FILLING POWER VACUUMS IN THE NEW GLOBAL LEGAL ORDER

Anne-Marie Slaughter*

Abstract: In her Keynote Address at the October, 12, 2012 Symposium, *Filling Power Vacuums in the New Global Legal Order,* Anne-Marie Slaughter describes the concepts of "power over" and "power with" in the global world of law. Power over is the ability to achieve the outcomes you want by commanding or manipulating others. Power with is the ability to mobilize people to do things. In the globalized world, power operates much more through power with than through power over. In contrast to the hierarchical power of national governments, globally it is more important to be central in the horizontal system of multiple sovereigns. This Address illustrates different examples of power over and power with. It concludes that in this globalized world, lawyers are ideally trained and positioned to exercise power.

INTRODUCTION

I love the title of this Symposium because I've been thinking a lot about power in a number of different contexts. This Symposium gives me the chance to apply some of that thinking, at least in a preliminary way, to thinking about the globalization of law. I've obviously been out of the pure legal world for a long time, but in government, I sat across the table from Harold Koh, the legal advisor of the Department of State, at Secretary of State Hillary Clinton's meeting every morning. Of course, Harold and I had sat on many panels together, and our careers have been intertwined, but I got a chance to see firsthand the way law shapes politics and constrains power. I was very pleased, then, to start thinking about how law operates in a vacuum, or in the relatively open spaces of a globalized world.

Let me start with a couple of reflections on power, and the nature of power.[1] Then, I will talk about how I think those conceptions of

---

[1] *See infra* notes 4–23 and accompanying text.

919

power apply to law.[2] I will end by talking a little bit about how that applies to lawyering.[3]

I. Power as Ladders and Webs: Power Over and Power With

I think a lot about power in terms of the vertical and horizontal worlds, to start with the most abstract ideas. One way to think about this concretely is the ladder and the web.[4] If you think about power in terms of a ladder, you want to be at the top. It's a vertical ascent. If you think about power in terms of a web, you want to be at the center. There is no top. Power in a web comes from the center, outward. To be at the top of a ladder would be to be on the periphery of a web. To be at the center of a web would be to be midpoint on the ladder.

This is a very different way of thinking about power. The examples come from Professor Carol Gilligan's book from the early 1980s, *In a Different Voice*.[5] She actually wrote the book about how adolescent boys and girls think about relationships in terms of ladders and webs. I'm not sure whether the gender dimension makes a difference. For my purposes, they are two equally valid ways of thinking about power and both, certainly, operate in the world today.

The next way to think about ladders and webs is to think of the ladder as "power over." If you're at the top of a ladder, you have power over the people below you. You can tell them what to do. It's a hierarchy. If you have power in a web—if you're at the center of a web—you don't have power over anyone. It's horizontal. You can't make anyone do anything, but you have "power with" them. It's the distinction between power over and power with. If you're at the center of a web, you can mobilize people to do all sorts of things. You have all the connections you need to bring people together to make things happen. But it is a different kind of power, and you have to exercise it differently.[6] I first heard this distinction from Professor Lani Guinier, my former colleague at Harvard. I've read it in many different places, but I remember

---

[2] *See infra* notes 24–60 and accompanying text.

[3] *See infra* notes 61–65 and accompanying text.

[4] *See* Carol Gilligan, In a Different Voice: Psychological Theory and Women's Development 32 (35th prtg. 1998) (contrasting boys' "hierarchical ordering" with girls' "web of relationships" as ways of thinking about conflict and choice).

[5] *Id.*

[6] *See* Lani Guinier & Gerald Torres, The Miner's Canary: Enlisting Race, Resisting Power, Transforming Democracy 108–30, 141–47 (2002).

her talking about the distinction of power over versus power with fifteen years ago.[7]

For our purposes today, I want to suggest that these are two ways to think about power in the national state and power in the global economy: power over and power with, or ladders and webs. In the national state, it's much more of a hierarchy, at least formally. We have the federal government, we have state governments. We think about law and politics in hierarchical terms. Now, within the federal government, we have checks and balances, such that we have no one institution that controls all the others, but broadly, it's a hierarchy. In the global economy, it is much more of a web. There are certainly elements of hierarchy such as the United Nations system or other sources of international law.[8] By and large, however, when you think about power in diplomacy, or power in any area that is not very strictly regulated, you're talking about a horizontal system of multiple sovereigns in which it's very important to be central.[9] Indeed, I have argued that the power of the United States comes from our central position in that global web.[10] But, it's easier to think about power exercised horizontally, rather than vertically. We can think about that very broadly: vertical power/horizontal power, ladder/web, national/global.

A. *Power Over*

Now, let me turn to more specific definitions of power in each context. With respect to vertical power, I would define it as getting the outcomes you want. Professor Joseph Nye, who has written a great deal

---

[7] As an example of web versus hierarchy, compare President Barack Obama's primary election campaign in 2008 with Hillary Clinton's campaign. Secretary Clinton had a centralized campaign that was top down, and people continually had to get instructions from the top. President Obama had "My Obama." He sent people into different places across the country and basically said, "You tell me what is going to work here and you customize it." The result was electric: you could see this web spreading as different people joined and different people contributed. He captured this energy and creativity and momentum, and that was really powerful.

