CHAPTER 6

Government networks: the heart of the liberal democratic order

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The new world order proclaimed by George Bush proved notable primarily for its absence. It was proclaimed, rhetorically at least, as the promise of 1945 fulfilled, a world in which international peace and security were guaranteed by international institutions, led by the United Nations, with the active support of the world's major powers. It was a liberal internationalist prototype of a world government, cast in the image of domestic political order. Such an order requires a governmental monopoly on force, a centralized rule-making authority, a clear hierarchy of institutions, and universal membership.

That world order is a chimera. Even as an ideal, it is unfeasible at best and dangerous at worst. Many international institutions have a vital role to play in regulating world politics, but they are destined to remain servants of their member States more than masters. The United Nations cannot function effectively independently of the will of the major powers that comprise it; those powers, in turn, will not cede their power and sovereignty to an international institution. Efforts to expand independent supranational authority, from the UN Secretary General's office to the Commission of the European Union to the World Trade Organization, have been carefully circumscribed and have produced a backlash and a determined reassertion of power by member States.

The leading alternative to liberal internationalism is "the new medievalism," a "back to the future" model of the twenty-first century. Where liberal internationalists see States as the primary subjects of international rules and institutions, the new medievalists proclaim "the end of the nation-state."[1] Less hyperbolically, Jessica Mathews describes a power shift away from the State – up, down, and sideways to supra-State,

[1] Jean-Marie Guehenno, *The End of the Nation-State* (Minneapolis, Minn.: London University of Minnesota Press, 1995); Kenichi Ohmae, *The End of the Nation State: The Rise of Regional Economies* (New York: The Free Press, 1995).

sub-State, and, above all, non-State actors.[2] These actors have multiple allegiances and global reach.

This power shift is in turn part of a larger paradigm shift in optimal organizational form: from hierarchy to network, centralized compulsion to decentralized voluntary association. Both shifts are rooted in the information-technology revolution, in technology that simultaneously empowers individuals and groups and decenters and diminishes traditional authority. The result is not world government, but "global governance." If government denotes the formal exercise of power by identifiable and discrete institutions, governance denotes cooperative problem-solving by a changing and often uncertain cast of concerned actors. The result is a world order in which global governance networks link Microsoft, the Catholic Church, and Amnesty International to the European Union, the United Nations, the Catalonians, and the Quebecois.

What has been largely overlooked by both sides in this debate is the emergence of a transgovernmental order: a dense web of relations among domestic government institutions – courts, regulatory agencies, executives, and even legislatures.[3] A new generation of international problems – terrorism, organized crime, environmental degradation, money laundering, bank failure and securities fraud – provide the incentives for such relations. In response, government institutions have created networks of their own, ranging from the Basle Committee of Central Bankers to informal links among law enforcement agencies to cross-fertilization of judicial decisions. They have institutionalized transgovernmentalism as a mode of international governance.

From this perspective, the State is not disappearing; it is disaggregating. Government officials and institutions participating in transnational government networks represent the interests of their respective nations, but as distinct judicial, regulatory, executive, and legislative interests. They respond to and interact with the growing host of non-State actors; they can link up with their sub-State and supranational counterparts. Disaggregation provides flexibility and networking capacity, while preserving the fundamental attributes of Statehood – links to a defined ter-

[2] Jessica T. Mathews, "Power Shift," *Foreign Aff.* 76 (1997), p. 50.

[3] Mathews argues that whereas "[b]usinesses, citizens organizations, ethnic groups, and crime cartels have all readily adopted the network model," governments "are quintessential hierarchies, wedded to an organizational form incompatible with all that the new technologies make possible." *Ibid.* at p. 52. Not so. Disaggregating the state into its component government institutions makes it possible to create functional networks of institutions engaged in a common enterprise even while they represent distinct national interests.

ritory and population and a monopoly on the legitimate use of force. That is the core of State power, power that remains indispensable for effective government at any level.

So what has all this to do with democracy and international law? This emerging transgovernmental order is concentrated among liberal democracies. It is thus a fundamental dimension of what John Ikenberry and others have described as the "liberal democratic order" – the set of relationships among predominantly Western industrialized nations.[4] The strongest link between transgovernmentalism and liberal democracy is the capacity for quasi-autonomous activity on the part of different government institutions. The norm of separation of powers that is a basic bulwark of individual liberty in these systems encourages the development of relatively strong and independent domestic institutions. Courts, regulatory agencies, executives, and legislatures all have distinct interests and the means to pursue them, although the balance of relative power and distinct identity differs in parliamentary and presidential systems. Further, the presumption of peace among liberal democracies – not the absence of conflict but the certainty that it will not escalate into a military confrontation – removes the security threat that has traditionally been the major incentive for adopting a unified foreign policy stance.

More fundamentally, for members of the liberal democratic order and for many States linked to it, the disaggregated State *is* the State. Different government institutions performing their functions at home and abroad are not simply different faces or facets of some mythical unitary State; they are the government, both domestically and – increasingly – globally. To enter into treaties requires action by the executive and the legislature, at least in most countries; ideally the courts will also be involved in interpreting and applying the resulting treaty obligations. Customary international law, on the other hand, may involve only the executive. But disaggregated institutions acting quasi-autonomously with their counterparts abroad are generating a growing body of rules and understandings that stand outside traditional international law but that nevertheless constitute a dense web of obligations recognized as binding in fact. The result is a new generation of international law – transgovernmental law – that is a critical component of the liberal democratic order and an important element in strategies for expanding that order.

The liberal democratic order is the core of the Clinton

[4] G. John Ikenberry, "The Myth of Post-Cold War Chaos," *Foreign Aff.* 75 (1996), pp. 79–80.

Administration's revision of liberal internationalism, returning it in part to its Wilsonian roots. The substitution of "enlargement" for "containment" as the leitmotif of American grand strategy envisions a steadily expanding community of liberal democracies. To achieve this vision, as this volume demonstrates, will require reliance on international institutions as well as many non-governmental organizations best encompassed by the new medievalist vision. Moving from the realm of heuristic models to the far more practical exigencies of policy recommendations, it is immediately apparent that traditional liberal internationalism, new medievalism, and transgovernmentalism are ultimately complementary: three paradigms focusing on different parts of the same elephant.

Nevertheless, transgovernmentalism constitutes a critical dimension of the liberal democratic order that can ameliorate and compensate for deficiencies in both old and new strategies. For instance, "enlargement" through embracing specific institutions in transgovernmental networks can sidestep the often thorny problem of labeling countries wholesale as democracies or non-democracies. A transgovernmental approach focuses instead on the nature and quality of specific judicial, administrative, and legislative institutions, whether or not the governments of which they are a part can be labeled a liberal democracy. Regular interaction between these institutions and their foreign counterparts offers less public and potentially more effective channels for the transmission of norms of democratic accountability, governmental integrity, and the rule of law. It may ultimately be possible to disaggregate the many complex elements of democratic legitimacy in ways that permit more nuanced and contextual strategies for democratization.

Similarly, the process of interaction among government institutions from nations around the world helps mediate some of the culture clashes that seem inevitably to attend a direct focus on defining and promoting democratic governance. Contrary to Samuel Huntington's gloomy predictions,[5] existing government networks include courts from Zimbabwe to India to Argentina and financial regulators of various kinds from Japan to Saudi Arabia. The functions these institutions perform offer a vital bridge across cultural boundaries while simultaneously allowing for broader input into the development of genuinely international standards.

More generally, transgovernmental mechanisms of liberal democratic norm diffusion are simultaneously more specific and more inductive

[5] Samuel Huntington, "The West: Unique, Not Universal," *Foreign Aff.* 75 (1996), p. 44.

than the top-down methods of international law. While efforts to define and legislate "democratic procedures" in various areas will gradually embed themselves in national consciousnesses over the long term, they also afford easy targets for nationalist and cultural opposition. A simultaneously and equally active effort to strengthen government networks as a critical horizontal structure of order can complement vertical efforts and arguably provide a more effective means to the same end.

The challenge, however, is to ensure that government networks are themselves legitimate modes of global governance. In theory, transgovernmentalism offers a model of world order that is potentially more accountable and more effective than either of the current alternatives. But it is a theory that is likely to prove very challenging to translate into practice.

On the one hand, traditional liberal internationalism poses the prospect of a supranational bureaucracy, answerable to no one. The new medievalist vision, on the other hand, depicts individuals answering to multiple overlapping authorities both above and below current State governments. It is thus attractive to a wide range of constituencies, appealing equally to States' rights enthusiasts and supranationalists. But it could easily reflect the worst of both worlds. Supranational authorities may well be too far from the individual to be properly accountable, while local or even regional authorities are likely to be too close to be properly neutral.

Transgovernmentalism, by contrast, assumes that the primary actors in the international system continue to be State actors – the same institutions that perform domestic government functions. These institutions exercise the same power as they do at home – the power that makes government so much more effective than "governance." Yet transnational and ultimately global government networks offer the same advantages of flexibility and decentralization that NGO and corporate networks do. Government institutions participating in these networks interact constantly with these non-State actors, both as regulators and as targets of lobbying and litigation efforts. They can also forge links with their supranational and subnational counterparts, creating the potential for truly global government networks.

But critical questions remain. In practice, are the decisions and decision-making processes in government networks consistent with basic liberal democratic values? This question is typically posed as one of accountability, but courts and regulatory agencies operating at home are not directly accountable. However, they are subject to a host of

constraints designed to ensure their actual and perceived legitimacy: reporting requirements, internal professional norms, carefully specified decision-making procedures, and opportunities for external review. Do those constraints operate equally on transgovernmental activity?

These questions can only be posed and answered once actual government networks have been mapped and fully understood. In the end, however, government networks can only be the heart of a liberal democratic order if they themselves constitute liberal democratic government.

I GOVERNMENT NETWORKS

A transgovernmental order is actually emerging, readily visible to those whose eyes are not blinkered by traditional "billiard ball" models of State interactions. Judges, regulators, heads of State, and even legislatures are forging links with their foreign counterparts, links designed to produce more than cosmetic cooperation. In some instances these government actors have formed their own institutions, sidestepping lengthy negotiations and formal treaty ratification procedures in favor of flexible charters and working rules that permit both selectivity and speed. Bilateral and plurilateral arrangements also coexist, resulting in overlapping regulatory networks, negotiating fora, and patterns of judicial and legislative cooperation that encompass different countries in different issue areas.

