomas argued in *Knight*, that “were there any . . . support [for the defendant’s argument] in our own jurisprudence, it would be unnecessary for proponents of the claim to rely on the European Court of Human Rights, the Supreme Court of Zimbabwe, the Supreme Court of India, or the Privy Council.”⁸⁴ Another concern is that, as Slaughter candidly notes, it is not especially clear that the citation of foreign case law has any real effect. For example, she quotes Yash Ghai, who notes that in Hong Kong, “the approach to the use of foreign cases is not very consistent; they are invoked when they support the position preferred by the court, otherwise they are dismissed as irrelevant” (p. 227).⁸⁵ This result is not surprising, since these cases are cited outside the context in which they actually function as law. They are bare words on paper. Cases stripped out of one system and pressed into another might ultimately amount to mere rhetorical flourish, as Ghai observes.

This rhetorical function is likely more useful to judges outside the United States who seek to give legitimacy to their decisions than to judges within the United States. If your constitutional tradition is not very longstanding or is colonially derivative, then appealing to case law outside your own tradition can carry legitimating weight. In this case, the stability and democratic credentials of the state to which a court belongs also matter — an observation that seems not to have persuaded Justice Breyer in citing to the Zimbabwe Supreme Court in *Knight*. The Supreme Court of Zimbabwe has been not just an honorable court, but a heroic one. Yet there is something profoundly wrong in citing to a court (no matter how heroic a role it has played in the losing battle for human rights in its country) that, not of its own choosing, is formally a branch of a cruel and tyrannical state.⁸⁶ Perhaps Justice Breyer believed that by citing the Zimbabwe court, he gave it legitimacy against Robert Mugabe’s wicked regime.⁸⁷ But I would respectfully suggest it is Mugabe’s regime to which such action

⁸⁴ 528 U.S. 990, 990 (Thomas, J., concurring in denial of certiorari).

⁸⁵ Internal quotation marks have been omitted. The author quotes Yash Ghai, *Sentinels of Liberty or Sheep in Wolf’s Clothing? Judicial Politics and the Hong Kong Bill of Rights*, 60 MOD. L. REV. 459, 479 (1997).

⁸⁶ Indeed, even Justice Breyer later admitted to having made a “tactical error” in citing to the Zimbabwe court, conceding that Zimbabwe is “not the human rights capital of the world.” See Curry, *supra* note 80.

⁸⁷ Justice Breyer subsequently confirmed this theory, explaining that he cites foreign precedents in order to help “institutions and courts trying to make their way in societies that didn’t use to be democratic”: “For years, people all over the world have cited the [U.S.] Supreme Court, [so] why don’t we cite them occasionally? They will then go to their legislatures and others and say, ‘See, the Supreme Court of the United States cites us.’ That might give them a leg up.” *Id.* (first alteration in the original) (reporting the comments of Justice Breyer).

lends legitimacy because, in fact, courts are not so “disaggregated” from the state as the account in *A New World Order* might lead one to think.

The value of rhetoric from outside one’s own constitutional system is especially a different matter if one looks to two hundred years of constitutional history. It is not American hubris, but conscientiousness, that suggests that one confine oneself to a tradition that carries legitimacy in part because the tradition defines the sources and limits of that legitimacy by *confining* them. Despite the benefits of an Americentric approach, a sense of personal and communal attachments, social relationships, loyalty, and social obligation — all the factors of socialization that Slaughter stresses — might still make it seem both good and politic to cite to those outside one’s own court system. Whether such personal and social factors affect the U.S. Supreme Court Justices’ decisions to cite to foreign tribunals, Slaughter is plain in urging that those factors ought to play a very important role indeed.

Citing a foreign case as persuasive authority rather than as mere rhetorical flourish raises the deep issue of legitimacy. Justice Scalia invoked just such a concern when, attacking transjudicialism, he said that “[w]e must never forget that it is a Constitution for the United States of America that we are expounding.”⁸⁸ Justice Scalia was not closing himself off to the possibility that someone or some institution outside the United States might have something relevant to say about an American situation. He certainly recognized that, for example, cross-border litigation by multinational entities will involve complex issues of comity and recognition of the views of foreign courts, as might the interpretation of treaties and other international documents that result from a multilateral process among sovereigns. His point was, rather, that “comparative analysis [is] inappropriate to the task of *interpreting a constitution*, though it [is] of course quite relevant to the task of writing one.”⁸⁹

Constitutions are unique insofar as they are the constitutive document of a political community.⁹⁰ As such, the issue is not so much the content of doctrine but instead its *provenance* — the fact that it comes out of the constitutional and constitutive processes of a particular community. Therefore, the fact that other communities might have different or better ways of approaching even the same issue is frankly irrelevant. There are moments when, to be perfectly blunt, *A New*

⁸⁸ *Thompson v. Oklahoma*, 487 U.S. 815, 868 n.4 (1988) (Scalia, J., dissenting).

⁸⁹ *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997) (emphasis added).

⁹⁰ The most important discussion of this whole matter remains Rubinfeld, *supra* note 11. He concludes that the “unfortunate reality, however, is that international law is a threat to democracy and to the hopes of democratic politics all over the world.” *Id.* at 34.

