Book Review: The Many Faces of Power: An International Law Response to Robert Kagan's "Of Paradise and Power"

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I. Introduction

Kagan's "Of Paradise and Power," appearing first in shorter form as an essay in *Policy Review* in Summer 2002,[1] was expanded because of its immense popularity into a 102 page book examining the growing "ideological gap"[2] in the way Europe and the United States view world politics. Kagan begins in his chapter *The Power Gap* by placing Europe and the US in their respective historical contexts. Whereas post World War II Europe was both weak and anxious to forget its bloody past, he argues, the US emerged from the war strong and dominating.[3] Against this background, he proposes in his chapter *Psychologies of Power and Weakness* that "Europe's relative weakness has understandably produced a powerful European interest in building a world where military strength and hard power matter less than economic and soft power."[4] After further elaborating on American strength and European weakness in the context of the Kosovo conflict in his chapter *Hyperpuissance*,[5] Kagan proposes the central thesis of his book in his chapters *The Postmodern Paradise* and *The World America Made*, that "Europe's evolution into its present state occurred under the mantle of the U.S. security guarantee and could not have occurred without it."[6] Having established this thesis about Europe's past, Kagan turns to the present in his chapter *Is it Still 'The West?'* Noting that European strategy and interests focus increasingly around the EU and less around NATO, he questions whether it is still possible to view Europe and the United States as a cohesive unit under such titles as "The West."[7] Finally, he turns to the future in *Adjusting to Hegemony*, concluding that the only way to resolve the difference of ideologies between norm-based Europe and militarily strong United States is for Europe to simply "readjust to the new reality of American hegemony."[8]

It is easy to see why Kagan's book was so popular: It is an important, controversial, and thought-provoking book across many disciplines, including international relations, political science, history, and world politics. But, one discipline is notably lacking from Kagan's analysis: that of international law. It is therefore the purpose of this book review to provide a counterpoint to Kagan's approach, an approach wholly based in international relations theory, by offering a response based in international law.

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[1] Robert Kagan, *Power and Weakness*, 113 POLICY REVIEW (June, 2002).
[2] ROBERT KAGAN, OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER 11 (2003).
[3] *Id.* at 12-18.
[4] *Id.* at 37.
[5] *Id.* at 42-53.
[6] *Id.* at 72.
[7] *Id.* at 85.
[8] *Id.* at 97.

Part II responds to Kagan's perception of power using the assumptions of international law, and contrasts his definition of power to that of several international legal scholars. Part III places Kagan's realist approach in a broader context of international relations (hereinafter "IR") and international law (hereinafter "IL") theory, beginning with a discussion of challenges to realism, and concluding with an examination of the growing body of literature which posits that the fields of international law and international relations are merging (hereinafter "integrationist" literature). Part IV returns to the question of power, examining ways in which Kagan's book challenges international lawyers to consider how military and doctrinal power interact, an inquiry which is particularly interesting in the European context, where doctrinal power is stronger than military power. The review concludes in Part V by agreeing with Kagan that the current rift between the US and Europe is likely to grow, but disagreeing on the result: Whereas Kagan foresees a world where the all-powerful US eventually disregards Europe, its former friend which is no longer of any strategic use to US interests, this review foresees a world where the powerful rules-based society of the European Union will continue to grow, creating a potent counter-balance to the US.

II. Varying Conceptions of Power: An International Law Response

As the title suggests, Kagan's book examines the different notions of power in the USA and Europe. But, although Kagan presents himself as a relatively neutral observer,[9] his entire book is written from the perspective of an American realist international relations scholar.[10] An equally valid and academically rich set of assumptions about the meaning of "power" exist within the discipline of international law, and when Kagan's topics are re-examined under this alternative paradigm a vastly different picture emerges. This Part will re-examine the notion of power from an IL perspective, concluding that because Europeans may view the world more like the international lawyer and less like Kagan, his conclusions regarding European policy choices surrounding military power may also need to be re-examined.

Kagan states that Europe's "mission, if it has a mission beyond the confines of Europe, is to oppose power."[11] But this assertion is heavily laden with Kagan's particular definition of power which

[9] *Id.* at 4 (claiming it is easier for him to see the contrast between the American and European international approaches "as an American living in Europe.").
[10] David P. Calleo, *Power, Wealth and Wisdom*, THE NATIONAL INTEREST 1 (Summer, 2003) ("The book is well worth reading, not least for insight into what the intelligent and civilized American neo-conservative thinks about the world.").
[11] KAGAN, *supra* note 2, at 68.

permeates his book: To Kagan power seems to come in only one variety, military power.[12] But, many international lawyers would disagree with this constrained definition of power, preferring a much broader definition of power, such as the following offered by Professor Byers:

> Power is the ability of one actor to compel or significantly influence the behavior of another. It may be applied through the use or threat of force, through economic incentives or penalties, or through a variety of social pressures. It may be derived from a number of different sources, including military capabilities, wealth or moral authority. It may be augmented or constrained by concepts, values, institutions and rules. It is above all a relational concept, in that the ability to compel or influence always depends on the relative abilities of the different actors concerned either to apply or resist pressure."[13]

Paul Kahn of the Yale Law School also notes the importance of power in international affairs, but cautions against viewing power and law as opposites:

> When we compare the international to the domestic order, the balance between power and law tilts dramatically in favor of power--meaning the capacity to advance state ends independently of the norms and procedures of law. Many contemporary observers, however, believe that this situation is rapidly changing, as international law gains normative strength and institutional presence. This opposition of power and law--and the trade-off between them--offers too simple a view of the relationship between these concepts. This is not just because a great power may often find it in its interests to support the international legal order. That is no doubt true, but it still assumes that power and law can be measured against each other, i.e., on a single scale of state interests. The situation we confront, however, challenges the idea that any such scale exists.[14]

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[12] *See, e.g., Id.* at 33 (minimizing the influence of "soft" economic power compared to "hard" military power); *Id.* at 38 (using the general term "weak" to mean "militarily weak" and the general term "strong" to imply military strength); *Id.* at 41 (claiming Europeans are not "wielding power" simply because they are not wielding military power). Realists have been criticized for their narrow conception of power in the past. For example, Koskenniemi notes that realists "fail to see to what extent their determining concepts such as 'interest,' 'power,' or 'security' are themselves defined and operative within a normative context." Martti Koskenniemi, *The Place of Law in Collective Security*, 17 MICH. J. INT'L L. 455, 465 (1996).

[13] Michael Byers, *Custom, Power, and the Power of Rules: Customary International Law from an Interdisciplinary Perspective,* 17 MICH. J. INT'L L. 109, 113 (1995). Professor Anne Orford criticizes Byer's work for not acknowledging that "the work of international relations and international legal scholars in describing and explaining the world is itself an exercise of power, rather than a mere observation of the way in which powerful actors such as 'sovereign states' behave," Anne Orford, *Review Essay: Positivism and the Power of International Law: Custom, Power and the Power of Rules: International Relations and Customary International Law by Michael Byers*, 24 MELBOURNE U. L.R. 502, 520 (2000), and arguing that "[a]t least since the publication of Edward Said's *Orientalism*, such an understanding of the role of knowledge producers in fields that engage with 'other' countries and cultures has been difficult to sustain." *Id.* at 526. In addition, Orford broadens the discussion of power yet again, noting that "[t]he work of feminist scholars, postcolonial scholars and queer theorists provides a way of thinking about the relationship between sovereignty and the operation of power in modern societies that differs from that developed by positivists. The model of power that emerges from these areas departs from a conception of power as a commodity or thing held by particularly powerful entities like states. Scholars in those fields have been arguing for decades that apparently organisational and public issues, such as militarism, imperialism, law and monetarism, are deeply personal, while the personal issues of subjectivity and experience are deeply political." *Id.* at 522.

[14] Paul W. Kahn, *American Hegemony and International Law: Speaking Law to Power: Popular Soverignty, Human Rights, and the New International Order*, 1 CHI. J. INT'L L. 1 (2000).

In addition, a large number of human rights lawyers would disagree with Kagan's notion of absolute sovereignty within which his idea of military power is based.[15] After tracing the development of international law from post-World War II state-centered positivism through to the development of the individual centered international human rights movement,[16] Professor Kahn suggests that it is this latter development, international human rights based outside of or antithetical to the concept of state sovereignty,[17] which left the United States in an impossible position with respect to international law: "[W]hile law functions in the United States as an expression of popular sovereignty that chooses to invest itself in particular rights, contemporary international law has little to do with popular sovereignty and gains its legitimacy from the defense of rights."[18] Accepting Kahn's analysis, Kagan is correct that the US fears usurpation of its sovereignty. But, rather than frame the issue as a divide between the US and Europe, it is perhaps more accurately framed within the global growth and increased importance of international human rights law.[19] To do this, however, would be to admit the importance of international law, something Kagan is unwilling to do.

Unfortunately, Kagan's assumptions about power permeate even his analysis of European policy choices surrounding military power, leading to some potentially erroneous conclusions. For example, one of Kagan's primary arguments, presented in his chapter *Psychologies of Power and Weakness*, is that "Europe's relative weakness has understandably produced a powerful European interest in building a world where military strength and hard power matter less than economic and soft power."[20] But, this

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[15] *Id.* at 6 ("[T]here are individuals, both here and abroad, who no longer understand themselves within the forms of our national civic religion of popular sovereignty and law's rule. They see themselves largely as consumers, not citizens, and members of a cosmopolitan civil society that has liberated itself from the politics of nations and the claims of popular sovereignty. It may be that their world is the future world, a world in which the logic of human rights may fully realize itself. We stand to that world in about the same way that the nineteenth century secularists stood to religious communities. It was too early then to proclaim the death of God; it is too early today to proclaim the death of the state.").