[8] *See, e.g.*, U.N. Charter art. 94, para. 1 (establishing the authority of the International Court of Justice over United Nations Members); Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 (establishing the World Trade Organization).

[9] *See generally* Anne-Marie Slaughter, *America's Edge: Power in the Networked Century*, 88 Foreign Aff. 94 (2009) (arguing that, for numerous reasons, the United States has the potential to be the most connected country in a networked world).

[10] *See id*. at 95–96.

on power—indeed, his last five books have had "power" in the title[11]—defines power as "the capacity to do things and in social situations to affect others to get the outcomes we want."[12] In other words, power is either the ability to do things yourself, without anybody constraining you, or the ability to get other people to do what you want.[13]

Nye talks about three ways in which that power operates.[14] The first is command.[15] You can command change. You can simply tell people they have to do what you want. As the mother of teenagers, the limits of that power are readily apparent. You can command, but they will not necessarily obey.[16] Indeed, you more often get a counter-reaction. But yes, there are certainly situations in which the first way we think about power is command.

The second way—and this is still drawing on Nye's work—is controlling agendas.[17] We're familiar with this, too. If you have ever worked in a bureaucracy or chaired a meeting, you have three options. One is extreme in one direction, the other is extreme in the other direction, and the one in the middle looks just right. So there, you're really using ideas and institutions to frame agendas for action in ways that make some options seem out of bounds. You drive people toward your preferred option. Just to continue the parenting metaphor, this would be like saying, "Would you like to go to theater camp or art camp or sports camp?" There are a whole bunch of things that are really not on the table. So, we're shaping agendas.

---

[11] *See* Joseph S. Nye, Jr., The Future of Power (2011) [hereinafter Nye, The Future of Power]; Joseph S. Nye, Jr., The Paradox of American Power: Why the World's Only Superpower Can't Go It Alone (2002); Joseph S. Nye, Jr., Power in the Global Information Age (2004); Joseph S. Nye, Jr., The Powers to Lead (2008); Joseph S. Nye, Jr., Soft Power: The Means to Success in World Politics (2004) [hereinafter Nye, Soft Power].

[12] Nye, The Future of Power, *supra* note 11, at 6; *see* Nye, Soft Power, *supra* note 11, at 1–2; Richard L. Armitage & Joseph S. Nye, Jr., *Introduction to* CSIS Commission on Smart Power: A Smarter, More Secure America 5, 6–7 (2007), *available at* http://csis.org/files/media/csis/pubs/071106_csissmartpowerreport.pdf ("Power is the ability to influence the behavior of others to get a desired outcome.").

[13] *See* Nye, The Future of Power, *supra* note 11, at 6.

[14] *See* Nye, Soft Power, *supra* note 11, at 6–7.

[15] *See id.* at 6.

[16] *See* Joseph S. Nye, Jr., *Soft Power*, Foreign Pol'y, Autumn 1990, at 153, 166 (stating that parents have greater and more enduring power if they shape their children's beliefs and preferences than if they rely on active control).

[17] *See* Nye, Soft Power, *supra* note 11, at 7 ("You can restrict my preferences by setting the agenda in such a way that my more extravagant wishes seem too unrealistic to pursue.").

The third way—and again, this is power over, thinking about it vertically—is to shape preferences.[18] This is Gramscian hegemony.[19] This is the way in which you shape what people want without them ever being aware of it. It is the norms, the deep beliefs, the ideas, the culture, so that we want things, or we believe things to be true, without ever recognizing the power of the culture. Obviously, Madison Avenue's influence is based on this kind of power: with advertising, we are constantly subject to these kinds of forces.[20] You recognize this all the time. You say things like, "We don't do that. That is not something we do." Every family has its own sense of "our" values. Or, in a school, you have deep values. That's what structures the community; that is the power of shaping preferences. That's power over: command, controlling agendas, and shaping preferences.

B. *Power With*

Now, let's think about the contrast with power with, and what power looks like in a setting where you do not have direct control over everybody. Command is off the table because you're one person in a group of equals. Anybody who's tried to lead a faculty of tenured professors will be very sympathetic to this view. You don't have actual control.

Therefore, instead of command, the first option under power with is to convene, to connect, and to catalyze. You can't make people do anything, but again, if you're at the center of that web, you can bring people together. You can connect them in ways that you actually can control. You can say, "You should meet so-and-so," and you know the two of them have a project or an interest in common. You know that they're aligned. Suddenly, you have sparked something that you want to happen, but you're doing it through those whom you connect. Then,

---

[18] *See id.* ("[Y]ou can appeal to my sense of attraction, love, or duty in our relationship and appeal to our shared values about the justness of contributing to those shared values and purposes.").