World Order reads as a kind of letter to Justice Breyer, telling him that he should feel empowered to do what, on some readings of his statements on this subject, he is already inclined to do — open U.S. constitutional interpretation up to transjudicial dialogue — and that, by so doing, he will gain the approbation of progressive intellectuals and *bien-pensant* opinion the world over. In an essentially moral argument, the subjective importance of believing one is on the side of progress and *bien-pensant* opinion is undeniably powerful.

Slaughter addresses the issue of constitutional legitimacy directly with a thoughtful discussion centered around a closely argued and highly informed article by Charles Fried. Fried writes in reference to the debate between Justice Breyer and Justice Scalia:

Justice Breyer's remarks on comparative constitutional law, if they had appeared in a law review article, would have been quite unremarkable As part of a judicial opinion, they were altogether remarkable. Why should that be? The reason is that if Justice Breyer's insertion into the case of comparative constitutional law materials had gone unchallenged, it would have been a step towards legitimizing their use as points of departure in constitutional argumentation⁹¹

Unlike for Fried, for Slaughter, Justice Breyer's actions merely raise the issue of competing interests in a political society. For citizens and their political representatives, she says, the critical issue "may be controlling the inputs into a particular political process — including judicial deliberation — so as to be able to control or at least manage the output" (p. 226). If that is so, then the problem is not content, "but the underlying battle of interests that informs any policy choice" (p. 226).

This characterization of the issue as merely managing political inputs and outputs seems to me entirely too anodyne. Characterizing the propriety of foreign citations as merely a partisan battle over regulations might be appropriate for purely political questions of resource allocation. But in matters of deepest constitutional interest, it has the effect of extracting the moral content out of what is the keenest question of morality. There is something wrong with reducing the most important social questions raised in constitutional issues to amoral interest group battles; it subtly belittles them, implicitly urging judges to adhere to political realities that lack the moral status to prevent the introduction of alien inputs into the sovereign constitutional system. Indeed, I would suggest that a more accurate characterization is one that recognizes the issue as one of profound moral importance.

⁹¹ Charles Fried, *Scholars and Judges: Reason and Power*, 23 HARV. J.L. & PUB. POL'Y 807, 818 (2000).

The moral heart of the debate is how one sees constitutionalism and the U.S. Constitution in particular. In many political systems, the constitution is a higher law, but not that much higher; it is a document that is relatively easily amended, is highly programmatic in its structure, and possesses neither the longevity nor legitimacy that the Constitution of the United States carries. It is thus easy to comprehend how, in such a system, legitimacy is not deeply offended by the importation of legal materials from outside the system. In fact, quite the opposite occurs, as Jed Rubenfeld observes:

For Europeans, the fundamental point of international law was to address the catastrophic problem of nationalism — to check national sovereignty, emphatically including national *popular* sovereignty. This remains the dominant European view today. The United Nations, the emerging European Union, and international law in general are expressly understood in Europe as . . . restraints on *democracy*, at least in the sense that they place increasing power in the hands of international actors (bureaucrats, technocrats, diplomats, and judges) at a considerable remove from popular politics and popular will.⁹²

That which Rubenfeld criticizes approximates what *A New World Order* ultimately has in mind. Yet the history of the United States is considerably different from that of Europe. Rubenfeld goes on to note that the “U.S. Constitution did not speak in the language of universal rights.”⁹³ Instead, it

spoke in the language of popular sovereignty American constitutional law was understood from the outset to be part of the project of popular self-government, as opposed to an external force checking that project. The American language of constitutional rights, properly understood, does not claim the authority of universal law. It claims, rather, the authority of democracy.⁹⁴

The Constitution derives its legitimacy from the people who are governed thereby and not because it is the enactment of some body of universal law bestowed upon them by elites who obtained it from on high and can therefore modify it as they receive further revelation.⁹⁵ If that interpretation be so — and it seems to be the ordinary understanding of Americans, including their elites — then the invocation of foreign constitutional law, no matter how persuasive its content, is fundamentally at odds with democratic constitutional self-government. The citizens of the United States have accepted democratic constitutional arrangements that are, in many ways, deeply countermajori-

⁹² Rubenfeld, *supra* note 11, at 24–25.

⁹³ *Id.* at 29.

⁹⁴ *Id.*

⁹⁵ I address the quasi-religious overtones of these discussions in Kenneth Anderson, *Reply: Secular Eschatologies and Class Interests of the Internationalized New Class*, in RELIGION AND HUMAN RIGHTS: COMPETING CLAIMS? 107 (Carrie Gustafson & Peter Juviler eds., 1999).

tarian, but they have done so on the basis of an argument from popular sovereignty.⁹⁶ The formal acceptance of constitutional legal materials from outside that system is, to say the least, inconsistent with the traditional understanding of the compact between the governed and the government.

