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NEOLIBERALISM, COLONIALISM AND INTERNATIONAL GOVERNANCE: DECENTERING THE INTERNATIONAL LAW OF GOVERNMENTAL LEGITIMACY

*James Thuo Gathii**

GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW. By *Brad R. Roth.* New York: Oxford University Press. 1999. Pp. xxx, 439. $95.

> [In the last few years, a new politics of difference is emerging whose distinctive features are] to trash the monolithic and homogeneous in the name of diversity, multiplicity and heterogeneity; to reject the abstract, general and universal in light of the concrete, specific and particular; and to historicize, contextualize and pluralize by highlighting the contingent, provisional, variable, tentative, shifting and changing.[1]
>
> Today, the struggle between competing universalisms (liberal democracy v. revolutionary-democratic dictatorship) — more or less resolved, at least for the present — seems set to be succeeded by struggle between universalism and various particularisms (liberal democracy v. assertions of cultural self-determination, ethnic grievance, and exceptional circumstances). [p. 365]

INTRODUCTION

Brad R. Roth's *Governmental Illegitimacy in International Law*[2] is a neoconservative realist response to liberal internationalists (or universalists). As a critique, the book unsurprisingly legitimizes the subject of its attack: liberal internationalism. That is so since in their opposition to each other, liberal internationalists and neoconservative realists fall within the same discursive formation — a Euro-American

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1. Cornel West, *The New Cultural Politics of Difference*, *in* THE IDENTITY IN QUESTION 147 (John Rajchman ed., 1995).

2. Brad Roth is Assistant Professor of Legal Studies and Political Science, Wayne State University.

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hegemony of thinking, writing, critiquing, engaging, producing, and practicing international law.

This Review is an antihegemonic critique. It seeks to decenter this Euro-American opposition between liberal internationalism and neoconservative realism that has characterized the study of international law, especially in the post-Cold War period. This Review aims to demonstrate the limitations of the commitments of liberal internationalism (to a universal culture of liberal democracy and free markets), on the one hand, and of neoconservatism (to maintain the integrity of sovereign states that have effective control of their populations by restricting intervention in their internal affairs), on the other hand, as the only alternatives to understanding and producing knowledge about legitimacy in international law.

My antihegemonic critique could very well be referred to as constituting a *third-world approach.* Third-world because it is neither American nor European, and because it is intended as a counterweight to the overwhelming dominance of American and European academia in the production of knowledge about international law. This third-world approach thus not only disrupts the hegemonic approaches to the study of international law, but also partly embodies the political goals of the third world, as I see them. It is thus as legal as it is political.[3]

This Review is inspired by scholars engaged in Third World Approaches to International Law (TWAIL) who, in the last fifty or so years, have represented a variety of shifting positions within the antihegemonic critique of Euro-American approaches.[4] In reclaiming the discursive energy of these engagements with international law, third-world scholarship has harnessed the critical insights from a variety of disciplines, including postcolonialism, cultural studies, Marxism, criti-

3. It is worth noting that, in their casebook, Henkin, Pugh, and Schachter declared that law is politics! *See* LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS iii (3d ed., 1993) ("The years since the previous edition was published have witnessed radical transformations in the international political system, with corresponding change . . . in international law and institutions. *It seems timely therefore, to make explicit the political character and context of international law and to place it up front: Chapter One, page one.*") (emphasis added). While it is interesting that the foregoing quote implicitly acknowledges that thinking of international law as politics was held back during the Cold War, my definition of politics here is more inclusive. *See infra* note 5 and accompanying text.

4. Some of these scholars include M. BEDJAOUI, TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER (1979); THOMAS OLAWALE ELIAS, AFRICA AND THE DEVELOPMENT OF INTERNATIONAL LAW (1972); S.B. GUTTO, HUMAN AND PEOPLES RIGHTS FOR THE OPPRESSED : CRITICAL ESSAYS ON THE THEORY AND PRACTICE OF HUMAN RIGHTS FROM A SOCIOLOGY OF LAW PERSPECTIVE (1993); U.O. UMOZURIKE, INTERNATIONAL LAW AND COLONIALISM IN AFRICA (1979).

I try to articulate these positions in James Thuo Gathii, Foreword, *Alternative and Critical: The Contribution of Research and Scholarship on Developing Countries to International Legal Theory*, 41 HARV. INT'L L.J. (forthcoming 2000); James Thuo Gathii, *International Law and Eurocentricity*, EUR. J. INT'L L. 184 (1998) (book review).

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cal race theory, feminist analysis, new approaches to international law, and critical legal theory, among others.

Elements of my antihegemonic critique of the liberal/conservative dichotomy are linked together by two central analyses: an economic critique and a cultural, nonmaterial critique. I do not subscribe to the idea that cultural and nonmaterial forms of oppression underplay the real dynamics of oppression in economic structures and relations. I do acknowledge, however, the potential for decentering, unpacking, or deconstructing homogeneous or universal categories of representation.[5] For example, legitimacy, as embodied in *Governmental Illegitimacy*, occupies a Euro-American discursive framework and excludes non-Euro-American notions of legitimacy. By unpacking this Euro-American mode of representing legitimacy, I hope to proliferate the meaning of legitimacy to go beyond examining state legitimacy into examining legitimacy in a wider context including race, culture, class, and sex.[6] My project, however, is not simply to provide a countervailing or an *authentic* notion of legitimacy, but rather to overcome the "given grounds of opposition" between liberal internationalism and neoconservative realism by opening up a space to

5. Here, I adopt Gaytri Spivak's explanation of deconstruction:

> Postcoloniality — the heritage of imperialism in the rest of the globe — is a deconstructive case. As follows: Those of us from formerly colonized countries are able to communicate with each other and with the metropolis, to exchange and to establish sociality and transnationality, because we have had access to the culture of imperialism. Shall we then assign to that culture . . . a measure of "moral luck?" I think there can be no doubt that the answer is "no." This impossible "no" to a structure which one critiques, yet inhabits intimately, is the deconstructive philosophical position, and the everyday here and now of "postcoloniality" is a case of it. Further, the political claims that are most urgent in decolonized space are tacitly recognized as coded within the legacy of imperialism: nationhood, constitutionality, citizenship, democracy, socialism, even culturalism. Within the historical frame of exploration, colonization, and decolonization, what is being *effectively* reclaimed is a series of regulative political concepts, the supposedly authoritative discourse narrative of whose production was written elsewhere, in the social formations of Western Europe. They are thus being reclaimed, indeed claimed, as concept metaphors for which no *historically* adequate referent may be advanced from postcolonial space.

GAYTRI CHAKRAVORTY SPIVAK, OUTSIDE IN THE TEACHING MACHINE 280-82 (1993). Anthony Appiah similarly argues that

> [I]f there is a lesson in the broad shape of . . . circulation of cultures, it is surely that we are already contaminated by each other, that there is no longer a fully autochthonous *echt*-African culture awaiting salvage by our artists (just as there is, of course, no American culture without African roots).

KWAME ANTHONY APPIAH, IN MY FATHER'S HOUSE: AFRICA IN THE PHILOSOPHY OF CULTURE 155 (1992).

6. As Edward Said argues with reference to orientalism:

> [T]his study proposes itself as a step towards an understanding not so much of Western politics and of the non-Western world in those politics as of the *strength* of Western cultural discourse, a strength too often mistaken as merely decorative or "superstructural." My hope is to illustrate the formidable structure of cultural domination and, specifically for formerly colonized peoples, the dangers and temptations of employing this structure upon themselves or upon others.

EDWARD SAID, ORIENTALISM 25 1978.

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make possible "the construction of a political project that is new, *neither one nor the other* [and] . . . that can accept the differential structure of the moment of intervention without rushing to produce a unity of the social antagonism or contradiction."[7]

In proliferating the meaning of legitimacy and the variety of categories whose legitimacy needs interrogation, I hope to mobilize the conceptual potential of critical analysis and theory for "change and innovation."[8] I hope to open new arenas of inquiry that are foreclosed within the discursive terrain of Euro-American international legal scholarship/production. Yet, I am aware that, in seeking to transcend the paralyzing antithesis of Euro-American international legal production, it is far too easy to foreclose systemic analysis of the foundational themes raised by my materialist and structuralist critique of neoliberal economics.[9] I argue that the two critiques could be deployed simultaneously. For example, neoliberal economic restructuring (or free-market reform under the aegis of the Bretton Woods institutions[10]) relies on racial and cultural stereotyping as a central, unstated, but apparent, element of the otherwise neutral-sounding economic justifica-

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7. HOMI BHABHA, THE LOCATION OF CULTURE 25 (1994). Bhabha argues such a progressive reading is

> effective because it uses the subversive, messy task of camouflage and does not come like a pure avenging angel speaking the truth of a radical historicity and pure oppositionality. If one is aware of this heterogeneous emergence (not origin) of radical critique, then . . . the function of theory within the political process becomes double edged. It makes us aware that our political referents and priorities — the people, the community, class struggle, anti-racism, gender difference, the assertion of an anti-imperialist, black or third perspective — are not there in some primordial, naturalist sense. Nor do they reflect a unitary or homogenous political object. They make sense as they come to be constructed in the discourses of feminism or Marxism or Third Cinema or whatever, whose objects of priority — class or sexuality or "the new ethnicity" — are always in historical and philosophical tension, or cross-reference with other objectives.

Id. at 26.

8. *Id.* at 31.

9. Bhabha argues, however, that this is not necessarily true, since it is necessary to make a "distinction between the institutional history of critical theory and its conceptual power and potential for change and innovation." *Id.* Further, he argues that the conceptual power of critical theory for transformation (what he calls translation) is possible when "the tension within critical theory between its institutional containment and its revisionary force" is acknowledged. *Id.* at 32.

10. The Bretton Woods institutions are the World Bank, otherwise referred to as the International Bank for Reconstruction and Development, and the International Monetary Fund. Both were created after the Second World War, the former to give member countries multiyear loans for a variety of development projects, and the latter to lend to member countries for shorter periods with a view to facilitating their currency transactions and enabling them to meet short-term deficits in foreign exchange. Policy-based lending, or what has been referred to as conditionality, is an important part of the lending functions of these institutions. These conditionalities include: national economic integration into the international economy through liberalization and deregulation; currency devaluations to spark export-oriented growth; and a reduction of government spending, particularly to control fiscal deficits, among other reforms. These reforms have been referred to with a variety of labels, including the Washington Consensus and Neo-Liberalism.

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tions in favor of free markets.[11] Since deconstructive critiques of universal categories of representation potentially foreclose critiques of economic relations and relations of production, the deconstructive critique and the foundational critique invariably contradict each other but also operate ambivalently throughout this Review.[12]

Each section of this Review focuses on a major theme(s) in *Governmental Illegitimacy*. In Part I, I explain how Roth's critique of liberal internationalism is a form of neoconservative realism, and I outline the main themes and arguments Roth makes. Further, I argue that Roth's neoconservative take on legitimacy as a response to liberal internationalists reflects the extent to which debates on governmental legitimacy in the Euro-American academia are trapped within a Eurocentric either/or framework.

Part II argues that, notwithstanding Roth's proposal that neoconservative realism ought to prevail over liberal internationalism in debates on legitimacy, there is a lot of common ground shared by these liberal and conservative proposals, in terms of their implicit or explicit endorsement of American economic hegemony internationally, and in terms of their pretensions of universality and their commitment to a common set of abstract legal principles.

Part III argues that Roth's analysis, in general, diminishes colonialism as ephemeral or exceptional, rather than as integral, continuing, and present. In essence, the continuities and discontinuities among colonialism, the mandate system, and the trusteeship system, as well as the era of self-determination, are left unexamined. In Part IV, I explore the consequences of Roth's maintenance of a public/private distinction: that politics resides in the public arena of intervention in civil society overseas, rather than in the private order.

Part V challenges Roth's allegiance to Euro-American conceptions of the nonintervention norm, a norm which excludes interventions in the economic affairs of sovereign states as a possible international legal violation. I also demonstrate the consequences of the Euro-American hostility to accommodating a countervailing optic that would examine the distributional costs of the market's inability to spread its goodies around the world efficiently, optimally, or even equitably.

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11. For elaboration, see James Thuo Gathii, *Representations of Africa in Good Governance Discourse: Policing and Containing Dissidence to Neo-Liberalism*, 1998-99 THIRD WORLD LEGAL STUD. 65.

12. Although I was born and bred in Kenya, an African country, I nevertheless acknowledge that my privileged presence in the academy within the United States has invariably influenced my scholarship. It could very well be reflective of the cultural politics of the constantly changing global economy. *See generally* AIAZ AHMAD, IN THEORY: CLASSES, NATIONS, LITERATURES (1992); Aijaz Ahmad, *Jameson's Rhetoric of Otherness and the 'National Allegory'*, 17 SOC. TEXT 3 (1987); Arif Dirlik, *The Postcolonial Aura: Third World Criticism in the Age of Global Capitalism*, 20 CRITICAL INQUIRY 328 (1994).

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In Part VI, I commend how Roth transcends the Liberal, linear story that sovereignty — classically understood as a consolidated unit that formalizes the boundary between the national and the international — is in the process of erosion and reformulation. In Part VII, I take issue with Roth's adherence to the state as a juridical entity bereft of its cultural, national, and ideological dimensions. I argue that, unless the state is thought of in this larger context, it is easy to fail to appreciate the legitimacy/illegitimacy of the postcolonial African state.

Last, in Part VIII, I examine Roth's analysis of the indeterminacy and limitations of both liberal advocacy for participatory rights and neoconservative advocacy for effective control as barometers of legitimacy. Neither of these approaches to legitimacy can be seen outside its alliance with regressive political and economic programs. For example, Roth celebrates Haiti as a success story of intervention because it exemplifies the emerging liberal consensus that participatory rights are a barometer of legitimacy. But the celebration of intervention should not obscure its costs. As a consequence of intervention, President Jean-Bertrand Aristide abandoned a popular economic program that would have benefited the large Haitian underclass by redistributing the wealth held by Haiti's military-economic elite. This also resulted in the return of poor Haitian refugees to Haiti in violation of their rights against *non-refoulement* with the legal imprimatur of the United States Supreme Court and the collaboration between the United States and the Haitian elite in the domination and exploitation of the Haitian underclass. The Review ends with a conclusion that sums up the broad outlines of my argument.

I. DEFINING ROTH'S NEOCONSERVATIVE REALIST CRITIQUE

I characterize Roth as a neoconservative realist for a variety of reasons. First, Roth, like early American realists, is not wedded to the idea that abstract legal concepts determine the content of subrules and outcomes of legal controversy. Roth's analysis can, in fact, be analogized to American international legal thinkers of the postwar period. These thinkers rejected positivism and began inquiring into whether or not international law was moored in a moral foundation. These thinkers also recognized the individual as a subject of international law and expressed skepticism about the overdetermination of state sovereignty.[13]

Although Roth's analysis is realist in that sense, it adds up to being an overdeveloped critique of the indeterminacy of legitimacy in the public sphere within Western society. Hence, Roth examines the place of social reality in both liberalism and revolutionary democratic

13. For a review of this tradition, see Carl Landauer, *J.L. Brierly and the Modernization of International Law*, 25 VAND. J. TRANSNAT'L L. 881, 917 (1993).

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dictatorship (as opposed to, say, their abstract principles and form), but he pays no attention to the pretences of neutrality and therefore of the legitimacy or illegitimacy of the private international rules that undergird market activity. This anomaly similarly characterizes public international legal scholarship and marks where Roth departs from American legal realism and postrealist thought.

Second, Roth is like a neoconservative since his take on legitimacy and illegitimacy of governments is very much a critique of liberalism, specifically liberal internationalism, for overextending itself as the only and universal source of governmental legitimacy.[14] *Governmental Illegitimacy* is perhaps one of the first book-length critiques of liberal internationalism in the area of governmental illegitimacy in international law. The neoconservative tradition is specific to the United States and is embedded in American exports such as neoliberalism[15] and democracy-promotion programs. The neoconservative tradition is roughly a nineteenth-century laissez-faire commitment supplemented by debates that were especially critical of the New Deal and that characterized social, economic, and political progress as arising automatically from the spread of free markets, unfettered by any public constraints. Neoconservatism in the post-Second World War period arose as a counterpoint to New Deal liberalism. New Deal liberalism, according to the neoconservatives, overextended itself in translating welfare needs into legal entitlements, thereby maintaining, by legal imprimatur, dependency upon public resources by one section of the population without reciprocal obligations. Hence, in giving public help to undeserving citizens, the neoconservatives argued that the welfare state stepped outside the bounds of classical liberalism and that it was therefore necessary to return to the era when such legally protected entitlements were shorn back. After all, the neoconservatives argued, welfare was neither contractually "earned," as prior contributions were, nor tied to any previous effort or responsibility; it could not be conceptualized as the fruits of a prior fixed arrangement with the government.[16]

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14. I am not suggesting a conspiracy between Roth and neoconservative thinkers in the United States. In fact, my claim is not that Roth has any affiliation or relation to these neoconservatives, but rather that the common thread that runs between Roth and other neoconservatives is their disdain for liberalism overextending itself. In the context of American political life, leading neoconservative thinkers include: IRVING KRISTOL, TWO CHEERS FOR CAPITALISM (1978); THE AMERICAN COMMONWEALTH (Nathan Glazer & Irving Kristol eds., 1976); DANIEL BELL, THE CULTURAL CONTRADICTIONS OF CAPITALISM (1976).

15. Neoconservatism is embedded in neoliberalism in that both distrust governmental regulation of the economy and prefer free markets in the allocation of resources. For a definition of neoliberalism, see *supra* note 10.

16. For an excellent reading of the gendered and racial underpinnings of welfare in the United States, see Susan Fraser & Linda Gordon, *A Genealogy of Dependency: Tracing a Keyword of the U.S. Welfare State*, 19 SIGNS 309 (1994). For an overview of the controversy, see ALAN BRINKLEY, LIBERALISM AND ITS DISCONTENTS (1998) and GARETH DAVIES,

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In analogizing Roth to neoconservatives, my point is that his book is very much a critique of what he considers to be the over-determination of liberal internationalism as the barometer of legitimacy of governments. In this way, he shares with neoconservatives the urge to swing the pendulum away from the liberals towards an alternative view of international society — which, contrary to the liberal faith in a laissez-faire world order bringing progress to humanity, is a society so plural as to render illusory any such unifying source of hope for the disparate societies in the international community. That the pendulum shifts between these two alternative images in Western society is not surprising.[17]

Third, in resorting to a whole range of Anglo-American philosophies to justify his proposition, Roth reproduces a significant shortcoming — the quest for a foundational standpoint of impartial judgment on procedural (the illegitimacy of states) as opposed to substantive (e.g., equality) commitments, while simultaneously relegating institutional innovation and substantive concerns and their legitimacy or illegitimacy to a secondary, merely technical or tactical, stage of reflection. Hence, unlike neoconservatives who turn towards private markets and the private realm —and away from the state — as mediating structures of social, economic, and political life Roth embraces the state and is silent on the significance, if any, of markets or of the private sphere in his conception of governmental (il)legitimacy. For Roth, illegitimacy and legitimacy of governments are procedural concerns that only implicitly involve normative choices. In fact, Roth tries to establish a norm of governmental illegitimacy as a counterpoint to the relativist, policy-based, and substantive democratic entitlement norm and, of course, to the revolutionary democratic dictatorship alternative. Roth's norm of governmental illegitimacy is designed to avoid this relativism since he postulates it as a procedural norm that is perhaps neutral and therefore legally acceptable in a plural international society.

The silence regarding the private sphere places it and the hierarchies inherent within it beyond scrutiny in Roth's proposal. In fact, the paradox of Roth's position is that, although he remains committed to *popular will*, his examination of only the legitimacy or illegitimacy of *state* authority invariably endorses the inequalities inherent in the private order, which overlays the authority of any government providing its public imprimatur in private ordering. One could then ask, why keep the private sphere, within which peoples' most fundamental interests (especially in deeply unequal societies) are constituted, shut

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FROM OPPORTUNITY TO ENTITLEMENT: THE TRANSFORMATION AND DECLINE OF GREAT SOCIETY LIBERALISM (1996).

17. *See, e.g.*, David Kennedy, *A New World Order: Yesterday, Today and Tomorrow*, 4 TRANSNAT'L L. & CONTEMP. PROBS. 330, 343 (1994); Landauer, *supra* note 13, at 908-17.

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off from the debate on illegitimacy, unless one were endorsing the private realm as an arena of individual freedom and choice rather than an arena characterized by inequality, coercion, and unfreedom?[18] I would therefore argue that the reason why Roth remains a neoconservative realist rather than a neoliberal is found in his near-total neglect of anything economic in his analysis of legitimacy and illegitimacy.[19]

A. *Main Themes of Governmental Illegitimacy in International Law*

Governmental Illegitimacy in International Law is well-written, well-argued, and well-researched. Its author is the recipient of the American Society of International Law's annual certificate of merit award for a work in a specialized area, an indication that this book deserves more reviewers' attention than it has attracted. In view of the importance of the themes that the book tackles and the bold insights that Roth makes, this Review argues that, although *Governmental Illegitimacy* does break new ground in post-Cold War international legal theory on illegitimacy of governments, it remains wedded to a Eurocentric bipolarity that is specifically American in its continuation of a neoconservative realist[20] response to liberal internationalists.[21] In

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18. On this point, see Christopher Pierson, *Democracy, Markets and Capital: Are there Necessary Economic Limits to Democracy?*, 40 POL. STUD. 83 (1992).

19. Roth, however, briefly notes that it is possible that the revolutionary tradition of revolutionary democratic dictatorships itself is

> not so moribund as is now fashionably believed. . . . [T]he contemporary failure of the revolutionary project in no way invalidates the insights that prompted so many to embrace it. The deficiencies of liberal democracy not only remain, but are being exacerbated as "actually existing liberalism" retreats, in much of the world, *to a harsh nineteenth-century model of negative liberty amid social stratification and economic despair.*
>
> At the moment, *the revolutionary orientation has no viable alternative economic model to offer.* There is no reason to assume, however, that this will forever be so. Should the revolutionary phoenix rise from the ashes, old questions will arise anew.