[19] *See generally* Antonio Gramsci, Selections from the Prison Notebooks of Antonio Gramsci (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., 1971). Although Antonio Gramsci never fully elaborated his theory of cultural hegemony, the posthumously printed essays that he penned in prison became a significant contribution to twentieth-century Marxist thought. *See, e.g.*, Thomas R. Bates, *Gramsci and the Theory of Hegemony*, 36 J. Hist. Ideas 351, 351 (1975); Douglas Litowitz, *Gramsci, Hegemony, and the Law*, 2000 BYU L. Rev. 515, 515, 518. Gramscian hegemony holds that power is achieved not only by force, but also by ideas. *See* Bates, *supra*, at 351.

[20] *See generally* Tamara R. Piety, *"Merchants of Discontent": An Exploration of the Psychology of Advertising, Addiction, and the Implications for Commercial Speech*, 25 Seattle U. L. Rev. 377 (2001) (comparing the effects of Madison Avenue advertising campaigns to the psychology of addiction).

of course, you catalyze action. Imagine if we were all in a social movement, and I had brought you all here and I had connected you. You're all passionate about human rights or you're all passionate about the environment. Then, I catalyze action by proposing that we do something together. It's the person who can bring all those people together and can mobilize them that holds the power. Even the word "power" doesn't quite work in the same way it does vertically. Instead of command, you convene, you connect, you catalyze.

Second, instead of controlling an agenda where I bring you all together and I give you a carefully constrained set of choices, I actually do the opposite. In power with, you don't constrain, you open up. I brought you together, having chosen who's here, and we're all together with a common purpose. If I tell you, "Here are our three options," many of you will leave. You will not want to accept my options. If I want to mobilize you, I actually put some general ideas on the table, and then I open myself up to your ideas. I get people mobilized if they think they can actually contribute and I will hear them.[21] Another way to put this is, if I want to persuade you of something, you have to be certain you can persuade me. You have to be certain I'm hearing you, that I'm not just standing up here with a predetermined agenda that I'm going to have you adopt, and pretend that we reached it together. You actually have to be able to contribute.

So, it's actually the opposite of controlling an agenda. You are saying, "I'm going to listen to you, and I'm going to change my sense of exactly what I thought I wanted when I came in here, depending on what you say." There has to be a broad set of constraints. If we come together for an environmental movement, we're not going to walk out of here pursuing digital technology. Within that broad area, however, you open yourself up. Instead of constraining, you create as many ways for people to participate as possible.

Third, instead of shaping preferences—that deep structure where you, in various ways, adopt a culture and have that shape what people want—many people in the power with world talk about the power of sharing. Instead of constraining or shaping preferences, what you're actually doing is sharing what you have and inviting others to share back. It sounds very touchy-feely, but it has some very concrete applications, which I will get to.[22] In the Internet world, as just one example, if

---

[21] *See* Daniel Goleman, *Leadership That Gets Results*, 78 Harv. Bus. Rev. 78, 78, 85–86 (2000) (contrasting the benefits of a leadership style that welcomed input with the drawbacks of leading by fiat).

[22] *See infra* notes 49–60 and accompanying text.

you want to gather followers on Twitter, you put stuff out, people send stuff to you, and you share back.[23] It's an active culture of generosity that brings people together and then they shape their preferences and their action. That's all very abstract, so let me now turn to how I think those different kinds of power operate in the world of law, and, specifically, in the global world of law.

II. Power Over and Power With in the Global World of Law

A. *Power Over*

The power over is quite easy. This is where we start with the power of law. First, there is command—we know all about that. That is, of course, what you learn when you come to law school. You think, initially, law is all about command. You think it's all about actual enforcement. Most people, when you talk about the power of law, say law can only operate where you have the ability to enforce.[24] You need your federal marshals. You need to be able to lock people up if they violate the law. That is true, at the core. Of course, we know law actually exercises power in many broader ways than that.[25] But, command is easy. You have a law, you violate it, you enforce it.

Second, of course, is controlling agendas. There again, that's what law does. It constrains options. It says some things are simply out of bounds. Think about the way our Constitution shapes First Amendment law, for example. If you want to fight hate crime, for instance, you cannot proscribe speech. The First Amendment limits you to a narrow set of options. Law does that all the time. Indeed, when you think about choosing a policy and enacting it in law, what you are doing is creating spaces within which people can actually act.

---

[23] *See Strategies for Effective Tweeting: A Statistical Review,* Buddy Media, http://marketing cloud.buddymedia.com/whitepaper-form_strategies-for-effective-tweeting (last visited Apr. 9, 2013) (login required) (analyzing the effectiveness of Twitter techniques of major brands); *Twitter for Small Business,* Twitter, https://business.twitter.com/pdfs/Twitter_Smallbiz_ Guide.pdf (last visited Apr. 9, 2013) (encouraging users to engage their audiences through various strategies).

[24] *See* Anthony D'Amato, *Is International Law Really 'Law'?,* 79 Nw. U. L. Rev. 1293, 1293 (1984).

