

LIBERAL INTERNATIONALISM, COMMUNITY AND CITIZENSHIP AT THE START OF THE TWENTY-FIRST CENTURY

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In discussing Constitutional values and the exercise of judicial power in the United States a generation ago, the constitutional law scholar, Alexander Bickell, posited two conceptual models of philosophical discourse on the subject. There was, he said, those imbued by what he termed the “Liberal Contractarian model.” This group subscribed to the view that there are “individual rights that have a clearly defined, independent existence predating society and are derived from nature and from a natural, if imagined, contract,” to which society must bend. Because the contract is fictional, its terms are derived through reason. Exemplified in the writings of the political theorist and moral philosopher, John Rawls, the model assumed that all “just societies” embodied some core universalist norms of fairness that can be deduced without regard to their own particular circumstance. As Prof. Bickell, himself a lawyer expatiated on the model, law, understood in procedural terms, was seen as being central to the working of the arrangement. “The relationship between the individual and government is defined by law; as are the entire public life of the society and, indeed, the society itself. Law has its origins in a contract, an imagined legal transaction. The concept of citizenship is, therefore, central, defining the parties to the original contract and the membership of the society.”

Juxtaposed to this model was another to which Prof. Bickell himself subscribed. He termed this the “Whig” model. The model “begins not with theoretical rights but with a real society, whose origins in the historical mists it acknowledges to be mysterious. [It] assesses human nature as it is seen to be. . . . The task of government informed by the present state of values is to make a peaceable, good, and improving society. That, and not anything that existed prior to society itself and that now exists independently of society, is what men have a right to.” Law also plays a significant role within this model, but it is subject and subsidiary to political control, with its place and role changing with shifting political preferences, structures and arrangements. In this model, as Prof. Bickell’s arguments in “The Morality of Consent” amply demonstrate, “citizenship” is a less dominant concern for the legal philosopher. The philosopher takes society as she finds it, and describes and evaluates it not in terms of some absolutist vision of the good society, but what society is able to do with the resources and visions that are at hand. As Prof. Bickell pointedly observes, Whigs are in fact relativists, while Liberal Contractarians tend to present their norms as universal imperatives.

With only the most minimalist of modifications, these models of legal discourse will resonate for most contemporary scholars of international law. Both models are subsumed within the framework of “Liberal Internationalism,” the now dominant school of discourse in International Law. This hardly should be surprising. The triumph of the

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United States as the sole superpower has, among other things, meant that its cultural institutions, including philosophical and constitutional legal discourses have been transplanted wholesale across the globe. The difficulty of any transplantation, of course, is the extent to which the transplant can be rooted. We may all be liberal internationalists now, but aside from mouthing familiar tropes of a “liberal world order,” “collective security,” “cosmopolitan citizenship,” “international community,” “pluralism,” “failed” (or “pariah” or “rogue”) states, and of course “universal human rights,” there has been remarkably little jurisprudential rootedness (at least on this side of the North Atlantic) in much of the discourse. Prof. Bickell’s observations were made against a backdrop of a political community that had been witnessing almost two centuries of continuous constitutional developments in political thought. Those developments were rooted in a highly particularized history, and they were shaped, molded and transmitted by and through hierarchically structured legal pronouncements that were driven and directly influenced by numerous political and military conflicts. Much of the contemporary discourse of Liberal Internationalism is based on little more than the normative aspirations of a handful of horizontally situated academics and policy-makers propped up by the seeming ascendancy of a constellation of cultural, military, political and economic forces. It may be that these forces will become sufficiently rooted to justify the presumed norms on which the arguments for them rest, but at a moment when they remain essentially ad hoc and transitional, the underpinnings that undergird the normative claims for their supremacy warrant investigation.