[16] *Id.* at 10-16. *See also Id.* at 5 ("For a long time, this combination of views fit easily into the reigning dualist paradigm of international law. On this view, the origin of international law was the consent of states. Although the modes of expression varied across the domestic and international contexts, both contexts shared the idea that law expressed the sovereign will. This era of international law is ending. The language of the international law scholar today is no longer the language of sovereignty; rather, it is that of the demise of sovereignty. The sovereign state is increasingly perceived as the problem to be overcome.").

[17] *Id.* at 12 ("The rhetoric of human rights provided a legal ground by which to overcome claims of state sovereignty.).

[18] *Id.* at 6.

[19] *Id.* at 14. This theory is consistent with the recent scholarly work on neo-liberalism. *See infra* note 73 and accompanying text. Reus-Smit notes that ""[b]ecause liberal theory stresses the primacy of individuals and private groups in shaping political and legal outcomes, the traditional ordering of international law, which privileges the international public law of interstate relations, is turned on its head, with law that directly regulates individuals and groups (the first two tiers) taking precedence. Furthermore, within international public law, law that most directly affects individual-state relations is given priority, thus placing human rights law at the 'core' of international law." Reus Smit, *The Strange Death of Liberal International Relations Theory*, 12 E.J.I.L. 573, 586 (2001).

[20] KAGAN, *supra* note 2, at 37. Kagan appeals to a popular audience by making this argument through a series of simplistic analogies in which the complexities of inter-state relations are personified. For example, he employs a

argument is logically flawed: As Kagan himself admits, Europeans could quite easily increase their military budgets to meet or even exceed that of the United States, but they *choose* not to do so.[21] Similarly, Kagan asks "If Europe's strategic culture today places less value on hard power and military strength and more value on such soft-power tools as economics and trade, isn't it partly because Europe is militarily weak and economically strong?"[22] But, Kagan's question puts the cart before the horse: Europe does not prefer "soft" power because it is militarily weak; it chooses to be militarily weak because it prefers soft power. Comparatively low military spending in Europe is not necessarily a response to a supposed adequate and free security protection being provided by the United States, but is rather a political choice attributed to entrenched European beliefs about the adequacy of international law to promote peace and security.[23]

"wild west analogy," where the US is the Sheriff and Europe is the saloonkeeper, and "outlaws shoot sheriffs, not saloonkeepers. In fact, from the saloonkeeper's point of view, the sheriff trying to impose order by force can sometimes be more threatening than the outlaws, who, at least for the time being, may just want a drink." *Id.* at 36. Similarly, he contrasts a "man armed only with a knife" who "may decide that a bear prowling the forest is a tolerable danger," with "[t]he same man armed with a rifle" who "will likely make a different calculation of what constitutes a tolerable risk." *Id.* at 31. He even attempts to link Saddam Huissen to the September 11 terrorist attacks and glosses the fact that no weapons of mass destruction have been found in Iraq. *Id. at* 31.

[21] KAGAN, *supra* note 2, at 53-54 ("Europe today has the wealth and technological capability to make itself more of a world power in military terms if Europeans wanted to become that kind of world power. They could *easily spend twice as much as they are currently spending on defense if they believed it necessary to do so.*") (emphasis added). Similarly, as part of a comprehensive study of European military prospects and economic constraints, researchers at RAND Corporation found that "the prevailing European view appears to be that there are realistic opportunities for reallocation within existing patterns of military spending and military investments, thereby allowing for shifting resources from the existing pool of military procurement without a need for additional resources. Charles Wolf, Jr., Benjamin Zycher, *European Military Prospects, Economic Constraints, and the Rapid Reaction Force*, RAND Publication No. MR-1416-OSD/SRF (2001) at 23, online at http://www.rand.org/publications/MR/MR1416/ (hereinafter "RAND study").The RAND study, although cautious in its analysis, nevertheless confirms that Europe can, without major policy changes, increase its military budget in accordance with the EU's European Security and Defense Policy (ESDP): "[I]f at least one-third of the present allocations for annual military investments is shifted and reallocated to the procurement needs associated with the ESDP/RRF, then by 2010 sufficient funding would be available to meet the estimated capital costs of the force. …[S]avings from increased efficiency in the defense industry and from movement toward a single defense market in the EU would contribute additionally, if modestly, to defraying the necessary capital costs." *Id.* at 35-36).

[22] KAGAN, *supra* note 2, at 33. Kagan commits this same flaw in logic repeatedly. *See, e.g., Id.* at 31-32 ("Europeans like to say that Americans are obsessed with fixing problems, but it is generally true that those with a greater capacity to fix problems are more likely to try to fix them than those who have no such capability."); *Id.* at 40 ("Those who cannot act unilaterally themselves naturally want to have a mechanism for controlling those ho can."); *Id.* at 38 ("Since Europeans lack the capacity to undertake unilateral military actions, either individually or collectively as 'Europe,' it is natural that they should oppose allowing others to do what they cannot do themselves."). Kagan also commits the same logical fallacy in reverse, assuming that American military participation is a result of American military capacity, instead of a geo-political world view that favors military intervention: "Americans know that when international crises erupt, whether in the Taiwan Strait or in Kashmir, they are likely to be the first to become involved." *Id.* at 35.

[23] This is consistent with the premise of liberal international relations theory. *See infra* notes 73-76 and accompanying text. Moravcsik, an IR liberal, states that "[a]mong advanced industrial democracies, a stable form of interstate politics has emerged, grounded in reliable expectations of peaceful change, domestic rule of law, stable international institutions, and intensive societal interaction. This is the condition Deutsch terms a 'pluralistic

From Kagan's "intelligent and civilized American neo-conservative"[24] viewpoint, it is unthinkable that social welfare budgets would ever take priority over defense spending,[25] and it is with this assumption that Kagan builds his hypothesis that Europe channels its money into social welfare only because the United States has eliminated the "primary" concern of security.[26] Kagan appears so firmly rooted in his beliefs, that he mistakenly attributes them to the Europeans he is attempting to analyze. As Calleo has noted, if the European strategists were operating with American neo-conservative assumptions and values, Kagan's argument based on security and military force would be a plausible explanation for European actions.[27] But, Europeans are *not* American neo-conservatives.[28] It is equally plausible to take their words at face value: Perhaps Europeans care more about social welfare programs than security,[29] and that allocation of relatively smaller military budgets and relatively larger social spending packages in Europe is a political choice by the European electorate, influenced by a moral vision about both international peace and domestic social welfare which is completely disconnected from US action.[30] Rather than the strategic attempt "to capitalize on a sizeable peace dividend" which Kagan portrays,[31] it is equally plausible that Europeans simply possess different values, that regardless of how much "free

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security community' and Keohane and Nye term 'complex interdependence.'" Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INTL. ORG. 513, 535 (1997).

[24] Calleo, *supra* note 10.

[25] KAGAN, *supra* note 2, at 54 n. 39 ("Europeans insist that there are certain structural realities in their national budgets, built-in limitations to any significant increases in defense spending. But if Europe were about to be invaded, … would they insist nonetheless that their social welfare programs be left untouched?").

[26] KAGAN, *supra* note 2, at 25.

[27] Calleo, *supra* note 10, at 2 ("The role [Kagan] assigns Europe in the newest American century may seem satisfactory in Washington and perhaps in London, but it does not appear to go down well in Paris or Berlin, nor in Moscow or Beijing. Kagan's argument nevertheless seems powerful at home, but less because of its conclusions than its premises. These premises reflect a variety of interlocking assumptions widely shared among American foreign policymakers and analysts. We should be grateful to Kagan for demonstrating these assumptions so forcefully and showing just where they lead. Those uneasy with his triumphalist conclusions might therefore start by re-examining his triumphalist assumptions.").

[28] *Id.* ("What Europeans see as prudent self restraint neo-conservative Americans count as pusillanimous diffidence.").

[29] Discussing potential funding sources for increased European military activity, researchers at RAND Corporation note that a "source could, in principle, be reallocations in existing government budgets from nondefense to defense purposes—for example, from … various entitlements. *It goes without saying that our European interlocutors were even more emphatic in rejecting this option as unrealistic*, so we omit it from the discussion." RAND study, *supra* note 21 , at 33 (emphasis added). Similarly, German interlocutors interviewed by RAND corporation as part of a comprehensive study on European military prospects and economic constraints "emphasized that paying down Germany's public debt—swollen by the burden of financing reunification costs—is a higher-priority claimant for budgetary resources than is any addition to military spending." *Id.* at 23.

[30] This being said, as Europe begins to balance its strong doctrinal power with some form of European defense force, *see infra* Part IV, the political choice of where to allocate funds is also likely to balance more evenly between social welfare and defense. *See* Robert Graham, France seeks to reassure US over Nato commitment, FINANCIAL TIMES, Oct. 18, 2003, at 7 (citing French Defense Minister Miche le Alliot-Marie: "Today we have to realise that defence spending is not a luxury but a necessity; and you cannot spend one year, then cut back the next.").

[31] KAGAN, *supra* note 2, at 25.

security" the US supposedly provided Europe, Europeans would have made equal or similar allocations towards social welfare and away from military spending because that is what they value most.