[25] *See* Gregory C. Shaffer & Mark A. Pollack, *Hard Versus Soft Law in International Security,* 52 B.C. L. Rev. 1147, 1163 (2011) (describing the advantages of law that is not binding); Joshua Kleinfeld, *Enforcement and the Concept of Law,* 121 Yale L.J. Online 293, 306–15 (2011), http://www.yalelawjournal.org/images/pdfs/1029.pdf (arguing that enforcement power is not a necessary condition for law).

Third is shaping preferences. That is what a constitution does. A constitution constitutes a polity and it constitutes it according to certain values that are then enshrined in law. Americans react like they're allergic to a constraint on free speech. Even with respect to the British, if you look at the British libel laws, we regard them immediately as, "You're really constraining free speech. How could you possibly do that?"[26] That is deep shaping of preferences and it doesn't require a lot more explanation than that. That is how national law operates. There is nothing particularly unusual about thinking about how power over translates into law.

B. *Power With*

Let's look at how law works in terms of power with. Here, we really are in a different world, and we see lots of examples. I want to try to present a framework to analyze those examples. Let's assume we are thinking about nations, or we're thinking about nongovernmental organizations ("NGOs"), or we're thinking about corporations, or we're thinking about universities. We are thinking of any of the actors on the global stage. They can be government and they can be nongovernment, but we are in this horizontal world. We need to connect with others. We want to get things done. That's the starting point. You can be a diplomat, an NGO strategist, or whoever.

Let's take one example. We all fly; let's be a member of the Star Alliance in the airline industry.[27] It's actually interesting: it is the only alliance that has been created in my lifetime as an international relations professor.[28] We have the North Atlantic Treaty Organization (NATO), we have all these old alliances, but the only new alliance I have seen is the Star Alliance and its equivalents.[29] That's important because those

---

[26] Defamation Act, 1996, c. 31, §§ 1–20 (Eng.). Unlike most jurisdictions, the United Kingdom places the burden of proof in libel cases on the defendant, thereby making it more difficult to defend a libel action. *See* Eric Pfanner, *Britain to Seek Curbs to 'Libel Tourism,'* N.Y. Times (May 9, 2012), http://www.nytimes.com/2012/05/10/business/media/britain-to-seek-curbs-to-libel-tourism.html (describing plaintiffs' attraction to British courts for libel actions).

[27] The Star Alliance is a network of twenty-seven airlines. *Travel the World with the Star Alliance Network*, Star Alliance, http://www.staralliance.com/en/about/member_airlines (last visited Apr. 9, 2013).

[28] Five airlines united their flight networks in 1997 to form the Star Alliance. *See Star Alliance Services GmbH*, Star Alliance, http://www.staralliance.com/en/about/organisation/ (last visited Apr. 9, 2013).

[29] NATO was formed in 1949. *See What Is NATO?: An Introduction to the Transatlantic Alliance*, N. Atlantic Treaty Org., http://www.nato.int/welcome/brochure_WhatIsNATO_en.pdf (last visited Apr. 9, 2013).

are businesses that do not control each other.[30] Those are national air-
lines. They have no power over each other. But it's a powerful group.
They come together, they give us frequent flier miles, we fly with them.
That's convening, connecting, and catalyzing.

If you think about power with, and you think about convening,
connecting, and catalyzing, what does that mean for law? How does law
help you convene, connect, and catalyze? In the first place, it's the law
that makes space that allows actors to act. It's the law that creates spaces
within which you can come together.

The best example is Internet governance. Think about the revolu-
tions in the Middle East. Think about how they have used the Internet
in multiple ways. Now, they use it to upload videos so that we can all see
what's actually going on.[31] But well before that, they used the Internet
to communicate with each other.[32] The revolutionaries who helped
overturn Slobodan Milošević in Serbia actually came together with oth-
er groups around the world, including in the Middle East.[33] They
found each other online. They connected.

Then, of course, there are the actual revolutions: the ability of Fa-
cebook and Twitter to stay one step ahead of the state.[34] Again, I don't
think social media created these revolutions. But, if you talk to the
people who are a part of them, they will say speed was essential.[35] Be-
cause before, by the time you'd organized a factory or a university or

---

[30] *See* Xing Hu et al., *Revenue Sharing in Airline Alliances*, Mgmt. Sci. (Nov. 28, 2012),
http://mansci.journal.informs.org/content/early/2012/11/28/mnsc.1120.1591.full.pdf
(describing the independent character of airlines in alliances).

[31] *See* Wael Ghonim, Revolution 2.0: The Power of the People Is Greater Than
the People in Power: A Memoir 66, 86–87, 127, 188 (2012).

[32] *See* David Matas, *Countering Hate on the Internet: Recommendations for Action, in* The
Holocaust's Ghost: Writings on Art, Politics, Law, and Education 483, 483–84
(F.C. Decoste & Bernard Schwartz eds., 2000) (describing how Serbian radio station Radio
B92 broadcast information about protests in 1996 over the Internet after the government
jammed the station's signal).