What follows is a modest exploration of the place of “citizenship” within the legal order that is framed by the philosophies and discourses of “Liberal Internationalism.” First, I outline the basic values embodied within “Liberal Internationalism.” Because the idea of the existence of “an international community” is central to Liberal Internationalism, I next discuss the concept of community, generally, and its particular application with the framework of Liberal Internationalism. Third, following up on the seemingly self-evident relationship between “citizenship” as the embodiment of membership within a political community, I then discuss the claims of national and cosmopolitan citizenship within the ideology of Liberal Internationalism. I conclude by suggesting a possible pitfall for an international legal order that dispenses with the theoretical grounding of norms in preference for pragmatic and policy-driven values.

I. The Values of Liberal Internationalism

The object of Liberal Internationalism is easily stated. It is to employ the tools of Liberal Legalism to legitimize the overwhelmingly preponderant (if not imperial) place that the institutions and preferences of liberal societies have come to play in the post-Cold War global order. Liberal Legalism assumes that relationships within a political community are organized and understood through law. Liberal Internationalism sees the relevant political community as nothing less than the entire body of humanity. The facility of the statement of the objective however belies the complexity of the task. Liberal Internationalism is a vastly under-theorized ideology. It is best understood as a set of accumulated and accumulating assertions of values by pragmatic legal scholars seeking to explain or justify policy particular liberal policy preferences, rather than as a

disciplined or integrated map of a world view. Although these legal scholars have tapped into the more theoretical writings of Political Scientists and International relations scholars, they have done so in a highly pragmatic and fluidly functional manner. The writings of political scientists on “regime theory,” “constructivism,” “democracy,” and “civil society,” among others, all have been resorted to for the purpose of advocating and/or explaining preferred policy preferences, but rarely was there an attempt to present these preferences within a theoretical framework that took account of the sociological place of law within political communities, or of national communities within the international legal order. The relationship of law to power, if at all adverted to, was treated essentially as being unproblematic. And to the extent that there was ever a focus of the relationship of means and ends, ends were either presented as indubitably desirable, or as unrelated to the means by which they were arrived at. Liberal Internationalism is thus best understood and most faithfully rendered in terms of the values or policy preferences that its proponents sought to promote. And here, there has been little dissent as to the preferred objectives.

Replacing the cold war legal order by propagating Liberal Legalism required liberal internationalists to confront the concept of “community” at two distinctive levels. The cold war era had cemented the legacy of nationalism that had been bequeathed to the international system by post-enlightenment European positivism. Under this arrangement, the international legal order consisted of atavistic national legal systems that were free to collaborate or ignore each other as they saw fit. Although the political order of the United Nations system philosophically privileged the concept of collective security that included among other institutions the existence of a “world court,” actual practice relied on a bi-polar balance of power system. The post-Cold war order which sought to resuscitate a collective security-oriented world order – albeit one grounded on the moral and political dictates of a unipolar hegemon rather than those of negotiated multilateral consensus – was thus faced with the task of delegitimizing the regime of atavistic national legal orders and justifying a dictated transcendent transnational legal order, and doing so at minimal cost to those national legal orders that already embodied Liberal Legalism. Liberal Internationalism thus faced two distinguishable but related projects: First, destroying the legitimacy of illiberal national legal orders, and second, creating a uniform international legal order that privileged Liberal Legalism. While the intellectual contributions of neoliberals in other disciplines assisted in the latter task, undertaking the former had to rely primarily (if not exclusively) on the skills of legal scholars. Fortunately, liberal legal scholars discovered quite early that the same institutional arguments could be deployed across board in the service of both undertakings. Theoretical justifications advanced in favor of transcendent internationalism could also be deployed in the service of delegitimizing national legal regimes.