A Transnational judicial networks

National and international judges are networking. They are becoming increasingly aware both of one another and of their engagement in a common enterprise. Global relations among these judges fall into three principal categories: cross-fertilization of judicial decisions; active cooperation among courts of different countries and between national and supranational courts in the solution of disputes; and direct communication on problems of common concern under the auspices of emerging regional judicial organizations.

1 Cross-fertilization of judicial decisions

The most informal and passive level of transnational judicial interaction is the cross-fertilization of ideas through increased knowledge of both foreign and international judicial decisions and a corresponding willing-

ness actually to cite those decisions as persuasive authority. The Israeli Supreme Court, the German Constitutional Court, and the Canadian Constitutional Court have long researched US Supreme Court precedents in reaching their own conclusions on constitutional issues such as freedom of speech, privacy rights or fair process. Young constitutional courts in Eastern and Central Europe and the former Soviet Union are now eagerly following suit. The paradigm case in this regard is a recent decision by the South African Supreme Court.[6] In finding the death penalty unconstitutional under the South African Constitution, the Court cited decisions from national and supranational courts all over the world, including Hungary, India, Tanzania, Canada, Germany, and the European Court of Human Rights.

Why should a court in Israel, India, South Africa, or Zimbabwe cite a decision by the United States Supreme Court or the Canadian Supreme Court or the European Court of Human Rights as a consideration in reaching its own conclusion? Decisions rendered by courts outside a particular national judicial system can have no actual precedential or authoritative value. They can have weight only due to their intrinsic logical power or because the court invoking them seeks to gain legitimacy by linking itself to a larger community of courts considering similar issues.[7] In fact, national courts have become increasingly aware that they and their foreign counterparts are often engaged in a common constitutional enterprise, attempting to delimit the boundaries of individual rights in the face of an apparently overriding public interest and the boundaries of State power in the face of the conflicting interests of other States. To take only one example, the British House of Lords recently delivered a direct rebuke to the US Supreme Court regarding its decision upholding the kidnapping of a Mexican doctor by US officials determined to bring him to trial in the United States.[8]

Nor is such cross-fertilization limited to Commonwealth countries, though it is perhaps most concentrated there. The South African Supreme Court looked to both civil and common law systems. The European Court of Justice (ECJ), which is composed of civil and common law judges, frequently looks to US Supreme Court decisions,

[6] *See* S. v. Makwanyane, 1995 (3) SA 391 (CC). *See also* Lawrence R. Helfer and Anne-Marie Slaughter, "Toward a Theory of Effective Supranational Adjudication," *Yale L.J.* 10 (1997), p. 371.

[7] *See* Anne-Marie Slaughter, "A Typology of Transjudicial Communication," *U. Rich. L. Rev.* 29 (1994), pp. 122–29.

[8] R. v. Horseferry Road Magistrates for the Court Ex. P. Bennett (Number 2); R. v. Horseferry Road Magistrates for the Court Ex P. Bennett, reported in *Bulletin of Legal Developments* (April 11, 1994), pp. 83–84.

as do the German and the Italian Constitutional Courts. Further afield, the Argentinean Supreme Court has long cited US Supreme Court decisions, for a wide range of propositions. Of particular interest is the way in which the Argentinean judges have invoked Supreme Court precedents to bolster the legitimacy of their own stand against abuse of State power.[9] In short, the common bond of constitutional adjudication and the core questions of individual rights versus State power, or individual responsibilities to one another as members of a constitutional polity, appear to transcend the borders of very different legal systems.

In the late 1980s, commentators such as Lord Lester and Mary Ann Glendon remarked on the spread of US constitutional decisions around the world.[10] At the time, this stream of decisions seemed to flow in only one direction, with the US Supreme Court sharply resisting any consultation, must less citation, of foreign precedents. Indeed, as Justice Scalia (in)famously declared when presented with evidence of global public opinion regarding the death penalty, "it is a Constitution for the United States of America that we are expounding."[11]

However, in the late 1990s, the tide is beginning to turn. Justice Breyer recently challenged Justice Scalia's position in his dissent in *Printz v. United States*, noting that the experience of foreign courts and legal systems "may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem."[12] More generally, Justice Sandra Day O'Connor has been exhorting US lawyers around the country to pay more attention to foreign law[13] and has led several delegations of US Supreme Court Justices to meet their foreign counterparts, first from the French Conseil d'Etat, the Conseil Constitutionnel, and the Cour de Cassation and most recently from the ECJ, the

[9] *See* Carlos Ignacio Suarez Anzorena, "Transnational Precedents: The Argentinian Case," LL.M. Thesis, Harvard Law School 1998 (on file with author).

[10] Mary Ann Glendon, *Rights Talk* (New York: The Free Press, 1991), p. 158; Anthony Lester, "The Overseas Trade in the American Bill of Rights," *Colum. L. Rev.* 88 (1988) 537, 541.

[11] Thompson v. Oklahoma, 487 US 815, 869 (1988), n. 4 (Scalia, J., dissenting).

[12] 138 L.Ed 2d 914, 977 (1997) Breyer, J., dissenting. Writing for the majority in the *Printz* case, Justice Scalia again rejected Justice Breyer's invitation to comparative analysis with the assertion that "such comparative analysis [is] inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one." *Ibid.* at p. 935 n. 11. On the other hand, in a 1997 case brought by several Members of Congress challenging the line-item veto, Chief Justice Rehnquist, pointed out that "[t]here would be nothing irrational about a system which granted standing [to legislators] in these cases; some European constitutional courts operate under one or another variant of such a regime . . . [although] it is obviously not the regime that has obtained under our Constitution to date." Raines v. Byrd, 138 L.Ed. 2d 849, 863 (1997).

[13] Sandra Day O'Connor, "Broadening Our Horizons: Why American Judges and Lawyers Must Learn About Foreign Law," *Int'l Judicial Observer* 4 (June 1997) 2 (article adapted from a speech given by Justice O'Connor at the 1997 spring meeting of the American College of Trial Lawyers).

European Court of Human Rights, and the German Constitutional Court. Following a day-long exchange of views with ECJ members and the opportunity to attend a hearing, both Justice O'Connor and Justice Breyer noted their willingness to consult ECJ decisions "and perhaps use them and cite them in future decisions."[14]

Judge Calabresi of the Second Circuit has been even more direct, urging his US colleagues to join a global trend and pay more attention to foreign decisions, not only decisions in the same dispute but more general precedents on point for the simple purpose of learning and cross-fertilization. In a concurring opinion in *United States v. Then*, he argued that US courts should follow the lead of the German and the Italian constitutional courts in finding ways to signal the legislature that a particular statute is "heading toward unconstitutionality," rather than striking it down immediately or declaring it constitutional.[15] In conclusion, he observed that the United States no longer holds a "monopoly on constitutional judicial review," having helped spawn a new generation of constitutional courts around the world.[16] "Wise parents," he added, "do not hesitate to learn from their children."

As American lawyers find judges more receptive to foreign law, they will search out foreign decisions that support their arguments; judges will then have these citations ready to hand for inclusion in their opinions. It is the beginning of a virtuous circle that may finally open the US judiciary and legal profession to the rich wealth of learning and experience in other legal systems.

2 *Cooperation in dispute resolution*

Judges not only share ideas; they also cooperate in the resolution of transnational or international disputes. The most advanced form of judicial cooperation involves a partnership between national courts and a supranational tribunal. In the European Union the ECJ works directly

[14] "Justices See Joint Issues with the EU," *The Washington Post* (July 8, 1998), p. A24. The quote is from Justice O'Connor; Justice Breyer added the following comment: "Lawyers in America may cite an EU ruling to our court to further a point, and this increases the cross-fertilization of US–EU legal ideas."

The US Supreme Court delegation was also scheduled to meet with judges on the European Court of Human Rights and members of both the German Constitutional Court and various French courts. Other members of the delegation included Chief Judge Richard Arnold of the 8th Circuit and Texas Chief Justice Tom Philips. "US Justices Compare US EU Judicial Systems," Press Briefing in Brussels, July 8, 1998, *available at* <http://www.usia.gov/current/news/geog/eu/98070808.wwe.html?/products/washfile/newsitem.shtml>. Justice Anthony Kennedy was also present for the meeting with the members of the ECJ.

[15] United States v. Then, 56 F.3d 464, 468–69 (2d Cir. 1995). [16] *Ibid.* at 469.

with national courts to resolve cases presenting questions of European as well as national law.[17] National courts refer cases presenting issues of European law up to the ECJ, which issues an opinion regarding those particular issues and sends the case back to national courts. The national courts then render their own decision based on the ECJ opinion. The process transforms the judgments of a supranational tribunal into judgments issued by national courts, with the same weight and impact as decisions rendered under national law. The Treaty of Rome provides for this reference procedure, but it is the courts themselves, at both the national and supranational level, that have developed a cooperative relationship.[18] Their interaction not only facilitates the resolution of disputes involving questions of national and European law, but also serves to safeguard the rule of law in the European Union in those cases where legal obligations may diverge from the interests of the legislative and executive branches of various national governments.

Cooperation among courts in the European community is relatively structured, authorized by a provision in the Treaty of Rome and engaged in by courts from the same geographic region and broadly similar legal systems. But judicial cooperation is not limited to such structures, nor to interactions between domestic and international tribunals. In cases involving nationals from two different States, or nationals from the same State in which some part of the activity at issue in the case has taken place abroad, the courts in the nations involved have long been willing to acknowledge each other's potential interest and to defer to one another when such deference is not too costly. Much of these relations can be captured by the concept of "judicial comity," which US courts have been invoking in various guises over the past several decades.

