TOM FRANCK AND THE MANHATTAN SCHOOL

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INTRODUCTION

The talks and reminiscences we have heard over the last days are all hard acts to follow. But none more so than Tom's own scholarly record. A twenty-seven page list of publications. A book every 17.8 months for 43 years. Or 6.34 publications a year—one every 8.2 weeks—for more than four decades. Tom peppers his work with *bons mots*, and I wanted to begin my retrospective with something eloquent, simply summarizing. But I couldn't muster it.

Tom's first lines often pitch as epigrams. In 1963, he opened an article positioning national courts as a disaggregated international judiciary with a transposition of Holmes, turned what, exactly—coy, ironic, insistent—by the added words "of course": "International law is, *of course*, what international courts do."[1]

In 1960, he begins this way: "Disorder, as it is known to the lawyer, is perhaps less frequently an absence of legal order than a surfeit of it . . . ."[2]

To write so much—so elegantly. He had to learn how, to be sure. He pushed that last one a bit by adding "the unrationalized un-co-ordinated grinding of a plethora of legal gears."[3] But reach and risk are all over Tom's prose.

Tom the stylist—we can all hear his voice, bring to mind the elegant toasts, the masterfully ironic—and substantive—

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1. Thomas M. Franck, *International Law: Through National or International Courts?*, 8 VILL. L. REV. 139, 139 (1962–63) (emphasis added) [hereinafter Franck, *International Law: Through National or International Courts?*].

2. Thomas M. Franck, *The Courts, the State Department and National Policy: A Criterion for Judicial Abdication*, 44 MINN. L. REV. 1101, 1101 (1960) [hereinafter Franck, *The Courts, the State Department and National Policy: A Criterion for Judicial Abdication*].

3. *Id.*

introductions, interventions. Tom the stylist—let me first praise his ear for language. When I read him, it is impossible not to hear his wry wit, the acerbic clarity.

In the 1964 *Harvard Law Review*, Tom began his review of Bowett's *The Law of International Institutions*[4] this way: "If law is what the law professors do, the past two decades have surely foreclosed forever the dialectics about whether international law is law."[5]

Or here is Tom in 1965 on the "continuing vogue for obscurantism":

> From whence came this passion of the legal scholar to be misunderstood? . . . In an earlier age the torch of learning was carried high and could be seen clearly from Bologna to Peking. . . . Nowadays, the verbal fog sometimes seems so thick you can scarcely see and what was once a test of form and performance becomes a rule-less game of "torch, torch, who's got the torch?"[6]

The fifties and sixties were his salad days. I don't think he'd write these lines today—he might *think* them, but his graciousness would intervene. His wisdom is worn well—and now ever so politely, even generously, withheld from the exuberant young.

Tom's stylistic talents combine with an uncanny ability to see around corners. And the increasing vitality of hindsight has only accentuated his periscopic powers. A legal intellectual, Tom works in a style, but is always far forward, along the cutting edge of disciplinary fashion. For more than forty years, Tom has styled international law's avant-garde.

This afternoon, I would like to revisit Tom's posture in the international law field, situating his style, his sensibility, his political projects, in the history of the professional vocabularies within which he has made his art. To my mind, international law is not a bundle of rules governing relations among

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4. D.W. BOWETT, THE LAW OF INTERNATIONAL INSTITUTIONS (3d ed. 1975).

5. Thomas M. Franck, Book Review, 77 HARV. L. REV. 1565, 1565 (1964) (reviewing D.W. BOWETT, THE LAW OF INTERNATIONAL INSTITUTIONS (1963)).

6. Thomas M. Franck, Book Review, 40 N.Y.U. L. REV. 398, 401 (1965) (reviewing WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW (1964)) [hereinafter Franck, *Friedmann Book Review*].

states. International law is a profession, a discipline, in which people, people like Tom, pursue projects, projects of affiliation and disaffiliation, of commitment and aversion, of power and submission—pursue them in a shared vocabulary, through the apparatus of shared professional practices and institutions. As they do so, they lay behind them evidence of both their shared and individual styles.

Over the last few years, I have been working on the intellectual history of various international legal disciplines: public international law, international institutions, international economic law, law and development, comparative law. I have been looking for blind spots and biases in these professional vocabularies—along the lines of the adage, to a man with a hammer everything looks like a nail. What do international lawyers *see* and what do they miss? How does their professional vision cabin, torque, enable, their projects in the world? In comparing these disciplinary sensibilities, I have also been developing a better sense for the way disciplinary style itself works—building a description, if you will, of the mechanics of professional expertise. There is a shared sense of history, of significant issues, important innovations and precedents, a common vocabulary of debate, advocacy, criticism.

International lawyers in the United States share a broad sense of what happened in the twentieth century (see FIGURE 1).

FIGURE 1: THINGS THAT HAPPENED

1914	World War I
1920s	League of Nations & International Labor Organization
1929–1939	Depression, Fascism, Socialism, Weimar, European liberalism, U.S. isolationism
1939–1945	World War II
1945–1960	Cold War, Totalitarianism, Marshall Plan, United Nations, IMF, IBRD, GATT
1960–1972	"Great society," welfare state liberalism, "1968," "development," decolonization, Vietnam
1972–1980	Oil shock, recession, debt crisis
1980–1990	Reagan, Thatcher, neoliberalism, Berlin Wall falls
1990–2000	Clinton, Blair, chastened neoliberalism, Gulf War, Yugoslavia

There were three world wars—the First, the Second, and the Cold War. Throughout the century, European liberalism was threatened from the left and right. Totalitarianism—communism and fascism—was followed by the passing of the torch

from Europe to the United States. Market expansion, welfare state liberalism. Decolonization and the heyday of development. 1968. Vietnam. Oil Shock. Debt Crisis. Recession. And the years of retrenchment—Reagan, Thatcher. Neoliberalism. The end of the Cold War. And the years of Clinton and Blair—opened by the Gulf War, but consumed by the conflicts of Yugoslavia. There is a lot here, of course—although many other things are off the screen.

Punctured by these events, the discipline's dominant style went through four distinct phases, beginning with the "traditional" synthesis of the late nineteenth century (see FIGURE 2).

FIGURE 2: SOME PHASES IN THE DEVELOPMENT OF INTERNATIONAL LEGAL CONSCIOUSNESS

Synthesis	1870–1914	"classical," "traditional," European liberalism, positivism
	1914–1925	war, anxiety, disputation
Synthesis	1925–1939	"modern," interdisciplinarity, social, antiformalism, *and* positivism labor, minority protection, collective security, codification organizations interdiscipline: political science
	1939–1955	war, anxiety, disputation
Synthesis	1955–1972	policy pragmatism, functionalism, American liberalism welfare state management, development, peacekeeping civil rights, human rights institutions interdiscipline: social sciences and economics
	1972–1989	oil shock, recession, anxiety, disputation
Synthesis	1989–2000	Liberalism, chastened neoliberalism, culture & identity democracy, free trade, humanitarian intervention human rights, environment global governance and civil society interdiscipline: human sciences, cultural study

Since 1914, the discipline has repeatedly been modernized:

- in the interwar period, by the social perspective and positivist revolution of European liberals,
- in the postwar period, by the process pragmatism and institutionalism associated with American liberalism, and
- since the Cold War, by enthusiasm for democracy, human rights, and the open economic structures

we associate with globalization and American neoliberals.

I end my history in 1999—it is far too early to tell whether 2001 and 2002—terrorism, 9/11, Iraq, the Europe-America split, changing geography for NATO and the EU, the antiglobalization movement—will turn out to have marked a new phase as well. Each phase had its dominant stylists and central headquarters. Postwar American international law was consolidated here, in Manhattan in the 1960s—and Tom was its Andy Warhol.

And then the sixties ended. The international law they spawned fell on hard times. Tom remained at the center—fighting back, angry—reaching out. But in the back study, in seminars, out in Belport, he was also tinkering away, reading, listening, editing the *American Journal*, and laying the foundation for a new set of disciplinary concerns. After the fall of the Berlin Wall, the malaise lifted. And a new style did emerge. New topics, new interdisciplinary influences. New questions. And again, Tom was at the center of it—a dominant intellectual player for a new generation.

It is not only ideas that run to fads—we might organize twentieth-century doctrinal and institutional developments in similar phases (see FIGURE 3). During each period, international lawyers shared a trauma that informed their sense of what must be done. They focused their energy on some doctrines, some institutions, largely ignoring others. The solutions they proposed to wide-ranging problems were broadly similar, and they shared a sense for the heroic figure best able to solve the urgent problems of the day. Perhaps most significantly, international lawyers in each period shared a mode of thought, a legal consciousness, visible in typical modes of analysis, methodological struggles, and preoccupations.