P. 120 (emphasis added).

20. Roth refers to his brand of analysis as conservative:

> [I]t would be disingenuous to claim that the instant work (or any work in legal interpretation) is a neutral rendering. Wherever possible, it reads the source materials as coherent rather than chaotic, and it presents established legal doctrines, especially those emphasizing non-intervention in the internal affairs of states, in a light that suggests that they are not, as some have maintained, altogether lacking in moral vision. It is, in a sense, *inherently a conservative project.*

P. 34 (emphasis added, footnotes omitted). Hence, I have coined this term not pejoratively, but in reference to Roth's self-described brand of analysis, and in the hope of capturing a series of analytical commitments that characterize the book. For example, Roth is neither a realist believer in power politics nor a moralist committed to the idea that ideals govern international affairs. Pp. 4-5. Instead, Roth observes that, since it is possible to have multiple interpretations of international legal norms that are "reasonable," the cynical perception of these interpretations is a "problem" that "can be cured *only* by more rigorous examination of international legal principles." P. 8 (emphasis added). Roth states:

> There can thus be no question that recognition of governments — in this specific sense of acknowledging their capacity to assert rights, incur obligations, and authorize acts in the name of the state — is "eminently a question of international law". Fulfillment of the obli-

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so doing, the book excludes from its purview non-Western notions of governmental legitimacy.[22]

There is perhaps no simple way to sum up the thesis of Roth's book. But one major theme is that the increasingly popular view among liberal scholars in international law — that citizens now have a democratic entitlement to vote in elections and therefore to elect a government of their choice — is a form of Western cultural and ideological imperialism. To be sure, although Roth has a healthy dose of skepticism in this version of liberal internationalism, cultural imperialism is not what he uses to describe his disagreement with proponents of the new democratic entitlement norm. Rather he says that "[t]he peace and security order embodied in the United Nations Charter" is designed in part to enable states "to order their own affairs unmolested by the predatory designs and ideological or cultural impositions of foreign powers."[23] This statement embodies the essence of Roth's

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> gations of the international system requires according legal recognition to such authority as legitimately represents the state to which obligations are owed, and denying legal recognition to would-be usurpers. *This imperative must inform any effort to elaborate the doctrinal context within which recent recognition controversies need to be assessed.*

P. 123 (emphasis added). The emphasis on legality in resolving the question of legitimacy's exact location seems to be a critical part of Roth's analysis. Overall, Roth's project is one of improving international legal theory on the subject of legitimacy, which he finds time and again to be rudimentary, inadequate, inchoate, and incomplete. This type of improving or attempting to give respectability to legal analysis has been referred to as a rationalizing legal analysis. *See* ROBERTO UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 34 (1996).

21. My argument here is basically that Roth's analysis of legitimacy is based upon competing sources of legitimacy, all posed in polarities. Roth believes that:

> [to] understand what counts for the international community as a plausible innovation of popular will, one must be acquainted with the breadth of the range of legitimacy rationales that have maintained a substantial following in contemporary times. To put it glibly, the international community contains *liberal democrats, non-liberal democrats, liberal non-democrats, and non-liberal non-democrats, all whom profess fidelity to the abstract principle of popular sovereignty.*

Pp. 39-40 (emphasis added). Hence, Roth contrasts, for example, the liberal democratic entitlement school with an alternative approach to the location of legitimacy — the revolutionary democratic dictatorship. These alternatives posed by Roth are Western or Eurocentric approaches to thinking about legitimacy and they exemplify a "pathological" feature of Western knowledge systems — binary thinking. This arises in part from a system of knowledge management that is biased towards

> particularly scientific management . . . [and is] characterized by its insistence of logical deduction from self evident axioms as the only basis of knowledge . . . its emphasis on analysis, its claim that knowledge must be articulate in order to . . . [demonstrate] its pretence to universality, its celebral nature, its orientation to theory and empirical verification of theory and its odd mixture of egalitarianism within the knowledge community and hierarchical superiority versus outsiders.

FREDERIQUE MARGLIN & STEPHEN MARGLIN, DOMINATING KNOWLEDGE 204 (1990).

22. For a recent example of an effort to assert a non-Western theory of governmental legitimacy, see Edward Kofi Quashigah, *Legitimate Governance: The Pre-Colonial African Perspective*, *in* LEGITIMATE GOVERNANCE IN AFRICA: INTERNATIONAL AND DOMESTIC LEGAL PERSPECTIVES 43 (Edward Kofi Quashigah & Obiora Chinedu Okafor eds., 1999).

23. Pp. 1-2. Roth argues, for example, that determining the "genuineness" of elections in terms of the will of the people is "arguably, inextricable from cultural, social and ideologi-

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project. Instead of tracing the emergence of a new norm of democratic entitlement through reinterpretation of the sovereignty norm, Roth seeks to predicate the increased importance on the will of the people or popular sovereignty on the doctrine of "legal recognition" of governments, and not on international guarantees of participation as liberal internationalists have done. This doctrine is closely related to the irrebuttable presumption in international law that a government is legitimate when it has effective control. Effective control in this context represents the will of the underlying political community except in cases of alien, racist, or colonial regimes that are illegitimate *ab initio*.[24]

In his own words, Roth seeks to determine:

> (1) the extent to which a norm of popular sovereignty has displaced the protections that international law has traditionally accorded *de facto* authorities; (2) the extent of that norm's relationship (if any) to liberal-democratic principles of government; and (3) the legal implications of this development for forcible and non-forcible multilateral interventions in the internal affairs of states. [p. 1]

He concludes that the collective practice of states in the post-Second World War period suggests that, in the democratic entitlement school, there is an "increased significance of empirical manifestations of popular will in *ad hoc* evaluations of governmental legitimacy, but denies that this development entails the emergence of a liberal-democratic 'legitimism' " (p. 4).

In my view, although the book adds an interesting spin to the legitimacy debate in its construction of the will of the people through the effectiveness of a government's control, there is a way in which it also leaves international law in the undesirable Cold War stalemate reached between liberals and conservatives. *Governmental Illegitimacy* is a neoconservative realist take on legitimacy of governments, because it criticizes the liberal internationalist location of governmental legitimacy in the realm of international legal guarantees of individual participation in their governments.[25] It argues in favor of a norm of governmental illegitimacy that arises not from the idealistic

cal matters that are essentially within the domestic jurisdiction, the result being (however regrettably) that the regime itself is privileged to act as the authoritative interpreter of local norms, and thus of its own international obligations." P. 164.

24. See *infra* Part III for a more extended discussion of Roth's views of colonial, racist, or alien regimes.

25. Roth notes, for example, that Article 21(3) of the U.N. Charter, "[i]nterpreted through the lens of liberal-democratic political thought... puts human rights on a collision course with non-intervention norms, positing a human rights norm as the sole legitimate basis of sovereignty itself." P. 164. In Roth's view, liberal democrats committed to arguing that the will of the people is the basis of government authority understate or ignore Article 2 (7) of the U.N. Charter, which enshrines the nonintervention norm.

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premises of the International Bill of Rights,[26] but from the practice or customs of states as may, for example, be evidenced in whether they have effective control of their territory (p. 189). In Roth's view, the "international system regards ruling apparatuses as self-sufficient sources of authority — or rather deems their authority to derive from their characteristic ability to secure the acquiescence of their populaces, *by whatever means*" (pp. 162-63; emphasis added). The will of the people can then be construed from whether the people's government has effective control over its territory; where the government has effective control, the people have acquiesced to such a government as a legitimate authority over them, except where the regime exercising such authority is colonial, racist, or alien.[27] For Roth, de facto control is not a mechanistic description of facts on the ground, but rather requires a "complex" interpretive framework to reveal the underlying *moral* logic of sovereign equality. De facto control and sovereign equality of states are not the cold, amoral concepts that the liberals have represented, but rather signifiers of the increased significance of popular will in evaluations of governmental legitimacy.[28]

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26. The International Bill of Rights consists of three important documents: the 1948 Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810, at (1948); the 1966 International Covenant on Civil and Political Rights, G.A. Res. 2200 A(XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966); the 1966 International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 A (XXI), U.N. GAPR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966). The last two documents came into force in 1976.

27. Roth argues that it is striking that, in drafting Article 25 of the 1966 International Covenant on Civil and Political Rights (unlike Article 21(3) of the U.N. Charter), the drafters "avoided the collision with non-intervention norms by omitting any statement as to the basis for the authority of government." P. 164. In Roth's view, therefore, "*the basis of authority may be such popular will as is expressed by habits of obedience to the regime in effective control, a will that is further expressed in such elections as the effective regime sees fit to hold.*" P. 164 (emphasis added). Further, in asserting the significance of a government in actual control, Roth argues that "non-intervention rules remain at the disposal of the government in effective control to assert in the name of the state." P. 165. He also concludes that

> non-intervention norms clearly and consciously discriminate in favor of the established government. The same foreign military assistance that constitutes an unlawful use of force when extended to anti-government factions is generally lawful when extended to government forces. It is even more clearly true that non-forcible foreign participation in internal affairs, however problematic when in aid of groups seeking to undermine or overthrow the established government, is unproblematic when in aid of the government.... [I]nternational law ordinarily has recognized the apparatus in effective control to be the government for such purposes.

P. 171 (footnote omitted).

28. Pp. 2-4. Roth later argues that:

> The ordinary lack of international attention to the basis of governmental authority is frequently attributed to crass pragmatism rather than principle. What this attribution fails to comprehend, however, is that applicable principles, to the extent that they embody positive international law and not mere abstract moralizing, are, of necessity, eminently pragmatic. Moreover, sovereign equality, the cornerstone of overlapping consensus in the international community, is itself a morally grounded principle. The equality of political communities entails, in the ordinary case, accepting on equal terms such stable internal arrangements as pre-

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This indeterminacy (between international legal entitlements and interpretations of de facto control and sovereign equality of states) of the source of legitimacy for governments is therefore a major linchpin upon which Roth predicates his critique of liberal internationalists.[29] It is also the very reason that I argue that the book takes us back to a stalemate already reached between conservatives and liberals during the Cold War. A second source of frustration with the book arises in part from the fact that this neoconservative realist position repeats the mistake made by its subject of attack, liberal internationalism. By predicating a norm of governmental illegitimacy on actual praxis rather than on international legal guarantees, as the acid test for legitimacy in a plural international society, neoconservative realists overlook the fact that even the determination of seemingly factual evidence, such as whether a government has effective control over its territory, could be as subjective and as manipulable as the determination of whether an election was free and fair under the International Bill of Rights. This problem arises in part because Roth's proposal of de facto control as a source of legitimacy or illegitimacy of states is not integrated throughout his analysis with his misgiving that de facto control does not always square with political will, an issue he takes up mainly in his discussion of recognition contests in Chapter Seven (pp. 2, 183, 197, 253).

Seen another way, Roth's neoconservative realism could be said to reflect his defense of the Westphalian state system complete with its attendant doctrines of statehood as a natural and necessary view of the world, while the liberal internationalists hold this view in contempt for being a defense of what they consider an old and decaying order. For the liberal internationalist, the state system has now been superceded by a multitude of interlocking jurisdictions, the market economy and a variety of regional and international actors all underpinned less by their commitment to their respective states and increasingly on a universal commitment to free markets and the values of liberal democracy. They argue that the traditional functions of the state have been greatly undermined as state boundaries have become more porous to flows of capital, goods, and technology.[30]

> sent themselves. It further quite arguably entails, as a matter of respect for persons whose circumstances and ways of thinking are imperfectly understood by outsiders, acknowledging at face value the decision of a people to acquiesce in those arrangements.

P. 345.

29. For a discussion of this indeterminacy in the context of colonial, racist, or alien regimes, see pp. 201-51.

30. *See generally* Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205 (1993); Anne-Marie Slaughter et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L L. 367 (1998); Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503 (1995); Anne-Marie Slaughter, *Liberal International Relations Law Theory and International Economic Law*, 10 AM. U. J. INT'L L.

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For Roth, the state and its (il)legitimacy remain a central focus. While liberal internationalists look to the International Bill of Rights, among other sources, to justify a democratic entitlement for citizens as the basis of state legitimacy or illegitimacy, Roth construes legitimacy and illegitimacy from the state in the first place. In his view, legitimate force can only be imposed by a legitimate state apparatus. In exercising such legitimate force, such an apparatus must be "acting on what I acknowledge to be their duty or license under a duly constituted system of governance to which I am concededly subject (even if I am justly in opposition to any number of its policies)" (p. 17). The state and its apparatus of power are for Roth the starting point in appreciating legitimacy and illegitimacy. From this understanding, legitimacy can be construed as the acquiescence of citizens to a necessary institution or evil in society — the state. This is not a benign idea of the state, nor is it a benevolent one.

For example, Roth's brief discussion of usurper governments following coups d'état is confined to the legal significance of their acts and "the obligations of citizens with respect to those acts as might be seen retroactively following the restoration of the legitimate government" (p. 156). This discussion telescopes complex and elaborate questions surrounding the legitimacy of regimes that result from successful coups and revolutions both in the international and domestic constitutional and legal contexts.[31] Telescoping the significant moral and political issues raised by such "revolutionary" circumstances into legal questions (contained in doctrines such as state necessity and implied mandate) is only one example of the manner in which the ambition of the subject matter of the book and its reach stand at a disjuncture. Moral and political controversy are so central to discussions on legitimacy that they cannot be ignored even by international lawyers.[32] It is interesting that Roth does not discuss the *public policy* alternative to state necessity and implied mandate as one of the innovations crafted by courts in responding to a constitutional crisis such as a coup d'état.[33] Does the exclusion of this strategy of responding to constitu-

& POL'Y 717 (1995); Anne-Marie Slaughter, *The Real New World Order*, FOREIGN AFF., Sept.-Oct. 1997, at 183; Anne-Marie Burley, *Toward An Age of Liberal Nations*, 33 HARV. INT'L L.J. 393 (1992). For a critique of Slaughter's liberal international law, see, for example, Outi Korhonen, *Liberalism and International Law: A Centre Projecting a Periphery*, 65 NORDIC J. INT'L L. 481 (1996). For other critiques of liberal renewal narratives, see generally Martii Koskenniemi, *The Place of Law in Collective Security*, 17 MICH. J. INT'L L. 455 (1966); Susan Marks, *The End of History?: Reflections on Some International Legal Thesis*, 18 EUR. J. INT'L L. 449, 467-75 (1997).

31. There is perhaps no better comprehensive and authoritative assessment of these issues than Tayyab Mahmud, *Jurisprudence of Successful Treason: Coups d'Etat and Common Law*, 27 CORNELL INT'L L.J. 49 (1994).

32. See, for example, *id.* at 53-58 for a poignant discussion on this point.

33. For a discussion of the public policy alternative to state necessity and implied mandate, see *id.* at 53, 62.

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tional crisis disclose a bias in favor of innovations that are legalistic rather than open-ended policy considerations of controversial moral and political issues?

Roth's analysis in *Governmental Illegitimacy* therefore reveals a strong neoconservative realism which, by combining philosophical, doctrinal, and policy analysis, asserts the importance of state power over other political and moral commitments in his conception of legitimacy and illegitimacy of states. Indeed, Roth focuses on the state "in the sense of the apparatus that rules in the name of a given political community, otherwise known as a 'government' " (p. 22). Roth's focus on when political authority is legitimate tells where his analysis of legitimacy begins — with the governmental power rather than with individual freedom as in the case of liberal internationalists.

This Review also attempts to move beyond the neoconservative realist response to liberal internationalism in at least two major ways: first, by demonstrating how the history of colonialism in international law has been central in constructing regimes of governmental illegitimacy and legitimacy in ways ignored in the Western liberal/conservative realist debates; and second, by demonstrating how the post-Cold War debate on the legitimacy of governments is closely related to neoliberal economic restructuring, an alliance (between the politics and economics of Western domination of developing countries) also ignored in the debate between the Western liberals and conservative realists writing on international law. I interpret the absence of engagement with the history of colonialism and neoliberalism in debates on governmental legitimacy and illegitimacy as a reflection of an ideological predilection for the rich industrial democracies across the Atlantic.

In reviewing the book, I therefore examine the understatement of several themes that touch on illegitimacy of governments in international law in contesting the privileging of Roth's preoccupation with determining the legal content of his proposed norm. I challenge Roth's commitment to norm creation, suggesting it is oblivious to its alliance with a very undemocratic program of global economic governance — neoliberalism and a history of colonialism. Undoubtedly, however, my reading of Roth is not any less circumstantial and contingent than his reading of international law.

B. *Eurocentric Moorings: Taking Legitimacy Beyond Liberalism and Conservatism*

Since the end of the Cold War, an industry in international legal circles has developed around justifying more interventionism in international affairs to protect human rights, avert or attend to international humanitarian emergencies, install democracies, monitor elections, and oversee transitions from authoritarian one-party states and

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military regimes, among a variety of similar do-gooder programs and projects. *Governmental Illegitimacy* is one of the first scathing book-length critiques of this liberal enterprise. I am not sure whether the publication of the book will spur another flourishing industry in international legal academia, signaling the demise of the liberal triumphalism of the post-Cold War period. It is too early to tell. Yet, the point must be made that the book has come much too long after the ascendancy of liberal triumphalism[34] — an indication that a competing industry providing devastating critiques is yet to emerge. However, with the defeat of the Comprehensive Test Ban Treaty,[35] the qualified accession of the International Criminal Court[36] and the circus surrounding congressional delay and reluctance to pay U.N. dues,[37] we may be seeing a coalescence of neoconservatism that will flow into international legal academia in the United States. This possibility is not without merit. After all, my argument is that liberals and conservatives have had alternating periods of activist and passivist internationalist projects and goals. *Governmental Illegitimacy* represents an attempt to tilt the balance in favor of a neoconservative tradition and away from the liberals who have been on the ascendant since the end of the Cold War.

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34. Liberal triumphalism is associated with the claim that, after the end of the Cold War, liberal democracy prevailed as the final form of human government, just as free markets have become ascendant as the most effective mechanism of achieving human progress. *See, e.g.*, FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992); FRANCIS FUKUYAMA, "A Reply to My Critics," (1989/1990) THE NATIONAL INTEREST at 25.

35. General Assembly Resolution 50/245 of September 10, 1996. The Comprehensive Nuclear-Test-Ban Treaty (CTBT) prohibits any nuclear weapon test explosion or any other nuclear explosion anywhere in the world. Drafted at the Conference on Disarmament in Geneva, the Treaty was adopted by the General Assembly on September 10, 1996. It was opened for signature on September 24, 1996 at United Nations Headquarters. As of March 8, 2000, 155 States had signed the CTBT, and instruments of ratification had been deposited by 54 States.

36. The purpose of the Court will be to serve as a permanent international criminal court to try persons charged with genocide or other crimes of similar gravity. The Court's constitutive document is the Rome Statute of the International Criminal Court, (U.N. Doc. A/CONF.183/9*) [as corrected by the procés-verbaux of 10 November 1998 and 12 July 1999]. For a discussion of the history of the establishment of the Court and the nature of U.S. Objections, see the collection of articles on Developments in International Criminal Law in 93 AM. J. INT'L L., 1-123 (1999).

37. Until quite late into 1999, the United States withheld its dues to the United Nations primarily because Congress insisted that reform within one section of the U.N. was an important prerequisite for these dues to be released. On January 20, 2000, the Chairman of the U.S. Senate Committee on Foreign Relations addressed the United Nations Security Council and outlined the nature of his objections to releasing U.S. dues to the U.N., including resentment of the U.S. within the U.N., the excessive contributions of the U.S. to the U.N. relative to other members, and lack of reform within the U.N. In fact, Senator Jesse Helms indicated that further releases of these outstanding amounts would only be made subject to the U.N.'s undertaking reforms that it had committed itself to in an agreement with the U.S. *See* Senator Jesse Helms, Chairman, U.S. Senate Committee on Foreign Relations, Address Before the United Nations Security Council (Jan. 20, 2000), *available at:* <http://www.senate.gov/~helms/FedGov/UNSpeech/unspeech.html>.

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The alternating liberal and neoconservative moments of American foreign policy are reflected within theoretical and methodological preferences in the traditions of American legal realism, critical legal studies, and, of course, poststructuralism, among others.[38] Simply stated, the liberals are cast as naïve believers in the potential efficacy that law has for completing the promises of modernity in international law: peace, development, and respect for human rights. By contrast, the neoconservatives argue that the hopes of modernity will be compromised by the power politics and interests of states around the world.

Here I argue that debates on governmental illegitimacy are therefore trapped within this either/or framework — for example, that legitimacy can only be sourced in either a liberal or conservative tradition. This dichotomization is based on a Eurocentric genealogy: the opposition between individualism and community; fact and value; reason and desire; form and substance.[39] Eurocentric genealogies in in-

38. For an attempt to canonize various approaches to the study of international law in the United States, see Steven S. Ratner & Anne-Marie Slaughter, *Symposium on Method In International Law*, 93 AM. J. INT'L L. 291 (1999).

39. According to Roberto Unger:

> Wherever liberal psychology prevails, the distinction between describing things in the world and evaluating them will be accepted as the premise of all clear thought. Because classical metaphysics disregards that distinction, we can no longer speak its language. Yet, there is at least one familiar way of thinking to which the distinction cannot be applied, the beliefs of religion. Indeed, the view that the understanding of what we ought to is part of a comprehension of what the world is really like is a well-recognized characteristic of religious ideas. Between liberal psychology and religion, there can be no lasting peace, but at most an illusion of mutual tolerance. From the standpoint of the liberal psychologist, religion must be treated as a creature of desire, just as magic can be described as a forerunner of reason.

ROBERTO M. UNGER, KNOWLEDGE AND POLITICS 41 (1976) (citation omitted). This telling distinction between modernity and premodernity, with reason as a baseline, is a well-known lineage of Western thought that has also been traced within international law. *See* David Kennedy, *Images of Religion in International Legal Theory*, *in* THE INFLUENCE OF RELIGION ON THE DEVELOPMENT OF INTERNATIONAL LAW (Mark Janis ed., 1991); David Kennedy, *Primitive Legal Scholarship*, 27 HARV. INT'L L.J. 1 (1986). This tradition of Western thought, however, claimed superiority over non-Western forms of knowledge as a source of knowledge. Western forms of knowledge, especially at the height of reason during the Enlightenment, discredited non-Western knowledge, culture, and way of life as inferior and claimed universality to Western forms of knowledge. Not infrequently, notions of racial, religious, political, and economic difference were mobilized to give credence to colonial subjugation of non-Western peoples. *See, e.g.*, Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law*, 40 HARV. INT'L L.J. 3 (1999) [hereinafter Anghie, *Finding the Peripheries*]; Antony Anghie, *Francisco de Vitoria and the Colonial Origins of International Law*, 5 SOC. & LEGAL STUD. 321 (1996); Antony Anghie, *"The Heart of My Home": Colonialism, Environmental Damage, and the Nauru Case*, 34 HARV. INT'L L.J. 445 (1993); Antony Anghie, *Universality and the Concept of Governance*, *in* LEGITIMATE GOVERNANCE IN AFRICA: INTERNATIONAL AND DOMESTIC LEGAL PERSPECTIVES, *supra* note 22, at 21; Antony Anghie, *Creating the Nation State: Colonialism and Making of International Law* (1995) (unpublished S.J.D. thesis, Harvard University) (on file with the Harvard University Library) [hereinafter Anghie, *Creating the Nation-State*].