Justice Scalia distinguished between "the comity of courts" and legislative comity in his dissent in the *Hartford Fire* decision, describing judicial comity as the decision by a court in one country to decline

[17] For a classic account of the construction of the European Community's legal system, see J. H. H. Weiler, "The Transformation of Europe," *Yale L.J.* 100 (1991), p. 2403. *See also* Eric Stein, "Lawyers, Judges and the Making of a Transnational Constitution," *Am. J. Int'l L.* 75 (1981), p. 1, which first alerted international lawyers of the potential significance of the ECJ's achievements. For an influential account by a member of the ECJ, see G. Federico Mancini, "The Making of a Constitution for Europe," *Common Mkt. L. Rev.* 26 (1989), 595. Two more general accounts, the first written from a legal realist perspective highlighting the motives of ECJ judges in developing a teleological interpretation of the Treaty of Rome and the second seeking to integrate legal accounts with political science theory, are Hjalte Rosmussen, *On Law and Policy in the European Court of Justice: a Comparative Study in Judicial Policymaking* (Dordrecht and Boston, Mass.: Martinus Nijhoff Publishers, 1986); and Anne-Marie Burley and Walter Mattli, "Europe Before the Court: a Political Theory of Legal Integration," *Int'l Org.* 47 (1993), p. 421.

[18] Helfer and Slaughter, "Supranational Adjudication," *supra* note 6, pp. 291–92.

jurisdiction "over matters more appropriately adjudged elsewhere."[19] By contrast, legislative or "prescriptive comity" is "the respect sovereign nations afford each other by limiting the reach of their laws."[20] Viewed through the lens of recent American case law, judicial comity comes into play when courts face questions often prior to the question of which law to apply: where the case shall be heard in the first instance, under what procedures, with what opportunities for discovery. In the words of Judge, now Justice, Stephen Breyer, these questions are all variants of a larger question: how to "help the world's legal systems work together, in harmony, rather than at cross purposes."[21] A growing number of US courts are grappling with the answer in a wide variety of contexts.

According to the 2nd Circuit, reviewing Supreme Court precedents on the enforcement of forum selection clauses, "international comity dictates that American courts enforce these sorts of clauses out of respect for the integrity and competence of foreign tribunals."[22] The court subsequently enforced a forum selection clause specifying an English forum in a securities fraud case brought by a US plaintiff – in which it was clear that neither an English court nor an English arbitrator would apply US securities law. In a similar case arising under federal trademark legislation, Judge Easterbrook of the 7th Circuit argued that foreign courts could interpret such statutes as well as US courts, noting that the entire *Mitsubishi* line of Supreme Court precedents "depend on the belief that foreign tribunals will interpret US law honestly, just as the federal courts of the United States routinely interpret the laws of the States and other nations."[23]

Other fertile sources of doctrinal developments regarding judicial comity are cases involving *forum non conveniens* dismissals, *lis alibi pendens* motions, and requests for anti-suit injunctions. In *Ingersoll Milling Machine Co. v. Granger*, the 7th Circuit affirmed the stay of an action pending before an Illinois district court following the issuance of a judgment in parallel suit by a Belgian court, noting: "International judicial comity is an interest not only of Belgium but also of the United States."[24] In the *forum non conveniens* context, courts have referred to nineteenth century admiralty decisions dismissing cases to avoid interfering with foreign

[19] Hartford Fire Insurance Co v. California, 509 US 764, 817 (1993). [20] *Ibid.*
[21] Howe v. Goldcorp Investments, Ltd., 946 F.2d 944, 950 (1st Cir. 1991).
[22] Roby v. Corporation of Lloyds, 996 F.2d 1353, 1363 (2d Cir. 1993) (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 US 614 (1985)).
[23] Omron Healthcare Inc. v. MacLaren Exports Ltd., 28 F.3d 600, 604 (7th Cir. 1994).
[24] 833 F.2d 680, 685 (7th Cir. 1987).

regulatory regimes, a debate that has recently been rekindled in Texas.[25]

Many of these decisions still intertwine very general and amorphous notions of comity between nations with a more specific concept of judicial comity (though one can certainly be understood as a subset of the other). But even at this stage, it is possible to identify several distinct strands of judicial comity. First is a respect for foreign courts *qua* courts, rather than simply as the face of a foreign government, and hence for their ability to resolve disputes and interpret and apply the law honestly and competently. Second is the corollary recognition that courts in different nations are entitled to their fair share of disputes – both as co-equals in the global task of judging and as the instruments of a strong "local interest in having localized controversies decided at home."[26] The *Ingersoll* court made this link, declining to criticize the district court for rejecting the "parochial concept that all disputes must be resolved under our laws and in our courts."[27] The quote is from the Supreme Court's seminal decision in *Bremen v. Zapata*, in which it agreed that American litigants could be forced to litigate abroad where they had negotiated a forum clause choosing a foreign forum.[28]

Respect for foreign courts need not mean deference. But it must mean at least awareness of the presence and potential interest of a foreign court, and at best direct interaction with that court in a cooperative effort to resolve the dispute at hand. In deciding whether to allow French litigants to use US discovery procedures against an American litigant litigating in a French court (as provided for in 28 USC § 1782), Judge Calabresi of the 2nd Circuit concluded that US courts should grant such assistance in the absence of a clear objection from the foreign tribunal. The US statute "contemplates international cooperation," he wrote, "and such cooperation presupposes an on-going dialogue between the adjudicative bodies of the world community . . .".[29] As an example of the dialogue sought to be fostered, he cited a case in which two English

[25] *Compare* Dow Chemical Company v. Castro Alfaro, 786 S.W.2d 674, 687 (Supreme Court of Texas 1990) (Doggett, J., concurring). ("Comity – deference shown to the interests of the foreign forum – . . . is best achieved by avoiding the possibility of incurring the wrath and the distrust of the Third World as it increasingly recognizes that it is being used as the industrial world's garbage can") (internal quotations marks and citations omitted) *with* Sequihua v. Texaco, Inc., 847 F.Supp. 61, 63 (S.D. Tex. 1994) ("exercise of jurisdiction by this Court would interfere with Ecuador's sovereign right to control its own environment and resources"; case should thus be dismissed on comity grounds).

[26] Gulf Oil Corp v. Gilbert, 330 US 501, 509 (1947) (applying the *forum non conveniens* doctrine to dismiss a New York case in favor of a Virginia forum), quoted in Piper Aircraft v. Reyno, 454 US 235, 241 (1981) (dismissing a case brought in the United States in favor of a Scottish forum).

[27] 833 F.2d at 685. [28] The Bremen v. Zapata Off-Shore Co., 407 US 1, 9 (1972).

[29] In the Matter of the Application of Euromep, *SA*, 51 F.3d 1095,1101 (2d Cir. 1995).

courts had directly enjoined a litigant from using §1782, on the ground that "the English court should retain control of its own proceedings and the proceedings that are before it."[30] The House of Lords subsequently vacated the injunction on the ground that the discovery sought was not unfair to the opposing litigant and did not interfere with "the due process of the [English] court."[31]

As this example illustrates, judicial cooperation is not necessarily harmonious. A recent squabble between a US judge and a Hong Kong judge over an insider trading case reveals the potential for more heated discussion. The US judge refused to decline jurisdiction in favor of the Hong Kong court on the grounds that "in Hong Kong they practically give you a medal for doing this sort of thing [insider trading]." In response, the Hong Kong judge stiffly defended the adequacy of Hong Kong law to address the conduct in question and asserted his willingness to apply that law. He also chided the US judge, pointing out that any conflict "should be approached in the spirit of judicial comity rather than judicial competitiveness."[32] Such a conflict is to be expected among diplomats, but what is striking is the way in which the two courts perceive themselves as two quasi-autonomous foreign policy actors trying to combat international securities fraud.

3 Judicial organizations

Finally, judges are talking face to face. The judges of the Supreme Courts of Western Europe began meeting on a triennial basis early in the 1980s. They have become more aware of one another's decisions since they began meeting, particularly with regard to each other's willingness to accept the decisions handed down by the ECJ.[33] In addition to official meetings of US Supreme Court Justices with their European, French, English, German, and Indian counterparts,[34] a number of meetings between US Supreme Court Justices and their foreign counterparts have also been sponsored by private groups, as have meetings of judges of the supreme courts of Central and Eastern Europe and the

[30] South Carolina Ins. Co. v. Assurantie Maatschappij *"De Zeven Provincien" NV*, 3 W.L.R. 398 (Eng. 1986), discussed and quoted in *Euromep*, 51 F.3d at 1100 n. 3. [31] 51 F.3d at 1100 n. 3.

[32] Naumus Asia Co. v. The Standard Chartered Bank, 1 HKLR 396 (H.P.K. High Court cp 1990).

[33] *See VI Conferencia de Tribunales Constitucionales Europeos*, Tribunales Constitucionales Europeos y Autonomias Territoriales (1985).

[34] Several official US Supreme Court visits to Europe, both to the European Court of Justice and the European Court of Human Rights and to France and Germany are described above. *See also* "India–US Legal Exchange Includes Supreme Court Justices, Lawyers," *Int'l Jud. Observer* (Sept. 1995), 1; James G. Apple, "British, US Judges and Lawyers Meet, Discuss Shared Judicial, Legal Concerns," *Int'l Jud. Observer* (Jan. 1996), 1.

former Soviet Union with US judges.[35] Law schools have also played an important role. For example, N.Y.U. Law School's Center for International Studies and Institute of Judicial Administration hosted a major conference of judges from both national and international tribunals from around the world in February 1995 under the auspices of N.Y.U.'s Global Law School Program.[36] Similarly, Harvard Law School hosted part of the Anglo-American Exchange.[37] For its part, Yale Law School has established a seminar for members of constitutional courts from around the globe to meet anually as a means of promoting "intellectual exchange" among the judges.[38] Another contribution of academic institutions to the international exchange of judicial ideas is through compilations of websites for courts to access information through the internet of the activities of national and supranational courts and tribunals from around the world.[39]

Finally, non-profit legal associations are convening transnational judicial conferences. For example, the Law Association for Asia and the Pacific (LAWASIA) with its Secretariat in Australia fosters judicial exchange through annual meetings of its Judicial Section.[40] Another way in which the American Bar Association encourages transnational judicial interaction is through sponsoring US judges to take trips abroad. The ABA Central and Eastern European Law Initiative (CEELI) periodically sends American judges to various Central and Eastern European countries to assist with law reform, codification efforts, and judicial training.[41]

The most formal initiative aimed at increasing direct judicial communication is the recently created Organization of the Supreme Courts of the Americas (OCSA). Twenty-five supreme court justices or their

[35] "European Justices Meet in Washington to Discuss Common Issues, Problems," *Int'l Jud. Observer* (Jan. 1996), 3. *See also* CEELI Update, ABA Int'l L. News (ABA, Washington, D.C.), (Summer 1991), 7; Helfer and Slaughter, "Supranational Adjudication," *supra* note 6, p. 372.