Of course, judges whose constitutional philosophy is something other than democratic self-government could gradually introduce the persuasive authority of foreign precedent; if Justice Breyer and four other Justices were to do so over time, revolt would not ensue. But it would not be consistent with democratic constitutionalism as the United States has understood it. And if the Justices and the federal courts were to move along that road, then it would seem to me quite appropriate for Congress to take the equally radical but entirely democratic step of stripping the federal courts of jurisdiction over certain matters, thereby preserving the balance of democratic governance.⁹⁷

VI. CONCLUSION

The foregoing is not a full moral argument for democratic sovereignty.⁹⁸ It is, rather, a defense of democratic sovereignty in the crucial area raised by *A New World Order* — the judiciary. It is hard to see how *A New World Order* can sustain the goal with which it began — to reconcile some form of global governance with democracy and democratic accountability. It seems that democracy and democratic accountability, in fact, fall by the wayside in what Slaughter ultimately sees as the virtuous result of global governance by government networks. Considering the concern for democratic control of unelected but nonetheless necessary bureaucracies arising from the post-New Deal welfare state,⁹⁹ it is remarkable to see offered a system of global governance predicated on the exercise of independent bureaucratic and judicial power precisely *because* of an ability to exercise independent discretionary power against the democratic state itself. I understand fully that Slaughter sees her model as a system with checks and balances from the elected, democratic, national organs of states and has spent much effort seeking to construct it that way. Yet I cannot believe that over time — if the system of global governance proceeded as *A New World Order* proposes — the model could hope to sustain

⁹⁶ See Rubinfeld, *supra* note 11, at 27.

⁹⁷ I confine this view solely to the prospect of the federal courts introducing into constitutional jurisprudence a body of materials that have no cognate in this country's democratic constitutional order. In that case, the extraordinary reassertion of democratic sovereignty by the elected branches of government seems justified.

⁹⁸ A fuller argument is found in RABKIN, *supra* note 7.

⁹⁹ See, e.g., B. GUY PETERS, *THE POLITICS OF BUREAUCRACY* 299–339 (5th ed. 2001).

much democracy in decisions that actually mattered. Slaughter's model strikes me as a proposal, on the contrary, for usurpation.¹⁰⁰

Yet there is something churlish in so harsh a conclusion. After all, *A New World Order* was written partly in response to critics like me who attacked forms of global governance that transferred power to unaccountable NGOs and private groups.¹⁰¹ The influential discourse of global governance in the 1990s championed governance by public-private partnerships and empowering NGOs. The nineties were the years of the NGOs, until it started to occur to wider groups of people that they carried no special legitimacy.¹⁰² Slaughter has listened carefully to that kind of criticism and deliberately formulated a proposal for global governance that generally removes the NGOs, corporate actors, and private actors from governance. This is a very good thing, and it is a reason why *A New World Order* deserves to be read widely and why its proposed form of global governance, through government networks that *do* have some claim to accountability, will and deserves to predominate discussion of global governance for some years to come. Slaughter has advanced the argument and its sophistication considerably.

Yet in the end, I cannot see that the system of *A New World Order* will preserve democracy and democratic accountability. It fails to balance the three horns of the trilemma: global governance, democracy, and democratic accountability. Slaughter's argument produces an unstable system and fails to square its descriptions of what global governance will come to mean if fully undertaken as

¹⁰⁰ It is the discomfort of that judgment that perhaps prompts *A New World Order*, midway through the argument, to urge a "new conception of democracy, of what self-government actually means" (p. 194). A new conception of democracy might ease the difficulty of satisfying the requirements of both global governance and democracy; on the other hand, it might simply eliminate the inconvenience of satisfying any real definition of democracy. What does this new conception of democracy turn out to be? "It is a horizontal conception of government, resting on the empirical fact of mushrooming private governance regimes in which individuals, groups, and corporate entities in domestic and transnational society generate the rules, norms, and principles they are prepared to live by" (p. 194). I do not know what this is supposed to mean for the democratic state. On the one hand, it sounds vaguely libertarian; we will all set our own rules in our own spheres of civil society. On the other hand, it sounds vaguely oppressive; private institutions, obviously such as corporations but also institutions of civil society, including churches, unchecked by the constitutional democratic state, have often been instruments of oppression. What I do not see in this is a conception of representative constitutional democracy in any sense continuous with what it has ordinarily meant — majority rule through representatives elected at the ballot box and whose majoritarianism is checked by courts within a constitutional arrangement that is given legitimacy from the people so governed. Or in other words, a democratic political community, without a political superior.

¹⁰¹ See, e.g., Anderson, *The Limits of Pragmatism*, *supra* note 18; Anderson, *The Ottawa Convention*, *supra* note 18; Anderson & Rieff, *supra* note 17.

¹⁰² See, e.g., *NGOs: Sins of the Secular Missionaries*, *ECONOMIST*, Jan. 29, 2000, at 25; David Rieff, *The False Dawn of Civil Society*, *THE NATION*, Feb. 22, 1999, at 11.

against the weaker, and ever weakening, legitimate value of democracy. Sovereignty is important because it can shelter within its embrace of power the weaker, yet more important, value of democracy. The value of robust democratic sovereignty is not that it must do so, but that it *can*. *A New World Order* offers a system in which, for all its good intentions, democracy gradually gives way because the system finally erodes sovereignty to the point at which it serves as no shelter for democracy at all.