

## SITUATING LIBERALISM IN TRANSNATIONAL LEGAL SPACE

“... a call to increase ‘collaboration’ between international lawyers and international relations theorists, together with the sociology of the end-of-State (as we know it) and the political enthusiasm about the spread of ‘liberalism,’ constitutes an academic project that cannot but buttress the justification of American hegemony in the world.”

– Martti Koskenniemi, *Image of Law and International Relations*<sup>1</sup>

“By the end of the nineteenth century, German forestry science was hegemonic.”

– James C. Scott, *SEEING LIKE A STATE*<sup>2</sup>

### I. INTRODUCTION

German forestry science sought to bring legibility and rational simplicity to the forest, driven by a commercial and bureaucratic logic to maximize the return of timber. The well-managed and aesthetically ordered forest succeeded in producing prodigious amounts of a single commodity.<sup>3</sup> Over time, however, the scientific management of forests failed miserably, introducing a new word to the vocabulary of German forestry science—*Waldsterben* (forest death).<sup>4</sup> According to Scott, the simplification of the forest disrupted the complex, symbiotic logic of the forest.<sup>5</sup> As it turns out, “[m]onocultures are, as a rule, more fragile and hence more vulnerable to the stress of disease and weather than polycultures are.”<sup>6</sup> The current debate over liberalism

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1. Martti Koskenniemi, *Carl Schmitt, Hans Morgenthau, and the Image of Law and International Relations*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS* 17, 30 (Michael Byers ed., 2000).

2. JAMES C. SCOTT, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* 19 (1998).

3. *Id.* at 13.

4. *Id.* at 20.

5. *Id.*

6. *Id.* at 21.

as an ordering principle of international, or more accurately, transnational legal space, evokes images of large-scale schematization. Dissident voices interested in the preservation of political and legal polycultures are therefore advocating a closer look at liberalism's implications.<sup>7</sup>

The effort to integrate international law and international relations has reached an analytical juncture that for some scholars offers a rich minefield of academic inquiry. For others, the effort signals a disturbing turn in an already normatively tinged enterprise. For example, Ann-Marie Slaughter's suggestion of liberalism as a heuristic device is certainly useful in re-imagining conceptions of international law within a "disaggregated" order of liberal States.<sup>8</sup> However, as the quote by Koskenniemi above illustrates, this call to liberalism can be seen as an endeavor to orient the discursive framework toward further entrenching hegemonic influence.<sup>9</sup> Andrew Hurrell also wonders, "[W]hose interests are being served by which governance mechanisms and whose values protected and promoted" by Slaughter's transnational, technocratic approach.<sup>10</sup> Slaughter herself recognizes that these critiques pose the "sharpest challenge" to her conception of transgovernmental networks,<sup>11</sup> yet she does not offer a satisfying defense.

Why is there such concern over the implications of liberalism? Is there something deeper at work than a concern that 'valid laws' are being eroded? And why is Slaughter unable to offer a lucid and powerful argument against this line of criticism? This note traverses the trail of Koskenniemi's intuition and maps out his *gestalt* reaction more concretely. It explores where the trail leads, what is found, and ultimately, whether what has been found is helpful in better understanding the relationship between international law and politics. As in the Koskenniemi article,<sup>12</sup> it is with a sense of caution that I approach the recourse to liberalism. As Latham states, "[L]ittle seems

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7. See, e.g., Koskenniemi, *supra* note 1; see also Andrew Hurrell, *Conclusion: International Law and the Changing Constitution of International Society*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS* 326, 341 (Michael Byers ed., 2000).

8. See Anne-Marie Slaughter, *Governing the Global Economy through Government Networks*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS* 177, 178 (Michael Byers ed., 2000).

9. See Koskenniemi, *supra* note 1, at 30.

10. Hurrell, *supra* note 7, at 341.

11. Slaughter, *supra* note 8, at 204.

12. See generally Koskenniemi, *supra* note 1.

to be known about how liberalism affects political and social life when viewed from a global perspective.”<sup>13</sup>

This note is a theoretically oriented attempt to track and analyze a particular intellectual discourse occurring in international legal scholarship. In unpacking the contents of liberalism, this note will first determine the character of the setting in which liberalism operates—namely, transnational legal space. It will then examine what liberalism entails, analyzing transgovernmental networks and their relation to liberal order building. I will also look more closely at Koskenniemi’s argument, and suggest ways to situate Koskenniemi’s argument to better understand the underlying issues posed by his critique. I argue that in addition to the proffered argument that liberalism sounds similar to Schmitt’s “space and greater-space,” there is also a sense that a “world of liberal States” has connotations of liberal modernity due to its schematic nature.<sup>14</sup> I will discuss liberal modernity in relation to Slaughter’s suggestion of transnational technocracy by focusing on the role of technocrats in building an order based on principles of liberalism. Finally, I will argue that while a critique such as Koskenniemi’s is illuminating, ultimately, it does not capture sufficiently the complex dynamics of transnational legal processes, international law, and international politics today.

## II. IMAGINING TRANSNATIONAL LEGAL SPACE

International legal scholarship has perhaps outlived its usefulness. Stretched and twisted in so many ways to explain and justify the panoply of “international” occurrences, not only has international law become an unfalsifiable monolith, it has become tiresome. As evidenced by the September 11 terrorist attacks, and the awkward U.S. attempts to identify an enemy, an increasing number of actors and actions are taking place in an ambiguous space that is neither domestic nor international. This increasingly important extra-category is transnational space.

Susanne Hoerber Rudolph states that “until recently, there were no words and metaphors for designating and populating the liminal space that cuts across inside/outside, a space that is neither within the state nor an aspect of the international state system but animates

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13. ROBERT LATHAM, *THE LIBERAL MOMENT: MODERNITY, SECURITY, AND THE MAKING OF THE POSTWAR INTERNATIONAL ORDER* 2 (1997).

14. *See generally* Koskenniemi, *supra* note 1.

both.”<sup>15</sup> As Rudolph suggests, surprisingly little is known about transnational space, especially transnational legal space. Even a cursory look through numerous legal dictionaries reveals nothing between entries for “transmission of shares” and “transsexual.”<sup>16</sup> While in non-legal disciplines, most frequently, for example, at the fringes of political science, the transnational phenomenon has received considerable attention,<sup>17</sup> in legal scholarship, the notion of transnational legal space as a viable and real space is only now starting to take root.

Rudolph observes that “[t]housands of interveners in transnational space have the authority and power to provide an alternative to state activity, not replace it,” and that transnational activity does not suggest the “collapse or demise of states but rather the thinning of their effect, function, and finality.”<sup>18</sup> This important aspect of global life has gone largely unnoticed in international legal scholarship, causing much analytical discord within the field of international law. Carving out and developing a separate transnational legal space, even if only for the sake of heuristic purposes, would provide an extra set of tools with which to analyze global phenomenon, and also save international law from itself by restoring specificity and particularity to the discipline. Of course, international law scholars have spoken about transnational processes, and because processes and actions cannot occur in a vacuum, have tacitly acknowledged the existence of a transnational legal space.<sup>19</sup> However, a systematic study dealing with transnational legal space itself, an examination of what it looks like, how it is shaped, and who shapes it, is lacking.