This choice is illogical if made under Kagan's assumptions about power and security, but it is legitimate if Europeans believe, as the international lawyer does, that cooperation through international law actually can prevent armed conflict: That rules *do* matter.[32] For example, Professor Byers offers an alternate explanation why many states, including European states, prefer rules-based power to military force:

> On occasion [states] may apply raw, unsystematized power in the pursuit of a short-term goal. However, the application of raw power promotes instability and escalation, and is not particularly subtle or efficient. More frequently, states will apply power within the framework of an institution or legal system. States develop and utilize institutions and legal systems because they create expectations of behavior, which lessens the risk of escalation and facilitates efficiency of action, and because they promote stability, thus protecting states which recognize that they could find themselves on the opposite side of an issue in future situations.[33]

Similarly, Professor Hudec notes that "[g]overnments … usually have a *longer-term interest* in the efficacy of the *legal* relationship they have established with other governments, and so they are more inclined to act in ways designed to preserve those relationships. Ultimately, the compliance decisions of governments are determined by *calculated self-interest* [rather] than by force."[34]

It is one goal of this book review to show that, rather than operating under American neo-conservative assumptions that military defense is inviolable, and explaining European action based on this assumption, perhaps Europeans are operating with an entirely different assumption altogether: That the best and most lasting guaranty for international peace and security is not military might but cooperation

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[32] *See, e.g.* Kahn, *supra* note 14, at 4 ("While the Europeans are pursuing a deeper and deeper integration within the Union, the American political imagination remains strictly parochial.").

[33] Byers, *supra* note 13, at 122 (citing JOHN RAWLS A THEORY OF JUSTICE 235-43 (1971)).

[34] Robert E. Hudec, *The Adequacy of WTO Dispute Settlement Remedies: A Developing Country Perspective*, *in* DEVELOPMENT, TRADE, AND THE WTO: A HANDBOOK 81, 82 (Bernard Hoekman et al. eds. 2002). (emphasis added). Similarly, Professor Kritsiotis of the University of Michigan Law School argues that "International law offers a much more constructive communicative medium (with all the prospects and risks that this entails) than naked power could ever hope to do. Its very rules promise peace; they preach pacifism. Compared with power, its old rival, international law creates the conditions for a genuine peace (based on negotiation and cooperation rather than threat, intimidation, and force) and a stable peace (which is protected by law and not by the balance of power). This peace is the platform for the prosperity of the system's participants." Dino Kritsiotis, *Specific Applications: The Power of International Law as Language*, 34 CAL. W. L. REV. 397, 404 (1998). *See also* Kahn, *supra* note 14, at 1 ("Both internationally and domestically, political power operates at the origins of law--for example, within legislatures or treaty negotiations. But, for both, the move from political disagreement to legal resolution represents a shift of norms from inequality to equality. Once the legal rules are set, outcomes should not depend on the relative power of the disputants. To identify the operation of political power within an institution of law is to discover a "defect," a site at which reform must be pursued if the values of law are to be maintained.").

through international law.[35] Viewed from this alternate perspective (that of international law), one could completely reverse Kagan's conclusion that a European insistence upon international law has hindered US efforts to promote peace militarily.[36] Instead, it is equally possible to view the United States as a hindrance to European and international efforts to promote peace doctrinally, through Security Council vetoes,[37] sole no votes in the General Assembly,[38] sole no votes in the Human Rights Commission,[39] violating Security Council resolutions or other international legal norms,[40] weakening the International Criminal Court,[41] disregarding the pronouncements of the International Court of Justice,[42] denying access

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[35] *See, e.g.*, Kahn, *supra* note 14, at 15-16 ("The moral content of international relations is being absorbed by claims of legal right, leaving less and less room for a morally driven politics outside of law. The United States still wants a moral discourse that is not a legal discourse. To the rest of the world, however, this insistence on both law and power looks like a form of a discredited colonial discourse. To them, the resistance of the United States to anything that looks like a subordination of its own political center to international legal institutions suggests that human rights law may be a continuation of a Cold War political strategy, directed now at the Third World."). To his credit, Kagan makes this point to some degree: "Europeans over the past half century have developed a genuinely different perspective on the role of power in international relations. … This is a perspective on power that Americans do not and cannot share." KAGAN, *supra* note 2, at 55. But, contrary to a pure international law view finding power in rules alone, for Kagan this European perspective on power is always supported by a crutch of American provided free-security.

[36] KAGAN, *supra* note 2, at 51.

[37] *US Vetos [sic] on the UN Security Council related to the Middle East* , MIDDLE EAST INFORMATION CENTER, online at http://middleeastinfo.org/article63.html, accessed Nov. 9, 2003 ("Of the 248 vetoes recorded by the five Security Council members since the inception of the United Nations, the United States has cast 73 - the vast majority of them related to the Middle East. …. In addition there have been 25 US abstentions on UN Security Council resolutions that are condemning Israel.").

[38] WILLIAM BLUM, ROGUE STATE 185-97 (New Updated Ed., 2002) (cataloguing a sample of 144 (margin of error < 3) UN General Assembly resolutions between 1978 and 1987 in which the US was either the sole no-vote or was accompanied solely by Israel in its opposition. Additionally, one resolution per year from 1992 to 1999 came to a vote on the necessity of ending the economic embargo against Cuba. In each of these 8 resolutions, the US and Israel opposed, occasionally accompanied by Paraguay, Uzbekistan and, once, Albania.).

[39] *See, e.g.*, *The Right to Food*, U.N. GAOR, Comm'n on Human Rts., 59th Sess., U.N. Doc. E/CN.4/RES/2003/25 (2003) & 57th Sess., U.N. Doc. E/CN.4/RES/2001/25; *The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, U.N. GAOR, Comm'n on Human Rts., 59th Sess., U.N. Doc. E/CN.4/RES/2003/28 (2003) ; *World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance and the Comprehensive Implementation of and Follow-up to the Durban Declaration and Programme of Action*, U.N. GAOR, Comm'n on Human Rights, 59th Sess., E/CN.4/RES/2003/30 (2003).

[40] *See, e.g.*, John Quigley, *International Law Violations by the United States in the Middle East as a Factor Behind Anti-American Terrorism*, 63 U. PITT. L. REV. 815 (2002*); United States of America: Hypocracy or Human Rights? Time to Choose*, AMNESTY INT'L, AI Index: AMR 51/075/2002 (May 15, 2002) ("On 14 August 2000, the day that President Clinton told his party that the USA was the most progressive force for human rights, the UN Sub-Commission on the Promotion and Protection of Human Rights affirmed that the use of the death penalty against child offenders – defendants who were under 18 at the time of the crime – violated customary international law. It called on offending countries to stop the practice. The USA, failing to stand firm for the rule of international law, has ignored such calls.").

[41] See *U.S. Proposals to Undermine the International Criminal Court Through a U.N. Security Council Resolution*, HUMAN RIGHTS WATCH, June 25, 2002, online at http://www.hrw.org/campaigns/icc/usproposal.htm; *The United States and the International Criminal Court*, HUMAN RIGHTS WATCH, accessed Nov. 8, 2003, online at http://www.hrw.org/campaigns/icc/us.htm; Diane Marie Amann & M.N.S. Sellers, *American Law in a Time of Global Interdependence: U.S. national Reports to the XIVth International Congress of Comparative Law: Section IV: The United States of America and the International Criminal Court*, 50 AM. J. COMP. L. 381 (2002); Joel F. England, *NOTE: The Response of the United States to the International Criminal Court: Rejection, Ratification or*

to UN Special Rapporteurs,[43] and failing to ratify[44] or severely limiting the effect of[45] human rights treaties. From this international law perspective, far from painting the US as the "key," allowing Europe to pursue its agenda of international law, the US is rather the biggest obstacle – through passive ignorance or active sabotage – of an international legal order to which an increasing number of states subscribe.[46]

Something Else? 18 ARIZ. J. INT'L & COMP. L. 941 (2001); Christopher M. Van de Kieft, *NOTE: Uncertian Risk: The United States Military and the International Criminal Court*, 23 CARDOZO L. REV. 2325 (2002); Eric P. Schwartz, *The United States and the International Criminal Court: The Case for "Dexterous Multilateralism"*, 4 CHI. J. INT'L L. 223 (2003); Jimmy Gurule, *United States Opposition to the 1998 Rome Statute Establishing an International Criminal Court: Is the Court's Jurisdiction Truly Complementary to National Criminal Jurisdictions?* 35 CORNELL INT'L L.J. 1 (2002); Jelena Pejic, *The United States and the International Criminal Court: One Loophole Too Many*, 78 U. DET. MERCY L. REV. 267 (2001); James L. Taulbee, *A Call to Arms Declined: The United States and the International Criminal Court*, 14 EMORY INT'L L. REV. 105 (2000); John Washburn, *Assessments of the United States Position; The International Criminal Court arrives – The U.S. Position: Status and Prospects* , 25 FORDHAM INT'L L.J. 873 (2002); Matthew A. Barrett, *NOTE: Ratify or Reject: Examining the United States' Opposition to the International Criminal Court*, 28 GA. J. INT'L & COMP. L. 83 (1999); Michael P. Scharf , *The United States and the International Criminal Corut: A Recommendation for the Bush Administration*, 7 ILSA J INT'L & COMP L 385 (2001); William K. Lietzau, *The United States and the International Criminal Court: International Criminal Law After Rome: Concerns from a U.S. Military Perspective*, 64 LAW & CONTEMP. PROB. 119 (2001).

[42] On April 14, 1998, the governor of Virginia ignored a request of the International Court of Justice to stay the execution of Breard, a Parguyan citizen pending review of the case by the international body, finding "no reason to interfere with his sentence" and proclaiming that "the safety of those residing in the Commonwealth of Virginia is not the responsibility of the International Court of Justice." Jonathan Charney and Michael Reisman, *Agora: Breard: The Facts*, 92 AM. J. INT. L. 666, 674-75 (1998).