[33] *See id.*

[34] *See generally* Ghonim, *supra* note 31 (recounting the role of Facebook in the demon-
strations in Tahrir Square, in Cairo, Egypt in 2011). *But see* Malcolm Gladwell, *Does Egypt
Need Twitter?*, New Yorker News Desk (Feb. 2, 2011), http://www.newyorker.com/online/
blogs/newsdesk/2011/02/does-egypt-need-twitter.html ("People protested and brought
down governments before Facebook was invented.").

[35] *See* Ghonim, *supra* note 31, at 232 ("The rapid pace of events drove home one of the
key strategies I learned from the revolution: to achieve your vision, you need friends and
communication channels more than you need plans. The world moves too fast for even
the best-laid plans to hold up.").

any site against the State, the State was there.[36] It could crack down on you before you could gain momentum. With Facebook and Twitter, however, you had a rolling speed of change that really worked.

That all relies on what, domestically, we think of as freedom of speech, freedom of association, and freedom of assembly. Online, that's the law, and it is law we are all going to be a part of shaping.[37] Does it allow that horizontal convening, connecting, and mobilizing? Do we have law that creates those spaces across borders the way we have it domestically?

It's also the law that mandates group interaction. This is trickier. Obviously, because of freedom of speech and freedom of assembly, you're allowed to connect and to convene and to work together, but you don't have to. What is the kind of law that forces you to actually work together? Think about the power of those young people together on Facebook, then together in the streets.[38] Think about what that accomplishes.

But what brings people together? Some of this is the ability to operate through social media, to connect with others. But there are much more specific ways in which law actually forces people together. For example, shifting ground pretty radically, think about administrative law. Think about reason-giving requirements where you are required, as a government entity—or as a private entity—to give reasons for your decisions.[39] That forces you to come together with others and give reasons.

---

[36] *See* Emilia Luna, *Egypt, Libya, Tunisia: Twitter Revolutions?*, Tufts Daily (Mar. 11, 2011, 7:03), http://www.tuftsdaily.com/news/egypt-libya-tunisia-twitter-revolutions-1.2511337#.UW IJMDfnZ1E.

[37] *See generally* Anupam Chander, *Googling Freedom*, 99 Calif. L. Rev. 1 (2011) (arguing that companies like Google have an obligation to enable free speech on the Internet even when governments repress it).

[38] *See supra* notes 31–36 and accompanying text.

[39] *See* Administrative Procedure Act, 5 U.S.C. § 553(c) (2006). The section of the Administrative Procedure Act on rule making requires:

> After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.

Id.; *see* Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 Duke L.J. 1811, 1871 (2012) ("In social theory, reason giving is a practice associated with negotiating social relationships and facilitating cooperation and collective action.").

If you give reasons and you have a notice and comment requirement, people are enabled to comment on what you said, but they are not required to. Suppose you said, "Here's our administrative regulation. Here are our reasons for our administrative regulation. Here's the notice we have to give." Other people respond, "This is our reaction." You have just structured a conversation. It requires people to come together and do that. Indeed, our entire lobbying industry, which we can pillory in many ways, is the way interests come together and actually define those interests, be they public interest groups or private. They come together and actually then work together to achieve an outcome.

Then, there's the law that allows and encourages network creation. To the extent laws facilitate things like the Star Alliance, or loose relationships among corporations, among NGOs, among universities, across borders, that is the law operating through power with. This includes everything from liability rules to corporate governance rules, where you're really allowing people to engage in these horizontal structures.

The second form of power with is where you open up and create opportunities to plug in. One way to think about this, for those of you who are familiar with the digital world, is through the open source movement: Linux versus Microsoft, essentially.[40] How does open source work? The first thing it does is create as many opportunities as possible for people to plug in because the point of open source is to get as many people as possible engaged.

Another example would be something like InnoCentive.[41] Procter & Gamble does over fifty percent of its research and development not in-house.[42] Rather, they do it online. They do it by putting their problems out there on InnoCentive and then paying whichever inventor can actually come up with options.[43] It's crowdsourcing, but it's crowdsourcing in research and development. To do that, you actually want to create

---

[40] Open source software means that the underlying computer code is made freely available. *See* Marcus Maher, *Open Source Software: The Success of an Alternative Intellectual Property Incentive Paradigm*, 10 Fordham Intell. Prop. Media & Ent. L.J. 619, 619–46 (2000) (describing the open source development process).

[41] InnoCentive, https://www.innocentive.com/ (last visited Apr. 9, 2013) (providing information on InnoCentive, a web-based crowdsourcing and innovation platform); *see* Miriam A. Cherry, *A Taxonomy of Virtual Work*, 45 Ga. L. Rev. 951, 966–67 (2011) (describing InnoCentive and other forms of crowdsourcing).

[42] Bruce Brown & Scott D. Anthony, *How P&G Tripled Its Innovation Success Rate*, 89 Harv. Bus. Rev. 64, 72 (2011).