For another fascinating legal account of such claims to dominance of Western forms of knowledge, see ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL

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ternational law juxtapose notions of individualism in liberalism with notions of communitarianism in Rousseauian or Marxian terms. Unsurprisingly, Roth unearths genealogies of Rousseau and Marx in European discourses of legitimacy to upend what he considers to be the overdetermined location of legitimacy within liberalism, especially in the post-Cold War period.

My complaint with this basic project is that it provides only two possible and polar alternatives to governmental legitimacy: liberalism and conservatism. This limited range of options excludes non-Western conceptions of legitimacy. Its effect, therefore, is to deny difference or multiple and heterogeneous possibilities of the meaning and scope of legitimacy since it only presents alternatives that are diametrically opposed to each other and that are all trapped within liberal psychology. For example, "[l]iberal individualism denies difference by positing the self as a solid, self sufficient unity, not defined by or in need of anything or anyone other than itself. . . . Community, on the other hand, denies difference by positing fusion rather than separation as the social ideal."[40]

Consequently, the debate of legitimacy in international law has been about states rather than nongovernmental entities or even international institutions such as the United Nations or the Bretton Woods institutions. Notwithstanding their hegemonic presence in determining what constitutes development across the third world, the legitimacy of the Bretton Woods institutions remains outside the purview of the legitimacy debate in international law. I argue that a different epistemological point of knowing than that presented by the impasse between liberalism and conservatism in Eurocentric thought, from which alternative conceptions of legitimacy may be imagined, is necessary to interrogate the legitimacy of international legal processes and institutions, as well as to give voice to different and non-European voices and conceptions of legitimacy, democracy, and empowerment. That would also decenter the current Eurocentric conception of legitimacy.[41]

THOUGHT (1990). In a sequel, Robert Williams gives an account of the legal conceptions that American Indians utilized in their relations with the West, rather than the legal ideas that the West used in justifying their colonial subjugation of American Indian people. *See* ROBERT A. WILLIAMS, JR., LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600-1800 (1997).

40. Iris Marion Young, *The Ideal of Community and the Politics of Difference*, *in* FEMINISM/POSTMODERNISM 300, 307 (Linda J. Nicholson ed., 1990).

41. *See, e.g.*, Dianne Otto, *Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference*, 5 SOC. & LEGAL STUD. 337 (1996).

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II. CONTINUITY NOT DISCONTINUITY BETWEEN LIBERAL AND CONSERVATIVE OSCILLATIONISM

In the United States, various orientations of conservative thought have from time to time justified: nonrecognition of international treaties by the United States; the dominant place of American strategic and economic interests as superceding any others in international affairs; and the secondary place of morality in international politics. It does seem in a rough fashion that, during democratic administrations, the liberals are on the ascendancy while, during republican administrations, conservativism or Kissingerian realism kicks in.[42]

For example, Woodrow Wilson, the famed icon of American internationalism, died frustrated in the face of a rising tide of nativism and isolationism in a United States unconvinced it needed to play an active part in international affairs.[43] The Smoot-Hawley Tariff Act[44] of 1930 was perhaps a high point of American isolationism in international affairs, as was the period of American self-doubt after the Vietnam War debacle.[45] It was not until President Ronald Reagan, when the United States reinstated what he called the struggle against the "evil empire," that American isolationism was interrupted.

This oscillation between liberalism and conservatism has its own problems. First, there is a continuity rather than a discontinuity in American economic hegemony worldwide, especially since the 1940s, so that, even in periods of isolationism, the economic goals of the United States remained at the forefront of American foreign policy. One then sees a continuity between liberal and conservative periods of international politics insofar as economic and strategic goals continue to predominate in both periods. Hence, international legal scholars in the U.S. supported Cold War goals of nuclear testing, armed intervention in the name of democracy (even where it contravened United Nations commitments against defenseless republics), loss of human life in the defense of U.S. strategic interests abroad, and proliferation of free markets notwithstanding their distributional impacts across the

42. *See, e.g.*, David Kennedy, *The Disciplines of International Law and Policy*, 12 LEIDEN J. INT'L L. 9, 17-29 (1999).

43. *See* RUHL J. BARTLETT, THE RECORD OF AMERICAN DIPLOMACY 454-57 (4th ed. 1964); DAVID STEIGERWALD, WILSONIAN IDEALISM IN AMERICA (1994).

44. The Smoot-Hawley Tariff Bill of 1930 provoked the United States' major trading partners into imposing retaliatory tariffs. *See generally* JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT (1969).

45. For example, the Congress elected in 1974 denied South Vietnam the assistance it needed to ward off the communist invasion from North Vietnam. Once the United States pulled out of Vietnam, it was unwilling to plunge itself back into the conflict and reopen the bitter divisions that foreign involvement had wrought within the United States.

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world.[46] Yet, notwithstanding this overwhelmingly conservative creed, there has remained a faithful liberal following, such as the World Order Model Project,[47] committed to the goals of the United Nations. There have also been the activist groups and personalities that have thought that implementing the promises of the International Bill of Rights is long overdue. And then there are the critical legal scholars and the postmodernists who have remained skeptical of the ability of international law to fulfill its liberal commitments.[48]

Second, continuity presents itself in the legitimacy debate through its universalist pretensions. During the Cold War, the ideological choices between liberalism and communism were pursued as West-East alternatives for achieving global dominance and hegemony. Liberalism espouses the individualism that goes with capitalism, while the Eastern Bloc, led by the former Soviet Union, preached communism and the communitarianism of Rousseau and Marx. For non-Western societies, this presents a false choice — an antithesis so fundamentally Western in its teleology and so apparent during the Cold War. Roth argues that the ascendancy of liberalism does not rule out the reemergence of past revolutionary democratic orders (p. 119), perhaps illustrating that he remains embedded within this Eurocentric framework that conceives of liberalism and revolutionary democratic dictatorship as the only alternatives. My point here is that, notwithstanding their

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46. *See generally* RICHARD J. BARNET, INTERVENTION AND REVOLUTION: THE UNITED STATES IN THE THIRD WORLD (1968); NOAM CHOMSKY & EDWARD S. HERMAN, THE WASHINGTON CONNECTION AND THIRD WORLD FASCISM (1979); 3 AKIRA IRIYE, *The Globalizing of America, 1913-1945*, *in* CAMBRIDGE HISTORY OF AMERICAN FOREIGN RELATIONS 35 (1993); WALTER LAFEBER, INEVITABLE REVOLUTIONS: THE UNITED STATES IN CENTRAL AMERICA (2d ed. 1993); GADDIS SMITH, THE LAST YEARS OF THE MONROE DOCTRINE, 1945-1993 (1994).

47. The World Order Models Project, WOMP, is a nonprofit research organization. One of its latest reports from a multiyear project called the Global Civilization Initiative resulted in a book by Richard Falk. *See* RICHARD FALK, ON HUMANE GOVERNANCE: TOWARDS A NEW GLOBAL POLITICS (1995).

48. According to David Kennedy, international legal doctrine is indeterminate because of its circular reasoning and vagueness. In fact, Kennedy has equated mainstream approaches to law with both critical legal studies and postmodernism. According to Kennedy:

> If we read post-modern legal scholarship as a rotation within the legal academy — as a departure, but also as a continuation of the problematic of contemporary legal scholarship, we might give the post-modern credit for a certain irony about its neo-classical imitation — to be mocking the impossibility of both the analysis and the political invocation which it asserts. After all, calling for "face to face politics" or for liberation of the "voice of women" in the full-dress regalia of a law review article, festooned with citations and the tone of edited clarity, has got to suggest its own impossibility.

David Kennedy, *A Rotation in Contemporary Legal Scholarship*, *in* CRITICAL LEGAL THOUGHT: AN AMERICAN GERMAN DEBATE 353, 395 (Christian Joerges & David M. Trubek eds., 1989). Martti Koskenniemi argues that "deconstruction" "is only a cultural or historical convention, a style with an emancipatory potential but which — just like Kantian universalism — is always in danger of being transformed into a means of status quo legitimation." Martti Koskenniemi, *Letter to the Editors of the Symposium*, 93 AM. J. INT'L L. 351, 360 (1999).

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critique of liberalism, revolutionary democratic dictatorships of the East were, like liberalism, also predicated upon a universalizing model. This is because, within revolutionary democratic dictatorships, the proletariat of the Soviet Union and the West would liberate those of the rest of the world.[49] This savior attitude towards the non-West is evident in a variety of Western discourses on the non-West.[50]

Third, there is no fundamental difference between liberalism and the conservatism within which I locate Roth. They share so much in terms of the abstract principles between them — "rights, majority rule, the rule of law, Judeo-Christian morality" — that distinguishing one from the other becomes difficult.[51] Yet, it is not uncharacteristic for "legal arguments . . . [to] directly or analogically translate general political into legal discourse. The rhetoric of self-reliance is conservative; that of sharing, liberal. The rhetoric of self-realization is liberal; that of communal authority, conservative."[52] However, it is not so much the porous nature of these alternative ideological and discursive frames that this Review finds compelling, but rather the broad institutional, social-structural, and historical context within which shifts between them occur. In other words, I am as concerned with context and history as I am with the normative reflection that is so welcome in Roth's analysis.

III. International Law, Colonialism, and Legitimacy

In seeking to establish a legal norm of governmental illegitimacy, there is a sense in which Roth can be regarded as overstating international law as a "set of rules with origins and applications," and understating it as a "history of a people with institutional, polemic and political projects."[53] It is perhaps this statement of international law more as rules and less as a living project that leads Roth to understate the susceptibility of international law's deployment in contexts such as colonialism and economic restructuring.

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49. P. 102. Roth quotes Marx and Engels at length here:

> The communists . . . are on the one had, practically, the most advanced and resolute section of the working class parties of every country, that section which pushes forward all others; on the other hand, theoretically, they have over the great mass of the proletariat the advantage of clearly understanding the line of march, the conditions and the ultimate general results of the proletarian movement.

P. 102 (quoting Karl Marz & Freidrich Engels, *The Manifesto of the Communist Party*, *in* THE MARX-ENGELS READER (Robert C. Tucker ed., 1978)).

50. Makau Wa Mutua, *Savages, Victims, and Saviors: the Metaphor of Human Rights*, Paper presented at the Harvard Law School Faculty Workshop Series (Mar. 19, 1999).

51. DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE) 51 (1997).

52. *Id.* at 54.

53. David Kennedy, 91 AM. J. INT'L L. 748 (1997) (reviewing SHARON KORMAN, THE RIGHT OF CONQUEST: THE ACQUISITION OF TERRITORY BY FORCE IN INTERNATIONAL LAW AND PRACTICE (1996)).

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In addition to thinking of international law as law, it could also be seen as the site for the deployment of institutional, polemic, and political projects, whether realist, moral, or otherwise. Perhaps nowhere is Roth's commitment to the idea of international law as a set of legal rules or principles more evident than in his proposal that the "radically different interpretations in different parts of the world" of internationally accepted norms, principles, or rules is a problem that "can be cured *only* by a more rigorous examination of international legal principles" (p. 8; emphasis added). This commitment to legality to resolve differing interpretations of the law is a form of legal totalitarianism. One way of articulating my problem with this commitment to legal principles to resolve different interpretations is as follows: advocating a theory or norm of governmental illegitimacy or of democratic entitlement may turn out to be more important to how that theory or norm turns out than any hard and fast notion of such a theory or norm.

For example, in addition to examining sources of governmental legitimacy other than those claimed by liberals, as Roth brilliantly does, a plausible argument may also be made that the liberal triumphalism that has characterized American foreign policy in the post-Cold War period marks a shift from coercive to consensual American global domination. This new era of consensual American domination through liberal democracy, exported through democracy-promotion programs, may be interpreted as a new stage in American global domination.[54] During the Cold War, the United States retained its dominance internationally through a coercive foreign policy that endorsed militaristic and discreet interventionism. In the post-Cold War period, democracy promotion, however, represents the continuity of the maintenance of United States dominance through consensual mechanisms that involve an alliance with third-world elites who gain legitimacy by having to go through the hoops of competitive elections with widespread citizen participation.[55] This new model of democracy promotion also represents the ideological victory of free-market capitalism as a replacement for alternative visions of social and political life, such as socialism.

In my view, colonialism, like liberal democracy and free markets, is in one way or another embodied in the institutional, polemic, and political projects of which the various rules of international law are part. Here, I differ from Roth, who sees colonialism as an exceptional case of illegitimacy. Instead of understanding colonialism as extinct or even exceptional, I argue that debates on legitimacy cannot be seen

54. *See* John-Jean Barya, *The New Political Conditionalities of Aid: An Independent View From Africa*, 24 INST. DEV. STUD. 16 (1993).

55. *See* WILLIAM I. ROBINSON, PROMOTING POLYARCHY: GLOBALIZATION, US INTERVENTION AND HEGEMONY (1996).

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outside the dynamics of identity, power, wealth, and inequality at the international level. Colonialism has signified and continues to signify the manner in which ideologies based on racial and cultural differences legitimated expropriation, conquest, conversion, and outcomes such as slavery.

Governmental Illegitimacy does not fall into nineteenth-century racism and in fact criticizes liberal internationalists for embracing a view of democracy that is liberal and Western in its outlook in a pluralistic society of nations. Yet, this celebration of pluralism could be broader. First, it could be mobilized to delegitimize the uncritical liberal ambition that is shared even in non-Western societies, to the effect of establishing that people are necessarily the repositories of governmental power without a concurrent examination of the quality of governance.

Second, and more importantly for this part of the Review, Roth's analysis could have argued that pretensions of universality in the norms of international law have historically been promoted by colonizing and dominant countries. This universalism presupposes that there are primitive societies that fall below the so-called great civilizations of the West. International law has deployed cultural and racial stereotypes in delegitimating societies outside the West because they fell below conceptions of the state whose standards are naturally and necessarily assumed to be those of the so-called great Western civilizations. In other words, Roth's acknowledgement of pluralism in international society does not extend to acknowledging that non-Western societies can legitimately organize their own societies on the basis of their own civic and political virtue — without any interpretation of their legitimacy by outsiders. Roth acknowledges cultural pluralism, but this cannot be equated with the ethical pluralism that flows from the various cultures of the world. While these cultures are not self-contained, Roth simply wants to predicate legitimacy of governments on a Western state denominator — effective control of the population.[56]

Roth's only extended discussion of colonialism is contained in Chapter Six. This chapter is devoted to demonstrating that colonial, alien, and racist regimes pose a fundamental problem for his theory — that popular will can be ascertained or construed through the mediation of an effective ruling apparatus or a government with de facto control. In his view, because of the fundamental illegitimacy of colonial, racist, or alien regimes, the question of the "will of 'peoples' is altogether removed from the question of effective control" (p. 199). Therefore, Roth's discussion of self-determination is an exception to his general thesis that, where a government has effective control over its population, there is a presumption of legitimacy in its favor. Ac-

56. I return to this point *infra* Part VI. For a review essay of Eurocentricity in international law, see Gathii, *International Law and Eurocentricity*, *supra* note 4, at 184-211.

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cording to Roth, "[w]here 'peoples' are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self determination,' effective control carries with it no presumption of legitimacy, and the popular will must be ascertained by other criteria" (p. 199; footnote omitted).

This is an important point. Yet, I quibble with it to the extent that it diminishes colonialism as ephemeral and exceptional to international law rather than as integral, continuing, and present.[57] Roth has a brief history of conquest to self determination — told with the aim of illustrating his understanding of self-determination rather than exploring the continuities between conquest, mandates, trusteeship, and self-determination. For example, this cursory reading is biased to the extent to which, in summarizing a long and complex history, it presents Woodrow Wilson's demands for self-determination to the Allied Powers as if self-determination was to be applied to all colonies and conquered territories equally. Roth presumes that Wilson's exhortation was viewed by the Central Powers as representing a "universal interest" (p. 205). This could not be further from the truth. Wilson and General Smuts supported the exclusion of southwest Africa from the international supervisory mechanism (the mandate system) set up after the First World War to prepare predominantly European colonies for independence. African mandates such as southwest Africa were ranked C, the lowest in the hierarchy.[58] Smuts, whose views Wilson shared with respect to southwest Africa and the Pacific, argued that these German territories were "inhabited by barbarians, who not only cannot possibly govern themselves, but to whom it would be impractical to apply any idea of political self determination in the European

57. Roth's idea of colonialism is actual physical occupation. Hence he argues that "the concept of self determination has necessarily played a pivotal role in twentieth-century efforts to erect a peace and security scheme that effectively outlaws conquest. Although *past* conquests underlie almost all territorial sovereignty, these efforts established the inadmissibility of *future* conquest." P. 203 (emphasis added).

58. According to Anghie:

> The mandate system . . . proposed . . . that sovereignty was hierarchical, that it could be graded and allocated in varying amounts to different territories depending on an assessment as to amounts to different territories depending on an assessment as to their state of political and economic advancement. All this was implied by the classification of mandates into 'A', 'B' and 'C' regimes . . . . The superior sovereign status enjoyed by more advanced territories, the 'A' mandates, was manifested in the form of greater autonomy given to these mandates." Hence 'A' mandates such as Palestine were regarded as possessing relatively sophisticated indigenous political traditions and hence were more amenable to be transformed from this cultural status into civilization. By contrast, the 'C' mandates like South West Africa had little or no indigenous political sophistication and needed more guidance and control to tame their primordial ways. Unlike the 'A' mandates, the 'C' mandates were therefore less prepared to have sovereignty over their own affairs.

Anghie, *Creating the Nation-State*, *supra* note 39, at 238, 256, 215-87.

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sense."[59] This was essentially the same logic that was used to justify colonial conquest in the first place.

Roth's brand of analysis is characterized by the idea that colonialism was a rare and aberrational feature of international law. He does not see it as continuing, systematic, and ingrained in international law as we know it today. If we restrict colonialism to white political rule over nonwhites, as Roth does, then it is possible to understand colonialism as rare and aberrational rather than contemporary and integral to international law. But economic disempowerment and cultural imperialism are only two examples of contemporary colonialism. In his last English-language book, Kenyan-born Ngugi Wa Thiong'o reminded us that the English language in former British colonies in Africa is a "cultural time bomb" that continues a process of erasing memories of precolonial cultures and history as a way of installing the dominance of new, more insidious forms of colonialism.[60]

While today the forms colonialism takes may be hidden, international lawyers of the nineteenth century were far from subtle. For example, they argued that, being different from Judeo-Christian Europe, Africa was culturally inferior and politically disorganized.[61] This in turn barred Africa from membership in the family of nations and the benefits of protection under international law.[62] Consequently, one of the most important ways in which international law delegitimated non-Western societies was through racial and cultural differentiation. Edward Said, in another context, has called this "orientalism": a manner of regularized (or orientalized) writing, vision, and study, dominated by imperatives, perspectives, and ideological biases ostensibly suited to the Orient, but actually tilted in favor of the Occident.[63]

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59. SIBA N'ZATIOULA GROVOGUI, SOVEREIGNS, QUASI-SOVEREIGNS AND AFRICANS 130-31 (1996) (quoting JAN CHRISTIAN SMUTS, JAN CHRISTIAN SMUTS 199 (1952)).

60. *See* NGUGI WA THIONG'O, DECOLONIZING THE MIND 15-16 (1986). According to Thiong'o, a

> specific culture is not transmitted through language in its universality but in its particularity as the language of a specific community with a specific history. Written literature and orature are the main means by which a particular language transmits the images of the world contained in the culture it carries.
>
> Language as communication and as culture are then products of each other.... Language carries culture, and culture carries, particularly through orature and literature, the entire body of values by which we perceive ourselves and our place in the world.... Language is thus inseparable from ourselves as a community of human beings with a specific form and character, a specific history, a specific relationship to the world.

Id. For an analysis of his earlier writings, see Josef Gugler, *How Ngugi Wa Thiong'o Shifted From Class Analysis to a Neo-Colonialist Perspective*, 32 J. MOD. AFR. STUD. 329 (1994). For an essay that influenced the title of this Review, see NGUGI WA THIONG'O, MOVING THE CENTER: THE STRUGGLE FOR CULTURAL FREEDOM (1993).

61. *See* M.F. LINDLEY, THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORIES IN INTERNATIONAL LAW 10-23 (1926).

62. *See id.*

63. *See* SAID, *supra* note 6, at 41-49.

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There is perhaps no better study of the orientalization of international law than Antony Anghie's work. Anghie argues that colonialism is central to international law particularly because its doctrines were constructed around a series of contrasting national identities, races, and languages with European ones at the apex.[64] Hence, international law was less about how order was created among sovereign states than how it managed order among entities of completely different cultural systems.[65]

Consequently, cultural difference was a major consideration in whether or not an entity was considered sovereign under international law. Those that did not match the cultural configuration that guaranteed sovereignty could not possess it; they were illegitimate. Anghie traces how the early writings of Francisco de Vitoria, a natural-law theorist, and John Westlake, a positivist, justified colonial conquest over Africa and India.[66] Their rationale was simple: these non-Western societies did not possess the traits of statehood necessary to justify their enjoyment of sovereignty. This, in turn, gave legitimacy to colonial conquest over peoples who did not possess what was considered a necessary condition for their exercise of sovereignty. Even the mandate system was based on a parallel idea — that non-European peoples needed to be governed by outsiders since they could not govern themselves.[67] Today, the idea of failed and collapsed states that need Western tutelage bears a striking resemblance to the denial of sovereignty for non-European societies under colonial rule and the Wilson-Smuts logic on the mandate system. Needless to say, there are already proposals for recolonization of failed and collapsed states.[68]

Consider this genealogy: in the seventeenth century, writers opined that "savages" had sovereignty over the lands that they occupied, no matter how much they fell outside what was considered as constituting civilization. These writers opined, however, that these savages had title only to those lands they actually occupied. Vacant land was legally *terra nullius*, open to seizure by any organized state

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64. *See* Anghie, *Finding the Peripheries, supra* note 39.

65. *See id.* For a listing of many of Anghie's works, see *supra* note 39.