Legal scholars such as Slaughter are becoming increasingly aware of the importance of this fluid space, and are trying to contribute to its understanding, while at the same time shaping its contours. Slaughter states that transgovernmental networks “offer the world a

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15. Susanne Hoeber Rudolph, *Introduction: Religion, States, and Transnational Civil Society*, in *TRANSNATIONAL RELIGION & FADING STATES* 1, 1 (Susanne Hoeber Rudolph & James Piscatori eds., 1997).

16. *OXFORD DICTIONARY OF LAW* 472 (4th ed. 1997); see also *MERRIAM WEBSTER'S DICTIONARY OF LAW* (1996). *BLACK'S LAW DICTIONARY* contains an entry for “transnational law,” but it is useless, as it defines the term too broadly. *BLACK'S LAW DICTIONARY* 1504 (7th ed. 1999) (“1. General principles of law recognized by civilized nations”).

17. Most of the discussion on transnationalism and transnational actors has been framed in terms of transnational civil society. See Hoeber Rudolph, *supra* note 15, at 9.

18. *Id.* at 15.

19. See, e.g., *supra* note 8; see also *infra* note 27. Also, there is an increasing number of studies dealing with norms and their effects on legalization, which occur largely in transnational legal space. See generally Special Issue, *Legalization and World Politics*, 54 *INT'L ORG.* 385 (2000).

blueprint for the international architecture of the 21st century.”<sup>20</sup> As transnational forces jostle the State and influence State behavior, the grand prize will go to those who can imagine and construct the architecture of transnational space, install the pathways of discourse, and imbue that space with “appropriate” ideological underpinnings.

Taking a geographical approach to the study of law, Nicholas Blomley asks, “[I]f we assume that law is both temporal and spatial, then might not legal geographies—representations of the spaces of [sic] social and political life—be as vital to the legal project as its construction of contingent histories?”<sup>21</sup> Blomley suggests that legal geographies “seek to reconstruct the law-space nexus so as to accord proper recognition to both *and* to affirm the complex interplay of the two, evaluating the manner in which legal practice serves to produce space yet, in turn, is shaped by a sociospatial context.”<sup>22</sup> This interplay, for Blomley and others, is not a neutral process, but one that is politically and ideologically driven. Lefebvre also asserts flatly that “space is political and ideological. It is a product literally filled with ideologies.”<sup>23</sup> If space is always political and ideological, this must also necessarily speak to its architectural process. As space cannot be created or conceived without enclosure, we need to understand where the boundaries are—what is being included and excluded—as well as what the particular enclosure design tells us about the politics of the architect.<sup>24</sup> It is with this spatial and temporal concept of liberalism that I approach my assessment of whether liberalism is capable of ordering transnational and international life.

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20. Ann-Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFFAIRS 183, 197 (1997).

21. NICHOLAS K. BLOMLEY, LAW, SPACE, AND THE GEOGRAPHIES OF POWER 25 (1994).

22. *Id.* at 51.

23. *Id.* at 43 (citing Henri Lefebvre, *Reflections on the Politics of Space*, 8 ANTIPODE 30, 31 (1976)).

24. Currently, transnational legal space can best be described as resembling a disorderly, but not illogical, medieval city. Transnational legal space viewed from above is unintelligible, the antithesis to the modern geometric, or “grid” cities (i.e., Manhattan, Chicago). See SCOTT, *supra* note 2, at 54–57. For an excellent theoretical treatise on architectural concepts and methodology, see ANTHONY C. ANTONIADES, POETICS OF ARCHITECTURE: THEORY OF DESIGN (1992). For a political account of architectural design, see the pioneering work by Ron Robin examining U.S. architectural symbolism abroad. RON ROBIN, ENCLAVES OF AMERICA: THE RHETORIC OF AMERICAN POLITICAL ARCHITECTURE ABROAD, 1900-1965 (1992).

### III. A WORLD OF LIBERAL STATES AND TRANSGOVERNMENTAL NETWORKS

As the primacy of the State in both international relations and international law slowly erodes, scholars and practitioners alike are looking to transnational dynamics to explain international outcomes. Certainly, the State plays an important role as an analytical unit in both international law and international relations, but increasingly, contestation is taking place in transnational space. From Koh's "transnational legal process"<sup>25</sup> to Aceves' "transnational law litigation,"<sup>26</sup> the increasing academic focus on transnational space not only reflects the increasing sophistication of international legal scholarship, but also signals the growing influence and debate over "liberalism" as an appropriate analytical device.<sup>27</sup>

Modern liberalism is characterized by three core assumptions.<sup>28</sup> First, the main actors in international life are rational individuals and private groups who pursue their interests within the constraints of material scarcity and differing values and societal influence.<sup>29</sup> Second, the State and other institutions represent individuals and private

25. Harold Hongju Koh, *The 1994 Roscoe Pound Lecture: Transnational Legal Process*, 75 NEB. L. REV. 181 (1996).

26. William J. Aceves, *Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation*, 41 HARV. INT'L L.J. 129 (2000).

27. Liberalism, in its various guises, has had a long life in the study of international law and politics. Work done by Chayes, Ehrlich, and Lowenfeld, focusing on international legal process, the New Haven School on political science, and Harold Koh's conception of transnational legal process, all share the common thread of looking into the "blackbox" of the State (usually a liberal State) to explain State behavior. ABRAM CHAYES, THOMAS EHRLICH & ANDREAS F. LOWENFELD, *INTERNATIONAL LEGAL PROCESS: MATERIALS FOR AN INTRODUCTORY COURSE* (1968); On the work of the New Haven School, see HAROLD D. LASSWELL & MYRES S. MCDUGAL, *II JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY* (1992); Koh, *supra* note 25. For excellent histories of international legal scholarship and liberalism, see David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 N.Y.U. J. INT'L L. & POL. 335 (2000); Mary Ellen O'Connell, *New International Legal Process*, 93 AM. J. INT'L L. 334 (1999); Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205 (1993).

28. I use "modern liberalism" here to distinguish this iteration from the more established notions of liberalism. Slaughter's version of liberalism is directly related to the neo-Kantian democratic peace theory. For a comprehensive overview of liberalism in its various guises, see MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* (1996); *LIBERALISM AND ITS CRITICS* (Michael J. Sandel ed., 1984). Also see the seminal work by LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION* (1955). Although in a slightly different context, see JOHN RAWLS, *THE LAW OF PEOPLES WITH "THE IDEA OF PUBLIC REASON REVISITED"* (1999).