[43] *See What We Do*, InnoCentive, https://www.innocentive.com/about-innocentive (last visited Apr. 9, 2013).

opportunities for as many people to plug into what you're doing as possible. You want to make it as open as possible, as accessible as possible.

The implications for transnational law are that instead of creating closed institutions, you want to create open networks, and you want to create them in ways that allow as many different parties to participate as possible. This gives you a different view of the proliferation of multilateral institutions. If you look at Southeast Asia or Europe, there has been this huge proliferation.[44]

If you think about that vertically, it just looks incredibly confused. Where are the lines of authority? Who's enforcing what? There are too many different institutions. If you look at it horizontally, and you think, "What we're really trying to do is get as many nations and non-state actors as possible involved in a common project," then more can actually be better. Not infinitely, but you take whatever institution you need to create to get whatever group of countries involved.

For a concrete example, think about Southeast Asia. You have so many different institutions. You have networks of all different regulators. You have something like APEC, the Asia Pacific Economic Cooperation,[45] which is very big and very unwieldy. It involves all Latin American countries and South Pacific countries and North Pacific countries. Basically, it includes all the countries on the Pacific Rim, and also includes Taiwan and Hong Kong.[46] It's the only organization that can include Taiwan and Hong Kong because the Chinese will not allow Taiwan and Hong Kong to be included in a security organization as separate states.[47]

You then have a security organization, the East Asia Summit,[48] which has some subset of those institutions but does not include Taiwan or Hong Kong. Still, you can actually discuss security. From a vertical, who-controls-what perspective, that looks really messy, but from the idea that you want to create institutions that can get as many different actors as possible around the table, that actually looks much better.

---

[44] *See* Kai He, Institutional Balancing in the Asia Pacific: Economic Interdependence and China's Rise 147 (2009).

[45] APEC comprises twenty-one members. *Member Economies*, Asia-Pac. Econ. Cooperation, http://www.apec.org/About-Us/About-APEC/Member-Economies.aspx (last visited Apr. 9, 2013).

[46] *See id.*

[47] Sigrid Winkler, *Taiwan's UN Dilemma: To Be or Not to Be*, Taiwan-U.S. Quarterly Analysis, Brookings Institution (June 2012), http://www.brookings.edu/research/opinions/2012/06/20-taiwan-un-winkler.

[48] *East Asia Summit (EAS)*, Ass'n S.E. Asian Nations, http://www.asean.org/asean/external-relations/east-asia-summit-eas (last visited Apr. 9, 2013).

Finally, the last idea is that we want to encourage sharing. For example, students may know about Zipcar.[49] For those of you who don't know, if you don't have a car, Zipcar allows you to rent a car that you can park downtown at a specific place and you can book an hour or two of it. The next step is: I have a car, and it's sitting in the parking garage for eight straight hours, and it's not doing any good for me. You're my colleague, and you need a car just for an hour or two, so you can go and do your groceries. Because I'm not making any money with it sitting in the parking garage, if you pay me some relatively small amount—at least cover my parking, gas, wear and tear, and maybe a little other amount—then I profit, and you profit. That's the sharing economy. That's the mesh.

The other example, which is very actively growing, is Airbnb.[50] People in San Francisco have spare rooms. Their kids go to college and they have more bedrooms than they know what to do with—or, at least, one extra bedroom. People come to conferences in San Francisco, but the hotels are full and expensive. People would love to be able to pay for a room. Airbnb converts your house into a bed and breakfast. Airbnb is doing very well as a start-up.[51] In fact, San Francisco has created a sharing economy working group.[52] In a world where sustainability is the watchword, there will be more and more value created by bringing people together and allowing them to share what they have.

Now, translate that to states. Think about all the law and institutions that encourage sharing best practices. We think of this as very weak stuff. The best example is the Copenhagen effort to get a global environmental treaty to fight global warming,[53] which I would love to see. That's one approach. It would be great if we could get it, but having been in the State Department during that negotiation, I don't see us getting there any time soon.

---

[49] Zipcar, http://www.zipcar.com/ (last visited Apr. 9, 2013).

[50] Airbnb, https://www.airbnb.com/ (last visited Apr. 9, 2013).

[51] Jordan Crook, *Airbnb's Big 2012: 4x Guest Growth and 2x the Number of Listings in 192 Countries Worldwide*, TechCrunch (Feb. 7, 2013), http://techcrunch.com/2013/02/07/airbnbs-big-2012-4x-guest-growth-and-2x-the-number-of-listings-in-over-150-countries-worldwide/.

[52] *See* Press Release, S.F. Office of Econ. & Workforce Dev., Mayor Lee, President Chiu, Supervisors Farrell, Kim & Wiener Announce Nation's First "Sharing Economy" Working Group to Support Innovative New Economy, Confront Emerging Issues (Mar. 27, 2012), http:// www.sfmayor.org/index.aspx?page=770.