[36] Papers from the conference have subsequently been published *in* Thomas M. Franck and Gregory H. Fox, eds., *International Law Decisions in National Courts* (Transnational, 1996). *See also,* Thomas M. Franck, "N.Y.U. Conference Discusses Impact of International Tribunals," *Int'l Judicial Observer* 1 (1995), 3.

[37] See James G. Apple, "British, US Judges and Lawyers Meet," *supra* note 34, p. 1.

[38] "Yale Law School Establishes Seminar on Global Constitutional Issues," *Int'l Jud. Observer* 4 (1997), 2.

[39] *See e.g.,* the Center for Global Change and Governance at Rutgers University's website called the "Global Courts Network" <http://andromeda.rutgers.edu/~lipscher/globo.html>.

[40] *See* <http://wwwlawasia.asn.au/lawasia/Assoc.htm>. LAWASIA member countries are: Afghanistan; Australia; Bangladesh; China; Fiji; Hong Kong, China; India; Iran; Japan; DPR of Korea; Korea; Macao; Malaysia; Nepal; New Zealand; Pakistan; Papua New Guinea; Philippines; Russian Federation; Singapore; Sri Lanka; Thailand; Western Samoa.

[41] *See* "CEELI Update," *ABA Int'l Law News*, Summer, 1991, p. 7.

designees attended a conference in Washington in October 1995 and drafted the OCSA charter, dedicated to "promot[ing] and strengthen[ing] judicial independence and the rule of law among the members, as well as the proper constitutional treatment of the judiciary as a fundamental branch of the State."[42] The Charter required ratification by fifteen supreme courts, which was achieved in spring 1996. It provides for triennial meetings and envisages a permanent secretariat. Among other activities, OCSA members plan to conduct a number of studies on procedural and substantive issues such as the relative merits of adversarial versus inquisitorial systems and the relationship of the press to the judiciary.[43]

OCSA is an initiative by judges and for judges. It has been strongly supported by the international relations committee of the Federal Judicial Conference. It is not a stretch to say that it is the product of judicial foreign policy, advancing values and interests of particular concern to a particular group of judges.

4 Toward a global community of law

Participants in judicial networks are constructing a global community of law. The members of this community share common values and interests, based on the recognition of the law as distinct but not divorced from politics. This conception of the law in turn supports a shared conception of their own role and identity as judges – as actors who must be insulated from direct political influence. At its best, this global community assures each participant that his or her professional performance is being both monitored and supported by a larger audience.

Champions of the ideal of a global rule of law have most frequently envisioned one rule for all, a unified legal system topped by a world court. A fully developed global community of law would instead encompass a plurality of rules of law achieved in different States and regions. No high court would hand down definitive global rules, although such a system could coexist perfectly comfortably with an international court of justice issuing judgments about public international law. Indeed, supranational tribunals may play a vital unifying and coordinating role, but their ultimate effectiveness will depend on their relationship with national government institutions exercising direct enforcement power. Overall, national courts would interact with one another and with

[42] Charter of the Organization of the Supreme Courts of the Americas, Article II, § 21.

[43] "Justices, Judges from Across Western Hemisphere Assemble, Create Charter for New Organization of Supreme Courts," *Int'l Jud. Observer* (Jan. 1996), 1–2.

supranational tribunals in ways that would accommodate national and regional differences, but that would acknowledge and reinforce a core of common values.

B Transnational regulatory cooperation

Perhaps the densest area of transgovernmental activity is among national regulators. National government officials charged with the administration of anti-trust policy, securities regulation, environmental policy, criminal law enforcement, banking and insurance supervision – in short, all the agents of the modern regulatory State – interact regularly and increasingly systematically with their foreign counterparts. They come together to extend their combined regulatory reach, tracking the increasingly mobile subjects of national regulation and figuring out cooperative strategies for the regulation of global markets and global problems such as air and water pollution and international *mafiosi*. The result is the creation of horizontal governance networks that both substitute for and complement international institutions. Indeed, in some cases the national regulators involved have created their own international institutions.

Domestic institutions that are autonomous and motivated enough to form transnational government networks can also interact with their supranational counterparts to create global government networks. As in the European example, the supranational institutions may play a vital unifying and coordinating role, but their ultimate effectiveness will depend on their relationship with national government institutions exercising direct enforcement power.

1 Networks of national regulators

It is hardly surprising that the globalization of financial and commercial markets, criminal enterprise, and environmental problems has led to the creation of transnational regulatory networks. National regulators have sought to keep up with their quarry by cooperating with one another. Such cooperation can arise on an *ad hoc* basis, but increasingly gives rise to bilateral and plurilateral agreements designed to cement and support such cooperation. The most formal of these agreements are Mutual Legal Assistance Treaties (MLATs), whereby two States set forth a protocol governing cooperation between their law enforcement agencies and courts. Increasingly, however, the preferred instrument of cooperation is the much less formal Memorandum of Understanding, whereby two or

more regulatory agencies set forth and initial the terms of an ongoing relationship. MOUs are not treaties; they do not engage the executive or the legislature in negotiations, deliberation, or signature. They affirm existing links among regulatory agencies based on their common functions and commitment to the solution of problems.[44]

The changing nature of transnational relations among regulatory agencies is perhaps best captured by a concept developed by the US Department of Justice called "positive comity."[45] Comity of nations, an archaic and notoriously vague term beloved of diplomats and international lawyers, has traditionally signified a kind of deference granted one nation by another in recognition of their mutual sovereignty. It betokens negative cooperation, in the sense of non-interference or waiver of powers that a sovereign is clearly entitled to exercise but chooses not to. For instance, a State will recognize another State's laws or judicial judgments based on comity. Positive comity, on the other hand, requires a much more active cooperation. As developed between the Anti-trust Division of the Department of Justice and the Commission of the European Community, the regulatory authorities of both States undertake to alert one another to regulatory violations within their jurisdiction, with the understanding that the alerted authority will then take action.[46] Comity thus becomes a principle of affirmative and enduring cooperation among counterpart government institutions.

2 Transgovernmental regulatory organizations

In 1988 the central bankers of the world's major financial powers adopted capital adequacy requirements for all the banks under their supervision. The result was a major reform of the international banking system, to which some commentators attribute a major and unnecessary credit squeeze in many of the participating nations. The decision to impose these capital adequacy requirements did not take place under the auspices of the World Bank, the International Monetary Fund, or even the meeting of the G7. The forum of decision was the Basle

[44] *See generally* Caroline A. A. Greene, Note, "International Securities Law Enforcement: Recent Advances in Assistance and Cooperation," *Vand. J. Transnat'l L.* 27 (1994), p. 635. *See also* Charles Vaughn Baltic III, Note, "The Next Step in Insider Trading Regulation: Internal Cooperative Efforts in the Global Securities Market," *Law & Pol'y Int'l Bus.* 23 (1991/92), pp. 191–92.

[45] *See generally* Robert D. Shank, Note, "The Justice Department's Recent Antitrust Enforcement Policy: Toward a 'Positive Comity' Solution to International Competition Problems?" *Vand. J. Transnat'l L.* 29 (1996), 176.

[46] *See* Joseph P. Griffin, "EC and US Extraterritoriality: Activism and Cooperation," *Fordham Int'l L. J.* 17 (1994), pp. 367–69.

Committee on Banking Supervision, an organization composed of twelve central bank governors. The Basle Committee was created not by a treaty, but by a simple agreement reached by the bank governors themselves and announced in a press communiqué. Its members meet four times a year and follow rules of their own devising. Decisions are taken by consensus and are not formally binding; however, members agree to implement accords reached within their own domestic systems. Back home, the authority of the Basle Committee is then often cited as an argument for taking domestic action.[47]

The Basle Committee's example has been followed by national securities commissioners and insurance regulators. IOSCO, the International Organization of Securities Commissioners, has no formal charter or founding treaty; it was incorporated by a private bill of the Quebec National Assembly. Its primary purpose is to find solutions to problems affecting international securities markets and to generate sufficient consensus among its members to implement those solutions through national legislation. Its members have also entered information-sharing agreements on their own initiative. IOSCO decision-making processes are very flexible; further, although its membership is large and open, the most powerful members of the organization dominate the principal rule-making committees.[48] The International Association of Insurance Supervisors[49] follows a similar model, as does the newly created Tripartite Group – an international coalition of banking, insurance, and securities regulators created by the Basle Committee to consider methods of improving the supervision of financial conglomerates.[50]

Pat Buchanan would have had a field day with the Tripartite Group, denouncing it as a prime example of an international bureaucracy bent on taking the power out of the hands of American voters.[51] In fact, transgovernmental regulatory organizations have no direct power; on paper, at least, their functions are primarily consultative. They have no formal basis in treaties or even executive agreements; they are founded by and function for the benefit of specific groups of national regulators;

[47] *See* David Zaring, "International Law by Other Means: the Twilight Existence of International Financial Regulatory Organizations," *Texas Int'l L. J.* 33 (1998), 281.

[48] *See* Paul Guy, "Regulatory Harmonization to Achieve Effective International Competition," *in* F. R. Edwards and H. T. Patrick, eds., *Regulating International Financial Markets: Issues and Policies* (Boston, Mass.: Kluwer Academic Publishers, 1992), p. 291.

[49] *See* IAIS, 1994 Annual Report.

[50] *See* US Objections Prompt Limited Global Pact on Financial Services, 14 no. 16 *Banking Pol'y Rep.* 2 (1995).