66. Examples of their writings are FRANCISCO DE VITORIA, DE INDIS ET DE IVRE BELLI REFLECTIONES [On the Indians Lately Discovered] (Ernest Nys & J.P. Bate trans., 1917) (1696); JOHN WESTLAKE, CHAPTERS ON THE PRINCIPLES OF INTERNATIONAL LAW (1894).

67. *See* Anghie, *Creating the Nation-State, supra* note 39, at 215-87.

68. *See, e.g.*, Gerald B. Helman & Steven R. Ratner, *Collapsing Into Anarchy: Saving Failed States*, 353 CURRENT 33 (1993) (arguing that U.N. policies toward collapsed states should be geared towards the concept of conservatorship, an effort designed to save nations at risk of collapsing); Gerald B. Helman & Steven R. Ratner, *Saving Failed States*, 89 FOREIGN POL'Y 3, 20 (1992) (arguing that the U.N. should help failed states, possibly through a type of conservatorship, including the use of governance aid, U.N. trusteeship, or the delegation of governmental authority).

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that *discovered* and *occupied* it.[69] Hence the doctrine of discovery was invented to justify conquest of non-European lands. Emer de Vattel, writing in Switzerland in the 1750s on the basis of very scanty traveler accounts, conditioned sovereignty on the performance of agricultural work. Nomads, hunters, and gatherers held no such right.[70] This doctrine was later used to justify expropriation of Indian land in the present United States.[71]

In the nineteenth century, a stricter definition of which societies constituted states was adopted in international legal thinking. International lawyers in the 1890s held that general cultural inferiority and political disorganization barred certain states (like those in tropical Africa) from membership in the family of nations. Westlake, for example, wrote that they even lacked the power to sign legal treaties transferring their sovereignty to a European power.[72] But such discrimination in international law was always explicitly based on culture, not only or necessarily on race.[73] There was also the theory that "lower races" deserved special or different treatment from the organized community of nations.[74] Although according to this theory they had certain disabilities, they also had certain rights, and these were often equated with those of minors in law. The Western countries, presumed to be more developed images of what non-Western societies would look like in future, were seen in the role of benevolent fiduciaries, trustees, or guardians of non-Western societies that were presumed to be less developed.[75] One outcome of this line of thought was the mandate system under the League of Nations between the two world wars, or the trusteeship council under the United Nations Charter.[76]

69. *See* SHARON KORMAN, THE RIGHT OF CONQUEST: ACQUISITION OF TERRITORY BY FORCE IN INTERNATIONAL LAW AND PRACTICE (1996).

70. *See* Emer de Vattel, Le droit des gens, ou, Principles de la loi naturelle, appliques à la conduite & aux affaires des nations & des souverains [THE LAW OF NATIONS, OR PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT & AFFAIRS OF NATIONS AND SOVEREIGNS] bk. I, ch. xviii (1758).

71. *See* Johnson v. M'Intosh, 21 U.S (8 Wheat.) 543 (1823). Chief Justice Marshall wrote:

> We will not enter into the controversy, whether agriculturalists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.

Id. at 588.

72. *See* WESTLAKE, *supra* note 66, at 137.

73. *See, e.g.*, LINDLEY, *supra* note 61, at 10-23.

74. *See* J.A. HOBSON, IMPERIALISM: A STUDY (1902).

75. *See* Anghie, *Universality and the Concept of Governance*, *supra* note 39, at 22-34.

76. *See* Anghie, *Creating the Nation-State*, *supra* note 39.

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The roots of the post-Second World War idea of trusteeship lies farther back in the history of European thought. The most obvious is the chivalric ideal of the middle ages, when the knight incurred obligations to help the weak along with his military status.[77] More important still was the Christian tradition, which laid a great stress on proselytism from the time of Saint Paul onward, an argument pursued with great persuasion recently.[78] If religious superiority carried an obligation to convert the heathen, cultural superiority might easily carry an obligation to convert the barbarian. The belief in this obligation, and the effort to carry it out, has also been referred to as "conversionism." Conversionism was broadly dominant in Western imperial thought during the first half of the nineteenth century, both in France and in England. In France, the idea of a *mission civilisatrice* was sporadically followed by moves toward the cultural assimilation of its subjects overseas — a policy that resulted in the countervailing notion of negritude or black pride.[79] In England, one of the most famous statements of the conversionist point of view is Macaulay's "minute" on Indian education, and the belief in a conversionist duty spelled out by the Parliamentary Committee on the Aborigines in 1837.[80]

Conversionism differed from the later belief in trusteeship in crucial ways. It called for missionaries, both cultural and religious, but not necessarily for conquest or control overseas. The obligation to spread Christianity and civilization was a self-imposed obligation on those who thought of themselves as civilized.[81] There was no equivalent duty or limitation on the rights of the uncivilized. They were not so often treated as minors in law, but as adults who would choose civilization and Christianity voluntarily once it was presented to them. While a little coercion was called for in some variants, and some potential recipients of civilization already lived in European colonies, the balance of duty lay with the civilizers.[82]

This, then, is a simple genealogy suggesting that international law has historically been implicated in drawing cultural, religious, and

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77. *See generally* RICHARD BARBER, THE KNIGHT AND CHIVALRY (1985).

78. *See* Makau Wa Mutua, *Limitations on Religious Rights: Problematizing Religious Freedom in the African Context*, 5 BUFF. HUM. RTS. L. REV. 75 (1999).

79. *See* Léopold Sédar Senghor, *Negritude: A Humanism of the Twentieth Century*, *in* THE AFRICA READER: INDEPENDENT AFRICA 179 (Wilfred Cartey & Martin Kilson eds., 1970).

80. *See* THOMAS B. MACAULAY, SPEECHES BY LORD MACAULAY, WITH HIS MINUTES ON INDIAN EDUCATION (1935).

81. *See* Mutua, *supra* note 78; Mutua, *supra* note 50.

82. Perhaps the most important British representative of the conversionist position was Thomas Fowell whose ideas for the civilization of Africa are given in most detail in THE REMEDY: BEING A SEQUEL TO THE AFRICAN SLAVE TRADE (1840). His ideas regarding other parts of the empire appear in the published hearings of the parliamentary committee on aborigines 1835-37. *See* PARLIAMENTARY PAPERS, 1836, vii (538); and vii (425).

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other boundaries to mark out what a state was and what it was not, and to stake out who was entitled to what protections and who was not. These notions in turn served to legitimize the spread of "civilized" ideas of statehood to those supposedly savage, so that they could be brought within the history of civilization. Colonialism was hence justified on exactly this sort of premise.

Although it may be too simplistic to draw analogies between the contemporary fad of collapsed states (which justifies foreign intervention for democracy, human rights, and economic restructuring) and nineteenth-century international law scholarship on ideas such as *terra nullius* and civilization (defined as Western) that justified colonization, there is nonetheless a continuity of ideas here. There is an undeniable genealogy in the sense that the idea of collapsed states replicates nineteenth-century colonial international legal discourse. In fact, as recently as 1995, a leading international lawyer, Inis Claude, suggested that a solution to the phenomenon of collapsed states was a return to the trusteeship system which failed by allowing too many states to become independent before they were prepared for the responsibilities of statehood.[83]

IV. SHUTTING OFF THE ILLEGITIMACY/LEGITIMACY OF PRIVATE ORDERING IN ROTH'S PROPOSAL

Roth, in Chapter Five, explores the legal consequence of non-recognition. He asks: Do de facto regimes have the legal capacity to enter into binding legal agreements? What is the underlying basis upon which decisions should be made on the legality of their conduct? Roth notes that:

> By far the most significant international law issues raised by collective non-recognition of a government concern assertions of the state's rights against foreign intervention in matters "essentially within the domestic jurisdiction" . . . and against threats or uses of force against the state's political independence. . . .
>
> The less dramatic issues involve such questions as title to property. . . . A related matter is the determination of whether a third party may lawfully purchase title to state property. . . . [p. 154]

Roth further argues that, in the absence of another competing doctrine, the doctrine of state necessity is a general principle of international law that may be used for the assessment of the legal significance

83. *See* Inis L. Claude, Jr., *The United Nations of the Cold War: Contributions to the Post-Cold War Situation*, 18 FORDHAM INT'L L.J. 789, 790, 793 (1995). It is interesting to note that in 1973 Claude argued that the attention of international law had shifted from the problem of powerful states to the problems of weak states. *See* Inis L. Claude, Jr., *The Central Challenge to the United Nations: Weakening the Strong or Strengthening the Weak?*, 14 HARV. INT'L L.J. 517 (1973).

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of acts undertaken by illegitimate regimes (p. 158). This leads him to another conclusion based on a public/private distinction:

> This would suggest . . . that a *de facto* government would have the legal capacity to bind the state to treaties of a technical, apolitical nature (e.g. postal and aeronautical conventions), though not to partisan alliances, that non-controversial policies or policies consistent with those of previous legitimate governments should enjoy deference from foreign courts as acts of state . . . . [p. 158]

This clear dichotomy between legal consequences that are public and controversial and private legal consequences that are less controversial is rather troubling for its artificiality. It is based on a rather spurious distinction that suggests that the private sphere is a depoliticized arena, while the public sphere is a controversial and political arena. It is as if the private arena eclipses the politics of the public arena so that we can then think of issues such as property, postal, and aeronautical conventions as apolitical, while questions relating to collective nonrecognition appear to be "dramatic" and presumably very political in Roth's telling.

Roth here replicates a common mainstream strategy: law, as opposed to politics, is located in spaces that do not depend on sovereign control and that are consensual, neutral, and hence effectual. Aeronautical and postal conventions are, in Roth's view, in this category. By contrast, Roth locates politics in the controversies surrounding the desirability of collective nonrecognition — in public intervention in civil society. This neat dichotomy between political issues and economic issues is problematic. Its commitment to a depoliticized private law regime that is presumed to be consensual underplays law's constitutive role. Law is constitutive of various choices since there is no neutral logic inherent in law for justifying one choice over another. Structuring different market needs or doctrinal forms is illustrative.[84] In the area of defining property, for example, choices must be made about how to balance the absolute freedom of an owner to do as she wishes with her property with the competing entitlement of her neighbor to peaceful and unrestricted use of her property. Making these choices is inescapably political.[85]

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84. *See* Karl Klare, *Legal Theory and Democratic Reconstruction: Reflections on 1989*, *in* A FOURTH WAY? PRIVATIZATION, PROPERTY AND THE EMERGENCE OF NEW MARKET ECONOMIES 310 (Gregory S. Alexander & Grazyna Skapska eds., 1994).

85. As Kerry Rittich argues:

> [T]he distinction between public and private as a way of conceptualizing or resolving the problems associated with economic reform is unsatisfactory . . . [since] concepts such as property . . . tell us nothing about the substantive questions, which are the scope, type and structure of private interests and power which should be configured. . . . The empowerment of the "private" actor signals nothing so much as a redistribution of power among different social groups that the state is prepared to back. This reconfiguration of entitlements and access to social resources that characterizes restructuring will benefit some people in some ways, but make others, including those who benefit, worse off in some ways.

Dan Tarullo,[86] Joel Paul,[87] David Kennedy,[88] and Amr Shalakany[89] argue that politics is equally present in the private realm of aeronautical and postal conventions that Roth dismisses as less dramatic and therefore apolitical. These scholars have shown in a variety of contexts the "potential for politics outside the traditional discourses of public authority."[90] Hence:

> Defending the stability of a political order necessary for investor confidence requires a set of political choices among states and among groups or classes within nations, as among the transnational interests of labor or capital or women or men. Moreover, it calls for choices among economic sectors with stakes in different patterns of modernization, among investors with different stakes in different patterns of production, trade and consumption. It is commonly said that, for example, that a global market "requires" an emerging market to enforce the "rule of law" to permit "transparency" and "predictability" in market transactions. It sounds very clean, egalitarian, procedural, just like apolitical background rules. But the alternative is neither arbitrary nor chaotic allocations, but a different, and often equally predictable allocation of resources, perhaps to local rather than foreign investors, to domestic oligarchs rather than foreign shareholders and vice versa.[91]

Roth therefore underestimates the politics of private law projecting rules of private international law as neutral, since, unlike in cases of collective nonrecognition of governments, sovereignty is at bay in the private sphere. There is almost blind faith in the idea that public intervention in civil society is always coercive, while the exclusivity of the private sphere from public power guarantees neutrality and therefore freedom. The power exercised by international financial institutions in developing countries, however, especially in the last few years, to fundamentally alter their labor laws, energy policies, and budgetary policies, underscores the inherently interventionist and political role of what is otherwise presented in the rhetoric of apolitical, even-handed

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Kerry Rittich, *Recharacterizing Restructuring: Gender and Distribution in the Legal Structures of Market Reform* 258 (1998) (S.J.D. thesis submitted in partial fulfillment of the requirements of the degree of Doctor of Juridical Science, Harvard Law School).

86. *See* Daniel K. Tarullo, *Beyond Normalcy in the Regulation of International Trade*, 100 HARV. L. REV. 546 (1987).

87. *See* Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1 (1991); Joel R. Paul, *The Isolation of Private International Law*, 7 WIS. INT'L L.J. 149 (1988).

88. *See* David Kennedy, *The International Style in Postwar Law and Policy*, 1994 UTAH L. REV. 7.

89. Amr A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Spectre of Neo-Liberalism*, 41 HARV. INT'L L.J. 419 (2000).

90. Kennedy, *supra* note 88, at 10-11.

91. David Kennedy, *"Background Noise?" The Underlying Politics of Global Governance*, 21 HARV. INT'L REV. 55 (1999). *See also* David Kennedy, *The Disciplines of International Law and Policy*, 12 LEIDEN J. OF INT'L LAW 9 (1999).

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functionality and economic rationality. These alterations to these economies have resulted in demobilizing political potential for social justice in areas such as public provisioning of health care and public education.[92] By contrast, the goals of economic growth and returns to profits and investments in the allocation of public resources and in decisionmaking have been given preferential treatment at the expense of public provisioning for social justice.[93]

In addition, to suggest that questions of title to property are not as controversial in the context of illegitimacy of governments is to forget that the entire colonial regime of international law on appropriation of non-European land was based upon controversial doctrines such as the doctrine of discovery — a doctrine based on the cultural inferiority of non-Western land owning and management systems. Again, just as he presents private issues as apolitical, Roth, in his discussion of colonialism, similarly treats culture as invisible in the context of staking out claims such as colonial expropriations. In the context of collective nonrecognition of governments, however, culture raises its ugly head as the rules of public international law grapple to repress and manage ethnic, religious, and other identity claims.

V. NONINTERVENTIONISM EXCLUDES INTERNATIONAL ECONOMIC DOMINATION

Perhaps there is no better example of Roth's silence on the coercion of the private sphere than his discussion of the nonintervention norm in relation to nonforcible measures undertaken in the promotion of human rights (pp. 171-72). Roth opines that since there is no

> commonly agreed-upon threshold[] of human rights-violative conduct triggering permissibility of otherwise unlawful measures, let alone mechanisms for authoritative findings that those thresholds have been reached in individual cases. . . . This uncertainty is fraught with dangers for weak, unpopular states at the hands of strong, influential ones, and one should not automatically assume (as many human rights-oriented writers often do) that these dangers benefit in any genuine way the cause of human rights. [pp. 170-71]

This is a point very well-made, yet I find it striking that Roth ignores an important related question — why do human rights-oriented writers, among others, more often than not tend to presume that the nonintervention norm does not prohibit what have been referred to as nonforcible measures such as the use of economic leverage?

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92. *See* MEREDETH TURSHEN, PRIVATIZING HEALTH SERVICES IN AFRICA (1999); Jonathan Cahn, *Challenging the New Imperial Authority: The World Bank and the Democratization of Development*, 6 HARV. HUM. RTS. J. 159, 160 (1993).

93. *See* Gathii, *Representations of Africa in Good Governance*, *supra* note 11.

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Although Roth acknowledges economic intervention is an issue, he is nevertheless moving from within this very limiting framework to the extent that his concern is which nonforcible economic measures violate the nonintervention norm — and he thereby aligns himself with the overwhelming doctrinal reading of the nonintervention norm as limited to prohibiting certain interventions in the public sphere of civil society and in the prohibition of the use of force except in certain circumstances. The failure to read nonintervention as prohibiting economic coercion underscores the selective reading of the norm of nonintervention by an overwhelming majority of Western public international lawyers. This prevailing tendency that fails to recognize economic coercion as a form of intervention follows from a widely embraced idea in international law that, in the exercise of their economic freedom, countries do not breach the nonintervention norm. Consequently, intervention under the United Nations Charter has largely been limited to restrictions on interference with matters that are essentially within the jurisdiction of a state, and to the prohibition of the use of force except in cases where there has been a "threat to the peace," "breach of the peace," or an "act of aggression."[94]

There are at least two norms of international law that guide the definition of the scope of permissible forms of restrictions on economic interactions between states. In the first view, international law permits states to impose *acts of retorsion* on other states. Acknowledging the right of a state to impose an act of retorsion follows from the strict view that each country has a sovereign right not only to determine with which countries it may have economic interactions, but also to impose whatever economic restrictions it wishes on other states.

The second view holds that, if a norm prohibiting the exercise of economic coercion between states exists, the exercise of one country's economic sovereignty against another could be considered a legitimate *reprisal* or *countermeasure*. In other words, although a countermeasure is an illegal act, if used in self-defense it is deemed legally permissible as self-help.[95]

These norms of international law reveal the absence of a clear statement restricting the interventionary economic programs promoted by powerful states and International Financial Institutions (IFIs).[96] This is unsurprising since the nonintervention norm applies to

94. *See* U.N. CHARTER art. 39.

95. *See* OMER ELGAB, THE LEGALITY OF NON-FORCIBLE COUNTER-MEASURES IN INTERNATIONAL LAW 4 (1988).

96. *See, e.g.*, Military and Paramilitary Activities (Nicar. v U.S.), 1986 I.C.J. 4 (June 27). The Court, without much guidance on what it had relied upon, stated that it was unable to find that United States' measures such as elimination of bilateral assistance, the reduction of sugar imports, blocking loans from international financial organizations, and ultimately the prohibition of export/import trade between the two countries and the barring of Nicaraguan

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relations between states rather than between nonstate actors such as the IFIs and states. However, the nonintervention norm reflects international law's laissez-faire attitude towards economic interactions. Under this view, only states can legitimately impose restrictions on relations with each other.[97] It is against this background that economic sanctions are considered legitimate avenues of international censure, to discipline what may be considered "errant" states both by individual states and by groups of states through IFIs.[98]

In addition, an international free-market economy is generally regarded as enhancing, rather than compromising, international peace and security.[99] This view is not necessarily true in all situations. The role played by economic restructuring in the violent collapse of the former Yugoslavia, for example, cannot be understated.[100]

My point, however, is that the normative authority of the sources from which the nonintervention norm is derived is a major way by which international law excludes activities of IFIs from its scrutiny. This happens through the failure to recognize economic coercion as a violation of the nonintervention norm, since such an argument cannot be made on the basis of neither custom nor treaty.[101]

Outside the realm of treaty and custom, however, a number of United Nations General Assembly resolutions recognize that economic coercion violates national economic sovereignty and therefore the nonintervention norm. Legal opinion in many developing coun-

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vessels from United States ports, constituted "breach of the customary-law principle of non-intervention." *Id.* at para. 245.

97. The U.N. Charter provides for the sovereign equality of all states. U.N. CHARTER art. 2, para. 1. The Charter of Economic Rights and Duties of States explicitly extends the meaning of sovereignty to incorporate the idea of economic independence. Chapter 1 (b) provides: "Economic as well as political and other relations among States shall be governed, *inter alia*, by the following principles . . . sovereign equality of all states." Charter of Economic Rights and Duties of States, G.A. Res. 3821, U.N. GAOR, 29th Sess., Supp. No. 31, at 50, U.N. Doc. A/9631 (1974).

98. There is also a view that, as a practical matter, much of a typical state's international trade involves a form of coercion. *See, e.g.*, D.W. Bowett, *International Law and Economic Coercion*, 16 VA. J. INT'L L. 248 (1976). *But see* Tom Farer, *Political and Economic Coercion in Contemporary International Law*, 79 AM. J. INT'L L. 405 (1985). Farer argues that

> taking into account the at best inconclusive character of the definitional exercise [under Article 2(4) of the U.N. Charter], the clear language of the Declaration of Friendly Relations, the earlier General Assembly resolution on nonintervention prohibiting "measures of an economic and compelling character to force the will of the State" and taking into account as well the language of the O.A.S. Charter, I conclude that under some conceivable conditions, economic coercion can be a violation of international law even where the means employed do not themselves violate any treaty.

Id. at 411.

99. *See* Anne Orford, *Locating the International: Military and Monetary Interventions after the Cold War*, 38 HARV. INT'L L.J. 443 (1997).

100. *See id.;* SUSAN L. WOODWARD, BALKAN TRAGEDY: CHAOS AND DISSOLUTION AFTER THE COLD WAR 148 (1995).

101. *See* STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 38(1)(c).

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tries shares this interpretation of the nonintervention norm under Article 2(7) of the United Nations Charter. This argument is further fortified by the view that economic coercion is prohibited under Article 2(4) of the UN Charter, since it constitutes a violation of the prohibition on unlawful threat or use of force.[102]

This interpretation of the nonintervention norm is primarily derived from the following United Nations General Assembly resolutions:

- Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Amongst States in Accordance with the Charter of the United Nations;[103]
- Resolution of Permanent Sovereignty Over Natural Resources;[104]
- Charter of Economic Rights and Duties of States.[105]

The dominant interpretation given to the nonintervention norm, however, holds that international law does not necessarily recognize a norm prohibiting economic coercion. Why is this so?

International legal opinion, especially in the West, does not regard economic coercion as intervention, since the definition of intervention contained in treaties and custom does not include economic coercion. On this view, international law excludes economic coercion as a part of the nonintervention norm, since it restricts the sources of the nonintervention norm to treaty and custom. This excludes as sources of international law United Nations General Assembly resolutions that declare that economic coercion constitutes a part of the nonintervention norm. This position is upheld on the assumption that the United Nations General Assembly does not have legislative authority to enact international law. As such, its resolutions cannot be regarded as authoritative sources of international law. This is especially the case when there are objections to the resolutions on the assembly floor. In addition, the resolutions are neither evidence of treaties nor state

102. *See* Bhupinder Chimni, *Towards A Third World Approach to Non-Intervention: Through the Labyrinth of Western Doctrine*, 20 INDIAN J. INT'L L. 243, 255 (1980).