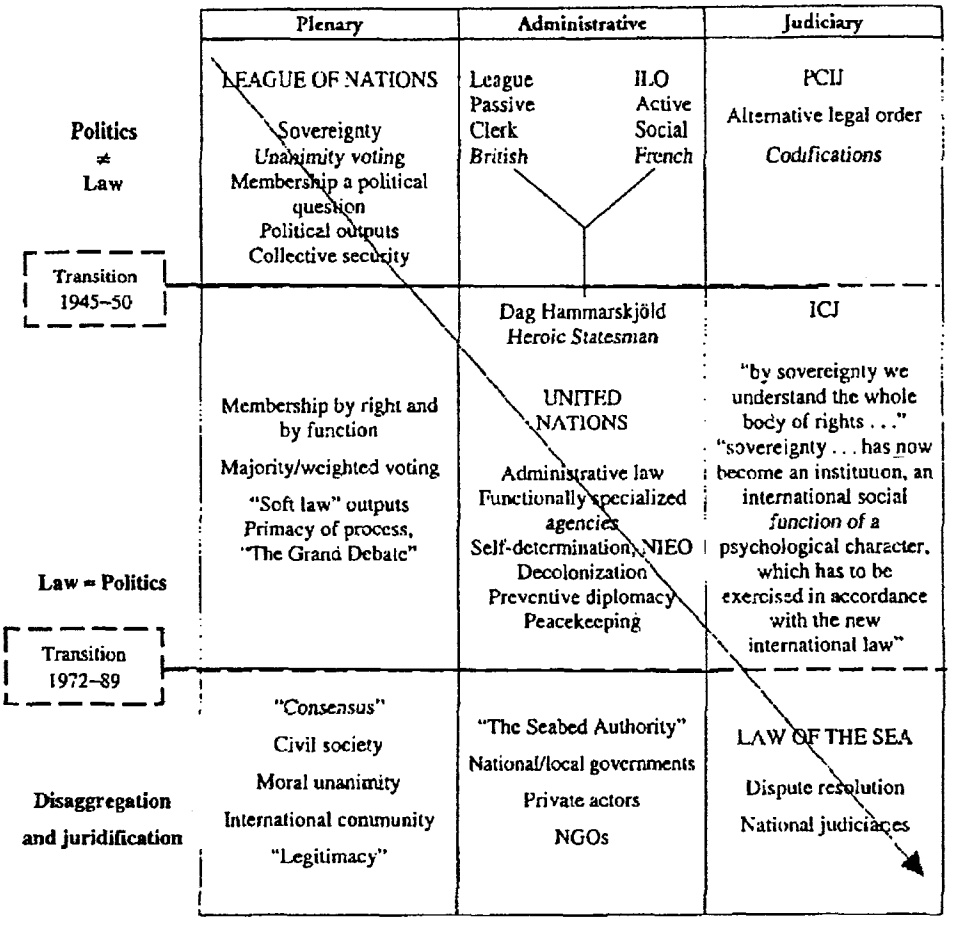
All these things do not just happen—someone has to think them up. Where they are common to other intellectual fields, someone has to import them to international law—where they are innovations within the international law vernacular, someone has to propose them, pursue them, and give them institutional and doctrinal life. The history of specific institutional and doctrinal developments often makes more sense lined up with broad shifts in the disciplinary vernacular.

FIGURE 3: PUBLIC INTERNATIONAL LAW

	1900–1950	1950–1989	1990–2000
Trauma	War, Hague, League failure	War, Cold War, totalitarianism, Depression	Thatcher/Reagan Neoliberalism Vietnam American Empire
Doctrinal Focus	Sources: treaties/ custom	Process, jurisdiction, state responsibility claims Law of the Sea	Substance Environment Human rights Terrorism International crimes
Preoccupation	Minority rights, colonial management Collective security, labor, nationalism Self-determination	Decolonization, development Disarmament/ security Social welfare, expropriation NIEO, human rights	Trade and economic management, "globalization" Humanitarianism Intervention, environment
Mode of Action	Codification	Administration and policy management Conventions and rights	Debate and adjudication Principles and standards
Mode of Organization	International organizations	International institutions	Civil society National and international NGOs and courts
Heroic Figure	Jurist and international judge	Manager Statesman	Citizen and NGO advocates and national judges
World Map	civilization and mandatories progress paternalism	East/West and Third-World coexistence and cooperation	Democratic liberalism and the nondemocratic, nonliberal world Free-trade globalization
Mode of Thought	Antiformal/social reform Positivism	Functional problem solving World Order building	Pragmatism, legitimacy, Humanism Ethics
Inter-disciplinary Resource	Politics Political science	Economics and social science	International relations Cultural and human sciences

We might think, for example, about international institutions (see FIGURE 4).

FIGURE 4: INTERNATIONAL INSTITUTIONS



Over the twentieth century, the focus has shifted from the plenary institutions—and questions of membership, representation or voting—to administration, and then to dispute resolution. The proliferation of judiciary organs—including national courts and arbitral bodies—that we have seen in the last twenty years makes more sense when seen as part of a more general move in the field to disaggregation and juridification. A similar story could be told about the evolution of particular doctrines. You might try the following exercise at home—take a series of classic cases elaborating the international law of, say, territory or sovereignty, and align them with the broader disciplinary trends of Figure 3 (see FIGURE 5).

I set these stories briefly before you to illustrate the significance of intellectual transformations in the field. Individuals—people like Tom—who are responsible for generating,

FIGURE 5: PUBLIC INTERNATIONAL LAW—SOME DOCTRINAL STORIES

Territory/Statehood	Sovereignty/Jurisdiction
Aaland Islands (1920) Island of Palmas Case (Neth. v. U.S.) (1928) Salimoff v. Standard Oil (1933) Eastern Greenland (Den. v. Nor.) (1933)	American Banana v. United Fruit Co. (1909) S.S. Lotus (Fr. v. Turk.) (1927) Salimoff v. Standard Oil (1933)
Western Sahara (1975)	U.N. Charter (1945) Package Deal Case (1948) Corfu Channel (U.K. v. Alb.) (1949) Reparations (1949) Imperial Chemical Litigation (1950s) Restatements § 401/403 (1950s) ICJ Jurisdiction Cases (1950s) Banco Nacional v. Sabbatino (1964) Fisheries Jurisdiction (U.K. v. Ice.) (1973)
Burkina Faso v. Mali (1986) El Salvador Dispute (1992) Maritime Delimitation Cases (1990s) Kasikili/Sedudu Island (Bots. v. Namib.) (1999)	U.S. v. Iran (1979) France v. U.S. Air Services (1978) Nova Scotia (1983) U.S. v. Nicaragua (1984) Rainbow Warrior (N.Z. v. Fr.) (1990) Pinochet (Regina v. Bartle) (1998)

elaborating, and renewing the discipline's most basic vocabulary can bring in their wake an entire corpus of doctrinal and institutional change. Tom has been a central figure in two moments of innovation in the field, each of which quickly settled into a dominant disciplinary consensus. The first began in the late 1950s and lasted at least through the 1960s, and the second, begun in the 1980s, consolidated during the Clinton years (see FIGURE 6).

Looking back, we can distinguish three quite different voices for mainstream liberalism in international law (see FIGURE 7).

The first change was a more substantial break—at least in the thinking of American international lawyers. Generational change was key: Between 1955 and 1965, the American international law professoriat was completely transformed. The second change—between roughly 1985 and 1995—is more difficult to mark with personnel. Tom is not alone in having been a leading figure in both moments. But the vocabulary of the field was transformed.

FIGURE 6: THE INTERNATIONAL STYLE

A. International Style: Developed 1950–60, Dominant 1960–75

- a turn to policy, engagement with functionalism and antiformalism
- a focus on process, procedures
- attachment to rules, reciprocity, nonintervention
- the judge as social engineer
- multilateral conventions: law of the sea, human rights
- idea of competing & incommensurate policy objectives, irreconcilable conceptions of law and politics, "antinomies," balancing
- interdisciplinarity: turn to "neutral" social sciences
- turn to management, expertise, heroic statesmanship
- institutional and constitutional arrangements
- national obligations read strictly, cooperative opportunities read broadly
- coexistence and cooperation
- a world of metropolis and periphery
- Keynesian Liberalism

B. International Style: Developed 1980–90, Dominant 1990–2000

- linguistic turn, law as language, social conversation, "legitimacy"
- professionalization, "invisible college"
- principles and standards: environment
- juridification: pragmatic return of form, rights, judge as legal reason and principle
- disaggregation: civil society—a turn to advocacy and adjudication
- open-ended "governance" process
- culture, identity, relativism
- a world of cultural difference, cosmopolis and the rest
- Carter Center Liberalism

Much of the energy for the transformation came from outside the field—new crises, new political and social opposition to the discipline's enthusiasms. Much came from the idiosyncratic projects of particular scholars, the accidents of influence and interdisciplinary borrowing. And much came from competition among the "schools of thought" that divide the field in each period. The Manhattan School of international law—Franck, Schachter, Friedmann, Henkin, Meron, and the rest—did dominate the field after 1960. But they did so in struggle with other fields—and their innovations were often forged in these methodological encounters with Yale, with the new right, and the new left. In an earlier piece published here at NYU, I mapped these changes (see FIGURE 8).[7]

So where was Tom in all of this? We all know he chooses topics well—his publication list reads as an index of the field's

7. *See* David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 N.Y.U. J. INT'L L. & POL. 335, 395 (2000).