[53] *Copenhagen Climate Change Conference—December 2009*, United Nations Framework Convention on Climate Change, http://unfccc.int/meetings/copenhagen_dec_2009/meeting/6295.php (last visited Apr. 9, 2013).

Another example is the C40.[54] It is a group of forty big, global cities. It involves connecting those cities, meeting regularly, sharing best practices, committing to ongoing projects, and effectively saying, "I tried this and it worked. I tried this and it didn't."[55] You share and you learn and you improve, in a continual model. That is law that actually encourages sharing.

A third example that is taking off is the Open Government Partnership.[56] It started with eight countries in 2011, including the United States, the United Kingdom, Brazil, the Philippines, Indonesia, Mexico, South Africa, and Norway.[57] There are now forty-five nations.[58] What is it? It is a group of nations that come together and commit to transparency, civic participation, and accountability.[59]

You might think this looks like a division between democracies and non-democracies. There is a lot of that in there, but that's not how it's framed. It's framed as open government, and open government is about transparency, civic participation, and accountability.[60] These governments pledge to make progress on specific areas. For example, whether you are a democracy or non-democracy, you may have to pledge to make your officials' salaries public, to make your environmental data public, or to make your health data public. And, you must do it in such a way that enables citizens to participate, and then share that experience with other nations. Again, this is a way of creating an institution that has a lot of power, if you think about power with.

Overall, I wanted to give you two different visions of power. First is the traditional vision of power in a hierarchy: power as command, power as controlling agendas, and power as shaping preferences. Contrast that with power with: power in a web, power in the center of a horizontal world. Exercising this power is much more about bringing people together, connecting them, and mobilizing them. It is about opening things up so people are actually participating and you're allowing them to define something together. It sounds touchy-feely, but it is increas-

---

[54] C40 Cities Climate Leadership Group, http://www.c40cities.org/home (last visited Apr. 9, 2013).

[55] *C40 Cities Make a Difference*, C40 Cities Climate Leadership Group, http://www.c40cities.org/c40cities (last visited Apr. 9, 2013).

[56] Open Gov't Partnership, http://www.opengovpartnership.org/ (last visited Apr. 9, 2013).

[57] *Open Government Declaration*, Open Gov't Partnership (Sept. 2011), http://www.opengovpartnership.org/open-government-declaration.

[58] *See id.*

[59] *See id.*

[60] *See id.*

ingly active. And if you don't have coercive power, then you better have some other set of tools.

III. Power, Law, and Lawyering in a Global Economy

So, what does this mean for lawyers? Let me end with how power and law interact in the global economy, or in any horizontal setting or network setting. What does this mean for how we think about being lawyers? I think it has some very interesting implications for how we think about what we do.

The first is that law—at least, popularly—is about resolving the things that push people apart. Let's just think about the television examples of law. It's litigation, it's dispute, it's courtrooms, it's fighting. When I taught civil procedure, I would open my first class every year with a quote from Professor Stephen Yeazell. It's a wonderful quote that says, "[Civil] procedure is the etiquette of ritualized battle."[61] And he is, of course, right. You used to do this with swords, with horses, and with lances. Now, we do it in the courtroom with briefcases. That's good because people don't die. Maybe of overwork, but it's not bloody, generally. That is how we think about lawyers, in many ways. It's about division, conflict, resolving conflict.

This vision of law in the horizontal space is much more about how you bring people together. Now, some of that's not new at all. Professor David Wilkins and many others have done work on law as problem solving.[62] Problem solving, and, of course, dispute resolution, other than the straight adversarial model, is absolutely bringing people together. You've got a problem, let's figure out how to solve it.

We teach a lot of those problem-solving skills. And that's one of the differences traditionally between the Anglo-Saxon model of law and the civil model of law: that we focus much more on problem solving, which is a way of bringing people together.[63] But, I think you can go much broader than that.

---

[61] Stephen C. Yeazell, Civil Procedure 1 (7th ed. 2008).

[62] *See, e.g.*, Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. Legal Educ. 313, 327 (1995); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. Rev. 754, 794 (1984); David Wilkins et al., "Cradle to Grave" Legal Professional Development 2–4 (unpublished manuscript), *available at* http://dotank.nyls.edu/futureed/2011proposals/13ctg. pdf (last visited Apr. 9, 2013) (discussing Harvard's Problem Solving Workshop course designed to prepare law students for the way lawyers solve problems in practice).

[63] Compare the *jurists* of Roman civil law, who did not hear cases but instead issued *responsa* regarding legal standards, with Harvard Law School Dean Roscoe Pound's explanation of sociological jurisprudence in 1916: "a process, an activity, not merely a body of

One thing law does is to serve as a common metric. Why are lawyers and economists often in positions of power? Among university presidents, for example, many are lawyers or economists.[64] I suggest to you that this is because both law and economics are common metrics for putting lots of different things together. If you're an economist, everything can be turned into costs and benefits. Everything. That's what we teach in public policy school. No matter what it is, you can reduce it to costs and benefits. That's good, because you can then weigh very disparate things. You can make policy choices that look very disparate because you've turned them into costs and benefits.