[51] Patrick J. Buchanan, *The Great Betrayal: How American Sovereignty and Social Justice are Sacrificed to the Gods of the Global Economy* (Boston, Mass.: Little, Brown, 1998).

they have flexible decision-making procedures and can control their membership and governance structures; their operations are largely hidden from public view. Above all, unlike the international bogeymen of demagogic fancies, these organizations do not aspire to, nor are they likely to, exercise power in the international system independently of their members. They are vehicles to help national regulators solve transnational problems.

3 The nationalization of international law

Perhaps the most distinctive attribute of the transgovernmental regulatory networks is that their primary purpose is not to promulgate international rules but to enhance the enforcement of national law. Traditional international law requires States to implement the international obligations they incur through national law where necessary, either through legislation or regulation. Thus, for instance, if States agree to a twelve-mile territorial sea, they must change their domestic legislation concerning the interdiction of vessels in territorial waters accordingly. However, the subject of such legislation would be international, in the sense that only in a world with multiple nations would there be any need to devise rules governing spaces outside their collective borders. Similarly, only in a world with multiple nations would we need rules regulating war or commerce between them. Global commons issues and inter-State relations, whether peaceful or conflictual, have thus been the stuff of traditional international law.

Transgovernmental regulatory networks, by contrast, produce rules governing subjects that each nation must and does already regulate within its borders: crime, monopoly, securities fraud, pollution, tax evasion. The same advances in technology and transportation that have fueled globalization have made it increasingly difficult to enforce national law effectively. Regulators thus benefit from coordinating their enforcement efforts with their foreign counterparts or from ensuring that all nations adopt a common enforcement approach.

The result is the nationalization of international law. Bilateral and plurilateral regulatory cooperation does not seek to create obligations between nations enforceable at international law. Rather, the agreements reached are pledges of good faith that are essentially self-enforcing, in the sense that each nation will be better able to enforce its national law by implementing the agreement reached if all other nations do likewise. The binding or coercive dimension of law emerges only at the national level. Uniformity of result and diversity of means go hand in

hand. And both the rule-makers and rule-enforcers are accountable at the national level.

C Executives and Parliaments

In the traditional conception of the international system, heads of State act as representatives of the unitary State, voicing and promoting the national interest. Legislatures, by contrast, are presumed to have no direct role in foreign affairs. They can approve or disapprove, or sometimes amend, agreements negotiated and concluded by the executives; they can also decide whether and how to implement such agreements through domestic legislation. However, their very number and decentralization is assumed to preclude direct interaction with other nations. The traditional account remains accurate as a stylized representation of legislative–executive interaction in foreign affairs, particularly in parliamentary systems. But even here, there are growing signs of independent interests and action on both sides.

Over the past decade political scientists have increasingly tracked the ways in which heads of State use international fora to promote their specific interests in the face of competing domestic actors. This is the "two-level game," whereby a head of State enhances his leverage over the national legislature by arguing that the nation's international credibility is at stake. The suspect scenario runs as follows: the President seeks to liberalize the economy. He is too weak to push through liberalizing legislation on his own. He thus meets with like-minded heads of State and negotiates an international trade agreement that will require the liberalization measures he seeks.[52] The only premise on which this scenario makes sense is that the executive has an interest distinct from the legislature and the ability to implement that interest through international interaction.

National legislatures are developing their own repertoire of responses to such games. They can and increasingly do meet directly with members of foreign delegations in international trade negotiations. In theory, they could also meet with their foreign counterparts to develop a counter-strategy. In practice, we have little evidence of such contact. However, national legislators do meet together on issues of common

[52] *See* Robert D. Putnam, "Diplomacy and Domestic Politics: the Logic of Two-Level Games," *Int'l Org.* 42 (1988), pp. 433–35. *See also* Peter B. Evans, Harold K. Jacobson, and Robert D. Putnam, eds., *Double-edged Diplomacy: International Bargaining and Domestic Politics* (Berkeley, Calif.: University of California Press, 1993).

interest under the auspices of international organizations such as NATO and the Organization for Security and Cooperation in Europe.[53] Many members of the US Congress also maintain home pages on the Internet that can be visited by their counterparts in other nations.

Another source of legislative networks is the spontaneous organization and mobilization of national legislators on international issues such as arms control, human rights, and democratic government. The leading organizations in this regard are Parliamentarians for Global Action and the Interparliamentary Union. While such groups can have an influence on domestic legislative initiatives and certainly promote communication and cross-fertilization of policy ideas and approaches among national legislators, they still reflect more of an effort to give legislators a voice on more traditional foreign policy issues than the development of transgovernmental networks on issues of more domestic concern. Increasingly, these parliamentary networks have become a means of asserting regional viewpoints on matters of international concern. More generally, they have provided legislators with an opportunity to meet with one another informally, providing an increasingly effective forum for the resolution of international problems.

Of particular interest regarding the issues discussed in this volume is the IPU's involvement in promulgating both information about electoral systems around the world and international law standards on free and fair elections.[54] It has been joined in this endeavor by specific regional organizations such as the Association of African Election Authorities, founded in 1997 and composed both of government officials and leaders of NGOs directly involved in monitoring and assisting elections. The Association Charter sets forth a long list of purposes, including "the promotion of free and fair elections in Africa; the promotion of independent and impartial election organizations and administrators; and the development of professional election officials with high integrity, a strong sense of public service and a commitment to democracy."[55] Here is a transgovernmental entity that includes non-governmental actors, all

[53] For a discussion of the North Atlantic Assembly, the NATO parliamentary organ, *see* Christian Brumter, *The North Atlantic Assembly* (Dordrecht and Boston, Mass.: Martinus Nijhoff Publishers, 1996). Similarly, for an overview of the OSCE's parliamentary assembly *see* Alexis Heraclides, *Helsinki-II and its Aftermath: The Making of the CSCE Into an International Organization* (London and New York: Pinter Publishers, 1993), p. 15.

[54] Inter-Parliamentary Union, *Electoral Systems: A World-Wide Comparative Study* (Geneva: Inter-Parliamentary Union, 1993); Guy S. Goodwin-Gill, *Free and Fair Elections: International Law and Practice* (Geneva: Inter-Parliamentary Union, 1994).

[55] AAEA, "Report on the Founding Meeting of the Association of African Election Authorities," United Nations Electoral Assistance Division (UN/EAD) (1997).

united by the desire to preserve and transmit a particular set of professional goals on an issue of crucial importance to democratic governance.

II TRANSGOVERNMENTALISM AND THE LIBERAL DEMOCRATIC ORDER

The transgovernmental networks and institutions described above coexist and interact with traditional international organizations. The hallmark of transgovernmentalism, however, is a system in which the principal actors are State units rather than unitary States, interacting horizontally with their foreign counterparts rather than ceding power to their international or supranational equivalents. Transgovernmentalism thus requires the "disaggregation" of the State into its component government institutions – institutions who will continue to recognize and represent the national interest relative to other nations, but who will also have distinct institutional interests.

Disaggregated State activity, in turn, is most concentrated among liberal democracies, defined as States providing some form of representative government secured by the separation of powers, constitutional guarantees of civil and political rights, juridical equality, the rule of law, and a market economy that protects private property rights.[56] Government networks are particularly dense and institutionalized in the EU,[57] and, more broadly, among OECD countries.[58] The members of the Basle Committee[59] and the principal rule-makers in IOSCO are all liberal democracies.[60] Government networks are equally a hallmark of relations among Commonwealth countries.[61] Even in the security realm,

[56] This is the definition of liberal democracy used by Michael Doyle in his pioneering work on the "democratic peace." *See* Michael W. Doyle, "Kant, Liberal Legacies, and Foreign Affairs," *Phil. & Pub. Aff.* 12 (1986), pp. 206–09. Note that the definition is quite broad: market economies that protect private property rights range from Sweden to the United States.

[57] Renaud Dehousse, "Regulation by Networks in the European Community: the Role of European Agencies," *J. Eu. Pub. Pol.* 4 (1997), 246; David Cameron, "Transnational Relations and the Development of the European Economic and Monetary Union," *in* Thomas Risse-Kappen, ed., *Bringing Transnational Relations Back In: Non-State Actors, Domestic Structures, and International Institutions* (New York: Cambridge University Press, 1995).

[58] Scott H. Jacobs, "Regulatory Co-operation for an Interdependent World: Issues for Government," *in Regulatory Co-operation for an Interdependent World* (OECD 1994), p. 15.

[59] Belgium, Canada, France, Germany, Italy, Japan, Luxembourg, the Netherlands, Sweden, Switzerland, the United Kingdom, and the United States.

[60] The IOSCO Technical Committee is composed of Australia, France, Germany, Hong Kong, Italy, Japan, Mexico, the Netherlands, Ontario, Quebec, Spain, Sweden, Switzerland, the United Kingdom, and the United States.

[61] David Howell, "The Place of the Commonwealth in the International Order," *The Round Table* 345 (1988), p. 29.

Thomas Risse-Kappen argues that they are a distinctive feature of relations within NATO and in the US–Japanese security relationship.[62] Finally, both vertical and horizontal judicial networks are most developed in Europe and among common law courts in the Commonwealth.[63] It is also noteworthy that the formation of OCSA followed the re-democratization of much of Latin America.

Although the empirical correlation between government networks and liberal democracies is easy to establish, the precise causal connections remain unproved. A number of possible explanations present themselves, however. First is the existence of the "(liberal) democratic peace," the now well-established proposition that liberal democracies are very unlikely to use military conflict to resolve their disputes.[64] As early as 1977, when identifying the features of the emerging phenomenon of "complex interdependence," Keohane and Nye listed both transgovernmental relations and a reluctance to use military force, a reluctance that was particularly observable "among industrialized, pluralist countries."[65] Writing in 1995, Risse-Kappen concurs, listing the democratic peace and transgovernmental relations as two important characteristics of "cooperation among democracies."[66] The connection between the two seems straightforward. Government institutions are likely to be far more willing to formulate and implement their own separate conceptions of the national interest if they are certain that potential conflict with other nations cannot escalate into a genuine security threat. Conversely, the prospect of war is the fastest way to ensure that all branches of a government will in fact cohere into a "unitary State."