FIGURE 7: THREE LIBERAL MODERNISMS

1920–1930	1960–1970	1990–2000
European liberalism	The Manhattan School	The New Liberalism
European society	U.N. system	American system/ empire
Counterpoint	U.S. mainstream	Hegemonic mainstream
Antiformal	Policy plus rule	Discourse
Functionalism	Pragmatism	Disaggregation and juridification
The "social"	The community	The individual
Political process	Government	Civil society/ governance
Mass psychology Political science	Political science Sociology System Politics	Philosophy Ethics Consciousness Culture
Social/liberal	Universal cosmopolitan	Situated liberal humanist

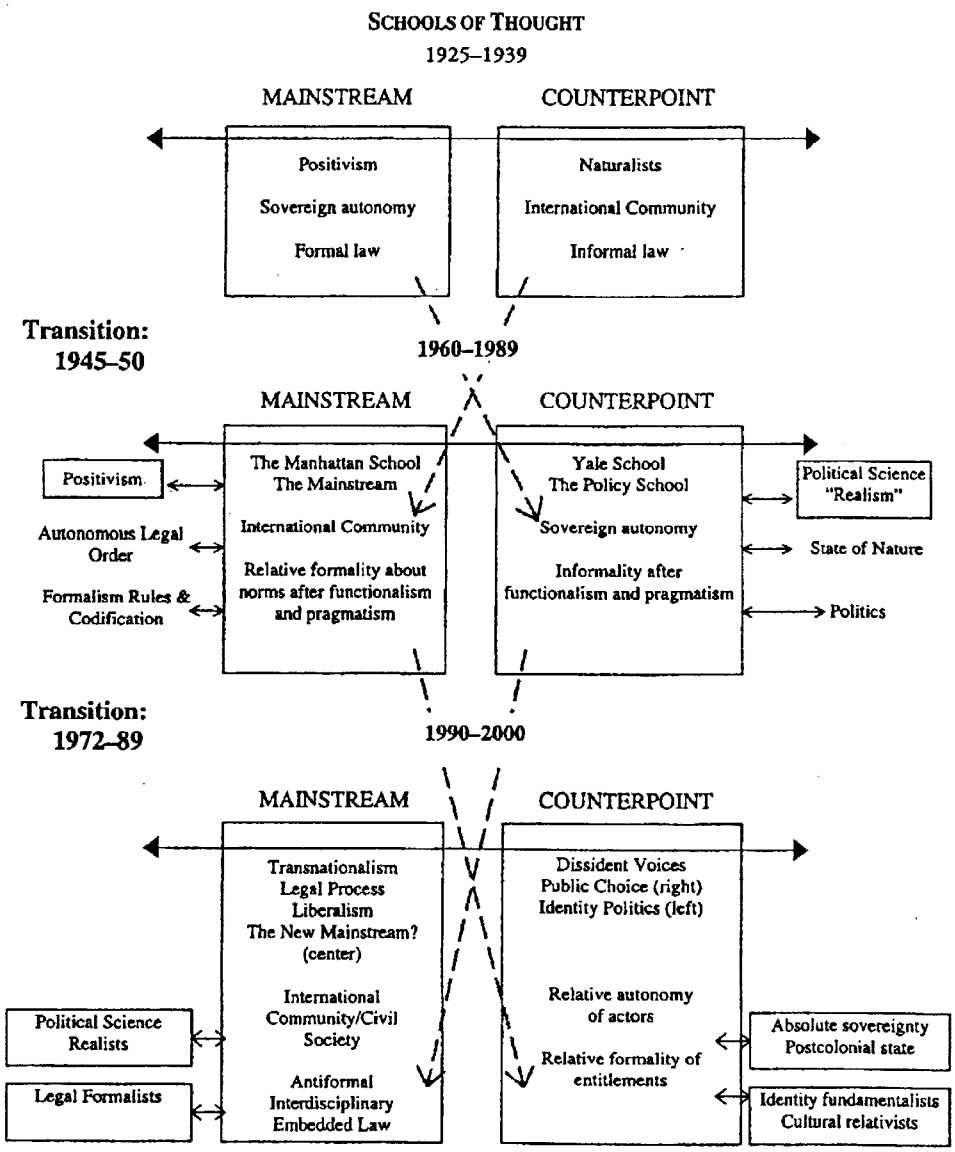
preoccupations. In 1959, decolonization, nation building. In the 1960s, the United Nations, management of Congo, development, international economic law, superpower reciprocity, intervention, the expanding use of force. In the 1970s, law of the sea, landlocked states, sea bed regimes, human rights, and foreign policy. In the 1980s, United States hostility to the United Nations, the legitimacy of the ICJ, secrecy, and foreign-policy making.

And he generally gets there first. In 1963, he discusses the potential for a new economic order. In 1974, he tackles terrorism. In 1979, Tom identifies NGOs and advocacy groups as central agents of international legal development. In 1960, he tackles the role of national judiciaries in international law. Here is Tom in 1962: "Indeed, American judges, in common with those of other countries, are actually the principal progenitors of third-party international law."[8]

How long would it be before the rest of the discipline came to worry about proliferating rights and multiplying tribunals, before the field metabolized the "less is more" of the

8. Franck, *International Law: Through National or International Courts?*, *supra* note 1, at 139.

FIGURE 8: UNITED STATESEAN PRODUCTION AFTER 1945



WTO or the soft law standards and disaggregated voices of international environmental advocacy? These would be the enthusiastic discoveries of my own generation in the 1990s.

Tom's battles are the good fights of American liberalism and cosmopolitanism—often waged against the U.S. foreign policy establishment. In the Johnson administration: Tom fights against military intervention, against an expanding doctrine of self-defense and superpower regional interventions. In the Nixon administration: Tom denounces excessive se-

crecy in foreign affairs, lauds the resignation of officials who find the government's path morally unsupportable. During the Reagan years: Tom defends the United Nations and the World Court, advocates congressional empowerment in foreign-policy making.

Looking back, I am struck more by his ear for intellectual trends. His appetite for new interdisciplinary fashions is legendary. In the 1950s, Tom is busy with sociology, empirical opinion polling, functionalism. In the 1960s, it's psychology, political science, and game theory modeling. In the 1970s, Tom turns to language, to *Word Politics*,[9] to study of the profession. The 1980s find Tom in philosophy, ethics, jurisprudence. In the 1990s, Tom turns to intellectual history—and religion.

Let me take the story one decade at a time.

1950s: CONSTITUTIONAL LAW AND THE AFRICAN MARGINS

Tom spends most of the decade in school. He comes to international law by way of Africa, and the racial politics of decolonization. His handle is constitutional law—the use of constitution drafting and redrafting as a tool to manage political and social revolution. His work is rooted in his experiences as a legal advisor in Zanzibar and elsewhere, and his study of the constitutional possibilities for Rhodesia. These were not at all the preoccupations of the international law field in 1955.

Rather, the international law profession in the 1950s was preoccupied with the problems of ideology and totalitarianism, with the possibility of a law between contesting ideological blocs. The field was increasingly split—between those reviving the prewar positivist and formal mainstream and those breaking sharply with it in New Haven. It was a period of intense anxiety about the plausibility and relevance of international law. The expanding global market captured attention. The United Nations seemed stuck. The new field was international business transactions: Compare Milton Katz and Kingman Brewster with Manley Hudson and Louis Sohn, or Leo Gross and Myres McDougal.

This part of the story—the dapper Canadian internationalist at the Harvard Law School of 1953–59—needs an expla-

9. *See* THOMAS M. FRANCK & EDWARD WEISBAND, WORD POLITICS: VERBAL STRATEGY AMONG THE SUPERPOWERS (1971).

nation. He studied with Sohn—"Uncle Louis" as he taught me to call him. Manley Hudson remained active. But this was the Harvard Law School of Hart and Sacks, an academic world preoccupied with the market machinery of private law, the greatest minds immersed in the delicate nuances of federal court jurisdiction. *Brown v. Board of Education*[10] caused a ripple—as often as not of reaction. Public law, public interest law, constitutional law—all lay more than a decade in the future. International "legal studies" may have been in vogue, but not international law per se. International Business Transactions, transnational law, foreign law—anything but World Peace Through World Law.

And Tom headed off to Africa to write about constitutional law. Much of the generation that would soon capture the field was elsewhere in the fifties. Some, like Abe Chayes, were in constitutional law—far more concerned about the relative powers of Congress and the President than of the United States and the United Nations. Abe used to tell a marvelous story about being forced to admit at his confirmation hearings as legal advisor that he did not know how many judges sat on the World Court, nor how they were selected. The discipline's attention was simply elsewhere. For Tom, it was focused on the constitutional arrangements of the new African states. And he traveled about, met everyone, interviewed, surveyed. Tom's first major work was a study of political opinion and legal structure in Rhodesia, published as *Race and Nationalism*.[11]

Each of the themes with which his generation would soon retake the discipline of international law is here. First, a particular style of realism; in this book, realism about state building, about the constitutional dilemmas, the sociopolitical-economic-psychological realities, on the ground. This is not the decolonization of seats in the United Nations, but the messy business of building a nation, a political class, an economic potential. The legal job, Tom says, is "not a simple thing [—] for evolution to stay one step ahead of revolutions; yet that is

10. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

11. THOMAS M. FRANCK, RACE AND NATIONALISM: THE STRUGGLE FOR POWER IN RHODESIA-NYASALAND (1960) [hereinafter FRANCK, RACE AND NATIONALISM: THE STRUGGLE FOR POWER IN RHODESIA-NYASALAND].

exactly what African and Asian politicians and lawyers are going to try to do in the next few decades."[12]

For Tom, lawyers lived in the political world, pushing to stay *ahead* of revolution, to ride the wild horse. *The lawyer/statesman as heroic figure*—a figure to be embodied for much of Tom's age cohort by Dag Hammarskjöld.

For these intellectuals, riding wild horses required antiformalism about legal categories.

To Tom, sovereignty was not an on-off affair, still less a switch to be turned by recognition or declaration. Decolonization was a gradual thing, a slow disconnection from London or Paris in stages, marked and managed by constitutions and treaties. Tom's methods find echo thirty-five years later in Jose Alvarez's reminder that judicial review of the Security Council by the International Court of Justice is also not a matter of on or off, but rather a matter of degree, marked in tiny legal steps, measured in political effects, and priced in the currency of institutional legitimacy.[13]

And the effort requires political engagement. The constitutional work Tom describes is not the technical substitution of a sanitized international problem solving for the mess of local politics—of the sort the field would celebrate in the 1990s. Rather, the opposite—an engagement with the local political forces, sure in the conviction that one should *care who won.*

Tom went to Africa—the international observer, the citizen of the world—with a *stake* in the outcome, in Rhodesia, and throughout the continent. He writes for his allies—and expresses vivid hope that his adversaries will be proven wrong. Tom's politics are passionate and liberal—anti-Marxist, antinationalist, democratic, individualist. "To the rest of the world, . . . [Rhodesian constitutional reform] represents a chance, perhaps a last chance, to prove that blacks and whites, elite and proletariat, the West and Afro-Asia, can work together to

12. Thomas M. Franck, *Some Legal Problems of Becoming a New Nation*, 4 COLUM. J. TRANSNAT'L L. 13, 14 (1965).

13. *See* Jose E. Alvarez, *Judging the Security Council*, 90 AM. J. INT'L L. 1 (1996).

their mutual benefit within a free, democratic and, essentially, capitalist frame of reference."[14]

There is something extreme in Tom's realism. *Race and Nationalism* castigates Tom's liberal allies for missing the appeal of black nationalists and Marxists—he roots their success in a terrible history of white prejudice and governmental shortsightedness. People of good will, humanitarians, liberals, must *wake up and smell the coffee.* About the World Court. About soft law. About great power politics. I'll never forget Tom taking the floor here at NYU among dozens of international lawyers debating fine points of the law of genocide to declare, "Do you want to know what the international law of genocide is? Genocide is illegal if there is a CNN camera within a quarter mile—it's as simple as that."