The complete (and in some cases, catastrophic) failure of national political, economic and legal institutions in those societies that had comprised the competing Soviet Bloc provided an unrivaled opportunity for liberal societies to trumpet the supremacy of liberal legal institutions as the framework for constituting functional political communities. The active participation of the “people” in their own governance

through “civil society” and “democratic institutions” was presented as the lynchpin for the success of liberal societies. The function of law was thus to privilege the participation of civil society within the political and economic order of the nation state. Precisely how law ought to go about achieving this goal was often treated quite unproblematically. The proposed restructuring of institutions in these “failed” societies depended on who was rendering the advice (a fact that itself often depended on which group was providing the funding of the advisor). The liberal institutions of a particular liberal society usually was taken as a given, and its efficacy assumed because of the success of the particular liberal state within which it functioned. That liberal institutions (and their underlying historical origins and cultural philosophies) varied was often overlooked or simply dismissed. It was thus not infrequent to encounter in the same restructuring process the existence of competing if not contradictory philosophical underpinnings for the proposed restructuring. It is hardly surprising then that the liberal legalist concept most directly implicated in this dilemma, that of “rule of law” remains the most undertheorized and obfuscated concept among the trinity of justificatory concepts typically invoked by liberal internationalists – “democracy,” “human rights” and “rule of law.” (A fourth, the “free market” is often relegated for use only among the money changers in the temple.)

As long as the focus of interest in “civil society” was on economic organizations and participants, the resulting ambiguities and contradictions could be finessed. But where there has been a complete failure of state institutions, it is virtually impossible to empower civil society in the economic arena, without allowing it significant role in the cultural and political. Liberal Legalism’s interest in the political is of course actualized by its faith in the efficacy of democratic institutions and practices as purveyors of a just order. Liberalism has functioned within national political orders. Democracy is expected to do the same. Liberalism and Liberal Legalism have tended to take the national political order as a given. Indeed, the self-confidence of contemporary liberalism rests on assuming away the fact that national political communities are in fact temporal and that stability within such communities may be as priced a value as any other. When, in the democratic arena, civil societies in the reconstituting societies of the Soviet Bloc showed a proclivity to express affiliations that showed off the temporal character of national political communities, Liberal Legalism found itself entirely at sea. What is or should be the legal philosophy of a national state? What roles do individuals and groups have in determining the boundaries of the relationships – both temporal and geographical – of the relevant political community? And, centrally, how is citizenship, or the right to claim a role in answering these questions to be determined? Lacking systematized philosophical grounding for their particular political preferences, proponents of Liberal Legalism and Liberal Internationalism often found themselves at sea. Rather than directly confronting such core questions of who are the “people” who get to decide, how are those decisions to be evaluated, and/or how are conflicting decisions to be weighted, the dominant opinion-shapers of Liberal Internationalism changed the terrain of discourse. They saw in international law an escape hatch for the troublesome and unresolved issues presented in Liberal Legalism’s project of recreating the national political orders of failed states in the image of those of successful liberal societies. International law appeared to offer a way out only if it could be denationalized and portrayed as global and universalist, rather

than as being what it traditionally had been seen to be: a collaborative venture that is based on the consent of independent nation states. This move however raised an internal logical dilemma for liberal legalists. If, in order to answer the challenges of a post-communist world order international law had to operate by denying the primacy of consent, how could liberal legalists continue to maintain consent as the legitimating norm of justice within political legal orders? In responding to this question liberal internationalists have offered up a multiplicity of responses, some of which are internally inconsistent.