A second factor contributing to the distinctive patterns of transgovernmental activity among liberal democracies is undoubtedly the

[62] Thomas Risse-Kappen, *Cooperation among Democracies: the European Influence on US Foreign Policy* (Princeton University Press, 1995), p.209. On the US–Japan security relationship, *see* Peter Katzenstein and Yutaka Tsujinaka, "'Bullying,' 'Buying,' and 'Binding,'": US–Japanese Transnational Relations and Domestic Structures," *in* Risse-Kappen, ed., *Bringing Transnational Relations Back In*, *supra* note 57.

[63] Helfer and Slaughter, "Supranational Adjudication," *supra* note 6, pp. 290–97, 370–73.

[64] Doyle, "Kant, Liberal Legacies, and Foreign Affairs", *supra* note 56; Bruce Russett, *Grasping the Democratic Peace: Principles for a Post-Cold War World* (Princeton University Press, 1993). Critics of this research routinely point to conflict among liberal democracies – Greece and Turkey, India and Pakistan – as contrary evidence. However, the claim is emphatically not that liberal democracies will not experience conflict, even sharp and heated conflict that threatens to escalate militarily. It is rather that such escalation can either be prevented at the outset or stepped back down, due to a wide variety of forces in both countries that ultimately work against military resolution.

[65] Robert O. Keohane, Joseph S. Nye, and Stanley Hoffmann, eds., *After the Cold War: International Institutions and State Strategies in Europe 1891–1991* (Cambridge, Mass.: Harvard University Press, 1993), p. 27.

[66] Risse-Kappen, *Cooperation among Democracies*, *supra* note 62, pp. 27, 38.

relatively high level of economic development among mature liberal democracies and the accompanying intensity of globalization, defined not simply as macroeconomic interdependence, but microeconomic integration of individual corporations.[67] Close transnational links between economic actors give rise to regulatory conflict and the accompanying need for repeated interaction and ultimately a framework for cooperation among national regulatory authorities. Similarly, disputes between transnational economic actors lead to conflicts between courts over judicial jurisdiction, ultimately requiring courts to devise ways to cooperate with or at least take account of one another. Another link between economic development and government networks is the level of economic development necessary for membership in the OECD, an organization that explicitly fosters government networks.

However, to say that mature liberal democracies enjoy a high level of economic development and that the economic interdependence frequently accompanying such levels of development creates a demand for government networks is not to say either that a liberal democracy will automatically prosper, or that economic development necessarily requires liberal democracy. Empirical studies have shown only that rising income levels correlate positively with the prospects for stable democracy; it is far less evident that stable democracy raises incomes.[68] Moreover, although post-Cold War conventional wisdom dictates that democracy must go hand in hand with a private-property market economy, the phenomenal growth rates in China and the experience of the Asian "tigers" prior to their democratization, not to mention the historical experience of many prosperous but non-democratic States, all suggest that the conventional wisdom is ripe for revision. Thus it may be true only that high levels of economic development are a central feature of contemporary relations among liberal democracies.

A third link between liberal democracy and transgovernmentalism is the relative strength and autonomy of the institutions participating in government networks. Fareed Zakaria has recently rekindled debate over whether "liberalism" and "democracy" automatically go together,

[67] Wolfgang Reinicke, "Global Public Policy," *Foreign Aff.* 76 (1997), p. 127. Consistent with the argument advanced here, Reinicke notes that most of the economic integration that has been associated with globalization has taken place among OECD countries. He cites the institutions charged with regulating this process, referred to above as transgovernmental regulatory organizations, as the "institutions of globalization," as opposed to the more traditional "institutions of interdependence" such as the IMF and the World Bank.

[68] John F. Helliwell, "Empirical Linkages Between Democracy and Economic Growth," *Brit. J. of Pol. Sci.* 24 (1994), p. 225.

arguing that "constitutional liberalism," defined as the Western tradition "that seeks to protect an individual's autonomy and dignity against coercion," rests on a set of political commitments that do not necessarily accompany free and fair elections.[69] Many scholars and practitioners sharply disagree, noting that the list of "liberal autocracies" is short, anomalous, and largely historical.[70] Nevertheless, even Zakaria's critics agree that the "liberal" and "democratic" elements of liberal democracy are distinguishable and that the preservation of individual liberty depends in part on mechanisms for curtailing the power of separate branches of government (loosely and often inaccurately defined as "the separation of powers"). Americans readily recognize this mechanism under the Madisonian rubric of "checks and balances," but important differences exist between presidential and parliamentary systems in this regard. Even in parliamentary systems, however, which typically do not recognize a formal separation of executive and legislative powers in the same way that many presidential systems do, the administrative bureaucracy enjoys substantial autonomy from shifting legislative majorities and the resulting cast of ministers. Overall, different branches of government in liberal States are nevertheless more powerful and autonomous on their home turf than their counterparts in illiberal States, whether democratic or not.

The relative power and autonomy of domestic government institutions bears on the formation of governmental networks in two ways. First, either formal or informal norms regarding separation of powers free government institutions to concentrate on their specific tasks of regulation, legislation, law enforcement and dispute resolution, leading them to take responsibility for specific government functions and thus to make common cause more easily with their counterparts in other nations performing similar functions. Second, in those systems such as the United States in which vigorous competition among domestic government institutions is encouraged, regulatory agencies, legislative committees, the executive branch, and even courts are likely to be skilled political players, accustomed to coalition-building in support of a particular institutional or policy position within.

Institutions thus empowered on their home turf are better equipped to seek out and cooperate with their foreign counterparts and indeed may be spurred to do so by competition with their fellow domestic

[69] Fareed Zakaria, "The Rise of Illiberal Democracy," *Foreign Aff.* 76 (1997), pp. 25–26.

[70] *See, e.g.*, John Shattuck and J. Brian Atwood, "Defending Democracy," *Foreign Aff.* 77 (1998), pp. 167–70; Marc F. Plattner, "Liberalism and Democracy," *Foreign Aff.* 77 (1998), pp. 171–80.

branches. For instance, a US court has made common cause with a British court to circumvent a Justice Department position in an anti-trust case that the US court hesitated to override on its own.[71] Examples of executives seeking to outflank their legislatures are also well documented.[72] By contrast, institutions subject to the political whims of a dictator or oligarchy, or else primarily pursuing their own material interests, are less likely to be fit interlocutors.

Here too, however, it is important not to overstate the argument. Autocracies of various stripes and illiberal democracies can and do operate specialized ministries or agencies that are committed to and carry out regulatory functions such as securities, banking, or even environmental regulation. Such entities may well have sufficient domestic power and autonomy to participate in government networks, as is evident from their membership in many of the networks described above. This aspect of government networks will be discussed further below. Alternatively, illiberal States may seek to promote independent judiciaries, primarily to attract foreign investment, or may have a tradition of independent judges who now often find themselves in opposition against the current government.

Functionalism and professionalization can thus provide a measure of common ground linking government officials from widely disparate political systems. Based on current empirical evidence, however, these broader government networks are likely to engage principally in information exchange and policy coordination. More active cooperation, collaboration, and conflict resolution require a high degree of trust, which in turn appears to depend on a sense of shared identity or "we-feeling."[73] Shared identity, however, can be derived from a common religion,

[71] *See* Laker Airways v. Sabena, 731 F.2d 909 (D.C. Cir. 1984). The Laker litigation began in the District of Columbia District Court as an antitrust action against a number of transatlantic airlines. The defendants obtained a preliminary injunction in the British High Court of Justice forbidding Laker from prosecuting its American antitrust action. The British Court of Appeal subsequently issued a permanent injunction requiring Laker to dismiss its suit against the British defendants, and characterized the American action as "wholly untriable." British Airways Board v. Laker Airways, [1983] 3 W.L.R. 545, 573 (C.A. 1983). For an account of the back-and-forth court decisions in the Laker litigation, see Daryl A. Libow, Note, "The Laker Antitrust Litigation: The Jurisdictional 'Rule of Reason' Applied to Transnational Injunctive Relief," *Cornell L. Rev.* 71 (1986), 655–661. [72] *See* Putnam, "Diplomacy and Domestic Politics," *supra* note 52.

[73] Karl W Deutsch, *et al.*, *Political Community and the North Atlantic Area: international organization in light of historical experience* (Princeton University Press, 1957), p.129. Deutsch developed the concept of a "pluralistic security community," based on a community of values that promotes "mutual sympathy and loyalties; of 'we-feeling,' trust, and consideration; of at least partial identification in terms of self-images and interests; of the ability to predict each other's behavior and ability to act in accordance with that prediction."

culture, ethnicity, or political ideology; geographic contiguity or shared historical experience; solidarity in the face of a common threat. Liberal democracies may identify with one another as members of an in-group confronted with non-democracies, but such identification or awareness of commonality does not necessarily promote government networks.[74]

The fourth link between government networks and liberal democracy is thus shared political values of a kind fostering the mode of governance that government networks represent. Liberal democratic norms of pluralism and tolerance enshrine principles of "legitimate difference" that help bridge cultural and political differences among entities seeking common ends but often through quite different means;[75] norms of equality translate into procedural requirements of consensus and consultation that help equalize power disparities among participants in governmental networks.[76] The guarantee of peaceful dispute resolution that is a concomitant of the liberal democratic peace also ensures that governmental networks will not be suddenly and violently disrupted, even if they may be stalemated by particularly intractable disputes. Making an analogous point, Risse-Kappen argues that such norms temper the "[f]ierce economic competition" that is a concomitant of shared capitalist values among liberal democracies.[77]

Chroniclers and proponents of the liberal democratic order as the principal US achievement after 1945 have focused far more on international institutions than transgovernmental relations. John Ikenberry notes that the "decentralized and open character of domestic institutions" in Western liberal democracies facilitates transnational politics, but his description of the Western "constitutional vision" emphasizes the creation of the United Nations, NATO, and the multilateral financial institutions.[78] Similarly, the Clinton Administration's foreign policy, dedicated to securing and expanding the liberal democratic order, has focused on democracy, free trade, and international institutions.

[74] The argument here roughly parallels the reasoning in Risse-Kappen, ed., *Bringing Transnational Relations Back In*, *supra* note 57, pp. 27–29 (arguing that explaining the democratic peace does not explain regular cooperation among liberal democracies within democratic international institutions).