29. Aceves, *supra* note 26, at 137.

groups and behave according to their constituents' preferences.<sup>30</sup> Third, the configuration and interaction of State preferences determine a State's behavior, implying the *transnational* nature of liberalism.<sup>31</sup> According to Slaughter, "the Liberal emphasis on the social interaction of individuals and groups as the underlying determinants of State behavior recasts transnational law as a primary contributor to world order."<sup>32</sup> In effect, liberalism renders the State as a transparent package of processes and practices, and proposes to examine the "black box" of sovereignty by peering into the State to determine to what extent governments and other institutions represent the preferences of its individuals and groups.<sup>33</sup>

Finally, liberalism is primarily a study of law among liberal States—democracies (liberal States) are presumed to act differently from "non-liberal" States (dictatorships), both domestically and internationally.<sup>34</sup> The relations among liberal States differ from relations between liberal States and non-liberal States. Underlying this difference is the assumption that liberal States hold certain values, practices, and institutions in common, and therefore operate under a similar understanding of domestic and international life.<sup>35</sup>

Building on the core assumptions of liberalism, in *International Law in a World of Liberal States*, Anne-Marie Slaughter conceptualizes a world of liberal States engaged in a dense network of transnational communication, interaction, and understanding.<sup>36</sup> Further refining the definition of liberalism, Slaughter states, "[L]iberal States are States with some form of representative democracy, a market economy based on private property rights, and constitutional protections of civil and political rights."<sup>37</sup> Slaughter hypothesizes the liberal State as a "disaggregated entity composed of its component political institutions."<sup>38</sup> Such components include the legislative, judicial, executive, and administrative institutions of the State. In this liberal

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30. *Id.*

31. *Id.*

32. Slaughter Burley, *supra* note 27, at 230.

33. *See id.* at 207.

34. Aceves, *supra* note 26, at 137.

35. *See generally* Slaughter Burley, *supra* note 27, at 226–35.

36. Anne-Marie Slaughter Burley, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503, 512–14 (1995).

37. *Id.* at 509.

38. *Id.* at 505.

State, “power and responsibility are equally dispersed . . . with multiple centres of authority.”<sup>39</sup>

In Slaughter’s hypothetical world of liberal States, each State institution engages in transnational transactions with other liberal States’ corresponding institutions. So, for example, legislatures among liberal States would interact extensively due to “an awareness of a common or complementary function . . . and a simultaneous recognition of an obligation to defend and promote the interests of a particular subset of individuals and groups in transnational society.”<sup>40</sup> These dense transnational networks, in turn, would constitute a transnational polity that would reflect a shared understanding of prevalent norms and obligations. Therefore, imagining a world of liberal States by disaggregating the State also disaggregates the traditional notion of international law, replacing it with *transnational* legal mechanisms. According to Slaughter, this world of liberal States is characterized by a “world of individual self-regulation facilitated by States; of transnational regulation enacted and implemented by disaggregated political institutions.”<sup>41</sup> Slaughter also stresses that her liberal State ideal-type is not so removed from reality, and that interactions occurring in the transnational frontier reflect just such a move toward voluntary transnational regulation.<sup>42</sup> Joseph Weiler, in his geological view of international law, hypothesizes that we are now in the fourth strata of international law, a level populated by regulatory regimes and self-regulating governance mechanisms.<sup>43</sup>

Taking the example of the International Organisation of Securities Commissioners (IOSCO), the Basle Committee, and the International Association of Insurance Supervisors (IAIS), and their increasing use of Memoranda of Understanding (MOU), Slaughter documents how disaggregated components of liberal States are coming together through transgovernmental networks.<sup>44</sup> Slaughter argues that these transgovernmental regulatory organizations (TROs) have

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39. *Id.* at 521.

40. *Id.* at 535.

41. *Id.* at 538.

42. *Id.* at 514.

43. Weiler states that the first strata was characterized by bilateral treaties, the second strata by multilateral treaties, and the third strata by customs and general principles of international law. In addition, Weiler states that this fourth strata can be characterized as having governance without governments, run by mid-level bureaucrats, and lacking accountability. Joseph Weiler, *Towards a Geology of 20th Century International Law: The Paradox of Law Making and Enforcement*, Speech at Duke Law School (Feb. 12, 2001).

44. Slaughter, *supra* note 8, at 181–92.



an advantage over more rigid forms in exercising “soft power,” and are quite effective.<sup>45</sup> Slaughter continues describing “soft power” as “the power flowing from an ability to convince others that they want what you want rather than an ability to compel them to forgo their preferences by using either threats or rewards.”<sup>46</sup> Discussing the various merits of these transgovernmental networks, Slaughter concludes that “they are the optimal form of organization for the Information Age.”<sup>47</sup>

The combined discussion of TROs with “soft power” hints at a project of order building based on principles of liberalism. It goes beyond hypothesizing about a world of liberal States engaged in transnational networks to a more normatively nuanced advocacy of a liberal world order. Slaughter’s liberal theory is “prescriptive,” and “seeks to provide prescriptions to policy-makers intent on creating effective legal institutions and instruments.”<sup>48</sup> This relationship will be examined further later in the note. Keeping Slaughter’s work in mind, I now turn to examine Koskenniemi’s critique. What latent assumptions operate in Slaughter’s “world of liberal States,” and how, if at all, does the seemingly innocuous concept of TROs relate to Koskenniemi’s charge that Slaughter’s argument is a “justification of American hegemony in the world”?<sup>49</sup>

#### IV. KOSKENNIEMI’S *WELTANSCHAUUNG*

Max Weber states that “every meaningful *value-judgment* about someone else’s *aspirations* must be a criticism from the standpoint of one’s own *Weltanschauung*; it must be a struggle against *another’s* ideals from the standpoint of one’s *own*.”<sup>50</sup> Taking Weber’s insight as a starting point, we need to understand the particular *Weltanschauung* motivating criticism such as Koskenniemi’s in order to situate it

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45. *Id.* at 197.

46. *Id.* Contrast Slaughter’s definition of soft power to Cumings’ definition of hegemony: “Hegemony is signaled when people do what you want them to do, without having to be told or, better yet, asked.” BRUCE CUMINGS, *PARALLAX VISIONS: MAKING SENSE OF AMERICAN-EAST ASIAN RELATIONS AT THE END OF THE CENTURY* 206 (1999). It is striking that Slaughter’s view of soft power is viewed by others as a synonym for hegemony.

47. Slaughter, *supra* note 8, at 204.

48. Jose E. Alvarez, *Do Liberal States Behave Better? A Critique of Slaughter’s Liberal Theory*, 12 EUR. J. INT’L L. 183, 187 (2001).

49. Koskenniemi, *supra* note 1, at 30.

50. Max Weber, “Objectivity” in *Social Science and Social Policy*, in MAX WEBER ON THE METHODOLOGY OF THE SOCIAL SCIENCES 49, 60 (Edward Shils & Henry A. Finch trans., Free Press 1949) (1917).

within a broader ideological or academic context. David Kennedy suggests that, “it would be far more accurate to describe what it means to participate in a school of thought by focusing on a person’s argumentative default position, his or her instinct in arguing about the field’s central questions or basic doctrinal and institutional choices.”<sup>51</sup> As a first step, we need to understand the academic contours of international law, define its discursive parameters, and determine the “political motivations” of its participants.

Like other disciplines, international legal scholarship generates a robust debate as to how the discipline should be characterized, what the discipline should include, and how it can be best analyzed. Some scholars believe that international law should be more autonomous, based on State consent, and more rule-like.<sup>52</sup> Others believe that international law is porous and contextual, and that its study should be more interdisciplinary, incorporating insights from other fields.<sup>53</sup> Therefore, for any given international event, international legal scholars will attempt to explain the outcome using various lenses, each contributing in some way to our understanding of the outcome. But the problem before us is altogether different.