103. G.A. Res. 2131, U.N. GAOR, 20th Sess., Supp. No. 14, U.N. Doc A/6220 (1965). This declaration fortifies the 1965 General Assembly Declaration on the Inadmissibility of Intervention into the Domestic Affairs of States, G.A. Res. 290 (IV), U.N. GAOR, 4th Sess., at 13, U.N. Doc. A/1251, at 13 (1949). Paragraph 2 of this latter declaration provides: "No state may use or encourage the use of economic, political, or any other type of measures to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind." The former calls upon states to refrain from "any forcible action" that deprives people of self-determination, equal rights, and freedom and independence. It further provides that "armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic, and cultural elements, are in violation of international law."

104. G.A. Res. 2635, U.N. GAOR, 25th Sess., Supp. No. 30, at 126, U.N. Doc. A/8028 (1970).

105. G.A. Res. 3821, *supra* note 97, at 50.

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practice evidencing custom.[106] This is the position Roth takes in subscribing to the view that the New International Economic Order did not rise to the status of international law (p. 168).[107]

An alternative view, however, regards General Assembly resolutions recognizing economic coercion as embodying a normative source of binding international law.[108] According to this view, General Assembly resolutions can result in more rapid formation of norms than would occur through the regular process of development of "international custom" or the strict formality of a specific international convention or treaty.[109] The advantage of admitting new sources that permit greater expedition in formation of international legal norms is that it enhances the ability of the United Nations to deal with new or unanticipated developments.[110]

There is in fact a legal basis for admitting General Assembly resolutions as sources of international law. Article 38(1)(c) of the Statute of the International Court of Justice specifies a source of international law other than treaty and custom: general principles of law recognized by civilized nations.[111] For example, expanding sources through general principles of international law, it has been argued, constitutes a source of norms of human rights law.[112] Some jurists have argued that the Article 38(1)(c) source of international law was written with an

106. On the legal significance of United Nations General Assembly resolutions and political statements, see Richard Falk, *On the Quasi-Legislative Competence of the General Assembly*, 60 AM. J. INT'L L. 782 (1966); Rosalyn Higgins, *The United Nations and Law Making: The Political Organs*, 64 AM. J. INT'L L. 37 (1970).

107. The New International Economic Order was an effort initiated by developing countries for, *inter alia*, the restructuring of international economic relations to establish a balance between their predominantly raw-material-producing economies and Western industrial and now increasingly service-oriented economies.

108. *See, e.g.*, NICO SCHRIJVER, SOVEREIGNTY OVER NATURAL RESOURCES (1997); *see also* B.S. Chimni, *The Principle of Permanent Sovereignty Over Natural Resources: Toward a Radical Interpretation*, 38 INDIAN J. INT'L L. 208, 214 (1998) (review of NICO SCHRIJVER, SOVEREIGNTY OVER NATURAL RESOURCES). Chimni argues that, to appreciate the principle of Permanent Sovereignty Over Natural Resources, one has to look to the material, rather than the formal and statist interpretations, of international law. Under this view, it is evident that third-world countries, since 1975, have abandoned nationalist bourgeois projects such as those relating to PSNR because those projects participate within the oppressive and neocolonial international legal system. Under this system, the rights of foreign investors and foreign capital are heavily protected at the expense of the developing countries' ability to use their resources to expand the welfare of their citizens and protect the rights of the victims of transnational capital activities. *See generally* B.S. CHIMNI, INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES (1993).

109. *See* HENKIN, *supra* note 3, at 1-148.

110. *See* Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 547 (1993).

111. *See* STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 38(1)(c).

112. *See* Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens and General Principles*, 12 AUSTRALIAN Y.B. INT'L L. 82, 82 (1992).

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aim of preventing the International Court of Justice from basing rulings upon subjective principles of justice. Such a broad power, according to this prevailing opinion, would inject subjectivity into the sources of international law and would be mistrusted by governments.[113] Yet, subjectivity is perhaps the staple food of legal argument, even in the adjudicative context, since gaps, contradictions, and ambiguities inexorably require judges to make choices.[114] In addition, even the so-called objective sources of international law, such as custom, have been invoked to legitimate bullying, such as the U.S. invasion of Panama.[115]

The nonintervention norm can be and has been construed to the effect that economic coercion violates it. This interpretation is unsurprisingly held widely in third-world international legal and political opinion. During the 1960s and 1970s, third-world majorities on the floor of the General Assembly dominated the debate and resolution process.[116] It was during this period that a number of resolutions calling for prohibition of economic coercion were passed. The overwhelming response of Western countries, including the United States, was that United Nations General Assembly resolutions were not a source of international law. Another response was to acknowledge these resolutions as merely soft law since they failed to command a sufficient level of legality. The ostensible reason for this was that there was relatively little international consensus over them.[117]

113. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 3, 15-16 (4th ed. 1990). Brownlie notes that Article 38(1)(c) of the Statue of the International Court of Justice has been used sparingly for rules of evidence, rules of procedure, or jurisdictional questions. Brownlie argues that Article 38(1)(c) was never intended to be the basis of major, new substantive norms in international law. *See also* Michael Akehurst, *The Hierarchy of the Sources of International Law*, 47 BRIT. Y.B. INT'L L. 273 (1974-75). Akehurst argues that general principles of international law are not a source of international law, but rather "simply broad principles, such as the principle of diplomatic immunity or the principle of the freedom of the seas; most of them are principles of customary international law . . . ." *Id.* at 278.

114. *See* KENNEDY, *supra* note 51, at 1.

115. *See* Antony D'Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*, 84 AM. J. INT'L L. 516 (1990).

116. *See* Richard Falk, *Introduction, The American Attack on the United Nations: An Interpretation*, 16 HARV. J. INT'L L. 566, 568 (1975); *see also* Progressive Development of the Principles and Norms of International Law Relating to the New International Economic Order, U.N. GAOR, 39th Sess., Agenda Item 5, at 4, U.N. Doc A/39/504/Add.1 (1984) (providing a good example of an argument in favor of taking general assembly resolutions as a source of international law); Farer, *supra* note 98, at 408 (defining economic coercion as "efforts to project influence across frontiers by denying or conditioning access to a country's resources, raw materials, semi- or finished products, capital, technology, services or consumers").

117. This bifurcation of legal claims (representing the status quo) on the one hand, and moral claims or soft law (deviations from the status quo or challenges to it) on the other hand, can be argued as reflecting a liberal strategy for perpetuating an unjust status quo by adopting the political posture that opposing claims may in time become legal principles when they attain or command a sufficient level of legality.

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My argument, then, is that the contemporary understanding of the nonintervention norm subscribed to by Roth is limited to the extent that sources of international law are restricted to treaty and custom. This selective recognition of the sources of international law excludes economic coercion as part of our understanding of unjustified intervention under the nonintervention norm. The focus on the source of international law's normative authority limits a broader or expansive definition of the nonintervention norm that accommodates economic coercion much in the same way that it bars interference with matters that are essentially within the jurisdiction of a state or the unlawful use of force. International law's normative authority is determined by the doctrine of sources through which international law defines what does or does not become a new norm. Consequently, in limiting new norms to custom and treaty rather than to general principles, for example, international law in effect perpetuates the status quo and preempts any radical rereading or reconfiguration of its norms in favor of developing countries.[118]

In so doing, the nonintervention norm protects the agenda of powerful and wealthy countries and nonstate actors, such as the IFIs, which currently fundamentally redefine third-world countries by virtue of their economic leverage over them.[119] In that way, international legal norms are decontextualized from the lived realities of peoples around the world — international law then remains a formal but a formidable mechanism for parceling out competences without regard to their material or distributional implications.[120]

As seen by its Western interlocutors, international law is, and should remain, deeply committed to ensuring that the international political economy is safeguarded from all forms of redistributive interventionism that would interfere with the automatic progress, dyna-

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118. *See* MOHAMMED BEDJAOUI, TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER (1979). Bedjaoui notes that international law

> must thus accept the challenge being made to it both by the structural disorder of the world economy and by the deeply felt desire of all peoples for a new international economic order. However, it is perfectly clear that to satisfy such hopes and to meet the needs of the international community seeking for this new order, international law cannot properly and effectively and effectively undertake its own transformation if it confines itself to its traditional sources alone, i.e. custom, treaties and general legal principles. The inadequacy of the traditional ways of forming the rules of international law is very sharply felt at the present time. What is to done if not to make use of other sources?

Id. at 128.

119. *See* Cahn, *supra* note 92, at 159-60.

120. Antony Carty is critical of approaches to international law that decontextualize international law from its historical and material specificity. *See* ANTONY CARTY, THE DECAY OF INTERNATIONAL LAW? A REAPPRAISAL OF THE LIMITS OF LEGAL IMAGINATION IN INTERNATIONAL AFFAIRS 4 (1986). For a Marxist take, see B.S. Chimni, *Marxism and International Law: A Contemporary Analysis*, ECON. & POL. WKLY., Feb. 6, 1999, at 337.

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mism, and productivity of the market.[121] While it therefore seems that international law has a well-articulated defense against redistributive interventionism inimical to free markets, it is hostile to accommodating a countervailing optic that would examine the distributional costs of the market's inability to spread its goodies around efficiently, optimally, or even equitably. In doing so, international law reinforces the fallacious vision of a universal economic order operating on more or less automatic self-regulating lines, while simultaneously delegitimating the power and authority of the nation-state 1) to protect its citizens from want through regulatory controls such as interest rates, taxes, and subsidies, and 2) to tame the inexorable march of the market so that a balance between social spending and investment programs could be entrusted to the hands of government.[122]

VI. ROTH BREAKS DOWN POST-COLD WAR LINEAR STORIES ON BREAKDOWN OF SOVEREIGNTY

Notwithstanding these implications of Roth's neoconservatism, an important outcome of his analysis is the effort to transcend the debate in liberal international theory in the post-Cold War period that has focused on legitimating the telling of a linear and unidimensional tale: the classical conception of sovereignty as a consolidated and unified unit formalizing the boundary between the national and the international has broken down or is breaking down or is in the process of erosion and reformulation.[123] Consequently, and on this view, states can no longer justify repression of individual rights on the basis of their exclusive sovereignty within their domestic jurisdictions as they did in

121. *See* Norbert Horn, *Normative Problems of a New International Economic Order*, 16 J. WORLD TRADE L. 338, 343 (1982). Horn observes that the New International Economic Order (NIEO) wrongly sought to extend the legal concept of sovereignty to economic aspects. Similarly, Schwarzenberger argues that the ideology of the Principle of Permanent Sovereignty Over Natural Resources was no more than a "convenient para-legal ideology of power economics." *See* Chimni, *The Principle of Permanent Sovereignty*, *supra* note 108, at 208 (describing Schrijver rejecting this view).

Robert Jackson argues that the NIEO "was unduly ambitious in that it attempted to replace free trade and cumulative justice with economic democracy and distributive justice." ROBERT H. JACKSON, QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS AND THE THIRD WORLD 202 (1991).

122. I tell this story in James Thuo Gathii, Empowering the Poor While Protecting the Powerful: A Critique of Good Governance Proposals (1999) (unpublished S.J.D. dissertation, Harvard Law School) (on file with the author).

123. It is noteworthy that the theme of the decline and demise of sovereignty is not confined to the post-Cold War period. *See, e.g.*, RAYMOND VERNON, SOVEREIGNTY AT BAY: THE MULTINATIONAL SPREAD OF U.S. ENTERPRISES (1971) (arguing that the nation-state was destroyed by the multinational enterprise); *see also* ROBERT GILPIN, U.S. POWER AND THE MULTINATIONAL CORPORATION 220 (1975); ROBERT O. KEOHANE & JOSEPH S. NYE, POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION 3 (1977); Saul Mendlovitz, *On the Creation of a Just World Order: An Agenda for a Program of Inquiry and Praxis*, Vol. 8 ALTERNATIVES, (Winter, 1980-1981).

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the 1960s and 1970s.[124] The new democratic entitlement that Roth takes issue with holds that, under the post-Cold War international order, individual liberty or the sovereign individual is the ultimate source of legitimacy in the liberal democratic order of good governance.

Roth seeks to break this unidimensional telling by examining the emergence of what he suggests to be a new norm — governmental illegitimacy of international law. This new norm, according to Roth, challenges the classical understandings of sovereignty that the democratic entitlement school (which he discredits) also challenges. The purpose of the book is therefore that of subjecting "collective nonrecognition of governments to painstaking and systematic examination," which the author states is "underexplored and undertheorized as a question in international law" (p. xi). In international legalese, the question that Roth sets out to answer is "when is a *de facto* authority to be considered a government for the purpose of international law?"[125] His aim is "to reach a conclusion on the 'current state of the positive international law of governmental illegitimacy.' "[126] Roth's project may therefore be summarized as a persuasion for balancing, if not blunting, the moralism of the democratic entitlement as the basis of government legitimacy with the reality of a norm of governmental illegitimacy based on interpretations of de facto control.[127] The resulting balance, perhaps more inclined in favor of de facto control, offers the lowest common denominator for governmental legitimacy in a world of plural cultures and societies. To illustrate:

124. *See* Gregory Fox, *New Approaches to International Human Rights: The Sovereign State Revisited, in* STATE SOVEREIGNTY: CHANGE AND PERSISTENCE IN INTERNATIONAL RELATIONS 105 (Sohail H. Hashmi ed., 1997). Fox notes that "international law no longer permits states to defend violations of fundamental human rights as legitimate exercises of national sovereignty." *Id.* at 115.

125. P. xv. This reference comes from the foreword authored by Oscar Schachter [hereinafter, Schachter Foreword].

126. P. xvi (Schachter Foreword).

127. Roth accepts the "the increased significance of empirical manifestations of popular will in *ad hoc* evaluations of governmental legitimacy, but denies that this development entails the emergence of a liberal-democratic 'legitimism.' " P. 4. Similarly, in discussing the constitutive and declaratory theories of recognition, Roth argues that

> some concession to the *realpolitik* of international relations is essential if international law is to be taken seriously as a framework for actual state behavior, as opposed to mere wishful moralizing on the part of natural law theorists.... [I]n order for there to be the necessary unity of legal and factual relationships, brute force must be permitted to create and destroy legal relationships, but not limitlessly."

P. 125. Roth, however, is also of the view "that international law's moralistic component is essential to its very efficacy." P. 182. Yet, it is also Roth's view that "the prospect of a new democratic legitimism replacing the effective control doctrine ... [would result in] radically transforming the sovereign equality scheme." P. 189. Roth further opines that the effective control doctrine, "though not by itself rising to the level of *jus cogens*, is the present method for interpreting a scheme that features as a peremptory norm the inadmissibility of the use of force against the political independence of states." P. 189.

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> [A]s the actors to be reckoned with in the international system become more numerous and come to represent more diverse interests, international law norms come under increasing pressure to embody truly general principles rather than a fortuitous overlap of the interests of a powerful few. . . . The moralistic rules calculated to legitimate the essence of the *status quo* generate, paradoxically, standards that progressively encroach on the prerogatives of the powerful. This is not to say that international law has become a strictly moral order. . . . It is, however, to deny the irrelevance of moralistic standards to international relations, and thus to deny that any pragmatic account of international law takes the legitimacy of *de facto* power as a given. [p. 10]

Roth's narrative is not one of a simplistic ossification of the classical doctrines of sovereignty and nonintervention, and progress towards a nirvana in which protection of individual rights of self-determined individuals has superceded the constraints imposed by the reification of the state and of state sovereignty. It is a project that seeks to infuse a sense of moralism into one of international law's touchstones — sovereignty. Rather than understanding sovereignty as a dry, amoral safeguard of statism, Roth reads popular sovereignty into this classical understanding of sovereignty. The location of sovereignty therefore moves from the state to the people. In this sense, therefore, Roth's narrative flirts with the contemporary fascination of progress that traces the upending of classical sovereignty by popular sovereignty not so surreptitiously.[128] Roth delves into political theory, jurisprudence and constitutionalism, and a variety of cases to demonstrate that international legal scholarship has failed to acknowledge that, while it may be true that legitimation of governance is today increasingly moving towards the ideal of the will of the people, governmental illegitimacy is perhaps better determined by realism (whether a government has de facto control as an indication of the acquiescence or will

128. Pp. 11-15. Roth summarizes what he calls the "progression of legal standards regarding the legitimacy. . . ." P. 11. Here is a classic example of this progression rendition:

> Two conceptual transformations thus paradoxically result from enshrining sovereignty in law, i.e. from the pursuit of peace based on the legal inviolability of the territorial integrity and political independence of recognized states. The first is a reconceptualization of the elemental units of the international system as, not territorial units or state apparatuses, but political communities or 'peoples', defined pragmatically as the inhabitants of relatively stable (even if coercive) political entities. State apparatuses are taken to be the expressions of those political communities, and their territorial claims are the claims of the communities they are thought to represent. Theoretically, then, state sovereignty is popular sovereignty, though the state apparatus may in most circumstances be irrebuttably presumed to represent the people over whom it exercises *de facto* control. Second, sovereignty itself no longer entails absolute discretion on matters within the domestic jurisdiction, as states are pressured to consent to obligations regarding the treatment of groups within their territories.

P. 12 (citations omitted). This narrative embodies progression to the extent to which it sees "sovereignty as part of some linear evolution of history, destined for the rise, preeminence and eventual fall as if mirroring the progression of the seasons." Mark Owen Lombardi, *Third-World Problem-Solving and the 'Religion' of Sovereignty: Trends and Prospects*, in MARK E. DENHAM & MARK OWEN LOMBARDI, PERSPECTIVES ON THIRD WORLD SOVEREIGNTY: THE POST MODERN PARADOX 153 (1996).

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of the people) than by idealism (the fact that the will of the people has been expressed through their exercise of participatory rights by voting — or expressing their sovereignty — in a government of their choice as guaranteed by international human rights conventions).

Roth is therefore skeptical of the increasing importance of individual rights and self-determination internationally, which "appear to point to liberal democracy as the basis for a norm of governmental legitimacy"[129] — a view with which he expresses great discomfort.[130] In brief, Roth seems to suggest that the increasing importance of the will of the people in legitimation of governments is mistakenly seen to be the result of conceptual developments by proponents of the new democratic entitlement norm. Roth disputes this reading of international law by predicating it less on the conceptual developments of the sovereignty doctrine and more on the "principle of governmental illegitimacy."

Governmental illegitimacy is not necessarily a liberal democratic notion. Roth traces notions of governmental illegitimacy as much to Rousseau as to Locke, the result of which is to discredit any preeminence of liberal democracy over other sources of governmental legitimacy such as those within revolutionary dictatorships as in the East. In fact, Roth argues that the principle of governmental illegitimacy preceded the presumed developments of the sovereignty doctrine. As the forward to the book notes, the fact that the principle of governmental illegitimacy came prior to the emergence of the democratic entitlement cannot be denied.[131] Roth discusses how collective denial of recognition primarily on the basis that such regimes lacked effective control over their territories — rather than on the basis that such regimes failed to pass the contemporary litmus test of reflecting the "will of the people" through popular elections — indicates that the principle of governmental illegitimacy may have matured into a new norm. Roth interprets failure to recognize governments for failing to have

129. P. xvi (Schachter Foreword).

130. Similar views have been expressed by critical legal scholars as well as anti-colonially inclined third-world scholars. *See e.g.*, Obiora Okafor, *Is there a Legitimacy Deficit in International Legal Scholarship and Practice*, 13 INT'L INSIGHTS 91 (1997); Obiora C. Okafor, *The Concept of Legitimate Governance in the Contemporary International Legal System*, 44 NETHERLANDS INT'L L.R. 33 (1997); Nathaniel Berman, *The Paradoxes of Legitimacy: Case Studies in International Legal Modernism*, 32 HARV. INT'L L.J. 583 (1991) (book review); Obiora Okafor, Re-Defining Legitimacy: International Law, Multilateral Institutions and the Question of Socio-Cultural Fragmentation Within African States (1998) (thesis submitted in partial fulfillment of the requirements for the award of the Degree of Doctor of Philosophy of Law, University of British Columbia). For an overview of several perspectives, see Obiora Chinedu Okafor, *The Global Process of Legitimation and the Legitimacy of Global Governance*, 14 ARIZ. J. INT'L. & COMP. L. 117; Quashigah, *supra* note 22. For a particularly insightful summary of the limitations and paradoxes of legitimacy as an emerging touchstone of both political and legal debate, see Karin Mickleson, *Afterword: Challenging Legitimacy*, *in* LEGITIMATE GOVERNANCE IN AFRICA, *supra* note 22, at 559.

131. P. xvii (Schachter Foreword).

effective control over their territory as being consistent with the notion of the will of the people. In Roth's view, the requirement that a government have effective control over its people in order to be recognized reflects "a principled respect for the decision of the people to acquiesce in the regime."[132]

Roth's assertion that de facto control can be construed as a reflection of the will of the people is one of the most important arguments he advances to debunk the overdetermination of the moralism of the democratic entitlement school. Roth seems to marry the moral idealism of the democratic entitlement school with his own brand of realism — in effect blunting the liberal triumphalism of the post-Cold War period.

Although Roth's analysis proceeds from the premise that a government that does not reflect the will of the people is illegitimate in international law, he is skeptical of proposing an enforceable legal norm — he is worried that if a norm of governmental illegitimacy were acknowledged, it would soon fall into disrepute, since its potential for abuse would be so great. This makes Roth look like a conservative realist — one not ready to give too much weight to idealistic criteria for the determination of the legitimacy of governments. For example, Roth notes that such a norm would be used to deny (nondemocratic) governments legitimacy on the basis of a liberal democratic creed that is not widely shared in today's "pluralist international society of diverse cultures and histories."[133] Roth is worried that such a norm would also give powerful countries a basis for justified international intervention, a prospect for which Roth has no patience. In fact, perhaps Roth's biggest opposition from liberal internationalists will be his argument in favor of the continued relevance of de facto control as an indicator of governmental legitimacy. The effort of the book in proposing a new law on governmental illegitimacy then seems to falter once the author acknowledges its futility or disutility as a predictable norm.