Some liberal internationalists have underplayed the relevance of consent for the international legal order by emphasizing the existence of a network of technocratic decision-makers. Decisions by groups whose interests are seen as transcending parochial national interests such as judges, academics, transnational business entrepreneurs human rights advocates and so-called “nongovernmental organizations” a “network” of judges, Others have argued for distinguishing among national political institutions on the basis of the extent to which those institutions reflect presumed substantive values such as “democracy” and/or “human rights.” Rather than examining the representativeness of the particular national institutions at issue, however, these latter groups have used the presumptive representativeness of the nation state as a proxy. The domestic institutions of states that are deemed to be “democratic” are thus seen as entitled to be insulated from review by the so-called “international community,” while that “community” is free to reshape – indeed supplant – domestic institutions in those societies deemed to be non-democratic; the latter, typically being referred to as “pariah” or “rogue” states. What unites both groups of liberal internationalists is the propensity, in the international arena, to dispense with the intrinsic worth of the participation in the individual in her own self-governance; a propensity which, at least if practiced in liberal democracies, would be viewed as heretical. In place of legitimation through direct participation, liberal internationalists prefer to focus on whether the inhabitants of a society are being well ruled; that is to say, that they are free from governmental abuses including violations of their human rights, repressive or autocratic decision-making and corrupt practices. Citizenship thus is relevant only to the extent that it forms the basis for determining those claims that can be asserted by a member of the polity. Such claims, flow from the “natural rights” of the individual. Where a state denies these rights, it can be compelled to mend its ways not only through its internal political processes, but by other member states of the international society and external civil societies. But this seeming rejection of democratic processes is typically explained by reconfiguring the idea of democracy. Democracy should not be seen simply in terms of rule by the majority (or even of rule by the people), but rule by them subject to certain minimal conditions. Those minimal conditions must include certain basic rights, the contents of which can rarely be specified with any level of exhaustiveness. And they are, furthermore, the product of a universal zeitgeist.

II. Liberal Internationalism and International Community

An appraisal of the values embodied in or advanced by Liberal Internationalism, like any evaluation of the legitimacy of the exercise of power (or, for that matter, of legal rules) must take account of the “community” within which the values function, and for whose benefit they are seen to exist. Liberal Internationalism assumes that the arena within which to engage its values necessarily is that of “international community.” The phrase is rarely defined, in large measure because its meaning is taken to be self-evident. And yet, the idea of an international community is not a self-defining one. In its origins, international law was seen as the law of nations; that is to say, the law agreed upon by nation states for the purpose of regulating interactions among nation states. International community, under such a legal regime would consist of the member states of international society. Such a “community” is, of course, a far cry from what liberal internationalists have in mind when they speak of an “international community.” So, what do liberal internationalists have in mind?

In the absence of a fully developed or articulated philosophy of Liberal Internationalism, one has to extrapolate from the values just presented. What is clear about the idea of a community is that it expresses a shared sense of belonging among a group, and of difference from other groups. The reflexiveness with which the sense is held is more a marker of the strength of attachment to the community, not of its existence. That sense may arise in one of two ways or, perhaps more accurately, the combination of both. First, the sense may reflect the existence of affective ties. For example, members of a family share a sense of kinship that binds them together while separating them from others. The sense is not necessarily derived from any shared characteristics, whether physical, psychological, or, increasingly, even genetic. It embodies passion rather than logic, trust and belief over knowledge. At best, the shared sense of community in this setting is explained away in terms of vestigial mysticisms and primordial connections. It may have served some functional purpose in the past, but that is hardly a sufficient explanation for its continuation – and indeed vibrancy – in the modern world. What is true of the family also probably explains such consanguineously based communal affiliations as tribal, ethnic, and in some cases, national communities.

The second type of a community is one that is built around functional needs. A university constitutes such a community. Similarly, corporate bodies, armies, and labor unions presumptively constitute communities. But it is not the case that any group that exists to discharge a function thereby becomes a community. Like an affective community, the members of a functional group must view themselves as having a special relationship towards each other, and which they do not share with outsiders. Again, that sense of solidarity and difference, even though generated and underwritten by the imperatives of reciprocal functional relationships, may be solidified by the demands of past necessities. For example, many religious communities may have come together for functional reasons, but the need to protect each other from external hostilities may have resulted in generating the sort of unquestioning bond of shared loyalty and exclusivity characteristic of affective affiliations. What is clear is that the strengths of the bonds created in functional communities vary widely. Among other factors, one may expect that those bonds are shaped by the nature of the functions performed by the community,

the intensity of the interactions among its members necessary to carry out those functions, the spread or exclusivity of the skills required of members, the barriers to acquisition of those skills, and the levels of external pressures to which members of the group believe themselves subject to.