And yet—or precisely thereby—Tom imagines himself as a *judge.* His realism is tempered by a judicial temperament. Or his judicial temperament is the committed realpolitik of Hammarskjöld. For the Manhattan School in 1960, "judging" was not something only judges did—it was the highest form of legal engagement, an aspirational perspective for all who would govern. Tom conceives his intervention in Rhodesia in judicial terms:

> Such an important arena cannot be entered by a researcher with the hope of remaining totally detached. . . . The essence of judicial inquiry is a certain remoteness between the parties and the evaluator. Europeans and Africans who have lived a lifetime in the Federation, are of course, the best advocates, but they are not necessarily the best judges in their own cause.[15]

It is in this period that Tom first promotes judges—national judges, international judges, whatever judges are available—as central players in the development of international law. And also that he imagines himself, imagines the international community, as he would imagine the United Nations: in judicial terms. In 1960, he also promotes a strong judicial role in foreign affairs. Discussing the deference courts should

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14. FRANCK, RACE AND NATIONALISM: THE STRUGGLE FOR POWER IN RHODESIA-NYASALAND, *supra* note 11, at 6.

15. *Id.*

give the executive in articulations of international law, Tom writes:

> [I]t is right that the legal notions of the political branches . . . should be respected by the courts. . . . [But] it is for the courts to decide whether or not to accept "suggestions," [from the executive] and to determine what effect to give . . . [them]. The courts should accede . . . only where a sufficient reason—the safeguarding of the national interest by preservation of the United States' posture in international law—has been convincingly shown.[16]

It would be thirty-five years before Harold Koh would find inspiration in the legal process materials of the 1950s for international legislation by transnational public interest litigation. But when Harold talks about courts, he means courts. And he imagines himself as an advocate.

In his first writing on foreign relations law, Tom calls the method he proposes for judicial work along the boundary between judiciary and executive "a pragmatic technique."[17] A *technique.* Functional, goal oriented, in a toolbox for social engineers. Courts should, he said, rely on "strands of law and policy which emanate from the lego-political fabric of America's relations with foreign states."[18] These combinations—*legal-political, law and policy*—become staples of the Manhattan School. But it will be years before they will again be embraced so forthrightly. Until the end of the Cold War, the Manhattan School's leading treatise—*International Law: Cases and Materials* by Henkin, Pugh, Schachter, and Smit—began with a fervent theoretical defense of international law *as law.*[19] A different kind of law, made differently, enforced differently, but law. And then, in the first edition after 1989, released from the need to defend their project against the left, they revise the first chapter and announce, page one, para-

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16. Franck, *The Courts, the State Department and National Policy: A Criterion for Judicial Abdication, supra* note 2, at 1123.

17. *Id.* at 1104.

18. *Id.* at 1102.

19. *See* LOUIS HENKIN ET AL., *Introduction to* INTERNATIONAL LAW: CASES AND MATERIALS, *at* vii-viii (2d ed. 1980).

graph one: "*First, law is politics* . . . ."[20] But Tom had been there years before.

The combination—realism about power and antiformalism about law—was to be linked to rule fidelity. It is an unstable mix that must be managed—pragmatically, wisely, shrewdly—by judges, or those with a judicial perspective, in the name of a liberal political vision. Realism about social conditions and antiformalism about legal categories each distinguished the Manhattan School from the prewar American international lawyer and his immediate postwar successors. A judicial temperament, rules as tools of social engineering, and a cosmopolitan point of view also began a softer differentiation from colleagues at Yale. This is the intellectual synthesis that would define international law in the United States for more than twenty years—and Tom had elaborated all of its major elements before he turned twenty-six.

1960s: The Emergence (and Triumph) of the Manhattan School

Kennedy is in the White House, Hammarskjöld is in the United Nations, and Tom is here, at NYU—with Columbia, the new center of the international legal world. There were endless panel discussions—here at NYU, at Columbia, at the New York Bar Association, at the United Nations—Franck, Schachter, Henkin, Friedmann, and many others—it must have been an absolutely thrilling moment. A generation comes into its own—the Manhattan School recognizes itself, affiliates, differentiates, consolidates its commitments, rehearses its aversions. They make out the case for rules, for realism, and for the viewpoint of a global cosmopolitan class of pragmatic judges and administrative statesmen who will act for—and as—the international community.

Here is Tom in 1965 on the "international community": "Insofar as *fact* has any wider meaning than God, the unmoved mover, the international community is surely fact, for like a person, a house, a tree, it has a fixed dimension and a mechanism (however underdeveloped) by which it gives evidence of its being."[21]

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20. Louis Henkin et al., International Law: Cases and Materials 1 (3d ed. 1993) (emphasis added).

21. Franck, *Friedmann Book Review*, *supra* note 6, at 400.

Theirs was a moral crusade—fighting faith. Tom affiliates with friends—and writes hard against positions with which he disagrees. There is a rearguard action against the "positivists" of the past. And battle against the "realists" of political science—and Yale—who take things too far, too simply.

I was particularly struck by Tom's 1965—wildly favorable—review of Wolfgang Friedmann's classic *Changing Structure of International Law*.[22] Tom opens with a lengthy, impassioned quote from the book and then asserts, "If the democratic, humanistic thrust of this passage fails to arouse your interest and concern, then this book is not for your shelf."[23] He goes on:

> For you, perhaps, instead, one of the positivistic, neorealist works with titles like "Law and Power," or "International Law in the Age of Overkill," which proceeds from the assumptions that: (1) there is no international law, and (2) there is no better use for international law than to score points against unfriendly governments, and (3) since other governments make use of international law in this knavish way, we had better strengthen our international legal studies.[24]

In the 1960s, it was possible to confuse members of the Manhattan School with their colleagues at Yale. Both embraced policy and the vocabularies of politic realism and ethical liberalism. The difference was one of nuance—the New Yorkers more confident in rules and institutions, in constitutionalism. And the difference was one of politics—the New Yorkers less willing to equate American power with the power of American liberalism.

Here is Tom in 1970 reviewing Falk and Black's *The Future of the International Legal Order*: "This is a book about international law, primarily by political scientists. Yet it has almost no law and virtually no politics in it. It is also a book about the

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22. WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW (1964).

23. Franck, *Friedmann Book Review*, *supra* note 6, at 399.

24. *Id.*

future of the international legal order, yet it says very little about the future."[25]

Tom finds Julius Stone's contribution altogether de trop—"*plus à droit que le droit*, so to speak, in his strict-constructionist, none-of-this-romantic-nonsense approach."[26] But the political scientists also lack both law—"there is an almost complete blackout of anything as mean as legal cases"[27]—and a reformer's instinct—there is altogether too much description, not enough prediction.[28] One hears Tom's winking approval of his colleagues in the law professoriat, who, "[i]nstead of trying to isolate and measure dependent and independent variables, . . . persist in barging ahead, creating and advocating schemes for substantive or procedural reform, guided by little more than their own subjective, 'instinctual' perceptions of the relevant phenomena."[29]

Reviewing Falk and Black's *Future of the International Legal Order*, Tom approves only two articles in the collection as likely to "please international legal practitioners and *those interested in engineering change rather than in the science of observing consistency*":[30] one by "those inveterately functional scholars: McDougal, Lasswell, and Reisman,"[31] the other by Falk—who, Tom concludes, agrees that "the problem of the future consists in defining one's priorities and making the necessary commitments."[32]

The Manhattan School of the 1960s stressed economic affairs, but not the world of international business transactions—rather, the economic affairs of the less developed. In 1965, Tom wrote, "The Hugo Grofries of the second half of the twentieth century may well be Raul Prebisch, and the suc-

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25. Thomas M. Franck, Book Review, 3 N.Y.U. J. INT'L L. & POL. 193, 193 (1970) (reviewing 1 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER: TRENDS AND PATTERNS (Richard A. Falk & Cyril E. Black eds., 1969)).

26. *Id.*

27. *Id.*

28. *See id.*

29. *Id.* at 194.

30. *Id.* (emphasis added).

31. *Id.*

32. *Id.* (quoting Richard A. Falk, *The Interplay of Westphalia and Charter Conceptions of International Legal Order*, *in* 1 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER: TRENDS AND PATTERNS, *supra* note 25, at 32, 37 (quoting with approval Daniel Bell, *The Year 2000—The Trajectory of an Idea*, DAEDALUS 639, 646 (Summer 1967))).

cessor to 'The Law of War and Peace' may well be entitled 'The Institutions of Trade and Development.' At least, for the sake of succeeding generations, one hopes so . . . ."[33]

The economic law he imagines is precisely that of Prebisch—development oriented, welfare-state based, a global regime of democratic socialism. I think no one appears more often, or more authoritatively, in Tom's writings from the 1960s than Gunnar Myrdal. In this, Tom, alongside Wolfgang Friedmann, is just ahead of the curve—these themes would frame the New International Economic Order debates of the 1970s.