As lawyers, we turn everything into rights and obligations. That's our common metric, our common currency. It's almost like alchemy, where we take all these very disparate things, complicated cases, and we reduce them to: "You have these obligations and you have these rights, and how do those work?"

Think about that in a global horizontal context, and how important that is. We think about crossing national cultures all the time: language, culture, ethnicity, religion—all those differences. But, think about it as taking all these different problems, all these different cultures, all these different ways of approaching issues, and translating them into a common metric, into a common currency—the currency of rights and obligations.

That is a way of thinking about what lawyers do that seems, to me, enormously important in a very diverse global world. You have a tool that allows you to take just about any problem and render it accessible by putting it into a common currency of rights and obligations. Different cultures have different ways of talking about those rights and obligations, but we all share that basic idea. We know that as lawyers. There's no legal system in the world that doesn't translate things into rights and obligations at some level, and I would say, even beyond that, into rights and obligations predicated on a system of values. The values can differ, but the values inform what you think people's rights are, and what their obligations are.

Finally, in this horizontal world, we still have states as very important actors. More broadly, I would say states' governments including

---

knowledge or a fixed order of construction. It is a doing of things, not a serving as passive instruments through which mathematical formulas and mechanical laws realize themselves in the eternally appointed way." *See* Daniel R. Coquillette, The Anglo-American Legal Heritage: Introductory Material 6, 559–60 (2d ed. 2004).

[64] *See* Julie Johnson, *Universities Looking to Lawyers for Leadership*, N.Y. Times, Dec. 25, 1987, at B12 (noting a trend of hiring lawyers to be university presidents).

local and state governments, provincial governments, regional governments, national governments, and international government. In addition to states' governments, however, the different sectors are also important actors. There is the corporate sector—all the different corporate actors—and the civic sector—NGOs, foundations, churches, universities, think tanks. In this horizontal world—and this is something that both Secretary Clinton and President Obama talk a great deal about—you need the work of all three sectors. The Obama National Security Strategy of 2010 references public-private partnerships nearly thirty times.[65] I've read a lot of national security strategies, and I have to say, you could close your eyes and you're not really sure what administration you're reading because there's an awful lot of "motherhood and apple pie," and "national security and economic prosperity," and "we're all for everything that is good."

"Public-private partnerships" is a new term. I assure you that to see the most powerful nation on earth write about its national security in terms of having to forge partnerships with the corporate and the civic sectors is different. It is because the problems we face are so big and so complex, there is no way to solve them simply by government. It doesn't matter how much money the government has, it still must mobilize what the corporate sector brings to it and what the NGO sector brings to it.

Think about environmental problems. Think about health problems. Think about food security or water security. Think about the global food initiative. You can't do that without the big agricultural companies. There's no way. You're never going to get there. But, you can't do it, either, without the NGOs that are going to monitor them, and the research institutes that are going to provide new technology, and the community organizations that are going to ensure things are implemented, and government because government has legitimacy and reach. So, in that world, lawyers have a tremendous ability to cross those cultures.

When I was teaching civil procedure, I would end the year by saying, "We teach you to make arguments on different sides of every question because we want you to be able to hear arguments on each side of every question. As law students, you don't want to take those positions, and we're making you be a hired gun and you don't like that. You came

---

[65] *See generally* WHITE HOUSE, NATIONAL SECURITY STRATEGY—MAY 2010 (2010), *available at* http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf (outlining the numerous benefits of collaborating with the private sector).

to law school because you want to champion a particular set of values. But, what we're really doing is teaching you tolerance, and we're teaching you a kind of cross-cultural competence."

To make arguments on any side of any question, you have to be able to put yourself in that other person's shoes. You have to be able to really hear the argument on the other side, because only if you do that can you actually be persuasive, no matter whom you're representing. Transpose those skills to a world in which you need all three sectors. Lawyers are exquisitely attuned to being culturally adaptable, to hearing different sides of every question.

To bring the three sectors together, the first thing it takes is an understanding of the different cultures. You need to be able to walk up to a CEO and talk the language of costs and benefits. You need to be able to walk into an NGO and talk the language of values and purpose and effectiveness. And, you need to be able to walk into government and talk the language of policy and politics. Lawyers are very, very well educated to do those things. That is not how we typically think of our role. We do think of it as a problem-solver. But, we don't think of ourselves as cross-cultural connectors.

Conclusion

I want to leave you with the idea that in a global world, where hierarchies are hard to establish—though they do exist: we have the United Nations system, the Security Council, the WTO, and a dispute resolution system that works—power operates horizontally more than vertically. I'm not saying this is all horizontal, but it's much more horizontal than national law. It involves mobilizing, convening, connecting, opening yourself up to lots of different participation, sharing. To do all that work and make it produce outcomes requires a set of people who are very, very good at resolving disputes and solving problems, but also at bringing people together across very different cultures. So, I put to you that lawyers are ideally placed to exercise power in a transnational world, or a globalized world. Thank you very much.