That the solidarity of membership in a community is shaped both by the internal dynamics of the group as well as by perceptions of threat from outside would seem beyond cavil. Indeed, the two factors do not necessarily operate independently of each other. In particular, the internal dynamics of a community – especially, but by no means exclusively, of one constituted by affective ties – is often influenced greatly by the members' perceptions of threats from the outsider.

It is evident that while an international community that is composed of states may well satisfy the idea of an international political community, the existence of an international community that transcends the nation state is less evidently so. The primary defect is simply that the sort of shared solidarity among the putative members of the alleged international community that is posited by liberal internationalists lacks the historical grounding that seems essential to the formation of a political community. To understand this claim, let us first explore the basis for finding the possible existence of an international community of states, and then seek to apply the teachings of the exploration to the potential members of an international community that might be constituted under Liberal Internationalism.

The United Nations charter arguably formalized the existence of an international community of states. That the commitments made in the Charter exemplify a functionally-based community would seem indisputable. More problematic may be the claim that all 192 members readily satisfy the affective basis for solidarity. But here, the shared experiences of two global wars and the obvious desire to avoid their repeats (after all, a desire that generated the push for collective security) would seem to provide the cement that may hold the glue of an international community of nation states. But one need not buy into the concept of a universal international community of nation states to accept that there are indeed regional international communities that are composed of nation states. Western Europe – and more particularly, the initial core of the European Economic Community – clearly exemplifies the concept of an international community of states. It is possible for the individual members of the community – and by extension their citizens – to speak genuinely of their membership in an international political community. The hundreds of years of transnational cultural, religious, linguistic, literary, philosophical and ideological exchanges, as well as the shared histories of economic, social and political conflicts as well as of peaceful commerce among European societies genuinely can be said to have transformed what would otherwise be national societies into a genuine international political community. It is possible then to speak of an “international community” when one has in mind an aggregation of states that claim to have shared values because of their past collective history. In this sense, some international communities of nation states may well parallel what we have in mind when we speak of the nation state as an imagined political community. But this is a far cry from what liberal internationalists have in mind when they speak of an “international community”; at least, if the purpose is to convey the existence of shared solidarity by

members of denationalized political groups whose interests transcend their national political arrangements.

As already described, there are at least two distinct strains of Liberal Internationalism. From what has been said about the idea and attributes of a community, one can readily dismiss the idea of an international community that is grounded on the network of relationships among international elites. Despite the occasional talk among liberal internationalists of the existence of an “invisible college,” it is difficult to credit the view that these elites in fact see themselves as constituting a homogeneous group of like minded communitarians with a separate and distinct identity from others. They may well share functional commitments (itself a debatable proposition), but it is next to impossible to seeing them as sharing affective ties. It is hardly conceivable that these elites in fact view themselves not only as being in solidarity with each other, but also as constituting a separate and distinct cadre of persons from other members of international society.

The more interesting claim for the existence of a universal international community comes from the strain of Liberal Internationalism that posits the existence of the individual as the beneficiary of uniform rights that exist without regard to membership in a national political community. This is of course the claim that human rights exists independently of any positive arrangements by political communities, and do so without regard to the constitution of national, religious, cultural or political orders. Although not always willing to acknowledge – let alone accept – the logical reach of their claims, this is what Liberal Internationalists suggest when they claim that human rights are “universal.” Proponents of this strain of Liberal Internationalism thus posit the possibility (if not actual existence) of “cosmopolitan citizenship.”