[43] In 1998, UN Special Rapporteur on Violence Against Women Radhika Coomaraswamy was denied access to prisons in Virginia and Michigan. Radhika Coomaraswamy, *Report of the Mission of the United States of America on the Issue of Violence Against Women in State and Federal Prisons*, UN Doc. E/CN.4/1999/68/Add.2, ¶9.

[44] See, e.g., Paula Donnolo and Kim K. Azzarelli, *Essay: Ignoring the Rights of Children: A Perspective on America's Failure to Ratify the United Nations Convention on the Rights of the Child*, 5 J.L. & POL'Y 203 (1996); Alison Dundes Renteln, *States Ratification of Human Rights Treaties: Who's Afraid of the CRC: Objections to the Convention on the Rights of the Child*, 3 ILSA J. INT'L & COMP. L. 629 (1997); Julia Ernst, *U.S. Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women*, 3 MICH. J. GENDER & L. 299 (1995); Paula Donnolo and Kim K. Azzarelli, *ESSAY: Ignoring the Human Rights of Children: A Perspective on America's Failure to Ratify the United States Convention on the Rights of the Child*, 5 J.L. & POL'Y 203 (1996); Frank C. Newman, *United Nations Human Rights Covenants and the United States Government: Diluted Promises, Foreseeable Futures*, 42 DE PAUL L. REV. 1242 (1993); Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 20 GEORGIA J. OF INT'L L. 311 (1990); Amy C. Harfeld, *Oh Righteous Delinquent One: The United States' International Human Rights Double Standard–Explanation, Example, and Avenue for Change*, 4 N.Y. CITY L. REV. 59 (2001); Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995); Nigel Rodley, *On the Necessity of the United States Ratification of the International Human Rights Convention*, in US RATIFICATION OF THE HUMAN RIGHTS TREATIES: WITH OR WITHOUT RESERVATION? 3, 4-13 (Richard B. Lillich ed., 1981); Harold Hongju Koh, *On American Exceptionalism*, 55 Stan. L. Rev. 1479 (2003).

[45] *See* Timothy K. Kuhner, *Note: Human Rights Treaties in U.S. Law: The Status Quo, Its Underlying Bases, and Pathways for Change*, 13 DUKE J. COMP. & INT'L L. 419 (2003); DAVID WEISSBRODT, JOAN FITZPATRICK & FRANK NEWMAN, SELECTED INTERNATIONAL HUMAN RIGHTS INSTRUMENTS AND BIBLIOGRAPHY FOR RESEARCH ON INTERNATIONAL HUMAN RIGHTS LAW 281-86 (2001); Connie de la Vega, *Civil Rights During the 1990s: New Treaty Law Could Help Immensely*, 65 U. CIN. L. REV. 423, 452-57 (1997 (examining RUDs attached to the ICCPR and CERD); Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control Over the Conclusion and Operation of Treaties*, 67 CHI.-KENT L. REV. 571, 584-85 (1991) (discussing RUDs to the ICCPR).

[46] Kahn, *supra* note 14, at 18 ("Much of the world today is tired of the politics of nation-states that has marked the modern era as one of deep and unrelenting violence. The European Union confronts a large number of states that

Against this background, Europe's position is aptly summarized in the draft European Constitution, which "says the transatlantic relationship is 'irreplaceable' but also says the United Nations charter is 'the fundamental framework for international relations.'"[47]

Like any scholar, Kagan approaches his analysis from a particular angle and with certain biases. Certainly, approaching these same issues from the perspective of international law is no less biased. But it is definitely complementary, a complementarity upon which quality scholarship depends. A weak point in Kagan's book, therefore, is the lack of discussion surrounding his disciplinary biases and the missed opportunity to enhance his text by providing, and then refuting, alternative views. This section has attempted to provide this missing complementarity by re-examining the concept of power and policy choices related to it from an alternate perspective. Kagan would most certainly find fault in this analysis, and international lawyers could have learned a great deal had he included, and effectively refuted, the international law perspective.

III. The World Beyond Kagan's Realism

As explored *supra* Part II, the notion of "power" in Kagan's work is essentially limited to that power supported by military force.[48] By repeatedly pairing the terms "international law" and "power" in syntactic opposition, he implicitly rejects that international law, outside Europe, is powerful at all.[49] This conception of law and power as opposites must be taken for what it is, the limited view of one particular school of international relations: realism. This post-World War II discipline, dominated by scholars such as Hans Morgenthau,[50] George Kennan, Georg Schwarzenberger, Reinhold Niebuhr, Arnold Wolfers and Robert Strausz-Hupe,[51] "believed … in the polarity of law and power, opposing one to the other as the

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want to enter, even though entry will require a reordering of the relationship among the conceptions of state, sovereignty, and law. Much of Latin America, too, has experienced a disgust with the politics of the nation and is turning toward a world of markets and international law. For many who distrust their own national politics--a wholly justified distrust in many parts of the world--the promise of international law is its restraint on these domestic political forces.").

[47] Thomas Fuller, *EU Leaders Agree on Defense Policy*, INT'L HERALD TRIBUNE (Dec 13-14, 2003) at 1.

[48] Whereas Kagan consistently downplays political and economic power to military power, they are at least acknowledged as form of power in their own right, albeit insubstantial ones. KAGAN, *supra* note 2, at 21 ("in economic and political realms, the European Union produced miracles."); *Id.* at 48 ("For all Europe's great economic power and for all its success at achieving political union, Europe's military weakness … produced diplomatic weakness and sharply diminished its political influence compared to that of the United States.").

[49] KAGAN, *supra* note 2, 73 (describing Europe's preference for international law as a "rejection of power politics" rather than a different form of power"); *Id.* at 95 (implying military power when stating that "Americans … remain realists in the limited sense that they still believe in the necessity of power in a world that remains far from perfection."); *Id.* at 65 (equating "military power" and "global rule," which are contrasted to "European integration."); *Id.* at 41 ("Europeans hope to contain American power without wielding power themselves.").

[50] Reus-Smit, *supra* note 19, at 581 (citing HANS J. MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE 5-18 (6th Ed., 1985)).

[51] Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 A.J.I.L. 205, 207 n. 5 (1993).

respective emblems of the domestic versus the international realm, normative aspiration versus positive description, cooperation versus conflict, soft versus hard, idealist versus realist. Regardless of their domestic colors, states in the international realm were champions only of their own national interest. 'Law,' as understood in the domestic sense, had no place in this world. The only relevant laws were the 'laws of politics,' and politics was 'a struggle for power.'"[52] Thus, Kagan's point about the relevance of international law in a world dominated by US hegemony is a well-worn one: the post World-War II realists were challenging the utility of international law in a world they (like Kagan) viewed as controlled by power politics long before "Of Paradise and Power." But, what Kagan does not acknowledge is the rich scholarly dialogue which resulted from this original realist challenge, in which international lawyers responded to the realists,[53] neo-realists responded to them,[54] and regime theorists responded to the neo-realists,[55] all of which has been concisely documented by Anne Marie-Slaughter[56] and Christian Reus-Smit.[57]

Without placing his realist ideology in this greater historical context, not only is it difficult for Kagan to claim impartiality, but he is unable to respond to the gamut of post-realist ideologies, some of which have challenged realism significantly.[58] For example, by proving through empirical evidence in particular international crises that international law could have verifiable compliance effect, scholars such as Abram Chayes's forced realists to reconsider their premise that international law was irrelevant to state

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[52] *Id.* at 207 (citing HANS J. MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE 4-5, 25-26 (4th ed. 1967)).

[53] Anne Marie Slaughter notes that "[t]he chief legal or jurisprudential response to the Realist challenge was the reconceptualization of the relationship between international law and politics." The most important effort came from Myres McDougal and Harold Lasswell of the Yale Law School, who "reinvented international jurisprudence, creating a comprehensive framework within which international lawyers, retrained as public policy experts, could use empirical data and theoretical insights from political science and a range of other disciplines to ascertain and critique existing law … to determine which law, or which system of laws, best furthers 'human dignity.'" Slaughter Burley, *supra* note 51, at 209-211. Some of McDougal's students, particularly Richard Falk, Saul Mendlovitz and Burns Weston, expanded this work "from the perspective less of human dignity than of systemic stability." *Id.* at 211-212.

[54] Reus-Smit, *supra* note 19, at 581-582 (citing KENNETH WALTZ, THEORY OF INTERNATIONAL POLITICS, *Preface* (1979)).

[55] *Id.* at 582-83 (citing ROBERT O. KEOHANE & JOSEPH S. NYE (EDS.), TRANSITIONAL RELATIONS AND WORLD POLITICS (1972); ROBERT O. KEOHANE, INTERNATIONAL INSTITUTIONS AND STATE POWER 174 (1989)).

[56] Slaughter Burley, *supra* note 51, at 209-225.

[57] Reus-Smit, *supra* note 19, at 577-589.