[75] Anne-Marie Burley, "Law among Liberal States: Liberal Internationalism and the Act of State Doctrine," *Columbia L. Rev.* 92 (1992), p. 1907.

[76] Risse-Kappen, *Cooperation among Democracies*, *supra* note 62, p. 39.

[77] *Ibid.* at 31.

[78] Ikenberry, "The Myth of Post-War Chaos," *supra* note 4, pp. 88–89. As noted above, Keohane and Nye pointed to the significance of transgovernmental relations in their analysis of "complex interdependence" in the 1970s and simultaneously argued that complex interdependence was most likely to obtain among liberal democracies. However, they did not see themselves as describing a liberal democratic order.

Transgovernmental relations tend to be an afterthought, invariably described as addressing "technical" or "functional" issues.

In fact, transgovernmentalism should be understood as a central component of the liberal democratic order. As an empirical phenomenon, networks of government institutions are the primary channels of communication and cooperation among liberal democracies. As argued in this section, they are particularly likely to flourish in conditions of peace, prosperity, strong and autonomous domestic institutions, and liberal democratic norms of decision-making and dispute-resolution. But they are more than a by-product of the liberal internationalist "constitutional vision" that Ikenberry describes. Transgovernmentalism comprises its own constitutional vision of international order.

The Kantian vision of international order among liberal democracies in *Perpetual Peace* was far more horizontal than vertical, envisaging a "pacific union" bound by the loosest possible ties and cemented primarily by the convergence of domestic values and political structures. Hierarchical institutions that would recreate domestic government on a global scale were to be avoided at all costs. The transgovernmental elements of the current liberal democratic order come closest to achieving this vision. In practice, governmental networks are likely to coexist with and complement liberal internationalist institutions. But they play a critical role in creating and cementing a community of liberal democracies. Moreover, they will play an increasingly important role in expanding that community.

III GOVERNMENT NETWORKS AND (LIBERAL) DEMOCRATIZATION

A pillar of US foreign policy under the Clinton Administration has been the substitution of "enlargement" for "containment": seeking to expand the liberal democratic order.[79] The critical question is how? Labeling States "democratic" or "non-democratic," "liberal" or "illiberal," is difficult and often disingenuous. Monitoring elections is at best a first

[79] Policy-makers and scholars use a wide variety of terms to describe the state of relations among advanced industrial democracies, stable but less developed democracies, and emerging democracies. The Clinton Administration often refers to the "community of democracies." *See* "From Containment to Enlargement," speech by Anthony Lake, Assistant to the President for National Security Affairs (Sept. 27, 1993); Text of President Clinton's Statement on NATO Summit (Dec. 10, 1996). John Ikenberry refers to the liberal democratic order; Fareed Zakaria emphasizes the "liberal order," as does Timothy Garton Ash. *See* Ikenberry, "The Myth of Post-War Chaos," *supra* note 4; Zakaria, "Illiberal Democracy," *supra* note 69; and Timothy Garton Ash, "Europe's Endangered Liberal Order," *Foreign Aff.* 77 (1998).

step even toward democratization, much less toward building the liberal institutions that safeguard individual rights against majority whim and protect against the usurpation of political power by a particular faction.[80] Long-term, patient efforts are needed to strengthen these institutions and establish the values of transparency, honesty, and professionalism throughout government that promote genuine democratic accountability and control. In the meantime, it is also increasingly possible for citizens of one country to "borrow" the liberal democratic institutions of another – at least for limited purposes and for a limited time.

A Piercing the shell of sovereignty

Governmental networks can function as important transmission belts for these values. They can also help build and even establish specific government institutions, as well as strengthening and occasionally legitimating their existing members. The value of a transgovernmental network approach is that it sidesteps strategies that require identifying a core "liberal democratic order" that must be "enlarged," an approach that often seems above all to reinforce perceptions of an exclusive democratic for which many would read "Western" – club. Focusing on individual government institutions instead of the governments of which they are a part acknowledges the complexity and often the contingency of any political engineering project, seeking at best to build liberal democracy one institution at a time.

As noted above, government networks are concentrated among liberal democracies. But they are not limited to them. Non-democratic States may still have institutions capable of participating fully in these networks, such as committed and effective regulatory agencies or a relatively independent judiciary. Indeed, Zakaria distinguishes not only between liberal and illiberal democracies, but also between illiberal democracies and "liberal autocracies," States without popularly elected government but with constitutional protections of individual rights and independent judiciaries.[81] Similarly, States such as China that seek to liberalize their economies without relinquishing centralized political power are finding the need to create more autonomous financial and commercial institutions and to strengthen their courts.

Governmental networks may be a particularly effective way of

[80] Zakaria, "Illiberal Democracy," *supra* note 69, pp. 30–32.

[81] *Ibid.*, 28 9. He cites only Hong Kong as a recent example, but notes that a number of countries have achieved this status in the past, such as the Austro–Hungarian empire.

strengthening and improving participating government institutions through a variety of mechanisms. First is simple information exchange, providing developing and/or democratizing countries with a range of institutional models by which to achieve specific policy goals. Through the Federation Internationale de Bourses des Valeurs, for instance, southern African countries such as Mauritius can quickly and easily inform themselves about various ways of regulating a stock market. Such knowledge may readily translate into power not only in the obvious sense of enhanced ability to undertake a particular regulatory project, but also into increased authority in domestic political debates.

Equally important, however, is the possibility that some of the regulatory models on display through the network will not be purely "Western" or "developed." Sovereign sensitivities, particularly against the backdrop of an imperialist past, may be much less likely to be inflamed by recommendations to follow a regulatory model borrowed from Kenya or South Korea than France or Japan. Thus substantive principles and professional values prevalent among contemporary industrialized democracies may be "laundered" through government networks to diminish their "Western" provenance and make them more palatable to States with strong historical and cultural reasons to wish to forge their own governance models. Moreover, many of the adaptations of original Western models by other countries around the world are likely to improve effectiveness of these models in particular developing countries.

A second way in which government networks can help strengthen government institutions outside the core community of industrialized liberal democracies is to provide leverage for the creation of new institutions. Many of the Memoranda of Understanding concluded between the US Securities and Exchange Commission (SEC) and foreign securities regulators, for instance, explicitly require that the foreign counterpart be delegated a certain degree of power and autonomy by its national legislature. SEC technical assistance to its foreign counterpart to build regulatory capacity and expertise is often conditioned on such legislative delegation. Environmental enforcement networks between Canada, the United States, and Mexico, developing under NAFTA auspices, similarly operate to strengthen domestic capacity for effective environmental regulation, largely in Mexico.[82] Under the global mantra

[82] Scott C. Fulton and Sperling I. Lawrence, "The Network of Environmental Enforcement and Compliance Cooperation in North America and the Western Hemisphere," *Int'l L.* 30 (1996), p. 111.

of "capacity-building," government networks operating institution to institution can help to reshape the domestic political landscape by creating and empowering new regulatory institutions.

Third, participation in government networks can socialize and strengthen domestic judicial and regulatory institutions in ways that will help them resist political domination, corruption, or simple incompetence back home. For many specific government institutions seeking to carve out a new role and mandate for themselves in domestic politics, participation in government networks can be a valuable source of support. The Organization of Supreme Courts of the Americas, for instance, actively seeks to strengthen norms of judicial independence among its members, many of whom must fend off powerful political forces. Heinz Klug has also described the ways in which the South African Supreme Court uses references to foreign and international law to bolster and legitimate itself while simultaneously developing a distinctively South African jurisprudence.[83] On the regulatory side, a domestic agency can justify a reform agenda by stressing the need to comply with codes of general principles adopted by like agencies around the world through a government network. Examples include principles of sound banking adopted by the Basle Committee, after extensive consultation with central banks in many developing economies, or the new IOSCO principles of securities regulation adopted through the Technical Committee.

Exchanging information, wresting a measure of autonomy from a national legislature, offering transnational moral support and such legitimation as can be afforded by pointing to a global consensus – these may seem an unlikely blueprint for building liberal democracy. But if in fact the success of liberal democratization rests not only on returning power to the people but also on preventing the abuse or usurpation of that power through the rule of law and honest and effective government, then governmental networks are the channels through which successful liberal democratic institutions can transmit their knowledge and experience and sometimes even replicate themselves.

B "Borrowing" liberal democracy

Individuals and groups who do not have access to liberal democratic or simply well-functioning government institutions at home may also

[83] Heinz Klug, "Bounded Alternatives: the Reception of Constitutional Paradigms and the Civilizing of Unnegotiable Conflicts in South Africa," *Washington Post* (July 9, 1998), A24.

"borrow" them from abroad to achieve a form of representation or a measure of justice that they cannot obtain in their own countries. The clearest example of this phenomenon arises in the human rights context, where victims of human rights violations in countries such as Paraguay, Argentina, Haiti, Nicaragua and the Philippines have sued for redress in the courts of the United States.[84] US courts essentially accepted these cases, even in the face of periodic opposition from the executive branch, by adopting a broad interpretation of a virtually moribund statute dating from 1789.[85] Under this interpretation, aliens may sue in US courts to seek damages from foreign government officials accused of torture and other human rights violations, even where the acts allegedly took place entirely within the foreign country. More generally, human rights NGOs seeking to publicize and prevent human rights violations can often circumvent non-functioning government institutions in their own States – corrupt or terrorized legislatures and politicized courts – by publicizing the plight of victims abroad and mobilizing a foreign court, legislature, or executive to take action against their own government.

Less dramatically, the Russian government has chosen to "borrow" the services of the US Food and Drug Agency, accepting any pharmaceutical licensed by the FDA for distribution in the United States as valid for Russia as well.[86] This decision would be a form of "mutual recognition," popular as a strategy for regulatory cooperation, except that it is not mutual. It is rather the wholesale adoption of the functions, standards, and results of a foreign regulatory agency – a kind of regulatory "out-sourcing." Two securities specialists have recently proposed a regime of "portable reciprocity" for global securities regulation,

[84] *See, e.g.,* Filartiga v. Pena-Irala 630, F.2 d 876 (2d Cir. 1980); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984); Lafontant v. Aristide, 844 F.Supp. 128 (E.D.N.Y. 1994); Fernandez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980), aff'd 654 F.2d 1382 (10th Cir. 1981); Von Dardel v. USSR, 623 F. Supp. 246 (D.D.C. 1985); Sanchez-Espinoza v. Reagan, 568 F. Supp. 596 (D.D.C. 1983); Trajano v. Marcos, No. 86–0207 (D. Ha. July 18, 1987); Guinto v. Marcos, 654 F. Supp. 276 (S.D. Cal. 1986); Siderman v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992). *See* Richard Lillich, "Invoking Human Rights Law in Domestic Courts," *Cinn. L. Rev.* 54 (1985), p. 367.