The critique of liberalism in international law scholarship is directed not only at the implications of a mode of analysis, but also at the proponents of liberalism—namely, American scholars engaged in an interdisciplinary study of international law and international relations. The critique is not of liberalism’s shortcomings as an analytical tool in explaining international outcomes, but of liberalism’s political assumptions and motivations, the qualitative nature of liberalism itself—it is the *politics* of an argument that is being contested in the debate over liberalism.

In *Image of Law and International Relations*, Koskenniemi examines Slaughter’s proposed call to liberalism and observes that such an enterprise is not new—Koskenniemi suggests that history is repeating itself when he states, “[W]e have been here before.”<sup>54</sup> More specifically, Koskenniemi sees the story of Schmitt and Morgenthau playing out again, and the disastrous historical experience following Schmitt’s functionalist image of international law. For Koskenniemi, it is Slaughter’s “logic of an argument—the Weimar argument—that

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51. Kennedy, *supra* note 27, at 375.

52. *See generally id.*

53. For an excellent discussion outlining the current state of international legal scholarship, see Kennedy, *supra* note 27.

54. Koskenniemi, *supra* note 1, at 17.

creates the image of law as an instrument for the values (or better, ‘decisions’) of the powerful . . .” that is problematic.<sup>55</sup> For Koskenniemi, Slaughter’s academic pursuit is not one of merely hypothesizing about transnational networks in a world of liberal States, but one that suggests order building along the lines of liberalism.<sup>56</sup> It is the content of liberalism and the implications of that content as an ordering principle in structuring international law that motivates the critique.

Koskenniemi alleges that the American academic enterprise of bringing together international law and international politics is but a “special kind of sociology or morality of the international” that de-formalizes “law into a political or moral instrumentality by the use of general, evaluative clauses (such as ‘democratic’ or ‘equitable,’ for instance).”<sup>57</sup> Koskenniemi seems to be the quintessential positivist international lawyer, with a set view as to what international law should be—unadulterated by sociology and morality, and specific in its explanatory scope. By outlining the history of Morgenthau’s intellectual transformation and chronicling Schmitt’s functionalist view of law, Koskenniemi advocates strongly upholding the validity of international law.<sup>58</sup> International law should retain analytical autonomy from the “sociology and ethics” espoused by international relations scholars.<sup>59</sup> He states that the call for interdisciplinary endeavor presents the international lawyer with an agenda heavily influenced by an “academic intelligentsia that has been thoroughly committed to smoothening the paths of the hegemon.”<sup>60</sup> In a very Weberian way, Koskenniemi sees distinct and compartmentalized roles for international lawyers and political scientists; “[i]nterdisciplinarity is not intended to transform lawyers into sociologists or moral theorists.”<sup>61</sup> Quite contrary to their *Beruf*, lawyers within Slaughter’s paradigm would amount to nothing more than henchmen for the hegemon.

The danger of Slaughter’s work in Koskenniemi’s mind is that by using a normatively loaded concept such as liberalism to re-imagine international law, international law is ultimately and fundamentally

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55. *Id.* at 30.

56. *See* Slaughter, *supra* note 36, at 514–16.

57. Koskenniemi, *supra* note 1, at 31–32.

58. *See generally id.*

59. *Id.* at 33. Koskenniemi sees Morgenthau’s abandonment of international law as logical, because Morgenthau believed that international law should retain validity and be free from instrumental uses. *See id.*

60. *Id.* at 34.

61. *Id.* at 33.

redeployed to achieve the ends of the hegemon. This not only disposes with valid law, but it strips international law of its independent meaning. Koskenniemi suggests that international law should be an equalizing force available to all entities and not the instrument of power solely available to the hegemon. The exclusive nature of liberalism and its world of liberal States marginalizes, and worse yet, treats as absent, those opposed to liberal views. Kennedy also wonders whether enthusiasm about a “disaggregation of the state and the empowerment of diverse actors in an international ‘civil society’ without asking who will win and who will lose by such an arrangement” is prudent.<sup>62</sup>

However, Kennedy also asserts that it is wrong to think that, “American international lawyers are somehow . . . implicated in a broad American plot of domination.”<sup>63</sup> Those advocating a disaggregation of the State in favor of a liberal agenda are also “strident opponents of American adventurism,” and are “themselves critical of American pop-cultural dominance, firmly empathetic to the developing world, supportive of the ethic of human rights everywhere, yet sensitive to the difficulties of cross-cultural understanding and dialog.”<sup>64</sup> Kennedy suggests that there is no conscious design by the proponents of liberalism to entrench and enhance hegemonic influence—the fact that liberalism is a quintessentially American idea should not automatically associate it with a hidden political agenda of hegemonic dominance.

Even if we accept Kennedy’s assessment, Koskenniemi’s critique cannot be taken lightly. Koskenniemi’s greatest contribution is in asking us to pause for a moment before innocently accepting the prescriptive aspects of liberalism. Koskenniemi offers a sober warning against Slaughter’s “millenist, triumphalist, upbeat” liberal theory.<sup>65</sup> But as I will argue, this is where the utility of Koskenniemi’s critique ends; it does not indicate where we should go from here, and whether in fact we can go anywhere. Also, Koskenniemi does not offer an explanation as to *how* transgovernmental governance furthers the hegemonic interest—his critique is limited to the “logic of an argument.” In the next section, I will attempt to further contextualize Koskenniemi’s argument and focus on the processes whereby transgovernmental networks serve the hegemonic interest.

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62. Kennedy, *supra* note 27, at 412.

63. *Id.* at 454.

64. *Id.*

65. See Alvarez, *supra* note 48, at 189.

## V. LIBERALISM, LIBERAL MODERNITY, AND HEGEMONY

In large part, Koskenniemi's critique of Slaughter's work is directed at her revitalized call for interdisciplinary scholarship. This does not, or at the very least, should not, justify Koskenniemi's rather harsh criticism of Slaughter's work.<sup>66</sup> There must be something in liberalism's content, and the prospects of that content being superimposed onto the world order, that is deeply problematic as well. This "something" is liberal modernity, and it is reflected in Slaughter's writings on transgovernmental networks.

Slaughter conceptualizes transgovernmental networks as part of the transnational process arising from a cluster of disaggregated, liberal States.<sup>67</sup> While Slaughter derives transgovernmental networks from the notion of liberalism, these networks and liberalism itself can be understood as constitutive elements of liberal modernity. What is meant by liberal modernity?

Much of international relations theory is concerned with power relations between nations, especially hegemonic power at the systemic level. While theories such as realism and neoliberalism may explain international dynamics and outcomes at a topical level in select cases, it is of little help in examining the *nature* of hegemonic power, its *modus operandi*, and the motive force behind its behavior. These are historical questions that cannot be adequately explained by acontextual and ahistorical theories.