[58] For a complete examination of the evolution of IR scholarship *see* Friedrich Kratochwil & John G. Ruggie, *International Organization: a State of the Art on an Art of the State*, 40 INT'L ORG. 753, 754 (1986). For more in-depth treatments of regime theory, *see* STEPHEN D. KRASNER, ED., INTERNATIONAL REGIMES (1983); Kennoth Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335 (1989). For additional challenges to realism, including post-modernism, critical theory, and constructivism, *see* Price & Christian Reus-Smit, *Dangerous Liaisons? Critical International Theory and Constructivism*, 4 E.J.I.L. 259 (1998).

behavior.[59] Louis Henkin made the same point more broadly, arguing in his canonical work *How Nations Behave* that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."[60]

At the same time realism was being challenged, however, international lawyers were forced to admit that state compliance, although common, is not guaranteed, causing them to "de-emphasis[e] … the constraint function of international law."[61] Indeed, this would seem the downfall of international law, if it were not for the development of regime theory. Keeping consistent with realist premises, Robert Keohane's neoliberal institutionalist theory of regimes explains the "pervasiveness and persistence" of norms ("regimes" in IR speak[62]) in international politics, arguing that because regimes lower transaction costs, increase information, reduce cheating, enhance the value of reputation and facilitate monitoring, they are useful to and frequently followed by self-interested utility maximizing states.[63] The net result of this was that, although rules may not matter quite as much as international lawyers would have hoped in

[59] Slaughter Burley, *supra* note 51, at 213 (citing ABRAM CHAYES, THE CUBAN MISSILE CRISES (1974); THOMAS EHRLICH, CYPRUS, 1958-1967 (1974); ROGER FISHER, POINTS OF CHOICE (1978)). Harold Koh cites to still further scholarship establishing the compliance effect of international law in areas such as international trade, international adjudication, international human rights, and international environmental law. Harold Hongju Koh, *Review Essay: Why Do Nations Obey International Law?* 106 YALE L.J. 2599, n. 2 (1997) (citing ERNST-ULRICH PETERSMANN & GUNTHER JAENICKE EDS., ADJUDICATION OF INTERNATIONAL TRADE DISPUTES IN INTERNATIONAL AND NATIONAL ECONOMIC LAW (1992); ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM (1993); ROBERT E. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY (2D ED. 1990); Curtis Reitz, *Enforcement of the General Agreement on Tariffs and Trade*, 17 U. PA. J. INT'L BUS. L. 555 (1996); M.K. BULTERMAN & M. KUIJER EDS., COMPLIANCE WITH JUDGMENTS OF INTERNATIONAL COURTS (1996); R.R. Churchill & J.R. Young, *Compliance with Judgments of the European Court of Human Rights and Decisions of the Committee of Ministers: The Experience of the United Kingdom*, 1975-87, 62 BRIT. Y.B. INT'L L. 283 (1992); JAMES CAMERON ET AL., IMPROVING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL LAW 48 (1996); PETER M. HAAS ET AL. EDS., INSTITUTIONS FOR THE EARTH: SOURCES OF EFFECTIVE INTERNATIONAL ENVIRONMENTAL PROTECTION (1993); ORAN R. YOUNG, INTERNATIONAL GOVERNANCE: PROTECTING THE ENVIRONMENT IN A STATELESS SOCIETY (1994); Harold K. Jacobson & Edith Brown Weiss, *Strengthening Compliance with International Environmental Accords: Preliminary Observations from a Collaborative Project*, 1 GLOBAL GOVERNANCE 119 (1995)).

[60] LOUIS HENKIN, HOW NATIONS BEHAVE 47 (2d ed. 1979)

[61] Slaughter Burley, *supra* note 51, at 212.

[62] *See Id.* at 218.

[63] Robert O. Keohane, *COMMENT: International Relations and International Law: Two Optics*, 38 HARV. INT'L L.J. 487, 490 (1997) ("[R]ules, as part of the environment faced by a state, exert an impact on state behavior. They do so, in this view, not because the norms they reflect persuade people that they should behave differently. Rather, they alter incentives") (citing the Restatement of American Foreign Relations Law ("[I]nternational law generally is largely observed because violations directly affect the interests of states, which are alert to deter, prevent, or respond to violations.") ; Reus-Smit, *supra* note 19, at 582-83; Slaughter Burley, *supra* note 51, at 218-20. *See also* Phillip R. Trimble, *Review Essay: International Law, World Order, and Critical Legal Studies*, 42 STAN. L. REV. 811, 833-34 (1990) ("International law conditions the behavior of participants and observers alike. It channels the ways in which officials think about a given situation, and it organizes their responses.").

the compliance sense, regime theory showed them to matter more than previously acknowledged in the strategic sense.[64] The seed was planted for an ongoing marriage between IL and IR.[65]

Viewing international law as a mere tool in IR strategizing is a dismal future for the discipline, however. In this regard, the most interesting scholarship being carried on today analyzes IR and IL not as complementary but as synergistic.[66] Rather than viewing IL as a tool for IR, like institutionalists (regime theorists), the "new generation of interdisciplinary scholars[]"[67] view both fields as inseparably intertwined. One of the most interesting works is by Professor Michael Byers, who attempts "to synthesize the two perspectives into a general theory of customary international law."[68] Byers seeks to

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[64] Anne-Marie Slaughter Burley notes that international lawyers had, however, recognized this facilitative role of international law at least two decades before Keohane's institutionalism. Slaughter Burley, *supra* note 51, at 219-20 (including a valuable chart comparing regime theorists' notions of the functions and benefits of international regimes with IL scholars' understandings of the functions and benefits of international law).

[65] This interrelation between the instrumentalist and normative roles of international law is neatly summarized in Keohane, *supra* note 63. *See also* Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers, supra* note 58; Kenneth Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts* 93 AM. J. INT'L L. 361 (1999). Professor Kritsiotis of the University of Michigan Law School offers a modern restatement of regime theory, reformulating many of the precepts of institutionalism from the standpoint of International law. Kritsiotis focuses his analysis on the power of international law as a language within international relations, "a new communicative medium which professes to be: more peaceful in its outlook on solving problems; more economical as far as human and financial resources are concerned; more secure in terms of the answers and solutions it provides; and, finally, more inclusive of the participants that make up the international system." Kritsiotis, *supra* note 34, at 398. Kritsiotis notes that the increased use of the language of international law "opens up a series of fundamental and recurrent questions - about compliance with and enforcement of the law - but it is the very existence, speaking and use of legal language that allows us to ask (and answer) such questions in the first place." *Id.* at 407. Kritsiotis believes that as international law is increasingly used to frame international relations debates, its "language of law, principle, precedent, and procedure" will eventually have an overwhelming effect, resulting in "a radical new reality for the conduct of international relations." *Id.* at 398 ("The rhetoric and reality of might, power, force, and war are thus gradually being displaced by a new rhetoric - or, more accurately, a new language of law, principle, precedent, and procedure. It is in this rhetoric that the underpinnings of a radical new reality for the conduct of international relations are located.").

[66] *See, e.g.*, Byers, *supra* note 13, at 112 ("seek[ing] to demonstrate that increased movement between the two disciplines, while not necessarily leading to better solutions to practical problems, may well lead to better understandings of the international society in which we live."); Gerry Simpson, *The Situation on the International Legal Theory Front: The Power of Rules and the Rule of Power*) 11 EUR. J. INTL. L. 439 (2000); Onuma Yasuaki, *International Law in and with International Politics: The Functions of International Law in International Society*, 14 E.J.I.L. 105 (2003); Judith Goldstein et al., *Legalization and World Politics*, 54 INT'L ORG. 385 (2000); MICHAEL BYERS, THE ROLE OF LAW IN INTERNATIONAL POLITICS (2000); Gerry Simpson, *The Situation on the International Legal Theory Front: The Power of Rules and the Rule of Power*, 11 EUR. J. INT'L L. 439 (2000); Anne-Marie Slaughter, Andrew S. Tulumello and Stepan Wood, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 A.J.I.L. 367 (1998). The synergistic relationship of IR and IL is also a major theme of the liberalist school. *See infra* notes 73-76 and accompanying text.

[67] Slaughter et al., *supra* note 66, at 373.

[68] Byers, *supra* note 13, at 111. *See also Id.* at 113 ("[t]he customary process gives weight to power because, rather than involving quasi-contractual agreements, it concerns patterns of legally relevant behavior which, if not effectively opposed, may develop into legal rules."). Byers adds that "Furthermore, … the maintenance, development, or change of customary rules usually involves a weighing of different amounts of supporting,

"explain[] the process of customary international law as a social institution created and shaped by the shared understandings and patterned behavior of self-interested states. According to this theory, customary rules largely arise through the application of power by states within a framework made up of the customary process and a number of fundamental structural principles of international law."[69] His use of customary international law is a particularly interesting avenue to simultaneously approach the disciplines of international law and international relations, because it shows, unlike Kagan, the different ways in which power is manifested in or created by international law. Byers "seeks to bring the study of power within the scope of international legal scholarship in a way that does not deny an important element of stability and determinacy to law. It might also encourage some international relations scholars to regard international law as a constraint on the exercise of power which cannot be ignored or changed in response to short-term interests."[70] After analyzing four fundamental principles of international law -- the principle of jurisdiction, the principle of personality, the principle of reciprocity, and the principle of legitimate expectation[71] -- Byers finds in direct opposition to Kagan's view that "the customary process and certain fundamental structural principles of international law act to qualify applications of state power.[72]

Another powerful integrationist effort is the liberal school. Led by Anne-Marie Slaughter, Andrew Moravcsik, and a combined effort by Slaughter, Andrew S. Tulumello and Stepan Wood, these scholars have sought to explain how "state-society relations—the relationship of states to the domestic and transnational social context in which they are embedded—have a fundamental impact on state behavior in world politics."[73] They believe that "the configuration of state preferences matters most in world politics—not, as realists argue, the configuration of capabilities and not, as institutionalists (that is,

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ambivalent, and opposing behavior. Power, and its relational nature, is therefore particularly important in the process of customary international law." *Id*

[69] Byers, *supra* note 13, at 111. *See also* Kritsiotis, *supra* note 34, at 402 ("Through the use of the law as language, we can then identify strands of opinio juris thought in state behavior (that is, incidents in state practice) - an essential legal ingredient in the creation of custom which, in turn, produces a normative system more reflective of the interests of its addressees. With its extraordinary dynamic and adaptability, custom is especially appropriate as a dialect of international law for allowing states to respond to complex emergencies or unanticipated crises, or perhaps to depart from treaty texts when appropriate.").