Sometimes, to be sure, he beat the curve by just a hairsbreadth. His 1972 speech about law and development, applauding U.S. AID for harnessing lawyers as social engineers to social and economic change in the Third World, appeared only moments before the funding—and the field—dried up for more than twenty years.[34] And yet the law and development crowd today—chastened post-Stiglitzian social engineers—could still profit from Tom's 1971 insistence that lawyers in the development process be understood as people with politics, stakes—people making choices, rather than people simply introducing formal and neutral "rules of law."

In the 1960s, Tom wrote about international institutions in the same *constitutional* terms he had used in writing about African public law. Twenty-five years later, John Jackson would use the word "constitution" to describe the GATT—but he would have something altogether else in mind. In 1963, one could imagine an international constitutional arrangement of political power, structured by law. Not a sophisticated legal regime, sneaking up on sovereignty. Not world federalism, or World Peace Through World Law. But also not the technical constitutionalism, the expert world, of the WTO appellate body.

Rather, a global political order—a wild horse indeed—structured by law, ridden by statesmen who could see, as Tom saw, beyond the clamor of parochial interest. In 1962, Tom dissects—and applauds—the U.N. operation in Congo. Working with local political conditions and legal realities, the

33. Franck, *Friedmann Book Review*, *supra* note 6, at 401.

34. *See* Thomas M. Franck, *The New Development: Can American Law and Legal Institutions Help Developing Countries?*, 1972 WIS. L. REV. 767.

United Nations had altered the constitution, creating precedent for a "notable, but sensible and historically consistent diminution of the meaning of 'domestic jurisdiction' as used in article 2(7) of the Charter."[35] It is painful to read the disillusionment in Oscar Schachter's bitter requiem for Hammarskjöld just a year later.[36] This was to have been their brave new world.

Theirs was to be a constitutionalism of spirit, not of rule. The triumph of a sensibility. There were classic constitutional dilemmas—how might unequal states be engaged and the principle of equality upheld? The answer was neither a rule nor deference to the will of great power—still less capitulation to a superpower intending to act alone: less coalition of the willing than sensibility of the committed.

To take but one example, Tom was committed to equality—of states, of persons. Sovereignty expressed equality. But he was not a formalist about it. General Assembly voting could be recalibrated by population for a more democratic constitutionalism. The point was a moral, political, and economic one. He denounces efforts to deny small states their recently won voices simply to strengthen the leadership of the West:

> We have learned from our own experience that legal equality is the essential prerequisite to equal development. . . . As with the underprivileged minorities of the United States, so with the underprivileged nations of the world. The demand that underprivileged persons or nations bootstrap themselves socially and economically before receiving the *imprimatur* of full rights, that they first learn to drink tea with the accepted curl of the fingers, or that they practice "civilized" standards of conduct towards foreigners and their investments, is, consciously or otherwise, a way of withholding indefinitely both equal rights *and* equal development.[37]

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35. Thomas M. Franck, *United Nations Law in Africa: The Congo Operation as a Case Study*, 27 LAW & CONTEMP. PROBS. 632, 647 (1962).

36. Oscar Schachter, *Dag Hammarskjold and the Relation of Law to Politics*, 56 AM. J. INT'L L. 1 (1962).

37. Thomas M. Franck, *Equality and Inequality of States in the United Nations*, *in* EQUALITY (NOMOS IX) 306, 309 (J. Roland Pennock & John W. Chapman eds., 1967) (Yearbook of the American Soc'y for Political and Legal Philosophy).

In this spirit, the problem can be managed, pragmatically, forward toward equality. In the meantime, the powerful can be accommodated:

> This does not mean that we should cease experimenting with functional inroads into this doctrine [of sovereign equality]. We know, for example, that in practice power is a many-faceted thing. . . . This influence [of the powerful] makes itself felt in votes on resolutions, but even more so in the implementation or non-implementation of these resolutions.[38]

Finally, in the sixties, Tom began his preoccupation with the individual—the psyche, the biases of the people who run international legal machinery. The biases of judges. The influences on statesmen. The independence of civil servants. Tom develops these themes in the vocabulary of the time—a meditation on the psychology of decision making and its perception. This is the sixties of "work on the self," encounter groups, and the popularization of psychology.[39]

Tom worries about his lawyer/statesman: how to nurture the right combination of rule following, impartiality, commitment? How to encourage right spirit? Neutrality is impossible. "Today it is common knowledge that a part of what is thrown onto the scales of justice in the third-party decision-making process is neither law nor fact, but the subjective, sometimes unconscious, socially conditioned attitudes of the decision-maker."[40]

The problem is to develop the right sensibility. Tom toys with different constitutional solutions: the international community as a world of its own, inspiring its own loyalty, disqualification of those who are not impartial, insulation of the civil service by rules, explicit training in the work of "balancing." All of these, important starts, come up short. We must rely on the open society. International statecraft is third-party mediation—judging. Effectiveness depends upon perception—one must be perceived to mediate from an impartial distance, be seen to operate in the spirit of the whole. Transparency will

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38. *Id.* at 310-11.

39. Thomas M. Franck, *Some Psychological Factors in International Third-Party Decision-Making*, 19 STAN. L. REV. 1217, 1217-18 (1967).

40. *Id.* at 1247.

align the interests of internationalists who wish to be effective with the virtues of impartiality.

It was a good idea—but it was too late for that. As the sixties close, the bloom is off the rose. 1968. Vietnam. Nixon. The liberal statesmen had not been virtuous. The virtuous liberals had not been statesmen. Legal doctrine had been misused—grievously misused. Stretched, dog-eared, fig-leafed over the dirtiest business. And first by the government of the Great Society.

1970s: RETRENCHMENT, RAGE, AND THE TURN TO AMERICAN PUBLIC LAW

Disappointment. Introspection. After 1970, Tom never wrote again with the same constitutional confidence. He was too angry. At the Soviet Union, for Prague. At the United States, for the Dominican Republic, for Vietnam. In these years, we learned that the personal is political. That institutions could no longer be trusted. Transparency had failed. Tom assails the growing secrecy in which foreign affairs are conducted: "Such a development might well set the stage for further Vietnam-type disasters of arrogance: something the United States and, indeed, the Western Alliance could scarcely survive."[41]

These were the years of *Who Killed Article 2(4)?*[42] And of a panel, organized by Tom, at the American Society of International Law to discuss *International Law Teaching: Can the Profession Tell It Like It Is?*[43] The result was a fascinating exchange among professional intellectuals intensely ambivalent about whether "how it is" makes their field more relevant than ever, or hardly relevant at all.[44]

And, of course, these were the years of *Resignation in Protest: Political and Ethical Choices Between Loyalty to Team and Loy-*

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41. Thomas M. Franck & Edward Weisband, *Dissemblement, Secrecy, and Executive Privilege in the Foreign Relations of Three Democracies: A Comparative Analysis*, *in* SECRECY AND FOREIGN POLICY 399, 441 (Thomas M. Franck & Edward Weisband eds., 1974).

42. Thomas M. Franck, *Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809 (1970).

43. *International Law Teaching: Can the Profession Tell It Like It Is?*, 66 AM. SOC'Y INT'L L. PROC. 129, 130 (1972).

44. *See id.*

alty to Conscience in American Public Life.[45] The Manhattan School's heroic figure was shifting—less the lawyer/statesman than the last moral man. Ethics was moving center stage, and the Manhattan School turned increasingly to the academy, to education, to custodianship of the profession.

Tom turned also to American public life—to American public law, to the foreign relations law of the United States. He writes voluminously about the roles of judges, Congress, the President—could the international constitution be established here at home? At the same time, he immerses himself in the realpolitik of superpower strategy, seeking to end-run the realists, out-Schelling Schelling. Could the efficacy of his international constitution be scientifically demonstrated?

Word Politics: Verbal Strategy Among the Superpowers looks hard at the effects of legal language.[46] But it is also, more so, a blistering retrospective on the foreign policy of the Johnson administration. Tom's own days of rage: "By failing to listen to themselves as if they were the enemy speaking, American policy makers had made it easy and cheap for Russia to reassert the darkest side of its nature. This cannot but be counted a failure of U.S. strategic planning."[47]

The constitutional terrain was shifting. The world's constitutional framework had been altered, and not by well-intentioned cosmopolitans or heroic U.N. statecraft. *Who Killed Article 2(4)?* chronicles the impact of realpolitik. Small-scale warfare, Security Council gridlock, growing nuclear threats, the regionalism of superpower prerogatives, had all rendered the Charter rules unrecognizable: "The United Nations Charter today bears little more resemblance to the modern world than does a Magellan map."[48]

Tom responds with an impassioned defense of rules, precedents, claims. By 1975, we have less realism about rules than rules for realism. Words matter—as inchoate acts of lawmaking, as unmeant promises, they reorient expectations: our own, our adversaries'. They mark out the boundaries of be-

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45. EDWARD WEISBAND & THOMAS M. FRANCK, RESIGNATION IN PROTEST: POLITICAL AND ETHICAL CHOICES BETWEEN LOYALTY TO TEAM AND LOYALTY TO CONSCIENCE IN AMERICAN PUBLIC LIFE (1975).

46. *See* FRANCK & WEISBAND, *supra* note 9.

47. *Id.* at vii.

48. Franck, *Friedmann Book Review*, *supra* note 6, at 810.

havior that is easy and that will incur costs, social costs, reputational costs—and they can also make it more difficult for us to exact costs when we wish. This was the time of unilateral declarations, of reliance come to international law, of the gentleman's agreement. Tom and his colleague Edward Weisband turn these soft law ideas on their head: You could stumble into them—say something, have others take you seriously, and find yourself standing by while tanks rumbled through Prague.