Departing from the traditional lens of international relations, Robert Latham, in *The Liberal Moment*, offers a meta-schematic explanatory vehicle that effectively captures the tenuous, heterogeneous, and transnational logic of U.S. hegemony.<sup>68</sup> Latham argues that the U.S. has pursued its international order-building project along the broad framework of liberalism.<sup>69</sup> For Latham, liberalism as a mechanism of order building is not a coherent or consistent set of principles and doctrines that States draw upon at historical moments, but one in which the principles and doctrines are contested over time and space.<sup>70</sup> Yet even with its tenuous form, liberal order building is char-

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66. Koskenniemi goes so far as to suggest that there are parallels between Slaughter's work and the notion of *Grossraum* in Schmitt's work. See Koskenniemi, *supra* note 1, at 34.

67. See *supra* text accompanying note 44.

68. LATHAM, *supra* note 13, at 36.

69. *Id.* at 4.

70. *Id.*

acterized by a certain trajectory toward ideals of liberal modernity.<sup>71</sup> Liberal modernity refers to “the *patterning* of . . . social and political life through a broad body of doctrines and practices,” and the “relations between polities and other social actors in the context of international trade and politics; the movement of people; and the *exchange of ideas* and identities (e.g., cosmopolitanism).”<sup>72</sup> By Latham’s definition, liberal modernity is an explicitly spatial and temporal concept that incorporates into its corpus a strong sense of historicity and architectural quality.

According to Latham, liberal modernity, as an ordering principle, originated in the aftermath of World War II, what Latham calls the “liberal moment.”<sup>73</sup> While ideas of liberalism circulated in the West and elsewhere in a nebulous form, it was the post-World War II period that gave shape and name to liberal modernity as a global ordering principle.<sup>74</sup> With the rise of the U.S. as the global hegemon, with liberal modernity its ordering vision, Latham astutely points to a less overt realm of hegemonic power. Latham states that “a hegemon must be able to shape the practices and ideas in the international realm, which is an ability that is mostly dependent on the effective presence of institutions, norms, and material resources.”<sup>75</sup>

Building on Latham’s conception of liberal modernity and hegemony, John Ikenberry and Charles Kupchan state that “the ability to generate shared beliefs in the acceptability or legitimacy of a particular international order—that is, the ability to forge a consensus among national elites on the normative underpinnings of order—is an important if elusive dimension of hegemonic power.”<sup>76</sup> Ikenberry and Kupchan contend that hegemonic power acquires a new dimension when leaders and political elites in secondary States buy into and internalize the norms articulated by the hegemon and subsequently pursue policies consistent with the hegemon’s conception of international order. In socializing elites in secondary States to reflect the in-

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71. *See id.* at 16. For a work arguing along similar lines, see FRANK NINKOVICH, *MODERNITY AND POWER: A HISTORY OF THE DOMINO THEORY IN THE TWENTIETH CENTURY* (1994). Empirically verifying a project of liberal order building is notoriously difficult. However, the field of international history and diplomatic history have contributed significantly in outlining the liberal order-building project from the end of World War II.

72. LATHAM, *supra* note 13, at 15–16 (emphasis added).

73. *Id.* at 42–48.

74. *See id.*

75. *Id.* at 62.

76. G. John Ikenberry & Charles A. Kupchan, *Socialization and Hegemonic Power*, 44 *INT’L ORG.* 283, 289 (1990).

terests of the hegemon, the hegemonic power relies on “normative persuasion,” a process that entails “ideological persuasion and transnational learning through various forms of direct contact with elites, including contact via diplomatic channels, cultural exchanges, and foreign study.”<sup>77</sup> The authors state that elites in secondary States embrace the norms and practices constructed by the hegemon for a variety of reasons, such as restoring domestic legitimacy and validating policies that have been adopted due to hegemonic coercion or institutional restructuring.<sup>78</sup> The processes described are in line with the phenomenon of norm entrepreneurs and norm cascades explained by Finnemore and Sikkink, but with a power twist.<sup>79</sup>

Finnemore and Sikkink examine various human rights norms and their effect on policy and rhetoric. Lutz and Sikkink conclude that norm cascades are “collections of norm-affirming events,” and that these are “discursive events.”<sup>80</sup> Koh describes this dynamic as “transnational legal process.”<sup>81</sup> Koh states that transnational legal processes occur in three phases: “interaction, interpretation, and internalization.”<sup>82</sup> The six key agents throughout these three phases are: (1) transnational norm entrepreneurs; (2) governmental norm sponsors; (3) transnational issue networks; (4) interpretive communities and law-declaring fora; (5) bureaucratic compliance procedures; and (6) issue linkages.<sup>83</sup> Koh’s formulation of transnational legal process is in many ways more amenable to describing processes at the transnational level than Finnemore and Sikkink’s conception of norm cascades because it avoids the teleological pitfalls associated with a unidirectional view of norm flows.

The transnational processes of information sharing, socialization, and normative persuasion also occur in what Peter Haas calls “epistemic communities.”<sup>84</sup> An epistemic community is “a network of pro-

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77. *Id.* at 290.

78. *See id.* at 293.

79. *See generally* Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT’L ORG. 887 (1998).

80. Ellen L. Lutz & Kathryn Sikkink, *International Human Rights Law and Practice in Latin America*, 54 INT’L ORG. 633, 655 (2000).

81. Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 624 (1998).

82. *Id.* at 626.

83. *Id.* at 647–65.

84. Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT’L ORG. 1, 3 (1992). For an in-depth theoretical treatment of the socialization processes described here, see Jutta Brunnee & Stephen J. Toope, *International Law and Con-*

professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area.”<sup>85</sup> These knowledge-based transnational networks and the knowledge-elite that constitute epistemic communities are bound by a common episteme that carries with it its own discursive practice, shared methods of acquiring knowledge, and shared understandings of problems within the discipline. It is within these epistemic communities that practices and ideas are promulgated, contested, and reformulated. Koh states that as actors in these transnational epistemic communities interact, “they create patterns of behavior and generate norms of external conduct which they in turn internalize.”<sup>86</sup> For Koh, these epistemic communities and their shared norms are an essential key in understanding compliance.<sup>87</sup>

It is with the above propositions in mind that we can properly situate Slaughter’s project and fully understand Koskenniemi’s concern. Transgovernmental networks can be viewed as the means by which hegemonic socialization occurs. TROs and other such networks are the epistemic communities facilitating normative and ideological persuasion in transnational space. We should keep in mind, however, that while liberal modernity is founded on ideals of liberalism, it has heterogeneous elements and plenty of room for the “exchange of ideas and identities.”<sup>88</sup> Also, the above discussion is confined to the realm of theory—whether hegemonic socialization along the lines of liberal modernity occurs through epistemic communities has yet to be borne out empirically and historically. In the next section I will look more closely at the carriers and agents who supposedly disseminate hegemonic norms—the technocrats—and examine whether hegemonic socialization does indeed occur in transgovernmental networks.

## VI. TECHNOCRATS AND LIBERAL ORDER BUILDING

Ikenberry and Kupchan state that “although normative claims articulated by the hegemon may take root in the public at large, it is ruling elites that must embrace these claims if they are to have a long-

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*structivism: Elements of an Interactional Theory of International Law*, 39 COLUM. J. TRANSNAT’L L. 19 (2000).