[70] Byers, *supra* note 13, at 111.

[71] *Id.* at 149-79.

[72] *Id.* at 180. Reaching this result, Byers notes that "International relations scholars who have previously dismissed and derided the role of international law may wish to reevaluate the accuracy of their essentially anarchical picture of international society. Similarly, for those international relations scholars who have begun to explore the role of international institutions and international law, the ideas expressed in this article may confirm their intuitions and encourage them to join international lawyers in a cooperative study of the complex issues which separate, yet bind, international politics to international law." *Id.*

[73] Moravcsik, *supra* note 23, at 513. *See also* Anne-Marie Slaughter Burley, *supra* note 51; Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 E.J.I.L. (1995); Anne-Marie Slaughter, *Interdisciplinary Approaches to International Economic Law: Liberal International Relations Theory and International Economic Law*, 10 AM. U.J. INT'L L. & POL'Y 717 (1995); Slaughter et al., *supra* note 66.

functional regime theorists) maintain, the configuration of information and institutions."[74] By attaching state preferences to individual preferences through domestic political systems, liberals have attempted to explain several notable IR phenomena, including the "democratic peace," or absence of war between democratic states.[75] The liberalist premise is integrationist because of its emphasis on the causal importance of norms in IR, albeit from a "bottom up" rather than "top down" perspective.[76]

Professor Reus-Smit brings the discussion to another level, positing that because integrationist theories such as Slaughter's are "proudly positive and explicitly eschew normative reflection," it "amounts not to bridge-building but to an attempt to draw international law across the river on to the turf of American political science, in the process losing much of what is distinctive and important about international legal theory."[77] In essence, Reus-Smit has accused Slaughter and her colleagues of the same offense the institutionalists had committed, trivializing international law by grounding an integrationist theory too firmly in the assumptions of political science.[78] He contrasts this approach to the works of inter-war pre-realist scholars. For example, although the prominent inter-war IR theorist E.H. Carr, "traditionally understood to have called for a science of international politics … purged of the utopianism of Wilsonian internationalism,"[79] is often considered the nemesis of Norman Angell, who is portrayed as a "naive liberal internationalist,"[80] an effort to combine realism and normativity was in fact at the heart of both of their philosophies. Contrary to Carr's reputation as a strict realist, he in fact "called for a science of international politics that blended realism and utopianism."[81] According to Carr, "international relations will never be a `mature' science until it recognizes the need to bring the empirical and the normative into dialogue."[82] Similarly, contrary to common portrayal, Angell was not ignorant of power politics, firmly recognizing the need to compromise realist and utopian tendencies:

> It seems fatally easy to secure either one of two kinds of action: that of the `practical man' who limits his energies to securing a policy which will perfect the machinery of war, and disregard anything else; or that of the pacifist, who, persuaded of the brutality or

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[74] Moravcsik, *supra* note 23, at 513.
[75] Slaughter Burley, *supra* note 51, at 225-26.
[76] In other words, the liberalist school emphasizes the influence of domestic norms and preferences on IR, not the influence of IL on domestic norms.
[77] Reus-Smit, *supra* note 19, at 590.
[78] *Id.* at 590. (claiming that Slaughter's strategy "has been to work out from a particular model of political science and conception of politics, and to treat legal institutions, processes and norms as empirical data to be explained. … The result is a liberal international legal theory that makes good political science, at least from the perspective of the American mainstream, but normatively weak international legal theory."). *See also Id.* at 593 ("Positive international relations theory lacks the philosophical resources to inform the articulation of a mature liberal theory of international law, a theory that coherently mediates between the pragmatics of social and political circumstance, the practice of rule interpretation, and the prescription of new norms.)"
[79] *Id.* at 577.
[80] *Id.* at 578.
[81] *Id.* at 573.
[82] E.H. CARR, THE TWENTY YEARS' CRISIS: 1919-1939, at 10 (2nd Ed., 1946) (cited in Reus-Smit, *supra* note 19, at 577).

> immortality of war, just leaves it at that, implying that national defence is of no concern of his. What is needed is the type of activity which will include both halves of the problem... To concentrate on either half to the exclusion of the other half is to render the whole problem insoluble.[83]

According to Reus-Smit, the reason these two philosophically opposed scholars could find so much common ground was because, in the inter-war period, the underlying assumption of all theorists was that political theory had to take account of both the instrumental and the moral.[84] After World War II, however, "there [was] a shift away from the orientation of classical international theories, which confronted the political in all of its … complexities, towards `neo-theories' of both realist and liberal varieties, which have reduced international relations to instrumental rationality, effectively abandoning political inquiry, and forgone normative argument, abrogating political engagement."[85] Reus-Smit argues that, rather than attempting to conceptualize IL with a post-war IR lacking a normative dimension, a true integrationist theory must re-espouse the conception of politics as a socially constitutive normative enterprise "that mediates between individual and group self-interest and utility, on the one hand, and ethical conceptions of what is right and good, on the other."[86] Although some would claim it unrealistic or even anachronistic to revert to a 70-year-old political dialogue,[87] Reus-Smit's effort to more carefully refine the integrationist project is outstanding, and will surely provide insight to many future integrationist scholars.

Anne-Marie Slaughter's "community of courts" paradigm goes a long way to answering Reus-Smit's critique. The "community of courts" model posits that whereas European and American foreign policy may be moving farther apart, their judicial systems are increasingly in dialogue,[88] Increased

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[83] NORMAN ANGELL, THE GREAT ILLUSION 327-38 (1933) (cited in Reus-Smit, *supra* note 19, at 579).

[84] Reus-Smit, *supra* note 19, at 579-80 (noting that inter-war international relations theorists "of both realist and liberal persuasions" recognized "the dual nature of international relations as a *political* science: it was political in the sense that it was expected to help provide solutions to the pressing political dilemmas of the day, dilemmas in which the is and the ought were inextricably intertwined; and in the sense that the analysis of international politics demanded an appreciation of the relationship between brute material facts and debate about the good."); *Id.* at 575 ("[P]olitics is distinctive `because it combines moral and instrumental considerations in a form of deliberation that is neither strictly instrumental nor strictly moral.'") (citing RONALD BEINER, POLITICAL JUDGMENT 151 (1983)).

[85] *Id.* at 576-77.

[86] *Id.* at 591.

[87] Koskenniemi, *supra* note 12, at 455 ("It may seem anachronistic to suggest that law might have something to do with the high politics of international security. The period between the two world wars has, of course, been credited precisely by a mistaken reliance on such an idea. Confidence in the League of Nations' ability to deter aggression did not only, we are told by Realists of the post-war order, prove an academic error, it was positively harmful in directing attention away from the need to prepare for the inevitable aggression when it came.").

[88] The "Community of Courts" paradigm envisions "a global community of law, established not by the World Court in The Hague, but by national courts working together around the world [,] … a shift from deference to dialogue, from passive acceptance to active interaction, from negative comity to positive comity." Anne-Marie Slaughter, *Essay: Fortieth Anniversary Perspective: Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1114 (2000) (hereinafter "Slaughter Essay").

judicial comity, "deference not to foreign law or foreign national interests, but specifically to foreign courts,"[89] could allow for an honest treatment of both IR and IL. Through deference, judicial comity does not lose sight of subtle political relationships characteristic of IR. At the same time, it is carried out by courts expounding law, thus maintaining the normative influence of IL. The US judicial system, both in the lower courts and in the Supreme Court, is increasingly recognizing both international and foreign law.[90] The most striking example of this is the US Supreme Court's recent decision in *Lawrence v. Texas*, citing several opinions of the European Court of Human Rights.[91] US Supreme Court judges are also meeting with their European colleagues, both from national constitutional courts and the ECJ, with increasing regularity. Justice Sandra Day O'Connor has led Supreme Court delegations to meet with their counterparts in France, Germany and England, and there have been two official meetings between the U.S. Supreme Court and the ECJ, one in 1998 in Brussels and another in 2000 in Washington.[92] In a very telling move, Chief Justice Rehnquist recently created a branch of the federal judiciary exclusively dealing with foreign policy issues, with the stated purpose to "coordinate the federal judiciary's relationship with foreign judiciaries and with official and unofficial agencies and organizations interested in international judicial relations and the establishment and expansion of the rule of law and administration of justice."[93] The combination of these events represent a substantial change in American relations both with Europe and the international community from the standpoint of judicial deference. Recognizing these events provides a fuller picture of the Euro-American relationship.

Thus, the fields of IR and IL have grown and developed significantly since the IR realists and IL utopians of the post-war period talked past each other. In addition to the important recognizition of IL brought to IR by regime theory, the past decade has brought a new wave of scholars working to unite the two disciplines. Kagan bypasses all of these new developments, proposing an analysis stuck in post-World War II realism. By restating the post World War II realist argument without acknowledging the subsequent responses by neo-realists, regime theorists, liberals, or others, Kagan's work is narrowly revisionist.