This is not the law of coexistence, of sovereignty, of formal rules formally applied. But nor is it the exuberant law of cooperation, social engineering for all mankind. By the late 1970s, the avant-gardist found himself lecturing Congress and the Executive on *pacta sunt servanda.* Yes, Virginia, you should do what you have promised. And in the late seventies, we have: *Treaties and Executive Agreements,*[49] *A Consulting Role Could End Senate's Editing of Treaties,*[50] *Minimum Standards of Public Policy and Order Applicable to Collective International Commodity Agreements,*[51] and *A Taste for Tampering with Treaties.*[52]

But even this was not to be. The Law of the Sea Treaty would remain unratified after years of arduous negotiation. The 1970s were a difficult time for the Manhattan School. Estranged from the foreign policy of the liberal democracies, their constituency among the intelligentsia in the new states eroded, they turned inward, to education, to the profession, to the American Society. And they turned from politics to ethics. In 1978, Tom publishes *Congress and the Concept of Ethical Autonomy.*[53] Where statesmen had seemed so promising, the bloom rises now on citizens. Tom embraces the trend in 1979 with

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49. *Treaties and Executive Agreements,* 71 AM. SOC'Y INT'L L. PROC. 253 (1977) (remarks of Thomas M. Franck).

50. Thomas M. Franck, *Consulting Role Could End Senate's Editing of Treaties,* L.A. TIMES, Oct. 29, 1979, pt. II, at 7.

51. Thomas M. Franck, *Minimum Standards of Public Policy and Order Applicable to Collective International Commodity Agreements,* 160 RECUEIL DES COURS 395 (1979).

52. Thomas M. Franck, *A Taste for Tampering with Treaties,* BALT. SUN, Oct. 25, 1979, at A21.

53. Thomas M. Franck & Edward Weisband, *Congress and the Concept of Ethical Autonomy, in* PRIVATE AND PUBLIC ETHICS: TENSIONS BETWEEN CONSCIENCE AND INSTITUTIONAL RESPONSIBILITY (Donald G. Jones ed., 1978).

Writing an Anti-Boycott Law: A Study in New Modes of Interest-Group Participation.[54]

From liberal vanguard to universal justice. From peace and security to human rights. The 1970s might be summarized as one long retrenchment to rule.

1980s: PLAYING HARDBALL—CHANGING THE GAME

In 1980, Carter is gone, Reagan and Thatcher are in power. Tom publishes *An International Law Agenda for the Eighties*: "An international law agenda for the eighties should include seven major items: Palestine, South Africa, the new international economic order; arms control; human rights; disaster prevention and relief; and revamping the multilateral lawmaking and problem solving machinery."[55] A bold agenda, but *whose*? Tom speaks of "the international lawyer" offering solutions to Arab and Israeli, devising a "global income tax," controlling arms shipments to the Third World.[56] And yet, he acknowledges that "[t]here has been virtually no progress in conventional arms control for the last twenty years."[57] An agenda for Congress? For the President? For the Secretary-General? For the individual international lawyer? I am reminded of Roger Fisher's persistent personal efforts through the seventies and eighties to bring Arab and Israeli, South African blacks and whites, to a common table.

The days of international legal engineering were simply over. Tom would spend much of the 1980s fighting for the survival and relevance of institutions that had once seemed capable of taking on such an agenda. But he defends them in far more modest terms: as inevitable terrains for the defense of American interests—and American engagement with the world. The agenda has shifted from global constitutionalism, through American public law, to American foreign policy.

In *Nation Against Nation: What Happened to the U.N. Dream and What the U.S. Can Do About It*, Tom articulates a new voice

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54. Thomas M. Franck & Christopher H. Johnson, *Writing an Anti-Boycott Law: A Study in New Modes of Interest-Group Participation*, 12 N.Y.U. J. INT'L L. & POL. 1 (1979).

55. Thomas M. Franck, *An International Law Agenda for the Eighties*, 17 WILLAMETTE L. REV. 33, 33 (1980).

56. *Id.* at 34-35.

57. *Id.* at 35-36.

for American foreign policy liberals. Tough. Hard. Strategic. "The UN is a combat zone, as well as a talking shop."[58]

When the liberals retook the oval office, this would be their voice. American interests, humanitarian objectives. The margin of maneuver is small, the gains to be had tiny—but significant. "[I]f the UN did not already exist, we would not now feel impelled to invent it. But since it does exist, and for as long as we choose to belong, it is better . . . to throw a few well-placed punches than to just lick our wounds."[59]

Tom mentions Eleanor Roosevelt twice in that paragraph—and yet, how far from the vision that had first made her the heroine of the Manhattan School. The ICJ was also under attack—and again, Tom's defense, worked out in *Judging the World Court*,[60] was all about "playing hardball."[61] *Nation Against Nation* concludes less with a bang than:

> The U.N. system, except in the most marginal ways, is not about to be reformed, nor is it in the U.S. interest that it should be. It is what it is; the realistic choice presented to the U.S. is either to understand it and operate as effectively as possible within it, or to get out: in part, or altogether. For the present, the U.S. national interest is better served by a muscular strategy of staying in.[62]

The United Nations had been "oversold."[63] The United States—and everyone else—had "cheated on the rules": "Of course we are neither the only, nor the worst, cheater. Cheat-

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58. THOMAS M. FRANCK, NATION AGAINST NATION: WHAT HAPPENED TO THE U.N. DREAM AND WHAT THE U.S. CAN DO ABOUT IT 248 (1985) [hereinafter FRANCK, NATION AGAINST NATION: WHAT HAPPENED TO THE U.N. DREAM AND WHAT THE U.S. CAN DO ABOUT IT].

59. *Id.* at 247.

60. *See* THOMAS M. FRANCK, JUDGING THE WORLD COURT 63-76 (1986).

61. FRANCK, NATION AGAINST NATION: WHAT HAPPENED TO THE U.N. DREAM AND WHAT THE U.S. CAN DO ABOUT IT, *supra* note 58, at 246.

62. *Id.* at 272.

63. Thomas M. Franck, *Great Expectations: An Exploration of the Exaggerated Hopes Aroused by the U.S. Campaign for Ratification of the U.N. Charter*, *in* CONTEMPORARY ISSUES IN INTERNATIONAL LAW: ESSAYS IN HONOR OF LOUIS B. SOHN 291, 292-96 (T. Buergenthal ed., 1984).

ing has become quite respectable nowadays. As many as can, do. We are not the only ones to be disillusioned."[64]

Disillusioned. Ten years after the rage of *Word Politics*,[65] Tom's vantage point is ever less the cosmopolitan judge of *Race and Nationalism*,[66] and ever more the hard edge of enlightened—and lonely—American liberalism. Americans should get over the idea that the United Nations should treat like cases alike. That idea is an American one—and it is not, Tom says, widely shared: "There is no commitment to 'equal protection' in the UN order of things. At best, fairness is one of many considerations in a government's decision to vote for or against a resolution."[67]

Fairness—in another ten years time it would be a hope—here it was the default, all one could redeem. What of the judiciary, the regime of the spirit?

> And there is no judiciary to override the political organs of the United Nations . . . . It is the U.S. system, uniquely, that nourishes the unorthodox expectation that the UN political bodies, like the U.S. Government, should act ethically in accordance with philosophically determined principles of fairness and reciprocity. . . . [The nature of the UN] troubles Americans, for good reasons that are indigenous to their politico-legal culture, but that are not widely shared. . . . [The UN] is not the "conscience" of the world, as they were once wont to think, but a highly politicized conference of states. The realistic analogy is not a court, with its majestic concern for principle, but a bazaar, with its emphasis on price and trade.[68]

What had happened? Tom the American, Vancouver Yankee at the East Side bazaar? The confident cosmopolitan, setting an agenda for the world community, coming to each local dilemma precisely with the demeanor of the *judge*, had

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64. Thomas M. Franck, *U.S. Foreign Policy and the U.N.*, 14 DENV. J. INT'L L. & POL'Y 159, 167 (1986) (Tenth Annual Myres S. McDougal Distinguished Lecture, presented at the University of Denver College of Law in May 1985).

65. FRANCK & WEISBAND, *supra* note 9.

66. FRANCK, RACE AND NATIONALISM: THE STRUGGLE FOR POWER IN RHODESIA-NYASALAND, *supra* note 11.

67. Thomas M. Franck, *Of Gnats and Camels: Is There a Double Standard at the United Nations?*, 78 AM. J. INT'L L. 811, 833 (1984).

68. *Id.*

withered. There was realism, and there was rule. And nothing in between. No wise statecraft. No heroic figures. We had hoped for rule. But they were ruthless.

Meanwhile, in the field of international law, sprouts had begun to grow that would become a new consensus, a renewed liberal vision in the field—after the Cold War ended, and the Democrats came back to power. Let me mention three—for each of which Tom developed a voice.

First, the civil society of nongovernmental organizations and advocates. Already in 1979, Tom wrote about "new modes of interest-group participation" in foreign-policy making.[69] They were transforming congress and executive into lobbyists after the 1977 enactment of the "anti-boycott" legislation aimed at the Arab League's efforts to boycott "the products of Jewish industry in Palestine."[70] Tom concludes: "It should be added that the generally constructive role played by the countervailing lobbies in this case encourages the hope that lobbying, and congressional sensitivity to interest groups, will augment, rather than distort, the process by which the national interest is pursued through the conduct of foreign relations."[71]

Three years later, he extended this "lobbying" vision to international lawmaking, analyzing the effort to boycott those investing in South Africa.[72] The judge, the statesman, the United Nations administrator, all were out. The citizen advocate was in.

Second: a new disciplinary voice of synthetic reconceptualization. In 1987, Tom wrote a review essay for the *American Journal* on the state of international law scholarship. He called it *The Case of the Vanishing Treatises.*[73] The occasion, however, was the surprising appearance of a treatise—by Oscar

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69. Franck & Johnson, *supra* note 54, at 1.