85. Haas, *supra* note 84, at 3.

86. Koh, *supra* note 25, at 204.

87. *See id.*

88. LATHAM, *supra* note 13, at 15.



term and consequential impact on the behavior of states.”<sup>89</sup> To better understand transgovernmental networks and their implication for liberal order building, we need to identify the actors and elites engineering and facilitating the integrative process. A particularly salient group that emerges is the modern phenomenon of technocrats.<sup>90</sup>

The rise of an international technocratic class is an interesting phenomenon because technocrats inhabit two somewhat contradictory spaces—they are instrumental actors for formulating policies of the State, yet they are firmly embedded in a larger, transnational “epistemic community.”<sup>91</sup> This *doppelgänger* nature of technocrats has complex implications for the traditional role of the State to formulate policies. While States, especially developing countries, must rely on technocrats to implement feasible policies, the policies formulated by technocrats are conditioned and informed by a larger, common transnational episteme generated from economic, legal, and political centers such as the United States. How powerful or hegemonic is this episteme? What are some of the tensions caused by the clash of transnational technocratic epistemes and the traditional authority of the State to formulate policies? What role have technocrats, the central actors of Slaughter’s transgovernmental networks, played in the hegemonic agenda of building a liberal order?

Technocrats occupy positions throughout major international legal institutions and international financial institutions (IFIs). Looking at technocracy in developing countries, Joan Nelson states, “[B]y the 1980s, in almost all developing countries some senior economic officials (and/or influential private economists) had spent some time as staff members of the IMF, the World Bank, or the regional international development banks.”<sup>92</sup> This also seems to hold true for international legal institutions, as legal expertise becomes increasingly important. In the economic realm, the technocrats’ experiences in these IFIs are crucial for socializing the technocrats in the neoliberal rhetoric of open economics.<sup>93</sup> According to Nelson, when technocrats re-

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89. Ikenberry & Kupchan, *supra* note 76, at 293.

90. There is a substantial body of literature on technocrats and technocracy, usually in the developing country context (e.g., the “Chicago Boys” of Chile, the “Berkeley Mafia” of Indonesia). See generally JORGE DOMINGUEZ, *TECHNOPOLS: FREEING POLITICS AND MARKETS IN LATIN AMERICA IN THE 1990S* (1997); GUILLERMO O’DONNELL, *MODERNIZATION AND BUREAUCRATIC AUTHORITARIANISM* (1973).

91. Haas, *supra* note 84, at 1.

92. Joan Nelson, in *ECONOMIC CRISIS AND POLICY CHOICE: THE POLITICS OF ADJUSTMENT IN THE THIRD WORLD* 330–31 (Joan Nelson ed., 1990).

93. *Id.* at 331.

turn to their home countries, they “interpret[ed] external pressures and attempt[ed] to persuade their colleagues in domestic decision-making circles, and they interpret[ed] internal constraints and attempt[ed] to persuade their former associates in dialogue with external agencies.”<sup>94</sup> Therefore, technocrats socialized in international settings are likely to be sympathetic and receptive toward neoliberal ideals. In developing countries with scarce human capital, these internationally connected technocrats serve as interlocutors of international norms by attempting to align national political economic sentiments with the conditionality imposed by the various IFIs. As legal regimes usually accommodate economic and financial exigencies, one would expect hegemonic socialization occurring in legal circles as well, especially those bearing a relation to regulatory areas.

To understand the importance and influence of technocratic groups within the State, and to see the inter-linkages with transgovernmental networks, we need to briefly examine the multiple purposes that technocratic groups serve for the State. First, political leaders in developing countries often employ technocrats because politicians do not have the specialized knowledge to understand the increasingly technical nature of policy-making. For example, President Rawlings of Ghana, faced with the pressing need to attract capital from international lending institutions, once stated, “I don’t understand all these theories, all this economic blah, blah, blah.”<sup>95</sup> Second, political leaders may wish to employ technocrats to “technify” features of political life.<sup>96</sup> Third, and most important for this study, States opt for technocrats to deal with international affairs and policy.<sup>97</sup> For example, in developing countries with no visible stan-

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94. *Id.*

95. Thomas Callaghy, *Lost Between State and Market: The Politics of Economic Adjustment in Ghana, Zambia, and Nigeria*, in *ECONOMIC CRISIS AND POLICY CHOICE: THE POLITICS OF ADJUSTMENT IN THE THIRD WORLD* 257, 275 (Joan Nelson ed., 1990).

96. This is particularly true for certain developing countries, where technifying political and economic issues mute the possibility of ideological contests and destabilizing challenges. There is a large body of literature pertaining to technocracy and scientific governance. The most famous example would be Max Weber’s work on Bureaucracy. See *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 196–245 (H.H. Gerth & C. Wright Mills eds., 1946); see also MICHEL CROZIER, *THE BUREAUCRATIC PHENOMENON* (1963). For an account on the rise of the rational State in the West, see BERNARD SILBERMAN, *CAGES OF REASON: THE RISE OF THE RATIONAL STATE IN FRANCE, JAPAN, THE UNITED STATES, AND GREAT BRITAIN* (1993).

97. See generally Ikenberry & Kupchan, *supra* note 76, at 294–313. For a discussion on regimes in transition, see STEPHEN HAGGARD & ROBERT R. KAUFMAN, *THE POLITICAL ECONOMY OF DEMOCRATIC TRANSITIONS* (1995) (arguing that most governments undergoing a change toward democratic governance tend to employ technocrats to deal with international and foreign policy issues).

dard of a national credit rating, the largely Western trained technocrats provide much needed credibility to entice international lenders and ameliorate investor fears. As long as IFIs are guaranteed that domestic technocrats will oversee the implementation of macroeconomic policies, IFIs seem content to make conditional loans.<sup>98</sup> Technocrats serve as the primary policy coordination point for external agencies, as well as mediators between the State and international institutions. They also serve as a buffer zone necessary for maintaining sovereign integrity. For example, in countries with a thin or non-existent technocratic base such as Zambia, international institutions such as the World Bank and IMF have exerted greater influence, significantly undermining the interests of the political regime.<sup>99</sup> According to Callaghy, a Zambian official remarked that “The IMF and World Bank have become the Ministry of Finance of Zambia.”<sup>100</sup>

Given the important role technocrats play in many developing countries (and developed countries for that matter), the notion that the cornerstone of technocracy, the technocratic episteme, can be influenced by hegemonic norms is an important contention that seems to vindicate Koskenniemi’s intuition. Slaughter herself argues that transgovernmental networks, within which technocrats play a prominent role, are “particularly effective at penetrating the face of national sovereignty and defusing opposition based on the ‘imposition’ of foreign or international rules and institutions.”<sup>101</sup> It seems that technocrats, as the instrumental actors involved in the transgovernmental networking process, have the potential to serve as the nodal points disseminating the hegemon’s norms and ideas into the domestic realm, hence confirming Koskenniemi’s fear of a “liberal millenarism.”<sup>102</sup>

Technocrats engage in discursive practices in transnational space and often are the harbingers of change for many States. It is also true that technocrats play a vital role in liberalization of economies and

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98. Of course, abuse of technocratic groups to attract capital for personal or party interests also occurs in some instances. According to Miles Kahler, Mobutu of Zaire would “frequently appoint trusted technocrats to strategic positions in order to attract more lending, and then abruptly remove them after additional financing had been committed.” Miles Kahler, *External Influence, Conditionality, and the Politics of Adjustment*, in *POLITICS OF ECONOMIC ADJUSTMENT: INTERNATIONAL CONSTRAINTS, DISTRIBUTIVE CONFLICTS, AND THE STATE* 89, 128 (Stephen Haggard & Robert R. Kaufman eds., 1992).