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[89] *Id.* at 1112-13.
[90] *Id.* at 166-69. *See also* Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819, 819 (1999) ("[E]xtensive and detailed treatments of foreign materials have become familiar features of constitutional adjudication in many courts outside the United States.") (cited in Slaughter Essay, *supra* note 88, at 117).
[91] Lawrence v. Texas, 123 S. Ct. 2472, 2481-2483 (2003) (citing *Dudgeon* v*United Kingdom* , 45 Eur. Ct. H. R. (1981); *P. G. & J. H.* v*United Kingdom* , App. No. 00044787/98, P 56 (Eur. Ct. H. R., Sept. 25, 2001); *Modinos* v *Cyprus*, 259 Eur. Ct. H. R. (1993); *Norris* v *Ireland*, 142 Eur. Ct. H. R. (1988)).
[92] Slaughter Essay, *supra* note 88, at 1120.
[93] *Id.* at 1122-23 (citing Chief Judge Michael M. Mihm, *International Judicial Relations Committee Promotes Communication, Coordination*, 1 INT'L JUD. OBSERVER 1 (Sept. 1995)).

IV. Kagan's Book as Integrationist Contribution

In the chapters *The Postmodern Paradise* and *The World America Made*, Kagan proposes the central thesis of his book, that "Europe's evolution into its present state occurred under the mantle of the U.S. security guarantee and could not have occurred without it."[94] Although it is difficult to fully substantiate Kagan's claim that Europe's international legal regime developed "but for" special circumstances such as US-provided security, he is right to point out the extent to which Europe has relied on US security and the extent to which it will need to outgrow this reliance if it is to complement its ever-more-important doctrinal strength.[95] It is this compelling hypothesis perhaps more than anything else that caused Kagan's essay and then book to raise so many eyebrows in international law and policy circles. Rather than view Kagan's assertions as challenges to the IL-focused European premise, it is more constructive to view them as an integrationist refinement on the current successful European international legal regime. Kagan's book could challenge international lawyers to more carefully consider the ways in which military and doctrinal power interact. It is premature to say, as international lawyers might, that there is no place in today's global society for military force. Yet, it is also wrong to claim, as Kagan does, that doctrinal/political force is a hollow shell without military force to back it up. Today's Europe disproves both of these notions, providing a third paradigm, where both military and doctrinal force matter (contrary to the view of international lawyers), but where doctrinal force was the condition precedent to military force and not the other way around (contrary to the realist view).

Europe's political and doctrinal strength and legitimacy has been steadily growing since the formation of the European Coal and Steel Community in 1951.[96] Only in recent months, however, has Europe begun to seriously attack the question of common security as a step towards further political

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[94] KAGAN, *supra* note 2, at 72. For example, Kagan argues that "[few] like to recall that the military destruction of Nazi Germany was the prerequisite for the European peace that followed." KAGAN, *supra* note 2, at 56. Similarly, he argues that "France's willingess to risk the reintegration of Germany into Europe – and France was, to say the last, highly dubious – depended on the promise of continued American involvement in Europe as a guarantee against any resurgence of German Militarism. *Id.* at 73. There is most certainly an element of truth in both of these claims. Note: This thesis that European normative power could not exist without US-provided security is similar yet analytically distinct from Kagan's argument explored *supra* Part II that US-provided security allows Europeans to choose normative power. Whereas Part II is an argument about political choice, the argument explored in this Part expands this theme beyond political choice to geo-political reality. They are analyzed separately because they present different issues: Whereas Kagan's argument as to political choice *supra* Part II is logically flawed, his more general geo-political argument is much more compelling.

[95] *See* Anthony Browne, Rory Watson and David Charter, *European leaders deny defence threat to NATO*, THE TIMES (London), Oct. 18, 2003, at 4 (noting that Silvio Berlusconi, the Prime Minister of Italy, which currently holds the presidency of the European Council, said that … "The European Union can't play a central role on the world stage without the back-up of an appropriate and adequate military force - it's inconceivable that Britain could be a world power with an autonomous military capacity," and that "No diplomacy can exist without military strength. We have lived under the American military umbrella. The time has come to foot our own bill.").

[96] *See* Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 167.

cohesion. Silvio Berlusconi, Prime Minister of Italy, which currently holds the presidency of the European Council noted that "apparently, all the EU countries are aware that there cannot be any genuine foreign policy if there is not also a European military capability that is independent and complementary to NATO."[97] Similarly, French President Jacques Chirac stated that "There is no Europe if it does not have the capacity to defend itself."[98]

Examples of increased European military planning and activity are multiplying rapidly. The first-ever independent European peacekeeping forces were launched last May in the Democratic Republic of the Congo.[99] Perhaps more importantly from the standpoint of geo-politics are the current discussions aimed at establishing a European force beyond peacekeeping missions capable of operating independently of NATO.[100] Whereas other areas, particularly voting allocations, have stalled talks to draft Europe's Constitution,[101] the delegates to the intergovernmental Conference (IGC) have agreed on the provisions of the Constitution establishing a common defense policy separate from NATO.[102] These changes are a marked break from the political choice to avoid military strength, discussed *supra* Part II, and lay waste to

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[97] *Inter-Governmental Conference: Presidency/Parliament/Commission in United Front on Institutions*, EUROPEAN REPORT (Oct. 25, 2003).

[98] John Tagliabue, *Blair reassures U.S. on European defense*, INT'L HERALD TRIBUNE, Oct. 18, 2003, at 3. *See also* Thomas Fuller And Brian Knowlton, *Europeans try to reassure U.S. on NATO*, INT'L HERALD TRIBUNE, Oct. 22, 2003, at 7 (quoting Chirac to have said "we have decided to pursue this project [of a European military force] because we think that there will not be a Europe without a defense capacity.").

[99] Helle Dale, *EU Army to the Rescue? Heaven Help Us From Our Friends*, WASH. TIMES, Oct. 29, 2003, at A21.

[100] *See* William Pfaff, *A history lesson for the allies: NATO's future*, INT'L HERALD TRIBUNE, Oct. 23, 2003, at 4; *Amid NATO row, Blair says Europe must have own defence*, AGENCE FRANCE PRESSE, (Oct. 23, 2003) ("British Prime Minister Tony Blair insisted … that Europe must have its own defence capability" but attempted to quell US fears about the independent force by saying "I'm absolutely the strongest ally the US can have but I know there will be certain situations that, for perfectly good reasons, when the US doesn't want to undertake military operation")(hereinafter "NATO Row"); *European Defence: Divide and Fall*, THE ECONOMIST, Oct. 25, 2003, at 13-14; Thomas Fuller And Brian Knowlton, *Europeans try to reassure U.S. on NATO*, *supra* note 98; Thomas Fuller And Brian Knowlton, *Europe allies try to reassure U.S.: They say NATO won't be undercut*, INT'L HERALD TRIBUNE, Oct. 21, 2003, at 1; John Tagliabue, *Blair reassures U.S. on European defense*, *supra* note 98 (noting Tony Blair's statement that "[t]here are going to be circumstances, we have them now in Macedonia, where America for one reason or another does not want to be involved"); John Tagliabue, *Europe Weighs Joint Defense, With a Nod to U.S. Concerns*, N.Y. TIMES, Oct. 18, 2003, at A4; Stefania Bianchi, *US Wants Guarantees on European Military Force*, INTER PRESS SERVICE (Oct. 22, 2003) (noting that at a September meeting in Berlin, "the leaders of Europe's 'big three' -- France, Germany and Britain -- agreed on a joint paper which sketches plans for the new initiative. The joint paper stated that the EU 'should be endowed with a joint capacity to plan and conduct operations without recourse to NATO resources and capabilities.'").

[101] *See infra* note 122.

[102] Fuller, *supra* note 47. *See also* Dale, *supra* note 99 ; *NATO Row*, *supra* note 100 ("defence plans [are] linked to talks on a first-ever constitution for the enlarging bloc"); John Tagliabue, *Blair reassures U.S. on European defense*, *supra* note 100 (noting that "European constitution … proposes, among other measures, the establishment of the office of European foreign minister, who would be broadly responsible for foreign and security policy."); *Inter-governmental Conference: Silvio Berlusconi Pledges to Secure Institutional Compromise in December*, EUROPEAN REPORT 2812 (Oct. 18, 2003).

Kagan's claim that "[t]oday, the European Union is no closer to fielding an independent force, even a small one, than it was three years ago."[103]

The American government has become increasingly worried about these events. It views the proposal to locate the EU force's headquarters outside Brussels (NATO headquarters) as a serious threat to trans-Atlantic relations.[104] The increased concern shown by the US government about European military development is difficult to square with Kagan's final chapter, in which he presents increased European military capabilities as a solution to the transatlantic divide.[105] The current trans-Atlantic tension over a European force is evidence that, rather than acting to preserve "the West," as Kagan predicts it would,[106] such a force will only increase the extent that the US and Europe are becoming "positively estranged."[107] And, whereas Kagan predicts that, amidst this divide, the US will choose to ignore a Europe for which it no longer has any use,[108] it instead appears that the US is very much paying attention.[109]

In conclusion, although this book review has been critical of the manner in which Kagan ignores doctrinal power, it admits that international lawyers risk committing just as big a gaffe by ignoring other forms of power, such as military force. Professor Anne Orford notes that international lawyers are already recognizing alternate forms of power to an increasing extent: "The structure of international argument has swung between apologetic or pragmatic approaches to the fact that international lawyers have to be realistic about where power lies and idealistic approaches that make great claims for the

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[103] KAGAN, *supra* note 2, at 53. Even at the time Kagan wrote his book, his claim was spurious. In 2001, the RAND study stated that "[t]hrough NATO and the DCI [Defense Capability Initiative], and through the ESDP [European Security and Defense Policy], European members of NATO, as well as the non-NATO members of the EU, have expressed their intention and commitment to enhance Europe's military capabilities. The result of their doing so could be a more balanced sharing of security burdens and responsibilities within NATO and, if circumstances warrant, a capacity for independent action by the EU." RAND study, *supra* note 21, at 3.