For this reason, the argument that a new norm on governmental illegitimacy would be so susceptible to abuse as to render it unpredictable should be no surprise to Roth. Yet, Roth wants to make it look like a perplexing or even vexing proposition to the extent that it would have no consensus among states. Roth's perplexity and vexation seem to arise from his commitment to the idea that "almost all states — large and small, rich and poor, strong and weak — accept [many] of [the] normative . . . core principles embodied in the United Nations Charter and repeated without deviation in a multitude of treaties and declarations" (p. 6). Agreeing with Hedley Bull, Roth emphasizes

132. P. xvii (Schachter Foreword).

133. P. xviii (Schachter Foreword).

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that, where a violation of these principles occurs, " 'the offending state usually goes out of its way to demonstrate that it considers itself (and other states) bound by the rule in question.' "[134] In Roth's view, most states conduct their affairs on the basis of certain accepted principles (referred to variously as principles, rules, and norms) as a "common reference point" (p. 7). Notwithstanding these observations about the pervasiveness of a core set of commitments for the maintenance of international peace and security after the Second World War, Roth still has an overbearing impatience with the liberal triumphalist reification of the "will of the people" as a *new* locus of the legitimacy of states insofar as it fails to accommodate the reality of whether or not such a government has *effective control* or the acquiescence of its people.

Yet, although Roth is critical of the democratic entitlement school for its idealism, his conception of the will of the people is not different from that of his identified nemesis — proponents of the new democratic entitlement. For Roth, sovereignty is transformed. It "is now popular sovereignty, predicated on the principle of self-determination of peoples, and qualified sovereignty, limited by an increasing list of international obligations . . . pertaining to the treatment of subjects" (p. 14). This view of sovereignty as the new basis of legitimacy for governments is based neither entirely on the liberal internationalist argument of the ascendancy of international treaty norms of citizen participation in elections, nor on the realism of a government with de facto control of its territory. Yet, insofar as Roth also predicates his view of legitimacy on popular sovereignty or self-determination of a people (as may be evidenced by their submission or acquiescence to a government of their choice), his proposal of a norm of illegitimacy of governments is the reverse of those arguing in favor of a democratic entitlement for citizens. Both Roth and his antagonists are all for the same thing — to decenter sovereignty from its state centricism by reinterpreting it as popular sovereignty or self-determination of peoples. Roth is the flip side of the liberal internationalists, since he deemphasizes the moral commitments of the International Bill of Rights as the source of legitimacy or illegitimacy for governments (his emphasis lies in construing sovereignty from whether a government has de facto control over its people, for example),[135] but he is nevertheless

134. P. 6 (footnote omitted). Hedley Bull, an Australian political scientist, is one of the leading thinkers in international relations. *See* HEDLEY BULL, THE ANARCHICAL SOCIETY (1977); Hedley Bull, *Society and Anarchy in International Relations*, *in* DIPLOMATIC INVESTIGATIONS 35 (H. Butterfield & M. Wight eds., 1968).

135. Roth states this position as follows:

> [T]he concept of "self determination of peoples" that underlies sovereignty is increasingly interpreted in the context of the international obligations that qualify sovereignty. The international community has come to understand a "people" less as an abstraction, the bearer of a unitary will authoritatively expressed by whatever state apparatus of domestic origin exerts *de facto* control over the territory, and more as a collection of persons possessing a right to participate in determining their own form of government, a right that the state apparatus

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committed to a norm of illegitimacy predicated on people rather than states as the source of sovereignty (p. 170).

One reason why Roth is unable to reconcile his proposal of a new law of illegitimacy of governments with the possibility of its potential abuse arises from his observation that it is impossible to reconcile the liberal commitment to the "will of the people" with the reality of one-party states and dictatorships — even in the post-Cold War liberal era (pp. 72-73). This factual detail, the inconsistency of desired norm and actual praxis, is then one of his most important points of departure in finding his proposed norm inadequate.

VII. ROTH ON STATEHOOD: WHAT OF THE NATION IN INTERNATIONAL LAW?

After rehashing the "well-rehearsed"[136] debate on constitutive and declaratory theories of recognition, Roth defines statehood:

> A state is essentially a political community (within whatever territorial boundaries) that existing states collectively decide *ought* to be self-governing. True, agreement on this 'ought' is most likely to be found where that political community (within those boundaries) has been self-governing in the recent past, both because the peace and security system's *status quo* orientation naturally leads it to champion the immediate *status quo ante* and because no alternative principles are likely to find consensus. Yet where agreement can be founded on another basis, such as the widely perceived illegitimacy of overseas colonialism and undesirability of fragmentation, the result is not different in kind. [p.131; footnote omitted]

In Roth's view, the state is a doctrinal entity. It is a *political* community. It must be stripped of any ethnic, religious, or other affective essence. The condition *sine qua non* for its exercise of state power is a government or an apparatus exercising state power within it (p. 130). Roth does not consider it necessary to recognize what Antony Carty has identified as "the institutional, cultural (national) and ideological dimensions of the State,"[137] since he adopts a formal view of the state that is decontextualized and ahistorical. He abstracts the state from the nation, despite the fact that the two have been almost inseparable

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> is obliged to respect and effectuate. It is this phenomenon that has caused some observers (mistakenly, in my view) to identify the developing norm of popular sovereignty with liberal democracy.

Pp. 14-15.

136. *See* Karen Knop, *The 'Righting' of Recognition: Recognition of States in Eastern Europe and the Soviet Union, in State Sovereignty: The Challenge of a Changing World*, PROCEEDINGS OF THE CANADIAN COUNCIL ON INT'L L., Oct. 15-17, 1992, at 36, 38-41.

137. Antony Carty, *Critical International Law: Recent Trends in the Theory of International Law*, 2 EUR. J. INT'L L. 82 (1991).

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over the last century.[138] In the nineteenth century, European states created nations.[139] In the twentieth century, one may argue that nations have more often than not claimed to have a right to their own states. Self-determination came to be understood as a means of dealing with the backwardness exemplified by the violence of nationalism, particularly in Africa and Asia.[140] States would usher these tribal societies into modernity, and move them away from and beyond tradition.

Nationalism, in the variety of its guises, suggests a consistent tendency to equate the boundaries of government with the state. In one of its Eurocentric guises, nationalism has it that a necessary condition of free institutions is that the boundaries of government should coincide with those of nationalities.[141] There are perhaps similarities that can be traced between European and non-European nationalism: the presumption that nationalism supplies the determination of the unit of population proper to enjoy a government exclusively its own; that humanity is divided into nations by virtue of certain characteristics that can be ascertained and are exclusively inherent in it and that is the only legitimate form of self-determination (hence each nation is distinct from another culturally, linguistically, and in other outward symbols of life); the requirement of uniformity and enforcement of belief policy/goals/values among members; and preoccupation with a glorious past and a more glorious future, where past greatness is appealed to in order to warrant subversion of present and existing institutions, hence past greatness is related to present degradation.[142]

By resorting to a legalistic conception of the state, Roth underplays how nationalism in postcolonial societies is so central to understanding these countries. In a historical perspective, it is pertinent to observe that European imperialism in non-Western societies in the late eighteenth and nineteenth centuries coincided with the height of the nationalist moment in Europe. That Roth therefore underplays

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138. Roth, however, discusses in passing how attribution of a unitary will within a country with minorities claiming statehood has posed a problem in international law. He attributes international law's inability to address this problem to its tendency to confer on members of groups individual rights while leaving intact the sovereignty of the larger political communities within which these minorities find themselves. P. 194.

139. *See* ERNEST GELLNER, NATIONS AND NATIONALISM (1983); ERIC HOBSBAWM, NATIONS AND NATIONALISM SINCE 1780 (1990); ANTHONY D. SMITH, THE ETHNIC ORIGINS OF NATIONS (1986). For a critique of the Eurocentric approaches to the study of Nationalism, see Gopal Balakrishnan, *The National Imagination*, *in* BALAKRISHNAN GOPAL & BENEDICT ANDERSON, MAPPING THE NATION (1996) and DAWA NORBU, CULTURE AND THE POLITICS OF THIRD WORLD NATIONALISM (1992).

140. *See* ELIE KEDOURIE, NATIONALISM 25-30 (3d ed. 1966).

141. *See* John Stuart Mill, *Considerations of Representative Government*, *quoted in* Benedict Anderson, *Mapping the Nation*, *in* MAPPING THE NATION, *supra* note 139.

142. *See* KEDOURIE, *supra* note 140, at 70-71, 84-85, 105-06.

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the idea of the nation in his analysis of states and governments is telling for both European and non-European societies.

Nationalism, like narratives about legitimacy of governments, is regarded as an invention of Europe and therefore a mark of European achievement.[143] Imperialism and colonial occupation were thought morally justifiable under this discourse of European identity, since being non-European was equated with being backward, primitive, and prehistoric.[144] Non-European societies were therefore regarded as falling outside the purview of nations enjoying certain values specific to Europe.[145] The imperial civilizing mission laid the basis for justifying European trusteeship, guardianship, and protection of non-Europeans on the basis that differences needed a formal framework to be aligned with the ideal of European experience.

Consequently, Tocqueville, writing on genocidal expeditions accompanied by expropriation of land undertaken by the French against Muslim Algerians, saw it necessary to bring "prosperity based on peace, regardless of how that peace is obtained."[146] The colonizing European countries regarded themselves as only having duties of respecting the independence and nationality of other "civilized" nations.[147] These duties did not extend towards those to whom nationality and independence were evil or questionable goods.[148]

The account of nationalism and its coincidence with imperialism is vividly illustrated in the scramble for Africa, a competitive episode of European imperialism to apportion Africa into spheres of influence between themselves. The loyalty and patriotism that nationalism evoked in this competitive episode demonstrates how the liberal aspirations upon which the civilizing mission was purportedly grounded were vitiated by its arrogance and preoccupations with racial and other forms of Western/European superiority.[149] The veneration of national culture and pride were thus the altar at which colonialism was executed.

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143. *See, e.g.*, KEDOURIE, *supra* note 140; HANS KOHN, NATIONALISM: ITS MEANING AND HISTORY 9-11 (1975). By contrast, Edward Said cites Eric Hobsbawm as observing that Palestinian nationalism was *created* by "the common experience of Zionism settlement and conquest." *See* Edward Said, *Nationalism, Human Rights and Interpretation*, *in* FREEDOM AND INTERPRETATION: THE OXFORD AMNESTY 192 (Barbara Johnson ed., 1993).

144. *See* Gyan Prakash, *Introduction*, *in* AFTER COLONIALISM: IMPERIAL HISTORIES AND POSTCOLONIAL DISPLACEMENTS 3 (Gyan Prakash ed., 1995); SAID, *supra* note 6, at 40-49.

145. *See* Annelise Riles, Note, *Aspiration and Control: International Legal Rhetoric and the Essentialization of Culture*, 106 HARV. L. REV. 723 (1993).

146. Melvin Ritcher, *Tocqueville on Algeria*, 25 REV. POL. 362, 384-85 (1963) (citation omitted).

147. *See* GROVOGUI, *supra* note 59, at 120-22.

148. *See* 3 JOHN S. MILL, DISSERTATIONS AND DISCUSSIONS 167-68 (1865).

149. *See* KEDOURIE, *supra* note 140, at 83.

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This account departs from regarding nationalism solely as a product of a European experience and instead focuses on its location at the intersection with the height of the discourse of national identity in Europe and colonialism. Hence, the encounter between Europe and the colonial world reveals the cultural connotations embedded in particular interpretations of nationalism. Nationalism also plays a role in erasing from the national memory the plunder and pain of imperial rule. For example, in the U.S. and in former colonial powers, nationalism erases the imperial past and repaints it in the golden color, décor, and splendor of the political doctrine of popular sovereignty, equal opportunity, and self-governance — the leader of the free world.[150]

Roth's separation of state and nation in his debate on legitimacy and illegitimacy of governments underestimates the significance of nationalism in postcolonial societies. For example, African states were arbitrarily parceled out among colonizing European powers in the nineteenth century without regard to the reality on the ground. Consequently, a nation of Somali peoples ended up in two juridical states, Kenya and Somalia. Similarly, the Maasai nations were split between Tanzania and Kenya.[151] This arbitrary parcelization of Africa resulted in the imposition of artificial states resulting in what Makau Wa Mutua has called a "crisis of internal legitimacy":

> I contend that foreign imposition of artificial states and their continued entrapment within the concepts of statehood and sovereignty are sure to occasion the extinction of Africa unless those sacred cows are set aside for now to disassemble African states and reconfigure them. I propose that pre-colonial entities within the post-colonial order be allowed to exercise their right to self-determination. Only this radical but necessary step can legitimize the African state and avoid its demise.[152]

Mutua's point is not merely the literal redrawing of the African map, but rather that attention must be paid "to African political and cultural heritage if [the state] is to attain any legitimacy with broad sectors of the people."[153] Hence, the legitimacy of the state in Africa according to Mutua is precarious, since its imposition has no roots among the African people. Some of the elements that constitute this kind of roots include reconsidering the relationship between the individual and the state, and redefining the relationship of the state with international capital in a way that captures the integrity of the African

150. *See* Anthony Paul Farley, *The Black Body as Fetish Object*, 76 OR. L. REV. 457 (1997).

151. *See* Makau Wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT'L L. 1118, 1119 (1995).

152. *Id.* (footnote omitted).

153. *Id.* at 1118, n.12.

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state.[154] These conceptions of legitimate statehood go beyond the juridical statehood that characterizes so many states in Africa today, since they are contextualized within actual circumstances.

Why is juridical statehood so removed from context in Africa? Is it because this conception is Eurocentric in its origins? Abstract in its character? Imposed by colonial rule? These are all questions begging for an answer, and the extent to which *Governmental Illegitimacy* skips these questions is telling, especially because there has for some time now been a burgeoning literature in international law and relations on these very questions.[155]

So far, I have made the claim that Roth's failure to consider the question of the nation, and therefore nationalism as well, confines legitimacy to very narrow questions of legality divorced from existing reality. I have also argued that, at the height of nationalist moment in Europe, European imperialism in non-Western societies was also at its height. In essence, although some see a discontinuous history between European and non-European colonialism,[156] there are striking continuities between them, especially with reference to the place of the nation.[157]

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154. *See id.* at 1175-76.

155. *See id.*; *see also* GROVOGUI, *supra* note 59; JACKSON, *supra* note 121; U.O. UMOZURIKE, INTERNATIONAL LAW AND COLONIALISM IN AFRICA (1979); Abdullahi Ahmed An-Na'im, *The National Question, Secession and Constitutionalism: The Mediation of Competing Claims to Self-Determination*, *in* STATE AND CONSTITUTIONALISM: AN AFRICAN DEBATE ON DEMOCRACY 101 (Issa Shivji ed., 1991); Jeffrey Herbst, *Challenges to Africa's Boundaries in the New World Order*, 46 J. INT'L AFF. 17 (1992); Robert H. Jackson, *Juridical Statehood in Sub-Saharan Africa*, 46 J. INT'L AFF. 1 (1992); J. Klabbers & R. Lefeber, *Africa: Lost Between Self Determination and Uti-Possidetis*, *in* PEOPLES AND MINORITIES IN INTERNATIONAL LAW 37 (C. Brolmann et al. eds., 1993); U.O. Umozurike, *International Law and Colonialism in Africa*, 3 EASTERN AFRICA L. REV. 47 (1970).

156. Kedourie argues that nationalism is a *new-fangled and unfamiliar* idea for the people of Asia and Africa. In his view, nationalism was for Europe and it could not be borrowed. In essence, he argued that it was inefficient for leaders in these countries to appeal to nationalism, and he recommended that they should instead appeal to traditional idioms and customary associations that would evoke spontaneous "emotions of solidarity and group loyalty" in a pavlovian mode. KEDOURIE, *supra* note 140, at 66. In Kedourie's view, the new theory of nationalism in the third world constitutes "resentment and impatience of the rich, and virtue of the poor, the guilt of Europe and the innocence of Asia and Africa, salvation through violence . . . the long reign, universal love-served by masses-opium very potent-excites belief into a frenzy of destruction." *Id.* Hans Kohn, in A HISTORY OF NATIONALISM IN THE EAST (1929), similarly dichotomizes Western- and Eastern-European nationalism. He considers the former indigenous and liberal while he opines the latter as non-Western, artificial, aggressive, and authoritarian. *Id.* at 3-4. Another perspective holds that third-world nationalism does not even exist, since "agrarian civilisations do not engender nationalism, but industrial and industrial [sic] societies do." ERNEST GELLNER, CULTURE, IDENTITY, AND POLITICS 18 (1987).

157. *See, e.g.*, Homi Bhabha, *Introduction* to NATION AND NARRATION (Homi Bhabha ed., 1990). Bhabha notes that there is no single model of nationalism that could prove adequate to its myriad and contradictory forms. Nationalisms do not work the same everywhere. Hence, observes Bhabha, although the nation functions globally as an irreducible component of identity, the problem remains that no single term is capable of registering the

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The nation is clearly central to understanding statehood today. One of the most distinguished historians of Africa, Basil Davidson, has written extensively on the various ways that arbitrary governance of artificial states in Africa brought about oppression, civil war, torture, and mass starvation.[158] These consequences are in part explicable by considering "the Janus-face of nationalism, at once an engine of social reform and goad to political accountability, yet also a tool of middle-class warfare against labour... [where] the imaginative invention of nations tends to outrun the political creation of states."[159]

Although nationalism in Africa was in large part driven by struggles for social justice and political independence, national unity preceded respect for competing claims of nationality within the post-colonial state. The nationalist leadership argued that national unity was too important to be sacrificed in the name of ethnic loyalty and that time was too short for development to be distracted by the possible divisiveness of ethnic rivalry that had characterized colonial governance.[160] Consequently, attempts to gain self-determination, such as Biafra in Nigeria and Katanga in the former Zaire, were roundly suppressed.[161]

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multiple, incommensurable differences dividing one nation from one another (or from itself). There is no normal way to define a nation.

158. *See* BASIL DAVIDSON, THE BLACK MAN'S BURDEN: AFRICA AND THE CURSE OF THE NATION STATE (1992).

159. John Lonsdale, *States and Nations*, 34 J. AFR. HIST. 143, 144 (1993) (book review); *see also* M.P.K. SORRENSON, LAND REFORM IN KIKUYU COUNTRY (1967); *see also* DAVID THROUP, ECONOMIC & SOCIAL ORIGINS OF MAU MAU 1945-53 (1987); John Lonsdale, *States and Social Processes in Africa: A Historiographical Survey*, 24 AFR. STUD. REV. 139 (1981).

160. *See* Clifford Geertz, *The Integrative Revolution: Primordial Sentiments and Civil Politics in the New States*, *in* OLD SOCIETIES AND NEW STATES: THE QUEST FOR MODERNITY IN ASIA AND AFRICA 105 (Clifford Geertz ed., 1963). Geertz notes that India's experience raises the question whether a new nation can survive "concession[s] to 'narrow loyalties, petty jealousies and ignorant prejudices?' " *Id.* at 106 (citations omitted). Geertz observes that new states have a pre-political matrix of a rudimentary form as evidenced in its constitution by institutions, beliefs and solidarities. These and other perspectives are critically appraised in MAHMOOD MAMDANI, CITIZEN AND SUBJECT: CONTEMPORARY AFRICA AND THE LEGACY OF LATE COLONIALISM (Sherry B. Ortner et al. eds., 1996).

161. Katanga (then Shaba), a province of the former Zaire, today the Democratic Republic of the Congo, sought to secede from Congo in 1978 to 1979 with assistance from exiles and rebels from the area. International assistance quelled the rebellion as President Mubutu's military was unable to respond. The Katanga secessionist attempt indicated the artificiality of the Zairean state and the complicity of the West in supporting a dictator that did not even have the command of his military. *See* Ghislain C. Kabwit, *Zaire: The Roots of the Continuing Crisis*, 17 J. MOD. AFR. STUD. 381-407 (1979); *see also* Kenneth Adelman, *Zaire's Year of Crisis*, 77 AFR. AFF. 306 (1978). The Biafra secession attempt came after four of Nigeria's regional governments at the time failed to resolve their artificial coexistence within one country, on the one hand, and the military leadership of the North over the rest of the country, on the other. This situation had led to successive electoral boycotts, ethnic cleansing of the Ibo community, and failure to agree on a return to civilian rule in Nigeria. In May of 1967, the Eastern Region declared itself a sovereign and independent

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Under this reading of nationalism, Kenya's freedom struggle, the Mau Mau War of Independence, can be seen as a nationalist movement for social justice and political freedom whose origins are traceable to British expropriation of land and repression of dissent.[162] This view displaces earlier readings of the Mau Mau that considered it an atavistic deviation and imitation of the standard European experience. In reading the Mau Mau as a revolt or rebellion, Eurocentric readings also advanced the preposterous proposition that it was a savage response to the alienation of benign colonial modernization.[163]

Indeed, any reading of statehood that excludes the nation and nationalism falls into the danger of characterizing non-European nationalism as a dangerous hypnotic obsession that differs from the intellect and reason that characterizes European nationalism. Nathaniel Berman's study of European nationalism in the interwar period challenges such a discontinuity. As in Africa, race, culture, place of origin, and linguistic groups all play a role in European nationalism. Non-European nationalism cannot be regarded as a pathological deviation from a standard secularized European nationalism. Rather, as Berman shows, cultural heterogeneity and nationalist passion were significant backdrops against which international legal jurists in Europe proliferated doctrinal and institutional mechanisms such as plebiscites and minority protection systems within multinational European societies.[164] Consequently, in showing how international law responded to the challenges of nationality and culture, Berman is able to illustrate how international law plays a culturally constitutive role.

In contrast to other international legal scholars, like Makau in the African context and Berman in the European context, Roth understates the culturally constitutive character of international law. In his

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republic. The federal government declared a state emergency and divided Nigeria into twelve states. The federal government eventually defeated the secessionist attempt in 1970.

162. *See* CARL G. ROSBERG & JOHN NOTTINGHAM, THE MYTH OF THE MAU MAU: NATIONALISM IN KENYA (1966).

163. *See* F.D. CORFIELD, HISTORICAL ORIGINS AND THE GROWTH OF THE MAU MAU 1030 (1960).

164. *See* Nathaniel Berman, *Modernism, Nationalism, and the Rhetoric of Reconstruction*, 4 YALE J.L. & HUMAN. 363 (1992). Berman has also examined the relationship between intra-European and colonial aspects of international legal history in the context of Czechoslovakia, Ethiopia, and Morocco. *See, e.g.*, Nathaniel Berman, *The International Law of Nationalism: Group Identity and Legal History*, *in* INTERNATIONAL LAW AND ETHNIC CONFLICT 25 (David Wippman ed., 1994); Nathaniel Berman, *Aftershocks: Exoticization, Normalization, and the Hermeneutic Compulsion*, 1997 UTAH L. REV. 281; Nathaniel Berman, *Between "Alliance" and "Localization": Nationalism and the New Oscillationism*, 26 N.Y.U. J. INT'L L. & POL. 449 (1994); Nathaniel Berman, *Beyond Colonialism and Nationalism? Ethiopia, Czechoslovakia and Peaceful Change*, 65 NORDIC J. INT'L LAW 421 (1996); Nathaniel Berman, *Economic Consequences, Nationalist Passions: Keynes, Crisis, Culture and Policy*, 10 AM. U. J. INT'L L. & POL'Y 619 (1995); Nathaniel Berman, *Nationalism "Good" and "Bad": Vicissitudes of an Obsession*, 90 A.S.I.L. PROC. 214 (1996).