III. Cosmopolitan Citizenship and Liberal Internationalism

The idea that human beings can and should claim ties of affection that transcend the seeming arbitrariness of national geographical boundaries is at least as old as the concept of the modern nation state. Indeed, pre-modern societies, whether as theocracies, cultural or secular empires often practiced (if they did not preach) highly multinational conceptions of citizenship. Contemporaneous with the emergence of the modern national state was the revolutionary view that all humankind belonged to a single family. For the most part, however, this “cosmopolitan” ideology was stillborn. No sooner had it been framed by the French Revolution than it was destroyed in the coup of the 18th Brumaire. Similarly, neither the Paris Commune, nor the Republican volunteer brigades of the Spanish civil war, let alone the syndicalists and supporters of the Comintern proved to be the equals of Chancellors, prime ministers, general staffs or Politburos in obtaining commitments of shared belonging to and participation in a joint national enterprise from their general populace. For reasons that may be worthy of exploration elsewhere but whose details are not essential for the purposes of this essay, in the match for loyalty between the ideals of cosmopolitanism and the values of nationalism, the latter invariably triumphed. Neither the huge blood lettings of the world wars, nor the ideals of

collective security that they generated dimmed the belief in national loyalties. Indeed, given the privileged place of the concept of self-determination that followed these wars, national citizenship was the norm.

It's against this backdrop that Liberal Internationalism, in the 1990s, picked up the cudgel for universal citizenship. For a standard legal realist (and for many subscribers to rational choice modeling), the quest may have seem quixotic, but for the idealist, there were good reasons in the 1990s for believing that a fantasy that had long eluded humankind may have become possible. In the first place, the conception of citizenship could be reformulated. Rather than focusing on the obligation of allegiance that the individual may owe to the state, the concept of citizenship could be recast in terms of the rights that the individual should assert against the state. Here, the emergence of human rights as a central concern of international law could and was deployed to support a view in which the individual, as a national citizen, not only had a right to make claims that are based on the state's human rights undertakings, but to rely on the international community to enforce those claims on her behalf against a recalcitrant or reneging state. In one of those wonderful ironies that history frequently throws off, liberal internationalists who railed against positivism, in fact relied on positivist tools to realize their universalist objectives.

Secondly, the new technologies of transportation and communication had drastically shrunk the globe but in temporal and geographical terms. There was now possible near instantaneous communication between any two points and any two persons on the globe at any given time. Moreover, the technologies of the visual media – notably television broadcasts, highly mobile video-cameras and ubiquitous satellite transmissions – gave the average person the illusion (if not the reality) that she shared a kinship with persons and cultures that not too long ago she would have considered to be at best exotic. And of course, the jet plane, fishing boats (however rickety) and porous national borders provided content to the ideal of the free movement of persons. The idea that there was thus one undifferentiated mass of humanity inhabiting a small planet, and that the suffering of one was the suffering of all, therefore had the ring of plausibility that could not simply be dismissed as the idealistic musings of upper-class romantics. In short, in contrast to prior eras, there seemed to be something genuinely middle-class and mainstream about the dream of a universal citizenship of all humankind.

Thirdly, and most centrally, there was practical power to back up the idealism. In what must be a unique occurrence in modern world history, the good guys of cosmopolitan citizenship appeared able to command the resources of the state for their noble goals. Napoleon may have abandoned French universalists following the failure of the Egyptian campaign, and Stalin may from the very beginning have viewed the Comintern simply as a tool of Mother Russia, but not so the relationship between Liberal Internationalism and the Clinton Administration. The United States stood out as a champion of Liberal Internationalism. Liberal internationalists thus had at their disposal the sympathetic might of the sole superpower. The President and his Secretary of State, as well as numerous members of the Government were

committed to their vision of a cosmopolitan order, as long of course as it was led by the United States; and that the United States would lead, no one doubted. Benevolent force had been employed with effect to curb “ethnic cleansing” in that cradle of nationalism, the Balkans. The United Nations – and especially the Security Council – seemed to be living up to the universalist goals on which its formation had been based. Firmly under the direction of the United States, the Organization’s platoon of armies, both uniformed and otherwise, worked hand-in-hand with civil societies to rebuild failed states in Africa and Asia. The sailing wasn’t always smooth, but in instances that mattered, the United States, ably backed by liberal internationalists had shown that it was indeed possible to create institutions that bypassed national governments and gave direct succor to individuals. The creation of international criminal tribunals, the direct imposition of economic sanctions not only on states, but directly on individuals, and the use of national courts to punish individuals for infringements of international law, all seemed to suggest the arrival of citizenship that depended on the international community rather than a particular national state for the articulation and enforcement of the rights of the individual.