[85] Judiciary Act of 1789, ch. 20 §9(b), 1 Stat. 73, 77, *codified at* 28 USC §1350 (1982). ("the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States"). Although the Carter Administration originally supported an expansive interpretation of the Alien Tort Statute to cover human rights claims in Filartiga, *supra* note 84, the Reagan Administration took the opposite position in a number of the cases litigated during its tenure, such as Tel-Oren and Argentine Republic v. Amerada Hess Shipping Corp., 488 US 810 (1988).

[86] *See* Bryan L. Walser, "Shared Technical Decision-making: The Multinational Pharmaceutical Industry, Expert Communities, and a Contextual Approach to Theories of International Relations" (May 15, 1996) (unpublished ms. on file with author).

whereby individual securities issuers would choose one country's laws to govern their activities anywhere in the world, backed up by that country's enforcement capacities.[87] And a Harvard Law professor consulting for the World Bank on financial reform in Nepal has recommended that Nepal "selectively incorporate" US financial regulation, not as the basis for new Nepalese law, but as an ongoing link to the US legal system.[88]

Borrowing foreign government institutions would hardly seem to contribute to democratic self-government. On the other hand, if the choice to go abroad is made not as an alternative to developing regulatory or judicial capacity at home but rather as a temporary expedient or even a long-term complement to strengthened and improved domestic institutions, "borrowing" can help make the fruits of liberal democracy, as well as economic development, more widely available to individuals around the world. The choice to borrow another nation's regulatory scheme may itself be made by democratically elected leaders. In the human rights cases, by contrast, the choice to borrow foreign courts is a more desperate move, but one that can nevertheless provide citizens denied the protection of their rights and government officials responsible for or at least complicit in trampling those rights a taste of what strong courts in their own system could mean.

Disaggregating the State shifts the focus away from reductionist labels of "democratic" versus "non-democratic" and toward the performance of specific government institutions. Expanding transgovernmental networks to include selected institutions from illiberal and/or non-democratic States offers opportunities to strengthen them where possible and to supplant them where necessary. The result is strategies of enlargement that are both realistic and effective.

IV TRANSGOVERNMENTALISM AND THE CHALLENGE OF GLOBAL ACCOUNTABILITY

If government networks are the heart of the liberal democratic order and the best hope of expanding that order, how can we ensure that they themselves are faithful to core liberal democratic principles? Specifically,

[87] Stephen J. Choi and Andrew T. Guzman, "Portable Reciprocity: Rethinking the International Reach of Securities Regulation," *S. Cal. L. Rev.* 71 (1998), 903.

[88] Howell Jackson, "A Concept Paper on the Selective Incorporation of Foreign Legal Systems to Promote Nepal as An International Financial Services Center," Professor of Law, Harvard Law School (unpublished).

how can they be held accountable? Any form of global governance faces a potential democratic deficit, this time on a global scale. But a transgovernmental order poses particular challenges and holds out particular opportunities for establishing accountable government.

Transgovernmentalism harnesses the full power of the nation-State in the effort to find and implement solutions to transnational problems. Global governance is often referred to as "governance without government." Governance without government is governance without power. And government without power rarely works. On the contrary, many of the most pressing international and domestic problems result from an absence of government – from insufficient State power – to establish order, build infrastructure, and provide at least a minimum of social services. Private actors may be taking up the slack, but cannot ultimately substitute for the State.

With the exercise of power come the responsibilities of power, but here the many advantages of networks as an organizational form threaten to become liabilities. Networks allow governments to capitalize on the virtues of flexibility and decentralization that new medievalists celebrate with regard to networks of non-State actors. Yet networks have particular deficits as mechanisms for delivering accountable government, as any feminist who has battled "the old boy network" will quickly recognize. Their flexibility and decentralization means that it is very difficult to establish precisely who is acting and when. Influence is subtle and hard to track; important decisions may be made in very informal settings.

Developing mechanisms for holding networks accountable, both in the public and the private realms, is thus a deep and important challenge. In devising strategies to meet this challenge, however, it is important to place the accountability of transgovernmental actors in perspective. Liberal internationalism poses the dangers of an unelected supranational bureaucracy; the new medievalism envisions free-form networks of public and private actors, together with the devolution of power above and below the State, that would make it difficult even to discern the lines of political authority. The accountability of government networks must be weighed and assessed against these alternatives. In this context, government networks have a number of potential advantages.

First, transgovernmentalism assumes the same conception of the State in international relations as in domestic politics: a set of competing and cooperating government institutions with both distinct and over-

lapping functions. In theory, at least those institutions should be as accountable in their international activities as they are in their domestic affairs. For many, however, the prospect of transnational government by judges and administrative agencies looks more like technocracy than democracy – government by specialized functionaries with little accountability to national legislatures. Government institutions engaged in policy-making with their foreign counterparts will be barely visible, much less accountable, to voters still largely tied to national territory.

These arguments have force, but many prospects for asserting democratic control remain to be explored. As national legislators become increasingly aware of transgovernmental networks, they can expand their oversight capacities and develop networks of their own. Moreover, transnational NGO networks are already capable of monitoring transgovernmental activity. The problem here, however, as many "new medievalists" recognize, is one of NGO accountability, suggesting the need to develop a transgovernmental capacity to monitor and potentially regulate the exercise of non-governmental power.

Second, transgovernmental networks will actually strengthen the State as the primary actor in the international system. The defining attribute of the State has traditionally been the possession of sovereignty – ideally conceived as absolute power in domestic affairs and autonomy in relations with other States. But as Abram and Antonia Chayes observe, sovereignty is actually "status – the vindication of the State's existence in the international system."[89] More important, they demonstrate that in contemporary international relations, sovereignty has been redefined to mean "membership in the regimes that make up the substance of international life."[90]

Disaggregating the State makes it possible to disaggregate sovereignty as well, helping specific State institutions derive strength and status from participation in a transgovernmental order. Lack of accountability is as likely to flow from a weak or failing government as an excessively strong one; liberal democracy is as threatened by anarchy as by autocracy. Thus in many cases, strengthening the State to help create effective government is the necessary first step toward creating accountable government.

Third, government networks can quite easily link up with their subnational and supranational counterparts, as well as with private actors performing the same functions as government officials. If in fact

[89] Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Regimes* (Cambridge, Mass.: Harvard University Press, 1995), p. 27. [90] *Ibid.*

sub- and supra-national actors prove more accountable than government institutions in a world "going global" and "going local" simultaneously, then these actors can be brought into transgovernmental networks. The EU has pioneered this type of multilevel governance through multilayered networks, particularly in areas such as regional policy and urban environmental policy. Contact with their subnational and supranational counterparts has strengthened the ability and effectiveness of national level officials. The question remains open, however, whether the constituents of these officials feel equally empowered, or whether government networks at all levels are equally alienating.

Concerns about accountability are critical to the success of transgovernmentalism as a distinctive feature of the liberal democratic order. If governmental networks cannot be made and seen to be responsive to voters at least to the same extent as national government officials, they will be deemed illegitimate. On the other hand, legitimacy may be conferred or attained independent of mechanisms of direct accountability – performance may be measured by outcomes as much as process. Courts, and even central banks, can earn the trust and respect of voters without being "accountable" in any direct sense. Accountability is a rein running to the electorate; insulated institutions are designed to counter the voters' changing will and whim. More broadly, changing forms of government may require changing criteria of what makes government good.

V CONCLUSION

The post-Cold-War order is taking shape faster than the capacities of pundits to pin it down. At its core, however, the distinctive set of institutions and practices governing relationships among liberal democracies has proved remarkably robust. Among those practices, although largely overlooked, is an increasingly dense web of relations among distinct government institutions: courts, regulatory agencies, executives, and legislators. These relations are becoming increasingly structured, creating transgovernmental networks that are well equipped to address the regulatory problems posed by a global economy and an increasingly global society.

Transgovernmentalism offers answers to the most important challenges facing US foreign policy: the loss of regulatory power attributable to economic globalization and the concomitant need for fast, flexible, and effective decision-making on a global scale. It also provides the pos-

sibility of penetrating the fast hardening divisions of the post-Cold-War world. The "first," "second," and "third" worlds have given way to liberal democracies versus everyone else; transgovernmentalism looks beyond such labels to the nature and quality of specific government institutions. Expanding government networks can thus help expand the liberal democratic order, albeit slowly and undramatically. Government networks can also help address perceptions of a global "democracy deficit" by substituting national for supranational bureaucrats. On the other hand, offshore networks of any kind – whether public or private – create their own accountability and potential legitimacy problems.

Transgovernmentalism also provides a powerful conceptual and normative alternative to a liberal internationalism that is reaching its limits and a new medievalism that, like the old Marxism, sees the State simply fading away. In practice, however, transgovernmental strategies to achieve a wide range of policy *desiderata*, including the spread of liberal democracy, will coexist with and complement the efforts both of international institutions, non-governmental organizations, and private actors of all kinds. Governments alone, even disaggregated ones, must recognize the limits of their power and find new ways to use their power most effectively. That will often mean harnessing the energies of actors both above and below the traditional State in ways that can permanently change the political identity and organization of that State. The other chapters in this volume detail many of those efforts; the plea here is primarily to count the State back in.

The new medievalists are right to emphasize the dawn of a new era, in which information technology will transform the world. Government networks are a response to that technology, creating the possibility of a genuinely new conception of world order in which networked institutions perform the functions of a world government – legislation, execution, administration, and adjudication – without the form. The challenge is to ensure not only that it is an order anchored by liberal democracies, but that it is a genuinely liberal democratic order.