99. Callaghy, *supra* note 95, at 292.

100. *Id.*

101. Slaughter, *supra* note 8, at 201.

102. Koskenniemi, *supra* note 1, at 33.

markets. Similarly, legal technocrats study, propose, and adopt legal doctrines and norms developed in the core countries. Again, because technocrats occupy multiple political spaces—transnational and domestic—they are especially effective at disseminating the hegemonic norms and values. However, a closer look at technocrats and technocratic behavior in peripheral States show a remarkably different attitude, reflected in policy and rhetoric.<sup>103</sup> For example, some developing countries' economic and legal development illustrates the *interactive* and tenuous dimension of liberal order building—a process in which the hegemonic vision is sometimes heeded, sometimes refracted, and sometimes subverted altogether.<sup>104</sup> It seems that the dynamics occurring in the marketplace of ideas is vastly complex, and not amenable to teleological or unidirectional causal theories.

## VII. EVALUATION

Technocrats and transnational networking can only carry out the hegemon's vision of a world order based on principles of liberalism if the episteme undergirding the epistemic community is completely dominated by the hegemon. Seeing transgovernmental networks as a mechanism for entrenching hegemonic power assumes that the dictates of the hegemon are accepted uniformly and are uncontested by technocrats and technocratic agencies in transnational space. In short, there must be complete socialization in the hegemonic norms and practices with a unilateral flow of ideas and ideals. This is hardly accurate. For example, Toope, in discussing legal norms within various regimes, states:

Law is . . . neither pure substance nor pure process, but a continuing interplay of legitimate means and legitimate ends. So the common meanings which arise in regimes do not depend upon one overarching philosophical goal such as the triumph of liberalism, but upon an incremental growth of *shared* perceptions fostered by

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103. I will not go too deeply into this subject. Briefly, Western trained technocrats, upon returning home, usually “refract” the episteme by interpreting doctrines and practices to suit local political-economic needs. For an interesting study of the political role technocrats play in developing countries, see DOMINGUEZ, *supra* note 90.

104. For a study of this dynamic, see JUNG-EN WOO, *RACE TO THE SWIFT: STATE AND FINANCE IN KOREAN INDUSTRIALIZATION* (1991) (arguing that Korea's economic development succeeded in part by subverting economic models urged by the United States); *see also* MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 5 (1998) (stating that transnational networks are characterized by “intersubjective understandings,” and that within these networks there is much contestation as to those intersubjective understandings).

participation in process of norm evolution which are deemed to be fair and open.<sup>105</sup>

In contrast to Koskenniemi's view that legal normativity is threatening and imperialistic, Toope takes the view that for norms to be viewed as legitimate in transnational and international space, they need to be equitable and just. Toope highlights that even within the normative space, the very logic of normative persuasion, requiring validity and legitimacy, supplies a mechanism of checks and balances. For Finnemore and Toope, obligation is intrinsically related to the legitimacy of law.<sup>106</sup> The two authors write, "[M]uch of what legitimates law and distinguishes it from other forms of normativity are the processes by which it is created and applied—adherence to legal process values, the ability of actors to participate and feel their influence, and the use of legal forms of reasoning."<sup>107</sup> Along similar lines, Keohane and Nye state that while there are many ideas and much information generated by the hegemon, their "comprehension and acceptance depends on how different the assumptions, attitudes, and expectations of different groups of people are."<sup>108</sup> The processes of validation and legitimization presuppose a vibrant transnational civil society, a space in which there is an effective and equitable distribution of ideas and communication.

James Scott states that one of the main features common to all failed utopian schemes is a prostrate civil society unable to challenge the bureaucratic elite's high-modernist ideology.<sup>109</sup> Bruce Cumings observes that the State and civil society "coexist in a curious zero-sum fashion: the less the civil society functions as it ought to, the more the state must grow in power to remedy this defect."<sup>110</sup> The fear of a prostrate civil society or a general sense of anomie, at least in the increasingly complex transnational arena, is absent. From the innumerable NGOs to cyber-communities, there is a dense and diverse network of individuals and groups espousing views, and effectively communicating those views. In this space, actors do "try to challenge the validity claims inherent in any causal or normative statement,"

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105. Stephen J. Toope, *Emerging Patterns of Governance and International Law*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS* 91, 98 (Michael Byers ed., 2000) (emphasis added).

106. Martha Finnemore & Stephen J. Toope, *Alternatives to "Legalization": Richer Views of Law and Politics*, 55 *INT'L ORG.* 743, 749 (2001).

107. *Id.* at 750.

108. ROBERT O. KEOHANE & JOSEPH S. NYE, *POWER AND INTERDEPENDENCE* 248 (3d ed. 2001).

109. SCOTT, *supra* note 2, at 5.

110. CUMINGS, *supra* note 46, at 106.

and do “seek a communicative consensus about their understanding of a situation as well as justifications for the principles and norms guiding their action.”<sup>111</sup> While Risse’s contention that power may dictate who has “legitimate access to discourse” and determine what constitutes a “good argument”<sup>112</sup> may accurately describe communicative action, the sheer density of transnational space makes this communicative arena perhaps the least susceptible to power influences. The attempt to constrain this vibrant community with the structural imperatives of liberalism not only fails, but as a theoretical matter, is profoundly disturbing. In all fairness, those espousing liberalism as a governance network only advocate such connections among liberal States. However, this characterization is misleading, as most States would fall under some criteria of a liberal State, and only a handful would entirely satisfy the narrow criteria posited by proponents of liberalism.

In the economic arena where normative consensus might seem the strongest (in favor of the hegemon), there is a multi-directional flow of influence. Research on whether technocrats in the economic sphere buy into the dominant episteme of market capitalism and neo-classical economics yields similar results: more often than not, developing country technocrats trained in the core countries often refract the episteme to achieve success in the global market.<sup>113</sup> In turn, these development strategies are examined by technocrats in core countries such as the U.S., and are integrated into a more comprehensive understanding of economic principles.<sup>114</sup> As Latham would have it, even the macro-historical framework of liberal modernity is shaped by divergent, heterogeneous, and fluid practices, norms, and doctrines.

At this point, it is important to consider a powerful structural argument. While the content of discourse and transnational learning may be heterogeneous and tenuous, some would say that the *form* in which the discursive practices play out may be largely dictated by the hegemon. Perhaps, as Risse points out, the rules of discourse may have been set during the birth of the discursive space.<sup>115</sup> As Keohane

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111. Thomas Risse, “*Let’s Argue!*”: *Communicative Action in World Politics*, 54 INT’L ORG. 1, 7 (2000).

112. *Id.* at 16.

113. *See generally* WOO, *supra* note 104.