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emphasis on the state as a juridical entity bereft of any cultural, ethnic, or other such affiliation, he ignores the origins of the idea of the state in Western history, its imposition in non-Western societies, and the violence that has accompanied its creation in the name of nationalism. That you could find nations anywhere across the world imposing a Eurocentric notion of the state upon these nations (as colonialism did) without regard to their nationalities would unsurprisingly result in nation building enterprises that were at times successful but, more often than, not less than successful. In brief, the state as a legal entity is not a neutral or even universal ideal. For example, in enshrining the European form of the state as the basic unit of international relations, international law deploys a specifically European idea as a universal norm. International law is, in this broad sense, therefore constitutive to the extent that it privileges the European state as a natural and basic unit of international governance, and it is widely accepted as the inevitable unit around which nations organize their affairs.

One latent danger in considering the state as a juridical concept is that international legal analysis then treats states that do not conform to an idealized European experience as trapped within the straitjacket of primordial attachments such as ethnicity. However, once the concept of the nation is introduced into the analysis, it becomes clear how juridical statehood plays a constitutive role in manipulating ethnicity, now seen less as an essential subject but rather as a contingent and constructed artifact.[165]

Apart from the African experience alluded to above, there is another contemporary example of the danger of looking at the state as merely juridical: the former Yugoslavia. Elizabeth Woodward has persuasively argued that post-Cold War security measures based on the promotion of human rights, transparency, and other nonmilitary means of conflict resolution, such as the right of peoples to self-determination, inviolability of international borders, and republican multiparty elections, became hallmarks of European policy in the former Yugoslavia.[166] Consequently, "little regard was paid to the inconsistency of the right of self-determination, on the one hand and the territorial integrity of Yugoslavia's borders. Western powers supported anti-communist supporters in the republican elections not-

165. Nationalist leadership often invoked notions such as India as undivided subjects with a singular will. Critical appraisals include PARTHA CHATTERJEE, NATIONALIST THOUGHT AND THE COLONIAL WORLD: A DERIVATIVE DISCOURSE? (1986). With regard to ethnicity, Leroy Vail notes that "[t]he creation of ethnicity as an ideological statement of popular appeal in the context of profound social, economic and political change in southern Africa was the result of the differential conjunction of various historical forces and phenomena." Leroy Vail, *Introduction*, *in* THE CREATION OF TRIBALISM IN SOUTHERN AFRICA 11 (Leroy Vail ed., 1989).

166. *See* WOODWARD, *supra* note 100.

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withstanding their extremist nationalist sympathies."[167] Woodward's analysis complements and challenges our understanding of the Yugoslavian wars of 1991-1994. She demonstrates how secessionist, anti-Communist, and xenophobic nationalist leaders exploited Western support as they purported to defend the cherished principles of self-determination, human rights, and individual liberty. In so doing, these politicians legitimized their war plans as necessary defenses of these principles.[168] In conclusion, then, one has to appreciate that these abstract but cherished principles are not necessarily emancipatory;[169] viewing them as antidotes to the violence of ethnicity and illiberal nationalism only downplays the tragic role they have at times been mobilized to serve. In addition, as Woodward argues, it would be foolhardy to ignore the role that the policies of IFIs played in fanning constitutional battles between the republics that eventually ended up in armed confrontation.[170] In acknowledging the constitutive role that abstract legal concepts such as statehood, self-determination, and human rights could play against a rapidly changing economic and social background, it becomes easier to drop the presumption that international law and norms act in the "interests of human rights, democracy and the people, while local institutions, actors or cultures are seen as posing a threat to these values."[171]

VIII. OF DEMOCRACY, NEOLIBERALISM, AND RECOGNITION

Roth also analyzes the case of Nicaragua in his statehood discussion. He concludes that exploration with the view that the authorization for foreign arms and logistical assistance to insurgents fighting the Samoza regime "indicates some broad-based movement toward reconsideration of the legal legitimacy that traditional doctrine has auto-

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167. *Id.* at 148.

168. *See id.* at 198.

169. *See* Orford, *supra* note 99, at 444.

170. In one of her bold assertions on this point, Woodward notes that:

> Economic reforms such as those demanded of Yugoslavia by foreign creditors and Western governments ask for political suicide: they require governments to reduce their own powers. They also do so at the same time that the demands on governments, particularly the necessity to protect civil order and to provide stability in the midst of rapid change, are ever greater. Without a stable civil and legal order, the social conditions that are created can be explosive: large scale unemployment among young people and unskilled urban dwellers; demobilized soldiers and security police looking for private employment; thriving conditions for black market activities and crime; and flourishing local and global traffic in small arms and ammunition.

WOODWARD, *supra* note 100, at 17.

171. Orford, *supra* note 99; *see also* Michael N. Barnett, *Bringing in the New World Order: Liberalism, Legitimacy and the United Nations*, 49 WORLD POL. 526, 545 (1997) (noting that "much of the Third World is viewed . . . not as a source of support for a liberal international order but rather as a potential site of resistance").

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matically conferred on governments in effective control" (p. 303). His point is that, just as cases of racist, colonial, or alien control are illegitimate *ab initio*, so is a "ruling apparatus that is manifestly unrepresentative of the underlying sovereign political community or that flagrantly violates certain irreducible duties upon which all legitimate governance is predicated" (p. 303). Roth is not, however, oblivious to the mixed motivations such interventions involve, as his references to the U.S.'s "neo-colonialist penetration" of Cambodia and Vietnam (p. 289) and candid but uncritical assessment of the U.S.'s role in Nicaragua, Panama, and El Salvador indicate.[172] He is therefore careful to warn of unilateral use of force based on assessments of foreign regimes, since such unilateral action constitutes a violation of the types of actions that the international order seeks to preclude. Roth's discussion of the Panamanian case therefore warns of the danger of unilateral action and cites approval for a multilateral approach that would have greater acceptability. He also sees prospects of a consensus in favor of empirical manifestations of popular will with "the increased role of the international organizations and NGOs [Nongovernmental Organizations] in orchestrating and monitoring electoral solutions to civil conflict" (p. 320). This improved context for the empirical manifestations of popular will is the backdrop against which Roth discusses Haiti.

His discussion of the debates surrounding six cases of credentials to the U.N. — Congo-Leopoldville, Yemen, Cambodia/Khmer Republic, Cambodia/Kampuchea, China, and Hungary — "do not yield straightforward answers to dilemmas in recognition doctrine" (p. 283). In his view, the cases show no consistent presumption in favor of the established government or the willingness of a government to abide by international commitments as a baseline for recognition. The effective-control doctrine cannot, therefore, be mechanically applied since the recognition of governments turns out to be informed by a range of considerations — legal, political, practical, and moral. Would the increased empirical manifestations of popular will displace the unpredictability of recognition or add to its toolkit of criteria to be taken into account?

The answer here is clearly ambiguous. How, for example, should the *will of the people*, underlying authority of government guaranteed in Article 21 of the Universal Declaration of Human Rights (UDHR),[173] be construed? Does it merely refer to a process of ascertaining voter preference as long as it guarantees competition and participation, *à la liberals*, or should it be inferred from the ability of a

172. Pp. 347-57. For a critical assessment, see Richard Falk, *The Haiti Intervention: A Dangerous World Order Precedent for the United Nations*, 36 HARV. INT'L L.J. 341 (1995).

173. Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810, at 71 (1948).

government to fulfill "an assigned social function," (such as achievement of effective control in the name of a program of social transformation), *à la* revolutionary-democratic dictatorships? Does the absence of reference to *the will of the people as the basis of the authority of government* in Article 25 of the International Covenant on Civil and Political Rights (ICCPR)[174] leave open the nature of the relationship between *authority and elections* and *authority and participation* (p. 330)? Does the reference to *democratic society* in Article 21 of the UDHR mean more than just nonfascist? Why did Article 21 of the ICCPR not specify multi-party elections as a basis of establishing authority? Why was the term "democratic society" omitted in Article 25 of the ICCPR (p. 332)?

Roth provides the answer on the basis of the post-Cold War praxis and perhaps an emerging *opinio juris*:

> With the end of the Cold War period has come a shift in the patterns of international division regarding participatory rights. The most robust challenge to the liberal-democratic approach, the concept of revolutionary-democratic dictatorship that held sway in the Socialist and in much of the Non-Aligned bloc, has been crippled by the ignominious collapse of the Soviet and Eastern European regimes and the fading away of revolutionary nationalist regimes and movements in the Third World. Of the remaining regimes of revolutionary origin, some, like China and Vietnam, have reversed their programmatic course so thoroughly as to render invocations of revolutionary struggle implausible....
>
> ... There are thus many fewer general appeals in the international discourse to the liberal-authoritarian rationale that popular movements need be suppressed in order to maintain liberty, although the claim continues to be made in individual cases.... [pp. 333-34]

Roth therefore concludes that, to the extent that there is no longer a universalist alternative to liberal democracy and that exceptions to it are made on the basis of cultural particularity, this perhaps explains why de facto control is insufficient to substantiate the claims of autocratic leaders. Yet, as Roth concludes, the right to political participation is open to many interpretations. In addition, he says that elections in many parts of the world have been less than liberal or democratic, since they have coexisted with "*de jure* or *de facto* repression, exclusion of candidates regarded as unacceptable, and reserves of power for unelected (especially military) élites, not to mention mechanisms for the perpetration of fraud" (p. 337). Hence, while popular sovereignty may be used to deprive a regime of de facto recognition, it does not follow that popular sovereignty necessarily stems from a liberal democratic interpretation or that forcible or nonforcible

174. International Covenant on Civil and Political Rights, Dec. 19, 1966, S. TREATY DOC. NO. 2 (1977), 999 U.N.T.S. 171.

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interventions should result in cases of noncompliance with this "democratic entitlement" (p. 339). This democratic entitlement is only one of several methods by which popular will may be assessed. It may well be assessed through time-honored traditions, demonstrations, public opinion, and so on. Indeed, according to Roth:

> A dictatorial government, even though failing to provide adequate mechanisms to render it accountable, may nonetheless appear legitimate in the eyes of the majority of its subjects. Moreover, an elected government may not .... [Consequently,] it cannot be said *a priori* that *coups d'état*, emergency rule, or even substantial periods of one-party or coalitional dictatorship violate popular sovereignty.
>
> This is not to say that the principle of popular sovereignty cannot give rise to a legal judgment of governmental illegitimacy. It is merely to say that such a judgment cannot be predicated solely on the failure of a governmental system to conform to a specified institutional form. [p. 344]

Roth also acknowledges that there are instances where methods qualitatively superior to *effective control* are possible and necessary to measure legitimacy — such as where elections are used as part of the arbitration between antagonistic parties, where these parties consent to the elections. Here the elections are a superior predictor of popular will (p. 364). Roth therefore has a rich telling of a complex story. Having already concluded that the effective control doctrine cannot be mechanically applied to determine legitimacy of governments, his discussion of political-participation rights comes to a similar conclusion — empirical manifestations of popular will through processes such as elections are unpredictable indicators of popular will, just like *effective control.*

International response to the Haitian coup of September, 1991 is, however, for Roth the momentous case indicating a clear demonstration that liberal internationalism may upstage effective control as a predictor of legitimacy or popular will. The swift international denial of legal recognition for the coup regime followed closely on the heels of the Santiago Commitment to Democracy and the Renewal of the Inter-American system (pp. 374-77). Did this only indicate the increased importance of participatory mechanisms in determining popular sovereignty in the Western hemisphere, or was it an accidental constellation of an unusual set of circumstances unlikely to be replicated? In Roth's view, "[g]iven the strength of traditions disfavoring direct international judgements on the legitimacy of internal processes of rule, and given the persistence of broadly-supported pronouncements evoking those traditions, prudence dictates reading the Santiago, Moscow, and similar documents narrowly" (p. 376; footnote omitted).

Roth subsequently discusses how the Security Council justified use of force under Chapter VII of the U.N. Charter to restore Aristide, for purposes of assessing "states' collective perception of the legal limits

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to action, *not with the political determinants of actions taken within those perceived limits*" (p. 383 n.57; emphasis added). The fact that Roth gives this disclaimer in a footnote is as revealing as it is striking. It is striking since he celebrates Haiti as the point at which the international law of governmental legitimacy is born (p. 387), and it is revealing for what it fails to examine. As Richard Falk has argued, the U.S.-led U.N. intervention to reinstall Aristide in Haiti continues a dilemma of international diplomatic interventionism — it simultaneously promises democracy promotion and protects the economic rights of investors and the traditional elite in these countries in ways inimical to social and economic progress.[175] Hence, Aristide's return to power was conditional upon his abandonment of his populist program of redistributing disproportionate concentrations of property and ill-gotten wealth from the propertied classes to the poor majority. He had to commit himself to the stringent programs of economic restructuring of the International Monetary Fund (IMF) that favored returns to investment in terms of growth and profitability at the expense of social spending.[176] The amnesty given to the allies of the dictatorship of General Cedras also raises troubling issues for a political agenda that simply buried problems in the quicksand of economic dislocation and political repression. As Falk remarks:

> What kind of restoration of democracy is taking place if the program and orientation of the elected leader is being scrapped as a condition for the support of his return? And is not the new approach to development endorsed by Aristide tantamount to an acceptance of the right-wing program favored by the military? What is worse, if Haiti goes along this path, there is no short-term assurance that the acute poverty plaguing ninety-five percent of Haitians will be relieved, or that the overall condition of the society will be improved.[177]

Hence, just when Roth celebrates Haiti as the exemplary contemporary case of successful prodemocracy intervention, we realize just how hollow this success story is for poverty-stricken Haitians. Their tragedy was compounded by the U.S. authorities who violated international norms of *non-refoulement* by refusing to give Haitians fleeing the atrocities of the military regime refugee status in the U.S.[178] Temporary relief against return to Haiti was won in U.S. courts, but the

175. *See* Falk, *supra* note 172, at 348.

176. *See id.* at 347. For another critical and important assessment, see ROBINSON, *supra* note 55, at 305-16, 333-39.

177. Falk, *supra* note 172, at 353. According to Robinson, the political intervention in Haiti "included multiple overlaps between the penetration of transnational capital, the . . . class structures and the emergence of new political protagonists, external constraints which the global economy placed on internal policy options and socioeconomic transformations. . . ." ROBINSON, *supra* note 55, at 335.

178. *See* Harold Hongju Koh, *The "Haiti Paradigm" in the United States Human Rights Policy*, 103 YALE L.J. 2391 (1994).

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U.S. Supreme Court ruled against the refugees.[179] As the current undersecretary for Human Rights argued, the courts implicitly endorsed the anti-immigrant sentiment in the country whose image of the "archetypal 'good' alien . . . is a white, European, healthy, heterosexual, self-sufficient refugee, arriving alone in search of political asylum. . . . [I]t hardly surprises that black, poor Caribbean migrants arriving in large numbers, many afflicted with HIV . . . should fare badly in our courts."[180] The increasingly hostile post-Cold War attitude towards refugees, especially those from non-Western countries, has been accompanied by a discourse of in-country protection and internally displaced persons at the expense of the post-Second World War refugee framework that protected refugees against involuntary return to their persecutors.

Last but not least, the Supreme Court rejected the Haitian refugees' attempt to enforce their rights against *non-refoulement* at federal and international law, mainly on the basis that the U.S. could not enforce this right extraterritorially (the refugees were not considered to be in the United States, as most were quarantined in the infamous U.S. naval base at Guantanamo, Cuba).[181] Paradoxically, the Supreme Court within the same period "permitted extraterritorial application of the Sherman Act to foreign conduct that produces a substantial anticompetitive effect in the United States."[182] The different outcomes in these cases indicate an underlying public/private split — the U.S. could unproblematically extend the territorial reach of its commercial legislation overseas, but it would be slow to extend domestic human-rights protection to migrants from a poor third-world country. I have already argued that a public/private scheme, such as the one that underlies the Supreme Court's decisions here, is fallacious. It presupposes that private law rules are neutral, while cases of collective non-recognition of governments and interventions in civil society, such as applying U.S. law to a foreign country, are necessarily political and should be minimized. However, as my commentary on the Haitian intervention illustrates, the international economic programs imposed by the U.S.-dominated IMF should not be confused with the rhetoric of "a clash between a liberating foreign force and a corrupt local ruling class" since it really was "the sealing of a long-term pact between that foreign force and the Haitian elite."[183] To construe these economic programs in the discourse of neutrality is to clothe alliances of domination and exploitation with a veil of legitimacy.

179. *See* Sale v. Haitian Centers Council, Inc., 509 U.S. 155 (1993).

180. Koh, *supra* note 178, at 2422.

181. *See Sale*, 509 U.S. at 188-207 (1993) (Blackmun, J., dissenting).

182. *Id.* at 2418 (emphasis removed).

183. ROBINSON, *supra* note 55, at 307.

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CONCLUSION: DECENTERING THE INTERNATIONAL LAW OF ILLEGITIMACY OF GOVERNMENTS

This Review has argued in favor of decentering the international law of governmental legitimacy away from: its Eurocentric binary between liberalism and conservatism; its formalism in separating law from politics and therefore in construing the state as a juridical entity separate from the nation; its binary opposition between public and private interventions; and its decontextualization from the centrality of the history of colonialism in international law and from the regressive programs of economic reform known as neoliberalism. Having made these critiques in a variety of contexts, I conclude that Roth overstates the law of illegitimacy or legitimacy of governments in international law exclusively as a set of rules or policy options without considering it as one component in a toolkit of political strategies and ideas that get deployed every day. His study would have been much richer and more *legitimate* had it engaged in a critical enterprise that did not shy away from colonialism and neoliberalism. It would have broadened our understanding of the legitimacy not only of governments, but also of the private order over which international law lies, of international institutions and their programs, and of the nature of the interaction these institutions have with third-world countries and their elites.

One of the striking omissions from the book is the manner in which governments that fail to conform to the nonnegotiable programs of neoliberal economic restructuring lose their entitlements to IMF and World Bank programs and lending, even if they would otherwise be entitled to them. There is, in fact, perhaps no better example of how states lose their legal entitlements, and thus their legitimacy, at the international level than through the relationships they have with international capital. That Roth fails to connect the economic programs now being pursued around the world with the humanitarian impulse behind humanitarian interventionism is therefore significant. His rationalization, to the effect that his project is not *political* but *legal*, dismally fails to explain this omission.

I contend that, if debates on legitimacy in international law were decentered from their statistism and Eurocentricity, and contextualized in the rich and complex interactions of colonialism, neoliberalism and non-European ways of thinking about legitimacy, a richer discourse of legitimacy would be possible. Such a strategy would involve a new politics that would not be tied to the legalism underlying Roth's project or his thesis of a clash between universalism and cultural particularity as the alignment of post-Cold War world conflict. This new politics would instead displace and decenter the search for legitimacy in monolithic, homogenous, and universal categories in favor of increasing our attention to the legitimacy of international institutions

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and laws and alliances between local and global politics and economic programs as may be evidenced in colonialism or neoliberalism. In addition, non-Western sources of legitimacy inspired by the ethical and political virtue of these societies in their heterogeneity would greatly enrich the discourse on legitimacy. Indeed, as Roth's analysis suggests, even legitimacy in the West cannot be located in any single parameter. There is therefore no better way to democratize national and international society than to multiply the sites at which we look for legitimacy (private, public, national, international, etc.) and sources of its underlying meaning in the rich diversity of international society. A discourse on legitimacy irrelevant to the non-European world will be as hollow as the promises of an international law unable to examine its alliance with projects such as colonialism and programs such as neoliberalism.

Hence, insofar as neoliberalism delegitimizes social provisioning for public health and education programs by stigmatizing public policy as inefficient and susceptible to corrupt and authoritarian governance, there is need for an optic in the international legal discourse on legitimacy through which such an outcome can be expressed. For example, one could argue that such delegitimation is suspect since its justifications have often proved false, if not tragic, in many a developing country. Hence, reducing governmental interventions in the economy has not automatically led to increase in economic growth and personal freedom in many of these countries. The argument that governmental interventions in the economy, including those intended to redress social division, hierarchy, and inequality in society, are inefficient or profit-constraining becomes an apology for the redistribution of national income in favor of profit or capital by the removal of such profit-constraining regulations, including those that support welfare needs. The neoliberal argument that the pain of economic restructuring is a necessary cost that a society must bear in order to produce a higher rate of investment, productivity, growth, and profit must hence factor into any discourse of legitimacy with democracy as its goal. Neoliberalism is an invitation of nineteenth-century classical legal thought with its attendant disposition against moral and political reasoning. It is committed to the necessity of a decentralized market economy and political system that could increase wealth while maintaining freedom and avoiding the tyranny of postcolonial authoritarianism. In view of this brooding neoliberal omnipresence, the imperative to democratize the discourse on legitimacy remains critical and urgent.

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GOVERNMENTAL ILLEGITIMACY AND NEOCOLONIALISM: RESPONSE TO REVIEW BY JAMES THUO GATHII

*Brad R. Roth**

INTRODUCTION

The essence of James Thuo Gathii's criticism of *Governmental Illegitimacy in International Law*[1] is that my study seeks to answer a doctrinal question rather than to challenge the "Eurocentric" assumptions that pervade doctrinal thinking. Although I (inevitably) take exception to some of Professor Gathii's characterizations of the book's details, an elaborate clarification and defense of these finer points would amount to an uninteresting response to an interesting essay. Indeed, since Gathii characterizes the book as "well written, well-argued, and well-researched,"[2] and since I am in sympathy with the considerations that prompt him to go beyond the scope of what I sought to accomplish, I am tempted to treat Gathii's essay as a complement (as well as, in many respects, a compliment) to my book, and therefore to leave well enough alone.

I nonetheless accept the *Michigan Law Review*'s invitation to respond, in order to confront directly the political challenge that Gathii, as a participant in the scholarly current of "critical" approaches to international law, poses to my more traditional brand of legal scholarship. Above all, I want to contest the relationship that Gathii posits between disciplinary methodology and political substance.