IV. Liberal Internationalism, Citizenship and the Waging of War on Terror

“The proof of the pudding is in the eating.” A striking observations for an international lawyer who is interested in the principled arguments about the legitimacy of the methods that have been employed by the United States as she wages her war on terrorism is the absence from the discourse of universalist normative claims about citizenship. To the extent that the Constitution of the United States embodies such claims, then reliance on that document, rather than on the norms would be perfectly acceptable. But it would seem quite unlikely that the provisions of the United States Constitution can substitute for universal norms relating to citizenship. The Constitutional provisions, one might conjecture, will be particularistic, and understandably so.

Intriguingly much of the argument for the war on terrorism has been framed in terms of citizenship. That President Bush and the Executive Branch would see the war in these terms is not surprising. That the Congress, in such enactments as the Detainee treatment Act and the Military Commissions Act should also delineate friend and foe, and the appropriate due process to be provided detainees on the basis of the citizenship dichotomy is also hardly surprising. (As a parenthetical, it should be noted that not all legislators have been indifferent about the normative significance of classifications of rights on the basis of citizenship. Senator Patrick Leahy has been notable for his impassioned pleas for the extension of habeas rights to all without regard to the nationality or citizenship of the detained.) The political branches, the Clinton Administration notwithstanding, do not wear rose-tinted glasses on matters of nationalism. What is fundamentally more revealing is the absence of references to cosmopolitan citizenship in the mass of judicial decisions that have now been issued to address various claims raised by the war. What accounts for these omissions?

The silence of the courts cannot be attributed to the absence of opportunities. The legal treatments that have been proposed and actually meted out frequently have been delineated according to the citizenship status of the alleged offender. The power of the President to detain persons without having to provide probable cause for such detention, to pick persons off the street and either hold them in indefinite detention or to render them to third countries without having to account for their whereabouts, to subject them to criminal proceedings in such tribunals and under such rules as he deems fit, and/or to declare persons enemy combatants, unlawful enemies or to otherwise invest a captured person with such incidence of infamy as he deems appropriate, very much have been grounded on the identity of the offender as a citizen or otherwise. With the possible exception of the crime of treason, it is difficult to believe that the United States Constitution provides definitive answers for resolving these questions; at least to the extent that they are framed along the citizenship/non-citizenship fault line. And while judicial construction and application of treaties might provide definitive answers in some situations, the silence of treaty coverage in many relevant areas render such a positivist approach of limited utility.

In any event, given the embrace of cosmopolitan citizenship by liberal internationalists, one would expect that in challenging these exorbitant assertions of power, liberal internationalists would frame some of their arguments in terms of the normative value of the claims that all human beings are entitled to assert against the state without regard to nationality. Indeed, one would think that such an argument might be buttressed by references to such documents as the International Covenant on Civil and Political rights that unmistakably condition the extension of human rights protections to an individual, not on the basis of the individual's citizenship, but of her being subject to the jurisdiction (that is, physical or constructive control) of a state. That courts have not been asked to rule on these grounds, and that they have not done so, suggest that claims of cosmopolitan citizenship by liberal internationalists are advanced more episodically than might be expected of a principled philosophical position. One of the collateral damages of the war on terrorism, then, may well be the exposure of the hollowness of the claim by liberal internationalists of cosmopolitan citizenship that is grounded on extending human rights protections to all persons alike without regard to their nationality. In the absence of a claim that liberal internationalists are more attuned to the welfare of cosmopolitan citizens when they are persecuted by the governments of their nominal states, than they are when such non-citizens are persecuted by governments that are foreign to them, it can be assumed that this omission flows at least in part from the rather pragmatic orientation of Liberal internationalists. A fascinating question is whether a more philosophical grounding of the claim for cosmopolitan citizenship might make a difference.