[104] Dale, *supra* note 99 ("U.S. NATO Ambassador Nick Burns called the plans for a EU military headquarters 'the most serious threat to the future of NATO.' And Secretary of State Colin Powell is reportedly preparing to travel to Europe in November to stress the seriousness of Americans concerns with EU leaders."); *NATO Row*, *supra* note 100 ("a US envoy warned that certain EU defence plans were a "significant threat" to the future of the 19-member NATO alliance."); Browne et al., *supra* note 95.

[105] KAGAN, *supra* note 2, at 100-01.

[106] *Id.* at 101.

[107] Pfaff, *A history lesson for the allies: NATO's future*, *supra* note 100 (describing how "for the Western Europeans, 'everything has changed' since the Iraq war," and that nascent plans for a European force capable of operating independently of NATO are akin to "a European declaration of independence" from NATO and US control). For use of the term "positively estranged" by Kagan, *see* KAGAN, *supra* note 2, at 100.

[108] KAGAN, *supra* note 2, at 100 ("The United States could become less inclined to listen [to Europe], or perhaps even to care [about it]. The Day could come, if it has not already, when Americans might no more heed the pronouncements of the EU than they do the pronouncements of ASEAN or the Andean Pact."); *Id.* at 102 ("American leaders should realize that they are hardly constrained at all, that Europe is not really capable of constraining the United States.").

[109] This is consistent with the RAND study, *supra* note 21, at 3 (Predicting that increased European military commitment and cohesion "will significantly influence the character of U.S.–European security relations during the next decade.").

possibility that international law can constrain such power."[110] This is a positive trend, and to the extent that Kagan's book adds to the integrationist literature, it is a valuable tool for the international legal scholar.

V. Conclusion: The European-American Rift as Integrationist Project

Kagan cautions against the idealist European who fails to acknowledge the unique geo-political conditions that led to the rise of the European Union.[111] Yet, he risks committing the same error himself by focusing *solely* on these factors, unnecessarily downplaying the resulting international legal regime.[112] For example, he claims that "the early promise of the 'new' Europe. … bonding together into a single political and economic unit … to recapture Europe's old greatness in a new political form [as] … the next superpower,"[113] has been unfulfilled. But, to the international lawyer, the new Europe has made the world is a very different place indeed. Whereas Kagan carries on for several pages about the "decline of Europe into relative military weakness,"[114] the international lawyer is equally impressed by its relative doctrinal strength. Europe is now building a norm-based international society (and encouraging other countries to do the same) without the help of (or even in opposition to) the United States.[115] The European Union, what began as a simple treaty between nations over coal and steel tariffs just a half century ago,[116] has quickly become the world's "leading example of actual organic integration."[117] Now, the European Union stands apart as the quintisencial model of all that international law can be, the EU

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[110] Orford, *supra* note 13at 521 n. 131 (citing MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (1989)).
[111] *See supra* note 94 and accompanying text.
[112] Europe may have begun through the serendipidous combination of geo-political factors, but its international legal regime continues to endure, and strengthen, even as factors change, leading Professor Shaw to note that "the EU either already is (in legal terms at least) beyond sovereignty and therefore post-Hobbesian, or at least it will become so in the near future. What [is meant] by post-Hobbesian is that the EU would be beyond the 'well-known Hobbesian dogma that for order to exist there must be a hierarchical coercive structure to keep man in awe.'" Jo Shaw, *Book Review: Sovereignty and European Integration*, online at www.europeanbooks.com (reviewing and citing MARLENE WIND, SOVEREIGNTY AND EUROPEAN INTEGRATION 80 (2001).
[113] KAGAN, *supra* note 2, at 20-21.
[114] *Id.* at 22-25.
[115] Maria Gavouneli, *International Law Aspects of the European Union*, 8 TUL. J. INT'L & COMP. L. 147 (2000) ("There is no question that one of the primary players acting in the international scene today is the regional economic integration organisation of the European states in its manifold manifestations.").
[116] *Id.* at 148.
[117] John H. Barton, *International Law: Two Ideas of International Organization*, 82 MICH. L. REV. 1520, 1531 (1984). It was Professor Eric Stein of the University of Michigan who first began studying Europe within the paradigm of a growing federalist system as opposed to an international organization of sovereign states. *See generally* ERIC STEIN, P. HAY & M. WAELBROECK, EUROPEAN COMMUNITY LAW AND INSTITUTIONS IN PERSPECTIVE (1976); Eric Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 AM. J. INTL. L. 1 (1981) (cited in Barton, *supra* note 117).

treaties representing "some sort of 'third way' between the strictures of both national and international law."[118]

After downplaying European doctrinal power throughout the book, Kagan finally recognizes the potential global influence of these European changes towards the end of book, in his chapter *Is it Still 'The West?'* In that chapter, Kagan notes that, as European strategy focuses increasingly around the EU and less around NATO, it becomes progressively more difficult to view Europe and the United States as a cohesive unit under such titles as "The West."[119] His questions about the possible future of this divide created by a doctrinally strong Europe and a militarily strong US will likely prove to be the book's most lasting contribution. But, his answers are heavily value-laden with his realist premise.[120] Whereas Kagan views Europe as destined to merely "follow where America leads,"[121] the international lawyer, concerned with international doctrinal power, views Europe as the leader. Endogenously, this power manifests itself in the project for a European Constitution and the development a common strategic and defense policy.[122] Exogenously, this power is evident as Europe prepares to expand from 15 to 25 members, exercises substantial control over policy decisions in the growing number of EU candidate countries,[123] increases its use of powerful association agreements,[124] and continues to exercise tremendous power over its former colonial holdings in Africa, Asia, the Pacific, and elsewhere. William Pfaff notes that "American neo-

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[118] Shaw, supra note 112. See also (Volker Röben, *Constitutionalism of Inverse Hierarchy: the Case of the European Union*, Jean Monnet Working Paper 8/03 (2003), online at www.jeanmonnetprogram.org (describing the EU as a complex three-tiered constitutionalism of reverse hierarchy, in which member states act at the lowest level through their executive organs and courts to carry out EU policies; and at the highest level through heads of state assembled in the European Council, national constitutional courts and national parliaments in their treaty-making capacity; with the EU/EC occupying a middle level).

[119] KAGAN, *supra* note 2, at 85.

[120] *Id.* at 97 ("The task, for both Europeans and Americans, is to readjust to the new reality of American hegemony").

[121] *Id.* at 96.

[122] William Pfaff, Moral choices in Europe: EU Expansion, INT'L HERALD TRIBUNE, Sept. 11, 2003, at 8. Although efforts to establish a European Constitution were stalled in December 2003 because of prolonged discussion over voting allocations, they will resume in 2004. Associated Press, *European Constitution Summit Collapses,* N.Y. TIMES (Dec. 14, 2003), (noting that Prime Minister Tony Blair feels that "differences could be overcome and the constitution adopted, but [that] … leaders would take at least several months before a breakthrough" and citing Blair directly as stating "`I don't think there's any point to rushing this before we have the basis of an agreement"). Interestingly, even the voting impasse itself is evidence of Europe's role as counterweight to the United States. *See* John Vinocur, *Europeans Stress the Positive in Breakdown of Talks,* N.Y. TIMES (Dec. 14, 2003) (noting that the voting debacle "hinged on the constitutional draft's provision to reduce the voting rights of Spain and Poland, seen as faithful allies of the United States, and together capable of forming the basis of a blocking minority.").

[123] *Id.* (citing Bulgaria, Romania, and Turkey, and mentioning further expansion possibilities in the former Soviet bloc states). *See also* Kahn, *supra* note 14, at 18 ("The European Union confronts a large number of states that want to enter, even though entry will require a reordering of the relationship among the conceptions of state, sovereignty, and law.").

[124] *See, e.g.*, Helen E. Hartnell, *Subregional Coalescence in European Regional Integration,* 16 WIS. INT'L L.J. 115 (1997) (noting that "the increase in number and types of association agreement since 1989 has been dramatic."); George Soros, *A Chance For Soft Power,* FINANCIAL TIMES (May 23, 2003), at 13 (calling association agreements one of the EU's "main policy instruments").

conservatives, … who formerly dismissed the EU as a grouping of over-regulated and non-competitive economies, now have begun to issue warnings against 'superpower Europe.'"[125]

Against these developments, Kagan's claim of "insecurity in the European claim to success"[126] seem difficult to substantiate. There is no question that Europe exercises substantial global power.[127] This power may not be as strong as that possessed by the United States, and it certainly manifests in a different form, but it is undeniably present. Rather than becoming mired in a discussion over which form of power is superior, the way forward is to recognize the important interaction of various forms of power, military, doctrinal, or otherwise. Kagan has presented his work in the narrow former sense, but it could equally be used in the broader sense, as an integrationist tool. This is no easy task, but a group of committed scholars are meeting the challenge, merging the two disciplines with particular finesse and discretion. Kagan's work, somewhat ironically, can add to this discourse.

[125] William Pfaff, *Change imminent for EU*, CHARLESTON GAZETTE (West Virginia), Sept. 14, 2003, at C2 (noting that "for the first time since the Reformation, the unity of European civilization has been recaptured.").
[126] KAGAN, *supra* note 2, at 62. *See also Id.* at 61 ("America's power and its willingness to exercise that power – unilaterally if necessary – constitute a threat to Europe's new sense of mission.").
[127] *See supra* notes 122-125.