"Critical" scholars frequently seem to imagine that, in struggling against the methodological norms of their disciplines, they are struggling against the very structure of the power relations that exploit and repress the poor and weak — the metaphor being, in their minds, somehow transubstantiated into reality. The result is, all too often, an

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1. James Thuo Gathii, *Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy*, 98 MICH. L. REV. 1996, 2013 (2000) (reviewing BRAD R. ROTH, GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW (1999)).

2. *Id.* at 2004.

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illusory radicalism, rhetorically colorful but programmatically vacuous. The danger is that a fantasized radicalism will lead scholars to abandon the defense of the very devices that give the poor and weak a modicum of leverage, when defense of those devices is perhaps the only thing of practical value that scholars are in a position to contribute.[3]

My main problem with Gathii's critique, then, is not (as he might imagine) that it is political, but that it is politically dysfunctional. More specifically, for all of Gathii's anticolonial posturing, my book is, I insist, far more effectively anticolonial than is his critique of it.

I. THE LAW AND POLITICS OF GOVERNMENTAL ILLEGITIMACY

Professor Gathii is fully justified in subjecting *Governmental Illegitimacy in International Law* to an essentially political critique, for the book, like all legal scholarship, has political implications — in this case, designedly so.[4] This is not to say, as "critical" scholars sometimes seem to imply, that law or legal scholarship is reducible to ordinary politics. Law is a purposive project, and thus not exclusively an empirical phenomenon; "law as it is" cannot be wholly separated from "law as it ought to be."[5] The purposes that drive the project, however, must be demonstrably immanent in social reality, not merely superimposed according to the predilections of the jurist; the jurist's task, at once creative and bounded, is to render a persuasive account of how those immanent purposes bind powerful actors to worthy projects

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3. Bruno Simma and Andreas S. Paulus make a version of this point against Hilary Charlesworth in a recent *Symposium on Method in International Law*. Simma and Paulus express doubt that the emphasis on subjectivity that marks Charlesworth's feminist approach to method:

> will be helpful in the dialogue with decision makers because it does not appear compatible with the setting of general standards for human behavior — norms urgently needed to hold the perpetrators of crimes against women accountable under the rule of law. The impressive contribution of the feminist movement to the development of international criminal law during the last decade testifies to the transformative potential of the adaptation of positive law to meet women's concerns.

Bruno Simma & Andreas S. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AM. J. INT'L L. 302, 306 (1999).

4. And confessedly so:

> [I]t would be disingenuous to claim that the instant work (or any work of legal interpretation) is a neutral rendering. Wherever possible, it reads the source materials as coherent rather than chaotic, and it presents established legal doctrines, especially those emphasizing non-intervention in the internal affairs of states, in a light that suggests that they are not, as some have maintained, altogether lacking in moral vision. It is, in a sense, inherently a conservative project. The account of norms of international conduct developed in an ideologically plural environment is unquestionably colored by the author's concern to preserve space in the world for ideological pluralism and innovation.

P. 34 (footnote omitted).

5. *See* Lon L. Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630, 644-48 (1958).

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(such as the self-determination of Third-World peoples) that they would not otherwise be inclined to undertake.[6] That legal scholarship impress those who are not natural political allies is the test, not only of its scholarly merit, but also of its *political* merit; that friends may be disappointed is of far lesser significance.

This task is not to everyone's taste, and some in the academy have devoted their considerable talents to discrediting the project of legal reasoning, as conventionally understood.[7] But their efforts, though often of great intellectual sophistication, are profoundly misguided. In their zeal to "unmask" law's legitimation of exercises of power, they fail to appreciate that law can legitimate such exercises only insofar as it simultaneously constrains them. Power holders seeking the imprimatur of legality can benefit only to the extent that they accept its limits, for violation of the limits necessarily reverses the process of legitimation.[8]

To deny such a relationship between legitimation and constraint is to assert that putative legal limits are a remarkably effective ruse — that legal rhetoric, rather improbably, fools most of the people all of the time. (Presumably, the power holders are not thought to be fooling themselves, since if the constraints, though objectively illusory, seem real enough to them, the rule of law would be a reality in political terms even if a chimera in philosophical terms.) On the other

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6. Thus, according to Ronald Dworkin:

> A naturalist judge might find, in some principle that has not yet been recognized in judicial argument, a brilliantly unifying account of past decisions that shows them in a better light than ever before.... Nevertheless the constraint, that the judge must continue the past and not invent a better past, will often have the consequence that a naturalist judge cannot reach decisions that he would otherwise, given his own political theory, want to reach.

Ronald A. Dworkin, *"Natural" Law Revisited*, 34 U. FLA. L. REV. 165, 169 (1982).

7. Martti Koskenniemi characteristically notes that in his experience in international legal practice,

> competent lawyers routinely drew contradictory conclusions from the same norms, or found contradictory norms embedded in one and the same text or behavior.... As I learned from David Kennedy, the legal argument inexorably, and quite predictably, allowed the defense of whatever position while simultaneously being constrained by a rigorously formal language.

Martti Koskenniemi, *Letter to the Editors of the Symposium*, 93 AM. J. INT'L L. 351, 354-55 (1999).

There are many grounds, however, for questioning the cynical lessons that Koskenniemi and Kennedy draw from such observations. Most straightforward among them is that the project of legal argumentation would not likely consume the time and attention of intelligent, well-informed, and savvy individuals if it were so barren of substance.

8. I have made this point more elaborately in Brad R. Roth, *What Ever Happened to Sovereignty? Reflections on International Law Methodology, in* TOWARD UNDERSTANDING GLOBAL GOVERNANCE: THE INTERNATIONAL LAW AND INTERNATIONAL RELATIONS TOOLBOX 69, 77-83 (Charlotte Ku & Thomas G. Weiss eds., 1998).

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hand, if law does constrain as well as legitimate the exercise of power, to neglect that point is to miss an important political opportunity.[9]

Thus, *Governmental Illegitimacy in International Law*, in developing legal grounds for limiting the intervention of foreign powers in the internal affairs of weak states, is highly conventional in its method, except in one important respect. Because there has only recently come into being an international law of the internal character of domestic political systems, there is no tradition in international law scholarship of interpreting the relevant practices and pronouncements of states in light of the diversity of political principles and power arrangements that have been efficacious in the international community. The task of legal interpretation in this area implicates the fields of political theory and comparative politics; without an understanding of the political ideals and structures that have had a voice and a vote in the international system, one tends to read the source material in light of highly parochial assumptions about political life. Thus, Chapters Two, Three, and Four, as interdisciplinary aids to legal interpretation, distinguish the book from more standard international law scholarship.

For this limited interpretive purpose, however, one need understand only *empowered* approaches to political legitimacy — that is to say, approaches that have been influential among state actors (Western, Socialist, and Nonaligned) whose deeds and words are the source material of international law in the relevant periods. That other, disempowered approaches may more authentically represent cultural norms in much of the world (e.g., in postcolonial states ruled by unrepresentative, Western-influenced leaders) would be interesting to know, but unhelpful to this particular project.

The book does not purport to be a thoroughgoing examination of the question of political legitimacy in general; that would be a project so immense as to be imponderable. Rather, the book seeks to be a thoroughgoing examination of the international norm emerging to govern the exceptional case: the de facto government so manifestly unrepresentative as to be arguably without standing to resist, in the name of the sovereignty belonging to the underlying political community, external impositions.

The question, then, is what indication of representativeness is minimally required to deem a ruling apparatus the state's "government" for purposes of international law. The orthodox approach to this question has been the "effective control doctrine," the linchpin of

9. Even Koskenniemi seems recently to have endorsed this proposition. *See* Martti Koskenniemi, *Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations*, *in* THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 17, 32 & n.96 (Michael Byers ed., 2000) ("[D]oing away with [the question of legal 'validity'] has definite social consequences. Not least of these is the liberation of the executive from whatever constraints (valid) legal rules might exert over them [sic].").

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which is popular acquiescence in governance (pp. 137-42). A sharp break from orthodoxy is implicit in liberal-internationalist assertions of a "democratic entitlement," the linchpin of which is a liberal-democratic institutional structure.[10] The former approach is clearly giving way to a significant extent, and there are those who argue, on the basis of a fair amount of evidence, that the latter approach is emerging as the basis of a new norm that would open the door to "prodemocratic" intervention, perhaps including even the use of force, especially where a "freely and fairly elected" government has been overthrown.[11]

Governmental Illegitimacy in International Law elaborately argues two politically relevant propositions: (1) that the case for the democratic entitlement as the emerging norm in international law is weaker than is generally supposed; and (2) that liberal-democratic legitimism (i.e., the use of the democratic entitlement as the basis for disregarding a government's legal prerogatives) is dangerous both to self-determination and to peace. The book presents the second proposition as relevant to the first, inasmuch as one may appropriately amplify those aspects of the source material that stem from enlightened considerations.

The book thereby intends to strike a blow for anticolonialism. It denies the existence of, and opposes the establishment of, a broad-ranging legal license for external intervention in the affairs of weak states. It associates such a license with great-power initiatives of the past that have been misguided at best, oppressive and exploitative at worst. Confronting a dismal subject matter that admits only of bleak choices, the book maintains a presumption in favor of what I, none too facetiously, often refer to as "the right to be ruled by one's own thugs," though it concedes a limited range of blatant thuggery that overcomes this presumption.[12]

The book does not, as Gathii charges, "celebrate[] Haiti as the exemplary contemporary case of successful prodemocracy intervention,"[13] but merely accepts that in a certain class of cases, of which Haiti is archetypical, one can no longer, and should not want to, deny the existence of an exception to the nonintervention norm. What

10. The seminal works of the "democratic entitlement" school are: Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539 (1992); Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992).

11. For a wide-ranging compilation of scholarly approaches to the question of the democratic entitlement, see DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW (Gregory H. Fox & Brad R. Roth eds., forthcoming 2000).

12. The book is not a political manifesto, however, and supporters of the democratic entitlement will hopefully find much within it to be of scholarly value, even while regarding its grounding for verdicts of governmental illegitimacy as far too limited.

13. Gathii, *supra* note 2, at 2052.

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Governmental Illegitimacy in International Law seeks to promote is a balanced norm, one that finds ample support in state practice and *opinio juris* and that serves, to the extent possible, the long-term interests of the inhabitants of weak states.

II. CONFESSIONS OF A "NEOCONSERVATIVE REALIST"

Gathii's characterization of my work as an exemplar of "neoconservative realism" presents several difficulties. There are certain aspects of the book that can fairly be characterized as "conservative" and as "realist," at least in counterposition to liberal internationalism, if special definitions of those terms are designated with sufficient care. The book is conservative in the limited sense that it seeks to rationalize and to bolster the conception of international legal order, premised on the twin principles of self-determination of peoples and nonintervention in internal affairs, that was dominant throughout the 1960s, 1970s, and 1980s, but that now faces significant challenges.[14] The book is realist to the extent that it takes states (*qua* political communities entitled to self-government) seriously as units of the international system, and that it treats skeptically efforts to superimpose idealist blueprints on complex and unruly realities.[15]

Gathii's own efforts to define the terms, however, lead only to confusion. The prefix "neo-" is especially troubling, because although Gathii at times seems to intend it in a more generic sense, the term "neoconservative" cannot be disassociated from a specific movement among right-wing American intellectuals that stands for propositions diametrically opposed to the book's central arguments. It is jarring to see the word used to characterize, for example, a discussion of U.S. intervention in Central America so overtly adverse to that emblematic neoconservative project of the 1980s (pp. 290-303, 347-61). Indeed, Gathii's accurate assertion that "[t]he neoconservative tradition . . . is embedded in American exports such as neoliberalism and democracy promotion programs"[16] goes far in explaining the book's chilly recep-

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14. Gathii seems not to notice that the American Right has been a consistent opponent of that conception. For a colorfully harsh illustration, see Jeane J. Kirkpatrick & Allan Gerson, *The Reagan Doctrine, Human Rights, and International Law*, *in* RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE 19 (Louis Henkin ed., 2d ed. 1991) (1989).

15. Edward Hallett Carr, certainly not a man of the Right, was frequently characterized (not quite fairly) as a realist for holding such views. *See generally* EDWARD HALLETT CARR, THE TWENTY YEARS CRISIS, 1919-39: AN INTRODUCTION TO THE STUDY OF INTERNATIONAL RELATIONS (1939); CHARLES JONES, E.H. CARR AND INTERNATIONAL RELATIONS: A DUTY TO LIE (1998).

16. Gathii, *supra* note 2, at 2002. Of course, the very fact that liberalism and conservatism are not necessarily antonyms suggests the urgent need for care in defining terms. Neoconservatism represents the right wing of liberal internationalism, the left wing of which is represented by the human rights activist community. Embedded in my book is the judgment that human rights activists are making a mistake in embracing legal frameworks, such as the democratic entitlement, that will end up best serving the neoconservative agenda.

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tion of the latter; but how, then, can the book conceivably be identified with neoconservatism? This glitch could be dismissed as a detail if it were not reflective of Gathii's broader misperception of the political spectrum.

Gathii complains of "binary thinking" as a " 'pathological' feature of Western knowledge systems,"[17] but ironically, it is his organization of the material, not mine, that suffers from this pathology. Thus, Gathii does not discern that my approach to the question of governmental illegitimacy charts a middle way between the effective control doctrine and the democratic entitlement, one that seeks to appreciate the vast diversity of legitimacy rationales without embracing an abject relativism. To the extent that the book seeks to categorize the elements of that diversity, it does so expressly for the sake of convenience alone, and in a tone of self-deprecation.[18] For all of his complaints about my neglect of non-Western approaches to legitimacy, Gathii nowhere explains how the book excludes that which it does not expressly discuss. Nonetheless, this either-or motif is the relentless theme of his essay.

According to Gathii's dichotomous reasoning, "Western" approaches to international relations amount to a dyad of liberal internationalist and neoconservative realist tendencies. Thus, the idea of "liberalism overextending itself" — which well captures my adverse characterization of the effort to exalt liberal-democratic institutional norms as legal criteria for governmental legitimacy — is, for Gathii, necessarily of a piece with Right-of-Center critiques of the New Deal welfare state.[19] Yet the considerations that underlie my critique of liberal internationalism cannot, on any careful reading, be imagined to emanate from the Right.

Gathii's reasoning turns on an assertion that my "examination of only the legitimacy or illegitimacy of *state* authority invariably endorses the inequalities inherent in the private order which overlays the authority of any government providing its public imprimatur in private ordering."[20] But given that my project concerned a very narrow (al-

17. *Id.* at 2005 n.21.

18. For example:

> Such legitimating visions are many and varied. A comprehensive listing and explication would consume many volumes, and would perhaps never be complete. These visions can, however, usefully be classified according to their relationship to the familiar (if frequently misunderstood) concepts of liberalism and democracy, the fusion of which is now fashionably proclaimed to offer a final resolution of the question of governmental legitimacy.

P. 70. It is only to this extent that, "*[t]o put it glibly*, the international community contains liberal democrats, non-liberal democrats, liberal non-democrats, and non-liberal non-democrats . . . ." Pp. 39-40 (emphasis added), *quoted in* Gathii, *supra* note 2, at 2005 n.21 (adding different emphasis).

19. *See* Gathii, *supra* note 2, at 2002 n.14.

20. *Id.* at 2003.

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beit grandly complex) question — namely, when does a ruling apparatus in effective control lack standing to assert rights, incur obligations, and authorize acts on behalf of the state in the international system? — Gathii's assertion seems merely to reflect a methodological prejudice against treating *anything* as a discrete issue.[21] For Gathii, either one expressly discusses economic and social inequality in every context, or one is unconcerned with it.

Ironically, part of the book's criticism of the democratic entitlement thesis is precisely that the latter emphasizes institutional criteria at the expense of contextual factors such as economic and social conditions (pp. 104-06, 120, 424-26) — an aspect that would, I had supposed, be hard to miss if one were reading the book for its political implications. The book's defense of sovereign prerogative overtly reflects an interest in maintaining political space for the very resistance to private-sector predation that Gathii seeks to champion.[22] Moreover, Gathii's complaint that I "ignore" international economic domination[23] could not be more misplaced, since I not only discuss the various pronouncements of intergovernmental organizations against coercive economic measures, but seek to establish for those pronouncements a legal significance that, though modest, goes beyond what most Western international lawyers tend to admit.[24]

To make use of legal discourse, however, is to accept that its political worth — its credibility with influential actors who do not share one's interests and values — can be maintained only by resisting the temptation to assert as law one's entire political and moral wish list. I do not contend that the lending conditions imposed by international financial institutions are violations of international law, as Gathii

21. Gathii's predisposition is particularly distortive in his treatment of the "state necessity"/"implied mandate" doctrine. *See id.* at 2009 (citing pp. 155-59). That doctrine legally ascribes to a state the uncontroversial public acts and obligations undertaken by a de facto government notwithstanding that government's illegitimacy — postal and aeronautical conventions being my posited examples. For Gathii, these examples reproduce the "public/private distinction," and my approving invocation of them supposedly demonstrates that I have "almost blind faith in the idea that . . . the exclusivity of the private sphere from public power guarantees neutrality and therefore freedom." Gathii, *supra* note 2, at 2025, 2026. Such unjustified leaps highlight the dangers of metaphorical reasoning.

22. *Compare* pp. 424-26, *with* Gathii, *supra* note 2, at 2052. Since Gathii dismisses sovereign prerogative and private property as deriving from one and the same Eurocentrism, he inadvertently debilitates his own cause.

23. *See* Gathii, *supra* note 2, at 2027.

24. I suggest, albeit rather tepidly, that secondary boycotts and other extraterritorial pressures, even when adopted purportedly in response to a state's human rights violations, amount to unlawful coercion absent authorization by the United Nations Security Council under Article 41 of the Charter (pp. 167-71). The more standard view is to the contrary. *See, e.g.*, Lori Fisler Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs*, 83 AM. J. INT'L L. 1, 46 (1989) (treating economic coercion as a nonissue, at least where human rights are at stake).

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would like,[25] because the absence of any broadly accepted basis would render the contention useless and self-discrediting. Furthermore, I do not denounce the absence of a doctrinal basis for this contention as a failing of international law, because that body of law has never pretended to exhaust the question of international distributive justice. Like many "critical" theorists, Gathii, in so busily demonstrating the truism that law is political, fails to appreciate the distinctiveness of law's role in politics, and therefore curses its necessary limitations.

The supreme example of Gathii's binary thinking, however, and by far the most disturbing, is the neat division between "Eurocentric" and "Third-World" approaches. The irony of Gathii's condemnation of my "Eurocentrism" (apart from the difficulty of reconciling it with my copious quotations from Kwame Nkrumah, Julius Nyerere, Raul Castro, and the like) is that the reconstructed image of the contemporary sovereign state system that I present reflects the influences, direct and indirect, of the Nonaligned Bloc, quite as much as it does those of Westphalia or even of the drafters of the United Nations Charter. As the book details, the era of decolonization and its aftermath profoundly affected legal norms, as both Western and Socialist blocs purchased Third-World political support by, *inter alia*, affirming the inviolability of weak states (pp. 6, 113-18, 160-71). In repudiating conventional legal analysis as Eurocentric, Gathii dismisses both the significance of Third-World participation in shaping contemporary norms and the extent of the Third World's stake in the continued vitality of those norms — an attitude not, so far as I can tell, broadly shared among Third-World leaders, scholars, or peoples.

International law's basic categories do, of course, stem from European sources,[26] but then so, too, in large measure, do the ideologies of the postcolonial state governments. Gathii may see this as itself a corruption of authentic African, Asian, and Latin-American traditions,[27] but the struggle over authenticity is internal to those

25. *See* Gathii, *supra* note 2, at 2026-39.

26. Gathii's harshest complaint here is with the idea of the state itself as a doctrinal entity abstracted from the idea of the nation. *See id.* at 2041-48. But one looks in vain for an indication of what solution a reintroduction of the idea of the nation (which I consider to be, in terms of both legal doctrine and normative political theory, a good riddance) presents for the problems of postcolonial countries. Surely he is not suggesting disaggregating African political units and reconfiguring them in some more traditionally coherent way, since this could be accomplished, if at all, only through extraordinary violence.

Indeed, it is difficult to perceive how Gathii defines "nation" and "nationalism." Insofar as he means the "nationalism" represented by the anticolonial and antiimperialist struggles that he references, he is mistaken to regard my book's characterization of legal doctrine in the area of self-determination of peoples as anything less than a monument to those struggles.

27. Illustrative is his approving citation of Ngugi Wa Thiong'o's characterization of "the English language in former British colonies in Africa [as] a 'cultural time bomb' that continues a process of erasing memories of pre-colonial cultures and history as a way of installing the dominance of new, more insidious forms of colonialism." *Id.* at2020.

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societies and cultures. If Gathii is intent on regarding Third-World authenticity as excluding Western political thought — Rousseau and Marx as much as Locke and Mill, and by extension all African, Asian, and Latin-American thinkers who have drawn inspiration from them — his notion of "Third-World approaches" cannot help but be a highly tendentious rendering.

Gathii is correct to assert that my analysis treats colonialism as a legal aberration rather than as "ingrained in international law as we know it today."[28] But he fails altogether to explain why it would be useful, in terms of his purported political goals, to do otherwise. Characterizing contemporary international law as essentially continuous with patterns of past Western domination (thereby belittling the hard-won achievements of anticolonialist struggles) scarcely promises a more effective defense to the phenomena — economic disempowerment, cultural imperialism, and proposals to subject "failed states" to trusteeship[29] — against which he inveighs. Gathii undoubtedly believes that *Governmental Illegitimacy in International Law*, in failing to attack the structure of international law itself, subtly reinforces these phenomena. But the first two exist despite, not because of, the conception of international law that the book embodies, and the last is most effectively opposed by invoking that conception.

CONCLUSION

Professor Gathii's substantive concerns about neocolonialism and neoliberalism are the very concerns that underlie *Governmental Illegitimacy in International Law*. It is thus ironic — though, in light of recent scholarly trends, not very surprising — that he should regard my book as part of the problem rather than as part of the solution. It would be different if the methodological radicalism of Gathii and others of his persuasion entailed a programmatic alternative. But it does not. Instead, it disdains to engage in the only consequential struggle in which its adherents are, by training and position, equipped to participate. It therefore reflects neither the interests nor, it is a sure bet, the views of those on whose behalf it purports to operate. Faced with the alternative that it presents to more traditional modes of scholarship, I much prefer to take the advice of an old mentor: "the more radical the message, the more conservative the suit."

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28. *Id.* at 2020.

29. *Id.* at 2021.