114. South Korea’s Export Oriented Industrialization (EOI) model is a prime example. Economic technocrats trained in the U.S., with a thorough understanding of the epistemic underpinnings of their discipline, embarked on a “Schumpeterian” development plan that proved to be hugely successful. *See* WOO, *supra* note 104, at 81.

115. *See* Risse, *supra* note 111, at 16–17.

and Nye state, while “America did not create globalism . . . it shaped the form that contemporary globalism has taken.”<sup>116</sup> And for a person such as Dean Acheson, one of the major post-World War II political and economic architects, to be able to say that he was “Present at the Creation”<sup>117</sup> suggests that liberalism had triumphed a long time ago—Acheson’s powerful title suggests that the particular framework in which communication and interaction occurs was not by happenstance, but a product of deliberate and consciously designed enclosure. Hegemonic power perhaps lies in this subtle distinction—the ability to direct the way in which discussions of norms, practices, and doctrines will take place; indeed mandating that there *will* be a discussion of norms and other instruments of persuasion and influence.<sup>118</sup> Latham, in describing liberal modernity, states that the hegemon’s constitutive presence is much the way that “walls, floors, and ceilings constitute the space of a house, but may not determine the dwelling’s purpose, decoration, or the daily pleasure and pain that occurs inside that space.”<sup>119</sup> If we accept this view on its own terms, this macro-level description of liberal order building would be more realistic and helpful in understanding the nature of hegemonic influence today. It accommodates aspects of contingency and uncertainty of processes at the sub-level, such as the back and forth of norms and practices within transnational technocratic space, while still asserting the presence of a greater order. So while an argument such as Edward Kwakwa’s, that most developing countries are “rule-takers” or “paradigm-receiving,” is well taken, within these paradigms there can be contention and norm struggles—this at the very least points to a participatory image of international life.<sup>120</sup> But, if liberalism had already triumphed, why should dissident voices be worried about the implications of liberalism in its current iteration? It would seem that studies of liberalism, such as Slaughter’s, would only be a natural pro-

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116. See KEOHANE & NYE, *supra* note 108, at 252.

117. DEAN ACHESON, *PRESENT AT THE CREATION: MY YEARS IN THE STATE DEPARTMENT* (1969). Speeches given by Dean Acheson during the Truman years also point to a conscious effort to construct the international political and economic macro-framework according to liberal notions. See *Draft Outline Notes for Acheson’s Speech Before the Delta Council, May 8, 1947, drafted April 23, 1947, available at [http://www.oll.temple.edu/hist249/course/documents/ach\\_marsh\\_plan1.htm](http://www.oll.temple.edu/hist249/course/documents/ach_marsh_plan1.htm)* (last visited Apr. 26, 2002); and *Dean Acheson’s Speech on the Proposed North Atlantic Treaty, March 18, 1949, available at <http://www.trumanlibrary.org/nato/doc5.htm>* (last visited Apr. 26, 2002).

118. These points are implied by Thomas Risse. See Risse, *supra* note 111.

119. LATHAM, *supra* note 13, at 62.

120. See Edward Kwakwa, *Regulating the International Economy: What Role for the State?*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS* 227, 232 (Michael Byers ed., 2000).

gression from an already established macro-framework of liberalism as envisioned by the likes of Acheson, Truman, and Marshall. Furthermore, a Koskenniemi-esque critique of transgovernmental networks as hailing the triumph of liberalism would be epiphenomenal and moot. However, considering the flip-side of this line of reasoning, one has to wonder why proponents of liberalism are making such an aggressive push to influence transnational legal space if liberalism has already won—are they unsure of American hegemony in the world? This takes us to a really interesting question. Is America a hegemon at all?

There is no doubt that the United States currently possesses the greatest military and economic resources in the world. But American hegemony, beyond these physical attributes, is uncertain. Perhaps it is useful to *assume* American hegemony for academic purposes; a closer look at “American hegemony,” however, yields confusion as to both what “American” would mean, and what “hegemony” would mean.<sup>121</sup> Also, beyond the physical description of liberalism, which is at best an ideal type, it is difficult to ascertain what the substance or effects of American liberalism looks like.<sup>122</sup> *A priori*, it is unclear what liberalism entails domestically, and there is further confusion when this nebulous, albeit intuitive, ideal is projected outwards. Even the notion of civil society within the United States is up for grabs. Cumings, in analyzing MacIntyre and Unger, states that Americans “cannot form an intersubjective political community (Habermas’s ideal) because not only do we not know what its purpose would be, but we have already agreed not to raise this question.”<sup>123</sup> A thorough examination of this question is beyond the scope of this note. However, I raise the issue of the skepticism toward American hegemony and the triumph of liberalism in order to bring validity to the current debate on liberalism. For the current debate to be meaningful, we cannot accept as a given the primacy of American hegemony or the existence of a liberal macro-framework. In the end, Hurrell may be correct when he states that “the relevant expertise and resources pos-

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121. Alvarez provides an excellent synopsis of the various criticisms against Slaughter’s conception of liberalism. See Alvarez, *supra* note 48, at 192–94 (arguing that the U.S. approach to treaty obligations is far from behavior expected from a liberal State).

122. See generally SANDEL, DEMOCRACY’S DISCONTENT, *supra* note 28 (stating that there is a sense of disempowerment arising from the conflict between the liberal self-image and the actual social and economic governance schemes).

123. CUMINGS, *supra* note 46, at 107.



essed by the United States increases the likelihood that its norms will win out,” but that remains to be seen.<sup>124</sup>

### VIII. CONCLUSION

Using Koskenniemi’s controversial critique against the project of rampant liberalism as a starting point, I have tried to unearth the implications of liberalism as an ordering principle. I have attempted to describe the transnational legal space in which liberalism seeks to govern, and to situate Koskenniemi’s critique within that increasingly important space. I have also examined whether transgovernmental networks and the mechanisms of liberalism had a uniform effect of socializing peripheral States in the norms espoused by the hegemon. By looking at technocrats as a possible indicator of socialization dynamics, I concluded that such unilateral influence does not take place and that the transnational discursive space is characterized by a sense of tenuousness and multiple possibilities.

Undoubtedly, Koskenniemi’s critique of Slaughter’s notion of constructing law under the auspices of liberalism is a valuable one. It is true that in a broad sense, the U.S. has attempted to project onto the international political, legal, and economic space a greater framework guided by liberal principles. But a look at transnational space suggests that the success or triumph of the U.S. liberal vision is by no means a self-evident reality. Within transnational legal space, where transgovernmental networks and other socialization processes occur, there is much room for disagreement, multi-directional flows of ideas and norms, and robust participation. This all suggests that American hegemony, and liberalism itself, is not a given, but are concepts and ideals, whose legitimacy and validity is constantly challenged.

Koskenniemi argues that, “[W]e have been here before.”<sup>125</sup> But history does not repeat itself. In this iteration of what Koskenniemi sees as Weimar intellectualism, the backdrop is not the end of a devastating war, but a phenomenally complex and variegated world with a dense network of individuals, institutions, and States—a world where liberalism, fascism, or any other governance ideal will be vigorously contested.

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124. Hurrell, *supra* note 7, at 341.

125. Koskenniemi, *supra* note 1, at 17.

Don Suh