70. *Id.* at 2 (quoting Arab League Council, Resolution No. 16, Dec. 16, 1946).

71. *Id.* at 30.

72. *See* Thomas M. Franck et al., *An Investment Boycott by the Developing Countries Against South Africa: A Rationale and Preliminary Assessment of Feasibility*, 4 HUM. RTS. Q. 309 (1982).

73. Thomas M. Franck, *The Case of the Vanishing Treatises*, 81 AM. J. INT'L L. 763 (1987) [hereinafter Franck, *The Case of the Vanishing Treatises*].

Schachter: *International Law in Theory and Practice*, his General Course at The Hague from 1982.[74]

As Tom saw it, the fragmenting methodologies of American legal scholarship had somehow missed international law. Nihilism had always already been there—deconstruction hardly seemed necessary. Again, Abe Chayes comes to mind, bursting into my office to declaim "why would you want to deconstruct international law, we've hardly got it constructed yet." Tom describes the waves of scholarship that had passed the field since the Manhattan School first came to power in 1960:

> [T]he determinative role in the making of law of the fact variable, then the central role of the judges' temperament, next the overriding importance of sound social or economic analysis in shaping law, and, finally, the centrality (or impossibility) of the linguistic and literary dimension of law. In quick succession, law has become everything and nothing.[75]

And yet, Schachter had written a treatise. It seems surprising—and Tom finds it "less surprisingly" very good indeed.[76] Here, in a desert of disregard, comes a full-fledged treatise. The secret is Schachter's magisterial style—the power of his voice, his ability to weave together the stray threads of experience, judgment, norm, power:

> The strength of the well-crafted treatise is its ability to modulate and incorporate contradictions, not only between seemingly irreconcilable normative imperatives of the legal system being described, but also between various cognitive approaches to law itself.[77]

I want that quote on my wall—for only here in the story had I managed to beat Tom to the punch. A few months before, I had published these lines about international law:

> Once these social difficulties have been transformed into rhetorical alternatives, alternatives which invoke social choices in only the most hyperbolic fashion,

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74. Oscar Schachter, *International Law in Theory and Practice: General Course in Public International Law*, 178 RECUEIL DES COURS 11 (1985).

75. Franck, *The Case of the Vanishing Treatises*, *supra* note 73, at 765.

76. *Id.* at 766.

77. *Id.* at 767.

> the field of rhetorical maneuver, for all its structure and repetition, seems able to extend itself virtually to infinity. To a certain extent this results from what seems to be the fluidity and logical indeterminacy of the rhetorical frameworks characteristic of each discourse. To a certain extent it results from the numerous ways a set of accommodative balances and temperings of one rhetoric by another can produce a feeling of closure and determinacy. . . . And I suppose it is also a matter of accident and luck. But the interminability of international law seems the subtle secret of its success.[78]

In Schachter's experienced hand, this vice became virtue. Schachter had written twenty years earlier of the antinomies of international law, the need to embrace them, work with them.[79] Doing so was to be the work of heroic lawyers and statesmen. That work would now fall to the scholar. Within five years, almost every leading member of the Manhattan School would publish a synthetic work, a theory of international law. Tom would do so as well—more than once.

The nineties would be the decade of the treatise. And the international legal scholarship of the 1990s—treatises included—would be written in a vocabulary that would have seemed altogether strange in 1960. The heroic political engagements were gone. These works would be written as personal testaments for the long *durée*—in the key, increasingly, of ethics. The rise of ethics marks the third transformation wrought during the Reagan years. Here, perhaps for the first time, Tom is behind the pack.

In 1982, he joins a volume on *Ethics, Economics, and the Law* as a skeptic.[80] His essay appears alongside one by his colleague David Richards. Also in the volume are Brian Barry, George Fletcher, Alan Gewirth, Frank Michelman, Harold Demsetz, David Lyons, Kent Greenawalt—as well as Richard

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78. DAVID KENNEDY, INTERNATIONAL LEGAL STRUCTURES 294 (1987).

79. *See* Schachter, *supra* note 36, at 3-5, 7-8.

80. Thomas M. Franck, *Political Functionalism and Philosophical Imperatives in the Fight for a New Economic Order*, *in* ETHICS, ECONOMICS, AND THE LAW (NOMOS XXIV) 268 (J. Roland Pennock & John W. Chapman eds., 1982) (Yearbook of the American Soc'y for Political and Legal Philosophy).

Epstein and Jules Coleman.[81] "My agnosticism," he writes, "seems to be rather widely shared, which would seem to diminish the utility of dressing a political preference as a moral imperative in the first place."[82]

Tom wants to "begin in the same place as [the moralist] and arrive approximately at the same place."[83] "I believe," he asserts, that "a politics of expediency and self-interest—much maligned of late—can get me there."[84] He works the analysis and gets to global redistribution from Locke, rather than Kant. But along the way, he rides hard on the idea of "fairness"—as a shared postulate, a quality of self-interest, a political strategy, ultimately, as "enlightened self-interest" that forms, Tom says, "the American ethic."[85] What had been default description became an ethical aspiration.

THE 1990s—ETHICS FOR THE AMERICAN EMPIRE: DISCOURSE AND CULTURE

Tom's scholarly output in the last decade has been simply astonishing. Four major works, with no letup in the flow of articles, reviews, polemics, editorials. The nineties brought back a number of Tom's career-long themes—these titles could as well have come from the sixties as the nineties. In 1991, *Courts and Foreign Policy*,[86] in 1994, *UN Checks and Balances*,[87] in 1995, *The United Nations as Guarantor of International Peace and Security*[88] and *The Secretary-General's Role in Conflict Resolution*.[89] We might be back in the world of constitutionalism,

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81. *Id.* at vii-viii.
82. *Id.* at 271.
83. *Id.*
84. *Id.*
85. *Id.* at 274.
86. Thomas M. Franck, *Courts and Foreign Policy*, 83 FOREIGN POL'Y 66 (1991).
87. Thomas M. Franck, *UN Checks and Balances: The Roles of the ICJ and the Security Council*, Remarks at Proceedings of the Second Joint ASIL/NVIR Conference Held in the Hague, the Netherlands, July 22–24, 1993 (July 23, 1993), *in* CONTEMPORARY INTERNATIONAL LAW ISSUES: OPPORTUNITIES AT A TIME OF MOMENTOUS CHANGE 280 (1993).
88. Thomas M. Franck, *The United Nations as Guarantor of International Peace and Security: Past, Present and Future*, *in* THE UNITED NATIONS AT FIFTY: A LEGAL PERSPECTIVE 25 (Christian Tomuschat ed., 1995).
89. Thomas M. Franck, *The Secretary-General's Role in Conflict Resolution: Past, Present and Pure Conjecture*, 6 EUR. J. INT'L L. 360 (1995).

the pragmatic statesman, the judicious perspective, the autonomy of civil servants.

But Tom's role was now a different one. The most significant mark of the change was his response to Harold Koh, *Dr. Pangloss Meets the Grinch: A Pessimistic Comment on Harold Koh's Optimism.*[90] Tom was ready to let go a heavy burden; the torch had been passed: "I am deeply grateful that this mantle [of optimism about international law] is now gracefully draping itself around Professor Koh's broad shoulders."[91] Tom could now say: "[T]he United States [is] extraordinarily impermeable [to international legal obligations]."[92]

International law does not have a bright future here: The courts do not care about international law, as a superpower we don't think we need law, when we think of law we think of a confection of policy flexibility and justification unrecognizable as law elsewhere. It is, of course, the very confection Tom had been cooking for a generation right here in Manhattan. But he is not dressing Harold down—as he might an illusioned liberal in Rhodesia in 1959, or at the United Nations in 1969. This is not a wake up call—the tone is resigned. So be it. Let another take up the burden of hope on *that* score. Tom had bigger fish to fry.

Four big ideas—groups of ideas really—each worked out over several articles and brought together in a synthetic work. I want to state these ideas again—they are familiar now to us all. Together, they capture the best spirit of the international legal imagination at the end of the twentieth century.

First, in 1990, *The Power of Legitimacy.*[93]

Continuous with the old Tom—the interest in *legal* obligations, the focus on the conditions for *sociological, political* acceptance of law. The work is continuous with the original Manhattan School—in many ways an extension of Louis Henkin's original *How Nations Behave.*[94] It harks back to the first

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90. Thomas M. Franck, *Dr. Pangloss Meets the Grinch: A Pessimistic Comment on Harold Koh's Optimism,* 35 HOUS. L. REV. 683 (1998).

91. *Id.* at 684.

92. *Id.* at 691.

93. THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990) [hereinafter FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS].

94. LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY (1968); *see also* David Kennedy, Book Review, 21 HARV. INT'L L.J. 301 (1980) (reviewing LOUIS HENKIN, HOW NATIONS BEHAVE (2d ed. 1979)).

modernization of international law in the 1920s—to the writings of Alvarez, Redslob—rooting legal doctrine in psychological and sociological reality.

The key to modern humanitarianism about war is the idea of *legitimacy*. Rules that have been consented to by the military will be legitimate in the eyes of the military and will be enforced. Rules that are reciprocal, fair, that respect the distinctive needs of the military, that protect the military from wanton suffering, will be followed. Organizations that mobilize the international community for multilateral action will be seen by the world community as legitimate. The international and humanitarian status of the International Committee of the Red Cross—or of the thin blue line of United Nations peacekeepers—will give their work legitimacy, and strengthen its chances for success. Standards that reflect military best practice will be followed—and when followed, the military that follows them will itself be legitimated. The last idea is key—military commanders and humanitarians will assess potential actions from a similar vantage point. We can imagine calculating a "CNN effect," in which the additional opprobrium resulting from civilian deaths, discounted by the probability of their becoming known to relevant audiences, multiplied by the ability of that audience to hinder the continued prosecution of the war, will need to be added to the probable costs of the strike in calculating its proportionality and necessity. For the humanitarian, giving voice to the aspirations of the international community to restrain the use of force, civilian deaths will seem weightier to the extent they seem weightier to world public opinion. Humanitarianism has come to control the use of force by affecting the attitudes of publics whose feedback will be relevant to the calculations of military necessity and proportionality. International humanitarianism about war is furthered both when the military pays attention to the CNN audience and when the vocabulary of the CNN audience is realistic, as understood from the perspective of the military planner. The goal is harmonic convergence between the military and humanitarian sensibility.

After the Second World War, it became increasingly common to understand the global legal and political environment as an extremely broad ongoing *conversation* among a wide range of players—national states, private actors, intergovernmental organizations, courts, legislatures, military figures.

People are understood to take action against a backdrop of expectations about their prerogatives. When they exceed the authority they were thought to have, they pay a price—the action would be more difficult and might generate negative consequences because perceived to be inappropriate by a relevant and potentially powerful constituency of other actors. Of course, an actor might also get away with it, in which case the expectations of other actors would change, and this new action would become part of their understood prerogative.

In such a world, it became important for states to defend their prerogatives—and back up their assertions of their authority with action to maintain their credibility. A great many military campaigns have been undertaken for credibility in just this sense. And in such a world, the vocabulary used to define prerogatives becomes significant. Actors who use force in ways that support or are sanctioned by shared expectations seem legitimate, and those who do not do not. It has been here that international humanitarians have sought to intervene—to author the vocabulary that states would use to define the legitimacy of their actions. When states take military action outside the framework of the law of force, they draw down their legitimacy account in the eyes of other actors. When they use force to support the United Nations, offer peacekeeping forces to the United Nations, or hold their military to the professional standards of the modern law in war, they make deposits in their legitimacy account. In this way, international humanitarianism becomes the vocabulary of legitimate statecraft.

We can see the roots of this conception in the earliest of Tom's writings—but the idea began to emerge most clearly in *Word Politics*, a byproduct of his post-1968 disillusionment and anger.[95] In such a world, one could advance international humanitarianism both by elaborating the humanitarian vocabulary and by promoting it as the vocabulary for statecraft. Indeed, work on the vocabulary might be *more* important than work on the problem. It is here that the legitimacy idea joins hands with the move to scholarship, to the *American Journal*, to education and treatise writing. And the first obligation of an international lawyer is to defend the vocabulary itself, denouncing those who promote their agendas in other terms—regardless of the expected results. Whether or not the United

95. *See* FRANCK & WEISBAND, *supra* note 9.

States preoccupation with Iraq will ultimately be good or bad for humanitarian or liberal objectives, the key point is that it must be pursued through the United Nations and articulated in the vocabulary of law.

Justice is left strangely out of the story—Tom devotes an entire chapter to explaining why. The social, redistributive side of Alvarez, and of the Tom or Wolfgang Friedmann of the 1960s, has withered. This is the rule-oriented side of the Manhattan School mooring itself in a universal sociology of compliance. Norms pull to compliance when they are determinate, symbolically validated, coherent, and adhere to a normative hierarchy: Useful to know if you are making rules.

But some things are also new—legitimacy is not a function of realpolitik calculation. The strategic gaming, the political science postulates of *Word Politics* are far away. The influence is philosophy, not political science. Jurisprudence, not social psychology. The terrain on which rules struggle is a discursive, not a functional one. Ultimately, it is here—not in *Word Politics*—that Tom makes the turn to language.

Second, in 1992, *The Emerging Right to Democratic Governance.*[96]

Again, old themes. Human Rights. Emerging law. The slow codification of entitlements—rules wrought from realism. What you end up with is a *right*, an *entitlement.* The Manhattan School insists on the emergence of law from life and on the relative autonomy of the law that *has* emerged. Tom applies the legitimacy idea. Discourse is again center stage. He describes the outcome of a universal conversation, after which, it turns out, governments that are not perceived to be democratic are not perceived to be legitimate.

This is not a codified right, consented to by states, available now for enforcement by institutions, still less by hegemonic lone rangers. This is a description, for the future, of where we are as a universe. Governmental enthusiasm for the democratic entitlement, if anything, is a Johnny-come-lately.[97] This is the Manhattan School of human rights, but not the rights of

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96. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992), *republished as Democracy as a Human Right, in* HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 73 (Louis Henkin & John Lawrence Hargrove eds., 1994).

97. *Id.* at 47.

remedies, or the rights of correlative duties. These rights are states of mind. Forms of speech. Which become forms of consciousness—aspects of self. We will see this voice again in *The Empowered Self*, where Tom describes "a growing consciousness of a *personal* right to compose one's identity."[98]

And the gloves are off: This sort of right, the culmination of a movement of the heart, described as the leading edge of history, can legitimate quite a bit. Looking back, we may excuse some post-1989 euphoria—but this voice would also become, from the Gulf War through the nineties, the backdrop for a muscular American foreign policy. The old formalities of sovereignty, territorial integrity, and nonintervention paled in the presence of such rhetorical momentum.

Third, in 1995, *Fairness in International Law and Institutions*.[99]

Again, there is continuity. The dispassionate international posture. The interest in distribution, economic and social justice. International institutions as agents of an international liberal orientation. If Henkin stood behind *Legitimacy*,[100] Friedmann and Schachter stand behind *Fairness*.

Legitimacy was about *order*—Tom writes *Fairness* to put redistribution back in the story. Fairness is not a political science term like reciprocity or expectation, nor is it a philosophical term like justice. Fairness is a feeling, the result of participation in a discourse. And it is generated in the management of antinomy: "These two aspects of fairness—the substantive (distributive justice) and the procedural (right process)—may not always pull in the same direction . . . . Fairness is the rubric under which this tension is discursively managed."[101]

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98. Thomas M. Franck, *Clan and Superclan: Loyalty, Identity and Community in Law and Practice*, 90 AM. J. INT'L L. 359, 359 (1996) (emphasis in original). This essay was a draft of part of a then-forthcoming book: THOMAS M. FRANCK, THE EMPOWERED SELF: LAW AND SOCIETY IN THE AGE OF INDIVIDUALISM (1999) [hereinafter FRANK, THE EMPOWERED SELF: LAW AND SOCIETY IN THE AGE OF INDIVIDUALISM].

99. Thomas M. Franck, *Fairness in the International Legal and Institutional System: General Course on Public International Law*, 240 RECUEIL DES COURS (1993-III), *revised and reprinted as* FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995) [hereinafter FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS].

100. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS, *supra* note 93.

101. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS, *supra* note 99, at 7.

The work of the book is to retell the story of international legal doctrines and practices as episodes in an international *conversation about fairness*: Equity, the democratic entitlement, self-determination, institutional good offices, mediation, investment guidelines, environmental protection. Moments in an evolving discourse. Fairness is not an explanation for discursive force—it is an account, a literary descriptive account, of what the conversation has been *about*.

And it has been about values all along.

Fourth, in 1999, *The Empowered Self: Law and Society in the Age of Individualism*.[102]

Again we have an emerging consciousness—emerging conditions of legitimacy. Perhaps an emerging right. A new condition of fairness. But these themes are sounded very lightly. The form of inquiry remains the same—Tom describes a conversation, played out in institutions, political actions, doctrinal developments, with echoes far back in the history of politics, religion, and philosophy. This conversation has brought forth a development he now reads for us.

Written there is a new consciousness about the relationship between community and person—a fissure in ideas about tribe, nation, community, through which an awareness, a self-consciousness, is coming into view. Identity is fluid. Choice is central. The individual is free.

History—intellectual history, religious history—has replaced political science, as political science replaced sociology. Culture provides the terrain on which identity is wrought—the material against which individual identity must distinguish itself, the forms through which it will do so. In 1950 or 1960 international liberalism was a secular and universal affair. Culture, like religion, lay beneath the waterline of sovereignty, and it was best to keep it there.

By the 1990s, governments have faded from view. Politics and economics are no longer central. Culture is the universal medium. And the culture of liberal tolerance has an advantage—as a host. When liberals govern nonliberals, it is okay for the nonliberals, for they are tolerated. When nonliberals

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102. FRANCK, THE EMPOWERED SELF: LAW AND SOCIETY IN THE AGE OF INDIVIDUALISM, *supra* note 98.

govern liberals, it is not okay, for they are not tolerated.[103] This structural imbalance provides the drive shaft once provided by enlightened self-interest.

Liberal internationalism is superior—not as a legal achievement of 1945, nor as a political achievement of 1648. It is the historic cultural achievement of Western humanism, a victory won in religion, politics, and law, against the overwhelming force of intolerance. This is not the clash of civilizations. Tom distinguishes his vision sharply from Huntington. Cultures change, intermingle. There is communitarianism in the West, individualism in the East. Intolerance everywhere. Convergence can happen. Enlightenment has opponents everywhere. But at the end of the 1990s, the American internationalist has something important to affirm: his culture, his history, his commitments. Tom has become an empowered self.

International law in the United States had two great moments of consensus after 1945. Tom has been a leader in each. And what has become of the international liberal project? It is alive and well. It has moved—from politics to culture, from political science to philosophy, from sociology to ethics. From system to consciousness. It remains a vision worth fighting for. And Tom remains on the field of battle. I have stopped here—but Tom has not. More than twenty works have appeared since *The Empowered Self*. The international style of the twenty-first century has begun. If we wish to know its future, we would do well to consult Professor Franck.

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103. *See* Thomas M. Franck, *Is Personal Freedom a Western Value?*, 91 AM. J. INT'L L. 593, 626 (1997).